CFP BOARD

October 10, 2023

Vanessa A. Countryman, Secretary
Securities and Exchange Commission
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Comment on 17 CFR Parts 240 and 275, Release Nos. 34-97990; IA-6353; File No. S7-12-23, Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers

Dear Secretary Countryman,

CFP Board is a professional standards-setting body that has been committed to the public interest for nearly 50 years. Our CFP® certification program rests on both competency and ethics standards and is accredited by the National Commission for Certifying Agencies. Today there are more than 97,000 CFP® professionals.

As part of the certification, each CFP® professional makes a voluntary commitment to abide by CFP Board's *Code of Ethics and Standards of Conduct*. The cornerstone of the *Code and Standards* is the requirement to act as a fiduciary, and therefore, act in the best interests of the client, at all times when providing financial advice. CFP® professionals also agree either to avoid conflicts of interest or to fully disclose material conflicts of interest to the client, obtain the client's informed consent, and properly manage the conflict. A CFP® professional acting under a conflict of interest continues to have a duty to act in the best interests of the client and place the client's interests above the interests of the CFP® professional and the CFP® professional's firm.

CFP Board's *Code and Standards* recognizes technology's important role in the development and delivery of financial advice. More specifically, the *Code and Standards* has both a duty of competence that applies to each component of the technology that a CFP® professional is using when providing professional services, and a standard that sets forth a CFP® professional's duties when selecting, using, and recommending technology. CFP Board's *Code and Standards* requires a CFP® professional to:

1. Exercise reasonable care and judgment when selecting, using, or recommending any software, digital advice tool, or other technology used for providing professional services to a client,
2. Have a reasonable level of understanding of the assumptions and outcomes of the technology employed, and
3. Have a reasonable basis for believing that the technology produces reliable, objective, and appropriate outcomes.

Several aspects of CFP Board's standard are particularly relevant to the proposed rule. First, a CFP® professional must know what assumptions the technology makes, the basis for these assumptions, and whether they are appropriate in view of the circumstances. A CFP® professional also may rely upon their firm's development of the assumptions if they have a reasonable basis to believe that they were developed after the firm conducted a review to determine that the assumptions are appropriate.

Second, a CFP® professional must use their professional skills and judgment to assess whether the technology's outputs are (a) accurate and error-free, (b) the product of any bias or conflicts of interest, and (c) proper for the client's circumstances and the purpose for which they will be used. Having a reasonable understanding of how the technology derives its outcomes (i.e., the methodology used to take assumptions and produce the output) allows a CFP® professional to tailor appropriately their reliance on the technology. A CFP® professional also should review underlying calculations and assumptions, review the final outputs, and measure those outputs against client information and the underlying assumptions. This may include utilizing the technology's reconciliation processes and stress testing capabilities, if appropriate, to determine the reasonableness of the outcome based on different scenarios.

Consequently, the components of the proposed rulemaking that may apply to CFP® professionals are consistent with the commitment these CFP® professionals have made to CFP Board as set forth in the *Code and Standards*. Specifically, the proposed rule would require affiliated persons to be aware of assumptions made in predictive technology so that the technology does not result in placing the professional's interests above the consumer's interests.

CFP® professionals, however, often work in environments where their firm selects technology for them. CFP Board will consider a CFP® professional's firm's approval of the technology or the use of a technology consultant as a factor in determining the reasonableness of a CFP® professional's care when selecting technology. This includes situations where the CFP® professional's firm has developed the technology, uses technology that a custodian provides, has mandated that a specific technology be used, or has provided a pre-approved list of technologies from which a CFP® professional may select.

A CFP® professional may rely upon the CFP® professional's firm's technology selection or pre-approved technology list, or the services of a technology consultant, if the CFP® professional has a reasonable basis to believe that the firm or consultant selected the technology or developed the list after conducting appropriate due diligence to determine that the technology provides reliable, objective, and appropriate outcomes. However, in practice it may be difficult for a CFP® professional to know whether this is the case. The technology that a CFP® professional uses must be worthy of a client's trust. Accordingly, technology (including predictive data analytics embedded in technology) that places the client's interests above the firm's will help CFP® professionals comply with CFP Board's *Code and Standards*, including the fiduciary duty and the technology standard.

CFP Board also is concerned about technology being able to do indirectly what may not be done directly. Depending on the facts, a technology-enabled client interaction might not constitute a recommendation for purposes of determining the standard of conduct that applies. If a firm may engage in an automated interaction with a client that would be prohibited if it were in the form of a recommendation from a CFP® professional (because the technology is being used to place the firm's interest above the client's), then there would be a risk of consumer harm because the automated interaction (a) may result in actions that are not in the client's best interests and (b) would undermine the perceived value of personal financial planning (or financial advice) that delivers recommendations tailored to the client's specific factual circumstances.

In addition to these observations, CFP Board has suggestions for the Commission. First, many CFP® professionals rely on third-party technology. The final rule should preserve a firm's ability to rely on third parties in complying with the proposed rule, while reinforcing that a firm's reliance on third parties does not relieve them of their obligations. There must be a mechanism for firms to be able to rely on third parties and demonstrate compliance with the proposed rule. For example, a third party might provide to the firm the documentation that the proposed rule requires.

Second, we encourage the SEC to consider alternatives that could reduce burdens and lower the risk of curbing appropriate technological advancements while still achieving the rule's objective of ensuring that technological advancements are in the best interests of the public.

Finally, we would like to share some important news about CFP Board. Earlier this year, CFP Board established a new organization to advance the financial planning profession for the benefit of the public and promote the benefits of a financial planning career. This evolution resulted in two affiliated nonprofit organizations. The mission of CFP Board of Standards is to credential competent and ethical financial planners, uphold CFP® certification as the recognized standard, and advance the financial planning profession. The mission of CFP Board Center for Financial Planning is to advance competent and ethical financial planning and expand CFP® professional diversity for the benefit of the public. We look forward to working with the Commission on initiatives that advance these missions.

Thank you for the opportunity to comment on the proposed rule. If you have any questions or would like to discuss this issue, please contact Leo Rydzewski, General Counsel, by phone at 202-379-2230 or by email at LRydzewski@cfpboard.org.

Sincerely,

Kevin R. Keller

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