FINANCIAL PLANNING COALITION

Consumers Are Confused and Harmed:

THE CASE FOR REGULATION OF FINANCIAL PLANNERS

Executive Summary

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[1] This executive summary is derived from a comprehensive research-based case statement in support of regulation of financial planners.

Introduction

The financial services industry in the United States has become increasingly complex and difficult to navigate for many consumers, leaving them more and more vulnerable to fraud and abuse. Segments of the financial services industry are highly regulated to promote fairness and consumer protection. However, these regulatory schemes, which have evolved over decades, often in response to specific crises, have created a patchwork of regulations that do not adequately address the evolving delivery of retail financial advice. Today, Americans receive financial advice from advisors who use a wide range of titles and are subject to different, often inconsistent, regulatory and ethical standards. This *de facto* patchwork of regulations has left a significant industry sector – financial planner professionals – largely unregulated or under-regulated.

Financial planners provide consumers with comprehensive and integrated financial advice that encompasses a broad range of subject areas and is focused on meeting the specific needs and goals of those consumers. They help millions of Americans meet their financial goals through proper management of financial resources, assisting with financial decisions that involve the interplay of strategies affecting budgeting, saving, investing, retirement planning, insuring against risk, and tax planning. As this report will show, while components of the advice provided by financial planners are regulated, the delivery of comprehensive and integrated financial planning services is unregulated.

This scheme that only regulates narrow components of financial planning has created gaps that allow financial service providers to hold themselves out to consumers as "financial planners," or as persons providing financial planning services, without requiring any demonstrated competencies in financial planning and without mandating even minimal standards of conduct. Author John Gray's description of the problem two decades ago remains equally true today: "[p]lanners influence the investment of several hundred billion dollars, but in effect they operate in the dark. There is no effective regulation of planners, no accepted standard for admission

into their ranks … no way to assess their performance, no way even to know how many of them there are. All anyone need do is hang up a shingle and start planning."[2]

Consumers want and benefit from true financial planning services. Yet, our current regulatory structure provides them no assistance in determining whether someone holding themselves out as a financial planner is competent to provide comprehensive and integrated financial planning or is only competent or licensed to provide a more limited range of financial services, e.g., licensed to sell securities or insurance products or regulated to provide investment advice. Within the financial planning profession, organizations like Certified Financial Planner Board of Standards ("CFP Board") have stepped in to fill gaps that regulation has not addressed, setting and enforcing competency and ethical standards for financial planners and awarding designations like CERTIFIED FINANICAL PLANNER™ certification that are intended to help consumers identify qualified financial planners. However, the public cannot turn to governmental authorities for verification of a financial planner professional's qualifications, as they are accustomed to when seeking services related to other professions and trades. As a result, many consumers have great difficulty selecting a financial planner and are harmed when they receive narrowly focused advice, single product solutions, or advice that is not in their best interest.

Congress recognized that there could be gaps in the regulation of financial planners when it directed the Government Accountability Office ("GAO") to study the oversight of financial planners as well as their use of designations.[3] The GAO, working within a very aggressive six-month timeline, reviewed then available data but did not conduct any original research. The GAO acknowledged that there was no "specific regulation of 'financial planners' *per se* at the federal or state level . . ."[4] but determined, based on the data available at the time it completed its report, that "while *no single law* governs the *broad array of activities* in which financial planners may engage, *given available information*, it does not appear that an additional layer of regulation specific to financial planners is warranted *at this time*."[5]

Other findings in the GAO Report are also worth noting. The GAO identified a number of consumer protection issues presented by the absence of financial planner regulation, including that "consumers may be unclear about when a financial planner is required to serve the client's best interest"[6] and that consumers "may be unable to distinguish among the various financial planning designations that exist and may not understand the requirements that underpin them."[7]

The GAO also acknowledged that its analysis was limited by the lack of industry-related data at its disposal, specifically noting that the extent of problems related to unethical and/or unqualified financial planners was not fully known. The GAO noted that this was because neither federal nor state regulators track data on financial planners since there are no laws that require

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[2] John A. Gray, *Reforms to Improve Client Protection and Compensation Against Personal Financial Planners' Unethical Business Practices*, 32 AM. BUS. L.J. 245, 245 (1994).

[3] GAO, REGULATORY COVERAGE GENERALLY EXISTS FOR FINANCIAL PLANNERS, BUT CONSUMER PROTECTION ISSUES REMAIN 2 (JAN. 2011) [hereinafter the GAO Report], mandated under section 919C of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").

[4] *Id.* at 3.

[5] *Id.* at 33 (emphasis added).

[6] *Id.*

[7] *Id.* at 32.

financial planners to register or keep books and records, as other financial service providers, such as investment advisers, are required to do. The GAO noted, however, that "[g]iven the significant growth in the financial planning industry, ongoing concerns about potential conflicts of interest, and consumer confusion about standards of care, regulators may benefit from identifying ways to get better information on the extent of problems specifically involving financial planners and financial planning services."[8]

The Financial Planning Coalition[9] has conducted original research and compiled reliable industry data relating to financial planners that the GAO did not have at its disposal when it conducted its 2011 analysis. This new data conclusively demonstrates that regulation of financial planners is necessary to protect consumers. It includes, among other things:

- Industry research showing that over 100,000 financial service providers incorrectly self-identify as members of a financial planning practice, but do not actually offer comprehensive financial planning services;
- Consumer research demonstrating significant consumer confusion regarding the title "financial planner";
- Consumer research showing that far too many consumers are harmed when they seek out financial plans or financial planning services and do not actually receive them; and
- Consumer research showing that competency and ethical standards for financial planners do make a difference in the quality of service consumers receive.

Common sense regulation of financial planners is needed to promote consumer protection. Consumers seeking financial planning advice must have the ability to identify competent and ethical financial planners, i.e., those who have met basic standards of training, testing, and experience, and who are required to act solely in the client's best interest. Individuals who market themselves to consumers as financial planners or as providing financial planning services must be accountable to some regulatory authority.

This report will answer the question – Why is regulation of financial planners needed? – by showing that:

1. Consumers want and benefit from comprehensive and integrated financial planning services;
2. Lack of regulation of financial planners allows significant numbers of advisors, spurred by economic incentives, to hold themselves out to consumers as financial planners or providing financial planning services without meeting basic competency and ethical standards;
3. Consumers are confused by the many titles that financial service providers use, which, in conjunction with industry misrepresentation, makes it difficult for them to find competent and ethical financial planners;

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[8] *Id.* at 27.

[9] The Financial Planning Coalition is comprised of the Certified Financial Planner Board of Standards ("CFP Board"), the Financial Planning Association® ("FPA®"), and the National Association of Personal Financial Advisors ("NAPFA").

4. Consumers seeking comprehensive financial planning services are harmed by lack of regulation because it results in consumers receiving narrowly focused advice, single product solutions or advice that is not in their best interests; and

5. Reasonable regulation will reduce harm to consumers by requiring those who hold themselves out as financial planners or as providing financial planning services to meet competency standards and provide services under a fiduciary standard of care.

Consumers Want and Benefit from Comprehensive Financial Planning

Financial planning is the process of helping individuals establish and meet their financial goals through properly managing their financial resources. The hallmark of true financial planning is providing comprehensive and integrated financial advice to consumers in a manner that puts the consumers' interests first. Financial planning advice covers a range of subject areas, including budgeting, selecting and managing investments, insurance planning and managing risk, income tax planning, estate planning and planning for secure retirement.

Financial planning began in the late 1960s and has grown steadily during the last 40 years. Coinciding with its growth, a body of scholarship has developed around financial planning and it is gaining increased recognition as a discrete profession.[10] For example, in a 2008 SEC release, the SEC stated that "financial planning has become a distinct profession."[11] The recognition of financial planning as a profession has been advanced by CFP Board, a non-profit organization founded in 1985 to establish and enforce education, examination, experience and ethics requirements for financial planners, and its partners in the Financial Planning Coalition. In the absence of financial planner regulation, CFP Board has been a leader in protecting consumers and promoting excellence in the profession by establishing competency and practice standards, as well as a code of professional conduct, that have become the recognized standards for financial planner professionals. CFP Board has achieved this through granting the CERTIFIED FINANCIAL PLANNER™ certification (CFP® certification) and enforcing compliance with its standards.

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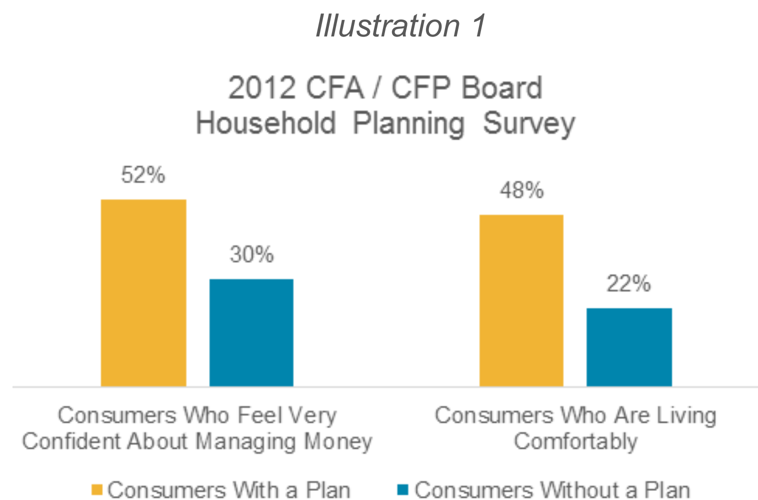
[10] CFP BOARD FINANCIAL PLANNING COMPETENCY HANDBOOK xxi (Dr. Charles Chaffin ed., John Wiley & Sons, Inc.) (2013).

[11] SEC, "Amendments to Form ADV," File No. S7-10-00; Release No. IA-2711; 34-57419; 17 CFR Parts 275 and 279; RIN 3235-AI17, 2008 SEC LEXIS 466 (Mar. 3, 2008) (citing Conrad S. Ciccotello, *Will Consult For Food! Rethinking Barriers To Professional Entry In The Information Age*, 40 AM. BUS. L. J. 905, 921 (2003) ("[p]ersonal financial planning as a distinct profession is quite new")).

Today, more than 70,000 CFP® professionals throughout the United States[12] have met the highest level competency standards for financial planning and have agreed to abide by ethical standards that require them to practice under a fiduciary standard of care when providing clients with comprehensive and integrated financial planning advice. CFP® professionals also voluntarily agree to subject themselves to the disciplinary oversight of CFP Board.

Research demonstrates that consumers want and benefit from comprehensive financial planning. In a consumer survey conducted by ORC International for CFP Board in 2013, 70 percent of consumers said they preferred an adviser who has the ability to look at their financial situation comprehensively as opposed to an adviser who specializes in one area, and 91 percent expect the advice they receive from a financial advisor to take into account their total financial situation.[13] In 2012, the Consumer Federation of America ("CFA") joined CFP Board in engaging Princeton Survey Research Associates International to conduct significant consumer research on the planning behaviors and attitudes of American households. A survey of over 1,500 household financial decision makers found that households, across income levels, that had financial plans reported higher levels of financial well-being than those without a plan. By a margin of 52 to 30 percent, consumers with a plan were more likely to feel "very confident" about managing money, savings and investments and by a margin of 48 percent to 22 percent, consumers with a plan were more likely to describe themselves as living comfortably.[14]

Illustration 1



A follow-up 2013 Household Financial Planning Survey and Index[15] highlighted the positive relationship between financial planning and financial preparedness. The study showed that 53 percent of consumers who were comprehensive planners felt very confident in their money management abilities, while only 26 percent of non-planners felt very confident.[16]

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[12] Worldwide, there are more than 150,000 CFP® professionals in 24 countries. *See* Financial Planning Standards Board Ltd. ("FPSB"), "Global CFP® Professional Growth and Distribution," https://www.fpsb.org/about/fpsb-vision-mission-values/64.html (last visited Oct. 17, 2014).

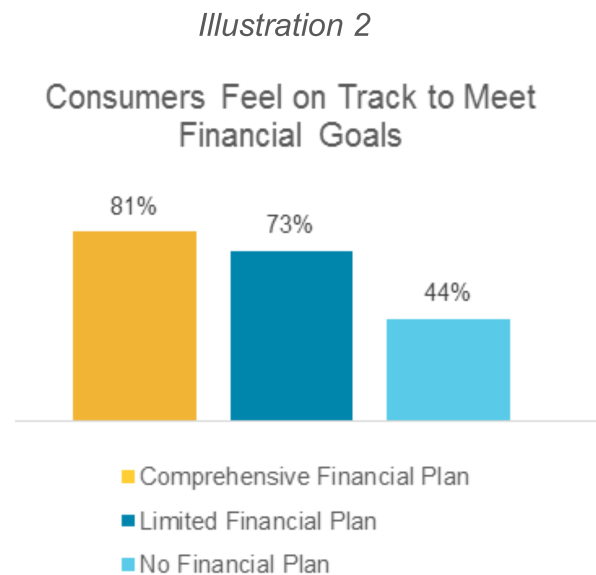
[13] ORC International, CFP Board Financial Adviser Consumer Survey, Aug. 2013, *available at* http://cfp.net/docs/news-events---research-facts-figures/cfp-board-consumer-adviser-survey-orc-research_1-0.pdf. The report presents the findings of an online survey conducted among a sample of 1,012 adults. Interviewing for this survey was completed in August 2013. Results are weighted by age, gender, region, race and education to be representative of the U.S. adult population.

[14] Princeton Survey Research Associates International, 2012 Household Financial Planning Survey, Jul. 2012, *available at* http://www.consumerfed.org/pdfs/Studies.CFA-CFPBoardReport7.23.12.pdf. This research replicated a similar finding in a 1997 study also conducted for CFA by Princeton Research Associates. CFA/Nations Bank, "SURVEY: TWO OUT OF THREE SAVERS ARE WITHOUT FINANCIAL PLANS, UNLIKELY TO ACHIEVE GOALS," May 5, 1997, *available at* http://www.consumerfed.org/pdfs/nofinplan.pdf.

[15] Princeton Survey Research Associates International, 2013 Household Financial Planning Survey and Index, Sept. 2013, *available at* http://www.CFP.net/docs/public-policy/2013-fin-planning-profiles-of-amer-households.pdf.

[16] *Id.*

In 2012, the Financial Planning Standards Council ("FPSC®")[17] released a report with very similar survey results. It documented a three-year longitudinal study designed to evaluate and better understand the value proposition of financial planning.[18] The survey included more than 15,000 Canadian respondents who had received comprehensive planning, limited planning, or no planning. The results, as evidenced in the chart below, clearly demonstrate that consumers are better off with comprehensive financial planning.[19]



Research also demonstrates that consumers want financial services provided under a "best-interest" fiduciary standard. A 2004 survey conducted by ORC International, on behalf of the Zero Alpha Group and CFA, surveyed 1,044 investors regarding regulation of brokers and investment advisers.[20] The survey reflected that 91 percent of respondents thought that the same investor protection rules should apply to both stockbrokers and financial planners if they are offering the same type of investment advice services.[21] Importantly, the survey also reflected that 65 percent of respondents would be much or somewhat less likely to use a stockbroker for investment advice if brokers were subject to weaker investor-protection rules than a financial planner would be.[22]

A 2010 survey conducted by Mathew Greenwald & Associates, on behalf of Envestnet, Inc., found that 98 percent of investors – 65 percent strongly – would support regulation that held all financial advisors to the same standard of service.[23] Additionally, a 2010 survey conducted by ORC International, on behalf of CFA, North American Securities Administrators Association, and the Financial Planning Coalition, found that 91percent of respondents thought that "a stockbroker and an investment adviser (who) provide the same kind of investment advisory services … should have to follow the same investor protection rules" and 97 percent agreed that

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[17] Financial Planning Standards Council (FPSC®) is a not-for-profit organization which licenses the CFP® marks in Canada.

[18] FPSC®, Report: The Value of Financial Planning, Aug. 2012, *available at* http://www.fpsc.ca/sites/fpsc.ca/files/documents/Value_Study.pdf.

[19] *Id. See also* The FPA® and Ameriprise Value of Financial Planning Study, Jul. 2008, *available at* http://www.fpanet.org/docs/assets/Report_Final.pdf (The study found that 49 percent of respondents who had a comprehensive financial plan were very/extremely confident in their financial future. By contrast, only 30 percent of respondents with limited financial plans and 25 percent who had no financial plan felt the same level of confidence.).

[20] ORC International, "Regulation of Stockbrokers and Financial Advisors: What American Investors Understand, Think Is Right: Summary of Survey Findings," briefing for Zero Alpha Group and Consumer Federation of America, Oct. 27, 2004, *available at* http://www.docstoc.com/docs/25999063/RIvestmentZAG_CFAFINAL_102704.

[21] *Id.*

[22] *Id.*

[23] PR Newswire, "Nationwide Survey Finds: Despite Market's Recent Volatility, Investors Express Confidence, High Level of Satisfaction in Their Advisory Relationships," Jun. 29, 2010, http://www.prnewswire.com/news-releases/nationwide-survey-finds-despite-markets-recent-volatility-investors-express-confidence-high-level-of-satisfaction-in-their-advisory-relationships-97375489.html (last visited Oct. 17, 2014).

"when you receive investment advice from a financial professional, the person providing the advice should put your interests ahead of theirs and should have to tell you upfront about any fees or commissions they earn and any conflicts of interest that potentially could influence that advice."[24]

Research also shows that providing advice under a fiduciary standard of care benefits financial service providers. A 2012 survey of financial advisors found that registered representatives who deliver fiduciary services to most clients generated stronger revenue growth versus other registered representatives.[25] In a 2014 survey of financial advisors, 76 percent of financial advisors that had switched from a suitability standard to a fiduciary standard of care reported an increase in total revenue, 72 percent reported an increase in client satisfaction, and 71 percent reported an increase in client trust.[26]

[24] ORC International, "U.S. Investors & The Fiduciary Standard," Sept. 2010, *available at* http://www.hastingsgroup.com/fiduciarysurvey/docs/091510%20Fiduciary%20survey%20report%20FINAL2.pdf.

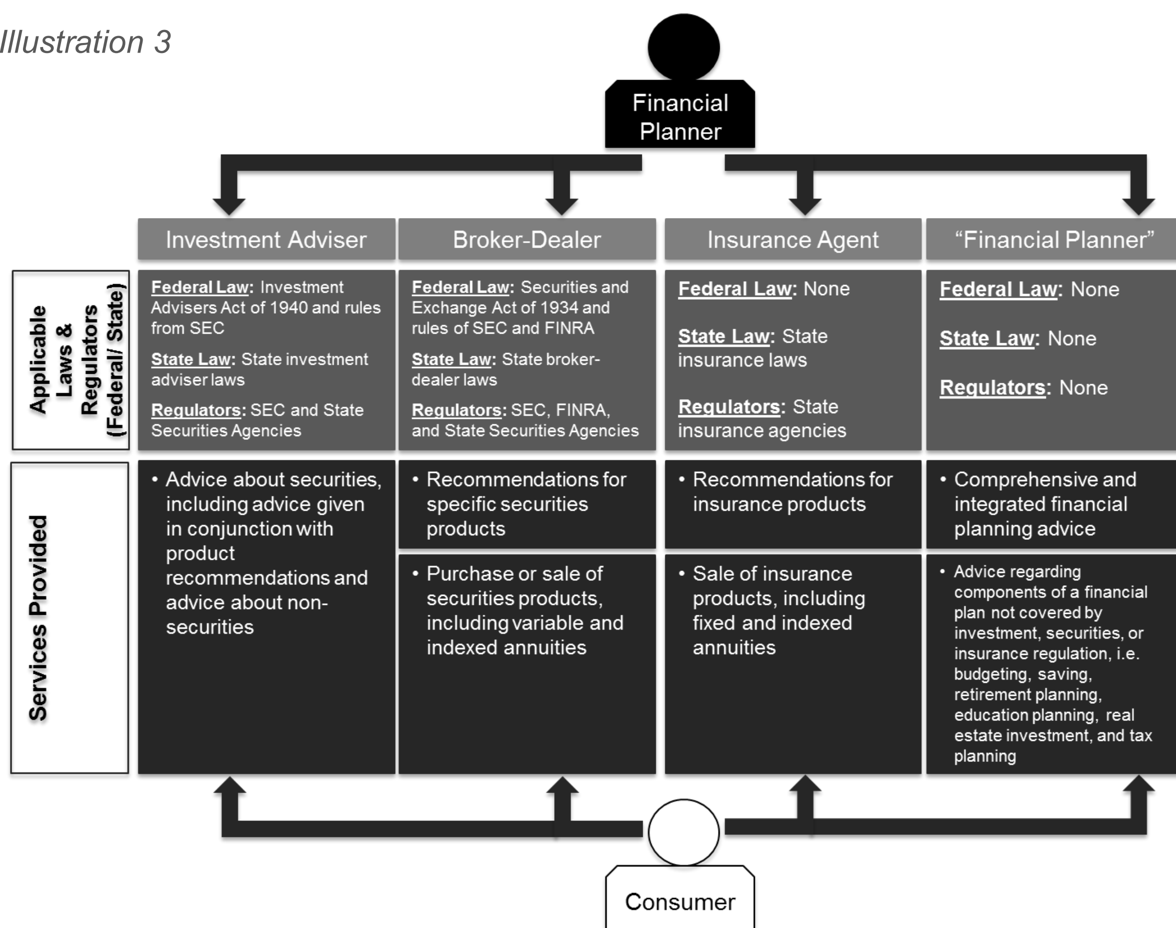
[25] Aite Group, "Fiduciary Study Findings," Jun. 2013, *available at* http://www.sec.gov/comments/4-606/4606-3126.pdf (Appendix A of the Financial Planning Coalition's comment letter submission to the SEC). The survey, conducted in March 2012, gathered substantial data on 498 registered representatives and registered investment advisers who work within the full-service arm of wealth management firms and have dedicated relationships with all, or at least some clients.

[26] Princeton Survey Research Associates International, "Fiduciary Standard Survey," Feb. 2014 (on file with author). Princeton Survey Research Associates International conducted interviews with 1,852 respondents from membership lists of each of these three organizations: CFP Board, FPA® and NAPFA. The interviews were administered online from Dec. 2013 - Feb. 2014.

Financial Planners Are Not Appropriately Regulated to Protect Consumers

As noted earlier, the GAO Report found that financial planners are not regulated, *per se*.[27] Rather, they are regulated on a piecemeal basis – primarily as investment advisers, broker-dealers or insurance agents – when their activities fall within these categories of already regulated services. The chart below summarizes the current patchwork of state and federal regulations governing financial planners.[28]

Illustration 3



[27] GAO Report, *supra* note 3. The lack of direct regulation of financial planners has been the subject of a number of treatises. *See generally* Jonathan R. Macey, Regulation of Financial Planners, White Paper Prepared for the Financial Planning Association, Apr. 2002; Thomas P. Lemke and Gerald T. Lins, Treatise: Regulation of Financial Planners (West 2013).

[28] The GAO created a chart summarizing the three principal regulatory schemes under which financial planners may be regulated. *See* GAO Report, *supra* note 3, at 12. However, it is important to note that the GAO's chart is "not comprehensive and does not include other regulatory regimes or practice standards that may be applicable to financial planners" and specifically found that "not all investment advisers, broker-dealers, or insurance agents are financial planners." For a comprehensive discussion of the application of financial services laws and regulations to financial planners, *see* Jonathan R. Macey, Regulation of Financial Planners, White Paper Prepared for the Financial Planning Association, Apr. 2002; Thomas P. Lemke and Gerald T. Lins, Treatise: Regulation of Financial Planners (West 2013).

As reflected on the chart, a financial planner who provides investment advice (advises consumers as to the value of securities, the advisability of investing in or purchasing or selling securities or issues analyses or reports concerning securities) is regulated under the Investment Advisers Act of 1940 ("Advisers Act").[29] A financial planner is subject to registration requirements and oversight by either the SEC or states for delivering investment advisory services, depending on the amount of assets the financial planner manages.[30] The Advisers Act sets forth standards for advertising, disclosures, fees, liability and record keeping. In addition, investment advisers are required to provide advice under a fiduciary standard of conduct, which requires them to put the interests of their clients first.[31]

A financial planner who operates as a broker (buys or sells stocks for others) or as a dealer (buys or sells stocks through a broker) or is associated with a broker or dealer is regulated under the Securities Exchange Act of 1934 ("Exchange Act").[32] Brokers and dealers must register with the SEC unless an exemption exists.[33] Prior to commencing operations, brokers and dealers are required, among other things, to become a member of a self-regulatory organization ("SRO").[34] The Financial Industry Regulatory Authority ("FINRA"), the recognized SRO for broker-dealers in the United States, sets and enforces a comprehensive set of rules and regulations that govern the sale of securities, including standards of training, experience and competence for persons associated with broker-dealers.[35] Under the Exchange Act and FINRA rules, broker-dealers are required to know their customers and provide recommendations regarding securities that are suitable for their customers.[36]

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[29] 15 U.S.C. §§ 80b et seq. The SEC broadly interprets the Advisers Act to apply to financial planners whose services include advice about securities. Applicability of the Investment Advisers Act to Financial Planners, Pensions Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services, Investment Advisers Act Release No. 1092, 39 S.E.C. Docket 494, 1987 WL 112702 (Oct. 8, 1987) [hereinafter "Release No. 1092"].

[30] An investment adviser is required to register with the SEC if the investment adviser has assets under management ("AUM") over $100 million. Advisers Act, § 203A-1(a)(1). Advisers with greater than $100 million in AUM but less than $110 million are permitted, but not required, to register with the SEC and advisers that are registered with the SEC and have at least $90 million in AUM need not withdraw their SEC registrations. Advisers Act, § 203A-1(a)(2). An investment adviser with AUM under $100 million is generally required to register with the states in which they do business. Many states have based their securities laws on the model rules adopted by the National Conference of Commissioners on Uniform State Laws. The current Uniform Securities Act has been adopted by seventeen states as of December 2013. *See* The Uniform Law Commission, "Uniform Securities Act," *available at* http://www.uniformlaws.org/Act.aspx?title=Securities%20Act (The states include: Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Missouri, Mississippi, New Mexico, Oklahoma, South Carolina, South Dakota, Vermont, and Wisconsin).

[31] SEC v. Capital Gains Research Bureau, 375 U.S. 180, 186 (1963). A financial planner who manages assets for employee benefit and pension plans is also subject to the regulatory requirements of the Employee Retirement Income Securities Act of 1974, as amended ("ERISA"), which include a high fiduciary standard of conduct. Pub. L. 93–406, 88 Stat. 829, codified in part at 29 U.S.C. ch. 18; *see also* Lemke & Lins, 19 REG. FIN. PL. § 3:494 (West 2013).

[32] 15 U.S.C. §§ 78a et seq.

[33] 15 U.S.C. § 78o.

[34] In addition, brokers or dealers must (1) properly file Form BD, (2) become a member of the Securities Investor Protection Corporation ("SIPC") and (3) comply with all applicable state requirements. SEC Guide to Broker-Dealer Registration, http://www.sec.gov/divisions/marketreg/bdguide.htm (last visited Oct. 17, 2014).

[35] *See generally* FINRA Rules, http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=607; Lemke and Lins, 19 REG. FIN. PL. § 3:123 (West 2013).

[36] 15 U.S.C. § 78o; FINRA Rule 2090, http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=9858.

A financial planner who either sells insurance products or offers advice about insurance products is generally required to be licensed by a state insurance department as either an insurance sales agent or an insurance consultant or adviser.[37] Although there is a degree of uniformity in the administration and the regulation of insurance agents or producers across states, variations continue to exist among the laws of various states.[38] As a general matter, state laws require insurance producers or agents to recommend insurance products that are suitable for their customers.[39]

While components of financial planning services are regulated under different laws and enforced by different regulatory bodies at the federal (SEC and SRO) and state levels, there is no regulation of the integration of financial advice. Unfortunately for consumers, this lack of regulation leaves significant gaps in the oversight of the delivery of financial planning services.

Some financial service providers take advantage of the lack of *per se* regulation of financial planners by using the title to evade regulation. In *SEC v. Grigg*, the SEC alleged Grigg was a self-proclaimed financial planner and investment adviser who "engaged in a scheme to defraud two clients out of approximately $332,000 by obtaining such funds from them and claiming to have invested them in securities that do not exist."[40] Grigg held himself out as a financial planner but he was neither licensed by or registered with any state or federal agency to offer or sell securities nor registered with any broker-dealer, or associated with any investment adviser.[41] Grigg subsequently pled guilty to criminal charges of fraud in connection with these activities.[42] In *U.S. v. Perry*, the Department of Justice alleged that the defendant used his position as a "financial planner" to defraud elderly clients by convincing them to liquidate annuities and loan money to him.[43] Importantly, Perry was not licensed as an investment adviser, broker-dealer, or insurance agent and was not otherwise regulated by any state or federal agency. Sadly, these are just a few of the allegations and cases of individuals using the financial planner label to evade regulation.[44]

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[37] Lemke and Lins, 19 REG. FIN. PL. § 4:29 (West 2013).

[38] *Id.*

[39] *Id.*

[40] Complaint, SEC v. Grigg, *et al.*, Civil Action No. 3-09 0087 (M.D. Tenn. Jan. 28, 2009), *available at* http://www.sec.gov/litigation/complaints/2009/comp20873.pdf. The Complaint also alleges Grigg defrauded an additional 25 clients out of approximately $6.2 million.

[41] *Id.* ¶ 9. The Complaint states that "from 1989 through 2002, Grigg was a registered representative with various broker-dealers registered with the Commission; he was, however, discharged in 2002 for multiple compliance violations."

[42] *See* U.S. v. Grigg, 434 Fed. Appx. 530 (6th Cir. 2011).

[43] Indictment, U.S. v. Perry, 2:11-cr-02291-PGR (D. Ariz. Nov. 29, 2011). John S. Leonardo, a U.S. Attorney for Arizona, reported that some of the victims of Perry's scheme were infirm, in their 90s, and lost their life savings.

[44] *See, e.g.*, *In the Matter of Brendan T. Jones*, State of Oregon Dept. of Bus. And Consumer Services, Final Order to Cease and Desist, Case No. S-12-0077, Sept. 4, 2012, *available at* http://www.cbs.state.or.us/dfcs/securities/enf/orders/S-12-0077.pdf (Jones held himself out as a financial planner, but at no time was he licensed to sell securities by the SEC or the state of Oregon); SEC v. Campbell, 2:10-cv-13083-SJM –RSW (E.D. Mich. Aug. 4, 2010), *available at* http://www.sec.gov/litigation/complaints/2010/comp21619.pdf, Summary Judgment granted by SEC v. C.J.'s Fin., 2012 U.S. Dist. LEXIS 117879 (E.D. Mich. Aug. 21, 2012) (Campbell misled investors by telling them she was a licensed financial planner; however, "she was not registered in any capacity with the Michigan Office of Financial and Insurance Regulation as an insurance agent, broker-dealer, or investment adviser.").

State and Federal regulators have also voiced concerns about the lack of regulation of financial planners, specifically finding that the financial planner title is being used to evade regulation. Victor Rodarte, previous chief deputy director for the Arizona Securities Division, stated that "'[w]e can suspend brokerage licenses right and left, but there's nothing to prevent these people from turning around and becoming financial planners.'"[45] In a July 2010 FINRA Order, FINRA specifically stated that "[f]ormerly associated persons, although no longer in the securities industry in a registered capacity, may work in other investment-related industries, such as *financial planning*, or may seek to attain other positions of trust with potential investors."[46]

Some components of financial planning advice are subject to no regulation at all. Advice that does not fall under investment, securities or insurance regulations can include budgeting, retirement planning, tax planning, estate planning, and educational planning. For example, advice on whether to buy a home, at what age to retire, whether to take out a second mortgage on a home, or whether to invest in a real estate venture or in jewelry, coins or fine art would not be subject to regulation under the SEC, FINRA or state securities and insurance regulators.[47] These areas of advice that are not regulated can have a more significant and long-lasting impact on an individual's finances and livelihood than advice covered by investment, securities or insurance regulations. These unregulated areas also account for a large part of consumer assets; in 2013, consumers held more than $4 trillion in "treasure assets," which include fine art, stamps, precious metals and jewelry.[48]

More significantly, the lack of appropriate regulation in the form of competency and conduct standards governing the delivery of holistic, integrated financial planning services harms consumers.

Lack of Competency Standards

Holistic, integrated advice is the foundation of financial planning. A financial decision in any one area of a consumer's financial life will necessarily impact other areas and a true financial planner is uniquely able to assess the impact of any decision on the client's broader financial planning strategy and goals. Yet, under our patchwork regulatory structure, it is very difficult for consumers to identify a financial advisor who has demonstrated the competency to provide integrated financial planning services. Investment advisers, broker-dealers and insurance agents are required to demonstrate specific competencies to obtain their specific licenses or

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[45] *See* Ruth Simon, "THE BROKEN PROMISE OF FINANCIAL PLANNING: Conflicts of interest, incompetence and outright fraud lurk in many parts of the financial planning industry," CNN Money, Nov. 1, 1992, ***available at*** http://money.cnn.com/magazines/moneymag/moneymag_archive/1992/11/01/87610/index.htm.

[46] FINRA, Order Approving a Proposed Rule Change to Amend FINRA Rule 8312 (FINRA BrokerCheck Disclosure), 2010 SEC LEXIS 2246 (Jul. 8, 2010) (emphasis added); *see also* Don Dodson, "Financial Planner Sanctioned by NASD," May 5, 2005, available at http://www.news-gazette.com/news/local/2005-05-15/financial-planner-sanctioned-nasd.html (broker-dealer barred from associating with any NASD (now FINRA) member in any capacity stated that he would remain in the financial planning business, but just could not engage in any transaction that requires a broker-dealer).

[47] *See* Ruth Simon, "THE BROKEN PROMISE OF FINANCIAL PLANNING: Conflicts of interest, incompetence and outright fraud lurk in many parts of the financial planning industry," CNN Money, Nov. 1, 1992, ***available at*** http://money.cnn.com/magazines/moneymag/moneymag_archive/1992/11/01/87610/index.htm (Individual, who held himself out as a "financial planner" and had been previously denied a license to become an investment adviser because he didn't have any securities training or experience, was indicted for defrauding consumers out of $64 million through rare-coin and condominium investments.).

[48] *See* Deloitte, "Art & Finance Report 2013," ***available at*** http://www.deloittelux-library.com/artandfinance/2013/lu_en_wp_artandfinancereport_15032013.pdf.

registrations. They are not, however, required to have competencies in the delivery of other areas of financial advice, nor are they required to take into consideration the impact of their advice across the other regulated or non-regulated subject areas.

This has significant implications for the type of financial advice consumers receive. Mercer Bullard, president and founder of Fund Democracy and an associate professor of law at the University of Mississippi School of Law, illustrates the harm that comes from the lack of regulation of integrated advice with the following example. "An insurance agent who makes personalized recommendations to purchase equity-indexed annuities ["EIAs"] is implicitly recommending that clients not use their funds to: (1) pay down their mortgages or credit balances, (2) increase their 401(k) contributions, (3) invest in mutual funds for retirement, or (4) invest in a 529 (college savings) plan. These four options implicate four distinct regulatory silos (five including the EIA purchase). None of them adequately regulates the conflicts of interest that cut across regulatory lines."[49] In this example, the recommendation by an insurance agent to buy an insurance product, while it might be a suitable product for the client, is an implicit recommendation that the client not use those funds to make a different financial transaction that may be better for the client.

Our piecemeal regulatory structure is designed to protect consumers who want investment advice, who want to buy or sell securities, or who want to buy insurance products; but it is wholly inadequate to protect consumers who want or believe they are getting financial planning advice or services.[50] Using Professor Bullard's example, for a consumer who wants and seeks an insurance solution, the recommendation may be perfectly appropriate. But for a consumer who wants financial planning, the insurance solution should be recommended only if it is in the client's best interests as evaluated in the context of the other potential investments or solutions. Under our current regulatory scheme, financial service providers can hold themselves out to consumers as "financial planners" or as providing financial planning services without any requirement that they demonstrate competencies to provide integrated financial advice or that they consider solutions outside of their regulatory construct.[51]

Lack of Standards of Conduct

In addition to the lack of competency standards, there are no consistent practice standards or code of professional conduct for financial planners. Under our piecemeal federal and state regulatory structure, financial planners are subject to no or different standards of conduct

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[49] Mercer Bullard, "The Future of Financial Planning Regulation," Morningstar, Jul. 7, 2011, http://news.morningstar.com/articlenet/article.aspx?id=386262 (last visited Oct. 17, 2014).

[50] As noted by Thomas Lemke and Gerald Lins in their treatise on the regulation of financial planners, "[b]ecause none of these regulations are designed specifically for financial planners, their requirements are not coordinated, frequently are not easy to apply, may overlap, and, in some cases, may be contradictory." Lemke and Lins, 19 REG. FIN. PL. § 1:1 (West 2013).

[51] *See In re Gherman*, 103 B.R. 326 (Bkrtcy. S.D. Fla. 1989) (insurance agent claimed to provide comprehensive financial services to clients who had bought insurance from him; however, he had no professional credentials, never went to college, had no professional training and once managed his own money so poorly that he suffered a $1 million bankruptcy); *see* Sommers v. Cuddy, 2012 WL 359339 (D. Nev. 2012) (insurance agents used the financial planner title to "coerce" plaintiff into giving them money to invest in inappropriate deferred annuities); *see* Dir. of Ins. v. Duey, Administrative Hearing Commission for the State of Missouri, No. 05-0471 DI, May 4, 2006, *available at* http://ahc.mo.gov/ahc/case/Duey05-0471DI.JSD.doc (insurance agent improperly held herself out to the public as a financial planner engaged in the business of giving financial planning or advice relating to investments; the Commission found that "she exhibited incompetence, untrustworthiness, and financial irresponsibility in failing to investigate the investments she was selling.").

depending on the services they provide, the products they sell or the regulatory licenses they hold. Financial planners must provide investment advice under a fiduciary standard of conduct, a principled-based standard that requires advice to be in the best interests of the client. In contrast, they are permitted to provide advice related to the sale of securities under a suitability standard of conduct. Likewise they are permitted to sell insurance products to consumers under either a good faith or suitability standard dependent upon applicable state law.

There are numerous consumer protection problems inherent in this patchwork of inconsistent standards of conduct that apply to the delivery of financial planning services. First, the standards in place are completely inadequate to cover the multiple modes of delivery of financial planning services. For example, a financial planner who is regulated as an insurance agent has no legal obligation to put the client's interests first in recommending insurance products or to evaluate whether other financial products or services may be better for the client. Similarly, a financial planner who is regulated as an investment adviser (and required to provide investment advice under a fiduciary standard) is under no obligation to disclose a material conflict of interest in connection with the sale of a term life insurance product. As Professor Bullard noted, the standards that apply to securities-related activities are inadequate as financial planning standards because they do not apply to non-securities insurance conduct and vice versa.[52]

The conflicting standards of conduct that apply to different components of financial planning services also allow financial service providers to choose the standard that is most advantageous to them. For example, financial planners are permitted, under our current regulatory scheme, to provide a financial plan under a fiduciary standard of conduct, and then "switch hats" and sell products to the consumer under a non-fiduciary standard in order to execute the plan.[53] This practice, which is common at firms dually registered as investment advisers and broker-dealers,[54] is confusing to the consumer and does not guarantee that the execution of the plan will be in the consumer's best interests.[55] While "hat switching" is not permitted under the *Standards of Professional Conduct* established by CFP Board for CFP® professionals,[56] it is a practice permitted under our fractured regulatory structure that raises significant consumer protection issues.[57]

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[52] Bullard, *supra* note 49.

[53] *In re IFG Network Securities, Inc.*, INITIAL DECISION RELEASE NO. 273, ADMINISTRATIVE PROCEEDING, SEC FILE NO. 3-11179 (2005) (the SEC found that there was "no case precedent that holds that an associated person of an investment adviser cannot change hats … and act in the capacity of an associated person of a broker-dealer without the higher obligations of an adviser.").

[54] The SEC found that industry members generally believe that "investment advisers who act as financial planners generally would not have a continuing duty to a customer after providing the financial plan." SEC, "Duties of Brokers, Dealers, and Investment Advisers," Release No. 34-69013; IA-3558; File No. 4-606, pg. 28, n. 37 (Mar. 1, 2013).

[55] *See* Emerson Electric Co. v. Marsh & McLennan Co., 362 S.W.3d 7, 9 (Mo. 2012) (The court held that "[w]hile a broker has a duty to act with reasonable care, skill and diligence in procuring insurance … a broker has no duty to advise the insured about what insurance he needs or what insurance to buy unless it specifically undertakes to do so.").

[56] *See* CFP Board *Standards of Professional Conduct*, http://cfp.net/for-cfp-professionals/professional-standards-enforcement/standards-of-professional-conduct/financial-planning-practice-standards.

[57] Ron A. Rhoades, "Fiduciary Duties: What Policymakers and the Public Need to Know," Jun. 22, 2009, http://www.brokeandbroker.com/index.php?a=blog&id=203 (last visited Oct. 17, 2014); Michael Chamberlain, "Let's Call a Spade a Spade and a Salesperson a Salesperson," InvestmentNews, Oct. 4, 2009, http://www.investmentnews.com/article/20091004/REG/310049996 (last visited Oct. 17, 2014).

There is strong consensus within the financial planning profession that the client first, fiduciary standard of conduct is the appropriate standard for the delivery of financial planning services.[58] The current regulatory scheme that allows for non-fiduciary advice, dependent upon the services provided or the licenses or registrations held, is not appropriate or sufficient to fully protect consumers.[59]

[58] *See* Princeton Survey Research Associates International, *supra* note 25 (Respondents to a survey of CFP® professionals, and members of FPA® and NAPFA strongly agree that a fiduciary standard of care is "appropriate for all financial service providers who deliver personalized investment advice to retail investors." Nearly nine in ten respondents agree the standard is appropriate with 68 percent saying they strongly agree and 19 percent agreeing somewhat.).

[59] Noveletsky v. Metro. Life Ins. Co., 2013 U.S. Dist. LEXIS 83762 n. 13 (D. Me. Jun. 14, 2013) (The court held that there is "no authority for the proposition that fiduciary duties may attach to someone providing wealth, estate, or insurance planning.").

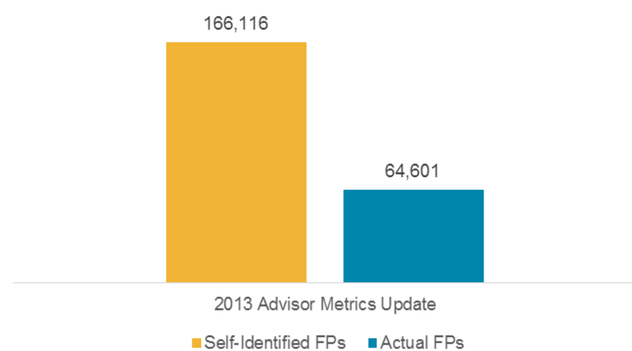
Significant Numbers of Advisors, Spurred by Economic Incentives, Identify as Financial Planners but Do Not Provide Financial Planning Services

As stated previously, data shows that consumers want and benefit from financial planning services. Consumers who want financial planning services are, however, unable to differentiate those who are truly competent to provide financial planning services from those who are using financial planning as a marketing tool. Industry data shows that financial service providers are contributing to the confusion in the marketplace by identifying themselves as financial planners but not providing financial planning services.

Advisors Incorrectly Self-Identify as Financial Planners

Cerulli Associates ("Cerulli"), a leading and well-respected research firm that specializes in data collection related to the financial services industry, has studied the extent to which financial service providers identify themselves as financial planners, but fail to provide financial planning services.[60] In their most recent 2013 report, Cerulli found that over 166,000 financial advisors self-identified as members of a financial planning focused practice.[61] They then verified the practice type

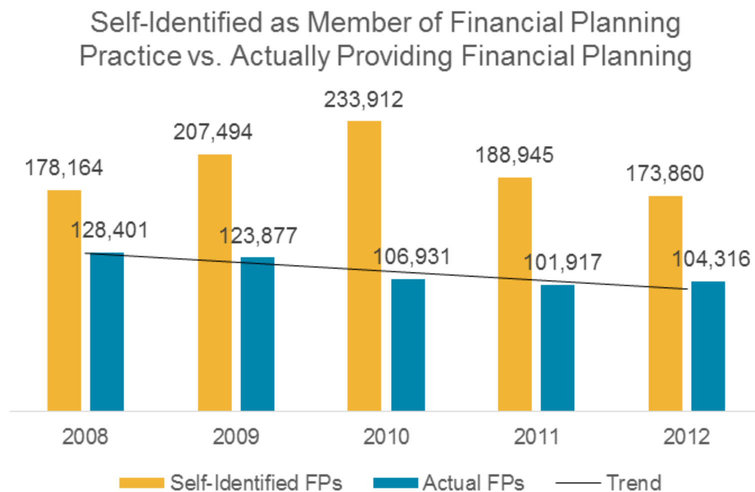
Illustration 4



[60] Advisors were asked to specify the services they offer and provide information about their client base, as well as to categorize themselves as money managers, investment planners, financial planners or wealth managers. Cerulli analysts determined which classification is most reflective of the adviser's actual practice by reviewing actual services offered and client base.

[61] In response to the question "which best describes the primary services your practice offers?" these advisors chose "my practice provides personalized, comprehensive financial planning services for clients, including income planning, college planning, estate planning, investment planning, etc. and uses a broad range of investment products to implement plans and recommendations (mutual funds, annuities, insurance, etc.)."

by analyzing the type of services offered,[62] assets under management, professional designations and team-based criteria. Based on this detailed analysis, Cerulli determined that only 38 percent of the self-identified financial planners actually had financial planning focused practices.[63] In other words, over 100,000 financial advisors incorrectly self-identified as being part of a financial planning practice.[64]



This gap between self-reported and actual financial planners is not new. As demonstrated by the chart below, Cerulli has collected similar data since 2008. While the size of the gap between self-identified and actual financial planners varies over the years, the fact that the gap exists illustrates a persistent problem that affects thousands of advisors.[65]

In analyzing the data, Cerulli has made a number of observations regarding the impact on consumers of this discrepancy between self-identified and actual financial planners.

- "Many advisor practices offer some of the basic elements of financial planning but focus their efforts nearly exclusively on asset accumulation strategies."[66]
- "Advisors consistently overestimate the depth of the financial planning advice they are offering to clients. Rather than a comprehensive approach to financial planning, advisors are quick to focus on short-term revenue generating opportunities such as asset accumulation strategies and perhaps insurance needs. Without industry-wide consistency in the nomenclature used by advisors, there is little chance that any clarity

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[62] Cerulli analysts determined which of the following services are offered: asset allocation, investment manager due diligence, estate planning, retirement accumulation planning, retirement income planning, employer benefits retirement planning, insurance, education funding, elder care planning, charitable giving, private banking, tax planning, budgeting, and trust services.

[63] Cerulli defines a financial planner as an advisor who develops "complete financial plans for clients based on an extensive analysis of their assets and liabilities" and provides a "[f]ull range of planning services, including income, tax, and insurance." CERULLI ASSOCIATES, CERULLI QUANTITATIVE UPDATE: ADVISOR METRICS (2012) at 91 (on file with author).

[64] Cerulli analysts determined that, based on the advisors' actual services and qualifications, they are more properly categorized as "investment planners" whose "practice focuses on managing clients' assets through investment selection and monitoring, but also provides some basic financial planning services (college planning, retirement planning, etc.)".

[65] The data from 2008 to 2012 reflect higher numbers of advisors self-identifying as members of a financial planning focused practice, due in part to a partnership between Cerulli and the Financial Planning Association.

[66] CERULLI ASSOCIATES, CERULLI QUANTITATIVE UPDATE: ADVISOR METRICS (2009) (on file with author).

will be achieved for investors when it comes to determining what services an advisor actually offers."[67]

- A "lack of training in planning engagements, and a narrow service offering centralized around retirement planning consigns the majority of advisors to the *investment* planner practice" and that "the vast majority these planning engagements will be delivered modularly, as opposed to the on-going comprehensive planning requirements of wealth manager clients."[68]

- "The manner in which advisors label their services is inconsistent and this lack of standards leads to investor confusion … This makes it harder for financial planners and wealth managers to differentiate their firms since other advisors are ostensibly pitching the same thing even though the actual service offerings are different."[69]

The Cerulli data highlights a number of consumer protection issues: (1) a significant number of financial advisors incorrectly self-identify as members of a financial planning focused practice but do not provide financial planning services; (2) this problem has persisted for at least the last five years; (3) there is a lack of industry wide standards for financial planners; and (4) consumers lack clarity about the services that the advisors are actually providing.

Case law, reinforcing the Cerulli data cited above, reflects that advisors are misrepresenting themselves as financial planners. In *In re Haight & Co.*, a broker-dealer ("Haight") and its associated persons defrauded customers by falsely holding themselves out as disinterested financial planners.[70] The SEC found that "under the guise of comprehensive 'financial planning' encompassing the purchase of varied securities, including listed securities, the [defendants] induced customers, who were generally inexperienced and unsophisticated, to believe that their best interests would be served by following the investment program designed for them by respondents. In fact, such programs were designed to sell securities that would provide the greatest gain to respondents, rather than to promote the customers' interests; indeed, in some instances, the recommendations were directly contrary to the customers' expressed investment needs and objectives."[71] Shockingly, the purported "experts" in financial planning, were in reality salespersons who had not even worked in the financial services industry for a full year.

In *People v. Sala*, the defendants "posed as objective financial planners qualified to provide each client with a personalized financial plan tailored to individual financial objectives … however, the advisory board recommended the identical financial plan to all clients."[72] The Court also found that the sales associates were given discretion to charge whatever they "'thought [they] could get away with.'"[73] In *SEC v. U.S. Pension Trust Corp.*, Pension Trust was a Florida corporation that had been operating as a sales and marketing company; however, the

[67] CERULLI ASSOCIATES, CERULLI QUANTITATIVE UPDATE: ADVISOR METRICS (2010) (on file with author).

[68] CERULLI ASSOCIATES, CERULLI QUANTITATIVE UPDATE: ADVISOR METRICS (2011) (on file with author) (emphasis added).

[69] CERULLI ASSOCIATES, CERULLI QUANTITATIVE UPDATE: ADVISOR METRICS (2013) (on file with author) (emphasis added).

[70] *In re Haight & Co.*, 44 S.E.C. 481, Release No. 9082, Release No. 34-9082, 1971 WL 120486 (1971).

[71] *Id.* at *11.

[72] People v. Sala, 258 A.D.2d 182, 186 (N.Y. App. Div. 1999).

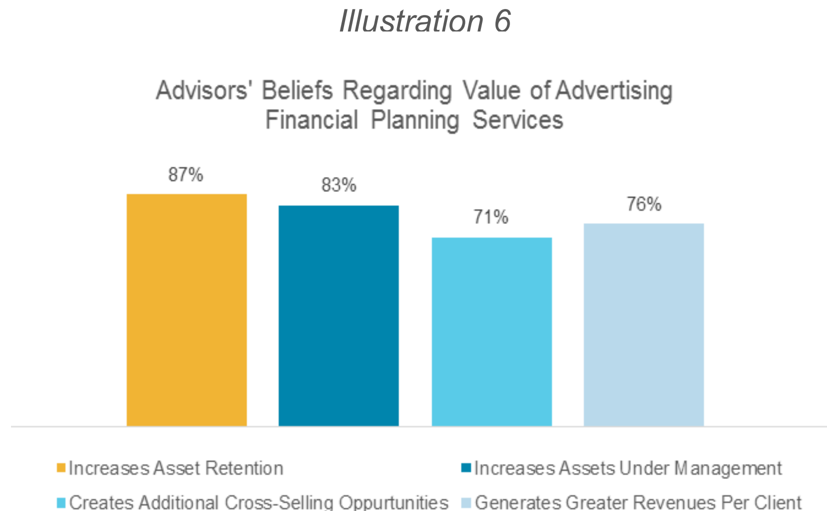
[73] *Id.* at 191.

Court found that the company had made false and misleading statements about investors' returns and losses, failed to disclose sales agents' commissions and the company's Regional Director testified that their sales agents provided investors with "financial planning."[74]

Advisors Are Spurred By Financial Incentives to Market Themselves as Financial Planners

The Cerulli data, which shows the large number of financial advisors incorrectly self-identifying as members of a financial planning practice is not surprising given the significant financial incentives in the marketplace that relate to the provision of financial planning services. The 2012 Cerulli Advisor Metrics Update shows that significant percentages of advisors believe that they can increase their asset retention, their AUM, their cross-selling opportunities, and their revenues per client by advertising that they provide financial planning services.[75]

Illustration 6



The Cerulli data also reflect that financial service providers plan to increase their financial planning practices. However, a Cerulli analyst cautioned that while "[i]t is promising to see so many advisors expecting to increase their financial planning activity in upcoming years, it is likely that some of this will prove to be purely aspirational. This is acknowledged in the current marketplace as one B/D's head of financial planning admitted that '*some reps are really doing financial planning and others are just saying they do*.'"[76]

Misrepresentation Extends to Insurance Industry

The Cerulli data (Illustrations 4 & 5 above) underestimate the problem of financial service providers holding out as financial planners. The data cover registered investment advisers, independent broker-dealers, insurance broker-dealers, wirehouses, and bank broker-dealers; but do not include insurance producers or agents solely regulated under state insurance laws. As discussed below, significant incentives exist for insurance agents and producers to hold themselves out as providing financial planning services.

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[74] SEC v. U.S. Pension Trust Corp., 2010 U.S. Dist. LEXIS 102938 (2010). It is important to note that the company never registered with the SEC in any capacity and never registered their products with any government agency. *Id.*

[75] CERULLI ASSOCIATES, CERULLI QUANTITATIVE UPDATE: ADVISOR METRICS (2012) (on file with author).

[76] *Id.* at 195 (emphasis added).

For example, in May 2009, the Partnership for Retirement Education and Planning ("PREP") surveyed 600 agents/advisor members of three leading insurance organizations[77] and asked respondents to self-identify as "planning experts" and "not planning experts." While there were a number of similarities between these two groups, including the advisor's age, years of experience, age mix of clients, size of firms, job function and types of products offered, there were significant differences in the revenues that each generated. Self-identified "planning experts" earned 40 percent more in gross revenue and had three times more assets under management than "not planning experts."[78] This data was used in training materials to encourage insurance agents/advisors to call themselves planners and promote the use of a planning approach to sell insurance products.[79]

Lawsuits brought by consumers and regulatory enforcement actions provide further insight into how insurance agents and producers take advantage of gaps in regulation and gain customers' trust by holding themselves out as financial planners. In *Four Corners Fin. Group ("FCFG") v. Augeley*, FCFG marketed and sold insurance policies by marketing its employees, who were paid commissions based on sales of FCFG policies, as "Financial Planner Associates."[80]

In *In re Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, a class action lawsuit was brought against a life insurer on behalf of over 8 million policyholders, alleging a variety of deceptive sales practices.[81] A multi-state task force, comprised of thirty states and the District of Columbia, found that Prudential rarely disciplined agents, even when there were multiple infractions of law or company policy and that Prudential agents improperly held themselves out as "financial planners" to attract consumers; the task force further found that what mattered to Prudential was the volume of sales, not how the sales were made.[82] In October 2013, National Western Life Insurance Company agreed on a $21 million settlement with a number of elderly consumers who were coerced into purchasing inappropriate deferred annuities.[83] The original complaint alleged that National Western Life used "misleading marketing and sales gimmicks" including financial planning seminars held to gain the trust of senior citizens.[84]

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[77] National Association of Insurance and Financial Advisors ("NAIFA"), Society of Financial Service Professionals, and Million Dollar Roundtable.

[78] Stuart Kahan, "Holistic Financial Planning is Quite Lucrative," WEBCPA, May 1, 2009, http://www.webcpa.com/news/-30943-1.html (last visited Aug. 29, 2013).

[79] Matt Thornhill, "Best Practices for Getting Boomers to Prepare for Retirement: Tips, Tactics and Techniques," (on file with author). During a presentation to a group of advisors, Thornhill told them that "[m]aybe getting that extra couple of letters after your name is a pretty good idea … because it leads to a path that looks like it has more revenue." Jason Zweig and Mary Pilon, "Is Your Adviser Pumping Up His Credentials?" WSJ Online, http://online.wsj.com/news/articles/SB10001424052748703927504575540582361440848 (last visited Oc. 17, 2014).

[80] Four Corners Fin. Group ("FCFG") v. Augeley, 2011 Del. C.P. LEXIS 21 (2011).

[81] In re Prudential Ins. Co. America Sales Practice Litigation Agent Actions, 148 F.3d 283 (3rd Cir. 1998).

[82] *Id. See also* Jane Bryant Quinn, "Prudential's Best Policy: Cleaning Up Its Act," Chicago Tribune, Jul. 28, 1996 (The task force found that "[t]he company failed to notice and block misleading sales brochures, and permitted agents to use sham titles such as 'financial planner' or 'insurance consultant.'").

[83] Juan Carlos Rodriguez, "National Western Agrees to pay $21M in RICO Suit," Oct. 16, 2013, http://www.law360.com/articles/480639/national-western-agrees-to-pay-21m-in-rico-suit.

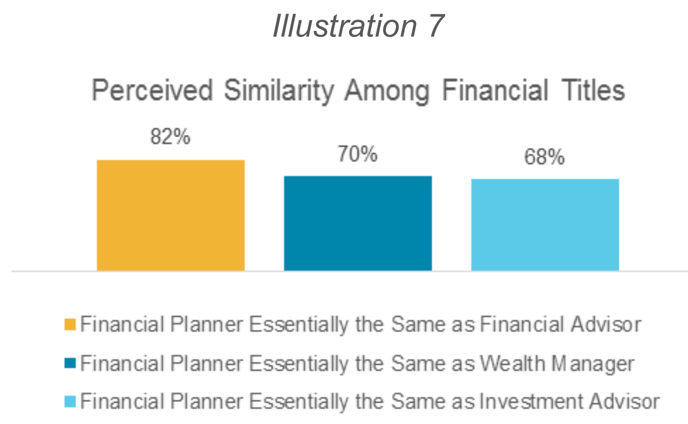
[84] Complaint, In re National Western Life Insurance Deferred Annuities Litigation, 3:05-cv-01018, U.S. Dist. Court for the Southern Dist. of Cal., Jun. 26, 2006, *available at* http://www.naic.org/documents/legal_nwlife_deferred_annuities_complaint.pdf (There was at least one example of a sales agent holding himself out as a CFP, even though he was not).

Consumers Are Harmed by Lack of Appropriate Regulation and Industry Misrepresentation

Consumers are Unable to Identify Qualified and Ethical Financial Planners

With thousands of advisors in the marketplace, motivated by strong economic incentives to misrepresent themselves as "financial planners" or as providing financial planning services, it is no surprise that consumers are confused about the services that financial advisors provide. A landmark 2008 SEC-sponsored study conducted by the RAND Center for Corporate Ethics, Law, and Governance found that "[e]xisting studies suggest that investors do not have a clear understanding about the distinction between broker-dealers and investment advisers and their different levels of fiduciary responsibility." [85]

The Financial Planning Coalition, in an effort to determine whether that consumer confusion extends to financial planners, commissioned a study to, among other things, explore consumers' perceptions and understanding of the distinctions between job titles associated with financial planning.[86] The study, conducted by Fondulas Strategic Research in 2013, included an online survey of 1,250 consumers with household incomes of $50,000 or higher



[85] Angela Hung, *et al.*, RAND Corp., Technical Report, *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers*, Jan. 3, 2008, *available at* http://www.rand.org/pubs/technical_reports/TR556.html [hereinafter 2008 RAND Study].

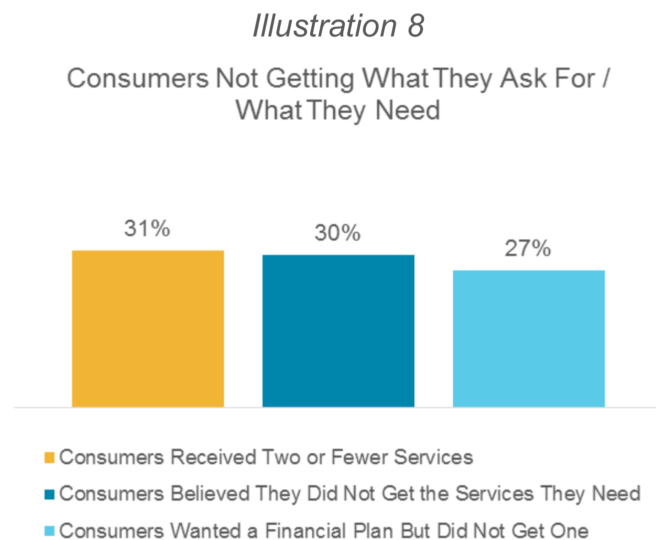
[86] Fondulas Strategic Research, Quantitative Survey: Consumers' Beliefs About Financial Planners, Jan. 2014 (on file with author).

across the country.[87] The data confirms that there is significant consumer confusion about the various titles associated with financial planning. A full 82 percent of consumers believe that a financial planner is essentially the same as a financial advisor, and there is only slightly less confusion between the titles financial planner, wealth manager and investment advisor.

As consumers look at the various titles that have proliferated in the financial services industry, they may see many or all of them as equivalents of what they are seeking: financial planning. Among the tens of thousands of advisors who self-identify as financial planners, consumers have no regulator to turn to for assistance in determining if the advisor is qualified to provide comprehensive and integrated financial planning advice and will provide that advice under a fiduciary standard of care, or if the advisor is only using the financial planner title or "planning approach" for the purpose of selling products. Consequently, consumers who want and would benefit from comprehensive and integrated financial planning services are harmed because they cannot identify a qualified and ethical financial planner.[88]

Consumers Do Not Receive Financial Planning Services

Consumers who seek financial planning services face the real risk that they will not get the services they desire. This was borne out in the second part of the research conducted by Fondulas Strategic Research. Of the 1,250 consumers surveyed, they identified 496 consumers who were identified as having worked with a financial professional on a financial plan in the previous five years. These consumers were questioned on the extent of the planning services offered (e.g., whether planning involved multiple products and services) and overall satisfaction with the service provided. As displayed on the chart to the right, significant numbers of consumers did not receive the financial planning services they were seeking. Approximately one-third of the consumers (31 percent) received two or fewer services as part of their financial plan, 30 percent of consumers said they did not get all the services they needed, and 27 percent wanted a financial plan but did not get one. Among those who received two or fewer services, there is a pronounced bias towards the financial advisor offering only "retirement planning" and investment advice.



[87] Included in the sample of 1,250 consumers were 496 consumers who have worked with a financial professional in the past five years on one or more of their financial services goals and 250 consumers who could name the financial professional they worked with. Interviewing was conducted from Oct. 28 to Nov. 11, 2013.

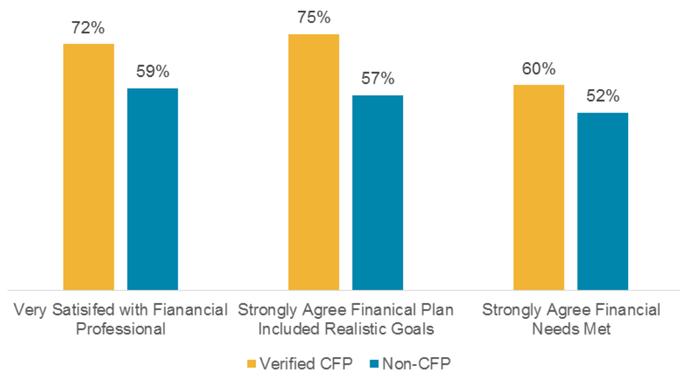
[88] This is important because in the 2012 Cerulli Advisor Metrics Update, over half (55 percent) of all advisors reported that they were not fully comfortable with all aspects of delivering financial plans. CERULLI ASSOCIATES, CERULLI QUANTITATIVE UPDATE: ADVISOR METRICS (2012) at 194.

Appropriate Regulation of Financial Planners Will Reduce Consumer Harm

This report supports the strong public policy case for taking preemptive action to regulate financial planners, which contrasts with the crisis-driven regulation that has been the predominate mode of regulating the securities markets for the past 40 years.[89] Appropriate regulation will protect consumers by deterring unqualified and unethical persons from holding themselves out as financial planners. Establishing clear qualifications and standards for financial planners, similar to the standards established by the CFP Board, will enable consumers to distinguish between financial planners who are able to provide competent, comprehensive and ethical advice and those who offer limited product solutions without regard for the client's broader financial interests.

A final component of the Fondulas consumer study highlights the benefits of such standards to consumers. The study identified and verified the subset of consumers who worked with a CFP® professional in the previous five years. The study showed that consumers working with a CFP® professional had higher levels of overall satisfaction, were more likely to say they received a plan with realistic financial goals, and were more likely to agree that their financial

Illustration 9



[89] Chelsea P. Ferrette, *The Myth of Investor Protection: The Dodd-Frank Act and the Office of the Investor Advocate*, 12 J. BUS. & SEC. L. 61, 92 (2011) (citing Lawrence A. Cunningham & David Zaring, *The Three or Four Approaches to Financial Regulation: A Cautionary Analysis against Exuberance in Crisis Response*, 78 GEO. WASH. L. REV. 39, 71-74 (2009)). This concept was developed by then U.S. Treasury Secretary Henry Paulsen for the 2008 financial crisis. Anticipatory regulation is defined as "(1) regulation during prosperous and/or calm economic conditions; (2) which is presented before a clear need for reform has been articulated by the market; (3) where regulatory innovation or renovation may or may not be proportionate to an anticipated crisis; (4) is not drafted in response to any manifest urgency; and (5) could suggest a revision or even elimination of regulatory agencies which seem to have redundant authorities and missions. What emerges is a clear, un-fragmented, non-crisis driven regulatory scheme."

needs and objectives were fully addressed, vs. those who worked with a non-CFP® professional.[90] This is some indication that the competency and ethical standards embodied in the CFP® certification make a meaningful difference in the quality of services delivered to consumers.[91]

Appropriate regulation will work as a deterrent against unethical and fraudulent behavior and will allow consumers to trust that they will receive comprehensive and integrated financial planning services when they work with a financial planner. As noted earlier, anyone can call himself or herself a financial planner.[92] But thanks to common sense regulations regarding other skilled professionals, consumers know that individuals who hold themselves out as lawyers, doctors, and accountants, are required to be licensed and meet certain education, competency and ethical standards. Given what is at stake – the financial well-being of millions of American consumers – financial planners should be regulated like these other skilled professionals. It borders on the absurd that beauticians and plumbers, who arguably can do far less harm to American families than an untrained or unethical financial planner, are regulated when financial planners are not.[93]

[90] *See* Fondulas Strategic Research, *supra* note 86 (This chart reflects statistically significant margins at 95% confidence).

[91] CFP Board *Standards of Professional Conduct* 100-1, http://cfp.net/for-cfp-professionals/professional-standards-enforcement/standards-of-professional-conduct/financial-planning-practice-standards.

[92] It is so easy to become a financial planner that even a dog can do it. In 2009, Consumers' Research Council of America proclaimed a dachshund puppy named Max Tailwagger one of "America's Top Financial Planners" after his owner, an investment adviser, paid $183 as a joke for the designation. Matthew Arndt, "Max Tailwager: America's Top Financial Planner," Investor Watchdog, Jun. 25, 2009, http://www.investorwatchdog.com/blog/tag/top-financial-planners/ (last visited Oct. 17, 2014).

[93] Data shows that there are over 1,000 occupations that require state licensing in order to operate legally, including cosmetologists, athletic trainers, tattoo and body-piercing artists, auctioneers, taxidermists, falconers, beekeepers, bingo suppliers, interior designers, carnival ride operators, and plumbers. *See, e.g.*, KRS § 317A.020 (2013) (licensing requirements for cosmetologist in Kentucky).

Conclusion

In conclusion, this report provides the empirical data that was lacking in the GAO Report showing that: (1) the lack of “per se” regulation of financial planners creates a significant and real gap in our current regulatory structure; (2) consumers want and benefit from comprehensive and integrated financial planning services but they are confused by the titles financial services providers use and they are not able to identify persons qualified to provide financial planning services; (3) financial service providers, spurred by economic incentives, are taking advantage of this consumer confusion and lack of regulation by holding themselves out as “financial planners” without the requisite training or competencies to provide comprehensive and integrated financial planning; (4) 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 interests; and (5) reasonable regulation will reduce harm to consumers by preventing untrained and unethical people from holding themselves out as “financial planners.”