

January 17, 2024

Mr. Christopher Kirkpatrick
Secretary
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Comments to Proposed Amendments to CFTC Regulation 1.25 (RIN 3038-AF24)

Dear Mr. Kirkpatrick:

Invesco Capital Management LLC (“**Invesco**”) appreciates the opportunity to comment on the U.S. Commodity Futures Trading Commission’s (the “**Commission**” or “**CFTC**”) proposal (the “**Proposal**”) to amend Commission Regulation 1.25 (“**Regulation 1.25**”) governing the types of investments that futures commission merchants (“**FCMs**”) and derivatives clearing organizations (“**DCOs**”) are permitted to make with funds held for the benefit of customers trading futures, foreign futures, and cleared swap transactions (collectively, “**Customer Funds**”).¹ The Proposal: (1) expands the list of permitted investments of Customer Funds; (2) specifies market risk capital charges that an FCM would be required to take on the revised permitted investments in computing the firm’s adjusted net capital; and (3) amends certain aspects of the regulation that relate to reporting and making available to the CFTC information regarding the depositories of Customer Funds.²

Invesco, together with its affiliated investment advisers, is a leading independent global investment manager with approximately \$1,585 billion in assets under management as of December 31, 2023. We are a global company focused on investment management, and our services are provided through a wide range of strategies and vehicles, including open-end mutual funds, closed-end funds, exchange-traded funds (“**ETFs**”), collective trust funds, separately managed accounts, real estate investment trusts, unit investment trusts and other pooled vehicles. Invesco is a commodity pool operator and commodity trading advisor registered with the Commission, and an investment adviser registered with the U.S. Securities and Exchange Commission (“**SEC**”). We frequently use cleared commodity interest transactions for and on behalf of our clients and, accordingly, we support the Commission’s efforts to promote the safety and soundness of Customer Funds placed in the possession of cleared derivatives intermediaries and the efficiency of the U.S. cleared derivatives markets.

As the Commission is aware, and cited throughout the Proposal, Invesco recently petitioned the Commission for a rulemaking to amend Regulation 1.25 to permit FCMs and DCOs to invest Customer Funds in ETFs that invest their assets only in short-term U.S. Treasury Obligations (i.e., Treasury bills, notes, or bonds with a maximum remaining term to maturity of 12 months)

¹ See 17 C.F.R. §§ 1.3, 22.1, and 30.7 (defining futures customer funds, cleared swaps customer collateral, and the foreign futures or foreign options secured amount, respectively).

² Investment of Customer Funds by Futures Commission Merchants and Derivatives Clearing Organizations, 88 Fed. Reg. 81,236 (proposed Nov. 21, 2023), <https://www.govinfo.gov/content/pkg/FR-2023-11-21/pdf/2023-24774.pdf>.

(“**Treasuries**”) and cash (“**Treasury ETFs**”).³ As much of the substance of our petition was ultimately made part of the Proposal, Invesco strongly supports the Proposal and is pleased that its petition was persuasive enough to the Commission to merit inclusion of Treasury ETFs among the expanded list of permitted investments of Customer Funds included within the Proposal. We believe that the Proposal, and in particular the change to Regulation 1.25 to include Treasury ETFs, will increase the efficiency of the U.S. cleared derivatives markets by allowing FCMs and DCOs to invest Customer Funds across a wider range of investments, without compromising the safety and soundness thereof. However, we nonetheless believe that the Commission need not apply one of the Proposal’s conditions to Treasury ETFs. Specifically, for the reasons explained below, Invesco respectfully requests that the Commission eliminate the requirement that an FCM or DCO be an authorized participant (“**AP**”) of a Treasury ETF to invest Customer Funds in such Treasury ETF in accordance with Regulation 1.25 (once amended).

Benefits of Adding Treasury ETFs to the List of Permitted Investments

Invesco strongly believes that the Proposal, and in particular the portion the Proposal relating to Treasury ETFs, is beneficial for all market participants in the U.S. cleared derivatives markets, including customers. This position is based on a number of observations. First, as set forth in our petition, providing FCMs and DCOs with this new investment option for Customer Funds will reduce operational challenges and inefficiencies associated with FCMs’ and DCOs’ optimization of their Customer Funds investments and allocation of Customer Funds among cash, money market funds, and Treasuries without compromising the CFTC’s customer protection regime.⁴ Second, customers will continue to be safeguarded because Treasury ETFs’ underlying holdings are comprised of a sub-set of the same high-quality liquid instruments that are otherwise permitted under the Commodity Exchange Act and Regulation 1.25 (i.e., U.S. government securities). Such investment portfolios are similar to those held by government money market funds, which the Commission already permits for investment of Customer Funds under Regulation 1.25. Finally, the design of Treasury ETFs as ETFs registered and regulated under the Investment Company Act of 1940, as amended, with concomitant features and characteristics including price and investment transparency and intra-day exchange trading and liquidity, undoubtedly make Treasury ETFs a safe and efficient vehicle in which FCMs and DCOs could invest Customer Funds.

³ See Petition for Rulemaking under Commodity Futures Trading Commission Regulation 1.25, from Anna Paglia, CEO, Invesco Capital Management LLC, to Christopher Kirkpatrick, Sec’y, CFTC (Sep. 28, 2023), https://www.cftc.gov/media/9541/Invesco_CFTCPetition_Regulation125_092823/download.

⁴ As described in Invesco’s rulemaking petition, investing in a Treasury ETF is simpler, less burdensome, and more cost-efficient for an FCM or DCO than identifying, investing and reinvesting in, and administering investments in individual Treasuries. For example, when an FCM or DCO invests Customer Funds in Treasury bills, it must undertake and address operational and administrative duties arising from managing and reinvesting interest and principal payments, periodically rolling positions and maintaining multiple CUSIPs, requiring a team of professionals to manage the duration, yield, and liquidity of a portfolio of Treasuries. Conversely, a Treasury ETF eliminates many of these obligations and related costs in an efficient investment vehicle—FCMs and DCOs investing in Treasury ETFs would not need to buy and sell Treasuries on a periodic basis, thereby eliminating the costs associated with trading and administering a portfolio of Treasuries. Invesco’s Treasury ETF (Ticker Symbol: TBLL) historically has performed better than a portfolio of direct investments in Treasuries, even after management fees are paid. The potential for higher yields with less involvement in the day-to-day trading and administration make Treasury ETFs an attractive solution for responsibly investing Customer Funds.

FCMs and DCOs That Are Not APs Should Be Permitted to Invest in Treasury ETFs Through an AP on an Agency Basis

The Proposal's Requirement that FCMs or DCOs Must be APs to Invest Customer Funds in Treasury ETFs Creates an Uneven Playing Field for FCMs and DCOs and Unnecessarily Limits Access to the Benefits of Treasury ETFs Described Above

The Proposal specifies conditions that an ETF would need to satisfy to be a Treasury ETF, and conditions that FCMs and DCOs would need to satisfy to invest Customer Funds in such Treasury ETFs. While these conditions are mostly consistent with the conditions proposed by Invesco in our petition, Invesco's petition suggested that an FCM or DCO that was not itself an AP should be permitted to purchase or sell shares of a Treasury ETF on an agency basis through another entity that is an AP.⁵ Invesco reiterates the view expressed in our petition and urges the Commission to forego, in any final amendments to Regulation 1.25, the condition contained in the Proposal that an FCM or DCO desiring to invest Customer Funds in a Treasury ETF be an AP of that Treasury ETF (the "**AP Condition**"). As further explained, Invesco does not believe that removing the AP Condition would in any way impact the Commission's stated objectives around investor protection, nor the concerns noted in the Petition regarding non-AP FCMs or DCOs investing Customer Funds in Treasury ETFs. Conversely, adopting the Proposal with the AP Condition would have the negative consequence of (x) advantaging FCMs that are APs to the detriment of FCMs that are not APs and (y) disadvantaging DCOs, which cannot be APs. Moreover, as described above, Invesco believes there are significant advantages to utilizing Treasury ETFs as a vehicle for investment of Customer Funds, and if access to Treasury ETFs is restricted for a subset of the FCM community and is entirely unavailable for DCOs, customers would be negatively impacted overall.

The Proposal's Concerns Over an FCM or DCO Transacting Through an AP Can be Addressed Through Existing Treasury ETF Primary Market Transaction Practices

As noted in our petition, Invesco confirms that, per the structure of ETFs, only APs can transact directly with ETFs in primary market transactions (i.e., purchase/sell shares of the ETF from/to the ETF directly). Further, as a general matter, to be an AP, an entity must: (1) be an SEC-registered broker-dealer or other securities market participant (such as a bank or other financial institution that is not required to register as a broker-dealer to engage in securities transactions); (2) be a full participating member of the National Securities Clearing Corporation and the Depository Trust Company; and (3) have entered into an AP agreement with the ETF (and potentially other parties, such as the ETF's sponsor, distributor or transfer agent).⁶ Accordingly, investors in ETFs that are not or cannot be APs typically purchase or sell ETF shares on the secondary market (i.e., on an exchange). Such transactions may be at prices other than NAV and also may have settlement windows beyond a single day. However, many investors (particularly large institutions) may forego trading in the secondary market and instead still access the primary market through an AP, with such AP operating on an agency basis for the non-AP investor (the "**AP Agency Model**").

⁵ See *supra* note 3 at 8.

⁶ See 17 C.F.R. § 270.6c-11(a)(1). An AP agreement typically will set forth the procedures for the creation and redemption of "Creation Units" of ETF shares and for the delivery of cash or securities required for such creations or redemptions, as also described in an ETF's prospectus. As an example, the Invesco Treasury ETF offers and redeems shares in Creation Units with settlement on the same day (if creation or redemption orders are received before 12:00 p.m. Eastern time) or the next business day (if creation or redemption orders are received on or after 12:00 p.m. Eastern time) at the net asset value per share ("**NAV**") next calculated in exchange for the deposit or delivery of cash or a basket of securities. In addition, a third party (for example, the ETF's administrator, such as a large institutional bank) generally calculates the ETF's NAV twice per business day at 12:00 p.m. Eastern time and at the close of regular trading (typically at 4:00 p.m. Eastern time) when the national securities exchange listed the ETF is open.

Accordingly, by utilizing the AP Agency Model, non-APs can access an ETF's primary market on the same terms as if they were an AP themselves and receive the benefits associated therewith (e.g., same day or next-day settlement and transacting at NAV).

Despite the Commission noting the existence of the AP Agency Model, it nonetheless included the AP Condition in the Proposal, due to stated concerns that, absent the FCM or DCO transacting directly with the Treasury ETF (as an AP): (1) the FCM or DCO might violate customer segregation requirements by transferring Customer Funds to an AP that is not a permitted depository of Customer Funds; and (2) the FCM or DCO could be subject to protracted redemptions taking longer than one business day if using an AP to redeem interests in a Treasury ETF on its behalf.⁷ According to the Commission, by using the AP Agency Model, an FCM or DCO would need to withdraw Customer Funds from the segregated account to purchase interests in a Treasury ETF in a manner that could cause the FCM or DCO to violate customer segregation requirements and potentially contravene Customer Funds requirements relating to permissible depositories (e.g., banks, trust companies, DCOs, and FCMs).⁸ In practice, however, a non-AP FCM or DCO could utilize the AP Agency Model without implicating this concerns. This is due to the fact that transactions occurring pursuant to the AP Agency Model may be executed on a delivery-versus-payment ("**DVP**") basis. In such arrangements, and where the FCM or DCO is transacting for cash (as would be the case under Regulation 1.25), (x) in the case of a redemption, the Treasury ETF shares would not be transferred by the FCM or DCO to the Treasury ETF (through the AP) until cash is received by such FCM or DCO and (y) in the case of a creation, cash would not be transferred by the FCM or DCO to the ETF (through the AP) until the Treasury ETF shares are received by the FCM or DCO. In both cases, the transaction would occur on a DVP basis, meaning at no time would the Customer Funds (either represented as cash or Treasury ETF shares) be custodied by any entity outside of the applicable FCM or DCO. Further, by accessing the primary market via the AP Agency Model, the transaction (creation or redemption) would occur at NAV and with settlement within a day. In this way, an FCM or DCO who is not itself an AP can transact in Treasury ETF shares directly with Treasury ETF in the primary market by using the AP Agency Model on a DVP basis and receive timely settlement consistent with Regulation 1.25 liquidity requirements (i.e., within one day) while at all times maintain custody of the Client Funds as required by Regulations 1.20(a), 22.2(f), and 30.7(a) and by Regulations 1.20(b), 22.2(b) and 30.7(b).

This arrangement and mechanism is analogous to, and consistent with, the way that FCMs and DCOs are currently permitted to invest Customer Funds in repurchase and reverse repurchase agreements.⁹ The Commission already provides for DVP and payment-versus-delivery ("**PVD**") transfers when an FCM or DCO invests Customer Funds in repurchase and reverse repurchase agreements, including with a broker-dealer that is not a permitted custodian of Customer Funds. Section (d)(9) of Regulation 1.25 requires DVP and PVD transfers for repurchase and reverse repurchase agreements, and such a transfer "is not recognized as accomplished until the funds and/or securities are actually received by the custodian of the [FCM's or DCO's] customer funds or securities purchased on behalf of customers" and the transfer or credit of securities under the agreement to the FCM's or DCO's customer segregated custody account must be "made simultaneously with the disbursement of funds from the [FCM's or DCO's] customer segregated

⁷ Proposal at 81,250-51. For example, for Treasury ETFs that offer same day settlement for redemption transactions, such flexibility would only be available to APs that redeem directly with the Treasury ETF. Invesco believes that the Commission is therefore concerned that FCMs or DCOs that are not APs would have to choose a redemption or sale approach that does not settle within a business day. However, as described more fully herein, Invesco believes that a non-AP FCM or DCO could redeem through an AP on an agency basis and still receive same-day or next-day settlement.

⁸ *Id.*

⁹ Regulation 1.25(a)(2); 17 C.F.R. § 1.25(a)(2).

cash account at the custodian bank.”¹⁰ The CFTC should apply these existing requirements applicable to Customer Fund investments in repurchase and reverse repurchase agreements to investments of Customer Funds in Treasury ETFs by an FCM or DCO utilizing the AP Agency Model.¹¹ Such requirements would ensure that at no time would Customer Funds be held outside the chain of permitted Customer Funds custody locations, while facilitating same day settlement of the transaction.

Conclusion

Invesco appreciates the Commission taking action on our petition for a rulemaking and strongly supports the Proposal. However, for the foregoing reasons, Invesco respectfully requests that the Commission eliminate the AP Condition, and instead permit an FCM or DCO to invest Customer Funds in shares of a Treasury ETF through an AP pursuant to an agency arrangement on a DVP basis. Removing the AP Condition will enable all FCMs and DCOs to more efficiently invest Customer Funds in shares of Treasury ETFs, allowing such firms to take advantage of the benefits of investing Customer Funds in a safe, highly liquid instrument consistent with the Commission’s Customer Funds protection regime.

If you have any questions or if we can provide you with further information that you believe would be helpful to you in finalizing the rule, please do not hesitate to contact the undersigned at (630) 684-8348.

Sincerely,



Brian Hartigan
Chief Executive Officer
Invesco Capital Management LLC

CC: Chairman Rostin Behnam
Commissioner Kristin N. Johnson
Commissioner Christy Goldsmith Romero
Commissioner Summer K. Mersinger
Commissioner Caroline D. Pham
Thomas Smith, Deputy Director, Financial Requirements Branch, CFTC
Adam Henkel, Head of Legal, US ETFs, Invesco

¹⁰ Regulation 1.25(d)(9); 17 C.F.R. § 1.25(d)(9).

¹¹ Moreover, the Commission itself recognized that FCMs and DCOs are likely to purchase and redeem Treasury ETF shares on the primary market through AP intermediation. Proposal at 81,250. The Commission explained that FCMs or DCOs could acquire interests in an ETF on a DVP basis or sell shares to a broker or dealer that will buy them at a price corresponding to the net asset value per share. *Id.* at 81,251.