

February 22, 2011

Mr. David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st St., N.W.
Washington, DC 20581

Re: RIN 3038-AD25/Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties

Dear Mr. Stawick:

All of the organizations listed below are vitally interested in preserving and strengthening the private retirement system, which helps ensure the retirement security of millions of Americans. In that regard, we are writing today to express a very deep level of concern with respect to the business conduct standards for swap dealers and major swap participants (“MSPs”) recently proposed by the Commodity Futures Trading Commission (the “CFTC”).

Pension plans use swaps to manage interest rate risks and other risks, and to reduce volatility with respect to funding obligations. If swaps were to become materially less available to plans, plan costs and funding volatility would rise sharply. This would undermine participants’ retirement security and would force employers to reserve, in the aggregate, billions of additional dollars to address increased funding volatility. These reserves would have to be diverted from investments that create and retain jobs and that spur economic growth and recovery.

Many of the organizations below are writing their own comment letters on the proposed business conduct standards that go into detail with respect to those standards. Jointly, we would like to focus on three key issues.

Conflict with proposed DOL regulations. The proposed business conduct standards would require swap dealers and MSPs that enter into swaps with retirement plans and other plans governed by the Employee Retirement Income Security Act of 1974 (“ERISA”) to provide certain services to those plans. The required services would likely make the swap dealer or MSP a plan fiduciary under a regulatory definition of a fiduciary recently proposed by the Department of Labor (“DOL”) (and possibly under the current-law definition). For example, the proposed business conduct standards would require a swap dealer or MSP (1) to provide a plan with information about the risks of a swap, (2) to provide swap valuation services to a plan, and (3) to review a plan’s advisor, each of which would likely make the swap dealer or MSP a plan fiduciary under the DOL’s proposed regulations.

If a swap dealer or MSP is a plan fiduciary, it would be a prohibited transaction under ERISA for the swap dealer or MSP to enter into a swap with the plan. Thus, the proposed business conduct standards would likely require a swap dealer or MSP entering into a swap with an ERISA plan to violate ERISA. The only way to avoid this result is for all swaps with plans to cease, which would be devastating for plans, as discussed above.

This is not solely a DOL issue. The CFTC needs to coordinate with the DOL on this issue to prevent the very harmful and unintended result described above. We recognize that the President's recent Executive Order does not technically apply to the CFTC, but the point expressed there—the importance of regulatory coordination—is clearly sound.

The interaction of the business conduct standards and the DOL's definition of a fiduciary needs to be publicly and formally resolved by the time the CFTC finalizes the business conduct standards. This is far too important an issue not to be clearly resolved before either of the regulations in conflict is finalized. Moreover, if the issue is not resolved before finalization of the business conduct standards, there would be an immediate chilling effect on all swap activity due to uncertainty regarding current and future DOL regulations.

Prior to finalization of either regulation, the CFTC and the DOL should jointly announce that no action required by the business conduct standards would cause a swap dealer or MSP to be an ERISA fiduciary. This result is best achieved by material modifications to both sets of proposed rules.

Recommending a swap. Under the proposed business conduct standards, if a swap dealer or MSP “recommends” a swap to a plan, the swap dealer or MSP must act “in the best interests” of the plan with respect to the swap. Under the proposed rules, many standard communications used by a swap dealer or an MSP in the selling process—such as “this swap may fit your interest rate hedging needs”—would be a recommendation. In fact, it seems clear that the term “recommendation” would include information regarding plan risks that the business conduct standards require a swap dealer or MSP to provide to a plan.

This means that swap dealers or MSPs acting solely as counterparties would be required to also act in the best interests of the plan. This is not possible. A swap dealer or MSP as a party to a swap transaction cannot have a conflicting duty to act against its own interests and in the best interests of its counterparty with respect to the swap.

If a swap dealer or MSP clearly communicates to a plan in writing that it is functioning solely as the plan's counterparty, no communication by the swap dealer or MSP should be treated as a “recommendation”.

Counterparty standard. If a swap dealer or MSP is simply acting as a counterparty with respect to a swap with a plan, the proposed business conduct standards require the swap dealer or MSP to carefully review the qualifications of the advisor advising the plan with respect to the swap, and to veto the advisor if appropriate.

This rule is problematic for several reasons. First, there is no basis for this rule in the statute; under the statute, a swap dealer or MSP's duties are fulfilled with respect to a swap with an ERISA plan if the swap dealer or MSP determines that the entity advising the plan is an ERISA fiduciary. Second, if swap dealers or MSPs can veto plan advisors, plan advisors could potentially be reluctant to negotiate in a zealous manner against a dealer, thus severely hurting plans. Third, swap transactions often need to happen quickly to effectively hedge plan risks;

there is no time for investigations of advisors. Finally, reviewing a plan's advisor may well make a swap dealer or MSP a fiduciary of the plan, which, as discussed above, would in turn make the swap a prohibited transaction.

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We urge you to modify the proposed business conduct standards to reflect the very deep concerns described above, so as to avoid undermining the retirement security of millions of Americans.

American Bankers Association
American Benefits Council
Committee on Investment of Employee Benefit Assets
The ERISA Industry Committee
Financial Executives International's Committee on Corporate Treasury
Financial Services Roundtable
Insured Retirement Institute
National Association of Insurance and Financial Advisors
National Association of Manufacturers
Securities Industry and Financial Markets Association

cc: Phyllis Borzi
Michael Davis