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Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D-11926
U.S. Department of Labor
200 Constitution Avenue N.W., Suite 400
Washington D.C. 20210

Subject: ZRIN 1210-ZA26

To Whom It May Concern:

Futurity First Financial Corporation ("FFFC") is pleased to comment on the United States Department of Labor's (the "Department") published notification of proposed class exemption, entitled *Proposed Best Interest Contract Exemption for Insurance Intermediaries* (the "Proposal").¹

FFFC is the parent company for a group of life insurance and annuity marketing organizations², headquartered in Hartford, Connecticut, that is regulated as an insurance producer entity in all jurisdictions where the conduct of its business requires licensure. FFFC is affiliated with over 3,500 producing agents, 100 partner agencies and 30 broker-dealer partners. FFFC offers life insurance, annuity contracts, and related products on behalf of insurance carriers and offers expertise on life insurance and annuity contracts to the insurance agents and financial institutions contracted with FFFC and their respective clients.

FFFC supports the implementation of a well-crafted and uniform classification for an insurance intermediary financial institution that would be authorized to execute a written best interest contract with Retirement Investors. We assert, however, that the requirements of the Proposal, as drafted, do not serve the best interests of the Retirement Investors.

As discussed in detail below, the requirements of the Proposal are inconsistent with, and far exceed, the requirements imposed on Financial Institutions under the Department's previously issued Best Interest Contract Exemption (the "Standard BICE"). We believe that the additional requirements imposed on insurance intermediaries, as compared to the Standard BICE

¹ Proposed Best Interest Contract Exemption for Insurance Intermediaries, 82 Fed. Reg. 7336 (proposed January 19, 2017) (to be codified at 29 C.F.R. 2550).

² As used herein, "FFFC" means Futurity First Financial Corporation and each of its subsidiary companies, as appropriate.

requirements of banks, insurance companies, registered investment advisors and broker-dealers, are unfairly burdensome.

FFFC also believes that the premium requirements of the Proposal require certain clarifications in order to accurately reflect what we understand as the Department's intent in setting these standards.

We respectfully request the Department consider the following comments on the Proposal.

1. Covered Transactions

FFFC believes that the scope of the Proposal should be expanded to cover all non-securities insurance products instead of being limited to Fixed Indexed Annuities.³

a. Insurance Intermediary Function

Any insurance intermediary seeking to rely on the Proposal as a Financial Institution would necessarily be licensed to engage in the business of insurance in all states where such licensure was required. Depending on the scope of the entity's licensure, this would include the sale of life insurance and other products. Given the scope of the Department's definition of investment advice, we believe that an expansion of covered transactions to include all non-securities insurance products is appropriate. If an insurance intermediary serves as the Financial Institution for an insurance agent for purposes of Fixed Indexed Annuity sales, we believe it would be also be appropriate for the same insurance intermediary to function in the same capacity for other categories of insurance sales, including life insurance products.

b. Recommendation

We suggest that the scope of Section I(b) of the Proposal be expanded to include all insurance products that are not regulated by the United States Securities and Exchange Commission (the "SEC") as securities. We believe that this would be consistent with the authority granted to insurance intermediaries pursuant to their state insurance licenses. Allowing an insurance intermediary to function as a Financial Institution for all non-securities insurance transactions (i) eliminates potential confusion that could be caused by non-securities licensed agents needing different Financial Institutions for different types of insurance business and (ii) allows more effective monitoring and supervision of non-securities licensed agents by consolidating their insurance business with a single Financial Institution.

2. Web Disclosure of Audited Financials

FFFC objects to the proposed requirement that a Financial Institution publish its audited financial statements on its website.⁴ This requirement would unfairly force the disclosure of proprietary financial information of Financial Institutions which rely solely on the Proposal for their status as a Financial Institution and also expose these IMO Financial Institutions to spurious legal risks that other Financial Institution classes would not have.

³ *Id.* at 7365.

⁴ *Id.* at 7369.

a. Non-Public Entities

As an initial matter, many of the entities, including privately held entities like FFFC, that may seek to rely on the Proposal, would not otherwise be subject to Section 12(g) of the Securities Exchange Act of 1934 (“Exchange Act”). Accordingly, most of the entities would not otherwise be subject to any obligation to make the type of financial disclosures required by the Proposal. To our knowledge, this represents an extraordinary requirement for a private company.

b. Comparisons to other Financial Institution Entities

Furthermore, the requirement to publish audited financials is inconsistent with the requirements imposed on Financial Institutions under the Standard BICE. Under the Standard BICE, an entity may serve as a Financial Institution if it is, inter alia, (i) registered as an investment advisor under the Investment Advisers Act of 1940⁵ (“Advisors Act”) or under the laws of the state in which the adviser maintains its principal office and place of business, or (ii) a broker or dealer registered under the Exchange Act. Though Financial Industry Regulatory Authority (“FINRA”) member firms and registered investment advisors are subject to more comprehensive regulatory regimes than insurance agencies, they are not required to publicly distribute their audited financial statements.

The financial disclosure requirements for a registered investment advisor under the Advisors Act are relatively limited, particularly with respect to state registered investment advisors, which are often not required to maintain audited financial statements. The disclosures required by the United States Securities and Exchange Commission’s Form ADV, which are publically available, are far more limited than the information contained in typical audited financials. Financial information collected by Form ADV only includes statements about assets under management and similar discrete questions, not detailed disclosures regarding costs of sales, employee expenses and the other line items captured by audited financials.

Although broker-dealers registered under the Exchange Act are required to have audited financial statements, such audited financials are not made available for inspection by the general public. Information publicly available on broker-dealers is generally limited to the disclosures available on FINRA’s BrokerCheck website,⁶ which include basic ownership information, business lines conducted by the broker-dealer and disciplinary history. The available information does not include detailed financial disclosures.

c. Confidentiality

Audited financial statements include detailed information on an entity’s operations, performance and stockholder equity. In some instances, an auditor’s notes may also reference questions related to ongoing or pending litigation, or other sensitive company data. This information is proprietary and confidential data and should not be mandated to be publicly available.

d. Recommendation.

⁵ 15 U.S.C. § 80b et seq. (2016).

⁶ BROKERCHECK BY FINRA, <https://brokercheck.finra.org/> (last visited Feb. 9, 2017).

FFFC understands the requirement for a Financial Institution to maintain audited financials⁷ and agrees that the Proposal inserts an appropriate check on the Financial Institution's internal controls and ability to serve in this capacity. We suggest that the requirements under Section V(b) of the Proposal, regarding documented evidence of the conditions of the exemption being satisfied, are sufficient to protect Retirement Investors without further disclosure obligations. When maintained as required, these financial statements will be available for inspection by the Department and other regulators. However, the requirement to make financial statements available on the Financial Institution's website represents an undue burden on the Financial Institution without offering any corresponding benefit to the investing public.

3. Financial Thresholds

FFFC believes that the Proposal's stated requirements for calculating premium sales may be ambiguous or otherwise may improperly exclude certain entities from qualifying for status as Financial Institutions.

a. Affiliate Groups

In our experience, Financial Institutions commonly do business as part of a larger group of affiliates, for reasons that include, sound corporate governance, multiple operating subsidiaries that may be the result of mergers and acquisition activity, and regulatory concerns. For example, registered broker-dealers and registered investment advisors regularly establish subsidiaries that apply for state insurance agency licenses. It is common for insurance intermediaries to create new subsidiaries that serve as aggregators of fixed rate and fixed indexed annuity premium for purposes consolidating their production with insurance carriers.

b. Calculation of Premium

As currently drafted, the Proposal might be interpreted to exclude from the definition of Financial Institution various affiliated entities that may collectively meet the premium requirement, but that for legitimate business purposes have not aggregated production under a single entity. For example, if two insurance producer entities under common control and management each have in excess of \$750 million in premium sales of Fixed Annuity Contracts, it is not clear that they would, together, meet the defined requirements of the Proposal. Further, even if the premium was aggregated under a single entity, it is not clear that they would meet the requirements of the Proposal for a full three years after the consummation of the aggregation. We do not believe that this is the intent of the Department based on our previous discussions.

c. Recommendation

By clarifying that the Proposal allows for the aggregation of premium by businesses affiliated companies under common ownership, the Department would eliminate the potential of an unfair and, we believe, unintended result that might otherwise be implied by the language of the Proposal. FFFC suggests that the premium sale requirement should be broadened to expressly include an

⁷ Proposed Best Interest Contract Exemption for Insurance Intermediaries, 82 Fed. Reg. at 7372.

aggregate of the historical production of entities under common control. We suggest the Proposal use, as a model, the Securities Act of 1933,⁸ which defines an “Affiliate” as “an affiliate of, or person affiliated with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified.”⁹ This definition would broaden the premium sale requirement to accommodate the current practices of insurance intermediaries.

4. Pre-review of Sales Materials

FFFC believes that requirement that all sales materials be approved in advance of use with Retirement Investors is inconsistent with the current regulatory regime for other Financial Institutions relying on the Standard BICE and the overall insurance regulatory regime.

The Advertisements of Life Insurance and Annuities Model Regulation published by the NAIC has been adopted in numerous states (as adopted “Advertisement Rules”) and provides clear standards and guidelines to assure full and truthful disclosure to the public of all material and relevant information in the advertising of life insurance policies and annuity contracts. By imposing the requirement that all sales materials be approved in advance of use, the Proposal exceeds the requirements of the Advertisement Rules. This conflict with state regulatory guidance imposes additional uncertainty on producers and additional compliance burdens on insurance intermediaries to manage its differing obligations under state law and the Proposal.

5. Client Disclosure

As proposed, the requirements (i) to provide the annuity disclosures in advance of the submission to insurance carriers¹⁰ and (ii) verbally review the required disclosures with Retirement Investors and sign the transaction disclosure¹¹ impose an unnecessary administrative burden on the sales process without offering meaningful additional protections to Retirement Investors.

a. Conflict with State Disclosure Requirements

As noted in the Department’s commentary on the Proposal, the Annuity Disclosure Model Regulation¹² published by the National Association of Insurance Commissioners (“NAIC”) has been adopted in numerous states (as adopted “Annuity Disclosure Rules”). The form and content of the disclosures mandated by the Annuity Disclosure Rules varies by state, but typically the Annuity Disclosure Rules provide for clear procedures for providing the model disclosures after the time of application in various circumstances, including when the contract is provided over the internet or otherwise not in a face-to-face meeting.

Where the Buyer’s Guide and disclosure document are not provided
at or before the time of application, a free look period of no less than

⁸ 15 U.S.C.A. § 77a et seq (2016).

⁹ 17 C.F.R. § 230.405 (2016).

¹⁰ Proposed Best Interest Contract Exemption for Insurance Intermediaries, 82 Fed. Reg. at 7368-69.

¹¹ *Id.* at 7369.

¹² National Association of Insurance Commissioners, *Annuity Disclosure Model Regulation*, NAIC.ORG (2015), <http://www.naic.org/store/free/MDL-245.pdf.s>

fifteen (15) days shall be provided for the applicant to return the annuity contract without penalty. This free look shall run concurrently with any other free look provided under state law or regulation.¹³

By imposing the requirement that the model disclosure be provided prior to the transmittal of a recommended application for a Fixed Indexed Annuity to the insurance company, the Proposal exceeds the requirements of the Annuity Disclosure Rules. This conflict with state regulatory guidance imposes additional uncertainty on producers and additional compliance burdens on insurance intermediaries to manage its differing obligations under state law and the Proposal.

b. Administrative Burden

The additional requirement to verbally review the disclosures with the Retirement Investors under all circumstances is administratively burdensome. While some sales may take the form of multiple in person meetings, often Retirement Investors may not want or need the additional interactions with the Advisor that could be mandated by Proposal's requirements. FFFC contends that any additional educational benefits to the Retirement Investor in a verbal review of the disclosure are more than offset by the reduction in the flexibility of the sale process. Effectively, any transactions conducted by correspondence, over the internet or when the Retirement Investor was unavailable to meet with the Advisor would potentially be excluded from the exemption offered by the Proposal. We believe that this is inconsistent with the realities of the insurance marketplace and unfairly burdens insurance intermediaries seeking to rely on the Proposal.

c. Recommendation

To the extent that the Department desires to incorporate the protections of the NAIC's model regulation regarding annuity disclosures, FFFC recommends that the Proposal's requirements mirror the requirements of the NAIC's model rule to allow for disclosures to be made after the application is submitted to the insurance carrier. In addition, we request that the Department consider withdrawing the requirement for the disclosures to be verbally reviewed with the client and acknowledged in writing unless otherwise required by state law.

6. Conclusion

FFFC supports the adoption and implementation of a well-crafted and uniform classification for an insurance intermediary financial institution that would be authorized to execute a written best interest contract with Retirement Investors. For the reasons discussed above, we believe that the current Proposal (i) unfairly burdens insurance intermediaries when compared to the requirements imposed on other forms of Financial Institutions that might seek to rely on the Standard BICE and (ii) imposes administratively onerous disclosure requirements on transactions conducted in reliance on the Proposal that potentially conflict with existing state laws. Based on our experience in the industry, we believe that this will only serve to discourage the use of the Proposal as an option and drive producers to reliance on the Standard BICE. This ultimately represents a

¹³ *Id.* at 245-5.

reduction in the flexibility of the industry to operate under the Department's fiduciary rule and may negatively impact the options available to Retirement Investors.

FFFC appreciates the opportunity to offer comments and alternative recommendations on the Proposal. We look forward to working with the Department to further refine the Proposal's conditions and requirements. FFFC is available and eager to discuss with the Department any of our comments or recommendations in this letter.

Respectfully,



Bruce Donaldson
Director
Futurity First Financial Corporation