



July 26, 2019

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

Submitted electronically via email to: securitiesregs-comments@sec.state.ma.us

RE: Comment on Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives

Secretary Galvin:

The National Association of Personal Financial Advisors (“NAPFA”) commends and supports the Massachusetts Securities Division’s (“Division”) proposed fiduciary conduct standard for broker-dealers (“B-D”s), investment advisers (“IA”s), and their respective agents and representatives when providing personalized investment advice (“Proposal”).¹

NAPFA is the nation’s leading organization of fee-only comprehensive financial planning advisors with more than 3,700 members nationwide. Since its founding in 1983, NAPFA has embraced the high ideals of delivering independent objective advice in the client’s interest. NAPFA is committed to and its members adhere to high professional standards, in particular, a robust fiduciary standard when providing financial advice to clients. Each NAPFA member annually must sign and renew a Fiduciary Oath and subscribe to NAPFA’s Code of Ethics. NAPFA appreciates this opportunity to provide comments on the Division’s Proposal.

NAPFA has endorsed the CFP Board of Standards newly revised *Code of Ethics and Standards of Conduct* (“*Code and Standards*”)², which becomes effective October 1, 2019. The *Code and Standards* contains a fiduciary standard of conduct that is broadly applicable yet business-model neutral. NAPFA strongly encourages the Division to consider the *Code and Standards* as a guide for strengthening the Proposal. We are pleased that on major issues such as the inclusion of a duty of loyalty, the Proposal and the *Code and Standards* appear broadly consistent. We encourage the Division, however, to more thoroughly consider and to clarify how actual and potential conflicts of interest should be managed.

¹ Proposal, available at

<https://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/fiduciaryconductstandardidx.htm>.

² 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>.

I. CFP Board Certification

An applicant for membership as a “NAPFA-Registered Financial Advisor” must be, among other things, a Fee-only financial advisor who holds the CFP® certification. Founded in 1985, CFP Board is a certification and standards setting organization. CFP Board sets and enforces education, examination, experience and ethics requirements for CFP® professionals. It is one of only six financial services designations accredited by the National Commission for Certifying Agencies (NCCA).

Today, nearly 85,000 CFP® professionals agree to abide by standards for competency and ethics, which CFP Board periodically reviews and updates to maintain the value, integrity and relevance of CFP® certification. As a professional standard-setting organization, CFP Board develops and enforces business conduct standards that are consistent with, and in certain instances may exceed, existing legal and regulatory requirements set at the federal or state level. All CFP® professionals are bound by CFP Board’s existing code of ethics and standards of professional conduct and will continue to be bound by the new *Code and Standards*.

II. CFP Board’s Revised *Code and Standards*, Effective October 1, 2019

CFP Board first adopted a fiduciary standard for CFP® professionals in 2007, when it updated then-existing rules of conduct to establish that a CFP® professional owes to the client a fiduciary duty when providing financial planning or material elements of financial planning. Since then, the population of CFP® professionals has grown by more than 50 percent. In that time, the marketplace for financial advice also has evolved – consumers increasingly expect advice delivered by a fiduciary, and financial professionals acknowledge the importance of fiduciary advice.

As part of its periodic review of its standards for competency and ethics, in December 2015 CFP Board announced the formation of a Commission on Standards to review and recommend to the Board of Directors proposed changes to the standards of professional conduct. Commission members included CFP® professionals and others in the financial services industry who operate under diverse business models, regulatory experts, an investor advocate, and a representative of the public. CFP Board sought input from a variety of stakeholders, including by hosting 17 public forums in cities located across the country and meeting with multiple firms, external trade groups, consumer advocates, internal councils, and other stakeholders. CFP Board also issued for public comment two drafts of the then-proposed *Code and Standards*, and considered more than 1,500 written comments and hundreds of oral comments.

After following this deliberative, inclusive, and transparent process, CFP Board adopted the revised *Code and Standards* in March 2018 with an effective date of October 1, 2019. This will extend the application of the fiduciary duty, owed by CFP® professionals to their clients, from financial planning services only to **all** Financial 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.”³

NAPFA endorses these expanded CFP Board fiduciary obligations. In public comments, we have stated that these enhancements “... supports CFP Board’s efforts to [broaden] fiduciary requirements for CFP® professionals. Working under fiduciary principles is the most transparent – and we believe the most objective – way of serving the public. Consumers have come to expect advice delivered in their best

³ 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”).

*interest and will now be able to count on a CFP® professional to provide it at all times when giving financial advice.”*⁴

III. Similarities Between CFP Board Code and Standards and the Proposal

NAPFA evaluated the Proposal in light of the revised *Code and Standards*. Both frameworks establish a genuine fiduciary standard of care, including the two-pronged duty of loyalty and a duty of care based on well-settled common law fiduciary principles.

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.

The duty of loyalty in the *Code and Standards* is reflected in the Division’s Proposal. For example, the 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). The “without regard to” provision, which also appears in the *Code and Standards*, follows 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.

Duty of Care. Under the *Code and Standards*, the duty of care mandates that a CFP® professional act “with the care, 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” provision found in both the Proposal and the *Code and Standards* links directly to the historical “prudent man rule,” which has since evolved into a “prudent investor rule,”⁵ 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 fiduciary law.⁶ In essence, this requires a 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.

Other Similarities. The *Code and Standards* and the Proposal also share similarities 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.⁷

⁴ *Id.*

⁵ 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).

⁶ 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).

⁷ 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

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 cheapest 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.

NAPFA acknowledges that the Proposal’s strong 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. NAPFA advocated for the inclusion of rollover recommendations in its public comments on the proposed SEC Regulation Best Interest regulatory package.⁸ Based on NAPFA’s experience, the inclusion of IRA rollovers – which are often the single most important financial decision in a retirement saver’s life – within a robust fiduciary standard is an important step to protect investors.

IV. Areas in Need of Clarification

NAPFA wishes to highlight several areas where the Proposal could be improved. Most importantly, the Proposal does not adequately address actual or potential conflicts of interest that may arise between financial professionals and their clients. NAPFA strongly recommends that the Division consider as a model the association’s Fiduciary Oath which requires conflicts of interest to be addressed proactively.

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 affect investors. In contrast, the *Code and Standards* clearly describes how conflicts can be managed as a part of a financial professional’s fiduciary duty of loyalty. 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 requirement recognizes that while many conflicts can be avoided, there are some that, as a practical matter, cannot reasonably be avoided.

“Financial Assets.” NAPFA 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 “securities, insurance products, real estate, bank instruments, commodities contracts, derivative contracts, collectibles, or other financial products.”

In conclusion, NAPFA has long supported a robust, uniform fiduciary standard for personalized investment advice. Our position is based both on the real-world experiences of NAPFA members who all provide financial advice to investors under a Fee-only business model. The fiduciary duty stated in the revised *Code and Standards* is straightforward, drawn from common-law fiduciary concepts, and includes

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.

⁸ 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>.

a duty of loyalty and a duty of care. NAPFA urges the Division to incorporate the fiduciary elements contained in NAPFA's Fiduciary Oath, NAPFA's Code of Ethics, and the CFP Board *Code and Standards* in the Division's final rule.

Sincerely,

A handwritten signature in black ink, appearing to read "Geoff Brown", with a stylized, flowing script.

Geoffrey E. Brown, CAE
Chief Executive Officer
National Association of Personal Financial Advisors