CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, INC.

ANONYMOUS CASE HISTORIES
NUMBER 30147

This is a summary of a decision issued following the June 2016 hearings of the Disciplinary and Ethics Commission ("Commission") of Certified Financial Planner Board of Standards, Inc. ("CFP Board"). The Initial Application for Certification ("Application") in this case was filed after September 14, 2012. CFP Board's *Fitness Standards for Candidates and Professionals Eligible for Reinstatement* ("*Fitness Standards*") were in effect at that time.

I. Issues Presented

Whether a candidate for CFP® certification could be certified when he: 1) executed securities transactions on behalf of a customer without authority to do so; 2) submitted a document to his firm that was false and misleading regarding whether the securities transactions were authorized; and 3) made oral statements to the state regulators that were materially false.

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

2009 State Department of Banking Consent Order

Respondent, who is an employee of Bank, has been registered with FX Investments, Inc. ("FX") as registered representative since May 1999 and as an investment adviser representative since March 2000. He is licensed as an Investment Company Products/Variable Contracts Representative (Series 6), a General Securities Representative (Series 7), and as an Investment Adviser Representative.

On his Initial Application for CFP® certification dated December 2015, Respondent disclosed that in August 2009 he entered into a Consent Order with the Department that resulted in a 30-day suspension of his registrations as a broker-dealer agent and as an investment adviser agent. According to Respondent, the suspension was based upon findings by the State Banking Commissioner ("Commissioner") that Respondent had: a) executed securities transactions on behalf of a customer without authority to do so; b) submitted a document to FX that was false and misleading regarding whether the securities transactions were authorized; and c) made oral statements to the Department that were materially false.

Respondent claims that the investigation that resulted in the Consent Order grew out of the Department's investigation of his clients, SH and MH ("Clients"). According to Respondent, SH was the incorporator of the Bank and, at the time, the chairman and CEO of the hedge fund SM. The Department was investigating SH for a number of customer complaints and some alleged securities violations.

The Clients were referred to Respondent by his former manager, and they opened multiple brokerage accounts with him through FX. One of those accounts was an individual retirement account ("IRA") for MH. When the account was opened, Respondent claims, SH stated that his wife, a homemaker, "always deferred to him" regarding her accounts because of his securities industry knowledge and experience.

During the course of the Department's investigation of SH, it became aware of the accounts with FX. The Department requested a letter from Respondent confirming that MH was aware of the transactions executed in her account. In April 2008, Respondent drafted and signed a letter stating that "to the best of [his] recollection" he received trading instructions from SH for "various options trades that occurred in the account during 2006 and 2007."

Subsequently, the Department requested that Respondent provide oral testimony regarding his servicing of the Clients' accounts. Respondent complied by providing testimony on two separate occasions, July 2008, and December 2008. In July, when he was questioned about receiving instructions directly from MH for transactions in her IRA in 2006 and 2007, Respondent initially stood by his statement in the April 2008 letter, but he ultimately admitted that MH never discussed transactions directly with him, stating that she "always deferred to [SH]." In December, Respondent admitted that he never received express authority from MH, SH, or FX authorizing him to accept orders from SH to execute trades in MH's IRA.

In August 2009, following the Department's investigation, Respondent entered into the Consent Order with the Commissioner. In the Consent Order, the Commissioner made the following findings:

> 1. [Respondent], while associated with FX, engaged in dishonest or unethical practices in the securities business by executing transactions on behalf of a customer without authority to do so, although he still maintains he had implied authority;
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> 2. [Respondent], while associated with FX, engaged in dishonest or unethical practices in the securities business by creating and submitting to his employing firm a document that was false and misleading with respect to whether securities transactions in a customer's account were authorized; and
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> 3. In connection with an investigation conducted by the [Securities and Business Investments Division], [Respondent] violated state law by making oral statements that were, at the time and in light of the circumstances under which they were made, materially false or misleading.

Based on the Commissioner's findings and pursuant to the Consent Order, Respondent agreed to pay the Department a total of $12,500, representing $10,000 for an administrative fine and $2,500 to defray investigative costs.

Respondent admitted to CFP Board that MH never signed any documents authorizing him to accept orders from SH to execute trades in her IRA. Nonetheless, he continues to assert that he believes MH was aware of the activity in the account because the account statements were sent to her residence and SH discussed the transactions in the account with her. Further, he is confident that MH was fully aware of and consented to the transactions because she never called to question him about them.

After learning about the Consent Order, FINRA notified FX that it had determined the Commissioner's finding that Respondent provided false testimony made him subject to disqualification and would prohibit his continued association with a FINRA member firm unless the member requested and received written approval from FINRA. Accordingly, FINRA informed FX that it could initiate the FINRA Membership Continuance process by submitting a completed MC-400 Application and paying a $1,500 processing fee to determine whether Respondent could remain associated with the firm.

FX timely submitted the completed MC-400 Application and the firm began enforcing its proposed heightened supervision plan pending FINRA approval while Respondent continued to run his practice.

In December 2011, while Respondent's MC-400 Application was still pending, MH issued a handwritten, signed, and notarized note stating that Respondent always had authority to accept trades from her husband in her IRA. This statement supports Respondent's earlier contention that he had the authority to accept trades from SH in MH's account.

Ultimately, in June 2013, FINRA issued its final decision allowing Respondent to continue his association with FX, albeit under heightened supervision. Notably, FINRA determined Respondent does not "pose a threat to the public

interest and does not create an unreasonable risk of harm to the market or investors." According to Respondent, his heightened supervision is tentatively scheduled to last until June 2023.

III. Commission's Determination on Respondent's Fitness

CFP Board has established specific character and fitness standards for candidates for CFP® certification and Professionals Eligible for Reinstatement to ensure the individual's conduct does not reflect adversely on his or her fitness for CFP® certification, on the profession or on the CFP® certification marks. Under CFP Board's *Fitness Standards*, Respondent's conduct is presumed to be unacceptable and will bar Respondent from becoming certified unless Respondent petitions the Commission for consideration. Under the *Fitness Standards*, Respondent had the burden to demonstrate that his conduct does not reflect adversely on his fitness for CFP® certification, the profession or the CFP® marks. Upon consideration of the facts in this matter, the Commission granted Respondent's Petition for Consideration after determining Respondent's conduct did not reflect adversely on his fitness, upon the profession or the CFP® certification marks.

The Commission noted in mitigation that:

1. Respondent provided an affidavit from MH that her husband did, in fact, have her approval to direct trades in her IRA;
2. CFP Board counsel recommended granting Respondent's petition;
3. Respondent's conduct resulted in no client harm;
4. FINRA stated that Respondent poses no threat to the public;
5. State allowed him to continue practicing without heightened supervision after serving a 30-day suspension;
6. Respondent is under the heightened supervision of a CFP® professional who has held the marks for 28 years and recommended granting Respondent's petition; and
7. Respondent's infraction occurred seven years ago and was self-disclosed.

The Commission did not note any aggravating factors.

The Commission reviewed *Anonymous Case Histories* 28795 and 26150 in reaching its decision.