CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, INC.

# ANONYMOUS CASE HISTORIES
# NUMBER 18767

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This is a summary of a Settlement Agreement entered into at the February 2011 hearings of the Disciplinary and Ethics Commission ("Commission") of Certified Financial Planner Board of Standards, Inc. ("CFP Board"). The conduct at issue in this case occurred prior to January 1, 2009. The Rules in effect at that time under the *Code of Ethics and Professional Responsibility* ("*Code of Ethics*") were Rules 101 through 705.

## I. Issues Presented

Whether a CFP® professional ("Respondent") violated CFP Board's *Standards of Professional Conduct* when he violated: 1) sections of the State Securities Act by selling unregistered securities; 2) the 2004 State Securities Board ("SSB") Undertaking and 2005 SSB Order regarding supervision; 3) the 2004 SSB Undertaking and sections of the State Securities Act by failing to fully complete forms before obtaining client signatures; 4) sections of the State Securities Act by failing to disclose required information on his Form U4 and making material misrepresentations to the State Commissioner; 5) the 2004 SSB Undertaking and 2005 SSB Order by engaging in unsuitable transactions; and 6) National Association of Securities Dealers ("NASD," now known as the Financial Industry Regulatory Authority or "FINRA") Conduct Rules by accepting a gift and/or gratuity in excess of $100 and charging clients both investment advisory fees and prohibited commissions.

## II. Findings of Fact

On his April 17, 2006 Renewal Application, Respondent disclosed his involvement in an NASD arbitration filed by Client 1 ("2005 Client 1 Arbitration").

### 2005 State Securities Board Suspension

According to the 2005 SSB Order, in September 2004, Respondent applied for registration in the state as an investment adviser representative of Firm A. In October 2004, Respondent applied for registration in the State as an agent of Firm B.

The SSB found that:

1) Respondent violated sections of the State Securities Act by selling unregistered securities when he, individually or through other registered representatives under his direction and control through Firm C, sold limited partnership units of Fund I and units of Fund II between 2002 and 2004, while registered as an agent of Firm D; and
2) Respondent violated SSB Rules and made material misrepresentations to the State Securities Commissioner ("State Commissioner") when he initially failed to disclose his other business engagements on his Form U4. Respondent did not disclose his

involvement with Firm C until July 2003. Respondent did not disclose his involvement in Fund I and Fund II until October 2004. Respondent did not disclose his prior engagement in Firm E, Firm F, and Firm G until October 2004.

The SSB: 1) granted Respondent's registrations as an agent and investment adviser representative of Firm A but suspended the registrations for 15 days; 2) reprimanded Respondent; 3) placed Respondent on probation for two years as an agent and investment adviser representative pursuant to a 2004 Undertaking ("2004 SSB Undertaking"); 4) fined Respondent $50,000; and 5) ordered that Respondent comply with the terms of the SSB Undertaking. Respondent consented to the entry of the 2005 SSB Order in December 2004.

Pursuant to the 2004 SSB Undertaking, Respondent, Firm A, Firm B and a Firm A registered representative agreed, among other provisions, that:

1) Respondent would not engage in any unauthorized or unsuitable transaction in the account of any Firm A or Firm B customer;
2) Respondent would not recommend the sale of a product on which a client had already paid a commission or penalty, in order to purchase another product for which Respondent would receive a commission, without a signed acknowledgement from the client regarding commissions and fees;
3) Respondent would not act in any supervisory capacity in the state and would be directly supervised by the Firm A registered representative, with none of the Firm A registered representative's supervisory activity to be under Respondent's control, influence or direction;
4) Any temporary delegation of supervisory duties over Respondent would be in writing, for a specified period of time, and would not be granted to Respondent;
5) Respondent would not exercise discretionary authority over any Firm A or Firm D customer's account for two years after his registrations were granted; and
6) All forms or documents signed by a client would be fully completed prior to obtaining the client's signature.

**<u>2010 SSB Suspension</u>**

In April 2010, the SSB issued a disciplinary order ("2010 SSB Order") in which it found that:

1) Respondent and Firm B violated the 2004 SSB Undertaking and 2005 SSB Order by failing to have Respondent directly supervised by a Firm A registered representative and put in writing delegation of the Firm A registered representative's supervisory duties. The SSB found that Respondent determined the Firm A registered representative's salary, suspended the Firm A registered representative from activities between February 2006 and March 2006, and requested the Firm A registered representative resign in May 2006;
2) Respondent violated the 2004 SSB Undertaking and sections of the State Securities Act by failing to have all forms and documents completed prior to obtaining a client's signature. The SSB found that between December 2004 and December 2006, blank forms and documents, including new account forms, were sent to Respondent's customers with a request that the customers sign and return the forms for completion by

Respondent's employees. Other forms filled out in meetings with Respondent were not completed in full prior to client signature;

3) Respondent violated sections of the State Securities Act by failing to comply with Firm A's written supervisory procedures;
4) Respondent violated sections of the State Securities Act by failing to disclose required information on his Form U4; and
5) Respondent violated the 2004 SSB Undertaking and 2005 SSB Order by engaging in unsuitable transactions.

The SSB also found that Respondent and Firm A engaged in inequitable practices when they: 1) assessed commissions prohibited in an investment's prospectus; and 2) assessed excessive investment advisory fees and failed to fully disclose such fees.

The SSB reprimanded Respondent, Firm A and Firm B, and: 1) suspended Respondent's registrations as an agent for Firm B and investment adviser representative for Firm A for nine months; and 2) ordered Respondent to pay an administrative fine of $25,000.

Respondent consented to the entry of the 2010 SSB Order in March 2010. Pursuant to the Undertaking contained in the 2010 SSB Order, Respondent agreed to refund commissions totaling approximately $413,000 to investors who were charged both a commission and an investment advisory fee. Firm A agreed to refund an additional amount of approximately $21,900 to the investors and to guarantee payment of the remaining commissions in the event of a default by Respondent.

**2010 FINRA Suspension**

In August 2010, Respondent disclosed to CFP Board his entry into a Letter of Acceptance, Waiver and Consent ("AWC") with FINRA that resulted in a suspension.

In July 2010, Registered Representative B, Firm B and Respondent entered into the AWC, in which they consented to violations of NASD Rules 2110, 2310(a) and 3060. According to the AWC, Respondent and his associate accepted a gift and/or gratuity in excess of $100 from the president and general partner of an entity that offered an alternative investment product. Respondent sold nearly $6,000,000 of the product to clients at a branch office of Firm B.

According to the AWC, Respondent charged customers commissions of approximately $435,000 and an annual percentage-based advisory fee on transactions in alternative investment products although the products' offering documents specifically prohibited such conduct. Respondent also made unsuitable recommendations to customers without a reasonable basis for believing that they were suitable. Pursuant to the AWC, Respondent was fined $25,000, ordered to pay restitution of approximately $413,000 plus interest and suspended in all capacities for nine months, from August 2010 through May 2011.

III. Rule Violations

*A. Rule 102 – In the course of professional activities, a CFP Board designee shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, or knowingly make a false or misleading statement to a client, employer, employee, professional colleague, governmental or other regulatory body or official, or any other person or entity.*

Respondent engaged in conduct involving dishonesty, fraud, deceit and misrepresentation, or knowingly made false or misleading statements when he: 1) failed to disclose other business engagements as required on his Form U4, which the SSB determined amounted to material misrepresentations to the State Commissioner; and 2) charged clients both investment advisory fees and prohibited commissions. Thus, Respondent violated Rule 102.

*B. Rule 201 – A CFP Board designee shall exercise reasonable and prudent professional judgment in providing professional services.*

Respondent failed to exercise reasonable and prudent professional judgment in providing professional services when he: 1) sold unregistered securities; 2) made material misrepresentations to the State Commissioner by failing to disclose other business engagements as required on his Form U4; 3) violated the 2004 SSB Undertaking and 2005 SSB Order regarding supervision; 4) failed to fully complete forms before obtaining client signatures; 5) engaged in unsuitable transactions; and 6) accepted a gift and/or gratuity in excess of $100 and charged clients both investment advisory fees and prohibited commissions. Thus, Respondent violated Rule 201.

*C. Rule 202 – A financial planning practitioner shall act in the interest of the client.*

Respondent failed to act in the interest of his clients when he: 1) sold unregistered securities to clients; 2) failed to fully complete forms before obtaining client signatures; 3) engaged in unsuitable transactions; and 4) charged clients both investment advisory fees and commissions on the sale of products whose offering documents specifically prohibited such conduct. Thus, Respondent violated Rule 202.

*D. Rule 405 – A CFP Board designee's compensation shall be fair and reasonable.*

Respondent received compensation that was not fair and reasonable when he charged clients both excessive investment advisory fees and commissions on the sale of products whose offering documents specifically prohibited such conduct. Thus, Respondent violated Rule 405.

E. *Rule 406 – A CFP Board designee who is an employee shall perform professional services with dedication to the lawful objectives of the employer and/or in accordance with the* Code of Ethics.

Respondent failed to perform professional services with dedication to the lawful objectives of his employer when he violated: 1) sections of the State Securities Act by selling unregistered securities; 2) the 2004 SSB Undertaking and 2005 SSB Order regarding supervision; 3) the 2004 SSB Undertaking and sections of the State Securities Act by failing to fully complete forms before obtaining client signatures; 4) the 2004 SSB Undertaking and 2005 SSB Order by engaging in unsuitable transactions; and 5) NASD Conduct Rules by accepting a gift and/or gratuity in excess of $100 and charging clients both investment advisory fees and prohibited commissions. Thus, Respondent violated Rule 406.

F. *Rule 606(a) – In all professional activities a CFP Board designee shall perform services in accordance with applicable laws, rules and regulations of governmental agencies and other applicable authorities.*

Respondent failed to perform services in accordance with applicable laws, rules and regulations of governmental agencies and other applicable authorities when he violated: 1) sections of the State Securities Act by selling unregistered securities; 2) the 2004 SSB Undertaking and 2005 SSB Order by violating provisions related to supervision and engaging in unsuitable transactions; 3) the 2004 SSB Undertaking and sections of the State Securities Act by failing to fully complete forms before obtaining client signatures; 4) sections of the State Securities Act by failing to disclose required information on his U4; and 5) NASD Conduct Rules by accepting a gift and/or gratuity in excess of $100 and charging clients both investment advisory fees and prohibited commissions. Thus, Respondent violated Rule 606(a).

G. *Rule 606(b) – In all professional activities a CFP Board designee shall perform services in accordance with applicable rules, regulations and other established policies of CFP Board.*

Respondent failed to perform services in accordance with applicable rules, regulations and other established policies of CFP Board when he violated Rules 102, 201, 202, 405, 406, 606(a), 607 and 701 of the *Code of Ethics*. Thus, Respondent violated Rule 606(b).

H. *Rule 607 – A CFP Board designee shall not engage in any conduct which reflects adversely on his or her integrity or fitness as a CFP Board designee, upon the marks, or upon the profession.*

Respondent engaged in conduct that reflects adversely on his integrity and fitness as a CFP Board designee, upon the marks and upon the profession when he violated: 1) sections of the State Securities Act by selling unregistered securities; 2) the 2004 SSB Undertaking and 2005 SSB Order regarding supervision; 3) the 2004 SSB Undertaking and sections of the State Securities Act by failing to fully complete forms before obtaining client signatures; 4) sections of the State Securities Act by failing to disclose required information on his Form U4 and by making material misrepresentations to the State Commissioner; 5) the 2004 SSB Undertaking and 2005 SSB Order by engaging in unsuitable transactions; and 6) NASD Conduct Rules by accepting a gift and/or gratuity in excess of $100 and charging clients both investment advisory fees and prohibited commissions. Thus, Respondent violated Rule 607.

*I. Rule 701 – A CFP Board designee shall provide services diligently.*

Respondent failed to provide services diligently when he sold unregistered securities, engaged in unsuitable transactions, failed to disclose required information on his Form U4 and failed to fully complete forms before obtaining client signatures on the forms. Thus, Respondent violated Rule 701.

## IV. Discipline Imposed

Article 3(a) of CFP Board's *Disciplinary Rules and Procedures* ("*Disciplinary Rules*") provides grounds for discipline for any act or omission that violates the *Code of Ethics*. The Commission found grounds for discipline under Article 3(a) because Respondent violated Rules 102, 201, 202, 405, 406, 606(a), 606(b), 607 and 701 of the *Code of Ethics.* The Commission and Respondent entered into a Settlement Agreement in which Respondent consented to the Findings of Fact and Rule Violations. Based on the terms of the Settlement Agreement, the Commission issued to Respondent a Suspension for three years of Respondent's right to use the CFP® marks, pursuant to Article 4.3 of the *Disciplinary Rules*.

The Commission considered no mitigating factors.

The Commission considered the following aggravating factors:

1. CFP Board cautioned Respondent prior to the conduct at issue; and
2. The multiple SSB actions taken against Respondent.