October 3, 2008

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

RE: Comments on Proposed Regulation on Investment Advice – Participants and Beneficiaries, 29 CFR Part 2550

Ladies and Gentlemen:

Financial Engines respectfully submits the following comments in response to the Department of Labor's proposed regulation entitled *Investment Advice – Participants and Beneficiaries,* published in the August 22, 2008 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 directly to plan participants in 401(k) and similar plans. 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.[1]

The following comments are intended to assist the Department in clarifying several key elements of the proposed regulation to further advance the goal of providing plan participants with greater access to investment advice.

The Department has included an extensive and helpful discussion within the Regulatory Impact Analysis section explaining that the requirements of the proposed regulation are controls to counter conflicts that are present when an investment advisor is not independent. A summary of this explanation, which is critical to advancing the goal of providing plan participants with greater access to investment advice, should be also included within the Background section of the preamble to the proposed regulation, as it may otherwise lack sufficient visibility. It should be made clear that independent investment advisors are not required to comply with the provisions of the proposed regulation or the proposed *Class Exemption for the Provision of Investment Advice to Participants and Beneficiaries of Self-Directed Individual Account Plans and IRAs*, also published in the August 22, 2008 Federal Register, and that the requirements of

[1] Financial Engines currently offers investment advice and management services to over 7 million plan participants through leading employers and financial institutions, including 112 *Fortune* 500 companies.

the proposed regulation and the proposed class exemption should not create any inferences regarding the selection or monitoring of independent advisors.[2] Further, we request that the Department expand upon the reference to Field Assistance Bulletin 2007-1 to additionally reference Regulation 29 C.F.R. §2550.408b-2(e)(2), which explains that a fiduciary does not engage in an act described in section 406(b)(1) if the fiduciary does not use any of the authority, control, or responsibility which makes such person a fiduciary to cause a plan to pay additional fees for a service furnished by such fiduciary or to pay a fee for a service furnished by a person in which such fiduciary has an interest which may affect the exercise of such fiduciary's best judgment as a fiduciary. The Department should designate a fiduciary described under §2550.408b-2(e)(2) as an "independent advisor."

In order to promote greater access to investment advice, the Department must clarify that the defined term "eligible investment advice arrangement" is not meant to confer on advice arrangements made possible by the proposed regulation or proposed class exemption any greater status or suitability than other investment advice arrangements not needing the exemptions provided within the proposed regulation or class exemption[3]. The Department must clarify that other permissible investment advice arrangements exist outside of the provisions of the proposed regulation and proposed class exemption[4].

The Department should also consider reinforcing within the Background section that the regulation, in accordance with the Pension Protection Act, applies to the provision of non-discretionary investment advice, e.g., advice accepted by the participant.

Within the sub-section titled "Availability and Use" within the "Promoting Investment Advice" section of the Regulatory Impact Analysis at page 49906, the Department has created an inference that existing investment advice services should be supplanted by advice offered under the proposed regulation or proposed class exemption. This inference can be avoided with the following additional language:

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[2]Many plan fiduciaries, ERISA counsel, and industry consultants believe incorrectly that investment advice for participants is not permissible in the absence of a certification.

[3] For example, at page 49907, there is a reference to dissatisfaction with automated computer investment advisory programs, yet the context of the comments was a narrower focus on some participants' preference for person-to-person advice. That reference would be more accurately described as a desire for advice services which include an opportunity for person-to-person interactions. Further, at pages 49908 and 49909, there is a discussion of "fiduciary advisors" being in a position to offer services at low or no direct cost to companies' DC plan and IRA clients (e.g., plan participants), by relying instead on compensation from the companies. This is incorrect. Independent advisors also are in a position to rely on compensation from the companies rather than the DC plan – and in fact many such arrangements exist between independent advisors and companies today. Further, there is no basis for the Department's speculation that fiduciary advisors might market more actively to participants than independent advisors do. In fact, it has been our experience that plan sponsors play a significant role in moderating the level of marketing to their participants.

[4] For example, the heading to Table 1 within the Regulatory Impact Analysis section, which is "Permissible Investment Advice Arrangements," should be footnoted to indicate that the table does not include <u>all</u> permissible investment advice arrangements but is instead intended to allow comparisons among the types of investment advisory arrangements which are only permissible after taking into consideration the proposed regulation or proposed class exemption.

> "Participants have always had the option of obtaining permissible investment advice services directly in the retail market. DC plan sponsors likewise have had **and continue to have** the option of obtaining such **permissible investment advice** services in the commercial market and making them available to plan participants and the beneficiaries in connection with the plan."

We support the Department's efforts within the proposed class exemption and in Field Assistance Bulletin 2007-1 to educate plan sponsors and others by clarifying the effect of the new regulation on existing Department guidance such as Advisory Opinion 2001-09A (Dec. 14, 2001), the SunAmerica opinion. Given that SunAmerica refers to "other relationships, agreement or understandings that would limit the ability of the party to carry out its responsibilities beyond the control, direction or influence of the fiduciary," additional clarification is needed with respect to the proposed regulation. This could be accomplished by adding a clarification to the preamble to the proposed regulation, as was done in the preamble to the proposed class exemption:

> "The Department notes, however, that it continues to believe that what constitutes "independent" for purposes of the analysis in AO 2001-09A is an inherently factual question, and that no inferences should be drawn with regard to the effect of the definition of material contractual relationship contained in §2550.408g-1(j)(7)."

Conclusion

Financial Engines appreciates the opportunity to comment on the proposed regulation and may provide additional comments as we continue to evaluate the proposal and discuss its impact with plan fiduciaries. 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 questions.

Very truly yours,

Anne S. Tuttle
Vice President and General Counsel

cc: Bradford Campbell, Assistant Secretary, Employee Benefits Security Administration
Robert Doyle, Director, Office of Regulations and Interpretations, Employee Benefits Security Administration
Louis Campagna, Division of Fiduciary Regulations and Interpretations, Employee Benefits Security Administration