CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, INC.

ANONYMOUS CASE HISTORIES
NUMBER 27565

This is a summary of an order issued following the June 2016 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 prior to January 1, 2009. The Rules in effect at that time under the *Rules of Conduct* were Rules 101 through 705.

I. Issues Presented

Whether a CFP® professional ("Respondent") violated CFP Board's *Standards of Professional Conduct* when he failed to exercise reasonable and prudent judgment when he: 1) failed to properly analyze and account for the client's needs and cash flow, 2) failed to include the costs of the VUL policies, variable annuities and REITs in his 2001 and 2008 financial plans; 3) recommended and sold to the client unsuitable VUL policies, variable annuities and REITs; and 4) placed the bulk of the client's assets into long-term investments with high fees and expenses although the client's primary objective was income.

II. Findings of Fact

SS Grievance

In September 2011, SS filed a grievance with CFP Board against Respondent. SS stated that Respondent prepared an initial financial plan in 1997 and a second plan in 2001. SS alleged that Respondent had "assembled an increasingly complex financial portfolio based nearly entirely on insurance products and annuities [sic] contracts that [MS] does not understand; cannot afford; and … are completely inappropriate…." SS also alleged that Respondent had MS purchase seven insurance policies that required $31,000 in annual premium expenses with an annual income that had not exceeded $50,000. SS claimed that as a result of Respondent's conduct, MS's insurance and annuity contracts were at risk of lapsing due to underfunding.

SS also stated that Respondent served as the advisor to the financial trust established for the care of MS's 67-year old cousin, CK. MS was the trustee of the trust. SS alleged that Respondent placed the trust's assets into an annuity contract that did not provide CK with income or preserve the assets of the trust for distribution. (*Id*.)

Clients' Relationship with Respondent

MS became a client of Respondent in November 1997, when MS and her husband, LS ("Clients"), converted his employee retirement account into an account with AFA. According to Respondent, the Client's engaged in detailed financial planning analysis. Respondent indicated that he prepared his first financial plan in November of 1997. In March 1998, MS purchased a RS Long Term Care policy ("LTC") with funds from her IRA. The LTC policy has an annual premium of approximately $1,700 and provides MS with approximately $170 in daily nursing home benefits. Respondent served as the Clients' financial planner from November 1997 until her husband's death in March 2001.

MS's Relationship with Respondent

In March 2001, Respondent recommended that MS place approximately $177,000 in a RS variable annuity ("RAVA") number with proceeds from her husband's estate. The RAVA was opened as an IRA due to the fact that her husband's estate came from another annuity. At the time of the purchase, MS was 62 years old, had approximately $48,000 in annual income, a net worth of $451,000 and a liquid net worth of $432,000. MS indicated that she had a time frame of seven to ten years, a moderate aggressive risk tolerance and a goal of capital appreciation. The annuity had a 10-year surrender period and a 2% bonus credit.

Respondent stated that MS felt comfortable purchasing the annuity because "this is what her husband had and she understood the advantages of this contract[,] including the 10-year surrender period and the 2% bonus." Respondent further stated that MS understood there were no tax advantages to the annuity because the annuity was held in an IRA. Respondent also stated that MS wanted access to multiple investment managers, access to guaranteed interest rates, death benefit guarantees, guaranteed lifetime payout rates and guarantees of principal, which were not available in the other choices Respondent provided to MS. MS would ultimately withdraw approximately $127,000 out of this annuity.

In April 2001, MS purchased approximately $20,000 of a Real Estate Investment Trust ("REIT"). Respondent indicated that the purpose of this REIT purchase was to provide current income, preservation of principal and to promote long term income and growth.

In June 2001, Respondent prepared a financial plan (Financial Advisory Proposal) for MS. According to the 2001 Plan, MS's assets totaled approximately $665,000, her liabilities totaled approximately $133,000 (approximately $100,000 mortgage and $33,000 consumer debt) and her net worth was approximately $532,000. MS's assets were allocated as follows: (a) approximately $18,000 (3%) in cash; (b) $29,000 (4%) in fixed assets; (c) $401,000 (60%) in equities; and (d) $217,000 (33%) in personal assets. MS's income was approximately $56,000 ($55,000 in income earned and $1,000 from investments) and her expenses totaled approximately $64,000 ($44,000 committed, $4,000 discretionary, and $16,000 taxes). According to the 2001 plan, MS's goals were to provide and maintain an adequate cash reserve, provide for long-term care needs and retire at age 63. The 2001 Plan determined that MS had a "significant debt load" and "negative monthly discretionary income."

In the 2001 plan, Respondent recommended the following to MS: (a) apply for home equity loan to consolidate debt and pay off credit cards; (b) use some of her excess cash reserves to pay off the debt balance; (c) borrow money from her tax sheltered annuity to eradicate credit card debt; (d) continue to contribute to her tax-sheltered annuity; (e) maintain current long-term care coverage; and (f) create a $12,000 cash reserve.

In July 2001, MS purchased a second RS LTC policy with funds from her IRA. The LTC policy has an annual premium of approximately $843 and provides MS with $68 in daily facility care benefit. Respondent indicated that MS paid the premiums for the two LTC policies from her IRA on a monthly basis and was aware of the surrender charges on the IRAs. Respondent testified at the hearing that this LTC policy provided for home care expenses, which was not covered by the earlier LTC policy.

Sometime in 2001, MS purchased the RVS Fund shares in an IRA account with funds from REIT distributions in another IRA account. The RVS Fund shares were sold with a 5.75% front end load sales charge. According to Respondent, the objective for this investment was long-term growth and income.

In October 2004, Respondent recommended that MS purchase a RS variable universal life insurance ("VUL") policy with a death benefit of $250,000 for each of her grandchildren for a total of six VUL policies. The annual cost of the premiums for the policies is approximately $6,000 per year. The applications for the VUL policies indicated that MS had an annual income of $80,000. MS was the owner and beneficiary of each policy. Respondent stated that the purpose of the policies was to save money for the long-term in a tax-deferred vehicle, for a guaranteed death benefit and life insurance policies in force when each grandchild reached adulthood and to ensure insurability. Respondent stated that MS's ultimate plan was to gift the policies to each of her grandchildren at some point after the age of majority so the grandchildren could continue to fund the policies.

Finally, Respondent stated that he performed annual financial plans that determined MS had excess cash if she continued to fund the VUL polices and complied with the rest of the plan. Respondent was not able to provide copies of any financial plan he alleges he prepared between the 2001 Plan and the sale of the VUL policies.

In October 2005, MS opened an IRA account in order to purchase a second RAVA annuity for approximately $107,000. MS sold a surrender-free Security Benefit Life variable annuity to purchase this RAVA annuity after Respondent informed her that it would be better to consolidate her investments to AFA. Respondent indicated that the death benefit and the contract value on the old annuity were equal so MS did not give up any death benefit in the transaction. Respondent also determined that the RAVA annuity had a lower mortality & expense cost (.75%) than the old annuity (1.75%). Respondent informed MS that although the rollover would involve a new 10-year surrender schedule, 10% of the contract value would be surrender-free each year. Respondent alleges that MS said “over and over” she would never need to exceed the 10% free withdrawal. As of 2009, MS had withdrawn approximately $55,000 from the annuity.

In December 2005, when MS was 66 years old, Respondent sold her a $500,000 VUL policy with a $25,000 annual premium. The premiums for the seven VUL policies totaled $31,000 a year although MS’s stated retirement income was $50,000. The plan was to pay $25,000 in premiums the first year, $15,000 the second year and $10,000 each year thereafter. Respondent testified that MS did not look at the premiums as an expense, but rather a reallocation of her assets. Respondent also testified that MS believed she would be paying a tax on the assets going towards the premium at a lower rate than her children would at inheritance and that she had concern with tax brackets being worse in the future. MS’s stated goal was capital appreciation and she had a moderate aggressive risk tolerance. By May 2009, the policy's death benefit was reduced to approximately $281,000 to make it more affordable for MS.

According to Respondent, the idea of purchasing the VUL policy started when MS expressed a concern regarding Income in Respect of a Decedent (“IRD”), federal income tax at death and “other estate shrinkage costs.” Respondent further indicated that MS believed it was important to begin transferring some of her taxable IRD estate and other assets into life insurance.

In June 2006, Respondent met with MS. MS indicated that she needed money to travel to Greece, pave her patio, fix a ceiling fan, etc. Respondent informed MS that she may not have a great deal of money until her annuity resets. Respondent also suggested that she reinvest in real estate, but noted that the money would be “tied up.”

In October 2006, Respondent met with MS to review her accounts. During this meeting, Respondent and MS discussed her need to pay for the $6,000 in premiums on the VUL policies for her grandchildren. Respondent noted that the annuity only had $4,000 available and that the remaining balance would have to wait until the RAVA reset. Respondent also noted that MS purchased a financial plan for a fee of $4,100, which would come out of the RAVA. Finally, Respondent noted that MS had been “pulling out a lot of money for trips and home repair.”

In 2007, Respondent sold MS three REITS in her IRA: (a) Hines REIT in July 2007; (b) KBS REIT in July 2007; and (c) CLP REIT in July 2007. In July 2007, MS contacted Respondent and sought $7,500 from her accounts. Respondent had to take the money from MS’s IRA, causing her to incur a $4,000 surrender charge.

In October 2007, Respondent again met with MS to discuss preparing a financial plan for MS. During the meeting MS indicated that she needed $20,000 out of her annuity for a bathroom renovation, a trip, income taxes and to pay into her grandchildren’s VUL policies. Respondent indicated that MS understood that the money would be taxed and discussed his concerns with her spending habits.

In April 2008, Respondent spoke with MS because MS needed $14,000 to assist her daughter with her divorce, to pay taxes and for her bathroom renovation. Respondent indicated that he discussed his concerns with MS's spending habits.

In August 2008, Respondent met with MS and discussed the fact that she may be selling her house. Respondent indicated in his notes that this would be a positive outcome because it would free up approximately $1,700 per month, which MS would need because she was spending a lot of money. Respondent also noted that MS had been spending a lot of money and did not have much money available at the time.

In December 2008, Respondent prepared a Personal Financial Plan ("2008 Plan") for MS. In the comment section of the 2008 Plan, Respondent indicated that MS's financial situation appeared to be positive and she did not need any additional income from her investments. The comments also stated that they would continue to monitor the VUL policies to prevent them from lapsing and that MS should continue to he pay the premiums on her LTC policies. The 2008 Plan also listed MS's annual retirement distribution need as $20,000.

After preparing with the 2008 Plan, Respondent spoke to or met with MS on numerous occasions where MS needed to withdraw money from her accounts for varies needs. Each time Respondent would counsel her on spending and then provide her with the money requested.

Respondent's Relationship with the AK Trust

In 2003, MS retained Respondent to manage the $150,000 trust of her disabled cousin, CK, for which MS and her sisters served as trustees. CK's trust was established under the will of her father (and MS's uncle), AK, specifically to provide income for CK's care, as well as provide fixed distributions to her beneficiaries upon her death. In August 2003, Respondent recommended that MS and the other trustees open a non-qualified account in order to purchase a RAVA annuity in CK's name. Respondent contends that, the original premium was $52,000, which came from funds from CK's trust. MS and her sisters are the beneficiaries of this account. Respondent also contends that the sisters decided on a non-qualified variable annuity because it would be tax deferred and was best suited to long-term growth and income. The contract had a 10-year surrender period.

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 201 of the *Code of Ethics*, which provides that a certificant shall exercise reasonable and prudent professional judgment in providing professional services. The Commission determined that Respondent, a CFP Board designee, failed to exercise reasonable and prudent judgment when he: (a) recommended and sold to MS unsuitable VUL policies, variable annuities and REITs; and (b) placed the bulk of MS's assets into long-term investments with high fees and expenses although the client's primary objective was income.

Specifically, with respect to the RAVA in 2001, the Commission determined that Respondent failed to properly evaluate the impact of the recent death of MS's husband on her finances and lifestyle before selling the annuity. Respondent should have waited before making recommendations for illiquid investments to fully understand the implications of MS' life change. Further, Respondent sold the RAVA to MS in March 2001, approximately three months prior to completing the 2001 Plan in which Respondent indicated MS had "negative monthly discretionary income." The Commission was determined that it was unreasonable and imprudent for Respondent to sell illiquid and complex products to a recently widowed client, without first preparing a financial plan to asses her financial situation.

Despite his knowledge of MS's "negative monthly discretionary income," he continued to sell her several illiquid products, including the annuities, VULs and REITs, over the next four to five years that required MS to transfer income into illiquid assets. There was no evidence in the record indicating that Respondent had discussions with MS about how her "negative monthly discretionary income" and spending habits combined with the illiquid product recommendations would impact MS's financial situation. Further, these investments contained substantial fees and internal expenses, which became a burden on MS's ability to maintain her lifestyle and address unforeseen circumstances. The Commission determined that these actions were also unreasonable and imprudent given MS's financial circumstances.

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 202 of the *Code of Ethics*, which provides that a financial planning practitioner shall act in the interest of the client.

Respondent, a financial planning practitioner, failed to act in the interest of MS when he recommended and sold to MS unsuitable VUL policies, variable annuities and REITs. Respondent was clearly a financial planning practitioner as the record contains two financial plans prepared for MS over a seven year period. As discussed in the First Ground for Discipline, the product recommendations made by Respondent were unreasonable and imprudent. Based on this finding, the Commission determined that Respondent failed to act in the interest of the client.

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 701 of the *Code of Ethics*, which provides that a CFP Board designee shall provide services diligently. Respondent, a CFP Board designee failed to provide services diligently when he: (a) failed to properly analyze the client's needs and cash flow, and (b) failed to include the costs of the VUL policies, variable annuities and REITs in his 2001 and 2008 financial plans.

In the case of the 2001 RAVA, Respondent did not analyze MS's cash flow until after he sold her the product and shortly before she had a major life change that likely would have significantly impacted her cash flow. This demonstrates a lack of diligence on Respondent's part. He should have completed the plan prior to implementing any product recommendations. Further, after determining that MS had a "negative monthly discretionary income" in the 2001 Plan, Respondent did not appear to address this when he recommended the purchase of another annuity and seven VUL policies, the annuities and the REITs. In fact, it does not appear that Respondent exercised any degree of diligence with regard to his recommendations in the 2001 Plan regarding cash flow. While Respondent provided notes spanning from 2006 until 2012 in which he noted that he mentioned MS's spending, he failed to provide evidence indicating that he specifically addressed MS's "negative monthly discretionary income" and how the purchase of an illiquid product would impact that given MS's spending.

Fourth 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 703 of the *Code of Ethics*, which provides that a financial planning practitioner shall make and/or implement only recommendations which are suitable for the client.

Respondent, a financial planning practitioner, failed to make recommendations that were suitable for MS when he recommended that she purchase unsuitable proprietary products that included multiple VUL policies, variable annuities and REITs. The Commission determined in the First Ground for Discipline that the products were unreasonable and imprudent given MS's financial situation. The Commission relies on that rationale to support its determination that the products were unsuitable.

The Commission determined that CFP Board did not meet its burden with respect to Respondent's recommendation of obtaining a home equity loan and borrowing from her annuities to reduce her debt load.

Fifth Ground for Discipline

Pursuant to Article 3(b) of the *Disciplinary Rules*, there are grounds to discipline Respondent for acts or omissions that violate *Practice Standard* 200-1, which provides that the financial planning practitioner and the client shall mutually define the client's personal and financial goals, needs and priorities that are relevant to the scope of the engagement before any recommendation is made and/or implemented. When appropriate, the practitioner shall assist clients in recognizing the implications of unrealistic goals and objectives.

CFP Board alleged that the 2001 plan showed that the client needed to delay retirement to age 65, but Respondent failed to counsel her against early retirement. Respondent also did not include the need for a budget reduction in the 2001 plan. The Commission determined that CFP Board did not meet its burden of proof on this portion of the ground for discipline. The 2001 Plan did in fact discuss a possible retirement at age 65 and informed MS that she should review her cash flow.

The Commission determined that CFP Board met its burden on the remaining parts of the ground for discipline. Respondent, a financial planning practitioner, claimed that MS wanted to purchase the VUL policies, variable annuities, and REITs, but failed to counsel her against the purchases although he was aware that the investments were not supported by her existing cash flow and assets. The 2008 plan fails to provide sufficient information about the client's financial situation, and is, in fact, inadequate. Respondent's recommendations to the client did not match her goals, needs and priorities. Respondent failed to assist MS in recognizing the implications of unrealistic goals and objectives. The Commission determined that Respondent failed to clearly communicate through projections or comments in the 2008 plan the severe consequences of MS's spending.

Sixth Ground for Discipline

Pursuant to Article 3(b) of the *Disciplinary Rules*, there are grounds to discipline Respondent for acts or omissions that violate *Practice Standard* 300-1, which provides that a financial planning practitioner shall analyze the information to gain an understanding of the client's financial situation and then evaluate to what extent the client's goals, needs and priorities can be met by the client's resources and current course of action.

Respondent, a financial planning practitioner, created the 2001 plan using investment return assumptions of 9.5% before tax and 7.5% after tax. Given the reliance on capital appreciation and the fact that the client was close to retirement, liquidity was essential for the client because money withdrawn or lost was not likely to be replaced. If, indeed, the client continued to spend beyond her means, the cash flow analysis should have reflected this. The 2001 plan assumes the adjustment of spending and cash flow without specifying the recommended actions. As discussed above, the Commission determined that Respondent lacked diligence in pursuing an adjustment of cash flow and spending after the 2001 Plan. The 2008 plan was inadequate and failed to provide details about the client's financial situation. Respondent failed to analyze the information to gain an understanding of the client's financial situation and then evaluate to what extent the client's goals, needs and priorities can be met by the client's resources and current course of action. Thus, Respondent violated Practice Standard 300-1.

The Commission did not find grounds for discipline based on the assumption of a 9.5 % before tax return and 7.5% after tax return, because this was in line with conservative return rates available at the time of the 2001 Plan.

Seventh Ground for Discipline

Pursuant to Article 3(b) of the *Disciplinary Rules*, there are grounds to discipline Respondent for acts or omissions that violate *Practice Standard* 400-2, which provides that a financial planning practitioner shall develop the recommendation(s) based on the selected alternative(s) and the current course of action in an effort to reasonably meet the client's goals, needs and priorities.

CFP Board alleged that Respondent, a financial planning practitioner, recommended an asset allocation of variable annuities, VULs and REITs to MS that was not supported by her expenses and cash flow. CFP Board also alleged that Respondent failed to develop the recommendation(s) based on the selected alternative(s) and the current course of action in an effort to reasonably meet the client's goals, needs and priorities. While Respondent provided evidence in the record indicating that he discussed other options with the client and CFP Board did not provide any evidence to contradict this, the Commission determined that the recommendations made by Respondent did not reasonably meet her goals, needs and priorities.

Eighth Ground for Discipline

Pursuant to Article 3(b) of the *Disciplinary Rules*, there are grounds to discipline Respondent for acts or omissions that violate *Practice Standard* 400-3, which provides that a financial planning practitioner shall communicate the recommendation(s) in a manner and to an extent reasonably necessary to assist the client in making an informed decision.

The Commission determined that Respondent, a financial planning practitioner, was cognizant of MS's cash flow issues and past spending history, yet he recommended the VUL policies, variable annuities and REITs to her. Respondent should have emphasized spending reduction and cash management rather than investing in an aggressive portfolio. Respondent failed to document for the client his purported warnings to the client regarding her withdrawals and the related surrender charges and failed to address the need for ongoing monitoring. Respondent failed to communicate the recommendation(s) in a manner and to an extent reasonably necessary to assist the client in making an informed decision.

The Commission did not find grounds for discipline based on CFP Board's allegation that in the 2001 plan, Respondent assumed a 9.5% before tax and a 7.5% after tax rate of return, but without those assumptions, the projections would have shown MS running out of money early in retirement.

Ninth Ground for Discipline

Pursuant to Article 3(b) of the *Disciplinary Rules*, there are grounds to discipline Respondent for acts or omissions that violate *Practice Standard* 500-2, which provides that a financial planning practitioner shall select appropriate products and services that are consistent with the client's goals, needs and priorities. The Commission determined that Respondent, a financial planning practitioner, failed to take into account MS's past spending history, liquidity needs and the fact that she needed income in her retirement years. Instead, he concentrated her assets in unsuitable variable annuities, VULs, and non-traded REITs, which were inconsistent with her goals, needs and priorities.

Tenth Ground for Discipline

Pursuant to Article 3(b) of the *Disciplinary Rules*, there are grounds to discipline Respondent for acts or omissions that violate *Practice Standard* 500-2, which provides that a financial planning practitioner shall select appropriate products and services that are consistent with the client's goals, needs and priorities. The financial planning practitioner uses professional judgment in selecting the products and services that are in the client's interest. Professional judgment incorporates both qualitative and quantitative information.

The Commission determined that Respondent, a financial planning practitioner, selected products for MS that were not in the client's best interest and that were not supported by documentation that justified the recommendations. Additionally, Respondent's plan failed to provide a comprehensive picture of the client's expenses and insurance needs. As determined above, Respondent failed to select appropriate products and services that are consistent with the client's goals, needs and priorities, and failed to use professional judgment in selecting the products and services that are in the client's interest.

IV. Discipline Imposed

The Commission determined that Respondent's conduct violated Rules 201, 202, 701 and 703 of the *Code of Ethics*, and *Practice Standards* 200-1, 300-1, 400-3, and 500-2, providing grounds for discipline under Articles 3(a) and (b) of the *Disciplinary Rules*. After careful consideration of the evidence in Respondent's matter, the Commission has decided to issue Respondent a suspension of his right to use the CFP® certification for one year and one day pursuant to Article 4.3 of the *Disciplinary Rules*. CFP Board will publish the suspension in a press release and on its website. The publication will include, but not be limited to, the discipline and a description of the facts underlying the discipline. Respondent's suspension is effective from October 2016 until October 2017.

The Commission did not cite any mitigating factors.

The Commission considered in aggravation that

1. Respondent's conduct resulted in harm to the client;
2. Respondent's conduct with MS occurred over several years; and
3. Respondent made his recommendations of unsuitable products shortly after MS had experienced a significant life change with her husband passing away.

In arriving at its decision, the Commission consulted *Sanction Guidelines* 11 (Diligence) and 31 (Suitability Violation). The Commission also consulted *Anonymous Case History* ("ACH") 22866 because the primary conduct involved in that ACH was that the respondent implemented investment recommendations prior to presenting a financial plan; and placed the majority of the client's assets in deferred annuities. The Commission also consulted ACH 23352 because that matter involved a respondent who failed to perform an analysis of client's insurance needs and failed to perform a cash flow analysis regarding the client's ability to pay for premiums. Finally, the Commission consulted ACH 25389 because the conduct involved a respondent's failure to perform due diligence when illiquid products were sold to client engaged in a financial planning relationship.

All three of these matters involved similar allegations of unsuitability and failure to properly assess cash flow. All of these ACHs resulted in at least a one year and one day suspension, with two resulting in suspensions of three and four years. The Commission ultimately determined that Respondent's misconduct was most similar to ACHs 23352 and 22866.

The Commission reviewed the ACHs cited by Respondent indicating that a private censure was an appropriate sanction for a suitability violation but determined that a private censure was inconsistent with the policy expressed by CFP Board in the *Sanction Guidelines*, which recommends a suspension of at least one year for a suitability violation.

Further, in reviewing the ACHs involving suitability violations a clear trend emerged. All but three private censures the Commission has issued in a matter where suitability was the primary misconduct ("Suitability Cases") occurred in 2010 or earlier. Of the seven Suitability Cases found by the Commission that were decided in 2010 or earlier, six resulted in a private censure. (See ACHs 22702, 16836, 15094, 19888, 21547, 21331 and 23777.) In 2011, the Commission's thinking on Suitability Cases began to shift. Of the six Suitability Cases found by the Commission occurring in 2011, one resulted in a private censure (ACH 24265), three resulted in a public letter of admonition (ACHs 24453, 12637 and 24481) and two resulted in suspensions greater than one year and one day (ACHs 22866 and 23352). The lone Suitability Case to receive a private censure in 2011 involved a client who had a small amount of assets involved in the unsuitable transactions. A clear shift in the Commission's thinking as to the appropriate level of discipline for a Suitability Case emerged in 2011 and continues to this day. Of the 11 Suitability Cases occurring since 2012 the Commission was able to review, the Commission issued two private censures (ACHs 25530 and 28739), three public letters of admonition (ACHs 29756, 27735 and 27841) and six suspensions (ACH 28783, 28815, 25698, 26476, 25389 and 27321). The Commission finds that these decisions indicate a clear trend that a suspension is the appropriate sanction in a Suitability Case absent any significant mitigating circumstances. Suitability Cases occurring from 2008 through 2010 that resulted in a private censure are no longer persuasive on the issue of an appropriate sanction for a suitability violation.

While the precedent of the two private censures occurring in 2012 or later are still persuasive, the Commission finds them distinguishable from this matter. In ACH 25530, the Commission determined that CFP Board's allegation that the assets were concentrated in illiquid products was not proven because CFP Board Counsel failed to provide evidence indicating the total amount of the client's assets. Thus, the Commission could not make a finding of asset concentration. Here, the Commission did not find similar gaps in the factual proof put forth by CFP Board that would warrant the issuance of a private censure. In the other matter, ACH 28739, the Commission determined that the respondent's original plan was sound in that it provided enough cash liquidity to meet the client's stated needs. In the matter at issue, Respondent failed to address with MS her "negative monthly discretionary income" and how the illiquid products would have a further negative impact. Further, Respondent sold MS a product that impacted her liquidity prior to performing a financial plan to assess her cash flow. Thus, ACH 28379 is distinguishable from this case because in this matter Respondent's plan was not sound from the start.

Given the aggravating factors, the Commission found no reason to deviate from the Sanction Guideline for suitability violations. With the addition of the diligence charge and the aggravating factors, the Commission determined that a one year and one day suspension was an appropriate sanction.