

## **Hearing on Definition of Fiduciary**

**U.S. Department of Labor – Employee Benefits Security Administration**

**March 1, 2011**

**Testimony of Financial Engines: Anne Tuttle, Executive Vice President and General Counsel, presenting**

Good morning, and thank you for the opportunity to testify today. My name is Anne Tuttle and I am here today as the General Counsel of Financial Engines.

We applaud the Department's proposal to update the definition of fiduciary. We support the Department's objective of improving protections for participants and beneficiaries. We applaud the Department for confirming that persons providing individualized investment advice be subject to ERISA's standards of fiduciary conduct. We share the concern that the current regulation may no longer adequately protect the interests of participants. 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 timely to re-examine the types of investment advice that should give rise to fiduciary duties under ERISA.

As the Department has pointed out, it's a thirty-five year old rule.

Thirty-five years ago, when this regulation was adopted, Financial Engines didn't exist. I was still in middle school. Our co-founder, Bill Sharpe, had not yet been awarded the Nobel Prize in Economics.

But today, Financial Engines is the nation's largest independent investment advisor. Financial Engines launched its first advice service in October 1998 as it set out to accomplish Bill Sharpe's vision: To provide high-quality independent investment advice to everyone. There are other significant changes in the financial services industry, and also in the role that 401(k) plans play in our society.

The Department recognizes the need to respond to these changes by taking another look at the regulation.

From our perspective, it is both important and feasible that participants and plans be represented by those willing to act as a fiduciary.

We work with 8 of the largest retirement plan providers serving the defined contribution market to make our services broadly available. We offer services to plan participants through leading employers, including 129 of the Fortune 500 – reaching over 7.3 million participants. To meet the needs of different investors, Financial Engines provides both discretionary investment management (managed accounts) and non-discretionary

investment advice (online advice). We act as a fiduciary to the plan participants, under both ERISA and the Investment Advisers Act. Our managed account service includes Income+, which provides steady monthly payouts from a 401(k) that can last for life.

Today I wanted to discuss several aspects of the proposed regulation.

The proposed regulation provides that investment education information and materials, as described in Interpretive Bulletin 96-1, will not constitute investment advice under ERISA. Investment education is a valuable way to offer help to participants. However, we know that investors are confused about the roles and responsibilities of different financial professionals.

Thus, we are concerned that an overly 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. 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.

The Department should specify that the exclusion for investment education will not apply where specific investment recommendations are provided. 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.

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The proposed regulation also 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 of a security or other product, 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 given with respect to securities and other products is not impartial.

We recommend that the Department modify the proposed limitation so that the exception does not apply where the recipient of advice pertaining to a security or other product 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.

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We also note the Department's request for comment on advice regarding plan distributions.

It is difficult to distinguish distribution advice from education and information, and several commenters have identified issues of fine-tuning that are worth examining. In other contexts, the Department has recognized that a buyer and seller cannot always stand in a fiduciary relationship. This appears to recognize a distinction for the activities that inform plans and participants what is available to them. It doesn't necessarily follow that one is "adverse" by offering a service. It should be permissible to offer additional services even if a pre-existing fiduciary relationship exists. But once there is an agreement to provide a service, whether that agreement is with the plan on behalf of the participants or directly with participants, and if the subject of that agreement is to provide investment advice as defined in the proposed regulation, the service provider should act as a fiduciary.

Finally, 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 investment advice in a fiduciary capacity to large numbers of plans and participants.

### **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 useful.