ERIC

The
ERISA
Industry
Committee

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Re: Definition of "Major Swap Participant" and "Major Security-Based Swap Participant" (RIN 3038–AD06) (File No. S7–39–10)

Mr. Stawick and Ms. Murphy:

The ERISA Industry Committee ("ERIC") is pleased to submit these comments on the definition of "major swap participant" and "major security-based swap participant" (collectively, "major participant") under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act" or the "Act").[1] The Commodity Futures Trading Commission and the Securities and Exchange Commission (together, the "Commissions") issued a joint proposed rule further defining these terms in on December 21, 2010.[2]

ERIC is a nonprofit association committed to the advancement of the employee retirement, health, incentive, and welfare benefit plans of America's largest employers. ERIC's members provide comprehensive retirement, health, and other benefits to tens of millions of active and retired workers and their families.

Many of the employee benefit plans sponsored by ERIC's members use swaps as an important part of their asset management strategy. Swaps permit plans to hedge against market fluctuations, interest rate changes, and other factors that create volatility and uncertainty with respect to plan funding. Swaps also help plans rebalance their investment portfolios, diversify their investments, and gain exposure to particular

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[1] Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[2] Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 75 Fed. Reg. 80,174 (proposed Dec. 21, 2010) (to be codified at 17 C.F.R. pts. 1 & 240) (the "Notice").

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asset classes without direct investment. By helping to protect plan assets as part of a prudent long-term investment strategy, swaps benefit the millions of participants who rely on these plans for retirement income, health care, and other important benefits. ERIC's members wish to ensure that the proposed rule does not inadvertently limit employee benefit plans' access to or use of swaps for these beneficial purposes.

Summary

ERIC supports the Dodd-Frank Act's goal of making the United States financial system safer. ERIC is concerned, however, that the major participant definition in the proposed rule will impose unnecessary and unintended new costs and restrictions on employee benefit plans that are end-users of swaps, even though these plans do not create the kinds of systemic risks that the Dodd-Frank Act is designed to prevent. ERIC's comments urge the Commissions to make the following changes in the proposed rule:

1. The major participant definitions should exclude all employee benefit plans that are subject to the demanding fiduciary standards in Title I of the Employee Retirement Income Security Act ("ERISA Title I plans").

2. If, contrary to ERIC's recommendation, the Commissions do not exclude ERISA Title I plans from the major participant definitions, ERIC recommends that the Commissions clarify the major participant definitions, as they apply to ERISA Title I plans, in the following ways:

    a. In the first major participant test, the exclusion for swap positions used to hedge or mitigate risk "directly associated with the operation of the plan" should apply to employee benefit plan swap positions used for a broad range of purposes.

    b. In the first major participant test, the exclusion for swap positions maintained by an employee benefit plan should apply to swap positions maintained by any trust that holds the assets of one or more employee benefit plans.

    c. The second major participant test should never apply to ERISA Title I plans, because their outstanding swaps do not create substantial counterparty exposure.

    d. The third major participant test should never apply to ERISA Title I plans, because these plans will never be "highly leveraged."

    e. Alternatively, if the Commissions apply the third major participant test to ERISA Title I plans, the plans' leveraged status should be determined based on the ratio of assets to liabilities shown on the related trust's most recent audited financial statement.

3. Swap positions maintained by employee benefit plans should not be aggregated with the swap positions maintained by the plan sponsor, an affiliate of the plan sponsor, or a plan fiduciary in determining whether the swap positions of any of these entities are "substantial" or create substantial counterparty exposure.

Discussion

1. The definitions of "major participant" should exclude ERISA Title I plans.

The Dodd-Frank Act requires major participants to register with the Commissions. Under the Act, major participants will be subject to extensive new capital and margin requirements, reporting and recordkeeping rules, and business conduct requirements. This comprehensive regulatory framework reflects the fact that major participants engage in swap activities that "could pose a high degree of risk to the U.S. financial system."[3]

In the preamble to the proposed rule, the Commissions raised the question whether certain types of entities should be excluded from the major participant definitions. ERIC urges the Commissions to exclude employee benefit plans that are subject to the fiduciary provisions in Title I of ERISA. The investment activities of ERISA Title I plans are already extensively regulated by the Department of Labor. The fiduciary provisions of ERISA ensure that these plans will pose little risk to the U.S. financial system. To regulate these plans as major participants would duplicate the protections of the existing regulatory regime and impose additional costs on ERISA Title I plans without advancing the objectives of the Dodd-Frank Act.

The Dodd-Frank Act includes several provisions that apply to "employee benefit plans as defined in paragraphs (3) and (32) of section 3 of ERISA," and the Commissions have generally referred to these plans in the preamble to the proposed rule as "ERISA plans." ERIC wishes to emphasize, however, that many of the employee benefit plans included in this broad definition are not actually subject to the strict fiduciary standards in Title I of ERISA.[4] ERISA's fiduciary provisions apply to the employee benefit plans maintained by most private-sector employers and employee organizations (such as labor unions). In contrast, ERISA's fiduciary provisions do not apply to government plans, church plans, and plans that primarily cover foreign employees. ERIC has used the term "ERISA Title I plans" throughout this comment to distinguish the employee benefit plans that are subject to ERISA's fiduciary standards.

Title I of ERISA imposes exacting standards of conduct on those who manage the assets of private-sector employee benefit plans.[5] Plan fiduciaries must act solely in the interest of participants and beneficiaries; they must carry out their duties for the exclusive purpose of providing benefits and defraying reasonable expenses of plan administration; and they must act in accordance with the plan's governing documents to the extent that the documents are consistent with applicable provisions of ERISA. Plan fiduciaries must invest plan assets with the care, skill, prudence, and diligence that a prudent person familiar with such matters would use in similar circumstances. They are required to diversify the plan's investments so as to minimize the risk of large losses (unless in the circumstances it is clearly prudent not to do so). Plan fiduciaries are strictly prohibited from dealing with related parties, dealing with plan assets on their own account, or acting on behalf of the plan in circumstances in which they have a conflict of interest, unless a specific statutory or administrative exemption applies.

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[3] Notice, 75 Fed. Reg. at 80,185 & n.69.

[4] *See* ERISA §§ 4, 401(a), 29 U.S.C. §§ 1003, 1101(a).

[5] *See* ERISA §§ 404, 406, 29 U.S.C. §§ 1104, 1106.

Federal courts often describe ERISA's fiduciary standards as "the highest known to the law."[6] These standards are strictly enforced. A fiduciary that breaches its duty under Title I of ERISA is personally liable to make good to the plan any losses to the plan that result from the breach, and to restore to the plan any profits that the fiduciary has realized as a result of the breach.[7] A plan fiduciary that is aware of another fiduciary's breach of duty and that does nothing to remedy the breach becomes jointly liable for the breach.[8] The U.S. Department of Labor has broad powers to enforce ERISA's fiduciary standards through administrative proceedings and lawsuits in federal court, and to assess substantial civil penalties for any violation of ERISA's fiduciary duties.[9] ERISA plan participants and other plan fiduciaries also have the right to bring civil actions in federal court to recover losses caused by a breach of fiduciary duty, to enjoin any practice that violates ERISA's fiduciary standards, and to seek other appropriate relief.[10]

The strict fiduciary standards under ERISA, the substantial penalties for breach of those standards, and the robust civil enforcement regime already ensure that the investment activities of ERISA Title I plans are closely regulated and supervised. The objective of ERISA's prudence, diversification, and other fiduciary requirements is to protect plan assets from investment losses that might impair the plans' ability to pay promised benefits. The fiduciaries of ERISA Title I plans have no incentive to adopt high-risk investment strategies: to the contrary, they face substantial personal liability if they incur losses by making imprudent investments or by investing in instruments whose risks they do not fully understand.

For these reasons, ERISA Title I plans pose little risk to the U.S. financial system. ERISA Title I plans played no part in the speculative activity and resulting economic crisis that led to the enactment of the Dodd-Frank Act.[11] ERIC is not aware of a single instance in which an ERISA-governed plan has been unable to meet its obligation to a counterparty under a swap agreement. It is not necessary to impose a costly, duplicative, and potentially inconsistent new layer of regulation on ERISA Title I plans by treating them as major participants.

Even though Senator Lincoln was a strong proponent of the Dodd-Frank Act provisions regulating swaps, she recognized that it is "appropriate for the CFTC and the SEC to consider the nature and current regulation of the entity when designating an entity a major swap participant or a security-based swap participant." In making this statement, Senator Lincoln recognized that "entities such as . . . employee benefit plans are already subject to extensive regulation relating to their usage of swaps under other titles of the U.S. Code." She observed that a principal objective of the Dodd-Frank

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[6] *See, e.g.*, *Braden v. Wal-Mart Stores, Inc.,* 588 F.3d 585, 598 (8th Cir. 2009); *Johnson v. Couturier*, 572 F.3d 1067, 1077 (9th Cir. 2009); *LaScala v. Scrufari*, 479 F.3d 213, 219 (2d Cir. 2007); *Gregg v. Transp. Workers of Am. Int'l*, 343 F.3d 833, 841 (6th Cir. 2003).

[7] *See* ERISA § 409, 29 U.S.C. § 1109.

[8] *See* ERISA § 405(a), 29 U.S.C. § 1105(a).

[9] *See* ERISA § 502, 29 U.S.C. § 1132.

[10] *Id.*

[11] *See* 156 Cong. Rec. S5907 (daily ed. July 15, 2010) (statement of Sen. Hagan) ("[W]hen the CFTC and SEC are making the determination as to whether a person dealing in swaps is a major swap participant or major security-based swap participant, it is the intent of the conference committee that both the CFTC and the SEC focus on risk factors that contributed to the recent financial crisis . . . .").

Act was "to protect Main Street," and that Congress "should try to avoid doing any harm to pension plan beneficiaries" when it regulated swaps.[12]

If ERISA Title I plans are designated as major participants, they will be forced to satisfy new regulatory requirements that will make it more expensive for the plans to use swaps prudently to hedge risk and diversify investments. Each dollar a Title I plan spends to satisfy new regulatory requirements will be a dollar less that is available to pay benefits to employees and their families. To the extent that plan fiduciaries elect not to enter into swap transactions in light of concerns over regulatory costs, capital requirements, and other restrictions imposed on major participants, ERISA Title I plans will be forced to abandon risk-mitigation strategies that have proved both prudent and beneficial, and that have helped the plans to weather economic downturns. As a result, treating ERISA Title I plans as major participants might have the perverse effect of introducing more risk into the U.S. financial system.

ERIC recognizes that the statutory definitions of "major swap participant" and "major security-based swap participant" include a specific exclusion for certain swap positions maintained by employee benefit plans. The statutory exclusion applies to employee benefit plans as defined in section 3(3) and 3(32) of ERISA, without regard to whether those plans are subject to the fiduciary requirements in Title I of ERISA. As ERIC has explained,[13] ERISA's strict fiduciary requirements apply to a smaller sub-set of employee benefit plans. Accordingly, a blanket exclusion from the major participant definitions for ERISA Title I plans will not supersede the specific statutory exclusion, which will continue to apply to employee benefit plans that are not subject to ERISA's fiduciary requirements. ERIC believes that a blanket exclusion for ERISA Title I plans is consistent with both the language and the purpose of the Dodd-Frank Act.

2. The Commissions should clarify the exclusion for positions maintained by employee benefit plans.

An entity (other than a swap dealer) that maintains a substantial swap position generally is a major participant. The Dodd-Frank Act expressly excludes from this test "positions maintained by any employee benefit plan (or any contract held by such a plan) . . . for the primary purpose of hedging or mitigating any risk directly associated with the operation of the plan."[14] As explained in the preceding comment, ERIC urges the Commissions to exclude ERISA Title I plans from all aspects of the major participant definitions. If the Commissions do not adopt this recommendation, however, the Commissions should clarify the exclusion for positions maintained by employee benefit plans.

The Commissions should make clear that a variety of different risks are "directly associated with the operation of the plan." The preamble to the proposed rule recognizes that the employee benefit plan exclusion is separate from, and broader than, the exclusion for positions held by other end users for hedging or mitigating commercial risk.[15] ERIC agrees with the statement in the

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[12] 156 Cong. Rec. S5906-07 (daily ed. July 15, 2010) (statement of Sen. Lincoln).

[13] *See* text accompanying note 4, above.

[14] Dodd-Frank Act § 721(a)(16) (Commodity Exchange Act § 1a(33)); *accord id.* § 761(a)(6) (Securities Exchange Act § 3(a)(67)).

[15] *See* 75 Fed. Reg. at 80,201 ("We preliminarily do not believe that it is necessary to propose a rule to further define the scope of this exclusion. In this regard, we note that this ERISA plan exclusion, unlike the other exclusion in the first major (continued…)

preamble that hedging by ERISA plans should be broadly excluded from the major participant test; but the Commissions' position on this issue should be clearly stated in the regulations themselves, and not merely mentioned in the preamble.

Unlike commercial entities, employee benefit plans exist for the purpose of paying benefits; and plans must match their available assets with their liabilities in order to discharge their benefit obligations. Employee benefit plans use swaps to hedge a wide variety of risks that affect the value of the plans' assets, the magnitude of their liabilities, or both. For example, an employee benefit plan might use credit default swaps to hedge the risk of defaults affecting the value of its bond portfolio, or it might use currency swaps to mitigate the risk that changes in the foreign exchange rate will affect the value of its securities. An employee benefit plan might also use interest rate swaps to hedge the risk that changes in interest rates will increase the present value of its liabilities, making it impossible for the plan to pay promised benefits.[16] The regulations should state that any swap position used to hedge or mitigate risks associated with the value of the plan's assets or with the measurement of its liabilities is a risk "directly associated with the operation of the plan."

The CFTC's proposed rule states that a swap position held for a purpose that is "in the nature of investing" is not eligible for the commercial-risk exclusion.[17] No similar investment-related exception is appropriate in the case of employee benefit plans' swap positions, since a principal purpose of many employee benefit plans is to accumulate assets through investment. Employee benefit plans often use swaps for purposes of portfolio rebalancing, diversification, or gaining exposure to alternative asset classes. Although these investment-related activities might be viewed as falling outside a narrow definition of "hedging or mitigating" risk, they are essential to the plan's operations. Employee benefit plans invest over long time horizons and must avoid the risks inherent in maintaining positions that are inappropriately concentrated in particular asset classes or economic sectors. As ERIC has explained, ERISA Title I plans are subject to a statutory duty to diversify their investments. Accordingly, the major participant definitions should make clear that swap positions maintained by employee benefit plans for any of these investment-related purposes fall within the exclusion.

The regulations also should make clear that the reference to swap positions maintained by an employee benefit plan also applies to swap positions maintained by any trust that holds the assets of one or more employee benefit plans. The assets of a Title I plan generally must be held in a trust.[18] Accordingly, if a Title I plan invests in swaps, it is generally the trust that owns the swaps, just as the trust owns the other assets of the employee benefit plan. The regulations should make clear that the

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participant test, is not limited to 'commercial' risk, which may be construed to mean that hedging by ERISA plans should be broadly excluded.").

[16] If the value of a pension plan's assets is less than 80% of the present value of its liabilities, the plan's ability to pay promised benefits is restricted; if the value of the plan's assets is less than 60% of the present value of its liabilities, no additional benefits may accrue. ERISA § 206(g), 29 U.S.C. § 1056(g). The present value of the plan's liabilities is materially affected by changes in interest rates.

[17] Proposed 17 C.F.R. § 1.3(ttt)(2)(i).

[18] ERISA § 403(a), 29 C.F.R. § 1103(a). If the employee benefit plan is a welfare benefit plan, such as a group health, life insurance, or disability plan, the trust often is established as a "voluntary employees' beneficiary association" ("VEBA") so that it will be tax-exempt under section 501(c)(9) of the Internal Revenue Code.

statutory exception for "positions maintained by any employee benefit plan (or any contract held by such a plan)" applies to positions held by the trust associated with the employee benefit plan.

A single trust might hold the assets of more than one employee benefit plan. For the sake of efficiency, employee benefit plans sponsored by a single employer or group of related employers often pool their assets for investment purposes in a single trust, called a "master trust." Similarly, employee benefit plans sponsored by two or more unrelated employers often pool their assets in a single trust, called a "group trust" or "collective trust." Each participating plan generally owns an undivided proportionate interest in the trust's investments, including any investment in swaps. In each case, the trusts are merely vehicles for the investment of employee benefit plan assets. Although the statutory exception refers to positions held by "any employee benefit plan" in the singular, there is no reason why the exception should not also extend to positions held by a pooled investment trust on behalf of multiple employee benefit plans. Accordingly, the regulations should make clear that the master trust's or collective trust's swap positions are eligible for the employee benefit plan exclusion.

3. ERISA Title I plans should be excluded from the second major participant test.

The second test used to identify major participants treats an entity (other than a swap dealer) as a major participant if its outstanding swaps "create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets."[19] The regulations should make clear that ERISA Title I plans are always excluded from this test because their outstanding swaps do not create this type of systemic risk.

As ERIC explained in its first comment, ERISA Title I plans are held to strict standards of fiduciary conduct that prohibit them from taking high-risk or speculative positions in swaps. The assets of ERISA Title I plans are held in trust, and the trust is an entity separate from the employer that sponsors the plan. As a result, even if the plan sponsor declares bankruptcy, the trust and its obligations (including obligations to counterparties under swap agreements) continue. There is no mechanism by which an employee benefit trust can declare bankruptcy and thus avoid its obligations to its creditors. In certain circumstances, a pension trust whose assets are substantially less than its obligation to pay benefits, and whose sponsoring employer also is in financial distress, can undergo an "involuntary" or "distress" termination in which the federal Pension Benefit Guaranty Corporation acquires its assets and assumes responsibility for its benefit obligations.[20] Even in this situation, however, the trust's contractual obligations under outstanding swaps are not extinguished, and all of the trust's assets are available to satisfy these obligations. Accordingly, an ERISA Title I plan would create counterparty exposure only if its obligations under outstanding swaps exceeded its assets; and ERISA's requirements for the prudent investment and diversification of plan assets ensure that an ERISA Title I plan will not take on swap obligations approaching this magnitude.

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[19] Dodd-Frank Act § 721(a)(16) (Commodity Exchange Act § 1a(33)(A)(ii)); *accord id.* § 761(a)(6) (Securities Exchange Act § 3(a)(67)(A)(ii)(II)) (major security-based swap participant).

[20] ERISA §§ 4041, 4042, 29 U.S.C. §§ 1341,1342.

4. ERISA Title I plans should be excluded from the third major participant test.

The third major participant test applies to "highly leveraged" financial entities that maintain a substantial position in any major swap category.[21] These entities pose a threat to the financial system because they might be unable to meet their obligations under swaps.

With the exception of employee stock ownership plans ("ESOPs"), which are permitted to borrow money from the sponsoring employer in order to buy employer stock, ERISA Title I plans rarely incur any substantial amount of debt. The strict fiduciary standards described in ERIC's first comment generally preclude ERISA Title I plans from engaging in highly-leveraged or other speculative transactions. ERISA also prohibits ERISA Title I plans other than ESOPs from obtaining loans from, or guaranteed by, the sponsoring employer or other related parties.[22] In addition, although most investment activities of employee benefit plans are tax-exempt, the income earned by debt-financed investments is taxable.[23] The tax treatment of debt-financed investments creates a substantial disincentive for ERISA Title I plans to make leveraged investments.

Because ERISA Title I plans do not maintain significant amounts of debt, the regulations should provide that they are never "highly leveraged" under the third major participant test. Entities that are subject to capital requirements established by a federal banking agency are exempt from this test. ERISA Title I plans, which are subject to strict financial constraints and federal oversight under Title I of ERISA, should also be exempt.

5. The definition of "highly leveraged," as applied to employee benefit plans, should be clarified.

If, contrary to ERIC's recommendation, the third test applies to ERISA Title I plans, the Commissions must modify the definition of "highly leveraged" so that it applies to these plans in a workable and understandable way. At present, the proposed rule defines "highly leveraged" as a ratio of an entity's total liabilities to equity (as determined in accordance with U.S. generally accepted accounting principles) in excess of a predetermined amount—the proposal suggests either 8 to 1 or 15 to 1. The entity's leverage ratio must be determined as of the close of each fiscal quarter.

Unlike other financial entities, employee benefit plans have no shareholders and therefore have no "equity" as defined by U.S. GAAP. For purposes of determining an employee benefit plan's leveraged status, the regulations should state that the ratio is determined using the value of the plan's assets rather than its "equity."

The regulations also should make clear that the value of the plan's assets may be determined as of its most recent annual valuation date. The value of an ERISA Title I plan's assets generally is determined once each year for purposes such as determining the plan's funding level and providing an annual financial report to the Department of Labor and Internal Revenue Service. Because employee benefit plans hold many assets that do not have a readily ascertainable market

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[21] The Dodd-Frank Act § 721(a)(16) (Commodity Exchange Act § 1a(33)(A)(iii)); *accord id.* § 761(a)(6) (Securities Exchange Act § 3(a)(67)(A)(ii)(III)) (major security-based swap participant).

[22] ERISA § 406(a)(1)(B), 29 U.S.C. § 1106(a)(1)(B).

[23] Internal Revenue Code §§ 511, 514.

value, determining the value of the plan's assets is an expensive and time-consuming process. The Commissions should not require plans to perform a special quarterly valuation for purposes of determining a leverage ratio, especially when, as ERIC has explained, it is extremely unlikely that an ERISA Title I plan would ever be "highly leveraged."

For purposes of determining an ERISA Title I plan's leveraged status, only its borrowings and other contractual obligations to third parties should be treated as liabilities, and not its obligation to pay benefits to plan participants and beneficiaries. All employee benefit plans have obligations to pay the retirement benefits, medical benefits, or other benefits provided under the plan. These benefit obligations often become due over very long time periods, as participants retire or reach other milestones that entitle them to benefits. Employee benefit plans that are financially sound often do not have on hand assets sufficient to pay 100% of their benefit obligations, since these obligations will not become due until many years in the future.

The fact that a plan's benefit obligations exceed its assets does not mean that the plan should be considered "highly leveraged," however. If an employee benefit plan incurs a contractual obligation to a lender, a swap counterparty, or another third party, the plan's assets are available to satisfy these contractual obligations, even if the plan will not have sufficient assets remaining to satisfy its future benefit obligations. Accordingly, the regulations should make clear that the plan's benefit obligations will not be taken into account in determining its total liabilities.

As explained above in ERIC's second comment, ERISA Title I plans often pool their assets for investment purposes in a single trust, which is either a "master trust" (if related employers sponsor the participating employee benefit plans) or a "group trust" or "collective trust" (if the sponsoring employers are not related). The employee benefit plans participating in a master trust or group trust typically own an undivided proportionate interest in any assets or liabilities of the trust, although the plans' benefit obligations are determined separately on a plan-by-plan basis. The regulations should make clear that in a case where the financial entity is a trust in which more than one employee benefit plan participates, the leverage ratio is determined for the trust rather than for each participating plan, since the relevant obligations exist at the trust level.

An ERISA Title I plan with more than 100 participants is required to file an annual report with the Department of Labor and Internal Revenue Service on IRS Form 5500. Schedule H of Form 5500 is a financial statement that shows the plan's assets and liabilities at the beginning and end of each "plan year," which is the fiscal accounting period (often a calendar year) selected for the plan. (If two or more plans participate in a single master trust or collective trust, the financial statement is also filed for the trust.) The annual financial statement shows the aggregate value of the plan's assets, and separately shows the amount of the plan's liabilities. The liabilities are presented as the plan's operating payables, acquisition indebtedness, and other liabilities: the liabilities do not include benefit obligations, with the exception of benefits currently due that have already been processed by the plan and approved for payment.

The Form 5500 (including the financial statement on Schedule H) must be audited by a qualified independent public accountant. The Form 5500 is available for review by plan participants and fiduciaries as well as by the Department of Labor and Internal Revenue Service. If the Commissions apply the third major participant test to ERISA Title I plans, ERIC recommends that the Commissions use the ratio of the plan's liabilities to its assets, as shown on the Form 5500 Schedule H most recently filed for the plan (or the corresponding ratio for the trust, if the assets of two or more plans are held in a single trust), to determine whether the plan or trust is "highly leveraged."

6. Swap positions of an employee benefit plan and the plan sponsor should not be aggregated for purposes of determining whether either is a major participant.

The first and third tests for major participant status depend, in part, on whether an entity maintains a "substantial position" in swaps; and the second test asks whether an entity's outstanding swaps create substantial counterparty exposure. ERIC agrees with the Commissions that "[t]he major participant definitions apply to the *entities* that actually 'maintain' substantial positions in swaps and security-based swaps or that have swaps or security-based swaps that create substantial counterparty exposure."[24] Accordingly, the swap positions maintained by an employee benefit plan should not be aggregated with the positions maintained by the plan sponsor or related entities for purposes of applying these tests.

An employee benefit plan and a plan sponsor are separate legal entities. They file separate financial statements, are subject to separate regulatory requirements, and have very different investment objectives and risk profiles. As a matter of law, the employer cannot guarantee or otherwise provide credit support for the swap obligations of an ERISA Title I plan, and the assets of an ERISA Title I plan cannot be used to support the swap obligations of the employer.[25]

Congress intended that the major participant definition apply separately to each entity. As the following colloquy between Senators Lincoln and Hagan demonstrates, Congress instructed the Commissions to focus on the swap positions of each legal entity:

> Mrs. HAGAN. . . . When considering whether an entity maintains a substantial position in swaps, should the CFTC and the SEC look at the aggregate positions of funds managed by asset managers or at the individual fund level?
>
> Mrs. LINCOLN. As a general rule, the CFTC and the SEC should look at each entity on an individual basis when determining its status as a major swap participant.[26]

Accordingly, the regulations should make clear that swap positions maintained by an employee benefit plan are not taken into account in determining whether the swap positions of the plan sponsor, an affiliate of the plan sponsor, or a plan fiduciary are "substantial," or whether the outstanding swaps of those entities create substantial counterparty exposure. Similarly, the swap positions of the plan sponsor, an affiliate of the plan sponsor, or a plan fiduciary should not be taken into account in determining whether the swap positions of the plan are "substantial" or create substantial counterparty exposure.

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[24] Notice, 75 Fed. Reg. at 80,201 (emphasis added).

[25] *See* ERISA § 406(a), 29 U.S.C. § 1106(a), prohibiting any extension of credit between an ERISA Title I plan and a related party, including the employer that sponsors the plan; *see also* ERISA § 403(c), 29 U.S.C. § 1103(c), providing that plan assets must be used exclusively to provide benefits to plan participants and pay reasonable administrative expenses of the plan, and may not inure to the benefit of the employer.

[26] *See* 156 Cong. Rec. S5907 (daily ed. July 15, 2010) (cited in 75 Fed. Reg. at 80,201 n.162).

ERIC appreciates the opportunity to submit these comments. If we can be of further assistance, please let us know.

Sincerely,

Mark J. Ugoretz
President & CEO