November 3, 2010

**MSP STATUS WOULD HARM PLANS
AND PLAN PARTICIPANTS**

The American Benefits Council ("The Council") and the Committee on Investment of Employee Benefit Assets ("CIEBA") represent directly or indirectly most of the private retirement community in this country. In that capacity, we urge you to follow Congress' clear intent with respect to the application of the major swap participant ("MSP") rules to ERISA plans.

During the consideration of the Dodd-Frank Act, countless individuals within Congress and the Administration told us that they never intended ERISA plans to be MSPs. This intent was then reflected in the only MSP exemption added after House consideration — an exemption for plan positions maintained to hedge or mitigate risk.

It is critical that the CFTC and the SEC implement Congressional intent with respect to the application of the MSP rules to ERISA plans. A full discussion of this issue is set forth in our September 20 comment letter, which is attached. Set forth below is a brief summary of certain key points.

Prong One of the MSP definition (Substantial Position Test). Under this test, by statute, positions maintained by ERISA plans to hedge or mitigate risk are excluded. This exclusion covers positions maintained to:

- Hedge interest rate, currency, equity, and other risks;
- Avoid volatility in funding obligations;
- Match cash flow with expected payments; or
- Mitigate portfolio risks by rebalancing or gaining exposure to additional asset classes.

The reason plans are mentioned only in Prong One is that Congress understood that plans could conceivably only meet Prong One, especially when plan swaps lead to no counterparty credit risk because they will likely be either cleared or fully collateralized. As a result, it would be consistent with Congressional intent for the Commissions to confirm that swaps that are either cleared or fully collateralized entered into by plans can not trigger MSP status under either Prongs Two or Three. Nevertheless, we make the following additional observations below.

Prong Two (Financial Stability of the United States Banking System or Financial Markets). ERISA plans are unleveraged (as discussed below), highly regulated, subject to the highest fiduciary standard in U.S. law, and are not operating entities subject to business-line risks and competitive challenges. These factors by themselves are sufficient for regulators to determine that ERISA plans would not have a level of uncollateralized swap risk that could threaten the financial stability of the United States banking system or financial markets and the history of ERISA plans in the swap markets would also serve to support such a conclusion. We are not aware (after consultation by members with many swap dealers) of a single instance since ERISA plans were created in 1974 in which an ERISA plan has ever failed to pay a counterparty on a swap, even when an ERISA plan sponsor went into bankruptcy. Rather, the existence of pension plans in the swap markets has served to enhance the stability of banks and the financial markets because pension plans (i) are reliable, creditworthy counterparties which provide consistent profits to banks, (ii) provide non-volatile liquidity to the markets and (iii) because of ERISA, utilize swaps only for prudent reasons. If pension plans are deemed to be MSPs, we are confident that many pension plans will exit, or limit their activities in, the swap markets due to the burdensome nature of being an MSP and the related costs. This could have the unintended, but real, consequence of creating more systemic risk to the United States banking system and the financial markets. Thus, there is no reason to subject plans to Prong Two's potentially vague standard which is of uncertain application. Plans should be deemed not to be MSPs under Prong Two.

Prong Three (Highly Leveraged). Aside from a specialized type of plan called an ESOP (a defined contribution plan that is specifically permitted to use borrowed funds to buy employer stock), plans generally do not borrow funds in excess of available liquid assets. In such instances, Plans should be deemed not to be MSPs under Prong Three.

MSP Tests Designed for Companies Should Not Apply to Plans. We know you have received recommendations regarding specific MSP criteria from others outside the plan world. We are expressing no view regarding the advisability of these criteria outside the context of ERISA plans, but many possible criteria are simply unworkable for plans. For example, Basel 1 risk capital, capital generally, and shareholders equity, among others, are not terms that would apply to ERISA plans. Congress recognized the unique nature of pension plans and treated plans separately; the regulations should follow Congress' lead.

Example of How MSP Status would Harm Plans and Plan Participants. The application of MSP capital requirements to plans would harm plans by requiring plan assets to be underinvested or uninvested. This could have one of two effects. First, if a plan is an MSP, the plan may bear the cost of lower earnings. It is clear, however, that plan costs are eventually passed on to participants in the form of smaller benefits or other compensation. Thus, it is plan participants who will suffer. Alternatively, if a plan stops using swaps to avoid becoming an MSP, the plan will become exposed to greater funding volatility. Funding volatility has been for many years the primary cause of employers ceasing to provide pension benefits. And in our current economic climate, greater funding volatility can require companies to set aside far greater cash reserves — reserves that could be better used to retain or create jobs.

The example below illustrates the harm to plans.

Pension Plan Asset & Liabilities (assume 100% funded)	$ 5,000,000,000
Plan wishes to hedge 50% of the interest risk of its liabilities (using physical bonds and swaps)	$ 2,500,000,000
Physical bonds hedge 20% of liabilities	$ 1,000,000,000
Therefore swap hedge must hedge other 30% of liabilities to reach target of 50%	$ 1,500,000,000
Assuming an 8% capital charge (of notional value of swaps) for MSPs, a Plan that is an MSP must set aside Plan Assets otherwise used to generate returns	$ 120,000,000
Plan Assets assumed to return 7.5% annually, so Plan Assets forego following $ return	$ 9,000,000
Sponsor must therefore add $9,000,000 ***ANNUALLY*** to compensate for lost return due to capital charge	
Total Plan Asset return is now diminished by 18bps ***ANNUALLY***, thus reducing the expected return on Plan Assets from 7.50% to 7.32%	**18 loss**