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November 24, 2014

Mr. Robert deV. Frierson
Secretary
Board of Governors of the
Federal Reserve System
20th Street and Constitution Avenue NW
Washington, D.C. 20551
Docket No. R–1415 and RIN 7100 AD74

Mr. Alfred M. Pollard
General Counsel
Federal Housing Financing Agency
Constitution Center (OGC Eighth Floor)
400 7th Street SW
Washington, D.C. 20024
Comments/RIN 2590-AA45

Mr. Barry F. Mardock
Deputy Director
Office of Regulatory Policy
Farm Credit Administration
1501 Farm Credit Drive
McLean, VA 22102-5090
RIN 3052–AC69

Legislative and Regulatory Activities Division
Office of Comptroller of the Currency
400 7th Street SW
Suite 3E-218, Mail Stop 9W-11
Washington, DC 20219
Docket ID: OCC–2011–0008

Mr. Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, D.C. 20429
Attention: Comments; RIN 3064–AE21

Mr. Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581
RIN 3038–AC97

Re: Margin and Capital Requirements for Covered Swap Entities; Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants

Ladies and Gentlemen:

TIAA-CREF appreciates the opportunity to comment on the above-cited proposed rulemakings (the "Proposed Rules")[1] issued by (i) the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Farm Credit Administration, and the Federal Housing Finance Agency (collectively, the "Prudential Regulators"), and (ii) the Commodity Futures Trading Commission

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1 *See Margin and Capital Requirements for Covered Swap Entities*; *Proposed Rule*, 79 Fed. Reg. 57348 (Sept. 24, 2014), *available at* http://www.gpo.gov/fdsys/pkg/FR-2014-09-24/pdf/2014-22001.pdf; and *Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants*, 79 Fed. Reg. 59898 (Oct. 2, 2014), *available at* http://www.gpo.gov/fdsys/pkg/FR-2014-10-03/pdf/2014-22962.pdf.

(the "CFTC" and, together with the Prudential Regulators, the "Agencies"), with respect to margin requirements for uncleared swaps and security-based swaps. The Proposed Rules issued by the Agencies put forward standards by which certain uncleared swaps and security-based swaps entered into by registered swap entities (such as swap dealers and security-based swap dealers and major swap participants and major security-based swap participants) would be collateralized. These standards, if designed properly, will promote the appropriate management of leverage and counterparty risk in the over-the-counter derivatives markets. TIAA-CREF remains highly supportive of the Agencies' efforts in this regard, but submits the comments set forth below to address certain concepts in the Proposed Rules that we believe are not in furtherance of the Agencies' regulatory goals and could impose unwarranted burdens on market participants.

I. TIAA-CREF Background

TIAA-CREF is a leading provider of retirement and investment services in the academic, research, medical and cultural fields, managing retirement assets on behalf of over four million individuals and 15,000 institutions nationwide. TIAA-CREF is an organization comprised of several distinct corporate entities whose overall assets under management or administration total $840 billion as of October 1, 2014[2].

Teachers Insurance and Annuity Association of America ("TIAA") is a life insurance company domiciled in the State of New York, which operates on a not-for-profit basis. TIAA is a wholly-owned subsidiary of the TIAA Board of Overseers, a special purpose New York not-for-profit corporation. The College Retirement Equities Fund ("CREF") issues variable annuities and is an investment company registered with the Securities and Exchange Commission ("SEC") under the Investment Company Act of 1940 ("ICA").

TIAA, through its TIAA Asset Management and TIAA-CREF Asset Management divisions, is also the parent of a number of investment advisers ("RIAs") registered with the SEC under the Investment Advisers Act of 1940 ("IAA"). These RIAs manage numerous investment companies ("RICs") registered under the ICA, operating as distinct families of equity and fixed-income mutual and closed-end funds.

TIAA-CREF's mission is "to aid and strengthen" the institutions we serve and provide financial products that best meet their specific needs. Our retirement plans and other products offer a range of options to help meet the retirement plan administration obligations of institutions and the savings goals and income and wealth protection needs of individuals. Through the aforementioned entities (which primarily would be deemed "financial end users" under the Proposed Rules), we regularly engage in a variety of investment activities, including the use of uncleared over-the-counter derivatives. This activity is subject to extensive regulation under

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2 This figure includes assets managed by affiliates of Nuveen Investments, Inc., which TIAA acquired on October 1, 2014.

applicable insurance law (in the case of TIAA) and under the ICA (in the case of CREF and other RICs managed by RIAs affiliated with TIAA).

While we welcome the additional safeguards contemplated in the Dodd–Frank Wall Street Reform and Consumer Protection Act (the "DFA") with respect to derivatives, including mandating margin requirements for certain uncleared over-the-counter derivatives, it is our belief that certain aspects of the Proposed Rules may unnecessarily complicate the implementation of this policy goal and would be counterproductive to the reduction of risk in the financial system. We offer the comments below in order to assist the Agencies in tailoring their final rulemakings to achieve their regulatory goals in a manner that is effective but not unduly burdensome for market participants.

II. Summary of Comments

TIAA-CREF generally supports the comments submitted by the American Council of Life Insurers ("ACLI") and the Investment Company Institute ("ICI"), which describe certain issues in the Proposed Rules that, if not resolved, will increase the costs and potentially impair the ability of life insurers and RICs to mitigate those risks in their investment portfolios that cannot be sufficiently hedged through more liquid cleared swaps. In particular, we agree with ACLI and ICI that the Proposed Rules could be improved by closer conformance with the international framework developed by the Basel Committee on Banking Supervision and the International Organization of Securities Commissions[3] in the manner and to the extent set forth in the their submissions.

While supportive of many of the comments contained in those submissions, we separately comment in order to express concern with respect to potential inefficiency and negative impact that could result from certain particular aspects of the Proposed Rules. Among these are the following:

- Prohibiting the use of non-cash collateral for purposes of transferring variation margin (i) would impose an unnecessary financial burden on institutional investors and registered funds that invest in certain liquid, high-quality fixed income assets with readily determinable market values, which assets have long been used to collateralize derivatives and similar financial transactions, and (ii) could cause potential dislocations in the markets for these assets in times of market stress;

- The definition of "control" that is proposed to be used for purposes of determining affiliation among entities would unnecessarily complicate (i) the determination of the implementation timing of initial margin requirements for

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3 *See Margin Requirements for Non-Centrally Cleared Derivatives*, Basel Committee on Banking Supervision and Board of the International Organization of Securities Commissions, September 2013, *available at* http://www.bis.org/publ/bcbs261.pdf (the "International Framework").

certain financial end users, and (ii) the appropriate allocation of permitted initial margin thresholds; and

- The application of the Proposed Rules to pre-effective date transactions collateralized under the same "eligible master netting agreement" ("EMNA") used to collateralize post-effective date swaps would be an unnecessary and inappropriate extension of the margin standards to transactions for which market participants carefully crafted risk mitigation protections prior to the issuance of the final rules.

These concerns are further elucidated below.

III. The Agencies Should Permit Market Participants to Post High-Quality, Readily Marketable Fixed Income Securities as Variation Margin

Life insurance companies (such as TIAA) and RICs (such as CREF and the registered funds managed by TIAA-affiliated RIAs) have long traded over-the-counter derivatives subject to Credit Support Annexes ("CSAs") that permit the use of a broad range of liquid, high-quality and readily marketable assets for initial and variation margin purposes. At a minimum, these CSAs typically permit each party to post United States Treasury and agency securities. Many CSAs also permit each party to post readily marketable, high-grade corporate debt securities, subject to sensible haircuts. The ability to post these forms of collateral gives end users the option of avoiding (when efficient) the use of bilateral and triparty repurchase ("repo") and securities lending ("sec lending") agreements to raise cash to use as collateral.

The Proposed Rules, however, would prohibit market participants from utilizing such high-quality, non-cash assets as variation margin. This would not reduce risk in the financial system. Instead, it may cause end users to borrow against these assets in the repo and sec lending markets to avoid being forced to hold more of their invested capital in cash. The immediate impact of this requirement, therefore, would be to increase the costs to end users of entering into derivatives (without reducing overall risk in the financial system), or to reduce returns to retail investors by virtue of the cost of repo and sec lending contracts used to raise cash.

The potential secondary impacts of this requirement are more worrisome. For instance, the repo and sec lending markets may not be readily available in stressed market conditions. As a result, end users may be forced to liquidate open derivatives contracts if they are not able or willing to hold sizeable cash positions against their derivatives positions and cannot raise cash by other means. This could potentially accelerate losses, on the one hand, or reduce the ability of institutional investors to hedge, on the other.

Accordingly, we strongly recommend that the Agencies consider permitting market participants to post United States Treasury and agency securities, as well as other high-quality, readily marketable fixed income securities (including corporate debt securities), for variation margin purposes. This would better align United States standards with those set forth in the International Framework. We also observe that the SEC generally permits RICs to internally

segregate, or "earmark," readily marketable securities for purposes of internally segregating assets to cover the potential loss associated with derivatives positions.[4] Extension of a similar concept to permitted forms of variation margin would be a reasonable approach.

IV. The Agencies Should Revise the Definition of "Control" Used in the Proposed Rules

The Proposed Rules establish implementation timing for initial margin requirements by virtue of a calculation of the aggregate notional amount of contracts held over a specified time period during the prior year by an entity and its "affiliates." Additionally, the Proposed Rules contemplate that a financial end user will allocate its permitted initial margin threshold among itself and certain of its affiliates.[5] The definition of "affiliate" that is used for this purpose utilizes the concept of "control" set forth in the Bank Holding Company Act ("BHCA"), including but not limited to the ownership of at least 25% of any class of voting securities of another entity.

Large institutional investors such as TIAA from time to time enter into joint venture, limited partnership, and similar transactions with third parties, whereby the institutional investor may hold a significant minority interest in a financial enterprise or operating company. In the case of TIAA, these investments, as with those of other life insurers, are subject to restrictions and overall limitations set forth under applicable state insurance law. It is not unusual, however, for day-to-day management of the relevant enterprise or company to be controlled by third party operators or investment managers with majority control. The use of a BHCA concept of "control," however, could require institutional investors such as TIAA to include the swap and security-based swap activity of certain of these entities to determine the timing of implementation of initial margin requirements, and the allocation of the initial margin threshold available to the institutional investor.

This requirement could lead to ambiguity and confusion in the market. For instance, in the event a company such as TIAA holds a 25% interest in a non-financial joint venture (*e.g.*, a joint venture investing in one or more commercial real estate properties), any hedging activity engaged in by such entity could arguably be aggregated for purposes of determining the overall notional amount of swap and security-based swap contracts held for purposes of the implementation of initial margin requirements, even though such entity is not a financial end user subject to mandated initial margin requirements. At the same time, among financial end users affiliated under a 25% ownership standard, disputes could arise over the appropriate allocation of the initial margin threshold available to distinct members of the "affiliated" group.

The complications and inefficiency created by the use of this definition of "control" likely outweigh the benefits thereof. We recommend that the Agencies consider revising the definition of "control" for non-registered market participants to require (i) majority ownership of

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4 *See, e.g.*, SEC Release No. IC-10666 (Apr. 18, 1979).

5 Positions held by affiliated entities are also used to determine a financial end user's "material swaps exposure" under the Proposed Rules.

any class of voting shares, (ii) the power to select a majority of board representatives or other members of the applicable governing body of the affiliated entity, or (iii) ownership of a majority of the profits or losses associated with a particular legal entity.

V. The Agencies Should Ensure that the Margin Requirements Do Not Apply Retroactively

The Proposed Rules would require that registered swap entities apply regulatory margin requirements to all transactions governed by a particular EMNA under which any post-effective date transaction is executed. As a result, market participants would be required to negotiate and execute a separate and distinct EMNA for post-effective date transactions if they wish to preserve the commercial terms negotiated in their pre-effective date transactions. While we understand that the Agencies are eager to forestall potential evasion of the final margin rules, we feel strongly that the current formulation of the Proposed Rules' scope would unreasonably burden counterparties to existing transactions, depriving market participants of the benefit of the bargain struck with their dealers under existing CSAs.

We have observed that the Financial Stability Board is working with the International Swaps and Derivatives Association ("ISDA") to prepare a market protocol that would allow all market participants to adhere to certain universal contractual stay provisions with respect to EMNAs with entities that are (or are affiliated with) G-SIFIs that have entered resolution proceedings. In our estimation, it would not be difficult for the Agencies to coordinate with ISDA to establish a similar protocol that could enable market participants to bifurcate the collateralization of pre- and post-effective date transactions under a single CSA, in order to better implement the final rules relating to swap and security-based swap margin requirements. We strongly recommend that the Agencies seek such a market-based solution in lieu of an unnecessarily blunt approach such as that contemplated in the Proposed Rules.

VI. Conclusion

When finalized, the margin requirements for uncleared swaps and security-based swaps will be among the most important products of the DFA, as they will help to ensure that unforeseen and dangerous levels of leverage and credit risk do not build in the financial system. It is important, however, that the Agencies recognize the collateral impacts of this important work, and carefully tailor their final rules to expand upon existing industry efforts to mitigate risk, without undermining them. We remain strongly supportive of the Agencies' work to date, and hope that the foregoing comments, together with those of ACLI and ICI, may assist the Agencies in crafting final rules that will expand upon existing industry efforts to reduce risk in an organic and effective manner.

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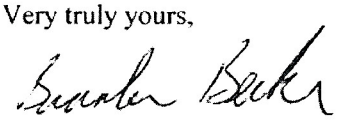
Again, we appreciate the opportunity to comment on the Proposed Rules and would be happy to discuss our views further to assist the Agencies in this endeavor if you would find that helpful.

Very truly yours,



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