TIAA CREF
FINANCIAL SERVICES FOR THE GREATER GOOD®

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VIA HAND DELIVERY

William J. Kotapish, Esq.
Assistant Director
Division of Investment Management
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: The College Retirement Equities Fund – 2011 Annual Meeting
Omission of Shareholder Proposal of Aaron Levitt *et al.*

Dear Mr. Kotapish:

This letter responds to the submission to you from Paul M. Neuhauser dated April 21, 2011 concerning our request dated March 22, 2011 to omit from CREF's 2011 Proxy Materials a proposal for shareholder action, together with a supporting statement, on the following resolution (the "Proposal"):

> THEREFORE BE IT RESOLVED that the participants request CREF to engage with corporations in its portfolio, such as Caterpillar, Veolia, and Elbit, that operate on the West Bank and East Jerusalem with the goal of ending all practices by which they profit from the Israeli occupation. If, by the annual meeting of 2012, there is no commitment from these companies to cooperate, CREF should consider divesting as soon as market conditions permit.

Mr. Neuhauser's letter expresses the opinion that the Proposal "must be included in CREF's year 2011 proxy statement and that it is not excludable by virtue of any of the cited rules."

For the reasons stated in our March 22 letter, we disagree with Mr. Neuhauser's opinion and believe the Proposal is properly excludable. In addition, we have the following specific responses to Mr. Neuhauser's submission (the "Submission") that we ask the staff consider in responding to our request.

1. *The Submission misunderstands the nature of the "substantially implemented" exclusion*

The Submission relies on a narrow and technical reading of the exclusion, which would require precise execution of each literal term of a proposal. On the contrary, the exclusion

requires only that the issuer have implemented the "essential objective" of the proposal, even where the company's actions do not fully comply with the specific dictates of the proposal.[1]

The essential objective of the Proposal is engagement of portfolio companies and consideration of divestment in appropriate cases. As more fully described in our March 22 letter, CREF fulfills this objective on an ongoing basis, in accordance with the TIAA-CREF Policy Statement on Corporate Governance (the "Policy Statement"), which provides for review and engagement with portfolio companies on a broad range of social, environmental and governance issues, including human rights.[2] And, in one recent instance, as a result of this process, CREF determined to divest from companies with material business dealings in Sudan. Clearly, this is a meaningful process that the organization treats with the utmost seriousness.

Indeed, Mr. Neuhauser's own characterization of the Proposal makes clear that it has been substantially implemented. The Submission describes the essential objective of the Proposal as "request[ing] CREF to review its investments in companies that operate in the occupied territories of the West Bank and Jerusalem." By his own words, he recognizes that review is the key. As noted above, a review of portfolio companies is a central component of the Policy Statement. Accordingly, the Proposal has been substantially implemented.[3]

2. *The Submission incorrectly states that "the Staff has long held that shareholder proposals concerning human rights abuses in the Occupied Territories raise important policy issues"*

The Submission relies on a 1991 letter to American Telephone & Telegraph Company for the proposition that "the Staff has already opined that shareholder proposals concerning human rights abuses in the Occupied Territories do, indeed, raise a significant policy issue." In fact, the following year, the staff stated the opposite view in a letter to the same issuer: "the policy issue raised by the proposal, Israel's treatment of Palestinians, **is not significant**, and in fact is not related, to the Company's business." (emphasis added).[4]

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[1] *See* Caterpillar Inc., SEC No-Action Letter (avail. Mar. 11, 2008); Wal-Mart Stores, Inc., SEC No-Action Letter (avail. Mar. 10, 2008); PG&E Corp., SEC No-Action Letter (avail. Mar. 6, 2008); The Dow Chemical Co., SEC No-Action Letter (avail. Mar. 5, 2008); Johnson & Johnson, SEC No-Action Letter (avail. Feb. 22, 2008).

[2] The Submission mistakenly states that TIAA-CREF's "ESG" strategy for socially responsible investing, referred to in note 20 of our March 22 letter, "applies solely to environmental matters." "ESG" refers to environmental, social and governance issues, and extends to human rights issues, among other social issues. Also, this strategy applies to all CREF public equity portfolio investments, not just those in its Social Choice Account.

[3] To the extent the Submission mischaracterizes the Proposal, and the proponents in fact seek specific investment activities and decisions rather than review, the Proposal impermissibly interferes with the conduct of CREF's ordinary business operations and is excludable under the "ordinary business" exclusion of Rule 14a-8(i)(7).

[4] American Telephone & Telegraph Co., SEC No-Action Letter (avail. Jan 30, 1992) (emphasis added). In this case, after the staff issued its letter finding that the issue was not significant and that the proposal could be excluded, the proponents appealed the decision to the Chairman of the Commission asking for formal review and reversal by the Commission. The Commission declined to review the Division's position. *See* Staff Reply Letter to Dr. William Pierce, Chairman of The National Alliance (February 20, 1992).

While the two letters addressed different provisions of Rule 14a-8, we do not see how a policy issue can be both significant and not significant at the same time. Accordingly, we do not believe – and do not think it is the common understanding – that following the second letter it has been the staff's "long held" view that shareholder proposals concerning "human rights abuses in the Occupied Territories" raise significant policy issues requiring their inclusion in proxy materials.

3. *There is no bright-line rule requiring inclusion of proposals self-designated as "human rights proposals"*

Mr. Neuhauser argues that any shareholder proposal that refers to human rights raises a significant policy issue and must, by that reason alone, survive any exclusion challenge. This "bright-line" approach conflicts with the longstanding views of the Commission and its staff that the determination of whether there is a significant policy issue must be made on a case by case basis, after considering "factors such as the nature of the proposal and the circumstances of the relevant company."[5] The staff's determination under the ordinary business exclusion requires exercise of its judgment in applying the relevant standards to the facts at hand. The Commission requires these judgments to include:

- whether a particular proposal relates to activities that are "so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight";

- whether a particular social policy issue would "transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote"; and

- whether the proposal "prob[es] too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment."

In fact, the staff has tried a bright-line approach in the past, but abandoned it in favor of the case-by-case analytical approach.[6]

As we explain in our March 22 letter, exclusion of the Proposal under Rule 14a-8(i)(7) is appropriate based on the circumstances of this case – CREF's specific business operations, the nature of this particular Proposal, and relevant precedents, including precedents specifically relating to CREF. The fact that the staff has required different proposals submitted to other companies with different business operations to be included in those

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[5] Exchange Act Release No. 40018 (May 21, 1998), *cited in* Staff Legal Bulletin No. 14 (CF) dated July 13, 2001 *available at* http://sec.gov/interps/legal/cfslb14.htm

[6] *Id.* at § III (see discussion of the no-action position taken in Cracker Barrel, SEC No-Action Letter (avail. Oct. 13, 1992)).

companies' proxy materials does not create a general "human rights" rule that trumps all other exclusions and circumstances.[7]

4. *The Submission inappropriately probes into matters of a complex nature upon which shareholders, as a group, will not be in a position to make an informed judgment*

The Submission asserts that there is a worldwide consensus on the validity of the allegations made in the Proposal, similar to the consensus regarding human rights violations in Sudan. In fact, Mr. Neuhauser states that anyone who disagrees with the view expressed by his clients "stands virtually alone."[8] As discussed in our March 22 letter, we believe the Proposal inappropriately seeks a shareholder referendum on a complex and highly controversial geopolitical dispute. This is a classic instance of a proposal that "prob[es] too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment."[9] Moreover, based on the one-sided view the Submission takes on this controversial and complex issue, reflecting a denial even of the existence of any good faith views that differ with those of the Proponents, we continue to believe that the debate likely to arise from putting this issue in the CREF Proxy Materials will not and cannot be full, fair and consistent with the spirit of Rule 14a-9.

For these reasons, and the reasons set forth in our March 22 letter, we again respectfully request that the Staff confirm it will not recommend enforcement action if CREF excludes the Proposal from its 2011 Proxy Statement.[10]

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[7] In seeking to justify his opinion under the ordinary business exclusion, Mr. Neuhauser cites only a single authority involving an investment company. In that case (Fidelity Funds, SEC No-Action Letter (avail. January 22, 2008)), the proposal was entirely different from the Proposal at issue here, and thus provides no meaningful guidance. Among other differences, the resolution proposed (which is set forth below) was general in nature, and requested oversight procedures that defer to the judgment of the Board (rather than dictating specific investment actions and timeframes). Moreover, as the supporting statement indicates, the resolution was directed to activities in Sudan, where as Mr. Neuhauser himself points out, United States law prohibits direct investment, and indeed facilitates divestment in companies that do business in Sudan. *See* Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, 121 Stat. 2516 (2007). In stark contrast, the United States does not prohibit investment in Israel, or facilitate divestment from companies that do business in Israel. Indeed, United States law specifically prohibits companies from taking certain actions in furtherance of various boycotts against Israel. *See* Export Administration Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 1625 (1977); *see also*, Ribicoff Amendment to the Tax Reform Act of 1976 Pub. L. 94-455, 90 Stat. 1520 (1976), which added section 999 to the Internal Revenue Code of 1986, as amended 26 U.S.C. §1 *et seq*. The resolution in the Fidelity Funds proposal is as follows:

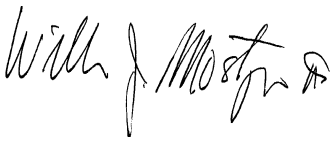
> "RESOLVED: In order to ensure that Fidelity is an ethically managed company that respects the spirit of international law and is a responsible member of society, shareholders request that the Fund's Board institute oversight procedures to screen out investments in companies that, in the judgment of the Board, substantially contribute to genocide, patterns of extraordinary and egregious violations of human rights, or crimes against humanity."

[8] The Submission erroneously implies that TIAA-CREF has expressed these views. TIAA-CREF has not expressed a view on these issues.

[9] Exchange Act Release No. 40018 at § III.

[10] We also note that Mr. Neuhauser states that the twenty-four identical proposals submitted were "jointly submitted" and "co-sponsored" by all individual proponents, and for that reason requests that all of the proponents be named in the proxy materials. We did not interpret the submissions in this manner, but would defer to Mr. Neuhauser's

Yours truly,



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characterization of a joint submission. If the staff agrees that the Proposal may be omitted, this request would be moot.