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OFFICE OF THE COMPTROLLER OF THE CURRENCY
Department of the Treasury
Mail Stop 2-3
250 E Street, SW
Washington, DC 20219

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
20th Street and Constitution Avenue, NW
Washington, DC 20551
Attn: Ms. Jennifer J. Johnson
Secretary, Board of Governors of the Federal Reserve System

FEDERAL DEPOSIT INSURANCE CORPORATION
550 17th Street, NW
Washington, DC 20429
Mr. Robert E. Feldman, Executive Secretary
Attention: Comments, Federal Deposit Insurance Corporation

U.S. SECURITIES AND EXCHANGE COMMISSION
100 F Street, NE
Washington, DC 20549-1090
Attn: Ms. Elizabeth M. Murphy
Secretary, Securities and Exchange Commission

Re: Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds

Ladies and Gentlemen:

TIAA-CREF appreciates the opportunity to respond to provide comments to the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System ("Federal Reserve Board"), the Federal Deposit Insurance Corporation ("FDIC"), and the Securities and Exchange Commission ("SEC" and together with the OCC, the Federal Reserve Board and the FDIC, the "Agencies") regarding implementation of Section 13 of the Bank Holding Company Act ("BHC Act"), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), commonly referred to as the "Volcker Rule." In this letter, we refer to the Agencies' Notice of Proposed Rulemaking (together with the preamble and specific

questions identified therein) published in the Federal Register, dated November 7, 2011, as the "Proposed Rulemaking."

I. Background and Introduction

TIAA-CREF is the leading provider of retirement services in the academic, research, medical, and cultural fields. We manage over $464 billion in retirement assets (as of December 31, 2011) on behalf of 3.7 million participants and serve more than 15,000 institutions.

Teachers Insurance and Annuity Association of America ("TIAA") was incorporated as a stock life insurance company in the State of New York in 1918 and is a licensed insurer in all 50 states, the District of Columbia and Puerto Rico. The College Retirement Equities Fund ("CREF") is registered as an investment company with the SEC under the Investment Company Act of 1940, as amended ("Investment Company Act"). CREF is supervised by the New York State Department of Financial Services ("NYS DFS") and is registered as an insurance company in several states.

At the core of TIAA-CREF's not-for-profit heritage is our mission "to aid and strengthen" the financial future of the clients we serve by providing financial products that meet their special needs. Our retirement plan annuities and mutual funds offer a range of options to help individuals (whom we call "participants") and institutions achieve financial well-being and meet their retirement plan administration and savings goals, as well as income and wealth protection needs. In addition to our core retirement business, we have a number of other products and services available to ensure we are meeting our participants' goals of lifelong financial well-being.

In order to provide our participants with the financial solutions they are seeking, TIAA owns a thrift institution. Our participants trust us as a partner in their long-term financial success and because of this trust and confidence, they have asked us to provide options for postretirement money management solutions. The thrift further enables us to meet the broader financial needs of our participant base throughout their lifetimes. Our thrift institution currently comprises less than 0.2% of TIAA's $225 billion in admitted assets (as of December 31, 2011).[1] However, it still qualifies as an "insured depository institution" under Section 2(p) of Subpart A of the Proposed Rulemaking. Further, under the Proposed Rulemaking, TIAA's ownership of this thrift triggers the investment restrictions of the Volcker Rule. This in turn subjects many aspects of TIAA's business, including ordinary course investing activities of the parent insurance company, to the investment and sponsorship restrictions of the Volcker Rule.

Both the statutory language of the Volcker Rule and the legislative history behind it clearly establish Congress's intent to "appropriately accommodate the business of insurance."[2] Members

[1] Admitted assets are those assets of an insurance company that may be included under applicable insurance laws and regulations as assets for purposes of determining the statutory surplus of such insurance company.

[2] Note that on January 18, 2012, TIAA-CREF testified at a hearing of the Committee on House Financial Services Subcommittees on Capital Markets and Government Sponsored Enterprises and Financial Institutions and Consumer Credit regarding the Volcker Rule. Our written testimony for this hearing, available at the following link, includes in

of Congress explicitly recognized the potential unintended affects of the Volcker Rule on insurers with small banking operations and noted in the debate surrounding the enactment of the Dodd-Frank Act that the Act should not affect ordinary investment activities of insurers. In addition to statements in the Congressional Record throughout the Spring of 2010 by Senators Hutchison, Hagan and Merkley, the Financial Services Appropriations Committee of the U.S. House of Representatives noted in its Report language for the 2012 fiscal year appropriation that, regarding the Volcker Rule, "[t]he Committee believes that the traditional investment activities of State-regulated insurance companies for their general accounts, including investing in both sponsored and third-party funds, are preserved by the law without constraint." The existing insurance regulatory investment regime imposes explicit quantitative limits on asset class exposure and requirements for diversification, thus ensuring life insurance companies like TIAA are undertaking the sophisticated yet prudent investment steps necessary to ensure the health and growth of their portfolios in order to meet current and future policyholder obligations. Further, life insurers are subject to annual cash flow and interest rate stress testing, along with public reporting requirements regarding holdings and purchases and sales of investments.

The primary mission of an insurance company is to invest its policyholders' contributions with a long-term horizon, in order to provide products that help policyholders meet longer-term goals (*e.g.*, wealth protection and income in retirement). State insurance regulation is tailored with this mission in mind. By way of contrast, one of the hallmarks of federal banking regulation is to maintain the safety and soundness of deposit-taking institutions in order to ensure the needs of customers, as depositors, are able to be met. Customers' deposits, which serve as a primary liability of an insured depository institution, generally are short term in nature. An insured depository institution has to adhere to its own separate capital and risk requirements through federal and state regulation. Congress recognized that an effectively regulated insurance company provides a safe and sound corporate structure within which an affiliated entity could engage in such banking activities. In enacting the Volcker Rule, Congress appropriately recognized the special nature of insurance company operations and, in particular, the comprehensive state regulatory infrastructure that governs investment activity of insurance companies and their affiliated entities. Unfortunately, the Proposed Rulemaking does not appropriately accommodate the business of insurance in a number of ways that, if not addressed in the final rules implementing the Volcker Rule, will cause the investment activity of insurers "central to the overall insurance business model to be unduly disrupted in contravention of clear Congressional intent."[3]

II. Dodd-Frank Act and Proposed Rulemaking Analysis

Section 13(a) of the BHC Act contains the general prohibitions on a banking entity engaging in proprietary trading or sponsoring or acquiring and retaining an ownership interest in a private equity fund or hedge fund. Section 10(b)(1)(i) of Subpart C of the Proposed Rulemaking uses the term "covered fund" in lieu of the statutory references to "private equity fund" and "hedge

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the Appendix excerpts from the Congressional Record, legislation, studies, and our previous comment letters related to the Volcker Rule.

[3] See Financial Stability Oversight Council Study and Recommendations on Prohibitions on Proprietary Trading and Certain Relationships with Hedge Funds & Private Equity Funds 71 (Jan. 2011).

fund," defining that term to include, among other things, any entity that would be an investment company but for Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act. This definition designates not only most privately offered pooled investment funds structured as limited partnerships or limited liability companies, but many other structures not traditionally considered "hedge funds" or "private equity funds," as "covered funds."

Section 13(d)(1)(F) of the BHC Act was enacted specifically to ensure that insurers affiliated with insured depository institutions could continue to conduct existing regulated investment activities without regard to the Volcker Rule's restrictions. By its very nature, this permitted activity contemplates the ability of insurance companies to continue to invest in a wide range of securities, including interests in private funds, within the limits set by insurance investment laws.

We note that Section 13(d)(1)(G) of the BHC Act and Section 11 of Subpart C of the Proposed Rulemaking permit banking entities to sponsor and invest in covered funds, subject to *de minimis* ownership limits and other requirements. Although insurance companies affiliated with a depository institution are covered by the broad definition of "banking entity" under the Volcker Rule, in light of clear Congressional intent to accommodate the activities of insurance companies (discussed further below), we believe that Section 13(d)(1)(F) of the BHC Act was intended to provide insurance companies greater latitude in their ability to sponsor and invest in covered funds than other banking entities. Insurance companies affiliated with a depository institution should be governed by Section 13(d)(1)(F) (or Section 13(d)(1)(D), if activity is being conducted on behalf of customers), so as to allow insurance companies to sponsor and invest in private funds without regard to the conditions imposed on other banking entities engaged in similar activities, subject to regulation in accordance with applicable insurance company investment laws. Nevertheless, the Proposed Rulemaking does not expressly extend Sections 13(d)(1)(F) or Section 13(d)(1)(D) to so apply.

We therefore believe that the Agencies should amend the Proposed Rulemaking to extend to the covered fund prohibition the exemption contained in Section 13(d)(1)(F) of the BHC Act as relates to investing for the general account of an insurance company. Providing insurance exemptions only for only proprietary trading (as such term is defined in the Volcker Rule) would in fact have little meaning for an insurance company, because insurance companies generally do not engage in proprietary trading "principally for the purpose of selling in the near term" (as defined in Section 13(h)(6) and as the term "proprietary trading" is further defined in Section 3(b) of Subpart A of the Proposed Rulemaking). The fundamental business model of an insurance company does not involve engaging in high risk or short-term profit seeking. Rather, it requires investing the insurance company's own assets in a prudent manner in order to ensure a healthy portfolio that can continue paying benefits to its policyholders over the long term. Investments in private funds are traditional tools for accomplishing this goal.

For the reasons alluded to above, we also believe that the Agencies should amend the Proposed Rulemaking to extend to the covered fund prohibition the exemption contained in Section 13(d)(1)(D), as relates to insurance company separate accounts.

III. Efficacy of State Regulation

Insurance companies have in the past and currently continue to invest in and sponsor private funds. Such activities are subject to regulation in accordance with the relevant insurance company investment laws. Perhaps most germane to ensuring the safety and soundness of insurance company operations regarding investment activity is the fact that state insurance laws provide ceilings on the proportion of an insurer's investments that may be invested in a particular asset and asset class, such as equity securities (and by extension, "covered funds"). In effect, these laws require wide diversification of an insurer's investments. Further, a regulated insurance company, including TIAA, is required to file reports, generally including detailed annual financial statements with state insurance regulators in each of the jurisdictions in which it does business, and its operations and accounts are subject to periodic examination by such authorities. Finally, insurance companies are subject to risk-based capital ("RBC") requirements, and report RBC based on a formula that considers various economic factors, which comprise the risk characteristics of the insurance company.

Given the existing regulatory framework, we believe that the Proposed Rulemaking should be modified to confirm expressly that insurance companies affiliated with insured depository institutions (to the extent those insurance companies are "banking entities" under the Volcker Rule) continue to be able to invest in and sponsor private funds consistent with traditional practice and without regard to the conditions applicable to other banking entities engaged in similar activities, subject to regulation in accordance with the relevant insurance company investment laws at the state level.

In the enclosed appendix, we have responded to Questions 134 and 135 posed by the Agencies in the Proposed Rulemaking. Our response to these questions goes into more detail concerning the extension of the insurance company exemption in the manner described above.

IV. The Importance of Investing in and Sponsoring Private Funds for Insurers

We believe Congress provided the broad exemption for insurance companies under Section 13(d)(1)(F) because it recognized that permitting insurance companies to continue to invest in a manner that aligns its conservative long-term objectives with its long-term obligations benefits both insurers and their policyholders. As with many insurance companies, TIAA-CREF has a policyholder base that makes contributions to fund their retirement on a regular basis. Our policyholders, many of whom are educators, make contributions oftentimes over a 30 year period or more, and as they enter retirement, they rely on insurance companies such as TIAA-CREF to have invested prudently and in a manner which ensures the retirement security for which they have carefully planned. Investing in and sponsoring private funds without regard to the conditions imposed on other banking entities engaged in similar activities as part of the ordinary course provides access to companies, markets, and investment strategies that might not otherwise be available, specifically with respect to diversification. Investments in private equity funds and hedge funds historically have represented a good portfolio fit for long-term liability products and insurance company surplus accounts. Further, allowing insurance companies to sponsor private funds without regard to the conditions imposed on other banking entities engaged in similar

activities appropriately accommodates the business of insurance in a number of ways, including scale, diversification and helping to control investment timing and allocations to suit long-term investment objectives.

Together, the longer-term asset-liability profile of insurers' investments, the quantitative investment limits imposed by state law (discussed in more detail in the Appendix), and the fact that insurers' covered fund investments are almost always in a limited liability vehicle ameliorates the risks of owning these investments compared to depository institutions.

V. Conclusion

In summary, first, the statutory language of the Dodd-Frank Act clearly establishes that the business of insurance should not be subject to the Volcker Rule and statements made by Members of Congress strongly support the intent of this language. Second, the Volcker Rule is designed to address specific risks to individuals, institutions and the safety and soundness of the financial system as a whole that the business of insurance, as properly regulated through a comprehensive system of state insurance regulators, simply does not present. The business of insurance is a highly regulated, minimally leveraged, low risk industry. Accordingly, we believe that ordinary rules of statutory construction combined with sound policy analysis require a broad recognition that the business of insurance (as described in Section 13 of the BHC Act), should not be subject to either the proprietary trading restrictions or the restrictions on investing in and sponsoring covered funds.

In addition to our primary concerns outlined above, the enclosed appendix provides specific responses to a number of the Agencies' questions contained in the Proposed Rulemaking.

We look forward to working with the Agencies as discussions in respect of the Proposed Rulemaking continue. Please feel free to contact me at 212.916.4750 with any questions or concerns.

Sincerely,

Brandon Becker
Executive Vice President and Chief Legal Officer

APPENDIX

Responses

[QUESTIONS RELATING TO SUBPART A, SECTION 2(e) – DEFINITION OF BANKING ENTITY AND AFFILIATES]

Question 5. Is the proposed rule's definition of banking entity effective? What alternative definitions might be more effective in light of the language and purpose of the statute?

We have a strong concern that the Proposed Rulemaking, in applying the term "affiliate" (as defined in Section 2(k) of the BHC Act), unintentionally has increased the scope of the Volcker Rule to prohibit activities by entities that may be only tangentially related to an insured depository institution. We support the designations in the definition of "banking entity" contained in Section 2(e)(1)-(3) of Subpart A. Nevertheless, Section 2(e)(4), when the word "affiliate" is defined as it is in Section 2(a) (the statutory definition of "affiliate" in Section 2(k) of the BHC Act), it results in an unnecessarily broad and unreasonable scope to the definition of "banking entity." For example, a passive investment by the parent entity of a depository institution in less than 25% of an issued and outstanding class of securities bearing limited voting rights may sweep in the investee entity as a "banking entity" under Section 2(e)(4), thus prohibiting this unrelated investee entity from engaging in proprietary trading and covered fund investment and sponsorship. This concern is exacerbated in situations like TIAA's, where the insured depository institution itself represents an extremely small portion of the enterprise's assets, revenues and income. Investee entities which are only tangentially related should not be deemed "banking entities," especially when such entities can not be reasonably be viewed as supporting the finances of the insured depository institution itself (and vice versa).

By using the "affiliate" definition as contained in Section 2(k) of the BHC Act, we presume that the regulatory interpretations of this definition under the BHC Act from time to time will apply. We are concerned that there will be a lack of predictability regarding what indicia would constitute "control" under such interpretations of the BHC Act. A broad scope of the definition can be expected to hamper capital raising activities by companies in the marketplace. Potential investee entities may not allow "banking entities" to invest in 5% or more of any class of voting securities of the investee entity, lest the investee entity itself run the risk of being deemed affiliated with the banking entity investor, and thus, a banking entity itself. As a result, "banking entities" as investors, such as insurance companies, will likely make fewer small (yet over 5% of a class of voting equity) investments in operating companies even if those investments comply with state regulations and are otherwise prudent investments for the investor entity. Such uncertainty may also have the unintended consequence of stifling a long-term, "buy and hold" source of investment capital for a wide variety of enterprises.

<u>Question 6</u>. Are there any entities that should not be included within the definition of banking entity since their inclusion would not be consistent with the language or purpose of the statute or could otherwise produce unintended results? Should a registered investment company be expressly excluded from the definition of banking entity? Why or why not?

We believe that registered investment companies ("RICs") which are registered with the SEC under the Investment Company Act should be expressly excluded from the definition of "banking entity." We believe that the SEC's comprehensive system of regulation and enforcement adequately serves the interest of investors in those RICs. The Investment Company Act imposes detailed disclosure requirements on RICs that issue securities to the public, informing such investors about the critical aspects and risks associated with their investment in a RIC. In addition, the Investment Company Act mandates detailed disclosure about the investment adviser responsible for managing and administering the RIC's investments and operations. The Investment Company Act also imposes constraints on such registrants' ability to issue or incur debt or engage in derivative transactions. Finally, the Investment Company Act requires that the Board of Trustees of RICs be independent from the management of such funds.

<u>[QUESTION RELATING TO SUBPART B, SECTION 6(b)(2)(iii) – SEPARATE ACCOUNTS]</u>

<u>Question 128</u>. Is the proposed rule's exemption of trading for separate accounts by insurance companies effective? If not, what alternative would be more appropriate? Does the proposed exemption sufficiently address the variety of customer-driven separate account structures typically used? If not, how should it address such structures? Does the proposed exemption sufficiently address the variety of regulatory or supervisory regimes to which insurance companies may be subject?

As to the treatment of this issue, we support the positions taken by both (1) the American Council of Life Insurers ("ACLI") in its comment letter to the Agencies related to the Proposed Rulemaking, dated January 24, 2012, and (2) the Committee of Annuity Insurers ("CAI") in its comment letter to the Agencies related to the Proposed Rulemaking, dated February 2, 2012.

<u>[QUESTIONS RELATING TO SUBPART B, SECTION 6(c) – INSURANCE COMPANY EXEMPTION]</u>

<u>Question 132</u>. Should any of the statutory requirements for the exemption be further clarified in the proposed rule? If so, how? Should any additional requirements be added? If so, what requirements and why?

We believe that Section 6(c)(2) of Subpart B should be expanded to include expressly the concept that an affiliate may purchase or sell the covered financial position solely for <u>or for the benefit of</u> the general account. Congress intended to accommodate the business of insurance and the exemption for investments by the general account, as drafted in Section 6(c)(2), requires

compliance with state insurance company investment laws. Expressly allowing affiliates (in particular, subsidiaries of directly regulated parent insurance companies) to engage in proprietary trading for their own account when the sole beneficiary is the general account of the parent insurance company would eliminate any ambiguity as to whether subsidiaries formed solely for the benefit or convenience of the parent insurance company could engage in the same trading activities that their parent entities could. Such affiliates, whether investment or operating subsidiaries of the parent insurance company, are regulated by state insurance laws. We believe this clarification will eliminate unnecessary ambiguity regarding the relatively common structures of many insurance company organizations.

Question 134. For purposes of the exemption, are the insurance company investment laws, regulations, and written guidance of any particular State or jurisdiction insufficient to protect the safety and soundness of the banking entity, or of the financial stability of the United States? If so, why?

Question 135. What impact will the proposed rule's implementation of the exemption have on the insurance activities of insurance companies affiliated with banking entities? If such impacts are negative, how could they be mitigated or eliminated in a manner consistent with the purpose and language of the statute?

I. Introduction

As noted in our cover letter and as discussed in more detail below, the Agencies should amend the Proposed Rulemaking to extend the insurance company exemption to apply to the investment in and sponsorship of covered funds by a regulated insurance company.

More fundamentally, we have some concern about the implications of Question 134 posed by the Agencies in the Proposed Rulemaking. As relates to insurance companies, the intent of Section 13 of the BHC Act is clear: Congress exempted the business of insurance from the prohibitions of the Volcker Rule. Congress did not indicate in Section 13 that the "business of insurance" should be exempted, if and only if, the Agencies determined that state regulation of insurance companies is adequate to protect depository institutions affiliated with an insurance company from loss. For example, Section 13(b) of the BHC Act specifically charged the Financial Stability Oversight Counsel ("FSOC") to study and make recommendations on implementing Section 13 so as to:

> "appropriately accommodate the business of insurance within an insurance company, subject to regulation in accordance with the relevant insurance company investment laws, while protecting the safety and soundness of any banking entity with which such insurance company is affiliated and of the United States financial system;"

Further, Section 13(d)(1)(F) of the BHC Act, which outlines the exemption from the Volcker Rule prohibitions for insurance company investment activities in their general account, contemplates the jurisdiction of state insurance investment laws. In particular, Section 13(d)(1)(F)

presumes that such investment activities, when conducted "in compliance with, and subject to," state insurance investment laws, will be permitted. Section 13(d)(1)(F)(ii) states that this presumption may be rebutted only after the "joint[] determin[ation]" of "the appropriate Federal banking agencies, after consultation with the [FSOC] and the relevant insurance commissioners of the States and territories of the United States ... that a particular [insurance company investment law] is insufficient to protect the safety and soundness of the [affiliated] banking entity, or of the financial stability of the United States." Here, Congress is emphasizing clearly that the business of insurance should be exempt from the Volcker Rule, in the context and with the oversight of state insurance investment laws.

In this regard, the letter submitted to the Agencies on January 27, 2012 by 17 Members of Congress succinctly highlights that Congress, in passing the Volcker Rule, did not intend to prohibit insurance companies from investing in covered funds for their general account.

II. Dodd-Frank Act and Proposed Rulemaking Analysis

A. Insurance Company Exemption

Section 13(d)(1)(F) of the BHC Act was enacted specifically to ensure that insurers affiliated with insured depository institutions could continue to conduct existing regulated investment activities without regard to the Volcker Rule's restrictions. By its very nature, this permitted activity contemplates the ability of insurance companies to continue to invest in a wide range of securities, including interests in private funds, within the limits set by insurance investment laws. Under the definition set forth in Section 2(e) of Subpart A of the Proposed Rulemaking, a "banking entity" will include an insurance company (such as TIAA) if that insurance company is the parent of, or affiliated with, an insured depository institution.

Importantly, Section 13(d)(1) of the statutory text of the Volcker Rule begins with the phrase "Notwithstanding the restrictions under subsection (a), . . . the following activities . . . are permitted." "[S]ubsection (a)" includes both the general prohibition on proprietary trading and the general prohibition on sponsoring or investing in a covered fund. Among the permitted activities provided thereafter is the one identified in Section 13(d)(1)(F), which carves out of the general prohibitions "the purchase, sale, acquisition, or disposition of securities and other instruments . . . by a regulated insurance company directly engaged in the business of insurance for the general account of the company . . . ." Section 13(d)(1)(D) further carves out of the general prohibitions "the purchase, sale, acquisition, or disposition of securities and other instruments...on behalf of customers."

There is no indication on the face of the statutory text or otherwise that these permitted activities should apply only to the general prohibition on proprietary trading. Indeed, Congress explicitly provided that these permitted activities would apply "[n]otwithstanding" *both* restrictions "under subsection (a)." Note that the term "proprietary trading" does not appear in either Section 13(d)(1)(F) or Section 13(d)(1)(D). Congress knew how to make clear that a given permitted activity applies only to proprietary trading, as evidenced by the explicit reference in the offshore exemption in Section 13(d)(1)(H). In light of this fact, the reference in Sections

13(d)(1)(F) and Section 13(d)(1)(D) to "securities and other instruments described in subsection (h)(4)" is manifestly not a limitation to the proprietary trading context but simply a cross-reference to the useful distinction in another part of the statute.

In this regard, we refer the Agencies to the comment letter submitted to the Federal Reserve Board on January 23, 2012 by Cleary Gottlieb Steen & Hamilton LLP, Davis Polk & Wardwell LLP, and Sullivan & Cromwell LLP in respect of Section 13 of the BHC Act. We believe this comment letter accurately summarizes the proper technical reading of the statute as relates to the scope of the insurance company exemption from the Volcker Rule's general prohibition on proprietary trading and covered fund investing. More fundamentally, it gives effect to what we believe was the true Congressional intent when it authored the insurance company exemption; namely, that insurance companies should be permitted to continue to invest in accordance with state insurance investment laws, including the ability to invest in covered funds.

B. Insurance Separate Accounts

Section 6(b)(2)(iii) of Subpart B of the Proposed Rulemaking, which outlines the exemption from proprietary trading for banking entities purchasing and selling a covered financial position for an insurance company separate account, provides the appropriate framework for the expansion of the insurance separate account exemption to apply to investing in and sponsoring covered funds. A separate account is a traditional device established on the books of an insurance company pursuant to state insurance law in order to fund certain types of insurance contracts. Under insurance law, the assets of a separate account are considered assets of the insurance company. The investments that TIAA and many peer insurance companies offer under separate accounts include equities, fixed income, money market accounts and real estate. These investments generally work in conjunction with our general account and are an important component of insurance companies' clients' retirement plans, allowing them to build a fully diversified portfolio. We believe that amending the Proposed Rulemaking to provide that the insurance company separate account exemption applies to the covered fund prohibition is necessary to honor the intent of Congress in enacting the Volcker Rule to appropriately accommodate the business of insurance.

III. Investments in and Sponsorship of Private Funds

We believe Congress provided the broad exemption for insurance companies under Section 13(d)(1)(F) because it recognized that permitting insurance companies to continue to invest in a manner that aligns its conservative long-term objectives with its long-term obligations benefits both insurers and their policyholders. Investing in and sponsoring private funds without regard to the conditions imposed on other banking entities engaged in similar activities as part of the ordinary course, regulated investment activity of an insurance company provides access to companies, markets, and investment strategies that might not otherwise be available, specifically regarding diversification.

Investments in private equity funds historically have had a low correlation to other insurance company investments and represent a good portfolio fit for long-term liability products

and insurance company surplus accounts. The importance of investing in the private equity fund asset class is further underscored by the current low interest rate environment; one that is projected by many to continue for a number of years. Newly issued fixed income investments issued by highly creditworthy borrowers are currently paying institutional lenders, such as insurance companies, extremely low interest rates, and, as many insurance companies have issued contracts guaranteeing their policyholders specified rates of return on their contributions, a low interest rate environment is a quite challenging investment environment. Investments in private equity funds (most typically as a limited partner or limited liability company member), which have a demonstrated ability to achieve higher rates of return with relatively low volatility, are a critical component of an insurance company's diversified investment program.

In addition, investments in hedge funds (again, most typically as a limited partner or limited liability company member) have served as a diversification tool for institutional investors such as insurance companies; shifting risk away from equity and fixed income positions, which still remain the hallmark of most insurance companies' investment profile. Also, hedge funds often offer access, on an indirect basis, to asset classes that provide even further diversification for a primarily long term investor, including commodities, precious metals and other direct asset investments.

Together, the longer-term asset-liability profile of insurers' investments, the quantitative investment limits imposed by state law, and the fact that insurers' covered fund investments are almost always in a limited liability vehicle ameliorates the risks of owing these investments compared to depository institutions and entities affiliated with depository institutions.

Further, we believe that allowing insurance companies to sponsor private funds without regard to the conditions imposed on other banking entities engaged in similar activities appropriately accommodates the business of insurance in a number of ways. Specifically, it enables insurance companies to (1) build scale in multiple investment classes; (2) obtain important diversification by owning a smaller percentage of a larger number of assets; (3) build and develop better investment staff to perform research and invest on behalf of the insurance company; and (4) control investment timing and allocations to suit long-term investment objectives, rather than relying exclusively on third-party managers who may have different objectives than the insurance company. Furthermore, insurance companies have historically achieved diversification in their investments by including co-investors. Establishing a relationship with co-investors and structuring a transaction to include participation by co-investors are costly and time consuming endeavors and doing so for multiple transactions is significantly inefficient compared to establishing a pool of capital to make multiple investments – *i.e.*, forming a private fund to make such investments. In light of an insurance company's expertise in making such investments, it is only natural that the insurance company would sponsor such funds and be permitted to make a meaningful co-investment in that fund, one that indicates an alignment of interests between the sponsoring insurance company and the unaffiliated co-investors.

IV. Efficacy and Protection of State Regulation

Insurance companies have in the past and currently continue to invest in and sponsor private funds. Such activities are subject to regulation in accordance with the relevant insurance company investment laws. TIAA, for example, is regulated by the NYS DFS and by the insurance regulators in all 50 states, the District of Columbia and Puerto Rico. State insurance regulators allow and consistently have allowed insurance companies to both invest in and sponsor private funds up to state imposed limits on equity investments. The NYS DFS, for example, has strict regulations on investment limits and capital requirements to protect the financial strength and solvency of regulated insurance companies. State regulators generally impose strict rules on the quality and type of capital insurance companies must hold to guarantee their solvency. While not uniform, insurance company investments are subject to state investment laws which are substantially similar and generally conform to standards set out in model laws and regulations developed by the National Association of Insurance Commissioners.

State insurance laws provide hard limits on the proportion of an insurer's investments that may be invested in a particular asset and a particular asset class. These laws compel insurance companies to hold their investments in a diversified portfolio, but they do not straitjacket insurers into any specific portfolio structure. For instance, Section 1405 of the New York Insurance Law ("NYIL") prohibits an insurer from carrying more than 20% of its admitted assets in real property. Similarly, the NYIL specifically constrains the amount of investments an insurer may make in equity investments issued by U.S. institutions (including partnership interests, the common structure of private equity funds, hedge funds and other "covered funds" offered to investors). This limit is currently 20% across all such equity interests, and no one investment may exceed 2% of the insurer's admitted assets.[4] Other limitations apply to foreign investments and investments in obligations issued by, or by an issuer located in, a lower rated jurisdiction. These statutory limitations constrain insurers from taking excessive investment risks while simultaneously allowing insurers appropriate leeway in determining the allocation of investments at an acceptable level of risk for the individual insurer's business.

Further, a regulated insurance company, including TIAA, is required to file reports, generally including detailed annual financial statements with state insurance regulators in each of the jurisdictions in which it does business, and its operations and accounts are subject to periodic examination by such authorities. Also, an insurance company's RBC calculations take into account, for example, the inherent differences associated with investments in equity and investments in fixed income and will generally assess a higher capital charge to equity investments. Within equity investments, including investments in pooled vehicles such as private equity and hedge funds, the RBC calculations often further differentiate to approximate the relative risk to the insurer's capital and solvency associated with such investments. The formula is used as to anticipate better solvency factors which impact insurance companies for purposes of initiating regulatory action. Insurance laws provide state insurance regulators the authority to require various actions by, or take various actions against, insurance companies whose RBC ratio does not meet or exceed certain levels.

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[4] See Section 1405(a)(6)(ii) of the NYIL.

In this regard, we can appreciate the legitimate concerns of the Agencies that, in the future, state insurance regulation might not be adequate to address federal concerns regarding an impairment to the safety and soundness of an affiliated depository institution. However, that concern is not a reason to restrict the insurance exemption now. First, Section 13 of the BHC Act simply does not empower the Agencies to create such a restriction from whole cloth. Second, for the reasons stated above, we believe there is nothing in the existing state regulatory structure which warrants this concern; rather, existing state regulation is robustly designed to protect insurance companies from imprudent investments in covered funds. Third, were a state to adopt what may be perceived as an imprudent regulatory structure for insurance company investments in covered funds (one that risked impacting the safety and soundness of the Federal financial system), there are adequate federal powers under the Dodd-Frank Act to address such concerns (*e.g.*, the designation of certain institutions, including insurance companies which may be affiliated with insured depositary institutions, as systemically important financial institutions). Fourth, the statute might conceivably be read to suggest that Congress intended the insurance company exemption under the Volcker Rule to be in some way limited to state insurance regulation as prevailed in 2010. In other words, were a state to adopt an unduly permissive approach (from a federal perspective) to insurance company investments in covered funds in the future, an argument might be made that the Agencies might deem such activity as outside the scope of exemption as understood in 2010. Even if such Congressional intent could be gleaned and supported, it does not reflect the current state of insurance company investment laws as of the date of the Proposed Rulemaking.

Finally, the implicit gloss on the Volcker Rule insurance exemption could lead to an especially unfavorable result for many of the United States' pensioners, who rely on insurance companies to provide retirement security through a variety of products and services. Insurance companies, in general, and insurance company investments in covered funds, in particular, were not the cause of the recent financial crisis. Nevertheless, pensioners, in particular, dramatically suffer the consequences of the long-term low interest rate environment now prevailing. Depriving the insurance companies that invest on behalf of those pensioners the returns available through investments in covered funds impairs the ability of those pensioners to maintain their retirement security. For the reasons stated above, we do not believe this result is either the correct statutory interpretation or the correct policy result.

In particular, we support the position taken by both the ACLI and the CAI on this issue in proposing a specific exemption (a new Section 13(e) of Subpart C) in their comment letters related to the Proposed Rulemaking, dated January 24, 2012 and February 2, 2012, respectively.

In addition, we support the position taken by the ACLI in Section VIII of its comment letter, dated January 24, 2012, as relates to the recordkeeping requirements and compliance monitoring required by Sections 7, 15 and 20 of Subpart D of the Proposed Rulemaking as relates to insurance company investment activities permitted by the Volcker Rule.

[QUESTION RELATING TO SUBPART C, SECTION 12(c)(2)(B)(ii)(2) AND SECTION 12(d) – SPONSORING/CO-INVESTING IN COVERED FUNDS (TIER 1 CAPITAL)]

<u>Question 267</u>. Is the proposed rule's approach to determining and calculating a banking entity's relevant tier 1 capital limit effective? If not, what alternative approach would be more effective and why? With respect to applying the aggregate funds limitation to a banking entity that is not affiliated with an entity that is required to hold and report tier 1 capital, is total shareholder equity on a consolidated basis as of the last day of the most recent calendar quarter that has ended an effective proxy for tier 1 capital? If not, what alternative approach would be more effective and why?

We support the general approach that Section 12(c)(2)(ii)(B)(2) of the Proposed Rulemaking is attempting to make, when designating the shareholders equity of the top tier affiliate within such organization as the appropriate analog for Tier 1 capital. Nevertheless, not all top tier holding companies account for their capital and surplus in the same manner. For example, insurance companies that serve as parent entities to insured depository institutions may report a relatively small amount of "shareholders' equity" on the balance sheet, as required under applicable statutory accounting principles. Meanwhile, state insurance regulators, in evaluating the financial strength of a domiciled insurance company, evaluate the totality of an insurance company's capital and reserve base, in New York using the term "capital and contingency reserves," of which shareholders' equity may be a very small component. As a result, we advocate including "(or its substantial equivalent)" after the term "shareholders' equity" in Section 12(c)(2)(ii)(B)(2) to ensure that accounting technicalities do not result in an unintended outcome.

<u>[QUESTION RELATING TO SUBPART C, SECTION 14(a)(2) – EXCEPTIONS FROM THE DEFINITION OF COVERED FUND]</u>

<u>Question 305.</u> Do the exemptions provided for in § __.14 of the proposed rule effectively promote and protect the safety and soundness of banking entities and the financial stability of the United States? If not, why not?

We do not believe that the exceptions from the definition of "covered fund" are comprehensive enough. For example, an investment in a wholly owned subsidiary that is not engaging in liquidity management activities or is an acquisition subsidiary could be technically deemed an impermissible ownership interest in a covered fund, in and of itself. Of course, that subsidiary, if deemed a "banking entity" under Section 2(e) of Subpart A, appropriately would be subject to the Volcker Rule's prohibitions and exemptions therefrom. We believe that the Volcker Rule adequately protects the safety and soundness of the financial system if the rule applies to that banking entity's activities. Not allowing the formation of a subsidiary, particularly of an insurance company regulated under a comprehensive system of state insurance laws (many of which do oversee subsidiary activities), does not advance the safety and soundness of the financial system. Such investments in subsidiaries, which is expressly contemplated by Section 13(d)(1)(F) of the Dodd-Frank Act for insurance companies, should not inadvertently be prohibited by operation of a narrow list of exceptions from the "covered fund" definition. As a result, we believe that a specific exemption to the covered fund prohibition should be added to the Proposed Rulemaking to

allow an insurance company to invest in or organize a subsidiary to the extent permitted under applicable insurance law.

In particular, we support the position taken by the ACLI on this issue in proposing a specific exemption (a new Section 14(a)(2)(vi) of Subpart C) in Section VI of its comment letter related to the Proposed Rulemaking, dated January 24, 2012.

[QUESTIONS RELATING TO SUBPART C, SECTION 11(f)(1) – OFFERINGS OF SPONSORED FUNDS]

Question 374. How have banking entities traditionally organized and offered covered funds? What are the benefits and costs associated with the proposed requirements for relying on the exception for organizing and offering covered funds? Please estimate any resulting costs or benefits or discuss why such costs or benefits cannot be estimated.

In our experience, a number of affiliates of insured depository institutions have organized, offered and co-invested in covered funds. From TIAA's standpoint as an insurance company, we believe organizing and offering covered funds enables insurance companies to (1) build scale in multiple investment classes, (2) obtain important diversification by owning a smaller percentage of a larger number of assets, (3) build and develop better investment staff to perform research and invest on behalf of the insurance company, and (4) control investment timing and allocations to suit long-term investment objectives, rather than relying exclusively on third-party managers who may have different objectives than the insurance company. Furthermore, insurance companies have historically achieved diversification in their investments by including co-investors. Further, many potential third-party investors in a sponsored covered fund typically expect the sponsor, or an affiliate thereof, to make a meaningful equity contribution to the covered fund itself, to ensure an adequate alignment of interests between the sponsor and its affiliates, and the third party investors. The ability to so-called 'co-invest' alongside third party investors is, we believe, critical to the ability of a covered fund to attract a diverse group of investors and to gain access and meaningful allocations to highly desirable investment funds. While difficult to quantify in absolute dollars, there is a clear qualitative benefit to the ability to attract as diverse and sound investor group to a sponsored investment vehicle as possible.

Question 376. Is it common for a banking entity to share a name with the covered funds that it invests in or sponsors? If yes, what entity in the banking structure typically shares a name with such covered funds? What costs and benefits will result from the proposed rule's implementation of the name sharing requirement in exception for organizing and offering a covered fund? What alternatives, if any, may be more cost-effective while still being consistent with the purpose of the statute?

In our experience, it is common for a covered fund sponsored by an affiliate of a banking entity to bear some variation of the name of the sponsor. Oftentimes, the sponsoring entity (that entity which receives management fees from the covered fund and/or the investors in that fund) will be an investment adviser registered with the SEC under the Advisers Act. We do appreciate

the concern that the Volcker Rule is trying to address; namely, that there is no implication that an insured depository institution guarantees or stands behind the obligations or investments offered by the covered fund. Nevertheless, adding the parenthetical "(or an affiliate or subsidiary thereof)" to the end of Section 11(f)(1) of Subpart C of the Proposed Rulemaking results in unintended consequences, particularly given the breadth of the proposed definition of "affiliate" in Section 2(a) of Subpart A.

We believe that requiring wholly distinct names results in significant inefficiencies for private fund sponsors and more importantly, their clients and investors. First, these clients will suffer confusion, as the clarity of client reporting will be diminished. In addition, having to name serial covered funds in a wholly distinct fashion by the end of the Proposed Rulemaking's conformance period will result in increased compliance oversight (and related costs) and multiple filing fees, all of which will harm returns to clients while providing no meaningful benefit to them. Also, it will be unnecessarily difficult for serial covered fund sponsors that happen to be affiliated with an insured depository institution to build and convey branding continuity in the marketplace, placing such sponsors at a competitive disadvantage.

It is important to note that affiliates of deposit-taking banks have sponsored mutual funds registered under the Investment Company Act for decades. These mutual funds often sell directly to retail investors who do not need to be "accredited investors" as defined in the SEC's rules. In comparison, private funds, the vast majority of which are structured as limited partnerships or limited liability companies, typically issue securities only to accredited investors and many such funds issue only to qualified purchasers.[5] The Proposed Rulemaking's implementation of the naming limitation seems facially inconsistent with the SEC's well-documented policy of providing investor protections commensurate with the level of sophistication of the investor and the SEC's and other Agencies' interest in transparency and "plain English" disclosures to investors and the marketplace.

We believe that the intent of Section 13(d)(1)(G) of the BHC Act would be served by limiting the naming restriction in Section 11(f)(1) of Subpart C to apply only to covered funds bearing the name, or a substantially similar version of the name of (1) the insured depository institution itself (including all such affiliated institutions if there is more than one) and (2) any subsidiaries of such institution, in each case when such name is used in a manner that could reasonably lead to a conclusion that the insured depository institution will guarantee, assume, or otherwise insure the obligations or performance of such covered fund.

[5] We note that in December 2011, the SEC issued final rules (Release No. 33-9287), as required under the Dodd-Frank Act, which tightened the standard for determining whether an individual was an "accredited investor," by excluding the value of that person's primary residence from the calculation of that person's net worth.