

BY ELECTRONIC MAIL

September 25, 2006

Barton C. Francis, CFP®, CPA, CIMA
Chair
CFP Board of Standards, Inc.
1670 Broadway, Suite 600
Denver, CO 80202-4809

Re: Exposure Draft Revisions to CFP Board's Code of Ethics and Professional Responsibility and Financial Planning Practice Standards

Dear Mr. Francis:

On behalf of the Financial Planning Association ("FPA®"),¹ I would like to thank the Board of Governors for the considerable effort that has gone into the review of the CFP® Board of Standard's ("CFP Board") ethical standards. I appreciate the opportunity to offer formal comments on these significant revisions to the *Code of Ethics and Professional Responsibility* ("*Code of Ethics*") and *Practice Standards*. FPA is interested in any changes to the CFP Board's standards inasmuch as approximately 19,000 FPA members are CFP® certificants, and FPA's bylaws require all individual FPA members to adhere to essentially the same standards.

The principal questions that we asked in evaluating the proposed changes were:

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

In this context, these proposed revisions fail to enhance consumer protections or advance the profession of financial planning.

Overview

FPA notes the favorable market position of the CFP Board as the most widely recognized accrediting organization in the United States and the world for financial planners. As a result, any changes to its standards will have long-term effects on the future of the financial planning profession, for both CFP certificants and others who hold out as financial planners. Further, FPA appreciates the fact that the *Code of Ethics* must evolve over time as the profession matures and the practice of financial planning adapts to market and regulatory changes. However, the characterization that these proposed revisions are a periodic update of the

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.

standards belies the fact that the core tenets of the *Code* and *Practice Standards* have been essentially eliminated or made optional in this proposal.²

These changes constitute a complete reorganization of the *Code* with material changes that weaken, not strengthen, consumer protections. The changes have the potential to adversely affect an estimated five million clients of CFP certificants in the U.S. and potentially tens of millions of future clients. The changes will instantly dilute the value of the registered marks for each CFP certificant in terms of credibility to the public and regulators. Questions over an equivocal standard of care are already being raised in the consumer financial press, raising concerns over erosion of the marks over time.³ In addition, the revisions conflict with most certificants' views of what constitutes uniform standards for a profession that rise above statutory law, and that are not revised merely to comport with existing regulation.

FPA is indeed troubled that the proposed revisions to the *Code* were prepared behind closed doors over an extended period of time without the benefit of broad stakeholder or public input that could have identified alternative solutions to some of the problems noted in the CFP Board's explanation of the changes.

The exposure draft contains some positive, incremental changes that would help simplify the current structure of the *Code of Ethics*; however, these are overshadowed by the negative effects of sweeping changes that will have a broad impact on consumers and the profession. FPA recommends that the CFP Board withdraw the proposal, reconsider the impact of the proposed changes on the public, and establish an improved stakeholder review process akin to those of state and federal regulators with advanced explanation of significant changes, greater transparency, and maximized stakeholder input.

Because we believe that the overall proposal is severely flawed and should be withdrawn for further review, we will refrain from commenting on every issue of concern to FPA.⁴ Instead, our comments will focus on the changes that FPA finds to have the most potentially damaging consequences to consumers and the profession.

Proposed Duty of Care

In our review of the proposed revisions to the *Code*, the primary concern was the weakened standard of care required of certificants. The relevant proposed *Rules of Conduct* are as follows:

² See subheading "Most Content Remains Unchanged" in the Exposure Draft Overview.

³ See, e.g., "F' Word -- Fiduciary -- Unwanted on Wall Street," by Susan Antilla, Bloomberg, Sept. 11, 2006. According to Antilla, a personal finance columnist, "Most controversial among the [proposed ethics] changes: to allow planners to slither out of their fiduciary duties as long as the client signs an agreement that says he or she has agreed to settle for less. You might wonder how on earth a classy outfit like the CFP Board could wind up proposing a loophole out of high standards." See also "New Financial-Advice Rules Give Investors the Double Shuffle," by Thomas Kostigen, Marketwatch, Aug. 11, 2006; "When Duty Calls, or Doesn't, Financial Planners Duck Behind Fine Print on Fiduciary Role," by Chuck Jaffe, July 26, 2006.

⁴ For example, FPA has significant concerns about the elimination of a requirement that certificants report ethical violations to the Board, the revised definition of "fee-only," the elimination of a requirement to refer clients to outside professionals in certain instances, and the removal of a stated fiduciary duty of care for certificants with custody over client assets.

1. Scope, Nature and Content of the Engagement

1.1. The certificant and the client shall mutually agree upon the client's personal financial goal(s) that are relevant to the services to be provided by the certificant under the agreement between the client and the certificant. The certificant or the certificant's employer shall then enter into a binding written agreement with the client governing those services. This agreement may consist of multiple written components and must specify: ...

e. Whether the certificant will be held to the duty of care of a fiduciary under the agreement. It will be presumed that the duty of care of a fiduciary is to be applied to the professional judgments made by the certificant pursuant to the agreement unless the parties specify in their agreement a different legal standard governing these actions ...

1.2. Prior to entering into a written agreement, the certificant and the client must discuss as appropriate: ...

e. Whether the certificant will be held to the duty of care of a fiduciary under the agreement.

Proposed Rule 1.1 requires a CFP certificant to indicate, in writing, what legal standard will govern the agreement between the certificant and the client. If no legal standard is designated, the default standard will be that of a fiduciary. Accordingly, the practical result will be greatly varying standards of conduct for CFP certificants – not a universal strengthening of standards as the CFP Board suggests.⁵ It appears that the proposed changes are designed to minimize any significant change to industry requirements of CFP certificants, as evidenced by the elimination of their obligations under Rule 202.⁶ For example, certificants who are registered investment advisers and certificants who choose to accept fiduciary status will automatically be accorded such status under the proposed change. Many other certificants that the CFP Board did not cite in its rationale for the change, such as insurance agents or registered representatives of broker-dealers, likewise may not have to designate a lower standard of care that will apply to the client relationship, since a fiduciary disclaimer has already been incorporated in many customer account forms.⁷

If the certificant will not act as a fiduciary, the requirements of Rule 1.1 also shift the burden of disclosure to the client by requiring him or her to read the fine print in determining whether the certificant is obligated to place the client's interest first.⁸ There should be no equivocation in ethical parlance on this key point: a certificant should always act in the best interest of the client.

⁵ See "Q: Are the standards in the Exposure Draft weaker or stronger?" in *Frequently Asked Questions*, http://www.cfp.net/aboutus/Exposure_Draft.asp.

⁶ Rule 202 in the current *Code of Ethics* states that "A financial planning practitioner shall act in the interest of the client." Under this rule, it could be inferred that a fiduciary standard applied to the relationship between a certificant and a client even though it was not required to be stated in a written agreement.

⁷ It is puzzling as to why the CFP Board would strongly oppose the proposed exception for broker-dealers from the fiduciary requirements of the Investment Advisers Act of 1940 and then readily embrace a lower standard for certificants who are brokers under the proposed changes.

⁸ Rule 1.1 also requires the certificant to "discuss as appropriate" whether the certificant will be held to a duty of a fiduciary under the written agreement, but the exposure draft offers no explanation or guidance as to when such a discussion is appropriate. Would determinative factors depend on the financial sophistication of the prospective client, whether the disclaimer is prominent, or some other unknown factor that the CFP Board would promulgate in its contemplated "Best Practices?" And would the "Best Practices" be mandatory? The lack of transparency in the previous drafting process is cause for concern on whether such issues would be addressed in the next phase of CFP Board rulemaking.

Rule 202 should be restored to its original place as a common baseline of conduct for any certificant, no matter their employment.

We are pleased to report that many CFP certificants who are members of FPA and are registered representatives of broker-dealers support the concept of imposing a fiduciary standard requiring certificants to act in the best interests of their clients. These members have observed that this standard of care advances the profession and enhances protections for a confused public that is looking for clarity as they plan for retirement. FPA feels confident that brokerage firms that truly embrace comprehensive financial planning as a professional discipline will continue to evolve and allow registered representatives to act in a fiduciary capacity with respect to their financial planning and investment advisory activities. In fact, many firms already do so.

Proposed Duty of Care is in Conflict with CFP Board Mission

The weakened standard of care clearly conflicts 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...” (emphasis added).⁹ The revised standards are not uniform, nor do these standards benefit the public if an identical service can be offered under fiduciary standards in some instances and under literally no standards in other client engagements.¹⁰

FPA agrees with the CFP Board that uniform standards should be standard operating procedure. A uniform standard of care is essential to avoid confusion among consumers about the obligations of financial planners, evidenced by the interest of the SEC in conducting a study of current marketing practices in the securities industry and whether a fiduciary standard should be applied to the advice offered by brokerage firms.¹¹ A uniform standard of care is a basic requirement of any profession. The proposed optional fiduciary standard is simply not a viable solution. The existing standards trigger certain additional disclosure requirements based on whether a financial planning engagement exists, and we believe the CFP Board should revisit this approach as a way of determining disclosures, but not a standard of care, that might be unique to a certain area of practice within financial planning.

The CFP Board’s FAQ relating to the release of proposed *Code* revisions describes the proposed standards as strengthened, not weakened, because the Board has raised the “default duty of care standard to the fiduciary level.”¹² This statement is incorrect and, in fact, misleading in certain client scenarios. The current standards do not have a default duty that can be waived by any certificant. The proposed standard is optional, and can, in fact, default to the industry rules under which the certificant is acting. As such, the standards appear to have been lowered, not raised, and made far more confusing for clients.

⁹ See CFP Board Mission Statement, <http://www.cfp.net/aboutus/mission.asp>.

¹⁰ See, e.g., numerous state insurance laws do not require even a suitability standard in the sale of fixed annuity products to consumers.

¹¹ See adopting release, “Certain Broker-Dealers Deemed Not to Be Investment Advisers,” SEC Rel. Nos. 34-51532; IA-2376, April 12, 2005, Sec. V at 68. SEC asked “Should broker-dealers who provide investment advice but who are excepted from the Investment Advisers Act nonetheless be subject to the fiduciary obligations imposed by that Act on investment advisers?”

¹² See “Q: Are the standards in the Exposure Draft weaker or stronger?” in *Frequently Asked Questions*, http://www.cfp.net/aboutus/Exposure_Draft.asp.

Broker-Dealer Rule

As previously noted, FPA has serious concerns about the apparent effort to revise the Code standards to comport with an SEC staff interpretation (“Staff Letter”) from December 2005 relating to the so-called “Broker-Dealer Rule.”¹³ As communicated to the CFP Board in a previous letter,¹⁴ FPA believes the Staff Letter has seriously diminished previously existing investor protections and undermined the value of financial planning. It does so by allowing registered representatives to hold out as CFP certificants without being required to register as investment advisers, as long as they do not provide financial planning services. This is already resulting in greater public confusion regarding the differences between financial planning and full-service brokerage, and the non-uniform standards of conduct.

Instead of preserving a uniform standard of care, however, the Board has responded with an optional duty of care that allows certificants to continue to take advantage of the Broker-Dealer Rule loophole by allowing brokerage firms to heavily market the CFP designation to prospective clients while disclaiming the higher fiduciary standard of care in the written agreement.

Disclosure Requirements

Rule 402 currently requires certificants in a financial planning engagement to disclose “all material information relative to the professional relationship,” such as conflicts of interest and sources of compensation. The Rule also requires a certificant to inform the client of his/her right to ask at any time for information about the certificant’s compensation and provide a written disclosure statement. These requirements are eliminated in the revised standards. The proposed rules call for a vague, written description of compensation arrangements *as required by regulatory rules governing the engagement*. The new rules also require the certificant to *discuss* terms for offering proprietary investment products but do not require written disclosure of such terms or the potential conflicts of interest in receiving higher rates of remuneration based on the sale of proprietary products. FPA recommends that the CFP Board reconsider these changes and require a more concise standard with written disclosure of all material information related to sources of compensation, conflicts of interest and proprietary product offerings.

The proposed Rules 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 required self-reporting in the certification process, so that certificants will be clearly notified of

¹³ See Investment Advisers Act Release No. 2376 (Apr. 12, 2005).

¹⁴ See April 10, 2006, letter from Marvin Tuttle, Executive Director, FPA to Sarah Teslik, CEO, CFP Board of Standards, Inc.

their 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*.

Written Agreement Requirement

Within the proposed revisions, the new definitions of “client” and “financial planning engagement” specify two new requirements for a financial planning engagement to exist:

- 1) a client must sign a binding written agreement for financial planning services;¹⁵ and
- 2) professional services must be rendered for compensation.¹⁶

Proposed Rule 1.1 also includes a requirement that a certificant shall enter into a binding written agreement with a 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 and in which services are not rendered for compensation.

FPA has developed a national *pro bono* program for FPA members that is helping to define the profession among a population of consumers who would not otherwise have access to financial planners. The *pro bono* program continues to expand and FPA wants to ensure that *pro bono* clients of a certificant who is involved in the program receive the same protections under the Code that apply to a paying client. Moreover, many charitable organizations and regulators are concerned about fraud and often are initially suspicious of free financial advice. Assuring them that the services will be provided by certificants who abide by a strict code of ethics is an important criterion in evaluating the relationship. Ironically, if the proposed changes had been in effect during the CFP Board’s free financial planning clinic in Los Angeles in July, its own certificants would not have been subject to any standard of conduct.

It is critical that the *Rules* and *Principles* of the *CFP Code* apply to *pro bono* clients in the same way that they apply to paying clients for client protection as well as for public policy reasons. We urge the Board to clarify 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.

Practice Standards

An interesting question was recently asked by a member of the FPA Board: “What will ‘Standards’ stand for in the name ‘CFP Board of Standards, Inc.’ if there are no more *Practice Standards*?” The removal of the *Practice Standards* as a stand-alone component of the *Code of Ethics* will not enhance consumer protection or advance the profession of financial planning. The *Practice Standards* were intended to benefit consumers by assuring that the practice of financial planning is based on established norms of practice, to advance professionalism in financial planning, and to enhance the value of the financial planning process.¹⁷ The *Practice Standards* also establish baseline procedures to be followed in a financial planning engagement and help to distinguish the financial planning profession

¹⁵ See proposed definition of “financial planning engagement” in the Terminology section.

¹⁶ See proposed definition of “client” in the Terminology section.

¹⁷ See *Statement and Purpose for Financial Planning Practice Standards*, p. 33, *CFP Board’s Standards of Professional Conduct*.

and the financial planning process to the public from others that purport to offer comprehensive financial advisory services.

The CFP Board's rationale for removing the *Practice Standards* appears to be based on two primary concepts. First, the Board hopes to eliminate redundant and conflicting language in the current *Code* and *Standards*. This is a laudable goal. Second, it hopes to improve enforceability of the *Code* to preclude certificants from claiming that they are not engaged in "financial planning" and are thus exempt from review in the event of an ethics complaint. FPA recognizes the importance of clarifying areas of the *Code* that are in conflict or that are repetitive. We also support clarifying the practice of financial planning so that all certificants are held to a uniform, high standard of care. However, we are not convinced that the removal of the *Practice Standards* is required to achieve the desired clarifications. This problem can be resolved by revising the definition of a financial planning engagement in clarifying application of the *Standards* to the work of a certificant. It isn't necessary to eliminate or make the *Standards* optional simply because some certificants do not practice financial planning.

The Board also incorrectly asserts that the content of the *Code* remains "essentially unchanged in the Exposure Draft."¹⁸ FPA has carefully reviewed the Exposure Draft in light of this statement and strongly disagrees. In addition to eliminating numerous requirements of the *Code of Ethics*, certain components of the *Practice Standards* also have been eliminated. For example, nothing in the new proposed *Rules of Conduct* addresses how practitioners should apply the six-step financial planning process in a manner consistent with the previous *Practice Standards*, nor are the ten *Practice Standards* explicitly incorporated into the revised *Rules of Conduct*.

The *Practice Standards* were developed over a period of seven years with input from certificants, consumers, regulators and other organizations. The *Standards* were completed in 2002. Now the Board has proposed to remove them, or at least merge them into the *Rules of Conduct*. At worst, this may require only a cursory discussion of the applicable standards, or none at all, based on Rule 1.2. The CFP Board pledges to promulgate *Best Practices* and other guidelines to help in filling any gaps¹⁹ left by the removal of the *Practice Standards*. However, FPA finds it difficult to accept such logic when the original *Standards* took years to develop and *Best Practices* could take additional years if done properly.

FPA encourages continued deliberations relating to amendments to the *Practice Standards* to improve clarity and consistency and to eliminate conflicts; however we believe that certificants and the public should be involved in the process. We firmly believe that the *Practice Standards* should remain as a stand-alone section of the *CFP Code*, to serve as a simple, clear and concise guide for the public and for planners.

Public Process

The removal of the *Practice Standards* is illustrative of another major concern with the Exposure Draft – the absence of any transparent *process* in developing the draft revisions. As stated previously, FPA supports the regular review of the standards, and offers our assistance as you continue this process. However, the process for developing conceptual changes, promulgating changes to standards, receiving public comment, and adopting them has never been formalized in the 21-year history of the CFP Board. The lack of transparency in this, the first

¹⁸ See subheading "Reasons for Revisiting the *Code* and *Standards*" in the *Exposure Draft Overview*.

¹⁹ See subheading "Most Content Remains Unchanged" in the *Exposure Draft Overview*.

comprehensive overhaul of the original standards, suggests it is time for the CFP Board to separately develop an administrative procedure, just as the SEC and federal agencies are required to do, in providing a notice-and-comment period. We are troubled that the CFP Board has repeatedly represented these proposed revisions as a periodic update that strengthens standards and retains virtually all of the content of the current standards and rules when in fact it does not. FPA reiterates its view that any major reorganization of the *Code* should be properly vetted with all of its stakeholders: the public, regulators, consumer representatives, and with the certificants who have essentially added intangible value to the marks and want to be subject to professional standards, much like doctors, attorneys and accountants, not merely held to lesser industry norms.

The CFP Board referenced the 60-day comment period for SEC Rule proposals when it released the Exposure Draft with a similar 60-day comment period. FPA recommends that the Board adopt a process similar to the SEC process for amending rules or proposing new rules where stakeholder input is sought before a significant change is proposed.²⁰ The SEC also uses a so-called “concept release” approach in considering major changes to the regulated community. Any such process adopted by the CFP Board should, at a minimum, include: 1) a concept release including a thorough explanation of the problems and the need for change along with a request for stakeholder input and a comment period; 2) a specific exposure draft with an additional comment period after analysis and review of public comment; and 3) public access to all of the comments, posted in a timely manner on its website similar to the SEC model.

FPA would also like to see stronger communication with the Board and formal FPA representation on the task force developing changes to the *Code*, as these changes directly affect FPA members.

Conclusion

FPA recognizes and supports the benefits of periodic review and consideration of changes to the *Code of Ethics* and *Practice Standards*. However, a complete reorganization of the governing principles and rules for financial planners should be forthrightly acknowledged by the CFP Board as a major departure from a periodic review and should receive commensurate public comment. The current proposal should be withdrawn, redeveloped with a more inclusive process, and resubmitted to the public and certificants for further comment. Doing so will ensure that consumer protections are improved, and that advancement of the financial planning profession continues despite any diminution to industry standards. Most importantly, the Board must embrace a clear duty of care that requires all certificants to put the interests of their clients first and does not allow such standard to be optional. Protecting the public should be of utmost concern. FPA sincerely offers to work with the CFP Board to achieve a set of clear and comprehensive standards for certificants that will ensure clients’ interests are foremost and that will advance the profession of financial planning.

Sincerely,



Daniel B. Moisand, CFP®
President

²⁰ See the SEC concept release archive overview, <http://www.sec.gov/rules/concept.shtml>.