

CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, INC.

ANONYMOUS CASE HISTORIES
NUMBER 28825

This is a summary of a Settlement Agreement entered into at the February 2015 hearings of the Disciplinary and Ethics Commission (“DEC”) of Certified Financial Planner Board of Standards, Inc. (“CFP Board”). The conduct at issue in this case occurred both prior to and after January 1, 2009. The rules in effect for conduct occurring prior to January 1, 2009 were Rules 101 through 706 of CFP Board’s *Code of Ethics*. The Rules in effect for conduct occurring after January 1, 2009 were Rules 1.1 through 6.5 of CFP Board’s *Rules of Conduct*.

I. Issue Presented

Whether a CFP® professional (“Respondent”) violated CFP Board’s *Standards of Professional Conduct* when he violated the securities laws of two states by: 1) acting as an unregistered investment adviser, securities salesperson and/or broker-dealer; 2) offering and selling an unregistered and nonexempt security; 3) offering securities to non-qualified investors; 4) misrepresented by omission in offering materials that the general partner entered into a sub-advisory agreement and shared fees with the sub-advisor; and 5) failed to disclose a state consent order on his Form ADV.

II. Findings of Fact

Previous 2011 CFP Board Case

In October 2011, Respondent contacted CFP Board and disclosed his involvement in a 2011 State 1 Consent Order. CFP Board send Respondent a Notice of Investigation and Respondent provided his response. On September 16, 2011, Respondent entered into a Consent Order with the State 1 Department of Banking and Finance related to an unregistered securities offering.

Respondent is the general partner and owner of MM, an investment advisor registered in State 1 and State 3. Respondent is also the president and owner of MC, an investment advisor registered in State 1 and State 3. MM and MC’s principal place of business from 2007 to 2010 was State 1. MM is the General Partner and investment manager of MP, a private equity fund. In its Confidential Private Offering Memorandum, MP claims exemption from the registration requirements of the Securities Act of 1933 under Regulation D and Rule 506. The Rule 506 registration exemption restricts the sale of the security to accredited investors or unaccredited investors who, either alone or with a purchaser representative, have the knowledge and experience in financial or business matters to enable them to evaluate the risks and merits of the investment. A purchaser representative cannot be affiliated or employed by the issuer, with limited exceptions.

In May 2010, State 1 regulators conducted a routine examination of MM and MC and discovered that, since 2000, MP sold interests to approximately 60 investors in six states. Prior to May 2010, neither MM nor MP filed a notice with State 1 regulators claiming exemption from registration for the interests in MP. State 1 regulators found that Respondent violated a State 1 Statute that prohibits any person from offering or selling a security in the State unless the security is registered under the Securities Act of State 1, exempt from registration, or qualifies as a federal covered security. As a result of the Consent Order, State fined Respondent \$2,500 and assessed \$12,500 for the costs of the investigation.

In December 2011, CFP Board closed its 2011 case but cautioned Respondent to perform services in accordance with applicable law, rules and regulations of governmental agencies and other applicable authorities and cautioned Respondent to provide services diligently. CFP Board also informed Respondent that CFP Board Counsel reserves

the right to reopen the investigation into the State 1 Consent Order if deemed appropriate. In light of the more recent allegations of misconduct in the Consent Order with State 2, CFP Board reopened the investigation into the State 1 Consent Order and added it to the 2012 case.

2013 CFP Board Case

In October 2013, Respondent emailed CFP Board and disclosed his involvement in a Consent Order with State 2. In November 2013, CFP Board sent a Notice of Investigation to Respondent. In November 2013, Respondent's attorney, HW, submitted a response. CFP Board sent a Request for Additional Information in January 2014, and HW responded in February 2014. HW provided additional information in September 2014.

In January 2012, the State 2 Department of Financial Institutions filed a Statement of Charges against Respondent and his entities. According to the Statement of Charges, in May 2010, MC and MM applied for registration as investment advisors with State 2 regulators. Pursuant to a pre-licensing examination, State 2 regulators obtained a list of State 2 clients who had executed investment advisory contracts with MC between 2000 and April, 2011. State 2 regulators determined that, by 2003, MC had entered into investment advisory agreements with at least six State 2 residents who did not fall under a statutory exemption while MC was not registered as an investment advisor or exempt from registration in State 2 in violation of the Revised Code of State 2.

State 2 regulators found that Respondent sold approximately \$748,000.00 of MP interests to at least 10 State 2 residents. Additionally, at least six State 2 investors were not accredited or qualified clients as defined by Securities and Exchange Commission Rule 205-3 of the Investment Advisors Act of 1940. Respondent violated State 2 law by entering into six performance-based compensation arrangements with clients who did not meet the requirements of Rule 205-3. State 2 regulators also found that Respondent violated State 2 law by offering and selling MP while not registered or exempt from registration as a securities salesperson or broker-dealer in State 2 and by not registering the offer or sale with the Securities Administrator of the State 2 Department of Financial Institutions ("DFI").

State 2 regulators found that Respondent violated State 2 law by representing in MP's offering materials that MM made all investment decisions and failed to disclose that MM entered into a sub-advisory agreement with MC who made recommendations for a portion of the management fee. Finally, DFI found that Respondent violated State law each of the five times he filed with the Investment Advisor Public Disclosure after the entry of the State 1 Consent Order without disclosing the State 1 Consent Order.

In October 2013, Respondent entered into a Consent Order with State 2 regulators wherein he agreed to cease and desist from violating State 2's laws and Respondent agreed to pay \$25,000.00 in investigative costs.

III. Rule Violations

A. *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) while located in State 1, sold an unregistered security to investors between 2007 and 2009 without filing a notice with the State 1 Department of Banking and Finance claiming that the security was exempt from registration or qualifying the security as a federal covered security; 2) entered into investment advisory contracts with at least six State 2 residents while not registered as an investment advisor in State 2; 3) offered and sold an unregistered and nonexempt security in State 2; 4) offered and sold securities while not registered or exempt from registration as a securities salesperson or broker-dealer in State 2; 5) entered into six performance-based compensation arrangements with unaccredited and unqualified State 2 investors while representing in offering materials that the offering was limited to qualified investors; and 6) misrepresented by omission in offering

materials that the general partner entered into a sub-advisory agreement and shared fees with the sub-advisor. Thus, Respondent violated *Code of Ethics* Rule 201.

B. 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.

Respondent failed to perform services in accordance with applicable laws, rules and regulations of governmental agencies and other applicable authorities when he violated State 1 and State 2 laws and regulations by: 1) while located in State 1, sold an unregistered security to investors between 2007 and 2009 without filing a notice with the State 1 Department of Banking and Finance claiming that the security was exempt from registration or qualifying the security as a federal covered security; 2) entered into investment advisory contracts with at least six State 2 residents while not registered as an investment advisor in State 2; 3) offered and sold an unregistered and nonexempt security in State 2; 4) offered and sold securities while not registered or exempt from registration as a securities salesperson or broker-dealer in State 2; 5) entered into six performance-based compensation arrangements with unaccredited and unqualified State 2 investors while representing in offering materials that the offering was limited to qualified investors; and 6) misrepresented by omission in offering materials that the general partner entered into a sub-advisory agreement and shared fees with the sub-advisor. Thus, Respondent violated *Code of Ethics* Rule 606(a).

C. 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 or her integrity and fitness as a CFP Board designee, upon the marks, and upon the profession when he: 1) entered into investment advisory contracts with at least six State 2 residents while not registered as an investment advisor; 2) offered and sold an unregistered and nonexempt security in State 2; 3) offered and sold securities while not registered or exempt from registration as a securities salesperson or broker-dealer in State 2; 4) entered into six performance-based compensation arrangements with unqualified State 2 investors while representing in offering materials that the offering was limited to qualified investors; and 5) misrepresented by omission in offering materials that the general partner entered into a sub-advisory agreement and shared fees with the sub-advisor. Thus, Respondent violated *Code of Ethics* Rule 607.

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

Respondent failed to provide services diligently when he: 1) while located in State 1, sold an unregistered security to investors between 2007 and 2009 without filing a notice with the State 1 Department of Banking and Finance claiming that the security was exempt from registration or qualifying the security as a federal covered security; 2) entered into investment advisory contracts with at least six State 2 residents while not registered as an investment advisor in State 2; 3) offered and sold an unregistered and nonexempt security in State 2; 4) offered and sold securities while not registered or exempt from registration as a securities salesperson or broker-dealer in State 2; 5) entered into six performance-based compensation arrangements with unaccredited and unqualified State 2 investors while representing in offering materials that the offering was limited to qualified investors; and 6) misrepresented by omission in offering materials that the general partner entered into a sub-advisory agreement and shared fees with the sub-advisor. Thus, Respondent violated *Code of Ethics* Rule 701.

E. 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.

Respondent engaged in in conduct that reflects adversely on his integrity and fitness as a certificant, upon the CFP® marks, and upon the profession when he: 1) in 2011, filed five amendments to the Forms ADV of his registered investment advisors without disclosing a State 1 Order; and 2) entered into the State 1 Consent Order in

2011 and the State 2 Consent Order in 2013 regarding violations of state securities laws. Thus, Respondent violated Rule 6.5 of the *Rules of Conduct*.

IV. Discipline Imposed

Article 3(a) of CFP Board's *Disciplinary Rules* provides grounds for discipline for any act or omission that violates the *Code of Ethics* or *Rules of Conduct*. The Commission found grounds for discipline under Article 3(a) because Respondent's conduct violated Rules 201, 606(b), 607 and 701 of CFP Board's *Code of Ethics* and Rule 6.5 of CFP Board's *Rules of Conduct*. CFP Board and Respondent entered into a Settlement Agreement wherein Respondent admitted to the alleged rule violations and proposed discipline. Based on the terms of the Settlement Agreement, the Commission issued to Respondent a Public Letter of Admonition, pursuant to Article 4.2 of the *Disciplinary Rules*.

The Commission identified the following aggravating factors:

1. Respondent had previously received a caution from CFP Board and this was the second matter involving securities law violations investigated by CFP Board; and
2. Respondent sold securities to investors who did not meet the definitions of accredited or qualified investors in SEC Rule 205-3, which was required by the offering materials.

The Commission identified no mitigating factors.

The Commission consulted *Sanctions Guideline* 30 (Securities Law Violation). The Commission also consulted Anonymous Case Histories ("ACH") 28376, 28383, 24269. Of these ACHs, the facts and violations of ACH 24269 most closely resembled the facts and violations in Respondent's matter. In ACH 24269, the DEC issued a sanction of a public letter of admonition.