

January 24, 2008

Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File Number SR-FINRA-2007-040

Dear Ms. Morris:

On behalf of our clients, Teachers Insurance and Annuity Association of America (“TIAA”), College Retirement Equities Fund (“CREF”), and their affiliated broker-dealers, TIAA-CREF Individual & Institutional Services LLC (“Services”) and Teachers Personal Investors Services, Inc. (“TPIS,” together with Services, the “Broker-Dealers,” and TIAA, CREF and the Broker-Dealers may be collectively referred to as “TIAA-CREF”), we are pleased to submit this comment letter regarding Securities Exchange Act Release No. 57050.¹

Several months ago TIAA-CREF established an internal task force to develop policies and procedures designed to address the requirements of NASD Rule 2821 (sometimes referred to as the “Rule”). Their efforts involve input from numerous areas of the organization, including their broker-dealer operations, variable product business lines, operations, IT, sales, customer service, legal, and compliance. TIAA-CREF appreciates the opportunity to raise issues the organization has encountered throughout the design and implementation of a robust Rule 2821 compliance program.

I. Introduction and Summary

TIAA-CREF commends Financial Industry Regulatory Authority (“FINRA”) for listening to the concerns of its members and seeking additional comment from the public on whether it would be advisable to make further changes to the Rule. TIAA-CREF also commends the Securities and Exchange Commission (the “SEC” or the “Commission”) for publishing the Release for comment and considering these issues as well.

¹ December 27, 2007; 73 FR 531, Jan. 3, 2008 (the “Release”).

TIAA-CREF applauds FINRA and the SEC regarding their efforts to adopt and approve appropriate investor protections for the purchases and exchanges of variable annuities (“transactions”). However, as adopted, TIAA-CREF believes that there are certain aspects of the Rule that may prove impracticable, cumbersome, and expensive. To summarize, TIAA-CREF suggests that the Rule should:

- (i) eliminate the principal review requirement for non-recommended variable annuity transactions;
- (ii) permit broker-dealers to “negotiate” customers’ checks and hold the funds in a money market mutual fund, pending principal review;
- (iii) establish that the seven-day approval period for principal reviews should begin when the broker-dealer’s office of supervisory jurisdiction (“OSJ”) receives the check and a complete application from the customer;
- (iv) establish a uniform effective date of August 4, 2008 for all portions of the Rule; and
- (v) amend the Rule to add a provision permitting FINRA to exempt, conditionally or unconditionally, any broker-dealer from all or any provision of the Rule for a transaction or a group of transactions to the extent the exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

TIAA-CREF’s concerns and suggestions are explained below in greater detail.

II. Background

A. Legal Status

TIAA is a life insurance company organized under New York law and supervised by the New York Department of Insurance. TIAA operates on a non-profit basis. TIAA issues fixed annuities and, to a more limited extent, variable annuities funded by separate accounts of TIAA. CREF is a unique entity created by a special act of the New York legislature and is a New York not-for-profit corporation. CREF issues variable annuity certificates that offer lifetime and other long-term annuity protection. CREF is also registered as an open end management investment company under the Investment Company Act of 1940, as amended (the “1940 Act”). As of December 31, 2007, TIAA and CREF jointly serve approximately 3.3 million people and over 15,000 institutions. As of September 30, 2007, their combined assets were approximately \$400 billion, including roughly \$200 billion in CREF.

Services and TPIS are each a broker-dealer registered with the Commission and a member of FINRA. The Broker-Dealers are engaged in the distribution of variable annuities issued by CREF and the TIAA Real Estate Account in connection with retirement planning services offered to institutions, including colleges, universities, and non-profit institutions, as well as governmental entities. The Broker-Dealers also distribute retail and institutional mutual funds, after-tax annuities, individual retirement accounts ("IRAs") and interests in state college tuition savings programs.

B. History

TIAA was founded in 1918 by the Carnegie Foundation for the Advancement of Teaching to provide a fully funded pension system for the United States academic community. Initially, TIAA issued only fixed annuity contracts. Because of longer life expectancies and inflationary pressures, TIAA determined that a combination of TIAA's fixed annuity with a "variable" annuity funded by stock investments would provide the best long-term protection for the retirement needs of its constituents. As a result, in 1952 TIAA created CREF, which has been referred to as "the world's first variable annuity." At that time, state insurance law did not permit the creation of insurance company separate accounts, which could insulate gains and losses from the insurance company and thus allow broader equity investment flexibility than would be allowed for the insurance company itself. Accordingly, TIAA sought and obtained a special act of the New York State legislature to create CREF as a separate entity that would pursue an equity investment strategy. Since then, TIAA and CREF have operated in tandem as companion companies.² For instance, TIAA and CREF issue companion variable annuity contracts under the combined name of TIAA-CREF. Because of TIAA-CREF's history and structure, the Broker-Dealers will institute procedures tailored to the organization's structure in discharging their responsibilities under Rule 2821.³

² The Commission has overseen various aspects of TIAA-CREF's operations. See Investment Company Act Release No. 17,116, 44 SEC Docket 660 (Aug. 22, 1989). Investment Company Act Release No. 17,861, 47 SEC Docket 962 (Nov. 20, 1990).

³ As explained above, CREF is considered the world's first variable annuity and it was created by special act of the New York legislature prior to the development of state legislation that authorizes the establishment of insurance company separate accounts. As a result of TIAA-CREF's unique structure, TIAA-CREF technically issues two annuity contracts (the TIAA and CREF companion contracts) that present different investment options. This is functionally equivalent to single annuity contracts of insurers with more modern structures, which may present a fixed investment option through a general account and variable options through a separate account. For example, when an individual invests in an IRA with TIAA-CREF, TIAA-CREF issues simultaneously an IRA Certificate for CREF, under which eight investment accounts are available, and an IRA

C. Products and Operations

TIAA-CREF offers among the lowest cost variable annuity products in the United States. TIAA-CREF has structured its business to minimize costs and to avoid high pressure sales tactics. TIAA-CREF's variable annuity products have very low expenses and do not charge any surrender charges or other fees associated with optional living benefit or bonus riders, as TIAA-CREF does not offer such options. There are no fees if an investor exchanges one annuity product for another.

Similarly, TIAA-CREF's distribution models are based on low costs. One of TIAA-CREF's distribution models is to sell variable annuities on a purely non-recommended basis. In general, investors contact TIAA-CREF by means of the mail, toll-free telephone numbers, or a website, to request information on TIAA-CREF's variable annuities and other investment products. TIAA-CREF provides an information kit in response, and if the customer decides to proceed, TIAA-CREF receives the order in the mail or by Internet. This model, whereby the Broker-Dealers do not make any recommendations to customers, constitutes a significant amount of TIAA-CREF's variable annuity business, including variable annuity transactions which would be subject to this Rule. Over the past couple of years, TIAA-CREF has developed a second distribution model by creating an Advice and Planning business area to provide objective, personalized advice to customers and potential customers who seek it. The Broker-Dealers do not compensate the individuals who provide advice with commissions. Additionally, customers are not charged any fees or commissions for any advice received.

III. Comments

Detailed comments are as follows:

A. Eliminate the Principal Review Requirement for Non-Recommended Transactions

NASD Rule 2821(c) provides for principal review of all variable annuity contracts.⁴ In seeking comment, the Release notes that "some firms questioned whether broker-dealers that do

Contract for TIAA, under which a fixed option and the Real Estate Account are available. Both contracts remain outstanding for so long as either is held. For purposes of compliance with the Rule, the Broker-Dealers will treat the CREF and TIAA contracts as a single variable annuity with multiple allocation options.

⁴ The Rule provides in relevant part:

not make any recommendations to customers (and generally do not employ principals to perform suitability reviews) should be subject to this provision.”⁵ A substantial portion of TIAA-CREF’s business involves variable annuity transactions for which it makes no recommendations. TIAA-CREF believes further consideration of the issue is warranted.

TIAA-CREF offers variable annuity contracts to purchasers in two ways:

First, the Broker-Dealers make available sales personnel from the Advice and Planning Business unit who are its registered representatives to assist existing and potential customers with investment choices, including the purchase of deferred variable annuity products and allocation options under the variable annuity products. These representatives may make recommendations regarding such products. The Broker-Dealers recognize that transactions in which recommendations are made would be subject to the principal review requirements of Rule 2821(c).

Second, a potential customer calls or makes a request on TIAA-CREF’s website for an investment kit. The customer makes his/her own investment decision and

[A] registered principal shall review and determine whether he or she approves of the purchase or exchange of the deferred variable annuity. Subject to the exception in this paragraph, and treating all transactions as if they have been recommended for purposes of this principal review, a registered principal shall approve the transaction only if the registered principal has determined that there is a reasonable basis to believe that the transaction would be suitable based on the factors delineated in paragraph (b) of this Rule. Notwithstanding the foregoing, a registered principal may authorize the processing of the transaction if the registered principal determines that the transaction was not recommended and that the customer, after being informed of the reason why the registered principal has not approved the transaction, affirms that he or she wants to proceed with the purchase or exchange of the deferred variable annuity. The determinations required by this paragraph shall be documented and signed by the registered principal who reviewed and approved, rejected, or authorized the transaction.

FINRA *Regulatory Notice 07-53* (Nov. 2007) (“*Regulatory Notice 07-53*”) provides at 6:

FINRA emphasizes, however, that the rule does not *require* broker-dealers to effect trades that they determine are not suitable; rather, the rule *permits* them to do so under the narrow circumstances discussed above. Thus, the rule has no effect on existing principles of law or contractual terms that allow a broker-dealer to decline the acceptance of an order.

⁵ 73 FR 532.

TIAA-CREF simply receives the application and the funds from the customer in the mail or via the website. In this second category, TIAA-CREF has no role in the investment decision whatsoever.

TIAA-CREF understands that FINRA has considered adopting an exemption from the principal review requirements only for those broker-dealers that “do not make any recommendations to customers (and generally do not employ principals to perform suitability reviews) [emphasis in original].” In other words, broker-dealers that offer some customers advice with respect to variable annuity products would be subject to the principal review requirement for all variable annuities that they sell, even if a portion of those transactions are not made pursuant to any recommendations. In making this distinction, FINRA would be focusing on the broker-dealer’s particular distribution model as opposed to whether a particular transaction was recommended or not recommended. This would result in a disadvantage to broker-dealers with different distribution models, even if non-recommended transactions are a substantial part of their business, as in the case of the Broker-Dealers. In TIAA-CREF’s view, it would be more appropriate to exempt from the principal review process those transactions that do not involve a broker-dealer’s recommendation, rather than exempting only those broker-dealers that do not make any recommendations. TIAA-CREF believes there is support for this suggestion, as discussed below.

TIAA-CREF currently offers customers a choice – free advice sessions for those customers who want it, and no advice for those who do not. TIAA-CREF does not believe that it should be forced to treat every variable annuity contract as if it were sold on the basis of a recommendation just because TIAA-CREF offers that service to some customers who want that assistance. If the Rule forces the Broker-Dealers to undertake the principal review process for every non-recommended variable annuity transaction received by mail or by means of the Internet, it will divert resources, drive up costs and substantially slow down processing. As stated previously, TIAA-CREF employs a distribution system whereby it offers among the lowest cost variable annuity products⁶ that have no surrender charges and do not include complex riders or options, and TIAA-CREF does not engage in high pressure sales tactics. TIAA-CREF believes that FINRA’s regulatory concerns have focused primarily on high cost variable annuity products sold by sales people who earn commissions on their sales. Accordingly, TIAA-CREF believes that non-recommended transactions involving low-cost variable annuity products, such as TIAA-CREF’s products, do not present the risk to investors that warrants the principal review process. Additionally, a platform which consists of mail-in applications and the Internet, such as TIAA-CREF’s platform, is designed for investors who are making their own investment decisions and therefore, whatever benefit that is afforded to customers by requiring a principal review of the

⁶ Morningstar Direct (February 2007) based on Morningstar expense comparisons by category.

non-recommended transaction is outweighed by the additional processing delays (and potential loss of investment gains) customers will experience. Thus, TIAA-CREF believes that broker-dealers should not be subject to a principal review requirement for these non-recommended transactions.

TIAA-CREF believes that additional support for the notion that non-recommended transactions should not be subject to principal review is found in the design of state replacement regulations. State replacement regulations distinguish between agent sales (recommended) and direct response sales (non-recommended) with respect to notices and disclosures, and provide drastically simpler procedures when the replacement transaction does not involve an agent. If an agent is involved, there are numerous requirements involved.⁷ In contrast, if it is a direct sale with no agent involvement, the customer would only receive a form advising him or her to consider the replacement of the existing contract before doing so. For example, New York's Regulation 60 does not require a detailed disclosure form to be provided to a customer in a direct response sale. Similarly, TIAA-CREF believes that the approach that most state replacement regulations employ of distinguishing between recommended and non-recommended transactions would be appropriate for the Rule.

TIAA-CREF respectfully suggests that FINRA should not require all broker-dealers that offer recommendations to some purchasers to treat all purchases as if they were recommended. TIAA-CREF believes FINRA should require a broker-dealer that offers recommendations to some customers and not to others, to institute policies and procedures ensuring that it provides suitability reviews, including any required principal reviews pursuant to the Rule, for those transactions for which it has provided a recommendation.⁸

⁷ For example, many state replacement regulations require that if an agent is involved in the replacement transaction: an agent describe in detail to a customer the replacement forms and disclosures; the replacing insurance company conduct a review of the application to assess whether the replacement transaction is appropriate and whether the agent fully complied with replacement procedures; and the replacing insurance company send to the existing insurance carrier a notice of replacement and materials the agent used to market the product.

⁸ TIAA-CREF is aware of FINRA's concern in protecting investors from the complexities of variable annuities. In FINRA's proposal of Rule 2821, dated December 14, 2004, FINRA (then NASD) stated that "[a] number of commenters also called for the elimination of the principal review requirements for non-recommended transactions. Due to the complexity of the products, NASD believes that it is appropriate to require firms to review all deferred variable annuity transactions for problematic sales practices. The rule change creates standards that will ensure that firms perform a consistent, baseline analysis of transactions, regardless of whether the particular transaction has been recommended, thereby enhancing investor protection for all customers.

B. Holding Customer Funds Pending Principal Review

Rule 2821(c) as explained by *Regulatory Notice 07-53* currently requires broker-dealers to hold the customer's non-negotiated check, pending the principal's review of the purchase. *Regulatory Notice 07-53* explains at 4 that:

The broker-dealers' receipt of the checks, however, could have triggered application of a number of other rules that might have required relatively quick principal reviews. NASD Rule 2330, for instance, generally prohibits improper use of customer funds, and NASD Rule 2820 specifically requires broker-dealers to "transmit promptly" the application and purchase payment for a variable annuity contract to the issuing insurance company. To alleviate the potential conflict between Rule 2821's review timing requirement and other FINRA rules, FINRA created an important exception: A broker-dealer may hold an application for a deferred variable annuity and a customer's non-negotiated check payable to an insurance company for up to seven business days without violating either Rule 2330 or Rule 2820 if the reason for the hold is to allow completion of principal review of the transaction pursuant to Rule 2821.

In addition, the Commission granted an exemption from Rule 15c3-1 and 15c3-3.⁹

Unfortunately, these changes did not ameliorate all of the practical problems associated with holding a non-negotiated check. The Release notes that FINRA stated that:

Rule 2821(c) does not permit the depositing of a customer's funds in an account at the insurance company prior to completion of principal review. In response to the Regulatory Notice, a number of firms explained that insurers' financial controls regarding the receipt of money from customers often include holding such funds in a general "suspense" account at the insurer.

NASD, moreover, is aware of instances where registered representatives have told their firms that variable annuity transactions were not recommended in order to bypass their firms' compliance requirements for recommended or solicited sales." While TIAA-CREF appreciates FINRA's concern in this regard, it believes that a better solution to address the means by which a firm distinguishes between a recommended and non-recommended transaction is through the design of a firm's written supervisory procedures.

⁹ See also Exchange Act Release 56376 (Sept. 7, 2007) regarding a conditional exemption to broker-dealers from the Rules 15c3-1 and 15c3-3.

TIAA-CREF believes that a similar concern applies to the Broker-Dealers with respect to transactions where applications and checks are sent by the customer via mail directly to the Broker-Dealers. Many customers send back the application and one check to cover all of their chosen investment options (e.g. a customer may indicate in the application a preference to invest some money in a variable annuity and to invest the remaining balance in other investments, such as a fixed annuity and mutual funds). The Broker-Dealers face a dilemma under the current version of Rule 2821(c). If the Broker-Dealers hold the check pending principal review, the Broker-Dealers would be complying with Rule 2821(c). However, by not negotiating the check and investing the other portion in the investments that the customer has specified, they would risk violating other FINRA requirements, as noted in *Regulatory Notice 07-53* at 4. For example, NASD Rule 2830(m) requires prompt purchase of mutual fund shares.¹⁰ Accordingly, the Broker-Dealers still risk violating some NASD rules to comply with another. The Rule only addresses the problem of holding the customer's check pending the principal review, with respect to the variable annuity purchase. The Rule does not address the question of how a broker-dealer should handle the check if it includes funds for other investments.

TIAA-CREF believes that a reasonable solution to this dilemma would be for Rule 2821 to allow broker-dealers to negotiate checks upon receipt. If the Rule were to permit negotiation

¹⁰ NASD Rule 2830 provides:

(m) Prompt Payment for Investment Company Shares

(1) Members (including underwriters) that engage in direct retail transactions for investment company shares shall transmit payments received from customers for such shares, which such members have sold to customers, to payees (i.e., underwriters, investment companies or their designated agents) by (A) the end of the third business day following a receipt of a customer's order to purchase such shares or by (B) the end of one business day following receipt of a customer's payment for such shares, whichever is the later date.

(2) Members that are underwriters and that engage in wholesale transactions for investment company shares shall transmit payments for investment company shares, which such members have received from other members, to investment company issuers or their designated agents by the end of two business days following receipt of such payments

Other regulatory requirements, such as NASD Rule 2110, require the Broker-Dealers to process trades promptly. In addition for its own business reasons, the Broker-Dealers designed their internal processes to process transactions promptly.

of the check upon receipt, TIAA-CREF could direct customers to send their funds to either the Broker-Dealer's lockbox or to an affiliated or unaffiliated trust company's lockbox. The Broker-Dealers propose sweeping from the lockbox the portion of the funds attributable to the variable annuity transaction, into an affiliated money market mutual fund that complies with Rule 2a-7 under the 1940 Act. The Broker-Dealers would process the non variable annuity investments in accordance with the customer's instructions. For the variable annuity investments, a principal review would be completed. After the principal review process was complete, the Broker-Dealers either would invest the funds in the variable annuities in accordance with the customer's instructions, or promptly advise the customer that the variable annuity transaction cannot be completed. In the event the Broker-Dealers are unable to complete the transaction, they would offer to return the money or await further instructions from the client. Please note that the customer would have the benefit of earning dividends on the money while it was held in the money market fund pending principal review. TIAA-CREF believes that a customer is disadvantaged for the time he or she is not invested in an interest bearing account.

TIAA-CREF respectfully suggests that FINRA should be open to the above proposed scenarios and other solutions pertaining to the problem of handling and protecting the customers' funds, pending completion of the principal review process. Unfortunately, TIAA-CREF believes that holding the customer's non-negotiated check is a workable solution only in a very limited number of situations and could result in negative consequences for customers.

C. Approval Period

Currently, Rule 2821(c) provides in part that:

Prior to transmitting a customer's application for a deferred variable annuity to the issuing insurance company for processing, but no later than *seven business days after the customer signs the application*, a registered principal shall review and determine whether he or she approves of the purchase or exchange of the deferred variable annuity [*emphasis added*].

The Release notes that "a number of firms asserted that seven business days beginning from the time when the customer signs the application may not allow for a thorough principal review in all cases. These firms have asked that a different timing mechanism be used."¹¹ TIAA-CREF shares this concern and believes that measuring the seven days from the day after the customer signs the application could be problematic in certain circumstances.

¹¹ Release at 532.

When a customer sends an application and the check in the mail, at which time a principal review will be required, the Broker-Dealers are concerned that there will not be sufficient time to perform a meaningful review and complete the review process within the required seven days for reasons outside of their control. In fact, a customer could sign an application and send it back to the Broker-Dealers just prior to, or even after, the seven-day period has elapsed. Moreover, problems could arise if the application is not complete and the Broker-Dealers need to contact a customer to obtain missing information or correct a problem, *e.g.*, a purchaser forgets to sign the application, fills out the form incorrectly, or writes a check for the wrong amount. Does the Rule implicitly toll the seven-day period if the application is materially lacking?

TIAA-CREF respectfully suggests that there are simple solutions to these problems that would not jeopardize the protections of the Rule. First, TIAA-CREF suggests that the seven-day period should run from the time upon which the broker-dealer receives the application at the OSJ. Second, TIAA-CREF suggests that the seven-day period should not start to run until the broker-dealer reasonably deems that the application is complete. With these modest adjustments, TIAA-CREF believes that Rule would be workable and still keep the application and principal review processes on track.

D. Effective Date

TIAA-CREF appreciates that FINRA is considering extending the compliance date for Rule 2821(c) to August 4, 2008. TIAA-CREF believes that additional time is warranted, given the complexities of the Rule and the compliance questions that have arisen during this implementation period. As proposed, the other portions of the Rule would continue to have a compliance date of May 5, 2008.

TIAA-CREF respectfully requests that FINRA consider adopting a uniform compliance date of August 4, 2008 for all portions of the Rule. Establishing two different compliance dates will add a strain on resources, additional costs and confusion when implementing the Rule. For example, Rule 2821(d) requires members to:

establish and maintain specific written supervisory procedures reasonably designed to achieve compliance with the standards set forth in this Rule. The member also must (1) implement surveillance procedures to determine if any of the member's associated persons have rates of effecting deferred variable annuity exchanges that raise for review whether such rates of exchanges evidence conduct inconsistent with the applicable provisions of this Rule, other applicable NASD rules, or the federal securities laws ("inappropriate exchanges") and (2) have policies and procedures reasonably designed to implement corrective

measures to address inappropriate exchanges and the conduct of associated persons who engage in inappropriate exchanges.

Additionally, Rule 2821(e) requires members to:

develop and document specific training policies or programs reasonably designed to ensure that associated persons who effect and registered principals who review transactions in deferred variable annuities comply with the requirements of this Rule and that they understand the material features of deferred variable annuities, including those described in subparagraph (b)(1)(A)(i) of this Rule.

TIAA-CREF believes that, by imposing two compliance dates, it will be necessary for broker-dealers to provide for duplicate sets of supervisory procedures to account for how the Rule works initially and then subsequently. Additionally, broker-dealers would need to implement one training program for its associated persons with regard to that process starting on May 5 and continuing to August 4, 2008, and then repeat the training process to include the principal review requirement for the period beginning August 4, 2008.

The Broker-Dealers believe that the additional complexity of a two-phase implementation process is not practical. Furthermore, given the nature of changes to be made to systems, written supervisory procedures, applications, forms and training programs involved in implementing the various portions of Rule 2821, the additional time TIAA-CREF recommends is warranted and reasonably justified. Accordingly, TIAA-CREF respectfully suggests that FINRA request, and that the Commission approve, an August 4, 2008 compliance date for the entire Rule.

E. Exemptive Process

TIAA-CREF requests that if FINRA does not believe that categorical exceptions should be granted to classes of broker-dealers that offer advice to some customers and not to others, FINRA should amend the Rule to permit a broker-dealer to apply for an exemption from all or portions of the Rule on a case-by-case basis.

TIAA-CREF believes that the Broker-Dealers would fall into such a category whereby FINRA would agree that portions of the Rule are unnecessary for the Broker-Dealers due to the nature of the products being offered and/or the manner in which they are offered. High cost variable annuity products with complex riders are the types of products that present the risk to investors warranting the principal review process. As stated above, TIAA-CREF does not offer complex riders on its variable annuity products and provides very low-cost products, especially

when compared to its competitors.¹² TIAA-CREF believes that these low-cost products demonstrate its organization's emphasis on saving for retirement. TIAA-CREF also believes that these low-cost products demonstrate that non-recommended transactions of its variable annuity products do not present the risk to investors warranting the principal review process. Furthermore, TIAA-CREF suggests that the nature of its sales and distribution models supports the notion that the Broker-Dealers should be exempt from the principal review requirement of the Rule for non-recommended transactions, whereby advice is not provided. Additionally, TIAA-CREF points out that even when advice is provided, no commissions are paid to registered representatives of the Broker-Dealers.

FINRA may be unwilling to grant exemptions from portions of the Rule on an across-the-board basis. Accordingly, TIAA-CREF requests that FINRA amend the Rule to permit FINRA's staff to grant exemptions, conditionally or unconditionally, to member firms on a case-by-case basis from all or any provision of the Rule for a transaction or a group of transactions to the extent the exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

IV. Conclusion

TIAA-CREF believes that some aspects of Rule 2821 as currently adopted will have the effect of imposing unnecessary burdens, processing delays and costs on TIAA-CREF without commensurate consumer protection benefits.¹³ In addition, for the reasons discussed above, the

¹² See Wall Street Journal Online, *Financial Makeover* (Jan. 16, 2006) at <http://www.jeffnat.com/articles/011606WSJYourMoneyMatters.pdf> (discussing that certain variable annuity providers, including "...TIAA-CREF—have long been known for selling annuities with relatively low fees and no early-termination charges. TIAA-CREF, for instance, has long offered one of the least expensive deals in the market...in its Lifetime Variable Select Annuity..."). See also 403bwise, *Do Annuities Make Sense in a 403(b) or 457(b)?* (2004) at <http://www.403bwise.com/wisemoves/annuities.html> (stating that "[t]he notable exception to high-cost annuities are annuity products from TIAA-CREF. With fees that are among the lowest in the financial service industry and the absence of surrender charges, a fixed or variable annuity from TIAA-CREF can be just as affordable as a low-cost, no-load mutual fund.").

¹³ Section 3(f) of the Securities Exchange Act of 1934 provides:

Whenever pursuant to this chapter the Commission is engaged in rulemaking, or in the review of a rule of a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation [*emphasis added*].

Rule proposal is not consistent with Sections 19(b)(2) and 15A(b)(9) of the Exchange Act, because it imposes burdens on competition not necessary or appropriate in furtherance of the Exchange Act. As a consequence, the Rule inadvertently will diminish TIAA-CREF's ability to serve customers. This letter offers several suggestions that TIAA-CREF believes will make the Rule more workable and will eliminate unnecessary burdens, without compromising its fundamental protections. TIAA-CREF is hopeful that FINRA will propose, and the Commission will approve, further changes in accordance with these recommendations.

We appreciate the opportunity to submit TIAA-CREF's views. Please contact me at (202) 261-3314 or Alison Ryan at (949) 442-6006 if you have any questions about these comments.

Sincerely yours,

/s/ Stuart J. Kaswell

Stuart J. Kaswell
Partner

cc: The Honorable Christopher Cox, Chairman, SEC
The Honorable Paul S. Atkins, Commissioner, SEC
The Honorable Annette L. Nazareth, Commissioner, SEC
The Honorable Kathleen L. Casey, SEC
Dr. Erik R. Sirri, Director, Division of Trading and Markets, SEC
Andrew J. Donohue, Director, Division of Investment Management, SEC
Mary Schapiro, Chief Executive Officer, FINRA
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