ORAL ARGUMENT NOT YET SCHEDULED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BUSINESS ROUNDTABLE and CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, Petitioners, v. UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Respondent.	**ON PETITION FOR REVIEW** Case No. 10-1305

PETITIONERS' RESPONSE TO MOTION OF TIAA-CREF TO FILE A SEPARATE *AMICUS CURIAE* BRIEF

Petitioners hereby respond to the motion of TIAA-CREF to file an *amicus curiae* brief that is separate from the brief of the other *amici* supporting Respondent.

Although the standards for a separate brief are not met here, Petitioners do not oppose TIAA-CREF's request. Petitioners would, however, oppose it if the *amici* supporting Respondent were to file briefs that together exceeded 7,000 words. *See* Fed. Rule App. P. 29(d); Circuit Rules 28(e), 29(d). Respondent's

amici have not moved for additional words, which would prejudice Petitioners and should not be permitted given the *amici*'s close identity and interests.

SUMMARY OF ARGUMENT

TIAA-CREF, which calls itself "one of this country's largest institutional investors" (Motion at 5), is a member of *amicus* Council of Institutional Investors ("CII"), whose brief it does not wish to join. During the rulemaking under review, TIAA-CREF filed a comment letter jointly with another *amicus* in the brief it does not wish to join, the California State Teachers' Retirement System. In their rule-making comments, TIAA-CREF and CII made many identical arguments; they made no conflicting arguments.

TIAA-CREF now says that it wishes to file a separate brief in part to address whether the "proxy access" rule in issue in this case should apply to mutual funds. But TIAA-CREF's rulemaking comments did not address that issue. CII did—it took the position that TIAA-CREF says it will take here.

The Court's Scheduling Order requires Respondent's *amici* to file a joint brief. The Court's Rules require the same, "to the extent practical." The "practical" reason for filing separate briefs must be something other than the desire of *amici*, whose positions on the matter are indistinguishable, to divide briefing for maximum rhetorical impact and to double the length of their presentation to the Court. Accordingly, while Petitioners do not oppose the request for separate

briefs, they oppose allowing more than 7,000 words combined for the briefs of Respondent's *amici*.

ARGUMENT

This case concerns the "proxy access" rules adopted by Respondent Securities and Exchange Commission. Petitioners challenge Rule 14a-11, which would require a publicly-traded company to include in its proxy materials a candidate nominated by shareholders that have held shares representing at least 3 percent of the voting power of the company's stock for the past 3 years.

The Court's October 14, 2010 Scheduling Order requires a "Joint Brief of any Intervenors or Amici Curiae in Support of Respondent." The Court's Rules require *amici* to file a joint brief "to the extent practicable." Circuit Rule 29(d). This is in keeping with the Court's general preference for joint briefing when there are multiple litigants on a side in a case. "Parties with common interests in consolidated or joint appeals must join in a single brief where feasible. This Court has admonished counsel that it looks with extreme disfavor on the filing of duplicative briefs in consolidated cases." D.C. Circuit Handbook of Practice and Internal Procedures at 37 (Dec. 2010); *see also* Fed. R. App. P. 28(i).

This Court also strongly disfavors motions to exceed page limits, and grants such motions "only for extraordinarily compelling reasons." Circuit Rule 28(e)(1). As noted, no such motion has been made here. *See* Fed. R. App. P. 27(a)(2)(A)

("A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it.").

A. The Request for Separate Briefs.

TIAA-CREF fails to explain why it would not be practical to file a joint brief with the other *amici* who support the SEC. TIAA-CREF joined another *amicus* here, California State Teachers' Retirement System, in a comment letter in the rulemaking under review. *See* Certified Record Index Do. No. ("CRI") 71 at 4-5. In addition, the rulemaking comments of *amici* TIAA-CREF and CII were remarkably similar. Both entities:

- Said the rules were justified due to the economic crisis and would improve board performance and accountability (CRI 293 at 2-3 (TIAA-CREF Aug. 17, 2009 Letter); CRI 83 at 1-2 (CII));
- Advocated against opt-out provisions, triggering events, or adopting any form of "private ordering" (CRI 293 at 5-6 (TIAA-CREF Aug. 17, 2009 Letter); CRI 539 at 3-4 (TIAA-CREF Sept. 18, 2009 Letter); CRI 83 at answer to Questions B.13, I.6 (CII));
- Argued that other corporate governance reforms, such as majority voting, were insufficient (CRI 293 at 7 (Aug. 17, 2009 TIAA-CREF Letter); CRI 539 at 2-3 (TIAA-CREF Sept. 18, 2009 Letter); CRI 83 at answer to Question A.2 (CII));

- Advocated a two-year holding period (CRI 293 at 4-5 (TIAA-CREF Aug. 17, 2009 Letter); CRI 83 at 2-3 (CII)); and
- Suggested that the shareholder nominating group with the largest holdings in the issuer should be allowed to nominate (CRI 293 at 5 (TIAA-CREF Aug. 17, 2009 Letter); CRI 83 at 5 (CII)).

As noted, TIAA-CREF is a member of CII. Motion at 4.

TIAA-CREF claims that it merits a separate brief because (1) it "shares characteristics" with *amici* on both sides of the case and therefore has a "different perspective"; (2) it does not care to address the special interest shareholder activism of union and public pension funds, which it says was a "central" concern of "much of" Petitioners' brief; and (3) it wishes to emphasize the importance of applying the rules to investment companies. Motion at 2-3, 6-9.

None of these reasons justifies a separate brief, much less an additional 7,000 words for Respondent's *amici.*

1. Under the Court's rules, whether *amici* file a joint brief depends on whether it is "practical," not on whether there are differences among *amici* that do not translate to conflicting substantive positions in the case. This Court's administrative law docket often produces strange bedfellows whose "perspectives" diverge on many matters but who nonetheless must file joint briefs, as *amici* or even as petitioners. What is striking about TIAA-CREF and the other *amici* by comparison is

not their differences, but their commonality: TIAA-CREF is a member of *amicus* CII and filed a rulemaking comment with a third *amicus*. It has not identified a single disagreement among the SEC's *amici* regarding the rule at issue.

TIAA-CREF's asserted "different perspective" is merely a bid to present additional arguments in support of an objective (proxy access) that the *amici* have previously pursued jointly—and to present each argument in the voice of whichever *amicus* they believe will have greatest rhetorical effect. (*See* points 2 and 3 below.) Petitioners nonetheless do not oppose TIAA-CREF filing a separate brief. Petitioners would, however, oppose Respondent's *amici*—whose interests are fully aligned in this proceeding—filing briefs that together exceed 7,000 words.

2. TIAA-CREF puts much weight on the point that, unlike some other CII members, it "is not a union or public pension fund." Motion at 8. Petitioners "devote much of their brief" to the activism of union and public pension funds, TIAA-CREF states, making it "one of [petitioners'] primary legal arguments" and a "central part of the petitioners' presentation to this Court." *Id.* at 6, 7. Because TIAA-CREF "is not a target of petitioners' attacks on the other *amici*," it feels no "need to respond" to Petitioners' "extensive" arguments on this point. *Id.* at 7, 8.

This mischaracterizes Petitioners' brief, and misrepresents TIAA-CREF's interests. Petitioners did not "attack" *amici*, rather, their brief criticized the SEC's handling of record evidence that union and government pension funds have special

interests that diverge from other shareholders and will cause them to abuse the "proxy access" mechanism. To the extent that oversight of record evidence is a "central," "primary" element of Petitioners' case, it is a critique that all the rules' supporters have an interest in addressing. The SEC will do so, even though it also is "not a union or public pension fund." TIAA-CREF has recognized this point in the past: It filed ***two separate comment letters*** saying that concern over "special interests" should not prevent adoption of the rule. CRI 293 at 3-4 (TIAA-CREF Aug. 17, 2009 Letter); CRI 539 at 1-2 (TIAA-CREF Sept. 18, 2009 Letter).

Put differently, when the other *amici* file a brief downplaying the significance of their special interests, they will be advancing arguments that coincide with arguments TIAA-CREF has advanced in the past. The *amici* may believe that allocating their arguments in this way is effective rhetorically (*see also* point 3 below), but that does not justify separate briefs, much less additional words.

3. TIAA-CREF emphasizes that it "offers mutual funds" and wishes to argue that the SEC nonetheless was correct to cover investment companies (including mutual funds) under the rule. Motion at 8. Once again, however, belief that the rule should cover mutual funds is a position TIAA-CREF holds in common with Respondent's other *amici*. Indeed, the rulemaking comments of TIAA-CREF did *not* address this issue, whereas the rulemaking comments of *amicus* CII did. CRI 83 answer to question B.4 (CII). TIAA-CREF would therefore be advancing a

position shared at least equally by the other *amici*. The word count should be shared as well.

B. Respondent's *Amici* Should Not Be Permitted More Than 7,000 Words Combined.

TIAA-CREF has not moved to exceed the Court's word limits or given any reason that is necessary, and for that reason alone Respondent's *amici* should be limited to 7,000 words combined. Fed. R. App. P. 27(a)(2)(A) ("A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it.").

TIAA-CREF also cannot meet the high hurdle for exceeding the prescribed word limits. *See* Circuit Rule 28(e)(1) ("The court disfavors motions to exceed limits on the length of briefs . . .; such motions will be granted only for extraordinarily compelling reasons."). TIAA-CREF and the other *amici* have similar interests, advanced nearly identical arguments in support of the rule during the comment period, have cooperated together in the past, and TIAA-CREF is a member of one of the other *amici*. If TIAA-CREF is allowed to exceed the word limit in those circumstances, it is unclear when this Court would require parties to file a joint brief within the word limit established by the Rules.*

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* The State of Delaware, which filed an *amicus* brief supporting Petitioners, is not bound by the joint brief requirement, Circuit Rule 29(d), or the requirement that all *amicus* briefs on each side not exceed 7,000 words, as the State may file

[Footnote continued on next page]

Finally, Petitioners would be prejudiced if Respondent's *amici* were permitted to significantly exceed the 7,000 word limit, because this Court's Order would grant them only 7,000 words to respond to as many as 28,000 words by Respondent and its *amici.*

CONCLUSION

For the foregoing reasons, Petitioners do not object to TIAA-CREF filing a separate brief, but the Court should require that the total word count for all *amicus* briefs in support of the SEC not exceed 7,000 words.

Dated: January 18, 2011

Respectfully submitted,

/s/ Eugene Scalia

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[Footnote continued from previous page]

a brief "without the consent of the parties or leave of court." Fed. R. App. P. 29(a). In any event, Delaware's brief was less than 1,900 words, while TIAA-CREF seeks an additional 7,000 words.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2011, I electronically filed the foregoing Petitioners' Response to Motion of TIAA-CREF to File a Separate *Amicus Curiae* Brief with the Clerk of Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. I also hereby certify that I caused 4 copies to be hand delivered to the Clerk's Office.

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