



HIGHLAND CAPITAL BROKERAGE

February 18, 2017

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

Ladies and Gentlemen:

Highland Capital Brokerage, Inc. ("Highland Capital") is grateful for the opportunity 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

Highland Capital, an insurance brokerage firm with its headquarters located in Birmingham, Alabama, is affiliated with thousands of financial service professionals, both independent agents and financial institutions, located throughout the United States ("Advisors"). Highland Capital is regulated as an insurance producer entity in all jurisdictions where its business activities require licensure. Highland Capital offers life insurance and related products on behalf of insurance carriers and offers expertise on insurance related planning opportunities to the insurance agents and financial institutions contracted with Highland Capital and their clients.

Highland Capital is a wholly-owned subsidiary of Ladenburg Thalmann Financial Services Inc. ("Ladenburg Thalmann"). Ladenburg Thalmann, a NYSE listed company (NYSE MKT: LTS), is a diversified financial services company with two primary business lines: (i) independent brokerage and advisory services, and (ii) investment banking and capital markets. As a subsidiary of Ladenburg Thalmann, Highland Capital is affiliated with thirteen Financial Industry Regulatory Authority ("FINRA") member firms and Securities and Exchange Commission ("SEC") registered investment advisors.² As an affiliate of these regulated entities, Highland Capital has access to sophisticated compliance and control resources.

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Securities offered through Investacorp,
Inc., member FINRA/SIPC.

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 Investacorp, Inc. (CRD# 7684); SSN Advisory, Inc. (CRD# 126090); Securities Service Network, Inc. (CRD# 13318); KMS Financial Services, Inc. (CRD # 3866); Arbor Point Advisors, LLC (CRD #165127); Ladenburg Thalmann Fund Management LLC (CRD # 129787); Securities America Advisors, Inc. (CRD #110518); Securities America, Inc. (CRD# 10205); Ladenburg Thalmann Asset Management Inc. (CRD#108604); Triad Advisors, Inc. (CRD# 25803); Ladenburg Thalmann & Co. Inc. (CRD# 505); Investacorp Advisory Services, Inc. (CRD# 109011); Triad Hybrid Solutions, LLC

Based on our industry experience and affiliation with Ladenburg Thalmann, we believe that we are well positioned to comment on the Proposal. Highland Capital acknowledges and appreciates the Department's motivation behind the Proposal and supports the implementation of an appropriately designed classification for an insurance intermediary financial institution that would be authorized to execute a written best interest contract with Retirement Investors. However, we believe that the requirements of the Proposal with respect to the definition of a "Financial Institution"³ are unreasonably restrictive and exclude many highly qualified insurance intermediaries from serving in this capacity.

We respectfully request the Department consider the following changes to the Proposal.

1. Premium Sales Threshold

Highland Capital asserts that the requirement that a Financial Institution have "transacted sale of Fixed Annuity Contracts averaging at least \$1.5 billion in premiums per fiscal year over its prior three fiscal years"⁴ is too high. This is far in excess of the volume that would be necessary to ensure that the Financial Institution is adequately capitalized.

a. Comparisons to other Financial Institution Entities

The \$1.5 billion premium requirement is inconsistent with the requirements imposed on Financial Institutions under the Department's previously issued Best Interest Contract Exemption (the "Standard BICE"). Under the Standard BICE, an entity may serve as Financial Institution if it is, inter alia, (i) registered as an investment advisor under the Investment Advisers Act of 1940⁵ 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 Securities Exchange Act of 1934.⁶

To be approved for FINRA membership, applicants must meet the provisions of SEC Rules 15c3-1 and 17a-11, the SEC's net capital rule. The statutory minimum amounts of net capital can be as low as \$5,000. For a registered investment advisor, the SEC does not impose a specific net worth/net capital requirement. There are no sales "volume" requirements imposed in these entities to qualify as a Financial Institution.

Though FINRA member firms and registered investment advisors are subject to more comprehensive regulatory regimes than insurance agencies, the Proposal, as currently drafted, may allow a small, state-registered investment advisor firm with a single principal to serve as a Financial Institution, while excluding a large insurance intermediary firm with full time compliance staff if its sales volume did not exceed \$1.5 billion. This does not serve the Proposal's stated intent "to promote the provision of investment advice that is in the best interest of retail investors such as plan participants and beneficiaries, IRA owners, and certain plan fiduciaries."⁷

b. Artificial Limitation on Qualifying Entities

Based on our knowledge of the industry, we estimate that only a very limited number of entities could meet the \$1.5 billion premium requirement. By setting the requirement at such a high amount, the Department would exclude many otherwise highly qualified entities from qualifying as a Financial

³ Proposed Best Interest Contract Exemption for Insurance Intermediaries, 82 Fed. Reg. at 7336.

⁴ *Id.*

⁵ 15 U.S.C. §§ 80b-1 et seq. (2016).

⁶ 15 U.S.C. §§ 78a et seq. (2016).

⁷ Proposed Best Interest Contract Exemption for Insurance Intermediaries, 82 Fed. Reg. at 7336.

Institution, restricting the number of insurance intermediaries to a very limited few. The reduction in qualified Financial Institutions materially undermines the Proposal's usefulness by reducing the entities allowed to participate fully in the market, leading to negative competitive consequences in the larger insurance industry.

c. Required Reserves

Furthermore, the Proposal's \$1.5 billion premium requirement to qualify as a Financial Institution is unreasonably high given the separate requirement that the Financial Institution maintain adequate reserves or fiduciary liability insurance.⁸ The current requirement to maintain at least 1% of the average annual amount of premium sales of Fixed Indexed Annuities as reserves adequately protects the interests of potential consumers.

d. Recommendation

We recommend that the Department consider using a \$500 million annual premium requirement as the threshold for qualifying as a Financial Institution. Even by instituting a substantially lower premium requirement, the Proposal would still function to exclude small insurance intermediaries that might not have the requisite capabilities to function effectively as a Financial Institution. We believe that a \$500 million premium requirement would best further and promote the Proposal's stated purpose.

2. Calculation of Premium Threshold

In addition, Highland Capital recommends that the Proposal's premium sale requirement should be broadened to include an aggregate of the production of entities under common control. We are concerned that, as currently stated, the Proposal's requirements for calculating premium sales may be ambiguous or otherwise may improperly exclude certain entities from qualifying as a Financial Institution.

a. Affiliate Groups

In our experience, Financial Institutions commonly do business as part of a larger group of affiliates, both as a result of mergers and acquisition activity and in response to regulatory concerns. For example, registered broker-dealers and registered investment advisors regularly establish subsidiaries that apply for state insurance agency licenses. It is also common for entities 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

The Proposal, as currently drafted, will likely exclude from the definition of Financial Institution various affiliated entities that may collectively meet the premium requirement, but 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 indexed annuities, they would not meet the defined requirements of the Proposal. Even if these entities took immediate steps to aggregate the premium under a single entity, they would not meet the requirements of the Proposal for a full three years after the consummation of the aggregation. This may

⁸ Proposed Best Interest Contract Exemption for Insurance Intermediaries, 82 Fed. Reg. at 7336.

unfairly exclude entities from qualifying as Financial Institutions based on their reasonable business decisions related to accounting and organizational structures.

c. Recommendation

We recommend that the premium sale requirement be broadened to aggregate the production of all entities under common control. In particular, we propose that the definition of the Proposal should model its definition of “Affiliate” in the Securities Act of 1933⁹ (the “Securities Act”). “Affiliate” is defined in the Securities Act as, “[a]n 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.”¹⁰ We believe that by using a broader definition of “Affiliate,” the Proposal would better reflect the industry standards and promote the Proposal’s stated purpose.

3. Impact of Proposed Premium Threshold

As illustrated above, Highland Capital is a large insurance brokerage with significant compliance and supervisory resources, including affiliation with numerous highly regulated entities. If the Proposal is ultimately adopted as drafted, in order to rely on the exemption created by the Proposal, the function of the Financial Institution would necessarily be performed by an “upstream” insurance intermediary. We believe that Highland Capital is better prepared and equipped to perform the supervisory function for our Advisors than any other insurance intermediary that could fill this role. Highland Capital has invested significant sums in the creation of supervisory and compliance structures to meet the requirements of the Proposal. For example, Highland Capital is prepared to conduct pre-review of marketing materials, conduct annual training and approve applications prior to their submission to the carrier.

If the 1.5 billion premium threshold is adopted, Highland Capital would be unlikely to qualify and we would likely rely on a larger insurance marketing organization to perform this function. A higher-level intermediary entity will be more removed from the Advisors and it is our belief that they have less resources and experience related to supervision and compliance. The interests of the Retirement Investors will ultimately be best served by Highland Capital serving in the capacity of the Financial Institution and executing the best interest contract.

4. Conclusion

In sum, Highland Capital recommends that the Department reduce the \$1.5 billion premium threshold for qualifying as a Financial Institution under the Proposal. Additionally, we propose that the premium sale requirement allow for the aggregation of production for all entities under common control. By amending the Proposal to reflect these recommendations, we believe that the Proposal will better reflect the Department’s intent for proposing this change, the current insurance industry standards and the stated purpose of the Proposal.

⁹ 15 U.S.C.A. §§ 77a et seq (2016).

¹⁰ 17 C.F.R. § 230.405 (2016).

Highland Capital 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. Highland Capital would be happy to discuss any of our comments or recommendations in this letter with the Department.

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Lancaster', with a stylized flourish at the end.

Anthony Lancaster
Senior Vice President & COO