



September 21, 2021

Via CFP Board website submission @ <https://www.cfp.net/ethics/enforcement/Comment-on-Proposed-Revisions-to-the-Sanction-Guidelines-and-Procedural-Rules?zs=rASTq1&zl=qg2n7>

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 and Procedural Rules**

Dear Sir / Madam:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to comment on CFP Board’s Proposed Revisions to Sanctions Guidelines and Procedural Rules (the “Proposal”).² The Proposal would increase the sanction for failing to timely report potential misconduct to CFP Board, and for filing an inaccurate Ethics Declaration to CFP Board, from the current sanction of a private censure to a public censure.

SIFMA’s member firms currently employ tens of thousands of CFP® certificants (each a “certificant” and collectively, “certificants”), representing a significant percentage of the total number of certificants, which current stands at nearly 90,000.³ 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.

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 CFP Board’s Proposed Revisions to Sanctions Guidelines and Procedural Rules (July 28, 2021), available at [CFP Board Requests Comments on Proposed Revisions to Sanction Guidelines and Procedural Rules | CFP Board](#).

³ See [CFP® Professional Demographics | CFP Board](#).



Before sharing our specific comments on the Proposal, we think it is important to highlight our industry's significant concerns with several current CFP Board policies and practices.

CFP Board should not subject pending regulatory, civil, or criminal matters to their own investigations or public censure.

Our primary concern is that although CFP Board is a private credentialing organization, and not a self-regulatory organization, in many instances, CFP Board requires certificants to report regulatory, legal, and other matters more broadly – and earlier in the process – than the SEC, FINRA, and other regulators.

For example, neither the SEC nor FINRA require a firm or financial advisor to disclose disciplinary information, including pending regulatory, civil, or criminal matters, until that matter is resolved based on its merits, unless specific criteria apply.⁴ This approach provides a degree of protection against frivolous or meritless lawsuits or complaints unnecessarily tarnishing the reputation of the firm or financial advisor. CFP Board, however, requires a certificant (i) to report more types of regulatory, civil, and criminal matters than are required to be reported to a regulator; and (ii) to report such matters at the time an investigation is commenced or a complaint is filed and prior to any hearing on the merits of the matter and its final resolution before a court of competent jurisdiction or before the appropriate regulatory authority.

Even though regulators do not require reporting as broad or as soon as CFP Board, the Proposal states that a certificant would be subject to a public censure if he or she does not timely report this information. Under a public censure, CFP Board would publicly disclose (i) the certificant's name, city, and state (ii) the details of the matter, and (iii) CFP Board's conclusion of fault or responsibility for the matter. CFP Board currently publishes this type of information on its website in certain circumstances.⁵ If adopted, however, the Proposal would significantly increase the frequency and number of public censures. CFP Board would continue to publicly disclose its findings and conclusions irrespective of whether the applicable regulatory body or a court of competent jurisdiction has heard and resolved the matter, potentially creating new reputational, compliance, and/or regulatory risks for both certificants and firms. Accordingly, we urge CFP Board to allow legal matters to be heard and fully resolved by proper courts or regulators prior to initiating their own investigations or imposing public censures for failure to timely report such matters.

⁴ See Disclosure Questions [Form U4 \(finra.org\)](#) and [Form ADV Part 2B \(sec.gov\)](#).

⁵ See [CFP Board Imposes Sanctions on 40 Individuals | CFP Board](#).

CFP Board reporting should not require a certificant to provide confidential, privileged or proprietary documents of his or her firm, nor should it require a certificant to violate the firm's own policies and procedures.

Each firm has its own internal policies and procedures regarding when a pending regulatory or civil action may be disclosed to a third party such as CFP Board. Such policies are in place because the information and documents relating to these matters are the property of the firm, and not the individual certificant. Some policies are designed to comply with regulatory requirements such as state and federal privacy regulations. Most firms also have policies to address litigation holds or non-disclosure of information or documents relating to the matter.

When disclosure to a third party is not permitted under firm policy, a certificant would be violating the firm's policies by providing information and documents to CFP Board without the firm's consent. In that case, CFP Board's self-reporting requirement would put the certificant in an untenable situation that neither the firm nor CFP Board⁶ would want – the choice to either follow firm policy and risk disciplinary action by CFP Board, or disclose to CFP Board, violate firm policy, and risk disciplinary action by the firm.

Based on the foregoing, and given that CFP Board has no legal, business or other formal relationship with certificants' firms, we recommend that CFP Board amend its reporting requirements to provide certificants with an exception to disclosure of: (i) information or documents in the possession, custody or control of the firm; (ii) information or documents that contain the firm's confidential, privileged or proprietary information; and (iii) information or documents prohibited by firm policy from disclosure to third parties.

CFP Board should narrow the scope of its requests to certificants, and avoid requests for documents and information that are the property of the firm, until there is a broader discussion and understanding on mutual information sharing.

Many CFP Board requests to certificants go too far in terms of the scope, breadth, and volume of documents and information requested. These types of requests take significant time and resources to address, and unnecessarily compete with firms' efforts to meet higher priority, legal and regulatory obligations. Our members would welcome the opportunity to discuss with CFP Board how to reasonably and appropriately narrow the scope, breadth, and volume of such requests. We are also specifically interested in discussing with CFP Board requests for documents and information that are the property of the firm and/or confidential in nature.

⁶ See Code of Ethics and Standards of Conduct Section D, Item 2 – Duties Owed to Firms and Subordinates.



Until such time as our members can discuss this matter with CFP Board, and agree on appropriate guardrails to protect firms' interests, we respectfully request that CFP Board limit its requests to documents and information that are the property of the individual certificant and not the property of the firm, and also limit its corresponding review and investigative scope to documents and information that are the property of the individual certificant and not the property of the firm.

If CFP Board believes it can only complete an investigation by obtaining documents and information that are the property of a firm, then CFP Board should work cooperatively with the firm to mutually decide what the firm may provide, consistent with its regulatory obligations, client privacy considerations, and its own internal policies and procedures.

Likewise, if a particular firm requests information from CFP Board, then CFP Board should work cooperatively with that firm to provide mutually agreed upon information including, for example: (1) notifying the firm when: (a) CFP Board makes a document or information request to a certificant, or (b) when a certificant self-reports to CFP Board documents or information that are not, or have not yet been, reported on Form U4, Form U5, and/or Form ADV, or (c) when an investor files a complaint about a certificant with CFP Board that is not, or has not yet been, reported on Form U4, Form U5, and/or Form ADV; and (2) identifying with specificity the documents or information requested, produced, or reported, respectively.

* * *

Following are our more specific comments on the Proposal itself:

**Timely reporting on Form U4, Form U5, or Form ADV,
to the extent publicly reported on BrokerCheck or IAPD,
should be deemed reporting to CFP Board.**

The proposed Sanction Guidelines for failure to timely report, under *Other Policy Notes*, states that the following demonstrate no violation: "(1) The information was timely reported on Form U4."⁷ We strongly agree that timely reporting on Form U4 should be deemed reporting to CFP Board and would therefore demonstrate no violation. This approach makes perfect sense given the existing, well-functioning, regulatory reporting regime.

Specifically, registered representatives of broker-dealers complete Form U4, and investment advisers complete Form ADV, as part of the securities industry registration and

⁷ Proposed redline revisions to Sanctions Guidelines at p. 24, available at https://www.cfp.net/-/media/files/cfp-board/standards-and-ethics/enforcement/2021/CFP-Board-Proposed-Revised-Sanction-Guidelines-2021-07-Redline.pdf?_zs=rASTg1&_zl=Xg2n7.



licensing process. The information on Form U4 (and on Form U5 for registration terminations) is fed into FINRA's Central Registration Depository (CRD®)⁸ and the information on Form ADV is fed into the SEC's Investment Adviser Registration Depository (IARD).⁹

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,¹⁰ a free online tool maintained by FINRA, whose data is drawn from CRD and IARD, respectively. Information about investment adviser firms and investment adviser representatives is also maintained on the Investment Adviser Public Disclosure (IAPD) website,¹¹ 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.

Information on BrokerCheck is timely and publicly available to CFP Board. In fact, for every certificant listed on CFP Board's website, CFP Board directs the public to links to BrokerCheck and IAPD to learn more information about individual certificants.¹² For those reasons, certificants should not be required to separately – and duplicatively – report any of that same information to CFP Board. Accordingly, timely reporting on Form U4, or Form U5 or Form ADV, should be deemed timely reported to CFP Board.

The proposed sanction for failure to timely report and filing an inaccurate ethics declaration should *not* be increased from private to public censure.

In addition to the concerns discussed above, we oppose increasing the sanction for failure to timely report and filing an inaccurate ethics declaration from private to public censure for the following reasons: First, neither of these violations constitute an offense against, or cause direct harm to, the public or investors, as they do not see or rely upon whatever is or is not reported to CFP Board by certificants. Rather, as discussed above, investors and the public rely upon what is publicly posted on BrokerCheck, which is equally available to the CFP Board. These particular offenses are more in the nature of an administrative shortcoming towards a private credentialing organization. In fairness, the penalty should fit the offense and public censure goes too far.

⁸ See <https://www.finra.org/registration-exams-ce/classic-crd>.

⁹ See <https://www.sec.gov/divisions/investment/iard.shtml>.

¹⁰ See <https://brokercheck.finra.org/>.

¹¹ See [IAPD - Investment Adviser Public Disclosure - Homepage \(sec.gov\)](#).

¹² See [Financial Advisors & Planning Professionals | CFP - Let's Make a Plan \(letsmakeaplan.org\)](#).

Second, in its news release, the CFP Board readily admits that it is no longer primarily relying on self-reporting by certificants to detect potential misconduct, given the CFP Board's enhanced detection practices. Yet, counterintuitively, at the same time, the CFP Board is increasing the sanction for self-reporting violations. The CFP Board has not presented any evidence that increasing the sanction would either improve self-reporting compliance, or deliver any net benefit to the public or investors. Accordingly, the sanction increase is unjustified.

Third, the proposed sanction increase fails to consider the prospective reputational risk, or other unintended consequences, to firms. Would the public censure name the financial services firm with which the certificant is associated? Even if it didn't, one could readily look it up on BrokerCheck. In either case, the firm would suffer potential reputational harm even though the firm has no legal, business, or other formal relationship with CFP Board.

Accordingly, we expect that a public censure of a certificant for any given offense would exclude any reference to the name of the firm with which they are associated. In addition, the public censure should explicitly state that:

- the public censure is for an administrative self-reporting violation committed by the individual certificant (and without reference to underlying details that have not yet been resolved or that were resolved in the certificant's favor);
- the violation and related censure apply only to a failure to timely self-report an event under CFP Board's requirements, and do not constitute a violation of any federal, state, and/or self-regulatory organization laws, rules, or regulations; and
- the self-reporting violation relates only to the certificant and does not in any way involve his or her firm.

For all the foregoing reasons,¹³ we strongly oppose increasing the sanction for failure to timely report and filing an inaccurate ethics declaration from private to public censure.¹⁴

**If CFP Board possesses the relevant information to be reported,
then that should demonstrate no violation.**

Under *Other Policy Notes*, the proposed Sanction Guidelines for failure to timely report also states that the following demonstrate no violation: "(3) CFP Board detects the information

¹³ CFP Board also appears to suggest that an incentive for a certificant to accept a public censure is that a hearing would not be required and the certificant would not be required to pay a hearing fee. This is no incentive. If there is no hearing, then there should be no hearing fee. Rather, an appropriate incentive for accepting a reporting violation without a hearing (and a hearing fee) would be to *reduce* the proposed sanction.

¹⁴ Alternatively, if the sanction increase is not stricken in its entirety, then at a minimum, the Sanctions Guidelines should be revised to make clear that public censure would be considered only in situations involving numerous failures to report or inaccurate reports, *and* where the certificant is a repeat offender.

and delivers a Notice of Investigation to Respondent prior to the 30-day reporting deadline.”¹⁵ We agree that if CFP Board is in possession of the information to be reported by the certificant, and delivers the relevant notice prior to the reporting deadline, then no violation should be found.

The same logic should hold true and also apply to the proposed Sanction Guidelines for filing an inaccurate ethics declaration. If the CFP Board is in possession of the *accurate* information that was allegedly *inaccurately* disclosed on the ethics declaration, and delivers the relevant notice to the certificant, then no violation should be found. Yet, for whatever reason, the *Other Policy Notes* for filing an inaccurate ethics declaration fails to include this third provision.¹⁶ Accordingly, we recommend that the *Other Policy Notes* for filing an inaccurate ethics declaration be amended to add: “(3) CFP Board detects the information and delivers a Notice of Investigation to Respondent.”

Unintentional violations should not be subject to sanction.

We appreciate that for both conduct categories (failure to timely report and filing an inaccurate ethics declaration), the proposed Sanctions Guidelines provides that a mitigating factor is where the respondent can establish that the failure to report, or the inaccurate declaration, “was unintentional and caused by excusable neglect....”¹⁷ We agree that unintentional violations should not be subject to sanction. For that reason, conduct that is “unintentional and caused by excusable neglect” should be characterized *not* as a mitigating factor, but as *not* a violation subject to sanction. To clarify this point, such conduct should be moved from the *Mitigating Factors* section to the *Other Policy Notes* section, which lists the various circumstances that “demonstrate no violation,”¹⁸ for both conduct categories.

In addition, consistent with the discussion above, we request that the Proposal be revised to add the following as mitigating factors for failure to timely report information to CFP Board: (i) the information or documents were in the possession, custody, or control of the firm; (ii) the information and documents contained the firm’s confidential, privileged, or proprietary information; and (iii) the information and documents were prohibited by firm policy from disclosure to third parties.

¹⁵ Proposed redline revisions to Sanctions Guidelines at p. 24.

¹⁶ *Id.* at p. 29.

¹⁷ *Id.* at pp. 22-23 and pp. 27-28.

¹⁸ *Id.* at p. 24 and p. 28.

Excusable neglect should be defined identically for both conduct categories.

The proposed Sanction Guidelines for failure to timely report¹⁹ provides that a respondent can establish excusable neglect by showing:

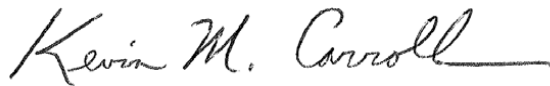
- (A) A logistical error made while attempting to report;
- (B) Reasonable reliance upon the advice of a legal or compliance professional that the *Code and Standards* does not require Respondent to report the information to CFP Board;
- (C) An emergency or medical issue prevented Respondent from timely reporting the information; or
- (D) A reasonable misinterpretation of the reporting requirement.

The proposed Sanctions Guidelines for filing an inaccurate ethics declaration,²⁰ however, provides that a respondent can establish excusable neglect by showing item (B) or item (D) above, but not by showing item (A) or (C) above. There is no good reason – and no reason is given in the Proposal – for excluding (A) (logistical error) and (C) (emergency or medical issue) from the circumstances constituting excusable neglect for *failure to file or timely file* an ethics declaration. Accordingly, we recommend that excusable neglect be defined identically for both conduct categories and include items (A) through (D) above.

* * *

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

Sincerely,



Kevin M. Carroll
Managing Director and Associate General Counsel

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

¹⁹ *Id.* at pp. 22-23.

²⁰ *Id.* at p. 28.