



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
TRADING AND MARKETS

May 2, 2008

Stuart J. Kaswell, Esq.
Dechert LLP
1775 I Street, N.W.
Washington, D.C. 20006-2401

Dear Mr. Kaswell:

This is in response to your letter dated April 28, 2008, to James Brigagliano, Associate Director, Division of Trading and Markets ("Division"). Your letter requests that the Division take a no-action position with respect to Teachers Insurance and Annuity Association of America ("TIAA") if under the facts and circumstances set forth in your letter, TIAA maintains the official records of contract holder account ownership for the variable annuities issued or funded by College Retirement Equities Fund ("CREF") without registering as a transfer agent under Section 17A of the Securities Exchange Act of 1934 ("Exchange Act") in reliance on the "insurance company exclusion" from the definition of "transfer agent" in Section 3(a)(25) of the Exchange Act. By including a copy of your letter, we avoid having to repeat or summarize the facts and circumstances you have presented therein.

On the basis of the facts and circumstances you have presented in your letter, the Division will not recommend that the Commission take enforcement action if TIAA performs the transfer agent recordkeeping functions for CREF and does not register as a transfer agent.

This position concerns enforcement action only and does not represent a legal conclusion with respect to the applicability of statutory or regulatory provisions of the federal securities laws. Moreover, this position is based on the facts and circumstances you have presented, and any different facts or circumstances may require a different response. In addition, this position is subject to modification or revocation if at any time the Commission or the Division determines that such action is necessary or appropriate in furtherance of the purposes of the Exchange Act. Finally, the Division expresses no view with respect to any other questions that the proposed activities may raise including the applicability of other federal or state laws or regulations to those activities.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

James A. Brigagliano
Associate Director
(202) 551-5720

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April 28, 2008

1934 Act/Section 3(a)(25)
1934 Act/Section 17A

Mr. James A. Brigagliano
Associate Director
Division of Trading and Markets

Mr. Jerry Carpenter
Assistant Director
Division of Trading and Markets

U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Teachers Insurance and Annuity Association of America
College Retirement Equities Fund

Dear Messrs. Brigagliano and Carpenter:

We are writing on behalf of the above referenced companies to request confirmation that the staff of the Division of Trading and Markets ("Staff") would not recommend that any enforcement action be taken by the Securities and Exchange Commission (the "SEC" or "Commission") if, under the facts and circumstances described below, Teachers Insurance and Annuity Association of America ("TIAA") maintains the official records of contract holder account ownership for the variable annuities issued or funded by College Retirement Equities Fund ("CREF") without registering as a transfer agent under Section 17A of the Securities Exchange Act of 1934 (the "1934 Act"), in reliance on the "insurance company exclusion" from the definition of transfer agent provided in Section 3(a)(25) of the 1934 Act.

The insurance company exclusion carves out of the transfer agent definition and regulatory scheme any insurance company or insurance company separate account that provides transfer agent functions solely with respect to variable annuities that it issues. This exclusion is designed to cover variable product issuers providing those functions for their own products, but contemplates the variable product model that prevails today, where the separate account is part of the insurance company and both are co-issuers of the variable annuity. TIAA and CREF were formed before the emergence of modern insurance company separate account legislation. While they are companion companies that operate and offer their products in tandem – inextricably linked by their history, mission, customer base and daily administration – they are separate entities and thus do not fall within the literal language of the insurance company exclusion. Nonetheless, as

more fully explained below, we believe that the unique history and close relationship of TIAA and CREF warrant treatment of them as a single organization for this purpose.

Significantly, the approach we propose is consistent with the manner in which the companies have operated for over 20 years under Commission exemptive orders. Furthermore, in light of the unique circumstances of these organizations, we do not believe this approach would provide a precedent of general application with broader implications under the Commission's transfer agent regulation.

I. FACTUAL BACKGROUND

A. TIAA-CREF

TIAA and CREF, as companion entities referred to together as TIAA-CREF, comprise the principal retirement system for the educational and research communities in the United States. TIAA is an insurance company organized under New York law and supervised by the New York Department of Insurance. 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. CREF issues variable annuity certificates that offer lifetime and other long term annuity protection. CREF is registered as an open end management investment company under the Investment Company Act of 1940, as amended (the "1940 Act") and registers its certificates for sale under the Securities Act of 1933, as amended (the "1933 Act"), on Form N-3.

The TIAA-CREF combination annuity products are offered together on the organization's pension platform, and are administered together. Purchasers may purchase both options and may transfer their pension accumulation amounts between them, subject to certain limitations. Customers receive a single account statement for both components. The two entities together serve approximately 3.3 million people at over 15,000 institutions. As of December 31, 2007, their combined assets were approximately \$407 billion, including roughly \$211 billion in CREF.

B. History

1. The Origins of TIAA-CREF

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. In 1950, concerned with the threat of inflationary forces and indications of dramatically longer life expectancies, TIAA

conducted a ground breaking economic study, which demonstrated that a combination of its 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 of this study, 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, and provided all the personnel and facilities necessary for CREF’s operations. Since then, TIAA and CREF have operated in tandem as companion companies under the combined name of TIAA-CREF.

2. The 1989 Exemptive Order – Internal Recordkeeping Arrangements

TIAA and CREF originally relied on the exemptions from the federal securities laws for charitable and educational organizations. In 1985, in connection with plans to expand the investment options available to participants in the TIAA-CREF system, it was determined that CREF should register with the SEC as an investment company under the 1940 Act and should register its securities for sale under the 1933 Act. Because CREF’s unique structure and operations did not fit easily into the framework of the 1940 Act – or even the framework that by then had been developed to accommodate conventional separate accounts issuing variable annuities – TIAA and CREF filed an application for an exemptive order seeking substantial exemptive relief under the 1940 Act. As a general matter, the application sought the ability to rely on the standard exemptive rules under the 1940 Act available for conventional separate accounts (the “separate account rules”) that CREF needed for its operations (the “separate account relief”), on the theory that CREF was the functional equivalent of a separate account.¹

¹ The request for the separate account relief was phrased as a request for relief from certain of the separate account rules. However, the separate account relief requested and granted included all of the separate account rules that were considered relevant to CREF’s operations. For example, CREF did not include in its request relief from rule 14a-2, which provides an exemption for separate accounts from the minimum net worth requirements of Section 14(a) of the 1940 Act, because at the time of the application, CREF already far exceeded the minimum requirement.

The application also sought relief from the provisions of the 1940 Act regarding redeemability, including limitations on transfers and withdrawals, and governance, including limits on voting rights.² When notice of the application for relief was published, there was substantial opposition, which focused on the redeemability and governance relief, and a number of constituencies sought to intervene. Ultimately, after a contested proceeding that included public hearings, the parties reached a settlement agreement dealing with these and other issues, and, in 1989, the SEC entered an order providing the exemptive relief necessary to implement the settlement agreement (“1989 Order”).³ The 1989 Order included the separate account relief, and thus permitted CREF to rely on the separate account rules in question “to the extent that CREF meets the conditions specified in each rule. . . (except for the requirement that CREF be an insurance company separate account).”

At the time of the 1989 Order, all services necessary for CREF’s operations, including all advisory, distribution, and administration functions, were performed by TIAA-CREF personnel, at cost, through an expense reimbursement agreement between TIAA and CREF, and the 1989 Order recognized these arrangements. These services included recordkeeping for the holders of CREF’s annuities. Because CREF provided its own advisory and distribution services, CREF was registered as an investment adviser and a broker-dealer, as well as an investment company. Neither TIAA nor CREF was registered as a transfer agent, and the SEC did not require such registration as a condition of granting the relief.

² The application explained that these variances from the 1940 Act provisions were designed to foster the purpose of the CREF annuities as retirement vehicles.

³ Investment Company Act Release No. 17,116, 44 SEC Docket 660 (Aug. 22, 1989).

3. The 1990 Order – Externalization of Recordkeeping Services

By 1990, CREF's multiply regulated structure had proven unwieldy, and TIAA and CREF sought additional exemptive relief from the SEC to "externalize" the provision of all services to CREF. TIAA set up two wholly controlled subsidiaries to take over these functions: (1) TIAA-CREF Investment Management, Inc. ("TC Management"), a registered investment adviser, took over the advisory services; and (2) TIAA-CREF Institutional & Individual Services ("TC Services"), a registered broker-dealer, took over all distribution and administrative services, which included maintaining the official records of contract holder account ownership for variable annuities issued or funded by CREF.

The proposed change was not designed to have a substantive impact, and would not result in a change of the individuals performing the functions, the services themselves, or even the location of the individuals. It would "only affect the corporate structure of CREF's service providers and not their operating methods (*e.g.*, personnel will not even have to change the location of their office)" ⁴ There was no opposition to the externalization proposal.

The Commission found that the proposed externalization arrangement for provision of all services to CREF by TC Services and TC Management was consistent with the purposes of the 1940 Act and granted the order ("1990 Order"). ⁵ The externalization was implemented in January 1992. In accordance with the proposal presented to and approved by the SEC, TC Services assumed all administrative functions for CREF, including the function of maintaining the ownership records for CREF's contract holders, as well as all distribution functions. As had been the case in 1989, none of the entities involved was registered as a transfer agent, and the SEC did not require such registration as a condition of granting the relief.

⁴ Investment Company Act Release No. 17,861, 47 SEC Docket 962 (Nov. 20, 1990) (citing representations from the applicants). TIAA and CREF explained that the restructuring "goes merely to the form of the entities providing certain services for Participants and not to the actual services being provided or to any change in CREF's purpose or function." *Id.*

⁵ Investment Company Act Release No. 17,906, 47 SEC Docket 1246 (Dec. 19, 1990); *see* Section 1 of the 1940 Act.

C. Proposed Performance of Recordkeeping Functions by TIAA

While the arrangements contemplated and approved by the 1990 Order were an improvement over the original structure, it has now been decided that contracting all administrative services to TC Services, a registered broker-dealer, is no longer efficient. Accordingly, it is proposed that TIAA will take over certain of these administrative services for CREF, including recordkeeping for ownership of the CREF variable annuity certificates (the "Recordkeeping Functions"). The proposed structure would align performance of the Recordkeeping Functions more closely to the manner in which most insurance companies keep contract holder records, and also to the manner in which TIAA generally keeps contract holder records for other TIAA annuities.⁶

II. APPLICABLE LAW AND LEGAL DISCUSSION

A. The Definition of Transfer Agent and the Insurance Company Exclusion

Section 3(a)(25) of the 1934 Act defines a "transfer agent" generally as any person who engages on behalf of an issuer of securities or on behalf of itself as an issuer of securities in:

(A) countersigning such securities upon issuance; (B) monitoring the issuance of such securities with a view to preventing unauthorized issuance, a function commonly performed by a person called a registrar; (C) registering the transfer of such securities; (D) exchanging or converting such securities; or (E) transferring record ownership of securities by bookkeeping entry without physical issuance of securities certificates.

However, under an express exception in the statute, the term transfer agent excludes "any insurance company or separate account which performs such functions solely with respect

⁶ TIAA issues fixed annuities and, to a more limited extent, variable annuities funded by separate accounts of TIAA. These separate accounts include two separate accounts registered under the 1940 Act and one real estate account that is not registered because it invests primarily in real estate, not securities. The real estate account was established in 1995 to provide TIAA-CREF participants with an additional asset diversification option offered in tandem with the CREF accounts. Although TC Services has historically performed recordkeeping functions for the real estate account, as of January 1, 2008, these functions are performed by TIAA.

to variable annuity contracts or variable life policies which it issues” (We refer to this statutory carve-out as the “insurance company exclusion).”

TIAA is not registered as a transfer agent. In performing recordkeeping functions for the TIAA variable annuities, TIAA performs these functions for variable annuities “which it issues,” and thus falls within the express, literal language of the insurance company exclusion.⁷ Because CREF is a separate entity and not a separate account of TIAA, and thus TIAA does not itself issue CREF’s variable annuities, TIAA would not fit within the literal terms of the insurance company exclusion if it also performed transfer agent functions for CREF. The purpose of this request, then, is to confirm that TIAA may rely on the insurance company exclusion for annuities issued by both TIAA and CREF, and thus may continue to rely on this exclusion subsequent to undertaking performance of the Recordkeeping Functions for CREF.⁸

B. Analysis

The insurance company exclusion covers insurance companies and separate accounts that provide recordkeeping functions for their own variable products. We believe that given TIAA’s and CREF’s historical and ongoing relationship with one another as companion entities it is appropriate to treat both entities as a single organization for these purposes. In other words, in the context of TIAA’s maintenance of CREF’s ownership records, TIAA should be viewed as performing these services for its own products, and thus should be

⁷ As the Staff is aware, the requirement to register as a transfer agent only attaches if any entity performs certain activities (*i.e.* transfer agent activities) with respect to “equity” securities (*i.e.* covered securities). We are not, however, requesting the Staff’s views whether, or conceding that, the activities performed for CREF constitute transfer agent activities. Nor are we requesting the Staff’s views whether, or conceding that, the variable annuity contracts (or interests therein) issued by CREF are covered securities. Instead, this letter focuses solely on the insurance company exclusion. Indeed, based on the language of the transfer agent functions set forth in the Section 3(a)(25) definition, it is not clear which of these functions, if any, would apply to variable contract recordkeeping.

⁸ We note that TIAA, CREF and certain banks involved in the structure of TIAA-CREF’s product offerings would also intend to rely on this relief for purposes of Regulation R, which provides an exemption from the definition of “broker” for banks that effect certain transactions relating to variable annuities directly with an insurance company or separate account that is excluded from the definition of transfer agent in Section 3(a)(25) of the 1934 Act. *See* Regulation R, Rule 775(a)(3)(ii), 72 Fed. Reg. 56,561 (Oct. 3, 2007) (to be codified at 17 C.F.R. § 247.775(a)(3)(ii)).

able to rely on the insurance company exclusion. This interpretation of the insurance company exclusion is consistent with the arrangements contemplated under the exemptive relief previously granted to TIAA and CREF and with the legislative history of Section 3(a)(25).

1. CREF Should be Viewed as the Functional Equivalent of a Separate Account of TIAA for Purposes of the Insurance Company Exclusion

TIAA and CREF have a unique relationship, based on their history and driven largely by TIAA's role as a path breaker in the field of variable annuities. As previously discussed, TIAA formed CREF in 1952 to provide an inflation resistant retirement investment for its educational constituency, prefiguring what conventional insurance companies would later be able to do in the form of insurance company separate accounts, the statutory framework for which did not exist in 1952.⁹ Like an insurance company depositor of today's separate accounts, TIAA took the steps to establish CREF and provides the personnel for all of its activities.

To reinforce the similarity of TIAA's and CREF's relationship to the relationship contemplated by the insurance company exclusion, the legislative history of CREF's formation describes the product that the new CREF would be part of in a manner that resembles the now standard "combination" fixed and variable annuity that today's insurance companies offer in conjunction with their separate accounts:

All of the fundamental concepts of TIAA's operations are to be retained, except that part of the retirement funds would be invested in equities and no promises will be made on this part to pay annuities in fixed number of dollars. The administration of the receipt of contributions and the payment of benefits would be directly parallel to TIAA and it is believed that considerable operating economies would be effected through joint administration.¹⁰

⁹ Application for the 1990 Order at 8 (File No. 812-6208, Amendment No. 3) (Filed Apr. 17, 1987).

¹⁰ *Id.* at 9-10 (quoting Governor's Bill Jacket for ch. 123 of Laws 1952, Statement in Support of Bills to Create a College Retirement Equities Fund, S-1 and A-89, submitted to Assemblyman Justin C. Morgan by George E. Johnson, Jan. 25, 1952, at 54).

Consistent with the original “combination contract” concept, the TIAA and CREF annuities still are offered together on the TIAA-CREF pension platform and are administered together. Purchasers today have the ongoing option to allocate their retirement funds to either component (among other options), and receive a single account statement.

TIAA and CREF have remained “companion” companies, inextricably linked to each other in all respects relevant to the Recordkeeping Functions. The TIAA and CREF annuities remain essential, complementary components of the unified diversified retirement product pioneered by TIAA over 50 years ago. The two organizations present themselves under their joint name – TIAA-CREF – which binds them and their reputations together in the public’s mind and the eyes of their pension customers. They share common officers, personnel, technology and other components of organizational infrastructure, including the systems and personnel relating to the Recordkeeping Functions.¹¹ For these reasons, treating these two companion companies as separate for purposes of requiring TIAA to register as a transfer agent in order to keep CREF’s contract holder records, when all other insurance companies need not do so for the separate accounts they establish, would exalt form over substance, and indeed penalize TIAA for its role as an innovator.

In the past, the Staff of the SEC’s Division of Trading and Markets (formerly the Division of Market Regulation) has determined that persons that do not fall within the precise language of the insurance company exclusion, nevertheless, may qualify for the exclusion. For example, in a no-action letter to Lincoln National Life Insurance Company (“Lincoln”), the Staff took a no-action position permitting Lincoln, an insurance company registered as a transfer agent, to rely on the insurance company exclusion in Section 3(a)(25) for variable annuity and variable life insurance contracts that it had acquired and administered, but of which it was not the issuer.¹² Although the facts and circumstances surrounding the Lincoln no-action letter are quite different from TIAA’s situation, this letter is significant because it stands for the proposition that the Staff, where appropriate, may employ a pragmatic, functional approach in interpreting the statutory exclusion from the definition of transfer agent.

¹¹ TIAA and CREF have different boards of trustees. Because CREF is a registered open end management investment company relying on certain exemptive rules, the CREF board must have a majority of “independent” trustees, within the meaning of Section 2(a)(19) of the 1940 Act.

¹² See Lincoln National Life Insurance Company, SEC No-Action Letter, 2003 WL 22415861 (Aug. 22, 2003).

2. Reliance on the Insurance Company Exclusion is Consistent with the 1989 and 1990 Orders

Our interpretation of the insurance company exclusion as it applies to TIAA and CREF is consistent with the exemptive relief the SEC has granted them in the past. As described above, the SEC granted the 1989 Order, which permitted TIAA and CREF to operate in the manner agreed on by the parties to the proceeding. One facet of these operations was the provision of recordkeeping services for CREF's contract holders by TIAA-CREF personnel through a reimbursement arrangement. Although the proposed structure contemplates TIAA providing the Recordkeeping Functions directly to CREF, on a practical level, this arrangement replicates the one contemplated by the 1989 Order, under which CREF would provide the Recordkeeping Functions itself, but through TIAA personnel.

Subsequently, the 1990 Order approved an arrangement for providing recordkeeping services for CREF that involved a different entity within the organization but otherwise did not effect any change in the substance or method of providing services.¹³ As described by TIAA and CREF in their application for the 1990 Order, they were proposing a very limited change:

The time spent by personnel on CREF matters that is currently allocated to CREF for expense purposes will now be allocated to the Subsidiaries; the day to day responsibilities of such personnel will be identical to what they were previously. There will be no transfer of assets, as CREF's assets currently consist solely of the investments in its Accounts. All office space and equipment are owned by TIAA; to the extent they are used for CREF purposes, an expense allocation currently is made to CREF.¹⁴

Neither order required any of these TIAA-CREF entities to register as a transfer agent.

¹³ The externalization involved all services provided to CREF, including administrative, investment management, and distribution services. Recordkeeping services, which are intrinsically a critical component of administering variable annuities for a separate account, were also more specifically addressed by the term administration "of the Certificates."

¹⁴ Application for the 1990 Order at 17 (File No. 812-7588) (Filed Sept. 17, 1990).

The lack of any transfer agent registration requirement in connection with both the 1989 and 1990 Orders is consistent with the comfort the SEC took in the state insurance regulation applicable to both TIAA and CREF, which supported parity of treatment of CREF with competing variable annuity contracts. The 1989 Order stated:

Although CREF is not an insurance company, it is a corporation formed pursuant to a special act of the New York legislature and is subject to regulation by New York's Superintendent of Insurance. The Superintendent passes on the fairness of all provisions in CREF's variable annuity contracts and certificates including their assumed earnings rates and the variety and appropriateness of payment options. Both CREF and TIAA are generally regulated as insurance companies, and the contracts they issue are subject to the same regulatory approval required of variable annuity contracts issued by other insurance companies in each jurisdiction in which the contracts are sold.¹⁵

3. Reliance on the Insurance Company Exclusion is Consistent with the Legislative History of Section 3(a)(25)

Our interpretation of Section 3(a)(25) is also consistent with the legislative history and underlying purposes of the statute.

Congress enacted the statutory provisions regulating transfer agents in 1975 as part of a broader legislative response to the "paperwork crisis" of the late 1960s and related findings submitted by the SEC in its 1971 "Study of Unsafe and Unsound Practices of Brokers and Dealers" (the "Study").¹⁶ During this period, the financial system supporting the secondary markets for publicly traded stocks became overwhelmed and over 100 brokerage firms failed. The SEC concluded in the Study that poor performance by transfer agents and other secondary market participants in the face of an unprecedented increase in trading volumes of exchange listed and over the counter stocks was one of the central

¹⁵ Investment Company Act Release No. 17,116, 44 SEC Docket 660 (Aug. 22, 1989).

¹⁶ SEC, *Study of Unsafe and Unsound Practices of Brokers and Dealers*, Committee on Interstate & Foreign Commerce, H.R. Rep. No 92-231, at 37 (1971).

causes of the crisis.¹⁷ In response to the crisis and findings by Congress¹⁸ and the SEC, Congress enacted a series of amendments to the 1934 Act (the “1975 Amendments”),¹⁹ including the enactment of the transfer agent provisions, which were designed, among other things, to provide for the “prompt and accurate clearance and settlement of securities transactions, including the transfer of record ownership and the safeguarding of securities and funds related thereto”²⁰

The problems that were detailed in the Study and that Congress sought to address with the 1975 Amendments had nothing to do with variable annuities. Accordingly, the early legislative history of the 1975 Amendments reflects an approach that would have broadly excluded variable annuity contracts from transfer agency regulation. The 1973 version of the bill that would become the 1975 Senate bill²¹ contained an exclusion from the transfer agent definition that applied to “any person who performs [transfer agent] functions solely with respect to variable annuity contracts issued by insurance companies.”²² This broad exclusion was consistent with testimony from Lee A. Pickard, then Associate Director of the SEC’s Division of Market Regulation, to the effect that variable annuities were outside the scope of the securities processing problems being addressed. In one of the first hearings regarding the transfer agent provisions of the proposed 1934 Act amendments, Mr. Pickard stated that annuity contracts issued by insurance companies do not “get into the security processing area” and commented that “[i]t is questionable whether we would

¹⁷ *Id.*

¹⁸ See Staff of S. Comm. on Banking, Housing, and Urban Affairs, 92nd Cong., *Securities Industry Study* (Comm. Print 1972).

¹⁹ See Pub. L. No. 94-29, 89 Stat. 100 (1975). Also in response to the paperwork crisis, Congress enacted the Securities Investor Protection Act of 1970, which is designed to protect broker-dealer customers in the event of brokerage house failures. Pub. L. No. 91-598, § 3(a)(3), 84 Stat. 1637 (1970).

²⁰ Section 17A(a)(1)(A), 1934 Act.

²¹ Section 3(a)(25), as enacted, reflects the language ultimately passed by the Senate in 1975. H.R. Rep. No. 94-229, at 102 (1975) (Conf. Rep.).

²² S. 2058, 93rd Cong., 93 Cong. Rec. 20827 (1973) (introduced).

want to set up a regulatory program in this area, where the security itself clearly does not get into the processing function or into the free flow of paper.”²³

The legislative history also provides some indication, which supports our request for relief, as to why the insurance company exclusion as finally adopted was somewhat narrower than the 1973 version and, instead of providing a broad exclusion for any person performing transfer agent functions for variable products issued by insurance companies, limited the exclusion to insurance companies and separate accounts serving their own variable annuities. While the earlier language of the exclusion was changed to the current form without explanation,²⁴ the change is consistent with comments submitted by the SEC to the relevant Senate Subcommittee.²⁵ In these comments, the SEC expressed concern that exclusions from some of the definitions in the proposed amendments, including the definition of transfer agent, might exclude “intermediary organizations commonly referred to as ‘service agents,’” which the SEC described as acting in various capacities simultaneously for investors, retailing dealers, principal underwriters and issuers.²⁶ The SEC “assumed” that the proposed exclusions would not include these service agents performing those functions for, among things, variable annuity contracts, and suggested that Section 3(a)(25) (then 3(a)(24)) be amended to make this clear.

²³ *Id.* These statements were made in response to a question by Harvey A. Rowen, then Counsel to the House of Representatives Subcommittee on Commerce and Finance and a primary draftsman of the 1975 Amendments.

²⁴ The Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs changed the language to the current form in a 1973 predecessor bill to the 1975 Amendments. *See* S. Rep. No. 93-359, at 12 (1973); *see also* H.R. Rep. No. 94-229, at 102 (1975) (Conf. Rep.) (explaining that the House of Representatives receded to the Senate with regard to the definition of “transfer agent”). We have found no indication in the records of the Subcommittee, the Committee, or the full Senate of the reason for the change.

²⁵ Comments of the Securities and Exchange Commission on S. 2058 to the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs, 93rd Cong., 1st Sess. at (1973), at 1-2. *See also* Comments of the Securities and Exchange Commission on Title IV of H.R. 5050 to the Subcommittee on Commerce and Finance of the House Committee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 93rd Cong., 1st Sess. (1973), at 5-7.

²⁶ *Id.*

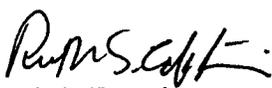
Based on the SEC's description of the "service agents" who were the target of the SEC's concerns in 1973, they were "professional" entities that would bear no similarity to TIAA in its relationship to the CREF annuity contracts. These service agents were described as third party intermediaries providing services for various market participants.²⁷ Accordingly, these service agents would not have been providing transfer agent services for their own variable annuity products as an ancillary function, but rather as a separate commercial service business. By contrast, TIAA, as described above, would provide the Recordkeeping Functions solely for the TIAA and CREF annuities, as integrated components of the organization's own product offerings, just as conventional variable annuity issuers do. Accordingly, this background supports the view that the provision of the Recordkeeping Functions by TIAA is consistent with the final language of the insurance company exclusion.

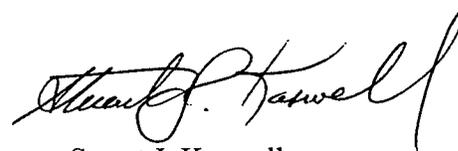
III. CONCLUSION

Based on the forgoing, we respectfully request confirmation from the Staff that it would not recommend that any enforcement action be taken by the Commission if TIAA performs the Recordkeeping Functions for CREF without registering as a transfer agent, in reliance on the insurance company exclusion.

Please call Ruth Epstein at (202) 261-3322 if you have any questions. We would be very happy to meet with the Staff and discuss this proposal.

Sincerely yours,


Ruth S. Epstein


Stuart J. Kaswell

cc: Ms. Susan Nash, Associate Director
Division of Investment Management

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²⁷ *C.f.* Applied Financial Systems, Inc., SEC No-Action Letter (Pub. Avail. Jul. 7, 1971); American General Capital Distributors, Inc., SEC No Action Letter (Pub. Avail. Aug. 29, 1976); Bradford Mutual Fund Services, Inc., SEC No Action Letter (Pub. Avail. Apr. 7, 1972) (describing activities of "shareholder service agents").