VIA ELECTRONIC SUBMISSION

May 4, 2022

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Comments to FINRA Regulatory Notice 22-08 (FINRA Reminds Members of Their Sales Practice Obligations for Complex Products and Options and Solicits Comment on Effective Practices and Rule Enhancements)

Dear Ms. Mitchell:

Invesco Ltd. ("**Invesco**") appreciates the opportunity to provide comments and feedback to FINRA in connection with FINRA Regulatory Notice 22-08 (the "**Notice**") and FINRA's solicitation of comments on effective practices and potential rule enhancements in connection with complex products and options. Invesco is a leading independent investment manager with approximately $1,555.9 billion in assets under management as of March 31, 2022. Invesco is a global company focused on investment management, and our services are provided to a wide range of clients throughout the world, including open-end mutual funds, closed-end funds, exchange-traded funds, unit investment trusts, collective trust funds, UCITS, real estate investment trusts and other pooled investment vehicles, as well as pensions, endowments, insurance companies and sovereign wealth funds. Invesco's indirect wholly-owned U.S. registered investment adviser subsidiaries, Invesco Advisers, Inc., Invesco Capital Management LLC and Invesco Investment Advisers, LLC, sponsor and advise mutual funds, closed-end funds, ETFs, unit investment trusts and REITs that are generally available for investment by a broad client base in the United States, including retail investors. Certain of these Invesco products, including interval funds, traditional closed-end funds, commodity futures funds, non-traded REITs, target date funds and smart beta funds, could constitute "complex products" according to the Notice and other previous FINRA pronouncements.

In the Notice, FINRA solicits comments and feedback on several questions that suggest it is considering imposing new regulatory requirements on broker-dealer member firms that recommend or provide access to "complex products" to their retail customers. As examples, FINRA asks whether (i) a retail customer's account (even if self-directed) should be subject to approval requirements before transacting in complex products, including by requiring a customer to receive and review educational materials about the common characteristics and risks of complex products and complete training and learning courses, "knowledge checks", attestations and other assessments to demonstrate knowledge and understanding of complex products and their associated risks and (ii) a retail customer initially approved for complex products should be continuously or periodically reassessed to ensure that approval remains appropriate. Implicit in these questions is that some retail customers would not satisfy relevant eligibility requirements and member firms holding their accounts would need to deny them the ability to transact in

complex products. Additionally, FINRA asks whether member firms should be required to implement additional supervisory practices with respect to retail customers and complex products, including heightened supervision for recommendations of complex products, implementation of appropriate policies and procedures to ensure that retail customers (including self-directed accounts) possess requisite understanding of complex products and their risks before investing and filing of complex product promotional material before first use with the Advertising Regulation Department of FINRA for review.

Invesco strongly opposes FINRA imposing additional regulations impacting the ability of retail investors to buy and sell complex products through member firms, particularly with respect to investment funds whose shares are otherwise available for sale publicly under U.S. federal securities and commodities laws and that are already comprehensively regulated under these laws. For the reasons discussed herein, we believe that such regulations would thwart product innovation, decrease competition in the market for investment products and impede or deprive retail investors of access to investment products that provide substantial diversification and other benefits. Additionally, we believe that neither a factual basis nor legal authority exists for FINRA to impose such regulations, and we urge FINRA not to do so.[1]

I. The Description of "Complex Product" is Ambiguous and its Application Will Thwart Investment Product Innovation, Reduce Competition and Harm Retail Investors

In the Notice, FINRA explains that, because new investment products and strategies are constantly introduced, it prefers to construe the term "complex product" flexibly to avoid a static definition that may not address investment product evolution. Nonetheless, FINRA describes a "complex product" in the Notice as:

> "*[A] product with features that may make it difficult for a retail investor to understand the essential characteristics of the product and its risks (including the payout structure and how the product may perform in different market and economic conditions). A product that combines features of multiple products and strategies also may be complex (e.g., leveraged or inverse exchange-traded products (ETPs)—collectively, "geared" ETPs—that can employ futures contracts and other derivatives or may engage in short sales; structured products with embedded optionality; interval funds; non-traded REITs).*"

FINRA similarly declined to statically define "complex product" in 2003 in FINRA Regulatory Notice 12-03 (Complex Products, Heightened Supervision of Complex Products) ("**Notice 12-03**" and, together with the Notice, the "**Notices**"), but described a "complex product" as:

> "*[A]ny product with multiple features that affect its investment returns differently under various scenarios…particularly… if it would be unreasonable to expect an average retail*

[1] Invesco's comments and feedback herein focus only on the Notice's questions regarding whether FINRA should impose additional regulatory requirements on member firms with respect to complex products. We do not offer comments on FINRA's regulation of options.

investor to discern the existence of these features and to understand the basic manner in which these features interact to produce an investment return."

These descriptions of complex products are ambiguous and subjective. The categorization is premised on references to unenumerated "features" (which might include a product's payout structure or its range of returns across different market or economic conditions), the existence, combination or interaction of which are either difficult for an "average" retail investor to understand or challenge that investor's ability to comprehend the product's essential characteristics and risks. Firms are left to consider whether all but the most conventional equity and fixed-income investment funds are potentially complex. It is unsurprising that, applying these amorphous descriptions, FINRA's staff has identified an extraordinarily expansive list of potentially complex products over the past decade: interval funds, tender-offer funds, traditional closed-end funds, global real estate funds, opportunistic, tactical and multi-strategy funds, cryptocurrency futures funds, defined outcome exchange-traded funds, commodity futures funds, geared and inverse exchange-traded funds, currency funds, bank loan/leveraged loan funds, high yield bond funds, long/short and market neutral funds, funds investing in start-up companies or unlisted securities, absolute return funds, funds investing in distressed debt, non-traded REITs, business development companies, target date funds, smart beta and custom index funds, socially responsible or ESG funds, emerging market funds, unconstrained bond funds and insurance-linked securities.[2]

We believe that the ambiguity and subjectivity of these descriptions, when combined with the fact that FINRA itself has already identified an expansive group of purportedly complex investment products through their application, will cause member firms to similarly adopt an expansive approach to the identification of complex products if confronted with new FINRA regulations mandating implementation of additional due diligence and supervisory requirements in connection with retail customer access to these products (including self-directed customers). In response to new requirements to produce and distribute educational materials, to administer training and learning courses, "knowledge checks", attestations and other assessments at customer account inception and periodically thereafter and to file promotional material with FINRA prior to first use, we expect that member firms will substantially curtail the number and variety of investment products distributed on their retail customer platforms, particularly novel or unconventional products. This is the likely outcome not only because member firms will take conservative approaches to avoid potential regulatory violations, but also because the compliance burden and due diligence associated with any new requirements will incentivize member firms to

[2] See the Notice; FINRA Investor Alert: Closed-End Fund Distributions: Where is the Money Coming From? (October 28, 2013); FINRA Investor Alert: Alternative Funds Are Not Your Typical Mutual Funds (June 11, 2013); FINRA News Release: FINRA Warns Investors About Chasing Returns in Structured Products, High-Yield Bonds and Floating-Rate Loan Funds (July 25, 2011); FINRA Investor Insights: Target-Date Funds (available at https://www.finra.org/investors/insights/save-date-target-date-funds-explained); FINRA Investor Insights: Custom-Built Index Funds-Are You the Right Customer? (available at https://www.finra.org/investors/insights/custom-built-index-funds); FINRA Investor Alert: Smart Beta-What You Need to Know (September 23, 2015); FINRA: Regulatory and Examination Priorities Letter (January 5, 2016); Axelrod, Susan F., Remarks From the SIFMA Complex Products Forum (October 29, 2014) (available at: https://www.finra.org/media-center/speeches-testimony/remarks-sifma-complex-products-forum-1); FINRA Investor Insights: Insurance-Linked Securities (available at: https://www.finra.org/investors/insights/insurance-linked-securities).

simply direct retail customers away from such products all together. Further, we expect that member firms will also limit the number of investment product sponsors with whom they do business. For example, a broker-dealer may scale back the number of investment managers whose funds its distributes, preferring to work with a smaller number of fund sponsors who commit to assisting it with the production and administration of educational materials, training courses and promotional communications.

Such curtailment would have harmful effects on the market for financial products generally and on retail investors specifically. First, product sponsors, including investment managers, may be less inclined and incentivized to invest in developing new products, especially novel or unconventional ones, because of greater uncertainty regarding the willingness of FINRA member firms to partner with them to distribute these products. While the Notice and Notice 12-03 focus on the purported complexity of certain new investment products and the risk that retail investors can misunderstand their features, it is unquestionable that the development of these products has contributed positively to the investment landscape in the United States. For example, as compared to traditional long-only mutual funds, the funds identified above provide investors with the opportunity for diversification, income generation, reduced volatility, hedging, principal protection and exposure to asset classes traditionally uncorrelated with public equity and fixed-income markets.

In addition to thwarting product innovation, we believe such curtailment could decrease competition for investment products in the United States. The multiplicity of product sponsors and proliferation of investment products and strategies competing for client subscriptions during the past 25 years has dramatically reduced the cost for retail investors to invest[3]. Additionally, the ability of product sponsors, including investment managers, to readily access broker-dealer distribution channels and platforms has bolstered competition, driving down investor costs for both non-traditional funds and traditional active and passive equity and fixed-income funds. Regulation that causes FINRA member firms to be more selective with the product sponsors with whom they do business will decrease competition for all investment products, potentially slowing the downward trend in expense ratios observed over the last quarter century.

Finally, we believe that such curtailment will operate to generally deprive investors of access to investment products that provide the diversification, income, loss protection and other benefits identified above. While an access divide between investors already exists, with institutional and high net worth investors able to gain exposure to unique investment opportunities and strategies through private funds and other private placement vehicles in which most retail investors cannot invest, the measures that FINRA contemplates in the Notice will expand that divide in an unprecedented manner, locking out traditional retail investors from investment products essential to a diverse portfolio. It is also important to recognize that, unlike institutional investors who ordinarily have the assets, resources and capability to invest in non-traditional assets and markets and/or pursue non-traditional investment strategies directly (including by retaining an investment manager), most retail customers are entirely reliant on publicly offered investment funds and other investment products to access these assets, markets and strategies. Consequently,

[3] See Investment Company Institute Research Perspective: Trends in the Expenses and Fees of Funds, 2021 (March 2022) (available at: https://www.ici.org/system/files/2022-03/per28-02_2.pdf).

regulations that inhibit retail customer access to investment products providing diverse exposures and investment strategies will likely drive these investors to traditional investment products, such as actively managed, long-only mutual funds and market capitalization weighted ("bulk beta") indexing strategies. In the current investment environment, punctuated by persistently low interest rates and heightened equity market volatility, we think it is incautious to impede retail investor access to a full spectrum of investment products.

II. The Existing Framework of FINRA Member Firms' Best Interest and Suitability Responsibilities, Coupled with the Requirements of and Protections Afforded By Existing Federal Laws, Sufficiently Address the Concerns FINRA Raises in the Notice

Invesco considers investor understanding of the essential characteristics and risks of investment products to be of critical importance. Consequently, we support FINRA exploring, in partnership with the industry, various methods of ensuring that retail investors make informed investment decisions. However, although we believe FINRA's objective is sound, for the reasons discussed herein we believe that the basis and reasoning for the contemplated regulations are not. Beyond our expectation that the prescriptive measures described in the Notice will have the highly detrimental, unintended consequences described in Section I above, we further believe there is no clear failing in the existing regulatory regime that needs addressing. To the contrary, the combination of existing member firm responsibilities and federal securities and commodities laws already operates to adequately minimize investor confusion while preserving fundamental investor choice.

As an investment manager offering an expansive array of investment products in the United States, Invesco has deep relationships with an extensive network of FINRA member firms. In this capacity, we have consistently observed that FINRA member firms are best positioned to determine the needs of their customers, both from an investment standpoint and from the perspective of knowledge and understanding of the vast spectrum of investment products. Further, member firms' best interest obligations to their retail customers, in combination with FINRA's existing suitability requirements, has fostered a strong compliance-driven framework, with firms devoting significant effort and resources to ensure their retail customers' needs are met. As noted above, we believe the additional regulations contemplated by FINRA will have a substantial chilling effect on firms precisely because they take their suitability and best interest responsibilities so seriously. Exhaustive due diligence of new products, including an extensive review of complexity and risk, is common throughout the industry, with member firms ultimately placing investment products on their platforms or recommending them to their retail customers only after a detailed analysis of the products and their appropriateness for customers.

Moreover, ongoing education of investors is a staple of the business. Invesco works closely with FINRA member firms to provide materials and training to assist them in ensuring their customers appreciate the features and characteristics of available investment opportunities. In each case, the approach is bespoke to the customer base, as firms are uniquely equipped to assess the best way to meet their customers' needs. As noted herein, taking a prescriptive, draconian approach to seeking informed investment, while basing the requirements on an ambiguous and subjective description of "complex product", will undermine and thwart the strength of the current framework.

Additionally, we strongly believe that disclosure-based regulatory regime that has operated effectively for more than 80 years should not be upended in favor of limiting access to investment products. We note that nearly all of the purportedly complex products cited in the Notices are funds or other issuers whose securities offerings have been registered under the Securities Act of 1933, as amended (the "**Securities Act**"). Most of the funds cited in the Notices are investment companies registered under the Investment Company Act of 1940, as amended (the "**Investment Company Act**") and, as such, are subject to comprehensive regulation and reporting requirements imposed by the Investment Company Act and Securities and Exchange Commission ("**SEC**") rules thereunder. Other funds not registered under the Investment Company Act are generally subject to the periodic reporting requirements of the Securities Exchange Act of 1934, as amended (the "**Exchange Act**"). All of these funds are sponsored and operated by investment managers registered under the Investment Advisers Act of 1940, as amended, and/or the Commodity Exchange Act of 1936, as amended (the "**Commodity Exchange Act**"), and subject to comprehensive regulation under these statutes and the rules of the SEC and Commodity Futures Trading Commission ("**CFTC**") thereunder. Exchange-traded funds must also satisfy extensive initial and ongoing requirements of the national securities exchanges listing their shares, which exchanges are themselves subject to SEC registration and regulation under the Exchange Act. Notably, none of these federal laws grants FINRA any authority to oversee or regulate the types of persons that are permitted to invest in these products.

Notwithstanding their purported complexity, these products are undoubtedly among the most extensively regulated, transparent and disclosed investment products available. As such, we believe that existing U.S. federal securities and commodities laws already operate to ensure that the objectives, strategies, features and risks of these products are clearly and comprehensively disclosed[4], that their issuers are subject to ongoing disclosure, reporting and transparency requirements[5] and that their sponsors and operators are robustly regulated. The comprehensive regulatory framework to which these investment products are already subject functions to protect investors and the public interest and ensure that adequate information is available to retail investors to make informed investment decisions and monitor and evaluate investment performance. Regulations imposed by FINRA on member firms requiring that additional educational materials about common characteristics and risks of complex products be periodically delivered to retail customers are unlikely to benefit these investors given the comprehensiveness of disclosures already available for these products, and risks confusing them. Instead, retail customers should be encouraged to review and evaluate product specific disclosures prepared by issuers and their sponsors pursuant to U.S. federal securities and commodities laws.

[4] See, e.g., Form N-1A and Form N-2 (applicable to open-end investment companies and closed-end investment companies, respectively, to register under the Investment Company Act and to offer shares under the Securities Act); Form S-1 and CFTC Rule 4.24 (applicable to publicly offered commodity pools).

[5] See, e.g., Form N-PORT and Form N-CSR (requiring comprehensive quarterly and semi-annual reporting by most registered investment companies); Forms 10-K and 10-Q and CFTC Rule 4.22 (requiring comprehensive monthly, quarterly and annual reporting by publicly offered commodity pools).

III. FINRA Lacks Legal Authority to Impose the Contemplated Regulatory Requirements With Respect to Purportedly Complex Products on Member Firms

Under Section 15A(b)(6) of the Exchange Act, a national securities association of broker-dealers such as FINRA is granted limited authority to promulgate rules applicable to its members. The association's rules must be designed to: (i) prevent fraudulent and manipulative acts and practices, (ii) promote just and equitable principles of trade, (iii) foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, (iv) remove impediments to and perfect the mechanism of a free and open market and a national market system and (v) in general, protect investors and the public interest. Importantly, the association's rules must also not be designed to permit unfair discrimination between customers or to regulate unrelated matters.

Promulgating new regulations that impose barriers to retail customer's ability to access certain products deemed "complex", such as "knowledge checks", attestations and other assessments, or that limit access to these products to only certain categories of customers, such as persons meeting a minimum net worth threshold, is at odds with promoting equitable principles of trade and removing impediments to and perfecting mechanisms of a free and open market. At the same time, FINRA neither alleges in the Notice that member firms have pervasively engaged in fraudulent or manipulative practices in connection recommendations or sales of purportedly complex products nor offers any evidence of widespread retail investor harm resulting from unfettered access to such products, which might justify additional regulation (even if it discriminately treats some investors) to prevent such practices and protect retail investors and the public interest.

Further, while FINRA has statutory authority under the Exchange Act to adopt rules that promote just and equitable principles of trade, which authority FINRA has used to regulate member firms recommendations to customers[6], the Exchange Act does not grant FINRA authority to establish eligibility criteria, requirements or conditions that (x) create categories of customers with whom member firms can transact certain types business or (y) impose "gatekeeper" impediments that limit or prevent retail customers from purchasing investment products they are otherwise entitled to acquire under U.S. federal securities and commodities laws. The requirements FINRA suggests it is considering to regulate retail customer access to purportedly complex products through member firms go far beyond the regulation of member firm "recommendations" and the promotion of just and equitable principles of trade, especially if applied to self-directed accounts, and in our view contravene the Section 15A(b)(6) statutory limitation that FINRA not seek to regulate matters outside of its jurisdiction.

In Question 6 of the Release. FINRA asks if existing product-specific requirements (such as account opening requirements, specific standard of care requirements when making recommendations, specific principal registration and supervision requirements, position limits and exercise limits and disclosure, confirmation and account statement requirements) should apply more generally to complex products. Such existing product-specific requirements are generally applicable to member firms under FINRA Rule 2360 in connection with customer accounts trading

[6] See FINRA Rules 2010 and 2111.

listed options. We believe these requirements applied by FINRA to options are unique and do not demonstrate FINRA's legal authority to regulate generally retail customer access to investment products. In 1978, the SEC provided Congress with its Special Study of the Options Markets[7]. The SEC produced the Special Study in response to the 1975 amendments to the Exchange Act, which directed the SEC to study and report to Congress on the nascent listed options market, in particular with respect to the ability of self-regulatory organizations, including the National Association of Securities Dealers, Inc. (FINRA's predecessor), to carry out regulatory responsibilities to assure listed options trading occurs in a manner and environment that is consistent with the maintenance of fair and orderly markets, the public interest and the protection of investors. The Special Study endorsed the self-regulatory organization regulatory framework currently applied to listed options, which Congress ultimately determined to accept. No similar historical authority exists for FINRA's regulation of complex products generally.

Additionally, since the enactment of the Securities Act following the Great Depression, U.S. federal securities laws have distinguished between public and private offerings of securities. An issuer that complies with the Securities Act by filing a registration statement, including a prospectus, with the SEC that meets the requirements of Sections 7 and 10 of the Securities Act and the rules of the SEC thereunder and that becomes effective is generally permitted to access U.S. capital markets fully and unconditionally by offering and selling its registered securities to any investor, including retail investors, regardless of a particular investor's knowledge, sophistication, status or wealth. In contrast, private securities offerings conducted pursuant to Section 4(a)(2) of the Securities Act or Regulation D thereunder, including private offerings by funds seeking to avoid registration under the Investment Company Act pursuant to Section 3(c)(7) thereof, generally require that investors satisfy wealth or knowledge qualifications[8] in recognition of the fact that private offerings have reduced investor protections and less disclosure and transparency[9]. Accordingly, the Securities Act imposes a disclosure based regime that conditions an issuer's broad access to U.S. capital markets on the provision of comprehensive information with respect to its offered securities, financial condition and risk factors, not a merit based regime that prohibits certain products from reaching retail investors. The SEC describes the purpose of the Securities Act as "requir[ing] that investors receive financial and other significant information concerning securities being offered for public sale" and that "companies offering securities for sale to the public must tell the truth about their business, the securities they are selling, and the risks involved in investing in those securities", and explains the Securities Act's policy objective as

[7] See House Committee on Interstate and Foreign Commerce, Report of the Special Study of the Options Markets to the Securities and Exchange Commission (Dec. 22, 1978) (96th Congress, 1st Session) (available at https://ufdc.ufl.edu/AA00023995/00001/images/2).

[8] See, e.g., Section 501(b) of Regulation D (defining "accredited investor"); Section 2(a)(51) of the Investment Company Act (defining "qualified purchaser"); Rule 3c-5 under the Investment Company Act (defining "knowledgeable employee").

[9] Issuers of securities in private offerings generally do not assume liability under Section 11 or Section 12 of the Securities Act. Additionally, while issuers in private offerings often prepare and provide prospective investors with offering materials (and may be required to provide certain information to non-accredited investors under Regulation D), the form and content of such disclosures will frequently differ as compared to disclosures required in a comparable registered offering.

"disclosure of important financial information through the registration of securities…[that] enables investors, not the government, to make informed judgments about whether to purchase a company's securities" [10]. Yet the regulatory requirements that FINRA considers imposing on member firms with respect to access to purportedly complex products would turn this disclosure based regime under the Securities Act on its head. Rather than rely on the comprehensive disclosures provided by issuers of purportedly complex products who satisfy the registration process under the Securities Act (as well as the ongoing transparency requirements under the Investment Company Act, Exchange Act and/or Commodity Exchange Act), FINRA seeks to interject its own regulatory requirements to determine which retail customers can and cannot access purportedly complex products. We believe these requirements would be inconsistent with the Securities Act, which provides (x) registered securities issuers with authority to sell those securities to (and raise capital from) all investors and (y) all investors with the freedom to purchase those securities if they so desire. By imposing these requirements on member firms, FINRA would encroach upon an area of U.S. federal securities law over which it has no authority and cause outcomes that frustrate the policy objectives of the Securities Act.

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We hope that our feedback and comments in this letter in response to the Notice are helpful to FINRA. We are available to discuss our comments or provide any additional information or assistance that FINRA might find useful.

Sincerely,

Invesco Ltd.

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[10] See Investor.gov, describing "The Role of the SEC" available at https://www.investor.gov/introduction-investing/investing-basics/role-sec; and Investor.gov, describing "The Laws that Govern the Securities Industry" available at https://www.investor.gov/introduction-investing/investing-basics/role-sec/laws-govern-securities-industry.