



August 6, 2020

VIA ELECTRONIC UPLOAD at www.regulations.gov (Docket ID EBSA-2020-00003)

Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Improving Investment Advice for Workers & Retirees, Proposed Exemption, Application No. D-12011

To Whom It May Concern:

Edelman Financial Engines is appreciative of the recent invitation to engage with the Department of Labor (Department) on the proposed class exemption entitled *Improving Investment Advice for Workers & Retirees*, published in the July 7, 2020 Federal Register¹ (Proposed Exemption). As America's largest independent registered investment adviser with more than \$220 billion in assets under management, we agree with the Department that consumers need more help with key decisions that impact their retirement savings and financial goals.² We look forward to working with the Department as it moves forward with rulemaking and, in furtherance of these efforts, respectfully submit the below comments.

Edelman Financial Engines

Financial Engines Advisors L.L.C. is a wholly owned subsidiary of Edelman Financial Engines, LLC (Edelman Financial Engines or the Company), and is a federally registered investment adviser that provides personalized investment advice and management services to investors in the workplace and through retail advisory centers. Edelman Financial Engines provides such services as, where applicable, a fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA), as amended, and the parallel prohibited transaction restrictions of the U.S. Internal Revenue Code of 1986, as amended (Code).

Edelman Financial Engines is the largest independent investment adviser in the United States, with more than \$220 billion in assets under management and serving more than 1.2 million clients.³ We are also the leading provider of independent advisory services to the employees of the nation's largest employers and partner with leading recordkeepers to provide access to advisory services for more than 10.9 million retirement participants in 401(k) and similar Defined Contribution (DC) plans.⁴ Edelman Financial Engines was formed in 2018 from the merger of Financial Engines and Edelman Financial Services. Edelman Financial Engines is well known for providing discretionary investment management in the workplace through our Professional Management service (managed accounts program) since September 2004, and notably, the Company provides non-discretionary investment advice to more than 1.1 million retirement plan participants. While we primarily provide access to our advisory services through DC

¹ 85 Fed. Reg. 40834 (July 7, 2020).

² <https://www.dol.gov/newsroom/releases/ebsa/ebsa20200629>.

³ As of June 30, 2020.

⁴ *Id.*

plans in the workplace, Edelman Financial Engines also provides highly personalized, comprehensive financial planning and advisory services to approximately 90,000 individual clients who access our services directly through our 158 offices around the country.⁵ Our business model is not reliant on rollovers to establish relationships with clients. We advise on all assets regardless of where they are custodied: workplace retirement accounts, IRAs and non-retirement assets. For a further description of Edelman Financial Engines and its business please refer to Appendix A.

I. The Proposed Exemption exacerbates issues with the current fiduciary definition regulation and does not adequately protect the interests of retirement investors.

As the Department has navigated changing the definition of fiduciary under 29 CFR 2510.3-21(c) during the last several years, Edelman Financial Engines has championed the objective of improving protections for retirement investors by seeking to ensure that persons providing investment advice are subject to the standards of fiduciary conduct under ERISA. Consequently, consistent with our previous comments, we are concerned that the current regulation does not adequately protect the interests of retirement investors and unnecessarily limits the scope of ERISA's fiduciary protections. The Department's regulation entitled *Definition of the Term "Fiduciary; Conflict of Interest Rule - Retirement Investment Advice"*⁶ would have taken steps towards easing that concern. Regrettably, that rulemaking was vacated by the U.S. Court of Appeals for the Fifth Circuit in 2018.⁷

Edelman Financial Engines supports efforts to maintain strong protections which provide a regulatory framework within which all investors have access to unconflicted investment advice. However, as a whole, the Proposed Exemption does not provide sufficient protections to retirement investors and, in fact, may provide unscrupulous, conflicted service providers with coverage to receive broad, little understood, types of compensation.

As an exemption, the Proposed Exemption does not resolve the issues with the fiduciary definition itself. Instead, it would allow investment advice fiduciaries to receive compensation and engage in transactions that would otherwise be prohibited under ERISA and the Code. As the Department states in the preamble to the Proposed Exemption, "[u]nder the exemption, Financial Institutions and Investment Professionals could receive a wide variety of payments that would otherwise violate the prohibited transaction rules, including, but not limited to, commissions, 12b-1 fees, trailing commissions, sales loads, markups and mark-downs, and revenue sharing payments from investment providers or third parties." While the Proposed Exemption would condition relief on compliance with "Impartial Conduct Standards," those standards, as-is, are insufficient to adequately protect retirement investors. Edelman Financial Engines believes the Proposed Exemption can and should be strengthened by improving necessary protections.

II. The Proposed Exemption should be improved by requiring clear, uniform disclosure that allows direct comparisons.

We applaud the Department for conditioning the Proposed Exemption on a Financial Institution acknowledging in writing its and its Investment Professionals' fiduciary status under ERISA and the Code, as applicable, when providing investment advice, as well as describing in writing the services to be provided and the material conflicts of interest. Edelman Financial Engines strongly agrees that it is important for retirement investors to know the fiduciary status and material conflicts of their advisors.

⁵ As of June 30, 2020.

⁶ 80 Fed. Reg. 21928 (Apr. 20, 2015).

⁷ *Chamber of Commerce of the U.S.A. v. Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018).

However, the Company strongly believes that for disclosure to be meaningful and protective of retirement investors, it must be written and presented in a consumer centric manner that seeks to educate and inform, and not to disclaim or obfuscate. We believe that the requirements of such disclosure should be highly prescriptive and: (1) be no longer than one page; (2) should not assume a certain level of financial literacy by the retirement investor; (3) prohibit industry buzzwords or jargon; (4) require a listing of all “relationship-based compensation” – meaning both direct and indirect compensation that the advisor will receive as a result of establishing and maintaining a relationship with the retirement investor; and (5) be provided prior to establishing the relationship. In addition to considering forms of prescriptive disclosure in financial services such as the Form ADV Part 2 and the Model Privacy Form under the Gramm-Leach-Bliley Act, the Department may find it helpful to consult other prescriptive disclosures that are specifically targeted to a consumer audience, including the HUD-1 Settlement Statement, the “Monroney sticker” that is appended to new vehicles, and the VIS (Vaccine Information Statement) produced by the CDC that informs vaccine recipients. These and other prescriptive forms of disclosure enable consumers to make apples-to-apples comparisons of service providers and/or facilitate their understanding more clearly than if presented in a less prescribed manner. The plain explanation of ‘relationship level’ compensation the advisor will receive based on their relationship with the retirement investor enables the consumer to consider not merely the fees they’ll pay for a particular service, but any potential conflicts the advisor may have based on their receipt of such compensation.

Currently, the Proposed Exemption does not mandate that the required disclosures be provided in any particular template or form. This lack of a mandate could allow advice providers to obscure what should be clear and simple. Studies have consistently shown that investors need disclosure that is more consumer centric.⁸ While the preamble to the Proposed Exemption seems to indicate that the Securities and Exchange Commission’s Customer Relationship Summary (Form CRS) could be used to satisfy the Proposed Exemption’s disclosure requirements, Form CRS has not been consumer tested for readability. When the proposed Form CRS was examined, a study found that “many investors failed to understand key information that would help them determine whether a brokerage or advisory account would best suit their needs even after a careful reading of the [Form] CRS.”⁹ The Department may find it useful to issue a model template or form that has been tested for readability using standard plain language principles and should include focus group testing.

The Proposed Exemption would cover advice to consumers at vulnerable points of time, such as when a retirement investor is making the decision whether to rollover retirement plan assets. While improved disclosure will strengthen protections under the Proposed Exemption, disclosure is not a cure-all and advisors should not be allowed to disclose away all of their conflicts. Furthermore, advisors should not be allowed to avoid fiduciary status by claiming advice during these vulnerable times is merely “education.” Edelman Financial Engines applauds the Department’s guidance in the preamble to the Proposed Exemption that makes it clear that in many cases rollover advice is fiduciary advice. Edelman Financial Engines believes that investors contemplating rollovers, along with all other retirement investors, deserve clarity, transparency, and uniformity from their advisors when making important financial decisions.

III. The Proposed Exemption should be narrowed to eliminate coverage of transactions with the most potential for conflict.

⁸ See a discussion of relevant studies in the Investor as Purchaser Subcommittee Recommendation on Disclosure Effectiveness, April 6, 2020, available at <https://www.sec.gov/spotlight/investor-advisory-committee-2012/disclosure-effectiveness-recommendation.pdf>.

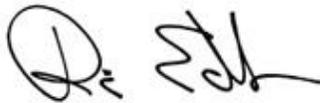
⁹ *Id.*

Edelman Financial Engines believes that the Proposed Exemption represents one of the broadest propositions for relief to receive otherwise prohibited compensation in connection with a vast array of transactions. Some types of transactions create the largest potential for conflicts that cannot be fully eliminated. These include coverage of principal transactions by a fiduciary and coverage of advice by a fiduciary to invest in a limited menu of investment options consisting only of proprietary choices that will enable the fiduciary or its affiliates to receive additional fees. To protect the retirement investor in these conflict laden areas, the Department should consider removing these types of transactions from coverage under the Proposed Exemption and require that recommendations involving these excluded, higher risk, transactions be handled through the individual prohibited transaction exemption process, which would allow for a more thorough consideration of the facts and circumstances of each transaction.

Conclusion

We appreciate the opportunity to comment on the Proposed Exemption and 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 questions.

Very truly yours,



Ric Edelman
Founder
Edelman Financial Engines



Christopher Jones
EVP and Chief Investment Officer
Edelman Financial Engines

Appendix A

About Edelman Financial Engines

Financial Engines Advisors L.L.C., a wholly owned subsidiary of Edelman Financial Engines LLC, is a federally registered investment adviser that provides personalized investment advice and management services to investors in the workplace and through retail advisory centers. Edelman Financial Engines provides such services as a fiduciary under ERISA and the Code.

Edelman Financial Engines is the largest independent investment adviser in the United States, with over \$220 billion in assets under management.¹⁰ We are also the leading provider of independent advisory services to the employees of the nation's largest employers and partner with leading recordkeepers to provide access to advisory services for participants in 401(k) and similar defined contribution (DC) plans. Edelman Financial Engines was formed in 2018 from the merger of Financial Engines and Edelman Financial Services. The company combines two leading advice solutions under one roof: high-touch financial planning services for individual households (Edelman), and tech-centric solutions for workplace retirement plans (Financial Engines). Our mission has always been to move the financial lives of our clients forward. This alignment of philosophy underpinned the rationale of the merger and drove its integration.

The company offers clients personalized, independent, and high-quality investment advice and financial planning, regardless of their wealth or investment experience. Our retail services deliver comprehensive financial planning and investment management with the attention of a dedicated personal financial planner.

In the workplace, we assist retirement plan participants with developing a personalized and comprehensive savings, investing, and retirement income plan. We use sophisticated technology and investment methodology to create a personalized diversified investment portfolio from among the investment choices available in investment accounts, including their employer's 401(k) plan. We model over 38,000 securities¹¹ while considering asset class exposures, tax efficiency, expenses, redemption fees, performance relative to a custom benchmark, and anticipated distributions. Importantly, we offer access to human advisors to assist those investors who need more help, both through a call center and our Edelman Financial Engines Advisor Centers located throughout the country. We have demonstrated that combining advice technology with human-based advisors can profitably serve investors, even those with modest account balances. The median account balance for our clients is approximately \$62,000.¹² We have Edelman Financial Engines retail offices in about 158 locations nationwide where clients can meet with dedicated advisers face-to-face.¹³

We can either professionally manage an employee's 401(k) account on a discretionary basis or provide online advice through expert recommendations, interactive tools and licensed advisers. In addition, we also offer tax-efficient management of taxable brokerage assets, taking into consideration household tax rates, unrealized gains and losses, asset placement across accounts, and the relative tax efficiency of investment options available to the investor in their accounts. Among our services in the workplace, we offer to employers and employees *Fiduciary Distribution Review*TM, a service that helps employees make

¹⁰ As of June 30, 2020.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

informed decisions about their separation benefits, retirement plan distribution choices, and in-plan income options – free from bias or product conflict of interest. As a primary focus, Edelman Financial Engines helps retirement workers evaluate their distribution options from their 401(k) plan, as well as other retirement benefits available to them. While in most cases that includes advising the individual to leave the assets with the 401(k) plan and take advantage of the high-quality plan design, our approach is flexible enough to consider the benefits of rollovers to an IRA or new employer’s 401(k), and/or encourage consolidation and roll-ins into their current 401(k). This in-depth analysis is based on the individual’s personal situation, goals, and preferences. Special consideration of retirement-plan distribution rules and limitations, investment and management fees, available investment options, protections from creditors, and income goals are some of the factors examined when advising employees. Annually, Edelman Financial Engines provides employees a retirement readiness assessment, including estimated annual retirement income from Social Security, 401(k)s, IRAs, and pensions, if applicable, to all employees in the plans we serve. For employees selecting the *Income+* feature of Edelman Financial Engines Professional Management service, we will manage the portfolio to generate sustainable retirement income that is designed to last for life with the purchase of an optional out-of-plan fixed annuity.

Edelman Financial Engines believes that our history and growth support the conclusion that it is neither onerous nor impractical for financial service providers to deliver high quality advice in a fiduciary capacity to large numbers of individual investors with modest assets. We have a proven track record of providing high-quality independent investment advice. Edelman Financial Engines works with more than 850 employers, including 133 of the FORTUNE 500 companies, and twelve of the largest retirement plan providers serving the defined contribution market.¹⁴ For all our advisory services, both for ERISA assets and for our retail business, Edelman Financial Engines acts as a fiduciary to our clients. As a result, more than 1.2 million have their assets professionally managed by the company.¹⁵

¹⁴ As of June 30, 2020.

¹⁵ *Id.*