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VIA ELECTRONIC DELIVERY

Elizabeth M. Murphy, Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: Retrospective Review of Existing Regulations
File Number S7-36-11

Dear Ms. Murphy:

TIAA-CREF Individual & Institutional Services, LLC (“TC Services”) writes in response to the Securities and Exchange Commission’s (“SEC”) request for information on how the SEC should develop a plan to review retrospectively its regulations.¹

We note the Request advises that comments must take into account the SEC’s limited resources and competing priorities.² With that in mind, we submit for consideration a procedural update of general application that can reduce significantly costs for both investors and financial firms and lessen the administrative burden of a broad range of regulations without reducing investor protection or materially consuming SEC resources.

The SEC should modernize its guidance governing the electronic delivery of materials required by the federal securities laws to allow financial services firms to deliver materials electronically by default. The current regulatory framework requires paper delivery and permits electronic delivery only upon satisfying certain restrictions we believe are no longer necessary.

Under the proposed default electronic delivery standard — referred to as “access equals delivery” — financial services firms would host required materials on their public website, provide investors with annual written notice of the materials’ availability and allow investors to request paper copies of any or all materials free of charge at any time.

¹ Securities Act Release No. 9257 (Sept. 6, 2011) (“Request”).

² See Request, *supra* note 1, at 5 (“We anticipate that any processes set forth in a Commission plan will reflect constraints imposed by limits on resources and competing priorities.”).

This proposal addresses the Request’s question as to what types of factors the Commission should consider when selecting and prioritizing rules for review.³ Specifically, the Commission should include as one factor considered how an increased use of the Internet can minimize burdens and costs while preserving investor safeguards. We acknowledge the Request cautions against commenting on specific rules, but believe our proposal fully consistent with and responsive to the governing Executive Order that prompted the Request — Executive Order 13579 — which specifically requests independent regulatory agencies take action regarding the review of existing significant regulations.⁴

We believe the goals of Executive Order 13579 especially relevant for the SEC to consider given the explosion of regulatory burdens Commission registrants have faced in the past decade. By way of example, the White House Office of Management and Budget just found the SEC had the largest year on year increase among all government agencies in the amount of time it takes the public to complete its paperwork. It now takes twice as long to complete SEC paperwork — collectively 361 million hours, up from 168 million the year prior.⁵

A. How Access Equals Delivery Would Work.

Under the proposal, financial service firms would provide investors with an annual written mailing setting forth the schedule on which the firms would post certain documents to either the public section of their website or, for materials containing personal data, to the secure portion of their website that requires investors create a private user name and password before obtaining access. The notice would include the schedule for such materials as prospectuses and their updates, quarterly account statements, immediate confirmation statements and privacy notices.

Firms would provide initial written notice in account opening materials and thereafter as a separate annual written mailing. This notice also would explain how investors could call to request a particular document in writing free of charge or on a more comprehensive basis change their ongoing delivery preference to paper. Any off cycle or “one-off” materials — such as a supplemental prospectus update or other unanticipated mailings — would require firms send a separate written notice of the availability of the materials on their website.

B. The Time for Access Equals Delivery is Now.

The current default of delivering paper materials through the United States postal system dates back to the initial passage of the federal securities laws during the Great

³ See Request, *supra* note 1, at 4.

⁴ See Section 2 of Executive Order 13579, ‘Regulation and Independent Regulatory Agencies’ (July 22, 2011), <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-28.pdf>. (“**Sec. 2 Retrospective Analyses of Existing Rules.** (a) To facilitate the periodic review of existing significant regulations, independent regulatory agencies should consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.”).

⁵ See Louise Radnofsky, *White House Tallies Hours Spent Filling Out Forms*, WALL STREET JOURNAL, Sept. 17, 2011, at A2.

Depression — nearly 80 years ago. This paper default made sense then as the mail system was a dominant and timely provider of information.

Today, however, financial information delivered through the postal system can be outdated by the time it reaches its recipient, particularly in fast moving and volatile markets. Moreover, the postal system's reliability is even in question. Recent news about the U.S. Post Office indicates that budget deficits may force it to default and suspend service by next summer, or at the least significantly reduce service.⁶ Contrast this to the immediate access investors have to current information through call centers and the Internet.

In addition to the above shortcomings with postal delivery, the current SEC guidance governing the electronic delivery of documents is also outdated. It was developed during the late 1990s when the Internet was still in its infancy.⁷ The guidance reflects the period in which it was written and requires firms meet certain prescriptive conditions designed to protect investors before using the Internet to deliver materials. In most relevant part, the guidance requires firms either obtain an investor's consent to electronic delivery or otherwise be able to evidence receipt of an electronic transmission.⁸ These restrictions are now outdated and unnecessarily burdensome given the current widespread use of the Internet.

Since the SEC last issued general guidance dedicated to electronic delivery back in 2000, the Internet has grown into the dominant provider of information and investors have embraced its "24/7" availability. The Investment Company Institute ("ICI") found that nearly 90% of U.S. households owning mutual funds had Internet access; and of this group, 91% used the Internet to obtain access to e-mail and 82% used the Internet for financial purposes.⁹ Overall, 80% of mutual fund owning households with Internet access used the Internet daily.¹⁰

This ubiquity provides an opportunity for both firms and investors to realize significant savings should the SEC modernize its electronic delivery guidance. We offer the following as a powerful example of the savings available to just one firm and its participants. TIAA-CREF manages or administers assets worth \$453 billion for 3.7 retirement plan participants.¹¹ In that role, we prepare and deliver written materials to plan participants who have not otherwise opted for electronic delivery. The materials account in aggregate for 1,000,000,000 pages and 2,700 tons of paper each year. These materials predominantly consist of written disclosures and statements required by the federal securities laws. The

⁶ See Christina Caron, *U.S. Postal Service Nears Default*, ABC NEWS, Sept. 5, 2011, available at <http://abcnews.go.com/Business/postal-office-nears-default-close-year/story?id=14449522>.

⁷ See Securities Act Release No. 7856 (Apr. 28, 2000) (the "2000 Release"); Securities Act Release No. 7288 (May 9, 1996) (the "1996 Release"); Securities Act Release No. 7233 (Oct. 6, 1995) (the "1995 Release").

⁸ See 1995 Release, *supra* note 6; 1996 Release, *supra* note 6; 2000 Release, *supra* note 6.

⁹ See INVESTMENT COMPANY INSTITUTE 2011 INVESTMENT COMPANY FACT BOOK: A REVIEW OF TRENDS AND ACTIVITY IN THE INVESTMENT COMPANY INDUSTRY, 92-93 (51st ed. 2011) ("ICI Fact Book"), available at http://www.ici.org/pdf/2011_factbook.pdf.

¹⁰ *Id.*

¹¹ As of December 31, 2010.

associated production and mailing costs are borne ultimately by both plan sponsors and participants through plan record keeping fees and expenses inherent in the underlying plan investments, such as a mutual fund's expense ratio.

In contrast, we estimate that an “access equals delivery” standard could reduce per participant expenses by \$10 per year, or approximately \$30 million in aggregate annually for our participants. Lower expenses also can be a meaningful contributor to a portfolio's rate of return during periods where economic growth is otherwise stagnant or below historical norms.

In addition to monetary savings, the potential benefits to the environment of eliminating the equivalent of one billion written pages are notable:

- It preserves nearly 65,000 trees.¹²
- The Environmental Protection Agency estimates that almost 50% of these materials are otherwise destined for landfills.¹³
- It saves 84 million British Thermal Units of energy — equivalent to the annual use of 927 homes.¹⁴
- It prevents the production of 71,000 pounds of sulfur dioxide, a compound that can contribute to air pollution. This amount is equivalent to the collective annual emissions of almost 13,000 18-wheelers.¹⁵
- It prevents the production of 15.5 million pounds of greenhouse gases, including carbon dioxide—equivalent to the annual emissions of 1400 cars.¹⁶

¹² See Conservatree, *Trees into Paper*, available at <http://conservatree.org/learn/EnviroIssues/TreeStats.shtml>. Conservatree, a non-profit organization dedicated to converting paper markets to environmental papers, uses a ballpark methodology for calculating how many trees are needed to make a given amount of paper. An average of 24 trees are needed to produce a ton of printing and writing papers (based on a mixture of softwoods and hardwoods 40 feet tall and 6 to 8 inches in diameter and assuming the kraft chemical (freesheet) pulping process is used to produce die paper). Another way to look at this ballpark estimate is that one tree makes approximately 16.67 reams of copy paper or 8,333.3 sheets of paper. This methodology is based on a methodology described in CLAUDIA THOMPSON, *RECYCLED PAPERS: THE ESSENTIAL GUIDE* (MIT Press 1992) based on reports on an estimated calculation by Tom Soder, then a graduate student in the Pulp and Paper Technology Program at the University of Maine.

¹³ See Environmental Protection Agency, *Saving Trees One Piece of Paper at a Time*, available at www.epa.gov/region09/waste/features/rpc (estimating that approximately 44 million tons or 48% of the paper generated in this country ends up in landfills).

¹⁴ See the Environmental Paper Network's Paper Calculator at <http://calculator.environmentalpaper.org/baseline>. This calculator estimates the environmental impact of using different grades of paper. For purposes of these calculations, we assumed 2700 tons of uncoated copy paper containing 10% recycled content.

¹⁵ *Id.*

¹⁶ *Id.*

- It prevents the production of nearly 16,000 pounds of particulates — small particles that can present health risks when inhaled. This is equivalent to the emissions of 1400 buses annually.¹⁷
- It prevents almost 57 million gallons of wastewater, equivalent to filling 86 Olympic swimming pools.¹⁸

The beneficial impact to the environment is even more striking were these types of savings extrapolated across the 90 million investors who hold mutual funds¹⁹ as well as the untold number of other investors who hold individual securities and debt instruments.

C. Access Equals Delivery is Consistent with Executive Order 13579.

Executive Order 13579 — and its companion Executive Order 13563 — ask the SEC to keep the following goals in mind when considering how best to review its regulations.

- “identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. [Our regulatory system] must take into account benefits and costs. . .”
- “propose or adopt a regulation only upon a reasoned determination that its benefits justify its cost. . .”
- “tailor its regulations to impose the least burden on society. . .”
- “select in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental [benefits]). . .” [emphasis added]²⁰

As discussed in prior sections, a properly designed “access equals delivery” structure can maintain investor protection in a manner that reflects innovation, is less burdensome, more cost effective and is far more benign to the environment than the current regulatory scheme. We also note that the Court of Appeals for the District of Columbia has repeatedly insisted that the SEC carefully consider the cost-benefits analysis associated with its rules.²¹

¹⁷ Id.

¹⁸ Id.

¹⁹ See ICI Fact Book, *supra*, Note 9, at 80.

²⁰ See Executive Order 13563 “Improving Regulation and Regulatory Review, (Jan. 18, 2011), <http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf>.; see Executive Order 13579, *supra* note 4.

²¹ See Business Roundtable v. S.E.C., 2011 WL 2936808 (C.A.D.C.,2011).

D. The Commission Previously Has Approached “Access Equals Delivery” in Other Rulemaking.

Other recent actions by the Commission already reflect widespread and effective use of the Internet. Extending the application of “access equals delivery” to all materials required by the federal securities laws is the logical next link in the following chain.

Securities Offering Reform Rules. The Commission embraced the access equals delivery concept in the securities offering reform rules and amendments adopted in 2005.²² These rules serve to modernize and liberalize the registration and offering of securities under the Securities Act of 1933, as amended (“Securities Act”). Among other things, the offering reforms include relief from the requirement under Section 5 of the Securities Act to deliver a final or statutory prospectus at or prior to the earlier of the delivery of a confirmation of sale or delivery of the security.²³ The rules embrace the “access equals delivery” model for delivery of prospectuses based on the assumption that investors have access to the Internet, and thereby permit issuers to satisfy the Section 5 delivery requirement if the prospectus is posted via EDGAR on the Commission’s website.

Proxy Rules. The Commission took an approach similar to the securities offering reform rules in its adoption of amendments to the proxy rules relating to the electronic delivery of proxy material.²⁴ Rule 14a-16(d) under the Exchange Act governs the contents of the notice that an issuer must send to its security holders in connection with the availability on the Internet of proxy material for that issuer. The rule requires the notice to state that if the security holder wants a paper copy of the proxy material, the security holder must request one. It also requires that the notice provide the security holder with a toll-free phone number, email address and Internet website where current and future proxy material in paper form can be requested.

Mutual Fund Summary Prospectus. Along the same lines as the securities offering reform rules and the proxy rules, the Commission adopted rules that permit mutual funds to use a new summary section of the prospectus as an optional “summary prospectus” to satisfy the fund’s prospectus delivery requirements under Section 5(b) of the Securities Act. Funds are permitted to use short-form summary prospectuses only on the condition that they make their full statutory prospectus and other specified fund documents available on the Internet, with paper copies available upon request. The fund’s full statutory

²² Securities Act Rel. No. 8591 (July 19, 2005).

²³ Rule 172 under the Securities Act provides that a prospectus would be deemed to precede or accompany a security for sale for purposes of Section 5(b)(2) of the Securities Act as long as a prospectus meeting the requirements of Section 10(a) of the Securities Act is filed with the Commission. This allows for the delivery to investors of only the confirmation and no prior or accompanying delivery of a written prospectus. Notwithstanding the relief provided under new Rule 172, issuers relying on the Rule still need to retain some paper copies of the prospectus. Specifically, new Rule 173 under the Securities Act requires the principal underwriter or selling broker-dealer to provide a paper copy of the prospectus upon request by an investor.

²⁴ Exchange Act Release No. 56135 (July 26, 2007).

prospectus on the Internet is in turn required to contain hyperlinks to assist investors in being able to quickly navigate from the headings in the table of contents in the full statutory prospectus to the corresponding sections in that prospectus and from the full statutory prospectus to the summary prospectus and the statement of additional information. The Commission stated that this approach is “intended to provide investors with better ability to choose the amount and type of information to review, as well as the format in which to review it (online or paper).”²⁵

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We would welcome the opportunity to discuss this matter further. If you have any questions regarding this comment letter, please contact me at 303.626.4229 or arygmyr@tiaa-cref.org.

Very truly yours,

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 TIAA-CREF Individual & Institutional Services, LLC

cc: Chairman Mary L. Schapiro
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²⁵ Securities Act Release No. 8998 (Jan. 13, 2009).