TO BE OR NOT TO BE... A FIDUCIARY: EXAMINING THE REVISED CFP CODE

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Individuals in the financial services industry often possess multiple professional designations and are governed by several regulatory bodies. One non-governmental regulatory body, the Board of Directors of the Certified Financial Planner Board of Standards, Inc. (the "CFP Board"), regulates all financial planners designated as Certified Financial Planner Professionals (CFP Professionals"). The CFP Board has proposed a new Code of Ethics and Standards of Conduct ("Revised CFP Code"), which is effective on October 1, 2019.1 In the United States, more than 82,000 individuals are certified as CFP Professionals, and all such individuals must abide by the Revised CFP Code in order to maintain a CFP designation. This Article will (i) focus on the new fiduciary standard imposed by the Revised CFP Code, (ii) discuss the role of the Revised CFP Code in the larger regulatory scheme for financial services, and (iii) explore criticisms of the Revised CFP Code.

UNPACKING THE NEW FIDUCIARY STANDARD

Though CFP Professionals are presently governed by the Current Standards of Professional Conduct, the Revised CFP Code departs from the prior standards in numerous ways. This Article focuses on one of the changes: the new fiduciary duty standard, including the adoption of the term "Financial Advice." However, keep in mind that there are other significant changes, including but not limited to changes to the definitions of terms, such as "Financial Planning," and heightened disclosure and conflict of interest requirements.

The Revised CFP Code is divided into two sections. The first section contains a six-pronged code of ethics, which requires the CFP Professional to, among other things, "[a]ct in the client's best interests" and "[a]void or disclose and manage conflicts of interest." The second section comprises the bulk of the Revised CFP Code and describes standards of conduct that offer a practical application of the code of ethics described above. Additionally, the second section contains a new fiduciary duty standard.

Under the Current Standards of Professional Conduct, a CFP Professional must act as a fiduciary when providing financial planning. Under the Revised CFP Code, a CFP Professional must uphold certain fiduciary duties and act in the client's best interests at all times when providing Financial Advice (as defined below) to a client.

Financial Advice is defined as:

A. A communication that, based on its content, context, and presentation, would reasonably be viewed as a recommendation that the Client take or refrain from taking a particular course of action with respect to:

1. The development or implementation of a financial plan;
2. The value of or the advisability of investing in, purchasing, holding, gifting, or selling Financial Assets;
3. Investment policies or strategies, portfolio composition, the management of Financial Assets, or other

financial matters;

4. The selection and retention of other persons to provide financial or professional services to the client; or

B. The exercise of discretionary authority over the Financial Assets of a client.

The determination of whether Financial Advice has been provided is an objective rather than subjective inquiry. The more individually tailored the communication is to the Client, the more likely the communication will be viewed as Financial Advice.[2]

Financial Advice does not mean responses to directed orders, "the provision of services or the furnishing or making available of marketing materials, general financial education materials, or general financial communications that a reasonable CFP professional would not view as Financial Advice."

When providing Financial Advice, the CFP Professional must: (1) act in the best interests of the client; (2) abide by a duty of loyalty by (i) placing the client's interests above the interests of the CFP Professional (and the CFP Professional's firm), (ii) avoiding or disclosing and managing conflicts of interest, and (iii) acting solely with regard to the client's interests, including financial interests; (3) abide by a duty of care by acting with the care, skill, prudence, and diligence of a prudent professional in light of the client's circumstances; and (4) adhere to the client's instructions (including the client's objectives and restrictions).

As further discussed below, this fiduciary standard has been subject to criticism, much of which is characterized as the inconsistent and redundant nature of the fiduciary code as compared with the standards of conduct imposed by other regulatory bodies.

THE REVISED CFP CODE'S ROLE IN THE OVERARCHING REGULATORY SCHEME

Numerous bodies regulate the financial services industry. Recently, the United States Department of Labor ("DOL") and the Securities and Exchange Commission ("SEC") have both proposed rules regulating financial services. Specifically, the DOL proposed a Fiduciary Duty Rule set to take effect in 2017 that would have imposed fiduciary standards on advisors working with retirement accounts. However, the Fifth Circuit Court of Appeals struck down the Fiduciary Duty Rule, and the DOL refrained from seeking review of the Fifth Circuit decision, so the Fiduciary Duty Rule is not currently in effect. Though current policies mandate that broker-dealers make recommendations that are suitable considering a consumer's specific circumstances, the SEC has proposed the Regulation Best Interest, which would require that broker-dealers act in a client's best interests under particular circumstances and make certain heightened disclosures. The Regulation Best Interest also explains fiduciary duties owed by investment advisors. The Regulation Best Interest was proposed in April 2018, though the rule has not yet been enacted. Further, certain states have also recently introduced or enacted legislation regulating the financial services industry, including without limitation Connecticut and Nevada. Critics of the Revised CFP Code argue that a patchwork quilt of regulations imposed on the financial services industry by federal and state governments, as well as non-governmental organizations, will result in both inconstant and duplicative standards of conduct for financial professionals, though the CFP Board argues that the Revised CFP Code either meets or exceeds the requirements of other standards of conduct imposed on financial planners.

CRITICISMS OF THE REVISED CFP CODE

There are numerous criticisms of the Revised CFP Code, and the CFP Board has responded to many of the criticisms in the Commentary to Code of Ethics and Standards of Conduct.[3] Among these criticisms, commenters argue that financial professionals will be required to potentially provide unnecessary services to clients, which could increase the cost of providing financial services to lower net worth clients. The CFP Board has responded by stating that CFP Professionals will not be required to provide financial planning to clients who do not desire such planning and that it is beneficial to all clients, including lower net worth clients, that CFP Professionals are held to a fiduciary standard when providing Financial Advice. Additionally, there are questions as to whether the Revised CFP Code could constitute a basis for imposing third-party liability on CFP Professionals, though the Commentary to Code of Ethics and Standards of Conduct states that the Revised CFP Code is not intended to "be a basis for civil liability and that Clients of a CFP professional and other third parties are not intended to be considered third-party beneficiaries of a CFP professional's agreement to adhere to the Code and Standards."

After October 1 of this year, if a CFP Professional violates the Revised CFP Code then such individual could be subject to discipline, which could include private censure, public sanction, suspension, or even revocation of the CFP Professional's certification. The heightened standards could result in individuals and firms surrendering their CFP certifications in order to avoid compliance with the Revised CFP Code, as CFP Professionals and firms employing CFP Professionals ask themselves— is the cost of compliance worth the benefit of maintaining a CFP designation?

CONCLUSION

The Revised CFP Code will potentially affect a large number of individuals and entities providing financial services, and it is important to consider the Revised CFP Code's place in the larger regulatory scheme governing financial services. Additionally, if you need one more thing to keep on your radar, the Financial Planning Coalition (an organization made up of the CFP Board, the Financial Planning Association, and the National Association of Personal Financial Advisors) currently advocates for the adoption of a uniform standard regulating financial planners — modeled after the CFP certification.[4]

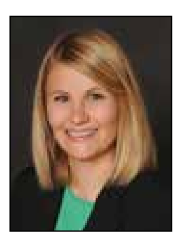
1 New Code of Ethics and Standards of Conduct, CFP Board, available at https://www.cfp.net/for-cfp-professionals/professional-standards-enforcement/code-and-standards.

2 Code of Ethics and Standards of Conduct, CFP Board, available at https://www.cfp.net/docs/default-source/for-cfp-pros—professional-standards-enforcement/cfp-board-code-and-standards.pdf?sfvrsn=11.

To provide clarity, the term "Financial Assets" is defined as "[s]ecurities, insurance products, real estate, bank instruments, commodities contracts, derivative contracts, collectibles, or other financial products."

3 Commentary to the Code of Ethics and Standards of Conduct, CFP Board, available at https://www.cfp.net/docs/default-source/for-cfp-pros—professional-standards-enforcement/cfp-board-code-and-standards-with-commentary.pdf?sfvrsn=9.

4 Regulation of Financial Planners, Financial Planning Coalition, available at http://financialplanningcoalition.com/issues/regulation-of-financial-planners/.



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