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Invested in America

January 31, 2018

Via Email to: comments@cfpboard.org

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

Re: SIFMA comment re: CFP Board's Revised Proposed Standards of Conduct

Dear Sirs / Madam:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on the CFP Board's Revised Proposed Standards of Conduct (the "Revised Proposal").[2] As we stated in our initial comment letter on the CFP Board's Initial Proposed Standards of Conduct, we share the CFP Board's interest in ensuring that financial advisors act in the best interest of their customers.[3]

The Revised Proposal includes a few changes but fails to address our members' most significant concerns. As a threshold matter, the CFP Board has repeatedly stated that it endeavors to be an organization that is "business model neutral" by giving due consideration to the different business models that employ or contract with CFP certificants.[4] The substance and timing of the CFP Board's proposed changes, however, contradict that assertion.

[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] CFP Board's Revised Proposed Standards of Conduct (December 20, 2017), available at https://www.cfp.net/docs/default-source/for-cfp-pros---professional-standards-enforcement/2017-proposed-standards/CFPBoard_Revised_Proposed_Standards.

[3] SIFMA comment letter to CFP Board dated August 21, 2017 (the "Initial Comment"), available at https://www.sifma.org/resources/submissions/proposed-revisions-to-cfp-boards-standards-of-professional-conduct/.

[4] *See, e.g., Certified Financial Planners Reveal How They are Paid*, TheStreet.com (Oct. 16, 2013) ("CFP Board is business and compensation model neutral"), available at https://www.thestreet.com/story/12793799/1/certified-financial-planners-reveal-how-they-are-paid.html.

The Revised Proposal removes the rebuttable presumption that the *Practice Standards for the Financial Planning Process* apply.[5] In doing so, the Revised Proposal recognizes that not all *Financial Advice* entails financial planning that requires application of the *Practice Standards*. Rather, only *Financial Advice* that incorporates *Financial Planning* would require application of the *Practice Standards*.

Notwithstanding the removal of the rebuttable presumption, however, the Revised Proposal continues to require that the *Practice Standards* apply whenever a CFP certificant provides (i) *Financial Planning*, or (ii) *Financial Advice* "that requires integration of relevant elements of the client's personal and/or financial circumstances in order to act in the client's best interest." This remains a considerable overreach.

With respect to the first prong above, the Revised Proposal continues to define the term *Financial Planning* in an unacceptably vague and overbroad manner, as follows: "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." The proposed definition would essentially sweep all personalized investment advice and broker recommendations within its scope, and thereby eliminate financial planning as a separate and distinct function, as the CFP Board, the financial planning profession, and regulators, among many others, have always historically defined it to be. Far from protecting investors, this eliminates investor choice when it comes to selecting a financial advisor. A CFP certificant would be forced to provide, and perhaps even charge for, additional financial planning activities even if the customer only wants and requires investment recommendations or investment management services.

Recommendation: ***The CFP Board should re-define Financial Planning in a manner that clearly establishes a bright line distinction between Financial Advice and Financial Planning, or alternatively, the CFP Board should retain its existing guidance and rules that define Financial Planning as an entirely separate and distinct function from general financial advice.***

With respect to the second prong above, every investment recommendation made to a customer in a brokerage account must, at a minimum, satisfy the know-your-customer and suitability obligations set forth in FINRA Rules 2090 and 2111, respectively. The know-your-customer and suitability obligations are critical to ensuring investor protection and promoting fair and ethical dealing with customers. The know-your-customer rule requires firms to "use reasonable diligence, in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer…" The suitability rule requires firms to

[5] Italicized terms in this comment letter are either defined terms or terms of art in the proposed CFP Board standards.

"have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence … to ascertain the customer's investment profile." The rule further explains that a "customer's investment profile includes, but is not limited to, the customer's age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and any other information the customer may disclose … in connection with such recommendation."

The know-your-customer and suitability obligations can very easily be read and interpreted as falling within the CFP Board's proposed construct as *Financial Advice* "that requires integration of relevant elements of the client's personal and/or financial circumstances in order to act in the client's best interest." Thus, under the CFP Board proposal, every investment recommendation made in a brokerage account would require application of the *Practice Standards*. This cannot be the intended result.

Recommendation: ***The CFP Board should clarify that merely following the regulatory requirements of the know-your-customer and suitability rules when making an investment recommendation does not constitute Financial Planning, or otherwise trigger application of the Practice Standards.***

The annotated commentary to the Revised Proposal states that the CFP Board's proposed standards – like the current standards – are not designed to be a basis for liability to any third party, and no third party is intended to be a third-party beneficiary of such standards.[6] Yet, why does this language appear only in the commentary and not in the text of the proposed standard itself? This language is explicitly included in the current standards, and should likewise be retained in the text of the proposed standard, so that our members may properly invoke this limitation on liability in arbitration, regulatory, and judicial proceedings.

Recommendation: ***The CFP Board should explicitly state in the text of the Revised Proposal that the proposed standards are not designed to be a basis for liability to any third party, and no third party is intended to be a third-party beneficiary of such standards.***

The Revised Proposal's modest overall changes fail to provide sufficient relief for our members and their customers, and fail to address many of the most significant concerns that we raised in our Initial Comment.[7] Accordingly, we hereby reassert those same concerns, and

[6] *See* https://www.cfp.net/docs/default-source/for-cfp-pros---professional-standards-enforcement/2017-proposed-standards/CFPBoard_Revised_Proposed_Standards_Annotated_Commentary.pdf, at p.12.

[7] Some of those concerns include, among others, that the proposed standards inappropriately exceed the scope of the CFP Board's mission and mandate and inappropriately extend well beyond financial planning activity; and as discussed in greater detail above, the proposed definition of *Financial Planning* is unacceptably vague and grossly overbroad, and would encompass essentially every investment recommendation made in a brokerage account.

incorporate by reference our Initial Comment herein. Rather than repeating here all the same points that we raised in our Initial Comment, this comment will focus on our continuing top-line concerns and recommendations, as follows:

The timing remains premature. The CFP Board states that it expects to release its final standards by the end of the first quarter of 2018, and that the standards would take effect January 1, 2019. The CFP Board further states that it sees no reason to defer its standards pending potential SEC fiduciary rulemaking.[8]

As we stated in our Initial Comment, however, there is good cause to delay.[9] That remains true today. Since we filed our Initial Comment, the DOL has extended the applicability date of the Best Interest Contract from January 1, 2018 until July 1, 2019.[10] This delay gives the SEC the time necessary to coordinate with the DOL and publish its own best interest standard, which would apply to financial advice in all brokerage accounts, not just retirement accounts.[11]

Unlike the CFP Board proposal, the SEC's best interest standard will apply to all financial advice provided by all brokers – not just those with the CFP designation. The SEC standard will almost certainly have some formulation of a duty of care, a duty of loyalty, and enhanced up-front disclosures. It is possible that many, if not most or all, of the CFP Board's concerns that precipitated its rule proposal would be addressed by the SEC's new standard. There is no good reason not to wait and see, and thereby avoid imposing conflicting, duplicative, or unnecessary additional compliance burdens on CFP certificants and their firms.

Moreover, a primary purpose of the SEC's prospective rulemaking – expected later this year – is to alleviate retail investor confusion about the duties owed to customers by brokers and advisers.[12] If the CFP proposal proceeds now, however, it would add yet another new standard

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[8] *See* https://www.cfp.net/docs/default-source/for-cfp-pros---professional-standards-enforcement/2017-proposed-standards/CFPBoard_Revised_Proposed_Standards_Annotated_Commentary.pdf, at p.12.

[9] Initial Comment at pp. 7 – 9, available at https://www.sifma.org/resources/submissions/proposed-revisions-to-cfp-boards-standards-of-professional-conduct/.

[10] 82 Fed. Reg. 56545 (Nov. 29, 2017), available at https://www.gpo.gov/fdsys/pkg/FR-2017-11-29/pdf/2017-25760.pdf.

[11] *See, e.g., Fiduciary Rule Poised for Second Life Under Trump*, The Wall Street Journal (Jan. 10, 2018). *See also* SEC Regulatory Agenda (SEC intent to propose an investment advice standard within a year), available at https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=3235&Image58.x=57&Image58.y=24&Image58=Submit.

[12] In 2008, the SEC commissioned a study by the RAND Corporation that focused on retail investors' understanding of the differences in duties owed to customers by brokers and advisers. The study made clear that the convergence – over the past two plus decades – of broker and investment adviser activity in the investment advice space was generating confusion among investors. At the same time, it presented an opportunity to eliminate, or render irrelevant, such confusion by establishing a uniform standard. *See* ANGELA A. HUNG ET AL., SEC. & EXCH.

into the mix, creating an even more confusing regime for retail investors. In effect, by frontrunning the SEC rulemaking, the CFP Board would be directly undermining the SEC's efforts to establish clear, consistent and uniform standards of conduct governing brokers and advisers – for the benefit of retail investors.

Recommendation: ***The CFP Board should set-aside its current proposal; focus on participating in the SEC rulemaking process to help establish an optimal, nationwide, best interest standard for all financial advisors – not just CFP certificants; and thereafter, revisit whether the Revised Proposal is still necessary or appropriate in light of the newly enhanced SEC standards.***

Recommendation: ***Alternatively, if the CFP Board refuses to delay its process pending the completion of the SEC rulemaking process, then the CFP Board should amend the Revised Proposal to provide that compliance with the standards of conduct imposed by the primary regulator of the CFP certificant's employer shall be deemed to constitute compliance with the proposed CFP Board standards.***

The Revised Proposal would duplicate, conflict with, and/or impose obligations in addition to, existing federal agency and SEC-approved rules governing financial advisors.

As explained in detail in our Initial Comment, registered investment advisers ("RIAs") and broker-dealers ("BDs") are already pervasively regulated by the SEC, the DOL (with respect to retirement plans and accounts), and in the case of BDs, by FINRA, among others. Over more than eight decades, the conduct standards for RIAs and BDs have been well articulated and well developed through rules, interpretive statements, opinions, and court orders, and both regulatory regimes provide strong, substantive protections for investors.

Thus, it is unnecessary and would be inappropriate for the CFP Board to encroach upon the federal regulatory regime by imposing on CFP certificants the CFP *Fiduciary Duty*, as well as the other *Duties Owed to Clients*, when they provide *Financial Advice* that does not involve *Financial Planning*. Doing so would in varying circumstances duplicate, conflict with, and/or impose obligations in addition to, the existing SEC-approved RIA and BD conduct standards.

The Revised Proposal, for example, will impact CFP certificants' use of the CFP designation on their business cards and webpages because the CFP Board *Fiduciary Duty*, as applied to *Financial Advice* provided to taxable brokerage accounts, differs from and conflicts with the current regulatory standard applicable to such advice – namely suitability, as set forth in FINRA Rule 2111. To the extent FINRA cannot determine whether or how a CFP certificant

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COMM'N, INVESTOR AND INDUSTRY PERSPECTIVES ON INVESTMENT ADVISERS AND BROKER-DEALERS (2008) *available at* https://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf.

who uses the CFP designation on his or her business card is satisfying the *Fiduciary Duty*, then such business card could be deemed false or misleading under FINRA Rule 2210 (Communications with the Public).

Recommendation: ***The Duties Owed to Clients in the Revised Proposal should not apply to all Financial Advice, but should be limited to when a CFP certificant provides Financial Planning services to a customer.***[13]

The Revised Proposal will have a disproportionately negative impact on broker-dealers and large dually registered firms.

While RIAs are already subject to a fiduciary duty under the Investment Advisers Act of 1940, and can satisfy the point-of-advice disclosure requirements under the Revised Proposal by delivering their Form ADV Parts 2A and 2B to the customer, as discussed above, BDs have no such existing disclosure regime to cover these requirements.

First, as a practical matter, CFP certificants at a BD cannot independently satisfy the *Fiduciary Duty* or point-of-advice disclosure obligations under the Revised Proposal. Registered representatives cannot provide unsupervised written disclosures to customers because such disclosures would likely be considered "Retail Communications" or "Correspondence" subject to supervisory approval, review by FINRA, and recordkeeping obligations under FINRA Rule 2210 (Communications with the Public).[14]

Moreover, if the registered representative provided such disclosures orally (which would be inadvisable in any event), it could still trigger a recordkeeping obligation by the firm because as a legal matter, Rule 17(a)-4 under the Securities Exchange Act requires member firms to keep a record of *"all communications … by the member … relating to its business as such…."*[15]

Either way, the point-of-advice disclosure obligations under the Revised Proposal would create new recordkeeping obligations that differ from and are in addition to those established under the Securities Exchange Act.[16] As such, if the CFP Board were a state actor, the Revised

[13] Moreover, as discussed in greater detail above, the Revised Proposal defines *Financial Planning* is a manner that is vague and grossly overbroad, and that should be revised to clearly delineate the difference between financial planning services and general financial advice.

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

[15] 17 CFR §§ 240.17a-4(b)(4).

[16] Notably, the Revised Proposal removes the requirement for pre-engagement disclosures to a prospective customer in response to commentator statements that such disclosures are not required of broker-dealers under SEC and/or FINRA rules, and implementation and supervision of such disclosures would be cost-intensive, burdensome and in some cases unworkable.

Proposal would be preempted by Section 103 of the National Securities Markets Improvement Act of 1996 ("NSMIA").[17] The central purpose of this NSMIA preemption provision was to ensure uniform and consistent record-keeping obligations across the fifty States, as established by the SEC. Although the CFP Board may not be subject to NSMIA's preemption provisions, it's Revised Proposal nevertheless directly undercuts Congress's purpose in enacting the statute.

Because CFP certificants at a BD cannot independently comply with the proposed standards, the compliance burden would necessarily fall on our member firms. And, because the proposed CFP standards are triggered not by the account type or services selected by the customer, but by the CFP status of the individual servicing the account, BD firms would face the unenviable choice of either creating a special disclosure/compliance/supervisory regime for CFP certificants only, or applying the new CFP standards to all advice given by all financial advisors. In either case, it would require a significantly expensive, burdensome, and time-consuming undertaking by our member firms to build the compliance and supervisory systems and procedures to accommodate the Revised Proposal.

Likewise, the *Practice Standards for the Financial Planning Process* impose an obligation to state whether the CFP certificant has account monitoring responsibilities, which is not a requirement under FINRA's suitability rule. Consequently, broker-dealer firms will be required to incur significant costs to amend their existing customer agreements in order to meet this obligation.

Moreover, the Revised Proposal continues to require reporting to the CFP Board that duplicates existing FINRA requirements for updating a registered representative's Form U-4/U-5 and CRD record, thereby imposing new and additional operational burdens and implementation expenses on broker-dealers.

Finally, we remain concerned that the required "Narrative Statement" that describes the material facts underlying the reportable matter will be subject to discovery by plaintiffs' attorneys, and is not subject to the attorney-client privilege or attorney work product doctrine.

Based on the foregoing, the Revised Proposal is not "business model neutral." Rather, it clearly will have disproportionately negative impact on CFP certificants who are associated with a BD or a dually-registered, full service firm that offers a variety of brokerage and advisory products and services, as compared to smaller, financial planning only or investment adviser only firms.

[17] Section 103 of NSMIA expressly preempts states from enacting regulations relating to making and keeping records "*that differ from, or are in addition to, the requirements in those areas established under [the Exchange Act]*." 15 U.S.C. §780(i)(1).

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Recommendation: ***To alleviate the heavy burden on BDs and dually registered firms, and to ensure consistency with the purposes of NSMIA, the proposed standards should limit the disclosure requirements for CFP certificants associated with a BD to those required under existing federal securities laws and FINRA Rules. We further recommend that the Narrative Statement be eliminated.***

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Finally, the CFP Board should take notice that given the heavy burdens that would be imposed on our members by the CFP proposal in its current form, and given the likely significant costs that will be imposed on our members to comply with the upcoming SEC rulemaking, our members will certainly prioritize compliance with the SEC rules and other regulatory requirements, and may have very limited resources, ability, and/or willingness to address new CFP requirements. Moreover, the burdens of the CFP proposal, coupled with the CFP Board's failure to address our member firms' most significant concerns about it, may cause firms to reevaluate their relationship with the CFP Board, including, without limitation, considering discontinuing their practice of reimbursing CFP certificants for the costs of training, testing, continuing education, and membership, and exploring alternate designations and certifications.

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: Dalia Blass, Director, Division of Investment Management, SEC
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