August 6, 2018

By Electronic Submission

Brent J. Fields
Secretary
Securities and Exchange Commission
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Re: Requests for Comment Regarding Proposed Regulation Best Interest (RIN 3235-AM35), Proposed Form CRS Relationship Summary (RIN 3235-AL27), and the Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers (RIN 3235-AM 36)

Dear Mr. Fields:

Financial Engines respectfully submits the following comments in response to the U.S. Securities and Exchange Commission's (the "Commission") proposed regulation entitled Regulation Best Interest (the "SEC Advice Rule"), proposed Form CRS Relationship Summary ("Form CRS"), and Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers ("Investment Adviser Interpretation"), each published in the May 9, 2018 Federal Register.[1] We applaud the Commission's decision to clarify the standards of care applicable to investment advisers and broker-dealers when providing services to retail customers,[2] and to require investment advisers and broker-dealers provide important disclosures regarding actual and potential conflicts of interests.

We thank the Commission for encouraging input on these important proposed Commission actions. We are respectfully submitting these comments to provide responses to several questions posed by the Commission, and to offer specific proposals to address some potential ambiguities and reduce the likelihood of negative unintended consequences.

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[1] Regulation Best Interest, 83 Fed. Reg. 21574 (May 9, 2018); Form CRS Relationship Summary: Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the Use of Certain Names or Titles, 83 Fed. Reg. 21416 (May 9, 2918); Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation, 83 Fed. Reg. 21214 (May 9, 2018). Throughout this letter the proposals with respect to the SEC Advice Rule, Form CRS and the Investment Adviser Interpretation are collectively referred to as the "Proposals."

[2] We note that proposed SEC Advice Rule uses the term "retail customer" while proposed Form CRS uses the term "retail investor." For purposes of consistency, we have used the term "retail customer" throughout this comment letter.

I. Financial Engines

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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 retirement investors in the workplace and through retail advisory centers. Financial Engines provides such services as, where applicable, a fiduciary under the Employee Retirement Income Security Act of 1974, as amended, and the parallel prohibited transaction restrictions of the U.S. Internal Revenue Code of 1986, as amended.

Financial Engines is the largest independent investment adviser in the United States, with over $177 billion in assets under management and serving over 1.1 million clients. 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. Notably, while Financial Engines is well known for providing discretionary investment management through our Professional Management service (managed accounts program) since September 2004, the company started out providing non-discretionary investment advice, and continues to do so today for more than a million individual investors. While we primarily provide access to our advisory services through DC plans in the workplace, in 2016, Financial Engines expanded our services to provide highly personalized, holistic financial planning and advisory services to individual clients who access our services directly through our Financial Engines Advisor Center locations. Today we serve more than 45,000 retail customers through over 140 advisor center locations around the country. The recent merger with Edelman Financial Services allows us to expand our financial planning capabilities as well as our nationwide footprint of advisors and advisor centers. For a further description of Financial Engines and its business please refer to Appendix A.

Financial Engines is encouraged by the recent invitation to engage with the Commission as you revisit the standards of conduct applicable to investment advisers and broker-dealers. As America's largest independent registered investment adviser[3] with over $177.1 billion in assets under management,[4] we certainly share the view Chairman Jay Clayton articulated in his statement that clarity and consistency are key elements to keep in mind as the Commission seeks to serve the interest of our country's retail customers.[5] We look forward to working with the Commission as it moves forward with rulemaking and, in furtherance of these efforts, have offered the below comments.

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[3] For independence of methodology and ranking, see InvestmentNews RIA Data Center, http://data.investmentnews.com/ria/.

[4] As of June 30, 2018.

[5] Jay Clayton, Chairman, SEC, *Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers* (June 1, 2017), https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31.

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II. Critical Need for a Strong Standard of Care

Since 1996, Financial Engines has provided high-quality, objective investment advice in a fiduciary capacity to millions of individual investors. Although the Department of Labor's (the "Department") regulation entitled *Definition of the Term "Fiduciary; Conflict of Interest Rule - Retirement Investment Advice,"* published in the April 20, 2015 Federal Register (the "DOL Fiduciary Rule"),[6] was vacated by United States Court of Appeals for the Fifth Circuit,[7] Financial Engines supported the Department's initiative from the beginning and continues to support the premise that investment advisers and broker-dealers must act in the best interests of their clients when providing investment advice. Financial Engines submitted multiple comments to the Department with respect to the DOL Fiduciary Rule encouraging the Department's continued efforts to maintain strong protections which provide a regulatory framework within which all investors have access to unconflicted investment advice. Financial Engines' experience over the last two decades demonstrates that it is possible to put the interests of investors first by providing personalized, unconflicted investment advice while still achieving solid business results.

Financial Engines agrees strongly with the Commission's decision to clarify the standard of care applicable to investment advisers and broker-dealers when providing advice to retail customers. The current regulatory landscape makes it too easy for unscrupulous, conflicted service providers to claim to be providing unbiased advice while pushing clients towards products that are more profitable for the service provider and may not be in the retail customer's best interests. It is Financial Engines' belief that application of a single, unified fiduciary standard to all investment recommendations, both in the workplace and retail markets, would establish a regulatory framework in which recommendations would always be required to be in the retail customer's best interest. ***However, while we strongly believe action is needed to address current regulatory gaps, we believe a weak "in name only" fiduciary standard would prove more detrimental to retail customers than the status quo, as it would provide additional marketing cover for conflicted service providers to act against the best interests of their clients.*** The determination of whether a broker-dealer has acted in the "best interest" of a retail customer should depend on a two-part analysis that considers (i) whether a measurable retail customer benefit was obtained through the recommendation, and (ii) the methods used by such broker-dealer to obtain such retail customer benefit. A broker-dealer should also be required to clearly explain the applicable standard of care to investors, and the broker-dealer's obligations under such standard.

[6] 80 Fed. Reg. 21928 (Apr. 20, 2015).
[7] *Chamber of Commerce of the U.S.A. v. Dep't of Labor*, No. 17-10238, slip op. 46 (5th Cir. Mar. 15, 2018) (vacating the DOL Fiduciary Rule).

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In that regard, Financial Engines supports the proposals and believes that they are a promising start to increasing retail customer protections and establishing a consistent level of unconflicted advice no matter what type of financial service provider is delivering the advice. However, our review of the proposals causes us to believe that certain modifications to key areas of the proposals are needed in order that the proposals address current regulatory gaps and establish a regulatory framework which requires both broker-dealers and investment advisers to consider the best interest of a retail customer when making recommendations.

Specifically, we suggest that the Commission consider the following enhancements:

- **While we support the adoption of the SEC Advice Rule, in our view the proposal would be stronger and would provide better protection to retail customers if certain key terms in the proposed rule were clearly defined. Specifically, we believe that without clearly defining the terms "best interest" and "recommendation" the rule will be inconsistently applied by broker-dealers and may present opportunities for abuse. Accordingly, we strongly urge the Commission to adopt definitions for both of these key terms in the final rule.**

- **Financial Engines believes that the decision to rollover retirement plan assets from an ERISA account to an individual retirement account may be the most important financial decision made by certain retail customers and may have significant long-term financial implications. Accordingly, we encourage the Commission to include rollover recommendations in any definition of "recommendation" adopted as part of the final rule, regardless of whether the recommendation includes a specific securities transaction or investment strategy recommendation.**

- **Financial Engines agrees with the Commission that both investment advisers and broker-dealers should be obligated to provide retail customers with clear and comprehensive disclosure regarding their relationships and conflicts of interests. However, it is our view that the standardized nature of Form CRS as proposed may result in a disclosure document insufficient to address the scope of information necessary to provide retail customers with such disclosure. Moreover, the standardized nature of Form CRS may result in broker-dealers and investment advisers delivering "canned" disclosure that does not provide retail customers with information necessary to differentiate among service providers. Financial Engines also believes delivering Form CRS to retail customers may make such retail customers less**

likely to read the more comprehensive disclosures included in Form ADV and Form BD. Accordingly, Financial Engines recommends that the Commission consider including a requirement that in the final Form CRS that a prominent statement informing retail customers that Form CRS is a summary only and directing readers to review Form ADV or Form BD, as applicable. Additionally, we would recommend that Commission consider establishing a requirement that broker-dealers deliver the Form BD to retail customers, similar to the current requirement for investment advisers to deliver Part 2 of Form ADV.

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- **Financial Engines supports prohibition on use of the terms "adviser" and "advisor" by broker-dealers to describe themselves when communicating with retail customers; however, Financial Engines believes that other terms, such as "manager" or "planner" are similarly problematic, and encourage the Commission to also prohibit use of such terms.**

- **Financial Engines believes that the SEC Advice Rule will not have the desired impact on broker-dealer activity unless it is accompanied by a strong enforcement mechanism giving the Commission the right to penalize broker-dealers for compliance failures. Accordingly, we encourage the Commission to consider including a robust enforcement mechanism in a final version of the SEC Advice Rule.**

Financial Engines looks forward to working with the Commission to guarantee all investors have access to high quality, unconflicted investment advice. We have set forth further explanation and analysis of our recommendations for your consideration below.

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III. The SEC Advice Rule

A. We agree with many of the SEC Advice Rule proposals, including the enhanced standard of care, disclosure, care, and conflict of interest obligations, and restrictions on the use of the terms "advisor" and "adviser"

i. Enhanced standard of care for broker-dealers

We agree with the Commission that a strong standard of care for broker-dealers is imperative to enhance the quality and transparency of broker-dealer relationships with investors. The current landscape for investment advice sees oversight from the Commission, the Department, and the Financial Industry Regulatory Authority, Inc. ("FINRA"), each of which imposes a different standard of care on investment recommendations subject to their jurisdiction. This has resulted in the application of inconsistent standards of care to investment advice depending on the source of such advice (*e.g.*, investment adviser versus broker-dealer).

As proposed, the SEC Advice Rule will require that each broker, dealer, or a natural person who is an associated person of a broker or dealer, when making a recommendation of any securities transaction or investment strategy involving securities to a retail customer, act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker, dealer, or natural person who is an associated person ahead of the interest of the retail customer. Under the proposed rule, a recommendation will be considered to be in the best interests of a retail customer if the following four elements are satisfied: (i) the customer receives disclosure of the scope and terms of the relationship and all material conflicts of interest associated with a recommendation; (2) the broker-dealer (or natural associated person) satisfies an obligation of care; and (3) a two-part conflicts of interest obligation is satisfied that requires written policies and procedures reasonably designed to (a) disclose or eliminate all conflicts of interest; and (b) identify, disclose and mitigate, or eliminate material conflicts of interest arising from financial incentives associated with a recommendation.[8]

Financial Engines generally supports the proposed rule and believes that the imposition of a clear "best interest" standard on broker-dealers similar to the standard currently imposed on investment advisers would be an important step forward in unifying the standards of care applicable to investment professionals across various regimes and in advancing the retail customer's interest in receiving high-quality, unconflicted advice. We have set forth our comments with respect to certain aspects of the proposed rule below.

[8] See Regulation Best Interest, 83 Fed. Reg. at 21682-83.

ii. Obligations with respect to disclosure, care, and conflicts of interest

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The imposition of express disclosure, care, and conflict of interest mitigation obligations on broker-dealers is consistent with existing common law interpretations of a fiduciary duty which typically require a duty of care, a duty of loyalty and requirement that conflicts of interests be disclosed. We believe that imposing these express obligations on broker-dealers when making recommendations to retail customers is long overdue. Existing broker-dealer obligations are insufficient to provide retail customers with the information necessary to make informed and reasoned decisions regarding the nature of investment recommendations. The proposed disclosure obligation will create transparency in the broker-dealer/retail customer relationship where there is currently none. Moreover, imposition of the care obligation will impose on the broker-dealer an obligation when making a recommendation to a retail customer to use reasonable diligence, care, skill, and prudence when considering a potential recommendation.[9] This obligation will require that broker-dealers determine a potential recommendation is appropriate given a retail customer's investment profile, and not just as a standalone recommendation.[10] Although the care obligation imposed by the SEC Advice Rule is not exactly equivalent to the duty of care imposed on investment advisers under existing interpretations of the fiduciary duty,[11] it is a significant step forward from FINRA's existing suitability standard[12] which is not sufficient to prevent broker-dealers from steering retail customers toward products that offer higher fees and commissions for the broker-dealer as opposed to those products that will provide potentially the best outcome for the retail customer. It is our collective experience that the vast majority of retail customers are entirely unaware that conflicts of interest may exist in their broker-dealer relationship, and, as such, often end up with investments that have lower returns, poorer performance, and higher fees. In this regard, the proposed conflict of interest obligation will require that each broker-dealer establish, maintain and enforce written policies and procedures reasonably designed to make retail customers aware of these conflicts, in particular those arising from financial incentives associated with such recommendations.[13]

We believe the Commission's proposed SEC Advice Rule is an important step towards requiring broker-dealers to act in the best interests of retail customers and may result in retail customers being more likely to receive quality, unconflicted advice. Moreover, the SEC Advice Rule may further accelerate the trend towards the availability of low-cost, technology-based financial services and products

[9] See Regulation Best Interest, 83 Fed. Reg. at 21682-83.
[10] See id.
[11] See *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963) ("SEC v. Capital Gains")
[12] FINRA Rule 2111, Suitability.
[13] See Regulation Best Interest, 83 Fed. Reg. at 21683.

through broker-dealers, which will, in turn, make the delivery of unconflicted advice increasingly more cost-effective for broker-dealers and accessible for retail customers. However, we are concerned that the prescriptive nature of the care, disclosure and conflict of interest obligations in the proposed rule may result in broker-dealers establishing "check-the-box" compliance programs to meet the requirements of the rule as opposed to engaging in a true effort to act in the best interests of their retail customers. As discussed in greater detail below, the addition to the proposed rule of a clearly defined best interest standard of conduct, supported by the express requirements in the proposed SEC Advice Rule, will offset this concern by clarifying to broker-dealers that meeting these three obligations are required as part of their efforts to meet the best interest standard, but do not by the mere act of meeting these obligations result in satisfaction of the standard.

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In addition, we believe that the Commission should strengthen the requirement that broker-dealers act to mitigate any potential conflicts of interest. Financial Engines agreed with the premise set forth by the Department in the DOL Fiduciary Rule that "[d]isclosure alone has proven ineffective to mitigate conflicts in advice."[14] As currently proposed, mitigation of conflict of interests is only required by the second prong of the conflict of interest obligation, and there is no explanation as to what a broker-dealer must do to mitigate material conflicts of interest. Financial Engines is concerned that if the final rule does not include specific mitigation techniques, broker-dealers may simply disclose conflicts and believe they have mitigated the conflict for purposes of satisfying the SEC Advice Rule. Accordingly, we urge the Commission to prescribe specific required mitigation steps in the final rule, such as obtaining consent of affected retail customers to engage in certain types of conflicted actions or waiving fees or compensation with respect to securities recommendations that involve affiliated broker-dealers or custodians.

iii. Restriction on broker-dealer use of "adviser" and "advisor"

We agree with the Commission's determination that the current use of "adviser" and "advisor" by broker-dealers and their associated persons in names and titles may confuse retail customers, who, as a result, may incorrectly believe a broker-dealer is acting as an investment adviser subject to a higher fiduciary duty. Accordingly, we support the proposed prohibition of the use of such terms by broker-dealers when communicating with retail customers. As stated in the Commission's Form CRS proposal, the regulatory regimes and business models under which investment advisers and broker-dealers provide investment advice to customers are distinct, and retail customers frequently do not perceive or understand these differences, including with respect to the standards of conduct.

[14] See DOL Fiduciary Rule, 80 Fed. Reg. at 20981.

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Imposing this prohibition on broker-dealers will reduce the likelihood of broker-dealer names confusing retail customers and will clarify the distinction between the services provided by, and the standards of care imposed upon, broker-dealers as compared to investment advisers. Although we support this prohibition as proposed, we note that there are other terms which, although used less frequently by broker-dealers and their associated persons, may similarly confuse retail customers regarding the source of investment advice. Examples of such terms include, but are not limited to, "manager," "wealth manager," "financial managers," "investment managers," and "planner." Consequently, we encourage the Commission to consider including such terms in in the proposed rule.

B. While we agree that broker-dealers should be subject to a best interest standard, the Commission's failure to define either "best interest" or "recommendation" results in a vague and problematic standard of care.

i. Lack of a clear "best interest" definition

In the proposing release with respect to the SEC Advice Rule, the Commission states that it is not proposing to define the term "best interest" because it believes that whether a broker-dealer or investment adviser has acted in the "best interest" of the retail customer will depend on the facts and circumstances surrounding each recommendation.[15] While we appreciate the fact-specific nature of determining whether a broker-dealer or investment adviser has acted in the "best interest" of a retail customer, we believe that the lack of a clear "best interest" definition may result in a vague and confusing standard that will cause broker-dealers to craft procedures necessary to check off compliance with each of the four components of the SEC Advice Rule rather than truly endeavoring to provide recommendations in the "best interest" of the retail customer. As a result, broker-dealers may point to technical compliance with procedures designed to satisfy the disclosure, care and conflict of interest obligations of the SEC Advice Rule as evidence of providing recommendations in the "best interest" of the retail customer and believe that they have achieved a "safe harbor" from any consequences of recommendations that are not in fact in the "best interest" of the retail customer.

Moreover, even technical satisfaction of these obligations does not preclude a broker-dealer from considering its own financial interests in connection with making a recommendation to a retail customer to the detriment of a retail customer. This risk is exacerbated when there are explicit and/or implicit incentives for the broker-dealer to make specific product recommendations, such as in recommending proprietary product(s) or products for which the broker-dealer or their representatives may receive significant revenue sharing from the product sponsor. The focus of the conflict of interest obligation in the SEC Advice Rule is

[15] See Regulation Best Interest, 83 Fed. Reg. at 21587.

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to require that the broker-dealer establish, maintain and enforce written policies and procedures to identify, disclose, and mitigate or eliminate material conflicts of interest associated with a recommendation, particularly conflicts involving financial incentives.[16] However, it is possible that, even with such reasonably designed written policies and procedures, a broker-dealer may still act in its own self-interest by steering its retail customers to certain revenue-generating investments over others.

Based on the above, Financial Engines is of the strong view that the SEC Advice Rule would better protect the interests of retail customers if the Commission were to include a definition of what constitutes the "best interest" of the retail customer in the final rule. This definition should make clear that, while the Commission expects broker-dealers to meet the obligations of disclosure, care, and conflicts of interests in seeking to meet the best interest standard, satisfaction of these obligations does not alone fulfill a broker-dealer's obligation to make recommendations that are in the best interest of a retail customer. Financial Engines believes that a "best interest" definition focused on obtaining retail customer benefits will close many of the current gaps in protection. The existence of retail customer benefit resulting from a particular recommendation can be confirmed by considering (i) if the retail customer has received stronger investment results on a risk-adjusted basis due to the recommendation, and/ or (ii) if the results achieved align with the goals and objectives of the retail customer, regardless of the revenues of the broker-dealer. Thus, we propose the following as the definition of "best interest":

> A broker-dealer has achieved the "best interest" of a retail customer if the broker dealer has acted in a manner consistent with achieving the highest retail customer benefit available, as determined by the existence of stronger investment results on a risk-adjusted basis due to the recommendation, and/or if the results achieved align with the goals and objectives of the retail customer, regardless of the revenues of the broker-dealer.

Defining "best interest" in a manner consistent with these measurements of retail customer benefit will give broker-dealers parameters to consider as they seek to meet the obligation of care imposed in the proposed rule. Broker-dealers can use these parameters to determine if a potential recommendation properly fits within a retail customer's investment profile given the likelihood of obtaining retail customer benefit from making such recommendation. Moreover, it is our belief that, after applying this proposed "best interest" definition to confirm the proposed obligation of care is satisfied, application of the disclosure and conflict of interest mitigation requirements currently included in the as proposed version of the SEC Advice Rule will permit each retail customer to be fully informed of all conflicts inherent in any recommendation, regardless of the measure of retail customer

[16] See Regulation Best Interest, 83 Fed. Reg. at 21603.

benefit. We believe the application of this proposed "best interest" definition supported by the disclosure, care and conflict of interest obligations of the as proposed version of the SEC Advice Rule will make it more likely that broker-dealers act in a retail customer's best interest.

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ii. Lack of a clear "recommendation" definition

In the SEC Advice Rule, the Commission does not propose a definition for the term "recommendation"; rather, the Commission states that the term should be interpreted consistent with existing broker-dealer regulation under the federal securities laws and self-regulatory organization ("SRO") rules.[17] The Commission also states that whether a recommendation has been made should be based on an analysis of the facts and circumstances of the situation in accordance with existing broker-dealer regulation. Moreover, the Commission points to FINRA's existing guidance with respect to what constitutes a recommendation under FINRA's Suitability Rule.[18]

Financial Engines strongly believes that unless a clearly articulated definition of what constitutes a recommendation is included in the SEC Advice Rule, the rule will be ripe for abuse, with broker-dealers able to develop their own interpretations of certain activities such that they may be treated as educational material or other non-recommendation activities when in reality they are product suggestions that should be subject to the rule.

Accordingly, we propose that the Commission develop a definition of the term "recommendation" that is consistent with FINRA's longstanding interpretation of the term under the current Suitability Rule[19] and its predecessor rule. We recognize that FINRA rules do not explicitly define "recommendation"; however, we note that FINRA has published several regulatory notices that offer guiding principles for broker-dealers to consider when determining whether a particular communication could be considered a recommendation. Under these principals, the applicable question is whether, given the content, context, and manner of presentation, a particular communication from a broker-dealer to a customer would reasonably be viewed as a suggestion that the customer take action or refrain from taking action regarding a security or investment strategy.[20] In addition, the more individually tailored the communication is to a particular customer or customers about a specific security or investment strategy, the more likely the communication constitutes a recommendation.[21] Under FINRA

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[17] See Regulation Best Interest, 83 Fed. Reg. at 21593.
[18] FINRA Rule 2111, Suitability.
[19] FINRA Rule 2111, Suitability.
[20] FINRA Regulatory Notice 11-02, Know Your Customer and Suitability, January 2011. http://www.finra.org/industry/notices/11-02; NASD Notice to Members 01-23, Online Suitability, April 2001. http://www.finra.org/industry/notices/01-23.
[21] FINRA Regulatory Notice 11-02.

guidance, a series of actions that may not constitute recommendations when viewed individually may amount to a recommendation when considered in the aggregate.[22]

While these principles have worked well under FINRA's rules in the context of an SRO, we believe that the Commission should take a more direct approach in establishing a standard of care for the broker-dealer community and clearly define what constitutes a recommendation for purposes of the SEC Advice Rule. In this regard, we suggest that Commission consider following a similar approach as was used by the Department in connection with the DOL Fiduciary Rule, which defined a recommendation as:

> "A communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the [retail customer] engage in or refrain from taking a particular course of action."

Financial Engines believes defining the term "recommendation" in a manner consistent with FINRA principles and the definition that was used by the Department in connection with the DOL Fiduciary Rule would establish a more consistent application of the SEC Advice Rule and avoid the risk that broker-dealers would take advantage of an ambiguous term to avoid "recommending" any security or strategy to a retail consumer. If the "best interest" definition proposed herein is incorporated into the final rule, also including a definition of "recommendation" will give broker-dealers a clear indicator of when they must consider the two measures of retail customer benefit per the "best interest" definition, and when the proposed rule's disclosure, care, and conflict of interest mitigation requirements are triggered. Thus, clearly defining the term "recommendation" will support achievement of the goal that all recommendations provided by broker-dealers be in the best interests of the retail customers.

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[22] Id.

iii. Incomplete inclusion of rollover standards

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As proposed, the SEC Advice Rule will apply when a broker-dealer (or associated person) is making a recommendation of any securities transaction or investment strategy involving securities to a retail customer. The proposed rule does not expressly apply to discussions broker-dealers have with retail customers regarding retirement plan rollover transactions unless those discussions involve recommendations of a specific securities transaction or investment strategy. In our view, the decision whether to rollover retirement plan assets from a 401(k) or other retirement plan to an Individualized Retirement Account ("IRA") can be an important financial decision for many investors with significant implications for their long-term financial security. As emphasized by the Department and other regulatory authorities,[23] a retirement investor's decision to rollover their assets into an IRA can be complex and should be done only after careful consideration of several factors, each given its appropriate weighting based on the investor's facts and circumstances.

We recognize that the Commission may consider the regulation of rollover recommendations that do not include the recommendation of a specific securities transaction or investment strategy to fall outside the Commission's regulatory authority as established by the Securities Exchange Act of 1934, as amended (the "Exchange Act"). The Exchange Act was adopted by Congress in 1934 to provide for regulation of "transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets."[24] The Exchange Act granted the Commission broad authority over the securities industry, including the ability to require the registration of broker-dealers, and to regulate and oversee broker-dealers. Given the mandate provided by the Exchange Act, we understand that the Commission may consider the scope of their authority to be limited to transactions involving securities or investment strategy recommendations and does not extend to recommendations of account type only. It is Financial Engine's belief that any recommendation to transfer account types inherently involves a securities transaction, the investments held in the 401(k) or similar retirement plan must be redeemed prior to the assets being deposited in a new IRA. Accordingly, any rollover transaction necessitates redemption of securities. It is Financial Engine's belief that the redemptions of securities inherent in rollover transactions constitute securities transaction. As such, each rollover recommendation made by a broker-dealer implicates a securities transaction. Moreover, the inherent implication in any rollover recommendation is that the retail customer will achieve better performance in the new account and, as such, should be subject to an appropriate

[23] See FINRA Regulatory Notice 13-45, Rollovers to Individual Retirement Accounts, December 2013. http://www.finra.org/industry/notices/13-45; see also, 401(K) Plans, Labor and IRS Could Improve the Rollover Process for Participants, GAO March 2013. https://www.gao.gov/assets/660/652881.pdf.

[24] Securities and Exchange Act of 1934, 15 U.S.C. 78a.

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standard of care. In addition, the staff of the Commission (the "Staff") has previously shown that it considers the regulation and oversight of rollovers to be within the purview of its authority, including retirement vehicles and rollovers as a priority in the 2014 National Examination Program's Examination Priorities.[25] The release further stated that the Commission's concerns regarding the incentives faced by investment advisers and broker-dealers to recommend that assets be placed with an IRA or other alternative offered by a financial services firm warranted review by the Staff.

Accordingly, we believe that the standard of care adopted for broker-dealers should apply to all recommendations of rollover transactions. Failure to do so would leave a significant gap in protection when a retirement investor is recommended to rollover or transfer assets in an employer-sponsored retirement plan to an IRA. This issue is made particularly important given the likelihood that retirement investors may not be aware of some of the more nuanced − but relevant − factors that may influence their decision if adequately disclosed.[26] Accordingly, we urge the Commission to consider the importance of asset rollovers and amend the SEC Advice Rule in a manner that applies the "best interest" requirement to recommendations of account types regardless of whether a specific securities transaction or investment strategy is a part of the recommendation.

IV. Form CRS and Disclosure Requirements

a. We support the creation of obligations for material disclosures to retail customers

Advice given to retail customers by investment advisers and broker-dealers frequently differs in legal and conduct standards, as well as compensation structure. Retail customers, particularly those that are unsophisticated, may not fully appreciate the complexity of the different relationship between an investment adviser and its retail customers as opposed to the relationship between a broker-dealer and a retail customer without clear and concise disclosure. The Commission has proposed the adoption of Form CRS to help fill this information void and to assist in the satisfaction of the disclosure requirements of the SEC Advice Rule.

Form CRS as proposed by the Commission is designed to help investors understand the type of investment professional they are working with and the fees, conflicts, and other material factors that might affect that relationship. If adopted

[25] Office of Compliance Inspections and Examinations, *Examination Priorities for 2014*, (January 9, 2014), https://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2014.pdf.

[26] For example, loans are permissible in a 401(k) but not in an IRA. Additionally, there could be negative tax consequences of rolling employer stock into an IRA, and there are differences in the protection from creditors and legal judgments.

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as proposed, Form CRS will require investment advisers and broker-dealers to provide every retail customer with a brief (no more than four-page) relationship summary which will (1) inform them about the relationships and services the firm offers, (2) outline the standard of conduct and the fees and costs associated with those services, (3) identify specified conflicts of interest, and (4) disclose whether the firm and its financial professionals currently have any reportable legal or disciplinary events.[27] Form CRS (which is standardized) must be delivered to each retail customer at the start of the professional relationship with a financial firm and must be updated following any material change.

We agree with the Commission that both broker-dealers and investment advisers should have an obligation to make material disclosures in connection with their relationships with retail customers, and believe that such disclosures are necessary for retail customers to understand and properly assess the relationship. Such disclosure is even more important where disclosure is necessary to permit the retail customer to understand and analyze a conflict of interest, and to determine whether to grant informed consent to the conflict or to seek another service provider.

b. While we appreciate the Commission's commitment to requiring that retail customers receive material disclosures regarding conflict of interests, we have concerns regarding the effectiveness of Form CRS and the resulting effect on investor reliance on Form ADV and Form BD

i. Use of Form CRS may cause retail customers to neglect reviewing the more comprehensive disclosures in Form ADV and Form BD

While the delivery of a short-form disclosure statement that provides retail customers with important disclosures is not new to the Commission,[28] it is our view that the creation and delivery of Form CRS may have the unintended consequence of reducing the number of retail customers who receive or read Form ADV and Form BD.[29] The Form CRS disclosures are duplicative of those already present in Form ADV and Form BD, and retail customers may not appreciate the extent to which Form ADV and Form BD include more comprehensive disclosures. Moreover, while Form CRS will be designed to provide retail

[27] Form CRS Relationship Summary, 83 Fed. Reg. at 21419.
[28] See 17 C.F.R. 230.431 (https://www.sec.gov/rules/final/2009/33-8998.pdf). Since 2009, the Commission has permitted investment companies registered under the Investment Company Act of 1940, as amended, to meet their prospectus delivery requirements by making use of a summary prospectus which provides certain basic information related to the fund.
[29] The use of the summary prospectus with respect to registered investment companies has been widely accepted; however, an unintended consequence of the creation of the summary prospectus is the fact that very few retail customers receive or read the full statutory prospectus.

customers with important information related to the relationship, the scope of information currently covered in Form ADV and Form BD cannot be conveyed within the limited page number and prescribed categories of Form CRS. The standardized and regimented format of the proposed Form CRS may not provide investment advisers and broker-dealers with the flexibility to accurately describe any relationships, fees, or services that do not fit into the format proscribed by Form CRS. Moreover, while reading the investment adviser's Form ADV or the broker-dealer's Form BD would provide retail customers with fulsome conflict of interest disclosures, Financial Engines believes it likely that retail customers receiving Form CRS will assume that the summary information and disclosures therein are complete, and, as a result, will not read the more comprehensive information disclosures included in Form ADV and Form BD. This is particularly problematic given the page number limit imposed by the proposed Form CRS. Financial Engines notes that many investment advisers and broker-dealers have multiple relationships with retail customers and otherwise which may require disclosure. Consequently, disclosures on Form CRS may be incomplete and potentially misleading due to the lack of space to properly disclose each relationship.

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Accordingly, to avoid this result, we recommend that the Commission require that Form CRS include a prominent statement that Form CRS is a summary only, does not replace Form ADV or Form BD with respect to disclosure requirements, and should be read in conjunction with Form ADV and Form BD. Moreover, the Commission should consider requiring that broker-dealers deliver Form BD to retail customers in the same manner that investment advisers deliver Part 2 of Form ADV. We also recommend that to the extent Form CRS is provided online or in another electronic capacity that it be required to include a hyperlink to the appropriate Form ADV or Form BD, as applicable.

V. Strong Enforcement Mechanisms

a. An enforcement mechanism must be added to the SEC Advice Rule.

As currently proposed, the SEC Advice Rule does not include an express enforcement mechanism. Rather, it establishes a standard of conduct and a minimum level of activity necessary to be considered to have met that standard. Financial Engines believes that the SEC Advice Rule should incorporate an express mechanism for enforcement by the Commission in order to provide retail customers with the desired protections. In our view, establishment of a robust enforcement mechanism is critical to the success of the rule and the protection of the interests of retail customers. As drafted, the SEC Advice Rule, although not expressly stated as such, provides a safe harbor for broker-dealers with respect to the standard of care if they can demonstrate adherence to the four required components of the SEC Advice Rule. Moreover, the regulation does not include

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an express provision permitting enforcement of the rule by the staff of the Commission. Thus, the rule as proposed not only appears to establish a safe harbor if certain minimum standards are met, but also does not include an express enforcement mechanism for failure to adhere to such conditions. We also are of the view that it should be the Commission, and not the SROs, that enforce the SEC Advice Rule. As stated by former Commissioner Luis A. Aguilar, there are inherent conflicts of interests between the SROs' regulatory functions and its members, market operations, issuers, and shareholders.[30] It would not be effective to rely on inherently conflicted SROs to enforce the SEC Advice Rule when one of the main purposes of the rule is to reduce the effect of conflicts of interest on the advice provided to retail customers. Consequently, Financial Engines firmly believes that the final SEC Advice Rule should authorize the Commission to utilize an express enforcement mechanism designed to encourage compliance with the rule in a manner that strikes an appropriate balance between administrative feasibility and strong, durable investor protections.

VI. Investment Adviser Interpretation

Over the last two decades, Financial Engines has strived to always act in the best interests of its customers and remains dedicated to meeting the fiduciary duty investment advisers owe to all clients, including retail customers. Financial Engines commends the Commission's decision to use this opportunity to reaffirm and/or clarify certain aspects of the fiduciary duty that investment advisers owe to their customers under the Investment Advisers Act of 1940, as amended, (the "Advisers Act"). We agree with the Commission that an investment adviser's fiduciary duty is imposed under the Advisers Act in recognition of the nature of the relationship between an investment adviser and a retail customer, and appreciate this opportunity to provide comment on this attempt by the Commission to further "eliminate the abuses" that led to the enactment of the Advisers Act.[31] We believe that the Commission's efforts to clarify and reaffirm its views are of particular importance given that the current interpretations of the investment adviser standard of conduct have evolved through judicial interpretations applying equitable common law principles over the 78 years since the adoption of the Advisers Act, as well as, through Commission actions and is not codified in any one source.[32] Financial Engines believes that the Interpretation, once adopted, will provide investment advisers with a single source of reference articulating the boundaries of the fiduciary duty, providing guideposts for investment advisers in the conduct of their business. Moreover, codifying the Interpretation as a Commission action will give the Interpretation the force of regulation and, as such, make enforcement of standard of conduct simpler by the

[30] Luis A. Aguilar, Commissioner, SEC, *The Need for Robust SEC Oversight of SROs* (May 8, 2013), https://www.sec.gov/news/public-statement/2013-spch050813laahtm.
[31] See 83 Fed. Reg. at 21205.
[32] *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963) ("SEC v. Capital Gains").

Commission and its staff. Notwithstanding the fact that Financial Engines agrees that it is appropriate and timely for the Commission to codify the Interpretation, our review of the Interpretation has identified certain areas that may require further clarification, and other areas in which we believe that the Commission may have misstated the investment adviser standard of conduct or has missed important aspects of the standard of conduct in an effort to summarize what has evolved to be a complex legal standard.

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a. Reliance on secondary sources.

As noted above, there is a well-established body of historical precedent establishing the boundaries of an investment adviser's fiduciary duty under the Adviser Act.[33] It is the view of Financial Engines that the Interpretation should serve only to clarify and reaffirm such historical precedent in single codified document that has the force of a regulation adopted by the Commission. Accordingly, each premise stated in the Interpretation should be firmly based in such historical precedent and not seek to establish new requirements or expand existing requirements. However, in explaining its views throughout the Interpretation the Commission has incorporated positions taken in numerous secondary sources, including industry comment letters, law review articles and abandoned rule proposals as a basis for its views on the requirements of the standard of conduct. Financial Engines does not believe that reliance on such secondary sources is appropriate in an Interpretation that will have the force of regulation. We understand that these secondary sources support the Commission's views and that the Commission frequently incorporates such sources into proposing and adopting releases for regulation; however, in the case of the Interpretation such sources are incorporated into the Interpretation and not as support for a regulation that can stand on its own. Similarly, in certain places throughout the Interpretation, the Commission has incorporated its views with respect to certain requirements that may expand the existing requirements that investment advisers must adhere to in order to satisfy their fiduciary duty to clients. Accordingly, Financial Engines requests that any final version of the Interpretation be amended to remove discussion of any express requirements that are not consistent with existing historical precedent, and remove references to secondary source material as a basis for such requirements.

b. Structure of the Fiduciary Duty.

In the Interpretation the Commission acknowledges that the investment adviser's fiduciary standard of conduct is based on judicial interpretation of the Advisers Act consistent with equitable common law principles of a fiduciary duty, acknowledges that an investment adviser's fiduciary standard of conduct is grounded in equitable common law principles of fiduciary duty, and as a result,

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[33] *See supra* note 5.

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imposes on investment advisers both a duty of care and a duty of loyalty to the client. Financial Engines agrees that both such duties are inherent in the investment adviser's fiduciary duty, however, Financial Engines believes that, in describing such duties, the Commission may have misstated the duty of care. Specifically, the Commission states in the Interpretation that the duty of care requires investment advisers to, among other things, "act and to provide advice that is in the best interest of the client."[34] In contrast, common law fiduciary principles which derived from historical trust law, typically define the duty of care (or prudence) as a duty to act as a prudent person would in light of the circumstances of the engagement and with the exercise of reasonable care, skill and caution.[35] Accordingly, Financial Engines believes that the Commission has incorporated a "best interest" requirement into the duty of care when under the common law there is not on. Rather, an investment adviser's duty to act in the "best interest" of the client arises from the duty of loyalty, which as described in the Interpretation, requires that the investment adviser (1) put the client's interest first, (2) not favor its own interests over those of a client or unfairly favor one client over another, (3) make full and fair disclosure to its clients of all material facts relating to the advisory relationship, and (4) avoid conflicts of interest with its clients, and, at a minimum, make full and fair disclosure of all material conflicts of interest that could affect the advisory relationship.[36] Financial Engines believes that this fundamental disconnect in the way that the Commission describes the two duties may give rise to confusion, and could result in the standard being ripe for challenge in the courts.

c. The Advisory Relationship.

Under existing industry practices, one of the fundamental premises is that the investment advisory relationship between investment advisers and their clients is that each client will enter into an investment advisory agreement with the investment adviser that establishes the parameters of the relationship and with full knowledge of the facts and circumstances of the relationship being established, including the services to be provided and any conflicts of interest that may exist in the relationship. The Commission acknowledges this premise in the Interpretation by stating at the outset that "the duty follows the contours of the relationship between the adviser and its client, and the adviser and its client may shape that relationship through contract when the client receives full and fair disclosure and

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[34] Interpretation, at 21206.

[35] *See e.g.* Restatement (Third) of Trusts, §77 Duty of Prudence (2003) (defining the Duty of Prudence as follows: "(1) The trustee has a duty to administer the trust as a prudent person would, in light of the purposes, terms, and other circumstances of the trust; (2) The duty of prudence requires the exercise of reasonable care, skill, and caution; and (3) If the trustee possesses, or procured appointment by purporting to possess, special facilities or greater skill than that of a person of ordinary prudence, the trustee has a duty to use such facilities or skill").

[36] Interpretation, at 21208.

provides informed consent."[37] However, the Commission appears to be attempting to establish limits on this premise by also stating that "although the ability to tailor the terms means that the application of the fiduciary duty will vary with the terms of the relationship, the relationship in all cases remains that of a fiduciary to a client" and that "the investment adviser cannot disclose or negotiate away, and the investor cannot waive, the federal fiduciary duty."[38] We note that in support of these views the Commission offers a series of secondary sources in Footnote 21 of the Interpretation, including quotations from comment letters received by the Commission from industry trade groups, a popular legal treatise and § 8.06 (Principal's Consent) of the Restatement (Third) of Agency.[39]

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Although we agree that the relationship at all times remains that of a fiduciary to a client, we also believe that, consistent with the discussion of the duty of care above, the Interpretation should more clearly acknowledge that the fiduciary duty of the investment adviser is one that is established by contract and that the contract establishes the facts and circumstances upon which the fiduciary duty is to be exercised. Clients and investment advisers must be free to negotiate for specified services in exchange for specific fees; and, therefore, under existing constructs of the fiduciary duty the investment adviser's obligation is to perform the agreed upon services in a manner that is consistent with the investment adviser's fiduciary duty in that context. Accordingly, the Interpretation should more clearly state that the fiduciary duty owed by the investment adviser is always construed in relation to the services contracted for and subject to the terms of the contract. In this regard, we also believe that the Interpretation should be modified to clarify that informed consent by the client to conflicts of interest (even material conflicts of interest) that have been fully and fairly disclosed is appropriate, and that such consented to conflicts will not be deemed to be the basis for a breach of a fiduciary duty by the investment absent other conduct in violation of the duty. Moreover, the Interpretation should clarify that the investment adviser and the client may establish in the investment advisory agreement the manner in which full and fair disclosure will be made, and how informed consent to future conflicts that will invariably arise during the course of the relationship may be disclosed and consent granted.

d. Request for Comment on Regarding Areas of Enhanced Investment Adviser Regulation

As part of the Interpretation, the Commission also requested comment regarding whether it would be appropriate for the Commission to impose on investment advisers certain investor protection requirements that are currently part of the broker-dealer regulatory framework through additional rulemakings. These

[37] *Id.* at 21205.
[38] *Id. at 21205.*
[39] Interpretation, at 21205 (see Footnote 21 and related text).

additional rulemakings would potentially include implementing: (i) federal licensing and continuing education requirements for investment adviser representatives; (ii) an express requirement for investment advisers to deliver periodic account statements, including specific fee and expense information to clients; and (iii) a comprehensive financial responsibility program, including net capital and fidelity bonding requirements.

Financial Engines does not believe that there are any compelling investor protection interests to implement such additional rulemakings at this time.

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VII. Conclusion

Financial Engines desires that all investors have access to unconflicted, personalized investment advice that promotes their best interests and helps them to accomplish their financial objectives. The current lack of a uniform standard of care across all sources of investment advice opens the door for the potential conflicts of interest present in investment recommendations that may harm retail customers. As such, we support the proposed application of a "best interest" standard of care to broker-dealers and investment advisers and the requirement to deliver Form CRS. However, we believe that certain areas of the proposed regulation, as well as the proposed Form CRS and the Investment Adviser Interpretation, should be adjusted so that the true purpose of the proposals, enhancing the quality and transparency of investors' relationships with investment advisers and broker-dealers while preserving access to a variety of types of advice relationships and investment products, is achieved. We believe that our above recommendations will further this objective, and appreciate the opportunity to furnish our views.

We welcome the opportunity to work with the Commission and provide any additional information that may be required. Please do not hesitate to contact us should you have any questions. For over 20 years, we have helped Americans with modest savings achieve greater financial security and would be happy to share our experience with you as you seek to shape the investment adviser and broker-dealer relationships of the future.

Respectfully,

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

[Enclosures]

Appendix A

About Financial Engines

Financial Engines

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

Financial Engines is the largest independent investment adviser in the United States, with over $177 billion in assets under management. 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.

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 and financial planning 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 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 37,000 securities 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 Financial Engines Advisor Centers located throughout the country. We have demonstrated that combining advice technology with human-based advisers can profitably serve investors, even those with modest account balances. The median account balance for our clients is approximately $69,000.[40] We have Financial Engines Advisor Centers located in about 140 locations around the country where clients can meet with dedicated advisers face-to-face.

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 advisers. In addition, we also provide 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. Annually, Financial Engines provides a retirement readiness assessment, including

[40] As of June 30, 2018.

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 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.

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. Financial Engines works with more than 760 employers, including 148 of the FORTUNE 500 companies, and eleven of the largest retirement plan providers serving the defined contribution market.[41] For all our advisory services, both for ERISA assets and for our retail business, Financial Engines acts as a fiduciary to our clients. As a result, over three million people have used Financial Engines Online Advice, and over one million have their assets professionally managed by the company.[42]

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[41] As of June 30, 2018.
[42] As of June 30, 2018.