THE DISCIPLINARY AND ETHICS COMMISSION

IN THE MATTER OF MARK T. LAMKIN, Respondent.	CFP Board Case No. 2019-52277 January 22, 2024

ORDER

I. Procedural Background

Respondent became a CFP® professional on December 1, 2017. Respondent's certification expired on September 30, 2019. (DEC Book[1] at 18-22; 157.)

On September 27, 2019, CFP Board sent a Notice of Investigation to Respondent. (*Id*. at 74-77.) On November 12, 2019, CFP Board sent a second Notice of Investigation to Respondent, noting that he had failed to respond to the first. (*Id*. at 77.) Respondent submitted his response to the Notice of Investigation on November 18, 2019. (*Id*. at 78-79.)

On December 5, 2022, Enforcement Counsel delivered a Complaint to Respondent consistent with Article 3.1 of the *Procedural Rules,* alleging that there were grounds to sanction Respondent for his alleged violations of CFP Board's prior *Rules of Conduct*. (*Id*. at 9-16.) In accordance with Article 3.1, the Complaint set forth the alleged grounds for sanction, based on Respondent's conduct or omission to act which gave rise to the alleged violations. (*Id*.) On August 25, 2023, Respondent delivered his acknowledgement and Answer to the Complaint, and he requested a hearing before the Commission. (*Id.* at 143-146, 157-169.)

On October 11, 2023, a Hearing Panel of the Commission convened to review the above-described CFP Board Complaint. (Transcript of Hearing of Mark T. Lamkin, October 11, 2023 (Tr. at 1.) CFP Board Enforcement Counsel appeared for CFP Board; DEC Counsel appeared for the DEC and for a Hearing Panel of the Commission; Respondent appeared with his counsel. (*Id.*) The Commission considered the Hearing Panel's recommendation and issued its Final Order on January 22, 2024.

II. Findings of Fact

A. Background

Respondent has passed the following Financial Industry Regulatory Authority, Inc. ("FINRA") examinations: Series 6 – Investment Company Products/Variable Contracts Representative Examination (1991); Series 7 – General Securities Representative Examination (1994); Series 24 – General Securities Principal Examination (2001); Series 63 – Uniform Securities Agent State Law Examination (1991); Series 65 – Uniform Investment Adviser Law Examination (2001); and SIE – Securities Industry Essentials Examination (2018). (*Id*. at 29, 158.)

[1] The DEC Book and any other exhibits to this Order will not be published under Article 17.7 of the *Procedural Rules*.

Respondent was registered as an associated person of Firm 1 from February 2001 to August 2018. (*Id*. at 31, 48, 87, 158.) Firm 1 terminated Respondent's registration in August 2018 because among other things, he was alleged to have "received and/or benefitted from loans from Firm customers."[2] (*Id*. at 48.).

Respondent became registered with Firm 2 as an Investment Adviser Representative in December 2018. (*Id*. at 27, 158.) Currently his Investment Adviser Representative registration has a restricted approval status in Kentucky. (*Id*. at 28, 39-41, 54, 158.) Respondent is also registered with Firm 2 as a General Securities Representative and an Investment Company and Variable Contracts Products Representative, and he remains registered with Firm 2 to date. (*Id*. at 27.)

Respondent is the sole managing member of Firm 3 in Kentucky. (*Id*. at 93, 158.)

The Hearing Panel and the Commission found credible Respondent's testimony about why he became a CFP® professional and what the CFP® certification means to him. Respondent stated: "And when I looked at the spirit of what the CFP[® certification] stands for, which is helping people, which is integrity, which is doing the right thing, I felt like it mirrored the actions of what I did with my grandmother, my parents [all of whom he helped with financial planning] and my clients, and I could have a thousand clients today write you letters of glowing recommendations and reviews of my work over the 17 years." (Tr. at 71; *see also* Tr. at 156: "And I'm like, well, why would you deal with somebody that's not certified at what they do? Would you go to a doctor that hasn't been certified? And so, it stands for what I want to be and it makes a difference in my career and it puts my clients at ease.")

B. Respondent's Letter of Acceptance, Waiver and Consent with FINRA

On March 30, 2020, FINRA accepted a Letter of Acceptance, Waiver, and Consent ("AWC") in which Respondent accepted findings that he violated FINRA Rule 2010, which requires members in the conduct of their business to observe high standards of commercial honor and just and equitable principles of trade, and FINRA Rule 3240, which says that a registered representative may not borrow money from any customer unless his or her member firm has written procedures that allow for such loans and, if allowed, requires the representative to obtain written pre-approval from the firm prior to borrowing money from a customer. (DEC Book at 86-92, 158.) FINRA imposed a sanction on Respondent of a suspension from association with any FINRA member in any and all capacities for a period of three months and a fine of $7,500. (*Id*.)

The findings in the AWC included that:

- On three occasions between December 2011 and August 2017, while registered through Firm 1, Respondent borrowed a total of $1,265,000 from a longtime friend who was also client of Respondent's. (*Id*. at 87.)

[2] Respondent testified about other potential reasons for which he may been terminated. (*See, e.g.,* Tr. at 94.) However, other than Respondent's testimony, there was no corroboration of these reasons. DEC Counsel accepted into the record two additional documents provided to the Hearing Panel and Enforcement Counsel by Respondent at the hearing (with Enforcement Counsel's consent), but the Commission did not find them to provide additional helpful context on this point by Respondent. (*See* Exhibits A and B to the Order.)

- The first loan, which was originated in December 2011 in the amount of $740,000, was made via a promissory note dated December 30, 2011 signed by Respondent's wife and secured by a mortgage dated December 30, 2011 which identified Respondent and his wife as the borrowers and was signed by both. (*Id*. at 87.) This loan was paid in full. (*Id*.)

- The second loan, in the amount of $250,000, was negotiated between Respondent and the customer and memorialized by a note signed by Respondent's wife on April 1, 2017.[3] (*Id*. at 87.)

- The third loan, in the amount of $275,000, was made to a limited liability company ("LLC") of which Respondent was a member and initially was memorialized by a note signed by Respondent and his business partner in the LLC on August 31, 2017. (*Id*. at 87.)

- Throughout the relevant period, Firm 1's written supervisory procedures prohibited registered representatives from borrowing money from a customer unless the customer was a family member. The customer was not Respondent's family member, and Respondent did not seek or obtain prior approval of any of the loans from Firm 1. (*Id*. at 87.)

- Additionally, in annual compliance questionnaires completed in 2012 and 2017, Respondent falsely affirmed that neither he nor "any related person or entity" had "borrowed or loaned any money or securities from or to another individual or entity." (*Id*. at 87.))

Although not discussed in the AWC, there was a fourth loan for $125,000 made to Respondent's wife by the same lender/client in March 2008, prior to the December 2011 loan. (DEC Book at 103, 112.) This was the first loan between Respondent or his family or a related entity and a long-time client to whom Respondent provided financial advice and financial planning services. (Tr. at 109.) According to Respondent, the purpose of the loan was to remodel a building operated by Firm 3 (which he wholly owned) and it was paid in full in July 2016. (DEC Book at 103, 104.) During his testimony, Respondent described that the idea for the client to lend him money came up during a client review at Respondent's office when he described that he was about to close a loan with a major bank for the renovation funds on the same terms. (Tr. at 82; *see also* Tr. at 83 ("I was ready to close at [major bank] and there would have been no difference.").)

Respondent admits that the first loan described in the AWC was made to his wife in that amount and that it came from a close personal acquaintance of over 30 years who was also a customer and who engaged in private lending business.[4] (DEC Book at 159.) According to Respondent, the purpose of the loan was to purchase the personal residence of Respondent and his wife, and it was paid in full in October 2016. (*Id*. at 104; *see also id* at 119 and 129 (Respondent is named a borrower on the mortgage and he signed the mortgage).)

[3] According to Respondent, the purpose of this loan was to allow Respondent's wife to purchase three stores and it has been repaid in full. (*Id*. at 87, 104; Tr. at 157.)

[4] The Commission noted that the friend who made the loans did not testify on Respondent's behalf or provide a written statement specific to this matter before the Commission. The DEC Book contained a copy of an unsworn letter from the friend that was dated July 2018 and appeared to have been submitted to FINRA during its investigation. (DEC Book at 112.)

Respondent also admits that the second loan described in the AWC was made out to Respondent's wife, and that Respondent spoke with the customer regarding the loan. (*Id*. at 159.) According to Respondent, the purpose of the loan was to purchase the personal residence of Respondent and his wife, and it was paid in full in October 2016. (*Id*. at 104; *see also id.* at 119 and 129 (Respondent is named a borrower on the mortgage and he signed the mortgage).)

He further admits that the third loan described in the AWC was made to an LLC that he was a 50 percent member of and that the loan was initially memorialized by a note signed by Respondent and his LLC business partner. (*Id*. at 160; Tr. at 91.) According to Respondent, the purpose of this loan was to purchase a restaurant; it had a maturity date of December 2022 and has now been paid off in full. (*Id*. at 137, 160.) However, "having recalled the instructions given him by [Firm 1] in relation to the initial loan from the [client/lender] back in 2008, the loan was re-memorialized by a new note that was held solely by Respondent's business partner personally." (DEC Book at 160.)

Respondent stated that he been aware of the restrictions on taking loans from customers and was always careful to ensure he complied with those conditions. (*Id*. at 168.) Respondent states that, for that reason, he approached his supervisors at Firm 1 regarding the propriety of the loans made to his wife and was informed that because they were not made to him directly, they would not be in violation of the existing procedures. (*Id*. at 159-160, 168.) Respondent states that he relied on this advice in "acquiescing to the loans."[5] (*Id*. at 168.) Respondent states that he later learned that the advice he received from Firm 1 and his supervisor was incorrect but, because the supervisor refused to acknowledge the advice he had given Respondent and, with Respondent unable otherwise to corroborate their interactions, Respondent "had little choice but to agree to a settlement with FINRA." (*Id*. at 168.)

Respondent testified that he was not aware that Firm 1's compliance questionnaire changed prior to his 2012 and 2017 signings to ask whether family had borrowed money to a client: "That is my fault. I take full responsibility. That's what [Firm 1] fired me over… I should have taken time to read the attestation closer because I didn't know they made that because I would not have signed that, in hindsight. I would have went back to [Firm 1] and got it fixed." (Tr. at 86-76.)

C. Respondent's Agreed Order with the Kentucky Department of Financial Institutions ("KDFI")

Because Respondent was terminated by Firm 1 in August 2018, he became temporarily unregistered as an investment adviser and investment adviser representative in Kentucky from August 2018 to December 2018 (a period of approximately 3.5 months). (DEC Book at 93-94, 161.)

[5] The circumstances of this advice are unclear, as there is contradictory evidence. Respondent's lawyer stated in a letter to FINRA that Respondent first requested approval from Firm 1 for a loan from client/lender to be made to Respondent personally in a "written notice" that was denied but that Firm 1 "counseled him" that if the loans were made to his wife, no notice or approval by Firm 1 would be required. (DEC Book at 101.) Respondent then testified that he first called Firm 1 for permission for the loan and that he did not receive anything in writing from Firm 1 about allowing a loan to Respondent's wife, calling it "the biggest mistake I've made in my career." (Tr. at 80, 84.) He further stated in testimony that he called Firm 1 about the April 2017 loan and that Firm 1 said what "your wife does is her business is up to her, not you." (Tr. at 89.) Nonetheless,

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The Kentucky Department of Financial Institutions ("Kentucky DFI") initiated an action against Respondent on May 28, 2019, to investigate allegations that Respondent transacted investment adviser-related business while unregistered in Kentucky. (*Id*. at 94.) Respondent and Kentucky DFI litigated the matter from May 2019 until March 2022. (*Id*. at 93-95, 161.)

On March 2, 2022, Respondent and Kentucky DFI entered into an Agreed Order. (*Id*. at 93-100.) Pursuant to the Agreed Order, Respondent was found to have transacted business in Kentucky as an investment adviser and investment adviser representative while unregistered due to his failure to remove himself as signatory of Firm 3's business account while such account continued to receive money earned by other Firm 3 registered persons associated with Firm 3 during the period of August 2018 to December 2018.[6] (*Id*. at 97.) According to the Agreed Order, Respondent's conduct violated the Securities Act of Kentucky, which provides that it is unlawful for any person to transact business in Kentucky as an investment adviser or investment adviser representative unless the person is registered in Kentucky as an investment adviser, investment adviser representative, or is exempt from registration. (*Id*. at 96-97.)

Pursuant to the Agreed Order, Respondent was fined $1,000 and subjected to heightened supervision for 12 months. (*Id*. at 97, 162.) In addition, Respondent's Kentucky Investment Adviser Registration was suspended for three months; however, Kentucky DFI continued to waive the suspension as long as Respondent did not commit a securities violation under Kentucky or federal law within three years following the entry of the Agreed Order. (*Id*. at 97, 162.)

Respondent stated that the Kentucky DFI matter "turned solely on [Respondent] being a signatory on the [Firm 3] business account during the time he was not a registered investment advisor in the Commonwealth of Kentucky." (*Id*. at 168.) Respondent stated that, part of the reason for this was that, because of Firm 3's internal processes, they could not make payments on commissions earned by other, registered advisors who worked for Firm 3. (*Id*. at 168.) Given a short turnaround to rectify the situation, and to ensure that his employees continued to receive the income to which they were unquestionably entitled, Respondent stated that he arranged with Firm 3 to pay the commissions and other fees to another registered advisor. (*Id*. at 168.) These funds would be deposited in a Firm 3 account. Respondent further stated that, when Kentucky DFI brought an action against Respondent, they did so on the basis that he was still a signatory on the account. (*Id*. at 168.)

Respondent stated in his Answer that the "investigation revealed that at no time during which he was not registered in Kentucky did he actively engage in providing investment advice to clients. The sole reason for the investigation and subsequent agreement was that he was listed as a signatory. It also bears noting

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while the first and second loans were structured to be only in Respondent's wife's name, the Commission notes that, in the letter they provided to FINRA, the client/lender appeared to be lending money to the couple: "As with many friends through the years, [my wife] and I have lent money to provide a win/win arrangement for us and them…. Because he is our financial advisor, we have discussed many times that any loans should ultimately be in [Respondent's wife's] name and I have agreed to sign or structure agreements that fit within his duties as a friend, advisor, and trusted partner." (DEC Book. at 112 (citing letter from lender/client).)

[6] There is no evidence in the record that Respondent made any recommendations or transacted any securities business in Kentucky during this time, which the Commission may have viewed to be more serious than Respondent's more technical violation of the Kentucky law.

that [Respondent] did not personally receive any funds which came into the account that were not his. (*Id*. at 168. (emphasis in original))

Respondent confirmed this during his direct testimony at the hearing:

> Q Yeah. For the folks that stayed and were continued to be registered with Kentucky, did they earn any commissions during that particular period of time, that you're aware of?
>
> A Yes.
>
> Q Did you earn any subpart of those commissions during that period of time?
>
> A Not a penny.

(Tr. at 79.)

III. Discussion of Respondent's Misconduct

To impose a sanction on Respondent, the Commission must find grounds for sanction. The Commission found grounds for sanction under CFP Board's *Procedural Rules* because it determined that Respondent violated CFP Board's *Rules of Conduct*, as discussed below. The Commission made its decision based on the authority granted to it in Article 12 of the *Procedural Rules*.

First Ground for Sanction

CFP Board Enforcement Counsel's Complaint alleged that there are grounds to sanction Respondent for a violation of Rule 3.6 of the *Rules of Conduct,* which provides that a CFP® professional may not borrow money from a client.

Article 7.2 of the *Procedural Rules* provides that a record from a (a) federal, state, local, or foreign governmental agency, (b) self-regulatory organization, or (c) other regulatory authority imposing discipline upon Respondent ("Professional Discipline") is conclusive proof of the existence of such Professional Discipline and the facts and violations that serve as the basis for such Professional Discipline. The fact that Respondent has not admitted or denied the findings contained in the record does not affect the conclusiveness of the proof. Professional Discipline includes a censure, injunction, undertaking, order to cease and desist, fine, suspension, bar, or revocation, and the surrender of a professional license or certification in response to a regulatory action or regulatory investigation. A record of Professional Discipline includes a settlement agreement, order, consent order, and AWC. As set forth in Article 7.5 of the *Procedural Rules*, since Respondent's Professional Discipline by FINRA and Kentucky DFI has been conclusively proven, Respondent may not challenge the fact of the Professional Discipline and may introduce evidence only concerning an appropriate sanction resulting from the Professional Discipline.[7]

[7] At the beginning of the hearing, after a discussion by the parties, DEC Counsel affirmed the application of Articles 7.2 and 7.5 and stated that the rules "speak for themselves." (Tr. at 25-23.)

Respondent admits that FINRA is an industry self-regulatory authority (*Id*. at 163.) The AWC is a record of Professional Discipline by FINRA, and Respondent admits that he is the subject of that record. (*Id*. at 163.) Therefore, the AWC conclusively establishes the existence of such Professional Discipline for purposes of this disciplinary proceeding and is conclusive proof of the facts and violations that serve as the basis for such Professional Discipline of Respondent.

Respondent was a CFP® professional at all times relevant to this violation.

The AWC is conclusive proof that after his initial certification date of December 1, 2017, Respondent, his wife, or the LLC of which Respondent is a member, continued to make payments on money borrowed from a client[8], which is evidenced by Respondent, his wife, or the LLC making payments to the lender, as required under the terms of the two loans, which totaled more than $500,000. Respondent also admits that "[Respondent] and his wife continued to re-pay the loans after his certification as a CFP[®] [p]rofessional."[9]

Therefore, there are grounds to sanction Respondent for a violation of Rule 3.6 of the *Rules of Conduct.*

Second Ground for Sanction

Enforcement Counsel's Complaint alleged that there are grounds to sanction Respondent for a violation of Rule 4.3 of the *Rules of Conduct*, which provides that a CFP® professional shall be in compliance with applicable regulatory requirements governing professional services provided to the client.

Article 7.2 of the *Procedural Rules* provides that a record from a (a) federal, state, local, or foreign governmental agency, (b) self-regulatory organization, or (c) other regulatory authority imposing discipline upon Respondent ("Professional Discipline") is conclusive proof of the existence of such Professional Discipline and the facts and violations that serve as the basis for such Professional Discipline. The fact that Respondent has not admitted or denied the findings contained in the record does not affect the conclusiveness of the proof. Professional Discipline includes a censure, injunction, undertaking, order to cease and desist, fine, suspension, bar, or revocation, and the surrender of a professional license or certification in response to a regulatory action or regulatory investigation. A record of Professional Discipline includes a settlement agreement, order, consent order, and AWC.

Respondent was a CFP® professional at all times relevant to this violation.

Respondent admits that Kentucky DFI is a state governmental agency. (*Id.* at 165.) Respondent also admits that the Agreed Order is a record of Professional Discipline by Kentucky DFI (*id*.), and Respondent

[8] The Commission notes that someone continues to be a borrower on a loan until the final payment on the loan is made. *See* ACH 31337 (finding a violation of Rule 3.6 for a loan made prior to the respondent's certification date but that had not yet matured).

[9] Although all three loans were originated prior to Respondent's initial certification as a CFP® professional on December 1, 2017, Respondent, his wife, or the LLC of which Respondent is a member, have made payments to the lender after December 1, 2017, as required under the terms of the loans. (*Id*. at 87.) Specifically, Respondent's wife made payments for the second loan, and Respondent and his LLC made payments on the third loan. (*Id*. at 87, 138.)

is the subject of that record. (*Id*.) Therefore, the Agreed Order conclusively establishes the existence of such Professional Discipline for purposes of this disciplinary proceeding and is conclusive proof of the facts and violations that serve as the basis for such Professional Discipline of Respondent.

The Agreed Order is conclusive proof that Respondent transacted business in Kentucky as an investment adviser and investment adviser representative while unregistered in Kentucky and failed to comply with the Securities Act of Kentucky, which is a state regulatory requirement governing professional services provided to the client.

Therefore, there are grounds to sanction Respondent for a violation of Rule 4.3 of the *Rules of Conduct*.[10]

Third Ground for Sanction

Enforcement Counsel's Complaint alleged that there are grounds to sanction Respondent for a violation of Rule 6.5 of the *Rules of Conduct*, which provides that a CFP® professional may not engage in conduct that reflects adversely on his or her integrity or fitness as a CFP® professional, upon the CFP® marks, or upon the profession.

Article 7.2 of the *Procedural Rules* provides that a record from a (a) federal, state, local, or foreign governmental agency, (b) self-regulatory organization, or (c) other regulatory authority imposing discipline upon Respondent ("Professional Discipline") is conclusive proof of the existence of such Professional Discipline and the facts and violations that serve as the basis for such Professional Discipline. The fact that Respondent has not admitted or denied the findings contained in the record does not affect the conclusiveness of the proof. Professional Discipline includes a censure, injunction, undertaking, order to cease and desist, fine, suspension, bar, or revocation, and the surrender of a professional license or certification in response to a regulatory action or regulatory investigation. A record of Professional Discipline includes a settlement agreement, order, consent order, and AWC.

Respondent admits that FINRA is an industry self-regulatory authority. The AWC is a record of Professional Discipline by FINRA, and Respondent admits he is the subject of that record. (*Id*. at 165.) Therefore, the AWC conclusively establishes the existence of such Professional Discipline for purposes of this disciplinary proceeding and is conclusive proof of the facts and violations that serve as the basis for such Professional Discipline of Respondent.

Respondent was a CFP® professional at all times relevant to this violation.

The AWC is conclusive proof that Respondent borrowed money from a client and failed to comply with FINRA Rules 2010 and 3240 and was sanctioned by FINRA with a three-month suspension and a $7,500

[10] At the beginning of the hearing, Enforcement Counsel, as a preliminary matter, stated that, in its Complaint, "there were two separate and independent grounds for violations of Rule 4.3" – one as alleged in paragraph 37 (about a Letter of Acceptance, Waiver and Consent ("AWC") that Respondent entered into with FINRA and the second as alleged in paragraphs 38 and 39 about an Agreed Order that Respondent entered into with the Kentucky DFI. (Tr. at 12-14.) Enforcement Counsel stated that it was only going to "proceed as to the second basis for liability" and moved to strike paragraph 37 of the Complaint. (Tr. at 12-14.) After hearing from the parties on the matter, DEC Counsel struck paragraph 37 and the Commission only made a determination about the second alleged basis for liability in the second ground for sanction. (Tr. at 14.)

fine. This is conduct that reflects adversely on Respondent's integrity and fitness as a CFP® professional, upon the CFP® marks, and upon the profession.

Respondent admits that Kentucky DFI is a state governmental agency. (*Id*. at 165.) Respondent also admits that the Agreed Order is a record of Professional Discipline by Kentucky DFI (*id*.), and Respondent is the subject of that record. (*Id*.) Therefore, the Agreed Order conclusively establishes the existence of such Professional Discipline for purposes of this disciplinary proceeding and is conclusive proof of the facts and violations that serve as the basis for such Professional Discipline of Respondent.

The Agreed Order is conclusive proof that Respondent transacted business in Kentucky as an investment adviser and investment adviser representative while unregistered in Kentucky and failed to comply with the Securities Act of Kentucky and was sanctioned by Kentucky DFI with a $1,000 fine and heightened supervision for twelve months. In addition, Respondent's Kentucky Investment Adviser Registration was suspended for three months; however, the suspension will be waived by Kentucky DFI as long as Respondent does not commit a securities violation under Kentucky or federal law within three years following the entry of the Agreed Order. This is conduct that reflects adversely on Respondent's integrity and fitness as a CFP® professional, upon the CFP® marks, and upon the profession.

Therefore, there are grounds to sanction Respondent for a violation of Rule 6.5 of the *Rules of Conduct*.

IV. The Commission's Decision

Pursuant to Article 12.3 of CFP Board's *Procedural Rules*, the Commission's final order must impose a sanction if the Commission finds a violation that does warrant a sanction. The Commission has discretion to order a sanction among those applicable sanctions set forth in Article 11.1.

After carefully considering the evidence in Respondent's matter and the violations found, the Commission determined to issue Respondent an **Order of Temporary Bar for One Year and One Day**.

CFP Board issued its non-binding *Sanction Guidelines* to serve as guidance for determining the appropriate sanction. The Commission considered the following conducts and recommended sanctions from the *Sanction Guidelines*:

- Conduct 3: Borrowing from a Client (Public Censure);
- Conduct 31: Securities Law Violation (Public Censure);
- Conduct 34: Professional Discipline as Defined in Article 7.2 involving a Suspension for More than One Calendar Month (30 days) and Less than Three Calendar Months (90 days) (Suspension for at least an equal length, up to one year); and
- Conduct 35: Professional Discipline as Defined in Article 7.2 involving a Suspension for More than Three Months 90 days) (Suspension for at least one year and one day).

The Policy Notes to Conduct 3 states: "The following should be considered additional aggravating or mitigating factors in determining the appropriate sanction: (1) Was this an isolated incident? (2) Was there informed consent? (3) Was there a preexisting relationship? (4) Was there harm to the client? (5) Did the CFP® professional profit from the incident?"

The Policy Notes to Conduct 31 states: "Inquire whether the CFP® professional knowingly violated the securities laws or whether it was his/her negligence that led to a violation of securities laws. Intentional acts should be treated more seriously than negligent acts."

The Commission determined to apply a baseline sanction of a suspension (in this case a temporary bar because Respondent is no longer certified) for one year and one day. Given that Respondent's three-month FINRA suspension falls just one day short of the suspension length for Conduct 35 (recommending suspension of at least one year and one day), the Commission weighed Conduct 35 more heavily than Conduct 34 (recommending a suspension of at least three months, in this case, up to a suspension of one year). The Commission also considered that there were multiple grounds for sanction and the other relevant *Sanction Guidelines* recommending a Public Censure.

The Commission then reviewed the aggravating and mitigating factors in this case to determine whether there were any material factors relevant to this matter, and, if so, what weight those factors may have in its decisions.

In aggravation, the Commission cited that:

1. These instances were not isolated - Respondent and/or related people or entities borrowed money from a client four times (two of which admittedly were paid off prior to his certification), which demonstrates a concerning pattern;
2. Respondent and the lender/client deliberately structured the loans in a manner designed to circumvent the prohibition against borrowing from a client and to benefit Respondent;
3. By failing to disclose on his annual compliance questionnaire in 2012 and 2017 that he or "any related person or entity" had "borrowed or loaned any money or securities from or to another individual or entity," Respondent appears to have been trying to hide the lending agreements. To the extent he signed the questionnaire without reading it, as he testified, the Commission was also troubled;
4. In borrowing from a client, Respondent was putting client funds at risk. If Respondent, his wife, or his business partner died or became disabled, or otherwise defaulted on the loan repayment, the client could have been left without repayment;
5. The concept for the first loan from the client was first raised during a client review in Respondent's office in 2008. The Commission was troubled that a conversation about the client's finances resulted in the client making an offer to lend Respondent money personally;
6. Respondent's BrokerCheck report reflects other customer disputes and another firm termination; and
7. Respondent's testimony regarding seeking Firm 1 approval of the loans contradicted his prior written representations about the key events, without explanation for the difference, and which undermined Respondent's credibility.

In mitigation, the Commission cited that:

1. Respondent and/or his wife or business partner repaid the loans and, therefore, there was no evidence in the record of actual client harm;

2. There is no evidence in the record that the interest rate paid or other terms on the loans from the client were any worse than what Respondent could have received from another lender. Therefore, Respondent did not appear to directly profit from the loan arrangements (though that there may have been some "social" or relationship benefit[11] to Respondent in accepting the loan from the client/lender);
3. There was a pre-existing relationship with the client/lender; and
4. Based upon the record evidence, the client/lender clearly provided his willing consent to make the loans, and the loans were documented with signed promissory notes. There was no evidence in the record that this was or was not fully informed consent.

The Commission then consulted various *Case Histories* (referred to as "ACHs" or "CHs") to determine if any *Case Histories* contained precedent that warranted a deviation from the *Sanction Guidelines.* The Commission specifically considered ACH 31241 (presented by Enforcement Counsel) and ACH 29879 (presented by Respondent's counsel). While helpful, the Commission did not find either Case History to be directly on point with the instant matter.

In ACH 31241, which reflects a settlement, a CFP® professional was issued a Public Letter of Admonition after her husband received a $500,000 loan from the respondent's client without disclosing it to her firm, for which she was terminated and sanctioned by her state regulator. The loan, which was fully repaid, was made to help respondent and her husband pay expenses related to their separation. In addition to finding that respondent violated Rules 3.6, 5.1, and 4.3, respondent also was found to have violated Rule 6.1 for her failure to cooperate with CFP Board during its investigation and for failing to disclose her termination and submitting a false statement with regard to the state regulator's investigation on her CFP Board Ethics Declaration. Like the instant matter, the loan at issue in ACH 31241 was fully repaid, the respondent was terminated, there was no proven client harm, and there was a long-term personal relationship with the lending client. However, unlike in this case, the respondent in ACH 31241 had no prior disciplinary history and the misconduct was isolated as opposed to a pattern. However, the respondent in ACH 31241 failed to fully cooperate with CFP Board and made false or misleading statements, which Respondent did not do here.

In ACH 29879, the CFP® professional received a Private Censure when he borrowed $30,000 on a one-time basis from a client after he experienced great loss of life within his family and fell in arrears with tax liens. Like Respondent in the instant matter, the respondent in ACH 29879 also had a long and close personal relationship with the lending client and he repaid the loan. There was no client harm, and he too was terminated by his employer. Unlike the Respondent in this case, though, the respondent in ACH 29870 had no prior disciplinary history. He also did not attempt to hide the loan or structure it to avoid disapproval and openly repaid the client from a checking account that used his office address as his mailing address which he knew was subject to review by his employer.

[11] Respondent testified several times about his friendship with the client/lender. (*See, e.g.,* Tr. at 83, 110.)

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In light of the substantial evidence that supports the Commission's factual findings and the violations found, and the weight of the aggravating and mitigating factors with respect to the *Sanction Guidelines* and the Case Histories reviewed, the Commission issues to Respondent an **Order of Temporary Bar for One Year and One Day**.

Ordered by:
CFP Board's Disciplinary and Ethics Commission
January 22, 2024