

February 24, 2017

Filed Electronically

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Attn: Conflicts of Interest Rule  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

Office of Exemption Determinations  
Employee Benefits Security Administration  
Attention: Conflicts of Interest Rule  
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200 Constitution Avenue, N.W.  
Washington, D.C. 20210



**Financial  
Engines™**

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Re: Definition of the Term “Fiduciary” - Delay of Applicability Date  
RIN 1210-AB79

To Whom It May Concern:

Financial Engines respectfully submits the following comments in response to the Department of Labor’s (the “Department”) proposed rule entitled *Definition of the Term “Fiduciary” - Delay of Applicability Date*, submitted to the Office of Information and Regulatory Affairs for review on February 9, 2017 (the “Proposed Rule”).

Since 1996, Financial Engines has provided high-quality, objective investment advice in a fiduciary capacity to millions of defined contribution plan participants. Financial Engines is America's largest independent registered investment advisor<sup>1</sup> with over \$138B in AUM.<sup>2</sup> Our experience and market position demonstrate that it is possible to put the interests of customers first by providing personalized, unconflicted investment advice and still achieving solid business results, even for investors with modest account balances.

We thank the Department for reviewing comments on the applicability date of the final regulation that updated the definition of fiduciary under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) (the “Conflict of Interest Rule”).<sup>3</sup> Although we recognize that some in the industry may desire additional time to comply, Financial Engines is proud to be in full compliance and we are encouraged that many others have announced their intention to be in compliance by the original applicability date. Looking beyond the delay of the applicability date, we urge the Department to maintain strong protections to ensure that all Americans have access to unconflicted investment advice.

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<sup>1</sup> For independence methodology and ranking, see InvestmentNews RIA Data Center, <http://data.investmentnews.com/ria>.

<sup>2</sup> As of December 31, 2016.

<sup>3</sup> Definition of the Term “Fiduciary”; Conflict of Interest Rule - Retirement Investment, 81 Fed. Reg. 20946 (Apr. 8, 2016).



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These comments provide background on Financial Engines, its approach to providing high quality, unconflicted investment advice, and its belief that the Conflict of Interest Rule should be maintained to ensure that all investors have access to these services as they continue to take charge of their retirement investment decisions.

## **Financial Engines**

Financial Engines Advisors L.L.C., a wholly owned subsidiary of Financial Engines, Inc., is a registered investment advisor that provides personalized investment advice and management services to retirement investors. Financial Engines provides such services as a fiduciary under ERISA and under the parallel prohibited transaction restrictions of the Internal Revenue Code.<sup>4</sup> We are also regulated by the Securities Exchange Commission as a federally registered investment advisor.

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 to provide access to advisory services to participants in 401(k) and similar plans. Notably, while Financial Engines may be best known for providing discretionary investment management through our Professional Management service (managed accounts program) since September 2004, the company was founded to provide non-discretionary investment advice, and continues to do so today. Since March 2010, Financial Engines has been a publically traded company registered on the Nasdaq exchange.

Established in 1996 by Nobel Laureate William Sharpe, former SEC Commissioner Joseph Grundfest, and the late Craig Johnson, then-chairman of the Venture Law Group, Financial Engines offers personalized, independent, and high-quality investment advice to individuals, regardless of their wealth or investment experience. We assist individuals with developing a personalized and comprehensive savings, investing, and retirement income plan. We use sophisticated technology to deliver services that help individuals set an appropriate risk level for their goals and financial circumstances, and create a diversified investment portfolio from among the investment choices available in their employer's 401(k) plan. We model over 43,000 securities while considering asset class exposures, tax implications, expenses, redemption fees, and distributions. Importantly, we offer access to human investment advisor representatives to assist those investors who need more help. 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 customers is approximately \$58,000.<sup>5</sup> We also have Financial Engines Advisor Centers located in about 125 locations around the country where clients can meet with dedicated advisors face-to-face.

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<sup>4</sup> Except as expressly noted, references in this letter to ERISA should be read to include the corresponding provisions of the Internal Revenue Code.

<sup>5</sup> As of December 31, 2016.



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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 certified advisors. For employees who decide to rollover their 401(k) when retiring or leaving their employer, we can also manage the employee's, or their spouse's, individual retirement accounts ("IRA") assets. In addition, we also provide tax-efficient management of taxable brokerage assets. Annually, Financial Engines provides 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 the Financial Engines Professional Management service, we will manage the portfolio to be ready to generate retirement income, and can potentially generate steady payouts that are designed to last for life with the purchase of an optional out-of-plan fixed annuity. Financial Engines is not affiliated with any other financial services entity, does not manufacture or sell investment products, and does not accept any commissions or product-based revenue sharing.

Financial Engines believes that our history and growth prove that service providers can offer high quality services in a fiduciary capacity to large numbers of plans and participants. We have a proven track record of providing high-quality independent investment advice. Financial Engines works with 708 employers, including 146 of the FORTUNE 500 companies, and nine of the largest retirement plan providers serving the defined contribution market. As a result, over three million people have used Financial Engines Online Advice, and over one million have their retirement account professionally managed by the company.<sup>6</sup>

### **Critical Need for Retirement Investment Advice**

The retirement landscape has changed significantly in the past forty years. Professionally managed pension plans have given way to individually-managed 401(k)s and IRAs. The shift in responsibility from professional managers to individual investors has led to an increase in investment options, making investment decisions ever more difficult for individuals and increasing the risk of underperformance. A recent Financial Engines study, for example, found that more than 60% of participants who did not have retirement help had inappropriate risk levels.<sup>7</sup>

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<sup>6</sup> As of December 31, 2016.

<sup>7</sup> Help in Defined Contribution Plans: 2006 through 2012 (May 2014), *available at*: <http://www.financialengines.com>. Aon Hewitt and Financial Engines contributed complementary participant data, financial technology, and portfolio analytics. The report is based on a dataset of fourteen plan sponsors representing more than 723,000 individual participants and more than \$55 billion in plan assets. This report looked at how participant behavior affected portfolio risk and returns over the seven-year period between January 1, 2006, and December 31, 2012, which includes one of the most volatile periods in stock market history. Help is defined to include target-date funds, professional management, or online advice, the latter two of which were provided by Financial Engines.



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With more than 92 million individual investors now responsible for managing their own retirement assets, there has never been greater demand for high-quality investment advice. Investors obtain advice from a range of sources, which differ in legal and conduct standards and the way in which they are compensated. Studies have shown that, although most investors are content with the advice they receive from these sources, they often do not fully understand the legal differences among various sources or the types of payments they receive.<sup>8</sup> It is imperative that the regulatory structure governing investment advice protect the integrity of this service.

Moreover, the need for additional rules is clear since potential conflicts of interest exist in the retirement business. We believe that the fiduciary standard predating the Conflict of Interest Rule (“prior regulations”) was no longer tenable given the immense stakes associated with the shift to the defined contribution model for retirement savings. Under the prior regulations, conflicted advisors could steer investors toward products that offered higher fees and commissions for the advisor, and not necessarily those products that will provide the best retirement outcome for the investor. Complex fee-sharing arrangements, commission structures, and other conflicts of interest create pressures—sometimes overt, sometimes subtle—to shade recommendations toward the interests of the advisor. The vast majority of investors are entirely unaware that these conflicts of interest even exist, and often end up with investments that have lower returns and higher fees.

The potential harm to consumers from these conflicts of interest is significant. A 2013 study showed that even brokers who are unaffiliated with a mutual fund company tend to steer their clients toward mutual funds that pay the brokers more, but that underperform by over one percent annually on average.<sup>9</sup> Although one percent might not appear significant, such annual underperformance can quickly translate into a retirement balance that is tens of thousands of dollars lower over a 30-year career.

### **Conflict of Interest Rule**

Based on our experience, we believe the Conflict of Interest Rule or a similar regulation is workable for investment advisors and beneficial for investors. Our business model and market experience are proof that technology can help investment advisors profitably offer high-quality, unconflicted advice to investors, even those with modest account balances. This advice can be provided both through web-based interactive experiences and through human advisors. Moreover, we are confident the Conflict of Interest Rule or a similar regulation will further accelerate the trends toward low-cost, technology-based financial services and products, which will, in

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<sup>8</sup> Angela Hung et al., *Investor and Industry Perspectives on Investment Advisors and Broker-Dealers* (2008).

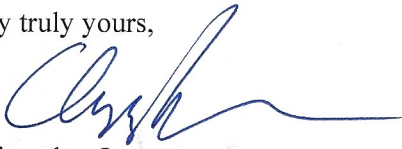
<sup>9</sup> Susan E. K. Christoffersen, *What Do Consumers' Fund Flows Maximize? Evidence from Their Brokers' Incentives* (2013).

turn, make unconflicted advice increasingly cost-effective for advisors and accessible for investors of all means. Technology has democratized high-quality, objective advice, once only available to high net worth investors. We believe the Conflict of Interest Rule is helping to accelerate these pro-consumer trends, and is crucial to the fair and efficient operation of our defined contribution retirement system.

### Conclusion

We appreciate the opportunity to comment on the Proposed Rule and welcome the opportunity to work with the Department as it considers next steps beyond the proposed delayed applicability date. We look forward to working toward ensuring that all investors can continue to access investment services that promote their interests and help them achieve their financial goals. Please contact us if you have any questions or if we may be of further assistance.

Very truly yours,



Christopher Jones  
Executive Vice President of Investment Management and Chief Investment Officer



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