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**Via E-Mail Submission at [ORI@dol.gov](mailto:ORI@dol.gov)**

Office of Regulations and Interpretations  
Employee Benefits Security Administration (EBSA)  
Room N-5669  
U.S. Department of Labor  
200 Constitution Avenue, NW.,  
Washington, D.C. 20210

Attn: 408(b)(2)  
(RIN 1210—AB08)

Dear Sir or Madam:

We appreciate the opportunity to comment on the proposed regulation on reasonable contracts or arrangements under the Employee Retirement Income Security Act of 1974 (“ERISA”) § 408(b)(2) published in the Federal Register on Thursday, December 13, 2007 (72 Fed. Reg. No. 239, December 13, 2007, pages 70988-71005).

Teachers Insurance and Annuity Association of America (TIAA) is a non-profit legal reserve life insurance company that provides fixed dollar and variable retirement annuities. Its companion organization, College Retirement Equities Fund (CREF), is a non-profit corporation registered as an investment company under the Investment Company Act of 1940, that issues variable retirement annuities. Through its record-keeping platform, TIAA also offers plans the opportunity to invest in proprietary and non-proprietary mutual funds. The annuities issued by TIAA-CREF and the mutual funds on its recordkeeping platform are used as funding vehicles for retirement plans maintained by colleges, universities, hospitals, independent schools and other non-profit research and educational organizations, as well as state governmental entities throughout the United States. TIAA provides recordkeeping services to defined contribution plans covered under Internal Revenue Code sections 401(a) (including 401(k) plans), 403(a), 403(b), and 457. The majority of these operate under IRC section 403(b). Currently, TIAA-CREF provides retirement products for over 3.4 million participants at nearly 15,000 organizations. As of

December 31, 2007, TIAA-CREF had approximately \$446 billion in assets under management.

We support the intent of the proposed ERISA § 408(b)(2) regulation to transparently show plan fiduciaries the fees they can expect to pay for the services that TIAA, and other plan service providers, provide. The following comments are technical in nature and their intent is to aid the Department in reaching the goal of requiring the disclosure of information to plan fiduciaries concerning services offered to plans and the fees plans pay to receive those services.

### **1. The written contract requirement**

The proposed regulation requires that certain disclosures must be made in writing and must be part of the service provider contract. As discussed above, TIAA-CREF, like other insurance companies, issues annuity contracts to plans that are used to fund participant accumulations and plan benefits. These annuity contracts have to be filed with the states in which TIAA-CREF does business and they must be approved under their insurance laws. Requiring the amendment of all of the annuity contracts used by plans would impose extraordinary burdens on insurance companies because the state filing process is a lengthy and costly process. We would like to clarify that the disclosures required by the proposed regulation can be provided to plans in separate writings without amending the insurance contracts.

We also request that the fee and other disclosures required by the regulation do not have to be in the signed recordkeeping contract itself but can be provided in separate disclosure documents would be appreciated. This will facilitate ongoing fee and other disclosures to plans without requiring that service contracts be continually amended. Moreover, so long as all of the information and representations required by the regulation are provided to the plan fiduciary, it should not matter whether the information and representations are part of the formal contract or made as direct written disclosures and representations to the plan fiduciary.

### **2. Indirect Compensation**

TIAA receives “indirect compensation” for the provision of recordkeeping services and like other financial services companies, TIAA does not currently track the receipt of indirect compensation on a plan by plan basis. During the year participants will allocate amounts to mutual funds and annuity contract options, all of which may have different underlying fees. Our participant base will make well in excess of a million transfers and transactions among these options during the year.

Under the proposed regulation, plans have an obligation to make sure that the information given them is sufficient to make the determination of reasonableness. We

believe that if we provide plans with a formula or basis point estimate for how much of the underlying compensation and float income is used for recordkeeping services together with a snap shot of the plan investments in annuity contract and mutual fund options at the beginning and end of the plan year, that this should be sufficient to meet the fee disclosure requirement for indirect compensation because it will permit the plan fiduciary to make a reasonable estimate of the fees its plan pays for these services in any given year. In other words, the plan fiduciary can estimate the fees paid in any plan year based on a snap shot of the gains in plan asset in the plan allocations by comparing the amount of increase from the first day of the plan year to the last day of the plan year and applying the fee formula or basis point charge to that increase. We would, however, appreciate it if the Department would confirm that this type of disclosure would suffice. Such confirmation is necessary for us as recordkeeper and the plan fiduciaries themselves who will be relying on our disclosures. We believe that this will be sufficient information for the plan fiduciary to determine the reasonableness of our fees and that to require any more specificity would be prohibitively expensive without providing any material benefit to the plans.

### **3. Bundled Providers**

As a “bundled provider” we strongly support the provisions in the proposed regulation that provide for a disclosure of the aggregate fees paid for the bundled services without requiring a breakdown of the aggregate compensation or fees among the individual services comprising the bundle. We interpret the proposed regulation to permit TIAA’s services to be covered in the bundle and would include in this TIAA’s provision of participant investment advice because there is no separate charge for that service. We also interpret the regulation to require a breakout of certain types of indirect compensation received by other service providers, such as the custodial or directed trustee for services they provide even though these services are offered as part of TIAA’s bundle of services. Specifically, we understand that the proposed regulation would require a breakout of compensation earned by a custodian or directed trustee and of the fees paid to such trustee or custodian that are derived from mutual fund advisory or other fees or from recordkeeping or platform fees. We question, however, whether this breakout should be required. In any event, it is our understanding that such indirect compensation could be reported to the plans by formula as discussed in 2 above. We would appreciate additional clarity from the Department on this issue, as well as to whether we can include fees for custodial and directed trustee services as part of our bundle of services without a separate breakout of such fees as long as no additional charge is made for such services.

In addition, we would like to clarify that the requirement to list “all services” provided can be met by listing general categories of services. For example, it should be sufficient to say that we will provide participant tax reports without specifying all such reports in detail. In addition, it should be sufficient for the parties to agree for the provision of additional services on an ad hoc basis in order to accommodate plan

changes and new legal and regulatory requirements without requiring formal contract amendments each time, provided no additional compensation is charged for the ad hoc service.

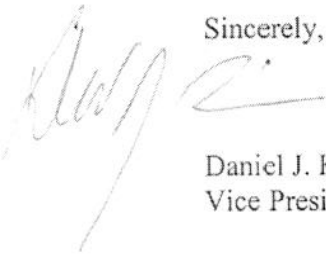
#### **4. Effective Date and Transition Rules**

We respectfully request that the Department provide a longer period to comply with the final regulations than the 90 days that are provided for in the proposed regulation. Service providers will need time to understand its impact, implement the systems changes that will be needed, and make any new disclosures that will be required. In addition there are no transition rules for existing arrangements. We recommend that existing arrangements should not have to be renegotiated immediately and that service providers should be given the opportunity to provide disclosures without entering into new service provider contracts with plans until the existing arrangements are subject to renewal. We believe a more realistic time frame would be 24 months following the publication of the final regulation.

#### **Conclusion**

We commend the Department for this initiative and fully support the fee transparency that this regulation will require. We support the intent of this proposed regulation—to provide the disclosures that plan fiduciaries need in order to make prudent decisions concerning plan service providers. If you have any questions concerning our comments, please let us know.

Sincerely,



Daniel J. Keniry  
Vice President, Government Relations