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[redacted]

January 4, 2021

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Email: rule-comments@sec.gov

Re: Tailored Shareholder Reports, Treatment of Annual Prospectus Updates for Existing Investors, and Improved Fee and Risk Disclosure for Mutual Funds and Exchange-Traded Funds; Fee Information in Investment Company Advertisements; File No. S7–09–20

Dear Ms. Countryman:

Teachers Insurance and Annuity Association of America ("TIAA"), through its investment management arm, Nuveen, LLC ("Nuveen"), welcomes the opportunity to submit the following comments in response to the proposal by the Securities and Exchange Commission (the "SEC" or "Commission") to modernize the regulatory framework governing disclosures made to shareholders by funds registered on Form N-1A (*i.e.*, mutual funds and exchange-traded funds ("ETFs")) (collectively, "open-end funds" or "OEFs").[1] We appreciate the SEC's efforts to improve the disclosure framework for OEFs and its focus on making OEF shareholder reports more engaging, informative, and easy to understand for retail investors. In particular, we support the Proposal's layered approach to OEF shareholder reports, which would move certain information to fund websites and Form N-CSR while providing key disclosures to retail investors in more concise and standardized reports.

While we largely agree with the proposed changes to the content of shareholder reports, we are concerned about the changes that would be made to the way information is furnished to shareholders. The Proposal would (i) make the new tailored shareholder report the primary disclosure document furnished to existing shareholders, (ii) remove the ability of OEFs to rely on Rule 30e-3 such that shareholders would by default receive a physical copy of that report unless they affirmatively opt-in to electronic delivery, and (iii) permit funds relying on proposed Rule 498B to not deliver a physical copy of the annual prospectus update to existing investors. In our view, none of these changes are necessary, and they pose a host of challenges if adopted, as we will explain in detail below. Instead, we recommend that the SEC continue to permit OEFs to

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[1] *Tailored Shareholder Reports, Treatment of Annual Prospectus Updates for Existing Investors, and Improved Fee and Risk Disclosure for Mutual Funds and Exchange-Traded Funds; Fee Information in Investment Company Advertisements*, 85 Fed. Reg. 70716 (Nov. 5, 2020) (the "Proposal"), *available at*: https://www.govinfo.gov/content/pkg/FR-2020-11-05/pdf/2020-17449.pdf.

rely on Rule 30e-3 and retain the prospectus as the primary disclosure document that is furnished to both new and existing investors. We believe the ultimate regulatory outcome would be improved if the Commission adopted an incremental approach, focusing first on revising the format and substance of shareholder reports and then separately re-examining how (and which) disclosure documents are furnished to shareholders.

In addition, the Proposal includes changes to certain disclosure requirements in the OEF prospectus. As explained below, we believe the proposed changes to the definition of "appropriate broad-based securities market index" and the prohibition on the presentation of principal risks in alphabetical order are unnecessary and counterproductive.

Finally, we would like to reiterate certain points raised in our 2018 letter in response to the SEC's request for comment on potential enhancements to the fund disclosure framework designed to improve the retail investor experience[2] (the "2018 TIAA Comment").[3] Namely, we recommend that the Commission (i) amend Rule 19a-1 under the Investment Company Act of 1940 (the "Investment Company Act") to clarify that funds can satisfy their Section 19(a) disclosure obligations by posting 19(a) Notices (as defined below) to a website by default, so long as they provide shareholders with appropriate advance notice and give them the opportunity to receive 19(a) Notices in paper form free of charge, and (ii) revise Forms N-1A, N-2 and N-3 to exclude interest expenses from the fee and expense tables included in a fund's prospectus.

We discuss our specific comments in more detail below. We thank the Commission for allowing us the opportunity to engage on this important topic, and we hope the perspectives offered in this letter are helpful as the SEC continues the vital work of improving the OEF disclosure framework.

I. About TIAA and Nuveen.

Founded in 1918, TIAA is the leading provider of retirement services for those in academic, research, medical, and cultural fields. Over its century-long history, TIAA's mission has always been to aid and strengthen the institutions and participants it serves and to provide financial products that meet their needs. To carry out this mission, TIAA has evolved to include a range of financial services, including asset management and retail services. Today, TIAA's investment model and long-term approach serve more than five million retirement plan participants at more than 15,000 institutions. With its strong nonprofit heritage, TIAA remains committed to its mission of serving the financial needs of those who serve the greater good.

To carry out this mission, we have evolved to include a range of financial services, including asset management and retail services. As TIAA's asset management arm, Nuveen offers a wide range of specialized investment solutions, including OEFs and closed-end funds ("CEFs"), through several investment advisory subsidiaries. In total, Nuveen has more than $1 trillion in

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[2] *Request for Comment on Fund Retail Investor Experience and Disclosure*, 83 Fed. Reg. 26891 (June 11, 2018), available at: https://www.gpo.gov/fdsys/pkg/FR2018-06-11/pdf/2018-12408.pdf.

[3] Letter from Bret C. Hester, Senior Managing Director and Head of Regulatory Affairs of TIAA, to Brent J. Fields, Secretary of the SEC, re Request for Comment on Fund Retail Investor Experience and Disclosure (Oct. 31, 2018), *available at*: https://www.sec.gov/comments/s7-12-18/s71218-4592352-176299.pdf.

assets under management, including two separately branded fund groups: the TIAA-CREF Fund Complex, which includes mutual funds and variable annuities registered as open-end funds on Form N-3, and the Nuveen Fund Complex, which includes mutual funds, ETFs and CEFs.

II. TIAA supports the Proposal's layered approach to OEF shareholder reports.

The Commission notes that the Proposal's new layered approach to OEF shareholder reports "is designed to tailor the information that investors receive" to help investors with different levels of knowledge and experience "better assess and monitor their fund investments and make informed investment decisions."[4] To achieve this goal, the SEC has proposed a number of changes, including updates that would make annual and semi-annual shareholder reports more "concise and visually engaging" in order to highlight information the SEC believes "is particularly important for retail shareholders to assess and monitor their fund investments on an ongoing basis," such as fund expenses, fund performance, and portfolio holdings.[5] OEFs would have the option of making electronic versions of their shareholder reports more interactive, and would be directed to make additional information that is currently required to be included in shareholder reports but may be less relevant to the majority of retail investors available online instead.

We strongly support the Commission's efforts to improve the retail investor experience by simplifying and standardizing both the content and presentation of information provided in OEF shareholder reports. These reports have, as a general matter, grown longer and more complicated over the years for a variety of reasons – so much so that we suspect many retail investors may be deterred from reading these reports closely and developing an understanding of the important investment-related information contained in them. We applaud the Commission for working to ensure that retail investors in OEFs have access to the information they need to make informed investment decisions, and that such information is presented in a clear, concise, and inviting manner.

III. The SEC should continue to permit OEFs to rely on Rule 30e-3 and retain the prospectus as the primary disclosure document that is furnished to both new and existing investors.

The Proposal would amend the scope of Rule 30e-3, which allows funds to satisfy their shareholder report transmission obligations through an optional "notice and access" method as of January 1, 2021, to exclude OEFs. In Question 208 of the Proposal, the Commission asks whether its proposed exclusion of OEFs from Rule 30e–3 is appropriate "in light of [the SEC's] goals of ensuring that all investors in these funds experience the anticipated benefits of the new tailored disclosure framework."[6]

The Commission contends that the Proposal "represents a more-effective means of improving investors' ability to access and use fund information, and of reducing expenses associated with printing and mailing, than continuing to permit" OEFs to rely on Rule 30e-3. The Proposal would achieve these objectives by having the new tailored shareholder report serve as the primary disclosure document for existing investors, who would no longer be required to receive an

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4 The Proposal, 85 Fed. Reg. at 70725.

5 *Id.*

6 *Id.* at 70783.

annual prospectus update from funds relying on proposed Rule 498B. The Proposal would result in existing investors receiving physical copies of two reports every year, while only new investors would receive a copy of the prospectus.

In advancing this aspect of the Proposal, the Commission presumes that new and existing investors have different informational needs, but offers no theory or evidence in support of that presumption. The Commission contends that the "prospectus serves as the principal selling document for *potential* investors to help inform investment decisions and facilitate fund comparisons….provid[ing] important information that an investor should consider when making an investment, including information about a fund's principal investment strategies, fees and expenses, principal risks, and performance."[7] However, we believe that *all* investors should be continually re-evaluating their investment decisions, and in so doing should be reviewing and comparing the "important information" available in the prospectus for their current funds, as well as other available funds. To the extent the Commission believes that the prospectus is lacking certain important information that investors should be considering (for example, summary portfolio holdings information), we believe that it would be simpler to include that information in or with the prospectus than to revise the entire existing disclosure framework.

Upending the existing disclosure framework would also create a number of unnecessary complications:

- The Proposal would require a fund to disclose in its annual report any material change in an enumerated list of prospectus disclosure items (*i.e.*, changes in the fund's name, investment objective, principal investment strategies, risks, fees, adviser or sub-adviser, or portfolio managers) during the reporting period or planned to be made in connection with the annual prospectus update. This requirement fails to account for a situation where a fund that updates its prospectus after delivery of its annual report, as permitted by SEC rules,[8] experiences an unplanned material change after delivery of the report.[9]

- Because the Proposal applies only to funds registered on Form N-1A, entities registered on Form N-3 (*i.e.*, one tier variable products that are management investment companies) would continue to use the summary prospectus as their key disclosure

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7 *Id*. at 70718.

8 Rule 30e-1 under the Investment Company Act generally requires funds to transmit annual reports within 60 days after the close of the fiscal year. Under Rule 8b–16(a) of the Investment Company Act, funds must update their prospectuses within 120 days of the end of fiscal year-end, with updated prospectuses delivered to existing shareholders shortly thereafter.

9 To the extent the Commission believes it is important to specifically identify material changes made in a prospectus from year to year, this list could be included in the prospectus itself, thereby eliminating this timing gap. However, we question whether such a list is truly necessary for OEFs. Recent amendments to Rule 8b-16(b) require CEFs to include a list of material changes in their annual reports, but most CEFs do not have a prospectus that is updated on an annual basis, thus leaving the shareholder report as the logical means of communicating such changes to shareholders. OEFs, on the other hand, provide shareholders notice of any material changes that occur during the year through prospectus supplements, and reflect such changes in the annual update to the prospectus. The Commission provides no evidence that shareholders lack awareness of such changes.

> document, and would need to provide paper copies of their shareholder reports only upon request pursuant to Rule 30e-3. These inconsistent disclosure regimes would make it difficult for shareholders whose retirement investments include both N-3 variable products and funds registered on Form N-1A to compare various disclosure documents, despite the fact that these investment vehicles are closely comparable. The Proposal would ultimately create competitive disadvantages between filers on Form N-1A and Form N-3, and would likely serve to increase investor confusion due to these differing disclosure regimes. [10]

These complications would be eliminated by retaining the prospectus as the primary disclosure document for both new and existing investors in OEFs.

While we recognize that the Proposal may result in cost savings for funds and their shareholders, there are other simpler changes the Commission could make to the current regulatory framework in order to reduce costs. The Proposal would reduce the number of mailings required under the Rule 30e-3 regime from three (two Rule 30e-3 notices and the annual prospectus update) to two (two tailored shareholder reports); this reduction in the sheer number of mailings would likely reduce costs borne by shareholders. However, the Commission could achieve similar cost savings, for example, by adjusting the Rule 30e-3 regime to no longer require that a Rule 30e-3 notice be delivered for semi-annual reports.[11]

Moreover, OEFs have expended significant resources preparing for compliance with Rule 30e-3, and those efforts and expenditures would be wasted if the SEC were to exclude OEFs from the Rule so soon after its effective date. Additionally, abandoning Rule 30e-3 for OEFs for an entirely new disclosure regime risks confusing investors. Finally, by requiring the physical delivery of two substantive disclosure documents as opposed to the one required under the Rule 30e-3 regime, the Proposal represents a step backward in light of the Commission's increasing embrace of electronic delivery of investor information, and the high levels of internet access among today's shareholders.

Thus, rather than completely revamping the existing disclosure regime, we believe the Commission should take an incremental approach, focusing first on the format and substance of shareholder reports. The Commission could then separately re-examine how (and which) disclosure documents are furnished to shareholders, and in doing so we urge the Commission to consider the adoption of "access equals delivery" with respect to all disclosure documents. In

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[10] Regardless of the Commission's ultimate determination on the future disclosure regime for OEFs, we would request that entities registered on Form N-3 be permitted to use the same disclosure regime under the Proposal as funds registered on Form N-1A. Extending the Proposal's application to include Form N-3 filers would avoid investor confusion and prevent any competitive disadvantage from arising between Form N-3 and Form N-1A filers, which investors often access through similar channels like retirement plans. The Commission notes that it has not included variable products in the Proposal due to the recent effectiveness of new summary prospectus rules for such products. However, many N-3 filers may choose not to utilize summary prospectuses due to the increased complexity and costs inherent in needing to create and mail multiple prospectus versions under the new rules, and may instead prefer to follow the same regime as competing OEFs.

[11] *See* Commission's discussion of potential alternatives considered for semi-annual shareholder reports in the Proposal, 85 Fed. Reg. at 70760-64.

the meantime, we believe it would be far simpler for the SEC to maintain Rule 30e-3 for OEFs and retain the prospectus as the primary disclosure document that is furnished to both new and existing investors.

IV. With respect to the prospectus, the Commission should reconsider proposed changes to the definition of "broad-based securities market index" and the prohibition on the presentation of principal risks in alphabetical order.

A. Broad-based securities market index.

The existing instructions to Form N-1A require both a fund's prospectus and annual report to compare the fund's performance to an "appropriate broad-based securities market index."[12] The Proposal would clarify that an "appropriate broad-based securities market index" is "an index that represents the overall applicable domestic or international equity or debt markets, as appropriate." The Commission is concerned that funds are choosing indices for this purpose that are too narrow, arguing that "performance disclosure without relevant context showing market performance would not provide the information that shareholders need to understand how their fund performed" and "would not give shareholders a sense of how their investments might have performed had their money been invested elsewhere."[13]

Investors choose to invest in a specific fund to obtain exposure to a particular strategy, whether that be narrow (*i.e.*, a fund focused on a particular industry, sector or geographic location) or more broad (*i.e.*, an index fund that seeks to track the equity or fixed income markets as a whole). In evaluating how their fund has performed, the most relevant comparison for investors is not to an "appropriate broad-based securities market index," but rather to the index against which the fund (and its board) benchmarks for performance purposes. This comparison provides investors with actionable information on whether their fund achieved its objective. Thus, if the Commission's goal is to give shareholders relevant data that will help them better understand and potentially reevaluate their investments, it would be more appropriate to require that a fund compare its performance to the performance of an index with a similar investment strategy or level of exposure, rather than to a broad-based index. Thus, we urge the Commission not to adopt the proposed clarification to the definition of "appropriate broad-based securities market index," and instead afford funds greater flexibility to select an "appropriate index" with which to compare their performance in prospectuses and annual reports.[14]

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[12] Instruction 5 to Item 27(b)(7) of Form N-1A.

[13] The Proposal, 85 Fed. Reg. at 70741.

[14] In its comment letter, the Investment Company Institute ("ICI") argues that the Commission should require only that a fund compare its performance to an "appropriate index," which ICI would define in relevant part as "one whose objective (*i.e.*, what it seeks to measure) is reasonably related to the [f]und's investment objective and principal investment strategies." *See* Letter from Susan Olson, General Counsel of ICI, and Dorothy Donohue, Deputy General Counsel of ICI (Dec. 21, 2020) at 21-26, *available at*: https://www.sec.gov/comments/s7-09-20/s70920-8186011-227164.pdf. We support this argument and join the ICI in advocating for a more flexible approach to index selection, which we believe will produce more helpful performance comparisons for investors.

B. Ordering risks.

The Proposal includes a new instruction in Form N–1A that would require funds to list principal risks in order of importance, with the most significant risks appearing first, and specifically prohibit ordering risks alphabetically. Question 258 of the Proposal asks whether this proposed new instruction is appropriate.[15]

We believe that the proposed instruction is problematic for a number of reasons. First, we expect funds will have difficulty determining the significance of various risks with any degree of precision or consistency. Second, the significance of a risk can change over time – and if it does, funds will be forced to consider supplementing their prospectuses to re-order risks, or accept increased litigation risk as a result of their decision not to. Finally, litigation risk is likely to increase in any event as a result of this requirement, as a fund's decision to list risks in a particular order will likely provide fodder to plaintiffs' attorneys searching for additional weapons to employ in typically frivolous but nonetheless costly lawsuits.

It is important to note that the Commission recently considered and rejected requiring operating companies to order risks by perceived significance in its proposed revisions to Item 105 of Regulation S-K.[16] Ultimately, while acknowledging that prioritizing risks in this way "could be useful to users of the disclosure in certain circumstances," the SEC decided not to adopt such a requirement, instead allowing "registrants flexibility to determine the order [of risks] to most effectively present the material risks that make an investment in the registrant or offering speculative or risky."[17] The Commission noted that "retaining this flexibility should also help address concerns expressed by some commenters that it could be difficult to evaluate and rank often equally significant and evolving risk factors."[18] We see no reason why the Commission should in this instance treat funds differently than operating companies.

V. Investment-related expenses, including interest expenses, should be excluded from any fee and expense presentation in the prospectus.

The Proposal would replace the current fee table in the summary section of a fund's statutory prospectus with a "fee summary" designed to streamline the presentation of fees and expenses, making it clearer and easier to understand. The fee table would be moved to the body of the statutory prospectus, where it would provide additional details about fees and expenses to interested shareholders.[19] Question 223 of the Proposal asks whether the Commission should modify the types of costs that funds currently must include in their expense ratios, to be disclosed in the proposed summary fee table and the full fee table, while Question 224 asks

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15 The Proposal, 85 Fed. Reg. at 70799.

16 *Modernization of Regulation S–K Items 101, 103, and 105*, 85 Fed. Reg. 63726 (Oct. 8, 2020), *available at*: https://www.govinfo.gov/content/pkg/FR-2020-10-08/pdf/2020-19182.pdf.

17 *Id*. at 63746.

18 *Id*.

19 The Proposal, 85 Fed. Reg. at 70783-84.

whether a fund's prospectus should include additional disclosures about performance expenses in lieu of including these expenses in the fund's expense ratio.[20]

As an initial matter, we question whether creating two separate fee sections in a fund's statutory prospectus will truly serve to simplify the presentation of fees for shareholders. In our view, it would be more effective to modify the existing single fee table to make it clearer and more streamlined, rather than adding a second section about fees.

In addition, as we previously recommended in the 2018 TIAA Comment,[21] we urge the Commission to exclude investment-related expenses, including interest expenses, from any fee and expense presentation in the prospectus. Interest expenses are more akin to transaction costs (such as brokerage commissions, which are currently excluded from the fee table) incurred in implementing a fund's investment strategy, as opposed to a fund's more traditional operating costs associated with audit, legal, custody, and transfer agency services, and should by the same logic be excluded from any fee and expense presentation. Requiring the inclusion of interest expense essentially penalizes funds that employ certain investment techniques designed to produce returns in excess of the expense by highlighting for investors only the expense side of the equation. Moreover, as we explained in detail in the 2018 TIAA Comment, interest expenses associated with "tender option bond" ("TOB") transactions that were previously excluded from a fund's expense ratio are now being included as a result of certain TOB structuring changes stemming from the Volcker Rule, giving investors the misleading impression that the expense ratios of funds employing TOB transactions are increasing.[22]

VI. The SEC should amend Rule 19a-1 to specify that funds will satisfy their delivery obligations by posting 19(a) Notices to their websites.

We would like to take this opportunity to reiterate our recommendation in the 2018 TIAA Comment regarding notices required by Section 19(a) of the Investment Company Act and Rule 19a-1 thereunder. Section 19(a) and Rule 19a-1 require a fund to provide shareholders with contemporaneous written statements identifying the source of distributions to shareholders if any portion of the distributions is from a source other than the fund's net income ("19(a) Notices"). We urge the Commission to amend Rule 19a-1 to permit funds to satisfy their disclosure obligations by posting 19(a) Notices on their websites by default, rather than by sending paper copies of 19(a) Notices in the mail as is currently required. Under our recommended approach, a fund's ability to satisfy its disclosure obligations by posting 19(a) Notices online would be conditioned on the fund's (1) providing shareholders with prior written notice that 19(a) Notices would be made available on the fund's website in the future and (2) giving shareholders the opportunity to opt-in to paper delivery of 19(a) Notices by mail, free of charge. In light of the significant costs of printing and mailing 19(a) Notices that are borne by funds – and ultimately, by investors in those funds – as well as the increasingly high rates of internet access among today's shareholders and the Commission's continued focus on

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20 *Id.* at 70790.

21 2018 TIAA Letter at 8-10. *See also* Letter from Susan Olson, General Counsel of ICI, to Brent J. Fields, Secretary of the SEC, re Request for Comment on Fund Retail Investor Experience and Disclosure (Oct. 24, 2018), *available at*: https://www.sec.gov/comments/s7-12-18/s71218-4932121-178430.pdf.

22 2018 TIAA Letter at 9-10.

enhancing electronic delivery of fund disclosure documents, we believe it would be appropriate for the Commission to allow funds to satisfy their obligations with respect to 19(a) Notices as we have suggested.

VII. Conclusion.

We are grateful for the opportunity to comment on the SEC's proposed changes to the OEF disclosure regime. We agree with the Commission that streamlining and simplifying OEF disclosures is of critical importance for retail shareholders, and we hope the points we have raised in this letter will aid in this effort. We welcome additional discussion on any of the foregoing.

Sincerely,

Christopher M. Rohrbacher