CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, INC.

ANONYMOUS CASE HISTORIES
NUMBER 26166

This is a summary of a decision issued following the November 2011 hearings of the Disciplinary and Ethics Commission ("Commission") of Certified Financial Planner Board of Standards, Inc. ("CFP Board"). The Initial Application for Certification ("Application") at issue in this case was filed after January 1, 2011. CFP Board's *Fitness Standards for Candidates and Registrants* ("*Fitness Standards*") were in effect at that time.

I. Issues Presented

Whether a candidate for CFP® certification ("Respondent") could be certified when he was the subject of a Securities and Exchange Commission ("SEC") cease and desist order, censure and civil penalty due to: 1) recommended that 17 brokerage customers (three of whom were also advisory clients) engage in two rounds of "switches" by misrepresenting to the customers that the customer would recover the surrender charges paid in the old annuities through bonuses received in the new annuities; and 2) Respondent's failure to adequately reflect liabilities on Respondent's broker-dealer's books and records causing a net capital deficiency.

II. Findings of Fact Relevant to the Commission's Decision

In September 2009, Respondent entered into a settlement with the SEC in which he consented to a censure, to cease and desist from committing or causing any future violations of the federal securities laws and to a $25,000 civil penalty. The conduct at issue in the SEC settlement is as follows:

Variable Annuity Transactions

From January 2004 through December 2006, Respondent and his broker-dealer recommended that 17 brokerage customers (three of whom were also advisory clients) engage in two rounds of "switches" by which the customers surrendered annuities prior the end of surrender period and used the proceeds of the surrendered annuities to invest in new variable annuities allegedly offering better investment terms.

In recommending the first round of transactions, Respondent represented to 17 customers that they would only incur minimal surrender charges and would recover the charges through a bonus payment from the issuer of the new annuity. Respondent failed to disclose to the customers that they paid for the bonuses through higher mortality and expense risk charges and that the bonuses had a vesting period. In the first round of transactions, the surrender charges totaled 6% of the total principal invested in the annuities by the 17 customers. The customers received bonuses totaling 93% of the surrender charges.

Copyright © 2012 Certified Financial Planner Board of Standards, Inc. All rights reserved.

In recommending the second round of transactions, Respondent again represented that the surrender charges would be minimal. Instead, the 17 customers incurred additional surrender charges and charges to recapture the bonuses received on the initial round of transfers because the bonus vesting period had not expired at the time of the second round of transfers. In total, the customers incurred surrender and recapture charges of 14% of the principal invested in the annuities by the 17 customers. While Respondent represented to the 17 customers that they would recover the surrender charges through bonuses, the bonuses received from the second round of transfers equaled approximately 46% of the associated surrender charges.

The two rounds of transactions cost the 17 customers about 11% of the total principal under investment, with individual costs ranging from 8% to nearly 15%. After two rounds of transactions, the 17 customers gained only .22% over their original investment, even though 2004 through 2006 was a time of market gains and the 17 customers contributed to the annuities beyond the original total purchase price. As compensation for both rounds of transactions, Respondent and his broker-dealer received approximately $200,000 in commissions.

The SEC determined that Respondent violated Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933 and Section 206(2) of the Investment Advisers Act of 1940.

Books and Records Violations

Respondent's broker-dealer received commission advances from an issuer of variable annuities. In January 2007, the issuer advancing the commissions made a demand for repayment of millions in unearned commissions advances due to sales that failed to close or that closed at lesser amounts than anticipated. Respondent failed to cause the books and records of his broker-dealer to reflect any liability and the broker-dealer incorrectly computed its net capital.

Respondent used the proceeds of a loan and his broker-dealer's assets to pay down the undisputed portion of the excess commission advances. The loan was secured by an encumbrance on his broker-dealer's assets. Respondent did not consider the effect of this encumbrance in computing net capital, causing an additional net capital deficiency.

Respondent failed to notify the SEC of his broker-dealer's net capital deficiency, as required by Rule 17a-11(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act"). Additionally, Respondent failed to notify the SEC that his broker-dealer's books and records were not accurate and did not provide a report regarding how the broker-dealer intended to cure the books and record deficiency, as required by Exchange Act Rule 17a-11(d).

The SEC determined that Respondent willfully aided and abetted and caused his broker-dealer to violate Section 15(c)(3)(A) of the Exchange Act and Rule 3(c) thereunder and Section 17(a)(1) of the Exchange Act and Rules 17a-3(a) and 17a-11 thereunder.

Copyright © 2012 Certified Financial Planner Board of Standards, Inc. All rights reserved.

SEC Sanctions

Based on the SEC Findings of Fact and Violations of Law, Respondent consented to the imposition of the following:

1. Respondent and his broker-dealer agreed to cease and desist from committing or causing any violations and future violations of the federal securities laws;
2. Respondent and his broker-dealer agreed to the undertakings;
3. Respondent and his broker-dealer agreed to a censure;
4. Respondent and his broker-dealer agree to pay restitution to his clients; and
5. Respondent and his broker-dealer were jointly and severally assessed a civil penalty.

In November 2011, Respondent filed a Petition for Consideration pursuant to CFP Board's *Fitness Standards*.

III. Discipline Imposed

Under CFP Board's *Fitness Standards,* Respondent's cease and desist order from the SEC and the underlying conduct is conduct that may reflect adversely on the profession and the CFP® marks and will bar an individual from becoming certified unless the individual petitions the Commission for reconsideration.

The Commission determined that Respondent's conduct did not reflect adversely on his fitness as a candidate for CFP® certification, upon the profession and the CFP® certification marks. Thus, the Commission granted Respondent's Petition for pending: 1) Respondent's completion of 45 hours in a registered education program on financial plan development, which includes the completion of the financial planning capstone course; and 2) certification by another CFP® professional or legal counsel that Respondent has viewed the webinars entitled "How to Apply the Fiduciary Standard to a Financial Planning Practice" (http://www.youtube.com/watch?v=ib9WGYvCcA0) and "Avoiding a CFP Board Rule Violation" (http://www.youtube.com/watch?v=znOQg0o-RU0).

The Commission cited the following mitigating factors:

1) Respondent complied with all of the SEC undertakings;
2) Respondent made full restitution to all clients; and
3) Respondent demonstrated a commitment to improving his compliance procedures.

The Commission cited the following aggravating factors:

1) Respondent indicated during his testimony that he was not ready to provide financial planning services;
2) Respondent's explanation of what he knew and what he told his clients about the bonus recapture during the second switch was inconsistent; and
3) The Respondent's testimony indicated that he experienced some issues with client relations during the time of the conduct at issue.

Copyright © 2012 Certified Financial Planner Board of Standards, Inc. All rights reserved.