

## **Federal Register**

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The federal government requires that we send you these two documents from the **Federal Register**. They contain the request for and the granting of a prohibited transaction exemption applicable to the TIAA Real Estate Account.

[Federal Register: April 4, 1996 (Volume 61, Number 66)]

**Teachers Insurance and Annuity Association of America (TIAA), Located in New York, New York**

[Application No. D-09915]

**Proposed Exemption**

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).

**Section I--Exemption for Certain Transactions Involving the Purchase and Sale of Certain Units in a Real Estate Separate Account by TIAA**

If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply, effective October 2, 1995, to the transactions described below, if each of the conditions set forth in

Section III have been satisfied:

(a) the purchase by TIAA of certain units (the Liquidity Units), as defined in Section IV(g) below, in a real estate separate account established and operated by TIAA (the Separate Account), as defined in Section IV(1) below, in the event of net withdrawals from the Separate Account; and

(b) the sale of Liquidity Units of the Separate Account by TIAA in the event of net contributions to the Separate Account.

**Section II--Exemption for the Purchase of Liquidity Units owned by TIAA in the Separate Account In Connection with a Decrease in TIAA's Participation in the Separate Account under Certain Circumstances**

If the exemption is granted, the restrictions of section 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply, effective October 2, 1995, to: (a) the use of cash flow from the Separate Account (the Cash Flow), as defined in Section IV(d) below; (b) the use of liquid investments in the Separate Account; or (c) the use of the proceeds from the sale of certain properties (the Properties), as defined in Section IV(i) below, owned by the Separate Account, for the purpose of purchasing Liquidity Units in the Separate Account from TIAA in connection with a decrease in the participation by TIAA in the Separate Account after the trigger point (the Trigger Point), as defined in Section IV(o) below, has been reached or during the wind down period of the Separate Account (the Wind Down), as defined in Section IV(q) below, provided that the conditions set forth in Section III have been satisfied.<SUP>8

\8\ For purposes of this proposed exemption references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

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Section III--General Conditions

The exemption is conditioned upon the adherence by TIAA to the material facts and representations described in this notice of proposed exemption (the Notice) and upon satisfaction of the following requirements:

(a) The decision to elect to add the Separate Account as an additional pension funding option for employee benefit plans (the Plan or Plans), as defined in Section IV(h) below, which invest in the Separate Account has been and is made by the fiduciaries of such Plans (the Fiduciary or Fiduciaries), as defined in Section IV(e) below, or in the case of a contract between TIAA and a supplemental retirement account (SRA) or an individual retirement account (IRA), the decision to elect to add the Separate Account as an additional pension funding option to a SRA or an IRA has been and is made by the participant in such SRA or IRA, if the Fiduciaries of the Plans and the IRA and SRA participants are unrelated to TIAA and its affiliates (the Affiliates or Affiliate), as defined in Section IV(b) below;

(b) Each of the Properties in the Separate Account has been and is valued at least annually by an independent, qualified appraiser;

(c) Except as otherwise specified below in paragraph (c)(10) of this Section III, prior to investment of funds in the Separate Account by any participant in a Plan (the Participant or Participants) (and, if applicable, by any of the Plans) which participate in the Separate Account, TIAA has furnished and will furnish to the Fiduciaries of such Plans and, in the case of a contract between TIAA and a SRA or an IRA, to the participant in such SRA or IRA, the following information:

(1) a copy of the most recent prospectus for the Separate Account, the most recent quarterly and other financial reports for the Separate Account filed with the Securities and Exchange Commission (SEC), and the most recent copy of any supplemental schedule of information, publications, or ancillary materials which have been made available to Plan Sponsors or Participants invested in the Separate Account;

(2) full disclosure concerning the investment guidelines, structure, manner of operation, and administration of the Separate Account; the method of valuation applicable to accumulation units (the Accumulation Units), as defined in Section IV(a) below, and the method of valuation of the Properties, and all other assets owned by the Separate Account;

(3) a written description of potential conflicts of interest that may result from TIAA's acquisition, purchase, retention, redemption, or sale of Accumulation Units in the Separate Account;

(4) the rules and procedures for withdrawal, transfer, redemption, distribution, and payout applicable throughout the term of the Separate Account to TIAA, to individual Participants (and, if applicable, to Plans) which participate in the Separate Account;

(5) the expense and fee provisions of the Separate Account (including but not limited to a description of any services rendered by TIAA, a schedule of fees for such services, and an estimate of the amount of fees to be paid by the Separate Account annually);

(6) a list of all assets in the Separate Account, as of the end of the most recent fiscal period of the Separate Account, and a list of the Properties which the Separate Account acquired or sold within twelve months prior to the end of the most recent fiscal period of the

Separate Account;

(7) the appropriate financial statements pertaining to the Separate Account (including but not limited to the most recent audited annual report, income statement, and balance sheet on the Separate Account);

(8) copies of the most recent reports on the Separate Account, including but not limited to information relating the value of units in the Separate Account (the Units), as defined in Section IV(p) below; and the quarterly return for the Separate Account, and the most recent quarterly updates of the valuation of the Separate Account (including a list of the holdings of the Separate Account during the period);

(9) any reasonably available information which TIAA believes to be necessary, or which any fiduciary of a plan or any sponsor of a plan reasonably

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requests in order to determine whether such plan should elect to add the Separate Account as an additional pension funding option for the benefit of participants (or, if applicable, for such plan), or, in the case of a contract between TIAA and a SRA or an IRA, which the participant in such SRA or IRA reasonably requests in order to determine if he or she should elect to add the Separate Account as an additional pension funding option under such SRA or IRA contract with TIAA; and

(10) upon publication of this Notice, a copy of such Notice, as it appears in the **Federal Register**, shall be provided to the Fiduciaries of the Plans, to the sponsors of the Plans (the Plan Sponsors or Plan Sponsor), to the sponsors of any SRA, and to the participants in any TIAA IRA which have elected to add the Separate Account as an additional pension funding option and which have been or are invested in the Separate Account. If this proposed exemption is granted, the Fiduciaries of the Plans, the Plan Sponsors, the sponsors of any SRA, and the participants in any TIAA IRA which have elected to add the Separate Account as an additional pension funding option and which have been or are invested in the Separate Account shall receive upon publication of a Grant of Exemption (the Grant), a copy of such Grant, as it appears in the **Federal Register**. If subsequent to the publication of the Grant, any fiduciaries of plans, any sponsors of plans, the sponsors of any SRA, or the participants in any TIAA IRA choose to elect to add the Separate Account as an additional pension funding option to enable such plans to invest in the Separate Account, the fiduciaries of such plans, the sponsors of such plans, the sponsors of such SRA, and the participants in any such IRA shall be provided, at least thirty (30) days prior to investment in the Separate Account, with a copy of both the Notice and the Grant, as such documents appeared upon publication in the **Federal Register**.

(d) TIAA has made and will make available, within the time periods specified below in subparagraphs (1) through (4) of this paragraph (d), to the Fiduciaries of the Plans, or in the case of a contract between TIAA and a SRA or an IRA, to the participant in such SRA or IRA:

(1) information relating to the value of the Units in the Separate Account to be available daily over a toll-free telephone number and/or to be distributed in writing to Participants in the Separate Account in quarterly confirmation statements within five (5) to ten (10) days after the end of each calendar quarter;

(2) information concerning the quarterly return of the Separate Account to be available daily over a toll-free telephone number and/or to be distributed in writing to Participants in the Separate Account in

quarterly confirmation statements within five (5) to ten (10) days after the end of each calendar quarter;

(3) a prospectus for the Separate Account to be distributed annually; and

(4) any information or TIAA publication, to be distributed from time to time, which TIAA reasonably believes to be necessary or which the Fiduciaries request, or in the case of a contract between TIAA and a SRA or an IRA, which the participant in such SRA or IRA requests (including but not limited to quarterly financial reports filed with the SEC) in order to determine whether any Participant in such Plan, or participant in such SRA or IRA should buy, sell, or continue to hold the Units in the Separate Account, as defined in Section IV(p) below;

(e) An independent, qualified fiduciary (the Independent Fiduciary), as defined in Section IV(f) below, has been appointed prior to or coincident with the start of operations of the Separate Account (and is subject to renewal and removal described herein) whose responsibilities include, but are not limited to:

(1) reviewing and approving the written investment guidelines of the Separate Account as established by TIAA, and approving any changes to such investment guidelines;

(2) monitoring whether the Properties acquired by the Separate Account conform with the requirements of such investment guidelines;

(3) reviewing and approving valuation procedures for the Separate Account and approving changes in those procedures;

(4) reviewing and approving the valuation of Units in the Separate Account and the valuation of Properties held in the Separate Account, as described in the Summary of Facts and Representations in the Notice;

(5) approving the appointment of all independent, qualified appraisers retained by TIAA to perform periodic valuations of the Properties in the Separate Account;

(6) requiring appraisals in addition to those normally conducted, whenever, the Independent Fiduciary believes that the characteristics of any of the Properties have changed materially, or with respect to any of the Properties, whenever the Independent Fiduciary deems an additional appraisal to be necessary or appropriate in order to assure the correct valuation of the Separate Account;

(7) reviewing the purchases and sales of Units in the Separate Account by TIAA and the Participants (and, if applicable, by the Plans) which participate in the Separate Account to assure that the correct values of the Units and of the Separate Account are applied; reviewing the fixed repayment schedule applicable to the redemption of certain seed money units (the Seed Money Units), as defined in Section IV(k) below, as approved by the State of New York Insurance Department; reviewing any exercise of discretion by TIAA to accelerate the fixed repayment schedule applicable to the redemption of Seed Money Units; and, approving TIAA's exercise of discretion only if such acceleration would benefit the Participants in the Separate Account;

(8) after (and, if necessary, during) the Start Up Period, as defined in Section IV(m) below, determining the appropriate Trigger Point, with respect to the ongoing ownership by TIAA of Liquidity Units; establishing a method to implement any changes to the Trigger Point; adjusting the percentage which serves as the Trigger Point; approving or requiring any reduction of TIAA's interest in the Separate Account; and, approving the manner in which such reduction of TIAA's participation in the Separate Account in excess of the Trigger Point is to be effected;

(9) in the event the Trigger Point is reached, participating and

planning any program of sales of the assets of the Separate Account, which would include the selection of the Properties to be sold, the guidelines to be followed in making such sales, and the approval of such sales, if in the opinion of the Independent Fiduciary, such sales are desirable at the Trigger Point in order to reduce the ownership by TIAA of Liquidity Units in the Separate Account or to facilitate the Wind Down;

(10) supervising the operation of the Separate Account during the Wind Down of such Separate Account;

(11) during the Wind Down, planning any program of sales of the assets of the Separate Account, including the selection of the Properties to be sold, determining the guidelines to be followed in making such sales, and approving the sale of the Properties in the Separate Account, in the event of the termination of the Separate Account, if in the opinion of the Independent Fiduciary, such sales are desirable to facilitate the Wind Down; and

(12) reviewing any other transactions or matters involving the Separate Account that are submitted to the

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Independent Fiduciary by TIAA and determining whether such transactions or other matters are fair to the Separate Account and in the best interest of the Separate Account.

(f) The exemption is also subject to the condition that the following transactions involving the Separate Account have not occurred and will not occur:

(1) participation by the Independent Fiduciary, TIAA, any Affiliate of TIAA, TIAA's general account (the General Account), or any other separate account over which TIAA or its Affiliates has any investment control in any joint venture with the Separate Account, or in the ownership of the Properties of the Separate Account either alone or together with a joint venture partner;

(2) the borrowing of funds from the Separate Account by the Independent Fiduciary, TIAA, any Affiliate of TIAA, TIAA's General Account, or any other separate account over which TIAA or its Affiliates has investment control, or the lending of funds to the Separate Account by the Independent Fiduciary, TIAA, any Affiliate of TIAA, TIAA's General Account, or any other separate account over which TIAA or its Affiliates has investment control in order to leverage any purchase by the Separate Account of any of the Properties, or otherwise; and

(3) the acquisition by the Separate Account of any Properties from or the sale by the Separate Account of any Properties to the Independent Fiduciary, TIAA, any Affiliate of TIAA, TIAA's General Account, or any other separate account over which TIAA or its Affiliates has investment control.

(g) The liquidation of any Accumulation Units held by a Participant or participating Plan, for which a withdrawal request is pending, has not been and will not be delayed by reason of the redemption of Seed Money Units held by TIAA, and TIAA has advanced and will always advance funds by purchasing Liquidity Units to fund the withdrawal requests of Participants or Plans on a timely basis;

(h) TIAA must maintain for a period of six (6) years from the date of any transaction, the records necessary to enable the persons described in paragraph (i) of this Section III to determine whether the conditions of this exemption have been met. However, a prohibited transaction will not be considered to have occurred if, due to

circumstances beyond the control of TIAA and its Affiliates, the records are lost or destroyed prior to the end of the six-year period, and no parties in interest, other than TIAA or its Affiliates, shall be subject to a civil penalty that may be assessed under section 502(i) of the Act, or to taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained, or are not available for examination as required by paragraph (i) below.

(i)(1) Except as provided in subparagraph (2) of this paragraph (i) and notwithstanding any provision of subsection (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (h) of this Section III are unconditionally available at their customary location for examination during normal business hours by:

(A) Any duly authorized employee or representative of the Department of Labor or the Internal Revenue Service;

(B) Any Fiduciary of a Plan which participates in the Separate Account, or in the case of a contract between TIAA and a SRA or an IRA, any participant in such SRA or IRA, who has authority to acquire or dispose of the interests of such SRA or IRA contract, or any duly authorized employee or representative of such Fiduciary of a Plan or participant in such SRA or IRA;

(C) Any contributing employer to any Plan participating in the Separate Account, or any duly authorized employee or representative of such employer; and

(D) Any Participant or beneficiary of any Plan participating in the Separate Account, or any duly authorized employee or representative of such Participant or beneficiary.

(2) None of the persons described in subparagraphs (1)(B) through (D) of this paragraph (i) shall be authorized to examine the trade secrets of TIAA or any of its Affiliates, or any of its commercial or financial information which is privileged or confidential.

#### Section IV--Definitions

For the purpose of this exemption:

(a) ``Accumulation Units'' mean the units of interest into which equity participation in the Separate Account is divided during the accumulation phase of the annuity contracts prior to retirement by a Participant. Seed Money Units, as defined in Section IV(k) below, and Liquidity Units, as defined in Section IV(g) below, are Accumulation Units.

(b) ``Affiliate'' or ``Affiliates'' of TIAA include(s):

(1) any person directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with TIAA.

(2) any officer, director, or employee of TIAA, or of a person described in paragraph (b)(1) of Section IV, and

(3) any partnership in which TIAA is a partner.

(c) ``Control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(d) ``Cash Flow'' means: (1) the sum of: (a) income received by the Separate Account from investments (including dividends and/or interest from non-real estate investments, and net operating income, less payment of capital expenditures and changes in reserves for capital expenditures, from equity real estate investments); and (b) Participant and Plan contributions (including transfers to the Separate Account) MINUS (2) the sum of: (a) Separate Account expense charges (including investment and administrative expenses for mortality and expense

guarantees); and (b) any redemption of Seed Money Units at fair market value.

(e) ``Fiduciary'' or ``Fiduciaries'' mean(s) the individual fiduciary or fiduciaries acting on behalf of each of the Plans that invest in the Separate Account.

(f) ``Independent Fiduciary''--

(1) For purposes of this definition, an Independent Fiduciary means a person who:

(A) Is not an Affiliate of TIAA;

(B) Does not have an ownership interest in TIAA or its Affiliates;

(C) Is not a corporation or partnership in which TIAA or any of its Affiliates has an ownership interest;

(D) Is not a Fiduciary with respect to any Plan which participates in the Separate Account;

(E) Has acknowledged in writing acceptance of fiduciary responsibility; and

(F) Is either:

(i) a business organization which has at least five (5) years of experience with respect to commercial real estate investments or other appropriate experience;

(ii) a committee comprised of three to five individuals who each have had at least five (5) years of experience with respect to commercial real estate investments or other appropriate experience; or

(iii) a committee comprised both of a business organization or organizations and individuals having the qualifications described in paragraphs (f)(1)(A) through (E) of Section IV above.

(2) For the purposes of the definition of Independent Fiduciary, no organization or individual may serve as Independent Fiduciary for the Separate Account for any fiscal year, if the gross income received from TIAA or its Affiliates by such organization or

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individual (or by any partnership or corporation of which such organization or individual is an officer, director, or ten percent (10%) or more partner or shareholder) for that fiscal year exceeds five percent (5%) of its or his annual gross income from all sources for the prior fiscal year. If such organization or individual had no income for the prior fiscal year, the five percent (5%) limitation is applied with reference to the fiscal year in which such organization or individual serves as an Independent Fiduciary. The income limitation includes services rendered to the Separate Account as Independent Fiduciary, as described in this exemption.

(3) No organization or individual who is an Independent Fiduciary, and no partnership or corporation of which such organization or individual is an officer, director, or ten percent (10%) or more partner or shareholder, during the period that such organization or individual serves as an Independent Fiduciary and continuing for a period of six (6) months after such organization or individual ceases to be an Independent Fiduciary, may

(A) acquire any property from or sell any property to TIAA, its Affiliates, TIAA's General Account, or any separate account maintained by TIAA or its Affiliates, including the Separate Account;

(B) borrow any funds from, or lend any funds to TIAA, its Affiliates, TIAA's General Account, or any separate account maintained by TIAA or its Affiliates, including the Separate Account;

(C) participate in any joint venture with TIAA, its Affiliates, TIAA's General Account, or any separate account maintained by TIAA or



its Affiliates, including the Separate Account, or participate, either alone or together with a joint venture partner, in the ownership of the Properties with TIAA, its Affiliates, TIAA's General Account, or any separate account maintained by TIAA or its Affiliates, including the Separate Account; or

(D) negotiate any such transactions, described above in paragraph (f)(3) (A) through (C) of Section IV.

(4) No Fiduciary of a Plan or Plan Sponsor which participates in the Separate Account or a designee of such Fiduciary, Plan Sponsor, or Plan may serve as the Independent Fiduciary with respect to the Separate Account.

(g) ``Liquidity Units'' mean Accumulation Units, as defined in Section IV(a) above, that are purchased from Participants (or, if applicable, from the Plans who participate in the Separate Account) by TIAA's General Account, when the Cash Flow of the Separate Account, as defined above in Section IV(d), and liquid investments of the Separate Account are insufficient, in order to guarantee liquidity for such Participants (or, if applicable, for such Plans) who wish to withdraw or transfer funds from the Separate Account.

(h) ``Plan or Plans'' mean(s) an employee benefit plan or employee benefit plans (primarily participant-directed defined contribution plans, but also some defined benefit plans) qualified pursuant to sections 401(a), 403(a), 403(b), 414(d) and 457(b) of the Code, as well as any TIAA IRA and SRA, as described, respectively, under section 408 and section 403(b) of the Code, which may participate in ownerships of Units in the Separate Account and which are subject to section 406 of the Act and/or section 4975 of the Code.

(i) ``Properties'' mean the geographically dispersed retail and office buildings, light industrial facilities, and residential apartment space with good operating income (and such other Properties that may be acquired pursuant to changes in the investment guidelines for the Separate Account that are approved by the Independent Fiduciary) which TIAA has acquired on behalf of the Participants (and, if applicable, the Plans) that invest in the Separate Account.

(j) ``Seed Money'' means the total amount (not to exceed \$100 million) actually contributed by TIAA's General Account to the Separate Account for the purpose of acquiring Properties for the Separate Account. Seed Money will be applied to purchase Accumulation Units at the fair market value of those Units at the time of purchase.

(k) ``Seed Money Units'' mean the Accumulation Units, as defined in Section IV(a) above, that are issued by the Separate Account to TIAA's General Account in exchange for Seed Money, as defined above in Section IV(j), during the Start Up Period of the Separate Account.

(l) ``Separate Account'' means the real estate equity pooled separate account invested in by Participants (and, if applicable by Plans), as described herein.

(m) ``Start Up Period'' means the period during which repayment of TIAA's General Account of Seed Money, as defined in Section IV(j) above, must be made on a fixed repayment schedule as approved by the State of New York Insurance Department (NYID). In this regard, the redemption of Seed Money Units by TIAA will begin on the earlier to occur of:

(1) two (2) years from the date on which TIAA first opened the Separate Account to Participants (and, if applicable, to Plans) for paying premiums to the Separate Account, or

(2) the date on which the value of the Separate Account first reaches \$200 million. Thereafter, at least 20 percent (20%) of the

original number of Seed Money Units acquired by TIAA's General Account from the contribution of Seed Money to the Separate Account are to be redeemed on predetermined dates in each year, as established by TIAA, for a period of five (5) years (at fair market value based on the value of Accumulation Units on the date of each redemption). The exercise of any discretion by TIAA to accelerate the fixed repayment schedule applicable to the redemption of Seed Money Units is subject to the advance review and approval of the Independent Fiduciary, and any such acceleration will not be applied so as to prevent a redemption of Seed Money Units scheduled to occur on any of the predetermined dates during any year. The Start Up Period will expire when all the Seed Money Units originally acquired by TIAA's General Account from the contribution of Seed Money to the Separate Account have been redeemed by TIAA.

(n) ``TIAA Pension Plans'' mean certain defined benefit and certain defined contribution plans maintained by TIAA. Among the defined contribution plans maintained by TIAA are the TIAA Retirement Plan, which is tax-qualified under the Code, and the TIAA Tax-Deferred Annuity Plan, which is a salary reduction annuity plan, pursuant to section 403(b) of the Code. Participants in the TIAA Retirement Plan and the TIAA Tax-Deferred Annuity Plan are permitted to invest in the Separate Account.

(o) ``Trigger Point'' means the point, as established by the Independent Fiduciary, at which TIAA's participation in the Separate Account through the ownership of Liquidity Units is decreased with the approval of or as required by the Independent Fiduciary, acting on behalf of the Participants (and, if applicable, the Plans).

(p) ``Units'' mean the units of interest into which equity participation in the Separate Account is divided.

(q) ``Wind Down'' means the period which begins on the date on which TIAA notifies all Participants (and, if applicable, all Plans invested in the Separate Account) that TIAA has decided to terminate the Separate Account and concludes on the date on which no Accumulation Units are held

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by Participants (or, if applicable, by Plans).

Effective Date: If the proposed exemption is granted, the exemption will be effective, as of October 2, 1995, the date the Separate Account was first opened to Participants and Plans for investment.

### **Summary of Facts and Representations**

1. TIAA, a non-profit stock life insurance company, was founded on March 18, 1918, by the Carnegie Foundation for the Advancement of Teaching. TIAA offers traditional annuities, which guarantee principal and a specified rate of interest while providing the opportunity for the crediting of additional amounts. TIAA also offers life insurance, long-term disability insurance, and long-term care insurance.

TIAA is organized as a corporation under the laws of the State of New York. All of the stock of TIAA is held by the TIAA Board of Overseers, a non-profit New York corporation. The TIAA Board of Overseers generally monitors TIAA's affairs to assure that TIAA is meeting its Charter purpose. The Board of Overseers do not directly supervise the management of TIAA, but they do elect members of the Board of Trustees of TIAA, which does exercise such supervision. The Board of Trustees consists of twenty (20) members, three of whom are employees of TIAA.

TIAA is the companion organization of the College Retirement Equities Fund (CREF). CREF is a non-profit membership corporation established under the laws of the State of New York in 1952. CREF is registered with the SEC as an investment company under the Investment Company Act of 1940. CREF typically offers to Plans individual annuity contracts with a variety of investment funds. In this regard, CREF currently offers seven (7) investment funds, namely, a stock fund, a money market fund, a bond fund, a social choice fund, a global equities fund, an equity index fund, and a growth fund.

As of December 31, 1993, TIAA had approximately \$67 billion in assets. As of the same date, the combined assets of TIAA and CREF totalled approximately \$128 billion. In 1993, TIAA's General Account contained \$7 billion in real estate investments.

2. It is represented that TIAA and CREF together form the principal retirement annuity funding system for education and research communities in the United States. In this regard, TIAA and CREF serve approximately 1.8 million individuals who are employed at approximately 5,500 educational and research institutions. Typically, TIAA and CREF issue individual annuity contracts (and occasionally group annuity contracts) in order to provide funding for pension plans which are sponsored by these educational institutions for their employees.

It is represented that the Plans involved in the proposed transactions are participant directed defined contribution plans, as described in section 401(a), 403(a), 403(b), 414(d) and 457(b) of the Code, as well as any TIAA IRA and SRA, as described, respectively, under section 408 and section 403(b) of the Code. In addition, participants in certain TIAA Pension Plans, as defined in Section IV(n) above, are permitted to invest in the Separate Account.<sup>9</sup> Further, it is represented that less than fifty (50) defined benefit pension plans may also be involved in the proposed transactions.

\9\ It is represented that any acquisition of Units in the Separate Account by plans sponsored by TIAA will not violate section 406(a) or 406(b) of the Act by reason of the statutory exemption contained in section 408(b)(5) of the Act. The Department is offering no view, herein, as to whether the acquisition by any plans sponsored by TIAA of Units in the Separate Account is covered by the statutory exemption provided in section 408(b)(5) of the Act.

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3. TIAA anticipates that almost all of the educational institutions participating in the TIAA annuity funding system are interested in adding a real estate separate account as an endorsed enhancement to individual annuity contracts. For this reason, TIAA established the Separate Account in which certain Plans covered by the Act and their participants and beneficiaries have invested and will invest.<sup>10</sup>

\10\ TIAA has represented its understanding that this proposed exemption, if granted, will apply only to those Plans that are subject to section 406 of the Act and/or section 4975 of the Code.

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4. The Separate Account is an open-end commingled equity real estate separate account which invests eligible retirement plan assets primarily in equity real estate, and other real estate related investments, including marketable securities. It is represented that

the Separate Account has not invested and will not invest in loans and leases to, or securities issued by, TIAA or its Affiliates. The Separate Account is a separate account, as defined in section (3)(17) of the Act, and was established and is operated in accordance with section 4240 of the New York Insurance law. Units in the Separate Account are registered with the SEC under the Securities Act of 1933. It is represented that TIAA operates the Separate Account so that it is not subject to registration as an investment company under the Investment Company Act of 1940.

TIAA provides investment management services to the Separate Account. As investment manager to the Separate Account, TIAA is a fiduciary, within the meaning of section 3(21)(A) of the Act, with respect to the assets of the Plans held in the Separate Account, and therefore, qualifies as a party in interest, pursuant to section 3(14)(A) of the Act, with respect to the Plans which participate in the Separate Account.

\11\ It is represented that TIAA receives fees for serving as investment manager of the Separate Account. In this regard, TIAA anticipates that the total investment management fees to Participants (and, if applicable, to Plans) which invest in the Separate Account will be in the range of from 50 to 75 basis points. It is represented that the overall expenses charged for the Separate Account will not exceed a maximum of 250 basis points. No other fees or charges are made or will be made, except for operating expenses and taxes that are net of gross income for a specific Property. TIAA maintains that statutory exemptions, pursuant of sections 408(b)(2) or 408(b)(5) of the Act, are available to provide relief for the fees received by TIAA with respect to the management of the Separate Account. The Department is offering no view, herein, as to whether the receipt of fees from the Separate Account by TIAA is covered by the statutory exemptions provided in sections 408(b)(2) or 408(b)(5) of the Act, nor is the Department providing any relief herein with respect to such fees charged by TIAA to the Separate Account.

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5. TIAA proposes to operate the Separate Account with a sufficiently diverse portfolio of Properties to offer to investing Participants (and, if applicable, to investing Plans). In this regard, it is anticipated that the Properties acquired by the Separate Account will be geographically dispersed retail and office buildings, light industrial facilities, and residential apartment space with good operating income. In order to acquire such Properties, TIAA believes that the Separate Account required an initial contribution of \$100 million in Seed Money.

Accordingly, on July 3, 1995, TIAA contributed \$100 million in Seed Money in a lump sum to the Separate Account from its General Account. In return for the contribution of Seed Money, TIAA received from the Separate Account, Seed Money Units representing 100% of the value of the Separate Account at the time of the contribution. Thereafter, TIAA proposes to redeem Seed Money Units under a fixed repayment schedule, subject to the approval of the NYID. In the opinion of TIAA, this approach would permit the Separate Account flexibility to acquire equity real estate investments, thereby enhancing the ability of the Separate Account to generate greater returns sooner for Participants (and, if applicable, for Plans).

It is represented that the NYID has approved the redemption by TIAA of its Seed Money Units to begin on the earlier to occur of: (i) two years from the date (i.e. October 2, 1995) on which TIAA first opened the Separate Account to Participants (and, if applicable, to Plans) for paying premiums to the Separate Account, or (ii) the date on which the value of the Separate Account first reaches \$200 million. Thereafter, it is represented that at least 20 percent (20%) of the original number of Seed Money Units acquired by TIAA's General Account from the contribution of the Seed Money to the Separate Account will be redeemed on predetermined dates in each year, as established by TIAA, for a period of five (5) years. In this regard, it is represented that TIAA will select twelve dates each year (i.e. the fifteenth day of each calendar month, or if such date is not a business day, then the next following day on which TIAA is open for business) on which it will redeem one-twelfth of the number of Seed Money Units to be redeemed in that calendar year in order to satisfy the requirement that at least 20 percent (20%) of its Seed Money Units is redeemed annually.<SUP>12

\12\ TIAA believes that the analysis contained in Advisory Opinion 83-38A (July 22, 1983) is applicable to TIAA's transfer of the Seed Money to the Separate Account, and to the Separate Account's redemption of Seed Money Units from TIAA which were acquired when TIAA contributed the Seed Money to the Separate Account. This opinion held that seed money allocated to separate accounts by an insurance company in order to aid in the start-up and management of those accounts would not be treated as assets of the plans which invested in the separate accounts, and that the redemption by the insurance company of participation units in the separate accounts would not constitute a violation of the prohibited transaction provisions of the Act, solely by reason of the transfer of seed money from the separate accounts to the insurance company's general account. In this regard, TIAA maintains that similar transfers of Seed Money between its Separate Account and its General Account do not violate section 406(a)(1) (A) and (D) or section 406 (b)(1) and (b)(2) of the Act. The Department is offering no relief, herein, for the transfer of the Seed Money into the Separate Account or the redemption by the Separate Account of TIAA's Seed Money Units acquired with the Seed Money, as above described. The Department notes that Advisory Opinion 83-38A did not address the situation involving the redemption of units of the separate account by the insurance company, when, at the same time, there were outstanding requests for withdrawal or transfer by participants (or, if applicable, plans) invested in the separate account.

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Notwithstanding the fixed repayment schedule, described above, TIAA has discretion to accelerate the redemption of Seed Money Units, but represents that it will exercise such discretion, subject to the advance review and approval of the Independent Fiduciary, and only if such exercise would be in the best interest of the Participants invested in the Separate Account. It is further represented that any such acceleration will not be applied so as to prevent a redemption of Seed Money Units scheduled to occur on any of the predetermined dates during any year.

TIAA proposes to redeem the Seed Money Units at the fair market value of such Units on the date of each redemption. TIAA believes that

the redemption by the General Account of TIAA's Seed Money Units at the fair market value of such units on the date redeemed is equitable and appropriate from the standpoint of both the General Account and the Separate Account. In this regard, it is represented that New York Insurance law requires TIAA to invest General Account assets in a prudent fashion. Further, TIAA maintains that Seed Money, as part of the General Account, must be invested for the benefit of those who depend upon the assets of the General Account to support their contractual obligations. Accordingly, in the opinion of TIAA, the General Account must share in both the upside and downside risks resulting from its investment of the Seed Money in the Separate Account.

TIAA represents that cash to redeem its Seed Money Units at fair market value will be obtained from the following sources: (a) Cash Flow from the Separate Account; (b) liquid investments in the Separate Account; or (c) the proceeds from the sale of Properties held by the Separate Account. TIAA believes this method of redemption of TIAA's Seed Money Units will allow the Separate Account to purchase additional Properties even during the time when the Seed Money initially contributed by TIAA is being repaid. In the opinion of TIAA, the creation of a more substantial, more diverse real estate portfolio in the Separate Account benefits Participants (and, if applicable, Plans) which invest in the Separate Account by achieving greater investment returns.

6. In accordance with the provisions of the Separate Account, each Participant (and, if applicable, each Plan) that invests in the Separate Account is entitled to withdraw or transfer funds from the Separate Account at the current daily fair market value of the Units of the Separate Account pursuant to the valuation methodology described below. Payouts to individual Participants are made in accordance with any limitations on the timing and frequency of such payouts which may be imposed under applicable Plan provisions.

In order to ensure that Participants (and, if applicable, Plans) may withdraw or transfer amounts from the Separate Account at any time, TIAA proposes to guarantee the liquidity of the Separate Account. In this regard, TIAA will provide a ``safety net'' or ``back-up'' liquidity feature to the Separate Account whenever certain sources of funds in the Separate Account are insufficient to satisfy all of the requests for withdrawal or for transfer from the Separate Account. In this regard, it is represented that in satisfying withdrawal or transfer requests from Participants (and, if applicable, from Plans), the Separate Account first relies on Cash flow, as defined in Section IV(d).

If the Cash Flow of the Separate Account is not sufficient to fund such requests, then TIAA looks to the liquid investments in the Separate Account. It is represented that generally the liquid investments of the Separate Account are expected to represent from 10 to 25 percent (10%-25%) of the assets of the Separate Account and to include Treasury bonds and notes, corporate bonds, money market instruments, collateralized mortgage obligations, shares of real estate investment trusts, and other real estate related companies. Finally, if the Cash Flow and liquid investments of the Separate Account are insufficient, TIAA represents that it will purchase a sufficient number of Liquidity Units, as defined in Section IV(g), from the Separate Account to fund the request for withdrawal or transfer from an exiting Participant (or, if applicable, from an exiting Plan).

TIAA recognizes that, through potential purchases of Liquidity

Units, it may retain an unanticipated level of ownership in the Separate Account. As a result of such purchases, TIAA's interest in the Separate Account may at any time increase beyond a predetermined percentage (i.e. the Trigger Point, as defined in Section IV(o)) of the total value of the Accumulation Units of the Separate Account, as defined in Section IV(a). In the event of such an increase beyond the Trigger Point through the purchase of Liquidity Units by TIAA from the Separate Account, TIAA proposes to reduce its holding of Liquidity Units by selling such Liquidity Units to the Separate Account. In this regard, cash to purchase Liquidity Units is obtained from the following sources: (a) Cash Flow from the Separate Account; (b) liquid investments in the Separate Account; or (c) the proceeds from the sale of Properties held by the Separate Account.

7. TIAA retains the authority to terminate the Separate Account and wind down the operation of the Separate Account. It is represented that

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the Wind Down will begin when TIAA informs the Participants (and, if applicable, the Plans) which participate in the Separate Account of its intention to terminate the Separate Account, and will conclude on the date on which no Units are held by any of the Participants or Plans which participate in the Separate Account. Such notification of the intent to terminate the Separate Account must be provided in writing by TIAA at least one year in advance of the termination of the Separate Account to Participants (and, if applicable, Plans) at their last known addresses in TIAA's business records. It is represented, that for one year prior to its termination, the Separate Account will continue to operate and honor withdrawal requests from Participants (and, if applicable, Plans). However, no new contributions or transfers from Participants (and, if applicable, from Plans) will be permitted into the Separate Account during that one-year period.

TIAA has provided rules for the redemption of Units during the Wind Down by Participants (and, if applicable, by Plans) which must be approved by the Independent Fiduciary prior to becoming effective. It is represented that once such rules are approved, TIAA has no discretion regarding their application. Under the rules applicable to Participants, there is no limitation on the amount of withdrawals during Wind Down. With respect to any Plan funded with a TIAA deposit administration type group annuity contract, the redemption of Accumulation Units is tied to the size of such Plan's interest in the Separate Account. If the value of the Accumulation Units held by such a Plan is equal to or less than \$1 million on the effective date of the termination of the Separate Account, the entire interest of the Plan will be redeemed. If the value of the Accumulation Units held by such Plan exceeds \$1 million on the effective date of the termination of the Separate Account, the distribution of the value of the Accumulation Units of that Plan will occur pro rata (with other similarly situated Plans) over no longer than a twelve (12) month period. It is further represented that any Participant (and, if applicable, any Plan) may elect to defer the redemption of Accumulation Units until all Properties in the Separate Account are sold. It is represented that upon termination and liquidation of the Separate Account, any Accumulation Units held by TIAA will be the last Units redeemed, unless the Independent Fiduciary directs otherwise.

8. In the absence of an exemption, under the circumstances described above, the transactions which may be deemed to violate the prohibited transactions provisions of the Act include: (a) the purchase

of Liquidity Units by TIAA to provide liquidity to the Participants (and, if applicable, to the Plans) which participate in the Separate Account in the event of net withdrawals; (b) the purchase of Liquidity Units by the Separate Account from TIAA in the event of net contributions to the Separate Account; and (c) the use of Cash Flow and liquid investments in the Separate Account and proceeds from the sale of Properties owned by the Separate Account in order to generate cash to purchase TIAA's Liquidity Units after the Trigger Point has been exceeded or during the Wind Down Period. In addition, because cash is transferred indirectly between the General Account and the Separate Account, in connection with contributions, withdrawals, and transfers of Units, such acquisitions or dispositions theoretically could be viewed as an indirect transfer or use of plan assets between TIAA and the Plans and their Participants. TIAA believes that the methods of reducing TIAA's ownership in the Separate Account to a percentage equal to or below the Trigger Point and the process of increasing and decreasing TIAA's interest in the Separate Account through the purchase or sale of Liquidity Units, involve transactions between the General Account and the Separate Account which may constitute prohibited transactions. Accordingly, TIAA requests exemptive relief from sections 406(a), 406(b)(1) and 406(b)(2) of the Act for the subject transactions.

9. TIAA believes that the requested exemption is in the best interest of Participants (and, if applicable, Plans) who participate in the Separate Account. The establishment and operation of the Separate Account permits Participants in the TIAA-CREF annuity funding system to take advantage of valuable investment opportunities available in real estate. In this regard, it is represented that Participants (and, if applicable, Plans) in the Separate Account are better able to diversify risk in a mixed asset pension portfolio. Moreover, the Separate Account is designed to permit unlimited withdrawal and transfer flexibility. This structure makes it possible for Participants (and, if applicable, Plans) to invest in real estate which is by nature too illiquid to permit rapid withdrawals and transfers. In this regard, TIAA represents that under no circumstances will the liquidation of any Accumulation Units held by a Participant or participating Plan, for which a withdrawal request is pending, be delayed by reason of the redemption of Seed Money Units held by TIAA. It is represented that TIAA will always advance funds by purchasing Liquidity Units to fund withdrawal requests from Participants or Plans on a timely basis.

10. TIAA has adopted a number of safeguards intended to fully protect the interests of Participants (and, if applicable, Plans) which invest in the Separate Account. In this regard, the Independent Fiduciary approves and monitors nearly all material transactions that occur during the establishment, operation, and Wind Down of the Separate Account. In addition, other procedures have been adopted to ensure that appropriate valuations and appraisals are made of the Units and of the assets in the Separate Account. Moreover, TIAA is required to provide disclosures to participants and to plans that contemplate investing in the Separate Account and is required to provide Participants, Plan Fiduciaries, and Plan Sponsors access to certain information about the Separate Account on a continuing basis.

One such safeguard is the specified valuation rules and procedures which TIAA and the Independent Fiduciary use in the operation of the Separate Account. In this regard, it is represented that on the day the Separate Account was established, the initial value of each of the Accumulation Units in the Separate Account was set at \$100. Thereafter,



the value of one Accumulation Unit equals the total value of the net assets of the Separate Account divided by the number of outstanding Accumulation Units in the Separate Account. It is represented that as of October 2, 1995, when the Separate Account was opened for investment by Participants (and, if applicable, Plans), the value of a Unit was \$101.25.

In order to calculate the value of an Accumulation Unit, each of the Properties held in the Separate Account is valued at its initial price. Thereafter, each of the Properties is valued annually (the Annual Appraisals) by an independent, qualified appraiser. TIAA is responsible for designating one or more independent appraisers, subject to the approval of the Independent Fiduciary, to perform such Annual Appraisals.

It is represented that the Annual Appraisals are conducted during an assigned valuation month for each Property. Each assigned valuation month is chosen with the intent to schedule the independent appraisals in as even a pattern as is practical over the course of a calendar year. It is represented that the Independent

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Fiduciary is involved in the assignment of each valuation month and any alternative thereto.

It is represented that procedures are in place to obtain independent appraisals of the Properties and to ensure the integrity of the valuation of the assets of the Separate Account. In this regard, it is represented that the portfolio manager of the Separate Account has no contact with the independent appraisers of the Properties. Instead, asset managers for the Separate Account, who are responsible for the leasing strategy and capital improvement program for each of the Properties and for oversight of the performance of third-party property managers, convey information about the Properties to the independent appraisers. In addition, TIAA's appraisal group, which reports directly to the Senior Vice President of TIAA's Mortgage & Real Estate Division, is responsible for communicating with the independent appraisers on an ongoing basis, and for reviewing draft appraisals in order to recommend corrections of misinformation and obvious errors, such as mathematical calculations.

It is represented that the independent appraisers have the final authority in the preparation of the Annual Appraisals. In this regard, in preparing the Annual Appraisals of the Properties in the Separate Account, the independent appraiser(s) take into account appropriate valuation methodologies which may include replacement cost, comparable costs, comparable sales, discounted cash flow, current and projected occupancy levels, market conditions, and the condition of the Property where appropriate. The cost of the Annual Appraisals, and any other appraisals as necessary, are reflected in the investment management fee charged to the Separate Account. Once prepared, it is represented that the Independent Fiduciary receives copies of the Annual Appraisals which are subject to the Independent Fiduciary's review and approval.

The Annual Appraisals, as approved by the Independent Fiduciary, are updated at least once every three (3) months by the staff of TIAA (the Quarterly Updates) and will be updated more frequently should events occur which have an impact on the value of any Property. TIAA takes into consideration the current rate of interest and inflation, occupancy levels, cash flow, regional and local market conditions, and other relevant factors, including such other appraisal tools and methodologies as in TIAA's judgment are deemed reasonable, prudent, and

appropriate. It is represented that the Quarterly Updates are subject to approval by the Independent Fiduciary and are effective as of the quarterly anniversary of the Annual Appraisals. If at any time between Quarterly Updates or between Quarterly Updates and the Annual Appraisals, an event occurs which impacts the value of any of the Properties, TIAA will review such impact on value. It is represented that the Independent Fiduciary receives copies of the internal appraisals for review and any change in the value of a Property is subject to the approval of the Independent Fiduciary. In addition, the Independent Fiduciary has the authority to require an independent appraisal whenever necessary. In that circumstance, the Independent Fiduciary would select such independent appraiser, who would be deemed approved by TIAA, if TIAA does not object within fourteen (14) days thereof. If TIAA does not object to the Independent Fiduciary's choice, then the independent appraiser will be retained to perform the appraisal. If TIAA objects to the Independent Fiduciary choice, the Independent Fiduciary will choose another independent appraiser. Further, the Independent Fiduciary is authorized to select the appropriate value in the event any appraisals of Properties performed by TIAA conflict with those prepared by independent third party appraisers or a conflict arises between different appraisals each of which was prepared by an independent appraiser.

In addition to updating and reviewing the values of the Properties, TIAA calculates daily accruals (the Daily Accruals) for the recognition of income and expenses of the Properties in the Separate Account. It is represented that such Daily Accruals are based on the projected net monthly operating income or loss for each of the Properties divided by the number of days in the month. The projected net monthly operating income or loss for each of the Properties is based on occupancy and rental information, anticipated expenses and other information. In this regard, it is represented that the Daily Accruals are modified as actual performance is determined and projected amounts change. The Independent Fiduciary is responsible for reviewing and approving the methodology to calculate such Daily Accruals and for monitoring the recurring calculation of such Daily Accruals. The Independent Fiduciary's duties also include observing the methodology and analyzing the calculations employed by TIAA in arriving at the Unit value set by the Daily Accruals and by the ongoing monthly reviews of the value of the Properties.

It is represented that all of the valuation procedures utilized by TIAA regarding the value of Properties in the Separate Account, as well as any other investments in the Separate Account, are subject to the monitoring and approval of the Independent Fiduciary. In this regard, non-real estate assets of the Separate Account are generally liquid investments. For public market securities, TIAA calculates the value of the assets as of the close of every valuation day. It is represented that TIAA generally uses market quotations or independent pricing services to value securities and other investments of the Separate Account. If market quotations or independent pricing services are not readily available, and for ``non-public market assets'' (e.g., mortgages), TIAA uses the fair market value of such assets, as determined in good faith by TIAA. It is represented that as of February 29, 1996, there are no ``non-public market assets'' in the Separate Account. In this regard, TIAA represents that while there is no maximum percentage limitation on the amount of ``non-public market assets,'' TIAA does not anticipate that the Separate Account will invest in a significant percentage of such assets.

It is represented that TIAA's valuations are subject to examination every five (5) years by the New York State Insurance Department. Further, the Separate Account is audited periodically by TIAA's internal auditor and annually by an independent outside auditor, currently the firm of Deloitte & Touche LLP (Deloitte). As part of its audit, Deloitte examines samples of valuations performed by TIAA, including valuations of assets for which there is no readily ascertainable market value. In addition, Deloitte is responsible for determining whether the valuation methods used by TIAA are in accordance with generally accepted accounting principles.

It is represented that TIAA will not alter its valuation methodology without the approval of the Independent Fiduciary and that all valuations of investments of the Separate Account are subject to review and approval by the Independent Fiduciary. Further, without the prior approval of the Independent Fiduciary, TIAA is not permitted to alter any valuation, which results in an increase or decrease of: (a) more than 6 percent (6%) of the value of any of the Properties in the Separate Account since the last independent Annual Appraisal; or (b) more than 2 percent (2%) of the value of the Separate Account since the prior month; or (c) more than 4 percent (4%) in the

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value of the Separate Account within any calendar quarter. In addition to these percentage limitations, it is represented that any adjustments to the value of the Properties which are made by TIAA during the first three (3) months after receipt of an Annual Appraisal prepared by an independent, qualified appraiser, are subject to the review and approval of the Independent Fiduciary.

11. It is represented that the proposed exemption is feasible in that it imposes no continuing administrative burden on the Department, because the Independent Fiduciary is responsible for monitoring and approving all significant transactions relating to the establishment and operation of the Separate Account. In this regard, among other things, the Independent Fiduciary must review and approve prior to adoption, the investment guidelines of the Separate Account established by TIAA under which the day-to-day investments of the Separate Account are made. Thereafter, the Independent Fiduciary is responsible for approving any changes to such investment guidelines. Further, it is the duty of the Independent Fiduciary to monitor whether the Properties acquired by the Separate Account conform to the requirements of such investment guidelines.

Prior to adoption by TIAA, the Independent Fiduciary must review and approve the valuation procedures of the Separate Account. In this regard, the Independent Fiduciary, among other things, is responsible for overseeing the methodology used in establishing the value of the Units, monitoring the calculation of Daily Accruals and the procedures for valuing the Properties and other assets of the Separate Account, and assigning the valuation month for each of the Properties. Further, any changes to the existing valuation procedures of the Separate Account are also subject to review and approval by the Independent Fiduciary.

The Independent Fiduciary must oversee the quality of the appraisal functions performed by TIAA and by outside independent, qualified appraisers with respect to the valuation of the Properties in the Separate Account. In this regard, the appointment of all the independent appraisers retained by TIAA to perform periodic valuation of the Properties in the Separate Account must first be reviewed and

approved by the Independent Fiduciary. Further, the Independent Fiduciary is responsible for approving the list of appraisers submitted by TIAA, and is authorized to remove any names of appraisers from such list.

The Independent Fiduciary is responsible for reviewing and approving the valuation of the Units in the Separate Account and the value of the Properties held in the Separate Account. In this regard, the Independent Fiduciary is authorized to conduct visits to the Properties. The Independent Fiduciary has discretion to adjust the valuation of the Properties at any time. Whenever the Independent Fiduciary believes that the characteristics of any of the Properties have changed materially, or with respect to any of the Properties, whenever it deems an additional appraisal to be necessary or appropriate in order to assure the correct valuation of the Separate Account, the Independent Fiduciary has discretion to require appraisals in addition to those normally conducted. TIAA is not permitted to alter the valuation of any Property or the Separate Account beyond the limits, described in paragraph ten above, without first obtaining the prior approval of the Independent Fiduciary. The opinion of the Independent Fiduciary on the value of any Property controls in the event of a conflict.

As described earlier in this proposed exemption, TIAA received from the Separate Account Seed Money Units upon contribution of the Seed Money to the Separate Account from its General Account, and subsequently intends to redeem such Seed Money Units under a fixed repayment schedule. It is represented that such fixed repayment schedule in addition to being subject to the approval of the NYID is also subject to review and approval by the Independent Fiduciary. Further, the Independent Fiduciary is responsible for reviewing any exercise of discretion by TIAA to accelerate the fixed repayment schedule applicable to the redemption of Seed Money Units, and approving TIAA's exercise of discretion only if such acceleration would benefit the Participants in the Separate Account.

The Independent Fiduciary must monitor and oversee the liquidity guarantee feature of the Separate Account, as described herein, if, during or after the Start Up Period, the Cash Flow or liquid investments of the Separate Account are insufficient to fund requests for withdrawal by Participants (and, if applicable, by Plans). In this regard, the Independent Fiduciary is responsible for reviewing the purchase and sale of Units by TIAA and the Participants (and, if applicable, the Plans) that are withdrawing from the Separate Account, in order to assure that the correct values of Units and of the Separate Account are applied.

As noted earlier, it is intended that TIAA's interest in the Separate Account will not exceed a certain percentage of the Separate Account established by the Independent Fiduciary as a Trigger Point. In this regard, it is represented that the Independent Fiduciary is responsible for determining the appropriate percentage to serve as the Trigger Point. Further, the Independent Fiduciary must determine whether or not to impose a Trigger Point during or after the Start Up Period with respect to TIAA's ongoing ownership of Liquidity Units in the Separate Account, or whether to impose different Trigger Points during or after the Start Up Period. With respect to TIAA's ongoing ownership of Liquidity Units, both during and after the Start Up Period, the duties of the Independent Fiduciary include: (a) establishing a method to implement any changes to the Trigger Point; (b) adjusting the percentage which serves as the Trigger Point; (c)

approving or requiring any adjustment of TIAA's ownership interest in the Separate Account in the form of Liquidity Units; and (d) approving the manner in which TIAA' participation in the Separate Account in excess of the Trigger Point is effected.

In the event the Trigger Point is reached, during or after the Start Up Period, the Independent Fiduciary is authorized to sell assets of the Separate Account, if in the opinion of the Independent Fiduciary such sales are desirable at the Trigger Point to reduce TIAA's ownership of Liquidity Units in the Separate Account. In this regard, the Independent Fiduciary is responsible for: (a) participating in the planning of any program of sales of the assets of the Separate Account, including the selection of Properties to be sold; (b) approving the order which causes the sale of any of the Properties; (c) establishing the guidelines to be allowed in making such sales; and (d) approving of such sales. It is represented that the opinion of the Independent Fiduciary controls in any conflict with TIAA over the sale of any of the Properties, and that the Independent Fiduciary is authorized to request appraisals upon the sale of any of the Properties in the Separate Account.

In addition to overseeing the redemption of Seed Money Units, controlling the Trigger Point, and managing the liquidity feature offered by TIAA's General Account to the Separate Account, the Independent Fiduciary is responsible for the activity of the Separate Account in the event of

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its termination and during the subsequent liquidation of its assets. During the Wind Down, the Independent Fiduciary must supervise the operation of the Separate Account. It is represented that in the event of termination of the Separate Account, the Independent Fiduciary is responsible for approving all sales of Properties in the Separate Account, and will do so, only if in the opinion of the Independent Fiduciary such sales are desirable to facilitate the Wind Down. In this regard, the Independent Fiduciary must review any program of sales of the assets of the Separate Account, including the selection of Properties to be sold, and the guidelines to be followed in making such sales. It is represented that the Independent Fiduciary also is responsible for approving the order in which the Properties are sold, approving the price for such Properties, and determining the timing of the disposition of such Properties.

It is represented that in addition to performing the duties described herein, the Independent Fiduciary, acting on behalf of Participants (and, if applicable, Plans) invested in the Separate Account, is responsible for reviewing any other transactions or matters involving the Separate Account that are submitted to the Independent Fiduciary by TIAA, and determining whether such transactions are fair to the Separate Account and in the best interest of such account. In order to fulfill all of its duties, it is represented that the Independent Fiduciaries is responsible for developing formats for periodic reports of information on the Separate Account to be provided by TIAA.

12. The Independent Fiduciary must be qualified to act on behalf of the Plans with respect to this proposed exemption. In this regard, the Independent Fiduciary must be an established firm with substantial expertise in real estate matters, such as the acquisition, management, investment valuation, financing, and disposition of real estate.

Such Independent Fiduciary appointed for the Separate Account must

be independent of TIAA or its Affiliates. In this regard, the Independent Fiduciary cannot have an ownership interest in TIAA or its Affiliates, and cannot be a fiduciary with respect to any of the Plans that participate in the Separate Account. Further, the Independent Fiduciary may not receive from TIAA or its Affiliates more than 5 percent (5%) of such Independent Fiduciary's annual gross income from all sources, including amounts received for services rendered to the Separate Account during its term as Independent Fiduciary. The Independent Fiduciary must also agree that during its term as Independent Fiduciary (and for six (6) months after the conclusion of its term as Independent Fiduciary), it will not: (a) acquire property from, sell any property to, borrow money from, or lend money to TIAA, its Affiliates, TIAA's General Account, or any separate account over which TIAA or its Affiliates have any investment control, including the Separate Account; (b) participate in any joint venture with TIAA, its Affiliates, TIAA's General Account, or any separate account maintained by TIAA or its Affiliates, including the Separate Account, or participate, either alone or together with a joint venture partner, in the ownership of the Properties with TIAA, its Affiliates, TIAA's General Account, or any separate account maintained by TIAA or its Affiliates, including the Separate Account; or (c) negotiate any such transactions.

It is represented that TIAA has the discretion to appoint the Independent Fiduciary. The Board of Trustees of TIAA established on December 19, 1995, a special subcommittee (the Subcommittee) of the Mortgage Committee. The Mortgage Committee is one of several standing committees of the Board of Trustees of TIAA which traditionally has been responsible for supervising the investment of funds of TIAA's General Account in real estate mortgages and real estate. The Subcommittee is composed exclusively of trustees who are independent outside members of the Mortgage Committee. In this regard, it is represented that the Subcommittee consists of five (5) individuals at least two (2) of which are employees of institutions participating in the TIAA annuity funding system and three (3) of which are otherwise independent of TIAA.

It is represented that TIAA has contractually bound itself to rely solely on the judgment of the Subcommittee with respect to the removal of the Independent Fiduciary ``with'' or ``without cause,'' under the terms of the Agreement between TIAA and the current Independent Fiduciary. It is represented that the current Independent Fiduciary, was appointed for an initial term of five (5) years and thereafter may be reappointed for successive terms of three (3) years each. It is represented that the Subcommittee may remove the Independent Fiduciary, ``without cause,'' only at the expiration of the initial 5-year term or at the expiration of any successive 3-year term. In this regard, the Independent Fiduciary is subject to removal ``with'' or ``without cause,'' if a majority of the Subcommittee members (i.e. three of the five members) vote in favor of such removal, following receipt by the Subcommittee of a report on the Independent Fiduciary's activities respecting the Separate Account.

It is represented that the Board of Trustees has delegated to the Subcommittee alone the power to renew the Independent Fiduciary agreement. In this regard, any agreement with the Independent Fiduciary will not be renewed, if 40 percent (40%) of the Subcommittee members (i.e. two of the five members) disapprove of such renewal.

In the event the Independent Fiduciary is removed or the agreement with Independent Fiduciary is not renewed, it is represented that the

Board of Trustees of TIAA will delegate to the Subcommittee the authority to select and appoint any successor Independent Fiduciary for the Separate Account. In this regard, it is represented that any successor Independent Fiduciary will perform all of the duties of Independent Fiduciary and comply with all of the conditions, as described herein.

The Independent Fiduciary may resign upon providing TIAA with 180 days' advance written notice of such resignation. In the event of resignation, it is represented that the Board of Trustees of TIAA will delegate to the Subcommittee the authority to select and appoint any successor Independent Fiduciary for the Separate Account, who will perform all of the duties of Independent Fiduciary and comply with all of the conditions, as described herein.

Prior to investing in the Separate Account, it is represented that each prospective participant (and, if applicable, each fiduciary of prospective participating plans) has been and will be provided with information regarding the role of the Independent Fiduciary with respect to the Separate Account and has been and will be advised of the identity of the party appointed to serve as the Independent Fiduciary. In this regard, a decision by a Fiduciary or Plan Sponsor or by a participant in a SRA or IRA to elect to add the Separate Account as an additional pension funding option and to participate in the Separate Account, after full disclosure by TIAA, constitutes approval and acceptance by such Fiduciary or Plan Sponsor or such participant in a SRA or IRA of such Independent Fiduciary.

Further, it is represented that in the event the Independent Fiduciary were to change, TIAA would within thirty (30) days of such change supplement the prospectus of the Separate Account

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and distribute such prospectus to participating institutions and to participants who express an interest in the Separate Account or who transfer money into the Separate Account.

13. As of May 17, 1995, TIAA appointed Institutional Property Consultants, Inc. (IPC) to serve as the Independent Fiduciary on behalf of the Separate Account. Thereafter, TIAA and IPC entered into an agreement (the Agreement) for a term of five (5) years which describes the conditions of such appointment and the duties performed by each party in accordance with the requirements of the Act. It is represented that on June 9, 1995, IPC accepted and executed the Agreement.

IPC is a sub-Chapter S Corporation, 100% owned by its senior professionals, which provides professional real estate counseling services nationwide. In this regard, it is represented that IPC maintains a principal office in San Diego, California, and a secondary office in Hudson, Wisconsin. It is further represented that IPC is a Registered Investment Advisor under the Investment Advisors Act of 1940 and qualifies as a Women Business Enterprise.

IPC provides services for business, financial, and non-profit institutions. In this regard, IPC clients are tax-exempt institutions, including public pension funds, corporate funds, Taft Hartley funds, and retirement funds. It is represented that the total plan assets of the IPC client group are approximately \$250 billion, with real estate investments comprising \$12 billion. Of IPC's corporate and Taft Hartley clients, approximately 10 percent (10%), calculated on the basis of total plan assets, are subject to the Act.

It is represented that IPC has considerable background, qualifications, and expertise in order to perform Independent Fiduciary

services for the Separate Account. In this regard, IPC has represented to TIAA that it has at least five (5) years of experience with respect to commercial real estate investments.

It is represented that IPC is independent of TIAA and its Affiliates. In this regard, it is represented that gross income received by IPC (or by any partnership or corporation of which IPC is a 10 percent (10%) or more partner or shareholder) from TIAA and its Affiliates for any fiscal year ending during the term of the Agreement does not exceed 5 percent (5%) of its annual gross income from all sources for the preceding fiscal years. Such income limitation includes the fees for services rendered to the Separate Account by IPC for serving as the Independent Fiduciary.

It is represented that IPC has acknowledged in writing that it has assumed responsibility, as a fiduciary under the Act, with regard to the Separate Account, particularly on behalf of the Participants (and, if applicable, the Plans) who participate in the Separate Account. It is represented that IPC has undertaken to perform for the exclusive benefit for the individual Participants in the Plans and their beneficiaries the duties of the Independent fiduciary, as described in TIAA's Application for a Prohibited Transaction Exemption and in subsequent supplemental information submitted by TIAA, and as described herein.

On September 13, 1995, IPC provided the Department with a report on its activities to date with respect to the Separate Account. As of that date, IPC reported that the Separate Account was in its Start-Up Period, no Properties had been acquired by the Separate Account, and no Units had been issued to the public. Nevertheless, subsequent to its appointment as Independent Fiduciary, it is represented that TIAA furnished IPC with detailed information on the expected operation of the Separate Account. Further, IPC has engaged in numerous discussions with the senior TIAA real estate staff involved in establishing and managing the Separate Account. In this regard, IPC represents that to date, it has reviewed and approved the investment guidelines established by TIAA for the Separate Account and that TIAA and IPC are currently working out specific procedures to ensure the flow, on a weekly and monthly basis, of all the information, including real estate valuations, that IPC deems necessary to fulfill its fiduciary obligation to the Separate Account.

With respect to valuation, IPC has reviewed, and approved the valuation procedures of the Separate Account. In this regard, IPC represents that it understands the need for independence in the valuation structure and has maintained an independent position with respect to TIAA and its staff. Because no Properties had, as of September 13, 1995, been acquired by the Separate Account, no independent appraisers had been appointed. IPC has been provided with a list of appraisers that TIAA intends to use for valuation purposes, and IPC has approved such list. In carrying out its responsibility as Independent Fiduciary once Properties are acquired by the Separate Account, IPC will oversee the appraisal function conducted by TIAA and by outside independent appraisers and will, if it deems necessary, conduct surprise visits of Separate Account Properties. Further, IPC has authority to require an independent appraisal whenever it deems it necessary to do so. While TIAA would hire the independent appraiser in that circumstance, such independent appraiser would initially be chosen by IPC and will be deemed approved, if TIAA does not object within fourteen (14) days thereof.

IPC expects that the structuring of the relationship between TIAA,



as investment manager, and IPC, as Independent Fiduciary, protects against the manipulation of the Separate Account by TIAA. Further, IPC represented that it will maintain a written record of its monitoring of appraisals and valuation of Properties acquired by the Separate Account. In this regard, IPC believes that the monitoring process is protective of the interests of Participants (and, if applicable, of Plans) in the Separate Account.

14. It is represented that during the operation of the Separate Account, no member of the Board of Trustees of TIAA or of CREF has had or will have a role in the selection of the Separate Account as a funding vehicle for any of the Plans or has served or will serve as a Fiduciary to any Plan participating in TIAA investment funding options. In this regard, Fiduciaries of the Plans unrelated to TIAA, or in the case of a SRA or an IRA, participants unrelated to TIAA who participate in such SRA or IRA, have made and will make the decision to invest in the Separate Account.<SUP>13

\13\ TIAA has not requested and the Department is not proposing, herein, any relief for the selection of the Separate Account as a funding vehicle for any of the Plans for which TIAA or CREF issue annuity contracts.

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Before making the decision to invest in the Separate Account, TIAA is required to make certain disclosures to prospective investors in the Separate Account. Such disclosures include the information described above in Section III(c) of this proposed exemption. TIAA proposes to meet these disclosure obligations, by distributing a prospectus of the Separate Account, under the Securities Act of 1933. It is represented that the prospectus contains, among other things, a list of all the Properties in the Separate Account and their values, detailed audited financial information, and information about the operation and investment objectives of the Separate Account. Specifically, TIAA represents that prior to the investment in the Separate Account by any Participants (and, if applicable, by

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any Plans), it has furnished and will furnish, either in a prospectus of the Separate Account or in ancillary materials, the disclosures, as required pursuant to Section III(c) of this proposed exemption, to any participant who expresses an interest in the Separate Account, all Plan Sponsors and Fiduciaries of Plans which participate in the Separate Account, and in the case of a contract between TIAA and a SRA or an IRA, to the participant in such SRA or IRA. In the event a Participant transfers money to the Separate Account before receiving a prospectus, it is represented that such a prospectus is sent to him concurrently with the required confirmation statement.

With respect to disclosure on an on-going basis to Fiduciaries of the Plans or in the case of a contract between TIAA and an SRA or an IRA, to the participant in such SRA or IRA, it is represented that TIAA under the Securities Act of 1933 is required to update information set forth in the prospectus on an annual basis. In addition, the prospectus is updated as the Separate Account acquires or sells Properties; provided such acquisition or sale has a material impact on the Separate Account. It is represented that each Participant and all of the Plan Sponsors have received and will receive annually an updated prospectus

and such updated information has and will become part of the prospectus sent to potential investors in the Separate Account.

The Separate Account is required to file quarterly and other financial reports with the SEC, pursuant to the Securities and Exchange Act of 1934. It is represented that these reports are available directly from the SEC. In addition, TIAA represents that it includes, either as part of these financial reports filed with the SEC, or as a supplemental schedule, a list of the Properties in the Separate Account and their market values. It is represented that TIAA has made and will make such quarterly and other financial reports, including the supplemental schedule, available to Plan Sponsors and Participants in the Separate Account upon request.

It is represented that TIAA has sent and will send to Participants written information relating to the value of the Units in the Separate Account and information on the quarterly return for the Separate Account in quarterly confirmation statements which are mailed within five (5) to ten (10) days after the end of a calendar quarter. Further, TIAA has published and will publish in a TIAA publication, which is provided at least quarterly to all Plan Sponsors and Fiduciaries of the Plans, a written notice that the quarterly financial reports (including the list of Properties and their current values) are available on request. It is represented that TIAA intends to establish an 800 number telephone system that allows Fiduciaries and Participants access 24 hours per day every day to information about the current market value of the Units in the Separate Account. Starting with the quarter ending December 31, 1995, it is represented that the 800 number telephone system will also include a quarterly valuation update on the investment performance of the Separate Account. It is represented that once established TIAA will publish the 800 telephone number in its quarterly publication in order to enable Plan Sponsors and Fiduciaries of the Plan to easily get prompt delivery of quarterly financial reports upon request.

In addition, upon publication of this Notice and, if this proposed exemption is granted, upon publication of the Grant, a copy of such Notice and such Grant, as each appears in the **Federal Register**, will be provided to the Fiduciaries of the Plans, to Plan Sponsors, to the sponsors of any SRA, and to participants in any TIAA IRA which were invested in the Separate Account and have withdrawn or are at the time invested in the Separate Account. Further, if subsequent to the publication of the Grant, any fiduciaries of plans, plan sponsors, the sponsors of any SRA, or the participants in any TIAA IRA chose to elect to add the Separate Account as an additional pension funding option to enable such participants (or, if applicable plans) to invest in the Separate Account, the fiduciaries of such plans, plan sponsors, the sponsors of such SRA, or the participants in any such IRA will be provided, at least thirty (30) days prior to investment in the Separate Account, with a copy of both the Notice and the Grant, as such documents appeared upon publication in the **Federal Register**.

15. In summary, TIAA, the applicant, represents that the proposed transactions meet the statutory criteria of section 408(a) of the Act because:

(a) The decision to elect to add the Separate Account as an additional pension funding option for the Plans which invest in the Separate Account has been and is made by the Fiduciaries of such Plans or in the case of a contract between TIAA and a SRA or an IRA, the decision to elect to add the Separate Account as an additional pension funding option to a SRA or and IRA has been and is made by the

participant in such SRA or IRA;

(b) Each of the Properties in the Separate Account is valued at least annually by an independent, qualified appraiser;

(c) Prior to the investment of funds in the Separate Account by any Participants (and, if applicable, by any of the Plans) which participate in the Separate Account, TIAA has furnished and will furnish certain disclosures to the Fiduciaries of such Plans and, in the case of a contract between TIAA and a SRA or an IRA, to the participant in such SRA or IRA;

(d) TIAA periodically has made and will make available information which TIAA reasonably believes to be necessary or which the Fiduciaries of the Plans, or in the case of a contract between TIAA and a SRA or an IRA, which the participant in such SRA or IRA may reasonably request in order to determine whether any Participant in such Plan, or participant in such SRA or IRA should buy, sell, or continue to hold Units in the Separate Account;

(e) the Independent Fiduciary was appointed prior to or coincident with the start of operations of the Separate Account (and is subject to renewal and removal described herein) and is responsible, among other things, for reviewing and approving the value of the Units and the assets of the Separate Account, establishing the Trigger Point, and supervising the operation of the Separate Account during the Wind Down of such Separate Account;

(f) Neither the Independent Fiduciary, TIAA, any Affiliate of TIAA, TIAA's General Account, nor any other separate account over which TIAA or its Affiliates has any investment control:

(i) has participated or will participate in any joint venture with the Separate Account, or in the ownership of the Properties of the Separate Account either alone or together with a joint venture partner;

(ii) has borrowed or will borrow any funds from the Separate Account or has lent or will lend any funds to the Separate Account in order to leverage any purchase of any of the Properties, or otherwise; or

(iii) has acquired or will acquire any Properties from or has sold or will sell any Properties to the Separate Account;

(g) The liquidation of any Accumulation Units held by a Participant or participating Plan, for which a withdrawal request is pending, has not been and will not be delayed by reason of the redemption of Seed Money Units held by TIAA, and TIAA has advanced and will always advance funds by purchasing Liquidity Units to fund Participants' or Plans' withdrawal requests on a timely basis; and

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(h) TIAA will maintain for a period of six (6) years from the date of any transaction, the records necessary to enable certain persons to determine whether the conditions of this exemption have been met.

#### **Notice to Interested Persons**

Those persons who may be interested in the pendency of the requested exemption include, but are not limited to, the Fiduciaries of the Plans which have in the past invested, are invested, and may invest in the Separate Account, the individual Participants in such Plans, and in the case of a contract between TIAA and an IRA or SRA, to the participants in any such IRA or SRA which have in the past invested, are invested, and may invest in the Separate Account. Because of the

large number of potentially interested parties and because TIAA does not know which participants (or, if applicable, which plans) may choose from time to time in the future to invest in the Separate Account, TIAA maintains that it is not possible to provide a separate copy of the Notice to each participant (or, if applicable, to each plan) which therefore may be affected by the requested exemption. Accordingly, the Department has determined that the only practical form of providing notice to interested persons is the distribution by TIAA of a copy of the Notice, as published in the **Federal Register**, together with a supplemental statement, in the form set forth in the Department's regulations under 29 CFR 2570.43(b)(2), to the Fiduciaries of any Plans, to the Plan Sponsors, to the sponsors of any SRA, and to the participants any TIAA IRA which have in the past or are invested in the Separate Account at the time the Notice is published in the Federal Register. Distribution of the Notice will be effected by first-class mail, postage prepaid, within fifteen (15) days of the date of publication of the Notice in the **Federal Register**.

Further, if this proposed exemption is granted, the Fiduciaries of the Plans, the Plan Sponsors, the sponsors of any SRA, and the participants in any TIAA IRA which have elected to add the Separate Account as an additional pension funding option and which have been or are invested in the Separate Account shall receive upon publication of the Grant, a copy of such Grant, as it appears in the **Federal Register**. If subsequent to the publication of the Grant, any fiduciaries of plans, the sponsors of plans, the sponsors of any SRA, or the participants in any TIAA IRA choose to elect to add the Separate Account as an additional pension funding option to enable such plans to invest in the Separate Account, the fiduciaries of such plans, the sponsors of such plans, the sponsors of such SRA, and the participants in any such IRA shall be provided, at least thirty (30) days prior to investment in the Separate Account, with a copy of both the Notice and the Grant, as such documents appeared upon publication in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Angelena C. Le Blanc of the Department, telephone (202) 219-8883 (This is not a toll-free number.)

[Federal Register: October 17, 1996 (Volume 61, Number 202)]

[Prohibited Transaction Exemption 96-76; Exemption Application No. D-09915, et al.]

**Grant of Individual Exemptions; Teachers Insurance and Annuity**

**AGENCY:** Pension and Welfare Benefits Administration, Labor.

**ACTION:** Grant of individual exemptions.

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**SUMMARY:** This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Notices were published in the **Federal Register** of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, D.C. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of proposed exemption were issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

**Statutory Findings**

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

- (a) The exemptions are administratively feasible;
- (b) They are in the interests of the plans and their participants and beneficiaries; and
- (c) They are protective of the rights of the participants and beneficiaries of the plans.

**Teachers Insurance and Annuity Association of America (TIAA) Located in New York, New York**

[Prohibited Transaction Exemption 96-76 Exemption Application No. D-09915]

**Exemption**

**Section I--Exemption for Certain Transactions Involving the Purchase and Sale of Certain Units in a Real Estate Separate Account by TIAA**

The restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply, effective October 2, 1995, to the transactions described below, if each of the conditions set forth in Section III have been satisfied:

(a) The purchase by TIAA of certain units (the Liquidity Units), as defined in Section IV(g) below, in a real estate separate account established and operated by TIAA (the Separate Account), as defined in Section IV(l) below, in the event of net withdrawals from the Separate Account; and

(b) The sale of Liquidity Units of the Separate Account by TIAA in the event of net contributions to the Separate Account.

**Section II--Exemption for the Purchase of Liquidity Units Owned by TIAA in the Separate Account in Connection With a Decrease in TIAA's Participation in the Separate Account Under Certain Circumstances**

The restrictions of section 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply, effective October 2, 1995, to: (a) The use of cash flow from the Separate Account (the Cash Flow), as defined in Section IV(d) below; (b) the use of liquid investments in the Separate Account; or (c) the use of the proceeds from the sale of certain properties (the Properties), as defined in Section IV(i) below, owned by the Separate Account, for the purpose of purchasing Liquidity Units in the Separate Account from TIAA in connection with a decrease in the participation by TIAA in the Separate Account after the trigger point (the Trigger Point), as defined in Section IV(o) below, has been reached or during the wind down period of the Separate Account (the Wind Down), as defined in Section IV(q) below, provided that the conditions set forth in Section III have been satisfied.\*

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\* For purposes of this exemption references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

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**Section III--General Conditions**

This exemption is conditioned upon the adherence by TIAA to the material facts and representations described in the notice of proposed exemption (the Notice) and upon satisfaction of the following requirements:

(a) The decision to elect to add the Separate Account as an additional pension funding option for employee benefit plans (the Plan or Plans), as defined in Section IV(h) below, which invest in the Separate Account has been and is made by the fiduciaries of such Plans (the Fiduciary or Fiduciaries), as defined in Section IV(e) below, or in the case of a TIAA supplemental retirement annuity contract (SRA) or a TIAA individual retirement annuity contract (IRA), the decision to elect to add the Separate Account as an additional pension funding

option to a TIAA SRA or a TIAA IRA, has been and is made by the participant in such TIAA SRA or TIAA IRA, if the Fiduciaries of the Plans, and the TIAA SRA and TIAA IRA participants are unrelated to TIAA and its affiliates (the Affiliates or Affiliate), as defined in Section IV(b) below (other than the fiduciaries of any TIAA Pension Plans, as defined in Section IV(n) below);

(b) Each of the Properties in the Separate Account has been and is valued at least annually by an independent, qualified appraiser;

(c) Except as otherwise specified below in paragraph (c)(10) of this Section III, prior to investment of funds in the Separate Account by any participants in a Plan (the Participant or Participants) (and, if applicable, by any of the Plans) which participate in the Separate Account, TIAA has furnished and will furnish to the Fiduciaries of such Plans, to the sponsors of any TIAA SRA, and to the participants in any TIAA IRA, the following information:

(1) A copy of the most recent prospectus for the Separate Account;

(2) Full disclosure concerning the investment guidelines, structure, manner of operation, and administration of the Separate Account; the method of

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valuation applicable to accumulation units (the Accumulation Units), as defined in Section IV(a) below, and the method of valuation of the Properties, and all other assets owned by the Separate Account;

(3) A written description of potential conflicts of interest that may result from TIAA's acquisition, purchase, retention, redemption, or sale of Accumulation Units in the Separate Account;

(4) The rules and procedures for withdrawal, transfer, redemption, distribution, and payout applicable throughout the term of the Separate Account to TIAA, to individual Participants (and, if applicable, to Plans) which participate in the Separate Account;

(5) The expense and fee provisions of the Separate Account (including but not limited to a description of any services rendered by TIAA, a schedule of fees for such services, and an estimate of the amount of fees to be paid by the Separate Account annually);

(6) A list of all assets in the Separate Account, as of the end of the most recent fiscal period of the Separate Account, and a list of the Properties which the Separate Account acquired or sold within twelve months prior to the end of the most recent fiscal period of the Separate Account;

(7) The appropriate financial statements pertaining to the Separate Account (including but not limited to the most recent audited annual report, income statement, and balance sheet on the Separate Account);

(8) The toll-free telephone number by which information relating to the value of the units in the Separate Account (the Units) and information concerning the quarterly return of the Separate Account is made available daily;

(9) Any reasonably available information (including but not limited to, a copy of the most recent quarterly and other financial reports for the Separate Account filed with the Securities and Exchange Commission (SEC), and the most recent copy of any supplemental schedules of information, publications, or ancillary materials which have been made available to the Fiduciaries of the Plans or to the sponsors of the plans (the Plan Sponsor or the Plan Sponsors) or to Participants invested in the Separate Account) which TIAA believes to be necessary, or which any fiduciary of a plan or any sponsor of a plan reasonably

requests in order to determine whether such plan should elect to add the Separate Account as an additional pension funding option for the benefit of participants (or, if applicable, for such plan), or, in the case of a TIAA SRA or a TIAA IRA, which the participant in such TIAA SRA or TIAA IRA reasonably requests in order to determine if he or she should elect to add the Separate Account as an additional pension funding option under such SRA or IRA contract with TIAA; and

(10) A copy of the Notice, as it appeared in the **Federal Register**, has been provided to the Fiduciaries of the Plans, to the sponsors of the Plans, to the sponsors of any TIAA SRA, and to the participants in any TIAA IRA which prior to or after the publication of the Notice elected to add the Separate Account as an additional pension funding option. In addition, a copy of the granted exemption (the Grant), as it appeared in the **Federal Register**, is provided to the Fiduciaries of the Plans, to the sponsors of the Plans, to the sponsors of any TIAA SRA, and to the participants in any TIAA IRA which are invested in the Separate Account at the time of the publication of the Grant. If subsequent to the publication of the Grant, any fiduciaries of plans, any sponsors of plans, the sponsors of any SRA, or the participants in any TIAA IRA choose to elect to add the Separate Account as an additional pension funding option to enable such plans to invest in the Separate Account, the fiduciaries of such plans, the sponsors of such plans, the sponsors of such SRA, and the participants in any such IRA shall be provided, prior to investment in the Separate Account, with a copy of both the Notice and the Grant, as such documents appeared upon publication in the **Federal Register**.

(d) TIAA has made and will make available, within the time periods specified below in subparagraphs (1) through (5) of this paragraph (d), to the Fiduciaries of the Plans, or in the case of a TIAA SRA or a TIAA IRA, to the participant in such SRA or IRA:

(1) Information relating to the value of the Units in the Separate Account to be available daily over a toll-free telephone number and/or to be distributed in writing to Participants (or, if applicable, to the Plans) in the Separate Account in quarterly confirmation statements within five (5) to ten (10) days after the end of each calendar quarter;

(2) Information concerning the quarterly return of the Separate Account to be available daily over a toll-free telephone number and/or to be distributed in writing to Participants (or, if applicable, to the Plans) in the Separate Account in quarterly confirmation statements within five (5) to ten (10) days after the end of each calendar quarter;

(3) A prospectus for the Separate Account to be distributed annually;

(4) Any information or TIAA publication, to be distributed from time to time, which TIAA reasonably believes to be necessary or which the Fiduciaries request, or in the case of a TIAA SRA or a TIAA IRA, which the participant in such SRA or IRA requests (including but not limited to quarterly financial reports filed with the SEC) in order to determine whether any Participant in such Plan, or participant in such SRA or IRA should buy, sell, or continue to hold the Units in the Separate Account, as defined in Section IV(p) below; and

(5) A written notification that quarterly financial reports (including the list of Properties and their current values) are available upon request and a written disclosure of the toll-free telephone number by which Plan Fiduciaries and Plan Sponsors may request delivery of such quarterly financial reports will be provided



by TIAA in a publication sent to all Plan Fiduciaries and all Plan Sponsors of the Plans, beginning after the end of the first calendar quarter after the Grant is published in the **Federal Register** and continuing at least quarterly thereafter.

(e) An independent, qualified fiduciary (the Independent Fiduciary), as defined in Section IV(f) below, has been appointed prior to or coincident with the start of operations of the Separate Account (and is subject to renewal and removal described herein) whose responsibilities include, but are not limited to:

(1) Reviewing and approving the written investment guidelines of the Separate Account as established by TIAA, and approving any changes to such investment guidelines;

(2) Monitoring whether the Properties acquired by the Separate Account conform with the requirements of such investment guidelines;

(3) Reviewing and approving valuation procedures for the Separate Account and approving changes in those procedures;

(4) Reviewing and approving the valuation of Units in the Separate Account and the valuation of Properties held in the Separate Account, as described in the Summary of Facts and Representations in the Notice;

(5) Approving the appointment of all independent, qualified appraisers retained by TIAA to perform periodic valuations of the Properties in the Separate Account;

(6) Requiring appraisals in addition to those normally conducted, whenever, the Independent Fiduciary believes that the characteristics of any of the Properties have changed materially, or with respect to any of the Properties,

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whenever the Independent Fiduciary deems an additional appraisal to be necessary or appropriate in order to assure the correct valuation of the Separate Account;

(7) Reviewing the purchases and sales of Units in the Separate Account by TIAA and the Participants (and, if applicable, by the Plans) which participate in the Separate Account to assure that the correct values of the Units and of the Separate Account are applied; reviewing the fixed repayment schedule applicable to the redemption of certain seed money units (the Seed Money Units), as defined in Section IV(k) below, as approved by the State of New York Insurance Department; reviewing any exercise of discretion by TIAA to accelerate the fixed repayment schedule applicable to the redemption of Seed Money Units; and, approving TIAA's exercise of discretion only if such acceleration would benefit the Participants in the Separate Account;

(8) After (and, if necessary, during) the start up period (the Start Up Period), as defined in Section IV(m) below, determining the appropriate Trigger Point, with respect to the ongoing ownership by TIAA of Liquidity Units; establishing a method to implement any changes to the Trigger Point; adjusting the percentage which serves as the Trigger Point; approving or requiring any reduction of TIAA's interest in the Separate Account; and, approving the manner in which such reduction of TIAA's participation in the Separate Account in excess of the Trigger Point is to be effected;

(9) In the event the Trigger Point is reached, participating in and planning any program of sales of the assets of the Separate Account, which would include the selection of the Properties to be sold, the guidelines to be followed in making such sales, and the approval of such sales, if in the opinion of the Independent Fiduciary, such sales

are desirable at the Trigger Point in order to reduce the ownership by TIAA of Liquidity Units in the Separate Account or to facilitate the Wind Down;

(10) Supervising the operation of the Separate Account during the Wind Down of such Separate Account;

(11) During the Wind Down, planning any program of sales of the assets of the Separate Account, including the selection of the Properties to be sold, determining the guidelines to be followed in making such sales, and approving the sale of the Properties in the Separate Account, in the event of the termination of the Separate Account, if in the opinion of the Independent Fiduciary, such sales are desirable to facilitate the Wind Down; and

(12) Reviewing any other transactions or matters involving the Separate Account that are submitted to the Independent Fiduciary by TIAA and determining whether such transactions or other matters are fair to the Separate Account and in the best interest of the Separate Account.

(f) The exemption is also subject to the condition that the following transactions involving the Separate Account have not occurred and will not occur:

(1) Participation by the Independent Fiduciary, TIAA, any Affiliate of TIAA, TIAA's general account (the General Account), or any other separate account over which TIAA or its Affiliates has any investment control in any joint venture with the Separate Account, or in the ownership of the Properties of the Separate Account either alone or together with a joint venture partner;

(2) The borrowing of funds from the Separate Account by the Independent Fiduciary, TIAA, any Affiliate of TIAA, TIAA's General Account, or any other separate account over which TIAA or its Affiliates has investment control, or the lending of funds to the Separate Account by the Independent Fiduciary, TIAA, any Affiliate of TIAA, TIAA's General Account, or any other separate account over which TIAA or its Affiliates has investment control in order to leverage any purchase by the Separate Account of any of the Properties, or otherwise; and

(3) The acquisition by the Separate Account of any Properties from or the sale by the Separate Account of any Properties to the Independent Fiduciary, TIAA, any Affiliate of TIAA, TIAA's General Account, or any other separate account over which TIAA or its Affiliates has investment control.

(g) The liquidation of any Accumulation Units held by a Participant or participating Plan, for which a withdrawal request is pending, has not been and will not be delayed by reason of the redemption of Seed Money Units held by TIAA, and TIAA will always advance funds by purchasing Liquidity Units to fund the withdrawal requests of Participants or Plans on a timely basis;

(h) TIAA must maintain for a period of six (6) years from the date of any transaction, the records necessary to enable the persons described in paragraph (i) of this Section III to determine whether the conditions of this exemption have been met. However, a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of TIAA and its Affiliates, the records are lost or destroyed prior to the end of the six-year period, and no parties in interest, other than TIAA or its Affiliates, shall be subject to a civil penalty that may be assessed under section 502(i) of the Act, or to taxes imposed by section 4975 (a) and (b) of the Code, if the records are not maintained, or are not available for examination

as required by paragraph (i) below.

(i)(1) Except as provided in subparagraph (2) of this paragraph (i) and notwithstanding any provision of subsection (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (h) of this Section III are unconditionally available at their customary location for examination during normal business hours by:

(A) Any duly authorized employee or representative of the Department of Labor (The Department) or the Internal Revenue Service;

(B) Any Fiduciary of a Plan which participates in the Separate Account, or in the case of a TIAA SRA or a TIAA IRA, any participant in such SRA or IRA, who has authority to acquire or dispose of the interests of such SRA or IRA contract, or any duly authorized employee or representative of such Fiduciary of a Plan or participant in such SRA or IRA;

(C) Any contributing employer to any Plan participating in the Separate Account, or any duly authorized employee or representative of such employer; and

(D) Any Participant or beneficiary of any Plan participating in the Separate Account, or any duly authorized employee or representative of such Participant or beneficiary.

(2) None of the persons described in subparagraphs (1) (B) through (D) of this paragraph (i) shall be authorized to examine the trade secrets of TIAA or any of its Affiliates, or any of its commercial or financial information which is privileged or confidential.

#### Section IV--Definitions

For the purpose of this exemption:

(a) ``Accumulation Units'' mean the units of interest into which equity participation in the Separate Account is divided during the accumulation phase of the annuity contracts prior to retirement by a Participant. Seed Money Units, as defined in Section IV(k) below, and Liquidity Units, as defined in Section IV(g) below, are Accumulation Units.

(b) ``Affiliate'' or ``Affiliates'' of TIAA include(s):

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with TIAA.

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(2) Any officer, director, or employee of TIAA, or of a person described in paragraph (b)(1) of Section IV, and

(3) Any partnership in which TIAA is a partner.

(c) ``Control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(d) ``Cash Flow'' means: (1) The sum of: (a) Income received by the Separate Account from investments (including dividends and/or interest from non-real estate investments, and net operating income, less payment of capital expenditures and changes in reserves for capital expenditures, from equity real estate investments); and (b) Participant and Plan contributions (including transfers to the Separate Account) MINUS (2) the sum of: (a) Separate Account expense charges (including investment and administrative expenses for mortality and expense guarantees); and (b) any redemption of Seed Money Units at fair market value.

(e) ``Fiduciary'' or ``Fiduciaries'' mean(s) the individual fiduciary or fiduciaries acting on behalf of each of the Plans that invest in the Separate Account.

(f) ``Independent Fiduciary''--

(1) For purposes of this definition, an Independent Fiduciary means a person who:

(A) Is not an Affiliate of TIAA;

(B) Does not have an ownership interest in TIAA or its Affiliates;

(C) Is not a corporation or partnership in which TIAA or any of its Affiliates has an ownership interest;

(D) Is not a Fiduciary with respect to any Plan which participates in the Separate Account;

(E) Has acknowledged in writing acceptance of fiduciary responsibility; and

(F) Is either:

(i) A business organization which has at least five (5) years of experience with respect to commercial real estate investments or other appropriate experience;

(ii) A committee comprised of three to five individuals who each have had at least five (5) years of experience with respect to commercial real estate investments or other appropriate experience; or

(iii) A committee comprised both of a business organization or organizations and individuals having the qualifications described in paragraphs (f)(1) (A) through (E) of Section IV above.

(2) For the purposes of the definition of Independent Fiduciary, no organization or individual may serve as Independent Fiduciary for the Separate Account for any fiscal year, if the gross income received from TIAA or its Affiliates by such organization or individual (or by any partnership or corporation of which such organization or individual is an officer, director, or 10 percent (10%) or more partner or shareholder) for that fiscal year exceeds 5 percent (5%) of its or his annual gross income from all sources for the prior fiscal year. If such organization or individual had no income for the prior fiscal year, the 5 percent (5%) limitation is applied with reference to the fiscal year in which such organization or individual serves as an Independent Fiduciary. The income limitation includes services rendered to the Separate Account as Independent Fiduciary, as described in this exemption.

(3) No organization or individual who is an Independent Fiduciary, and no partnership or corporation of which such organization or individual is an officer, director, or 10 percent (10%) or more partner or shareholder, during the period that such organization or individual serves as an Independent Fiduciary and continuing for a period of six (6) months after such organization or individual ceases to be an Independent Fiduciary, may

(A) Acquire any property from or sell any property to TIAA, its Affiliates, TIAA's General Account, or any separate account maintained by TIAA or its Affiliates, including the Separate Account;

(B) Borrow any funds from, or lend any funds to TIAA, its Affiliates, TIAA's General Account, or any separate account maintained by TIAA or its Affiliates, including the Separate Account;

(C) Participate in any joint venture with TIAA, its Affiliates, TIAA's General Account, or any separate account maintained by TIAA or its Affiliates, including the Separate Account, or participate, either alone or together with a joint venture partner, in the ownership of the Properties with TIAA, its Affiliates, TIAA's General Account, or any separate account maintained by TIAA or its Affiliates, including the Separate Account; or

(D) Negotiate any such transactions, described above in paragraph (f)(3) (A) through (C) of Section IV.

(4) No Fiduciary of a Plan or Plan Sponsor which participates in the Separate Account or a designee of such Fiduciary, Plan Sponsor, or Plan may serve as the Independent Fiduciary with respect to the Separate Account.

(g) ``Liquidity Units'' mean Accumulation Units, as defined in Section IV(a) above, that are purchased from Participants (or, if applicable, from the Plans) who participate in the Separate Account by TIAA's General Account, when the Cash Flow of the Separate Account, as defined above in Section IV(d), and liquid investments of the Separate Account are insufficient, in order to guarantee liquidity for such Participants (or, if applicable, for such Plans) who wish to withdraw or transfer funds from the Separate Account.

(h) ``Plan or Plans'' mean(s) an employee benefit plan or employee benefit plans (primarily participant-directed defined contribution plans, but also some defined benefit plans), qualified pursuant to sections 401(a), 403(a), 403(b), 414(d) and 457(b) of the Code, as well as any TIAA IRA and TIAA SRA, as described, respectively, under section 408 and section 403(b) of the Code, which may participate in ownerships of Units in the Separate Account and which are subject to section 406 of the Act and/or section 4975 of the Code.

(i) ``Properties'' mean the geographically dispersed retail and office buildings, light industrial facilities, and residential apartment space with good operating income (and such other Properties that may be acquired pursuant to changes in the investment guidelines for the Separate Account that are approved by the Independent Fiduciary) which TIAA has acquired on behalf of the Participants (and, if applicable, the Plans) that invest in the Separate Account.

(j) ``Seed Money'' means the total amount (not to exceed \$100 million) actually contributed by TIAA's General Account to the Separate Account for the purpose of acquiring Properties for the Separate Account. Seed Money will be applied to purchase Accumulation Units at the fair market value of those Units at the time of purchase.

(k) ``Seed Money Units'' mean the Accumulation Units, as defined in Section IV(a) above, that are issued by the Separate Account to TIAA's General Account in exchange for Seed Money, as defined above in Section IV(j), during the Start Up Period of the Separate Account.

(l) ``Separate Account'' means the real estate equity pooled separate account invested in by Participants (and, if applicable by Plans), as described herein.

(m) ``Start Up Period'' means the period during which repayment of TIAA's General Account of Seed Money, as defined in Section IV(j) above, must be made on a fixed repayment schedule as approved by the State of New York

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Insurance Department (NYID). In this regard, the redemption of Seed Money Units by TIAA will begin on the earlier to occur of:

(1) Two (2) years from the date on which TIAA first opened the Separate Account to Participants (and, if applicable, to Plans) for paying premiums to the Separate Account, or

(2) The date on which the value of the Separate Account first reaches \$200 million. Thereafter, at least 20 percent (20%) of the original number of Seed Money Units acquired by TIAA's General Account from the contribution of Seed Money to the Separate Account are to be redeemed on predetermined dates in each year, as established by TIAA, for a period of five (5) years (at fair market value based on the value

of Accumulation Units on the date of each redemption). The exercise of any discretion by TIAA to accelerate the fixed repayment schedule applicable to the redemption of Seed Money Units is subject to the advance review and approval of the Independent Fiduciary, and any such acceleration will not be applied so as to prevent a redemption of Seed Money Units scheduled to occur on any of the predetermined dates during any year. The Start Up Period will expire when all the Seed Money Units originally acquired by TIAA's General Account from the contribution of Seed Money to the Separate Account have been redeemed by TIAA.

(n) ``TIAA Pension Plans'' mean certain defined benefit and certain defined contribution plans maintained by TIAA. Among the defined contribution plans maintained by TIAA are the TIAA Retirement Plan, which is tax-qualified under the Code, and the TIAA Tax-Deferred Annuity Plan, which is a salary reduction annuity plan, pursuant to section 403(b) of the Code. Participants in the TIAA Retirement Plan and the TIAA Tax-Deferred Annuity Plan are permitted to invest in the Separate Account.

(o) ``Trigger Point'' means the point, as established by the Independent Fiduciary, at which TIAA's participation in the Separate Account through the ownership of Liquidity Units is decreased with the approval of or as required by the Independent Fiduciary, acting on behalf of the Participants (and, if applicable, the Plans).

(p) ``Units'' mean the units of interest into which equity participation in the Separate Account is divided.

(q) ``Wind Down'' means the period which begins on the date on which TIAA notifies all Participants (and, if applicable, all Plans invested in the Separate Account) that TIAA has decided to terminate the Separate Account and concludes on the date on which no Accumulation Units are held by Participants (or, if applicable, by Plans).

EFFECTIVE DATE: The exemption is effective, as of October 2, 1995, the date the Separate Account was first opened to Participants and Plans for investment.

#### **Written Comments**

In the Notice, the Department invited all interested persons to submit written comments and requests for a hearing on the proposed exemption within 45 days of the date of the publication of the Notice in the **Federal Register** on April 4, 1996. All comments and requests for hearing were due by May 20, 1996.

During the comment period, the Department received no requests for hearing. However, the Department did receive a comment letter from the applicant, TIAA, dated May 17, 1996. The comments from TIAA requested certain changes and clarifications to the conditions of the exemption as proposed in the Notice, and certain amendments which, according to TIAA, should have been reflected in the SFR, as published in the Notice in the **Federal Register**. TIAA's comments on the conditions of the exemption and the SFR are discussed below in an order that corresponds to the appearance of the relevant language in the Notice.

1. In its comment TIAA points out that throughout the Notice the phrase, ``in the case of a contract between TIAA and a supplemental retirement account (SRA) or an individual retirement account (IRA),'' is used to describe the relationship between TIAA and any SRA or IRA. To reflect the fact that TIAA provides annuity products to contractholders who are participants in such an SRA or an IRA, TIAA requests that the phrase, ``in the case of a TIAA supplemental

retirement annuity contract (SRA) or TIAA individual retirement annuity contract (IRA),' be substituted for all references throughout the final exemption to the phrase quoted above which appeared throughout the Notice.

The Department concurs with TIAA's requested change. Accordingly, the Department has modified the final exemption to reflect the change in the first instance where the phrase occurred in the operant language of the exemption; but, in order to avoid repeating the entire phrase, the Department has instead substituted the following abbreviated phrase, ``in the case of a TIAA SRA or a TIAA IRA,' subsequently. In addition, the Department has made changes in the language of the conditions of the exemption in order to be consistent, so that any reference therein to an SRA or an IRA will now be to a TIAA SRA or a TIAA IRA.

2. TIAA believes that a modification to Section III(a) of the exemption is necessary to take into account the fact that TIAA's own plans have been and will be invested in the Separate Account. TIAA appears to be concerned that the obligation of TIAA to purchase Liquidity Units may amount to an extension of credit between TIAA and its own plans and that such transaction would not be permitted under the terms of condition III(a), as it appeared in the Notice. As a result, TIAA requests that at the end of Section III(a) on page 15128 of the Notice, the parenthetical phrase, ``(other than the fiduciaries of any TIAA Pension Plans, as defined in Section IV(n) below),' be inserted before the semi-colon. TIAA also requests that a similar change should have been made to the SFR at the end of the second sentence of the first paragraph of representation 14 on page 15138 of the Notice.

The Department concurs with TIAA's request for changes in the language of the conditions of Section III(a) of the exemption. Accordingly, the language of Section III(a) has been amended to read as follows:

The decision to elect to add the Separate Account as an additional pension funding option for employee benefit plans (the Plan or Plans), as defined in Section IV(h) below, which invest in the Separate Account has been and is made by the fiduciaries of such Plans (the Fiduciary or Fiduciaries), as defined in Section IV(e) below, or in the case of a contract between TIAA and a supplemental retirement annuity contract (SRA) or an individual retirement annuity contract (IRA), the decision to elect to add the Separate Account as an additional pension funding option to a TIAA SRA or a TIAA IRA has been and is made by the participant in such TIAA SRA or TIAA IRA, if the Fiduciaries of the Plans and the TIAA IRA and TIAA SRA participants are unrelated to TIAA and its affiliates (the Affiliates or Affiliate), as defined in Section IV(b) below, (other than the fiduciaries of any TIAA Pension Plans, as defined in Section IV(n) below).

However, the Department wishes to note that as indicated in footnote 9 on page 15132 of the Notice, TIAA represented in its application for exemption that any acquisition of Units in the Separate Account by employee benefit plans sponsored by TIAA would not violate section 406(a) or 406(b) of the Act by reason of the statutory exemption contained in section 408(b)(5) of the Act. To the extent that the acquisition of Units in the Separate Account by plans sponsored by TIAA

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does not satisfy the requirements of section 408(b)(5) of the Act, no relief has been provided by the exemption for the participation by such plans in the Separate Account.

3. TIAA has requested a modification to the language of Section III(c) of the exemption. In this regard, Section III(c), as set forth on page 15128, column 2 of the Notice read, in part,

Except as otherwise specified below in paragraph (c)(10) of this Section III, prior to investment of funds in the Separate Account by any participant in a Plan (the Participant or Participants) (and, if applicable, by any of the Plans) which participate in the Separate Account, TIAA has furnished and will furnish to the Fiduciaries of such Plans and, in the case of a contract between TIAA and a SRA or an IRA, to the participant in such SRA or IRA, the following information.

TIAA requests that the phrase, ``or immediately following,'` be inserted after the words, ``prior to,'` and before the word, ``investment,'` in the language of Section III(c) above. TIAA asserts that, as it has 1.8 million existing contractholders, it cannot provide the information required in Section III(c), prior to a participant's decision to invest in the Separate Account. In this regard, TIAA states that, with some exceptions, the information the Department requires TIAA to disclose, pursuant to Section III(c), is included in the prospectus for the Separate Account. In the event the prospectus is not provided prior to investment of funds in the Separate Account, TIAA represents that it will provide this information immediately following such investment in accordance with the Federal securities rules governing prospectus delivery. However, in the event this proposal was not satisfactory to the Department, TIAA suggested as an alternative that the introductory language of Section III(c) be amended to conform to the language, as set forth in Section III(c)(10). As such, the introductory language of Section III(c), as proposed in the alternative by TIAA, would read as follows:

Except as otherwise specified below in paragraph (c)(10) of this Section III, prior to investment of funds in the Separate Account by any participant in a Plan (the Participant or Participants) (and, if applicable, by any of the Plans) which participate in the Separate Account, TIAA has furnished and will furnish to the Fiduciaries of such Plans to the sponsors of any TIAA SRA, and to the participants in any TIAA IRA, the following information:

With respect to the timing of disclosures, the Department believes that the information required to be provided by TIAA, pursuant to Section III(c) of the exemption, is fundamental to the making of informed investment decisions and should be furnished to certain parties by TIAA prior to investment of funds in the Separate Account by investors. In this regard, the Department points out that TIAA on page 30 of its application for exemption and again on page 2 of Exhibit A to such application, represented that the timing of disclosures to Fiduciaries of the Plans, Plan Sponsors, and in the case of a TIAA SRA or TIAA IRA to the Participants of such TIAA SRA and TIAA IRA would occur prior to the investment of funds in the Separate Account by any



participants (and, if applicable, by any plans).

The Department concurs with the alternative language proposed by TIAA. Accordingly, the language of Section III(c) has been amended to read as above.

4. As discussed in paragraph three (3) above, pursuant to Section III(c), TIAA must provide certain disclosures about the Separate Account to certain investors prior to their investing in the Separate Account. In this regard, the Department required in Section III(c)(1), as set forth on page 15128, column 2 of the Notice, that TIAA provide to such parties, among other information, the following items:

a copy of the most recent prospectus for the Separate Account, the most recent quarterly and other financial reports for the Separate Account filed with the Securities and Exchange Commission (SEC), and the most recent copy of any supplemental schedule of information, publications, or ancillary materials which have been made available to Plan Sponsors or Participants invested in the Separate Account.

Further, pursuant to Section III(c)(8), as set forth on page 15128, column 2 of the Notice, the Department required TIAA to provide such parties with:

copies of the most recent reports on the Separate Account, including but not limited to information relating [sic.] the value of units in the Separate Account (the Units), as defined in Section IV(p) below; and the quarterly return for the Separate Account, and the most recent quarterly updates of the valuation of the Separate Account (including a list of the holdings of the Separate Account during the period).

TIAA requests that Section III(c)(1) be amended such that only a copy of the most recent prospectus for the Separate Account be required to be disclosed. In this regard, TIAA represents that, as required by the amended introductory language in Section III(c), it has provided and will continue to provide a copy of the prospectus for the Separate Account to the Fiduciaries of Plans, to the sponsors of any TIAA SRA, and to the participants in any TIAA IRA which invest in the Separate Account. TIAA represents that the prospectus is updated annually and contains detailed audited financial information concerning the Separate Account and detailed disclosure concerning its operations and investment objectives. Further, TIAA represents that it has made and will make available unit value information and quarterly return information for the Separate Account via a toll-free telephone number that can be accessed at any time. In addition, TIAA represents that, upon request, it has provided and will provide copies of quarterly and other financial reports filed with the SEC. TIAA believes that its approach provides superior disclosure at a substantial cost savings which benefits the Participants (and, if applicable, the Plans) which participate in the Separate Account, and is essential for the Separate Account to be cost-effective.

The Department concurs, in part, with TIAA's requested modifications to the disclosure requirements of Section III(c)(1) and (c)(8), as set forth in the Notice. However, the Department believes that, any prospective investor who wishes to receive the information which was described in the deleted portion of Section III(c)(1) should be able to request that TIAA provide such information, pursuant to Section III(c)(9) of the exemption. Further, the Department believes

that any investor interested in investing in the Separate Account should be able to request additional information from TIAA which is reasonably available. This is consistent with the provisions of Section III(d)(4) which permit a Fiduciary of a Plan which is invested in the Separate Account and a participant in a TIAA SRA or an TIAA IRA which is invested in the Separate Account to request similar information from TIAA. In this regard, the Department wishes to make clear that the phrase, ``any other reasonably available information,' as set forth in Section III(c)(9), includes, but is not limited to, copies of the most recent quarterly and other financial reports for the Separate Account filed with the SEC, or the supplemental schedules of information, publications, or ancillary materials which have been made available to Fiduciaries of the Plan, to Plan Sponsors, or to Participants who are invested in the Separate Account. Accordingly, the Department has modified the language in Section III(c)(9) by inserting between the word, ``information,' and the word, ``which,' the following parenthetical phrase,

(including but not limited to, a copy of the most recent quarterly and other financial reports for the Separate Account filed with

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the Securities and Exchange Commission (SEC), and the most recent copy of any supplemental schedules of information, publications, or ancillary materials which have been made available to Fiduciaries of the Plan or to the sponsors of the plans (the Plan Sponsor or the Plan Sponsors) or to Participants invested in the Separate Account).

With respect to Section III(c)(8), the Department concurs with TIAA's request to delete Section III(c)(8), as set forth on page 15128, column 2 of the Notice. However, the Department notes that TIAA has already agreed to make such information available daily via a toll-free telephone number to any Fiduciary of a Plan and to any participant in a TIAA SRA or a TIAA IRA who is already invested in the Separate Account, pursuant to Section III(d)(1) and (d)(2), as set forth in the Notice on page 15129, columns 1-2. Accordingly, the Department has modified Section III(c)(8) to read as follows, ``the toll-free telephone number by which information relating to the value of the units in the Separate Account (the Units) and information concerning the quarterly return of the Separate Account is made available daily.''

5. TIAA submitted comments with respect to Section III(c)(10). Section III(c)(10) requires that TIAA provide copies of the Notice and copies of the granted final exemption (the Grant) to certain parties within a prescribed period of time. TIAA requested modification of the requirements of Section III(c)(10), such that the Notice and Grant need not be supplied to prospective investors in the Separate Account 30 days prior to their investment. TIAA believes that requiring the prospective investors to wait 30 days after receiving a copy of the Notice and Grant would unduly interrupt investment in the Separate Account. Further, TIAA maintains that it would be impractical and costly for TIAA to administer a 30 day waiting period, particularly with respect to participants in TIAA IRAs who are allowed to select other allocation options immediately upon enrollment.

Although the Department notes that TIAA on page 31 of its application for exemption, represented that it would provide a copy of the Notice and a copy of the Grant to Plan Fiduciaries and Plan

Sponsors, at least 30 days prior to investment in the Separate Account, the Department concurs with TIAA's request, and accordingly, has deleted the 30 day requirement from Section III(c)(10) for those investors who invest in the Separate Account after the date of the Grant.

In addition, with respect to the requirements imposed by Section III(c)(10), TIAA was concerned that investors who invested after publication of the Notice but before publication of the Grant received inconsistent treatment with respect to the receipt of a copy of the Notice. In this regard, Section III(c)(10), as proposed, required delivery of a copy of the Notice, upon publication of the Notice, to certain parties who were at that time invested in the Separate Account; but, did not specify, when or if, those parties who invested in the Separate Account subsequent to the publication of the Notice had to receive a copy of the Notice. TIAA requested that the Department modify Section III(c)(10), such that investors who invested after the publication of the Notice but before the publication of the Grant, receive a copy of the Notice immediately following their investment, and receive a copy of the Grant, upon publication of the Grant in the **Federal Register**. The Department concurs and has modified the language of Section III(c)(10) accordingly.

6. In Section III(d)(1) on page 15129 of the Notice, in the line 5, after the word, ``Participants,' ' TIAA suggests that the parenthetical phrase, ``(or, if applicable, to the Plans),' ' be added to the sentence which should read, as follows:

information relating to the value of the Units in the Separate Account to be available daily over a toll-free telephone number and/or to be distributed in writing to Participants (or, if applicable, to the Plans) in the Separate Account in quarterly confirmation statements within five (5) to ten (10) days after the end of each calendar quarter.

Further, TIAA suggests that the same parenthetical phrase should be inserted after the word, ``Participants,' ' in line 5, in Section III(d)(2) on page 15129 of the Notice, such that the sentence should read as follows:

information concerning the quarterly return of the Separate Account to be available daily over a toll-free telephone number and/or to be distributed in writing to Participants (or, if applicable, to the Plans) in the Separate Account in quarterly confirmation statements within five (5) to ten (10) days after the end of each calendar quarter.

The Department concurs.

7. In Section III(g), as set forth in the Notice on page 15130, column 1, lines 7 and 8, TIAA requests that the Department delete the italicized phrase ``has advanced and' ' from the following sentence:

The liquidation of any Accumulation Units held by a Participant or participating Plan, for which a withdrawal request is pending, has not been and will not be delayed by reason of the redemption of Seed Money Units held by TIAA, and TIAA has advanced and [emphasis added] will always advance funds by purchasing Liquidity Units to fund the withdrawal requests of Participants or Plans on a timely basis.

TIAA believes that this change is necessary, because to date TIAA has not had to advance funds by purchasing Liquidity Units. The Department concurs.

8. TIAA requests that representation 12, as it appeared in the SFR, should have been stated differently. In this regard, in representation 12, as set forth on page 15137 of the Notice, column 3, the first sentence of the last full paragraph, reads as follows:

Prior to investing in the Separate Account, it is represented that each prospective participant (and, if applicable, each fiduciary of prospective participating plans) has been and will be provided with information regarding the role of the Independent Fiduciary with respect to the Separate Account and has been and will be advised of the identity of the party appointed to serve as the Independent Fiduciary.

TIAA requests that the phrase, "[P]rior to investing in the Separate Account," at the beginning of this paragraph should have been deleted, and the word, "it," should have been capitalized as the beginning of the sentence. In addition, TIAA requests that on line 5 and on line 9 of the same paragraph, the word, "and" should have been deleted, and the word, "or," should have been substituted following the words, "has been."

The Department does not concur with TIAA in the changes that have been requested to representation 12 of the SFR. In the opinion of the Department, investors who are interested in investing in the Separate Account must be provided, prior to investing in such account, with disclosure of the identity of the Independent Fiduciary and the role of such fiduciary with respect to the Separate Account. In this regard, the Department notes that on page 15 of its application for exemption TIAA made the following representation:

Each Participant (and, as applicable, each Participating Plan) will be informed of the appointment of the Independent Fiduciary. A decision by a Plan fiduciary or a Plan Sponsor on behalf of a Plan to elect to add the Real Estate Separate Account as an additional pension funding option, and to participate in the Account, after full disclosure by TIAA, will constitute approval and acceptance by the Plan fiduciary or Plan sponsor of the Independent Fiduciary. Similarly, a decision by a TIAA SRA contractholder or by a TIAA IRA contractholder to elect to add the Real Estate Separate Account as an additional pension funding option, after full disclosure by TIAA,

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will constitute approval and acceptance by such a contractholder of the Independent Fiduciary. (A decision by a Participant in such a Plan to invest in the Account, after full disclosure by TIAA, will constitute approval and acceptance by the Participant of the Independent Fiduciary.)

Accordingly, the Department does not agree that changes to the SFR, as requested by TIAA are merited.

9. TIAA has requested that representation 14, as set forth in the SFR at page 15138, column 3 of the Notice, should have been stated differently. In this regard, TIAA requests that the italicized phrase

in the quotation below should have been deleted from representation 14. The language of the first paragraph of representation 14 reads as follows:

It is represented that during the operation of the Separate Account, no member of the Board of Trustees of TIAA or of CREF has had or will have a role in the selection of the Separate Account as a funding vehicle for any of the Plans or has served or will serve as a Fiduciary to any Plan participating in TIAA investment funding options [emphasis added]. In this regard, Fiduciaries of the Plans unrelated to TIAA, or in the case of an SRA or an IRA, participants unrelated to TIAA who participate in such SRA or IRA, have made and will make the decision to invest in the Separate Account.

Specifically, TIAA does not wish any member of the Board of Trustees of TIAA or of CREF to be prohibited, either currently or in the future, from serving as a fiduciary to any of the Plans. The Department concurs.

In the event a member of the Board of Trustees of TIAA or of CREF does serve as a fiduciary to a Plan, TIAA represented in its comment that such member will not play a role in such Plan's consideration and selection of the Separate Account as a funding vehicle for the Plan. In this regard, TIAA stated, on page 10 of Exhibit A of its application for exemption, that:

In the event that any member of the TIAA Board or the CREF Board also serves in a fiduciary capacity to an ERISA-covered plan, such person will recuse himself or herself from any and all fiduciary decisions related to the Real Estate Separate Account, including the decision to add the Real Estate Separate Account as a funding option to his or her plan.

The Department concurs.

10. TIAA has requested that representation 14, as set forth in the SFR at the bottom of page 15139, column 1 in the Notice, should have been stated differently. Specifically, TIAA requests that the underlined phrase in the sentence quoted below should have been deleted from the SFR. In this regard, the fourth line of representation 14, reads as follows:

Further, TIAA has published and [emphasis added] will publish in a TIAA publication, which is provided at least quarterly to all Plan Sponsors and Fiduciaries of the Plans, a written notice that the quarterly financial reports (including the list of Properties and their current values) are available on request.

The Department concurs that TIAA's requested change should have been reflected in the SFR. Further, in a letter dated October 5, 1995, TIAA represented that it would also publish a toll-free telephone number, which would enable Plan Sponsors and Fiduciaries of the Plans to easily get prompt delivery of such quarterly financial reports. The Department believes that it is necessary for Plan Sponsors and Fiduciaries of the Plans to receive such periodic notification of the availability of quarterly financial reports and to be reminded of the toll-free telephone number, in order to request and receive copies of such financial reports from TIAA. Accordingly, the Department has added a new subparagraph five (5) to Section III(d). In this regard, Section

III(d)(5) reads, as follows,

a written notification that quarterly financial reports (including the list of Properties and their current values) are available upon request and a written disclosure of the toll-free telephone number by which Plan Fiduciaries and Plan Sponsors may request delivery of such quarterly financial reports will be provided by TIAA in a publication sent to all Plan Fiduciaries and all Plan Sponsors of the Plans, beginning after the end of the first calendar quarter after the Grant is published in the **Federal Register** and continuing at least quarterly thereafter.

In order to integrate this new Section III(d)(5) into the numbering system of the exemption, the Department has deleted the word, ``and,' after the semi-colon in Section III(d)(3) and has added the word, ``and,' after the semi-colon at the end of Section III(d)(4).

11. The Department acknowledges and incorporates by reference such other clarifications requested by the applicant to the information contained in the SFR. For further discussion regarding the applicant's comments, interested persons are encouraged to obtain a copy of the exemption application file (D-9915) which is available in the Public Documents Room of the Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-5638, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

After full consideration and review of the entire record, including the written comments filed by the applicant, the Department has determined to grant the exemption, as modified and clarified above. Comments submitted by the applicant to the Department have been included as part of the public record of the exemption application. The complete application file, including all supplemental submissions received by the Department, is available for public inspection in the Public Documents Room of the Pension Welfare Benefits Administration, Room N-5638, U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, D.C. 20210.

For a complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the Notice published on Thursday, April 4, 1996, 60 FR 15128.

**FOR FURTHER INFORMATION CONTACT:** Angelena C. Le Blanc of the Department, telephone (202) 219-8883. (This is not a toll-free number.)