

**Supplemental Report on
Financial Planner Standards of Conduct**

prepared by the

FPA FINANCIAL PLANNING STANDARDS OF CONDUCT TASK FORCE

for review by the

FINANCIAL PLANNING ASSOCIATION
BOARD OF DIRECTORS

August 16, 2007

A Report to supplement the Final Report on Financial Planner Standards of Conduct
prepared by the FPA Fiduciary Task Force on June 1, 2007.

FINDINGS & RECOMMENDATIONS

Copyright © 2007

by the

FINANCIAL PLANNING ASSOCIATION

TABLE OF CONTENTS

Findings and Recommendations2

Recommendations of the Fiduciary Task Force6

Glossary8

FPA Financial Planning Standards of Conduct Task Force Roster11

Developments Leading to the Formation of the Task Force12

FINDINGS AND RECOMMENDATIONS

The FPA Financial Planning Standards of Conduct Task Force was appointed by the Financial Planning Association's Board of Directors and is composed of representatives of many different constituencies within the financial planning community. The Task Force's goal was to examine the source of the "best interests of the client" standard of conduct and issues relating to its application to financial planners, generally, and to the Financial Planning Association's membership, specifically. The results of this examination were to serve as the basis for making recommendations to the FPA Board of Directors as they strive to construct and articulate a universal standard of care which is unambiguous and without exception, to which the financial planner will adhere and that the consumer can expect. The Task Force met via several telephone conference calls from May through July, 2007. The following *findings* and *recommendations* were developed in these calls.

Findings.

1. The current version of the Certified Financial Planner Board of Standards, Inc.'s *Code of Ethics* is applied to members of FPA through the FPA Bylaws.
2. The seven Principles of the FPA Code of Ethics are modeled after the Principles of the CFP Board's current *Code of Ethics* and are applicable to all FPA members – CFP® certificants and non-CFP certificants alike.
3. Under the provisions of FPA's current Code of Ethics and Bylaws, the CFP Board's recently adopted *Rules of Conduct* do not apply to FPA members who are not CFP certificants but who hold themselves out to the public as financial planners, thereby indicating an advisory relationship. Amendments to the FPA Bylaws are required to apply the *Rules of Conduct* to all FPA members in advisory relationships.
4. FPA Bylaws currently require all FPA members in advisory relationships to also abide by the CFP Board *Practice Standards*. All other members must simply abide by the seven Principles of the FPA Code of Ethics.
5. The five major responsibilities of a financial planner to his or her client listed in recommendation F of the FPA Fiduciary Task Force Final Report are commonly associated with the fiduciary standard of care as defined by the CFP Board; thus there is no material difference between the FPA "best interests of the client" standard of care and the CFP Board's fiduciary standard of care applied in the *Rules of Conduct* to certificants providing financial planning or material elements of the financial planning process to a client.

6. The CFP Board's *Rules of Conduct*, effective July 1, 2008, set forth adherence to a fiduciary duty of care when the certificant provides financial planning or material elements of the financial planning process, a term partly defined as acting "in the best interest of the client" per the CFP Board's release describing the final *Rules of Conduct*. [Fiduciary defined: "One who acts in utmost good faith, in a manner he or she reasonably believes to be in the best interest of the client."]
7. In addition, under the CFP Board's *Rules of Conduct*, effective July 1, 2008, a Certificant "shall at all times place the interest of the client ahead of his or her own."
8. The Task Force studied whether exposure can be created for the FPA's members, vis-à-vis their own clients, by adopting a Code of Ethics for members. A Code of Ethics does not create an independent cause of action. However, if a client has a cause of action for negligence (or professional malpractice), the Code of Ethics could be cited as evidence (non-conclusory) of an appropriate standard of care in the industry. If the Code of Ethics were clearly aspirational, however, it would be very weak evidence. Also, many trade associations have effectively used disclaimers that their Code of Ethics cannot be used as evidence of the standard of care.
9. It is possible for the FPA to have both "practitioner" and "non-practitioners" classes of membership. One standard of conduct could be adopted for practitioners, and another for non-practitioners.
10. The FPA has an enforcement committee – the "Ethics Committee" – which has powers to sanction: (1) suspend member listing in PlannerSearch; (2) suspend FPA membership; (3) terminate member listing in PlannerSearch; (4) terminate FPA membership. The FPA has no power to fine. FPA members have 60 days to appeal decisions in writing.
11. From the Fiduciary Task Force Preliminary Report: "[T]he financial planner shall possess the following five major responsibilities to the client: (1) A financial planner shall put the clients' best interests first; (2) A financial planner shall act with utmost due care and in good faith; (3) A financial planner shall not mislead clients; (4) A financial planner shall provide full and fair disclosure of all material facts; and (5) Financial planners shall disclose and fairly manage material conflicts of interest."

Recommendations. The Task Force approved the following recommendations to the FPA Board to be used in taking positions in future policy initiatives.

1. The FPA Code of Ethics should continue to be modeled after the CFP *Code of Ethics* and *Rules of Conduct* contained in the CFP Board *Standards of Professional Conduct*, effective July 1, 2008. Consistency between FPA and CFP Board standards of conduct will help to provide clarity for FPA members regarding their responsibilities to their clients.
2. The Code of Ethics of the FPA which embodies the best interests of the client standard should be aspirational for all classes of FPA members. However, for those members who are in an advisory relationship according to Paragraph D.1. of the FPA Fiduciary Task Force Final Report, this standard of care should be mandatory.
3. FPA Bylaws should be revised to clarify that every FPA member in an advisory relationship (both CFP certificants and other members in advisory relationships) according to Paragraph D.1. of the FPA Fiduciary Task Force Final Report, must abide by each of the following:
 - a. CFP Board's *Code of Ethics* (aspirational principles);
 - b. CFP Board's *Rules of Conduct* (binding rules including fiduciary standard of care);
 - c. CFP Board's *Practice Standards* (professional guidelines).
4. The exercise of informed judgment and the exercise of due diligence are vital components of the duty of due care.
5. A financial planner shall not mislead clients.
6. A financial planner shall disclose both professional and personal interests which may compete with the interests of the client. "Full and fair disclosure" shall include:
 - a. Compensation arrangements (including costs to clients, compensation to the financial planner and his or her employer);
 - b. A general summary of likely conflicts of interest;
 - c. A description of the services to be provided to the client;
 - d. The terms and conditions of the engagement;
 - e. The financial planner's and client's respective responsibilities; and
 - f. Other elements which are material to the engagement and services provided.
7. Most conflicts are dealt with through a combination of written policies and procedures and through disclosures. These components should be considered jointly. While the implementation of a policy may mitigate a conflict of interest, it does not

absolve the financial planner of the obligation to disclose the conflict of interest to his or her client.

8. As to the issue of “holding out”:
 - a. The presence of certification marks on a member’s business card or letterhead indicating an expertise in financial planning generally creates a reasonable expectation on the part of the consumer that all services provided by that member will be advisory in nature. However, the member may counter this expectation with especially clear disclosure that advisory services are not in fact being provided. All of the facts and circumstances are critically important in determining whether an advisory relationship has been established between the member and the consumer;
 - b. At the outset of a consumer relationship, where clear and adequate disclosure to the consumer has been made in advance, a member may offer non-advisory services and/or products to a consumer even though financial planning is one of the services available from the member, provided that a financial planning relationship did not previously exist with that consumer and that financial planning services are not provided to that consumer;
 - c. Notwithstanding the foregoing, if other facts and circumstances, including but not limited to oral and/or written communications to consumers describing the services offered by a member or the member’s firm, suggest that the member is predominantly offering financial planning or the material elements of financial planning, then the member is “holding out” and thereby creating the rightful expectation by the consumer that an advisory relationship exists;
 - d. This position on “holding out” is a transitional one which recognizes the realities of how the financial services business is conducted today, and specifically acknowledges the widespread marketing abuses intimating advice in relationships with consumers where no intention to meet the ensuing responsibilities of an advisory relationship exists. Further, it recognizes the intentionally misleading misuse and/or abuse of terms such as financial planner, financial adviser, financial counselor and financial consultant, causing many consumers to view these terms as virtually interchangeable;
 - e. This position is not meant to contradict any federal or state law or regulation or the common law. Members should be aware that, regardless of the opinion of this task force, broad fiduciary duties may nevertheless be imposed upon a

member with respect to a particular consumer under a variety of circumstances.

9. The Board should devote additional resources to study the development of a body of “CFP Case Law” independently or in conjunction with the CFP Board.

For Reference Purposes: Recommendations of the FPA Fiduciary Task Force

The work of the Financial Planning Standards of Conduct Task Force builds upon the recommendations made by the FPA Fiduciary Task Force. As a reference, these recommendations are restated below.

The FPA® Fiduciary Task Force undertakes the following *recommendations* to FPA’s Board of Directors as to positions which should be undertaken in future policy initiatives:

- A. The six-part financial planning process as it currently exists is adequately set forth in the July 2003 CFP Board’s Financial Planning Practice Standards.
- B. The definition of “personal financial planning subject areas” contained in the terminology section of the July 2003 CFP Board’s Financial Planning Practice Standards is reaffirmed.
- C. “Financial planning” shall include activities which relate to “retirement planning,” “estate planning,” “risk management planning,” and other portions of a comprehensive financial planning process, and the “best interests of the client” standard shall apply in each of those instances.
- D. The “best interests of the client” standard shall apply when a financial planner implements any portion or element of a financial plan presented by that financial planner to the client.
 - D.1. The “best interests of the client” standard arises out of an advisory relationship. An advisory relationship exists between an individual and a client when one or more of the following facts and circumstances are present:
 - (1) Either existing law (including both statutory and common law) or regulation dictate that the individual possesses a fiduciary duty to the client with regard to the advice provided to the client;

- (2) The nature of the services provided is financial planning, or one or more of the material elements of financial planning;
 - (3) The terms and conditions of the contract between the individual and the client include an express assumption of the individual's duty to act in the best interests of the client;
 - (4) The individual "holds out" as a financial planner (or similar terms), thereby creating the rightful expectation that an advisory relationship exists.
- E. The "best interests of the client" standard shall apply to persons holding out as financial planners or who otherwise create a reasonable expectation regarding an advisory relationship.
- F. When the circumstances set forth in Recommendations C (financial planning in any of the financial planning practice areas), D (implementation of a financial plan) or E (holding out as a financial planner) exist, professional standards of conduct shall apply to a financial planner in her or his services to a client. In such instances the financial planner shall possess the following five major responsibilities to the client:
1. A financial planner shall put the clients' best interests first;
 2. A financial planner shall act with due care and in utmost good faith;
 3. A financial planner shall not mislead clients;
 4. A financial planner shall provide full and fair disclosure of all material facts;
and
 5. A financial planner shall disclose and fairly manage all conflicts of interest.

GLOSSARY

Broker-dealer (BD). A broker-dealer is a company that trades in securities for customers as well as for its own account. In the United States, a broker-dealer is registered with the U.S. Securities and Exchange Commission pursuant to the Securities and Exchange Act of 1934. When executing trade orders on behalf of a customer, the institution is said to be acting as a broker. When executing trades for its own account, the institution is said to be acting as a dealer. The agents of a broker-dealer are referred to as *registered representatives*.

Compensation methods. *Financial intermediaries* may rely upon only one compensation method or may combine two or more methods. Common methods include:

Commissions. Some *financial intermediaries*, including many *broker dealer* firms and their *registered representatives*, receive their compensation based on commissions clients pay each time they buy or sell a security.

Hourly, fixed or retainer fees. Some *financial intermediaries*, including many financial planners, charge fees for their services which clients pay directly to the provider. They may be hourly fees, a flat fee, a retainer fee, or some combination thereof, for a particular service or range of services.

Percentage of assets under management. Some *financial intermediaries*, including most *registered investment advisers*, charge a fee based on a percentage of the assets in the client's account on which advice is provided.

Dual registrant. The term utilized to describe securities *broker-dealer* firms or their *registered representatives* when they are also registered as a *registered investment adviser* or *investment adviser representatives*.

Fiduciary. Generally, a person who is in a relationship of trust and confidence with a client and who owes the client broad duties of due care, utmost good faith, and loyalty. From the Latin *fiducia*, meaning "trust," a person (or a firm) who has the power and obligation to act for another (often called the beneficiary or entrustor or client) under circumstances which require total trust, good faith and honesty. The most common fiduciary is a trustee of a trust, but fiduciaries can include *registered investment advisers*, *insurance brokers*, attorneys, guardians, or anyone who undertakes to assist someone who places complete confidence and trust in that person or company. As set forth herein, under various circumstances *registered representatives*, *insurance agents*, and *financial planners* may be fiduciaries. Characteristically, the fiduciary has greater knowledge and expertise about the matters being handled.

Financial planner. Unlike the terms *registered investment adviser* (or *investment adviser representative*) and *broker dealer* (or *registered representative*), financial planner is not a legally defined term under federal law. However, it generally refers to providers who undertake the *financial planning process* for clients based upon their long-term goals.

Financial planning process. "Personal financial planning process" or "financial planning process" denotes the process which typically includes, but is not limited to, these six elements: establishing and defining the client-planner relationship; gathering client data including goals; analyzing and evaluating the client's financial status; developing and presenting financial planning recommendations and/or alternatives; implementing the financial planning recommendations; and monitoring the financial planning recommendations.

Financial planning subject areas. "Personal financial planning subject areas" or "financial planning subject areas" denotes the basic subject fields covered in the financial planning process which typically include, but are not limited to: financial statement preparation and analysis (including cash flow analysis/planning and budgeting); investment planning (including portfolio design, i.e., asset allocation and portfolio management); income tax planning; education planning; risk management; retirement planning; and estate planning.

Financial intermediaries. The term utilized to describe various participants in our financial markets which bring together issuers (i.e., corporations issuing stock, and/or governments or corporations issuing debt) and purchasers. While the term generally includes institutions such as commercial banks, savings and loans associations, credit unions, and mutual fund companies, in this Final Report five types of financial intermediaries were examined: *broker dealers* (and their *registered representatives*), *financial planners*, *insurance agents*, *insurance brokers*, and *registered investment advisers* (and their *investment adviser representatives*).

Investment adviser representative (IAR). The representative of a *registered investment adviser* firm. IAR's may use a variety of titles in addition to investment adviser, such as investment manager, investment counsel, asset manager, wealth manager, or portfolio manager.

Life insurance agent. Generally speaking, an individual who is licensed by a state to sell a life insurance product for one or more specific insurance companies. Generally, life insurance agents are deemed to act as the agent of the insurance company or companies he or she represents.

Life insurance broker. Generally speaking, a life insurance broker serves as the agent of his or her customer, acting in the customer's stead in soliciting, negotiating or otherwise obtaining insurance products best suited to the customer's needs

Registered investment adviser (RIA or IA). The term investment adviser is a legal term that describes a firm or individual who is in the business of giving advice about securities (the term "securities" includes stocks, bonds, mutual funds, and annuities) and is registered with either the U.S. Securities and Exchange Commission pursuant to the Investment Advisers Act of 1940 or a state regulatory agency pursuant to state law. Investment advisers provide ongoing management of investments based on the client's objectives. The representative of a registered investment adviser firm is legally referred to as an *investment adviser representative*.

Registered representative (RR). Individual salespeople employed by broker-dealer firms are often called stockbrokers and are officially referred to as registered representatives of the broker-dealer firm.

FPA FINANCIAL PLANNING STANDARDS OF CONDUCT TASK FORCE ROSTER

The FPA Financial Planning Standards of Conduct Task Force appointed by the FPA Board of Directors consists of the following individuals:

CHARLES G. HUGHES JR., CFP® (*Chairman*)
FREDERICK E. "RICK" ADKINS III, CFP®, CLU, ChFC, The Arkansas Financial Group, Inc.
BOB BROWN, CFP®, The Tax & Financial Group
MERCER BULLARD, J.D., President, Fund Democracy
JOHN L. DIXON, CFP®, ChFC, CLU, CEO, Mutual Service Corporation
HAROLD EVENSKY, CFP®, Evensky & Katz
RAY FERRARA, CFP®, Provis Management Group, LLC
DAVID J. GORDON, J.D., CFP®, CIMA, Senior V.P., Investments, Wachovia Securities
STEPHEN D. JOHNSON, CFP®, Johnson Marotta
NANCY JOHNSON JONES, CFP®, BKD Wealth Advisors, LLC
KEITH LOVELAND, J.D., Loveland Consulting
DANIEL B. MOISAND, CFP®, Spraker, Fitzgerald, Tomayo & Moisand
WILLIAM J. MORAN, CFP®, Ameriprise Financial
NICHOLAS A. NICOLETTE, CFP®, Sterling Financial Group
TOM L. POTTS, CFP®, Ph.D, Baylor University
BARBARA ROPER, Director of Investor Protection, Consumer Federation of America
MARTIN SIESTA, CFP®, ChFC, MSFS, Compass Wealth Management LLC
(liason to FPA Board of Directors)
NEIL A. SIMON, ESQ., Vice-President, Investment Adviser Association
NEAL SOLOMON, CFP®, CLU, ChFC, Managing Director, CCO, WealthPro LLC
PATRICIA D. STRUCK, Administrator, Department of Financial Institutions,
Division of Securities, State of Wisconsin
MARVIN W. TUTTLE, JR., CAE, Executive Director/CEO, Financial Planning Association
DICK WAGNER, J.D., CFP®, Worth Living, LLC
DUANE THOMPSON, Managing Director, Washington Office, FPA (*staff liason*)
ROBERT H. NEILL, ESQ., Assistant Director of Government Relations, FPA (*staff liason*)
RON A. RHOADES, J.D., CFP®, CCO, Joseph Capital Management, LLC (*Reporter*)

DEVELOPMENTS LEADING TO THE FORMATION OF THE FPA FINANCIAL PLANNING STANDARDS OF CONDUCT TASK FORCE.

The formation of the FPA Financial Planning Standards of Conduct Task Force arose following a series of events.

In May 2002 the Financial Planning Association published a white paper titled “Regulation of Financial Planners.” Written by Yale law professor Jonathan R. Macey, the white paper reviewed the existing regulatory climate for financial planners and examined options for future regulation as a distinct, stand-alone profession. At the time of publication the white paper was publicized to FPA’s membership and was made available on FPA’s website.

In April 2005 the U.S. Securities and Exchange Commission adopted its Final Rule exempting fee-based brokerage accounts from the fiduciary protections afforded to individual investors under the Investment Advisers Act of 1940. The FPA, assisted by other consumer protection and industry groups, challenged the Final Rule in U.S. District Court and oral arguments in the case were heard in early October 2006. On March 30, 2007, the U.S. Court of Appeals issued its decision in *FPA vs. SEC*, ruling 2-1 that the SEC exceeded its authority in the rule-making leading to the utilization of fee-based brokerage accounts. At the time of the writing of this Final Report the decision is not final, as the SEC may seek rehearing and/or appeal.

In response to renewed focus on the issue of whether and when fiduciary duties apply to financial planning activities, the FPA formed the FPA Regulation Task Force in 2005. The FPA Regulation Task Force was charged by then-President James Barnash to examine in detail the regulatory options raised by the 2002 white paper. Its extensive examination of the basic regulatory options led the FPA Regulation Task Force to the following conclusions (as contained in the “Recommendations on Future Regulation Of the Financial Planning Profession,” submitted by the FPA Board of Directors to the FPA membership on behalf of the Regulation Task Force, dated June 12, 2006:

- (1) Financial planning is not widely recognized as a profession, notwithstanding growing recognition of the CFP® and Certified Financial Planner™ marks as a sign of professionalism.
- (2) The public generally does not understand the financial planning process, nor is it able to easily identify a competent, ethical financial planner.
- (3) FPA currently does not have a long-term plan for addressing future regulation of the profession.
- (4) If financial planners are to be eventually recognized as a separate, stand-alone profession, continued subset regulation as investment advisers, brokers, insurance agents, or in banking departments will hinder reaching that goal.
- (5) The financial advisory industry - which straddles the securities, insurance and banking sectors - is highly fractured and, at this stage, disinterested, unwilling, or

- unable to reach consensus on the best form of regulation and what role financial planning should play in delivering advice to the public.
- (6) FPA must embrace change as inevitable and develop a strategic and opportunistic approach to establishing a framework for professional regulation, either through changes to law or within the legal system.

The FPA Regulation Task Force's recommendations set forth goals and objectives for future regulation that the FPA Regulation Task Force believes the FPA should rely on in crafting meaningful standards for a profession.

- A. Clear identification by the public of a licensed financial planner.
- B. Uniform competency and ethical standards for regulating the financial planning process.
- C. Exemption from duplicate regulation where licensed financial planners meet or exceed existing regulatory standards.
- D. *Fiduciary standard in law for financial planners.*
- E. Peer review process for financial planners.
- F. Statutory authority to censure, discipline or otherwise bar individuals from holding out as financial planners or practicing financial planning.
- G. A governance framework that includes professional representation.
- H. Said regulatory board is ultimately accountable to a public agency and/or legislative entity.

[*Emphasis added.*]

The FPA Regulation Task Force concluded, "Should the Board agree with the (FPA Regulation) Task Force's findings, in particular that the status quo is unacceptable and that a long-term plan is needed to clearly identify and set standards for the profession, then it believes buy-in from membership is critical."

On July 24, 2006 the CFP Board of Standards, Inc. (hereafter "CFP Board") released an exposure draft of proposed changes ("Exposure Draft") to its *Code of Ethics and Professional Responsibility* and *Financial Planning Practice Standards* for a 60-day public comment period. The Exposure Draft contained proposed revisions to CFP Board's ethical standards developed over a period of several years. The most controversial of the proposals was to provide for an "opt-out" from the fiduciary standard of conduct by agreement between the financial planner and the client. The CFP Board subsequently formed an Ethics Task Force to consider more carefully the 336 comments submitted. The Certified Financial Planner Board of Standards, Inc. issued on March 9, 2007, a *Second Exposure Draft* of proposed revisions to the ethical standards for CFP® certification March 9, 2007 for a period of public comment. CFP Board's Board of Directors and its Ethics Task Force hosted a Town Hall Meeting on March 30, 2007 regarding the *Second Exposure Draft*. The *Second Exposure Draft* states that all CFP® certificants who provide financial planning services will be held to

the duty of care of a fiduciary, as defined by CFP Board. The *Second Exposure Draft* also proposes that CFP® certificants “shall at all times place the interest of the client ahead of his or her own,” regardless of whether financial planning services are provided to the client. The *Second Exposure Draft*, with minor changes, was adopted in its final form by the CFP Board of Standards, Inc., to be effective July 1, 2008.

On September 26, 2006 the U.S. Securities and Exchange Commission (“SEC”) awarded a contract to the RAND Corporation (“RAND”) to conduct factual research and analysis for a major study comparing how the different regulatory systems that apply to broker-dealers and investment advisers affect investors. Verbal reports suggest that RAND's study will be issued in December 2007 to the SEC, and that it will contain fact-finding as to consumer understanding of the distinctions between various types of accounts, and account descriptions, but that the study will not contain comprehensive recommendations as to regulatory reform.

In October 2006 the FPA’s Board of Directors appointed a “Fiduciary Task Force” to further explore the legal and practical issues with regard to identifying and standards of conduct for those involved in the process of financial planning. A “Final Report” was issued by the task force on June 1, 2007, containing various findings and the following recommendations. The Fiduciary Task Force “Final Report” contained substantial background materials. It also contained an “Alternative View” expressed by some members of that task force.

The Financial Planning Association then appointed this FPA Financial Planning Standards of Conduct Task Force to recommend amendments to the FPA Code of Ethics in light of the Fiduciary Task Force findings and recommendations and to further explore various aspects of the “best interests of the client standard” recommended by the Fiduciary Task Force. An initial telephone conference was held in May 2007, and subsequent teleconferences, e-mails, and the utilization of an online discussion board followed. This Report is the culmination of those efforts.