

December 4, 2009

The Honorable Barney Frank  
Chairman  
Committee on Financial Services  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Spencer Bachus  
Ranking Member  
Committee on Financial Services  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Collin C. Peterson  
Chairman  
Committee on Agriculture  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Frank D. Lucas  
Ranking Member  
Committee on Agriculture  
U.S. House of Representatives  
Washington, DC 20515

Dear Chairmen Frank and Peterson and Ranking Members Bachus and Lucas:

The undersigned organizations write to express our concern related to House derivatives legislation and its impact on pension plans. Although we appreciate the acknowledgment that mitigating commercial risk is necessary and appropriate for many businesses, both the House Financial Services Committee and the House Agriculture Committee bills create serious risks for the operations of major pension funds that use swap transactions to manage pension assets.

Our principal concern related to the use of derivatives in the management of pension plan assets is that each bill could be interpreted as defining certain pension plans as “Major Swap Participants” (MSP), facing registration, capital, margin, and other regulatory obligations from both the SEC and CFTC. Since pension plans are mitigating or hedging “financial risk,” not technically “commercial risk,” these plans would not meet the exception to the definition of “Major Swap Participant.” We do not believe this is the intended result, but the impact would be detrimental to the ability of pension funds to serve the interests of their plan participants and beneficiaries.

Pension funds often use derivatives to manage pension plan assets and/or hedge pension plan liabilities. Pension funds need to manage the impact of changes to pension assets and liabilities in order to control volatility and predictability for determining future contributions to be made by plan sponsors. Importantly, these investments are subject to ERISA and Department of Labor fiduciary responsibility requirements in the same manner as other plan investments.

Thus, pension fiduciaries must determine that utilizing these investments is, among other things, prudent and made solely in the interest of the plan’s participants and beneficiaries.

Under each bill, pension funds are at risk of being considered a MSP subject to bank-style capital and margin rules for swaps used to manage pension assets. *See* Agriculture bill at 17:4-18:3; Financial Services bill at 13:20-14:22 for the definition of MSP. These requirements would be very costly and harmful to pension fund operations, participants, and beneficiaries.

Meeting capital requirements would reduce the amount of pension assets available to pay out to their retirees and beneficiaries. For example, if capital and margin requirements are imposed on pension funds because they use swaps, a pension fiduciary can be expected to avoid using swaps that otherwise are prudent for the pension fund, solely because of the concern that the use of swaps will diminish the amount of pension assets available. We do not believe pension funds are intended to be MSPs under either bill, but unless changes are made, such interpretation is possible.

An exception from the MSP definition for union, public, and private pension funds that use derivatives to manage or hedge pension plan assets, consistent with Department of Labor prudential standards, would appropriately remove this risk. The following language would achieve this objective.

Notwithstanding any other provision of this Act,  
(i) an employee benefit plan as defined in Section 3(3) of ERISA (a “Benefit Plan”), whether or not subject to ERISA and including governmental plans and foreign plans, and any fund, separate account or trust that holds the assets of one or more Benefit Plans and that enters into swaps to manage or hedge pension assets shall not be defined as a “major swap participant;” and  
(ii) an employer that sponsors or maintains a Benefit Plan shall not be defined as a “major swap participant” as a result of hedging, reducing, or otherwise mitigating any risk directly associated with the operation of such plan through the use of swaps.

Thank you for your consideration of this important issue relating to the pending swaps legislation. We look forward to working with you to advance legislation that will improve transparency and stability in the derivatives markets.

Sincerely,

American Benefits Council  
Business Roundtable  
Financial Executives International  
National Association of Corporate Treasurers  
National Association of Manufacturers  
Profit Sharing/401K Council of America  
The ERISA Industry Committee  
U.S. Chamber of Commerce

Cc: The Members of the House Committee on Financial Services  
The Members of the House Committee on Agriculture