April 20, 2010

The Honorable Robert P. Casey
United States Senator
393 Russell Senate Office Building
Washington, DC 20510

Dear Senator Casey,

The American Benefits Council is a trade association representing sponsors and administrators of employee benefit plans covering more than 100 million Americans. We are writing to you regarding the regulation of swaps and, in particular, the inadvertent adverse effects that financial reform legislation could have on pension, retirement, and health plans that use swaps. Our more than 300 member companies are keenly interested in protecting and supporting the private sector plans that provide benefits to millions of Americans.

Under the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code, private sector plans are very heavily regulated. Plan fiduciaries that invest plan assets are subject to strict standards that require them to act "solely in the interest of [plan] participants and beneficiaries" and to act with the necessary level of "care, skill, prudence, and diligence". Moreover, the plans are overseen by the U.S. Department of Labor, the Internal Revenue Service, and, in some cases, the Pension Benefit Guaranty Corporation.

In accordance with the very strict fiduciary duties imposed by ERISA, private sector retirement plans use swaps to mitigate and manage risk, not to speculate and create risk. The bill pending before the Senate Committee on Agriculture, Nutrition & Forestry would, however, effectively subject many private sector plans to regulation as if they were dealers speculating in swaps. In addition, the bill would eliminate the ability of a plan fiduciary to decide whether to clear a "standardized" swap.

We are very concerned about both of these aspects of the bill. We believe that plans are inadvertently being swept up in a regulatory regime that is not appropriate for plans and that will cause real harm to plan participants, plan sponsors and the economy.

Regulating plans like dealers – by treating them as "major swap participants" – could subject plans to bank-like capital requirements (in addition to the collateral furnished by plans) and other regulatory constraints that do not make sense for a heavily regulated plan using swaps to reduce risk. Subjecting plans to such requirements would cause plans to be underinvested, reducing asset returns and jeopardizing benefits. Accordingly, many plan fiduciaries would be forced by their duties under ERISA to stop investing in swaps. This would trigger a marked increase in plan asset volatility, which in turn would cause funding obligations to be far more volatile. Increased volatility results in companies having to reserve more for future funding obligations, and these reserves decrease the money available to invest in job retention and economic recovery.

Requiring all standardized swaps to be cleared would hurt plans by depriving them of the ability to negotiate better security and better pricing in a non-cleared transaction. Today, fiduciaries are free to negotiate very advantageous swap terms; a clearing mandate would simply take away this ability. No plan would be better off by having its fiduciary denied the opportunity to negotiate more protective terms pursuant to its duties under ERISA.

As a result of your leadership and the leadership of Chairwoman Lincoln and your colleagues on the Committee, we understand that changes protecting private sector plans may be made to the bill pending before the Committee. Under one change, plans would, for a two-year period, be exempt from treatment as a major swap participant. This change is absolutely critical. Without this change, the severely adverse consequences described above would result. And no one we have talked to has ever maintained that plans were intended to be treated as major swap participants. In addition, we understand that after the two-year period, plans would not be treated as major swap participants unless the CFTC determines that such treatment becomes appropriate.

Under the second change, which may be offered separately, plans would have a two-year exemption from clearing, which would expire at the end of the two-year period. This change will allow plans the opportunity to continue to make the choice most advantageous for their participants. And it will give the clearing system time to become established, so that hopefully, it can become the best way for plans to purchase swaps.

The members of the American Benefits Council whose plans use swaps to mitigate and manage risk believe the changes you are working on are critical for benefit security and job retention. Thank you for your leadership on this important issue.

Sincerely,

James A. Klein

James A. Klein
President
American Benefits Council