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

Re: Proposed Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice (RIN 1210-AB32); Proposed Best Interest Contract Exemption and Proposed Amendments to and Proposed Partial Revocation of PTEs 86-128 and 75-1 (ZRIN 1210-ZA25)

Ladies and Gentlemen:

Invesco Ltd. ("Invesco")<sup>1</sup> is pleased to have the opportunity to comment on the proposal published by the U.S. Department of Labor ("Department") on April 20, 2015 intended to redefine who is a "fiduciary" under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and Section 4975 of the Internal Revenue Code of 1986, as amended (the "Code") (the "Proposed Fiduciary Rule").<sup>2</sup> Invesco also wishes to use this opportunity to comment on the proposed prohibited transaction class exemption ("PTE") referred to as the Best Interest Contract Exemption ("BIC Exemption")<sup>3</sup> and the related proposed modifications to existing PTEs<sup>4</sup> (the "PTE Proposals"; and together with the "BIC Exemption," the "Proposed Exemptions"; and together with the Proposed Fiduciary Rule, the "Proposals"). The term "Retirement Investors" hereinafter is intended to refer to employee

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<sup>1</sup> Invesco is the parent company of various entities that are registered as investment advisers under the Investment Advisers Act of 1940, as amended (the "Advisers Act"). Certain of these entities are sponsors of and investment advisers to various investment companies registered as such under the Investment Company Act of 1940, as amended (the "1940 Act"). Invesco also is the parent of Invesco Trust Company, a Texas trust company, which sponsors collective trust funds. Invesco is also the parent to Invesco Capital Markets, Inc., the sponsor of a family of unit investment trusts.

<sup>2</sup> Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice ("Fiduciary Rule Notice"), 80 Fed. Reg. 21928 (April 20, 2015).

<sup>3</sup> Proposed Best Interest Contract Exemption ("BIC Exemption Notice"), 80 Fed. Reg. 21960 (April 20, 2015).

<sup>4</sup> Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 86-128 for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers; Proposed Amendment to and Proposed Partial Revocation of PTE 75-1, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefits Plans and Certain Broker-Dealers, Reporting Dealers and Banks ("PTE Notice") 80 Fed. Reg. 22021 (April 20, 2015).

benefit plans, plan fiduciaries, plan participants or beneficiaries, individual retirement accounts ("IRAs") and IRA owners collectively.

Invesco is a leading independent global investment manager with approximately \$803 billion in assets as of June 30, 2015 managed through a wide range of investment strategies and vehicles, including open-end mutual funds, closed-end funds, institutional money market funds, exchange-traded funds ("ETFs"), collective trust funds ("CTFs"), separately managed accounts, real estate investment trusts ("REITs") and unit investment trusts ("UITs"), all of which are vehicles through which Retirement Investors may invest.

Invesco supports the application of a principles-based "best interest" standard for advice and recommendations provided to Retirement Investors by advisers<sup>5</sup> appropriately classified as ERISA investment advice fiduciaries. Invesco likewise supports a best interest contract exemption that would achieve the Department's stated goal of preserving existing fee and compensation practices of advisers and financial intermediaries who become fiduciaries under the Proposed Fiduciary Rule while minimizing any harmful impact of potential conflicts of interest on the quality of advice provided to Retirement Investors. Invesco, however, believes that the Proposals in their current form are flawed in the following manner:

- The Proposed Fiduciary Rule casts too broad a net to apply fiduciary status to parties who should not have fiduciary status under ERISA;
- Aspects of both the Proposed Fiduciary Rule and the Exemptions (including the BIC Exemption) carry a level of complexity and ambiguity that make key elements (including the BIC Exemption) unworkable in practice;
- The Proposals inappropriately favor certain types of investment strategies, investment products and investment vehicles over others or create a structure that provides preferential access to a particular strategy, product or vehicle or groups of such strategies, products or vehicles; and
- The Proposals will result in a confused web of inconsistent regulatory requirements with respect to a Retirement Investor's relationship with her financial adviser.

Invesco believes such flaws will result in unintended consequences that are harmful to Retirement Investors. These unintended consequences include inappropriate limits on the types of investment strategies, investment products and investment vehicles available to Retirement Investors, as well as inappropriate limits on sales activity, investment education and, in certain cases, even the basic availability of advice to Retirement Investors. Invesco seeks with this comment letter (this "Comment Letter") to advocate what we believe is a more balanced and workable approach to the implementation of the Department's stated public policy goals.

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<sup>5</sup> Consistent with the Department's approach in the Proposed Fiduciary Rule, the term "adviser" shall not be limited to advisers registered under the Advisers Act but to representatives of any financial institution, such as banks, registered investment advisers, insurance companies or broker-dealers. Fiduciary Rule Notice, 80 Fed. Reg. 21928.

In assessing the likely impact of the Proposals and alternative solutions to address the public policy concerns which underlie the Proposals, Invesco is guided by the following principles:

- Regulation of complex matters such as the fiduciary relationship between advisers and Retirement Investors should balance appropriate implementation of public policy objectives and commercially workable solutions that can function well in the marketplace;
- Regulation should not favor certain types of investment strategies, investment products or investment vehicles over others or create a structure that provides preferential access to a particular strategy, product or vehicle or groups of such strategies, products or vehicles;
- Advisers provide valuable advice to Retirement Investors and should be compensated fairly for the value of that advice; different compensation structures available in the marketplace can serve the needs of different groups of investors; regulation should permit a variety of compensation structures within the overall context of a workable best interest fiduciary standard;
- Regulation should not increase the risk that Retirement Investors or any particular demographic group of Retirement Investors will lose access or have reduced access to investment advice;
- Regulation should not increase the risk that Retirement Investors or any demographic group of Retirement Investors will receive less investment education and general investment information; and
- Regulators should avoid increased regulatory confusion and dissonance that will result from different regulatory outcomes for identical conduct depending upon the taxable nature of an investor's account.

In addition to its own views expressed herein, as noted below, Invesco also wishes to endorse certain proposed changes to elements of the Proposals set forth in the comment letters being submitted to the Department by the Investment Company Institute (the "ICI") regarding the Definition of the Term Fiduciary; Conflict of Interest Rule—Retirement Investment Advice dated as of July 21, 2015 (the "ICI Fiduciary Rule Letter") and regarding the Proposed Best Interest Contract Exemption (the "ICI BIC Letter").

## **I. The Proposed Fiduciary Rule**

### **A. Overview.**

The Proposed Fiduciary Rule was designed to ensure that all advisers providing investment advice to Retirement Investors act as fiduciaries under ERISA and adhere to ERISA's corresponding prohibited transaction rules. The Department points to the growth of participant-directed investment arrangements and IRAs since the passage of ERISA in 1974, and the Department's desire to "better protect[s] plans, participants, beneficiaries, and IRA owners from conflicts of interest, imprudence, and disloyalty,"<sup>6</sup> as the primary drivers for this sweeping change from the current definition of fiduciary investment advice.

The Proposed Fiduciary Rule will expand what constitutes fiduciary investment advice and correspondingly expand the number and type of service providers that would be treated as fiduciaries under ERISA and the Code based upon their interactions with Retirement Investors. While Invesco understands the desire to subject a broader array of persons and courses of dealing to ERISA's fiduciary standards, Invesco fears that the breadth of the Proposed Fiduciary Rule will impose fiduciary status on persons who cannot reasonably expect to have such status and will derail ordinary marketing and servicing efforts which are helpful to Retirement Investors but which never before have been considered by the adviser or the Retirement Investor to be fiduciary in nature. We believe that it is important to ensure that the Proposals do not increase the risk that any Retirement Investor loses access to these non-fiduciary courses of dealing and therefore in our comments seek clarity regarding activities that are and are not fiduciary investment advice.

### **B. Narrowing the Definition of Fiduciary Investment Advice.**

The Proposed Fiduciary Rule identifies a person as an investment advice fiduciary if the person provides, for a fee or other direct or indirect compensation, investment or investment management *recommendations* or appraisals to a Retirement Investor or fiduciary, and either acknowledges the fiduciary nature of the advice, or acts pursuant to an agreement, arrangement, or understanding with the advice recipient that the advice is individualized to, or specifically directed to, the recipient for consideration in making investment or management decisions regarding plan assets.<sup>7</sup> The term "recommendation" in the Proposed Rule is defined as "a communication that, based on its content, context and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action."<sup>8</sup> We note that the five-factor test under existing regulation that would require a mutual agreement between the adviser and the Retirement Investor of a fiduciary relationship would no longer exist.

Invesco agrees with the Department that Retirement Investors should receive investment advice about products and services from advisers who are acting in the Retirement Investor's best interests. Invesco believes, however, that the Proposed Fiduciary Rule casts too broad a net to apply fiduciary status to parties who should not have fiduciary status under ERISA. In order to bring certainty and clarity to what are important interactions, Retirement Investors and their advisers should have a clear understanding of when they are party to a fiduciary relationship. The definition of investment advice under

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<sup>6</sup> Fiduciary Rule Notice, 80 Fed. Reg. 21928, 21929.

<sup>7</sup> Fiduciary Rule Notice, 80 Fed. Reg. 21928, 21956-7.

<sup>8</sup> Fiduciary Rule Notice, 80 Fed. Reg. 21928, 21960.

the Proposed Fiduciary Rule is so broad that it clouds this understanding. While we understand the Department's concerns with the existing five-factor test, we believe that an appropriately crafted investment advice fiduciary rule should preserve the requirement that there be a mutual agreement between the adviser and the Retirement Investor that a fiduciary relationship exists. Invesco also believes that the Department, advisers and Retirement Investors would be well served if the Department further honed its definition of fiduciary investment advice so as to crystalize the types of interactions it believes should have fiduciary status. Without such clarification, the Proposed Fiduciary Rule seems to sweep in ordinary marketing or even client servicing efforts that should not be regarded as fiduciary in nature. While Invesco asks the Department to consider these general principles in recrafting the Proposed Fiduciary Rule, Invesco also proposes the following specific adjustments:

- Invesco can conceive of multiple forms of communication, much of which is mass produced, that it or its distribution partners share with Retirement Investors, such as a mutual fund or ETF fact sheet or general marketing material sent by hard copy or electronically to email addresses on file for Retirement Investors based upon any number of demographic screens. Marketing departments routinely direct materials to audiences based upon specific demographic information; however, without a personal interaction with the Retirement Investor to individualize the communication, Invesco is hard pressed to understand how those marketing efforts could be considered an appropriate foundation for a fiduciary relationship. Accordingly, Invesco urges the Department to narrow the definition of fiduciary investment advice so that it applies when a recommendation is simply "individualized to" the recipient as opposed to "specifically directed" **or** "individualized to" the advice recipient.
- We also respectfully request that the Department clarify that a product sponsor is not acting in a fiduciary capacity where the context makes it clear that the recommendation is limited to the party's own products and services.<sup>9</sup> For example, we assume that the Department did not contemplate responses to requests for proposals ("RFP") as fiduciary investment advice. While RFP responses are typically "specifically directed" and "individualized" to the advice recipient, they are also clear sales pitches to which fiduciary responsibility should not attach.
- Invesco asks the Department also to consider the so-called "daisy chain" of liability that seems to arise under the Proposed Fiduciary Rule when general marketing materials produced by product sponsors, such as Invesco, are distributed to Retirement Investors through such sponsor's network of distribution partners. As currently drafted, a product sponsor could be deemed a fiduciary to a Retirement Investor with whom the product sponsor has no direct relationship or contact if its marketing materials are placed in the hands of a fiduciary to such Retirement Plan notwithstanding that the product sponsor does not know the identity or specific investment needs of the Retirement Investor. Tightening this definition to require the individualized contact seems necessary in

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<sup>9</sup> The Department's longstanding position has been that marketing one's own products or services is not a fiduciary activity. See, e.g., 29 CFR § 2550.408b-2(f), example (1) (an investment adviser that markets its own services is not considered to be using its fiduciary authority, control, or responsibility to cause the plan to select and pay for such services).

creating a balanced approach to defining fiduciary investment advice.

- The definition of fiduciary investment advice under the Proposed Fiduciary Rule would also seem to capture the types of client servicing efforts provided by mutual fund call centers. Call centers provide a host of services to Retirement Investors and through such discussions, may actually serve to promote the preservation of retirement assets. Invesco, like many similarly situated mutual fund sponsors, maintains a call center in its transfer agency. The representatives in the call center provide critical information to investors upon request, including information about how to complete administrative forms that allow the Retirement Investor or beneficiary to take a distribution, create an IRA, change a beneficiary, process a loan or establish a domestic relations order. These call center employees also assist Retirement Investors with questions about tax regulations and topics like required minimum distributions, eligibility for ERISA Solo 401(k) plan loans and loan processing, rollover procedures when a Retirement Investor has decided to leave an ERISA plan and tax code provisions concerning re-characterizations of contributions to small ERISA plans. The transfer agency staff is trained not to provide investment, legal, tax or accounting advice to callers. Invesco does not believe that the servicing described above is fiduciary investment advice or that such services are clouded by the conflicts that the Proposed Fiduciary Rule are intended to avoid. Accordingly, Invesco requests that the Department specifically exclude servicing provided by transfer agency call centers from the Proposed Fiduciary Rule.<sup>10</sup>
- Invesco, like many mutual fund sponsors, serves as the broker-dealer of record to a number of accounts previously serviced by a broker-dealer that has ended its relationship with the account. In these cases, Invesco will provide ongoing services to the account and will collect ongoing Rule 12b-1 fees in consideration for the provision of these services. Invesco did not solicit this business and does not look to broaden such relationships. Invesco does, however, continue to answer day-to-day inquiries made by this "direct" retail shareholder base, many of whom are Retirement Investors. Invesco has made the decision over the years to retain these accounts in order that these typically small investors (often Retirement Investors) can maintain their accounts, as well as the ongoing servicing that Invesco delivers. Invesco requests that services to these accounts be excluded from the Proposed Fiduciary Rule. If the Department does not specifically exclude the services provided by mutual fund sponsors to these accounts from the definition of fiduciary investment advice, a mutual fund sponsor may have no choice but to no longer service these accounts so as not to subject the fees it earns to the requirements of the BIC Exemption or to the web of prohibited transaction rules.

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<sup>10</sup> In connection with this request, Invesco acknowledges that any such exclusion should be subject to an obligation that the transfer agency call center service providers not provide investment, legal, tax or accounting advice. Absent an outright exclusion, Invesco requests clarity that the activities described above would not be deemed fiduciary investment advice so that transfer agencies can continue providing these helpful services without unnecessary concern that they will somehow trip into a fiduciary relationship.

### C. Carve-Outs.

The Department has rightfully crafted a number of carve-outs “for communications that the Department believes Congress did not intend to cover as fiduciary ‘investment advice’ and that parties would not ordinarily view as communications characterized by a relationship of trust or impartiality.”<sup>11</sup> Invesco generally supports the Department in the character of these carve-outs; however, Invesco believes that a number of the carve-outs are too unnecessarily complex to be workable, or in the case of the Investment Education Carve-Out, too watered down to be beneficial. Invesco supports the more robust solutions with respect to the carve-outs set forth in the ICI Fiduciary Rule Letter. We also wish to highlight our specific concerns with the four carve-outs below.

**1. The Counterparty Carve-Out.** The Counterparty Carve-Out is intended to permit advisers to give incidental advice to ERISA plans deemed sophisticated enough to deal with an adviser at arms-length and differentiate between sales efforts and investment advice. The Counterparty Carve-Out matters particularly to advisers in their sales and servicing efforts, but is too unnecessarily complex to apply as written. We wish to focus on two areas of concern with the Counterparty Carve-out.

- The Counterparty Carve-Out should clarify that it applies to the sale of both investment vehicles and investment management services. This clarification particularly matters in the institutional asset management space where the investment advice given may be to hire a particular manager rather than to invest in a particular vehicle.
- We believe the Department can simplify its approach to ensure that a Retirement Investor is sufficiently sophisticated before an adviser can rely upon the Counterparty Carve-Out. The Counterparty Carve-Out uses two alternative conditions, each designed to ensure a sufficient level of sophistication. The first, that an ERISA plan has 100 or more participants, is an inadequate proxy for sophistication. The second, that an ERISA plan’s assets are managed by an independent plan fiduciary that has at least \$100 million in employee benefit plan assets under management, is unduly restrictive, requiring a greater threshold of assets under management than the existing QPAM exemption.<sup>12</sup> Moreover, to rely upon the Counterparty Carve-Out, an adviser must obtain a number of representations tied to its due diligence efforts in proving that the ERISA plan meets the required levels of sophistication. Invesco recommends that the Department simplify the Counterparty Carve-Out by indicating that all ERISA plans and any Retirement Investor represented by a QPAM meet the carve-out’s conditions concerning financial expertise. While the Department has expressed concerns that smaller participant directed plans are more like retail investors<sup>13</sup> and therefore require added protections, the plan sponsors of smaller plans are subject to the same fiduciary standards as sponsors of large plans and we simply are not convinced that the plan sponsor of a smaller plan would lack

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<sup>11</sup> Fiduciary Rule Notice, 80 Fed. Reg. 21928, 21941.

<sup>12</sup> Note that PTE 84-14 only requires that a registered investment adviser have \$85 million in assets under management in order to be a qualified professional asset manager.

<sup>13</sup> Fiduciary Rule Notice, 80 Fed. Reg. 21928, 21942.

the sophistication to distinguish between a sales effort and investment advice. We fear that without this change, smaller participant directed plans will lose access to advice and servicing.

- 2. The Investment Education Carve-Out.** The Investment Education Carve-Out is intended to permit advisers to provide the following types of materials to Retirement Investors: plan information, general or conceptual financial or investment information, asset allocation models and interactive investment materials. Today, investment education is understood to be outside the definition of fiduciary investment advice and in 1996, the Department provided guidance in Interpretive Bulletin 96-1<sup>14</sup> to clarify that providers of asset allocation models and interactive investment materials that identify specific investment products do not become investment advice fiduciaries so long as the materials are accompanied by a statement that alternative investment options may be available. The Department expresses concern in the Fiduciary Rule Notice that current industry practices create a risk that these models will “effectively steer recipients to particular investments, but without adequate protections against potential abuse.”<sup>15</sup> We ask that the Department better explain its concern but until then are troubled that this new limitation imposed by the Investment Education Carve-Out will mandate replacing what have been truly illustrative educational pieces with those that will be far less useful to advisers and Retirement Investors.
- 3. The Financial Reports and Valuation Carve-Out.** The Financial Reports and Valuation Carve-Out is intended to permit persons to provide statements of value to Retirement Investors in order to comply with regulatory reporting requirements. The Financial Reports and Valuation Carve-Out, however, is unnecessarily constrained in that, unless given to an employee stock ownership plan or to a pooled investment vehicle, statements of value are only carved-out from the definition of fiduciary investment advice if given “solely for purposes of compliance with the reporting and disclosure provisions”<sup>16</sup> under Federal or state law, rule or regulation. We are unaware of any policy rationale that should prevent a product sponsor from providing information about the valuation of a pooled vehicle to a Retirement Investor upon request or in connection with a regularly provided statement, even if such statement is not required as a matter of law. Additionally, and of specific importance to Invesco in supporting its CTF clients, Invesco also requests that the Department remove from the Financial Report and Valuation Carve-Out the condition that a CTF maintain more than one participating plan to qualify for the Financial Report and Valuation Carve-Out. In Invesco’s experience, there may be significant periods of time, in particular immediately following the launch of a CTF, where the trust has only one participating plan investor. Likewise, if an investing plan in a CTF redeems its assets, such trust may continue for a lengthy period of time with only one remaining plan investor. In both situations, Invesco employees and fund custodians will be providing valuation services to the single plan CTF. It is not in furtherance of the intent of the Proposed Fiduciary Rule to treat those Invesco employees as investment advice fiduciaries simply because the CTF has not as

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<sup>14</sup> Interpretive Bulletin Relating to Participant Investment Education, 29 C.F.R. 2509.96-1 (June 11, 1996).

<sup>15</sup> Fiduciary Rule Notice, 80 Fed. Reg. 21928, 21945.

<sup>16</sup> Fiduciary Rule Notice, 80 Fed. Reg. 21928, 21958.

yet managed to attract other plans as investors or has had plans redeem their investment.

- 4. The Execution of Securities Transactions Carve-Out.** The Execution of Securities Transactions Carve-Out is intended to expand upon existing Department guidance that broker-dealers and banks can avoid being fiduciaries to Retirement Investors solely in their trade execution capacity. Invesco believes the Execution of Securities Transactions Carve-Out should be expanded to include securities transactions processed by mutual fund transfer agents. Mutual fund transfer agencies process transactions as requested by fund shareholders and the servicing agents supporting them. The transactions processed by a mutual fund transfer agent will not include the instructions required in §2510.3-21(d)(1)(ii)<sup>17</sup> but are otherwise in line with the intent of this carve-out (as the transactions are not solicited and will be specific as to the number of fund shares or their dollar value).

## **II. The BIC Exemption**

### **A. Overview.**

The BIC Exemption was developed to promote the provision of investment advice that is in the best interest of retail Retirement Investors, such as plan participants and beneficiaries, IRA owners, and plan sponsors of small non-participant directed plans under ERISA ("BIC Investors") while allowing investment advice fiduciaries to such BIC Investors to receive payments from third parties that would otherwise violate the prohibited transaction provisions of ERISA. Without a BIC Exemption, the impact of the Proposed Fiduciary Rule would be that advisers could no longer accept the types of fees and compensation that are generally accepted in the retail market, such as brokerage or insurance commissions, 12b-1 fees and revenue sharing payments. Invesco applauds the Department in recognizing the long-standing value of these "beneficial business models."<sup>18</sup>

In providing comments on the BIC Exemption, Invesco will begin with its response to the Department's specific questions about the virtue of a high quality/low fee exception to the BIC Exemption and to the Department's limitation of the applicability of the BIC Exemption to covered "Assets" as defined in the BIC Exemption. Invesco strongly believes that regulation should not favor certain types of investment strategies, investment products or investment vehicles and that any artificial constraint to the contrary will actually hamper an adviser in fulfilling her fiduciary obligations to serve the best interests of her clients. Invesco will then turn to the complexities of the BIC Exemption itself and propose certain refinements that we believe will be necessary in practical terms for advisers to rely upon the exemption. We have significant concerns that, as drafted, the BIC Exemption is too complex and advisers may conclude that they are better off abandoning their BIC Investor clients rather than risk running afoul of ERISA prohibited transaction rules.

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<sup>17</sup> Fiduciary Rule Notice, 80 Fed. Reg. 21928, 21959.

<sup>18</sup> In proposing the BIC Exemption, the Department stated "[r]ather than create a set of highly prescriptive transaction-specific exemptions, which has generally been the regulatory approach to date, the proposed exemption would flexibly accommodate a wide range of current business practices, while minimizing the harmful impact of conflicts of interest on the quality of advice. The Department has sought to preserve beneficial business models by taking a standards-based approach that will broadly permit firms to continue to rely on common fee practices, as long as they are willing to adhere to basic standards aimed at ensuring that their advice is in the best interest of their customers." BIC Exemption Notice, 80 Fed. Reg. 21960, 21961.

**B. A high quality/low fee exception to the requirements of the BIC Exemption would constrain investment advice fiduciaries from acting in the best interest of their clients.**

The Department requested comment, as part of the BIC Exemption Notice, on a possible streamlined prohibited transaction exemption that would include fewer conditions than the BIC Exemption if the adviser's investment advice relates to high quality, low fee investments. Invesco believes the Department should not tilt the playing field toward or away from any particular type of retirement investment. Invesco believes that Retirement Investors are best served when they and their advisers are able to assemble a well-constructed investment portfolio that is designed to meet the individual investment objectives, risk tolerances and time horizons of those Retirement Investors. In order to ensure that advisers and Retirement Investors are best positioned to be able to accomplish this goal, a full array of investment strategies, investment products and investment vehicles must be made available. We believe it is contrary to the interest of Retirement Investors and bad public policy to either limit the investment tools available to accomplish this task or establish a structure which creates incentives for advisers to avoid certain types of investments or products which may be best suited to help achieve a Retirement Investor's investment objective, manage risk, mitigate the impact of market volatility over investment cycles and generally help achieve their desired outcome.

The cost of an investment is one factor among many which an investment advice fiduciary must consider in selecting investments that will best help achieve a Retirement Investor's goals. Cost, however, should not be the dispositive factor. We believe that investment advice fiduciaries, operating under a best interest standard, must be permitted to assemble an investment portfolio which they believe will best achieve a Retirement Investor's investment objective, within her risk tolerance and time horizon, without the imposition of artificial constraints on the exercise of their investment judgment, including constraints focused solely upon costs. Invesco believes that any structure that is created by regulation which would cause an investment advice fiduciary to disfavor certain investments solely upon the basis of their cost is imprudent and not consistent with the best interest of Retirement Investors.

To the extent that the Department is considering any high-quality low-fee streamlined exemption, it must provide a detailed rationale for the exemption, an example of the economic impacts of the exemption and an explanation of how the exemption would function. These elements are necessary when the Department engages in proposing a rule under the Administrative Procedure Act. The Department has not done so.

**C. Investment Advice Fiduciaries are better situated than the Department to select investment vehicles that are in the “best interest” of BIC Investors.**

The Department has limited the types of investments for which an adviser may be compensated when relying on the BIC Exemption to the following: bank deposits, CDs, shares or interests in registered investment companies, bank collective funds, insurance company separate accounts, exchange-traded REITs, exchange-traded funds, publicly-offered corporate bonds, agency debt securities, U.S. Treasury securities, insurance and annuity contracts (both securities and non-securities), guaranteed investment contracts, and equity securities that are publicly traded in the United States.<sup>19</sup> The Department concluded that the list was sufficient to provide BIC Investors access to “the investments needed to build a basic diversified portfolio . . . while limiting the exemption to those investments that are relatively transparent and liquid [and] have a ready market price.”<sup>20</sup>

For the reasons stated in our response to the “high quality/low fee” inquiry, Invesco takes issue with a regulation that artificially constrains an investment advice fiduciary from having access to any tool that would be in the best interest of a BIC Investor. Invesco requests that the Department reconsider the limitations it has proposed in this regard and permit investment advice fiduciaries to rely on the BIC Exemption in connection with payments with respect to any securities or property. If however, the Department is unmoved by this view, Invesco respectfully requests that the Department at least correct a technical issue in the BIC Exemption that would result in UITs being excluded from coverage. Although UITs, as investment companies registered under the 1940 Act, would be included within the definition of “Asset” under the BIC Exemption, the BIC Exemption does not cover principal transactions. Fixed income UITs are generally sold in principal transactions and equity UITs are sold in “riskless principal” transactions. In a footnote in the preamble to the BIC Exemption, the Department indicates that it “does not view a riskless principal transaction involving mutual funds shares as an excluded principal transaction.”<sup>21</sup> However, it is not clear whether the Department includes all types of registered investment companies, including UITs, in that statement. UITs are generally portfolios that buy securities hold them for a specific period of time. They are valued daily and otherwise subject to the same regulatory framework as mutual funds. Invesco requests that the Department revise the BIC Exemption to explicitly provide relief for compensation generated by recommendations related to “Assets” that consist of registered investment companies, such as UITs, that distribute units only on a principal basis.

**D. Technical Concerns with the BIC Exemption.**

Invesco has significant concerns that the ongoing monitoring, reporting, disclosures and contractual obligations required by the BIC Exemption in their totality may discourage advisers from providing advice to BIC Investors at all. These include:

- Monitoring the number of participants in small defined benefit plans to ensure that the adviser can accept compensation under the BIC Exemption.

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<sup>19</sup> BIC Exemption Notice, 80 Fed. Reg. 21960, 21967.

<sup>20</sup> BIC Exemption Notice, 80 Fed. Reg. 21960, 21967.

<sup>21</sup> BIC Exemption Notice, 80 Fed. Reg. 21960, 21968.

- Securing a written contract with the BIC Investor prior to making a recommendation.
- Delivering point of sale disclosure with respect to the recommended asset that includes the total cost of investing in the asset for a one-, five- and ten-year period, expressed as a dollar amount and assuming an investment of the dollar amount recommended by the adviser and “reasonable assumptions” about investment performance.
- Delivering annual disclosures that would include a list identifying each asset purchased or sold; the total dollar amount of all fees and expenses paid by the BIC Investor directly or indirectly with respect to each asset purchased and the total dollar amount of all compensation received by the adviser directly or indirectly from any party as a result of each asset sold.
- Maintaining a website on an ongoing basis that shows the direct and indirect “material compensation” payable to the adviser, financial institution and affiliates for services provided in connection with each asset or class of assets that a BIC Investor may purchase, hold or sell through the adviser or financial institution, and that a BIC Investor has purchased, sold or held during the previous 365 days. This web disclosure must also include the source of the compensation and how the compensation varies within and among assets.

Invesco supports the Department’s effort to empower a BIC Investor to consider the costs she pays and the revenues her adviser receives in connection with the investments she makes. Invesco believes, however, that the Department accomplished these goals three years ago with its implementation of 29 C.F.R. § 2550.408b-2(c) (“Rule 408b-2”) and therefore would encourage the Department to incorporate these requirements into the BIC Exemption rather than create an entirely new disclosure regime for the BIC Exemption. The Department, together with the financial services industry, went through a robust and costly implementation process in connection with the development and finalization of Rule 408b-2. It would seem wasteful, confusing and unnecessary in reaching its desired outcome to require the same set of constituents to create a new system in support of the requirements of the BIC Exemption when the implementation of Rule 408b-2 was driven by this same intent. Moreover, Invesco does not believe that the litany of disclosures required will be helpful to BIC Investors given the volume and complexity of data embedded in these BIC Exemption disclosure requirements.

The Department has additionally created a number of standards of care in the BIC Exemption that are quite vague and therefore will be difficult to implement, or may produce unintended and inappropriate consequences.

- The definition of “best interest” under the BIC Exemption goes further than the statutory fiduciary standard of care set forth under Section 404 of ERISA, which requires a fiduciary to act “solely in the interest of the participants . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.”<sup>22</sup> The definition of best interest under the BIC Exemption, however, would require the

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<sup>22</sup> 29 U.S. Code § 1104(a)(1).

adviser to commit contractually that it was additionally acting without regard to its own financial or other interests. We appreciate the Department is concerned that advisers not be improperly driven by their own financial interests in making recommendations to Retirement Investors but grafting this standard into the exemption is unnecessary: existing law already requires fiduciaries to avoid making decisions on the basis of one's own financial or other interests.<sup>23</sup> We therefore ask the Department to consider the impact of giving undue prominence to this factor within a BIC Exemption contract, which could unfairly expose advisers to speculative claims that their compensation is unreasonable. Advisers provide valuable advice to Retirement Investors and should be compensated fairly for the value of that advice. Advisers should be able to receive and retain such compensation without undue risk of claims from the plaintiffs' bar or others based on an unnecessary regulatory expansion of well understood, long-standing legal principles.

- The total amount of compensation to be received by the adviser may not exceed "reasonable compensation in relation to the total services they provide" to the BIC Investor. It is not clear how the Department intends to define "reasonable compensation;"<sup>24</sup> though Invesco recommends that the Department leverage its existing regulations under ERISA Section 408 to guide its reasonable compensation requirement under the BIC Exemption.<sup>25</sup> Invesco also advocates that fees established pursuant to a comprehensive regulatory oversight regime, such as the regime that applies to open-end mutual funds, closed-end funds and ETFs, each of which has a robust process backed by the oversight of independent trustees, should be considered reasonable per se for purposes of the BIC Exemption.
- The adviser's firm must warrant that it is not using any sort of program or action that "would tend" to encourage individual advisers to make recommendations that are not in the best interest of a BIC Investor. While the Department shies from identifying any particular required compensation or employment structures, it suggests that "certainly, one way for an [adviser's firm] to comply is to adopt a 'level-fee' structure, in which compensation for [a]dvisers does not vary based on the particular investment product recommended. The Department believes that the specific implementation of this requirement is best determined by the [adviser's firm] in light of its particular circumstances and business models."<sup>26</sup> It is difficult to understand how an adviser's firm would prevail against a challenge to its compensation structure that is anything short of a level-fee structure. As Invesco believes this is inconsistent with the Department's stated objectives with respect to preserving existing compensation structures under the BIC Exemption, Invesco recommends that the Department identify in its final rule release other permitted payment structures so as to clarify that in fact, there are variable compensation practices that are acceptable. Invesco believes different

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<sup>23</sup> As the Department notes in the Proposed BIC Exemption "both ERISA section 404(a)(1)(A) and the trust-law duty of loyalty require fiduciaries to put the interests of trust beneficiaries first, without regard to the fiduciaries' own self-interest." BIC Exemption Notice, 80 Fed. Reg. 21960, 21970.

<sup>24</sup> BIC Exemption Notice, 80 Fed. Reg. 21960, 21984.

<sup>25</sup> In so doing, Invesco requests that the Department specifically identify what would qualify as a reasonable fee in connection with the sale of UITs, which do not afford advisers many of the sources of compensation allowed by mutual funds but are sold with an upfront load and a series of scheduled deferred sales charges.

<sup>26</sup> BIC Exemption Notice, 80 Fed. Reg. 21960, 21971.

compensation structures available in the marketplace can serve the needs of different groups of investors; regulation should permit a variety of compensation structures within the overall context of a workable best interest fiduciary standard.

Invesco also supports the more precise recommendations identified in the ICI BIC Letter relating to the BIC Exemption. We emphasize our concern that Retirement Investors could be forced to invest without the benefit of advice if the requirements of the BIC Exemption are not moderated in a way that is workable for advisers. Advisers provide valuable advice to Retirement Investors, including BIC Investors, and should be compensated fairly for the value of that advice. The BIC Exemption was created to preserve the permissibility of these different compensation structures but then seems to swallow that intent with a set of requirements that are unnecessarily onerous, broad, and ultimately unworkable. We urge the Department to work with service providers to create a more balanced and workable BIC Exemption before promulgating its final rule, as we fear too many advisers will avoid providing advice to BIC Investors at all rather than subject themselves to the risk of excise tax penalties and lawsuits for even an inadvertent breach of these significant obligations.

### **III. The Prohibited Transaction Proposals**

The PTE Proposals were crafted to further address the Department's concerns identified in the Proposed Fiduciary Rule and align the impartial conduct standards set forth in the BIC Exemption within certain PTEs. Invesco hereby requests that the Department consider Invesco's comments to the Proposed Fiduciary Rule and the BIC Exemption in finalizing the PTE Proposals.

Additionally, Invesco urges the Department to consider providing additional clarity regarding the applicability of Proposed Amendments to and Proposed Partial Revocation of PTEs 86-128 and 75-1 (the "Proposed PTE 86-128").<sup>27</sup> Under the "Mutual Fund Transactions Exemption" included in Proposed PTE 86-128, a fiduciary would be permitted, in certain instances, to act as principal in the sale of "mutual fund" (as defined in the PTE) shares to a Retirement Investor and receive a commission. In making this proposal, the Department noted that the described sales practice remains prevalent in the mutual fund industry and indicated that due to various factors relating to the nature of the transactions and mutual funds generally, a related PTE is appropriate. However, we believe the Department may not have contemplated that beyond mutual funds, many transactions in UITs meet the same objectives and criteria described and therefore merit coverage under Proposed PTE 86-128. As a general matter, UITs are sold at net asset value, often in the same manner and under the same circumstances that the Department intends Proposed PTE 86-128 to cover for mutual fund transactions. Although differences between UITs and mutual funds certainly exist, we believe that their differences are immaterial to the Department's stated analysis and primary concerns on this issue. As such, we believe that equal treatment is appropriate and that the Department should revise Proposed PTE 86-128 to clearly include UIT transactions.

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<sup>27</sup> PTE Notice, 80 Fed. Reg. 22021.

#### **IV. Regulatory Inconsistency**

On a broader public policy level, Invesco urges the Department to step back from this effort and consult with its financial services regulatory partners regarding the benefits of a market-wide fiduciary standard. While we understand the Department believes there are conflicts that taint the provision of investment advice to Retirement Investors, the layering of inconsistent regulatory regimes within the same account will unnecessarily complicate the provision of advice or otherwise disrupt the provision of advice. Invesco urges the Department to consider that many individuals currently utilizing advisers hold both taxable and non-taxable accounts with the same adviser. While the Proposals will not apply to the provision of advice to the taxable accounts, an investment advice fiduciary may have no choice but to act in compliance with the Department's regime in its relationship with the investor overall and this could encourage advisers to abandon their efforts to service the non-taxable accounts so as to avoid subjecting the entire relationship to the requirements of the Proposals.

#### **V. Implementation Timeframe**

The Proposals state that the final rule will be effective 60 days after publication in the Federal Register and the requirements of the final rule will become applicable eight months after publication of the final rule.<sup>28</sup> Invesco believes such a short implementation schedule will be inadequate in order to allow the financial services industry to adapt to the final rule (for example, to implement all of the documentation and systems revisions that the Proposals, and in particular the BIC Exemption, will require). Invesco therefore requests that the Department consider a longer implementation period, or, to the extent practicable, adopt a phased implementation schedule offering more time for complex operational details to be implemented.

#### **VI. Conclusion**

As stated above, Invesco supports the application of a principles-based "best interest" standard for advice and recommendations provided to Retirement Investors by advisers appropriately classified as ERISA investment advice fiduciaries. Invesco likewise supports a best interest contract exemption that would achieve the Department's stated goal of preserving existing fee and compensation practices of advisers and the financial intermediaries who have such fiduciary status while minimizing any harmful impact of potential conflicts of interest on the quality of advice provided to Retirement Investors. Invesco, however, believes that the Proposals in their current form are flawed in the manner described above and that such flaws will result in unintended consequences that are harmful to Retirement Investors. Invesco seeks with this Comment Letter to advocate what we believe is a more balanced and workable approach to the implementation of the Department's stated public policy goals.

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<sup>28</sup>Fiduciary Rule Notice, 80 Fed. Reg. 21950.

Invesco thanks the Department for its consideration and hopes that our comments assist the Department in assessing the impact of the Proposals on Retirement Investors. In further support of the Department's stated goals, Invesco encourages the Department to continue working with industry leaders and its regulatory peers in reaching a more balanced approach in its final rule.

Sincerely,

Invesco Ltd.

A handwritten signature in black ink, appearing to read "Kevin M. Carome". The signature is fluid and cursive, with the first name "Kevin" and last name "Carome" clearly distinguishable.

By: \_\_\_\_\_

Kevin M. Carome

Senior Managing Director and General Counsel