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Office of Regulations and Interpretations  
Employee Benefits Security Administration  
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Office of Exemption Determinations  
Employee Benefits Security Administration  
U.S. Department of Labor  
200 Constitution Avenue, NW  
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(D-11712; D-11850; D-11327; D-11687)

Definition of the Term “Fiduciary”; Conflict of Interest Rule – Retirement Advice;  
Proposed Rule (RIN 1210-AB32)  
Proposed Best Interest Contract Exemption (ZRIN: 1210-ZA25)  
Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption  
84-24 (ZRIN: 1210-ZA25)  
Proposed Amendment to Prohibited Transaction Exemption 75-1 (ZRIN: 1210-ZA25)  
Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption  
86-128 (ZRIN 1210-ZA25)

Ladies and Gentlemen:

Teachers Insurance and Annuity Association – College Retirement Equities Fund (“TIAA-CREF”) is pleased to submit this comment letter on the Department of Labor’s proposal

to change the definition of “fiduciary” under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) and the Internal Revenue Code of 1986, as amended (the “Code”), to add new prohibited transaction exemptions, and to make changes to existing prohibited transaction exemptions (collectively, the “Proposal”). TIAA-CREF is a mission-driven company that seeks to provide those who serve others with the income they have earned and need in their retirement years. We do this through annuities, both fixed and variable, and mutual funds. Annuities are the only way to guarantee that our clients will not outlive their income, so they are particularly important to achieving our mission.

We appreciate the effort made by the Department in developing the Proposal, and are fully supportive of imposing a clear Best Interest<sup>1</sup> standard in the situations addressed by the Proposal. We are concerned, however, that some of the Proposal’s details would seriously undermine our ability to fulfill our mission. Some requirements are impractical and would impose significant cost, time and resource burdens that are unnecessary to accomplish its purposes. For a company such as TIAA-CREF that operates on a non-profit basis, those burdens will ultimately be felt by participants via additional fees or lower returns on their investments. We have thought carefully about the potential effects on TIAA-CREF’s current business, and suggest a number of areas below where we think some narrowing and simplification will preserve the intent of the Proposal.

We have the following key issues:

- The proposal raises unnecessary barriers to TIAA-CREF in its key mission to provide plan participants and IRA Owners with the advice they need on guaranteed lifetime income solutions so they will not outlive their retirement income.
- The proposal unnecessarily restricts and brings into question the types of payments TIAA-CREF can receive for providing recordkeeping and administrative services to Plans and IRAs on a cost effective basis.
- The proposal unnecessarily restricts what TIAA-CREF and its representatives can say about its products and services in both educational and sales settings.
- The Best Interests Contract Exemption has needlessly expensive and burdensome conditions and is unworkable in its present form.

We have a number of other concerns, comments, and proposed modifications to the Proposal. We intend these to be constructive and help the Department achieve the purpose of the Proposal. As a guide to the organization of our comments, here is a general table of contents.

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<sup>1</sup> Capitalized terms not defined in this letter have the same meaning as in the Proposal.

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## I. Introduction

### About TIAA-CREF

TIAA-CREF is the leading provider of retirement services in the not-for-profit and K-12 markets and a global asset manager with more than \$869 billion in assets under management.<sup>2</sup> The organization was founded nearly a century ago with the mission to “serve those who serve others” and “aid and strengthen” our client institutions. Teachers Insurance and Annuity Association of America (“TIAA”) was formed by the Carnegie Foundation for the Advancement of Teaching in 1918, is incorporated as a stock life insurance company in the State of New York and operates on a not-for-profit basis. The College Retirement Equities Fund (“CREF”) – the world’s first variable annuity – was created in 1952 to give retirement savers the ability to invest in equities and reduce their exposure to inflation risk.

Throughout its history, TIAA-CREF has helped millions of Americans achieve financial well-being and a secure retirement. Today, TIAA-CREF is a Fortune 100 company with 12,500 employees and 130 offices nationwide, serving 5 million individuals and over 16,000 institutions. As TIAA-CREF works to fulfill its mission in the 21st century, we have grown our asset management capabilities, becoming a three-time winner of the Lipper Award for Best Overall Large Fund Company in 2012, 2013, and 2014, the world’s largest agriculture investor, and the world’s second-largest commercial real estate manager. We have undertaken this growth to support and enable the core focus of our business: helping the people we serve achieve a financially secure retirement. We believe that focus, along with our nonprofit heritage and unique mission, set us apart in the financial services industry.

Our unique corporate structure allows us to focus our efforts on successful retirement outcomes for participants. TIAA has no outside shareholders, other than our Board of Overseers, which is a not-for-profit entity. Importantly, according to TIAA’s corporate charter, TIAA functions without profit to the corporation or its shareholders. CREF, a companion organization, is operated at cost. That means that TIAA-CREF can use operating earnings to fortify the overall organization. As a result, our corporate interests are aligned with those of our clients – both at the plan and individual investor level.

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<sup>2</sup> As of June 30, 2015.

Today TIAA-CREF offers to both plan sponsors and IRA investors a diversified array of ten annuities, proprietary mutual funds advised by an affiliate, and non-proprietary mutual funds from scores of different fund families. We believe we act in the best interest of plan participants and IRA Owners at any interaction with them – whether we are selling these products, educating people, or providing fiduciary advice, the products are designed to be in their best interests. They provide our participants with the security they need in retirement. The TIAA employees who market and sell these products to the plans we recordkeep and to our plan participant and IRA clients are not paid commissions.

Our clients largely use defined contribution plans as their primary retirement vehicles, and understand the value of lifetime income vehicles and our TIAA and CREF annuities. TIAA-CREF drives results – in 2014 we paid \$4.7 billion to retired clients, including 28,000 annuitants over the age of 90.

### **TIAA-CREF is Committed to a Best Interest Standard**

TIAA-CREF supports the goal of the Department and the Administration of imposing a best interest standard on Advisers and their institutions in many situations of concern to the Department. Indeed, we wholeheartedly agree with the Secretary’s statements that, “[r]etirement security is a fundamental pillar of the middle class,” and that “[w]e must ensure that Americans who work hard and save responsibly for retirement are getting a fair share of the returns on those savings.”<sup>3</sup> And we agree that generally those situations of concern include discussions where a plan participant is advised to roll over assets from a retirement plan to an IRA. We believe that advice about distributions from a retirement plan, including whether to roll to an IRA, should be subject to the same ERISA fiduciary standard as all other advice.

TIAA-CREF has been dedicated for almost 100 years to helping those who serve others to and through retirement. “Putting the Customer First” is a core value that helps define the way we serve participants and IRA Owners, including the services and products we offer to help them to and through retirement. The Proposal accords with our values, how we historically have conducted our business, and how we value the participants and IRA Owners we serve.

We also believe, however, that modifications to the Proposal are needed to ensure that participants and IRA Owners continue to have access to advice and educational resources that enable them to plan effectively for retirement. Successfully planning for, and living through, retirement is complex. It is informed by the paths individuals take as well as life’s unexpected twists and how they react and adapt. Success also depends in part on having access to the right resources at the right points in time, and often we find that successful retirees have had a number of conversations with financial professionals throughout their lives. The new administrative assistant or teaching hospital resident, or the assistant physics professor with two children, is not a “high net worth” individual with the resources to pay a fiduciary advisor out of pocket. Instead, they are juggling student loans, credit card debt, assembling the down payment

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<sup>3</sup> Testimony of Thomas E. Perez, Secretary, U.S. Department of Labor, before the Health, Employment, Labor and Pensions Subcommittee of the Committee on Education and the Workforce, U.S. House of Representatives, June 17, 2015.

for a house, or (at a later stage) paying a mortgage while saving for college tuition for the children. In our experience, the right resource to get our participants on track to retirement security is provided at no out-of-pocket expense, through our bundled recordkeeping offer. Our aim with these comments is to help the Department avoid a fiduciary framework that is so rigid and restrictive that it would become legally impossible or economically impractical to provide this help to people who need it.

A conversation with a financial professional who can dynamically interact with the participant will help address his or her needs and circumstances in a manner which a self-service educational tool or automated advice program cannot. By way of example, we have found that our plan participants are more likely to act on the fiduciary retirement plan advice we deliver, and save more for retirement, when the advice is delivered through one of our employees where they have the opportunity to ask questions and obtain supporting information than when they obtain the same advice through our online tool.<sup>4</sup>

One way we measure our success in aligning our interests with participants is through a short survey with a question that we present to every individual participant after an advice session discussing plan accounts or IRAs:

“How strongly do you agree or disagree that [Name of TIAA-CREF Employee] puts your interests first?”

The permitted answers are: “strongly agree”, “agree”, “neither agree nor disagree”, “disagree”, or “strongly disagree.” From 2012 through May 2015, between 95% and 98% of respondents either agreed or strongly agreed that their TIAA-CREF employee consultant “put their interests first.” We are proud of this record and strive to maintain it; our business processes include having a director-level supervisor call clients who have scored us less favorably to understand why and be sure their needs have been met.

## **II. Key Structural Issues - Summary**

Our key concerns are:

1. The Proposal raises **unnecessary barriers to guaranteed lifetime income solutions (annuities)**, both inside a plan and in an IRA. We are concerned that the broad definition of “investment advice”, the limited counterparty carve-out, the constricted definition of education, a Best Interests definition that departs from the settled approach used in ERISA, and the new limits proposed on various Prohibited

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<sup>4</sup> In 2014, 55% of participants using our online retirement plan advice tool took one of the following actions after receiving the advice: increased their savings, reallocated their holdings, or rebalanced their portfolio—all toward improving their retirement outcome. However, when the same retirement plan advice was delivered through one of our employees, 62% of participants who received the advice took one of the same actions.

Transaction Exemptions (“PTEs”), all taken together, raise major questions about TIAA-CREF’s ability to describe and sell appropriate proprietary products, including the “in-plan” and individual annuity options through which TIAA-CREF can provide plan participants and eligible IRA investors guaranteed lifetime income. These annuities are important for and in the best interest of our participants, because they are a low-cost means for them to avoid outliving their retirement income.

To close this gap, we suggest that the Department (i) narrow the definition of “investment advice” so routine sales activities can be conducted without imposing fiduciary status, (ii) broaden the seller’s carve-out to include sales of products and services (including asset management services) to plans of all sizes and IRAs, and (iii) retain the standard for distinguishing “education” from “advice” first set forth in IB 96-1.

- 2. Revenue Sharing.** The Proposal’s changes to the current PTEs appear to unnecessarily restrict appropriate forms of compensation received by TIAA-CREF, such as revenue sharing from mutual funds and amounts received for recordkeeping and plan services from proprietary annuity contracts. These forms of compensation to the company, which are fully disclosed to plan sponsors and explicitly permitted under Section 408(b)(2), permit us to offer low cost recordkeeping and investment management services. These revenue streams are critical to our success in providing low-cost services to plans.

The Department should clarify that changes to the current prohibited transaction class exemptions apply at the Adviser level, not at the Financial Institution level, and are not intended to preclude TIAA-CREF or its corporate affiliates from receiving these types of payments in conjunction with recordkeeping and other services provided to retirement plans.

On a related point, the Department should not prescribe conduct standards or restrictions on permissible forms of compensation that would limit TIAA’s ability to sell its high-quality mutual funds and annuity products through its own sales force. As noted above, we are a three-time winner of the Lipper Award for Best Overall Large Fund Company, and CREF has among the lowest mortality and expense risk charges of any variable annuity product. It would be unfortunate and contrary to the Department’s intent if TIAA-CREF Advisers were required to sell lower quality or more expensive third-party products because of the proposed exemptions.

- 3. Clarify Treatment of Recommendations or Mentions of Exempt Products or Services.** The Proposal appears to indicate that a reference to or recommendation – or a mere mention – of a product or service that is designed and operated to be an exempt transaction would be investment advice, even if no compensation is received by TIAA-CREF or the Adviser on account of the recommendation. For example, a referral to an independent advice program that qualifies under the SunAmerica Advisory Opinion of the Department (Advisory Opinion 2001-09A) or as an “eligible

investment advice arrangement” under ERISA Section 408(g), or to an exempt total fee offset arrangement (see, *e.g.*, Advisory Opinion 2005-10A), should not be prohibited because, although TIAA-CREF or its Affiliates or Related Entities may receive compensation as part of the underlying arrangement, that compensation is permissible. As long as no additional compensation is paid by the plan or IRA for the referral or recommendation itself, the referral or recommendation is a permissible separate transaction that should not require an exemption like the BIC Exemption or a separate PTE.

4. **The BIC Exemption has Impractical and Cost-Prohibitive Aspects.** Certain conditions of the BIC Exemption are impractical and cost prohibitive, and render the BIC Exemption virtually unworkable. Onerous and unnecessary conditions include some of the contracting requirements, warranties, the disclosure requirements, and extremely burdensome recordkeeping requirements. In addition, we believe the restrictive definition of “Assets” is arbitrary and will limit investor choice to the detriment of participants.

Our comments below focus on the cumbersome requirements to execute the contract before the recommendation (not before the execution of the transaction), argue that the contract should be between the investor and the firm but not the Adviser, suggest the Department drop the requirement to include specific warranties in the contract, suggest a change in the Impartial Conduct Standard to eliminate the language adding the concept of “without regard” to the financial interests of the firm or the Adviser, address the definition of “Assets”, and suggest ways of simplifying the disclosure obligations so they are useful to investors and feasible for service providers.

The BIC Exemption as proposed simply does not address today’s reality of multi-channel interactions between clients and TIAA-CREF. We provide several examples below to demonstrate that the traditional model of direct meetings in person between client and Adviser is no longer the norm. For example, if we do not have an email address that meets the Department’s requirements, we would be forced to delay the execution of an investment transaction pending receipt of a written triparty contract that must be delivered and returned via regular mail. This scenario creates market risk to the participant or IRA Owner that can be very significant and upsetting to the client.

A cross-functional team at TIAA-CREF has estimated the additional costs and burdens of complying with the contract, disclosure and record retention requirements of the BIC Exemption. First, the team estimated the one-time cost of building the infrastructure to (a) capture, at the point of contact with clients, the information needed to produce and distribute the triparty contract and point-of-sale (“POS”) disclosure, (b) produce and distribute POS disclosures and triparty contracts, storing the data, and combining it with investment option cost information to produce annual disclosures, (c) building web disclosure requirements, and (d) developing the capabilities to meet the audit requirements of the Proposal. We estimate these one-time efforts would take at least 9-15 months depending on funding, final design

details, and dependencies with other projects, at a cost of approximately \$24.7 million.

Once that infrastructure has been developed, we estimate that each year an additional 870,000 calls or other interactions with clients would require changes to comply with the BIC Exemption, and we would have to send an additional 1.55 million packages via email or regular mail. An additional 320 full time employees would be required. The total recurring annual costs would be approximately \$37.8 million.

These are staggering estimates of the direct cost of the exemption as proposed. And these do not include the indirect costs to participants, such as longer cycle times and market risk because of interjecting agreements and disclosures into existing processes. Within our non-profit system, ultimately all of these costs – and related risks such as litigation risk – will be passed on to our clients, who will suffer reduced investment returns because of increased fees, a more difficult client experience and, most importantly, less income in retirement.

We offer below a number of comments that address these and other concerns, while preserving the guiding principles of the Proposal.

### **III. The Importance of Advice and Guaranteed Income; Access to Advice**

Advice is important to ensuring successful outcomes in retirement, and is directly related to our mission of helping the people we serve achieve a financially secure retirement. Earlier this year, TIAA-CREF engaged an independent research firm to poll a random, nationwide sample of financial decision makers in households with at least \$250,000 in investable assets to understand better their approach to saving for retirement. While we understand this surveyed group of participants is well above the current average balance of plan participants across the industry, this survey demonstrates that a large part of the success of this group is because they had access to and used advisors. For example, one finding of this survey was that more than half (53%) of respondents first met with an advisor between the ages of 25 and 44. Of these, 27% first met with an advisor between the ages of 25 and 34. We believe that when investors talk to an advisor to receive basic guidance and education early on in their careers, when they likely have very little savings, they are more likely to succeed in saving for retirement.

In examining how these financial decision makers manage their assets and what they do to prepare for retirement, some important findings emerged. For one, saving for retirement is a top priority among these investors. According to the survey, 50% say their most important investment goal is to generate income in retirement, and 41% say their top goal is to accumulate savings for retirement.

What do they do to reach their goals? 60% said they use a financial advisor to help them manage their investments. In terms of reliable sources of information, 57% of respondents said that an advisor is the most reliable, followed distantly by financial newspapers (23%) and

financial websites (20%). Survey respondents noted several areas where advisors helped them make good decisions:

- During times of market turmoil: 53% of respondents with an advisor said they took no action during recent market volatility because their portfolio was regularly managed and positioned to ride out turbulence. But for respondents without an advisor, only 41% had confidence to stay the course with their portfolios.
- Understanding their investment costs: 72% of investors with an advisor have checked the fees on their investments in the last six months.
- Surveyed investors who used advisors said they found them helpful in these areas:
  - Determining which investment vehicles are appropriate for their goals (97%)
  - Recommending how to divide investments among asset classes such as stocks and bonds (97%)
  - Explaining how to turn savings into lifetime income in retirement (93%)
  - Strategizing about financial legacy and estate planning (93%)

### **The Link Between Access to Advice and Successful Retirement Outcomes**

The value of advice is measurable also in terms of outcomes. Independent research suggests that the impact of making intelligent financial planning decisions has a quantifiable impact on a client's outcomes. Guidance that extends beyond a standard asset allocation pie chart to include an analysis and discussion of the underlying investments is critical and is an important step in achieving the full benefit of a diversified asset allocation strategy. There is an increasing correlation across asset classes that may not be evident to the average investor – for example, convertible income securities at times perform more like equities than traditional fixed income investments. Additionally, guidance on important decisions such as the beneficial impact of asset location (*i.e.*, the benefits of holding income-generating assets in tax deferred accounts and capital gains-generating investments in taxable accounts), use of annuities and use of dynamic withdrawal strategies (*e.g.*, the order of withdrawals across multiple accounts to protect against the adverse effects of drawing down assets during a bad market) has also been found to improve investor outcomes.

Investors who “go it alone” tend to find the learning curve steep and time consuming. There also is a hidden cost to the investor of poor decision making. Research has shown that providing information alone has not resulted in material improvements in a client's financial decision making. Conversely, research also has shown that providing guidance at pivotal decision points leads to better decision making.<sup>5</sup>

### **The Importance of Guaranteed Lifetime Income in Retirement**

In recent years, American workers have been realizing that assuring their retirement savings will last for their lifetime is just as important as their efforts to accumulate savings during their working years. This has become increasingly important as employers have moved

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<sup>5</sup> See note 3, *infra*.

from defined benefit pension plans, which offer guaranteed lifetime income, to defined contribution plan, where the worker bears the risks of loss and longevity. The importance of protecting their savings in plans became so apparent in the financial crisis of 2008 and 2009, when millions of workers lost hundreds of millions of dollars in retirement savings.

TIAA-CREF has long recognized, even before the financial crisis, the need for American workers to focus on the preservation of their retirement savings during the “decumulation” phase of the retirement lifecycle. That is why we have become an industry leader in providing “in-plan” individual and group annuity products that offer guaranteed lifetime income. These products protect retirement savings throughout the accumulation and retirement lifecycle, and shift the investment risk to the company as the insurance company guarantor. TIAA-CREF works hard to manage that risk to be in a position to meet the obligations under its annuity contracts. As an insurance company subject to state insurance law, TIAA-CREF must maintain strict capital requirements and undergoes extensive risk testing to assure it can meet its contractual obligations.

The Department also recognizes the importance of lifetime income to American workers as they move to savings vehicles such as defined contribution plans and IRAs. A Department news release states: “As Americans live longer and pensions increasingly trend away from the traditional defined-benefit structure that provides a stream of guaranteed income for the duration of a retiree’s life, improving access to lifetime income options is an important way to help retirees manage their savings.<sup>6</sup> Similarly, the Department recognized the importance of lifetime income in the preamble to the Proposal: “Based on public input received in connection with its joint examination of lifetime income issues with the Department of the Treasury, the Department is persuaded that additional guidance may help improve retirement security by facilitating the provision of information and education relating to retirement needs that extend beyond a participant’s or beneficiary’s date of retirement.”<sup>7</sup>

Additionally, both the Department and the Treasury Department have undertaken significant efforts in recent years to promote guaranteed lifetime income, focusing on Qualified Longevity Annuity Contracts,<sup>8</sup> the use of deferred income annuities in target date funds,<sup>9</sup> and the expected proposed regulations on lifetime income stream illustrations in benefit statements. But the Proposal risks of discouraging guaranteed lifetime income solutions because they are more complex products than mutual funds and necessarily cost more because of their guarantees.

A very recent study examines lump-sum distributions, annuitization, and annuity life options among households observed at ages 65-69 and 75-79 and relates these pension provisions to poverty incidence and the risk of falling into poverty at older ages. The results indicate that households with pensions that are annuitized with the joint-and-survivor life option

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<sup>6</sup> News Release, EBSA, US Labor, Treasury Departments act to enhance retirement security for an America built to last (Feb. 2, 2012), *available at*: <http://www.dol.gov/opa/media/press/ebsa/EBSA20111653.htm>.

<sup>7</sup> 80 FR at 21944 (April 20, 2015).

<sup>8</sup> IRB 2014-30.

<sup>9</sup> Joint Department and Treasury Department guidance, October 2014.

and that do not take lump-sum distributions before age 55 can best avoid income and asset poverty.<sup>10</sup>

#### **IV. Definition of Fiduciary Investment Advice**

##### **Background**

The Department proposes to eliminate the current five-part test and replace it with a two-part test that requires an Adviser and Financial Institution to determine (i) if recommendations of certain types (“Covered Advice”) will be made for compensation and (ii) if so, whether the advice is rendered “pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to, or that such advice is specifically directed to, the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA.”

A “recommendation” is defined in the Proposal as “a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action.” In the Preamble to the Proposal, the Department states that the parties must have a “meeting of the minds” (*i.e.*, agreement or understanding) that the advice is individualized or specifically directed to the plan or IRA, but no such “meeting of the minds” is required regarding “the extent to which the advice recipient will actually rely on the advice.” 80 FR at 21940 (April 20, 2015)

##### **Concerns**

The proposed changes to the fiduciary definition are so broad that Advisers, Financial Institutions, Affiliates and Related Entities will almost always become fiduciaries under ERISA and the Code when they engage in routine sales of products and services to plans and IRAs. Such persons and entities could even become fiduciaries when they engage in activities incidental to the sales process because of the Proposal’s constricted interpretation of the everyday term “education”. For example, mere discussions of products and services (*e.g.*, sales presentations) that the Adviser and Financial Institution offer could be construed as fiduciary advice; the delivery of a brochure or sales presentation that is not personalized should not rise to the level of “investment advice”. In addition, completing requests for proposal (“RFPs”), to the extent the RFP includes a sample fund line up or discusses certain products and services, could also be construed as fiduciary “investment advice” under the Proposal. Finally, customizing a brochure to address different market segments (*e.g.*, plan size) appears to be “investment advice.”

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<sup>10</sup> Natalia S. Orlova, Matthew S. Rutledge, and April Yanyuan Wu, *Transition from Defined Benefit to Defined Contribution Pensions: Does it Influence Elderly Poverty?*, The Center for Retirement Research at Boston College, CRR WP 2015-17, July 2015.

The Proposal's basic presumption of fiduciary status for almost any interaction with a plan fiduciary, plan participant or beneficiary, or IRA Owner simply does not conform to normal business practices where a buyer of a product or service would not reasonably expect that the seller will act as a fiduciary during the sales process.<sup>11</sup> Unfortunately, while the Proposal includes a few "carve-outs" from the definition, the only carve-out that addresses sales activities does not apply to IRAs and small participant-directed defined contribution plans, which make up a substantial majority of the retirement marketplace.

For example, TIAA-CREF routinely receives requests from plan sponsor or consultant fiduciaries, for either existing or new clients that are below the 100 participant or \$100 million thresholds for the counterparty carve-out to apply, to provide sample menus that will allow us to provide recordkeeping services with no cost beyond the investment management fees, on a bundled basis. We have thousands of plan sponsor clients in this category. The menu must permit us to cover our costs of servicing the plan, so TIAA-CREF develops a "revenue requirement" that sets forth the estimated revenue necessary so we can provide services without losing money. That requirement depends on several proprietary factors, including the size and complexity of the client, potential economies of scale, and costs due to inefficient processes at the plan sponsor (such as the need to process payrolls by hand or incomplete or nonconforming data feeds). The revenue necessary may be provided through explicit fees paid by the plan sponsor or by participants through charges to their plan accounts. More frequently, it is provided by revenue share paid to TIAA-CREF by nonproprietary mutual funds or recordkeeping offsets credited by our proprietary annuities or mutual funds. Consultants who are acting as fiduciaries for plan sponsors often request that certain share classes be on the menu and they want to understand the effect on our pricing.

We always disclose revenue share or similar fees and expenses in our recordkeeping agreement, and provide details about our direct and indirect compensation in our 408(b)(2) disclosures. We strictly comply with the guidance of IB 96-1 when providing these services – although specific funds are identified to the plan sponsor or other fiduciary as a necessary product of the pricing or RFP process, it is clear that these activities are ancillary to selling activities. The decisions about which investment options should be on the menu for retirement plans are fiduciary decisions, and under that demanding standard the fiduciary must be fully informed about costs and value. That characterization does not depend on the size of the plan, so the failure of the counterparty carve-out to cover small plans leaves no room for legitimate selling activities that are recognized as such for larger plans.

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<sup>11</sup> *Hecker v. Deere & Co.*, 556 F.3d 575,583 (7th Cir. 2009) (In concluding that Fidelity did not act as a fiduciary when it negotiated its compensation with regard to services provided to the plan, the court noted that "there are cases holding that a service provider does not act as a fiduciary with respect to the terms in the service agreement if it does not control the named fiduciary's negotiation and approval of those terms."); *Renfro v. Unisys Corp.*, 671 F.3d 314, 324 (3rd Cir. 2011) ("When a person who has no relationship to an ERISA plan is negotiating a contract with that plan, he has no authority over or responsibility to the plan and presumably is unable to exercise any control over the trustees' decision whether or not, and on what terms, to enter into an agreement with him. Such a person is not an ERISA fiduciary with respect to the terms of the agreement for his compensation.", citing *F.H. Krear & Co. v. Nineteen Named Trs.*, 810 F.2d 1250, 1259 (3rd Cir. 2011).

At the individual investor level, plan participants and IRA Owners expect a financial institution to provide information about the product and services within the plan or IRA. The retirement investor is not well served by restricting such communications simply to description of asset classes. For example, let us say a plan participant or IRA Owner contacts our call center and asks about a specific type of fund, like an international equity fund, and whether that type of fund is available. The call center employee tells him there are several such funds that meet the criteria, including a proprietary mutual fund, and the employee names them, discusses their performance and tells the client about their fees. The client then says, “Okay, please transfer 5% of the amounts from fund A into the proprietary international mutual fund.” The call center employee then must say, “I cannot do that now,” because to meet the applicable BIC Exemption he or she has to enter a contract with the client and provide a written point of sale disclosure. In the meantime, the client is subject to market risk while this paperwork is completed.

We submit that this kind of conversation should not rise to the level of fiduciary advice at all. It should, under the intent of the regulation, be considered education requested by the client and the regulation should make this clear. Another reason for treating this type of conversation as other than investment advice is that the participant or IRA Owner may at the time of the conversation do nothing. However, at a future time he or she might make a change (perhaps by using TIAA-CREF’s web functionality) and we would not know that the information was used in any way until after the transaction – and the link with the conversation will never be clear. At that point it will not be possible to comply with an exemption like the BIC Exemption.

The various investment options available through a plan or IRA, including TIAA’s and CREF’s guaranteed in-plan annuity offerings, have differing features, investment objectives, and risks. Participants frequently have basic questions about the details. Basic information about products and their features in the context of education about investing concepts and asset classes promotes financial literacy and helps, not hinders, the process of making well-informed investment decisions. Such basic education, without a call to action or a recommendation (or a reasonable basis for an expectation that the client is relying on the statement to make an investment decision) does not rise to the level of fiduciary advice and should be encouraged, not discouraged. We should be able to provide it without having to satisfy an exemption like the BIC Exemption (if it is even available for the transaction).

Another example relates to certain arrangements where a discretionary investment adviser hires a third party adviser to provide it with generic model portfolios. The discretionary investment adviser may consider the models as part of its discretionary investment advisory services to clients (which may include plans and IRAs). The model provider does not know of the discretionary investment adviser’s clients, and accordingly, the models are generic and not individualized to any of the discretionary investment adviser’s clients. Nor is there any advisory or other relationship between the model provider and the discretionary investment adviser’s clients. Because the discretionary investment adviser is a fiduciary when providing services to a plan, the model provider may be considered a fiduciary when it provides its model to the discretionary investment adviser, even though it does not provide services individualized or directed to the plan and IRA clients of the discretionary investment adviser and even though it has no knowledge of or information regarding the discretionary investment adviser’s clients.

We believe that this result is unintended and request that the DOL clarify that model providers are not investment advice fiduciaries in this context.

The breadth of the definition of fiduciary investment advice, the unavailability of a carve-out and the shift of the burden of proof<sup>12</sup> will require our Advisers, and TIAA-CREF and its Affiliates and Related Entities, to assume fiduciary status even where no plan fiduciary or IRA holder could reasonably expect that the Adviser or Financial Institution is acting in a fiduciary capacity. In such a case, the Financial Institution will have to assume the costs associated with complying with (or failing to comply with) the BIC Exemption or the other exemptions covered by the Proposal or decline to provide financial advice, thus depriving the Retirement Investor of a valuable service.

Alternatively, we believe there are many situations where TIAA-CREF will want to act as a fiduciary on behalf of its clients but will confront technical problems under the various PTEs as proposed to be amended. We believe the definition of investment advice should be narrowed so that TIAA-CREF is in a position to better determine when it will be a fiduciary.

Finally, we note that the fiduciary relationship for investment advice cannot be created before there is a binding commitment to pay direct or indirect compensation to the fiduciary (unless, of course, there has been an acknowledgement of fiduciary status). The Proposal should be amended to state this fundamental point explicitly.

### **Proposed Modifications**

For these reasons, we urge that the Department modify the definition of “investment advice” as follows:

1. “Specifically Directed To”. The “specifically directed to” language should be removed. The mere fact that a suggestion is “specifically directed to” a retirement investor is simply not relevant to the question of whether a fiduciary relationship has been entered into with a plan, plan participant or IRA holder.
2. Individualized. The “individualized to the advice recipient” language requires greater precision and should be modified to read “sufficiently individualized as to the plan, participant or beneficiary, or IRA Owner to form a reasonable basis for reliance by the advice recipient.” This language is in line with the “meeting of the minds” language in the Preamble and is in accordance with the DOL’s statements throughout the Preamble that it views as “fiduciary” in nature those investment recommendations where there is an expectation that the advice provider will provide unbiased and impartial advice that is in the recipient’s best interest.

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<sup>12</sup> Unlike the current regulation where the Department must prove that all five elements of the five-part test are met in order to assert fiduciary status, the Proposal essentially shifts the burden to the Adviser and Financial Institution to prove that, even though they are presumed to be a fiduciary, they will not be treated as one by demonstrating conformance with a carve-out.

For example, a model portfolio provider should not be considered a fiduciary when it provides its model to the discretionary investment adviser, because it does not provide services individualized or directed to the plan or IRA clients of the discretionary investment adviser and has no knowledge of or information regarding the discretionary investment adviser's clients. We believe that this is unintended and would request that the DOL clarify that model providers are not investment advice fiduciaries in this context.

3. Definition of Recommendation. The definition of "recommendation" is too broad and should be replaced with one that focuses on whether a qualitative judgment has been conveyed. For example, a "recommendation" should be viewed as "a communication that, based on its content, context, and presentation, would reasonably be viewed as a call to take action or to refrain from taking action."

Two potential sources of guidance that support this approach are (i) DOL guidance on the "endorsement" of a program and (ii) FINRA guidance on recommendations.

- a. DOL's authority regarding the activities that constitute the "endorsement" of an IRA or group-like insurance product should be seen as a guidepost in developing the definition of "recommendation." The DOL has issued a regulation that provides a safe-harbor exclusion from ERISA coverage for certain group-type insurance programs offered by an employer to employees. One of the conditions of that safe-harbor regulation requires that "the sole function of the employer or employee organization with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees or members, to collect premiums through payroll deductions or dues check offs and to remit them to the insurer." 29 C.F.R. § 2510.3-1(j)(3). In its guidance, the Department recognizes that fiduciary duties attach only when an employer's involvement is active enough to rise to the level of endorsing the arrangement.
  - b. FINRA guidance concerning the distinction between recommendations and non-recommendations focuses not on the existence of a mere suggestion, but on whether there has been a communication that might reasonably be viewed as a "call to action" that might reasonably influence an investor to trade a particular security or group of securities. See NASD Notice to Members 01-23.
4. Neutral and Factual Communications. Under our proposed approach, communications that remain neutral about the product, investment or manager, make no subjective statements regarding the quality of the product or investment, and express no subjective qualitative judgments about whether, for example, the product or manager is a "good fit" or the "right choice" for the investor would avoid rising to the level of a "recommendation." Similarly, references to awards,

ratings, and achievements (such as Lipper awards, Morningstar ratings, or insurance ratings) should be permitted as purely informative and neutral.

5. When the Fiduciary Relationship is Established. The definition of fiduciary investment advice should state specifically, under Section 3(21) of ERISA, that the fiduciary relationship does not begin until the fiduciary either receives direct or indirect compensation for the covered advice, the investor enters a binding commitment to pay such compensation, or the fiduciary has acknowledged the relationship.

## **Investment Management and Other Services**

### **Background**

The definition of Covered Advice includes a “recommendation as to the management of securities or other property” and a “recommendation of a person who is also going to receive a fee or other compensation for providing” a “recommendation as to the management of securities or other property.” The definition of fiduciary “investment advice” appears to include the sale by an Adviser of investment advice services, managed account services, or investment management services provided by an Adviser or a Financial Institution, Affiliate, or Related Entity. Thus, for example, if the Adviser provides an objective statement that describes the Adviser and that ends up persuading the plan fiduciary to hire the Adviser to manage the assets of a plan on a discretionary basis in exchange for a fee, he or she will be acting as a fiduciary.

### **Concerns**

We believe this result may be an unintended consequence of the Proposal. Notably, this result appears to contradict the Department’s own regulations at 29 CFR 2550.408b-2, Examples (1), (3) and (4). Those examples point to situations in which an employer or similar fiduciary makes the decision to hire an independent third party to provide fiduciary or non-fiduciary services (or additional service) on behalf of the plan and the Department concluded that the exemption under ERISA section 408(b)(2) is available because the employer or similar fiduciary decided to hire the service provider and the service provider did not use any authority, control or responsibility that makes it a fiduciary to cause the payment of compensation (or additional compensation) to itself.

For example, TIAA-CREF provides investment allocation advice to plan participants in accordance with the SunAmerica advisory opinion (DOL Advisory Opinion 2001-09A), and a managed allocation service that also follows that Advisory Opinion. We submit that educating and marketing to a participant or plan sponsor about either service should not amount to fiduciary advice because TIAA-CREF is not being paid to provide such advice until the participant or plan sponsor uses the service. At that point, TIAA-CREF accepts fiduciary responsibility for the service and has managed its conflicts under current DOL guidance.

## **Proposed Modifications**

Recommendations for no Additional Fee. The Department should clarify that the marketing and sales of “fee based” investment advice and investment management services are not “fiduciary investment advice” as long as no compensation is paid by the plan or IRA to any firm or individual in connection with the marketing and sales of such services. Thus, while fees would be paid to the Adviser for the provision of advisory or management services, the Adviser would not become a fiduciary until the advisory or management agreement is entered because no compensation would be paid by the plan or IRA in conjunction with the marketing or sale activities themselves.

## **Valuations**

### **Background**

Covered Advice also would include appraisals or similar statements, whether verbal or written, “concerning the value of securities or other property if provided in connection with a specific transaction or transactions involving the acquisition or disposition, or exchange, of such securities or other property by a plan or IRA”. The definitional section of the Proposal (paragraph (b)(5)(ii)) clearly excludes from fiduciary status appraisals to an investment fund which holds plan assets of more than one unrelated plan.

### **Concerns**

The definition of Covered Advice in italics above is extremely broad and threatens to capture communications that reflect market values from market sources, even in the absence of a recommendation. This might include everything from planning reports compiled for the convenience of the retirement investor setting forth his or her various assets to provide a snapshot of his or her complete financial picture to periodic statements required under FINRA rules. These sorts of communications should not be covered by the definition.

We appreciate the Department’s response to previous comments about independent valuations provided to investment funds holding assets of unrelated plans. Adding the exclusion in paragraph (b)(5)(ii) relieves concerns we had about whether routine independent valuations provided to the TIAA Real Estate Account could have been viewed as fiduciary actions.

## **Proposed Modifications**

Definition of Covered Advice. We suggest that the Proposal be clarified so the types of communications described above, including quarterly statements and website presentations of account investments and values, do not constitute Covered Advice.

## V. Carve-Outs

### Counterparty (Sellers) Carve-Out

#### Background and Concerns

We have noted that the Department’s approach in the Proposal is to define “investment advice” so broadly that virtually all sales activity is included in the definition of “investment advice.” For example, it is unrealistic to expect a participant in a conversation with a call center representative not to wonder how a particular product works. A participant might want to know how TIAA-CREF decides about the crediting rate on TIAA Traditional, our fixed annuity. What mortality and expense charges might apply to the CREF accounts, and how much are they for other variable annuity products? What are the differences between our CREF variable annuities and our TIAA-CREF mutual funds and what benefits are offered by each? How does a CREF variable annuity provide guaranteed lifetime income? A multitude of questions help educate the plan participant or IRA Owner about the type of investment that might be right to help achieve a particular investment goal.

By defining “investment advice” very broadly and then introducing “carve-outs,” the Department effectively shifts its burden under current law to prove that a person acts as a fiduciary. Under the Proposal, the Adviser and TIAA-CREF would be obligated to prove they are not fiduciaries by proving that they fit within a carve-out. We respectfully suggest that some narrowing of the term “fiduciary” is appropriate as described above. But regardless of whether that term is narrowed, we would suggest modifications to the counterparty carve-out as discussed in the following paragraphs.

The Department intends to carve out an arm’s-length sale, purchase, loan or bilateral contract between a plan and a seller of products and services if certain disclosure and other requirements are met. The Department states that the “overall purpose” of the seller’s carve-out is “to avoid imposing ERISA fiduciary obligations on sales pitches that are part of arm’s length transactions where neither side assumes that the counterparty to the plan is acting as an impartial trusted adviser, but the seller is making representations about the value and benefits of proposed deals.”<sup>13</sup> TIAA-CREF agrees. As explained above, in most sales situations a plan fiduciary, plan participant and beneficiary, and IRA Owner do not reasonably expect that the seller will act under a fiduciary standard, particularly if the carve-out’s requirements are met. However, TIAA-CREF is concerned that the carve-out does not apply to small participant-directed plans unless the plan is represented by a fiduciary with at least \$100 million dollars of employee benefit plan assets under management, and does not apply to any IRA.

We see no justification for this distinction between small and large plans in the law or in policy. We are not aware of any evidence (and the Department has not identified any) that IRA Owners and smaller plans are less able to identify situations where a conflict exists or may develop. The fiduciary standard is elastic in scope and interpretation – it requires that

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<sup>13</sup> 80 FR at 21941 (April 20, 2015).

appropriate consideration be given to all of the relevant facts and circumstances. The carve-out should be similarly flexible rather than artificially excluding IRAs and plans below a certain size.

### **Proposed Modifications**

1. Apply Carve-out to Plans and IRAs. The Proposal provides for a counterparty carve-out, which effectively provides a safe harbor for fiduciaries who sell to plans with at least 100 participants as long as certain requirements are met.

By establishing a size limitation, the Department appears to be taking the position that fiduciaries of large plans are capable of distinguishing circumstances where the Adviser or Financial Institution is merely selling a product or service rather than providing investment advice. However, the limitation of this carve-out to plans of a certain size is contrary to a fundamental premise underlying ERISA. ERISA requires that a plan fiduciary (*e.g.*, the plan sponsor) act in accordance with ERISA's fiduciary duty provisions regardless of the size of the fiduciary. ERISA does not hold plan fiduciaries to a lesser standard merely because they are small in size. Rather, if the plan fiduciary lacks the requisite expertise to perform its duties, it may hire professionals with the appropriate expertise to help it meet its duties under ERISA or it may delegate its fiduciary responsibilities to another fiduciary. However, in any case, the plan fiduciary is not absolved from fiduciary status due to a lack of expertise.

To be consistent with this fundamental premise under ERISA, the Department should extend the counterparty carve-out to a plan of any size as long as the requirements in the carve-out are otherwise met. Similarly, the Department has never interpreted the Code to distinguish between whether an IRA Owner or other fiduciary is capable of evaluating whether an Adviser or Financial Institution acts as a seller or as a fiduciary. Therefore, the counterparty carve-out should also be extended to IRAs. If extended to IRAs, the seller's carve-out would require Advisers to fairly inform the investor of the existence and nature of the Adviser's and Financial Institution's financial interests in the transaction.

2. Alternative Approaches. Alternatively, if the Department does not believe that the counterparty carve-out should apply to all small plans and IRAs, we believe that sales to small plans and IRAs of a certain size or those that are represented by an independent investment adviser registered under state or federal securities laws (and thus subject to supervision by a state or federal agency with examination and enforcement authority) should be carved out, as described below.
  - a. Plans with 10 or Fewer Participants: The Department noted a precedent for a 100 participant threshold in its requirements regarding filing Form 5500. Plans that have less than 100 participants are not subject to financial statement audit requirements and need not complete Schedule C. Thus, the Department implies that those plans need some sort of protection from Advisers who sell investment products and services to them that is not otherwise available via the Form 5500

and Schedule C requirements. However, we do not believe there is such a connection between the Form 5500 and Schedule C requirements and increased fiduciary sophistication, and the Department has not demonstrated such a connection. Furthermore all retirement plans receive fee disclosure under the Department's final regulations under Section 408(b)(2). Therefore, we believe that the number is arbitrary and that a lower number is reasonable. For example, the Department noted that most plans with fewer than 100 participants have fewer than 10 participants. In our view, a 10 participant threshold would be sufficiently protective.

- b. IRA Owners who are Sophisticated Investors: Similarly, the Owner of an IRA that is an "accredited investor" under SEC Rule 501 of SEC Regulation D<sup>14</sup> promulgated under section 4(a)(2) of the Securities Act of 1933, as amended ("Securities Act") can purchase an interest in an investment fund without the fund's interests becoming subject to registration under the Securities Act. Yet, the Proposal suggests that the very same purchaser cannot make sound investment decisions in managing its IRAs. To the contrary, we believe that IRA Owners who are accredited investors can make fully informed, sound investment decisions and should be "carved out" under the counterparty exception if they give such a representation.<sup>15</sup>
- c. Plans and IRAs Represented by Adviser: Finally, the Department points to its cross-trading exemption as a basis for the \$100 million dollar threshold used to designate sophisticated fiduciaries acting on behalf of a plan. However, much like the 100 participant threshold, we do not see and the Department provides no connection between that \$100 million amount and the ability of a fiduciary to adequately act on behalf of a small plan or IRA. For example, under the SEC's Regulation D, an employee benefit plan within the meaning of ERISA is an accredited investor as long as the decision to invest in the security is made by a plan fiduciary, as defined in ERISA section 3(21), which is either a bank, savings and loan association, insurance company, or registered investment adviser, or if the plan has at least \$5 million in assets under management. In addition, if the plan is a participant-directed plan, the plan is an accredited investor if each of the participants is an accredited investor. Also, the term "investment manager" as defined under ERISA section 3(38), which includes a registered investment adviser, bank or insurance company, does not require that the manager have a certain amount of assets under management.

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<sup>14</sup> 17 C.F.R § 230.500, *et. seq.*

<sup>15</sup> An "accredited investor" includes individuals who have annual earned income of more than \$200,000 (\$300,000 with a spouse) or who have a net worth of more than \$1,000,000. See 17 C.F.R. § 230.500 *et seq.* The SEC explains that a "principal purpose of the accredited investor concept is to identify persons who can bear the economic risk of investing in these unregistered securities." Investor Bulletin: Accredited Investors, S.E.C. Pub. No. 158 (Sept. 2013), *available at*: [http://www.sec.gov/investor/alerts/ib\\_accreditedinvestors.pdf](http://www.sec.gov/investor/alerts/ib_accreditedinvestors.pdf).

Yet, the Proposal suggests that a party needs at least \$100 million of benefit plan assets under management to be able to recognize when an Adviser and Financial Institution sells products and services rather than gives advice. To the contrary, we believe that the carve-out should apply in any case in which the sponsor or fiduciary receives investment advice from a fiduciary as defined under ERISA Section 3(21) or Section 3(38) that is a bank, savings and loan association, insurance company, or registered investment adviser about the purchase of an investment product or service as long as such plan or IRA fiduciary is independent from the seller. In addition, if the sponsor or similar fiduciary does not receive advice from such a fiduciary, the dollar threshold for the benefit plan assets under management should be \$5 million rather than \$100 million of assets under management, as that standard would be consistent with existing SEC guidance.

## **Platform Carve-out**

### **Background**

The Department included in the Proposal carve-outs for investment platforms and the provision of limited information regarding the investments on the platform. The Department does not specifically state that a variable annuity contract is a “platform.” Furthermore, the Department specifically excludes IRAs from the platform carve-out because “there typically is no separate independent ‘plan fiduciary’ who interacts with the platform provider to protect the interests of the account owners. As a result, it is much more difficult to conclude that the transaction is truly arm’s length or to draw a bright line between fiduciary and non-fiduciary communications on investment options.” The Department requested “specific comment as to the types of platforms and options that may be offered to IRA Owners, how they may be similar to or different from platforms offered in connection with participant directed individual account plans, and whether it would be appropriate for service providers not to be treated as fiduciaries under this carve-out when marketing such platforms to IRA Owners.”

### **Concerns**

First, we note that the courts and the Department have always taken the position that the creation of a platform is not a fiduciary act. TIAA-CREF is concerned that the Department’s inclusion of a platform carve-out implies that the creation of a platform gives rise to fiduciary status when under current law TIAA-CREF has no reason to believe the mere creation of a platform gives rise to fiduciary status. Therefore, the Department should clarify that providing or making available an investment platform is not included within the threshold definition of “investment advice.”

The Department has indicated that a service provider to a plan or IRA does not act as a fiduciary by merely providing a platform of investments to such plan or IRA as long as a fiduciary independent of the platform provider approves the platform, such fiduciary receives notice regarding any changes to the platform, and such fiduciary approves by either affirmative

or negative consent any changes to the platform that impact the plan.<sup>16</sup> However, the DOL also notes that if the service provider or its affiliate provides investment advice for purposes of ERISA with regard to the selection of one or more investments on the platform and such advice results in the payment of additional compensation to the service provider or its affiliate, such service provider or affiliate could be viewed as using its fiduciary authority to increase its own compensation in violation of ERISA section 406(b).<sup>17</sup> As such, the service provider may act as a non-fiduciary with regard to creating the investment platform, but act as fiduciary with regard to investment of plan or IRA assets in the platform investments. Further, we note that several courts have stated on different occasions that a service provider does not act as a fiduciary when it provides a platform or “big menu” of lifetime income and mutual fund investments to ERISA-governed plans.<sup>18</sup>

The “education and monitoring assistance” section of the platform carve-out, at Sec. 2510.3-21(b)(4) of the Proposal, excludes from fiduciary status an activity that “merely provides objective financial data and comparisons with independent benchmarks to the plan fiduciary.” As we explain below, TIAA-CREF regularly provides performance and benchmark information to plan participants and beneficiaries, plan sponsors, and IRA Owners. We often employ composite benchmarks in accordance with SEC rules, because in our judgment they more accurately reflect the investment goals and strategies of the particular investment option. The SEC rules require us to show an independent benchmark (called an “appropriate broad-based securities market index”) in the risk-return table in the fund prospectus, in addition to the composite benchmark.<sup>19</sup> We suggest that the Department provide specifically that using of a composite benchmark, accompanied by the type of broad-based securities market index required by the SEC rules, would satisfy this aspect of the platform carve-out rules.

### **Proposed Modifications**

1. Platform Offerings are not investment advice. Based upon the foregoing, the Department should clarify that the creation of a platform for plans or IRAs in and of itself, does not involve fiduciary “investment advice,” unless the platform creator acknowledges fiduciary status in creating the platform. We believe that this approach is appropriate because the existence of a platform carve-out implies that the creation of a platform is tantamount to the provision of investment advice under certain circumstances. This would expose platform providers to additional litigation and

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<sup>16</sup> Adv. Op. 97-16A (May 22, 1997) (making available a menu of funds to a plan sponsor and retaining the ability to change the funds offered under that menu did not rise to the level of a fiduciary act as long as an independent plan fiduciary approved the initial menu and had the opportunity to approve any changes to the menu with advance notice of the proposed change).

<sup>17</sup> *Id.*; see also DOL Adv. Op. 2003-09A (June 2, 2003).

<sup>18</sup> See *Hecker v. Deere & Co.*, 556 F.3d 525 (7th Cir. 2009); see also *Leimkuehler v. Am. United Life Ins. Co.*, 713 F.3d 905 (7th Cir. 2013), *Zang v. Paychex*, 728 F.Supp.2d 261 (W.D.N.Y. 2010); *Santomenna v. John Hancock Life Ins. Co.*, No 2:10-cv-01655 (WJM), 2013 WL 3864395 (D.N.J. 2013).

<sup>19</sup> See SEC Form N-1A, Instruction 2(b) to Item 4 and Instruction 6 to Item 27(b)(7).

compliance risk without any corresponding benefit to participants, beneficiaries, or IRA Owners.

2. Alternative Approach. Alternatively, as explained below, the platform carve-out should be modified so that (a) variable annuity contracts are included as “platforms” for purposes of the carve-out, (b) IRA platforms qualify for the carve-out, (c) an employee-Adviser’s provision of investment advice regarding investment offerings available under the platform will not result in the loss of the carve-out with regard to the Financial Institution that created the platform, and (d) a composite benchmark that complies with SEC guidance may be used under the education and monitoring assistance rules.

- a. Variable Annuity Contracts are “Platforms”. If the Department takes the position that platforms should be the subject of a carve-out, the Department should clarify that individual or group variable annuity contracts offered to a plan sponsor constitute a “platform” for purposes of the carve-out. TIAA offers plans fixed annuities that qualify as guaranteed benefit contracts under ERISA and a separate account offering direct investments in real estate (the TIAA Real Estate Account), and CREF offers variable annuities with a choice of eight different investment portfolios or accounts, each with its own investment objective and strategy. Plan participants and beneficiaries or IRA Owners can transfer among these various annuities or mutual funds on the platform while they are in their accumulation phase, and they can get the benefits of a lifetime income stream by annuitizing their accumulated account balance at distribution, while still having the option to direct the investment of their account balances during their working years or afterwards. The insurance portion of the contracts gives the participant the annuitized distribution option. In addition, TIAA-CREF has a more conventional variable annuity offered through an insurance company separate account that provides several mutual funds as investment options. The plan sponsor or fiduciary selects which of the investment options will be made available under the plan or IRA. As such, these annuity offerings are indistinguishable from a platform of investments made available by a broker-dealer, recordkeeper, or other platform provider, but offer the added benefit of lifetime income protection through an annuitization option.

While we do not read the Proposal to preclude annuity contracts from the platform carve-out, we believe that the final regulation should clarify that annuity contract and separate account offerings can qualify as a “platform” for purposes of the carve-out.

- b. Carve-out for IRA Platforms.

While TIAA-CREF believes that investors are often best served by retaining assets in employer plans which provide access to guaranteed income, opening and maintaining an IRA (including in some cases, a rollover of assets into an IRA to obtain a consolidated or appropriately diversified investment portfolio or additional services) also can serve the retirement investor’s best interests. To this

end, TIAA-CREF IRAs allow the retirement investor to choose the investment options that best fit his or her needs. Investment options include annuities and mutual funds issued by TIAA-CREF affiliates, third party mutual funds, stocks, bonds and other typical brokerage investments. The retirement investor can choose to manage his or her IRA on a self-directed basis or engage TIAA-CREF to manage the account through enrollment in one of TIAA-CREF's managed account programs. These options allow the retirement investor to complete his or her retirement portfolio with investment options that complement the investments held in the employer-sponsored plan and achieve diversification of investments across retirement savings in a manner that may not be available if he or she were to limit investing strictly to options available within the employer plan.

As discussed above, the Department's exclusion of IRAs from the platform carve-out fails to recognize its own prior position and that of the courts that creating a platform and making it available is not itself a fiduciary act. Further, by excluding IRAs the Department appears to assume that IRA Owners are incapable of recognizing when they are being offered an investment platform from which they may select, as opposed to when advice about which option to choose is being provided. We do not agree with this position. TIAA-CREF provides individual fixed and variable annuity contracts to IRAs that are very similar to the annuity contracts it offers to participant-directed individual account plans, as well as other investment options including mutual funds and brokerage accounts. We believe it unlikely that any IRA Owner would believe that including any number of investment options under an individual contract would be tantamount to giving advice to the IRA holder to invest in any one or more of the investment options, particularly if the number of investment options is sufficient to offer "diversified investment alternatives which constitute a broad range of investment alternatives" and TIAA-CREF as the platform provider included the disclosure required under the proposed platform carve-out.

Therefore, we disagree with the Department's position on this point and believe that the platform carve-out should be made available to IRAs.

- c. Role of Employees. The proposed Platform carve-out applies to a "person" who "markets and makes available to an employee benefit plan (as described in section 3(3) of the Act), without regard to the individualized needs of the plan, its participants, or beneficiaries, securities or other property through a platform or similar mechanism from which a plan fiduciary may select or monitor investment alternatives" if certain requirements are met. The "person" may also make available to the plan fiduciary, participants, and beneficiaries information about the investment alternatives within certain limits and the platform carve-out will continue to be available. The Department does not specify whether the "person" is the Financial Institution that is the platform provider or an Adviser (*i.e.*, an independent contractor, agent, or registered representative of the Financial Institution).

However, TIAA-CREF provides education and advice through employees, not through independent contractors or non-employee insurance agents. Employees,

of course, act on behalf of the employer as its agents in the scope of their employment. We are concerned that the Proposal could be interpreted to provide that the platform carve-out is not available to TIAA or CREF if an employee of TIAA advises a plan fiduciary regarding what investments are made available under the plan. This means that we will be unnecessarily exposed to compliance and litigation risk in the event that the carve-out is not available. In addition, this result would be inconsistent with the language in section 3(21) of ERISA, which provides that a person is a fiduciary “with respect to a plan *to the extent . . . he renders investment advice for a fee or other compensation . . .*”

Therefore, the DOL should clarify the platform carve-out continues to be available to a Financial Institution even if an Adviser provides investment advice about the investment alternatives in the platform, and even if the Adviser is an employee of the Financial Institution.

- d. Education and Monitoring Assistance. The Department should provide specifically that using a composite benchmark, accompanied by the type of broad-based securities market index required by the SEC rules, would satisfy this aspect of the platform carve-out rules.

## Education Carve-out

### Background

TIAA-CREF agrees with the Department’s proposal to recognize that investment education is not, and should not, be treated as investment advice under ERISA, based on principles articulated in Interpretive Bulletin 96-1.<sup>20</sup> We believe that the framework reflected in IB 96-1 has led to greater access to educational information for the millions of plan participants and IRA Owners serviced by TIAA-CREF. We believe the provision of this information improves their chances at a financially secure retirement. However, we note that the carve-out specifically excludes asset allocation models populated with specific investment funds. The Department, based upon its own experience and public comments, believes that asset allocation models populated with actual investment alternatives available under the plan or IRA “function as tailored, individualized investment recommendations, and can effectively steer recipients to particular investments, but without adequate protections against potential abuse.”<sup>21</sup>

Also, the carve-out as proposed includes information about discussing distribution alternatives in the lifetime income context.

### Concerns

The Department’s position ignores the fact that most asset allocation models are populated with the investments actually available under the plan or IRA. In this way, the model is most helpful to the plan fiduciaries, plan participants, plan beneficiaries, and IRA holders that

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<sup>20</sup> 29 C.F.R. § 25.09.96-1 (“IB 96-1”).

<sup>21</sup> 80 FR at 21945 (April 20, 2015).

rely on them. Restricting the Education carve-out to generic models will require wholesale changes to the models currently in use and reduce significantly the usefulness of the model itself. TIAA-CREF believes such a restriction would dramatically reduce the value of participant education initiatives by making it exceedingly difficult, if not impossible, to impart the information needed by participants to implement their investment decisions.

It is significant that “the Department believes that FINRA’s guidance in this area may provide useful standards and guideposts for distinguishing investment education from investment advice under ERISA.”<sup>22</sup> The Department has asked for comments on the discussion in FINRA’s “Frequently Asked Questions, FINRA Rule 2111 (Suitability)” (“FINRA FAQs”) of the term “recommendation” in the context of asset allocation models and general investment strategies.<sup>23</sup> In our view, FINRA guidance is informative as to whether the population of asset allocation models with specific funds may be advice. The FINRA FAQs reference FINRA Regulatory Notice 12-25 for guidance as to when an asset allocation model is a recommendation. That Notice points to FINRA Rule 2111.03, which provides for a safe harbor from the suitability requirements if an asset allocation model meets certain requirements. In Question 8, FINRA states that “as an allocation recommendation becomes narrower or more specific, the recommendation gets closer to becoming a recommendation of particular securities and, thus, subject to the suitability rule, depending on a variety of factors (*including the number of issuers that fall within the broker-dealer’s allocation recommendation*)” (emphasis added). Clearly, FINRA believes that in at least some circumstances the allocation can be populated with specific investments without becoming advice. The determinative factor is whether they are presented in a way that the result in a recommendation. In other words, FINRA requires no blanket prohibition, unlike the Department’s Proposal.

The Proposal states that the plan may “describe investment objectives and philosophies, risk and return characteristics, historical return information or related prospectuses of investment alternatives under the plan or IRA.” Thus, it appears that a person can provide information identifying the asset classes of the plan’s or IRA’s investment options and can provide a hypothetical asset allocation for the plan fiduciary, plan participant or beneficiary, or IRA holder, but the person cannot combine the two. Is it permissible, for example, to present two separate information brochures, each of which contains one of the two points? When, if at all, does the regulation link those two pieces of data so that separately they are educational, but together constitute advice?

As a practical matter, we note that when a plan sponsor or independent fiduciary significantly revamps a plan’s investment menu, or (in the case of a multi-vendor 403(b) plan) consolidates multiple recordkeepers into a sole recordkeeper, those changes are explained in a transition guide or other participant brochure. These guides are carefully written to make the changes as clear as possible, and would always contain a list of the new investment options, a description of which asset classes they are in, and a description of any decisions the fiduciary has made about how eliminated funds will be mapped to the new funds. These are educational activities that describe the new offering and investment menu, not recommendations. Quite

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<sup>22</sup> 80 FR at 21945, fn 24.

<sup>23</sup> *Id.*

often, the guide will also contain model asset allocations, which under the Proposal would seem to change the entire brochure into “advice” to the extent they are coupled with the description of the new investment options. It is a stretch to see how this sort of balanced presentation could morph an educational process into a “tailored, individualized investment recommendation” that “effectively steers recipients to particular investments.”

One of the unintended consequences of the Department’s shift of the IB 96-1 line between education and advice is to make it more difficult for us to provide data about the performance and fees of existing options, as well as benchmark information. We provide this data regularly, at the request of many of our plan sponsor clients, and the basic performance data over multiple time periods helps our clients meet their fiduciary requirements to assess and monitor the investment options they have chosen for their plans, to fulfill commitments made in their investment policy statements, and identify candidates for their watch lists. For many plan sponsor clients, we provide this data on quarterly webcasts, and always invite plans with both large and small numbers of participants.

We understand this sort of practice to be relatively common in the retirement services industry. If the Department retains the existing separation of education and advice in accord with the principles of IB 96-1, it would not appear that providing data of this sort, with no editorial comment or marketing, would rise to the level of fiduciary advice. But if the Department does not retain that approach, it should specifically state this service for plan sponsors does not constitute advice.<sup>24</sup>

The Proposal provides generally that a recommendation about whether to take a distribution from a plan and to roll over the distribution to another plan or IRA is fiduciary advice. We agree there may be many instances when such a recommendation is fiduciary advice as opposed to education, based on the particular facts and circumstances. We believe that in many cases participants are well served to keep their assets within a plan. We occasionally observe transactions where IRA providers have convinced our plan participants to roll over in ways we believe could be easily argued are against the participants’ best interests. Such abuses may be related to advice to a plan participant to liquidate a favorable investment with a current interest rate far above what is available in the current IRA market, or to enroll in a “teaser” offer providing incentives for a rollover, or a situation where a plan participant rolls assets to an IRA without understanding that his or her new investments have a much different risk profile (such as a move to a long term bond fund from a guaranteed fixed annuity). A seller’s carve-out under which an IRA investor or potential IRA investor would clearly understand when he or she is being sold, versus being advised, would adequately address those abusive situations.

In the education carve-out, the Department states that certain plan information is carved out from investment advice because the information is investment education rather than advice. Regarding the plan information regarding distributions, a person may “describe the terms or

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<sup>24</sup> The “selection and monitoring assistance” carve-out from the proposed fiduciary definition, Proposed Reg. Sec. 2510.3-21(b)(4), may permit this activity as a carve-out from fiduciary activities. But, in fact, this activity is educational, not advisory, so it should not be necessary to rely on a carve-out.

operation of the plan or IRA, inform a plan fiduciary, participant, beneficiary, or IRA Owner about the benefits of plan or IRA participation, the benefits of increasing plan or IRA contributions, the impact of preretirement withdrawals on retirement income, retirement income needs, varying forms of distributions, including rollovers, annuitization and other forms of lifetime income payment options (*e.g.*, immediate annuity, deferred annuity, or incremental purchase of deferred annuity), advantages, disadvantages and risks of different forms of distributions.” However, any such information must be provided “without reference to the appropriateness of . . . any individual benefit distribution option for the plan or IRA, or a particular participant or beneficiary or IRA Owner.”

The carve-out in the Proposal would require a financial professional providing holistic education to omit information that is both appropriate and arguably indispensable to a participant’s or IRA Owner’s understanding of his or her choices. Obviously a plan participant or IRA Owner must understand his or her distribution options and minimum distribution requirements (under section 401(a)(9) of the Code). The carve-out appropriately requires the material to be factual and objective. Because of the heightened emphasis in the definition of advice on distributions, however, the education carve-out should specifically permit distribution education and rollover education. It is critical that participants in plans be provided information that supports the public policy objective of keeping retirement assets in retirement vehicles so that the assets will be available in the retirement phase of life. We strongly urge the Department not to limit discussion of distributions in education.

In general, call center employees should be permitted to explain any information required to be included in a notice under section 402(f) of the Code, an IRA disclosure statement, a prospectus or other required disclosure, or an information return. The allowance of education incidental to disclosure should not be limited to tax information. If the information given is not accurate, customers have recourse through the usual company complaint channels and legal remedies.

### **Proposed Modifications**

1. Identifying Specific Investment Options should be Permitted. In the final regulation, the Department should extend the education carve-out to asset allocations among the investment options available under the plan or IRA, as previously determined by a plan fiduciary or IRA holder. We believe that the potential for abusive “steering” identified by the Department can be eliminated in one of two ways. First, the Department can require that if “a model asset allocation identifies or matches any specific investment alternative available under the plan with a generic asset class, then all investment alternatives under the plan with similar risk and return characteristics must be similarly identified or matched.” 61 FR 29586, 29587 (exposure draft). In the event many investment alternatives are available within an asset class, the final regulation should permit asset allocation models to identify a representative subset of alternatives, as long as the subset is selected based on neutral factors and does not disproportionately identify alternatives that result in the most compensation being paid to the adviser or financial institution. Second, any potential for abuse by the model provider in the plan context would be eliminated if the plan

sponsor or independent plan fiduciary could select the specific investment options included for each asset class in the portfolio.

We also request clarification that providers of generic asset allocation models to financial services companies that serve as discretionary investment managers and fiduciaries to a plan would not be viewed as providing investment advice.

2. Continue the Well-Understood IB 96-1 Standard for Education. As we noted in the Summary of Key Structural Issues at the beginning of this comment letter, we respectfully request the Department to retain the well-known and well-understood standard for distinguishing “education” from “advice” first set forth in IB 96-1, and permit educational materials and conversations that describe how specific products work and how they may benefit plan sponsors and participants. Providing basic education about these specific product details, without a call to action or a reasonable basis for an expectation that the representative is selling, do not rise to the fiduciary level of advice, and should not be discouraged.
3. Transition Guides. We would find very helpful an example in the final regulation that concludes that furnishing a transition guide for participants as described above does not constitute advice because of its educational nature, as long as it follows fundamental rules about refraining from a call to action or creating a reasonable basis that the seller is acting on behalf of the plan. Similarly, the Department should clarify that providing data to plan sponsors, participants, or IRA Owners about the performance and fees of existing options, as well as benchmark information, is not fiduciary advice.
4. Clarify the Language about Distribution and Rollover Education. Our concern is that the carve-out provides no specific information about how to distinguish between providing rollover education versus rollover advice. The language above seems to suggest that an Adviser may provide information that a rollover opportunity is available, but provides no clarity how one might provide education on the benefits of a rollover to a plan or IRA. On the other hand, the Proposal provides guidance on how to inform plan participants about the advantages of remaining in the plan. In addition, in the course of a discussion about a plan’s distribution options, a plan participant will almost inevitably ask whether TIAA-CREF offers an IRA product. The language in the education carve-out suggests that even answering the question “yes” may trigger loss of the carve-out, which should not be the case. We assume this is not the intent of the Department.

Therefore, the Department should include more guidance in its final regulation regarding when information about distribution options (including rollovers) is education rather than advice. As noted above, we recommend the Department retain the current IB 96-1 line between education and advice.

## **VI. Exemptive Relief for Participant-Directed Plans**

### **The Proposal may unnecessarily restrict appropriate forms of compensation received by TIAA-CREF**

#### **Background**

The Department proposes to modify the current exemptions available under ERISA and the Code, so that certain prohibited transactions that may arise by reason of investment advice provided to “Retirement Investors” may only be permitted through the BIC Exemption. The BIC Exemption would be available for prohibited transactions that may arise by reason of providing investment advice to IRA Owners regarding the purchase of insurance products and mutual funds that are securities for purposes of the federal securities laws. For insurance products that are not securities (such as fixed annuities), the Adviser, Financial Institution, Affiliate, and Related Entity may rely on the BIC Exemption or PTE 84-24, as modified by the Proposal.

The Department has stated that the intent of the BIC Exemption is to allow the receipt of revenue streams that are normally received by the Adviser, Financial Institution, Affiliate, and Related Entity, provided that the exemption conditions are met. (As explained below, we believe the conditions of the BIC Exemption must be modified for the exemption to be workable.)

Importantly, however, the BIC Exemption does not apply to advice given to plan sponsors or similar fiduciaries of participant-directed defined contribution plans. As such, Advisers and Financial Institutions must rely on existing PTEs, as amended.

Currently, prohibited transactions that arise by reason of providing investment advice to a sponsor or similar plan fiduciary of a participant-directed defined contribution plan, regardless of the size of the plan, may be exempt under PTEs 75-1, 84-24, or 86-128. Each of these class exemptions was modified by the Proposal. The modifications to these exemptions make it impossible for the Adviser, Financial Institution, Affiliate, and Related Entity to receive conventional forms of compensation for distribution and other services, such as commissions, 12b-1 fees, shareholder servicing fees, sub-transfer agent fees, revenue sharing and other third party payments for the following reasons:

1. PTE 84-24 defines “Insurance Commission” as “a sales commission paid by the insurance company or an Affiliate to the insurance agent or broker or pension consultant for the service of effecting the purchase or sale of an insurance or annuity contract, including renewal fees and trailers...” However, the definition specifically excludes “revenue sharing payments, administrative fees or marketing payments, or payments from parties other than the insurance company or its Affiliates.” Moreover, the definition covers only commissions paid to an agent, broker, and consultant. TIAA-CREF uses its employees to educate about and sell annuity products and mutual funds on its platform to its plan participants and IRA Owners, and does not pay commissions but instead considers the extent of sales as a factor in awarding variable compensation (bonuses) to the employee.

2. Similarly, the definition of “Mutual Fund Commission” includes a “commission or sales load paid either by the plan or the investment company for the service of effecting or executing the purchase or sale of investment company shares,” but specifically excludes “a 12b-1 fee, revenue sharing payment, administrative fee or marketing fee.”
3. Section I(a)(4) of the proposed changes to PTE 84-24 exempts “the purchase, with plan assets, of an insurance or annuity contract from an insurance company”. Given this clear statement, we do not understand the need for retaining Section I(a)(5), which addresses the purchase of an insurance or annuity contract from an insurance company which is a fiduciary or a service provider solely by sponsoring a master or prototype plan.

### **Concerns**

There will be many instances where TIAA-CREF will voluntarily take on a fiduciary role under the Proposal and will need to rely on the amended PTEs. TIAA’s employees educate our clients about annuity products and mutual funds we sell on our platforms. TIAA-CREF does not pay commissions for these activities, but instead considers the volume of sales of all TIAA-CREF products as a factor in awarding variable compensation to the employee. However, TIAA-CREF and its affiliates do receive 12b-1 fees, revenue sharing payments, administrative fees or marketing fees, and other third-party payments for the sale of shares in mutual funds made available under variable annuities and on its other platforms. These third-party payments enable TIAA-CREF to provide flexibility to its plan and IRA clients regarding how they will pay for several services associated with maintaining the plan such as recordkeeping, trustee and custodial services. Many of our plan sponsor clients prefer to pay for these services in this manner rather than paying directly from plan or IRA assets, and this compensation structure is a business necessity in this era of open architecture.

As a result of the proposed amendments to PTE 84-24, the Proposal effectively prohibits the receipt of third-party payments where they are permitted under the current exemptions. For example, when TIAA-CREF offers a variable annuity that includes unaffiliated funds or a platform of mutual funds outside of an annuity contract that includes unaffiliated and affiliated mutual funds to self-directed defined contribution plans, and a TIAA-CREF employee provides investment advice to the plan fiduciary regarding which funds to make available under the plan, PTE 84-24, as proposed, can be read to prohibit TIAA-CREF’s receipt of third-party payments. Similarly, PTE 86-128, as proposed, does not cover agency transactions and narrowly defines “Commission,” so we believe that no compensation can be paid in connection with purchases and sales of unaffiliated mutual funds’ shares under that exemption. In addition, while the Department may take the position that the BIC Exemption may permit the receipt of third-party payments from affiliated and unaffiliated mutual funds, the BIC Exemption does not exempt compensation paid with respect to purchase and sales transactions involving advice given to plan sponsors and similar fiduciaries of participant-directed plans.

If the Department intends to provide special treatment to insurance and investment companies that sponsor master or prototype plans (see PTE 84-24, Sections I(a)(5) and (6)), we

do not understand why that special treatment is appropriate. We note that there is currently no master or prototype program for 403(b) plans, although we anticipate the IRS may approve a pre-approved plan document program for 403(b) plans by 2017 or 2018.

The proposed changes to PTE 75-1, Part II and PTE 86-128 similarly appear to make it impossible for TIAA-CREF and other providers to receive 12b-1 fees, revenue sharing payment, marketing fees, administrative fees, sub-TA fees, and the other payments in connection with the purchase and sale of unaffiliated mutual fund shares. This is because almost no mutual fund shares are purchased or sold in the manner described in the proposed exemption. Instead, mutual fund shares are purchased by a recordkeeper on an agency basis, on behalf of the plan, not on a principal basis from inventory held by the recordkeeper. Further, unlike the current PTE 75-1, Part II, the proposed PTE 86-128 cannot be read to exempt any prohibited transaction that may arise in connection with the purchase and sale transaction, but rather is limited to “Commissions,” which do not include the aforementioned payments. The inability of TIAA-CREF and other providers to receive revenue sharing and other payments will prevent us from charging plans lower fees for our products and services.

### **Proposed Modifications**

1. Comments on PTE 84-24, as amended. Proposed PTE 84-24, Part I(a)(3) provides that if the conditions of the exemption are met it covers “the effecting by an insurance agent or broker, pension consultant or investment company principal underwriter of a transaction for the purchase, with plan assets, of an insurance or annuity contract or securities issued by an investment company.” Currently, PTE 84-24, Part III(c) includes the same language, which is generally interpreted to exempt any prohibited transaction that may arise by reason of the sale of an “insurance or annuity contract” – including payments of 12b-1 fees, revenue sharing payments, administrative fee, marketing fees and similar amounts to an insurance company that issues a group variable annuity contract. We and others have understood the current language to provide relief for any conflict of interest that we and our employee-agents may have when recommending annuities or funds, which would include such compensation. In addition, the provision is interpreted to apply to such payments made in connection with investment advice given by the fund’s underwriter (or an affiliate). However, the proposed limits in the definitions of “Insurance Commission” and “Mutual Fund Commission” call into question whether the Department views such payments to the insurer as problematic.

TIAA-CREF will rely on this exemption to sell its fixed and variable proprietary pay-out annuities to plan participants. And any recordkeeper with an open architecture offering with non-proprietary mutual funds will have the same concern about getting compensated for the services it provides to the mutual fund family. We therefore need to be assured that TIAA-CREF’s receipt of fees under those contracts is covered under PTE 84-24. This is a critical element of our success in providing lifetime income solutions to plan participants with low fees for recordkeeping expenses. And our ability to do so is in the best interest of our participants who need these annuities and the financial support they provide in retirement.

In addition, participants would benefit if TIAA-CREF could sell its variable annuities to IRA holders using PTE 84-24. A participant may well have a combination of plan and IRA money at retirement and we should be able to rely on PTE 84-24 for both the participant's plan and IRA assets where we believe that a combination of fixed and variable pay-out annuities from both sources is in the best interest of the participant. These payments allow us to charge self-directed defined contribution plans lower fees for investment, recordkeeping, insurance guarantees, and other products and services necessary for the operation of the plan.

2. Comments on PTE 75-1 and PTE 86-128, as amended. The Department should extend PTE 86-128 to include agency purchase and sale transactions of mutual fund shares and to include payments of 12b-1 fees, revenue sharing payments, marketing fees, administrative fees, sub-TA fees, and other payments to a Financial Institution. We note that the PTE 86-128 will now include the Impartial Conduct Standard and continue to include the current exemption's reporting requirements. Thus, the plans will be adequately protected from any conflicts of interest.

## **Details of the Best Interest Standard in PTE 84-24 and PTE 86-128**

### **Background**

In the Proposal, the Department intends to modify PTE 84-24 so that the insurance agent or broker, pension consultant, insurance company or principal underwriter complies with Impartial Conduct Standards. Among other things, these standards require that the insurance agent or broker, pension consultant, insurance company or principal underwriter act in the "Best Interest" of the plan or IRA. A person acts in the "Best Interest" if he or she acts with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances and needs of the plan or IRA, without regard to the financial or other interests of the fiduciary, any affiliate or other party."<sup>25</sup> Apparently, the Department added this condition not to create new duties for plan fiduciaries, but to extend ERISA-type duties to IRA advisors, who are not subject to section 404 of ERISA.<sup>26</sup>

### **Concerns**

TIAA-CREF fully supports the Department's adoption of the Best Interest standard. But we believe that standard should be phrased so it is identical to the duties of prudence and loyalty that have been developed since ERISA was passed. Because the operative language in the Proposal does not expressly incorporate the section 404 duties, the Department risks creating for plans and IRAs a new and independent standard. At the least, this new standard will cause uncertainty for years to come, and at worst, it establishes an even broader and potentially unachievable standard, particularly for those making recommendations with respect to

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<sup>25</sup> Prop. PTE 84-24 §VI(b); Prop. BIC Exemption § VIII(d) (emphasis added).

<sup>26</sup> 80 FR at 21970 (April 20, 2015).

proprietary products and services. The potential for increased litigation over the meaning of the additional phrase added to ERISA’s standard fiduciary definition risks subjecting TIAA-CREF to unnecessary litigation, the cost of which will directly be borne by our participants in lower retirement benefits. ERISA’s fiduciary standard is the highest standard required by law and does not need this kind of enhancement to protect our participants and IRA Owners.

We also do not believe that a fiduciary to an IRA should be subject to a standard that is articulated differently from ERISA’s standard. ERISA’s duty of prudence requires the fiduciary to act with the “care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.” ERISA’s duty of loyalty requires that a fiduciary “shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries.” As in the plan context, adding a “Best Interest” standard articulated differently from the ERISA fiduciary standard will only increase compliance risk and litigation risk, without meeting the Department’s stated goal to assure that fiduciaries acts in the plan’s and IRA’s best interest. For example, ERISA’s duties of prudence and loyalty allow a fiduciary to recommend the sale of proprietary products or the sale of products that will cause certain payments being made to an agent or insurance company. However, the Best Interest standard’s phrase “without regard to the financial or other interests” exposes financial professionals and insurers to the risk they can offer no advice with respect to a proprietary product or a transaction resulting in the payment of revenue sharing.

In particular, the Proposal’s language “without regard to the financial or other interests of the Adviser, Financial Institution, any Affiliate, Related Entity, or other party” could call into question one of the longstanding tenets of ERISA’s duty of loyalty – the concept of permissible incidental benefits. The duty of loyalty has been consistently interpreted to permit a fiduciary to benefit from a plan transaction as long as that benefit is incidental to a decision that is in the best interests of the plan participants. The U.S. Supreme Court has held that a fiduciary does not violate ERISA by taking action otherwise consistent with ERISA’s duty of loyalty but that incidentally benefits the fiduciary.<sup>27</sup> Moreover, the Department has acknowledged and accepted this interpretation of ERISA’s fiduciary duty in several of its own Advisory Opinions.<sup>28</sup>

As currently proposed, the Best Interest standard provides no clear guidance or examples regarding compliant sales practices, particularly regarding the sale and recommendation of proprietary products (even products like ours that are designed to be in the best interests of our participants). The “without regard to” language could be interpreted to preclude the sale of proprietary products altogether. The outcome here would be a standard that would favor certain

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<sup>27</sup> See *Hughes Aircraft v. Jacobson*, 525 U.S. 432 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996).

<sup>28</sup> See, e.g., A.O. 2011-15A (February 3, 2011); 2001-01A (Jan. 18, 2001), and 2003-04A (Mar. 26, 2003).

business models at the expense of others.<sup>29</sup> For example, insurance companies like TIAA-CREF only sell proprietary annuity products. By prohibiting insurance companies from exclusively selling their own products, the Department would only decrease the availability of guaranteed lifetime income products. These are, of course, the very products our participants need to be able to retire without fear of outliving their income.

### **Proposed Modification**

1. Apply the ERISA Standard. Therefore, we urge the Department to modify the Best Interest standard in 84-24 and 86-128 to require the fiduciary adviser to act:
  - (i) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances and needs of the plan or IRA, and (ii) solely in the interest of the Retirement Investor, in each case as such standards are interpreted under Section 404 of ERISA.

We make a similar recommendation about the use of the Best Interest Standard in the BIC Exemption; see below.

2. Proprietary Products. We also ask the Department to confirm that to comply with the Best Interest and Impartial Conduct Standards an Adviser need not recommend non-proprietary products or the “lowest cost” product. This is especially important to us because we have designed our annuities to always be in the best interest of our participants by providing the guarantees that they need. These annuities have to be economically viable in order to provide benefits that can last for decades in retirement. Mutual funds cannot provide these guarantees. They must be paid for, and that makes annuity products – both fixed and variable – inherently more expensive than low cost mutual funds. The Department’s current guidance, including PTE 77-4 and PTE 84-24, contemplates that a fiduciary can provide advice to invest in a proprietary product and still meet ERISA’s duty of loyalty requirements. Further, the Department and the courts have long recognized that cost is simply one factor among several, including quality of the product or service, to be considered when making any fiduciary decision.<sup>30</sup>

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<sup>29</sup> The Department has recognized the need to provide relief for the sale of proprietary products to plans since the enactment of ERISA. *See, e.g.*, ERISA Section 408(b)(5); PTE 77-3; PTE 84-24; A.O. 2000-15A.

<sup>30</sup> *See Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009) (“nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems)”; *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596 (8th Cir. 2009) (a fiduciary might “have chosen funds with higher fees for any number of reasons, including potential for higher return, lower financial risk, more services offered, or greater management flexibility”); see also United States Department Of Labor: Employee Benefits Security Administration *Meeting Your Fiduciary Responsibilities*, 1, 5 (February 2012), available online: <http://www.dol.gov/ebsa/publications/fiduciaryresponsibility.html>

## **VII. Best Interest Contract Exemption**

### **Background and Concerns**

Sophisticated plan sponsors and fiduciaries want their service providers to maintain multiple touch points with plan participants, and IRA Owners demand the same service. These contacts may be educational or may constitute advice, and it is impossible to predict how a conversation or discussion will go – exactly the point of having well-trained representatives who can bring their entire experience to bear on the interaction. Therefore the service provider will err on the side of considering any possible interaction as one that should be subject to the BIC Exemption. To the extent this turns out to have been unnecessary, the firm and the Adviser may have unnecessarily subjected themselves to potential liability. It would be helpful for the Department to clarify that an interaction that did not require the BIC Exemption cannot give rise to liability under it, and that such a provision in the written contract will be enforceable.

At the same time, the BIC Exemption must be flexible enough to accommodate varying channels (ways of delivering advice), such as in person, on the phone, or on the web. As presently drafted it appears only to contemplate advice provided on a transactional basis. It ignores that what Retirement Investors often need is a holistic assessment of their retirement portfolio and the options for meeting their future retirement needs that is delivered through in person interactions that allow for back and forth interaction between the Adviser and the Retirement Investor. This kind of dialog cannot be replicated through self-service tools or use of a computer model. It also should be available to Retirement Investors regardless of net worth and the ability to pay an asset-based fee.

These needs are particularly pronounced where the Retirement Investor is nearing or entering retirement and seeking advice on how he or she can create an income stream that will last through retirement. In such instances, a multi-pronged approach may be in the Retirement Investors' best interest, taking into account guaranteed income sources from Social Security and fixed annuities (which may be available under the employer plan) that can provide a guaranteed income floor to meet fixed expenses as well as a systematic withdrawal portfolio that allows him or her to continue to experience growth in assets through an investment portfolio consistent with his or her risk tolerance, objectives and other needs. This holistic approach typically considers several investment options which may be implemented together or at various points in time by the investor. Additionally, the Retirement Investor may interact with several Advisers about his or her needs throughout this process, with varying areas of specialization.

But the BIC Exemption imposes a transaction-based contracting and disclosure regime on what should be a fluid discussion that addresses varying needs and investing options and at varying times in the Retirement Investor's life. It is unclear how a Financial Institution would administer such contract and disclosure obligations when providing advice that is geared to a holistic assessment of retirement needs at various points in time. Would the written contract need to be amended with each successive interaction? Would each Adviser serving the Retirement Investor (albeit at different points in time) need to be a party to the contract with the contract delineating the role of each? Would the disclosures envisioned by the rule need to be updated with each successive interaction and include cumulative information reflecting each

product or service discussed over time? We submit that the costs of building systems to accommodate such requirements (which we have estimated; see below) could make the provision of such services unfeasible from an economic perspective – especially where the participant pays no advisory fee for such services and the only compensation the firm earns is paid in connection with the distribution of the products in which the participant chooses to invest (e.g., 12b-1 fees and administrative fees). Additionally, the potential risks associated with immaterial or unintentional breaches of an agreement and the compliance challenges associated with subjective, hard-to-measure exemption requirements would need to be factored into firms’ willingness to provide the service and pricing for such services. This could result in firms declining to provide such services entirely or only providing such services for an asset based fee reflective of the costs of compliance with the BIC Exemption and risks involved, effectively putting valuable advice outside the reach of many participants and IRA Owners who need it the most. As we note in Section III of this letter, the value of advice to participants in connection with investment decision making should not be discounted by the Department.

There are potentially very serious consequences from an immaterial failure to meet some of the detailed requirements of the BIC Exemption. These risks are not proportionate to any harm to the investor. We think participants and IRA Owners would ultimately be well served by a general provision in the exemption that would excuse Advisers and Financial Institutions from immaterial and unintentional breaches, so they do not give rise to exposure to the IRS for excise taxes or to private plaintiff lawyers for strike suits and nuisance settlements. Such an approach would help participants and IRA Owners because the costs of serving them would be reduced, and would be consistent with the policy approach used by the Department in drafting the BIC Exemption, which is unlike the typical extremely detailed requirements of a PTE. A savings provision may be narrowly drafted, as set forth below.

## **Impartial Conduct Standard**

### **Background**

The BIC Exemption requires a warranty from the Adviser and Financial Institution that they will conform to an Impartial Conduct Standard. Among other things, the standard requires that the Adviser act in the “Best Interest” of the Retail Investor. The Adviser and Financial Institution act in the “Best Interest” if they provide “advice that reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party.”

Additionally, while not part of the Impartial Conduct Standard, the Adviser and Financial Institution must provide a number of warranties, including that “Neither the Financial Institution nor (to the best of its knowledge) any Affiliate or Related Entity uses quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other actions or incentives to the extent they would tend to encourage individual Advisers to make recommendations that are not in the Best Interest of the Retirement Investor.”

The Proposal goes on to provide that the aforementioned warranty provision “does not prevent the Financial Institution or its Affiliates and Related Entities from providing Advisers with differential compensation based on investments by Plans, participant or beneficiary accounts, or IRAs, to the extent such compensation would not encourage advice that runs counter to the Best Interest of the Retirement Investor (*e.g.*, differential compensation based on such neutral factors as the difference in time and analysis necessary to provide prudent advice with respect to different types of investments would be permissible).”

In the Preamble to the BIC Exemption, the DOL noted that a “level-fee” structure, in which compensation for Advisers does not vary based on the particular investment product recommended, is not required to satisfy this condition. It also specified five examples of compensation structures that could satisfy the contractual warranty: independently certified computer models, asset-based compensation, fee offsets, differential payments based on neutral factors, and aligned policies and procedures.

### Concerns

We fully support the application of the Best Interest standard based on a common understanding of the duties of prudence and loyalty as developed to date. But the “Best Interest” standard as articulated is unnecessarily duplicative in cases where advice provided to a Retirement Investor has already resulted in fiduciary status under ERISA. In addition, in the context of both plans subject to ERISA and IRA Owners where ERISA does not apply, the articulation of the “Best Interest” standard in a manner that does not reflect the prudence and loyalty standards in ERISA section 404(a) is not consistent with the Department’s stated intent that the standard should be interpreted “in light of forty years of judicial experience with ERISA’s fiduciary standards and hundreds more with the duties imposed on trustees under the common law of trusts.” As we argue above in connection with PTEs 84-24 and 86-128, the Proposal’s articulation will only expose Advisers and Financial Institutions to unnecessary compliance and litigation risk. The Department should state in the final BIC Exemption that “Best Interest” has the same formulation and meaning as the duties of prudence and loyalty under ERISA section 404.

Under a proposed BIC warranty, fee structures that “tend to encourage individual Advisers to make recommendations that are not in the Best Interest of the Retirement Investor” are prohibited. This warranty is not necessary as long as the Adviser or Financial Institution, as appropriate, state in the contract that they will comply with the “Best Interest” standard. Settled ERISA jurisprudence and DOL guidance already establish how a fiduciary should act in the “best interest” of an investor.<sup>31</sup>

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<sup>31</sup> In fact, the judicial interpretation of the “solely in the interest of the participants” language in section 404 of ERISA is that a fiduciary does not breach his duty of loyalty by pursuing a course of conduct which serves the interests of the plan’s beneficiaries while at the same time “incidentally benefitting” the fiduciary himself. See *Morse v. Stanley*, 732 F.2d 1139, 1146 (2d Cir.1984); *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir.1982); *Siskind v. Sperry Ret. Program, Unisys*, 47 F.3d 498, 506 (2d Cir.1995).

In essence, the warranties are guides about processes that should be put into place to help Financial Institutions comply with the Impartial Conduct Standards. It seems clear that to meet those standards all applicable laws should be complied with, policies and procedures should be in place to mitigate material conflicts and to police the activities of Advisers, measures should be adopted to prevent conflicts that would cause violations of the standards, and there should not be compensation practices in place that would encourage Advisers to make recommendations not in best interest of the Retirement Investor. We believe these are appropriate reference points that may be suggested in the preamble to final regulations, but they should not be made the basis for strike suits by plaintiff class action lawyers where the actions have been, in fact, prudent. From a public policy point of view, fiduciaries should be tasked with establishing processes and procedures to comply with the prudent person rule, just as they have for over 40 years.

Alternatively, if the Department insists on maintaining the current warranty requirement, the Preamble should include more than just examples of fee structures that likely pose no conflict under current law. Rather, those examples should be supplemented with examples of arrangements that could potentially result in a conflict, but otherwise pass muster under the BIC Exemption. Otherwise, to avoid litigation and tax risk an Adviser and Financial Institution may have to adopt one of the fee structures offered as an example under the Proposal, or decline to provide the service. With respect to the example that neutral factors can include compensation based on a reasonable assessment of the time and expertise necessary to provide prudent advice, the Department should clarify that the reasonableness assessment could be based on a good faith estimate of the amount of time and expertise required and would not require the Financial Institution nor its Adviser to track the time actually spent on each advice interaction. In addition, the Department should clarify that a neutral factor may be an assessment of the amount generally charged for similar services or products in the marketplace.

### **Proposed Modifications**

1. Apply ERISA Standards. The “Best Interest” standard in the Proposal should read as follows: “(i) provide advice with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims and (ii) solely in the interest of the Retirement Investor, in each case as such standards are interpreted under Section 404 of ERISA.”
2. Eliminate warranties. All warranty requirements should be eliminated from the BIC Exemption because they are unnecessary legally under the Best Interest standard and the written contract requirement will provide adequate remedies for a breach of that standard.
3. Provide Additional Guidance on Compensation. Alternatively, if the Department insists on maintaining the “tend to” warranty requirement, the preamble to the final rule should include examples of fee structures that likely pose a conflict, to provide guidance about types of compensation arrangements for Advisers that can manage the conflict.

4. Distinguish between Adviser Conflicts and Firm Conflicts. In the BIC Exemption, the Department should clarify the distinction between the management of Adviser conflicts versus the management of conflicts of the Financial Institution, Affiliates, and Related Entities. Therefore, to the extent that the Financial Institution does not compensate Advisers in a way that will cause the Adviser to make recommendations not in the Retirement Investor's "Best Interest," the ability of the Financial Institution to receive 12b-1 fees, shareholder servicing fees, sub-transfer agent fees, revenue sharing and other payments as a result of the recommendations should be treated as a separate transaction. The Department should also clarify that such a transaction may be exempt under ERISA section 408(b)(2) if the payments are not otherwise prohibited compensation or may be exempt under the BIC Exemption as long as the payments to the Financial Institution do not induce the Adviser to make recommendations that are not in Retirement Investor's "Best Interest."

## **Reasonable Compensation Requirement**

### **Background**

We recognize that ERISA and the Department have long required, and properly so, that the compensation paid to an Adviser, Financial Institution, Affiliate and Related Entity for the purchase and sale of account assets and the provision of services be "reasonable." The Department's regulations under Section 408(b)(2) specifically acknowledge that the value of the services provided is a critical factor in evaluating the reasonableness of fees.

### **Proposed Modification**

To reinforce ERISA's standard as to reasonableness of fees, the Department should include in the Proposal language reaffirming its position that an Adviser need not recommend or select the lowest cost product or service, but rather that ERISA requires a qualitative analysis requiring a review of the facts and circumstances with cost being just one factor to consider. The clarification would be particularly important for IRAs, as there is little guidance from the Department about the reasonableness of IRA fees.

## **Written Contract Requirement**

### **Background**

The BIC Exemption requires that the Retirement Investor enter into a tri-party agreement with the Financial Institution, signed by the Adviser, the Financial Institution, and the Retirement Investor, before any investment advice is provided to the Retirement Investor. This condition will simply not work in the normal course of business dealings between a prospective client and the Adviser and Financial Institution, from both a timing and an operational perspective.

## Concerns

Under the Proposal, an employee of TIAA-CREF who makes a “recommendation” in the context of a sales presentation before the investor has had the opportunity to make a judgment about whether the recommendation is worthy of serious consideration appears to become an Adviser immediately and would need to enter into a contract with the investor prior to providing the sales presentation. We do not believe that many investors would be willing to enter a contract with an Adviser or provide the detailed personal financial information needed by the Adviser to make a fiduciary decision before they understand the nature of the recommendations that the Adviser will make. And requiring a prospective investor to sign a detailed, tri-party contract before the Adviser may give the client any recommendations whatsoever will bring a quick end to the sales process. Additionally, TIAA-CREF personnel would be unable to assist investors with time sensitive matters (*e.g.*, unforeseen market events) that require a discussion of investment options without first entering into the three-party agreement with the investor – thus potentially exposing the investor to market risk while waiting for the contract signature process to be take place. Moreover, if the expertise of more than one TIAA-CREF employee is needed to assist the client, multiple Adviser signatures may be required to be obtained.

TIAA-CREF, like many other Financial Institutions, employs a multi-channel servicing model – typically, Retirement Investors can obtain assistance with their accounts, including advice where available, through our call center, on the campuses of their plan sponsor employer by meeting with a field consultant or, in some cases, by establishing a relationship with our Individual Advisory Services group (in this latter case, the Retirement Investor is supported by a dedicated advisor or advisory team).<sup>32</sup> Many TIAA-CREF representatives may serve the Retirement Investor based on the multi-channel servicing model and the Retirement Investor may not access the same representative for each interaction or transaction. Some of these interactions may constitute advice under the Proposal; others may not. Additionally, as noted above, the advice provided may be holistic and iterative over time and may involve multiple TIAA-CREF employees. The agreement requirement of the BIC Exemption must flexible enough to accommodate not only a multi-channel servicing model but also the provision of holistic advice, which is an important approach to meeting the participant’s needs in the most effective way possible. It is not practicable to require a tri-party agreement for each such interaction or with multiple Advisers. It is likewise impractical to establish a requirement which would effectively require the Financial Institution to amend the agreement when one or more Advisers cease to support the Retirement Investor and one or more new Advisers begin to support the Retirement Investor in place of the departing Adviser(s) or, in concert with the initial Advisers who signed the agreement with the goal of providing holistic advice.

Also we note that basic agency principles would make the principal (TIAA-CREF or its affiliates) responsible for the acts of the employee-advisor. For example, Restatement 3d of Agency § 2.04 states, “An employer is subject to liability for torts committed by employees while acting within the scope of their employment.” And, for example, New York law recognizes that liability for any violations of law or regulations by an agent or employee, if

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<sup>32</sup> The participant also can obtain assistance on a self-directed and automated basis through the TIAA-CREF.org website.

working in the scope of the agent's or employee's actual and apparent authority, would fall on the employer.<sup>33</sup> So while there may be some cautionary or in terrorem effect on the Adviser from having signed the agreement, we submit that, given typical corporate indemnity policies that protect employees against personal liability for actions within the scope of their duties, the financial risk of bad actions will fall on the employer or Financial Institution.

Another set of issues arises because of the structure of diversified financial services firms such as TIAA-CREF: which entity should be a party to the written contract? Fiduciary advice under the Proposal likely will be provided by a licensed representative of a broker-dealer or registered investment advisor ("RIA"), so it may appear that the contracting party should be the entity with whom the representative is associated for purposes of providing fiduciary investment advice (*i.e.*, the brokerage or RIA firm that holds the securities licenses associated with the recommendation/fiduciary advice activities). However, in our case the representatives typically are "employees" of another entity (TIAA), although the supervisory responsibility for the representatives' fiduciary advice activity resides with the broker-dealer affiliate or RIA. Under FINRA rules, any person engaged in the securities business of the broker-dealer firm must be registered with FINRA as a registered representative of such firm and such persons may perform securities activities on behalf of the firm only to the extent appropriately licensed and supervised by the firm. Similar concepts apply to investment adviser representatives of RIA firms regarding investment advisory activities under applicable state laws. To obtain such licenses, the representatives must pass one or more qualification exams designed to demonstrate competence in connection with the securities or investment advisory activities in which the representatives will engage. The representatives must also complete continuing education associated with the licenses. Broker-dealer firms also must provide periodic training to their representatives on relevant topics.

In any event, the prohibited transactions sought to be addressed by the Proposal occur at multiple entity levels. In our case, the parent company TIAA acts as recordkeeper, offers the Traditional or fixed annuity backed by its general account, and offers various separate accounts including the Real Estate Account. Subsidiaries include a registered broker-dealer subject to SEC supervision, a federally chartered trust company subject to OCC and Federal Reserve supervision that acts as trustee and custodian for plan and IRA assets, a mutual fund adviser under the Investment Company Act, and others. In addition, TIAA offers and provides services for the eight CREF annuities, and it appears that CREF is a Related Entity and may even be an Affiliate. Our point is that requiring written contracts with each of these entities would involve a dizzying array of contracts, especially when multiple Advisers may be required to sign the same contract (and the contract amended from time to time to add and replace Advisers who provide advice to the client).

Furthermore, the agreement requirement should be flexible enough to allow for multiple services to be addressed, so there would be no need for multiple agreements with a Retirement Investor.

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<sup>33</sup> See *U.S. v. Incorporated Village of Island Park*, 888 F. Supp. 419, 444 (E.D.N.Y. 1995).

## Proposed Modifications

1. Timing of the Contract. The final BIC Exemption should not require that an agreement be entered prior to when investment advice is provided, but rather before the implementation or execution of such advice. Accordingly, the Department should revise section II(a) of the BIC Exemption to state: “(a) Contract. Prior to the transaction for which relief is sought under Section I, the Adviser and Financial Institution enter into a written contract with the Retirement Investor . . . .”
2. Multiple Entities. Where multiple Affiliates or Related Entities may provide services, the Department should confirm that the written agreement may be entered by one firm on behalf of all Affiliates or Related Entities involved or potentially involved.
3. Comprehensive, Evergreen Agreement. The Department should confirm that specific Assets need not be identified – instead, the contract may refer to all products and services on the platform. As the preamble notes (FR at 21969), the contract may be included in a comprehensive agreement that covers a wide array of potential advice activities, and the contract may be evergreen (*i.e.*, terminable upon reasonable notice by either party). This confirmation should be moved into the language of the final regulation with the force of law rather than in a preamble, especially given the potentially significant consequences of a prohibited transaction.
4. Only the Retirement Investor Must Sign. Contractual undertakings between a Financial Institution and an investor, including a Retirement Investor, typically involve an account agreement between the Financial Institution and the investor. The investor typically signs the agreement, but it is commercially impractical for a representative of the Financial Institution to sign each such agreement on behalf of the Financial Institution. The contract is enforceable upon the acceptance of the account by the Financial Institution or the provision of the applicable service. It would require a massive undertaking from a cost, time and resource perspective, for us to shift to the construct set forth in the Proposal. Additionally, it is not clear how this would or could work where advice is provided through a call center or in the context where holistic advice is provided over time and potentially by multiple Advisers. Nor is it clear how Financial Institutions could easily amend the contract.

For these reasons, we suggest that the Department clarify that the agreement need not be signed by the Financial Institution as long as it clearly states that it will bind the institution.

5. Disclaimers. The contracting institution must be able to disclaim liability for acts or omissions of a third party, such as a custodian or clearing firm, and for punitive and consequential damages.
6. Materiality. The definition of “Material Conflicts of Interest” should be revised to incorporate a standard of materiality. Additionally, the terms “direct” and “indirect” should have the same meanings attributed to them under Section 408(b)(2) of ERISA and the Form 5500.

## **Compensation and Other Disclosure Requirements**

### **Background**

The BIC Exemption conditions include making available certain disclosures and other information available to Retail Investors and the public. These disclosures are in addition to other disclosures that may be required under ERISA section 408(b)(2) or other applicable law. They include the following:

Point of Sale and Annual Disclosure: The proposed BIC Exemption requires a point of sale disclosure that must be delivered prior to the execution of any investment transaction. Such disclosure must include the following: (i) the all-in cost and anticipated future costs of recommended Assets in a summary chart and the “total cost” to the Retirement Investor for 1-, 5- and 10- year periods expressed as a dollar amount and (ii) the “Total Cost” of investing in an Asset. Additionally, on an annual basis, the Retirement Investor must receive (i) a list of each Asset purchased or sold during the applicable period and the price at which the Asset was purchased or sold, (ii) a statement of the total dollar amount of all fees and expenses paid by the Retirement Investor, both directly and indirectly, regarding each Asset purchased, held or sold during the applicable period; and (iii) a statement of the total dollar amount of all compensation received by the Adviser and Financial Institution, directly or indirectly, from any party, as a result of each Asset sold, purchased or held by the Retirement Investor during the applicable period.

Website Disclosure: The Financial Institution and the Adviser must maintain a public webpage, updated not less than quarterly and written in a manner easily accessible to a Retirement Investor and the general public. The website must also include (i) all direct and indirect compensation that the Adviser may obtain on every Asset and (ii) in machine-readable format, all direct and indirect material compensation payable to the Adviser, Financial Institution and any Affiliate, including its source, regarding each Asset that a plan, participant or beneficiary account or an IRA can purchase, hold, or sell through the Adviser or Financial Institution, and that the plan, participant or beneficiary account or IRA has purchased, held, or sold within the last 365 days.

### **Concerns**

The proposed point of sale, annual, and website disclosures are extremely onerous. Implementation of these disclosure requirements will require a huge investment in technology and human resources to produce such disclosures and their implementation will take significantly more time than the proposed effective date of the final regulation. Further, TIAA-CREF believes that the type of disclosure requested will be of little benefit to plan fiduciaries, plan participants and beneficiaries, and IRA holders.

We understand the Department’s concern about its lack of resources to oversee compliance with the BIC Exemption, and its decision to rely in part on private enforcement activities. But contractual actions must be calibrated so they do not lead to nuisance or strike

suits that add no value to participants or investors but only increase their costs, as in TIAA-CREF's structure the cost of litigation will ultimately be passed on to them. To help investors reach a successful retirement, disclosure about conflicts is appropriate but should come at a realistic cost to the service provider.<sup>34</sup>

We noted in the "Key Structural Issues" discussion at the beginning of this letter that a cross-functional team at TIAA-CREF has estimated the additional costs and burdens of complying with the contract, disclosure and record retention requirements of the BIC Exemption. As noted in that section, we estimate these one-time efforts would take at least 9-15 months to complete depending on funding, final design details, and dependencies with other projects, at a cost of approximately \$24.7 million.

Once that infrastructure has been developed, we estimate that each year an additional 870,000 calls or other interactions with clients would require changes to comply with the BIC Exemption, and we would have to send an additional 1.55 million packages via email or regular mail. An additional 320 full time employees would be required. The total recurring annual costs would be approximately \$37.8 million.

A much better alternative is available. In recent years financial institutions have devoted significant financial and compliance resources to complying with the Department's Section 408(b)(2) disclosure regulations, and helping their plan sponsor clients comply with their Section 404(a)(5) disclosure regulations. These disclosures are designed to make sure participants understand the costs and fees of their retirement plan investments.

### **Proposed Modifications**

1. Simplify Disclosure Requirements. The Department should not require the point of sale and annual disclosures as proposed. Rather, the Department should require disclosures for plan sponsors substantively identical to those required under its Section 408(b)(2) regulation, and disclosures to plan participants and IRA Owners substantively identical to those required under Section 404(a)(5) but from the service provider rather than the plan sponsor. Such disclosures could be coordinated with the plan sponsor's 404a-5 notice to eliminate duplicate efforts. This approach would provide the key information plan sponsors, plan participants and IRA Owners would need and it would leverage systems already built.
2. Eliminate Website Disclosure. We respectfully submit that the costs and burdens of the website disclosure requirement far outweigh any potential benefit to the Retirement Investor, and therefore cannot be justified from a cost perspective. This disclosure is not useful to the investor. In furtherance of financial literacy, DOL

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<sup>34</sup> We note also that there could be cost and competitive advantages to marginal providers who decide not to comply despite legal requirements. In such a case, there would be no private right of action (given the marginal provider would have avoided entering into the written contract required by the BIC Exemption). Additionally, well known budgetary and resource constraints of the IRS may make detection of such unscrupulous behavior and imposition of excise taxes an uncertain result at best.

should focus on disclosures that educate the Retirement Investor about different types of investments, and how to assess their performance and the fees. Disclosure should not focus on cost alone, as cost tells only part of the story. For example, certain investment types cost more than others – e.g., active vs. passive funds – and cost alone is not indicative of the appropriateness of an investment. The requirement to include total fees from any party should be limited, in our case, to the fees paid to TIA and its affiliates. For example, introducing brokers typically do not have transparency into all forms of fund compensation payable to the clearing broker.

3. Conform Point of Sale Disclosure with SEC and FINRA Rules. With respect to the point of sale disclosure, including 1-, 5- and 10-year charts depicting the investment's total cost over those periods would be of limited use to the Retirement Investor and will not allow a comparison to costs of other available investments. Moreover, it may result in delays in execution of a transaction as the point of sale disclosures will take time to generate – to the ultimate detriment of the Retirement Investor (particularly in times of market volatility). We believe the Retirement Investor would better served if the Adviser directs him or her to the relevant information as to fees and cost in a mutual fund or variable annuity prospectus.<sup>35</sup> The disclosures do not appear to apply to other types of investments.

Clarification may be needed from other regulators, such as the Securities and Exchange Commission, FINRA and state insurance regulators, regarding the circumstances under which Financial Institutions may include prospective cost estimates in a fair and balanced manner and consistent with their rules and regulations, especially where the estimates are dependent upon return assumptions. For example, forward-looking statements are problematic under FINRA rules, as they require speculation. And unless delivery of the POS disclosure can be deemed a good order requirement, the requirement to deliver the disclosure prior to execution of a recommendation may cause difficulty with respect to SEC and FINRA rules that require prompt delivery of orders to purchase a security.

4. Allow Flexible Delivery Procedures. The Department must provide a flexible construct for the delivery of the point of sale disclosures. For example, will Advisers be allowed to deliver the disclosures via e-mail or another electronic channel? Can disclosures be read to an investor in a recorded telephone conversation? Must the Adviser comply with the requirements of ESIGN before delivering the disclosures via electronic mechanisms? Depending on the answers to these and other questions, the transaction may be delayed. If the disclosures must be delivered by paper in the absence of the investor's consent, the transaction may be further delayed.

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<sup>35</sup> For mutual funds and variable annuities, the DOL should simply require the Adviser to direct a Retirement Investor to the expense example in the fund or variable annuity prospectus, as applicable. This expense example, which is a longstanding SEC requirement, will show the cumulative expenses paid over a 1-, 3-, 5-, and 10-year period on a \$10,000 initial investment.

5. Limit Fee Disclosure to the Adviser. Regarding the annual disclosure, the disclosures with respect to total fees paid to any party should be limited to the fees paid to the Adviser, if any. With respect to fees paid to TIAA-CREF and its affiliates as well as any other party, the Retirement Investor should be directed to the relevant section of the applicable mutual fund or variable annuity prospectus and we should be permitted to provide the investor with disclosure which articulates the type of fees the Financial Institution and its affiliates receive. The Financial Institution may not have information concerning the compensation arrangements that non-affiliated entities have with the issuer of the investment, such as clearing brokers, so this information cannot be required.

## **Range of Investment Options**

### **Background**

The proposed BIC Exemption requires that a determination be made that the Financial Institution offers, and the Adviser makes available, all asset classes necessary to serve the best interests of the Retirement Investor. The Financial Institution may offer only proprietary products, only those that generate third party fees, or only those of a particular asset class or product types if additional requirements are met. Specifically, the Financial Institution must make a written finding that the limitations do not prevent its Advisers from providing advice that is in the Retirement Investor's best interests, the compensation received for the provided services must be reasonable and written notice must be provided to the Retirement Investor of any such limitations.

### **Concerns and Proposed Modifications**

Asset Classes. Further definition is needed as to "asset classes" to determine that all asset classes are offered and made available to serve the best interests of the client. Are the asset classes only equities, debt and cash? What about guaranteed income? We believe guaranteed income is an important tool to create a guaranteed income floor in retirement. We assume an Adviser making available guaranteed income products in lieu of fixed income would not compromise the Adviser's ability to provide advice that is in the Retirement Investor's best interests and the Adviser would not need to advise on fixed income investments as well.

Limited Range. Additional clarity is needed on what constitutes a limited range of investments. Does making available mutual funds or annuities only within an IRA constitute a "limited range" if the mutual funds or annuities cover all asset classes? If a written finding is required by the Financial Institution that the limitations do not prevent its Advisers from providing advice in the Retirement Investor's best interest, can the finding be made as to the platform it offers (rather than specific to each investor and each time advice is provided)? Because repercussions would be severe and could require reversing transactions if the requirements are not met, Financial Institutions need objective criteria that are easily applied.

Reasonableness of Fees. It also is unclear how one would measure and apply the test that requires compensation to be both reasonable in relation to the value of the specific services provided to the Retirement Investor in exchange for payments and also not above the fair market value of the services. Under this construct, it would appear the Adviser and the Financial Institution must have knowledge of the pricing structures used by competitors for such services at the time of providing the advice. Reasonable compensation should instead be the sole test.

## **Recordkeeping and Data Requests**

### **Background**

The BIC Exemption also requires the Financial Institution to maintain information on a quarterly basis as to inflows, outflows and holdings for each Asset purchased, sold or held under the exemption. This information includes the identity and quantity of each such Asset purchased, sold or held, the aggregate dollar amount invested or received and the cost to the investor for each such Asset, the revenue received by the Financial Institution and its affiliates in connection with each purchase, sale or holding (with each revenue source identified along with the reason for the payment). Investor- and Adviser-specific information must be maintained, including portfolio valuation information and inflow and outflow information. The data must be maintained for six years from the date of the transaction and must be provided to the Department upon request within six months from the date of the request. Furthermore, documentation demonstrating the conditions of the exemption have been met also must be maintained for six years and provided to the Department, the Internal Revenue Services, any Retirement Investor and any plan sponsor whose participants engaged in a transaction under the exemption. Any such information disclosed to the Department would be available publicly.

### **Concerns**

We believe the above requirements are unreasonable given the time-consuming and costly systems builds that would be needed as well as privacy considerations. TIAA-CREF's estimates of the cost to meet these requirements are included in the BIC Exemption costs described above. We further believe it would be inappropriate to disclose Retirement Investor and Adviser information in public filings, even on a per-Adviser aggregate basis. We are concerned that such disclosures may be at odds with privacy protections afforded under state laws. Additionally, we believe disclosure of per-Adviser performance information would be potentially misleading and prone to unfair manipulation by competitors. Additionally, given that failure to comply with the above requirements are severe and would negate a Financial Institution's ability to rely on the exemption, any recordkeeping requirements must provide a carve out for records that are lost or destroyed because of acts beyond the Financial Institution's reasonable control.

### **Proposed Modifications**

Recordkeeping. If our suggestion above to employ 404(a)(5) and 408(b)(2)-style disclosures is adopted by the Department, many of our recordkeeping concerns would be ameliorated because the data necessary to demonstrate compliance would be readily available.

TIAA-CREF already has systems in place to retain the data necessary. In addition, per-Adviser data should not be subject to disclosure, and a carve-out should be added to address lost or destroyed records.

## **Application of BIC Exemption to Rollovers, Managed Accounts and Recommendations of Investment Managers**

### **Background and Concerns**

The BIC Exemption “permits Advisers, Financial Institutions, and their Affiliates and Related Entities to receive compensation for services provided in connection with a purchase, sale or holding of an Asset by a Plan, participant or beneficiary account, or IRA, as a result of the Adviser’s and Financial Institution’s advice to” Retirement Investors. The proposed exemption defines the term “Asset” in the proposed exemption. We note that the definition of this term does not include an IRA or plan nor does it address the recommendation of an investment manager who provides covered advice for a fee such as a managed account provider, even though TIAA-CREF receives no compensation for marketing the service but simply receives an “assets under management” fee if it is engaged. While TIAA-CREF is not compensated for the actual sale, the ultimate management fee paid to TIAA or its Affiliate may be deemed compensation for purposes of the proposed “investment advice” definition.

We are also concerned that the BIC Exemption could be interpreted not to apply to any advice about the decision to take a distribution and roll it over to an IRA or transfer it to another plan. We assume this was an oversight. The typical rollover advice transaction may comprise four potential separate recommendations: (i) a recommendation to hire the Adviser; (ii) a recommendation to take a distribution from the plan; (iii) a recommendation to roll over to an IRA; and (iv) a recommendation regarding how to invest the assets of the IRA once rolled over. Under the Proposal, the Adviser acts as a fiduciary with respect to each of the recommendations. We view each as a separate transaction for which an exemption is needed.

### **Proposed Modifications**

1. Clarify BIC Exemption Applies to Rollovers. Under the Department’s much expanded definition of fiduciary advice, a typical rollover transaction might involve each of the four separate fiduciary recommendations outlined immediately above. We request that the Department clarify that the BIC Exemption applies to a recommendation to transfer assets to a specific IRA or a retirement plan either from another retirement plan or from another IRA.
2. Sale of Management Services Should not be Advice. The Department should clarify that marketing “fee-based” investment advice or management services, including managed account services, will not be considered fiduciary advice so long as no compensation is received by any firm or individual in connection with the marketing or the sale of the services. Thus, while the adviser or manager would receive fees for the provision of advisory or management services, it would not be considered a

fiduciary adviser when marketing those services. If the Department insists on subjecting this marketing to fiduciary standards, we request that the BIC Exemption be revised to provide relief for this type of “advice.”

To address these two points, we propose the following revision to Section VIII(c) of the BIC Exemption. We note that our comment immediately following would eliminate the need for a detailed definition of Asset, so we offer this revision only if the Department does not agree with our comment below.

(c) An “Asset,” for purposes of this exemption, includes only the following investment products: IRA, an investment management or advisory agreement, bank deposits, certificates of deposit (CDs), shares or interests in registered investment companies, bank collective funds, insurance company separate accounts, exchange-traded REITs, exchange-traded funds, corporate bonds offered pursuant to a registration statement under the Securities Act of 1933, agency debt securities as defined in FINRA Rule 6710(l) or its successor, U.S. Treasury securities as defined in FINRA Rule 6710(p) or its successor, insurance and annuity contracts, guaranteed investment contracts, and equity securities within the meaning of 17 CFR 230.405 that are exchange-traded securities within the meaning of 17 CFR 242.600. Excluded from this definition is any equity security that is a security future or a put, call, straddle, or other option or privilege of buying an equity security from or selling an equity security to another without being bound to do so.

## **Definition of “Asset”**

### **Background**

The BIC Exemption applies to the receipt of “compensation for services provided in connection with a purchase, sale or holding of an Asset.” The Department specifically defines “Asset” as a limited set of types of securities and other property. The Department states that “Limiting the exemption in this manner ensures that the investments needed to build a basic diversified portfolio are available to plans, participant and beneficiary accounts, and IRAs, while limiting the exemption to those investments that are relatively transparent and liquid, many of which have a ready market price. The Department also notes that many investment types and strategies that would not be covered by the exemption can be obtained through pooled investment funds, such as mutual funds, that are covered by the exemption.” However, the Department requests comments regarding whether other investments should be included.

### **Concerns**

There is no precedent for an approved asset list under ERISA; the common law and statutory concepts of such a list have been discredited for decades under state law principles of trust investments.<sup>36</sup> The Department substitutes its judgment for the market at peril. Its

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<sup>36</sup> See Stewart E. Sterk, *Rethinking Trust Law Reform: How Prudent is Modern Prudent Investor Doctrine*, 95, CORNELL L. REV. 851, 853 (2010); see also Trent S. Kiziah, *Uniform Prudent Investor Act*

proposed list will lead to difficult questions of classification and interpretation, and will impede product innovation and development. For example, many plans prefer to invest through separately managed accounts (“SMAs”) for many reasons. Certain clients want to own their underlying portfolio securities directly, prefer a format where the adviser is a direct fiduciary to the client, and retain the flexibility to impose investment and trading restrictions on their accounts, vote proxies and enjoy the other rights of security holders. We note that for plans that invest through SMAs, the “Asset” list excludes certain security types that plans may find beneficial, including non-U.S. ordinary securities, municipal bonds and others. We also note that pooled investment vehicles such as unit investment trusts and non-publicly traded REITs are excluded. There may be sound portfolio management and investment reasons for plan fiduciaries to own these vehicle types and asset classes and we believe that plans should have the right to own them. Investing in these asset classes and vehicles types may be in a plan’s or IRA’s best interest. We believe that plan fiduciaries and IRA Owners and their Advisers should have the right to make their own investment choices, and that is it not appropriate for the Department to substitute its judgment for that of the plan and their Advisers.

### **Proposed Modification**

The term “Asset” should include any asset that a fiduciary to the plan or IRA has determined to be consistent with the Best Interest standard.

### **Prohibitions against Principal Transactions**

#### **Background**

Section I(c)(2) of the BIC Exemption provides that the exemption does not apply to compensation received “as a result of a transaction in which the Adviser is acting on behalf of its own account or the account of the Financial Institution, or the account of a person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the Financial Institution (i.e., a principal transaction).” The Department’s reasoning is that “Principal transactions involve conflicts of interest not addressed by the safeguards of this proposed exemption.”

#### **Concerns**

We are concerned that the aforementioned language may be interpreted to provide that TIAA-CREF cannot sell annuity contracts it issues because a TIAA-CREF employee in recommending such products may be viewed as “acting on behalf of its own account or the account of” TIAA or its affiliate.

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*and Modern Portfolio Trust Investment Statutes*, The American College of Trust and Estate Counsel (Nov. 21, 2013), available online: [www.actec.org/public/Documents/Studies/Kiziah\\_50\\_State\\_UPIA.pdf](http://www.actec.org/public/Documents/Studies/Kiziah_50_State_UPIA.pdf). See generally *Harvard College v. Amory*, 26 Mass. 446, 461 (1830).

## **Proposed Modifications**

Principal Transactions. Therefore, Section I(c)(2) should be revised as follows: “compensation is received as a result of a transaction in which the Adviser is acting on behalf of its own account or the account of the Financial Institution, or the account of a person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the Financial Institution (*i.e.*, a principal transaction), unless the Financial Institution or an Affiliate or Related Entity is the issuer of the Asset.”

## **Failure of BIC Exemption to cover Financial Institution’s own Plans**

### **Background and Concerns**

TIAA-CREF is concerned that we will not be able to make available our own investment products and services, particularly TIAA-CREF’s IRA products, to employees and former employees who participate in our ERISA-covered plans, because the BIC Exemption does not apply if “The Plan is covered by Title I of ERISA, and . . . the Adviser, Financial Institution or any Affiliate is the employer of employees covered by the Plan . . . .” In the preamble to the proposed definition of fiduciary, the Department states that “The Department believes that due to the special nature of the employer/employee relationship, an exemption permitting an Adviser and Financial Institution to profit from investments by employees in their employer-sponsored plan would not be in the interest of, or protective of, the plans and their participants and beneficiaries.”<sup>37</sup>

TIAA-CREF believes that the Department should make exemptive relief available to Advisers, Financial Institutions, and any Affiliate that make available their own products, including IRAs, and services to employees and former employees. This follows the statutory exemption under ERISA Section 408(b)(5). The legislative intent behind that exemption is, “it would be contrary to normal business practice to require the plan of an insurance company to purchase its insurance from another insurance company.” H. Rep. 93-1280, at 314 (1974) (Conf. Rep.). The Department has broadened the exemption available under Section 408(b)(5) through PTE 89-41. In addition, the Department issued PTE 77-3 to permit investment of plans in mutual funds that are proprietary to the plan sponsor or an affiliate. TIAA-CREF notes that PTE 89-41 and PTE 77-3 condition the relief on no commission being paid. However, the relief in 408(b)(5) and the PTEs is not conditioned on no “profit” and they contemplate that the financial institution will receive some type of indirect benefit.

### **Proposed Modification**

Permit No-Commission Sales. Therefore, we ask that the Department create an exception to the exclusion in the BIC Exemption so that the Adviser, Financial Institution or any Affiliate

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<sup>37</sup> 80 FR at 21968 (April 20, 2015).

that is the employer of employees covered by a Plan subject to Title I of ERISA may market, sell, or otherwise make available proprietary products, including IRAs, and proprietary services to the Plan, Plan participants and beneficiaries, and IRA Owners so long as the Adviser, Financial Institution or any Affiliates receive no commission for the sale of such product or service.

## **Inadvertent Compliance Failures**

### **Background and Concerns**

As noted above, an immaterial failure to meet some of the detailed requirements of the BIC Exemption can lead to catastrophic taxes and private remedies out of all proportion to any harm to the investor. We think participants would ultimately benefit from a general provision in the exemption that would excuse immaterial and unintentional breaches, so they do not give rise to exposure to the IRS for excise taxes or to private plaintiff lawyers for strike suits and nuisance settlements.

### **Proposed Modification**

Address Inadvertent Compliance Failures. TIAA-CREF recommends that the BIC Exemption be modified so the Adviser, Financial Institution, Affiliates and Related Entities could rely on the Exemption if they have acted in “good faith and with reasonable diligence” in complying with the BIC Exemption, any failure is not material to the Retirement Investor, and there is a commitment to correct any errors within a reasonable time period after detection to the extent practicable. In addition, the Department should clarify that an interaction that did not require the BIC Exemption cannot give rise to liability under it, and that such a provision limiting liability in the written contract will be enforceable.

## **Grandfathering – BIC Exemption**

### **Background**

The proposed exemption indicates that agreements in place prior to the effective date of the final regulation must be amended to include the BIC Exemption conditions if the Adviser and Financial Institution intend to rely on such exemption regarding advice given after the applicability date. Specifically, section VII(b)(3) of the Proposal makes exemptive relief available only if there is no advice given by the Adviser or Financial Institution after the applicability date.

### **Concerns**

TIAA-CREF cannot reasonably be expected to amend thousands of participant agreements within a short period of time, or ignore legitimate requests for advice after the applicability date to the detriment of participants and IRA Owners. Under the Proposal, the Adviser cannot answer the customer’s question unless and until multiple parties enter into a

written contract, because any response as to buying, holding, or selling would be considered a “recommendation” without the protection of the BIC Exemption. Such a requirement would create potentially ruinous delays in, and deprive existing clients of reasonable access to, the advice they need to secure their retirement future.

### **Proposed Modifications**

Grandfathering. The Department should grandfather all pre-effective date agreements under prior law so all existing sales and new transactions under those agreements (*e.g.*, additional deposits, re-allocation, and follow-up communications) are covered by prior law, even if such agreements are modified under their terms. Future transactions such as whether existing plan assets should be rolled over to an IRA would be subject to the new rules.

## **VIII. Other Comments**

### **Welfare Plans**

#### **Background**

Under Section 3(21) of Title I of ERISA, the term “fiduciary” applies in the context of all types of plans, including pension and welfare plans (as long as not otherwise exempt under Section 4 of Title I of ERISA). The existing regulations set forth the criteria for establishing a fiduciary relationship in connection with an investment advice provided to a welfare plan. However, the Proposal attempts to subject welfare plans to a much broader definition of “investment advice” by including welfare plans in the definition of a “plan” in paragraph (f) of the Proposal.

#### **Concerns**

TIAA-CREF offers recordkeeping and trust services in connection with retiree healthcare savings programs, which use voluntary employee beneficiary associations described in section 501(c)(9) of the Internal Revenue Code. As discussed above, the breadth of the definition of fiduciary investment advice, the limitations of the carve-outs and the shift of the burden of proof will require our Advisers, TIAA-CREF and certain affiliates to assume fiduciary status even where no plan fiduciary or participant could reasonably expect that the Adviser or TIAA-CREF is acting in a fiduciary capacity. However, as the Department has itself acknowledged in the Preamble to the final regulations under Section 408(b)(2), there are significant differences between service and compensation arrangements of welfare plans and those involving pension plans. In fact, the Department decided to pursue a distinct regulatory initiative with respect to disclosure framework applicable to the welfare plans under Section 408(b)(2). The Department should reach a similar conclusion regarding a new definition of “investment advice” as applied to welfare plans (and especially, in the absence of any analysis with respect to potential consequences of its application to welfare plans).

## Proposed Modifications

Definition of Plan. For the above reasons, we urge the Department to modify the definition of a “plan” in paragraph (f) of the Proposal to mean “any employee pension plan as described in section (2)(A) of the Act and any plan described in section 4975(e)(1)(A) of the Code.”

## Streamlined Exemption

We do not think the Department should pursue the suggestion that a special, streamlined exemption for “certain high-quality low-fee investments” be created as an alternative to the BIC Exemption or another exemption. We expect that an exemption of this type could substantially favor passive investment vehicles, which we do not believe are the right option for every investor and in every situation. Further, this type of exemption could be viewed as tantamount to explicit DOL approval of whatever product or service fell within the exemption, regardless of performance or suitability. Instead, plan fiduciaries and IRA Owners with the help of their Advisers (not the Department) should determine what investments are prudent and appropriate under ERISA.<sup>38</sup>

Even the suggestion of a “separate streamlined exemption” for advice related to “certain high-quality low-fee investments” raises a serious question about how much weight should be given to the cost of products and services versus other qualitative factors. Rather, ERISA requires a qualitative analysis requiring a review of all the relevant facts and circumstances, with cost being one of many factors to consider. The suggestion that only cost matters is contrary to prior positions of the DOL and the courts, which have stated that ERISA does not require a fiduciary to recommend or select the lowest cost product or service. Rather, ERISA requires a qualitative analysis requiring a review of the facts and circumstances with cost being one factor to consider.<sup>39</sup>

One potential consequence of such an exemption could be to discourage the adoption of guaranteed lifetime income products. As noted at the beginning of this letter, the Department and the Treasury Department have recently taken several steps – which we applaud – to encourage the availability of lifetime income products within participant-directed defined contribution plans.<sup>40</sup> A low-fee safe harbor would likely drive plan sponsors fearful of litigation, and their consultants, away from lifetime income solutions, because the cost of the pooling of

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<sup>38</sup> We note that TIAA-CREF offers low-cost mutual funds that are passively managed and highly rated by Morningstar. Sales of these funds would presumably benefit from a “low-cost exemption” but we oppose the suggestion nonetheless for the reasons stated.

<sup>39</sup> We note that “cost” is inherently difficult to evaluate in the context of investments that pay additional interest or dividends in light of general account performance and other variables, as the additional interest or dividends are economically equivalent to rebates or other cost reductions. In a similar vein are fluctuating 10b-1 and other fees received by an insurer that are applied against contract charges. For long term investments, it is too simplistic to look only at upfront costs.

<sup>40</sup> See text accompanying notes 8 and 9, *infra*.

risks and longevity insurance that only insurance companies may provide is greater than the cost of indexed, passive investments. Such a step would frustrate the Department's goals of encouraging lifetime income options within plans, where they are subject to fiduciary oversight and protection.

In addition, absent specific regulatory language in the Proposal, it would be inappropriate for the Department to proceed with finalizing a regulation about low-fee investments. Such a regulation could have far-reaching ramifications, similar to the promulgation of the QDIA regulations in 2007 which led to a wide acceptance of target date funds as default investments in plans. Such a broad economic effect and legal change requires a specific proposal followed by a notice and public comment period.

### **Effective Date – Proposed Modifications**

The requirements of the Proposal, even if modified as we suggest, will require a significant amount of time for TIAA-CREF to determine which of its activities will be “investment advice”, to write and test needed software code so data are transferred among our systems accurately, and implement business, compliance, and audit procedures. In addition, we believe that the changes to our systems needed to meet the disclosure requirements of the BIC Exemption could take at least nine to 15 months to implement. Therefore, an effective date of eight months after the final regulation is published will not be sufficient time for TIAA-CREF or any other large financial institution to complete the necessary tasks. For expenditures of money and resources of the magnitude contemplated (at least \$25 million up front and extra annual costs estimated at \$38 million), a compressed budget and funding cycle will seriously disrupt other important projects that would benefit participants and IRA Owners. To accommodate the immense burden of operational compliance, we request an extension of the effective date of no sooner than 36 months after the date the final regulation is published in the Federal Register. In addition, given the complexity of the Proposal, we believe the Department should specifically acknowledge that good faith efforts with reasonable diligence to comply with the terms and conditions of the final rule are sufficient to demonstrate compliance.

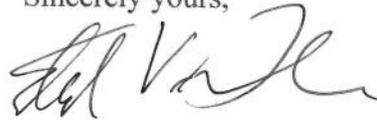
We note that for the Department's disclosure regulation under Section 408(b)(2), 4 ½ years passed between the initial proposed rule and effectiveness (two years after publication of the interim final rule). The effective date was delayed four times. And for 404a-5 disclosure, four years passed between the initial proposed rule and effectiveness (1-3/4 years after publication of the final rule). The effective date was delayed four times, by 3-1/2 years. The Proposal dwarfs both of those projects in scope, cost, and importance.

## **IX. Conclusion**

TIAA-CREF appreciates the opportunity to comment on the Department's wide-ranging and complex proposal. We trust that our review and comments will help the DOL develop a more refined means of implementing a "best interest" standard that will help participants and IRA Owners achieve more successful retirement outcomes without causing unnecessary burdens on service providers such as TIAA-CREF and its affiliates.

We would be happy to discuss any of these comments with representatives of the Department. Furthermore, we hereby request the opportunity to testify at the public hearing to be scheduled by the Department during the week of August 10, 2015.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Ed Van Dolsen", written in a cursive style.

Edward Van Dolsen  
Executive Vice President  
President, Retirement &  
Individual Financial Services