

CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, INC.

ANONYMOUS CASE HISTORIES  
NUMBER 30676

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This is a summary of a Settlement Agreement entered into at the February 2018 hearings of the Disciplinary and Ethics Commission (“the Commission”) of Certified Financial Planner Board of Standards, Inc. (“CFP Board”). The conduct at issue in this case occurred after January 1, 2009. The Rules in effect at that time under the *Rules of Conduct* were Rules 1.1 through 6.5.

I. Issues Presented

Whether a CFP® professional (“Respondent”) violated CFP Board’s *Standards of Professional Conduct* when he (1) Executed transactions on behalf of clients without prior authorization from either the clients or Respondent’s firm; (2) traded securities in his own account receiving a better price on the same side of the market on the same day in violation of firm policy; and (3) failing to report Financial Industry Regulatory Authority (“FINRA”) and state regulatory actions against Respondent to CFP Board within 30 calendar days.

II. Findings of Fact

*Background*

Respondent was first certified as a CFP® professional in January 2008, and has maintained his certification since that date. Respondent passed the Series 7 and Series 66 exams in July 2002. He began working for Firm ABC (“ABC”) as a registered broker and a registered investment adviser that same month. In August 2002, Respondent began offering insurance products through an ABC subsidiary. Respondent has been employed by all of these organizations (referred to collectively hereinafter as "ABC") ever since.

In January 2016, Respondent reviewed several news articles posted on Barron's concerning a fund (Fund A) which led him to believe that the fund had not been properly tracking its index, and that it was significantly overvalued. Late in the trading day, Respondent became convinced that the fund would experience a 30% drop in value in overnight trading. He sold the Fund A fund assets in his own personal account, and used the proceeds to purchase a parallel Fund A index fund called Parallel Fund. Sixteen of Respondent's clients had positions in Fund A, and respondent began to contact them to get trading authorization before the market closed. He successfully reached four clients, and all of them accepted Respondent's recommendation to sell Fund A and purchase Parallel Fund. Since he was not in the office, he was not able to successfully call the other 12 clients.

Towards the end of the trading day, Respondent instructed his investment associate to sell the Fund A index fund and purchase the Parallel Fund index in the accounts of five of his clients whom he had not yet reached to obtain authorization. Respondent claimed that he selected these five clients because he was most certain that they would provide him with authorization after the fact.

Respondent claimed that he intended to contact those clients when he returned to the office. However, because he ended up getting tied up in an appointment, and then had to leave work to get home to his children, he did not obtain authorization before the close of trading, or at any other point that day. Respondent claimed that each of the five clients subsequently approved the transactions.

Respondent recognized that it was "stupid" and "wrong" to make the trades without prior authorization from his clients, and that he decided to inform his employer. Six days later, in January 2016, Respondent self-reported his violative activity to ABC. He presented a written statement to his supervisor which stated as follows:

My systems broke down...I was not doing this to make money or trying to harm any clients. I made the trades because I thought [it] was the best thing to do for the clients. We discounted the trades as much as possible...I screwed up and it has bothered me since I did it and knew it was wrong. At this time, I need to come clean, clear my conscience and start to repair things...I am embarrassed, ashamed, and disappointed in myself. I let my family, my team, my clients and ABC Financial down by these actions. This is the dumbest thing I have ever done and it will not happen again.

#### *ABC's Suspension and Fine for Violating Firm Policies*

In June 2016, Respondent's employer, ABC, delivered a Letter of Reprimand informing Respondent that he had violated the firm's policies and procedures by: (a) engaging in 10 total unauthorized trades on five separate client accounts without prior authorization, and (b) trading the same security on his own account and receiving "a better price on the same side of the market on the same day." In his Letter of Reprimand, ABC's Managing Partner noted as follows: "In determining to issue discipline, I have considered your favorable compliance record, the fact that you self-reported the unauthorized trades, your cooperation with the Firm's investigation, and the fact that each of the five customers ratified the unauthorized trades."

ABC imposed a 10-day suspension, a \$12,500 fine, a one-year suspension of Respondent's right to serve in the "Lead Financial Consultant" role, and a requirement to re-familiarize himself with various provisions of ABC's compliance policies. ABC also indicated that it planned to file a Rule 4530 Disclosure Filing with FINRA disclosing that ABC was suspending his Financial Associate Agreement for the 10-business-day period between June 2016 and July 2016.

#### *FINRA's Suspension and Fine*

In December 2016, Respondent entered into a Letter of Acceptance, Waiver and Consent ("AWC") with FINRA in which he accepted and consented to, without admitting or denying, the following findings:

[In January] 2016, [Respondent] exercised discretion in executing 10 transactions in connection with the sale and purchase of exchange-traded notes and funds in five of his customers' accounts. While the customers consented to the transactions, [Respondent] did not obtain prior written authorization from the customers to exercise discretion in the accounts and ABC did not approve the accounts for discretionary trading.

FINRA determined that Respondent's actions violated the following two rules:

- NASD Rule 2510(b)-Discretionary Accounts: "No member or registered representative shall exercise discretionary power in a customer's account unless such customer has given prior written authorization to a stated individual or individuals and the account has been accepted by the member, as evidenced in writing by the member..."
- FINRA Rule 2010: "A member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade."

ABC's Letter of Reprimand stated that Respondent's conduct in exercising discretion in the customers' accounts without first obtaining written authorization from the customers and written approval from ABC to exercise discretion in the accounts violated Section 7.1 of ABC's Compliance Policies Manual-Unauthorized Trading. The Letter of Reprimand also stated that Respondent violated ABC's Personal Trading Policy when he traded the same security (the purchase of the Parallel Fund) in his own related account and received a better price than he obtained for his client on the same day and on the same side of the market.

By signing the FINRA AWC, Respondent consented to the imposition of the following sanctions: (a) a suspension from associating with any FINRA member in any capacity for 10 business days; and (b) a \$5,000 fine. Respondent's FINRA suspension was effective from early January 2017 through mid-January 2017.

#### *State A Division of Securities Suspension and Fine*

In May 2017, Respondent entered into a Consent Order with a State A Division of Securities. State DOS found that Respondent's unauthorized discretionary trades in the five customer accounts constituted a violation of State A Codified Laws and FINRA Rule 2010. State A DOS issued a suspension from registration as a securities agent for 10 business days and a fine/penalty of \$500. Under the Consent Order, Respondent also agreed to undertake the following actions:

- Abstain from exercising discretion in client accounts without the customer's prior written authorization or the firm's designation of the account as discretionary;
- Maintain dated, detailed broker notes on all customer account transactions;
- Notify State DOS within 10 business days if Respondent became the subject of a securities-related customer complaint (either oral or written), or the subject of any regulatory investigation, internal investigation, arbitration proceeding, or litigation concerning allegations arising from his conduct of securities business.

State A DOS decided not to require Respondent to serve an additional suspension. The Consent Order specifically stated that its 10-day suspension had already been fulfilled retroactively, because of the 10-business-day suspension that FINRA had previously imposed on Respondent in January 2017.

#### *State B Commissioner of Insurance's Fine*

In November 2017, the State Office of the Commissioner of Insurance ("OCI") issued a Decision and Order finding that Respondent had failed to report the State DOS administrative action within the required 30-day disclosure period. Respondent had finalized his settlement with State DOS in May 2017. Six months later, when OCI initiated its own investigation in November 2017, Respondent had still not disclosed the State DOS action to OCI.

Respondent entered a statement into his CRD record which simply claimed that his failure to notify OCI within the time allowed was "inadvertent." OCI's Decision and Order required Respondent to pay a fine of \$500 for his failing to report the State DOS suspension in a timely fashion.

#### *Conclusion*

Article 13.1 of the *Disciplinary Rules* provides that a letter or other writing from a governmental or industry self-regulatory authority to the effect that a Respondent has been the subject of an order of professional discipline by such authority shall conclusively establish the existence of such professional discipline for purposes of disciplinary proceedings and shall be conclusive proof of the basis for such discipline by the Respondent. As defined in Article 13.4

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of the *Disciplinary Rules*, professional discipline "shall include the suspension, bar or revocation as disciplinary measure by . . . [an] industry self-regulatory organization or professional association."

FINRA is an industry self-regulatory organization. The December 2016 FINRA AWC is an order of professional discipline by FINRA which imposed a 10-business-day suspension on Respondent, who was the subject of that order. Therefore, the AWC conclusively establishes the existence of such discipline for purposes of this disciplinary proceeding and is conclusive proof of the basis for such discipline by the Respondent.

State DOS is a governmental agency. The May 2017 Consent Order is an order of professional discipline by State DOS which imposed a 10-business-day suspension on Respondent, who was the subject of the order. Therefore, the Consent Order conclusively establishes the existence of such discipline for purposes of this disciplinary proceeding and is conclusive proof of the basis for such discipline by the Respondent.

As set forth in Article 13.3 of the *Disciplinary Rules*, since Respondent's professional discipline has been proved, Respondent shall have the right to be heard by the Hearing Panel only on matters of rebuttal of any evidence presented by CFP Board Counsel other than proof of professional discipline.

Pursuant to Article 13.2 of the *Disciplinary Rules*, upon being the subject of professional discipline, the Respondent was required to notify CFP Board in writing of such professional discipline within 30 calendar days after the date on which the Respondent was notified of the professional discipline.

Respondent was notified of the FINRA suspension in December 2016, but he did not notify CFP Board about that disciplinary action until March 2017—when he filled out his Ethics Profile for renewal of his certification more than three months later.

Respondent was notified of his State DOS suspension in May 2017. However, he did not notify CFP Board about that disciplinary action until after the Staff sent a Request for Additional Information letter ("RFAI") to Respondent in November 2017.

In the one-page letter that Respondent sent to CFP Board staff in response to the RFAI letter, Respondent conceded that he did not disclose his professional disciplines within the required 30-day period. He wrote:

I do not have any explanation on why the FINRA suspension and ABC suspension were not disclosed within 30 calendar days except that I just simply did not remember to do it. This is an error on my part that I do not have a reason for. It was not to hide the fact, but just a simple error on my part.

### III. Grounds for Discipline

#### *First Ground for Discipline*

Pursuant to Article 3(a) of the *Disciplinary Rules*, there are grounds to discipline Respondent for acts or omissions that violate Rule 4.4 of the *Rules of Conduct*, which provides that a certificant shall exercise reasonable and prudent professional judgment in providing professional services to clients.

Respondent, a certificant, exercised discretion in the accounts of five of his clients by executing 10 transactions involving the sale and purchase of exchange-traded notes and funds at a time when he did not have prior authorization from the customers or prior approval from his firm to exercise discretion in these accounts. In engaging in this conduct, he failed to exercise reasonable and prudent professional judgment. Thus, Respondent

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violated Rule 4.4 of the *Rules of Conduct*.

#### *Second Ground for Discipline*

Pursuant to Article 3(a) of the *Disciplinary Rules*, there are grounds to discipline Respondent for acts or omissions that violate Rule 4.3 of the *Rules of Conduct*, which provides that a certificant shall comply with applicable regulatory requirements governing professional services provided to the client.

NASD Conduct Rule 2510(b) prohibits registered persons from exercising discretionary power in a customer's account unless the customer has given prior written authorization and the account has been accepted by the member firm in writing as a discretionary account.

FINRA Rule 2010 requires registered persons to observe high standards of commercial honor and just and equitable principles of trade.

State A's Codified Laws state that DOS can suspend and otherwise impose discipline on a registered person who has "engaged in dishonest or unethical practices in the securities...or insurance business within the previous ten years." State A regulator rules state that any brokerage agent who violates any applicable provision of a FINRA or NASD Rule shall be "deemed to have engaged in dishonest or unethical practices [under State A's laws] and such conduct may be grounds for denial, suspension or revocation of registration."

Respondent, a certificant, violated the applicable regulatory requirements of NASD/FINRA and State A DOS when he exercised discretion by executing unauthorized transactions in the accounts of five of his clients without obtaining prior written authorization from the customers and prior written approval from his firm to exercise discretion in those accounts. Respondent's conduct failed to comply with applicable regulatory requirements, and thereby violated Rule 4.3 of the *Rules of Conduct*.

#### *Third Ground for Discipline*

Pursuant to Article 3(a) of the *Disciplinary Rules*, there are grounds to discipline Respondent for acts or omissions that violate Rule 5.1 of the *Rules of Conduct*, which provides that a certificant who is an employee/agent shall perform professional services with dedication to the lawful objectives of the employer/principal and in accordance with CFP Board's *Code of Ethics*.

Respondent, a certificant, failed to perform professional services with dedication to the lawful objectives of his employer and in accordance with CFP Board's Code of Ethics when he: (a) failed to obtain written customer authorization or ABC's approval for discretionary account trading prior to exercising discretion in the customers' accounts (in violation of Section 7.1 of ABC's Compliance Policies Manual-Unauthorized Trading); and (b) traded the same security in his own account, receiving a better price on the same side of the market on the same day (in violation of ABC's Personal Trading Policy). Both actions violated his employer's policies and procedures. Thus, Respondent violated Rule 5.1 of the *Rules of Conduct*.

#### *Fourth Ground for Discipline*

Pursuant to Article 3(d) of the *Disciplinary Rules*, there are grounds to discipline Respondent for acts that are the proper basis for professional discipline. The acts set forth in the FINRA AWC and the State DOS Consent Order are the proper basis for professional discipline. Respondent's suspensions issued by FINRA and State DOS constitute professional discipline. Therefore, the AWC and Consent Order are conclusive proof that there are

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grounds to discipline Respondent for acts that are a proper basis for professional discipline.

#### *Fifth Ground for Discipline*

Pursuant to Article 13.2 of the *Disciplinary Rules*, there are grounds to discipline Respondent for failing to report a professional discipline. Article 13.2 provides that every Respondent upon being the subject of professional discipline, shall notify CFP Board in writing of such professional discipline within 30 calendar days after the date on which the Respondent is notified of the professional discipline.

Respondent, a certificant, failed to report two instances of professional discipline when he failed to disclose his FINRA suspension and his State DOS suspension to CFP Board within 30 calendar days. Therefore, Respondent violated Article 13.2 of the *Disciplinary Rules*.

#### IV. Discipline Imposed

The Commission and Respondent entered into a Settlement Agreement in which Respondent consented to the Findings of Fact and Grounds for Discipline. Pursuant to the terms of the Settlement Agreement, the Commission issued to Respondent a Private Censure pursuant to Article 4.1 of the *Disciplinary Rules*.

In coming to its decision to enter in the Settlement Agreement, the Commission considered no aggravating factors. The Commission did consider, however, numerous mitigating factors:

- Respondent's self-disclosure of the misconduct to his employer within 6 days;
- No client harm and the clients at issue approved the transaction after the fact;
- Respondent demonstrated extreme remorse for his misconduct;
- Self-disclosure during annual renewal to CFP Board.

The Commission also considered Anonymous Case Histories ("ACH"). First, the Commission considered ACH 29910 which involved similar conduct by a respondent who made unauthorized transactions for clients. In the case, the Commission issued Respondent a private censure. In ACHs 28574 and 26250, the Commission considered cases where the respondents engaged in unauthorized transactions. However, in these cases, the respondents' activities were more egregious, resulting in a public letter of admonition.