financial engines

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Definition of Fiduciary Proposed Rule
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Definition of Fiduciary Proposed Rule

Ladies and Gentlemen:

Financial Engines respectfully submits the following comments in response to the Department of Labor's proposed regulation entitled *Definition of the Term "Fiduciary,"* published in the October 22, 2010 Federal Register. Financial Engines Advisors L.L.C., a wholly owned subsidiary of Financial Engines, Inc., is a registered investment adviser that provides personalized investment advice and management services to participants in 401(k) and similar plans. Financial Engines provides such services as a fiduciary under ERISA. Financial Engines is the leading provider of independent advisory services to large plan sponsors, working with many of the nation's largest employers and retirement service providers.

We applaud the Department's proposal to update the definition of fiduciary under 29 CFR 2510.3-21(c), and support the objective of improving protections for participants and beneficiaries by seeking to ensure that persons providing investment advice are subject to ERISA's standards of fiduciary conduct. We share the concern that the current regulation may not adequately protect the interests of participants and may limit unnecessarily the scope of ERISA's fiduciary protections. ERISA's fiduciary standards provide important protections against conflicts of interest and self-dealing and, particularly in light of changes in the financial industry, it is crucial now more than ever to re-examine the types of relationships that should give rise to fiduciary duties under ERISA and to apply these protections broadly.

The current proposal represents good progress towards achieving the Department's objective of enhancing fiduciary protections. However, we respectfully submit that the Department should expand and clarify the proposed definition to better protect the interests of participants and beneficiaries and to reflect more closely statutory intent and the broad fiduciary definition set forth in ERISA.

I. Investment Education exclusion should not encompass specific investment advice

A. Investment Education

Paragraph (c)(2)(ii)(A) of the proposed regulation provides that investment education information and materials as described in Interpretive Bulletin 29 CFR 2509.96-1(d) (the "Interpretive Bulletin") will not constitute investment advice under ERISA section 3(21)(A)(ii). Investment education is a valuable way

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to offer help to participants. However, as the preamble to the proposed regulation notes, the information and materials described in the Interpretive Bulletin merely represent *examples* of the type of information and materials that may be furnished to a participant or beneficiary without being considered the rendering of fiduciary investment advice under the proposed regulation.

Thus, we are concerned that a broad exclusion for investment education may not account for certain industry practices and the expectations of participants and beneficiaries when they are provided information and materials that are not generic in nature. For example, asset class recommendations may properly be considered investment education, but if the asset classes are mapped to specific funds available within the participant's plan, the participant now has specific, actionable investment advice. Using the label "model portfolio" to describe allocations to specific funds within a plan may align with the Interpretive Bulletin in form, but in substance investment advice is being rendered. Because participants who receive specific and tailored recommendations likely perceive those recommendations as advice rather than general education, providers of such specific recommendations should be treated as fiduciaries under ERISA.

B. Recommendation

The Department should specify that the exclusion for investment education will not apply where specific investment recommendations are provided, such as where asset class models are mapped to specific investment alternatives within a plan. Similarly, interactive investment materials should not be non-fiduciary investment education under circumstances in which an individual receives tailored, actionable recommendations. These modifications would help to provide clarity about what constitutes investment education, and help to ensure participants and beneficiaries who take action based on customized recommendations are not left without ERISA's fiduciary protections.

II. Seller-Purchaser exemption should be limited to advice recipients other than plan participants

A. Seller-Purchaser exemption

Section 2510.3(21)(c)(2)(1) of the proposed regulation provides that a person will not be considered a fiduciary with respect to the provision of advice or recommendations if such person can demonstrate that the advice recipient knows, or under the circumstances reasonably should know, that the person is providing advice in the capacity of a seller or purchaser whose interests are adverse to that of the plan or participants, and that the person is not undertaking to provide impartial advice. Individual plan participants should not be expected to know that advice is not impartial.[1]

[1] Congress and regulators have been focused on investor confusion regarding the roles and standards of conduct applicable to financial professionals. See, for example, the *Study on Investment Advisers and Broker-Dealers,* issued by the Securities and Exchange Commission on January 22, 2011 and mandated by Section 913 of the Dodd-Frank Act (the "Study"), which describes the confusion of retail customers, who do not understand the roles of investment advisers and broker-dealers or the standards of care applicable when they provide personalized advice about securities. As the Study notes, "[m]any find the standards of care confusing, and are uncertain about the meaning of the various titles and designations used by investment advisers and broker-dealers. Many expect that

B. Recommendation

We recommend that the Department modify the proposed limitation so that the exception does not apply where an advice recipient is an individual plan participant. Alternatively, the limitation should more precisely describe the burden that must be met by a seller who seeks to avoid fiduciary status by claiming that an advice recipient should have known that advice is not impartial.

III. Additional Comments

A. Clarify treatment of discretionary managed accounts as covered advice

Additionally, from a more technical perspective, we are concerned that there is a gap in the proposed definition with respect to the treatment of discretionary managed accounts. Status as an investment manager under ERISA Section 3(38) would satisfy Section (c)(1)(ii)(B), thus satisfying the second prong of the proposed definition. However, paragraph (c)(1)(i) of the proposed definition may only capture discretionary managed accounts to the extent investment transactions are actually implemented. For example, Paragraph (c)(1)(i)(A)(3) includes a person who "[p]rovides advice or makes recommendations as to the management of securities or other property". One could argue that making recommendations is inherent in the activities of a discretionary investment manager, but there may also be no formal process of recommending a specific transaction to the participant and receiving an affirmative or negative consent to its execution. Paragraph (c)(1)(ii)(B) of the proposed regulation includes persons who are fiduciaries within the meaning of section 3(21)(A)(i) of ERISA. Under section 3(21)(A)(i), a person is a fiduciary with respect to a plan to the extent it **exercises** any discretionary authority or discretionary control with respect to the management or disposition of its assets, leaving open the question of whether a person is a fiduciary if the authority is granted, but not exercised.

B. Clarify standard for determining whether an understanding exists as to whether the advice is being considered in making investment decisions

Section 2510.3(21)(c)(1)(ii)(D) of the proposed regulation includes within the meaning of "investment advice" the provision of advice or recommendations described in paragraph (c)(1)(i) pursuant to an agreement, arrangement or understanding, written or otherwise, between such person and the plan, a plan fiduciary, or a plan participant or beneficiary that such advice may be considered in connection with making investment or management decisions with respect to plan assets, if individualized to the needs of the plan, plan fiduciary, participant, or beneficiary. The preamble to the regulation also refers to the understanding "of the parties." Although the proposed definition, unlike the existing definition, does not explicitly require that the understanding be mutual, it may be difficult to determine whether a participant's reasonable reliance on advice, or use of advice in reaching an investment decision, is sufficient to constitute an agreement, arrangement or understanding if the advice is rendered on a non-discretionary basis, where the participant may be asked to approve an investment strategy, proposed portfolio, or proposed transaction.

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both investment advisers and broker-dealers are obligated to act in the investors' best interests." (Executive Summary at page v).

C. Recommendation

We recommend that the Department clarify that a person is a covered fiduciary where exercise of authority over assets has been granted, regardless of whether the authority is actually exercised, and that such status not be avoidable by requiring participant approval of an investment strategy, proposed portfolio, or proposed transaction.

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IV. Provision of fiduciary investment advice is not cost prohibitive

Finally, in the Regulatory Impact Analysis, the Department notes uncertainty both as to the potential costs of the proposal, such as whether service provider costs would increase and whether the service provider market could shrink because of concerns about higher costs. Financial Engines believes that our history and growth support the conclusion that it is neither onerous nor impossible for service providers to provide high quality services in a fiduciary capacity to large numbers of plans and participants. Financial Engines launched its first advice service in October 1998 as it set out to accomplish the vision of its co-founder and Nobel Prize winner Bill Sharpe: To provide high-quality independent investment advice to everyone. With the subsequent introduction of a discretionary managed accounts service, Financial Engines works with more than 760 large employers (including 123 of the FORTUNE 500) and 8 of the largest retirement plan providers serving the defined contribution market[2]. As a result, over one million people have used Financial Engines Online Advice or have their retirement account professionally managed by the company.

Conclusion

Financial Engines appreciates the opportunity to comment on the proposed regulation, and we support the Department's actions in seeking to better protect participants and beneficiaries. We welcome the opportunity to work with the Department and to provide any further assistance that may be required. Please contact us should you have any question.

Very truly yours,

Anne S. Tuttle
Executive Vice President and General Counsel

[2] As of September 30, 2009

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