

(1) Overview of the Proposed Revisions/Revisions Process

As the *Financial Planning Practice Standards* were being developed from 1996 through 2001, CFP Board and the community of CFP professionals in the U.S. were well aware that at some stage in the future, CFP Board would need to review and harmonize both the content and application/enforcement of its *Code of Ethics* and *Financial Planning Practice Standards*. With years of experience adjudicating infractions of the *Financial Planning Practice Standards*, CFP Board's Board of Professional Review and legal staff are well qualified to address how best to modify the documents to improve the efficiency of CFP Board's disciplinary review process.

FPSB supports and welcomes CFP Board's efforts to:

- (1) Reduce redundancies, eliminate conflicts and provide more specificity where needed to support comprehension of the documents both by CFP certificants and participants in CFP Board's peer review system.
- (2) Introduce a written agreement between CFP certificants and clients to clearly establish the scope and nature of the personal financial planning engagement. (FPSB anticipates that as part of CFP Board's best practices guidelines it would offer sample engagement documents for CFP certificants.)
- (3) Provide a definition for the concept of fiduciary where none existed before.

While 60 days may be the norm for an open comment period in the United States, it is a short timeframe for the global CFP certification community to provide feedback. Should CFP Board decide to extend the comment period, based on feedback it receives by the 25 September deadline, FPSB would be able to offer additional feedback after our biannual FPSB Meeting in Hong Kong early in November 2006.

Given our mutual interest in maintaining high standards for CFP certification, FPSB would welcome both of our organizations taking a more cooperative approach towards modifying or developing standards to ensure global consistency. It is important that the efforts of CFP Board and FPSB to set standards for the 100,000 CFP professionals worldwide be coordinated and consistent, for the benefit of all stakeholders.

As you are aware, FPSB is currently in the process of undertaking a review of the global CFP certification standards and requirements. We have chosen to begin our process by establishing a Global Competency Profile for the professional practice of personal financial planning in 2006, after which we will address the competency, ethics and practice standards and requirements for the global CFP certification program. We will be glad to include CFP Board in our efforts and should have valuable feedback for you on CFP certification standards in the U.S. as a result, specifically in the area of ethics and professional practice standards.

(2) General Comments on the Proposed Revisions

Limited Jurisdiction: Professional Standards Body vs. Certification Body

FPSB is well aware that CFP Board only has jurisdictional oversight of individuals who hold the CFP marks. However, by focusing on developing standards only for those over whom it has regulatory oversight, FPSB believes that CFP Board has moved away from its mission and vision to establish personal financial planning as a distinct professional practice that will benefit the public.

As part of your current mission², CFP Board works to: “create and enforce uniform standards of competence, practice and ethics of financial planners,” “create awareness of the importance of financial planning and the value of the financial planning process,” and “help underserved populations have access to competent and ethical financial planning.” Quite rightly for a 501(c)(3) organization, CFP Board has not chosen to: “create and enforce uniform standards of competence, practice and ethics of *CFP certificants*,” “create awareness of the importance of financial planning and the value of the financial planning process, *as delivered by CFP certificants*,” and “help underserved populations have access to competent and ethical financial planning, *as delivered by CFP certificants*,” an approach that would recognize your limited jurisdiction but that would be more suited to a membership organization than to an organization such as CFP Board.

Personal financial planning is still emerging in the U.S., and worldwide, as a distinct professional practice and one of the major players in this evolution has been CFP Board. The strides that have been made in making the public aware of and have value for personal financial planning has been largely due to the public-interest approach that CFP Board has taken in its standards-setting, and other, initiatives over the years. In cooperative ventures with government bodies/consumer groups, you have not focused your efforts on benefiting only CFP certificants³. In establishing the *Financial Planning Practice Standards*, CFP Board wrote them so that they could be embraced by all personal financial planners⁴, even if they could only be enforced against CFP certificants practicing personal financial planning. This broad, public-interest approach, which has been embraced by FPSB’s Affiliates, is what has allowed financial planning to emerge as a profession in the U.S. and globally (and the CFP marks as the gold standard), and we would encourage CFP Board not to withdraw from this stance.

² The mission of Certified Financial Planner Board of Standards, Inc. is to help people benefit from competent, professional and ethical financial planning. To further this mission, CFP Board works to: Create and enforce uniform standards of competence, practice and ethics of financial planners through rigorous, validated and professionally administered education, examination, experience and ethics requirements; Create awareness of the importance of financial planning and the value of the financial planning process; and Help underserved populations have access to competent and ethical financial planning.

³ Ask the planner what qualifies him to offer financial planning advice and whether he is recognized as a CERTIFIED FINANCIAL PLANNER™ professional or CFP® practitioner, a Certified Public Accountant-Personal Financial Specialist (CPA-PFS), or a Chartered Financial Consultant (ChFC). From CFP Board’s *How to Choose a Financial Planner*, <http://www.cfp.net/learn/knowledgebase.asp?id=6>.

⁴ Compliance with the Practice Standards is mandatory for CFP Board designees, but all financial planning professionals are encouraged to use the *Practice Standards* when performing financial planning tasks or activities addressed by a *Practice Standard*. From *Financial Planning Practice Standards*, <http://www.cfp.net/learn/standards.asp>.

While FPSB acknowledges and accepts that CFP Board has limited jurisdiction when it comes to enforcing its standards and certification requirements, we regret that CFP Board seems to be stepping back from the approach it has taken over the past 20 years to develop professional standards that can be used by all while enforcing those standards against people who hold the CFP marks. In essence, CFP Board seems to be withdrawing from a standards-setting function for the financial planning profession to focus on being a certification body for holders of the CFP mark. A potential outcome of this could be that one or more organizations (including ISO with its ISO:22222 standard) will step forward to pick up the need to promulgate standards within the broader personal financial planning market space in the U.S., and CFP Board's relevance among regulators and public-interest groups will diminish and with it the prestige of the CFP marks.

Limited Jurisdiction: CFP Professionals vs. CFP Marks Holders

FPSB is also well aware that many individuals who hold the CFP marks are not engaged in the practice of personal financial planning – some are engaged in other recognized professions (e.g., teaching, law, etc.); some work in areas that would not be considered professions (e.g., financial product selling, firm management functions, etc.); and some may not work but simply maintain their certification through completing CFP Board's biennial continuing education requirement.

The situation described above is not unique to personal financial planning. Many who complete education and testing in law, medicine and other professional practice areas choose to pursue a variety of career options, some of which are only slightly related to the professional practice area, others which are completely unrelated. That said, the legal and medical professions establish their Codes of Ethics and Rules of Conduct for the professional practice that they are seeking to establish and promote. Regulatory documents are written to guide the behavior and practices of professional practitioners, with the knowledge that non-practitioners, who maintain their licenses, are unlikely to be brought up on a medical or legal malpractice suit if they happened to be working as a landscape artist or teacher; if they were, their ability to rebut a claim would be easy.

Every individual who has earned, and maintains, the right to hold the CFP marks has demonstrated competency, met the certification requirements, and made a public commitment to the ethics and practice standards requirements set by CFP Board. As such, the CFP marks do not merely indicate a biographical fact that the person has been certified by CFP Board, they also indicate that the CFP marks holder has met and continues to meet CFP Board's CFP certification standards for the practice of personal financial planning. Consequently, it should not be a burden on any CFP marks holder to be held to a Code of Ethics for professional financial planners – they've already shown and continue to show that capability.

To address the needs of CFP marks holders, CFP Board seems to have abdicated its original mission to further the evolution of the personal financial planning profession. In fact the proposed revisions may have the unintended consequence of creating a document that may be meaningless for the very people it seeks to address (see page 7 of this letter).

Fiduciary Standard

FPSB is aware of much of the debate in the U.S. financial planning community around the concept of fiduciary and understands CFP Board's argument that there may be circumstances in which a CFP marks holder, in a financial planning engagement, may be carrying out activities that do not or should not carry a fiduciary obligation (i.e., product selling) or that, in circumstances where the CFP marks holder is working with a sophisticated client who agrees to it, the two may mutually agree to contract out of a fiduciary obligation in some circumstances.

While FPSB acknowledges the complexity of activities and services in which a CFP marks holder is involved in a personal financial planning engagement, these situations are no more complex than those dealt with by other professionals with fiduciary obligations to clients such as doctors or lawyers. The professional regulatory authorities for the medical and legal professions require professionals in these sectors to act as fiduciaries – this fact does not prevent lawyers or physicians from contracting out or acting outside of their obligations in certain circumstances, such as when two clients with adverse interests agree that an attorney can act for both of them to resolve a conflict or when a psychiatrist commits a patient to institutionalized care against that patient's wishes. Generally, such contracting out of or acting outside of a fiduciary duty relates only to a specific transaction or activity and not to the relationship as a whole.

FPSB promotes the fact that CFP certificants agree to act in the best interest of clients as part of their commitment to professional practice, and this stance is supported by regulatory regimes around the world. To cite just a few, European Union Financial Services Directive 2004/39/EG makes “acting honestly, fairly and professionally in accordance with the best interest of the client” a legal obligation for all investment advisers; Hong Kong's Securities and Futures Commission requires licensees, under the general principle of diligence, to “act with due skill, care and diligence, in the best interests of his clients and the integrity of the market”; and all advisers in the United Kingdom are bound by Treating Customers Fairly requirements, which include acting in the interests of clients.

FPSB would prefer to see CFP Board use language that simply states that CFP marks holders in a financial planning engagement have a fiduciary obligation to clients, with the understanding that clients and their planners can choose to enter into legal agreements that establish a separate legal standard for portions of the engagement or particular services. Rather than having a fiduciary obligation defined as the default if an alternative contract does not exist, we encourage CFP Board to reverse this and have the fiduciary obligation be the actual standard. Since part of the revised *Code of Ethics* and *Rules of Conduct* call for a written agreement between the CFP marks holder and client, it should be relatively straightforward for the CFP marks holder to prove to CFP Board's Board of Professional Review that s/he did not have a fiduciary duty based on the written agreement or contract between the parties, if that becomes an issue.

It appears that the fact that large financial services firms employ many CFP marks holders may have influenced CFP Board's thinking on the fiduciary requirement and its standards-setting in general. While CFP Board acknowledges that it has no authority over any party except certificants (i.e., not over firms)⁵, it notes professional services being purchased company-to-company⁶ as a reason for using a fiduciary standard as a default standard. FPSB wonders if financial services firms employing CFP certificants, who have a fiduciary obligation to clients, cannot act in the same manner as law firms or medical facilities that employ legal or medical fiduciaries. The firms themselves take on the fiduciary obligation of the employee or, if appropriate, have the employee contract out of the fiduciary obligation (and contract the firm out of the same obligation).

The Securities and Exchange Commission's Director of the Office of Compliance, Inspections and Examinations stated, as recently as February 2006, that "all advisory firms, whatever their size, type or history in the business, owe their advisory clients a fiduciary duty, [a duty which] is the first principle of the investment adviser because the duty comes not from the SEC or another regulator, but from common law."⁷ While a dually registered broker/advisor can limit the fiduciary obligations placed on advisers through a client advisory agreement (i.e., a contract), the SEC has stated that a mere statement to the client that the firm has changed the capacity under which it is acting is inadequate to effectively alter the nature of the adviser relationship thereby relieving the adviser from its fiduciary obligations.⁸ Furthermore, while parties can mutually agree on the terms of their engagement in a professional relationship, it is the court's prerogative to determine the legal category to which the professional relationship belongs.⁹ "Courts and legislatures determine who is a fiduciary, not the individual parties in a relationship... Individuals cannot simply remove themselves from fiduciary obligations. Under their authority to "do justice," courts can refuse to enforce contracts that eliminate fiduciary obligations."¹⁰

In short, FPSB believes that CFP Board can allow flexibility within the practices of CFP marks holders to establish different legal standards with clients while promoting the objective of having CFP certificants act as fiduciaries in personal financial planning engagements. This would recognize that the legal regime governing the engagement of a client by a personal financial planner is a combination of contract and fiduciary regimes. But it would ensure that the client of the financial planner can rely on the protections of fiduciary law as opposed to the more risky *caveat emptor* principles of a contractual

⁵ CFP Board's explanation to the Exposure Draft, page 3, footnote 5.

⁶ CFP Board's explanation to the Exposure Draft, page 4, para. 4 under "A Few Provisions Added."

⁷ Speech by Lori A. Richards, Director, Officer of Compliance, Inspections and Examinations, US Securities and Exchange Commission, at the Eight Annual Investment Adviser Compliance Summit, Washington, DC, 27 February 2006.

⁸ Fiduciary Obligations of Dually Registered Representatives, New Jersey Law Blog, 29 June 2006. WWW.NJLAWBLOG.COM/SECURITIES-COMPLIANCE-ARBITRATION-FIDUCIARY-OBLIGATIONS-OF-DUALLY-REGISTERED-REPRESENTATIVES.HTML

⁹ Contract Law, Contractarian Law, and Fiduciary Law, Tamar Frankel, Professor of Law, Boston University of Law, 2001.

¹⁰ Strains in the Fiduciary Metaphor: Divided Physician Loyalties and Obligations in a Changing Health Care System, Marc. A Rodwint, www.law.suffolk.edu/faculty/addinfo/rodwin/pubs/Physicians/Sec3.pdf.

engagement, and it would allow the client to more easily terminate the engagement, even if in breach of contract, due to a loss of trust in the personal financial planner.¹¹

As all of us who have worked in developing financial planning as a profession over the years are aware, frequently there is a significant asymmetry of knowledge between a financial planner and a client. To date, the role of each CFP certification body has not been to put forward the minimum possible standard, but to put forward rigorous professional standards around which the profession can coalesce and in which consumers can have confidence. The revised Code could imply to a casual reader that contracting out of a fiduciary obligation is the norm, rather than the exception, for a professional personal financial planner and could lead CFP certificants who do so to treat it casually with clients. FSPB would prefer to see a fiduciary standard as the requirement, which places the onus on a CFP professional or his/her employer to explain to the client why this standard won't be followed in a given situation – this way, the client is put on notice that a different standard is being applied and can engage the CFP certificant or firm in a dialogue to determine if this reduced standard is acceptable.

A more positive statement in the *Code of Ethics* indicating that CFP certificants have a fiduciary obligation will serve to further establish the “professional credentials” of financial planning and more clearly communicate to the public that CFP certificants will put their interests first.

(3) Comments on the Code of Ethics and Professional Responsibility

3.1 Introduction, first paragraph

Insert “in the U.S.” after “CFP Board has exclusive authority to determine who may use the CFP ... marks” to more accurately reflect CFP Board’s and FPSB’s joint but separate jurisdiction over the CFP marks. We would welcome you adding that CFP Board cooperates with FPSB on matters related to the CFP marks in the interests of their integrity and benefits the public seeking the advice of competent and ethical personal financial planners.

3.2 Terminology

CFP Board defines client to include an “entity who engages a certificant and for whom professional services are rendered for compensation.” In its creation of a Global Competency Profile for personal financial planning, FPSB has determined that a client of a *personal* financial planner is either an individual or group of individuals, not an entity (e.g., a corporation). We would welcome further discussion of this issue.

3.3 Principles

3.3.1 Professional Responsibility

In the introduction to the Code, CFP Board explains that the Code will guide all CFP certificants regardless of practice area (i.e., those who are not working as

¹¹ Ibid.

personal financial planners). But as mentioned previously, CFP marks holders work in a variety of employment settings, many of which cannot be categorized as professional practice areas. How will CFP Board hold CFP marks holders to the professional principles of its Code of Ethics when these individuals are not working as professionals (e.g., product sales). Although the revisions are meant to broaden the Code beyond professional financial planners to the total universe of CFP marks holders, it would seem that it has only broadened the universe to include CFP marks holders who are engaged in a recognized profession. Meanwhile, in broadening the Code, its standing as a Code for professional financial planners has been lost.

3.3.2 Who Decides if it is a Profession?

Principles 1-5 and Principle 7 have application for the broad category of CFP marks holders who practice in a professional capacity with clients, regardless of practice area. By default, CFP Board seems to have taken the position that if a CFP marks holder does not have a relationship with a client, CFP Board will not deem them to be a professional and therefore, these CFP marks holders would fall outside the purview of the Code. An obvious example here is teaching – most teachers in the U.S. will tell you they are part of a profession and are bound to some degree by local or state practice requirements, but they do not have clients and may not be recognized as a profession by those who hold to the theory that a professional needs a client. Consequently, the number of CFP marks holders that can be regulated under the revised Code diminishes further.

3.3.3 Not All Principles Can Apply to All CFP Marks Holders

Principles 1-5 and Principle 7 will apply to CFP marks holders who practice in any professional capacity with clients. However, Principle 6 requires CFP marks holders to “be a credit to the profession” and “cooperate with fellow certificants to enhance and maintain the profession’s public image.” This begs the question – which profession? If the profession intended in this Principle is personal financial planning, then this would undermine CFP Board’s effort to broaden the Code to all CFP marks holders. If it isn’t personal financial planning, it could be interpreted to mean CFP certificants must work with all CFP marks holders to promote the public image of all professions in which the CFP marks holders are engaged. This may be an oversight on CFP Board’s part since the explanation document on CFP Board’s website indicates that “the Exposure Draft does not include language requiring certificants to maintain the profession’s public image.”¹²

3.3.4 Aspirational vs. Directive

CFP Board has indicated that the Ethical Principles are aspirational in nature, which deserves further discussion within the global CFP certification community. In formulating an effective regulatory scheme, articulating broad principles that are open to flexible interpretation works as long as rules exist that amplify and clearly articulate the principles for the benefit of practitioners and the public.

¹² CFP Board’s explanation to the Exposure Draft, page 3, para. 3 under “Certain Provisions Removed.”

Therefore, any review of the intent and language of the Principles must be conducted within the context of the related Rules. Throughout the Principles, language appears indicating that certificants “should”, “shall”, “must” and “will” do a variety of things. Given that these terms are not interchangeable, what is CFP Board’s intent in varying the requirements imposed on CFP marks holders by certain Principles, and if “should” serves as the main aspirational verb of the Principles, what level of obligation is meant by the terms “must”, “will” and “shall,” which appear to be more directive than aspirational?

3.4 Board of Professional Review

In the Code introduction, CFP Board indicates that it will follow a fair process that provides CFP marks holders “an opportunity to be heard by a panel of other professionals.” Since traditionally CFP Board has populated this review body with CFP marks holders who have a minimum of 10 years of experience as a personal financial planner (as a way of ensuring that defendants are reviewed by knowledgeable peers), will CFP Board expand the representation of this panel to be more reflective of professions in general to accommodate the many CFP marks holders who are engaged with clients in professional engagements other than personal financial planning ones?

(4) Comments on the Rules of Conduct

4.1 Rule 1.0 -- Scope, Nature and Content of the Engagement

The introduction to the Code states that the Rules of Conduct “are binding on certificants regardless of title, position, type of employment or method of compensation, and govern all those who have the right to use CFP Board’s marks.” Rule of Conduct 1.1 requires the CFP marks holder to “mutually agree on the client’s personal financial goals(s)...” These two statements are incongruent and would imply that Rule of Conduct 1.1 reduces the population who must comply with it to CFP marks holders who are in a professional engagement with a client where that engagement happens to be a personal financial planning engagement. Similarly Rule of Conduct 1.2 would seem to focus on CFP marks holders engaged in the practice of personal financial planning, which would not be relevant for “all those who have the right to use CFP Board’s marks.” Consequently, the scope of Rule of Conduct 1.0 would seem to be antithetical to the intent of CFP Board’s revision efforts.

4.2 Alternating Scope Among Rules of Conduct

The category of CFP marks holders who would be liable to the Rules of Conduct varies significantly, depending on the Rule.

- All CFP marks holders, whether professionals or not or whether or not they serve clients, would be bound by four Rules – 2.0, 4.0, 7.0 and 8.0.
- CFP marks holders who are engaged in a professional practice of any kind and who work with clients would be bound by the previous four Rules and an additional two – Rules 5.0 and 6.0.

- CFP marks holders who engage clients in professional financial planning engagements would be bound by all of the Rules, including Rules 1.0 and 3.0.

This approach is likely to cause as much confusion for CFP Board staff and the Board of Professional Review in determining which CFP marks holder can be bound to a particular Rule of Conduct (depending on whether they are a non-professional, a professional without clients, a professional with clients or a personal financial planning professional).

4.3 Implementation and Provision of Proprietary Products

In Rule 1.2(a)(v) and 1.2(a)(vi), CFP Board may want to acknowledge that implementation and monitoring can be absent from or be incidental to a personal financial planning engagement, maybe by using “as appropriate” or similar language in these Rule statements. Similar clarifying language indicating that “offering a client proprietary investment products” need not be part of a personal financial planning engagement would be helpful.

###