June 14, 2019

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Submitted electronically via email to DCAProposal@dca.lps.state.nj.us

RE: Comment on Rule Proposal No. PRN 2019-044, "Fiduciary Duty of Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives"

Mr. Gerold:

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 Bureau of Securities' ("Bureau") rule proposal[5] regarding the fiduciary duty of broker-dealers ("B-D"s), investment advisers ("IA"s), and their respective representatives when providing personalized investment advice ("Proposal").

As stated in our previous letter,[6] the Coalition's position on a fiduciary standard for personalized investment advice is based upon the real-world business experience of almost 85,000

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[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 almost 85,000 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 proposed amendment to N.J.A.C. 13:47A-6.3 and proposed new rule N.J.A.C. 13:47A-6.4, *available at* https://www.njconsumeraffairs.gov/Proposals/Pages/bos-04152019-proposal.aspx.

[6] Financial Planning Coalition letter to New Jersey Bureau of Securities (dated Dec. 14, 2019), *available at* http://financialplanningcoalition.com/wp-content/uploads/2019/03/0.-FPC-letter-to-New-Jersey-on-Fiduciary-Pre-Proposal-FINAL.pdf.

CERTIFIED FINANCIAL PLANNER™ ("CFP®") professionals who provide fiduciary-level services across business and compensation models.

The Coalition's position in support of a fiduciary standard of conduct for all personalized investment advice is supported by CFP Board's newly revised *Code of Ethics and Standards of Conduct* ("*Code and Standards*")[7], which becomes effective October 1, 2019. The *Code and Standards* contains a genuine fiduciary standard of conduct that is broadly applicable yet business model-neutral. Although there are many similarities between the Proposal and the *Code and Standards*, such as an inclusion of the duty of loyalty, there are key differences, including the manner in which conflicts of interest are resolved. Detailed background and comparisons are described below.

I. CFP Board Certification

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. As such, CFP Board serves the public interest by promoting the value of professional, competent and ethical financial planning services, as represented by those who have attained CFP® certification. 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, nearly 85,000 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 set at the federal or state level. All CFP® professionals are bound by CFP Board's existing code of ethics and standards of professional conduct and will continue to be bound by the new *Code and Standards*.

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

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

For example, multiple investor surveys indicate that consumers have come to expect fiduciary advice and many assume they are already getting such advice, when in reality they may be receiving advice pursuant the less rigorous "suitability" standard of conduct applicable to broker-

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

dealers.[8] Also in recent years, a growing number of financial service providers believe that a robust fiduciary standard of conduct is appropriate for the delivery of personalized investment advice.[9]

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

After following this deliberative, inclusive, and transparent process, CFP Board adopted the revised *Code and Standards* in March 2018 with an effective date of October 1, 2019. This will extend the application of the fiduciary duty, owed by CFP® professionals to their clients, from financial planning services only to **all** Financial Advice, broadly defined. This development enjoys strong support among CFP® professionals and their membership organizations. More than 96 percent of CFP® professionals who responded to a recent survey agreed that a CFP® professional should be required to act in the client's best interest when providing "Financial Advice."[10]

FPA and NAPFA support these expanded fiduciary obligations. FPA applauded CFP Board "for taking the bold and necessary step in expanding the fiduciary standard for CFP® professionals."[11] NAPFA commented that the proposal "supports CFP Board's efforts to [broaden] fiduciary requirements for CFP® professionals. Working under fiduciary principles is the most transparent – and we believe the most objective – way of serving the public. Consumers have come to expect advice delivered in their best interest and will now be able to count on a CFP® professional to provide it at all times when giving financial advice."[12]

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[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.")

[9] 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").

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

[11] *Id*.

[12] *Id*.

Also in March 2018, CFP Board issued commentary[13] and a side-by-side comparison[14] of existing standards of professional conduct and the revised *Code and Standards*. An ethics continuing education program on the *Code and Standards* was developed and made available to CFP® professionals. CFP Board also formed a Standards Resource Commission to develop guidance materials to help CFP® professionals comply with the revised *Code and Standards*. The Commission is composed of members of the profession who operate in a variety of business models. CFP Board has issued several guidance documents, including responses to Frequently Asked Questions, a Roadmap[15] to the *Code and Standards*, and 12 case studies[16] that provide practical guidance to CFP® professionals and their firms.

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

It is with the revised *Code and Standards* in mind that the Coalition evaluated the Bureau's Proposal. Both documents establish a genuine fiduciary standard of care, including the two-pronged duty of loyalty and a duty of care based on long-established common law fiduciary principles. Notably, key elements of the duty of loyalty cannot be disclosed away either under the *Code and Standards* or under the Proposal.[17]

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

Much of the language found in the *Code and Standards* on the duty of loyalty is mirrored in the Bureau's Proposal. For example, New Jersey's proposed fiduciary duty "requires that a recommendation or the advice is made without regard to the financial or any other interest" of the broker-dealer or its agents, an investment adviser or its representatives, or any other third party. This "without regard to" language, which also appears in the *Code and Standards*, is taken directly from Section 913(g) of Dodd-Frank, which authorized the SEC to promulgate a uniform standard of conduct that is no less stringent than that applicable to investment advisers under the Investment Advisers Act of 1940.

Duty of Care. Under the *Code and Standards*, the duty of care mandates that a CFP® professional act "with the care, skill, prudence, and diligence that a prudent professional would exercise in light of the Client's goals, risk tolerance, objectives, and financial and personal circumstances." Likewise, the Bureau's proposed fiduciary duty requires the use of "care, skill,

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[13] *See* n. 10, *supra*.
[14] *Available at* https://www.cfp.net/docs/default-source/for-cfp-pros---professional-standards-enforcement/CFP-Board-Code-and-Standards-Side-by-Side-Comparison.
[15] *Available at* https://www.cfp.net/docs/default-source/for-cfp-pros---professional-standards-enforcement/cfp-board-roadmap-to-code-and-standards.pdf?sfvrsn=6.
[16] *Available at* https://www.cfp.net/docs/default-source/for-cfp-pros---professional-standards-enforcement/cfpboard-case-studies-applying-code-and-standards.pdf?sfvrsn=2.
[17] The Bureau's Proposal explicitly states in Section 13:47A-6.4(a)2.(b)2.ii, "There shall not be a presumption that disclosing a conflict of interest in and of itself shall satisfy the duty of loyalty." Pursuant to the *Code and Standards*, the duty to place the interests of the client "above" the interests of the CFP® professional and his/her firm; and they duty to act "without regard to" the financial or other interests of the CFP® professional, his/her firm, or any individual or entity other than the client cannot be disclosed away.

prudence, and diligence that a prudent person acting in a like capacity and familiar with such matters would use taking into consideration all of the facts and circumstances."

The "care, skill, prudence, and diligence" phrase found in both documents links directly to the historical "prudent man rule," which has since evolved into a "prudent investor rule,"[18] and elements of which are reflected in various legal frameworks including federal pension law (e.g. Employee Retirement Income Security Act of 1974 ("ERISA")) and in state trust law.[19] In essence, this language calls upon the financial professional to competently provide services, to be knowledgeable about the recommended products and services, and to use best judgment and due diligence in evaluating risks and options based on the client's profile.

IV. Areas in Need of Clarification

Despite key similarities with regard to a robust fiduciary duty, there are several areas where the Proposal could be strengthened. Most importantly, the Proposal does not adequately address actual or potential conflicts of interest that may arise between financial professionals and their clients. The Coalition urges the Bureau to look to the CFP Board *Code and Standards*, which transparently requires conflicts of interest to be addressed proactively.

Addressing Conflicts. Although the Proposal explicitly states that the fiduciary duty cannot be disclosed away, it provides no process for ensuring that conflicts of interest inherent in both the broker-dealer and the investment adviser business models do not adversely impact investors. In contrast, the *Code and Standards* clearly outlines how to manage conflicts as a part of the duty of loyalty element of the overall fiduciary duty.

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

CFP Board prefers the term "manage" to the term "mitigate" because not all conflicts are susceptible to mitigation; rather, they may continue in their existing form.[20] Moreover, CFP Board is concerned that the use of the term "mitigate" would introduce ambiguity because of the difficulty in specifying the extent of mitigation that is necessary.[21] CFP Board has concluded that the more workable requirement is for a CFP® professional to manage the conflict through the adoption of business practices that prevent the conflict from harming the Client's best interests.[22]

"Financial Assets." The Proposal generally applies to securities recommendations and investment advice. In contrast, the *Code and Standards* applies to a broad variety of activities

[18] *See generally* Martin D. Begleiter, *Does the Prudent Investor Need the Uniform Prudent Investor Act -- An Empirical Study of Trust Investment Practices*, 51 Me. L. Rev. 27 (1999).
[19] *See generally*, David H. Webber, *The Use and Abuse of Labor's Capital*, 89 N.Y.U.L. Rev. 2106 (2014); and Harvey Bines and Steve Thel, *The Varieties of Investment Management Law,* 21 Fordham J. Corp. & Fin. L. 71 (2016).
[20] *See* n. 10, *supra*, COMMENTARY at p. 7.
[21] *Id*.
[22] *Id*.

and products within the definition of "financial advice." The provision of financial advice includes, among other things, recommendations as to financial assets, which are defined broadly as "[s]ecurities, insurance products, real estate, bank instruments, commodities contracts, derivative contracts, collectibles, or other financial products." The Coalition urges the Bureau to consider the *Code and Standards*' broad definition of "financial assets" as a guidepost and we encourage regulatory cooperation across state agencies to streamline a common approach.

Finally, the Coalition recognizes the Bureau's inclusion of explicit language encompassing "the opening of, or transfer of assets to, any type of account," in both Sections 13:47A-6.3 and 13:47A-6.4. Thus, the Proposal would include rollover recommendations, which the Coalition recommended in its public comments on the proposed SEC Regulation Best Interest regulatory package.[23]

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In conclusion, the Coalition has long supported a uniform fiduciary standard. Our position is based both on the real-world experiences of CFP® professionals across a variety of business models, and on CFP Board's rigorous process to develop the *Code and Standards*. The fiduciary duty stated in the revised *Code and Standards* is straightforward, drawn from common-law fiduciary concepts, and includes a duty of loyalty and a duty of care. We urge the Bureau to incorporate these fiduciary elements in its final rule.

Sincerely,

Kevin R. Keller, CAE
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CFP Board

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FPA®

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NAPFA

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