

BY ELECTRONIC MAIL

April 25, 2007

Karen P. Schaeffer, CFP®
Chair
CFP Board of Standards, Inc.
1670 Broadway, Suite 600
Denver, CO 80202-4809

Re: Second Exposure Draft of Proposed Revisions to CFP Board's *Standards of Professional Conduct*

Dear Ms. Schaeffer:

On behalf of the Financial Planning Association ("FPA®"),¹ I would like to thank the Board of Governors for the time and energy that has gone into the review of the CFP® Board of Standard's ("CFP Board") ethical standards. I am pleased to offer formal comments on these significant revisions to the *Code of Ethics and Professional Responsibility* ("*Code of Ethics*") and *Practice Standards*. FPA has a considerable interest in any major changes to the standards set by the Board inasmuch as 19,000 FPA members are CFP® certificants, and FPA's bylaws currently require all individual FPA members to adhere to essentially the same standards.²

In reviewing the Second Exposure Draft of Revisions to the CFP Board's *Standards of Professional Conduct* ("*Standards*") FPA poses the same questions that it asked in reviewing the First Exposure Draft:

- Do the revisions enhance protections for consumers?
- Do the revisions advance the profession of financial planning?

With respect to the new draft, FPA answers both questions strongly in the affirmative. The proposal will significantly strengthen the standard of care, thereby offering greater protection to consumers and advancing the profession of financial planning. FPA desires to create a world in

¹The Financial Planning Association is the largest organization in the United States representing financial planners and affiliated firms, with approximately 28,500 individual members. FPA is incorporated in Washington, D.C., where it maintains an advocacy office, with headquarters in Denver, Colo.

² Article IV of the FPA bylaws currently require all FPA members who hold themselves out to the public as financial planners to abide by the CFP Code of Ethics and Practice Standards as a condition of membership. See <http://www.fpanet.org/member/about/principles/bylaws.cfm>.

which professionals delivering financial planning and advisory services can do so with trust, respect and full disclosure while living by the same rules and with the intent of serving the best interests of the clients. Thus FPA is pleased to offer strong general support for the proposed amendments to the Standards. At the same time, FPA offers a number of questions and specific recommendations relating to provisions where it believes that additional clarification is needed.

I. Overview

FPA supports the Second Exposure Draft proposal as a significant improvement over the existing *Code of Ethics*. The proposal appears to make the *Standards* clearer with respect to their application to the financial planning process, less ambiguous, and in greater alignment with consumer protection. The heart of the proposed changes requires CFP certificants to place the interest of their clients first at all times and creates a fiduciary standard of care that applies to certificants providing financial planning or material elements of the financial planning process. The proposal also simplifies certain provisions, easing compliance concerns. FPA is also very pleased that the proposal retains the Practice Standards, which facilitate best practices and establish consumer expectations. FPA commends the CFP Board on an open and inclusive process that has been utilized in proposing these amendments to the *Standards*.

II. Public Process

FPA is very supportive of the numerous ways that the CFP Board has communicated the proposed changes to certificants and has encouraged meaningful feedback. These mechanisms have included webcasts, a comprehensive summary and comparison to existing requirements, an online survey, a town hall meeting, online questions and answers, and a formal comment period. FPA recognizes that facilitating these in-person and online conversations requires a significant amount of time and resources from CFP Board staff and the Board of Governors, and FPA commends the Board for its efforts.

This process is consistent with FPA's view that any major reorganization of the *Standards* should be properly vetted with all of the Board's stakeholders: the public, regulators, consumer representatives, and certificants. FPA's members have expressed a strong desire to be subject to professional standards, much like doctors, attorneys and accountants, not merely held to industry regulation which is sometimes inconsistent with professional accountability. FPA believes that this proposal is an important step in this progression to a higher standard of care for the client. FPA wants to make it easier for the public to better understand financial planning, the responsibilities of financial planners, and how to identify a competent and ethical financial planner.

FPA also hopes to see continued meaningful communication with the Board as well as formal FPA representation on future task forces that consider changes to the CFP Board's *Standards of Professional Conduct*.

III. Organization

A. Code of Ethics and Rules of Conduct

The existing *Code of Ethics* includes Part I *Principles* and Part II *Rules*. Both apply to certificants based on the professional services that they provide, although the *Principles* are described as aspirational guidance, whereas the *Rules* are intended to apply to in particular situations if applicable to the certificant's activities. In the proposed Standards, the *Code* and *Rules* have been substantially revised, clarified, and reorganized. The *Code of Ethics* now contains only the aspirational principles. The separate *Rules of Conduct* are binding on **all certificants**, regardless of title, position, type of employment or method of compensation, and govern all persons with the right to use the mark, whether or not those marks are used in a retail business environment. FPA supports this reorganization as a sensible and uniform approach to applying standards to a diverse population of certificants often subject to widely varying standards of regulation in the financial services industry.

B. Practice Standards

The *Practice Standards* were intended to benefit consumers by advancing professionalism, assuring the public that the practice of financial planning is based on established norms, and enhancing the value of the financial planning process.³ The *Practice Standards* also establish baseline procedures to be followed in a financial planning engagement and distinguish the financial planning process from product-driven advice or a less disciplined approach. The proposed Exposure Draft retains the *Practice Standards* and includes revisions that serve to clarify and simplify their overall structure. FPA believes that retaining the *Practice Standards* is crucial as they provide a simple, clear and concise guide to the financial planning process; thus FPA fully supports their inclusion and the language changes that have been made to improve clarity and consistency.

IV. Terminology

A. 'Certificant' and 'Registrant'

The proposed *Terminology* section includes new definitions for "certificant" and "registrant". Certificant denotes an individual currently certified by the Board, and registrant denotes an individual not currently certified but certified in the past and potentially entitled to use the marks. The new definitions clarify that the Rules of Conduct would apply to current certificants and to registrant conduct only at the time when the registrant was certified, thus giving the Board jurisdiction to investigate such conduct. FPA believes that these new definitions offer greater clarity to enforcement of the *Standards*.

B. 'Client' and 'Financial Planning Engagement'

Proposed definitions for "client" and "financial planning engagement" eliminate the reasonable reliance standard in the existing definitions, thus requiring mutually agreed upon professional services to be rendered in order for a financial planning engagement to exist. FPA supports these new definitions, which appear to clarify that both parties must agree that specific services will be rendered in order for a client-planner relationship to exist.

C. 'Fee-Only'

³ See *Statement and Purpose for Financial Planning Practice Standards*, p. 33, *CFP Board's Standards of Professional Conduct*.

The proposed definition of “fee-only” allows a certificant to describe his or her practice as fee-only if, and only if, all of the certificant’s compensation from client work comes exclusively from the clients in the form of fees. FPA generally supports this definition; however FPA recommends that the CFP Board provide specific guidance on how this definition affects certificants who receive 12b-1 fees or other sources of indirect third-party compensation. FPA also suggests reviewing Advisory Opinion 2003-1, which specifically references and applies the language from the current definition, and may require modification consistent with the new definition.

D. Fiduciary

FPA believes that it is imperative that CFP certificants be held to a high standard of care, and generally supports the proposed definition of fiduciary, “one who acts in utmost good faith, in a manner he or she reasonably believes to be in the best interest of the client.” As you know, there is no definition of fiduciary in the current *CFP Code*. Instead, Rule 202 mandates a general requirement that a financial planning practitioner shall act in the interest of the client and refers only once to fiduciary responsibilities.⁴

The proposed definition of fiduciary is clearly a step forward. However, FPA believes the definition is missing an important fiduciary component. Although the definition contains a duty of utmost good faith, it does not include a clearly stated duty of care. Fiduciaries generally owe their entrustors a duty of loyalty and a duty of care.⁵ The fiduciary duty of care requires that decisions on behalf of an entrustor be made after gathering relevant information, deliberating, and acting with “wisdom and caution.”⁶ FPA believes that including a duty of care would strengthen the proposed definition of fiduciary and is consistent with CFP Board’s goals of requiring a commitment to education, examination and experience in addition to ethics.

FPA also has specific concerns regarding when this fiduciary standard of care applies under the proposed *Rules of Conduct*.⁷ Proposed Rule 1.4 states that “when the certificant provides financial planning **or material elements of the financial planning process**, the certificant owes to the client the duty of care of a fiduciary as defined by CFP Board” (emphasis added). FPA strongly urges the CFP Board to provide additional clarity and formal examples regarding when a certificant could be considered to be providing “material elements” of the financial planning process.

We strongly urge the CFP Board to disregard the recent interpretative guidance by the Securities and Exchange Commission (“SEC”) regarding distinctions between financial planning

⁴ See Rule 103(e), requiring a CFP Board designee to act as a fiduciary when taking custody of a client’s assets.

⁵ 2 TAMAR FRANKEL & ANN TAYLOR SCHWING, *THE REGULATION OF MONEY MANAGERS: MUTUAL FUNDS AND ADVISERS* § 13.01[A][2], (2d ed. 2001).

⁶ *Id.*

⁷ FPA concerns regarding the application of the fiduciary standard of care are discussed in detail in Section VI of this letter.

and brokerage services⁸ in evaluating material element of financial planning. In the event that the SEC rule restricting the offer or delivery of financial planning is permanently vacated by the U.S. Court of Appeals for the District of Columbia Circuit,⁹ the SEC interpretative guidance would no longer be applicable.

If the CFP Board looks to SEC regulatory guidance in identifying material elements of financial planning, it should review earlier and more consistent descriptions of financial planning, such as IA Release No. 770. IA-770 provides an extensive description of core advisory services provided in a financial planning engagement.¹⁰

As a basis for additional guidance to certificants, FPA also suggests that the CFP Board consider using the recent findings of the FPA Fiduciary Task Force relating to a fiduciary standard of conduct as it applies to the activities of financial planners.¹¹ After reviewing the existing state of the law regarding standards of care that currently govern financial planners and other financial services providers, the Task Force recommended to the FPA Board of Directors that anyone providing financial planning services, implementing a financial plan, or holding out as a financial planner should assume the following five major responsibilities on behalf of the client:

- a.) placing the clients' best interest first;

⁸ See letter from Robert E. Plaze, Associate Director, Division of Investment Management to Ira D. Hammerman, SIA General Counsel (December 16, 2005) ("SIA Letter"). These four issues involved (1) advertisements; (2) the difference between financial planning and brokerage services; (3) dual capacities for dually registered firms; and (4) the use of certain educational or specialized training credentials.

⁹ See *Financial Planning Association v. Securities and Exchange Commission*, March 30, 2007, opinion by the U.S. Court of Appeals for the District of Columbia Circuit.

¹⁰ SEC Release IA-770 ((August 13, 1981) states in part

Financial planning typically involves the provision of a variety of services, principally advisory in nature, to individuals or families with respect to management of financial resources based upon an analysis of individual client needs. Generally, financial planning services involve the preparation of a financial program for a client based upon information elicited from the client as to the client's financial circumstances and objectives. Such information normally would cover present and anticipated assets and liabilities, including insurance, savings, investments, and anticipated retirement or other benefits. The program developed for the client typically includes general recommendations for a course of activity, or specific actions, to be taken by the client. For example, recommendations may be made that the client obtain insurance or revise existing coverage, establish an individual retirement account, increase or decrease funds held in savings accounts, or investment funds in securities. A financial planner may develop tax or estate plans for the client or may refer the client to an accountant or attorney for these services....

¹¹ The FPA Fiduciary Task Force is composed of representatives of many different constituencies within the financial planning community, including the CFP Board.

- b.) acting with utmost due care and in good faith;
- c.) not misleading clients;
- d.) providing full and fair disclosure of all material facts; and
- e.) disclosing and fairly managing all conflicts of interest.¹²

V. Code of Ethics and Professional Responsibility

FPA supports the revised language of the principles contained in the proposed *Code of Ethics*. The language captures the existing seven principles of the current *Code* but appears to achieve greater clarity and brevity.

VI. Rules of Conduct

A. General Disclosure Rules

Proposed Rule 2.1 replaces more detailed rules in connection with misleading advertising practices. Generally, it prohibits a certificant from communicating any false or materially misleading information regarding qualifications or potential benefits from services, and prohibits the omission of material facts. The patchwork of existing rules is somewhat confusing and offers different levels of disclosure, depending upon the nature of the service provided. Rule 402 applies general disclosure requirements to a certificant rendering professional services but does not require written disclosure unless required by law. The more comprehensive disclosure requirements of Rule 403 apply only to a certificant in a financial planning engagement. Both Rule 402 and 403 require disclosure of material information such as conflicts of interest, qualifications, and compensation structure. However, only Rule 403, which applies to a certificant in a financial planning engagement, requires a certificant to inform the client of his/her right to ask at any time for information about the certificant's compensation and requires a written disclosure statement. Given the existing 'reasonable reliance' standard for a client engagement, the application of both disclosure rules has always been unclear; FPA therefore welcomes the clarity and uniformity provided by proposed Rule 2.1.

Proposed Rule 2.2 specifies disclosures that must be made to prospective clients regarding compensation and conflicts of interest. It also requires a written agreement if financial planning or material elements of financial planning are to be provided. FPA notes two potential concerns with proposed Rule 2.2. First, the certificant may be able to avoid disclosure of **his or her own** payment incentives by disclosing only the overall compensation of the **firm** as provided for in proposed Rule 2.2(a)(i). Second, there appears to be no ongoing requirement to provide disclosures of material conflicts **after** the onset of the client engagement. The CFP Board notes that Rule 2.2(e) requires revision of written agreements to reflect changes of services offered or compensation arrangements, but does not make it clear that additional disclosure may be required as a result of changes in services or compensation. While disclosure of disciplinary events other than CFP Board actions, changes in ownership of a firm, or other material information is clearly required for prospective clients, it is not clear whether affirmative

¹² These responsibilities were drawn from a discussion of fiduciary duties of an adviser by SEC staff. See "Fiduciary Duty: Return to First Principles" at the Eighth Annual Investment Adviser Compliance Summit, Washington, D.C., February 27, 2006, Lori A. Richards, SEC Director of Office of Compliance Inspections and Examinations.

disclosure of material changes should be delivered to current clients. Under the Advisers Act, and as fiduciary advisers, investment advisers are required to notify clients of any material event or conflict in a timely manner, not just at the time of the required delivery of the disclosure document. FPA suggests that similar standards be applied to CFP certificants.

B. Disclosure of Disciplinary Events

Neither the current nor the proposed rules appear to require certificants to advise prospective clients of any certification suspension or revocation imposed by the CFP Board. Proposed Rule 4.6 requires disclosure of these events to current clients but not prospective clients. Proposed Rule 2.2 (c) could arguably be interpreted to require such disclosure; however, FPA recommends including explicit language to this effect.

The proposed Rules also omit an express requirement that certificants must notify the Board of any activities that could affect their right to maintain their certification, or to disclose material disciplinary actions to clients, such as:

- State or federal licensing or regulatory body censure, enforcement action, or arbitration proceeding;
- Investment adviser, securities, or insurance license revocation or suspension;
- Certain civil or criminal lawsuits filed against the certificant

FPA strongly encourages the CFP Board to include such a requirement in the *Rules of Conduct*, not just as a required self-reporting activity in the certification process. Certificants should be fully aware of an ongoing obligation to disclose specific disciplinary events to the Board and to the public. Such a requirement will enhance the investor protections contained in the *Rules*.

C. Fiduciary Duty

As stated previously, FPA generally supports proposed Rule 1.4, which requires a certificant to at all times place the interest of the client ahead of his or her own. FPA also supports the additional requirement in Rule 1.4 that a certificant providing financial planning or material elements of the financial planning process must act with the duty of care of a fiduciary as defined by the CFP Board. As noted earlier, FPA believes that requiring certificants to act in utmost good faith and in the best interest of the client when they are offering financial planning services significantly strengthens the *Rules of Conduct* and comports with the stated mission of the CFP Board, “to help people benefit from competent, professional and ethical financial planning” and to “[c]reate and enforce uniform standards of competence, practice and ethics of financial planners...”¹³ While we support the improved standard of care that places the clients’ interests first, FPA also urges the CFP Board to provide additional guidance regarding **when** a certificant provides “material elements of the financial planning process” and is thus subject to the fiduciary standard.

¹³ See CFP Board Mission Statement, <http://www.cfp.net/aboutus/mission.asp>.

FPA believes that the examples the CFP Board has provided as guidance regarding material elements of financial planning are an excellent first step.¹⁴ However, we encourage the CFP Board to formalize this guidance as a reference to certificants and consumers going forward, such as a FAQ or in the form of an interpretive opinion or release. In doing so, we urge the Board to consider the following question: Does Rule 1.4 allow a certificant to implement recommendations or monitor on behalf of clients outside of the fiduciary standard of care?¹⁵ We urge the Board to consider implementation and monitoring as an integral part of the financial planning process. We recommend further that the Board develop a process of providing additional formal guidance through advisory opinions, best practices guidelines, or by further defining “material elements” of the financial planning process.

D. Notification of Potential Rule Violations by Other Certificants

Current Rule 603 requires a certificant who has knowledge, i.e. no substantial doubt, that another certificant has committed a violation of the *Code of Ethics*, to promptly inform CFP Board of such a violation. The proposed *Rules of Conduct* do not include a similar provision requiring certificants to notify the CFP Board of ethics violations of other certificants. FPA urges the Board to consider retaining this provision for egregious violations of the *Code* of which another certificant is aware, to maintain existing consumer protections.

E. Written Agreement Requirement

Proposed Rule 1.3 includes a requirement that when a certificant’s services include financial planning or material elements of the financial planning process, the certificant or the certificant’s employer shall enter into a binding written agreement with the client governing the services that will be provided. FPA is not opposed to a requirement that the agreement between a certificant and a client be in writing as this could enhance enforceability and facilitate the disciplinary review process. However, we are concerned about the effect on *pro bono* client engagements which do not always include a written agreement.

FPA has developed a national *pro bono* program for the public that provides free professional services to a disadvantaged population of consumers who would not otherwise be able to afford to pay professional fees. As the *pro bono* program continues to expand, FPA wants to encourage the same standards apply to both *pro bono* and paying clients. Moreover, many charitable organizations and regulators are understandably concerned about fraud and with promises of free financial advice. Assuring them that the services will be provided by certificants who are subject to a strict code of ethics is an important criterion in evaluating the relationship.

FPA therefore urges the Board to clarify either in the *Code* itself or in an advisory opinion that the *Code of Ethics* and the *Rules of Conduct* apply to *pro bono* certificants in the same manner that they are applied to paying clients.

¹⁴ See Q: What activities fall under the category of “material elements of the financial planning process” and how will CFP Board make determinations in situations where an activity may or may not be a “material element?” in Frequently Asked Questions, http://www.cfp.net/aboutus/Exposure_Draft.asp.

¹⁵ For example, can a certificant complete a financial plan under a fiduciary standard of care and then revert to a purely sales role at the implementation stage when selling an insurance or securities product?

VII. Conclusion

FPA is pleased to offer its general support for the Second Exposure Draft of Revisions to the CFP Board's *Standards of Professional Conduct*. The proposal is a significant improvement over existing *Standards* and will enhance current protections for consumers and advance the profession of financial planning. The unequivocal requirement that CFP certificants must place the interest of their clients first at all times and the newly clarified fiduciary standard of care for certificants providing financial planning are huge steps forward for the profession after decades of debate. FPA strongly commends the CFP Board for its work on the revision and offers its continued support as the Board continues to update and interpret the proposed standards.

Sincerely,



Nicholas A. Nicolette, CFP®
President