BEFORE THE COMMISSIONER OF THE
TENNESSEE DEPARTMENT OF COMMERCE AND INSURANCE

IN THE MATTER OF:	]	
FINANCIAL WEST GROUP	]	
Petitioner	]	**Docket # 12.06-004874J**
	]	
	]	

NOTICE OF AN INITIAL ORDER BECOMING A FINAL ORDER

All parties are hereby notified that on **August 1, 2000**, the Initial Order entered in this matter became a Final Order pursuant to T.C.A. §4-5-318(f)(3), no party having filed a Petition for Appeal to the Agency pursuant to T.C.A. §4-5-315, within the ten (10) days permitted for such petitions, and the Agency having failed to issue a Notice of Intention to Review within the ten (10) days permitted under T.C.A. §4-5-315(b).

THE FINAL ORDER MAY BE REVIEWED IN THE FOLLOWING MANNER:

Within ten (10) days after the effective date of the Final Order, as listed above, any party may petition the Administrative Judge for reconsideration of the Final Order. If no action is taken within twenty (20) days of filing of the petition, it is deemed denied. See T.C.A. §4-5-317.

Any party may petition the **Commissioner of the Department of Commerce and Insurance** stay of the Final Order within seven (7) days after the effective date of the Order. See T.C.A. §4-5-316.

Any person aggrieved by this final decision may seek judicial review in a Chancery Court having jurisdiction within sixty (60) days after the date of the Final Order as listed above or, if a Petition for Reconsideration of the Final Order is granted, within sixty (60) days of the entry date of the Final Order disposing of the petition. (However, the filing of a Petition for Reconsideration does not itself act to extend the sixty-day period, if the Petition is not granted.) A reviewing court may also order a stay of the Final Order upon appropriate terms. See T.C.A. §4-5-322 and §4-5-317.

Charles C. Sullivan II, Director
Administrative Procedures Division

If any party has knowledge of an Appeal of the Initial Order or a Notice of Intention to Review the Initial Order having been filed within the required ten (10) days, contrary to the above information, please notify this office, telephone (615) 741-7008 or 741-2078, and this Notice may be set aside.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this document has been served upon counsel and all interested parties by delivering same to them at their address of record by placing a true and correct copy of same in the United States mail, postage prepaid.

This 3rd day of **August**, 2000.

Janet Blakemore
Administrative Procedures Division
Office of the Secretary of State

BEFORE THE DEPARTMENT OF COMMERCE AND INSURANCE
FOR THE STATE OF TENNESSEE, AT NASHVILLE

IN THE MATTER OF:	)	
	)	
TENNESSEE SECURITIES DIVISION,	)	
Petitioner,	)	
v.	)	**Docket No. 12.06-004874J**
	)	
FINANCIAL WEST GROUP,	)	**TSD No. 99-005**
Respondent.	)	

ORDER

THIS ORDER IS AN INITIAL ORDER RENDERED BY AN ADMINISTRATIVE JUDGE WITH THE ADMINISTRATIVE PROCEDURES DIVISION.

THE INITIAL ORDER IS NOT A FINAL ORDER BUT SHALL BECOME A FINAL ORDER UNLESS:

1. PARTY FILES A WRITTEN APPEAL OR PETITION FOR RECONSIDERATION WITH THE ADMINISTRATIVE PROCEDURES DIVISION NO LATER THAN **August 1, 2000**.

OR

2. THE AGENCY FILES A WRITTEN NOTICE OF REVIEW WITH THE ADMINISTRATIVE PROCEDURES DIVISION NO LATER THAN **August 1, 2000**.

YOU MUST FILE THE APPEAL, PETITION FOR RECONSIDERATION OR NOTICE OF REVIEW WITH THE ADMINISTRATIVE PROCEDURES DIVISION. THE ADDRESS OF THE ADMINISTRATIVE PROCEDURES DIVISION IS:

SECRETARY OF STATE
ADMINISTRATIVE PROCEDURES DIVISION
SUITE 1700, JAMES K. POLK BUILDING
NASHVILL , TN 37243-0307

IF YOU HAVE ANY FURTHER QUESTIONS, PLEASE CALL THE ADMINISTRATIVE PROCEDURES DIVISION, **615/741-7008 OR 741-2078, FAX 615/741-4472.** PLEASE CONSULT APPENDIX A AFFIXED TO THE INITIAL ORDER FOR NOTICE OF APPEAL PROCEDURES.

BEFORE THE DEPARTMENT OF COMMERCE AND INSURANCE
FOR THE STATE OF TENNESSEE, AT NASHVILLE

TENNESSEE SECURITIES DIVISION,	)
	)
Petitioner,	)
	) **Docket No. 12.06-004874J**
v.	)
	) **TSD No. 99-005**
FINANCIAL WEST GROUP,	)
	)
Respondent.	)

INITIAL ORDER

This matter came to be heard on March 3, 2000, before Marion P. Wall, Administrative Law Judge, appointed by the Secretary of State and sitting for the Commissioner of Commerce and Insurance. The Department was represented by Mr. G. Everett Sinor, Jr. of the Nashville Bar and the Respondent was represented by Mssrs. Frank Watson and T. Lang Wiseman of the Nashville Bar. This matter became ready for consideration on May 1, 2000, when the Department filed its Proposed Finding of Fact and Conclusions of Law.

The original Complaint filed by the Tennessee Securities Division (hereinafter "Division") included five counts. At the hearing, the Division dismissed Counts I, II, and III, leaving the two remaining counts alleging violation of the Tennessee Securities Act by false, incomplete, or untimely disclosure on Form U-4 as it related to the indictment and conviction of a person affiliated with Respondent, and violation of the Act by failure to properly supervise this person.

After consideration of the entire record herein, it is concluded that the Department has

failed to prove by a preponderance of the evidence that the Respondent violated the Act, and that therefore this matter should be DISMISSED. This determination is based upon the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Financial West Group is registered with the Tennessee Securities Division currently as a broker-dealer, and has been since 1995. It is based in California.

2. Frank Kufrovich [hereinafter sometimes Mr. Kufrovich] was formerly employed by Financial West Group as a registered representative, and was registered with the Tennessee Securities Division as a securities agent from May 8, 1995 until September 15, 1998, at which time he was terminated by Financial West Group. During the time he was registered as a securities agent with the Tennessee Securities Division, Frank Kufrovich was employed by Financial West Group.

3. Frank Kufrovich was indicted by the United States District Court for the District of Connecticut on July 9, 1997 for violations of 18 U.S.C. § 2422(b) and 18 U.S.C. § 2423(b) (commonly known as the Mann Act), both concerning intent to engage in sex with a minor. While both of these crimes are felonies, they are not related to the investment and/or securities business. On June 10, 1998, Frank Kufrovich pled guilty to these charges, and agreed to (1) a sentence of 18 months in prison; (2) supervised release for a term of 3 years; (3) restitution to the victim in the amount of $25,000.00; and (4) other conditions to the plea bargain.

4. Some forty-eight days after Mr. Kufrovich's guilty plea, on July 23, 1999, an amendment to Form U-4 was filed with the Central Registration Depository System. There was

never any filing with regard to the indictment. It is the industry norm for filings to be made within thirty days of the events they report; however, no action would normally be taken for a filing that was eighteen days late, such as the filing with regard to the guilty plea and conviction in this contested case. Thus, this contested case involves the failure to report the indictment and the allegedly incomplete or misleading language of the filing itself. After this filing, Respondent caused Mr. Kufrovich's registration to be terminated in all jurisdictions.

5. Form U-4 was promulgated and adopted by the National Association of Securities Dealers (NASD) to track the registration status of broker-dealers, as well as their registered representatives. It has been adopted by regulation in Tennessee. See, Rule 0780-4-1-.04(4)(a)(4) and 0780-4-1-.04(4)(b). It is filed with the Central Registration Depository System, which provides for dissemination to the various state agencies.

6. The November 1991 revised version of the U-4 form was in effect at the time of Mr. Kufrovich's July 1997 indictment for the above-described crimes. Question 22I of the 11/91 U-4 revision asks: "Are you now the subject of any complaint, investigation or proceeding that could result in a 'yes' answer to parts A-H of this item [question 22]?" Question 22A of the 11/91 U-4 revision asks if the individual has been convicted of "any other felony[1]." Question 22B asks if the individual has been charged with two of the offenses listed in Question 22A[2], and specifically omits reference to "any other felony." Thus, it could be said that the 1991

---

1 Question 22A reads:
Have you been convicted of or plead guilty or nolo contendere ("no contest") n a domestic or foreign court to:
(1) a felony or misdemeanor involving: investments or an investment-related business, fraud, false statements or omissions, wrongful taking of money, or bribery, forgery, counterfeiting or extortion?
(2) gambling
(3) any other felony?

version of Form U-4 did not require amendment, if one were of the opinion that the indictment could not lead to a conviction of a felony. The form specifically did not ask about indictments like that of Mr. Kufrovich.

7. The U-4 form was revised by the National Association of Securities Dealers and others in November 1997. Question 22I(1) of the 11/97 U-4 revision asks: "Have you been notified, in writing, that you are now the subject of any investigation, regulatory complaint or proceeding that could result in a 'yes' answer to any part of 22A, B, D, E , or F"? Question 22B of the 11/97 U-4 revision asks, in pertinent part: "Have you, or based upon activities that occurred while you exercised control over it, has an organization ever been charged with any felony?"

8. When the November 1997 revised version of the U-4 form came into effect, its terms clearly required Respondent to make disclosure of Mr. Kufrovich's indictment. Likewise, it required reporting of the conviction.

9. As the 7/23/98 disclosure was a disciplinary disclosure, an authorized individual with Financial West Group [hereinafter sometimes Financial West] was required to sign the hard copy U-4 at the time of its submittal to the CRD system. Furthermore, U-4 submittals to the CRD system must be accomplished through the agent's broker-dealer, in this case, Financial West. It is the general practice of broker-dealer registrants to make filings within thirty (30) days after an event requiring disclosure. This is true of U-4 amendments that are filed. This filing was therefore eighteen days late, as previously noted. The Act, however, only requires "prompt" disclosure. The fact that this eighteen day late disclosure would not result in any disciplinary action by the Department is evidence that this disclosure was prompt enough. The Department

does not allege a violation of the Act as it relates to this eighteen days.

10. There is no proof in the record that Respondent was aware of the indictment of Mr. Kufrovich, and there is no proof that it was not.

11. Under these same facts, no other state has taken any disciplinary action against the Respondent.

CONCLUSION OF LAW

1. The Department bears the burden of proof in this matter, by a preponderance of the evidence.

2. The Commissioner of Commerce and Insurance for the State of Tennessee [hereinafter the Commissioner] has jurisdiction of this matter pursuant to the Tennessee Securities Act of 1980, Tenn. Code Ann. §§ 48-2-101, et seq. [hereinafter the Act].

3. Tenn. Code Ann. § 48-2-112(a) states that the Commissioner may by order deny, suspend or revoke any registration under the Act if the Commissioner finds that (1) the order is in the public interest and necessary for the protection of investors; and (2) the applicant or registrant or, in the case of a broker-dealer, any affiliate, partner, officer, director, or any person occupying a similar status or performing similar functions (C) has been convicted within the past ten (10) years of any misdemeanor involving a security or any aspect of the securities business or any investment-related business, or any felony.

4. Tenn. Comp. R. & Regs., tit. Dep't of Commerce and Ins., ch. 0780-4-1-.04(4)(a)(4) & 0780-4-1-.04(4)(b) adopts Form U-4, Uniform Application for Securities Industry Registration or Transfer, and the instructions contained therein.

5. With respect to the registration of broker-dealers (as well as agents and securities)

the Tennessee Securities Act of 1980, Tenn. Code Ann. §§ 48-2-101, et seq., is based upon, and hinges upon disclosure. Disclosure is the hallmark of all securities acts within the United States, including the 1933 and 1934 federal securities acts. This disclosure is relied upon by the Division in its regulation and enforcement of the securities industry, as well as by the general public.

6. Tenn. Code Ann. § 48-2-102(3) states in pertinent part that a broker-dealer means any person engaged in the business of effecting transactions in securities for the account of others, or any person engaged in the business of buying or selling securities issued by one (1) or more other persons for such person's own account and as part of a regular business rather than in connection with such person's investment activities.

7. Tenn. Code Ann. § 48-2-116(a) states in pertinent part that the Commissioner may from time to time make, promulgate, amend, and rescind such rules, forms, and orders as are necessary to carry out the provisions of the Act.

8. Tenn. Code Ann. § 48-2-109(a) states that it is unlawful for any person to transact business from or in this state as a broker-dealer or agent unless such person is registered as a broker-dealer or agent under the Act.

9. Tenn. Code Ann. § 48-2-112(a) states that the Commissioner may by order deny, suspend or revoke any registration under the Act if the Commissioner finds that (1) the order is in the public interest and necessary for the protection of investors; and (2) the applicant or registrant or, in the case of a broker-dealer, any affiliate, partner, officer, director, or any person occupying a similar status or performing similar functions (B) has willfully violated or willfully failed to comply with any provision of the Act or a predecessor chapter or any rule or order under

the Act or a predecessor chapter, including, without limitation, any net capital requirements.

10. Tenn. Code Ann. § 48-2-111(c) states that if the information contained in any document filed with the commissioner is or becomes inaccurate or incomplete in any material respect, the registrant shall promptly file a correcting amendment.

11. The term "willfully" is not defined in the Act. However, Tennessee's securities act is an older uniform act, and it is appropriate to look to other states, and the federal government, when ascertaining its meaning. Generally, "willfully", in the context of securities laws, means an intent to do the act which violates the law, or an awareness by the actor of his acts. See State v. Fries, 337 N.W.2d 398, 404-05 (Neb. 1983); State v. Russell, 291 A.2d 583, 587 (N.J. 1972); State v. Sheets, 610 P.2d 760 (N.M. Ct. App. 1980). More stringent intent requirements are required when the person is accused of securities fraud. See Curtis v. State, 118 S.E.2d 264 (Ga. Ct. App. 1960). In Tennessee, securities fraud is prohibited by Tenn. Code Ann. § 48-2-121. This heightened intent requirement, scienter, is required by the language employed in that section of the Act, which is a uniform provision. Securities Fraud was not pursued against Financial West in this matter. Notice of Hearing and Charges, Count III (voluntarily dismissed with prejudice by the Division). Transcript at 8-9.

12. Mr. Kufrovich made a false or incomplete, and untimely disclosure on a Form U-4 which was signed or permitted to be filed by a person affiliated with Financial West, and such false or incomplete, and untimely disclosure was submitted by Financial West. As this U-4 amendment was not filed promptly, and was not filed accurately and/or completely, Mr. Kufrovich violated Tenn. Code Ann. § 48-2-112(a), thus permitting the Commissioner to revoke his registration. This, however, is not the instant proceeding. The question is whether, by failing

to disclose Mr. Kufrovich's indictment, Respondent Financial West willfully violated the Act and regulations. Even under the lesser intent requirement of "willfully," as opposed to scienter, the Department has the burden of showing that the Respondent was "aware if its acts," that is, that is was under a duty to disclose the indictment. Absent proof that the Respondent was aware of facts which gave rise to this duty, it cannot be said that the Department has shown that the Respondent willfully violated the Act or regulations. Until it was aware of the indictment, there could be no duty to report it. See, Gearhart & Otis, Inc. v. SEC, 348 F.2d 798 (D.C. Cir. 1965).

13. Tenn. Code Ann. § 48-2-112(a) states that the Commissioner may by order deny, suspend or revoke any registration under the Act if the Commissioner finds that (1) the order is in the public interest and necessary for the protection of investors; and (2) the applicant or registrant or, in the case of a broker-dealer, any affiliate, partner, officer, director, or any person occupying a similar status or performing similar functions (J) has failed reasonably to supervise such person's agents if the person is a broker-dealer, or such person's employees if the person is an investment advisor.

14. The Department contends that the Respondent failed to reasonably supervise Mr. Kufrovich in that it failed to require him to amend the U-4 to reflect the indictment. Again, there is no proof that it knew of any facts requiring such amendment. The Department argues that its failure to know of such indictment shows a lack of supervision. No authority is cited for this proposition, however. On this record, the Department has failed to make out a case of failure to reasonably supervise Mr. Kufrovich against the Respondent. A charge of failure to reasonably supervise requires some identification of specific lapses in supervision. Here, there is no proof of any facts, other than a presumed lack of knowledge of the Connecticut indictment, to show

any lack of supervision by Respondent. This is not enough. There must be some basis for a showing that the Respondent did not do what it ought to have done, or did what it ought not, to meet this burden.

15. The Department contends that the amended filing was misleading because it did not provide a summary of the type of criminal violation, but merely recited the code sections violated. This contention is untenable. The filing was accurate, and it set forth the violation accurately. While not a model of clarity, it disclosed those matters required, and was not materially inaccurate or incomplete. It may not have been as complete as the Department would have liked, in that it may have required them to look up the code sections to determine the nature of the offense, but it cannot be said to have misled anyone. Making the Department look something up, absent a specific requirement that a summary be provided (and there is no such requirement), cannot be said to be misleading. It certainly was not inaccurate, and it also clearly, if only by reference to the code section, set forth every violation. Likewise, the Department complains that the disclosure stated that Mr. Kufrovich was required to spend seventy-six months at a Wackenhut facility (a contract corrections facility for the Federal government), and did not state that he was sentenced to slightly over six years confinement. Again, the disclosure was precisely accurate, as far as it went. The fact that the Department would have preferred the disclosure to be in different language, absent a specific requirement regarding such language, cannot constitute a violation. It is noted that Oklahoma, New Hampshire, Washington, and Connecticut found this statement to be one indicating incarceration.

16. Having failed to show by a preponderance of the evidence that the Respondent violated the Act, this matter should be, and hereby is, DISMISSED.

This Initial Order entered and effective this 17th day of July, 2000.

Marion P. Wall
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State this 17th day of July, 2000.

Charles C. Sullivan, II, Director
Administrative Procedures Division

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this document has been served upon counsel and all interested parties by delivering same to them at their address of record by placing a true and correct copy of same in the United States mail, postage prepaid.

This 17th day of July, 2000.

Administrative Procedures Division
Office of the Secretary of State