Congress of the United States
Washington, DC 20515

July 25, 2011

The Honorable Hilda Solis
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

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

Dear Secretary Solis and Chairman Gensler,

We are writing today in regards to the rules both of your agencies are currently drafting and finalizing which will impact the retirement security of Americans. Specifically, we are concerned with the Commodity Futures Trading Commission (CFTC) proposed business conduct standards and how they interact with the Department of Labor (DOL) proposed redefinition of the term "fiduciary" for purposes of the Employee Retirement Income Security Act of 1974 (ERISA). Both rules are clearly well intentioned, but we would like to take this opportunity to express our concerns with the proposed regulations as written.

We understand that pension plans interpret the DOL's proposed fiduciary definition to be in conflict with the CFTC's proposed business conduct standards. This conflict would preclude plans from entering into swaps to manage risks. Pension plans use swaps as a means of hedging their risk against unpredictable market fluctuations in order to provide full funding for beneficiaries. Left without this option, the liquidity of retirement plans will be left at risk and corporate assets would need to be diverted away from jobs and economic recovery. We appreciate the clarification offered by Phyllis Borzi, the Assistant Secretary for the Employee Benefits Administration that stated the DOL rule was not intended for swap dealers and MSPs. Unfortunately, concerns remain that swap dealers will not be exempt from the regulations and therefore will no longer participate in deals with pension plans.

The CFTC business conduct standards would require swap dealers and major swap participants (MSP) to perform certain services for pension plans that could cause them to become fiduciaries or advisors under the new definition set forth by the DOL. The required services would likely make the swap dealer or MSP a plan fiduciary under the proposed DOL definition of a fiduciary. If a swap dealer is a fiduciary, it would be a prohibited transaction under ERISA for the dealer to enter into a swap with the plan. Under these circumstances, we are concerned that these rules could easily be interpreted to preclude pension plans from entering into swaps to manage risks.

It is our hope that, on or before the finalization of the business conduct standards, both agencies can issue a joint statement on this issue, which could be reflected in the preamble to the final business conduct standards. The statement could provide expressly that no swap dealer or MSP will become a fiduciary to plan covered by ERISA solely by reason of complying with the business conduct standards. We believe that a clear written statement could maintain effective income security and allow plans to continue to use swaps to mitigate their risks.

To avoid this conflict, it is also necessary for the proposed business conduct standards to be modified so that swap dealers and MSPs are not effectively turned into plan advisors. Dealers could become advisors and be forced to act in the best interest of the plans, creating a conflict of interest that would prevent dealers from entering into swaps. If a swap dealer or MSP clearly informs a plan that the dealer or MSP is functioning not as an advisor but as a counterparty, the dealer or MSP should not be converted into an advisor.

Finally, swap dealers and MSPs should not have the right to veto a plan's choice of an independent advisor. This could create an uncomfortable situation in which plan advisors do not have the full ability to act in the best interest of their plan. Plans need advisors that will vigilantly advance the plans' interests in negotiating a swap with a dealer. If a dealer can effectively choose a plan's advisor, plans' interests will clearly be less effectively served.

It is our hope that this issue can be resolved in a timely and clear manner. We greatly appreciate your efforts to improve retirement income security. Thank you for your consideration of our concerns and look forward to working with you in the future to continue to address these important issues.

Sincerely,

Adam Smith
Member of Congress

Rick Larsen
Member of Congress

Kurt Schrader
Member of Congress

Laura Richardson
Member of Congress

Dan Boren
Member of Congress

Jim Himes
Member of Congress

Terri Sewell
Member of Congress