THE DISCIPLINARY AND ETHICS COMMISSION

IN THE MATTER OF ANDREW TODD ROSEBERRY Respondent.	CFP Board Case No. 2020-55685 September 15, 2023

ORDER

I. Procedural Background

CFP Board granted Respondent the right to use the CFP®, CERTIFIED FINANCIAL PLANNER™, and certification marks ("CFP® marks") on September 14, 1998, and has remained certified since that date, except for a period from November 2020 to January 2021 when his certification lapsed. (DEC Book[1] at 18.)

On February 19, 2020, CFP Board Enforcement Counsel presumably commenced an investigation under Article 1 of CFP Board's *Procedural Rules* by delivering to Respondent a Notice of Investigation ("NOI"), which Respondent references in his undated acknowledgment and Response to the NOI, but the NOI was not provided in the DEC Book. (*Id.* at 74-75.) In his undated Response to the NOI, Respondent enclosed certain documents and information related to: "2019 Ohio Department of Commerce Division of Securities notice of intent to revoke investment advisor license and notice of intent to issue a C&D order." (*Id.*)

On January 19, 2021, Respondent submitted to CFP Board an Ethics Declaration in connection with his CFP® Certification Renewal Application, stating he had been communicating with Enforcement Counsel and had previously disclosed to CFP Board that, as the result of a 2018 audit, the Ohio Department of Commerce Division of Securities ("Ohio Division") intends to issue an order in which Respondent intends to agree to the imposition of a two-week suspension, for conduct related to Respondent not properly disclosing an outside business activity and improperly filing a Form ADV as the Chief Compliance Officer ("CCO") of an entity. (*Id.* at 50-51.)

On July 26, 2022, Enforcement Counsel sent an email to Respondent seeking to schedule an Oral Examination of Respondent, and Respondent emailed back that day stating he had "no interest in any way to re-litigate this matter." (*Id.* at 128-132.) On August 1, 2022, upon being informed of his Duty of Cooperation under Article 1.3 of the *Procedural Rules*, Respondent waived the 14-day notice period and Enforcement Counsel delivered to Respondent a Request for Oral Examination and a Notice of Oral Examination, setting the date of Oral Examination for August 10, 2022, at which time Respondent appeared and provided testimony on the record. (*Id.* at 133-135, 136-138.)

On March 15, 2023, Enforcement Counsel delivered a Notice of Complaint and Complaint to Respondent consistent with Article 3.1 of the *Procedural Rules,* alleging that there are grounds to sanction Respondent for his alleged violations of CFP Board's *Rules of Conduct*. (*Id*. at 5-9, 10-15.) In accordance with Article 3.1, the Complaint set forth the alleged grounds for sanction, based on Respondent's conduct

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

or omission to act which gave rise to the alleged violations. (*Id*.) On April 14, 2023, Respondent delivered his Acknowledgement and Answer to the Complaint pursuant to Article 3.2 of the *Procedural Rules,* and he requested a hearing before the Commission. (*Id.* at 229-232, 242-254.)

On June 8, 2023, a Hearing Panel of the Commission convened by video conference to review the above-described CFP Board Complaint. (Transcript of Hearing of Andrew Roseberry, CFP[®], June 8, 2023 ("Roseberry Tr.") at 1.) CFP Board Enforcement Counsel appeared for CFP Board, DEC Counsel appeared for the Commission and for the Hearing Panel of the Commission, and Respondent appeared *pro se*. (*Id.*) The Commission considered the Hearing Panel's recommendation and issued this final Order on September 15, 2023.

II. Findings of Fact

A. Background

Respondent has passed the following FINRA examinations: (a) Series 52 – Municipal Securities Representative Examination (1995); (b) Series 63 – Uniform Securities Agent State Law Examination (1995); (c) Series 7 – General Securities Representative Examination (1995); (d) Series 8 – General Securities Sales Supervisor Examination [Options Module & General Module] (1997); and (e) Series 24 – General Securities Principal Examination (1998). (*Id.* at 56.) Respondent maintains an insurance license with the Ohio Department of Insurance. (*Id.* at 73.)

Respondent is currently registered as an investment advisor representative for "Firm," and has been since January 13, 2009. (*Id.* at 65.)

Respondent is currently employed by Firm, where he has remained employed since 1998. (*Id.* at 68.) Respondent is also a member and partial owner of Firm, and stated he provides portfolio management and financial planning for individual clients of Firm. (Roseberry Tr. at 32.)

Respondent's Partner was also employed by Firm as an investment advisor representative, from January 2001 to June 2019. (*Id.* at 213, 249.) Firm terminated Partner on June 29, 2019, for "unauthorized outside business activities." (*Id.* at 213, 249.)

Respondent served as Firm's Chief Compliance Officer ("CCO") from May 2008 to March 2019. (*Id.* at 214, 249.) On March 26, 2019, Firm filed a Form ADV to remove Respondent from the CCO position and appoint a new person to the CCO position. (*Id.* at 214, 249.)

In his NOI Response, Respondent stated: "I have adhered to and take seriously the CFPB Standards of Professional Conduct and will continue to do so in my future role as an Investment Advisor." (DEC Book at 75.)

Respondent also stated that in the 22 years he has been an investment advisor, he has had no customer complaints or disciplinary history other than with respect to the conduct at issue in this matter. (*Id.*) There is no evidence in the record demonstrating otherwise.

B. Respondent and Partner Establish X-Fund & A-Asset Management

On September 17, 2001, Respondent and Partner established X-Fund Ltd. a/k/a X-Asset Fund, L.L.C. ("X-Fund") to invest in tax lien certificates. (DEC Book at 213, 249.) Respondent characterized X-Fund as a real estate investment, and stated he initially thought X-Fund would perform well. (Roseberry Tr. at 43-44.)

The incorporator of X-Fund is A-Asset Management Ltd. ("A-Asset Management"), a limited liability company organized in 2001 by Respondent and Partner in the names of their wives. (*Id.* at 213, 249.) According to Respondent, he and Partner organized A-Asset Management using their wives' names to create retirement plans in their wives' names and receive tax advantages, in the event the X-fund was successful. (*Id.* at 163, 214, 249; Roseberry Tr. at 51-52.) However, no 401(k)'s or other retirement accounts were ever created, according to Respondent. (Roseberry Tr. at 51-52.) The Commission was therefore skeptical of Respondent's intentions regarding the investment.

A-Asset Management was at all times operated by Respondent and Partner and was created by them for the sole purpose of acting as the management company for X-Fund. (*Id.* at 163, 214, 249; Roseberry Tr. at 36.)

From approximately September 2001 through 2004, X-Fund solicited and obtained over $1 million from at least eight investors. (*Id.* at 214, 249.) Several of the investors in X-Fund were investment advisory clients or former clients of Partner and Firm, but not clients of Respondent, according to Respondent. (*Id.* at 214, 249; *see also* Roseberry Tr. at 44-45.) Respondent stated that only Partner handled solicitations with respect to X-Fund. (*Id.* at 249.)

X-Fund and A-Asset Management have never filed any registration offering documents with the Ohio Department of Commerce Division of Securities ("Ohio Division"). (*Id.* at 213-214, 249.)

C. Respondent's Material Omissions Related to X-Fund

Partner and X-Fund did not disclose to client-investors at the time of investment that Partner and Respondent were the creators and managers of X-Fund, and they continued to withhold this information for 17 years, until at least November 2018. (*Id.* at 214; *contra id.* at 250, where Respondent denied this allegation of the Complaint, stating Partner had told the investors that he was involved; *c.f. id.* at 121, 117-122: Ohio Department of Insurance Report and Recommendation and Order revoking Partner's insurance license, citing Ohio Division's Order revoking Partner's Investment Advisor Representative license and Ohio County Common Pleas Court affirmance of the revocation, stating Partner "did not disclose critical personal relationships to his investors.")

Respondent and Partner were not investors in X-Fund; however, they took an asset-based management fee through A-Asset Management as compensation for operating the X-Fund. (*Id.* at 214.) Partner did not disclose to investors that he and Respondent took this compensation for operating X-Fund, including to those investors who were investment advisory clients of Partner and Respondent. (*Id.*)

In approximately 2008, X-Fund ceased generating revenues, and X-Fund and Respondent stopped soliciting new investors, although Respondent stated there had been no new investors since 2003 or 2004. (*Id.* at 214, 250.) When X-Fund's underlying liens stopped performing in 2008 due in part to the collapse of the real estate market, Respondent stated he and Partner also stopped taking asset-based fees as creators. (Roseberry Tr. at 36.)

To create liquidity and issue distributions to a select subgroup of investors beginning in about 2008 through at least January 19, 2018, Respondent and Partner would periodically deposit personal funds into A-Asset Management's bank account. (*Id.* at 214, 250.) Partner would then write a check from A-Asset Management to X-Fund and deposit the check into X-Fund's bank account. (*Id.* at 214, 250.)

Thereafter, Partner would draft checks from X-Fund's bank account to issue distributions and Respondent would sign these checks on behalf of X-Fund to some of the X-Fund investors. (*Id.* at 214, 250.) The personal assets contributed by Respondent and Partner were reflected on X-Fund's balance sheet as "AAM Note," which is an abbreviation for "A-Asset Management Note." (*Id.* at 215, 250.) "AAM Note" as listed on X-Fund's balance sheet represents a loan from A-Asset Management to X-Fund, although Respondent stated it was never intended to be a loan and they used AAM Note on X-Funds balance sheet to keep track of the amount of personal funds they had contributed. (*Id.* at 215, 250.)

As of June 2018, Respondent and Partner had not prepared a financial statement for X-Fund in over 10 years. (*Id.* at 215, 250.) Further, Respondent and Partner were unable to provide an accurate valuation of X-Fund's assets or determine the true asset valuation for X-Fund. (*Id.* at 215, 250.)

From at least 2012 through 2017, with the assistance of an accountant, X-Fund issued a Schedule K-1 to each of its investors, which included the value of the investor's capital account. (*Id.* at 215, 250.) Every tax year, Partner and X-Fund updated the value of each investor's capital account to reflect any distributions made to the investor that year. (*Id.*) However, Respondent, Partner, and X-Fund did not make any adjustments to the value of the investors' capital accounts based on changes in the valuation of X-Fund's assets. (*Id.* at 215.) Therefore, the capital account values provided to investors on the Schedule K-1s did not accurately reflect the value of each investor's investment. (*Id.* at 215-216, 250-251.) Respondent stated that Partner handled all accounting and tax in this regard. (*Id.* at 250-251.)

From at least 2012 through 2017, Partner signed the partnership tax returns for X-Fund and mailed or otherwise delivered the Schedule K-1s to the investors. (*Id.* at 201, 251.) The K-1 forms for year-end 2017, issued by X-Fund to the 12 investors, show an aggregate investment value of $783,554, after X-Fund was no longer operating. (*Id.* at 216, 251.)

D. Failure to Disclose Outside Business Activity for Division Licensure

On January 9, 2015, July 6, 2015, and September 25, 2015, Respondent filed Form U4 Amendments with the Financial Industry Regulatory Authority, Inc. ("FINRA") on its Central Registration Depository ("CRD"). (*Id.* at 221, 251.) In each of these Form U4 Amendments, Respondent states in Section 13, Other Business, "Independent Insurance Agent-sells property & casualty ins," but makes no mention of X-Fund. (*Id.* at 221, 251.)

Respondent did not disclose his involvement with X-Fund or A-Asset Management on these amendments and has never previously disclosed his involvement with X-Fund or A-Asset Management on any Form U4 Amendment. (*Id.* at 221, 251.) Respondent and Partner furthermore did not inform their colleagues at Firm of their involvement with X-Fund until at least February 2018, over the course of 17 years. (*Id.* at 221, 251.)

E. 2022 Ohio Consent Agreement and "Division Order" (Order Suspending Ohio Investment Advisor License / Cease and Desist Order with Consent)

On December 23, 2022, in accordance with a Consent Agreement between Respondent and the Ohio Division, Respondent consented, stipulated, and admitted to the findings, conclusions and Order Suspending Ohio Investment Advisor License / Cease and Desist Order with Consent ("Division Order"), in which the Ohio Division and Respondent consented to findings that he had violated:

- Ohio Law #1[2] by providing false information on his Form U4s filed on January 9, 2015, July 6, 2015, and September 25, 2015; and
- Ohio Law #2[3] by failing to update his Form U4s to reflect his outside business activity with X-Fund and A-Asset Management. Respondent and Partner had operated X-Fund for approximately 17 years—since 2001—and never disclosed this information on their Form U4s. (*Id.* at 222, 251.)

By the Division Order, Respondent also agreed to:

- Restitution to all of the 12 X-Fund investors, or if deceased, to their heirs, in an aggregate amount of $768,110, which is the value of the investment shown on the 2017 K1-1 forms reduced by the amounts shown for distributions per the 2018 K-1 forms issued to X-Fund investors;
- Not act in the role of a supervisory person, control person, or CCO for any investment adviser firm or securities dealer firm for the term of his natural life; and
- A suspension for 14 days effective from the issuance date of the Consent Order. (*Id.* at 223-224, 251.)

The Ohio Division found Respondent's license was subject to suspension under several Ohio state securities laws[4], and specifically cited a subsection providing that the division may suspend or revoke the license of an investment adviser representative if the licensee: "[h]as *knowingly* made a false statement of a material fact or an omission of a material fact in an application for a license, in a description or application that has been filed, or in any statement made to the division under such section…." (*Id.* at 222.) (Emphasis added.)

According to Respondent, Firm paid the $768,110 restitution on Respondent's behalf, and all the investors or their heirs were made whole. (Roseberry Tr. at 47: "the entity paid all of it, I did not pay any of it.") Respondent also stated that he did not want to agree that he would not act in the role of supervisory

[2] O.A.C. 1301:6-3-44(E)(1)(c).
[3] O.A.C. 1301:6-3-16.1(C).
[4] R.C. 1707(19)(A)(2),(4),(5),(9).

person or control person, but "some of that was just to bring closure to the issue, but I can't contest what I signed, and I did sign it. That's it." (Roseberry Tr. at 30; DEC Book at 251.)

F. U.S. Securities and Exchange Commission ("SEC") Division of Enforcement Investigates X-Fund and Concludes Investigation as to Respondent

On April 27, 2023, the Assistant Regional Director of U.S. Securities and Exchange Commission ("SEC") Division of Enforcement sent a notice to Respondent stating the SEC Division of Enforcement had concluded its investigation as to Respondent and did not intend to recommend and enforcement action against Respondent. (DEC Book at 255.) The notice continued to state that it "must in no way be construed as indicating that the party has been exonerated or that no action may ultimately result from the staff's investigation." (*Id.*) The notice concerned "In the Matter of [Firm] (#-#####)," suggesting Firm was the subject of the SEC matter, and the investigation as to Respondent had concluded with respect to its investigation of Firm. (*Id.*)

G. Respondent's Testimony and Lacking Credibility

During the Commission's hearing on this matter, the Hearing Panel found Respondent's credibility to be profoundly lacking, and the Commission agreed. There were several inconsistencies between the Respondent's testimony and the information in the DEC Book. For example, Respondent stated during the hearing that he was uncertain how much he charged in management fees for X-Fund but guessed 1% annually. (Roseberry Tr. at 40-41.) During his Oral Examination, Respondent previously testified that he and Partner charged $15,000 per year—each—in management fees, which would have been about 3% annually, assuming an asset base of approximately $1 million. (DEC Book at 165.) While the Commission recognized that significant time had passed since Respondent had charged these fees, significant time had not passed since Respondent's Oral Examination, indicating to the Commission that Respondent was either not truthful, or he had given so little attention to the matter that his testimony in other regards may be less than credible.

The Hearing Panel further found Respondent not to be credible when he stated at the hearing that he did not personally invest in X-Fund or encourage any of his clients to invest in X-Fund because he did not want to "compete" with Firm or with Partner. (Roseberry Tr. at 44.) Respondent quickly backtracked to justify how it could be okay for Partner to solicit Partner's clients when they both worked at the same firm by stating they were 'different dollars.' (*Id.* at 45.) The Commission agreed that Respondent did not appear credible in this regard.

Respondent stated Firm's payment of the $768,000 in restitution that Respondent was ordered to pay, made clients "whole" (assuming, in addition to the previous distributions made). (*Id.* at 47.) Considering that the Division Order found a "select subgroup" of investors were given distributions over the years, the Commission doubted whether clients were truly paid back the entirety of their investments, especially considering the amount of time that had passed and that heirs of the original investors may not have known the history or details of the investment.

The Hearing Panel also found that Respondent did not appear to take any responsibility for his or Partner's misconduct, and the Commission agreed. For example, Respondent stated that the Ohio Division wanted to

"make an example of" him (Roseberry Tr. at 65), that he only signed the Division's Order to be done with the matter when he could easily have won on the merits (*id.* at 64), and that Firm only terminated his Partner to "curry favor" with the Ohio Division, rather than as a result of Partner's misconduct (*id.* at 45-46)—each implying that Respondent nor Partner had done anything wrong.

The Commission also found that Respondent did not appear to respect the disciplinary processes resulting from his misconduct. At the time of the Commission's June 2023 hearing, Respondent had not removed his former title of CCO from public regulatory filings and appeared to have continued to violate the cease-and-desist terms of the Ohio Division's Consent Order since it had been issued in December 2022. (DEC Book at 58, 68; Roseberry Tr. at 48-50). And, in closing at the hearing, Respondent stated: "I am guilty [of] not disclosing outside [an] business activity and not correctly updating for[m] ADV[s]. If you, in fact, think that a nonfunctioning entity after 2008 needed to be disclosed on an ADV, then I guess that I would be guilty in that case" (Roseberry Tr. at 65.)

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 the *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*.

Ground for Sanction

CFP Board Enforcement Counsel's Complaint alleged there are grounds to sanction Respondent for a violation of Rule 4.3 of CFP Board's *Rules of Conduct*, which provides that a certificant 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 Letter of Acceptance, Waiver, and Consent ("AWC").

The Ohio Department of Commerce is a state governmental agency. The Finalized Ohio Consent Agreement is a record of Professional Discipline by the Ohio Department of Commerce, and Respondent is the subject of that record. Therefore, the Finalized Ohio Consent Agreement 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 Finalized Ohio Consent Agreement is conclusive proof that Respondent failed to comply with Ohio Law-#1 and #2, which are regulatory requirements 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*.

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 **Suspend for Two Years** Respondent's right to use the CFP® marks, and order Respondent to complete **Remedial Education or Work** in the form of 30 hours of Continuing Education ("CE"), including 2 hours of CE that shall be on the topic of Ethics, in addition to the number of CE credits otherwise required of a CFP® professional during the two-year period. With this sanction, the Commission intends for Respondent to, among other things, reflect on his actions, improve Firm's compliance oversight, and increase his knowledge in compliance with state and federal regulations.

The Commission notes that at the time of the hearing, Respondent appeared to be in non-compliance with the Ohio Order by continuing to publicly identify in regulatory documents as CCO of Firm. (DEC Book at 58, 68) Respondent should immediately update all regulatory documents and, per the Ohio Order, never state he is a CCO. If Respondent seeks reinstatement of his CFP® certification, he shall present evidence of his immediate compliance following the Commission's order.

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 20 (c): Fraud, Misrepresentation or Deceit / Misrepresentation to Non-Clients (Private Censure)
- Conduct 31: Securities Law Violation (Public Censure)
- Conduct 33: Professional Discipline as Defined in Article 7.2 Involving a Suspension for Up to One Calendar Month (Public Censure)

The Policy Notes to Conduct 20 state:

> Fraud is a finding by the Commission that a Respondent knowingly or recklessly misrepresented or concealed a material fact to induce another to act to his or her detriment.
>
> The following should be considered additional aggravating or mitigating factors in determining the appropriate sanction: (1) What was the nature of the conduct? (2) Was there harm to the

client or a prospective client? (3) Was the CFP® professional negligent? (4) Was the CFP® professional reckless? (5) Was this an isolated incident?

The Policy Notes to Conduct 31 state: "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 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 mitigation, the Commission cited that the SEC and Ohio Insurance Commission each conducted investigations and took enforcement actions against Partner that resulted in revocations of Partner's investment advisor and insurance licenses, among other things, yet neither regulator recommended taking enforcement actions against Respondent. However, this factor was given little weight because the Ohio Division still investigated and sanctioned Respondent, including by suspending his license.

In aggravation, the Commission cited that:

1. Respondent's actions were egregious, intentional, and recurring;
2. Respondent knowingly concealed his involvement with X-Fund from X-Fund investors, from his business partners, as well as from regulators and the general public;
3. Respondent deposited personal funds and knowingly concealed the source of funds for distributions X-Fund made to select investors, hiding the fact that their investments were worthless;
4. On at least three separate Form U4 filings, Respondent knowingly made material misrepresentations or false statements to regulators and to the public;
5. Respondent caused harm to Firm customers and other investors, resulting in a regulator ordering that Respondent pay more than $750,000 in restitution to investors;
6. Multiple investors in X-Fund were senior or elderly, including at least one 93-year-old investor and one 69-year-old investor (DEC Book at 217, 219);
7. Respondent did not appear to the Commission to take personal responsibility for his actions, and furthermore did not appear to recognize that his actions or his Partner's actions were wrong;
8. Respondent knew or should have known his actions were wrong, particularly when Respondent was CCO of Firm during the relevant period in question and also holds two supervisor/principal licenses (Series 8 and Series 24);
9. At the time of the hearing, Respondent had not removed his former CCO title from public regulatory filings and appeared to have never complied with the cease-and-desist terms of the Ohio Division's Consent Order.

The Commission then consulted relevant *Case Histories* (referred to as "ACHs" or "CHs") to determine if those relevant CHs contained precedent that warranted a deviation from the *Sanction Guidelines*. Of the CHs reviewed, including ACH 30781, ACH 30788, ACH 31666, ACH 32209, and ACH 29246, the Commission cited ACH 32209 and ACH 29246.

IN THE MATTER OF ANDREW TODD ROSEBERRY
CFP BOARD CASE NO.: 2020-55685
September 15, 2023

In ACH 32209, a CFP® professional (1) entered into an Acceptance, Waiver and Consent ("AWC") with Financial Industry Regulatory Authority, Inc. (FINRA), consenting to the imposition of a three-month suspension from associating with any FINRA member in all capacities and a $10,000 fine, and findings he violated FINRA Rules 3270, 2010, and 3240(a) when he (a) engaged in two outside business activities ("OBAs") without providing prior written notice to his member firm; (b) made two loans totaling to $450,000 to friend / firm customer, without notifying or obtaining prior approval from the firm, and (c) made false statements about his OBAs on six compliance questionnaires and falsely stated on a compliance questionnaire that he had not loaned money to a firm customer; (2) entered into a consent order with State-Z, agreeing that he violated state statutes based on FINRA's findings and consenting to a three-month suspension of his State-Z licenses and a $2,500 fine; and (3) violated his firm's policies and procedures when he provided inconsistent answers to the firm during its investigation into two customer complaints (the complaints alleged that the CFP® professional (i) had an ownership interest in the investment that he recommended but failed to make this conflict of interest disclosure; and (ii) did not reveal the company's financial information, the fees or charges involved, the full risks of the investment, or that the company did not own the IP rights to the products it sold). As a result of a settlement agreement with CFP Board, the CFP® professional consented to the Commission's issuance of a Consent Order finding the CFP® professional violated Rules 4.3 and 5.1 of CFP Board's *Rules of Conduct*, including two violations of Rule 4.3—one violation related to the FINRA AWC, and one violation related to the State-Z consent order. The Consent Order cited in mitigation that the CFP® professional had no previous disciplinary history with CFP Board and in aggravation that there was evidence Respondent provided inconsistent answers to his firm during its investigation of his OBAs and customer complaints. In the Consent Order, the Commission imposed a Suspension for one year and one day.

Both Respondent in the instant matter and the CFP® professional in ACH 32209 violated Rules 4.3 of CFP Board's *Rules of Conduct*, although the CFP® professional in ACH 32209 engaged in two instances of violating Rule 4.3 that gave rise to two separate and distinct grounds for sanction, and also was found to have violated Rule 5.1. Like Respondent in the instant matter, the CFP® professional in ACH 32209 engaged in OBA's without properly disclosing his involvement to his firm or to the public and entered into a consent order with a state securities regulator in which he agreed to a suspension, although, the CFP® professional in ACH 32209 consented to a longer suspension of three months and to pay a small fine, while Respondent consented to a shorter suspension of 14 days and to pay a large sum in restitution but no fine. The Commission notes that the CFP® professional's customer complaints in ACH 32209 resulted in one FINRA arbitration ruling in favor of the CFP® professional and one settlement with the CFP® professional's firm for $425,600, to which he individually contributed $62,800, and these facts likely precluded any restitution. Unlike the instant matter, the CFP® professional in ACH 32209 was sanctioned by three authorities, including (i) a state regulator, (ii) his firm, and (iii) FINRA, while Respondent was only sanctioned by (i) a state regulator, while (ii) Respondent's firm supported him by paying the restitution order by the state regulator, according to Respondent, and (iii) the SEC dismissed its investigation as to Respondent. Regardless, Respondent in the instant matter also consented to cease and desist from serving in any supervisory, control person, or CCO position for the rest of his life, which the Commission found to be the weightiest sanction of those described above, yet, at the time of the hearing, the Commission reasonably inferred that Respondent was actively violating the Division's Order by continuing to identify himself as the CCO of Firm in public-facing regulatory filings, including in the SEC's Investment Advisor Public Disclosure (IAPD) profile on the SEC's public website. The

Commission in the instant matter also found many more factors aggravating Respondent's sanction than the aggravating factors that the CFP® professional agreed to in ACH 32209, including but not limited to Respondent's position as CCO during the relevant period, his apparent lack of contrition, his lack of credibility and inconsistent answers during his testimony, and multiple instances of Respondent filing false Form U-4s, and the Commission determined Respondent's aggravating factors justify a deviation upward from the sanction recommended by the guidance provided in the *Sanction Guidelines*. Finally, ACH 32209 resulted from a proposed settlement agreement and a Consent Order, where the CFP® professional consented to the Commission's findings and imposition of sanctions. Respondent in the instant matter made no such proposed settlement agreement and the Commission's decision is not a Consent Order.

In ACH 29246, a CFP® professional made material misstatements and omissions to clients while recommending that the clients invest in what was found to be a Ponzi-like investment scheme. There is no such finding of a Ponzi-like scheme in the instant matter, and the Commission in ACH 29246 found seven (7) grounds for sanction against Respondent, while the Commission in the instant matter found one ground for sanction against Respondent. However, the cases are similar in that the CFP® professional in ACH 29246 and Respondent in the instant matter both associated themselves with a business partner and an investment in risky securities and then concealed investors that their investments became worthless.

In ACH 29246, the CFP® professional associated with Individual-A, who formed Company-D to sell debt securities to unsophisticated investors with limited assets by promising to pay them a fixed rate of return. The funds were then invested in tax liens and the securities were not registered with the SEC. Individual-A formed Company-E along with a number of affiliated entities, which purportedly was a separate entity from Company-D. Company-E issued debt securities to investors in exchange for a fixed rate of return and promising to invest the funds in the asset lines designated by the investors, such as tax liens, commercial mortgages, and distressed debt. These securities were not registered with the SEC. The investments failed and Individual-A started using new investor funds to pay old investors to conceal the fraud. The SEC opened an investigation and Individual-A fled the country.

Like the CFP® professional in ACH 29246, Respondent contributed personal funds into X-Fund to create investor distributions and perpetuate concealment of the fact that the investment was essentially worthless. Respondent did not disclose his involvement in X-Fund to Firm or to Firm customers who invested in X-Fund. Both Respondent's and the CFP® professional in ACH 29246's schemes continued for many years with numerous clients. Unlike ACH 29246, however, Respondent did not continue soliciting or inducing other customers or other investors to invest in X- Fund, was not found to have participated in a Ponzi-like scheme, did not accept undisclosed referral fees, and did not claim to have performed extensive due diligence related to X-Fund. In addition, the SEC did not pursue an enforcement action against Respondent, although the Ohio Division did. The SEC permanently barred the CFP® professional in ACH 29246 with the right to reapply in 5 years, while the Ohio Division suspended Respondent in the instant matter for 14 days and ordered him to pay restitution. As a result of a settlement agreement with CFP Board Enforcement Counsel, the Commission in ACH 29246 issued to the CFP® professional a Consent Order in which he agreed to the imposition of a Suspension for five (5) years.

The Commission in the instant matter found ACH 29246 instructive in determining the length of Respondent's suspension, and due to only the single ground for sanction alleged against Respondent,

compared to the seven grounds for sanction in ACH 29246, the Commission determined to impose on Respondent a Suspension for two years with Remedial Education or Work.

In arriving at its decision, the Commission found that, to a disturbing extent, Respondent did not appear to take responsibility for any of his or Partner's misconduct. Most concerning to the Commission, Respondent had two principal securities licenses and was the CCO of Firm throughout the entire relevant period. Therefore, Respondent knew or should have known that his and Partner's actions violated state regulations.

Respondent demonstrated to the Commission that he regarded his misconduct to be an administrative issue, rather than an ethical issue, and appeared to regard the resulting disciplinary processes as inconveniences, rather than opportunities for contrition.

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 ACHs reviewed, the Commission issues to Respondent an **Order of Suspension for Two Years with Remedial Education or Work**.

Ordered by:

CFP Board's Disciplinary and Ethics Commission