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January 29, 2019

Certified Financial Planner Board of Standards, Inc.  
Proposed Procedural Rules  
1425 K Street NW #800  
Washington, DC 20005

Ladies and Gentlemen,

The Financial Planning Association® (FPA), the country's largest voluntary membership association for CERTIFIED FINANCIAL PLANNER™ professionals and those who support financial planners and the financial planning process, is pleased to provide the following comment letter on CFP Board's *proposed Procedural Rules* (Proposed Rules) that will consolidate and replace the current *Disciplinary Rules and Procedures* and *Appeal Rule and Procedures* (Current Procedures).

FPA was formed in 2000 through the merger of the International Association of Financial Planners (IAFP) and the Institute of Certified Financial Planners (ICFP). Since that time, FPA has been committed to providing a professional home for those practitioners who strive to adhere to the high standards evidenced by the CFP® marks. With 23,000 members across the country, including nearly 17,000 CFP® professionals, FPA is profoundly interested in seeing the marks recognized by the public as an indication that a CFP® professional is committed to the highest standards of competency and ethical behavior.

In accordance with FPA's Primary Aim, which is "to elevate the profession that transform lives through the power of financial planning," and FPA's Strategic Directive, which is "to be the indispensable resource for CFP® professionals," this comment letter serves to support FPA's role in being the voice and advocate for CFP® professionals.

FPA applauds the CFP Board of Standards for seeking comment on the Proposed Rules and providing a 60-day comment period. Furthermore, FPA commends the CFP Board of Standards for substantially amending, clarifying, and combining the current *Disciplinary Rules and Procedures* and *Appeal Rule and Procedures* into one document. FPA also appreciates the landing page for the Proposed Rules that provides access to the Proposed Rules, a side-by-side document comparing the existing and proposed changes, and a narrative section highlighting the key changes in the Proposed Rules. In addition, we applaud the CFP Board of Standards for pointing out in the side-by-side additions to the Proposed Rules where there is "no equivalent to current rules" to provide a readily available comparison.

As part of FPA's comment letter process, we surveyed membership, engaged the Member Advocacy Council (MAC) to provide input and content for the comment letter, and engaged the FPA Board of Directors for further input on the Proposed Rules and comment letter. FPA would like the CFP Board to address the following questions.

- What prompted the CFP Board to revise the Current Procedures? Specifically:
  - Does the CFP Board intend for the Proposed Rules to mirror any specific federal or state procedural rules?
  - Do revisions to the Current Procedures arise from any findings or analyses by the CFP Board regarding the outcomes of disciplinary procedures involving CFP® professionals? (i.e., has the CFP Board determined that the Current Procedures are ineffective and, if so, how has it made that determination?)
  - Does the CFP Board intend for CFP® professionals to have less power in responding to a disciplinary investigation or action brought by the CFP Board under the Proposed Rules as compared to the Current Procedures?
  - How does the CFP Board intend to measure the effectiveness of the Proposed Rules when they are implemented?
  
- Can the 60-day comment period be extended? Releasing the Proposed Rules at the end of the 2018 created challenges for FPA to receive valuable feedback from our members. FPA would welcome more time to obtain fuller input from its membership.
  
- We request that the Proposed Rules be provided alongside visual tools explaining the procedural process under the Proposed Rules in a graphic format that is easier for CFP® professionals to quickly understand.
  
- Does the CFP Board have any memoranda of understanding with federal, state, or SRO regulators (such as FINRA) regarding the sharing of disciplinary information involving CFP® professionals?

### **Observations**

FPA supports the CFP® certification as the designation that consumers should seek when engaging a financial planning professional and defends the integrity of the marks on behalf of FPA Members.

- While the Proposed Rules make a strong effort to be both exhaustive in scope and exact in language, the 24-page document also may be difficult for a CFP® professional without a legal background to understand.
  
- The Proposed Rules give the CFP Board more reach than the Current Procedures and we would like to see balance and fairness toward the rights of the certificant in the next revision.

### **Specific Recommendations for the Proposed Rules**

In addition to the general questions listed above, FPA members also note several areas of concern. FPA recommends that the CFP Board consider the below specific concerns as it further revises the Proposed Rules. (The concerns listed here are not exhaustive but represent a few of the most significant concerns noted by FPA members who have reviewed the Proposed Rules to date.)

- Section 1.1 suggests that the CFP Board will have discretion to proactively commence investigations of CFP® professionals, regardless of whether the CFP Board first receives a complaint or disclosure prompting an investigation. This is a significant expansion from the Current Procedures that gives the CFP Board considerably more power over its regulation of CFP® professionals. FPA members are concerned about the potential for overreach without the establishment of appropriate checks and balances.
  
- Section 1.3 imposes substantial new duties upon CFP® professionals responding to a CFP Board inquiry, while creating an imbalance in “cooperation” favoring the CFP Board. Further, complying with this

section may cause CFP® professionals to violate privacy regulations and fiduciary duties owed to clients. Specifically:

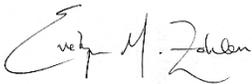
- Section 1.3(a)(1) requires CFP® professionals to timely provide “all non-privileged documents requested in a Request for Production that are in Request Recipient’s possession, custody, or control.” (Whether and which documents are “privileged” in this context is not clearly defined.) On the other hand, Section 6.1 allows the CFP Board Counsel to withhold documents requested by a CFP® Professional if the CFP Board Counsel deems the documents to be irrelevant, privileged, confidential, attorney or expert work product, or prohibited from disclosure by law. The imbalance created by these juxtaposing rules unfairly favors the CFP Board, and is inconsistent with due process in both FINRA arbitrations and the courts.
- Section 1.3(5)(i)-(iii) requires CFP® professionals to “use reasonable efforts” to execute documents that authorize the release of information and documents to the CFP Board and that release third parties from potential liability for providing the information to the CFP Board. For many years, public policy surrounding the protection of confidential information has led to regulations that *close down* the sharing and release of non-public, confidential information. However, it seems one intended purpose of this proposed rule is to cause CFP® professionals to execute contracts authorizing the release of confidential client documents and information to the CFP Board. CFP® professionals that follow this rule may violate privacy regulations applicable to financial services professionals, such as Regulation S-P, if they release confidential client information to third parties, including the CFP Board. Likewise, the CFP Board exposes itself to liability associated with the protection and proper disposal of confidential information it requests and then holds in its possession. Moreover, if the CFP Board expects CFP® professionals to require clients to contractually waive their rights to take action against a party responsible for the harmful release of confidential client information, the CFP Board interferes with the fiduciary duty CFP® professionals owe to their clients.
- Section 10.3(b) does not properly account for expert witnesses a CFP® professional may use in a hearing. Namely, the rule suggests that an expert witness would not be permitted to attend a hearing, except while testifying. An expert witness should be permitted to attend the full hearing to be able to adequately address and respond to others’ testimony and all facts and arguments presented at the hearing. Further, a Respondent should be permitted to call a rebuttal witness during a hearing without having first filed a notice identifying the rebuttal witness.
- Section 3.3 provides that the CFP Board Counsel “must” deliver a Complaint for Single Bankruptcy if the CFP Board learns that a CFP® professional files for bankruptcy and certain other circumstances are met. Section 3.4 then places the burden on the Respondent to either accept an Order of Public Censure or demonstrate to the CFP Board that the CFP® professional remains able to responsibly manage his/her financial affairs. The rigidity of this rule is unnecessary and inappropriate, as there surely are examples of life events (e.g., a divorce or serious health problem) that could lead a CFP® professional to file for bankruptcy without the bankruptcy filing, in-and-of-itself, necessitating a Public Censure or formal disciplinary hearing. If this rule is to remain in the Proposed Rules, it should at least be amended to provide the CFP Board discretion to consider extenuating circumstances leading to or surrounding a bankruptcy filing.
- Section 2.1(b)(1) provides that the CFP Board Counsel may issue an Interim Suspension Order if Respondent is the subject of a felony or misdemeanor Criminal Conviction for certain crimes, including “a crime of moral turpitude.” What constitutes a “crime of moral turpitude” for the purposes of prompting an automatic suspension? As this may be a subjective standard open to different interpretations depending on the jurisdiction, this standard should be more carefully defined in the Proposed Rules.

## Conclusion

Due to the depth and complexity of the proposed changes to the Current Procedures, FPA requests that the CFP Board extend the public comment period of the Current Procedures to allow members of the FPA additional time to review and understand the Proposed Rules. Specifically, we request that the CFP Board establish a joint working committee with members of the FPA to further discuss the questions and concerns noted above, along with other issues of shared interest to the CFP Board and FPA.

Please know FPA stands ready to further engage our community of CFP® professionals on this critically important issue and will do everything we can to support the profession and our members as the CFP Board further develops, refines, finalizes and implements the Proposed Rules.

Respectfully,



Evelyn Zohlen, MBA, MS, CFP®  
2019 FPA Board President



Frank Pare, CFP®  
2019 FPA Board Chair



Martin Seay, Ph.D., CFP®  
2019 FPA Board President-elect



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