Wayne McClain III
Managing Director, Associate General Counsel
Head of Pension Law Team

T (704) 988-5590
F 704-988-1615
Email: wayne.mcclain@tiaa.org

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Employee Benefits Security Administration
Office of Regulations and Interpretations
Office of Exemption Determinations
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Application No. D–12057

Re: Retirement Security Rule: Definition of an Investment Advice Fiduciary (RIN 1210–AC02)
Proposed Amendment to Prohibited Transaction Exemption 2020–02 (ZRIN 1210–ZA32)

Ladies and Gentlemen:

Teachers Insurance and Annuity Association of America ("TIAA") shares the Department of Labor's ("DOL" or "Department") goal of improving the retirement security of American workers. TIAA has helped plan sponsors provide lifelong retirement security to their employees for more than 100 years. Since 1918, TIAA participants have received over $585 billion in annuity payments and other benefits.[1] The core product that has provided a guaranteed stream of income that lasts the entirety of retirees' lives is TIAA Traditional, a commission-free, fixed annuity.

TIAA, together with its wholly-owned asset management arm Nuveen, LLC ("Nuveen"), submits this comment letter in response to the Department's proposed amendments to the definition of an investment advice fiduciary ("Proposed Rule")[2] under Titles I and II of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and Internal Revenue Code section 4975, as well as the Department's proposed amendments to existing prohibited transaction exemptions ("Proposed Exemption(s)")[3] (collectively, the "Proposal").

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[1] As of 12/31/22. Other benefits from TIAA include: surrender benefits and other withdrawals, death benefits, health insurance and disability insurance benefits, and all other policy proceeds paid.

[2] *Retirement Security Rule: Definition of an Investment Advice Fiduciary*, 88 Fed. Reg. 75890 (Nov. 3, 2023), *available at*: https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23779.pdf.

[3] *Proposed Amendment to Prohibited Transaction Exemption 84–24*, 88 Fed. Reg. 76004 (Nov. 3, 2023), *available at*: https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23781.pdf; Proposed Amendment to Prohibited Transaction Exemption 2020–02, 88 Fed. Reg. 75979 (Nov. 3, 2023), *available at*: https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23780.pdf.

As the leading provider of retirement services for employers in academic, research, medical, and cultural fields, our investment model and long-term approach benefit more than five million retirement plan participants and 15,000 retirement plan sponsors. TIAA's unique corporate structure aligns with prioritizing successful retirement outcomes for retirement plan participants. TIAA has no shareholders other than our Board of Overseers, which is a not-for-profit entity. TIAA's charter requires us to function without profit to the corporation or its shareholders, aligning TIAA's and its clients' interests – both at the plan and individual investor level.

TIAA has a strong interest in providing robust protections for our clients when receiving advice about their retirement investments. We support strong and uniform ERISA fiduciary standards. However, we believe aspects of the Proposal would negatively impact our ability to serve plan sponsors, plan fiduciaries, participants and IRA holders as effectively as possible. The Proposal would benefit from revisions, additional clarity and refinement as discussed below.

I. The Benefits of Annuities in Providing Retirement Security and Guaranteed Lifetime Income.

TIAA annuity products offer investors guarantees, including a critically important guarantee for retirees who want the security of a product that will provide a guaranteed stream of income, month after month, for as long as they live. This includes guaranteed investment returns and a guaranteed retirement paycheck for life. TIAA annuity products are a key component to helping our clients achieve retirement security. TIAA works diligently to offer a range of annuities that are cost-effective and readily available for plan sponsors to offer and for plan participants to choose as part of their retirement plan investment menus.

As the retirement system has shifted substantially from defined benefit to defined contribution plans, annuities have become increasingly important to help retirees receive a similar benefit to a defined benefit plan. As the only product that can guarantee a steady stream of income in retirement, annuities provide investors with greater ability to achieve a dignified retirement and ensure they do not outlive their savings. Policymakers at both the federal and state levels, including at the DOL, recognize this and have taken steps to help increase access and utilization of annuities as part of a comprehensive retirement plan.

Some examples of these efforts include:

- The DOL's 2010 Request for Information Regarding Lifetime Income Options for Participants and Beneficiaries in Retirement Plans.

- The DOL's 2016 Information Letter related to the inclusion of guaranteed lifetime income products as part of a default investment in a retirement plan.

- The SECURE Act of 2019 ("SECURE Act"), which included an improved annuity provider selection safe harbor for fiduciaries of defined contribution plans, a requirement that benefit statements include lifetime income illustrations, and a provision related to annuity portability between plans.

- The SECURE 2.0 Act of 2022 ("SECURE 2.0"), which included enhancements to regulations governing qualified longevity annuity contracts ("QLACs"), eliminated a

penalty on partial annuitization, and removed required minimum distribution barriers for certain annuities.

Now more than ever, annuities play a crucial role in helping retirement investors achieve successful retirement outcomes. In 2023, TIAA launched a Retirement Bill of Rights, which recognizes that more needs to be done to improve the U.S. retirement system.[4] A key goal of the Retirement Bill of Rights is to help every worker "save for and achieve a financially secure retirement.[5]" In addition, the Retirement Bill of Rights highlights the importance of helping individuals obtain "retirement income that will last the rest of their lives."

Annuities are a crucial tool in helping employees build and obtain a guaranteed retirement paycheck for life. We believe the Biden Administration and the Department understand this and share our mission of improving access to such solutions. We hope policymakers will continue to champion efforts like the ones noted above to strengthen retirees' ability to achieve guaranteed lifetime income. The Department should prioritize adoption and utilization of lifetime income solutions, including expanding the kinds of annuities that can be used as default investments.

II. Comments on the Retirement Security Rule: Definition of an Investment Advice Fiduciary Proposed Rule (RIN 1210–AC02).

a. The DOL should include a "seller's" exclusion for interactions with independent fiduciaries.

The Proposed Rule omits an important distinction between a financial institution's interactions with independent plan fiduciaries (*e.g.*, plan sponsors, consultants) versus those it has with individual participants. The omission is unexpected, as the Department itself has acknowledged the distinction in the now vacated 2016 final regulation that defined who is a "fiduciary" of an ERISA employee benefit plan as a result of giving investment advice to the plan or its participants or beneficiaries.[6] In the vacated 2016 rule, the Department created a clear exclusion for arm's-length interactions between an independent plan fiduciary and a seller, including for those interactions that might otherwise be perceived as a recommendation.[7]

Like the vacated 2016 rule, the Department should include a "seller's" exclusion in the final rule. Unlike the vacated 2016 rule, however, the final rule should not (i) impose a minimum financial threshold or (ii) require a person to know or reasonably believe that the plan fiduciary is capable of evaluating investment risks independently, both in general and with regard to particular transactions and investment strategies. ERISA provides no basis for mandating the minimum financial threshold that was included in the seller's exclusion in the vacated 2016 rule. ERISA requires a plan fiduciary to act in accordance with ERISA's fiduciary standards, regardless of the amount of plan assets under management. ERISA does not hold plan fiduciaries to a lesser standard merely because a fiduciary manages

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[4] TIAA Retirement Bill of Rights, *available at*: https://www.tiaa.org/public/learn/retirement-planning-and-beyond/retirement-bill-of-rights.

[5] https://www.tiaa.org/public/learn/retirement-planning-and-beyond/retirement-bill-of-rights

[6] *Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice*, 81 Fed. Reg. 20946 (Apr. 8, 2016), *available at*: https://www.govinfo.gov/content/pkg/FR-2016-04-08/pdf/2016-07924.pdf.

[7] *Id*. at 20948.

fewer assets. Likewise, it is inappropriate to assign to a financial institution the duty to gauge an independent fiduciary's perceived financial acumen. ERISA tasks a plan fiduciary with the responsibility to evaluate investment risks. If the plan fiduciary lacks the requisite expertise, ERISA requires the plan fiduciary to hire professionals to help the fiduciary meet its duties.

Accordingly, we urge the Department to include a "seller's" exclusion in the final rule to cover the financial institution's interactions with any plan fiduciary for which the financial institution and its investment professionals declare that they are not undertaking to provide impartial investment advice.

b. The DOL should formally incorporate a broad "hire-me" exclusion into the regulatory text to encompass all types of recommendations of one's own fiduciary services.

TIAA appreciates the Department's recognition in the preamble to the Proposed Rule that normal activities of marketing one's own investment management or advisory services should not trigger fiduciary obligations.[8] While this recognition is welcome, we urge the Department to formally codify the "hire-me" exclusion in the regulatory text to facilitate reliance on the exclusion by all impacted parties.

TIAA also appreciates the DOL delineating in the preamble to the Proposed Rule the scenarios where, consistent with ERISA's functional test, an entity may be a fiduciary for a rollover or investment recommendation, but not for a recommendation to retain the entity to provide fiduciary services.[9] While this delineation is helpful, the DOL should both codify and further clarify the breadth of the exclusion. For example, it is a normal business activity for a financial representative (*e.g.*, a call center representative), after discussions with a retirement investor about their financial needs, to refer the individual to an advisory team. It is also a normal business activity for a financial institution to make targeted outreaches (*e.g.*, marketing segmentation or website interfaces) to individuals, based on their profile information, to recommend the engagement of one's own fiduciary services. These types of "hire me" recommendations typically involve in-plan services that the independent plan fiduciaries have approved to be made available and offered to their plan participants.

Accordingly, we believe that the Department should both codify and further clarify that the "hire-me" exclusion encompasses all types of recommendations of one's own fiduciary services (including the above examples). We agree that where a "hire-me" recommendation is also accompanied by a recommendation on how to invest assets, including a rollover recommendation, the separate recommendation would need to be independently evaluated to determine if it is in the client's best interest.

c. The DOL should incorporate an investment education exclusion into the regulatory text.

Consistent with the vacated 2016 rule, the regulatory text of the Proposed Rule should incorporate an investment education exclusion. In response to the request for comments about incorporating any provisions of Interpretive Bulletin 96-1 ("IB 96-1") into the final

[8] 88 Fed. Reg. at 75906.
[9] *Id*.

regulation,[10] we believe that an investment education exclusion is needed in the regulatory text. The concepts of IB 96-1 should also be updated to incorporate changes in laws, policies, and practices over the past 27 years.

In the preamble to IB 96-1, the Department stated that its goal is to encourage "educational service providers to emphasize that participants should: (1) participate in available plans as soon as they are eligible; and (2) make the maximum contribution possible to the plan."[11] While such a declaration is helpful, we urge the Department to include up-to-date examples of appropriate and representative educational interactions between plan participants and recordkeepers about plan enrollment and contributions. For example, a participant's online account at a recordkeeper that encourages the participant to enroll or increase plan contributions with an "enroll now," "start contributing now," or "you should save more" button should be viewed as educational as long as the experience is not accompanied by a specific investment or investment strategy recommendation. Similarly, a targeted communication from a recordkeeper telling the participant to contribute more and by how much should be viewed as educational as long as all material assumptions underlying the assessment are clearly explained, and the communication is not accompanied by a specific investment or investment strategy recommendation.

Further, as is evident by the text of IB 96-1, the Department's goal of encouraging plan participation through education was focused only on participant interactions. Rightfully, Congress subsequently recognized the importance of plan design provisions as an additional means to encourage plan participation. In that regard, the Pension Protection Act of 2006 introduced new plan design features of auto enrollment and auto escalation. These features have proven so appealing from a public policy standpoint that, sixteen years later in SECURE 2.0, Congress mandated them for new plans.

Given the importance (and, in some cases, the requirement) for a plan to include auto enrollment and auto escalation features, the Department should provide concrete examples of educational interactions between a service provider and a plan fiduciary about this topic. For example, individualized communications between a recordkeeper and plan fiduciary about potential benefits of adopting auto enrollment and auto escalation features should be viewed as educational. If such communications are also accompanied by specific investment or investment strategy, recommendations should not be viewed as fiduciary if the "seller's" exclusion conditions are met as discussed above.

Finally, as the Department has acknowledged in the preamble to the Proposed Rule, the analysis of IB 96-1 "is valid regardless of whether the retirement investor is a plan participant, beneficiary, I.R.A. owner, I.R.A. beneficiary, or fiduciary."[12] TIAA agrees and urges the Department to explicitly state in the regulatory text that the investment education

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[10] *Interpretive Bulletin 96–1; Participant Investment Education*, 61 Fed. Reg. 29586 (June 11, 1996), *available at*: https://www.govinfo.gov/content/pkg/FR-1996-06-11/pdf/96-14093.pdf.

[11] *Id*. at 29588.

[12] 88 Fed. Reg. at 75911.

exclusion is available for interactions with any retirement investor – plan participant, beneficiary, plan fiduciary, IRA owner, beneficiary and fiduciary.

III. Comments on the Proposed Amendments to Prohibited Transaction Exemption 2020–02 (ZRIN 1210–ZA32).

a. The definition of "Covered Principal Transaction" in PTE 2020-02 should be expanded to include closed-end fund initial public offerings.

As part of its proposed amendments to PTE 2020-02, the Department should expand the list of securities that may be purchased by a plan or IRA as part of a Covered Principal Transaction to include closed-end fund initial public offerings ("CEF IPOs").[13]

We believe the exclusion of CEF IPOs, which are typically sold on a principal basis, is detrimental to investor choice and the interests of some retirement investors. By restricting Covered Principal Transactions to a limited list of securities, the DOL has essentially endorsed a small class of investments while excluding a wide range of products that may be attractive to and beneficial for many retirement investors. This runs contrary to the ideals of investor choice. Rather than creating unnecessary challenges for investors who wish to choose from a broad range of investment products, we urge the Department to expand the list of securities under the Covered Principal Transaction definition to include CEF IPOs.

CEFs are an attractive investment choice for long-term retirement investors because of their strong focus on generating high returns and high cash flows. CEFs play an important role in providing retirement investors with income streams and diversification opportunities. Notably, the CEF structure incorporates significant investor protection mechanisms. For example, the value of a CEF portfolio is priced according to certain board-approved valuation procedures and ongoing board oversight. Unlike open-end mutual funds, CEFs often have a limited opportunity to raise investment capital through a brief IPO period that typically lasts less than a month. The IPO process for CEFs differs from that of operating companies with pricing that is known at the outset, continued high transparency and liquidity opportunities after launch, additional regulations and protection from the Investment Company Act of 1940 and FINRA, and a capital raise that is strongly aligned with investor demand, not issuer and syndicate goals.

In light of the many benefits CEFs can offer to long-term retirement investors, it would be beneficial for retirement plans and IRAs to be permitted to invest in CEF IPOs. However, because CEFs are traded on a principal basis at the point of their inception, the Department's exclusion of CEF IPOs from the narrow list of securities that may be traded as part of a Covered Principal Transaction prevents retirement investors from fully accessing these products. For these reasons, we urge the Department to add CEF IPOs to the list of permitted securities under the definition of "Covered Principal Transaction" in the final amendments to PTE 2020-02.

b. The DOL should clarify that the sales of proprietary fixed annuities are covered by PTE 2020-02.

By proposing to significantly limit the availability of PTE 84-24 to independent insurance agents receiving commissions for non-security annuities recommendations, the Department

[13] 88 Fed. Reg. at 75981.

intends that the recommendations of most annuities shall be made under PTE 2020-02. PTE 2020-02 covers two kinds of transactions: (i) the receipt of "reasonable compensation", and (ii) a "mark-up, mark-down, or other payment" in a riskless principal transaction or "Covered Principal Transaction." For the reasons below, we ask the Department to confirm that PTE 2020-02 covers all of the prohibited transactions that might result when an employee of a financial institution recommends propriety fixed annuities.

The term "Principal Transaction" covers sales of only a limited set of securities, which does not include annuities. As for the "reasonable compensation" coverage, the sale of a proprietary fixed annuity might involve a prohibited transaction other than the "reasonable compensation" that is received by an employee who made the recommendation.

Recognizing this point, PTE 84-24 covers "[t]he purchase, with plan assets, of an insurance or annuity contract from an insurance company." This broad coverage is necessary because an insurance company is not typically understood to be receiving "compensation" in connection with its fixed annuity products as profit comes from the spread between the contractual guarantees and the amount earned from investments and is not required to be disclosed as "compensation" under ERISA Section 408(b)(2).

We believe that the Department intended PTE 2020-02 to cover all of the prohibited transactions that might result from an employee of an insurance company recommending a propriety fixed annuity. Given the heightened importance for clarity in this area, we ask the Department explicitly to confirm and codify this in PTE 2020-02.

c. PTE 2020-02 should cover a financial institution's own plans.

TIAA urges the Department to remove the restriction prohibiting reliance on PTE 2020-02 for a financial institution (or its affiliates) providing in-plan investment advice to its employees. While TIAA is aware of the Department's reasoning as articulated in the preamble to proposed PTE 2020-02[14] and its now vacated Best Interest Contract Exemption 2016-01, TIAA believes that the Department's concern is unwarranted, and the restriction should be removed.

The robust conditions of PTE 2020-02 are designed to mitigate the harmful impact of conflicts of interest and provide substantial safeguards regardless of whether the individual receiving advice is employed by the institution providing the advice. As the Department has recognized on multiple occasions, an employer's decision to hire or retain an employee is a business decision completely separate from the fiduciary act of providing investment advice. Any perceived abuse related to performing these two separate functions would be addressed by the responsibility of a fiduciary, who is delivering investment advice, to mitigate conflicts by complying with the robust safeguards of PTE 2020-02.

If in-house plan participants are not eligible to receive advice on in-plan investment products, such participants would be forgoing meaningful advice, resulting in potentially negative impacts on their retirement outcomes. For example, the decision to select a lifetime annuity is an important decision, and TIAA plan participants would significantly benefit from

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[14] "The Department is of the view that, to protect employees from abuse, employers generally should not be in a position to use their employees' retirement benefits as potential revenue or profit sources, without additional safeguards." *Improving Investment Advice for Workers & Retirees*, 85 Fed. Reg. 40834, 40841 (July 7, 2020), *available at*: https://www.govinfo.gov/content/pkg/FR-2020-07-07/pdf/2020-14261.pdf.

the advice TIAA would otherwise be able to provide under the Impartial Conduct Standards. There is no reason that a financial institution that provides a fiduciary service to third-party plan participants should not also be able to do so for its own employees. TIAA plan participants, just like third-party plan participants, should be able to receive advice on these important decisions. This is especially important given the passage of the SECURE Act and SECURE 2.0, which includes several provisions aimed directly at improving access to lifetime income products.

Accordingly, TIAA urges the Department to remove the in-house plan restriction from PTE 2020-02.

d. In response to the Department's request as to whether additional disclosures are required, TIAA believes that current required disclosures are sufficient.

In the preamble of the proposed amendments to PTE 2020-02, the Department requests comment on proposed additional disclosures and whether they would be helpful to retirement investors.

TIAA believes the proposed additional disclosures would be unnecessary. Existing regulations already require broker-dealers and investment advisors to disclose their relationships and conflicts stemming from their recommendations. More specifically, a broker-dealer must provide a Regulation Best Interest and Form CRS disclosure under SEC regulation. An investment advisor must comply with the disclosure requirements of Form ADV. Moreover, firms already using the PTE must provide a statement explaining the basis for a rollover recommendation. We believe these existing disclosure requirements are sufficient to protect investors.

The proposed additional disclosures also run counter to SECURE 2.0's direction to the DOL, Treasury, and Pension Benefit Guaranty Corporation to review the existing reporting and disclosure regime and look for ways to consolidate and simplify disclosures and improve effectiveness for plan participants. As such, we recommend that the Department not require disclosures in addition to what is currently required, especially in light of SECURE 2.0's requirement for further analysis and a report on the effectiveness of current reporting requirements.

Conclusion.

TIAA appreciates the Department's consideration of our comments on the Proposal and welcomes the opportunity to engage further on any aspect of the foregoing.

Sincerely,

Wayne McClain III
Managing Director, Associate General Counsel