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August 21, 2017

Via Email to: comments@cfpboard.org

Certified Financial Planner Board of Standards, Inc.
1425 K Street, NW
Suite 800
Washington DC 20005

Re: Proposed Revisions to CFP Board's Standards of Professional Conduct

Dear Sirs / Madam:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on the CFP Board's Proposed Revisions to its Standards of Professional Conduct (the "Proposal").[2] SIFMA and its members share the CFP Board's interest in maintaining high conduct standards for our profession and ensuring that all financial advisors – regardless of whether they hold the CFP designation – act in the best interest of their customers. As recently as last month, SIFMA filed a comment letter with the SEC recommending that it: (i) establish a best interest standard for broker-dealers ("BDs") that encompasses a duty of loyalty, a duty of care, and enhanced up-front disclosures to investors, and (ii) closely coordinate its efforts with the Department of Labor ("DOL") to ensure that the conduct standards for BDs remain high, consistent, and harmonized across all regulatory regimes.[3]

While we believe the Proposal is well-intentioned, SIFMA and its members share significant concerns about numerous aspects of the Proposal. First, registered investment advisers ("RIAs") and BDs are already subject to extensive regulation and high conduct standards by the SEC, DOL, and FINRA, among others. The Proposal would duplicate, conflict with, and/or impose obligations in addition to, existing federal agency and SEC-approved rules governing the advisory activities of RIAs and BDs.

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[1] SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $18.5 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[2] Proposed Revisions to CFP Board's Standards of Professional Conduct (June 20, 2017), available at https://www.cfp.net/about-cfp-board/proposed-standards#resources.

[3] SIFMA comment letter to SEC re: Standards of Conduct for Investment Advisers and Broker-Dealers (July 21, 2017), available at http://www.sifma.org/issues/item.aspx?id=8589968054.

More specifically, the proposed standards would create different substantive duties – to the same client, in the same account, based on the exact same advice – depending solely upon the CFP status of the financial advisor. Because the Proposal imposes numerous requirements (including the *CFP Fiduciary*[4] standard and the *Practice Standards*,[5] among others), firms would face the choice of either applying the new CFP standards to all advice given by all financial advisors, or creating distinct advice regimes depending on the financial advisor's CFP status. In either case, it would require a significantly expensive, burdensome, and time-consuming undertaking by firms to accommodate the Proposal's hopefully unintended, complete reengineering of the regulatory regime. It would also result in greater investor confusion by layering on yet another differing standard of conduct – especially since such standard would be triggered *not* by the account type or services selected by the investor, but by the CFP status of the individual servicing the account.

We also take issue with the CFP Board's assertion in recent public forums that the Proposal is "business model neutral." The Proposal will clearly have a disproportionate, negative impact on CFP professionals who are BDs (who are not now subject to a regulatory fiduciary standard), as compared to RIA (who are). The Proposal will likewise have a disproportionate, negative impact on large, dually-registered, full service firms that offer a variety of brokerage and advisory products and services, as compared to smaller, financial planning only or investment adviser only firms.

Accordingly, in order to appropriately recognize the existing, robust regulatory regime, and to ameliorate the disproportionate impact of the Proposal, we recommend that the Proposal be modified to provide that if a CFP professional complies with his or her BD and/or RIA employer firm's policies and procedures, then such CFP professional shall be deemed to be in compliance with the new proposed standards.

Another significant concern with the Proposal is its timing. As explained in SIFMA's recent comment letter,[6] there is currently a concerted, bilateral, ongoing effort between the SEC and DOL to restore consistency, clarity and uniformity to the securities regulatory regime. Now is not an opportune time to introduce into the mix yet another set of new standards, adding to the confusion of both financial advisors and their clients. Thus, there is good reason to delay the Proposal pending the outcome of SEC/DOL coordination, and that is what we recommend.

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[4] *See infra* footnote 10. Note: Terms that are *italicized* in this comment letter are either defined terms, or terms of art, under the proposed CFP standards.

[5] *See infra* page 12.

[6] *See supra* footnote 3 and accompanying text.

Moreover, it is unclear why or how the CFP Board determined to significantly expand the current scope of its mission – which is to set standards for financial planning activity – and to essentially assume the role of regulator over all CFP professionals' advisory activity unrelated to financial planning. As the CFP Board acknowledges in its request for comment, the Proposal represents "a significant revision to the [existing] standards…."[7] Yet the Proposal fails to provide us with the essential, accompanying narrative providing the background, rationale and analysis of why significant revisions are deemed necessary and appropriate, and detailing the purpose, intention, and interpretive guidance around each proposed revision.

The Proposal is essentially the bare text of the new proposed standards – telling us the what, but without the benefit of sharing why it makes sense, or how it would work (or not) in practice. And neither the introductory video, nor the annotated version of the proposed standard, nor the FAQs that appear on the CFP Board of Standards website, adequately address the many thorny definitional and interpretive questions raised by the Proposal.[8]

The Proposal appears to conflate all *Financial Advice* with *Financial Planning*,[9] which one could interpret to require a financial advisor to provide *Financial Planning* services each time he or she dispenses *Financial Advice*. And, if that is not the case, then what *Financial Advice* does not require *Financial Planning*? In addition, the Proposal's rebuttable presumption that all *Financial Advice* must be accompanied by *Financial Planning* ignores the central role of customer choice, and in many cases, would contradict client *Engagement* agreements in which the *Scope of Engagement* explicitly excludes *Financial Planning* services.

Because the Proposal is insufficiently developed, and the record is incomplete, our ability to comment comprehensively and specifically is somewhat limited. Accordingly, we further recommend that the CFP Board review and address all comments received on this initial Proposal, and then redraft and re-propose, if necessary and appropriate, with the benefit of a complete record at a later, more appropriate time.

SIFMA's further comments on the Proposal are set forth below:

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[7] *See* https://www.cfp.net/about-cfp-board/proposed-standards.

[8] *Id.*

[9] *See infra* footnotes 11 and 32.

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I. SIFMA opposes the proposed expansion of a CFP professional's obligation to act as a fiduciary not only when providing financial planning, but also when providing any financial advice to a client.

Under the current CFP standards, CFP professionals are required to act as a *CFP Fiduciary*[10] when providing financial planning. Under the proposed standards, however, CFP professionals "must at all times act as a *CFP Fiduciary* when providing *Financial Advice*"[11] to a client. SIFMA's members strongly recommend against applying the *CFP Fiduciary* duty to all *Financial Advice* for the following reasons:

1. The Proposal would duplicate, conflicts with, and/or impose obligations in addition to, existing SEC and FINRA rules governing the advisory activity of RIAs and BDs.

With respect to the provision of investment advice to retail clients, both RIAs and BDs are pervasively regulated at the federal level. RIAs are already subject to a comprehensive fiduciary standard under the Investment Advisers Act of 1940 (the "Advisers Act"), which applies to RIAs' entire relationship with their clients and prospective clients.[12] BDs, on the other hand, are subject to a duty of fair dealings with clients under the Securities Exchange Act of 1934 (the "Exchange Act") and FINRA Rules, which includes the obligation to make suitable

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[10] Under the proposed CFP standards, a *CFP Fiduciary* duty means: "(a) Duty of Loyalty. A CFP professional must: (i) Place the interests of the Client above the interests of the CFP professional and the CFP Professional's Firm; (ii) Seek to avoid Conflicts of Interest, or fully disclose Material Conflicts of Interest to the Client, obtain the Client's informed consent, and properly manage the conflict; and (iii). Act without regard to the financial or other interests of the CFP professional, the CFP Professional's Firm, or any individual or entity other than the Client, which means that a CFP professional acting under a Conflict of Interest continues to have a duty to act in the best interest of the Client and place the Client's interest above the CFP professional's. (b) Duty of Care. A CFP professional must act with the care, skill, prudence, and diligence that a prudent professional would exercise in light of the Client's goals, risk tolerance, objectives, and financial and personal circumstances. (c) Duty to Follow Client Instructions. A CFP professional must comply with all objectives, policies, restrictions, and other terms of the Engagement and all reasonable and lawful directions of the Client."

[11] Under the proposed CFP standards, *Financial Advice* is defined as: "A. A communication that, based on its content, context, and presentation would be reasonably viewed as a suggestion that the Client take or refrain from particular course of action with respect to: 1) the development or implementation of a financial plan addressing goals, budgeting, risk, health considerations, educational needs, financial security, wealth, taxes, retirement, philanthropy, estate, legacy, or other relevant elements of a Client's personal or financial circumstances; (2) the value of or the advisability of investing in, purchasing, holding, or selling Financial Assets; (3) investment policies or strategies, portfolio composition, the management of Financial assets, or other financial matters; (4) the selection and retention of other persons to provide financial or Professional Services to the Client; or B. The exercise of discretionary authority over the Financial Assets of the Client."

[12] *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963) (construing the Advisers Act as imposing a federal fiduciary duty on RIAs). *See also Transamerica Mortgage Advisors, Inc.*, 444 U.S. 11, 17 (1979) ("[T]he Act's legislative history leaves no doubt that Congress intended to impose enforceable fiduciary obligations.").

recommendations, ensure best execution, and observe high standards of commercial honor and just and equitable principles of trade.[13] While BDs are generally not subject to a fiduciary duty under the federal securities laws, the suitability obligation generally requires a BD to make recommendations that are "consistent with the best interests of his customer."[14]

Both the RIA and BD conduct standards have been well articulated and developed over many decades by the SEC, FINRA, and the courts through rules, interpretive statements, opinions, and orders issued in enforcement actions. Thus, it is unnecessary and would be inappropriate to layer upon RIAs and BDs the *CFP Fiduciary* standard, which would in varying circumstances duplicate, conflict with, and/or impose obligations in addition to, the existing, SEC-approved, RIA and BD conduct standards.

2. The Proposal does not adequately consider the proliferation of conduct standards, and current SEC/DOL efforts to reconcile the regulatory regime.

In December 2015, the CFP Board formed the *Commission on Standards* to recommend changes to the CFP standards. In developing recommendations, the CFP Board directed the *Commission on Standards* to consider, among other things, "[f]ederal and state statutes, rules and regulations related to the provision of investment advice…" including the Advisers Act, Exchange Act, FINRA Rules, and ERISA.[15]

As discussed above, the Advisers Act, Exchange Act, and FINRA Rules already comprehensively regulate the advisory activity that the new proposed CFP standards seek to encroach and layer upon. Moreover, in the ERISA context, on June 9, 2017, the fiduciary definition in the DOL's Fiduciary Rule (the "DOL Rule"), and the Impartial Conduct Standards in the Best Interest Contract Exemption and the Principal Transactions Exemption, became applicable to firms relying on these exemptions.[16] Consequently, BDs who make recommendations to investors to rollover into an Individual Retirement Account ("IRA") or who currently service IRA accounts must now satisfy the Impartial Conduct Standard.

The Impartial Conduct Standard requires: (1) providing advice in the best interest of the client, (2) charging no more than reasonable compensation, and (3) avoiding materially

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[13] *See* SEC Study on Investment Advisers and Broker-Dealers (January 2011), at iv., available at https://www.sec.gov/news/studies/2011/913studyfinal.pdf.

[14] *Id.* at 59; FINRA Regulatory Notice 11-02 (January 2011), at 7 n. 11, available at http://www.finra.org/sites/default/files/NoticeDocument/p122778.pdf; FINRA Rule 2111 (Suitability) FAQs, at A7.1, n. 69 (citing numerous cases) available at https://www.finra.org/industry/faq-finra-rule-2111-suitability-faq.

[15] CFP Board, *Commission on Standards*, Scope of Review and Recommendations, at p. 1, available at https://www.cfp.net/about-cfp-board/commission-on-standards.

[16] 82 Fed. Reg. 66 (April 7, 2017), available at https://www.gpo.gov/fdsys/pkg/FR-2017-04-07/pdf/2017-06914.pdf.

misleading statements.[17] The remaining conditions and requirements of the DOL Rule do not become effective until January 1, 2018 (the "effective date").

On June 1, 2017, SEC Chairman Clayton issued a request for public comment on the standards of conduct for RIAs and BDs (the "Request"), in light of the recent applicability of the DOL Rule, and the recently expressed interest by both the SEC and the DOL in regulatory coordination on this important issue.[18] As previously discussed, on July 21, 2017, SIFMA submitted a comment letter to the SEC in response to the Request.[19]

On July 6, 2017, the DOL issued a Request for Information Regarding the Fiduciary Rule (the "RFI"), which seeks comment on the potential impact of the DOL Rule and any changes that may be needed.[20] On July 14, 2017, SIFMA filed a comment letter with the DOL, urging the DOL and SEC to work together to craft a better rule, and urging the DOL to extend the January 1, 2018 effective date by a minimum of 24 months in order to provide sufficient time for the SEC and DOL to collaborate.[21] On August 9, 2017, SIFMA submitted a second comment letter to DOL in response to the specific questions raised by the RFI.[22]

Thus, the SEC and DOL are now squarely in the midst of a process to coordinate their regulatory efforts in order to restore consistency and clarity to the regulatory regime for BDs and RIAs. They require sufficient time to review public comments in response to their requests and determine whether and how to incorporate such commentary into their joint efforts. This is a valuable and necessary federal regulatory process that should be allowed to proceed without interference or competition from conduct standards, like the CFP Board's proposed standards, among others,[23] that are not national in scope and application to all RIAs and BDs.

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[17] 81 Fed. Reg. 68 (April 8, 2016), 21077, available at https://www.gpo.gov/fdsys/pkg/FR-2016-04-08/pdf/2016-07924.pdf.

[18] Public Statement by Chairman Jay Clayton, *Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers* (June 1, 2017) available at https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31.

[19] *See supra* footnote 3 and accompanying text.

[20] DOL Request for Information Regarding the Fiduciary Rule, 82 Fed. Reg. 31278 (July 6, 2017), available at https://www.federalregister.gov/documents/2017/07/06/2017-14101/request-for-information-regarding-the-fiduciary-rule-and-prohibited-transaction-exemptions.

[21] SIFMA comment letter to DOL, Reference: RIN 1210-AB82 (July 13, 2017), available at http://www.sifma.org/issues/item.aspx?id=8589968061.

[22] SIFMA comment letter to DOL, Reference RIN 1210-AB82 (August 9, 2017), available at http://www.sifma.org/issues/item.aspx?id=8589968235.

[23] *See also* Nevada Senate Bill No. 383, approved by the Governor, Chapter 322 (effective July 1, 2017), available at https://www.leg.state.nv.us/Session/79th2017/Reports/history.cfm?ID=847 (imposing a statutory fiduciary duty on BDs and IAs in Nevada).

3. The Proposal should take a "wait and see" approach, pending the outcome of current federal regulatory coordination and rulemaking.

As the video clip touting the new proposed standards explains, the process to develop the proposed CFP standards started about a year-and-a-half ago with a listening tour. At that time, the CFP Board declared that "the time has come to revise the standard."[24]

In the last year-and-a-half, however, a *lot* has changed. We have the DOL Rule (now applicable, in part), we have a pending January 2018 effective date, and we have a concerted, bilateral SEC/DOL effort underway to restore consistency, clarity and uniformity to the regulatory regime. If the CFP proposal were to proceed now, it would add yet another new standard into the mix, creating an even more confusing regime for both financial advisors and their clients. There is no compelling reason why the proposed CFP standards should move forward at this particular juncture, but as discussed above, there is a strong case that efforts to advance the proposed CFP standards should stand-down, and await the outcome of final SEC and DOL rulemaking.

4. The Proposal appears to exceed the scope of the CFP Board's and the *Commission on Standards*' mission and mandate, which are to set standards for financial planning activity.

As stated in the current CFP standards,[25] the CFP Board maintains professional standards "in the financial planning profession" and establishes practice standards for CFP professionals "engaged in financial planning." The Preamble to the proposed standards reinforces this seemingly narrow mandate as it describes its purpose as setting "standards for delivering financial planning" and advancing "financial planning as a distinct … profession."[26] Likewise, the CFP Board charged the *Commission on Standards* with recommending new standards for "financial planning."

Neither the CFP Board's mission, nor the explicit text of the current or new proposed CFP standards, nor the charge of the *Commission on Standards*, appear to provide a foundation

[24] CFP Board, Video Clip, Proposed Revisions to CFP Board's Standards, available at https://www.cfp.net/about-cfp-board/proposed-standards.

[25] CFP Standards of Professional Conduct, Introduction, available at https://www.cfp.net/for-cfp-professionals/professional-standards-enforcement/standards-of-professional-conduct.

[26] Proposed CFP Standards of Conduct, Preamble, available at https://www.cfp.net/docs/default-source/for-cfp-pros---professional-standards-enforcement/2017-proposed-standards/final-standards-for-public-comment.pdf?sfvrsn=2.

or basis for the CFP Board to engage in setting standards for activities beyond the scope of financial planning. Yet, that is precisely what the new proposed standards would do.

The new standards purport to cover not only non-financial planning related advisory activity, but also extend to allowable compensation, and cybersecurity and privacy protocols (i.e., matters beyond the scope of the CFP Board's authority and, in the case of the latter two items, only weakly related to interaction between the client and the CFP professional). As discussed above, the foregoing requirements would also duplicate, conflict with, and/or impose obligations in addition to, the high standards and protocols that firms already have in place, and it would be inappropriate to indirectly impose these burdens on SIFMA member firms for the sake of a standard applicable to individual CFP professionals. For the foregoing reasons, the new proposed standards should be appropriately curtailed and limited to financial planning activity.

5. The CFP Board acknowledges that it would be inappropriate to impose a fiduciary duty on a CFP professional's brokerage activity unrelated to financial planning.

The CFP Board has previously acknowledged that many CFP professionals engage in business and brokerage activity unrelated to financial planning, and "it would be inappropriate for CFP Board to impose a fiduciary standard in such situations."[27] The CFP Board further explained that "[i]f a [CFP professional] is selling an individual product such as a security, but not selling the product as part of an overall financial plan, CFP Board would not consider the [CFP professional] to be engaged in personal financial planning."[28] The "CFP Board's fiduciary standard is reserved for financial planning services …."[29]

[27] Letter from Michael P. Shaw, Esq., Managing Director, CFP Board to David T. Bellaire, General Counsel, Financial Services Institute (August 23, 2008), at p. 2, available at https://www.financialservices.org/uploadedFiles/FSI/Advocacy_Action_Center/State_Issues/FSI_Member_Briefing_CFP_Board_Response_8-23-08.pdf.

[28] *Id.* *See also* CFP Board, Frequently Asked Questions, Question 1-12 (Financial Planning) ("A standard suitability review conducted in association with a transaction – a review that takes into consideration such basic elements as the client's age, net worth and risk tolerance – does not typically reach the level of financial planning or material elements of financial planning."), available at https://www.cfp.net/for-cfp-professionals/professional-standards-enforcement/compliance-resources/frequently-asked-questions/financial-planning/#Q1-1.

[29] CFP Board, Frequently Asked Questions, Question 2-1 (Fiduciary Duty), available at https://www.cfp.net/for-cfp-professionals/professional-standards-enforcement/compliance-resources/frequently-asked-questions/fiduciary-duty/#Q2-1 .

6. Existing CFP standards already contemplate specific disclosures for client engagements that do not involve financial planning.

Under existing CFP standards, for client engagements that do not involve financial planning, the CFP professional must disclosure orally:

a. "Contact information for the CFP professional, and the firm with which the CFP professional is associated;
b. Any information about the CFP professional or the firm with which the CFP professional is associated that could materially affect the client's decision to engage the CFP professional;
c. ***The CFP professional's*** and client's ***obligations and responsibilities*** (emphasis added);
d. The compensation that the CFP professional, the CFP professional's firm, and/or any third party may earn;
e. How costs of products and services are determined;
f. Whether and how the CFP professional may benefit from the client's decision;
g. If the CFP professional offers proprietary products and the terms under which such products may be offered; and
h. Other likely conflicts of interest."[30]

Thus, existing CFP standards already make clear through disclosure when a CFP professional is acting in his or her CFP-certified financial planner capacity, and when he or she is not. Consequently, it is unnecessary to apply the *CFP Fiduciary* duty outside of the context of financial planning activity to cover all investment advice provided by the CFP professional. The current standards are sufficient to alleviate any potential investor confusion about the relevant role that the financial advisor is playing, and the standard of conduct applicable to that role.

II. SIFMA opposes the proposed rebuttable presumption that CFP professionals are required to provide *Financial Planning* when providing *Financial Advice*, as well as the proposed redefinition of *Financial Planning*.

The Proposal seek to significantly expand the scope of a CFP professional's conduct that is subject to the CFP Board's authority by (i) creating a rebuttable presumption that all *Financial Advice* must include *Financial Planning*, thus requiring the CFP professional to comply with the revised *Practice Standards for the Financial Planning Process* (the "*Practice Standards*")

[30] CFP Board, Frequently Asked Questions, Question 4-2 (Disclosure – Non-Financial Planning), available at https://www.cfp.net/for-cfp-professionals/professional-standards-enforcement/compliance-resources/frequently-asked-questions/disclosure---non-financial-planning/.

whenever they give *Financial Advice*;[31] and (ii) redefining *Financial Planning*[32] in a manner that encompasses essentially all *Financial Advice*.[33]

1. SIFMA opposes the rebuttable presumption that the *Practice Standards* apply.

The revised *Practice Standards* in the Proposal require the following seven steps, each of which includes their own requirements:

Practice Standards for the Financial Planning Process
1. Understanding the client's personal and financial circumstances,
2. Identifying and selecting goals,
3. Analyzing the client's current course of action and potential recommendation(s),
4. Developing the financial planning recommendation(s),
5. Presenting the financial planning recommendation(s),
6. Implementing the financial planning recommendation(s), and
7. Monitoring progress and updating.

The Proposal lists five factors that the CFP Board will weigh to determine whether or not to apply the rebuttable presumption. Conspicuously absent from the factors, however, are the most relevant factors, namely the client *Engagement* and *Scope of Engagement*, which would be the best evidence of whether the client wanted financial planning services to accompany the particular investment advice at issue in the first place. These relevant factors merit inclusion.

Moreover, the proposed standards squarely place the burden of rebutting the presumption on the CFP professional, but provides no guidance on how the CFP professional might satisfy that obligation at the time the CFP professional is giving the advice. We presume that the CFP Board does not intend the rebuttable presumption standard to be a hindsight determination in the context of a disciplinary proceeding but rather, a conscious and deliberative determination made at the point of advice. The proposed standards should provide detailed guidance on how to document a rebuttal of the presumption.

At a minimum, such guidance should provide that the presumption may be definitively rebutted by reference to a client *Engagement* agreement, in which the *Scope of Engagement*

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[31] Under the proposed CFP standards, "[t]here is a rebuttable presumption that a CFP professional providing *Financial Advice* is required to integrate relevant elements of the Client's personal and/or financial circumstances in order to act in the Client's best interests."

[32] Under the proposed CFP standards, *Financial Planning* is defined as: "A collaborative process that helps maximize a Client's potential for meeting life goals through *Financial Advice* that integrates relevant elements of the Client's personal and financial circumstances."

[33] *See* footnote 11, defining *Financial Advice* under the proposed standards.

explicitly does not include *Financial Planning* services. Otherwise, the Proposal's rebuttable presumption provision would effectively eliminate customers' choice as to what services they want, and do not want, to receive from a CFP professional, and would inappropriately discourage CFP professionals from servicing traditional brokerage clients or clients seeking more limited services (e.g., 529 plan clients, etc.). Notwithstanding the Proposal, CFP professionals and their clients should still be able to agree in advance as to the scope and extent of services to be provided, including the exclusion of *Financial Planning* services.

Finally, as with the imposition of the *CFP Fiduciary* standard on all investment advice, it is likewise unnecessary and would be inappropriate to layer upon RIAs and BDs the CFP Board's revised *Practice Standards*, which, again, would in varying circumstances duplicate, conflict with, and/or impose obligations in addition to, the existing, SEC-approved, RIA and BD conduct standards.[34]

2. SIFMA opposes the redefinition of *Financial Planning*.

As stated above, under the proposed standards, *Financial Planning* is defined as: "A collaborative process that helps maximize a Client's potential for meeting life goals through *Financial Advice* that integrates relevant elements of the Client's personal and financial circumstances." In turn, the "[r]elevant elements of personal and financial circumstances" include the client's need for or desire to "develop goals, manage a budget, identify and manage risk, address health considerations, provide for educational needs, achieve financial security, preserve or increase wealth, manage taxes, prepare for retirement, pursue philanthropic interests, and address estate and legacy matters."

In other words, *Financial Planning* is now defined so broadly that every time an RIA gives personalized investment advice, or a BD makes a recommendation, they meet the definition of *Financial Planning*. In doing so, the proposed standards essentially eliminate the concept of financial planning as a separate and distinct function as it has long been commonly understood to be. The CFP Board asserts that *Financial Advice* is a category broader than *Financial Planning*. Yet the proposed standards introduce an entirely new confusion over what *Financial Advice* is excluded from the definition of *Financial Planning*. The CFP Board should provide that necessary clarity.

Because, as currently drafted, all investment advice meets the definition of *Financial Planning*, RIAs and BDs who are CFP professionals would be subject to *not only* the *CFP Fiduciary* standard, and the CFP *Practice Standards*, every time they give advice, *but also* all of the other duties in the proposed standards. These other duties include, among others:

[34] For example, in conflict with *Practice Standards* Step 7 (Monitoring progress and updating), BDs have no regulatory obligation to monitor their accounts after advice is given.

Duties Owed to Clients

1. Fiduciary Duty (as discussed above)
2. Competence
3. Diligence
4. Sound and Objective Professional Judgment
5. Integrity
6. Professionalism
7. Comply with the law
8. Confidentiality and privacy
9. Disclose and manage conflicts of interest
10. Provide information to a prospective client
11. Provide information to a client
12. Document
13. Duties when communicating with a client
14. Duties when representing compensation method
15. Duties when recommending, engaging, and working with additional persons
16. Duties when selecting, recommending, and using technology
17. Refrain from borrowing or lending money and commingling financial assets.

Duties Owed to CFP Board

1. Definitions
2. Refrain from adverse conduct
3. Reporting
4. Provide narrative statement
5. Cooperation
6. Compliance with terms and conditions of certification and license.

As with the imposition of the *CFP Fiduciary* standard and the CFP *Practice Standards* on all investment advice, it is likewise unnecessary and would be inappropriate to layer upon RIAs and BDs all of the additional duties above, which, again, would in varying circumstances duplicate, conflict with, and/or impose obligations in addition to, the existing, SEC-approved, RIA and BD conduct standards.[35]

[35] For example: (1) In conflict with Duty to Clients no. 9 (Disclose and manage conflicts of interest), BDs have no current regulatory obligation to make such point-of-advice disclosures, or obtain the client's informed consent; (2) In conflict with Duty to Clients no. 10 (Provide information to a prospective client), BDs do not currently generate or deliver a Form ADV disclosure document; and (3) In conflict with Duty Owed to Clients no. 12 (Document), BDs are not required to document their recommendations.

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III. CFP Board should provide guidance to CFP professionals on how they may comply with the proposed standards, regardless of what policies and procedures their employers may or may not adopt to facilitate compliance.

The proposed standards would ostensibly apply to individual CFP professionals. But the subtext of the proposal is that the RIA and BD firms that employ these CFP professionals are being asked to make significant changes to their policies and procedures that will take significant time, money and effort, and that may create significant, new regulatory, litigation and operational risks for these firms.

SIFMA's member firms have already expended significant resources to adapt to the DOL Rule (as applicable today) and there remains substantial uncertainty about how the rule will ultimately look in its final form. Consequently, many firms are quite reluctant to, at the same time, undertake yet another process to reengineer their systems and procedures to accommodate the proposed CFP standards. Accordingly, we recommend that the Proposal be modified to provide that if a CFP professional complies with his or her BD and/or RIA employer firm's policies and procedures, then such CFP professional shall be deemed to be in compliance with the new proposed standards.

In addition, some firms are considering making changes to their systems and procedures, for example, through the client *Engagement* and *Scope of Engagement*, among other things, to clarify that although the firm employs CFP professionals, the firm, consistent with existing regulatory standards, shall not apply the *CFP Fiduciary* standard or *Practice Standards* to the firm's taxable brokerage accounts. We would be interested to hear how the CFP Board might respond to this eventuality. Specifically, we recommend that the CFP Board provide guidance on how individuals may comply with the proposed standard, regardless of their employer's policies and procedures.

Regardless of such guidance, however, the compliance burden would still be borne by our member firms, as a BD may not allow its registered representatives to provide unsupervised, written disclosures to clients that relate to how services will be provided, given that such materials may be considered "Retail Communications" or "Correspondence" subject to FINRA Rule 2210 review requirements.[36] Thus, larger firms that offer a variety of brokerage and advisory products and services would probably need to develop a process to review materials created by registered representatives regarding how they provide services as a CFP professionals.[37]

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[36] FINRA Rule 2210 (Communications with the Public), available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=10648.

[37] Such a process would probably not be required in a financial planning only or investment adviser only organization, as the Advisers Act rules do not have the same review or retention standards as FINRA Rule 2210.

IV. SIFMA's members are concerned that regulators may conflate the proposed CFP standards with regulatory standards, introducing new confusion and uncertainty into the regulatory regime.

Take, for example, the firms described above who may take the position that although their firms employ CFP professionals, the firms shall not apply the *CFP Fiduciary* standard or *Practice Standards* to the firms' taxable brokerage accounts. Would these firms be creating a misleading advertising problem for their CFP professionals?

CFP professionals use the CFP designation on their business cards and webpages. If they are employed by a firm that does not adopt the CFP standards, could FINRA take the position that their business cards/webpages are misleading under FINRA Rule 2210 (Communications with the Public)?

V. The proposed standards should explicitly state that they are not designed to be a basis for legal liability to any third party or regulator.

When the CFP Board updated their standards in 2008, the updated standards clearly stated that they "are not designed to be a basis for legal liability to any third party."[38] The CFP Board stated that "… it would be inappropriate for other regulatory bodies to interpret or enforce [CFP] rules. In the case that CFP Board is made aware of attempts by other bodies to enforce CFP Board's rules against a CFP certificant, CFP Board will provide the CFP certificant with documentation that explains CFP Board's jurisdiction over its rules and affirm that the rules are not meant to create liability in relation to anybody other than CFP Board."[39]

We request that the CFP Board include the same or substantially similar disclaimer language in the current proposed standards to the effect that the proposed standards are not designed to be a basis for legal liability to any third party or regulator.

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[38] FSI Member Brief, *CFP Board Standards of Professional Conduct Raise Serious Concerns for Independent Financial Advisors and Broker-Dealers*, at p. 3 (April 17, 2008), available at http://www.financialservices.org/uploadedFiles/Member_Briefing_on_CFP_Board_Standards_04-17-08.pdf.

[39] Letter from Michael P. Shaw, Esq., Managing Director, CFP Board to David T. Bellaire, General Counsel, Financial Services Institute (August 23, 2008), at p. 3, available at https://www.financialservices.org/uploadedFiles/FSI/Advocacy_Action_Center/State_Issues/FSI_Member_Briefing_CFP_Board_Response_8-23-08.pdf.

VI. The reporting duties to the CFP Board are burdensome and duplicative of existing regulatory obligations, and the narrative statement obligations raises privilege and discovery concerns.

The current standards require reporting to CFP Board within 10 days of any conviction of a crime or suspension or bar. The proposed standards, however, expand reporting to CFP Board within 30 calendar days to include, among other things, if the CFP professional has: been subject of a regulatory investigation, or a regulatory finding, a civil action, or an arbitration award or settlement involving the CFP's conduct; been terminated for cause or permitted to resign; been the subject of or been named in a customer complaint alleging sales practice violation of $15,000 or more; filed for personal bankruptcy; or failed to satisfy liens. These obligations are duplicative of the FINRA U-4/U-5 and BrokerCheck reporting obligations, and will create operational burden and expense to implement.

Under the proposes standards, the CFP professional must also provide to the CFP Board a narrative statement that describes the material facts underlying the reportable matter. Such a statement raises concerns for members as it would not be subject to attorney-client privilege and may also be subject to subpoena by third parties.

VII. Client benefits should be excluded from the definition of *Sales-Related Compensation* for fee-only advisors.

Under the proposed standards, a CFP professional may represent his or her compensation method as "fee-only" only if: a) The CFP professional and the CFP professional's firm receive no *Sales-Related Compensation*; and b) *Related Parties* receive no *Sales-Related Compensation* in connection with any professional services the CFP professional or the CFP professional's firm provides to clients.

The Proposal defines *Sales-Related Compensation* as "more than a de minimis economic benefit for purchasing, holding for purposes other than providing Financial Advice, or selling a Client's Financial Assets, or for the referral of a Client to any person or entity. *Sales-Related Compensation* includes, for example, commissions, trailing commissions, 12(b)1 fees, spreads, charges, revenue sharing, referral fees, or similar consideration." Excluded from the definition of *Sales-Related Compensation* are: i) Soft dollars (any research or other benefits received in connection with Client brokerage that qualifies for the "safe harbor" of Section 28(e) of the Securities Exchange Act of 1934); ii) Reasonable and customary fees for custodial or similar administrative services if the fee or amount of the fee is not determined based on the amount or value of Client transactions; or iii) The receipt by a Related Party solicitor of a fee for soliciting clients for the CFP professional or the CFP professional's Firm.

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Many CFP professionals that charge clients only an asset-based fee and that operate as independent investment advisors will want to qualify for the CFP fee-only designation. Many of these CFP professionals, however, receive benefits from custodians based on the total client assets held at the custodian ("client benefits"). The examples of *Sales-Related Compensation* in the Proposal are at the transaction and/or product level, and there is a specific carve-out for soft dollars. Client benefits should not be treated as *Sales-Related Compensation*, but should be carved-out like soft dollars. Unlike commissions and other *Sales-Related Compensation*, client benefits are at the custodial relationship level and are not tied to any specific transaction, product, or client. Accordingly, we recommend a specific carve-out for client benefits from the definition of *Sales-Related Compensation*.

In addition to being fundamentally different from *Sales-Related Compensation*, client benefits are still covered by the Proposal and are appropriately dealt with under Section A.15 (*Duties When Recommending, Engaging and Working with Additional Persons*). Since client benefits are available to an RIA based on a client's choice to maintain his or her assets at a particular custodian, any advice an RIA provides to the client about the choice of custodian raises a potential conflict of interest. This type of conflict is common to RIAs and already requires full and fair disclosure. Section A.15(a)(ii) of the Proposal also requires disclosure of the recommendation of a custodian and any client benefit an RIA would receive from that custodian. SIFMA strongly supports full disclosure by RIAs to their clients of all potential conflicts, including those related to the choice of custodian.

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If you have any questions regarding the foregoing, please contact the undersigned at 202.962.7300.

Sincerely,

Kevin M. Carroll

Kevin M. Carroll
Managing Director and Associate General Counsel

cc: David W. Grim, Director, Division of Investment Management, SEC
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