April 19, 2010

Dear Senator:

The undersigned organizations, which represent the interests of major private retirement plans across the country, are writing to express deep concerns about the potential adverse effect of swaps legislation on such plans. We are not writing today to express any views on the general effect of such legislation. In fact, some of the undersigned organizations have significant concerns with respect to other aspects of the legislation. But today, as representatives of the plan community, we are writing to highlight the fact that plans are being inadvertently swept up in a regulatory regime that could cause great harm to plans and their participants.

We have had extensive discussions on this issue with Members of Congress, their staffs, and representatives of the Administration. No one has said that it was their intent to apply dealer-type regulations to the swap transactions of plans subject to Title I of the Employee Retirement Income Security Act of 1974 ("ERISA plans"). For example, last week CFTC Chairman Gensler explicitly told press representatives that pension funds were not intended to be so regulated. Yet some of the legislative proposals would inadvertently do exactly that by treating many plans as "Major Swap Participants" ("MSPs").

Such treatment of ERISA plans is inappropriate because these plans do not use swaps to speculate or create risk. On the contrary, in accordance with their very strict fiduciary duties under ERISA, ERISA plans use swaps to mitigate and manage risk, such as interest rate, currency, and equity risk. (Under ERISA, the person responsible for plan investments is a fiduciary, and, as such, must act (1) "solely in the interest of the [plan] participants and beneficiaries" and (2) with appropriate "care, skill, prudence, and diligence.") Use of swaps to mitigate and manage risk by such a fiduciary does not merit new requirements designed for entities that create risk to the financial system.

Moreover, dealer-type regulation has the potential to do great harm to ERISA plans:

- Plans that are treated as MSPs will inappropriately be subject to bank-like capital, margin, business conduct, and registration costs. No one cites any benefit for these costs in the context of plans. ERISA plans have not posed, and do not pose, systemic risks. But by driving up plan costs, the new rules will drive down benefits and undermine employers' incentives to continue their plans.

- Standardized swaps entered into by ERISA plans will be required to be exchange traded and cleared. Today, plan fiduciaries are required by ERISA to decide whether or not to exchange trade or clear based on an evaluation of the costs and benefits of such actions. To deprive fiduciaries of the option not to exchange trade or clear could again simply increase plan costs and even undermine plan security since plans can often negotiate less costly and more protective arrangements.

- Many plan fiduciaries may decide, based on the additional costs described above, that the costs of swaps outweigh the benefits. If this occurs, plans will have lost a critical tool to manage risk and control plan asset volatility. Increased plan asset volatility requires greater company reserves to be set aside. Greater reserves in turn reduce the amounts available to invest in jobs and economic recovery.

Some have suggested that the MSP definition should sweep broadly and that the Administration can later provide exemptions as needed. Under this approach, many ERISA plans would be treated as MSPs pending an administrative exemption. This approach would have immediate adverse effects. If ERISA plans are treated as MSPs, such plans and their plan sponsors would be imprudent not to modify their investment and benefit policies promptly to prepare for a massive change. To wait for a possible exemption would be imprudent from both a business and legal perspective.

Plans need clarity that they will not be treated as MSPs. Absent such clarity, plans will likely have to treat themselves as MSPs, with all the adverse consequences described above. Accordingly, we are asking all Committee Members to work together at the mark-up (or on the floor if there is no mark-up) to adopt an amendment to protect plans and the participants they serve.

American Benefits Council
Business Roundtable
Committee on Investment of Employee Benefit Assets
The ERISA Industry Committee
National Association of Manufacturers
Profit Sharing/401k Council of America
U.S. Chamber of Commerce

CC: All Members and professional staff, Senate Agriculture, Nutrition & Forestry Committee