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March 7, 2011

Ms. Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-1001

Mr. David A. Stawick  
Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, N.W.  
Washington, D.C. 20581

**Re: Governance and Conflict Mitigation Requirements for Swap and Security-Based Swap Clearinghouses, Execution Facilities and Trading Platforms (SEC File No. S7-27-10 and CFTC RIN 3038-AD01)**

Dear Ms. Murphy and Mr. Stawick:

TIAA-CREF appreciates the opportunity to comment on the proposed rules<sup>1</sup> (collectively the “Proposed Rules”) issued by the Securities and Exchange Commission (the “SEC”) and the Commodity Futures Trading Commission (the “CFTC” and, together with the SEC, the “Commissions”) for the purpose of setting corporate governance standards, as well as ownership and voting limitations, on certain entities that register with the Commissions to provide trading, execution and clearing services for swaps<sup>2</sup> (such trading and execution providers being referred to as “Trading Facilities” and such clearing service providers being referred to as

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<sup>1</sup> See “Ownership Limitations and Governance Requirements for Security-Based Swap Clearing Agencies, Security-Based Swap Execution Facilities, and National Securities Exchanges with Respect to Security-Based Swaps under Regulation MC”, 75 Fed. Reg. 65882 (October 26, 2010), *available at*: <http://sec.gov/rules/proposed/2010/34-63107fr.pdf>; “Ownership Limitations and Governance Requirements for Security-Based Swap Clearing Agencies, Security-Based Swap Execution Facilities, and National Securities Exchanges with Respect to Security-Based Swaps under Regulation MC”, Release No. 34-64018 (March 3, 2011), *available at*: <http://sec.gov/rules/proposed/2011/34-64018.pdf>; “Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest”, 75 Fed. Reg. 63732 (October 28, 2010), *available at*: <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2010-26220a.pdf>; and “Governance Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities; Additional Requirements Regarding the Mitigation of Conflicts of Interest”, 76 Fed. Reg. 722 (January 6, 2011), *available at*: <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2010-31898a.pdf>.

<sup>2</sup> The term “swaps” includes both swaps and security-based swaps as such terms are used in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Act”).

“Clearinghouses” and collectively, the “Registered Entities”)<sup>3</sup>. The Commissions issued the Proposed Rules under Sections 726 and 765 of the Act in furtherance of Congress’ stated purpose of improving the corporate governance of Registered Entities and mitigating conflicts that may arise between the interests of such Registered Entities and certain financial institutions that play a significant role in the swap markets, including swap dealers and major swap participants.<sup>4</sup>

## **I. Background**

TIAA-CREF is a leading provider of retirement services in the academic, research, medical and cultural fields, managing retirement assets on behalf of 3.7 million participants at more than 15,000 institutions nationwide. TIAA-CREF is an organization comprised of several distinct corporate entities whose overall assets under management or administration total \$453 billion.<sup>5</sup> Teachers Insurance and Annuity Association of America (“TIAA”) is a life insurance company domiciled in the State of New York that operates on a not-for-profit basis with general account assets of \$204 billion. The College Retirement Equity Fund (“CREF”) issues variable annuities and is an investment company registered with the SEC under the Investment Company Act of 1940. TIAA-CREF also sponsors a family of equity and fixed-income mutual funds. TIAA-CREF’s mission is “to aid and strengthen” the institutions we serve and to provide financial products that best meet their investment and financial needs. Our retirement plans offer a range of options to help individuals and institutions meet their retirement plan administration and savings goals as well as income and wealth protection needs.

As end-users of swaps, TIAA-CREF’s constituent companies support the Commissions’ efforts to foster transparency and accountability in the swaps markets through the Proposed Rules. We believe ensuring that Registered Entities compete in an open and efficient market, with appropriate corporate governance and accountability, will achieve Congress’ stated goal of promoting competition and mitigating systemic risk and conflicts of interest in the derivatives markets. In particular, TIAA-CREF supports the Commissions’ efforts to require independent directors<sup>6</sup> to play a prominent role in the corporate governance of Registered Entities, and also believes that customer representation is strongly warranted in connection with the activities of both Clearinghouses and Trading Facilities.

At the same time, we recognize that as a general matter trading and clearing facilities in various markets are increasingly being operated as “for profit” business enterprises. Thus, it

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<sup>3</sup> The term “Trading Facilities” refers to designated contract markets, swap execution facilities, national securities exchanges and security-based swap execution facilities, and the term “Clearinghouses” refers to derivatives clearing organizations and security-based swap clearing agencies, in all cases as such terms are used in the relevant Proposed Rules.

<sup>4</sup> The term “swap dealers” refers to swap dealers and security-based swap dealers and the term “major swap participants” refers to major swap participants and major security-based swap participants, in all cases as such terms are used in the Act, as modified by the Commissions’ pending rulemaking.

<sup>5</sup> All figures as of December 31, 2010.

<sup>6</sup> The term “independent directors” refers to (i) independent directors, as such term is used in the Proposed Rule issued by the SEC, and (ii) public directors, as such term is proposed to be modified in the Proposed Rule issued by the CFTC.

might be argued, end-users and customers can appropriately give voice to their concerns regarding such entities by deciding in the marketplace whether or not to use their services. Nevertheless, we believe that it is important that end-users and customers have a voice in the governance of such entities because, as a practical matter, such entities often operate as market utilities whose services end-users and other market participants have little choice but to use. While the Commissions have taken steps to begin putting into place rules and guidelines designed to increase competition among such entities in the swaps market, our experience leads us to believe that large institutions, for a variety of business reasons, will find it necessary to utilize all such entities. Moreover, we believe the Act will, if anything, increase this pressure to use all such entities as trading is increasingly standardized.

In light of these circumstances, we believe it is vital that end-users and customers have an effective voice within the governance process. Such a voice is important to ensure the fair consideration of all relevant issues affecting the greatest number of interested parties, as well as the equitable treatment of end-users and customers. In addition, we believe that a well-balanced governance structure will ensure that broad marketplace considerations play an appropriate role in the decision-making of Registered Entities.

## **II. Independent Directors Serve an Important Role in Effective Corporate Governance**

TIAA-CREF long has advocated for director independence, which is now widely accepted as a keystone of good corporate governance. Qualified and informed independent directors are an essential part of governance in American corporate law, as reflected by (i) the requirement of majority independent directors as a stock exchange listing standard, (ii) state and Federal requirements pertaining to the composition of certain committees of corporate boards of directors, and (iii) state law requirements for independent director approval of related party and other corporate transactions.

We support a requirement that the board of directors of each Registered Entity include a minimum percentage of independent directors. Although definitions of independence vary, we believe that independence requirements should be interpreted broadly to ensure there is no conflict of interest, in fact or in appearance, that might compromise a director's objectivity. In addition, we support the CFTC's goal of bringing certain aspects of its "public director" definition in line with the SEC's definition of "independent director" in order to achieve uniform standards for Registered Entities who simultaneously may be involved in the swap and security-based swap markets.

We recognize, however, that all directors serving on the boards of directors and risk management committees of the various Registered Entities must have the basic knowledge and experience to perform their essential duties as board members. Accordingly, directors' experience with and knowledge of both the over-the-counter and exchange-traded derivatives markets will be important to a well-functioning board or committee, as applicable. We believe, however, that Registered Entities should be able to find qualified independent directors possessing the requisite knowledge and skill to perform their duties in concert with insiders. American corporate boards have accomplished this task for decades, and while institutions specializing in derivatives require specialized knowledge and experience, we believe that there are sufficient numbers of individuals with the relevant experience who would fall within the Commissions' independence requirements.

We also note that an independent director need not possess the same amount of knowledge and experience as a longtime officer of an enumerated entity (as such term is used in the Proposed Rules issued by the CFTC), so long as the independent director possesses the requisite knowledge and experience in the derivatives markets to help them protect the interests of the relevant Registered Entity. In fact, some distance from such insider status, combined with the essential knowledge and expertise, may be preferable to a board or committee dominated by insiders that will compete with one another while at the same time being charged with ensuring the viability and functionality of the relevant Registered Entity. Finally, and perhaps most importantly, we believe that requiring their boards of directors and risk committees to have a minimum percentage of independent members will provide Registered Entities with credibility in the eyes of the American public, which will promote confidence in the financial system in the wake of the financial crisis.

### **III. Customer Representation and Consultation is Warranted for all Registered Entities**

We support the Commissions' efforts to find an appropriate channel through which to introduce end-user and customer voice in the governance process of Clearinghouses. In addition, we believe that such efforts should be extended to Trading Facilities, in order to carry out the Act's stated intent of promoting transparency and information sharing in the swaps markets. Broader prudential and marketplace stability concerns will be most appropriately considered, and resolved, if end-users and clients are included in the governance process of all Registered Entities. Further, we note that providing end-users and customers with a role in the governance process is not intended and should not be viewed as a means for such entities to control or unnecessarily influence any Registered Entity. Instead, it is our belief that the derivatives market as a whole would be best served by having all views – including minority ones – effectively expressed and considered during the governance process, rather than leaving end-users and customers with no avenue to voice their concerns other than through regulatory colloquy or other, less efficient means.

#### *Customer Representation in Clearinghouses Serves the Purposes of the Act*

The Commissions are also considering the role of customers on the boards of directors and risk management committees of Clearinghouses. In this connection, we note that since 1975 the securities laws have required that clearing participants play an important role in the governance of securities clearing agencies, and support the Commissions' efforts to provide a similar role for Clearinghouse customers. We believe that the Commissions should seek uniformity in their approach, and recommend that they mandate minimum percentages of customer representation on both the boards of directors and risk management committees of Clearinghouses, as well as any subcommittees responsible for proposing Clearinghouse risk policy.

Customer representation at each of these levels is warranted for two principal reasons. First, customer representation and voice will serve as a reminder to the clearing member and shareholder constituencies that the primary function of the Clearinghouse is to provide fair, open and transparent access to reasonably priced swap contracts free of bilateral counterparty risks. While minority representation for customers may not eliminate the influence or control that clearing members and shareholders wield, this representation will provide customers an active

voice in management, one that is able to express to these other constituencies whether this service is being adequately provided. Further, customers will not be bound by the same profit motives as owner and clearing member constituencies, and will serve as a counterweight against efforts either to open the Clearinghouse to products that may introduce unnecessary risks or strategies not currently sought by market participants, or to exclude new potential clearing members. Such representation also will provide customers with a view into the management and structure of the Clearinghouses, which if transparent and made public will allow all customers to make informed decisions when selecting a preferred central clearing counterparty.

Second, customer representation is warranted because customers will in fact retain certain levels of risk when entering into cleared swaps. For example, in the existing futures model, customers are exposed to “fellow-customer risk” (*i.e.*, the risk that a customer’s margin will be used to cure a shortfall resulting from a default by another customer of a futures commission merchant). While we understand that the CFTC is considering alternative arrangements under which customer margin would not be available to cure any such shortfall, until such time as cleared swap customers can be assured that they will bear no fellow-customer risk they should have a role in the Clearinghouses’ risk management structure. Further, even if fellow-customer risk is removed entirely, customers still will retain the credit risk of the Clearinghouse itself, beyond guaranty fund contributions and clearing member assessments. Accordingly, some minority customer representation in risk management and ultimate board oversight still would be warranted.

#### *Customer Representation or Involvement is Also Warranted for Trading Facilities*

Finally, we propose that the Commissions consider requiring minimum customer involvement in the governance of Trading Facilities, as the decisions made and products traded by these entities will be of vital importance to end-user customers and the market generally. For example, an important step during the initial implementation of the Act will be the process of determining what products should be made available for trading on Trading Facilities. The factors supporting a decision to make a particular swap product available on a Trading Facility (*e.g.*, sufficient volume to support the pricing mechanisms employed by the Trading Facility) likely will differ from those factors used to determine whether to accept such product for clearing, and will require input from a wider variety of market participants. Swap end-users can provide such input, given their valid concerns regarding when and how those decisions are made and what factors are considered. These concerns will remain even after the implementation phase, as new products are introduced by market participants, and such products become actively traded and homogeneous in the over-the-counter market. End-users, as well as the swaps market as a whole, will be disadvantaged if such customers do not have a voice in the discussion of whether new and existing products have matured to the extent necessary to warrant more standardized trading on Trading Facilities. Their mutual interest in this regard may not be sufficiently represented by the owners of the relevant Trading Facilities, who might stand to benefit from continued trading of such products in the over-the-counter market.

To address these and other potential issues, we recommend that the Commissions consider ensuring that Trading Facility end-user customers have an avenue to formally express concerns to the governing bodies of Trading Facilities and promote information sharing throughout the market. For example, an end-user customer advisory committee or subcommittee of the board of directors of a Trading Facility could serve as a helpful means for such customers



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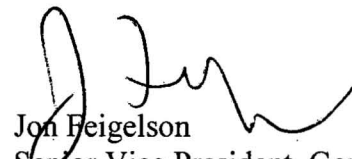
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to be involved in the governance of these entities, while also ensuring that the decision-making process and efficiency of such entities are not burdened. Such a role for such customers would further help to ensure that the Trading Facilities maintain an open and active dialogue with the customer community on a more formalized and representative basis.

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We appreciate and look forward to the continued efforts of the Commissions as these matters progress. Please feel free to contact me at 212.916.4750 any time with questions or concerns.

Very truly yours,



Jon Feigelson  
Senior Vice President, General Counsel &  
Head of Corporate Governance

cc: The Honorable Mary L. Schapiro, Chairman  
The Honorable Kathleen L. Casey, Commissioner  
The Honorable Elisse B. Walter, Commissioner  
The Honorable Luis A. Aguilar, Commissioner  
The Honorable Troy A. Paredes, Commissioner  
Securities and Exchange Commission

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The Honorable Jill E. Sommers, Commissioner  
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