From: Kent A. Mason
Sent: Thursday, May 19, 2011 6:37 PM
To:
Cc: Lynn Dudley; Diann Howland
Subject: FW: Swap issues for ERISA plans

We wanted to keep you in the loop on what we are doing. Set forth below is an e-mail that we sent to the Hill last night with respect to the critical swap issues we are facing.

From: Kent A. Mason
Sent: Wednesday, May 18, 2011 8:26 PM
To:
Cc: 'Lynn Dudley'; 'Diann Howland'
Subject: Swap issues for ERISA plans

We wanted to give you a brief report on where we are with respect to swaps, because we may well need your help, possibly even legislative help, as discussed below.

As you recall, we have three issues:

(1) In our view, the proposed business conduct standards would require a swap dealer to perform three functions for plans that would make the swap dealer a plan fiduciary under the proposed fiduciary regulation: (a) the provision to the

plan of information on the risks of a swap, (b) the provision of valuation services, and (c) the review of whether the plan's advisor is qualified to advise the plan with respect to the swap. Also, in our view, the third requirement would make swap dealers fiduciaries under current law. As you know, if the swap dealer is a fiduciary, the swap would be a prohibited transaction.

(2) In our view, the proposed business conduct standards effectively require swap dealers to function as advisors to plans, thus triggering a duty to act in the best interests of the plan. This creates a conflict of interest that would, pending further clarification, prevent swap dealers from entering into swaps.

(3) As noted, the proposed business conduct standards require the swap dealer to review the qualifications of a plan's advisor. This would give the dealers the right to veto plan advisors, which is very unhelpful. This would also hurt plans by making advisors less inclined to challenge dealers for fear of being vetoed by the dealer.

DOL STATUS REPORT

We had a meeting today with DOL on our swap issues. There was a great turnout on both sides. DOL folks attending the meeting included: Phyllis Borzi, Michael Davis, Tim Hauser, Alan Lebowitz, Ivan Strasfeld, Joe Canary, Bill Taylor, Lou Campagna, Fred Wong, and Joe Piacentini. In addition to the American Benefits Council and the Committee on Investment of Employee Benefit Assets, the following companies also attended: Ford, Xerox, Weyerhaeuser, US Steel, GM, IBM, Chrysler, and Lockheed Martin.

The meeting focused on issue #1 above. DOL viewed issues #2 and 3 as solely within CFTC's jurisdiction. We urged them to weigh in with the CFTC on those issues from a policy perspective, and DOL indicated that they would consider that.

Our message on issue #1 was as follows. We thanked them for their letter that stated swap dealers would not become fiduciaries solely by reason of complying with the business conduct standards. However, we let them know that we have consulted with internal counsel and outside counsel for plan sponsors and dealers, and everyone we have talked to agrees that the DOL letter could not be relied on by legal counsel in giving opinions. It is not a case of legal counsel not believing the DOL; it is simply the case that the letter is an informal non-binding description of how two proposed regulations interact. As such, the letter could not be relied on. So if the two sets of regulations were finalized in their current form, all swaps would cease because legal counsel would not sign off on swaps with plans. This was the universal and strongly held view of all companies and advisors we talked to.

Accordingly, we need legally binding guidance from the DOL on issue #1 on or before the issuance of the final business conduct standards. We stated that this could be done through a combination of (1) language in the preamble to the CFTC's final business conduct standards regarding the application of the fiduciary regulation being worked on, and (2) an advisory opinion on the interaction of the business conduct standards and the present-law fiduciary issue. DOL stated that they thought that the letter should be enough, but they also understood our points. They indicated a willingness to consider the clarifications we requested.

We will, of course, be following up with DOL on our requests.

CFTC

We have requested a meeting with the CFTC staff working on the business conduct standards, but have not heard back from them yet. However, one group of swap lawyers has met with them on issue #3 above, and it is possible that progress is being made, but it is too early to tell for sure. Informal indications are that the CFTC believes that the DOL letter settles issue #1 and that no further guidance is needed on that issue. As noted above, unfortunately, that is not the case. We will also be asking the CFTC Commissioners for meetings on our issues.

FUTURE STEPS

The level of concern among plan sponsors has become extremely high. After the DOL meeting and the informal reports about the CFTC view, the companies have informed us that they can envision a realistic scenario where this issue is not addressed and swaps with plans cease at least temporarily. The estimated annual cost to the plans and to the companies of this result varies; one company has estimated it at $100 million. Another company with a larger plan thought that it might cost them $1 billion annually. We are working to refine the numbers.

In this context, we need to consider all options in light of the possibility that the business conduct standards could be finalized by the July 15th deadline. One option that has been raised to us on the House side is bipartisan legislation focused exclusively on our three business conduct standards issues, none of which has been controversial in the numerous Hill meetings we have had. We are very interested in pursuing that option. In that regard, we have prepared draft legislation, which is attached. The draft bill is short and straightforward:

Section 1 is the short title.

Section 2 provides that no person shall be an ERISA fiduciary solely by reason of complying with the business conduct standards.

Section 3 provides that a swap dealer or MSP shall not be treated as an "advisor" to a plan or other Special Entity – and thus required to act in the best interests of the Special Entity -- if the swap dealer or MSP discloses to the Special Entity that it is acting solely as a counterparty and not as an advisor.

Section 4 provides that an ERISA fiduciary is deemed to be a qualified advisor to a plan. This makes sense because, under ERISA, a fiduciary is required to be a prudent expert on the matters that the fiduciary is responsible for.

Section 5 provides the effective date.

We know that there are challenges facing any legislation involving Dodd-Frank, but in light of the stakes here, we believe that a legislative effort may well be needed. We would be very interested in your views on that, as well as your thoughts on the draft bill.

We will also be reaching out to the White House and Treasury. And we will be inquiring further about the possibility of bipartisan letters to the DOL and the CFTC.

If you have any questions or if anything further would be helpful, please let us know. Thanks for your help on this critical set of issues.

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and delete the original message. We apologize for any inconvenience, and thank you for your prompt attention.

DRAFT
May 17, 2011

H.R._____

To amend the Employee Retirement Income Security Act of 1974, the Commodity Exchange Act, and the Securities Exchange Act of 1934 to ensure that pension plans can use swaps to hedge risks, and for other purposes.

In the House of Representatives

_____introduced the following bill; which was referred to the Committee on _____

A bill to amend the Employee Retirement Income Security Act of 1974, the Commodity Exchange Act, and the Securities Exchange Act of 1934 to ensure that pension plans can use swaps to hedge risks, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 1. SHORT TITLE.

This Act may be cited as the "Pension Plan Risk Reduction Act of 2011".

SEC. 2. CLARIFICATION OF THE DEFINITION OF FIDUCIARY.

(a) IN GENERAL- Paragraph (21) of section 3 of the Employee Retirement Income Security Act of 1974 is amended by adding at the end thereof the following subparagraph:

(C) No person shall be a fiduciary with respect to a plan solely by reason of any service, act, or duty that such person is required to perform with respect to such plan by reason of section 4s(h) of the Commodity Exchange Act, section 15F(h) of the Securities Exchange Act of 1934, or any rule, regulation, or standard prescribed pursuant to such sections.

(b) CONFORMING AMENDMENT.- Subparagraph (A) of section 3(21) of such Act is amended by striking "subparagraph (B)" and inserting "subparagraphs (B) and (C)."

SEC. 3 . CLARIFICATION OF DEFINITION OF ADVISOR.

(a) AMENDMENT TO CEA.- Paragraph (4) of section 4s(h) of the Commodity Exchange Act is amended by adding at the end thereof the following subparagraph:

(D) ADVISOR.- For purposes of this subsection, a swap dealer or major swap participant shall not be treated as acting as an advisor to a Special Entity if the swap dealer or major swap participant represents in writing to the Special Entity that the swap dealer or major swap

participant is acting solely as a counterparty, and is not acting as an advisor to the Special Entity.

(b) AMENDMENT TO 1934 ACT.- Paragraph (4) of section 15F(h) of the Securities Exchange Act of 1934 is amended by adding at the end thereof the following subparagraph:

(D) ADVISOR.- For purposes of this subsection, a security-based swap dealer or major security-based swap participant shall not be treated as acting as an advisor to a Special Entity if the security-based swap dealer or major security-based swap participant represents in writing to the Special Entity that the security-based swap dealer or major security-based swap participant is acting solely as a counterparty, and is not acting as an advisor to the Special Entity.

SEC. 4. COUNTERPARTY REQUIRMENTS.

(a) AMENDMENT TO CEA.- Subclause (VII) of section 4s(h)(5)(A)(i) of the Commodity Exchange Act is amended to read as follows:

(VII) in the case of employee benefit plans subject to the Employee Retirement Income Security Act of 1974, is a fiduciary as defined in section 3 of that Act (29 U.S.C. 1002), provided in such case, subclauses (I) through (VI) shall not apply and any duty established pursuant to this clause shall be satisfied by the receipt by a swap dealer or a major swap participant of a written representation from the Special Entity or a representative of such Special Entity that the Special Entity has a representative that is a fiduciary (as defined in section 3 of that Act) with respect to the swap; and

(b) AMENDMENT TO 1934 ACT.- Subclause (VII) of section 15F(h)(5)(A)(i) of the Securities Exchange Act of 1934 is amended to read as follows:

‘‘(5) SPECIAL REQUIREMENTS FOR SECURITY-BASED SWAP DEALERS AS COUNTERPARTIES TO SPECIAL ENTITIES.—

(VII) in the case of employee benefit plans subject to the Employee Retirement Income Security Act of 1974, is a fiduciary as defined in section 3 of that Act (29 U.S.C. 1002), provided in such case, subclauses (I) through (VI) shall not apply and any duty established pursuant to this clause shall be satisfied by the receipt by a security-based swap dealer or a major security-based swap participant of a written representation from the Special Entity or a representative of such Special Entity that the Special Entity has a representative that is a fiduciary (as defined in section 3 of that Act) with respect to the swap; and

SEC. 5. EFFECTIVE DATE.

(a) IN GENERAL- The amendments made by sections 3 and 4 of this Act shall take effect as if included in sections 731 and 764 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(b) ERISA AMENDMENTS. - The amendment made by section 2 of this Act shall take effect as of the same date that the amendments made by sections 3 and 4 take effect.