

Responses to Comments on 2022 Draft Revisions to *Procedural Rules*

On May 16, 2023, CFP Board [announced](#) the adoption of revised *Procedural Rules*, which will take effect September 1, 2023. CFP Board issued the revised *Procedural Rules* after carefully considering the comments received in response to CFP Board's [request for public comments](#). CFP Board made several changes to the draft version that was released for public comment, including the following:

- In response to a comment from the Securities Industry and Financial Markets Association, CFP Board modified the Duty of Cooperation set forth in Article 1.3. of the *Procedural Rules* to provide that a Respondent is required to produce only those documents and information that are in Respondent's control. (The prior language required production of documents in Respondent's possession, custody or control.) As a result, a Respondent does not violate the Duty of Cooperation by failing to produce documents in Respondent's possession if Respondent's firm controls the documents and Respondent's firm does not consent to the production of the documents.
- Modified the language in Article 2.1.b.2. to make clear that DEC Counsel may deliver an Interim Suspension Order if Respondent is the subject of a Civil Finding that Respondent engaged in fraud, theft, misrepresentation or other dishonest conduct.
- Modified the deadlines, set forth in Article 10.3., for filing documents, witness notifications, written statements and stipulations. The revised deadline is 60 days before the first day of the range of projected hearing or review dates.
- Revised the language in Article 10.3.c.2., which provides that a party has 14 days to oppose a Motion for Leave to Introduce Expert Witness, to specify that DEC Counsel may extend but not shorten this response deadline.
- Deleted Article 14.3., which identified factors relevant to rehabilitation and fitness, because the factors relevant to rehabilitation and fitness are set forth in Article 11.8.
- Modified the language in Article 15.3 that defines the "substantial evidence" required for the Appeals Commission to accept the DEC's factual findings on appeal. Prior to this modification, the *Procedural Rules* defined substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." This language has been modified to change "reasonable mind" to "reasonable person."

- In response to a comment from the Financial Planning Association, modified Article 17.3.b. by extending the deadline from 7 to 14 days for a party to request a recusal of a potential member of the Hearing Panel, the DEC, the Settlement Review Panel and/or the Appeals Commission.
- Added the definition of *de novo* to Article 17.10., which provides that a Hearing Panel may consider *de novo* and modify or reverse DEC Counsel's resolution of any motion or objections made pursuant to these *Procedural Rules*. *De novo* means that the DEC must consider the matter anew, as if DEC Counsel had not resolved the motion or objections.

Several commenters expressed their support for the proposed changes. CFP Board carefully evaluated other comments that did not result in modifications to the *Procedural Rules*, some of which are denoted as follows:

- A commenter questioned whether expert testimony should be permitted in a CFP Board enforcement proceeding where a majority of the members of the DEC are CFP® professionals with a professional background that makes them experts in financial planning. The Board of Directors determined that there may be circumstances where the DEC would benefit from expert testimony. Therefore, the Board determined that the *Procedural Rules* should provide a process for determining whether expert testimony will be admitted in a particular case.
- Another commenter opined that CFP Board should not provide the DEC with its own legal counsel. However, as set forth in the existing *Procedural Rules*, CFP Board's long-standing practice is to support the DEC with its own counsel. The Board of Directors recognizes that by providing the DEC with the assistance of counsel, the Board is promoting decision-making that adheres to the *Code and Standards*. CFP Board providing the DEC with counsel also is consistent with the practice of other decision-makers. Federal and state courts, administrative hearing officers and other decision-makers commonly rely on the assistance of counsel in the adjudicatory process. The assistance of counsel also does not undermine the peer review nature of CFP Board's enforcement proceedings. Under the *Procedural Rules*, the DEC continues to decide the merits of each case presented to the DEC.
- Another commenter recommended that CFP Board add volunteer lawyers to the DEC and have these lawyers provide the DEC with legal counsel. This comment misconstrues the role of the DEC and its members. DEC volunteers do not serve as counsel to the DEC, and they do not provide the DEC with legal advice. Instead, they serve as members of a Commission with the authority to decide the merits of the matters presented to the DEC.
- Another commenter objected to the expanded role of DEC Counsel, which includes deciding administrative matters, ruling on motions and facilitating

hearings. The Board of Directors disagrees. DEC Counsel has legal training that best enables DEC Counsel to handle these functions. This change also will enable the DEC to focus on the merits of the enforcement matter, including whether there has been a violation and, if so, what sanction should result.

- The same commenter also opined that the DEC's ability to override a DEC Counsel decision is illusory. This comment misreads the language set forth in Article 17.10. If a party seeks to challenge a DEC Counsel decision, then the party may do so orally at the hearing. The written submissions that resulted in DEC Counsel's decision will be included in the materials that the DEC receives prior to the hearing, and the DEC will be able to evaluate the submissions in reaching its decision. Therefore, Article 17.10 prohibits additional written filings as being unnecessary.
- A commenter opined that the levels of review within CFP Board's adjudication program are insufficient to provide a fair disciplinary process. The Board of Directors finds that CFP Board's enforcement process is fundamentally fair and that no additional layer of review is needed. CFP Board notifies a Respondent of the nature of the investigation, presents to a Respondent a written complaint that sets forth the nature of the allegations and grounds for sanction, offers a Respondent the opportunity to present, through counsel if desired, documents and testimony at a hearing before a hearing panel, and then issues to Respondent a written decision. CFP Board then offers a Respondent the opportunity to appeal the decision to an independent body, which considers the appeal and issues the final decision of CFP Board. This process was upheld by the federal district court in the District of Columbia and the federal Court of Appeals for the DC Circuit. A Respondent now may challenge an adverse decision in an arbitration, which will be decided by a panel of three arbitrators, each of whom must have at least five years of experience as a state or federal court judge.
- A commenter requested that CFP Board modify the *Procedural Rules* to include policies governing the separation of enforcement functions between staff devoted to detection, investigation and prosecution on the one hand, and staff devoted to adjudication and appeals on the other hand. The Board of Directors decided that its existing governance structure provides the best framework for maintaining an appropriate separation of functions. Therefore, the Board determined that no revision to the *Procedural Rules* is necessary.
- A commenter recommended that CFP Board invite a Respondent to participate in deciding when the hearing will be held. The Board of Directors determined that this is unnecessary. When Enforcement Counsel issues a Complaint, the Complaint is scheduled for the next available set of hearings, which occur every two months. If a Respondent is unavailable at that time, then the hearing routinely is rescheduled for the next available set of hearings. For the same reason, the Board of Directors finds no need for the *Procedural Rules* to extend

the time between the issuance of a Complaint and the hearing. Enforcement Counsel does not issue a Complaint until after the investigation is concluded. By that time, the parties already have exchanged documents and information. Moreover, a Respondent who seeks additional time is permitted to file a motion requesting a continuance of the hearing if there is a basis for doing so.

- A commenter recommended that CFP Board publish the process for a hearing panelist to recuse where there is a conflict of interest. The standard for a DEC member to recuse already is set forth in Article 17.3 of the *Procedural Rules*. The Board of Directors determined that this process is sufficient.
- A commenter recommended that CFP Board modify the *Procedural Rules* to prevent Enforcement Counsel from contacting third parties to request documents and information, to require Respondent or Respondent's counsel to be present whenever Enforcement Counsel contacts a third party, and to permit a Respondent to file a lawsuit against a CFP® professional who has alleged that the Respondent has engaged in misconduct. The Board of Directors disagrees. Enforcement Counsel must be able to investigate potential misconduct and should not have to coordinate its third-party outreach with Respondent. If Enforcement Counsel seeks to examine a witness under oath, then Article 1.2 of the *Procedural Rules* requires Enforcement Counsel to invite Respondent to that examination. Moreover, a whistleblower should not be subject to the burdens of civil litigation for notifying CFP Board of potential misconduct. A contrary conclusion would have a chilling effect on CFP® professionals who become aware of potential misconduct. It is Enforcement Counsel, and not a whistleblower, who may institute an enforcement proceeding, and Enforcement Counsel does so after conducting its own due diligence. In conducting the investigation, Enforcement Counsel will be able to determine if a CFP® professional is acting unethically in filing a grievance.