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Teachers Insurance and Annuity Association
730 Third Avenue
New York, New York 10017-3206

College Retirement Equities Fund
730 Third Avenue
New York, New York 10017-3206

Re: **Civil Liability of TIAA-CREF for Potential Boycott of Israeli Firms and Investments**

Dear Sir or Madam:

I write to you with grave concern about an extreme anti-Israel resolution which the TIAA-CREF membership is preparing to vote upon at their upcoming annual meeting. We are urging the TIAA-CREF not to present this resolution for a vote at that meeting. Shurat HaDin – Israel Law Center, an Israeli organization dedicated to enforcing basic human rights through the legal system, represents victims of terrorism in courtrooms around the world. Our clients include American, European, and Israeli citizens. We stand opposed to the Boycott, Divestment, and Sanctions ("BDS") movement, which is sponsoring this resolution, as BDS is inherently biased, prejudicial and has an extremist agenda. Its activities seek to harm and discriminate against Jewish people and inflict violence against the State of Israel. Indeed, as the Anti-Defamation League put it, "The BDS movement at its very core is anti-Semitic."

We understand that, under pressure from the BDS movement, TIAA-CREF removed Caterpillar Inc. from its Social Choice Funds in 2012. Its holdings in Caterpillar stock were, at the time, roughly $70,000,000. TIAA-CREF is now under pressure from the BDS movement to make significant additional political divestments. We provide this letter to inform you that doing so might subject TIAA-CREF, its officers, and its agents to civil liability.

If TIAA-CREF adopts this extreme resolution at its annual meeting in July, it will have officially taken a biased and discriminatory position in the landmark political battle of our time. It would deeply embroil the TIAA-CREF in the Middle East conflict. Considering that TIAA-CREF's corporate charter limits its proper function to conducting business "to aid and strengthen nonprofit colleges, universities,…and other nonprofit institutions by providing means for the diversification of investment of contributions of such entities," we doubt that the resolution can properly be presented to the membership as it's adoption would arguably be an *ultra vires* act. Regardless, the racist resolution, if adopted, would place CREF in direct violation of New York and federal law. It is contrary to public policy and must be abandoned.

N.Y. EXEC. LAW § 296(13) defines as "an unlawful discriminatory practice" any "boycott" or any decision to "refuse to buy from, sell to or trade with, or otherwise discriminate against any person, because of the…creed…[or]national origin…of such person, or of such person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers or customers." It further defines as an unlawful discriminatory practice any willful act, or the refrain from any act, that enables another to violate the former prohibition. § 296(13) expressly provides two statutory exceptions, which are not applicable here. No other exceptions or limitations that we are aware of apply under the present circumstances.

Additionally, N.Y. EXEC. LAW § 296(6) defines as "an unlawful discriminatory practice" the aiding and abetting, inciting, or coercing of any of the other acts prohibited in that section (including the adoption of a discriminatory boycott). Liability for the discriminatory boycott advanced by the BDS resolution would therefore extend to secondary actors, including the individuals named in this letter.

Moreover, N.Y. EXEC. LAW § 300 provides that "[t]he provisions of this article [(including § 296)] shall be construed liberally for the accomplishment of the purposes thereof." The New York State Legislature has decided—correctly—that discriminatory boycotts aimed at a sovereign nation and its nationals are not to be

tolerated in the State of New York. Then-Governor Carey, upon signing the legislation that created § 296, wrote, in no uncertain terms, "that no nation or person is welcome to do business in this state, if that business is accompanied by…bigotry." Section 300 guarantees the enforcement of the legislative objective of ensuring that New York's businesses not engage in discriminatory boycotts by directing courts to read § 296 broadly so as to eliminate such boycotts.

TIAA-CREF should note that N.Y. EXEC. LAW § 297(9) creates a private right of action for violations of § 296. The former statue provides that plaintiffs may seek damages, a declaration compelling the violator of § 296 to cease and desist its discriminatory practices, equitable relief compelling the violator of § 296 to reverse its prior actions, and civil fines to be paid to the State of New York.

In addition, adoption of the BDS resolution might be a violation of federal statute. Section 8 of the Export Administration Act of 1979, 50 U.S.C. app. § 2407 expressly prohibits actions that further or support certain boycotts and imposes reporting requirements upon certain individuals and companies (15 C.F.R. § 760.5) and potential civil and criminal penalties (50 U.S.C. app. § 2410). Section 2407 prohibits "refus[ing] to do business with or in the boycotted country, with any business concern organized under the laws of the boycotted country, [or] with any national or resident of the boycotted country" pursuant to a request made on behalf of a boycotting country. It also prohibits writing certain instruments (such as contracts and letters of credit) that compel compliance with such boycotts. Federal regulation, 15 C.F.R. § 760.2, defines "refusal to do business" as an "action that excludes a person or country from a transaction for boycott reasons" and expressly prohibits the use of blacklists (such as those provided to CREF by BDS operatives). Further, the regulations state that "there need not be a direct request from a boycotting country" for a decision not to engage in business with or invest in a particular company to be construed as part of "an agreement with or requirement of a boycotting country." In other words, § 2407 is violated by entering into an agreement with a third party (such as BDS operatives) if those operatives are acting on behalf of foreign governments. Because BDS is a clear extension of the historic and continuing Arab boycott of Israel, BDS's demands are fairly clearly made on behalf of the boycotting countries (we do not believe that any judge will view the matter differently). Compliance with the BDS resolution is thus presumably a violation of § 2407 and its implementing regulations.

Shurat HaDin hopes that TIAA-CREF heeds this letter and declines to bring the BDS resolution to a vote. If it does permit the resolution to go to a vote, we hope that TIAA-CREF's officers and directors ensure that the voting participants understand that the resolution demands that TIAA-CREF do something illegal and

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that, even if the resolution passes, TIAA-CREF will be unable to comply. But if the anti-Israel resolution passes and TIAA-CREF does not expressly disavow it and refuse to comply with it, Shurat HaDin will be ready to immediately bring TIAA-CREF to court to ensure the enforcement of state and federal anti-discrimination and anti-boycott laws and to ensure that Israeli companies and businesses are not harmed as a result of TIAA-CREF's newly-adopted policy of discrimination.

We welcome any questions or comments that you have and would appreciate your statement of intent not to entertain any resolution that calls on TIAA-CREF to engage in a discriminatory boycott.

Very truly yours,

Nitsana Darshan-Leitner

Nitsana Darshan-Leitner, Esq., Director
Shurat HaDin – Israel Law Center