

May 5, 2010

United States Senate
Washington, DC 20510

Dear Senator:

One of the core goals of the undersigned organizations is to protect and strengthen the private retirement system. We represent the overwhelming majority of the major plan sponsors and plan service providers in the country.

We are writing today to call your attention to an unintended but grave threat to the private retirement system contained in the Restoring American Financial Stability Act of 2010. Under sections 731 and 764 of the most recent version of the bill, a swap dealer that enters into a swap with a pension plan has a fiduciary duty to the plan.

This provision was intended to protect plans but instead it will operate to prohibit plans from entering into swaps, such as interest rate or currency hedges. If swap dealers give advice to plans, they should be treated as fiduciaries. This is already the law under ERISA, which imposes one of the highest legal standards on fiduciaries. The bill, however, goes much further and treats swap dealers as fiduciaries solely by reason of being on the other side of a swap with a plan (or just offering to be on the other side). Since a fiduciary cannot by law represent the “opposing” party in a transaction, the bill would effectively preclude swap dealers from entering into swaps with plans. This will have a devastating effect on plans.

This view of the provision is shared by legal experts, plans, providers, and swap dealers. Legal advisors to plans have publicly stated that this provision will preclude plans from engaging in swaps. Swap dealers have informed their plan clients that the dealers will no longer be able to enter into swaps with plans if this provision passes. Stable value providers have warned their clients that the provision may preclude stable value funds in 401(k) plans. Plans are extremely concerned about being unable to use swaps to control fund volatility and offer stable value funds.

Please note that this issue affects both private and public plans (including both union and non-union plans). Since the bill’s fiduciary duty is not limited to ERISA plans, public plans will also be prevented from using swaps by the fiduciary provision (which was drafted to apply to public plans). In fact, the executive director of the \$7.8 billion Ohio Public Employees Deferred Compensation Plan was recently quoted expressing concerns with the fiduciary provision and noting that he is reaching out to other concerned organizations.

A swap dealer performing fiduciary functions with respect to an ERISA plan, as required by the bill, would appear to become an ERISA fiduciary because, under ERISA, an entity functioning as a fiduciary is a fiduciary regardless of how the entity is otherwise designated. Swap dealers entering into swaps with non-ERISA plans, such as public plans, would be subject to common-law fiduciary rules, except as otherwise provided by the CFTC or SEC. As explained further below, having a fiduciary represent both sides of a transaction is not workable under either fiduciary regime.

There are well-meaning organizations that oppose removing the fiduciary provision. They believe that pension funds' concerns are the product of manipulation by the dealers and by corporate interests. Unfortunately, it appears from their public statements that they do not understand the meaning and effect of a fiduciary duty. They say:

nothing in the legislation would require dealers to "represent" the pension funds and others on the other side of the transaction. In reality, a fiduciary duty imposes two basic requirements: it requires the dealer to have a reasonable basis for believing the contract is in the best interests of the customer and it requires the dealer to disclose all material information, including information about conflicts of interest that could bias their recommendations.

It is very simple to refute this erroneous statement. One only needs to look at the text of ERISA itself:

a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan...

ERISA section 404(a)(1) (emphasis added). A fiduciary duty under ERISA or under common law principles is not satisfied by some disclosure and a reasonable belief that the plan is being treated fairly; fiduciaries must act solely in the interest of the plan and must have no allegiances compromising their duty to the plan. A dealer that serves as a fiduciary to the plan clearly has conflicting allegiances in negotiating a deal between itself and the plan.

We urge all Senators to consult the HELP Committee and the Department of Labor regarding the real meaning of a fiduciary duty with respect to plans. It is, in fact, somewhat shocking that the participant groups would want the opposing party in a transaction to be the one looking out for a plan's interests. That is not in a plan's interest. In this type of negotiation, plans should rely on internal or external fiduciaries that are independent of the opposing party.

Both defined contribution and defined benefit plans use swaps to mitigate and reduce risk, and thereby control plan asset volatility. If swaps are unavailable to plans, plan asset volatility will increase markedly. This in turn will make funding obligations for defined benefit plans far more unpredictable. If funding obligations become more unpredictable, companies will need to set aside additional resources from other areas to ensure that they will have enough money to meet their funding obligations. This will mean less money for job retention, less money for investment in the economic recovery, and less money for benefits for employees.

The fiduciary issue may also cause an enormous problem in a different area, due to the extremely broad definition of a swap. Under the definition, guarantees issued in connection with

stable value funds (and perhaps other investment products) may, at least in many circumstances, be treated as swaps. So many stable value funds could be precluded by the fiduciary provision, as noted above. In that case, a dealer issuing stable value guarantees could not issue a guarantee to a plan because that would be a prohibited form of fiduciary self-dealing.

Stable value products play a critical role in large and small 401(k) plans across the country. These products account for a substantial portion of all 401(k) plan assets. Importantly, stable value products provide a good safe return for the millions of participants who need protection against market fluctuations. In short, the fiduciary provision could have a devastating effect on a huge number of 401(k) plans and participants.

Some of the undersigned organizations have other pressing issues with the bill, including ensuring a clear exemption for end users. But all of us want to protect plans. The fiduciary provision in S. 3217 will not protect plans. On the contrary, it will have devastating effects on plans and on jobs.

The other rules in the bill provide the government with very broad authority to protect plans. The fiduciary provision is thus both counterproductive and unnecessary. As such, the fiduciary provision should be removed from the bill.

American Benefits Council
Association for Financial Professionals
Business Roundtable
Committee on Investment of Employee Benefit Assets
Defined Contribution Institutional Investment Association
The ERISA Industry Committee
Financial Executives International's Committee on Benefit Finance
National Association of Manufacturers
National Council of Farmer Cooperatives
Profit Sharing/401k Council of America
U.S. Chamber of Commerce

cc: All Senators