



AMERICAN BENEFITS
COUNCIL

February 1, 2013

The Honorable Gary Gensler
Chairman
Commodity Futures Trading Commission
1155 21st Street, NW
Washington, DC 20581

The Honorable Phyllis Borzi
Assistant Secretary
Employee Benefits Security
Administration
U.S. Department of Labor
200 Constitution Avenue
Washington, D.C. 20210

Dear Mr. Chairman and Madam Secretary:

The American Benefits Council is very concerned about the urgent need for coordination between two regulatory regimes that may currently be in conflict and we appreciate the opportunity to share the concern with you.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

As you know, one of the important changes required under Dodd-Frank in order to reduce risk to the financial system was requiring most "swap" transactions to be cleared. The Commodity Futures Trading Commission (the "CFTC") has finalized rules under which certain participants in the swap market – including a number of large funds containing the assets of ERISA plans – will be subject to mandatory clearing as early as March 11, 2013. Unfortunately, because of potential technical issues under ERISA and resulting uncertainty in the marketplace, many ERISA plans and plan asset funds are finding it difficult, if not impossible, to enter into clearing arrangements so that they will be able to meet Dodd-Frank's mandatory clearing requirement. Absent these arrangements, ERISA plans and plan asset funds will be excluded from the swap market and will be unable to enter into critical risk-reducing trades designed to protect participants.

We understand that the Department of Labor (the “DOL”) has been actively working on guidance that would resolve the technical issues referenced above. We greatly appreciate that work. Our reason for writing is that time is extremely short. Since swap documentation takes time to prepare, we are already close to being too late to avoid a significant detriment to ERISA plans and their participants. Action to address this issue – either from the CFTC or the DOL or both – is needed immediately.

If plans lose the ability to use swaps because clearing arrangements cannot be entered into by the applicable deadlines, plans become subject to far more volatility, thus threatening the stability of the plan and participants’ retirement security. We are confident this was not intended by Congress and is not desired by either the DOL or the CFTC. Accordingly, much like it did in 1982 in the context of futures, where its clear guidance in Advisory Opinion 82-49A served the needs of all market participants, we urge the DOL to issue interpretive guidance regarding swaps clearing that will keep this important market open to ERISA plans. If the DOL is not able to issue this guidance well in advance of the applicable deadlines, we urge the CFTC to issue no-action relief extending the deadline for mandatory clearing by ERISA plans and funds holding ERISA plan assets until a reasonable period after the DOL is able to issue that guidance.

The DOL and the CFTC worked together in a very constructive and effective way to avoid a conflict between the DOL fiduciary rules and the CFTC business conduct rules. We greatly appreciated your work in that regard. We look forward to an equally timely and appropriate resolution of this new potential conflict.

Thank you for your consideration of this critical issue.

Sincerely,

A handwritten signature in cursive script that reads "Lynn D. Dudley". The signature is written in black ink and is positioned above the printed name and title.

Lynn D. Dudley
Senior Vice President, Policy