

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BUSINESS ROUNDTABLE AND CHAMBER OF)	
COMMERCE OF THE UNITED STATES OF AMERICA,)	
)	
<i>Petitioners,</i>)	
)	No. 10-1305
v.)	
)	
SECURITIES AND EXCHANGE COMMISSION.)	
)	
<i>Respondent.</i>)	

**MOTION OF TIAA-CREF FOR LEAVE
TO FILE A SEPARATE *AMICUS CURIAE* BRIEF**

Pursuant to Federal Rules of Appellate Procedure 27 and 29 and Circuit Rules 27 and 29, TIAA-CREF moves this Court for leave to file a separate brief of *amicus curiae*. Circuit Rule 29(d) requires amici “on the same side” to “join in a single brief to the extent practicable,” and this Court’s scheduling order filed on October 14, 2010 calls for a “Joint Brief of any Intervenors or Amici Curiae in Support of Respondent.” While TIAA-CREF recognizes the benefit of joint briefs as a general matter, as explained below this is a case where the interests of TIAA-CREF diverge from those of the other *amici* on both sides of the argument and separate briefing is warranted.

BACKGROUND

This case is before the Court on a petition for review of final rules issued by the Securities and Exchange Commission (“SEC” or “Commission”). The specific rule challenged by petitioners, the “proxy access rule,” requires publicly-traded companies to include in their proxy materials any candidates nominated by shareholders that have held shares representing at least three percent of the voting power of the company’s stock for the past three years. The Business Roundtable and the Chamber of Commerce of the United States are the petitioners. The Investment Company Institute (“the Institute”) has filed an *amicus* brief supporting petitioners, as has the State of Delaware. TIAA-CREF supports the proxy access rule and, like the Council of Institutional Investors (“the Council”) and some of its individual members, is an *amicus* supporting the SEC.

TIAA-CREF seeks leave to file a separate *amicus* brief because it is uniquely situated with respect to the challenged rule. As would be expected, TIAA-CREF shares some characteristics with the other *amici* supporting the SEC. But TIAA-CREF also differs from those *amici* in important respects and shares important characteristics with petitioners and their *amici*. Understanding the singularity of TIAA-CREF’s position here requires an understanding of the composition of petitioners and the *amici*.

Business Roundtable: Business Roundtable, a petitioner, is an association of chief executive officers of large U.S. corporations. Although the organization has fewer than 200 members, those members represent nearly a third of the total value of the U.S. stock markets. Business Roundtable's members include many large financial companies, including Bank of America, Charles Schwab, and Prudential. As further set forth below, TIAA-CREF offers many of the same financial products as those companies.

Chamber of Commerce of the United States: The U.S. Chamber of Commerce, also a petitioner, is the largest lobbying organization in the United States, employing about 150 lobbyists and spending more than \$100 million annually. The Chamber does not make its membership public, but claims a direct membership of more than 300,000 companies, and more than three million through its various state and local affiliates. Among those companies are, of course, entities of all sizes and from all industries, including entities from the financial industry that offer products similar to those offered by TIAA-CREF.

Investment Company Institute: The Investment Company Institute, the *amicus* supporting petitioners, is the national association of registered investment companies in the United States. The Institute's members include many companies primarily offering mutual funds or exchange-traded funds, as well as "closed-end" investment funds—which are typically closed to new investment after they begin

operating and whose shares trade much like stocks—and “unit investment trusts,” which unlike mutual funds comprise fixed portfolios. But TIAA-CREF offers products similar to many of those offered by members of the Institute, and is itself a member of the Institute.

Council of Institutional Investors: The Council, an *amicus* supporting the SEC, was founded in 1985 by a group of state pension fund officials. Funds regulated under public sector laws and other such governmental and municipal pension funds (“public pension funds”) remain a core constituency of the Council, but the organization’s membership has also expanded over the years to include other categories of entities. In particular, the Council includes many union pension funds, as well as a number of corporate pension funds. The Council’s members have combined assets of about \$3 trillion.

TIAA-CREF is a member of the Council as an “Educational Sustainer.” Such membership is open to any incorporated entity, educational institution, association or other group interested in the work of the Council. Educational Sustainers may not vote, but can attend the semi-annual meetings of the Council and receive publications. Notably, the other *amici* supporting the SEC are members of the Council and are represented by the same counsel before this Court.

TIAA-CREF: The Teachers Insurance and Annuity Association of America (“TIAA”), the College Retirement Equities Fund (“CREF”) and other TIAA

affiliates (collectively known as “TIAA-CREF”) are neither public pension funds nor union funds. TIAA-CREF is a national financial services organization that serves over 3 million individual participants. TIAA-CREF’s primary mission is to help individuals in the academic, research, medical, cultural, and research fields plan for and live through retirement by maximizing long-term shareholder value. TIAA-CREF had \$434 billion in combined assets under management as of September 30, 2010. CREF is one of this country’s largest institutional investors, holding shares in over 7,000 publicly traded companies. Affiliates of TIAA sponsor a family of mutual funds that, along with CREF, are registered with the SEC under the Investment Company Act of 1940.

TIAA-CREF thus shares characteristics with entities on both sides of this appeal. On one hand, like *amicus* Council of Institutional Investors—which intends to file in support of the SEC—TIAA-CREF is an institutional investor that manages investment assets on behalf of millions of individual investors. On the other hand, TIAA-CREF—like many members of the petitioner groups and their *amicus* the Investment Company Institute—is also a large financial services organization offering products like employer-sponsored retirement plans, individual retirement accounts, mutual funds, life insurance, and annuities. Indeed, TIAA-CREF has in the past been a member of petitioner Business Roundtable and it remains a member of the Institute.

ARGUMENT

I. TIAA-CREF is neither a public pension fund nor a union fund, and the motivations petitioners ascribe to those kinds of entities supporting the SEC clearly do not apply to TIAA-CREF.

Petitioners devote much of their brief to arguing that the proxy access rule is flawed because “activist” shareholders—which allegedly include “union pension funds” and “government pension funds”—have “special interests that may not represent shareholders’ interests as a whole.” Br. 10. According to petitioners, “investors . . . associated with state government and labor unions . . . often appear to be driven by concerns other than a desire to increase the economic performance of the companies in which they invest.” Br. 11 (internal quotation marks and citation omitted). Petitioners claim that “union members can benefit *as employees* by forcing companies to take certain actions that deliver no benefits to shareholders,” while “state employee pension funds are often overseen by elected officials who may use [shareholder activism] to advance political objectives.” Br. 11-12 (internal quotation marks and citation omitted).

Petitioners base one of their primary legal arguments on these alleged non-economic motives of union and state pension funds. Specifically, petitioners argue that it was arbitrary and capricious for the SEC to “fail[] to address the role and objectives of union and government pension funds” that might seek to take advantage of the proxy access rule. Br. 39. Petitioners claim that alleged failure

by the SEC was particularly egregious because the purported problem of union and public pension fund abuse “has been at the heart of the proxy access debate for more than a decade.” Br. 45.

Although TIAA-CREF finds petitioners’ arguments related to the roles and objectives of union and public pension funds specious and self-serving, they are undoubtedly a central part of the petitioners’ presentation to this Court. Consequently, TIAA-CREF would expect that a brief from the Council would focus substantially on presenting a very different perspective on the motivations and goals of those entities from that advanced by petitioners. However, from the perspective of TIAA-CREF, the issue of “shareholder activism to advance objectives other than the maximization of shareholder value” is nowhere near “the heart of the proxy access debate.” Br. 45. As set forth above, TIAA-CREF’s mission is to help the individuals who invest with us to plan for and live through retirement—and our only interest in the proxy access rule lies in using it as a tool to attempt to maximize shareholder value. TIAA-CREF therefore seeks leave to file a separate *amicus* brief addressing the benefits of the proxy access rule unencumbered by the need to respond to extensive allegations that do not concern TIAA-CREF or the vast majority of its participants.

II. Although CREF and the TIAA-CREF family of mutual funds are investment companies—like many members of petitioners and their amici—TIAA-CREF does not oppose application of the proxy access rule to investment companies.

Petitioners argue that it was arbitrary and capricious for the Commission to apply the proxy access rule to investment companies, such as the members of petitioners' *amicus* the Institute. Not surprisingly, the Institute devotes its entire brief to arguing that the SEC overreached by including the Institute's members within the scope of the proxy access rule, claiming that "existing federal law protections for fund shareholders" are sufficient to render it unnecessary to apply the rule to those companies. Br. 5.

TIAA-CREF, while serving specialized markets, is otherwise quite similar to members of the Institute because it also offers mutual funds and other investment products. In its separate *amicus* filing, TIAA-CREF would argue that the Commission correctly found that there is no reason to distinguish or omit investment companies from regulation under the proxy access rule, even though that means that the rule would apply to entities within TIAA-CREF.

In short, TIAA-CREF seeks to respond to an argument presented by the Institute in support of petitioners on an issue that directly affects TIAA-CREF much more than the other *amici* supporting the SEC. In addition, as explained previously, TIAA-CREF is not a target of petitioners' attack on the other *amici* supporting respondent because TIAA-CREF is not a union or public pension fund.

TIAA-CREF therefore has a very different perspective on the proxy access rule than other *amici* on both sides of the argument.

CONCLUSION

The Court should grant TIAA-CREF's motion for leave to file a separate *amicus* brief.

Respectfully submitted,

/s/ Christopher J. Wright

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Dated: 6 January 2011

Counsel for TIAA and CREF

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2010, I electronically filed the foregoing MOTION OF TIAA-CREF FOR LEAVE TO FILE A SEPARATE *AMICUS CURIAE* BRIEF with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I also certify that I caused 4 copies to be delivered via overnight delivery to the Clerk's Office.

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