



CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, INC.

November 30, 2012

## **Amendments to Appeal Rules and Procedures**

*Effective January 1, 2013*

The Board of Directors of Certified Financial Planner Board of Standards, Inc. (CFP Board) recently approved the following amendments to CFP Board's *Appeal Rules and Procedures (Appeal Rules)*. These amendments are effective on January 1, 2013.

### **Background and Overview**

Following review of comments received during a 45-day comment period held from August-October 2012, the Board of Directors recently approved amendments to the *Appeal Rules*. The *Appeal Rules* govern the procedure of appeals from orders of CFP Board's Disciplinary and Ethics Commission (DEC) and appeals from Administrative Orders issued by CFP Board.

During the comment period, CFP Board received a total of 10 comments, the majority of which did not oppose the proposed amendments.

These amendments streamline the appeal process, clarify the "clearly erroneous" standard of review and ensure that CFP Board's appeal process is fair and credible to all participants.

The substantive amendments to the *Appeal Rules* include:

- Article 2 – Appeal Panel – Transfer jurisdiction of hearing appeals from Appeal Committee to Appeal Panel. The Appeal Panel will be made of up former Appeal Committee members, former DEC members and former DEC volunteers.
- Article 4 – Right to Appeal and Representation – Add a provision allowing CFP Board Counsel to appeal a decision of the DEC.
- Article 5 – Appeal Procedures – Streamline the process by eliminating the step of forwarding the record under separate cover. CFP Board will provide the record with the DEC Order.
- Article 10 – Decisions – Clarify the potential outcomes under the "clearly erroneous" standard of review.

- Article 11 – Review by the Appeal Committee of the Board of Directors of CFP Board – Add provision allowing the Appeal Committee of the Board of Directors to review the decisions of the Appeal Panel and “call” any decision for its review. If the Appeal Committee determines that the Appeal Panel committed “clear error,” the Appeal Committee can remand the matter back to the Appeal Panel with instructions.

## **APPEAL RULES AND PROCEDURES** (as amended November 2012, effective January 1, 2013)

### **ARTICLE 1: SCOPE OF RULES**

These Appeal Rules and Procedures (the Rules) govern the procedure of appeals from orders of the Disciplinary and Ethics Commission (DEC) of the Certified Financial Planner Board of Standards, Inc. (CFP Board), and appeals from Administrative Orders.

### **ARTICLE 2: APPEAL PANEL**

#### **2.1 Function and Jurisdiction**

The Appeal Panel is charged with the duty of reviewing all appeals from orders of the DEC and Administrative Orders. The Appeal Panel shall have jurisdiction to review cases that are appealed in accordance with these Rules, and that involve: (1) any Order issued by the DEC, except Interim Suspension Orders; or (2) Administrative Orders.

#### **2.2 Composition**

The composition of the Appeal Panel and appointment of a Chair shall be as set forth in CFP Board’s Bylaws, Policy Governance Manual and/or Appeal Panel Charter, as amended from time to time. No member of the Appeal Panel may serve simultaneously as a member of the DEC.

#### **2.3 Functions of the Appeal Panel Chair**

The Appeal Panel Chair shall rule on all motions, objections, and other matters presented in the course of the hearing. The Chair shall also have the authority to rule on preliminary motions or matters raised prior to the hearing.

#### **2.4 Disqualification**

Appeal Panel members shall not participate in any appeal proceeding that would result in, or cause, a conflict of interest or would give the appearance of impropriety.

### **ARTICLE 3: STANDARD OF REVIEW**

#### **3.1 Appeals from Orders of the DEC**

In appeals from orders of the DEC, except interim suspension orders, the Appeal Panel shall affirm the findings of fact and disposition of the proceedings, unless Appellant

establishes or the Appeal Panel finds that the findings of fact, rule violation(s) and/or the disposition of the proceedings is, clearly erroneous.

### **3.2 Appeals from Administrative Orders**

In appeals from administrative orders, the Appeal Panel shall affirm the order of Certified Financial Planner Board of Standards (CFP Board), unless Appellant establishes: (a) excusable neglect for failing to respond to the Complaint, or (b) that the issuance of the order was clearly erroneous.

## **ARTICLE 4: RIGHT TO APPEAL AND REPRESENTATION**

CFP Board Counsel may appeal any Order of the DEC, except an order in which the DEC declines to impose an interim suspension, to the Appeal Panel, provided he or she complies with all other provisions of these Rules. In the event that CFP Board Counsel appeals an Order of the DEC, the Respondent shall not be assessed an appeal fee. A Respondent may appeal any Order of the DEC, except an interim suspension order, and an Administrative Order issued by CFP Board Counsel to the Appeal Panel, provided he or she complies with all other provisions of these Rules. Additionally, a Respondent has the right to be represented by counsel. Respondent's Counsel, if any, shall be identified to CFP Board in his or her Petition for Appeal or Response to Petition for Appeal. When Respondent's Counsel is identified, the Respondent shall provide the counsel's contact information as well as whether the counsel will appear in person or via telephone. Respondent's counsel must be an active member in good standing of the bar of a United States state, jurisdiction, possession, territory or dependency

## **ARTICLE 5: APPEAL PROCEDURES**

### **5.1 Initiation of Appeal**

- (a) *Initiation Deadline.* An Appellant's Petition for Appeal must be filed within 30 calendar days from the date the DEC's or CFP Board's order is mailed to respondent.
- (b) *Motion for More Time.* In the event Appellant fails to satisfy the provisions of this section within the time allotted in subsection (a) above, the Appeal Panel may extend the time for initiating the appeal upon motion by Appellant. Said motion must be filed by Appellant no later than 30 calendar days after the expiration of the time prescribed in subsection (a) and must demonstrate excusable neglect for Appellant's failure to submit a Notice of Appeal and/or costs within the time allotted under subsection (a).

### **5.2 Petition for Appeal**

- (a) *Filing.* Filing shall be accomplished by depositing the Petition for Appeal in the U.S. Mail, by Certified Mail, return receipt requested, properly addressed to CFP Board headquarters.

(b) *Content.*

(1) *Appeals from Orders issued by the DEC.* The Petition for Appeal from an Order issued by the DEC must specify the party filing the appeal, shall identify the DEC's order, and shall state clearly and concisely the grounds upon which the Appellant seeks a modification or remand of the Order. The contents of the Petition for Appeal shall be limited to the evidence contained in the record. The Appeal Panel shall not consider new evidence or hear testimony from any witnesses. However, a party can raise new "arguments" (as distinguished from a new "claim") on appeal. Once a claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below. See, *Yee v. City of Escondido*, 503 U.S. 519, 534-535 (U.S. 1992).

(2) *Appeals from Administrative Orders.* The Petition for Appeal from administrative orders shall specify the party filing the appeal and must identify the Administrative Order. The content of the Petition for Appeal must be limited to the circumstances and evidence surrounding Appellant's failure to respond to CFP Board's Complaint. The Appeal Panel must not consider any evidence with regard to the allegations in the Complaint, except those allegations relating to Appellant's failure to respond.

(3) *Length.* The aggregate length of a Petition for Appeal shall not exceed 10 single-spaced pages, excluding any attachments, and shall be submitted on 8 ½ x 11 inch paper, with a minimum font size of 11 points. Attachments shall not exceed 20 pages.

(c) *Appearance.* An Appellant appealing an Order issued by the DEC has the right to appear, either telephonically or in person, but must request such an appearance in the Petition for Appeal. Failure to request an appearance in the Petition for Appeal will result in a waiver of the Appellant's right to appear.

(d) *Costs.*

(1) All costs for an appellate review, including all costs from the underlying hearing, if any, must be received by CFP Board within the time allotted under subsection (a) above and are nonrefundable. Appellant may request a reduction or waiver of the appeal hearing costs due to financial hardship. Such request must be submitted in writing with the Petition for Appeal. Upon receipt and review of the request, CFP Board Advisory Counsel shall have the discretion to reduce or waive the required appeal hearing costs.

- (2) If CFP Board Counsel initiates the appeal of an Order, the Appellee will not be assessed a hearing fee.

### **5.3 Answer**

- (a) *Filing.* Appellee must file an Answer within 30 calendar days after CFP Board receives the Petition for Appeal. The Answer must be filed at least 30 calendar days prior to the hearing, unless Appellant expressly waives his or her right, in writing, to the 30 day notice. Filing must be accomplished by depositing the Answer in the U.S. Mail, by Certified Mail, return receipt requested, and shall be sent to the Appellant and/or Appellant's counsel's last known address.
- (b) *Content.* The Answer must specify the party filing the Answer, respond to the issues raised in the Petition for Appeal, and state clearly and concisely the grounds upon which the DEC's order should be affirmed, modified or remanded.
- (c) *Length.* The aggregate length of the Answer must not exceed 10 single-spaced pages, excluding any attachments, and must be submitted on 8 ½ x 11 inch paper, with a minimum font size of 11 points. Attachments must not exceed 20 pages.

### **5.4 Rebuttal**

- (a) *Filing.* An Appellant may file a rebuttal under the following circumstances: (1) if Appellant has waived the right to appear at the appeal hearing; or (2) if Appellant is appealing an administrative order. Appellant must file a rebuttal within 10 calendar days of receipt of the Answer. A rebuttal must be filed at least 20 calendar days prior to the appeal hearing, unless Appellee expressly waives his or her right, in writing, to this 20 day notice. Filing is accomplished by depositing the rebuttal in the U.S. Mail, by Certified Mail, return receipt requested, properly addressed to Appellant and/or Appellant's counsel's last known address.
- (b) *Content.* The content of the rebuttal is limited to those issues raised in the Petition for Appeal and the Answer.
- (c) *Length.* Rebuttals must not exceed two single-spaced pages and shall be submitted on 8 ½ x 11 inch paper, with a minimum font size of 11 points. No attachments are permitted.

## **ARTICLE 6: MOTIONS**

### **6.1 Filing**

An Appellant or Appellee may file a written motion (exclusive of motions in Articles 5.1b and 9.3b) regarding procedural matters. The motion must be filed no later than 30 days prior to the appeal hearing. Filing is accomplished by depositing the motion in the U.S. Mail, by Certified Mail, return receipt requested, properly addressed to the Appellant's or Appellee's and/or Appellant's or Appellee's counsel's last known address.

## 6.2 Content

The motion must state with reasonable particularity the grounds for the motion and the relief sought. If the motion pertains to a specific rule or rules, the motion must identify the rules.

## 6.3 Response

An Appellant or Appellee may file a written response to any motion filed by another party. Any response must be filed no later than 10 days after the filing of the motion. The content of a response to a motion is governed by Article 6.2. Filing is accomplished by depositing the response in the U.S. Mail, by Certified Mail, return receipt requested, properly addressed to the last known address Appellant's or Appellee's and/or Appellant's or Appellee's counsel's last known address. If a response is filed, a rebuttal is not permitted.

## 6.4 Length

Motions must not exceed two single-spaced pages and must be submitted on 8 ½ x 11 inch paper, with a minimum font size of 11 points. Attachments must not exceed 10 pages.

## 6.5 Disposition of a Motion

- (a) *Appearance Requested.* The Appeal Panel Chair must rule on all motions, either orally or in writing on or before the date of the hearing.
- (b) *Paper Review.* The Appeal Panel Chair must rule on all motions in a written order mailed to both party's within 30 days of the Appeal Panel's decision. The order must be mailed to each party by U.S. Mail, by Certified Mail, return receipt requested, to the last known address of each party and/or each party's counsel.

## ARTICLE 7: AUTOMATIC STAY OF ORDER

Upon successful initiation of an appeal, the order of the DEC shall be stayed pending a decision by the Appeal Panel.

## ARTICLE 8: THE RECORD ON APPEAL

### 8.1 Composition

- (a) *Appeals from Orders Issued by the DEC.* The record on appeal shall consist of all evidence provided to the DEC the DEC's order, the transcript of the hearing before the DEC, the Petition for Appeal, the Answer to the Petition for Appeal, and the rebuttal, if applicable.
- (b) *Appeals from Administrative Orders.* The record on appeal shall consist of the Notice of Complaint and Hearing, the Complaint, proof of service of the Complaint upon the Appellant, the Administrative Order of Revocation, all

evidence that relates to Appellant's failure to respond, the Petition for Appeal, the Answer to the Petition for Appeal, along with a timeline of events, and the rebuttal, if any.

## **8.2 Omission from or Misstatement in the Record**

If anything material to any party is omitted from the record created from the hearing before the DEC or is misstated therein, either party may, at any time, supply the omission or correct the misstatement by stipulation. In the event there is no stipulation, the parties may submit the matter to the Appeal Panel Chair, who may, at any time, direct the omission or misstatement be remedied and, if necessary, that a supplemental record be prepared and filed.

## **ARTICLE 9: APPEAL HEARING**

### **9.1 Notice of Hearing**

Not less than 30 calendar days prior to the date set for an appeal hearing, written notice of such hearing shall be sent to the each party, designating the date and place of the hearing. The notice shall be deposited in the U.S. Mail, by Certified Mail, return receipt requested, to each party's last known address.

### **9.2 Review of the Record**

The Appeal Panel shall review the record on appeal (see Article 7.1).

### **9.3 Presentations**

(a) *Right to Presentation.*

(1) *Appellant.*

*Appeals from Orders Issued by the DEC.* If Appellant requests an appearance pursuant to Article 5.3(d), he/she will have the right to make an oral presentation. If Appellant has waived his/her right to appear pursuant to Article 5.3(d) of these *Rules*, the Appeal Panel will make its decision based on the record and neither the Appellant nor the DEC will have the right to make an oral presentation.

*Appeals from Administrative Orders.* Neither Appellant nor Appellee will have the right to appear if Appellant is appealing an administrative Order of Revocation.

(2) *Appellee.*

The Appellee will have the right to make an oral presentation in all cases on appeal where the Appellant has exercised his/her right to appear pursuant to Article 5.3(d) of these Rules.

(b) *Affirmative Presentation.*

- (1) *Content.* Affirmative presentations shall be concise, shall address only those issues raised in the Petition for Appeal and Answer, and may be terminated by the Appeal Panel if either Appellant or Appellee exceeds the time limits prescribed below.
- (2) *Time Allotted and Order of Presentations.* Appellant and Appellee each have 20 minutes to make an oral presentation. Appellant shall present first.
- (3) *Motion for More Time.* The Appeal Panel may consider motions from the Appellant or Appellee requesting additional time for oral presentations and may grant such motions upon a showing of good cause.

(c) *Rebuttal.* Following the presentation of the Appellee, Appellant shall be permitted five minutes for rebuttal. The rebuttal must address only those issues raised in the Petition for Appeal and Answer or the affirmative presentations.

(d) *Questioning.* The Appeal Panel may ask questions at any time during or after the presentations. In the event the Appeal Panel exercises its right to ask questions, the time allotted for presentation will not be extended.

#### **9.4 Transcript of Appeal Hearing**

If either party wishes to have a transcript of the appeal hearing, the party is responsible for securing, making all necessary arrangements with, and paying the cost of, the transcriptionist.

### **ARTICLE 10: DECISIONS**

#### **10.1 Order of the Appeal Panel**

Decisions shall be rendered as set forth below.

- (a) *Order issued by the DEC.* The Appeal Panel shall: (i) affirm the DEC's findings of fact, rule violation(s) and the disposition of the proceedings if the Appeal Panel finds no clear error; (ii) affirm the DEC's findings of fact and modify the rule violation(s) and/or disposition of the proceedings if the Appeal Panel finds clear error as to the rule violation(s) and/or disposition of the proceedings; or (iii) remand the matter to the DEC with instructions for further proceedings if the Appeal Panel finds clear error as to the DEC's findings of fact. A finding is 'clear error' when the Appeal Panel, after considering all the evidence, is left with the definite and firm conviction that a mistake has been committed regarding the support of one or more factual findings by the evidence or the application of the Rule(s).

- (b) *Administrative Orders*. The Appeal Panel shall: (i) affirm CFP Board's administrative order; or (ii) remand the matter to the DEC for a disciplinary hearing. In order to impose (ii) above, the Appeal Panel must find Appellant has established excusable neglect for failing to respond to the Complaint, or that the issuance of the order was clearly erroneous.

## **10.2 Service of the Order of the Appeal Panel**

A written order must be mailed to both parties within 30 days after the review by CFP Board's Board of Directors as provided in Article 11. The order must be mailed to the Appellant or the Appellant's counsel by U.S. Mail, by Certified Mail, return receipt requested, to the last known address of each party and/or each party's counsel.

## **ARTICLE 11: REVIEW BY THE APPEALS COMMITTEE OF THE BOARD OF DIRECTORS OF CFP BOARD**

### **11.1 Presentation to Appeals Committee**

The Managing Director of Professional Standards and Legal ("Managing Director") must present every decision issued by the Appeal Panel to the Appeals Committee of the Board of Directors. The Board of Directors may: (i) affirm the Appeal Panel's decision; or (ii) call the matter for review at the next scheduled Appeals Committee meeting. The Appeals Committee's decision is the final decision of CFP Board.

### **11.2 Call for Review by the Appeals Committee**

After receiving the presentation from the Managing Director, the Appeals Committee may, if it wants further details of the Appeal Panel's determination, call the case for review at the Appeals Committee's next scheduled meeting. At the Appeals Committee's next scheduled meeting, the Managing Director must present a detailed review of the Appeal Panel's determinations. Neither Appellant nor Appellee will have the right to appear during this review by the Appeals Committee.

### **11.3 Decision After Review**

After review of the matter under Article 11.2, the Appeals Committee may: (i) affirm the Appeal Panel's decision; or (ii) if it finds clear error, remand the matter to the Appeal Panel with instructions for further proceedings.

## **DEFINITIONS**

***Administrative Orders***. CFP Board Counsel issues an Administrative Order of Denial or an Administrative Order of Revocation in instances where a CFP Board designee fails to file a timely Answer to the Complaint within the required 20 calendar days from the date of service of the Complaint, as provided in Article 7.3 of the *Disciplinary Rules and Procedures*. Such orders are referred to as "administrative" because they do not involve a hearing before the Disciplinary and Ethics DEC.

**Appellant.** The party who appeals an Order issued by the Commission and/or an Administrative Order.

**Appellee.** The party against whom an appeal is taken and whose role is to respond to the Petition for Appeal.

**Clear Error / Clearly Erroneous.** A finding is “clearly erroneous” when the Appeal Panel, after considering the entire evidence, is left with the definite and firm conviction that a finding of fact, rule violation and/or the disposition of the proceedings is unsupported by substantial evidence.

**Excusable Neglect.** A legal standard of review which generally means a failure to take proper steps at a proper time, which were not a consequence of carelessness, but rather resulted from some unavoidable hindrance or occurrence. In determining whether excusable neglect exists, relevant circumstances include: (1) the danger of prejudice to the Disciplinary and Ethics Commission; (2) the length of the delay and its potential impact on the proceedings of either the Disciplinary and Ethics Commission or the Appeal Panel; (3) the reason for the delay, including whether it was within the respondent’s control; and (4) whether the respondent acted in good faith.

**Preponderance of the Evidence.** A legal standard of review which generally means “more probable than not,” i.e., evidence which shows that, as a whole, the fact sought to be proved is more probable than not to have occurred.