

CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, INC.

ANONYMOUS CASE HISTORIES  
NUMBER 27854

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This is a summary of a decision issued following the March 2013 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 after 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/*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) helped another individual to sell away variable annuities; 2) engaged in private securities transactions without obtaining the prior approval and consent of his employer; 3) shared commissions without the prior approval and consent of his employer; and 4) purchased new variable annuities for his clients without first processing 1035 Exchanges for the old variable annuities, thereby creating a taxable event and potentially exposing his clients to higher capital gains taxes.

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

***2011 Securities Firm Termination***

According to Respondent’s BrokerCheck record, Securities Firm terminated him in June 2011 for violating Securities Firm’s policies and procedures by sharing commissions with a registered representative from another firm without Securities Firm’s approval. According to Respondent, Person 1, a relative he has known for many years, approached him and asked him to execute transactions through Securities Firm. Person 1 claimed the transactions could not be executed through Investment Firm, Person 1’s firm. In his May 2012 response to the NOI, Respondent admitted to executing the transactions without obtaining the prior approval and consent of Securities Firm, and helping Person 1 sell away from Investment Firm.

Respondent stated that although he originally agreed to help Person 1 with the first trade because of restrictions Investment Firm had on a particular customer, Respondent continued to execute transactions that Person 1 referred to him for several years thereafter. Respondent also stated that he did not inquire into Person 1’s reasons for the subsequent transactions. Respondent did not explain why he did not question Person 1 about the reasons for the subsequent transactions.

According to Person 1’s BrokerCheck record, in June 2011, Investment Firm terminated Person 1 for participating in selling away activities by sharing commissions with a Respondent in violation of Financial Industry Regulatory Authority, Inc. (“FINRA”, formerly known as the National Association of Securities Dealers or “NASD”) Rule 3040. Person 1 had clients take substantial withdrawals from existing variable annuities to purchase new variable annuities at Securities Firm, through Respondent, without processing 1035 Exchanges. Person 1 and Respondent split commissions on the new annuity purchases without notification to Investment Firm or Securities Firm.

In July 2011, FINRA opened an inquiry into the 2011 Securities Firm Termination by mailing to Respondent a request for information related to the Termination. Respondent responded to FINRA’s Inquiry letter in July 2011. In his response, Respondent stated that Person 1 informed him that each new annuity referred to

Respondent was being purchased with new money, and was not funded by withdrawals from another variable annuity. Respondent stated that he subsequently learned that in at least one case there had been a withdrawal from a variable annuity some weeks before Person 1 referred the business to him.

According to Respondent, he conducted due diligence regarding the suitability of the variable annuities for the clients by reviewing the applications Person 1 provided to him. Respondent stated that customers were not impacted as a result of the transactions. According to Person 1's BrokerCheck record, however, Person 1 had the clients make withdrawals from existing variable annuities to purchase new variable annuities without processing 1035 Exchanges for the clients.

Person 1's failure to process 1035 Exchanges for the clients likely created taxable events for the clients following their withdrawals from their existing variable annuities and prior to purchasing the new variable annuities through Securities Firm. Respondent did not explain whether these surrenders negatively affected the clients or how he avoided creating capital gains taxable events without processing the 1035 Exchanges.

According to Respondent, he executed the transactions at Securities Firm and returned almost all commissions made on the transactions to Person 1, except a percentage that he retained for taxes incurred on the transactions. Person 1's BrokerCheck record indicates Person 1 split the commissions earned on the transactions with Respondent outside of Securities Firm.

Respondent's provided two spreadsheets, which revealed that Respondent and Person 1's selling away activities/private securities transactions began in January 2003 and ended in November 2010. In total, Respondent sold approximately \$1,800,000 in annuities during this period of time. The total gross commissions on the sales of the annuities in the two spreadsheets were approximately \$120,000. The total gross commissions retained by Respondent were approximately \$54,000. The spreadsheet indicates that after paying approximately \$53,000 in taxes, Respondent retained approximately \$1,000 for himself.

#### ***2012 FINRA Letter of Acceptance, Waiver and Consent ("AWC")***

In October 2012, Respondent submitted an AWC to FINRA, and in November 2012, FINRA's Office of Disciplinary Affairs accepted the AWC. According to the AWC, from January 2006 through November 2010, Person 1 recommended and sold variable annuities totaling approximately \$1.4 million to 13 customers. After meeting with the customers and completing the annuity applications, Person 1 forwarded the documents to Respondent to process the transactions as the registered representative of record. Respondent paid Person 1 50% of the net commissions generated from the annuity sales and used the remainder to pay federal and state taxes, and to pay himself a small fee. Respondent paid Person 1 approximately \$50,000 in commissions. Respondent did not inform Securities Firm of his commission-sharing arrangement with Person 1.

According to the AWC, by paying commissions to another registered representative, Respondent violated NASD Conduct Rule 2110 for conduct prior to December 2008, and FINRA Rule 2010 for conduct after December 2008. Without admitting or denying the findings, Respondent consented to a three-month suspension from association with any FINRA member firm and a \$5,000 fine. According to Respondent's BrokerCheck record, Respondent's suspension was in effect from December 2012 through March 2013.

### III. Commission's Analysis and Conclusions Regarding 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 making a false or misleading statement to the client, employer, employee, professional colleague, governmental or other regulatory body or official, or any other person or entity*

Based on Respondent's admission during his testimony, the Commission determined that from 2003 to 2008, Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation when he: 1) helped Person 1 to sell away variable annuities from Investment Firm; 2) engaged in private securities transactions with Person 1 without obtaining the prior approval and consent of Securities Firm; and 3) shared commissions with Person 1 without the prior approval and consent of Securities Firm. Thus, Respondent violated *Code of Ethics* Rule 102.

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

Based on Respondent's admission during his testimony, the Commission determined that Respondent failed to exercise reasonable and prudent professional judgment in providing professional services when he agreed to: 1) help Person 1 to sell away variable annuities from Investment Firm; 2) engage in private securities transactions with Person 1 without obtaining the prior approval and consent of Securities Firm; and 3) share commissions with Person 1 without the prior approval and consent of Securities Firm. Thus, Respondent violated *Code of Ethics* Rule 201.

- C. *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*

Based on Respondent's admission during his testimony, the Commission determined that from 2003 to 2008, Respondent failed to perform professional services with dedication to the lawful objectives of his employer and in accordance with the *Code of Ethics* by violating Securities Firm policy when he: 1) purchased variable annuities for customers referred by Person 1 without obtaining the prior approval and consent of Securities Firm; and 2) shared commissions with Person 1 without the prior approval and consent of Securities Firm. Thus, Respondent violated *Code of Ethics* Rule 406.

- D. *Rule 407(a) – A CFP Board designee shall advise his or her employer of outside affiliations which reasonably may compromise service to an employer*

Based on Respondent's admission during his testimony, the Commission determined that from 2003 to 2008, Respondent failed to advise Securities Firm of outside affiliations that might compromise his service when he failed to inform Securities Firm of: 1) his selling away activities with Person 1; 2) the variable annuities purchases referred by Person 1; and 3) the shared commissions with Person 1. Thus, Respondent violated *Code of Ethics* Rule 407(a).

- E. *Rule 408 – A CFP Board designee shall inform one's employer, partners or co-owners of compensation or other benefit arrangements in connection with one's services to clients, which are in addition to compensation from the employer, partners or co-owners for such services*

Based on Respondent's admission during his testimony, the Commission determined that Respondent failed to inform his employer of compensation or other benefit arrangements in connection with his services to

clients when he failed to notify Securities Firm of his commission-sharing arrangement with Person 1. Thus, Respondent violated *Code of Ethics* Rule 408.

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

Based on Respondent's admission during his testimony, the Commission determined that from 2003 to 2008, Respondent failed to perform services in accordance with applicable laws, rules and regulations of governmental agencies and other applicable authorities when he violated Securities Firm's policies and procedures by sharing commissions with Person 1 without Securities Firm's approval, in violation of NASD Conduct Rule 2110. Thus, Respondent violated *Code of Ethics* Rule 606(a).

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

Based on Respondent's admission during his testimony, the Commission determined that from 2003 to 2008, Respondent failed to perform services in accordance with applicable rules, regulations and other established policies of CFP Board when he: 1) helped Person 1 to sell away variable annuities from Investment Firm; 2) engaged in private securities transactions with Person 1 without obtaining the prior approval and consent of Securities Firm; 3) shared commissions with Person 1 without the prior approval and consent of Securities Firm; and 4) purchased new variable annuities for his clients without first processing 1035 Exchanges for the old variable annuities, thereby creating a taxable event and potentially exposing his clients to higher capital gains taxes. Thus, Respondent violated *Code of Ethics* Rule 606(b).

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

Based on Respondent's admission during his testimony, the Commission determined that from 2003 to 2008, Respondent engaged in conduct that reflects adversely on his integrity and fitness as a CFP<sup>®</sup> professional, upon the marks and upon the profession when he: 1) helped Person 1 to sell away variable annuities from Investment Firm; 2) engaged in private securities transactions with Person 1 without obtaining the prior approval and consent of Securities Firm; and 3) shared commissions with Person 1 without the prior approval and consent of Securities Firm. Thus, Respondent violated *Code of Ethics* Rule 607.

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

Based on Respondent's admission during his testimony, the Commission determined that from 2003 to 2008, Respondent failed to provide services diligently when he purchased new variable annuities for his clients without first processing 1035 Exchanges for the old variable annuities, thereby creating a taxable event and potentially exposing his clients to higher capital gains taxes. Thus, Respondent violated *Code of Ethics* Rule 701.

*J. Rule 4.1 – A certificant shall treat prospective clients and clients fairly and provide professional services with integrity and objectivity*

Based on Respondent's admission during his testimony, the Commission determined that from 2009 to 2010, Respondent failed to treat his clients fairly and provide professional services with integrity and objectivity when he: 1) purchased new variable annuities for the clients without first processing 1035 Exchanges for the old variable annuities, thereby creating a taxable event and potentially exposing his clients to higher capital gains taxes; 2) helped Person 1 to sell away variable annuities from Investment Firm; 3) engaged in private

securities transactions with Person 1 without obtaining the prior approval and consent of Securities Firm; and 4) shared commissions with Person 1 without the prior approval and consent of Securities Firm. Thus, Respondent violated *Rules of Conduct* Rule 4.1.

*K. Rule 4.3 – A certificant shall comply with applicable regulatory requirements governing professional services provided to the client*

Based on Respondent's admission during his testimony, the Commission determined that from 2009 to 2010, Respondent failed to comply with applicable regulatory requirements governing professional services provided to the client when he: 1) engaged in private securities transactions with Person 1 without obtaining the prior approval and consent of Securities Firm; and 2) shared commissions with Person 1 without the prior approval and consent of Securities Firm, in violation of firm policy and FINRA Rule 2010. Thus, Respondent violated *Rules of Conduct* Rule 4.3.

*L. Rule 4.4 – A certificant shall exercise reasonable and prudent professional judgment in providing professional services to clients*

Based on Respondent's admission during his testimony, the Commission determined that from 2009 to 2010, Respondent failed to exercise reasonable and prudent professional judgment in providing professional services to clients when he: 1) purchased new variable annuities for the clients without first processing 1035 Exchanges for the old variable annuities, thereby creating a taxable event and potentially exposing his clients to higher capital gains taxes; 2) helped Person 1 to sell away variable annuities from Investment Firm; 3) engaged in private securities transactions with Person 1 without obtaining the prior approval and consent of Securities Firm; and 4) shared commissions with Person 1 without the prior approval and consent of Securities Firm. Thus, Respondent violated *Rules of Conduct* Rule 4.4.

*M. Rule 4.5 – A certificant shall make and/or implement only recommendations that are suitable for the client*

Based on Respondent's admission during his testimony, the Commission determined that from 2009 to 2010, Respondent failed to make and/or implement only recommendations that were suitable for his clients when he purchased new variable annuities for the clients without first processing 1035 Exchanges for the old variable annuities, thereby creating a taxable event and potentially exposing his clients to higher capital gains taxes. Thus, Respondent violated *Rules of Conduct* Rule 4.5.

*N. Rule 5.1 – A certificant shall perform professional services with dedication to the lawful objectives of the employer/principal and in accordance with CFP Board's Code of Ethics*

Based on Respondent's admission during his testimony, the Commission determined that from 2009 to 2010, Respondent 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: 1) purchased variable annuities for customers referred by Person 1 without obtaining the prior approval and consent of Securities Firm; and 2) shared commissions with Person 1 without the prior approval and consent of Securities Firm. Thus, Respondent violated *Rules of Conduct* Rule 5.1.

*O. Rule 6.5 – A certificant shall not engage in conduct which reflects adversely on his or her integrity or fitness as a certificant, upon the CFP® marks, or upon the profession*

Based on Respondent's admission during his testimony, the Commission determined that from 2009 to 2010, Respondent engaged in conduct that reflects adversely on his integrity and fitness as a CFP® professional,

upon the CFP® marks and upon the profession when he: 1) purchased new variable annuities for the clients without first processing 1035 Exchanges for the old variable annuities, thereby creating a taxable event and potentially exposing his clients to higher capital gains taxes; 2) helped Person 1 to sell away variable annuities from Investment Firm; 3) engaged in private securities transactions with Person 1 without obtaining the prior approval and consent of Securities Firm; and 4) shared commissions with Person 1 without the prior approval and consent of Securities Firm. Thus, Respondent violated *Rules of Conduct* Rule 6.5.

#### 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* and/or *Rules of Conduct*. The Commission found grounds for discipline under Article 3(a) because Respondent violated Rules 102, 201, 406, 407(a), 408, 606(a), 606(b) and 607 of the *Code of Ethics* and Rules 4.1, 4.3, 4.4, 4.5, 5.1 and 6.5 of the *Rules of Conduct*. Pursuant to Article 4.3 of the *Disciplinary Rules*, the Commission issued a three-year suspension.

While considering the degree of sanction to impose, the Commission consulted Anonymous Case Histories ("ACH") 23408 and 22986. The Commission also consulted *Sanction Guidelines* 7 (Conflict of Interest), 11 (Diligence), 12 (Employer Policies Violation), 20 (Fraud, Misrepresentation or Deceit), 30 (Securities Law Violation), 31 (Suitability Violation) and 33 (Professional discipline as defined in Article 13.6 involving a suspension for more than one calendar month and less than three calendar months). The Commission determined that Respondent's conduct was substantially similar to ACH 22986, which resulted in a four-year suspension. The panel determined to mitigate that sanction slightly due to the mitigating factors considered below. The Commission, however, was concerned that Respondent's conduct happened over an extended period of time and was intentionally designed to avoid detection by compliance.

The Commission cited the following mitigating factors:

1. Respondent cooperated fully with FINRA and CFP Board during the investigation;
2. Prior to the conduct at issue, the last regulatory matters on Respondent's record are from 1988;
3. Respondent admitted to the conduct during the hearing and was contrite and remorseful;
4. Respondent's intent was to assist his cousin rather than to gain financially.

The Commission cited the following aggravating factors:

1. One of the annuities Respondent sold resulted in a customer complaint;
2. Respondent's conduct extended over an eight-year period;
3. Respondent's conduct appeared to be designed to circumvent compliance procedures;
4. Respondent's employer terminated him due to his conduct;
5. Respondent indicated during his testimony that if he and his cousin did not get caught that he would still be engaging in the conduct.