



March 1, 2019

Diana J. Foley, Esq.
Securities Administrator
Nevada Secretary of State's Office
Securities Division
2250 Las Vegas Boulevard North
Suite 400
North Las Vegas, NV 89030
fiduciaryduty@sos.nv.gov

RE: *Public Comment on Draft Regulations to be added to Chapter 90 of the Nevada Administrative Code pertaining to laws set forth in Nevada Revised Statutes (NRS) Chapters 90 and 628A.*

Ms. Foley:

The Financial Planning Coalition ("Coalition")¹ – comprised of Certified Financial Planner Board of Standards ("CFP Board"),² the Financial Planning Association® ("FPA"),³ and the National Association of Personal Financial Advisors ("NAPFA")⁴ – appreciates this opportunity to comment on the Securities Division's draft regulations⁵ regarding the fiduciary duty of broker-dealers ("B-D"s), investment advisers ("IA"s), and their respective representatives when providing personalized investment advice.

The Coalition's position on a fiduciary standard for personalized investment advice is based upon the real-world business experience of more than 83,000 CFP® professionals who are stakeholders and members of the Coalition organizations. Importantly, CERTIFIED FINANCIAL PLANNER™ professionals provide fiduciary-level services across business models – as

¹ The Financial Planning Coalition is a collaboration of the leading national organizations representing the development and advancement of the financial planning profession. Together, the Coalition seeks to educate policymakers about the financial planning profession, to advocate for policy measures that ensure financial planning services are delivered in the best interests of the public, and to enable the public to identify trustworthy financial advisers. See, <http://financialplanningcoalition.com>.

² CFP Board is a non-profit certification and standard-setting organization, which sets competency and ethical standards for more than 83,000 CERTIFIED FINANCIAL PLANNER™ professionals throughout the country. CFP® professionals voluntarily agree to comply with CFP Board's rigorous standards, including education, examination, experience and ethics, and subject themselves to CFP Board's disciplinary oversight.

³ FPA® is the largest membership organization for CFP® professionals and those who support the financial planning process in the U.S. with 23,000 members nationwide. 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® works in alliance with academic leaders, legislative and regulatory bodies, financial services firms and consumer interest organizations to represent its members.

⁴ NAPFA is the nation's leading organization of fee-only comprehensive financial planning advisors with more than 3,500 members nationwide. NAPFA members are highly trained professionals who adhere to high professional standards. Each NAPFA advisor annually must sign and renew a Fiduciary Oath and subscribe to NAPFA's Code of Ethics.

⁵ Specifically pertaining to NRS 90.575, NRS 628A.010, and NRS 628A.020, as modified by SB 383.

investment advisers, broker-dealers, and insurance agents – and across compensation models – including commission and fee models. It is this unique perspective that we bring to the discussion about the proper standard of conduct for investment advice. And it is with this experience that the Coalition reiterates its longstanding support for a uniform fiduciary standard for investment advice and acknowledges Nevada’s initiative to close loopholes through draft regulations implementing Senate Bill 383, while advocating for stronger provisions in line with CFP Board’s newly revised *Code of Ethics and Standards of Conduct*.

I. The Coalition’s Practical Experience

The Coalition offers unique, on-the-ground experience borne out every day by thousands of professionals certified by CFP Board. CFP Board is a certification and standards-setting organization that was founded in 1985 as a non-profit under section 501(c)(3) of the Internal Revenue Code. CFP Board is a professional body that 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). The NCCA standards require demonstration of a valid and reliable process for development, implementation, maintenance, and governance of certification programs.

Today, more than 83,000 CFP® professionals agree to abide by high 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. All CFP® professionals are bound by CFP Board’s existing standards of professional conduct, which were recently revised and go into effect on October 1, 2019 as the *Code of Ethics and Standards of Conduct* (“Standards”).

CFP Board *Standards*, complete with fiduciary obligations, apply across a wide variety of business models: CFP® professionals work at independent broker-dealers, wirehouses, registered investment advisers, insurance companies, and other stand-alone business models or dual registrants. Wherever CFP® professionals are employed, they have experience with providing professional services under the fiduciary standard, complete with the traditional duties of care and loyalty found in common law fiduciary precedent, and the duty to follow client instructions.

II. The Coalition’s Longstanding Support for a Uniform Fiduciary Standard

Since its inception in 2007, the Coalition has been an unwavering advocate in support of regulatory reforms to increase protections for “Main Street” retail investors, in particular by advocating for a uniform fiduciary standard for investment advice. The Coalition actively supported Congressional adoption of Section 913(g) of the Dodd-Frank Act, which authorized the U.S. Securities and Exchange Commission (“SEC” or “Commission”) to promulgate rules requiring broker-dealers and investment advisers to act in the best interest of the customer “without regard to” their own financial or other interest when providing personalized investment advice about securities. The Coalition also advocated for a uniform fiduciary standard of conduct for investment advice in its 2013, 2017, and 2018 comment letters⁶ to the SEC in

⁶ Respectively available at <https://www.sec.gov/comments/4-606/4606-3126.pdf>; <https://www.sec.gov/comments/ia-bd-conduct-standards/cl4-2674105-161456.pdf>; and <https://www.sec.gov/comments/s7-07-18/s70718-4186652-172763.pdf>, <https://www.sec.gov/comments/s7-08-18/s70818-4185790-172672.pdf>, and

response to requests for information and the Regulation Best Interest package of rule proposals (Reg BI). Additionally, the Coalition supported the U.S. Department of Labor's ("DOL") 2016 Fiduciary Rule for retirement investment advice. Throughout these communications, the Coalition advocated for a standard of conduct for investment advice that is no less stringent than the existing fiduciary standard under the Investment Advisers Act of 1940 (the "Advisers Act") and made clear that disclosure alone is ineffective against investor confusion and harm.

The Coalition's longstanding support for a uniform fiduciary standard for investment advice envisions a duty to act in the client's best interest, regardless of business model or compensation type. At its core, this duty is based upon common law fiduciary principles, and includes both a duty of loyalty, which addresses conflicts of interest that may harm investors, and a duty of care, which encompasses due diligence and competence requirements for those providing financial advice. The Coalition's position stems from both the practical experience of CFP® certificants and CFP Board's newly revised *Standards*, which expand an already existing fiduciary duty to the provision of all financial advice, not just financial planning.

III. CFP Board *Standards*: A Business-Model Neutral Fiduciary Standard

CFP Board first adopted a fiduciary duty in 2007, when it updated its then-existing standards of professional conduct to include a requirement that a CFP® professional must act as a fiduciary when providing financial planning or material elements of financial planning. Although some in the financial services industry called such a standard unworkable at the time, the population of CFP® professionals has grown by more than 50 percent. Additionally, in recent years, a growing number of financial service providers believe that a fiduciary standard of conduct is appropriate for the delivery of personalized investment advice.⁷ Multiple investor surveys also indicated that consumers have come to expect fiduciary advice and many assume they are already getting such advice, when in reality they may only be receiving advice pursuant the suitability standard of conduct.⁸

Partly due to this changing landscape, CFP Board decided to revise its standards of professional conduct. In December 2015, CFP Board announced the formation of a Commission on Standards to review and recommend to the Directors of CFP Board proposed changes to its standards of professional conduct. Commission members included CFP® professionals and others in the financial services industry who operate under diverse business models, regulatory experts, a consumer 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

<https://www.sec.gov/comments/s7-09-18/s70918-4185807-172700.pdf>.

⁷ Aité Group LLC, "Fiduciary Study Findings For CFP Board," at p. 14 (January 2016) ("Over Half of Registered Representatives and More Than 80% of RIAs Believe the Fiduciary Standard is Appropriate").

⁸ Financial Engines, "In Whose Best Interest? (Part 2) A Financial Engines Survey on the Conflict of Interest Rule," at p. 1 (April 2017), available at <https://financialengines.com/docs/financial-engines-best-interest-report-2-041817.pdf> ("Unchanged from 2016, 93 percent of Americans think it is important that all financial advisors who provide retirement advice should be legally required to put their clients' best interest first. [...] More than half of respondents (53 percent) mistakenly believe that financial advisors are already legally required to put their clients' best interests first when they give retirement advice."); AARP, "Attitudes Toward The Importance of Unbiased Financial Advice," at p. 4 (April 2016), available at https://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2016/attitudes-unbiased-fin-advice-rpt.doi.10.26419%252Fres.00123.001.pdf ("Nearly nine in ten (88%) retirement account holders think it is important that professional financial advisors give advice that is in the best interest of their clients."); Personal Capital, "2017 Personal Capital Financial Trust Report," at p.5, available at <http://bit.ly/2rUJOpU> ("Nearly half (46%) of Americans believe all financial advisors are required by law to always act in their client's best interests.")

comment two drafts of the then-proposed *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 *Standards* in March 2018. The *Standards* will become effective in October 2019 and extend the application of the fiduciary duty from financial planning services to **all** Financial Advice. Financial Advice is very broadly defined but excludes order taking. A CFP® professional's fiduciary duty under these new *Standards* includes a duty of loyalty, a duty of care, and a duty to follow client instructions. The *Standards* provide explanations of each of these duties drawn from common law fiduciary concepts.

The expanded fiduciary obligation is “the crown jewel” that animates a CFP® professional's commitment to high professional standards. CFP® professionals will owe their clients the same fiduciary duty both when providing Financial Planning services and when providing Financial Advice, thereby eliminating potential client confusion about the CFP® professional's obligations to a client when providing both types of services. The fiduciary obligation found in the *Standards* applies to all CFP® professionals, regardless of compensation or business model.

IV. Comparisons of Nevada's Draft Regulations to Reg BI and CFP Board Standards

The Coalition acknowledges that the Nevada Securities Division has limited authority over insurance producers and insurance sales representatives. Nevertheless, despite these jurisdictional limitations, the Coalition commends Nevada for drafting generally comprehensive regulations, and even including coverage for recommendations and advice on “an insurance product or an investment by comparison to a security...” (emphasis added). It would be beneficial if the Nevada Securities Division work with its fellow state regulators in the future to expand a fiduciary duty to the insurance space.

It is against the backdrop of the SEC's ongoing Reg BI rulemaking process and CFP Board *Standards*, that the Coalition evaluated Nevada's draft regulations. Although there are similarities between Nevada's draft regulations and Reg BI, the state's proposal goes farther in terms of establishing a fiduciary standard of conduct. However, there are crucial areas, including details of the fiduciary duty and handling conflicts of interest, where Nevada's approach falls short of the more stringent requirements set by CFP Board *Standards*.

A. Nevada's Draft Regulations in the Context of Reg BI

It is clear that Nevada's draft regulations borrow aspects from the SEC's Reg BI rulemaking:

- Both proposed regulations mention working in the best interest of retail investors but do not specifically define what “best interest” means. Neither the Nevada draft regulations nor Reg BI use the “without regard to” language found in Section 913(g) of Dodd-Frank to define what “best interest” means.
- Both proposals frame “best interest” as preventing a B-D firm or its sales representative from placing their interests ahead of the client's. This is different than mandating an affirmative duty to proactively place the client's interests ahead of those of the B-D, and may result in a “tie” between the B-D's interests and those of the client.

- Reg BI and Nevada’s draft regulations each clarify that the standard of conduct is limited in its application to securities-based recommendations, transactions, or investment advice.

Yet there are differences between Nevada’s draft regulations and the SEC’s approach, signifying Nevada’s effort to close existing loopholes through the implementation of Senate Bill 383:

- The key distinction is that Nevada uses the term “fiduciary” and extends this fiduciary duty to broker-dealers and their representatives, while the SEC declines to do either. Even though the term “fiduciary” is not defined in Nevada’s draft regulations, the regulations list the types of acts that would trigger this fiduciary duty.⁹ These acts are the same for broker-dealers and investment advisers.¹⁰
- Unlike the SEC, Nevada also envisions a rebuttable presumption that broker-dealers and their sales representatives each owe a fiduciary duty to their clients and the burden of proof lies with them to show that an exemption exists from this ongoing duty.¹¹
- Nevada’s draft regulations contain an Episodic Fiduciary Duty Exemption for B-Ds and sales representatives. (The state proposal makes clear that IAs would be held to a fiduciary standard all the time, since no such similar exemption exists for investment advisers). This is a strikingly different approach than the one taken by Reg BI, which is transaction-based and starts with the premise that B-Ds are giving periodic advice. In other words, Reg BI would only apply at the time a recommendation is made. It does not contemplate an ongoing and continuous duty, like Nevada’s draft regulations do. Once the Episodic Fiduciary Duty Exemption is triggered, it mimics Reg BI in that qualifying B-Ds and sales representatives are held to only a limited fiduciary duty as to specific advice, rather than an ongoing and continuous fiduciary duty.
- Additionally, while the SEC proposed title restrictions for stand-alone broker-dealers and their registered representatives, Nevada expressly stated that dually registered professionals are “presumed to be acting in their capacity as an investment adviser”¹² or IA representative. In fact, in determining whether a B-D or its sales representative breached the fiduciary duty, Nevada’s draft regulations take into consideration not only an extensive list of titles,¹³ but also whether that professional held him/herself out as a fiduciary.¹⁴ The SEC’s Reg BI proposal contains no such extensive list or holding out provision; it only addresses “investment adviser” and “investment advisor” titles.

B. Nevada’s Draft Regulations in the Context of CFP Board *Standards*

The state’s proposal and CFP Board *Standards* both conceptually equate working in the client’s best interest with a fiduciary standard of care. Broadly speaking, both frameworks apply to representatives of B-Ds and IAs. However, while there are similarities, what is most important are the significant differences between Nevada’s approach and CFP Board *Standards*. On

⁹ Sec. 1., generally and Sec. 1.2., specifically.

¹⁰ Sec. 3.1.

¹¹ Sec. 9.

¹² Sec. 3.2.

¹³ Sec. 5.4; Sec. 1.1.

¹⁴ “[A]cts in a fiduciary capacity towards the client” Sec. 1.2(d); Sec. 3.1(d).

almost all major points, CFP Board's voluntary *Standards* set a higher standard than the provisions found in Nevada's draft regulations.

➤ Application of Fiduciary Duty

Notably, the *Standards* are business model-neutral in that the fiduciary duty applies to professionals working in all business models equally, including insurance professionals. Nevada's draft regulations apply only to B-Ds, IAs, and their respective representatives. The state proposal also would provide certain exemptive relief to professionals working in the B-D space providing episodic advice. The *Standards* do not distinguish between different types of professionals and do not make exceptions for intermittent advice-giving. Once an individual is a CFP® professional, that person has an ongoing and continuous fiduciary duty throughout the course of the client engagement. Although the Coalition understands that the Nevada Securities Division's jurisdiction is limited with respect to the insurance industry, there is room to strengthen the Division's approach to episodic advice-giving.

➤ Definition of Fiduciary Duty

The *Standards* make clear that "best interest" means "fiduciary" and provide a detailed definition of that standard of conduct. Unlike Nevada's draft regulations, the *Standards* specify that the fiduciary duty entails loyalty, care, and following client instructions. The *Standards* use the "without regard to" language found in Section 913(g) of Dodd-Frank to emphasize the parameters of the duty of loyalty. The *Standards* further require that a "CFP® professional must place the interests of the Client above the interests of the CFP® professional and the CFP® Professional's Firm." Through these requirements, the *Standards* seek to ensure that the client's best interests are always paramount.

Nevada's draft regulations do not define "fiduciary" or "best interest" but rather list the types of activities that would trigger an ongoing, continuous fiduciary duty, and the types of activities that would be considered breaches of this duty. These proposed fiduciary triggers appear to be based on well settled fiduciary law principles. However, identifying fiduciary triggers in a regulation differs from, and will likely prove less effective than, establishing a principles-based system that expressly defines key terms and outlines the concepts behind them.

➤ "Investment Advice" versus "Financial Advice"

As stated above, Nevada's proposed regulations appear to follow the SEC's Reg BI proposal in limiting application of its standard of conduct to securities-related recommendations and investment advice. That limitation does not exist in CFP Board *Standards*, which invoke the fiduciary duty for CFP® professionals "[a]t all times when providing Financial Advice to a Client." The *Standards'* definition of "Financial Advice" is inclusive of and more expansive than the definition of "Investment Advice" found in Nevada's draft regulations. "Financial Advice" is defined broadly to include not just the same securities-based recommendations and advice referenced in Nevada's draft regulations, but also advice as to a wider array of financial assets.

➤ Conflicts of Interest

Finally, the *Standards* discuss how practically to handle conflicts of interest, whereas Nevada's draft regulations are silent on this. The *Standards* mandate that CFP® professionals "avoid or disclose and manage conflicts of interest." Nevada's proposed regulations contain no such similar affirmative, mandatory provision. Instead, the state's draft regulations frame the fiduciary

duty in terms of circumstances triggering and breaching the ongoing fiduciary duty, but nowhere in those provisions is avoidance, mitigation or management referenced.

Additionally, Nevada's draft regulations list the types of conduct that are not *per se* violations, if certain other criteria are met. For example, earning sales commissions would not be banned outright "so long as it is in the client's best interest to be charged by transaction as opposed to other types of fees, and the commission is reasonable."¹⁵ This regulatory provision may partially echo the business model-neutral spirit of the *Standards* but it does not provide for a proactive way of avoiding or managing/mitigating conflicts. Nevada's draft regulations also seem to rely on disclosures of gains, such as commissions or load fees, at the time advice is given. Nowhere in Nevada's disclosure provision is conflict avoidance, mitigation, or management mentioned.

V. Areas in Need of Additional Clarification

Apart from the shared aspects and nuances found among Nevada's draft regulations, Reg BI, and CFP Board *Standards*, there remain outstanding questions about certain provisions in the state's proposal. For instance, the definition of "Investment Advice" includes advice or recommendations regarding the type of account a client should open. This provision may be interpreted to refer to Individual Retirement Account ("IRA") rollovers but that is not made clear by the wording. If IRA rollovers are to be included in the definition of "Investment Advice," the regulatory text should expressly reflect that.

Likewise, there is no directive to mitigate or manage conflicts of interest in Nevada's draft regulations. The sale of proprietary products or earning sales commissions are not *per se* violations, as long as certain conditions are met. Certain gains, such as financial planner referral fees, must be disclosed before or at the time the advice is given. But pointing out examples of scenarios is no substitute for establishing a principles-based conflict management system. The absence of principles-based methods of handling conflicts of interest leaves a major blind spot that needs to be addressed.

Finally, it is unclear whether or not Nevada's draft regulations establish a private right of action. Although a private right of action does not appear to be explicitly stated in the draft, Section 9 introduces a presumption that B-Ds and their sales representatives each owe a fiduciary duty to their clients, and indicates that the burden of proof lies with the B-D and sales representative to show "in an arbitration, civil or administrative hearing" that an exemption exists. It is unclear from this language whether the draft regulations contemplate an implied private right of action. We request that the Division clarify this issue.

In conclusion, the Coalition has a longstanding history of supporting a uniform fiduciary standard. The Coalition's position is based upon the real-world experiences of CFP® professionals across a variety of business models who are required to adhere to a fiduciary duty. The fiduciary duty in CFP Board's newly revised *Standards* reflects the simple and unambiguous principle that working in the client's best interest is built upon the common law fiduciary principles of a duty of care and a duty of loyalty, encompasses conflict management, and covers all financial advice. Effective regulations will do the same.

¹⁵ Sec. 6.3.

Thank you.

Sincerely,



Kevin R. Keller, CAE
Chief Executive Officer
CFP Board



Lauren Schadle, CAE
Executive Director/CEO
FPA®



Geoffrey Brown, CAE
Chief Executive Officer
NAPFA