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January 7, 2020

Office of the Secretary of the Commonwealth
Attn: Proposed Regulations – Fiduciary Conduct Standard
Massachusetts Securities Division
One Ashburton Place, Room 1701
Boston, MA 02108

RE: Solicitation of Comments on Proposed Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives

Dear Secretary Galvin:

The Financial Planning Association® (FPA) appreciates the opportunity to comment regarding the Massachusetts Securities Division's (Division) Proposed Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives (Proposal).

FPA is the largest membership organization for CERTIFIED FINANCIAL PLANNERS™ (CFP®) and those who support the financial planning process in the United States with 22,000 members nationwide and 868 members in Massachusetts. Many members of the FPA® of Massachusetts chapter are registered with the state of Massachusetts as investment adviser representatives, broker-dealer registered representatives, and/or insurance agents. With a national network of 88 chapters and state councils, FPA® represents tens of thousands of financial planners, educators and allied professionals involved in all facets of providing financial planning services.

FPA has endorsed the Certified Financial Planner Board of Standards' (CFP Board) newly revised *Code of Ethics and Standards of Conduct (Code and Standards)*¹, which became effective October 1, 2019. The *Code and Standards* contains a fiduciary standard of conduct that is broadly applicable yet business model neutral. We are pleased that on most of the major issues, such as the inclusion of a duty of loyalty, the Proposal and the *Code and Standards*, we are in agreement. FPA® supports the Division's Proposal as CFP® professionals complying with the revised *Code and Standards* would also be in compliance with the Division's Proposal; however, we encourage the Division to clarify how conflicts of interest should be managed.

I. CFP Board's Revised *Code and Standards*

CFP Board adopted the revised *Code and Standards* in March 2018 with an effective date of October 1, 2019 and an enforcement date of June 30, 2020. This will extend the application of the fiduciary duty, owed by CFP® professionals to their clients, from financial planning services only to **all** Financial

¹ CFP Board, "Code of Ethics and Standards of Conduct" (Effective October 1, 2019), *available at* <https://www.cfp.net/docs/default-source/for-cfp-pros---professional-standards-enforcement/cfp-board-code-and-standards.pdf?sfvrsn=17>; *See also* CFP Board, "Roadmap to the Code of Ethics & Standards of Conduct," *available at* <https://www.cfp.net/docs/default-source/for-cfp-pros---professional-standards-enforcement/cfp-board-roadmap-to-code-and-standards.pdf?sfvrsn=6>.

Advice, broadly defined. This development enjoys strong support among CFP® professionals and their membership organizations. More than 96 percent of CFP® professionals who responded to a recent survey agreed that a CFP® professional should be required to act in the client’s best interest when providing “Financial Advice.”²

In releasing the updated *Code and Standards* in March 2018, CFP Board also issued commentary³ and a side-by-side comparison⁴ of existing standards of professional conduct and the revised *Code and Standards*. An ethics continuing education program on the *Code and Standards* was developed and made available to CFP® professionals. CFP Board also formed a Standards Resource Commission to develop guidance materials to help CFP® professionals comply with the revised *Code and Standards*. The Commission is composed of members of the profession who operate in a variety of business models. CFP Board has issued several guidance documents, including responses to Frequently Asked Questions, a Roadmap⁵ to the *Code and Standards*, and 12 case studies⁶ that provide practical guidance to CFP® professionals and their firms.

II. Similarities Between the Code of Standards and the Division’s Proposal

FPA evaluated the Division’s Proposal against the revised *Code and Standards*. Both documents establish a genuine fiduciary standard of care, including the two-pronged duty of loyalty and a duty of care based on long-established common law fiduciary principles.

a. Duty of Loyalty

The *Code and Standards* defines fiduciary as acting in the best interests of the client at all times when providing financial advice. Under this fiduciary standard, CFP® professionals must fulfill the duty of loyalty, the duty of care, and the duty to follow client instructions. The duty of loyalty requires, among other things, placing the interests of the client “above” the interests of the CFP® professional and his/her firm. It also requires, among other things, acting “without regard to” the financial or other interests of the CFP® professional, his/her firm, or any individual or entity other than the client.

Much of the language found in the *Code and Standards* on the duty of loyalty is mirrored in the Division’s Proposal. For example, Massachusetts’ proposed fiduciary standard “requires a broker-dealer, agent, or adviser to avoid conflicts of interest and to make recommendations and provide investment advice *without regard to* the financial or any other interest of the broker-dealer, agent, adviser, any affiliated or related entity or its officers, directors, agents, employees, or contractors, or any other third-party” (emphasis added). This “without regard to” language, which also appears in the *Code and Standards*, is taken directly from Section 913(g) of Dodd-Frank, which authorized the SEC to promulgate a uniform standard of conduct that is no less stringent than that applicable to investment advisers under the Investment Advisers Act of 1940.

b. Duty of Care

Under the *Code and Standards*, the duty of care mandates that a CFP® professional act “with the care,

² COMMENTARY TO CODE OF ETHICS AND STANDARDS OF CONDUCT, at p. 4 (March 2018), available at [https://www.cfp.net/docs/default-source/for-cfp-pros---professional-standards-enforcement/CFP-Board-Code-and-Standards-with-Commentary-\("COMMENTARY"\)](https://www.cfp.net/docs/default-source/for-cfp-pros---professional-standards-enforcement/CFP-Board-Code-and-Standards-with-Commentary-().

³ See generally COMMENTARY at n. 7, *supra*.

⁴ Available at <https://www.cfp.net/docs/default-source/for-cfp-pros---professional-standards-enforcement/CFP-Board-Code-and-Standards-Side-by-Side-Comparison>.

⁵ Available at <https://www.cfp.net/docs/default-source/for-cfp-pros---professional-standards-enforcement/cfp-board-roadmap-to-code-and-standards.pdf?sfvrsn=6>.

⁶ Available at <https://www.cfp.net/docs/default-source/for-cfp-pros---professional-standards-enforcement/cfpboard-case-studies-applying-code-and-standards.pdf?sfvrsn=2>.

skill, prudence, and diligence that a prudent professional would exercise in light of the Client’s goals, risk tolerance, objectives, and financial and personal circumstances.” Likewise, the Division’s proposed fiduciary standard requires the use of “care, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with such matters would use taking into consideration all of the facts and circumstances.” The “care, skill, prudence, and diligence” phrase found in both documents links directly to the historical “prudent man rule,” which has since evolved into a “prudent investor rule,”⁷ and elements of which are reflected in various legal frameworks including federal pension law (e.g. Employee Retirement Income Security Act of 1974 (“ERISA”)) and in state trust law.⁸ In essence, this language calls upon the financial professional to competently provide services, to be knowledgeable about the recommended products and services, and to use best judgment and due diligence in evaluating risks and options based on the client’s profile.

c. Other Similarities

The *Code and Standards* and the Proposal also share other aspects that not only advance investor protection, but also promote workable solutions for industry practitioners. For example, both the Proposal and the *Code and Standards* clarify that the fiduciary duty cannot be disclosed away.⁹ Likewise, they both define “client” and “customer” in highly inclusive ways, without denying protections to “accredited investors” or imposing a household-use test. Neither the *Code and Standards* nor the Proposal mandates a recommendation of the least costly option. Rather, they recognize that a process under the fiduciary standard requires an examination of whether the remuneration is reasonable in light of the practically available options and other considerations.

The Proposal’s fiduciary duty applies to account type recommendations, thus implicitly including IRA rollovers. The Proposal explicitly encompassed “the opening of or transferring of assets to any type of account” within the fiduciary duty, and thus opened the door for rollover recommendations to be subject to this fiduciary standard of conduct. FPA advocated for the inclusion of rollover recommendations in its public comments, as part of the Financial Planning Coalition, on the proposed SEC Regulation Best Interest regulatory package.¹⁰

III. Clarification Needed

There are areas where the Proposal could be strengthened. Most importantly, the Proposal does not adequately address actual or potential conflicts of interest that may arise between financial professionals and their clients. FPA urges the Division to look to the CFP Board *Code and Standards*, which requires conflicts of interest to be addressed proactively.

a. Addressing Conflicts

Although the Proposal explicitly states that the fiduciary duty cannot be disclosed away, it provides no process for ensuring that conflicts of interest inherent in both the broker-dealer and the investment adviser business models do not adversely impact investors. In contrast, the *Code and Standards* clearly

⁷ See generally Martin D. Begleiter, *Does the Prudent Investor Need the Uniform Prudent Investor Act -- An Empirical Study of Trust Investment Practices*, 51 Me. L. Rev. 27 (1999).

⁸ See generally, David H. Webber, *The Use and Abuse of Labor’s Capital*, 89 N.Y.U.L. Rev. 2106 (2014); and Harvey Bines and Steve Thel, *The Varieties of Investment Management Law*, 21 Fordham J. Corp. & Fin. L. 71 (2016).

⁹ The Division’s Proposal explicitly states in Section 12.207(c)2.ii., “There shall not be a presumption that disclosing a conflict of interest alone shall satisfy the duty of loyalty.” Pursuant to the *Code and Standards*, the duty to place the interests of the client “above” the interests of the CFP® professional and his/her firm; and they duty to act “without regard to” the financial or other interests of the CFP® professional, his/her firm, or any individual or entity other than the client cannot be disclosed away.

¹⁰ Coalition Letter to SEC, at pp. 16-17 (dated Aug. 7, 2018), available at <https://www.sec.gov/comments/s7-07-18/s70718-4186652-172763.pdf>.

outlines how to manage conflicts as a part of the duty of loyalty element of the overall fiduciary duty.

To satisfy the duty of loyalty, the CFP® professional must, among other things, “Avoid Conflicts of Interest, or fully disclose Material Conflicts of Interest to the Client, obtain the Client’s informed consent, and properly manage the conflict.” This straightforward language recognizes that while many conflicts can be avoided, there are some that, as a practical matter, cannot reasonably be avoided. Because CFP Board certifies individuals and not firms, the *Code and Standards* focuses on the CFP® professional’s responsibility to manage conflicts to ensure that such conflicts do not inappropriately influence the CFP® professional’s recommendations.

b. “Financial Assets”

FPA urges the Division to consider the *Code and Standards*’ broad definition of “financial assets” as a guidepost and we encourage regulatory cooperation across state agencies to streamline a common approach. The Proposal generally applies to securities recommendations and investment advice. In contrast, the *Code and Standards* applies to a broad variety of activities and products within the definition of “financial advice.” The provision of financial advice includes, among other things, recommendations as to financial assets, which are defined broadly as “[s]ecurities, insurance products, real estate, bank instruments, commodities contracts, derivative contracts, collectibles, or other financial products.”

IV. The Use of Titles

FPA applauds the Division’s inclusion of restricting the use of the term “financial planner” by creating an “expectation that the broker-dealer, agent, investment adviser, or investment adviser representative will monitor the customer’s or client’s account(s) or portfolio on a regular or periodic basis. . .” FPA® encourages the Division to help consumers identify competent and ethical financial planners.

The current landscape encourages financial service professionals to offer financial planning services with dubious certifications and/or designations. Indeed, the use of titles has created such confusion that the SEC’s Office of Investor Education and Advocacy has, in conjunction with the North American Securities Administrators Association (NASAA), issued an investor bulletin that cautions “do not rely solely on a title to determine whether a financial professional has the expertise that you need – find out what the title means and what the financial professional did to obtain it.”¹¹ But this is not easily determined – the SEC/NASAA bulletin goes on to suggest a litany of questions that an investor should ask his financial professional as well as multiple web sites that the investor should consult. While this advice may be potentially helpful to some investors, as noted above, most will not even ask the most basic questions of their financial professionals, let alone engage in independent research to attempt to learn what these titles really mean.

In fact, industry research shows that over 100,000¹² financial service providers, spurred by economic incentives, incorrectly self-identify as members of a financial planning practice, but do not actually offer financial planning services. As a result, consumers who want and expect financial planning advice are being harmed because they are receiving narrowly focused advice, single product solutions or advice that is not in their best interest. Furthermore, consumers are confused by the titles financial service providers use and they are not able to identify persons qualified to provide financial planning services.

¹¹ https://www.sec.gov/files/ib_making_sense.pdf.

¹² Consumers Are Confused and Harmed: The Case for Regulation of Financial Planners, a report of the Financial Planning Coalition, available at <http://financialplanningcoalition.com/wp-content/uploads/2014/06/Financial-Planning-Coalition-Regulatory-Standards-White-Paper-Final.pdf>. The 100,000 number is derived from data produced by CERULLI ASSOCIATES, CERULLI QUANTITATIVE UPDATE: ADVISOR METRICS, 2013.

As such, the FPA suggests that the Division clarify which certifications or professional designations may be used for financial planners. The FPA® proposes to limit designations to only those that are granted by accredited certifying bodies and, at a minimum, include rigorous ethical and professional standards, thorough education and examination requirements to first obtain the designation, and ongoing continuing education requirements to maintain the certification. For example, CFP Board, which offers the CFP® certification, is accredited by the National Commission for Certifying Agencies (NCCA). The NCCA standards require demonstration of a valid and reliable process for development, implementation, maintenance, and governance of certification programs. The CFP® certification is one of only six financial services designations accredited by NCCA. The CFP® certification requires substantial educational and professional experience, a rigorous exam designed to test for competencies in financial planning, continuing education which meets CFP Board’s requirements, and high professional and ethical standards enforced through a disciplinary process with publicly available sanctions, including documented revocation of the CFP® certification. Notably, CFP® professionals operate across a variety of business models and are obligated to provide financial planning services under a fiduciary standard of conduct.

Indeed, FINRA communicates to investors that [m]any state securities and insurance regulators do not allow financial professionals to use a designation – in particular a “senior” designation – unless it has been accredited by either the American National Standards Institute or the National Commission for Certifying Agencies.”¹³

Furthermore, the Division should include “holding out” language, meaning that anyone who implies to provide financial planning services who are not certified or licensed with an accredited designation would be restricted from representing themselves to the public as financial planners. This will help consumers identify competent and ethical financial planners.

V. Conclusion

FPA is committed to working with the Division on this and other regulatory efforts. We appreciate the opportunity to comment on the Division’s Proposed Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives. If you have any questions regarding this letter, please contact Josephine M. Colacci, Esq., Public Policy Counsel, FPA, with any questions at 303-759-4900 or jcolacci@onefpa.org.

Sincerely,



Lauren Schadle, CAE
Executive Director/CEO

¹³ <https://www.finra.org/investors/accredited-designations>