VIA ELECTRONIC SUBMISSION

January 2, 2024

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Room N-5655
Washington, DC 20210

Re: Proposed Rule – Definition of an Investment Advice Fiduciary (RIN 1210-AC02)
Proposed Amendment to Prohibited Transaction Exemption 2020-02 (ZRIN 1210-ZA32)
Proposed Amendment to Prohibited Transaction Exemption 84-24 (ZRIN 1210-ZA33)

Dear Ladies and Gentlemen:

Invesco Ltd. ("Invesco") appreciates the opportunity to provide comments on the proposals published by the U.S. Department of Labor ("Department") on November 3, 2023, intended to (i) redefine who is a fiduciary for purposes of investment advice under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and Section 4975 of the Internal Revenue Code of 1986, as amended ("Code") (the "Fiduciary Proposal") [1]; and (ii) amend the Department's Prohibited Transaction Class Exemptions 2020-02 and 84-24 ("PTE 2020-02 Proposal" and "PTE 84-24 Proposal", respectively).[2]

Invesco is a leading independent investment manager with approximately $1,487.3 billion in assets under management as of September 30, 2023. As a global company, Invesco's investment products serve a wide range of clients throughout the world, including open-end mutual funds, closed-end funds, exchange-traded funds, collective investment trust vehicles, UCITS, real estate investment trusts, unit investment trusts and other pooled investment

[1] Retirement Security Rule: Definition of an Investment Advice Fiduciary, 29 C.F.R. Section 2510.3-21, 88 Fed. Reg. 75890 (November 3, 2023).
[2] Proposed Amendment to Prohibited Transaction Exemption 2020-02, 88 Fed. Reg. 75979 (November 3, 2023); Proposed Amendment to Prohibited Transaction Exemption 84-24, 88 Fed. Reg. 76004 (November 3, 2023).

vehicles, as well as separately managed accounts for pensions, endowments, insurance companies and sovereign wealth funds. In the U.S. retirement savings marketplace, Invesco offers products and services that span both the "institutional" and "retail" segments of the marketplace.[3]

I. Executive Summary

In providing these comments on the Fiduciary Proposal, PTE 2020-02 Proposal and PTE 84-24 Proposal (collectively, the "2023 Proposal"[4]), Invesco reiterates its long-standing support for the application of a principles-based "best interest" standard for advice and recommendations to retirement investors by persons and financial services providers appropriately classified as ERISA investment advice fiduciaries.[5]

Unfortunately, we strongly believe that the 2023 Proposal is overbroad and over-corrective in its scope and intent to reformulate ERISA's rules to define and regulate these advice fiduciaries. In our view, and as described in detail below, the Department's reformulation of the current regulatory definition of fiduciary investment advice, including the so-called "Five-Part Test," would newly and broadly sweep many financial services providers, including asset managers like Invesco, into the category of fiduciary advice provider, resulting in more harm than benefits to retirement investors.

Today, plan sponsors and plan investment committees routinely seek and obtain educational investment-related insight and support through interactions and relationships with asset managers like Invesco, in the form of information on market color, investment strategies, asset allocation strategies, and other investment concepts of interest to the plan. These interactions and relationships all occur today without the manager triggering fiduciary status for itself, due to the current, well-established definition of fiduciary investment advice, including the "Five-Part Test," described below. We believe that the current definition, including the "Five-Part Test," strikes a fair, importance balance between (i) the rendering of actual investment advice as well-understood and agreed upon by both the advice provider and retirement investor, and (ii) an entire range of interactions and activities between an asset manager or other financial services provider and retirement investor that categorically should not be labeled as ERISA fiduciary advice.

[3] In the institutional segment, the Invesco Trust Company, an Invesco subsidiary, sponsors approximately 74 collective investment trust vehicles and serves these vehicles and their ERISA investors as an ERISA 3(38) discretionary investment manager. In the retail segment, Invesco participates in the retirement marketplace on an "investment only" basis in multiple ways, including as a "defined contribution investment only" ("DCIO") provider, whereby our investment strategies are included on approximately 30 third-party retirement platforms, which in turn offer products and services to a variety of financial intermediaries, plans, and individual investors. Also in the retail segment, Invesco offers a range of retirement plan products for self-employed individuals and small businesses, including 401(k), profit-sharing, SEP IRA, SIMPLE IRA, and 403(b) plans, as well as an Invesco IRA product for individual retirement investors. Invesco retail retirement plan products currently serve more than 92,000 plan sponsors and approximately 815,000 accountholders.

[4] The Department also published a related Proposed Amendment to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, and 86-128, 88 Fed. Reg. 76032 (November 3, 2023), though we do not comment on it here.

[5] *See, e.g.*, Invesco's comment letter to the Department dated July 20, 2015, related to the Department's prior Proposed Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice, 80 Fed. Reg. 21928 (April 20, 2015) ("Prior Fiduciary Rule") (https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00584.pdf).

For all of the reasons described below, and absent the requested changes to the 2023 Proposal that we propose, we believe that in many instances, the Department's total reformulation of the current definition will likely curtail the provision of high-quality educational information and support services by asset managers and other providers of financial services to plans and other retirement investors that have never before been viewed as "investment advice." Respectfully, we submit that such a curtailment will cause plans and retirement savers to have access to less investment information and support than they rely on and benefit from today.

In addition to providing our own comments here, Invesco strongly supports the comment letters submitted to the Department by the Investment Company Institute ("ICI"); the Securities Industry and Financial Markets Association ("SIFMA"); the SPARK Institute, Inc. ("SPARK"); and the American Bankers Association ("ABA"),[6] all of which align with our comments and offer additional perspective and analysis. The ICI, SIFMA, SPARK and ABA all strongly oppose the 2023 Proposal and call for the Department to withdraw it. Respectfully, we join in their call for withdrawal, for the detailed reasons described below.

Alternatively, we suggest ways that the Department could modify the 2023 Proposal with certain necessary changes, in order to make the 2023 Proposal minimally workable for impacted financial institutions to successfully comply with the rulemaking, and preserve, without compromise, retirement investors' access to the investment information, products, services and support they enjoy today.

Our comments to the 2023 Proposal follow below.

II. <u>The Proposed Revised Definition of Investment Advice Fiduciary</u>

The Fiduciary Proposal fails to strike the fair and important balance contained in the current fiduciary advice definition, under the so-called "Five-Part Test" and with respect to a "recommendation." Therefore, changes to the proposal should be made to restore this balance, to the benefit of retirement investors.

In its Fiduciary Proposal, the Department has chosen to wholly reformulate the current regulatory definition of fiduciary investment advice that has been in place for approximately five decades, including the portion of the current definition that is often referred to as the "Five-Part Test."[7] We are concerned by this effort, as we believe the current definition, including the Five-Part Test, strikes a fair, important balance between (i) capturing advice activities that appropriately reflect an established "relationship of trust and confidence"[8] between a retirement investor and an investment advice provider, and (ii) recognizing that an entire range of interactions and activities exists between a financial professional or other individual and a retirement investor that categorically should not be labeled as ERISA fiduciary advice.

This is not to say that we believe the Five-Part Test or the Department's interpretation of ERISA investment advice should not evolve over time. Respectfully, however, we believe that the

[6] *See* ICI, SIFMA, SPARK and ABA comment letters dated and submitted to the Department on or by January 2, 2024.
[7] 29 C.F.R. Section 2510.3-21(c)(1).
[8] Such "relationships of trust and confidence" are a touchstone that reverberates throughout the judicial opinion in *Chamber of Commerce v. United States Department of Labor*, 885 F.3d 360 (5th Cir. 2018), in which the Fifth Circuit U.S. Court of Appeals vacated the entire Prior Fiduciary Rule.

Fiduciary Proposal's complete reformulation of the Five-Part Test is highly overbroad and far exceeds an update to account for a specific identified reason or reasons (for example, "one-time" rollover advice to a plan participant transferring their account balance to an IRA).

In what is known as the Five-Part Test within the current definition of fiduciary investment advice, the following five elements must be present: (i) the advice provider must be providing advice recommendations to the retirement investor; (ii) on a *regular basis*; (iii) pursuant to a *mutual agreement* that the provider has been engaged to provide such services; (iv) such advice must be individualized to the particular needs of the investor; and (v) such advice must be a *primary basis* for the investor's investment decision. However, under the Fiduciary Proposal, the "regular basis," "mutual agreement," and "primary basis" elements of this test have been reworked or altogether eliminated. (See subsection B. below for detailed discussion of the reformulated Five-Part Test, which the Department now covers through a new "facts and circumstances" advice category.)

In addition, regarding the meaning of the key term "recommendation," the Department sets forth, in the preamble to the Fiduciary Proposal, its view that, based on objective notions of "content, context, and presentation," a mere "suggestion" by a person that the retirement investor engage in, or refrain from engaging in, a particular investment course of action would suffice as a "recommendation" for purposes of fiduciary advice.[9] We believe the intertwined use of the terms "suggestion" and "recommendation" in this manner is alone a reason for concern that asset managers and other financial services providers will curtail the provision of high-quality educational information and support services, for fear that the low bar of a "suggestion" could trigger novel, unintended ERISA fiduciary advice status for the provider.

We request that any final rule that is issued eliminate the reference to a "suggestion" as a basis for a fiduciary advice recommendation, and that it be replaced with the concept of a "call to action" to the retirement investor. Use of this "call to action" concept would be similar to its use in the meaning of "recommendation" under Regulation Best Interest promulgated in 2019 by the U.S. Securities and Exchange Commission ("SEC"), which established a standard of conduct for broker-dealers when they make investment recommendations to retail customers, including certain retail retirement investors.[10]

Under the SEC's formulation in Regulation Best Interest, and similar to here, a recommendation is inherently based on the facts and circumstances of a particular situation.[11] However, in Regulation Best Interest, the inquiry further focuses on whether the subject communication "reasonably could be viewed as a 'call to action' and "reasonably would influence an investor" to take a particular action.[12] We believe that replacing the "suggestion" element in the meaning of "recommendation" with the concept of a "call to action" would help avoid curtailment of educational information and support services to retirement investors, while better aligning the rules governing investment advice under ERISA with Regulation Best Interest where feasible, which has been a stated goal of the Department.[13]

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[9] Fiduciary Proposal, 88 Fed. Reg. at 75904.
[10] SEC Regulation Best Interest: The Broker-Dealer Standard of Conduct, 17 C.F.R. Part 240, 84 Fed. Reg. 33318 (July 12, 2019).
[11] *Id.*, 84 Fed. Reg. at 33355.
[12] *Id.*
[13] PTE 2020-02, 85 Fed. Reg. at 82802.

Lastly, on the merits of the Fiduciary Proposal, the Department proposes three new and/or modified covered advice "categories" in which a person making a covered recommendation would be an advice fiduciary. These separate advice categories consist of (i) a "discretionary control" category;[14] (ii) a "facts and circumstances" category;[15] and (iii) an "acknowledged fiduciary" category.[16]

Below, we specifically comment on the "discretionary control" and "facts and circumstances" advice categories, due to our particular concerns about how the Fiduciary Proposal implements them, to the detriment of retirement investors and the investment products, services, and relationships that they experience today with Invesco and other asset managers and providers of financial services. In the event that the Fiduciary Proposal is finalized and not withdrawn, we offer these comments to assist the Department in better retaining the fair balance of the current definition, and avoiding the detrimental impacts to retirement investors of which we caution.

A. The "discretionary control" advice category of the Fiduciary Proposal is unworkable and should be eliminated.

Under the so-called "discretionary control" category of the Fiduciary Proposal, fiduciary advice status would apply upon a person making a single "recommendation" to a retirement investor, if the person who provided the recommendation, or another person acting at the same firm or an affiliate, has existing discretionary authority or control over *<u>other investments</u>* of the retirement investor.[17] This represents an expansion of the current definition of fiduciary advice involving discretionary control, which only applies in the context of discretionary control with respect to the subject "plan" itself, and *<u>not</u>* any other investments of the investor.[18] Unfortunately, we believe that this expansion would be unworkable in practice.

For an institutional asset manager acting in a discretionary capacity for a given client, this modified discretionary control advice category under the Fiduciary Proposal would cause any separate, ostensible "recommendation" communicated to the client regarding their retirement plan assets – by any personnel of the manager or an affiliate, no matter how uninvolved they are with the current discretionary management, regardless of whether they are a retirement or non-retirement investor client, and regardless of whether the "recommendation" is individualized to them or not – to be deemed ERISA fiduciary advice. The actual facts, circumstances, and intended context of the interaction as mutually understood and agreed by client and manager would be moot, and there would be no ability for the parties to define the parameters of the relationship or otherwise limit the application of this advice category.

Today, in the institutional plan marketplace, plan investment committees, their consultants, and other responsible plan fiduciaries often seek and obtain educational, investment-related information and insights through interactions and relationships with institutional asset managers like Invesco. This information and these insights typically pertain to market color, investment strategies, asset allocation strategies and other investment concepts of interest to the plan.

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[14] Prop. Reg. 29 C.F.R. Section 2510.3-21(c)(1)(i).
[15] Prop. Reg. 29 C.F.R. Section 2510.3-21(c)(1)(ii).
[16] Prop. Reg. 29 C.F.R. Section 2510.3-21(c)(1)(iii).
[17] Prop. Reg., 29 C.F.R. Section 2510.3-21(c)(1)(i).
[18] 29 C.F.R. 2510-3(21)(c)(1)(ii)(A).

Critically, all of these are currently able to be provided without the manager triggering fiduciary status for itself, due to the current definition of fiduciary investment advice, and without the manager being required to adhere to PTE 2020-02, which is the mandatory "companion" exemption that the financial institution that is deemed to be providing fiduciary advice must also comply with, including its "impartial conduct" standard and a detailed compliance framework. (See Section III below for a detailed discussion regarding the PTE 2020-02 Proposal.)

However, we believe that the modified "discretionary control" category of the Fiduciary Proposal would be unworkable based on its breadth, by virtue of the category covering *any affiliate of the manager* having discretionary control over other investments of the plan, plan sponsor or, very broadly, *any other fiduciary to the plan* (since the broad definition of "retirement investor" includes *any* fiduciary to the plan[19]). This could include, for example, a third-party fiduciary investment consultant to the plan, a circumstance that would not seem to be an intended source of the Department's concern in proposing this change. We believe that any asset manager or other financial services provider with affiliated advisory or asset management entities will find it very difficult, if not impossible, to ensure there is no inadvertent triggering of this advice category in its everyday business.

As a result of this unworkability, institutional plans, and ultimately their participants and beneficiaries, will be subjected to an environment in which asset managers and other institutions are more constrained in their ability to support plans' needs for educational, investment-related information, and in their interactions and discussions with plan committees and other fiduciaries in which this education and information is conveyed, for fear of making "recommendations" that could automatically trigger this advice category as the Department is proposing to expand it. Further, we are concerned that there is no requirement in the "discretionary control" category that the "recommendation" be individualized, and that such fiduciary line-crossing could occur inadvertently (for example, where a representative of an asset manager conducts an educational presentation in front of a large audience or some other group setting).

Accordingly, we request that the Department not move forward with its modifications to the "discretionary control" advice category as set forth in the Fiduciary Proposal.

B. The "facts and circumstances" advice category of the Fiduciary Proposal should include express exceptions from applicability.

The Department newly provides for an advice category that is to be determined "through application of the facts and circumstances surrounding [the financial service provider's] interactions with their customers."[20]

Under this category, fiduciary status would apply to a recommendation if the service provider, either directly or indirectly (for example, through or together with any affiliate), makes investment recommendations to investors "on a regular basis as part of their business," and the subject recommendation is "provided under circumstances indicating that it is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement

[19] Fiduciary Proposal, 29 C.F.R. 2510.3-21(c)(1).
[20] Prop. Reg., 29 C.F.R. Section 2510.3-21(c)(ii); Fiduciary Proposal at 75907.

investor's best interest."[21] By its terms, it is with this category that the Department is seeking to capture the majority of interactions and activities with retirement investors for purposes of coverage under the Fiduciary Proposal, and where the Department's reformulation of the Five-Part Test occurs, including with respect to the "regular basis," "mutual agreement," and "primary basis" elements of the Five-Part Test, referenced above.

We strongly support the many comments raised by the ICI, SIFMA, SPARK and ABA in their respective comment letters to the Department with respect to this "facts and circumstances" advice category. In particular, the comment letters from ICI, SIFMA, SPARK and ABA express in detail their concern with the Department's decision to omit, either in connection with this advice category or for any other purpose in the Fiduciary Proposal, any clear, categorical exceptions, or carve-outs, from coverage as fiduciary advice. This decision is of course a departure from the Department's Prior Fiduciary Rule, which provided for various express exceptions from rule coverage.

Simply put, the lack of any express exceptions would leave asset managers like Invesco and other financial services providers without any baseline-level regulatory certainty about their products and services to retirement investors, or the manner in which these products and services are delivered and supported. If the Department were to not provide for any categorical exceptions in connection in any final rulemaking (for example, an exception for sales and marketing activities between and among asset managers and financial intermediaries, which we advocate for below), we anticipate a similar outcome to the one described in subsection A. above: As a direct result of the 2023 Proposal, we believe that a broad "facts and circumstances" advice category containing no bright-line exceptions that can be reasonably relied upon, combined with the prospect of triggering (or potentially triggering) compliance with PTE 2020-02, possibly for the first time, will have a chilling effect that results in many asset managers and other financial services providers pulling back on the range of non-fiduciary activities, services and support they provide today for the benefit of retirement investors.

Below are the exceptions that we would urge the Department to implement in connection with any finalized advice rule. In addition, we strongly advocate for all exceptions to be expressly set forth in the text of any final rule, and not in brief, passing remarks in the preamble, as the Department chose to do in the Fiduciary Proposal; preambles do not have the legal effect of a rulemaking, and are subject to changes in interpretation by the Department over time outside the formal rulemaking process.[22]

1. Exception for sales and marketing activities between and among asset managers and financial intermediaries

A common everyday practice in the investment industry is for asset managers like Invesco to interact with a range of financial intermediaries, including broker-dealers, registered investment advisers, banks, insurance companies, and consultants, many of which may be serving in an ERISA fiduciary capacity to plans, or in a fiduciary capacity to IRA investors under the Code. In these interactions, the asset manager should be able to engage in sales and marketing efforts with these financial intermediaries, including with respect to the manager's own investment

[21] Prop. Reg., 29 C.F.R. Section 2510.3-21(c)(ii).

[22] Alternatively, if the Department is not willing to provide for any express exceptions, we request that it include helpful examples within the rule text that illustrate the same principles that our requested exceptions convey.

products, to better inform the intermediaries' own fiduciary recommendations to their plan and IRA clients.

These everyday sales and marketing interactions are foundational to our work as an asset manager, and to Invesco's intermediary-sold business model.[23] Asset managers and their financial intermediary partners should be able to continue these interactions on behalf and for the benefit of retirement investors, without the stricture of a "facts and circumstances" advice test for the asset manager. We believe that the Fiduciary Proposal's lack of an exception for clear sales-related conversations and activities between and among asset managers and financial intermediaries ultimately would threaten to disrupt and reduce certain beneficial "structural" outcomes that these sales and marketing interactions and activities with financial intermediaries foster over time – for example, the promotion of retirement plan formation, the expansion of plan coverage, and the development of new products and services for plans and their participants and beneficiaries. We urge the Department to revise the Fiduciary Proposal to include an express exception for sales and marketing activities that are strictly between manager and financial intermediary, as a critical regulatory signal that sales and marketing interactions between and among highly regulated financial services providers to plans and other retirement investors can and should appropriately be deemed non-fiduciary in nature.

Respectfully, we urge the Department to not treat these interactions as inherently suspect, and thus defaulted into a category of fiduciary advice, but rather, to view them as reasonable, necessary and appropriate non-fiduciary interactions and activity between service providers to a plan in furtherance of the plan's investment goals, as well as ultimately contributing more broadly to the plan formation and expansion goals referenced above. Plans are well-protected under ERISA today, with the financial intermediary a fiduciary with respect to investment advice services to the plan, and the asset manager a fiduciary with respect to any investment management services to the plan.

2. Exception for coverage to institutional investors

In the preamble to the Fiduciary Proposal, the Department asserts that no "compelling evidence [exists] that wealth or income are strong proxies for financial sophistication or inconsistent with a relationship of trust and confidence", and that nothing in ERISA suggests that "sophisticated investors" are categorically not worthy of fiduciary protection.[24] This led the Department to forego the inclusion of any exception from the rule for sales and other consultative activities with institutional plan investors (for example, a large defined benefit plan investment committee).

We strongly object to the Department's essential premise that *every* retirement investor, no matter their size, needs or expectations, must be blanketed with the same protection regarding investment advice. The reality is that most, if not all, institutional investors are keenly equipped to – and do – seek out investment insights and information from investment managers every

[23] Under this model, Invesco relies primarily on a network of third-party financial professionals and intermediaries to distribute and sell the Invesco mutual funds to end investors, whether for retirement or non-retirement purposes. This same intermediary-sold model also applies to our proprietary Invesco retirement plan and IRA products; third-party intermediaries, not Invesco, distribute and sell these products directly to retail retirement investors. Invesco believes that the role of the third-party financial adviser or other intermediary is to provide individualized advice, assessing and taking into account the client's retirement plan or IRA needs, investment goals and objectives, preferences, risk tolerances, liquidity requirements, and other assets.
[24] Proposal at 75907.

day, and then independently consider and assess these insights and information as they proceed to make prudent investment decisions for their plans, participants and beneficiaries.

The Fiduciary Proposal's lack of an "institutional sales activity" exception for ERISA 3(38) investment managers and other registered investment advisers is highly problematic, as it would likely curtail, if not eliminate, the manager's or adviser's provision of full and robust investment ideas and information to institutional retirement investors on all manner of topics that are key to the plan investor's ability over time to provide for adequate retirement outcomes for participants and beneficiaries. Institutional investors routinely seek out insight and information from investment experts regarding investment strategies, asset allocation strategies, and other investment concepts.

In the Fiduciary Proposal, the Department has not provided any evidence based on its regulatory enforcement experience, case law developments, or otherwise, to justify the blanket imposition of fiduciary responsibility for investment advice in the institutional plan context. Respectfully, we believe that this is because no such evidence exists. If an institutional plan investor desires to expressly engage an investment manager or other provider for investment advice on an "impartial conduct" basis, it should be by a mutually agreed-upon arrangement.

Therefore, we request that the Department provide a clear exception for sales activity to institutional investors in any final rule, or alternatively, to include helpful examples in a final rule that would accomplish the same. For purposes of determining who is an institutional investor for this purpose, we recommend that the Department propose a definition that aligns with a threshold adopted by other financial regulators for this same need, such as the "accredited investor" definition adopted under Regulation D of the Securities Act of 1933 (an ERISA or governmental plan that "has total assets in excess of $5,000,000")[25]; or the "qualified purchaser" definition under the Investment Company Act of 1940 (a person who "owns and invests on a discretionary basis . . . not less than $25,000,000 in investments")[26].

Treatment of these everyday interactions and activities based on a "facts and circumstances" approach is unnecessarily counter-productive to the interests and needs of institutional plan investors, and unnecessarily complex for asset managers and other financial institutions that must do business and assure regulatory compliance with these rules.

3. <u>Exception for "hire me" conversations and RFP responses</u>

For the benefit of all retirement investors no matter their size or sophistication, asset managers should be able to bid for a discretionary investment manager role by engaging in so-called "hire me" conversations, in which a manager touts its experience, capabilities and ideas, free from uncertainty about whether this activity might be deemed fiduciary investment advice under the Fiduciary Proposal. In addition, managers should be able to provide responses to a Request for Proposal ("RFP") or similar written inquiry from a plan investor, also from doubt about this activity falling within some interpretation of the Fiduciary Proposal.

[25] 17 C.F.R. Section 230.501(a).
[26] 15 U.S.C. Section 80a-2(a)(51).

4. Exception for model portfolios

Many asset managers provide IRA investors and small-market qualified plans (and non-retirement investors as well) with model investment portfolios that are designed to achieve a particular balance of risk and investment return, or other investment objective. At Invesco, we offer these model portfolios through financial intermediaries such as unaffiliated broker-dealers and registered investment advisers. Most commonly, the financial intermediary, not Invesco, has the direct relationship with the retirement investor. Typically, Invesco lacks much of the retirement investor-specific knowledge and information that the financial intermediary possesses, and does not directly engage or interface with the investor. Depending on the specific contractual arrangement between Invesco and the financial intermediary, Invesco agrees to assume ERISA 3(21) fiduciary responsibility with respect to its management of the model portfolios on behalf of accounts subject to ERISA.

Retirement investors appropriately look to the asset manager for the provision of management of the assets in accordance with the model portfolio strategy selected, and to the financial intermediary for the provision of fiduciary investment advice, as needed. As written, the Fiduciary Proposal fails to provide certainty that the availability of model portfolio arrangements from an asset manager, in and of itself, does not amount to the provision of fiduciary investment advice under ERISA.

Similar to points we make in subsections B.1., B.2. and B.3. above, asset managers should continue to be able to make these model portfolios available to unaffiliated fiduciary intermediaries (who in turn make them available to their end retirement investor clients), free from doubt about the manager's involvement falling within some interpretation of the Fiduciary Proposal that would extend fiduciary advice provider status to the manager. The existence of potential doubt could, in our view, lead managers to curtail the underlying information and interactions flowing between it and intermediaries in connection with these products, to the detriment of retirement investors. To reiterate a recurring point made above (and covered in more detail in Section III below), such a curtailment would likely be attributable, at least in part, to a manager's desire to avoid triggering the need to comply with PTE 2020-02, to the extent that prohibited transaction exemption relief is necessary in connection with fiduciary advice activity.

Based on the foregoing, we request that the Department provide a clear exception for the ability of an asset manager or other provider to develop and offer model investment portfolios that are not individualized to a retirement investor and only offered through unaffiliated broker-dealers and other financial intermediaries, without triggering coverage as fiduciary investment advice.

5. Exception for investment platforms

As described above, Invesco offers a range of retail retirement plan products for self-employed individuals and small businesses, including 401(k), profit-sharing, SEP IRA, SIMPLE IRA, and 403(b) plans, and offers the Invesco IRA for individual retirement investors. These offerings include access to an investment menu consisting of the full range of Invesco mutual funds. Invesco also maintains a call center with trained representatives who can answer questions about the Invesco retirement plan and account products and the Invesco mutual funds, without crossing any line into providing fiduciary investment advice.

In addition, many Invesco funds appear on broad-based investment menus on the retirement investment platforms of many plan recordkeepers and other service providers that are unaffiliated with Invesco. Further, Invesco participates in numerous DCIO platforms consisting of third-party retirement products, and Invesco investment strategies may also be available through third party investment platforms where Invesco serves as a sub-adviser. In these cases, the fund and strategy lists and menus are typically not tailored or customized for any specific retirement investor; the retirement investor and their financial intermediary, if any, would evaluate and select specific funds based on the retirement investor's specific needs and objectives.

As written, the Fiduciary Proposal fails to provide certainty that the creation and availability of these investment and investment strategy menus (or "platforms") – non-individualized as they are – will not cause the platform provider, or the call center representatives (where applicable), to be a fiduciary investment advice provider, solely based on the existence of the platform or the call center. To provide regulatory certainty and promote the long-term viability of both these platform-based offerings and "no-advice" call centers for accountholders, we request that the Department provide an express exception or example in any final rule.

III. PTE 2020-02 Proposal

One major element of the 2023 Proposal is that the Department intends for PTE 2020-02 to now be the *only* investment advice class exemption under ERISA available to any person or provider who would become subject to the definition of fiduciary advice provider under the Fiduciary Proposal.[27] As has been highlighted in the comment letters filed by the ICI and SIFMA, PTE 2020-02 was issued in final form in December 2020, and not fully effective until early 2022. Clearly, PTE 202-02 is still a new exemption, with many financial services providers currently utilizing it in connection with their fiduciary investment advice offerings and activities under the current regulatory definition, but many other providers *not* currently utilizing PTE 2022-02 since it is not necessary in connection with their non-fiduciary advice offerings and activities. Our understanding is that asset managers, particularly those with an "intermediary-sold" business model as described in Section II.B.1. above, or that primarily serve institutional plan investors in a discretionary capacity only, tend to fall into this latter category, and therefore, do not utilize PTE 2020-02.

PTE 2020-02 allows financial institutions to provide fiduciary investment advice to ERISA plans, ERISA plan participants, and IRAs and to receive otherwise prohibited compensation resulting from that advice, if certain conditions are satisfied by the financial institution.[28] These conditions include (i) the provision of an acknowledgement of fiduciary status under ERISA; (ii) the provision of written disclosures to the client regarding the scope of the relationship and any material conflicts of interest; (iii) compliance with "Impartial Conduct Standards," which require adherence to a "Best Interest" standard of care, charging of only reasonable compensation, and avoidance of making misleading statements; (iv) completion of an annual review of the financial institution's compliance with PTE 2020-02 (and documentation of the results in a written report to a senior executive of the financial institution); and (v) adoption and implementation of policies

[27] PTE 2020-02 Proposal at 75981; one exception, with respect to investment advice involving certain insurance products, is not relevant for purposes of our comment letter.
[28] PTE 2020-02, 29 C.F.R. 2550, Section I.

and procedures regarding compliance with the Impartial Conduct Standards, mitigation of conflicts of interest, and other compliance items.[29]

These conditions are exacting and substantial, and financial services providers of fiduciary investment advice under the current definition that rely on PTE 2020-02 for exemptive relief under ERISA have all expended significant time, financial costs and other resources to help ensure that compliance with all of the conditions described above are satisfied. However, until now, many asset managers and other firms that have appropriately avoided fiduciary advice provider status under the current definition, and have had no reason to evaluate the need to build and implement a PTE 2020-02 compliance program, integrate it within its existing retirement-related products and services where appropriate, or plan for maintaining such a substantial compliance program over time.

Among a host of exemption changes contained in the PTE 2020-02 Proposal, any financial institution currently or newly deemed an advice fiduciary and in need of relief under PTE 2020-02 would be subject to a *de facto* contractual obligation based on a new "written statement" requirement under the "Best Interest" standard of care that is already owed to the retirement investor under the exemption.[30] Echoing the views set forth in the ICI, SIFMA, and ABA comment letters, we believe that this new written statement requirement amounts to a duplicative route for a private cause of action under ERISA, which is already inherent in ERISA for a plan subject to Title I thereof.[31]

Further, this change would ostensibly amount to a new private cause of action for IRA investors, which Congress has never provided for under ERISA.[32] As the Fifth Circuit in the *Chamber of Commerce* case made clear, creation of a private cause of action under ERISA for an IRA owner is solely in the purview of Congress to create via an amendment to ERISA, not the Department via regulatory rulemaking.[33] These added avenues for a potential private cause of action under ERISA only add to the challenges for a financial institution seeking to identify and implement an appropriate business path forward, on a product-by-product, service-by-service basis – either to accepting fiduciary advice provider status as expanded under the 2023 Proposal and utilizing PTE 2020-02, or determining that changes are necessary in order to appropriately avoid fiduciary advice provider status.

As described above throughout Section II of this letter, it is precisely for these reasons that we have concerns about the chilling effect on many asset managers and others due to the overbreadth of the Fiduciary Proposal, the lack of any reasonable and appropriate exceptions, and the prospect of being shoehorned into compliance with PTE 2020-02. Thus, the potential for a service provider's curtailment of investment-related information, insights, products and services that have for decades been well-understood and accepted by retirement investors as being non-fiduciary in nature is a real, not imagined, concern.

For the detailed reasons described in Section II of this letter, we believe that revisions to the Fiduciary Proposal are critical so that asset managers – particularly with respect to retirement investors that are sophisticated institutional plans – can continue to support plans and their participants and beneficiaries just as they do today in a reasonable, appropriate, and mutually

[29] PTE 2020-02, 29 C.F.R. 2550, Section II.
[30] PTE 2020-02 Proposal, 29 C.F.R. 2550, Section II(a)(1).
[31] 29 U.S.C. Section 1132(a)(3).
[32] *Chamber of Commerce*, 885 F.3d at 384.
[33] *Id.*

understood non-fiduciary manner, in all of the contexts we have described. As an extension of our concerns, we strongly object to the Department's companion PTE 2020-02 Proposal, and endorse the numerous detailed comments filed by the ICI, SIFMA, SPARK and ABA regarding the PTE 2020-02 Proposal, and their request that the Department not proceed with it.

IV. PTE 84-24 Proposal

In the 84-24 Proposal, the Department requested public comment on the extent to which parties continue to rely on certain long-available relief under Section III(f) of PTE 84-24 for mutual funds and their principal underwriters, in connection with the purchase of mutual fund shares with plan assets when such principal underwriter acts as the sponsor of the "Pre-approved Plan" document utilized by such plan, or provides for nondiscretionary trustee services to the plan.[34]

Our understanding is that there are parties that currently rely on Section III(f) of PTE 84-24, and that these parties would expect the Department to continue to make this relief available without change in any finalized proposal to PTE 84-24.

V. The Department's Regulatory Impact Analysis

As a required element of the 2023 Proposal, the Department set forth its Regulatory Impact Analysis ("RIA"), which describes in detail the regulatory basis for the Department's proposed changes; a cost estimate for all impacted financial institutions to comply with and implement the proposed changes; and the results of the Department's cost-benefit analysis.[35]

We specifically support the comments regarding the RIA that have been provided by the ICI and SIFMA in their respective comment letters to the Department. The ICI and SIFMA both provide numerous important comments on the substantial deficiencies and errors in the RIA, and the likely vulnerability of the RIA under applicable federal administrative law, if it were to be included in any final rulemaking. In addition to all of our substantive comments expressed throughout this letter, we respectfully urge the Department to consider withdrawal of the 2023 Proposal based on the ICI and SIFMA analysis of the RIA, as set forth in their respective comment letters.

VI. Final rule effective date

In the 2023 Proposal, the Department indicated that a final rule would be effective 60 days after its publication in the Federal Register. We join in the comments from the ICI, SIFMA, SPARK and ABA, that a 60-day period to comply with any final rule would be wholly inadequate and manifestly unworkable due to the breadth and complexity of the changes in the Fiduciary Proposal and PTE 2020-02 Proposal. Further, the effort involved in any initial compliance with PTE 2020-02 would be substantial; financial services providers that currently have no need to rely on PTE 2020-02 for some or all lines of business could be required to newly implement PTE 2020-02 if the Fiduciary Proposal is implemented in its current form. We therefore request an effective date of a minimum of 12 months from the date of publication of any final rule, followed

[34] PTE 84-24 Proposal at 76007; PTE 84-24, Section III(f).

[35] *See* Fiduciary Proposal, Supplementary Information, Section F, 75912-75963.

by at least an additional 12 months for initial compliance with the rule, and PTE 2020-02, as amended.

VII. Conclusion

Respectfully, but strongly, Invesco opposes the 2023 Proposal as a seriously overbroad effort by the Department to fundamentally reformulate ERISA's rules that define and regulate investment advice fiduciaries, when such a reformulation is patently not supported by evidence or the actual experience of entire categories of retirement investor. We believe that, if the 2023 Proposal were to be finalized in its current state, these retirement investors will likely experience a meaningful curtailment in the investment information, insights, products and services that they rely on today to help address their retirement security needs.

Accordingly, we request that the Department withdraw the 2023 Proposal, and instead work with retirement plan representatives, plan and participant advocacy groups, asset managers, and the range of other impacted financial services providers, to assist the Department in identifying regulatory changes that meaningfully serve investors, while addressing the concerns we have described. Alternatively, we request that the Department modify the 2023 Proposal as we have described in our letter, in order to make the 2023 Proposal minimally workable for impacted financial institutions to successfully comply with the rulemaking, and preserve retirement investors' access to investment information, products, services and support without the limitations about which we have cautioned.

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Invesco appreciates the opportunity to comment on the 2023 Proposal, and we are available to discuss our comments or provide any additional information or assistance that the Department would find useful; I may be reached via Invesco's main U.S. offices at (404) 892-0896 or (800) 241-5477.

Sincerely,

Invesco Ltd.

Melanie Ringold

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Melanie Ringold

Head of Legal, Americas