

*“No thinking man can believe that an economy built upon a business foundation ... can permanently endure without some loyalty to that (fiduciary) principle.”*

**Justice Harland Fiske Stone  
Harvard Law Review, 1934**

SUBJECT: Managing Conflicts and CFP Board’s Revised Proposal on Professional Standards  
TO: CFP Board, February 2, 2018  
FROM: Knut A. Rostad

The Institute for the Fiduciary Standard comments on the CFP Board’s Revised Standards Proposal to address the importance of effectively addressing conflicts. Avoiding or overcoming conflicts is at the heart of the fiduciary duty of loyalty. The Supreme Court explained why in *SEC v Capital Gains Research Bureau*. The SEC discussed what this means in *The Matter of Arlene Hughes*. These are well recognized cases that set a high standard. The Board should seize the moment, think large and emulate these cases. It should:

State, unabashedly, that conflicts are harmful to investors. Communicate the importance of eliminating present conflicts, avoiding new conflicts, and only then, disclosing and managing to neutralize the impact of conflicts that remain. Communicate the toxic nature of conflicts. The SEC urges advisers to avoid such conflicts. As the former director of the Office of Compliance Inspections and Examinations (OCIE), Carlo V. di Florio, noted, “Conflicts of interest can be thought of as the viruses that threaten the organization’s wellbeing ... and if not eliminated or neutralized, even the simplest virus is a mortal threat to the body.”

Provide guidance concurrent with the standards. The Board says guidance will come later, after the standards. Yet, this leaves CFPs in the lurch. There is no accepted definition in the brokerage and advice industries as to what “managing conflicts” means. Consumer Federation and SIFMA urge that conflicts be managed. Yet, their views vary widely. It’s not fair to CFPs, as Michael Kitces notes, to have CFPs find out “What is deemed unacceptable after the fact with an adverse DEC ruling.”

Provide guidance that meets true fiduciary practices. The Board must communicate the seriousness of addressing conflicts. This means prohibiting certain practices, requiring compensation that’s level, reasonable and transparent; and, requiring certain disclosure that identifies BDs as BDs. In comments, so far, it hasn’t. Instead, The Board neither requires CFPs disclose material conflicts in writing, nor for clients to provide informed consent in writing. It relies on oral communications, a casual and unreliable practice. The Board also rejects NAPFA’s suggestion to, “Express a preference for avoidance of conflicts of interest” over disclosure. This is significant. In these few words, suddenly, giving advice and avoiding conflicts is indistinguishable from giving conflicted advice and “disclosing” conflicts. This is just wrong, illogical and the result of rejecting a commonsense suggestion core to the duty of loyalty.

Conclusion. The Board has a unique opportunity to set a true fiduciary standard, and seize the moment to benefit generations to come. In the attached letter to the SEC from the Institute, we provide further steps and protocols to manage and neutralize conflicts impact. We urge the Board to apply them.