



December 1, 2023

Via CFP Board web portal

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

**Re: SIFMA comment re: CFP Board's
Proposed Revisions to Sanctions Guidelines**

Dear Sir / Madam:

The Securities Industry and Financial Markets Association ("**SIFMA**")¹ appreciates the opportunity to comment on the CFP Board's proposed revisions to its sanctions guidelines ("**Proposal**").² As you know, SIFMA member firms employ tens of thousands of CFP certificants ("**Certificants**"), representing a significant percentage of the total number of Certificants, which current stands at over 97,000.³ These Certificants provide a wide variety of products and services on behalf of their firms, and are subject to extensive regulatory oversight by the SEC, FINRA, and state securities and insurance regulators, among others. They are also subject to robust supervision by the firms with which they are associated.

The Proposal would significantly increase the recommended/default sanction for many offenses under the CFP Board's Sanctions Guidelines ("**Guidelines**"). For most of the listed violations, the Guidelines would now provide a heightened default sanction, and shift the burden to the Certificant to prove mitigating circumstances for a lesser sanction. The Guidelines would also allow for the CFP Board to apply a higher sanction if it finds certain aggravating factors.

¹ SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate on legislation, regulation, and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. 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 <https://www.cfp.net/news/2023/09/cfp-board-requests-comments--on-revised-sanction-guidelines-and-fitness-standards>.

³ <https://www.cfp.net/knowledge/reports-and-statistics/professional-demographics#:~:text=The%20CFP%C2%AE%20professional%20demographic%20data%20below%20is%20drawn,certification%20renewal%20cycle.%20Number%20of%20CFP%C2%AE%20professionals%2089%2C753>.

Introduction

Before sharing our specific comments on the Proposal, it is important to highlight our industry's growing concern with CFP Board's evolving policies and practices. As we have stated over many years, our primary concern is that although CFP Board is a private credentialing organization, it increasingly purports to function and act as a regulator. In doing so, CFP Board has imposed and continues to impose significant supervisory, compliance, regulatory and legal risks on the firms that employ Certificants.

As you know, Certificants and their firms are already subject to extensive regulation by the SEC, FINRA, and state securities and insurance regulators, among others. Each of these regulators subject Certificants to investigations for prospective violations of their rules. Each imposes sanctions when they find violations. And each does so pursuant to their own sanctions guidelines. CFP Board's separate sanctions and sanctions standards are an unnecessary overlay. With respect to these regulated Certificants, CFP Board can and should rely exclusively on the existing robust regulatory sanctions regime.

CFP Board also imposes on Certificants a separate disclosure obligation for sanctions it imposes. This disclosure is likewise an unnecessary overlay on the existing robust regulatory disclosure regime. Information about the professional and disciplinary backgrounds of registered representatives and broker-dealers, as well as investment adviser firms and investment adviser representatives, is maintained on BrokerCheck,⁴ a free online tool maintained by FINRA, whose data is drawn from CRD⁵ and IARD,⁶ respectively. Information about investment adviser firms and investment adviser representatives is also maintained on the Investment Adviser Public Disclosure (IAPD) website,⁷ a free online tool maintained by the SEC, whose data is drawn from IARD. Under most circumstances, the information reported by firms, financial advisors and regulators is available in BrokerCheck and IAPD on the business day following its upload to CRD and/or IARD. For these reasons, CFP Board's sanctions disclosures should be limited to those already disclosed on BrokerCheck and IAPD. At a minimum, CFP Board should allow Certificants to satisfy any separate disclosure obligation by timely reporting on Form U4, Form U5, or Form ADV.

Finally, and as detailed below, CFP Board's foray into the role of adjunct regulator continues to expose firms that employ or associate with Certificants to significant risk. In undertaking investigations, bringing disciplinary actions and imposing sanctions, CFP Board often times incentivizes Certificants to produce documents or information that are the property of their firm, or that contain their firm's confidential, privileged, or proprietary information, or a client's personal information. At a minimum, CFP Board should undertake:

⁴ <https://brokercheck.finra.org/>.

⁵ <https://www.finra.org/registration-exams-ce/classic-crd>.

⁶ <https://www.sec.gov/divisions/investment/iard.shtml>.

⁷ [IAPD - Investment Adviser Public Disclosure - Homepage \(sec.gov\)](#).

- to not use such documents and information;
- to notify the firm when a Certificant produces such documents and information;
- to keep such documents and information strictly confidential; and
- to sanction Certificants when they produce such documents and information without the firm's written permission.

* * *

Executive Summary

- I. CFP Board should incorporate safeguards to ensure that Certificants do not produce documents or information that are the property of their firm, or that contain their firm's confidential, privileged, or proprietary information, or a client's personal information.
- II. CFP Board should amend certain of the "General Factors" that would conflict with internal firm policies or procedures and/or require use of confidential firm information.
- III. CFP Board should amend the expanded chart of sanctionable violations to:
 - specify certain documents and information that require the firm's approval prior to production and
 - specify that disclosure of any firm documents or information produced to CFP Board to prove mitigating factors or disprove aggravating factors in violation of firm policies or procedures or that contain the firm's confidential, privileged, or proprietary information or a client's personal information without their firm's written permission will trigger a separate sanctions violation of the duty of Confidentiality or Privacy (Standard A.9).
- IV. CFP Board should amend the expanded chart of sanctionable violations to reflect additional appropriate changes.

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I. CFP Board should incorporate safeguards to ensure that Certificants do not produce documents or information that are the property of their firm, or that contain their firm's confidential, privileged, or proprietary information, or a client's personal information.

SIFMA member firms maintain a range of internal policies and procedures governing the retention, handling, and under certain circumstances, production to third parties (such as CFP Board) of documents and information of the firm and its clients. Some of these policies are required in order to comply with federal and state regulations, including securities and privacy regulations. Other policies are designed to address litigation holds, and pending regulatory and civil actions, and the circumstances under which documents and information relating to those matters may be disclosed. And still other policies are designed to protect the property of the firm, including its confidential, privileged, and proprietary documents and information.

The Proposal's heightened sanctions, coupled with its burden shifting to Certificants to prove mitigating factors, will create a strong incentive for Certificants to voluntarily produce documents and information to CFP Board to prove mitigating factors or disprove aggravating factors. In certain cases, unfortunately, we expect that Certificants will likely (i) produce documents that are the property of the firm or that are otherwise confidential, privileged or proprietary, or that contain client personal information, (ii) produce documents directly to CFP Board without first going through proper firm channels, and/or (iii) produce documents to CFP Board other than through their official firm-provided email address.

Accordingly, we respectfully request that CFP Board incorporate the following safeguards into the Proposal:

- A requirement that Certificants verify in writing that any documents or information produced to CFP Board: (i) were produced in compliance with their firm's policies and procedures regarding notice to the firm and the content of the production; and (ii) are not prohibited from disclosure by their firm's policies and procedures or otherwise;
- A prominent notice to Certificants that they are required to use their official firm-provided email address (as opposed to a personal email address) when producing documents and information to CFP Board;
- A requirement that CFP Board notify the firm in writing in the event that a Certificant uses a non-firm provided email address to communicate with CFP Board; and
- A requirement that CFP Board: (i) notify the Certificant's firm when CFP Board requests that the Certificant produce documents or information in connection with an investigation of, or enforcement action against, the Certificant; and (ii) obtain the firm's prior written consent to the production of any documents or information that

are the property of the firm or that are otherwise confidential, privileged or proprietary, or that contain client personal information.

II. CFP Board should amend certain of the “General Factors” that would conflict with internal firm policies or procedures and/or require use of confidential firm information.

The Proposal includes twenty-six new listed General Factors (“*GFs*”) which could aggravate or mitigate the default sanction depending on the circumstances. The following factors would be particularly problematic for firms and should be modified accordingly.

1. Acknowledgement of Misconduct (GF1). GF1 would mitigate a sanction if the Certificant proactively acknowledged (to the client, firm, regulator, or CFP Board) that the conduct was wrong. This provision would incentivize Certificants to admit culpability/liability to CFP Board (and others) without necessarily following the proper firm policies and procedures, including without limitation making admissions of culpability/liability prior to the conclusion of an internal firm investigation. A Certificant’s acknowledgment of misconduct may also expose his or her firm to potential liability.

- Accordingly, GF1 should be amended to require the Certificant to: (i) self-report the misconduct to his or her firm, (ii) obtain the firm’s written consent prior to reporting the misconduct to CFP Board; (iii) show proof of such written consent; and (iv) notify CFP Board whether he or she is the subject of an ongoing internal firm investigation or a regulatory, civil, or criminal matter; if so, CFP Board should preclude the Certificant from invoking this factor until such investigation or matter is concluded.

2. Conceal or Attempt to Conceal (GF5). GF5 would aggravate a sanction if the Certificant “improperly withholds or impedes access to material information from any individual or entity entitled to such information...includ[ing] the CFP Board.” This provision would likewise incentivize Certificants to produce firm documents, including confidential, proprietary or privileged information, to avoid aggravation under this factor.

- Accordingly, GF5 should be amended to: (i) require CFP Board to notify the Certificant not to produce confidential, proprietary, privileged or client personal information of his or her firm, and that not producing such information will not be used by CFP Board to aggravate a sanction; and (ii) permit the Certificant to raise “prohibition from disclosure under firm policies and procedures” as a defense against a GF5 aggravation of a sanction.

3. Cooperation with CFP Board (GF6). GF6 would mitigate a sanction if the Certificant: (i) provides documents and information that [he or she] is not required to provide and is material to the CFP Board’s investigation, (ii) provides credible evidence of other CFP professionals engaging in misconduct, or (iii) self-discloses misconduct that the CFP Board’s Code does not require the Certificant to report. GF6 also states that “the Commission should weight more heavily [the Certificant’s] cooperation in providing information that is of greater value, including information that otherwise would not have been obtained.”

GF6 would aggravate a sanction if the Certificant “does not cooperate with CFP Board in accordance with the Procedural Rules.” The Procedural Rules provide for a duty to cooperate that includes providing all requested documents in a Certificant’s possession, custody, and control, responding fully to requests for information, “appearing for Questions by Oral Examination upon the request of CFP Board Counsel, and providing truthful and complete responses to questions raised during the examination.”

- GF6 both incentivizes and threatens Certificants to produce firm documents and/or information, including confidential, proprietary, privileged firm information and client personal information, to CFP Board. Accordingly, GF6 should be amended to: (i) require CFP Board to notify the Certificant not to produce confidential, proprietary, privileged or client personal information of his or her firm, and that not producing such information will not be used by CFP Board to aggravate or mitigate a sanction; and (ii) permit the Certificant to raise “prohibition from disclosure under firm policies and procedures” or “attorney-client privilege” as a defense against a GF6 aggravation of a sanction.
- GF6 should be further amended to clarify that is not intended to, and does not in fact, apply to documents or information outside the scope of CFP Board’s current investigation.

4. Other Relevant Assessments of this Misconduct (GF12)/Pattern of Similar Misconduct or Ongoing Misconduct (GF14)/Prior Caution or Warning (GF16). To assess any of factors GF12, GF14 or GF16, CFP Board will likely request information from the Certificant about past misconduct, including discipline/warnings from regulators/courts, as well as information about any discipline from firms.

- In most cases, such information will include confidential firm information that the Certificant is prohibited from producing by his or her firm’s policies and procedures. As discussed above, public information about a Certificant’s disciplinary history is available on BrokerCheck and IAPD.
- Accordingly, GF12, GF14, and GF16 should be amended to: (1) require CFP Board to notify the Certificant: (i) not to produce confidential, proprietary, privileged or client personal information of his or her firm; and that not producing such information shall not be used by CFP Board to aggravate or mitigate a sanction; and (ii) not to produce in-progress investigations or regulatory or judicial actions, but only final actions; and (2) to permit the Certificant to raise “prohibition from disclosure under firm policies and procedures” or “attorney-client privilege” as a defense against a GF12, GF14 or GF16 aggravation of a sanction.

5. Reasonable Reliance on the Advice or Assistance of Counsel, Compliance Officer, or Accountant (GF19). GF19 would mitigate a sanction if the Certificant can show “reasonable reliance on the advice or assistance of legal counsel, the firm’s compliance officer, an accountant, or other advisors.” GF19 also states that the Certificant waives the attorney-client privilege with respect to the advice received if he or she raises this factor. GF19 would

incentivize Certificants to waive their firm's attorney-client privilege with their Certificant employee – without the firm's knowledge. That outcome would be inappropriate and should not be encouraged.

- Accordingly, GF19 should be amended to require the Certificant to: (i) notify his or her firm prior to invoking GF19; (ii) obtain the firm's written consent prior to waiving privilege; and (iii) show proof of such written consent prior to invoking GF19.

6. Rehabilitative and Remedial Conduct (GF21, GF22). GF21 and GF22 would mitigate a sanction with proof of the completion of training/education related to the misconduct and/or a change in business practices, or remediation “in compliance with Firm policies” by a Certificant, firm or firm's insurance. Again, these factors may cause the Certificant to produce confidential, proprietary, privileged or other sensitive information of the firm.

- Accordingly, GF21 and GF22 should be amended to require the Certificant to: (i) notify his or her firm prior to invoking these factors; (ii) obtain the firm's written consent prior to producing any documents or information in response; and (iii) show proof of such written consent prior to invoking GF21 or GF22.

III. CFP Board should amend the expanded chart of sanctionable violations to specify certain documents and information that require the firm's approval prior to production, or that would trigger a separate sanctions violation.

Part B of the Proposal (“Sanction Guidelines, Specific Factors and Policy Notes”) provides an expanded chart of sanctionable violations. The following violations appear to presume the production of certain categories of documents and information of the firm: (i) Forgery (p. 9) - Firm policies; (ii) Failure to Exercise Sound and/or Objective Professional Judgment (p. 13) - Firm product offerings; (iii) Unauthorized Transactions (p. 17) - Firm supervisory practices/system; (iv) Violation of Duty of Confidentiality (pg. 17) - Firm policies regarding the “protection, handling and sharing of a client's non-public personal information.”

- With respect to the foregoing categories of firm documents and information, the Proposal should be amended to require that: (i) the Certificant obtain the firm's written consent prior to producing any such materials to CFP Board; (ii) the Certificant show proof of such written consent; and (iii) the CFP Board keep such information confidential.
- With respect to any documents and information produced by a Certificant to CFP Board in violation of firm policies or procedures or that contain the firm's confidential, privileged, or proprietary information or a client's personal information without the firm's written permission, the Proposal should be amended to provide that such production shall trigger a separate sanctions violation of the duty of Confidentiality or Privacy (Standard A. 9).

IV. CFP Board should amend the expanded chart of sanctionable violations to reflect additional appropriate changes.

Violation of Duty of Confidentiality (pg. 17) states that CFP Board can opine on whether a firm's policies are "reasonable" and whether a firm "failed to notify client(s) of an unauthorized exposure of client's non-public personal information in accordance with applicable laws, rules, and regulations."

- Given that CFP Board has no authority over SIFMA's member firms, references to CFP Board opining on firm policies or communications with clients should be stricken from the Proposal.

Failure to Provide Information to Client (p. 18) states that a Certificant's failure to provide CFP Board with written evidence that all clients have been advised of CFP Board's discipline within 45 days of the order will lead to suspension or revocation.

- As discussed above, brokerage and advisory firms already report relevant disciplinary information on BrokerCheck and IAPD, respectively. These resources are publicly available to all clients and should serve as the single, centralized source for disciplinary history. Accordingly, the Proposal should be amended to allow the above-referenced disclosure to clients to be satisfied by the Certificant disclosing the matter via Form U-4, Form U5, or Form ADV, as appropriate.

Failure to Use Reasonable Care When Supervising (p. 22) includes a mitigating factor if the Certificant self-reports a supervisory failure to regulators or CFP Board prior to their detection. This provision would inappropriately incentivize Certificant's to disclose possible regulatory issues to CFP Board without the firm's knowledge or consent and/or prior to the conclusion of the firm's investigation. Moreover, such disclosures would necessarily be incomplete and anecdotal at best, rendering them of little or no value.⁸

- Accordingly, the references to self-reporting to regulators and CFP Board should be stricken from the Proposal; self-reporting should be limited to the Certificant's firm, and to relevant regulators, when and as required by applicable law.

Failure to Timely Report Information to CFP Board (p. 28) includes a mitigating factor for reasonable reliance on advice of counsel that the CFP Board Standards did not require the Certificant to report the information to CFP Board. As discussed above, this factor encourages a Certificant to break attorney-client privilege where the legal advice came from the firm's counsel, and heightens the risk of a Certificant disclosing regulatory, civil, or criminal matters that are still pending.

⁸ Finally, we note that CFP Board's Standard D.1. (failure to supervise) invites confusion between the regulatory meaning of supervision performed by appropriately trained and licensed registered principals and a layperson's understanding of the term.

- Again, as discussed above, this factor should be amended to; (i) require the Certificant to notify his or her firm prior to invoking it, and obtain the firm's written consent prior to waiving privilege; (ii) require CFP Board to notify the Certificant not to produce in-progress investigations or regulatory or judicial actions, but only final actions; and (iii) permit the Certificant to raise "prohibition from disclosure under firm policies and procedures" or "attorney-client privilege" as a defense against a failure to timely report information to CFP Board.

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

Sincerely,

A handwritten signature in cursive script that reads "Kevin M. Carroll". The signature is written in dark ink and is positioned above a horizontal line.

Kevin M. Carroll
Deputy General Counsel

cc: Robert W. Cook, President and CEO, FINRA
Robert L.D. Colby, Chief Legal Officer, FINRA