U.S. DEPARTMENT OF LABOR
Pension and Welfare Benefit Programs
Washington, D.C. 20216

MAR 13 1978

OPINION 78-8 A

3(17)
401(b)(2)
408(c)(2)

Eugene T. Rossides, Esq.
Rogers & Wells
1666 K Street, N.W.
Washington, D.C. 20006
Re: College Retirement Equities Fund

Dear Mr. Rossides:

This is in reply to your letter of November 17, 1976 in which you request on behalf of the College Retirement Equities Fund (CREF) a ruling that assets held by CREF in its "general" account to support obligations arising under variable annuity contracts issued by CREF and sold to pension plans are not assets of such plans, and, therefore, that the individual members of CREF's Board of Trustees are not fiduciaries of such plans who would be subject to the requirements of the Employee Retirement Income Security Act of 1974 (the Act). Specifically, CREF requests such ruling so that the Act's prohibition against double compensation of fiduciaries will not apply to those CREF trustees who are professors or administrative officers of institutions which use annuity contracts issued by CREF to fund their pension plans.

In your letter you set forth the following facts and representations. CREF is a nonprofit educational organization which is regulated by the New York Insurance Department and is licensed by the insurance departments of four other states. It is the companion organization to Teachers Insurance and Annuity Association of America (TIAA), a nonprofit organization established to provide a pension system and related benefits for institutions of higher education. In the TIAA-CREF pension system, TIAA provides the fixed annuity component and CREF the variable annuity.

A participant under a contract issued by CREF accrues accumulation units based upon premiums paid and dividends and other income earned on the assets held in CREF's "general" account which support obligations under such contracts. The value of a participant's accumulation units (the participant's accumulation) is not guaranteed, and varies with the market value of the CREF investment portfolio to reflect, in part, the realized and unrealized capital appreciation of the assets in the portfolio. When a participant retires, the participant's accumulation, after making provision for appropriate operating charges, must be applied to the purchase of an annuity under one of the variable payment options, or, in certain circumstances, an annuity issued by TIAA. The dollar amount the retired participant receives under a contract issued by CREF changes from year to year to reflect the value of his annuity units. If a participant should die before retirement, then the participant's accumulation will be paid to the named beneficiary.

All CREF premiums are placed in its "general" account; no assets are separately managed.

Several of the individual members of CREF's Board of Trustees are professors or administrative officers of institutions which use CREF annuity contracts as funding media for their pension plans. Your letter represents that the responsibilities of a trustee include overall administration and operation of the CREF "general" account and that all board members are selected to serve solely by reason of their expertise in pension or investment matters. All trustees, except those who are CREF officers, are paid an annual stipend and meeting attendance fees and are reimbursed for expenses incurred in attending meetings.

Your letter suggests that because all CREF assets are held in its "general" account and because CREF does not segregate or separately manage any of its assets, ERISA IB 75-2 (40 FR 31598, July 28, 1975) provides that assets held by CREF do not constitute assets of the pension plans which are funded by annuity contracts issued by CREF. ERISA IB 75-2 states that when an insurance company issues an insurance contract to a plan and places the consideration for such contract in its general asset account, the assets in such account shall not be considered to be plan assets.

Although CREF labels its account a "general" account, it is the view of the Department of Labor (the Department) that the assets in the account which support obligations under variable annuity contracts issued to pension plans are plan assets. Section 401(b)(2) of the Act states that when an insurance company issues a guaranteed benefit policy to a plan, the assets of the plan do not, solely by reason of the issuance of such policy, include any assets of the insurance company. Section 401(b)(2)(B) defines the term "guaranteed benefit policy" to include, among other things, any surplus in a separate account but to exclude any other portion of a separate account. The annuity contracts issued by CREF provide for variable benefits; generally assets supporting obligations under these contracts are held in a separate account. The term "separate account" is defined in section 3(17) as an account under which income, gains or losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains or losses of the insurance company.

The legislative history of sections 3(17) and 401(b)(2) of the Act makes it clear that the assets in an insurance company account which support variable annuity contracts shall constitute plan assets. At pages 296-97 of the Conference Report the conferees stated:

> An insurance company also is not considered to hold plan assets if a plan purchases an insurance policy from it, to the extent that the policy provides payments guaranteed by the company. If the policy guarantees basic payments but other payments may vary with, e.g., investment performance, then the variable part of the policy and assets attributable thereto are not to be considered as guaranteed, and are to be considered as plan assets subject to the fiduciary rules. (However, such assets need not be held in trust under the fiduciary responsibility rule.)
>
> Additionally, it is understood that assets placed in a separate account managed by an insurance company are separately managed and the insurance company's payments generally are based on the investment performance of these particular assets. Consequently, insurance companies are to be responsible under the general fiduciary rules with respect to assets held under separate account contracts, and the assets of these contracts are to be considered as plan assets (but need not be held in trust). However, to the extent that insurance companies place some of their own funds in these separate accounts to provide for contingencies, this separate account "surplus" is not to be subject to the fiduciary responsibility rules.

The Department believes that the above language evidences a Congressional intent that when an insurance company provides investment advice which determines the rate of return to the plan and its participant, the assets in the account shall constitute plan assets so that the insurance company is subject to the fiduciary responsibility provisions of the Act.

As stated in your letter, the annuity payments to which a participant or beneficiary will be entitled are dependent upon the investment performance of the assets held by CREF. The CREF account thus constitutes a separate account as defined by the Act and the assets therein are plan assets pursuant to section 401(b)(2). ERISA IB 75-2 was based in part upon the Department's understanding that the various state laws which regulate insurance companies prohibit an insurance company from placing premiums paid for variable annuity contracts in a general asset account. It was not intended to modify or alter the basic statutory scheme of section 401(b)(2) of the Act.

Although your letter does not specify in detail the duties and responsibilities of a CREF trustee, it would appear that the trustees are plan fiduciaries pursuant to section 3(21)(A)(i) of the Act by virtue of being persons who exercise any authority or control respecting the management or disposition of plan assets and, therefore, are also parties in interest with respect to such plan, pursuant to section 3(14)(A). Section 406(a)(1)(C) and (D) of the Act prohibits a fiduciary with respect to a plan from causing the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect furnishing of goods, services, or facilities between the plan and a party in interest or a transfer to, or use by or for the benefit of, a party in interest of any assets of the plan. Furthermore, section 406(b)(1) and (3) of the Act prohibits a plan fiduciary from dealing with the assets of the plan in his own interest or for his own account and from receiving any consideration for his own personal account from any party dealing with the plan in connection with a transaction involving the assets of the plan. Section 408(c)(2) of the Act, however, provides that nothing in section 406

shall be construed to prohibit any fiduciary from receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already receives full-time pay from an employer or an association of employers, whose employees are participants in the plan, or from an employee organization whose members are participants in such plan shall receive compensation from such plan, except for reimbursement of expenses properly and actually incurred. Thus, section 408(c)(2) of the Act would not permit those CREF trustees who are professors or administrative officers of institutions which use CREF annuity contracts to fund their pension plans to receive compensation, other than reimbursement of expenses properly and actually incurred, for the performance of their fiduciary duties because they already receive full-time pay from an employer or association of employers whose employees are participants in a plan.

Because the above discussion also raises questions under section 4975 of the Internal Revenue Code of 1954 (the Code), which is within the jurisdiction of the Internal Revenue Service (the Service), we have conferred with representatives of the Service and they concur in the position set forth above as it relates to section 4975 of the Code to the extent the assets managed are assets of a plan or plans as defined by section 4975(e)(1) of the Code.

In order to compensate those board members who are professors or administrative officers of participating institutions, CREF must obtain an exemption from the prohibitions of sections 406(a)(1)(C) and (D) and 406(b)(1) and (3) of the Act.

The foregoing was discussed at a conference held on February 21, 1978 at the Service, at your request, and attended by yourself, Mr. William F. Heller, Assistant General Counsel of CREF, and representatives of the Department and the Service.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 (41 FR 36281, August 27, 1976). Accordingly, this letter is issued subject to the Procedure including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Fred W. Stuckwisch
Director
Office of Regulatory Standards
and Exceptions