



UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, DC 20549

DIVISION OF  
TRADING AND MARKETS

March 11, 2011

Michael P. Shaw  
Managing Director, Professional  
Standards and Legal  
Certified Financial Planner Board of  
Standards, Inc.  
1425 K Street, NW, Suite 500  
Washington, DC 20005

**Re: Certified Financial Planner Board of Standards, Inc.'s No-Action Request**

Dear Mr. Shaw:

In your letter dated March 10, 2011, on behalf of the Certified Financial Planner Board of Standards, Inc. ("CFP Board"), you request assurance that staff of the Securities and Exchange Commission ("Commission") would not recommend that the Commission take enforcement action under Section 248.10 of Regulation S-P<sup>1</sup> if broker-dealers or investment advisers registered with the Commission provide Background Documents<sup>2</sup> to the CFP Board in the manner and for the purposes described in your letter.

You represent that the Background Documents disclosed to the CFP Board would consist of consumer complaints and responses by broker-dealers and investment advisers to those complaints, statements of claim (including arbitration claims) and claim resolution documents. You also represent that the CFP Board would use the Background Documents to process applications for CFP certification and to investigate and possibly take action against holders of the CFP certification. In addition, you represent that many broker-dealers and investment advisers employ individuals who have obtained the CFP certification, and that approximately 62,000 financial planning professionals have obtained the CFP certification.

You further represent that broker-dealers and investment advisers often seek to have their associated persons qualified as CFP professionals. Moreover, you represent that, as with the

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<sup>1</sup> 17 C.F.R. § 248.10.

<sup>2</sup> Capitalized terms used herein have the same meaning as in your letter unless otherwise noted.

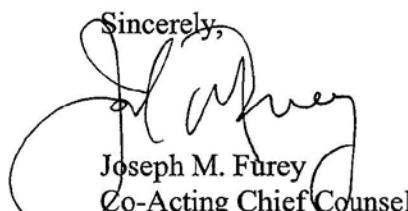
Mr. Michael P. Shaw  
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qualification standards for individual associated persons of broker-dealers, the standards for financial planning are assessed at the individual level rather than at the firm level.

Based on the facts and representations set forth in your letter and without necessarily concurring in your analysis, the staff of the Division of Trading and Markets would not recommend that the Commission take enforcement action against a broker-dealer under Regulation S-P if the broker-dealer discloses Background Information to the CFP Board in the manner and for the purposes described in your letter. In addition, the Division of Investment Management has asked us to inform you that it would not recommend that the Commission take enforcement action against an investment adviser registered with the Commission if the investment adviser discloses Background Information to the CFP Board in the manner and for the purposes described in your letter.

Because this position is based on the facts presented and the representations you have made, any different facts or conditions might require a different response. Furthermore, this response expresses our position on enforcement action only, and does not purport to express any legal conclusions on the question presented.

Sincerely,



Joseph M. Furey

Co-Acting Chief Counsel

CERTIFIED FINANCIAL PLANNER  
BOARD OF STANDARDS, INC.

1425 K Street, NW, Suite 500, Washington, DC 20005 P: 800-487-1497 F: 202-379-2299 E: mail@CFPBoard.org W: www.CFP.net

March 10, 2011

**VIA EMAIL & FIRST CLASS MAIL**

Joseph M. Furey  
Co-Acting Chief Counsel  
Division of Trading and Markets  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

**Re: Certified Financial Planner Board of Standards, Inc. Regulation S-P Request**

Dear Mr. Furey:

Certified Financial Planner Board of Standards, Inc. ("CFP Board") respectfully requests assurance that the staff of the Securities and Exchange Commission ("SEC") will not recommend enforcement action under Regulation S-P<sup>1</sup> if a broker-dealer or registered investment adviser provides Background Documents (as defined below) to CFP Board in the manner described in this request.

**Description of CFP Board and CFP Certification**

CFP Board is a non-profit corporation organized under the laws of Colorado, with its headquarters in Washington, DC. It acts in the public interest by fostering professional standards in personal financial planning through setting and enforcing education, examination, experience, and ethics standards for financial planner professionals who hold the CFP® certification. Its mission is to benefit the public by granting the CFP® certification and upholding it as the recognized standard of excellence for personal financial planning. CFP® professionals agree on a voluntary basis to comply with CFP Board's competency and ethical standards, and subject themselves to the disciplinary oversight of CFP Board.

Financial planning professionals provide services that integrate knowledge and practices across the financial services industry. Financial planners work with their clients to determine

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<sup>1</sup> 17 CFR Part 248, Subpart A.

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whether and how they can meet their life goals through the proper management of their financial resources. Financial planning typically covers investment, income tax, education, insurance, retirement, and estate planning.

Many broker-dealers and investment advisers employ individuals who have obtained the CFP® certification. As indicated above, the CFP® certification has become a widely-accepted standard in the securities industry for financial planning. This is evidenced by, among other things, the fact that approximately 62,000 professionals have obtained the CFP® certification.

#### **Background on Request from CFP Board**

To become a CFP® professional, a person must, among other things, submit an application to CFP Board, pass a qualification examination, and undergo a background check conducted by CFP Board. CFP Board conducts a background check on all applicants for initial CFP® certification. If the applicant is an employee of a broker-dealer or investment adviser, CFP Board, as part of the background check, requests that the broker-dealer or investment adviser employer provide CFP Board with copies of any customer complaint involving the applicant and the employer's response to the customer complaint, and any statement of claim (including arbitration claims) involving the applicant and the resolution of the claim (collectively, the "Background Documents"). In addition, in situations where a more thorough investigation of an applicant's background is warranted, CFP Board may request that former broker-dealer or investment adviser employers of the applicant provide CFP Board with Background Documents related to the applicant. CFP Board uses the information in the Background Documents, as well as other criteria, to determine whether to permit the applicant to become a CFP® professional.

After becoming a CFP® professional, an individual must renew his or her CFP® certification every two years. In connection with the renewal, the individual must submit a certification renewal application to CFP Board that requires, among other things, disclosure of any investigations or legal proceedings relating to the individual's conduct during the past two years. If CFP Board receives a certification renewal application from an individual with such disclosure, it will conduct an investigation of the individual, and may request as part of that investigation Background Documents from current or former broker-dealer or investment adviser employers of the certificant. CFP Board may bring a disciplinary action against the individual as a result of the investigation, which can include revoking the individual's ability to use the CFP® marks.

As the discussion above indicates, CFP Board grants the CFP® certification only to individuals, not firms, and only has the ability to exercise authority over such individuals. For

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example, under Rule 6.1 of CFP Board's *Rules of Conduct*, a CFP® professional is compelled to cooperate fully with CFP Board's professional review operations and requirements. This includes providing documents to CFP Board during an investigation. Broker-dealer and investment adviser firms, however, are not compelled to provide information to CFP Board.

Thus, in responding to the requests for Background Documents by CFP Board discussed above, the broker-dealers and investment advisers frequently cite Regulation S-P as preventing them from sharing the Background Documents with CFP Board. They are concerned that the Background Documents may contain "nonpublic personal information" as defined in Regulation S-P, and that Regulation S-P does not contain an exception that would allow them to share such documents with CFP Board.<sup>2</sup>

Consequently, CFP Board is sometimes faced with protracted discussions with such broker-dealers and investment advisers about sharing Background Documents with CFP Board, even in situations where such documents do not contain nonpublic personal information. To address legitimate Regulation S-P concerns by such broker-dealers and investment advisers (*i.e.*, situations where it appears that the Background Documents contain nonpublic personal information), CFP Board's current practice is to seek "customer" consent, through the execution of a waiver of confidentiality form by the customer, in order to obtain the Background Documents from such broker-dealers and investment advisers.<sup>3</sup>

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<sup>2</sup> Section 248.3(t)(1) of Regulation S-P defines "nonpublic personal information" as "(i) [p]ersonally identifiable financial information; and (ii) [a]ny list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived using any personally identifiable financial information that is not publicly available information." Section 248.3(u)(1) of Regulation S-P defines "personally identifiable financial information" as any information "(i) [a] consumer provides to you to obtain a financial product or service from you; (ii) [a]bout a consumer resulting from any transaction involving a financial product or service between you and a consumer; or (iii) [y]ou otherwise obtain about a consumer in connection with providing a financial product or service to that consumer." Section 248.3(w) of Regulation S-P defines "you" as including any broker-dealer and registered investment adviser.

<sup>3</sup> Section 248.3(j) of Regulation S-P defines a "customer" as a "consumer who has a customer relationship with you." Section 248.3(g)(1) Regulation S-P defines a "consumer" as "an individual who obtains or has obtained a financial product or service from you that is to be used primarily for personal, family, or household purposes, or that individual's legal representative." The term "customer" when used in this request refers to a "customer" as defined in Regulation S-P, which captures customers of broker-dealers and clients of investment advisers.

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This results in delays in CFP Board's ability to process applications for CFP® certification, as well as in delays in CFP Board's ability to investigate and possibly bring disciplinary actions against CFP® professionals. Essentially, CFP Board is forced to handle requests for Background Documents on a case-by-case basis, devoting a significant amount of CFP Board staff time to handling these requests. In certain situations (such as when a customer does not execute the waiver of confidentiality form), CFP Board may never receive Background Documents, and may be forced in the disciplinary context to drop a potential action against a CFP® professional if it is unable to gather sufficient facts to proceed against that individual.

#### Request from CFP Board

As noted in Section 1 of Regulation S-P, Regulation S-P governs the treatment of nonpublic personal information about consumers by financial institutions (e.g., broker-dealers and registered investment advisers). It (1) requires a financial institution to provide notice to customers about its privacy policies and practices; (2) describes the conditions under which a financial institution may disclose nonpublic personal information about consumers to "nonaffiliated third parties,"<sup>4</sup> and (3) provides a method for consumers to prevent a financial institution from disclosing that information to most nonaffiliated third parties by "opting out" of that disclosure, subject to certain exceptions.

In particular, Sections 248.4 through 248.9 of Regulation S-P include requirements concerning the delivery of initial and annual notices about the privacy policies and practices of a financial institution, and about the opportunity and methods for consumers to opt out of their institution's sharing of their nonpublic personal information with nonaffiliated third parties. Sections 248.10 through 248.12 of Regulation S-P contain limitations concerning (i) disclosure of nonpublic personal information to nonaffiliated third parties, (ii) redisclosure or reuse of information that a financial institution discloses to other parties, and (iii) sharing of account number information for marketing purposes. Sections 248.13 through 248.15 of Regulation S-P include exceptions from the provisions requiring financial institutions to provide privacy notices and opt out notices to consumers. For instance, Section 248.15(a)(3) provides an exception from the notice and opt out requirements in Regulation S-P that allows a broker-dealer or registered

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<sup>4</sup> Section 248.3(s)(1) of Regulation S-P defines a "nonaffiliated third party" as any person except "(i) [y]our affiliate; or (ii) [a] person employed jointly by you and any company that is not your affiliate (but nonaffiliated third party includes the other company that jointly employs the person)."

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investment adviser to provide nonpublic personal information to nonaffiliated third parties “that are assessing [the broker-dealer’s or investment adviser’s] compliance with industry standards.”<sup>5</sup>

We believe that this exception should allow broker-dealers and investment advisers to provide the Background Document(s) to CFP Board in the circumstances described above without violating the notice and opt out requirements in Regulation S-P. In particular, while this exception addresses a firm’s compliance with industry standards, certain industry standards in the securities industry are assessed at the individual associated person level rather than at the firm level. This is because it is the individuals who interact directly with the public as agents for their firms. For example, the broker-dealer regulatory regime is based on a broker-dealer’s individual associated persons meeting certain qualification and testing standards before the broker-dealer is allowed to offer securities to the public. Under Exchange Act Rule 15b7-1, a registered broker-dealer is prohibited from effecting transactions in securities unless any natural person associated with such broker-dealer who effects such transactions is registered or approved in accordance with the standards of training, experience, competence, and other qualification standards (including but not limited to submitting and maintaining all required forms, paying all required fees, and passing any required examinations) established by the rules of any national securities exchange or national securities association of which such broker-dealer is a member.

This is also the model typically followed with respect to financial planning. In this regard, broker-dealers and investment advisers often seek to have their associated persons qualified as CFP® professionals to be able to offer financial planning services to their customers, and use that certification status as a marketing tool to solicit existing and new customers. While CFP® certification is not a prerequisite for offering financial planning services, it has become over the years a de facto industry standard in the securities industry for offering such services, due in large part to the rigorous qualification and testing program administered by CFP Board for CFP® certification. The wide acceptance of the CFP® certification in the securities industry is demonstrated by, among other things, the fact that approximately 62,000 professionals have obtained the certification. Like the qualification and testing standards for individual associated persons discussed above, the standards for financial planning are assessed at the individual level rather than at the firm level because it is the individuals who have direct contact with the public as agents for their firms.

Accordingly, we respectfully request assurance that the staff will not recommend enforcement action under Regulation S-P if a broker-dealer or registered investment adviser provides Background Documents to CFP Board in the circumstances described above. Such a

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<sup>5</sup> In particular, this provision provides an exception from the requirements for initial notice in Section 248.4(a)(2), for the opt out in Sections 248.7 and 248.10, and for initial notice in Section 248.13 in connection with service providers and joint marketing.

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position by the staff would allow CFP Board to more efficiently and effectively process applications of candidates for CFP® certification, and to more efficiently and effectively investigate and possibly bring disciplinary actions against current CFP® professionals.

**Conclusion**

For the reasons set forth above, we request that the staff of the SEC adopt the above-described no-action position regarding Regulation S-P. We appreciate your consideration of this request. If you have any questions regarding this letter, please do not hesitate to contact me directly at (202) 379-2230.

Sincerely,



Michael P. Shaw  
Managing Director, Professional Standards and Legal

cc: Penelope Saltzman, SEC  
Brice Prince, SEC