

September 28, 2023

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

**Re: Petition for Rulemaking under Commodity Futures Trading Commission  
Regulation 1.25**

Dear Mr. Kirkpatrick:

Invesco Capital Management LLC (“**Invesco**” or the “**Petitioner**”), a commodity pool operator and commodity trading advisor registered with the U.S. Commodity Futures Trading Commission (the “**Commission**” or “**CFTC**”) and an investment adviser registered with the U.S. Securities and Exchange Commission (“**SEC**”), respectfully submits this petition for rulemaking (“**Petition**”) to amend Commission Regulation 1.25 (“**CFTC Regulation 1.25**”). As explained in detail below, the Petition seeks to amend CFTC Regulation 1.25 (the “**Amendment**”) to permit futures commission merchants (“**FCMs**”) and derivatives clearing organizations (“**DCOs**” and together with FCMs, “**Clearing Entities**”) that satisfy the terms and conditions of CFTC Regulation 1.25, including specific conditions contained in the Amendment (such Clearing Entities being “**Eligible Entities**”), to invest customer funds in exchange-traded funds (“**ETFs**”) that invest their assets only in short-term U.S. Treasury Obligations (Treasury bills, notes, or bonds with a maximum remaining term to maturity of 12 months) and cash, subject to the terms and conditions specified herein (“**Qualified Treasury ETFs**”).

## **I. Summary of Proposed Amendment**

The Petitioner is requesting the Amendment to allow Clearing Entities to invest customer funds in Qualified Treasury ETFs because the amendment will: (1) provide Clearing Entities with additional investment choices for customer funds, promote operational efficiencies and offer potentially better investment returns for Clearing Entities, and their customers, with respect to customer fund investments, and facilitate financial market innovation; (2) enable customers to receive protections under the CFTC’s customer funds protection rules for an additional category of investment instrument; and (3) be consistent with, and promote, the public interest goals enumerated in the Commodity Exchange Act (the “**Act**”).

Under Section 4d of the Act and CFTC Regulations 1.25, 22.2(e)(1), 22.3(d), 30.7(h), and 39.15(e), Clearing Entities are restricted in the types of instruments in which they may invest futures customer segregated funds, cleared swaps customer collateral, and the foreign futures or foreign options secured amount (collectively, “**Customer Funds**”) <sup>1</sup> to a list of specified instruments (“**permitted investments**”) that are highly liquid and are not subject to a material risk of loss of principal. Shares of ETFs are currently not included in the list of permitted investments. Invesco is the sponsor of various short-term Treasury ETFs, including the Invesco Short Term Treasury ETF (“**TBILL**”),

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<sup>1</sup> 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).

among other Qualified Treasury ETFs, and wishes to permit Eligible Clearing Entities to invest Customer Funds in TBLL, and any other Qualified Treasury ETF offered by Invesco or other sponsors that satisfies the terms and conditions specified herein. Accordingly, Invesco respectfully requests the Commission to amend CFTC Regulation 1.25 to include such Qualified Treasury ETFs in the list of permitted investments.

Invesco believes that there are significant benefits to be gained from making shares of Qualified Treasury ETFs (“**Shares**”) available to Clearing Entities for investment of Customer Funds. For example, Qualified Treasury ETFs will provide Clearing Entities with a new investment option for Customer Funds without compromising the Commission’s customer protection regime. This is because the Qualified Treasury ETFs are comprised of a sub-set of the same high-quality liquid instruments that are otherwise permitted under the Act and CFTC Regulation 1.25 (i.e., U.S. government securities). Moreover, the current list of permitted investments already contemplates indirect investment of Customer Funds in U.S. Treasury Obligations through an investment vehicle that invests in such securities because CFTC Regulation 1.25 allows Clearing Entities to invest Customer Funds in government money market funds. In addition, as explained below, investing in a Qualified Treasury ETF is much simpler, less burdensome, and cost-efficient for a Clearing Entity than identifying, investing in, and administering investments in individual U.S. Government Treasury securities. There is also the possibility that Qualified Treasury ETFs will provide Clearing Entities and their customers with better investment returns than direct investments in selected underlying U.S. Treasury Obligations. Finally, the design of Qualified Treasury ETFs and characteristics such as price and investment transparency and intra-day exchange trading and liquidity are additional features that help make the Shares a safe and efficient vehicle for investment by Clearing Entities of Customer Funds.

This Petition is based upon the Petitioner’s experience sponsoring Qualified Treasury ETFs and its familiarity with such instruments, analysis of the Commission’s protections for investment of Customer Funds by Clearing Entities, and discussions with Clearing Entities themselves. As a result of its review, the Petitioner has determined that there is considerable interest in, and support and justification for, Clearing Entities being permitted to invest Customer Funds in Qualified Treasury ETFs. Accordingly, Petitioner requests that the Commission adopt the Amendment.

## **II. Regulatory Background and Basis for Petition**

### **a. Customer Protection under Section 4d and 4(b) of the Act**

The Act and CFTC regulations promulgated thereunder provide a comprehensive customer protection regime with which Clearing Entities must comply. The customer protection regime applies to Customer Funds and the investments that a Clearing Entity may make with such funds. Section 4d(a)(2) of the Act provides in relevant part that futures customer segregated funds “may be invested in obligations of the United States, in general obligations of any State or of any political subdivision thereof, and in obligations fully guaranteed as to principal and interest by the United States, such investments to be made in accordance with such rules and regulations and subject to such conditions as the Commission may prescribe.”<sup>2</sup> Similarly, Section 4d(f) governs cleared swaps customer collateral, and includes a provision regarding the investment of such collateral identical to the provision in Section 4d(a)(2), cited above.<sup>3</sup> The Commission’s customer funds protection regime also covers the foreign futures and foreign options secured amount pursuant to its plenary authority under Section 4(b) of the Act, and the Commission’s regulations limit the types

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<sup>2</sup> 7 U.S.C. § 6d(a)(2).

<sup>3</sup> *Id.* § 6d(f)(4).

of investments that a Clearing Entity may make with secured amount funds to those enumerated in CFTC Regulation 1.25, as set forth below.<sup>4</sup>

**b. Permitted Investments of Customer Funds under CFTC Regulation 1.25, 22.2(e)(1), 22.3(d), 30.7, and 39.15(e)**

Pursuant to the statutory authority described above, the CFTC has promulgated Regulations 1.25, 22.2(e)(1), 22.3(d), 30.7, and 39.15(e) enumerating the types of permitted investments in which a Clearing Entity may invest Customer Funds. Specifically Clearing Entities may currently invest Customer Funds in: U.S. government securities, municipal securities, U.S. agency obligations, certificates of deposit, and commercial paper, corporate notes and bonds fully guaranteed by the U.S. under the Temporary Liquidity Guaranty Program administered by the Federal Deposit Insurance Corporation (“**FDIC**”), interests in certain government money market funds, and agreements for resale or repurchase of the foregoing instruments (i.e., repurchase agreements and reverse repurchase agreements).<sup>5</sup> The Commission has, from time to time, reviewed and modified the list of permitted investments. For example, the CFTC permitted Clearing Entities to enter into repurchase agreements using Customer Funds in interpretative relief that CFTC Staff issued in 1984, expanded the relief in 1993 to include reverse repurchase agreements provided that the underlying securities had a maturity of 180 days or less, and ultimately codified the relief in large part in 2000 and 2004 with amendments to CFTC Regulation 1.25.<sup>6</sup> In addition, CFTC Staff has issued no-action relief to a clearing house (CME Clearing) to expand the scope of permitted investments to include an interest earning facility that invested in short-term U.S. government securities.<sup>7</sup>

The CFTC requires that all permitted investments must satisfy specific standards, and imposes restrictions on certain types of permitted investments, that are intended to assure that the permitted investments are low risk and highly liquid, as set forth below:

- Liquidity. A permitted investment must be highly liquid, with the ability to be converted into cash within one business day without material discount in value.<sup>8</sup>
- Time to maturity. A permitted investment’s time to maturity must not be greater than 24 months (with the exception of investments in money market funds).<sup>9</sup>
- Concentration Limits. Investments in a permitted investment are subject to specified asset-based and issuer-based concentration limits.<sup>10</sup> Investments in U.S. government securities, however, are not subject to these concentration limits.

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<sup>4</sup> *Id.* § 6(b); 17 C.F.R. § 30.7(g).

<sup>5</sup> 17 C.F.R. § 1.25(a).

<sup>6</sup> CFTC Interpretative Letter 84-24 (Dec. 5, 1984); Division of Trading and Markets Financial and Segregation Interpretation No. 2-1 (Dec. 15, 1993); Rules Relating to Intermediaries of Commodity Interest Transactions, 65 Fed. Reg. 77,993 (Dec. 13, 2000) (publishing final rules); Investment of Customer Funds, 65 Fed. Reg. 82,270 (Dec. 28, 2000) (making technical corrections and accelerating effective date of final rules from February 12, 2001 to December 28, 2000); Investment of Customer Funds, 69 Fed. Reg. 6,140 (Feb. 10, 2004).

<sup>7</sup> CFTC Interpretative Letter No. 96-78 (Oct. 28, 1996).

<sup>8</sup> 17 C.F.R. § 1.25(b)(1).

<sup>9</sup> *Id.* § 1.25(b)(4).

<sup>10</sup> *Id.* § 1.25(b)(3). CFTC Regulation 1.25(b)(3)(i)(A) provides that investments in U.S. government securities “shall not be subject to a concentration limit.”

- Investments in Affiliates. A Clearing Entity is prohibited from investing Customer Funds in obligations of an entity affiliated with such Clearing Entity. However, a Clearing Entity may invest Customer Funds in a money market fund that is affiliated with that Clearing Entity.<sup>11</sup>
- Prohibitions. In addition, a permitted investment may not:
  - contain interest-only payment features;
  - provide payments linked to a commodity, currency, reference instrument, index, or benchmark, with the exception of certain adjustable rate securities; and
  - with the exception of money market funds, contain an embedded derivative.<sup>12</sup>

In addition, money market funds are subject to other terms, conditions and prohibitions.<sup>13</sup>

Currently, Clearing Entities and other derivatives market participants, such as swap dealers and their swap counterparties, are subject to various regulatory requirements regarding the use of high-quality liquid collateral: initial margin requirements for cleared futures and swaps, both of which require an FCM to set aside a targeted residual interest amount of its own funds in the customer account, and initial margin requirements for uncleared swaps, as well as applicable Basel III liquidity coverage ratios and other regulatory capital requirements. As such, the need for high-quality liquid collateral is substantial and is exacerbated in events of stress in the financial system. In addition to the increased demand for high-quality liquid collateral for uncleared swaps and Basel III requirements, existing collateral alternatives may not be acceptable or may present operational challenges (e.g., cash is expensive to maintain on a bank's balance sheet, Clearing Entities face operational challenges in connection with rolling Treasury bills and maintaining multiple CUSIPs, and money market funds must be transferred via a transfer agent which also gives rise to operational challenges).

For the reasons stated above, the Petitioner has observed that Clearing Entities need a greater number of high-quality liquid collateral options. One way to provide these additional alternatives is through the expansion of permitted investments to include Qualified Treasury ETFs. Although Qualified Treasury ETFs are not enumerated as permitted investments, such instruments are economical equivalents to a subset of the current list of permitted investments, namely government

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<sup>11</sup> *Id.* § 1.25(b)(5).

<sup>12</sup> *Id.* § 1.25(b)(2).

<sup>13</sup> Money market funds are subject to additional conditions; they must comply with the requirements identified above, subject to certain exceptions, as well as the following requirements: (1) the fund must be an SEC-registered investment company pursuant to the Investment Company Act of 1940 and hold itself out to investors as a money market fund in accordance with SEC Rule 2a-7; (2) the fund's sponsor must be a federally regulated financial institution, a bank, an SEC-registered investment adviser, or a domestic branch of a foreign bank insured by the FDIC; (3) with certain exceptions, the fund must be legally obligated to redeem an interest and make payment in satisfaction of the redemption by the business day following a redemption request, and a Clearing Entity must retain documentation to support compliance with this requirement; (4) the fund's net asset value must be computed by 9:00 a.m. of the business day following each business day, and be made available to the Clearing Entity by such time; (5) a Clearing Entity must maintain the confirmation relating to the purchase in its records in accordance with the CFTC's general recordkeeping rule (CFTC Regulation 1.31) and must note the ownership of fund shares (by book-entry or otherwise) in a custody account of the Clearing Entity pursuant to CFTC Regulation 1.26; (6) a Clearing Entity must obtain the acknowledgment letter (in the template form required pursuant to CFTC Regulation 1.26) from an entity that has substantial control over the fund shares purchased with customer funds and has the knowledge and authority to facilitate redemption and payment or transfer of the Customer Funds (i.e., a depository acting as custodian or the fund sponsor); (7) the agreement pursuant to which the Clearing Entity has acquired and is holding its interest in the fund must not contain a provision that prevents the pledging or transferring of shares; and (8) the fund must be a "non-electing government money market fund" that is subject to the conditions of CFTC Letter Nos. 16-68 and 16-69.<sup>13</sup> See 17 C.F.R. § 1.25(c); Division of Swap Dealer and Intermediary Oversight, CFTC, No-Action Relief, CFTC Letter No. 16-68 (Aug. 8, 2016); Division of Clearing and Risk, CFTC, Interpretation, CFTC Letter No. 16-69 (Aug. 8, 2016).

securities, and can otherwise comply with the conditions of CFTC Regulation 1.25 while providing an efficient, liquid and safe investment alternative to Clearing Entities.

### III. Description of Qualified Treasury ETFs

#### a. Overview of ETFs

The following provides a general overview of ETFs, but it should be noted that the proposed amendment would permit a Clearing Entity to invest Customer Funds only in ETFs that are Qualified Treasury ETFs. An ETF is a type of security that is similar to a mutual fund (and may be an investment company registered under the Investment Company Act of 1940, as amended (“**Investment Company Act**”), pooling money from investors and investing these funds in stocks, bonds, short-term money market instruments, derivatives, other securities or assets, or some combination of these investment instruments (although as noted above, Qualified Treasury ETFs will invest only in short-term U.S. Treasury Obligations and cash). An ETF’s shares are registered with the SEC under the Securities Act of 1933, as amended (“**Securities Act**”), regulated under the Securities Exchange Act of 1934, as amended (“**Exchange Act**”), listed on one or more national securities exchanges registered with the SEC pursuant to Section 6 of the Exchange Act, 15 U.S.C. § 78f (“**National Securities Exchange**”), and traded throughout the day like other exchange-listed securities. Unlike mutual funds, however, the price of an ETF’s shares on a National Securities Exchange fluctuates throughout the day and shares may be bought and sold throughout the trading day through a National Securities Exchange (whereas mutual funds may only be bought or sold once a day after the markets close).

For further clarity, below is an explanation of: (1) other attributes of ETFs generally, such as the role of specific market participants that have entered into an agreement with the ETF (“**Authorized Participants**” or “**APs**”), the way ETF shares are offered and the secondary trading of the shares, the financial reporting requirements applicable to an ETF, and liquidity risk management program requirements applicable to most ETFs; (2) specific attributes of Qualified Treasury ETFs, such as the regulatory registration status of a Qualified Treasury ETF and eligible assets in which a Qualified Treasury ETF may invest; and (3) the conditions an Eligible Entity must satisfy to purchase Shares as an Authorized Participant.

#### b. Offering of ETF Shares

##### i. The Role of Authorized Participants

An ETF offers its Shares to Authorized Participants, who purchase and redeem blocks of a specified amount of shares (each block, a “**Creation Unit**”) pursuant to the Authorized Participant Agreement (“**AP Agreement**”) entered into between the ETF and each Authorized Participant. Creation Units may be created or redeemed only by Authorized Participants, who 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 (“**NSCC**”) and the Depository Trust Company (“**DTC**”); 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).

Authorized Participants play a key role in the primary market for ETF shares because they are the only investors that are allowed to transact directly with the ETF. Authorized Participants do not receive compensation from an ETF or its sponsor and have no legal obligation to create or redeem shares. Their activity is driven either by client demand or proprietary trading activity. Authorized Participants can choose to create or redeem shares as they build positions, or they can choose to build up or unwind their ETF positions in the secondary market in their discretion. Also, Authorized

Participants create and redeem Shares in the primary market when doing so is a more effective way of managing a firm's aggregate exposure than trading in the secondary market. Some Authorized Participants are clearing brokers (rather than dealers) and receive payment for processing creations and redemptions as an agent for a wide array of market participants such as registered investment advisers and various liquidity providers, including market makers, hedge funds, and proprietary trading firms.

An AP Agreement typically will set forth the procedures for the creation and redemption of Creation Units and for the delivery of cash or securities required for such creations or redemptions, as also described in an ETF's prospectus. Generally, a Qualified Treasury ETF offers and redeems Shares 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 ("**NAV**") next calculated in Creation Units in exchange for the deposit or delivery of 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 is open.

## **ii. Secondary (Exchange) Trading of the Shares**

In addition to the availability of ETF shares being sold by the ETF to Authorized Participants through the Creation Unit order process, individual shares of ETFs may be purchased and sold on a National Securities Exchange by the general investing public through registered broker-dealers. Shares that are traded on a National Securities Exchange trade at market prices rather than NAV. Therefore, shares may trade at a premium or discount in relation an ETF's NAV. However, because Authorized Participants have the ability to arbitrage small differences between the ETF's share price on the National Securities Exchange and the NAV (e.g., the Authorized Participant can purchase shares on the National Securities Exchange at a discount and deliver them to the ETF at NAV), any premiums or discounts tend to be small. This effect is particularly true for ETFs whose underlying assets are highly liquid, such as is the case for Qualified Treasury ETFs.

## **c. Regulatory Requirements Applicable to ETFs, such as Qualified Treasury ETFs**

### **i. Periodic Financial Reporting Requirements under the Investment Company Act**

As an investment company registered under the Investment Company Act whose shares are registered under the Securities Act and Exchange Act, ETFs must comply with a number of financial reporting requirements, including the following reports required pursuant to the Investment Company Act: (1) annual shareholder report, including audited financial statements, filed on Form N-CSR;<sup>14</sup> (2) semi-annual shareholder report, including unaudited financial statements, filed on Form N-CSR;<sup>15</sup> (3) monthly portfolio statistics and holdings filed quarterly on Form N-PORT;<sup>16</sup> (4) annual census report containing financial-related information filed on Form N-CEN;<sup>17</sup> and

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<sup>14</sup> 17 C.F.R. § 270.30e-1; <https://www.sec.gov/files/2017-03/formn-csr.pdf>. Form N-CSR is a combined reporting form that is to be used for reports of registered management investment companies under Section 30(b)(2) of the Investment Company Act and Section 13(a) or 15(d) of the Exchange Act, filed pursuant to Rule 30b2-1(a) under the Investment Company Act (17 C.F.R. § 270.30b2-1(a)).

<sup>15</sup> *Id.*

<sup>16</sup> 17 C.F.R. § 270.30b1-9; <https://www.sec.gov/files/formn-port.pdf>.

<sup>17</sup> 17 C.F.R. § 270.30a-1; <https://www.sec.gov/files/formn-cen-info.pdf>.

(5) periodic reports with respect to portfolio liquidity and derivatives use on Form N-RN.<sup>18</sup> As an Exchange Act Section 12 registrant, an ETF would be subject to financial reporting under the Exchange Act if it were not excused from these requirements by virtue of its registration under the Investment Company Act.<sup>19</sup>

## ii. Liquidity Risk Management Program (Rule 22e-4 under the Investment Company Act)

The current formulation of SEC Rule 22e-4 under the Investment Company Act requires an open-end management investment company that is registered with the SEC, including a Qualified Treasury ETF, to adopt and implement a liquidity risk management program (“**LRMP**”) that is reasonably designed to assess and manage its liquidity risks.<sup>20</sup> The rules define “liquidity risk” to mean “the risk that the fund could not meet requests to redeem shares issued by the fund without significant dilution of remaining investors’ interests in the fund.”<sup>21</sup>

Under the SEC’s rules, an LRMP must include specific elements, including: (1) assessment, management, and periodic review of a fund’s liquidity risk, with specific considerations;<sup>22</sup> (2) classification of the liquidity of fund portfolio investments on at least a monthly basis into one of four categories (highly liquid investments, moderately liquid investments, less liquid investments, and illiquid investments); (3) with regard to a fund that does not primarily hold assets that are highly liquid investments, determine a highly liquid investment minimum; (4) procedures related to the acquisition of illiquid investments; and (5) with regard to a fund that engages in (or reserves the right to engage in) redemptions in kind, policies and procedures regarding how and when it will engage in such redemptions in kind. When a fund’s level of illiquid investments exceed 15 percent of the fund’s total assets, or when a fund’s highly liquid investments fall below the fund’s prescribed minimum for more than a short period of time, the fund must confidentially report this information to the SEC on Form N-LIQUID.

A fund’s board of trustees must have oversight over the fund’s LRMP, meaning that that the board of trustees must initially approve the program itself as well as the designation of the person (or persons) responsible for administering the program and preparing a written report at least annually that satisfies the criteria in the regulation.<sup>23</sup> Moreover, the fund’s board of trustees must perform a review of the designated person’s written reports at least annually.<sup>24</sup> A fund also must comply with the rule’s recordkeeping obligations.

## d. Eligible Assets in which a Qualified Treasury ETF May Invest

Pursuant to the Amendment, the assets in which a Qualified Treasury ETF may invest would be consistent with the Act and CFTC regulations. The investment objective and strategy of a Qualified

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<sup>18</sup> 17 C.F.R. § 270.30b1-10; <https://www.sec.gov/files/formn-liquid.pdf>.

<sup>19</sup> For example, a Qualified Treasury ETF is not subject to Forms 10-K, 10-Q, and 8-K under the Exchange Act. See, e.g., 15 U.S.C. §§ 78m, 78n, and 78p.

<sup>20</sup> 17 C.F.R. § 270.22e-4.

<sup>21</sup> *Id.* § 270.22e-4(a)(11).

<sup>22</sup> For example, an ETF must consider in its assessment, management, and periodic review of its liquidity risk: “(1) The relationship between the ETF’s portfolio liquidity and the way in which, and the prices and spreads at which, ETF shares trade, including, the efficiency of the arbitrage function and the level of active participation by market participants (including authorized participants); and (2) The effect of the composition of baskets on the overall liquidity of the ETF’s portfolio.” *Id.* 270.22e-4(b)(1)(i)(D).

<sup>23</sup> *Id.* 270.22e-4(b)(2).

<sup>24</sup> *Id.*

Treasury ETF is disclosed in its prospectus. Qualified Treasury ETFs permitted under the Amendment would be limited to those that invest in solely in: (i) highly liquid U.S. Treasury Obligations with a maturity of 12 months or less; and (ii) cash. Although ETFs that track indexes often have a policy of investing least 80 or 90 percent of the value of their assets in components of the applicable index (e.g., a short term treasury ETF may have a policy to invest at least 80% of its assets in U.S. Treasury Obligations with maturities of 12 months or less), the Petitioner believes a higher standard for Qualified Treasury ETFs (i.e., 100% of assets being invested in U.S. Treasury Obligations with maturities of 12 months or less and/or cash) is appropriate for the principles and purposes of the Amendment and CFTC Regulation 1.25.

As previously noted, Sections 4d(a) and 4d(f) of the Act explicitly permit a Clearing Entity to invest Customer Funds in obligations of the United States and CFTC Regulation 1.25 allows a Clearing Entity to invest Customer Funds in “government securities” (defined to include obligations of the United States and obligations fully guaranteed as to principal and interest by the United States).<sup>25</sup> The Amendment would allow Eligible Entities to invest in government securities, albeit indirectly through an investment instrument that is itself liquid and compliant with the other conditions of CFTC Regulation 1.25.

#### **e. Clearing Entity Eligibility Requirements**

To comply with the regulatory requirement that investments be “highly liquid”, an investment must have the ability to be converted into cash within one business day without a material discount in value.<sup>26</sup> Accordingly, to ensure same day liquidity, the Petitioner proposes that a Clearing Entity must satisfy certain criteria to invest Customer Funds in a Qualified Treasury ETF. Under the Amendment, a Clearing Entity must be an Authorized Participant that has entered into an AP Agreement with a Qualified Treasury ETF, giving it the ability to transact directly with the Qualified Treasury ETF in a manner that settles same day, or have an agency agreement with an Authorized Participant.<sup>27</sup> In addition, the Clearing Entity must comply with the Qualified Treasury ETF’s Creation Unit purchase and redemption order procedures, subject to the pricing mechanism available to an Authorized Participant and in compliance with the specified settlement methods.

##### **i. Clearing Entity must be an Authorized Participant of a Qualified Treasury ETF (Eligible Entity)**

To invest Customer Funds in Qualified Treasury ETFs, an Eligible Entity must satisfy certain criteria. It must be an Authorized Participant or have an agency agreement with an Authorized Participant that has entered into an AP Agreement with a Qualified Treasury ETF. As detailed above, an Authorized Participant must be a registered, self-clearing broker-dealer that can process all required trade submission, clearance, and settlement transactions on its own account and must be a full participating member of the NSCC and DTC. A Clearing Entity that satisfies these criteria is considered an Eligible Entity.

##### **ii. Creation Basket and Pricing**

An Eligible Entity will receive a Creation Unit in exchange for U.S. Treasury Obligations or U.S. dollars when it purchases a Creation Unit pursuant to the procedures in the AP Agreement through its agency relationship with its AP. The purchase price must be based on the Qualified Treasury

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<sup>25</sup> 7 U.S.C. §§ 6d(a)(2), 6d(f)(4); 17 C.F.R. § 1.25(a)(1)(i).

<sup>26</sup> 17 C.F.R. §1.25(b)(1).

<sup>27</sup> While FCMs often serve as APs, this is generally not the case for DCOs. DCOs, however, often have contractual agency relationships with FCMs.



ETF's next-calculated NAV per Shares as determined in accordance with the Qualified Treasury ETF's pricing procedures adopted in accordance with the Investment Company Act.

### **iii. Redemption Basket and Pricing**

An Eligible Entity will receive U.S. dollars when it redeems a Creation Unit, the price of which must be based on the Qualified Treasury ETF's next-calculated NAV per Share as determined in accordance with the Qualified Treasury ETF's pricing procedures adopted in accordance with the Investment Company Act.

### **iv. DVP Settlement Method Requirements**

The AP Agreement between an Eligible Entity and a Qualified Treasury ETF must stipulate to the settlement method of Creation Units orders. Pursuant to a Delivery Versus Payment (“DVP”) settlement, an Eligible Entity will not transfer payment or securities until it has received Shares or cash. For purchases of Creation Units, the exchange of assets must occur on a DVP basis (meaning that the Eligible Entity receives the Shares immediately prior to the receipt of payment by the Qualified Treasury ETF). For redemptions of Creation Units, the exchange of assets must occur on a DVP basis (meaning that the Eligible Entity receives U.S. dollars immediately prior to the transfer of Shares to the Qualified Treasury ETF).

## **IV. The Petition for Amendment Furthers Public Policy**

### **a. The Amendment would be Consistent with the Public Interest and the Purposes of the Act**

The Amendment is consistent with the public interest<sup>28</sup> and the customer protection regime under the Act and CFTC regulations because Qualified Treasury ETFs may only invest in instruments that are otherwise permitted investments of Customer Funds, providing a high quality, low risk and highly liquid alternative investment option for Eligible Entities seeking an alternative and efficient investment instrument for Customer Funds. The SEC oversees the offer and sale, listing, and ongoing regulatory obligations of Qualified Treasury ETFs, including periodic financial reporting and compliance with LRMP requirements, as described above. In fact, investing Customer Funds in pooled investment vehicles is already permitted under CFTC Regulation 1.25 by virtue of the regulation's enumeration of money market funds as permitted investments.

### **i. Qualified Treasury ETFs will Satisfy all of the Conditions Applicable to Other Permitted Investments Under Rule 1.25**

Although a Qualified Treasury ETF is not currently a permitted investment enumerated in CFTC Regulation 1.25, it satisfies all of the conditions with which a permitted investment must comply. Specifically:

- Liquidity
  - A Qualified Treasury ETF invests only in highly liquid U.S. Treasury Obligations and cash. Therefore, it is even more liquid than other permitted investments, such as money market funds, whose underlying investments may be less liquid than those

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<sup>28</sup> The national public interests noted in the Act include the prevention of fraud and the preservation of the financial integrity of markets, as well as the promotion of responsible economic or financial innovation and fair competition.

of a Qualified Treasury ETF. In addition, as more fully described below, the Shares may be purchased and redeemed with same-day settlement from the relevant Qualified Treasury ETF in the primary market and are traded secondarily on a National Securities Exchange. As a result, Shares should be considered highly liquid securities.

- A Qualified Treasury ETF satisfies the requirement that a permitted investment can be converted into cash within one business day. Due to the fact that a Qualified Treasury ETF will be utilized by Eligible Entities for purposes of Customer Fund investments, it is expected that disposition of Shares will occur primarily through principal transactions of Creation Units. With respect to such redemption orders, generally a Qualified Treasury ETF will make a payment that settles on the same business day if the redemption request is received before 12:00 p.m. Eastern time and for all redemption requests received on or after 12:00 p.m. Eastern time, payment settles on T+1.
- Consistent with the requirements of SEC Rule 22e-4 under the Investment Company Act, a Qualified Treasury ETF that is a registered open-end management investment company must have an LRMP and, pursuant to the requested relief, such program will take into consideration the liquidity needs that the Qualified Treasury ETF reasonably expects to be associated with the Creation Unit creations and redemptions, including in connection with the use of its Shares pursuant to the requested relief.
- Qualified Treasury ETFs calculate and disseminate NAV twice daily: (1) the first NAV calculation is at 12:00 p.m. ET, and Shares settle T+0; and (2) the second NAV calculation is at the traditional end-of-day, with Shares settling at T+1. In comparison, Treasury securities settle at T+1, making Qualified Treasury ETFs an attractive investment choice for Customer Fund Investments.
- *Time to Maturity.* No Qualified Treasury ETF will hold investments with a time to maturity that is greater than 12 months.

Further, a Qualified Treasury ETF under the Amendment does not: (1) contain interest-only payment features (although it does pay a dividend); or (2) provide payments linked to a commodity, currency, reference instrument, index, or benchmark (although its value may be linked to a reference index). Moreover, an Eligible Entity is not prohibited from pledging or transferring the Shares, consistent with the regulatory requirement that an instrument must be “one that a futures commission merchant owns or has an unqualified right to pledge, [and] is not subject to any lien”<sup>29</sup>.

## **ii. Expanding Permitted Investments to Include Qualified Treasury ETFs is in the Public Interest**

Customers and Eligible Entities will benefit from additional permitted investment options for Customer Funds. Eligible Entities benefit by having a new investment option that reduces operational inefficiencies and promotes the safe and liquid investment of Customer Funds consistent with the Act and CFTC regulations. Eligible Entities and customers may also benefit to the extent that Qualified Treasury ETFs earn a yield greater than the return on short-term U.S. Treasury Obligations.

The expansion of permitted investments to include Qualified Treasury ETFs provides greater flexibility to Clearing Entities while maintaining the same level of protection for customers and helps reduce operational challenges that Clearing Entities currently face. For example, Qualified

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<sup>29</sup> 17 C.F.R. § 1.25(b)(ii)(B).

Treasury ETFs help reduce operational challenges and inefficiencies associated with Eligible Entities' optimization of their investments and allocation of Customer Funds among cash, money market funds, and Treasuries. One challenge is simply the expense to maintain cash deposits on a bank's balance sheet, which also generates a low yield. Thus, Clearing Entities need to find alternative methods to minimize cash balances of Customer Funds by instead investing Customer Funds in highly liquid instruments that offer better returns than cash.

Investing Customer Funds in Treasury bills also presents operational challenges to Clearing Entities in connection with managing and reinvesting interest 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 Qualified Treasury ETF eliminates many of these challenges and related costs in an efficient investment vehicle. The operational efficiencies that a Qualified Treasury ETF provide allow an Eligible Entity to gain exposure to short-term U.S. Treasury Obligations without buying and selling Treasury securities on a periodic basis, such as each quarter, eliminating the costs associated with trading Treasury securities. TBLL, for example, historically has performed better than a portfolio of direct investments in U.S. Treasury Obligations, even after management fees are paid. The potential for higher yields with less involvement in the day-to-day trading make Qualified Treasury ETFs an attractive solution for responsibly investing Customer Funds.

In addition, Qualified Treasury ETFs provide exposure to Treasuries and other U.S. Treasury Obligations, which may become particularly beneficial in times of market stress when high-quality liquid collateral is scarce. An additional type of permitted investment helps diversify an Eligible Entity's portfolio of Customer Fund investments, which is restricted by issuer-based and asset-based concentration limits pursuant to CFTC Regulation 1.25.

**b. The Amendment will have no Material Adverse Effect on CFTC or Contract Market Regulatory or Self-Regulatory Responsibilities**

The requested relief will not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory duties under the Act. Designated self-regulatory organizations, including designated contract markets (“DCMs”) and the National Futures Association (“NFA”) through delegated authority of the CFTC routinely examine FCMs for compliance with CFTC Regulation 1.25. The CFTC periodically examines DCOs for compliance with CFTC Regulation 1.25. Qualified Treasury ETFs will be subject to the existing conditions applicable to permitted investments, and specific conditions that are objectively ascertainable by the Clearing Entity, DCM, and NFA. Although the Commission, DCMs and the NFA may need to update their examination procedures to reflect the addition of a permitted investment, the same examination methodology will be involved. Thus, the Commission, NFA, and contract markets will be able to continue to discharge their regulatory responsibilities without a material adverse effect.

**c. The Amendment is Pro-Competitive**

The Petitioner believes that the Commission's expansion of permitted investments to include Qualified Treasury ETFs promotes financial innovation and fair competition. The Qualified Treasury ETFs are consistent with existing instruments that are considered permitted investments of Customer Funds, making them a safe investment option for Customer Funds. The expansion of permitted investments to include Qualified Treasury ETFs increases Clearing Entity investment opportunities, allowing Eligible Entities to expand the type of investments in their portfolios of Customer Fund investments while not limiting Eligible Entities' choice in Qualified Treasury ETFs. The relief sought applies not only to Invesco's Qualified Treasury ETFs but to all Qualified Treasury ETFs currently offered in the market and those that are offered in the future.

## **V. The Proposed Amendment**

### **a. Amendment Sought**

The Petitioner respectfully requests the Commission adopt an amendment to CFTC Regulation 1.25 to permit Qualified Treasury ETFs, subject to the conditions below (the “**Conditions**”), to be “permitted investments” of Customer Funds under CFTC Regulation 1.25. As described in detail, Qualified Treasury ETFs invest assets only in instruments that are themselves permitted investments and satisfy liquidity and other requirements applicable to permitted investments. Moreover, Qualified Treasury ETFs are subject to the SEC’s regulatory regimes under the Investment Company Act, Securities Act, and Exchange Act. The Commission’s expansion of the enumerated permitted investments will benefit the Clearing Entity community and customers alike without causing a material adverse effect on the CFTC or any contract market. Qualified Treasury ETFs will also benefit by the addition of an entirely new market segment that they may pursue as investors.

### **b. Terms and Conditions of the Amendment**

In accordance with the proposed Amendment, to be considered a “permitted investment” under CFTC Regulation 1.25, a Qualified Treasury ETF must comply with the following Conditions:

1. Each Qualified Treasury ETF is and remains registered as an open-end management investment company under the Investment Company Act.
2. The Shares of each Qualified Treasury ETF is and will remain registered under the Securities Act of 1933.
3. Each Qualified Treasury ETF will be subject to periodic reporting of financial information that is required by the Exchange Act and the Investment Company Act.
4. Shares of each Qualified Treasury ETF must be listed for trading on a National Securities Exchange, without any restriction imposed on such listing or trading by that National Securities Exchange.
5. Each Qualified Treasury ETF will have in place and maintain a policy to invest, under normal circumstances, at least 100 percent of the value of its assets in U.S. Treasury Obligations with maturities of 12 months or less and cash. Each Qualified Treasury ETF must disclose its policy in its prospectus.
6. Each Qualified Treasury ETF must have implemented and must maintain a liquidity risk management program pursuant to SEC Rule 22e-4 under the Investment Company Act, 17 C.F.R. § 270.22e-4, or any future LRMP regulation.
7. Each Qualified Treasury ETF’s LRMP must take into consideration the liquidity needs that the Qualified Treasury ETF reasonably expects to be associated with the creation and redemption of Share Baskets, including in connection with the use of its Shares pursuant to CFTC Regulation 1.25.
8. Each Qualified Treasury ETF must have entered into an AP Agreement with each Clearing Entity or AP agent of a Clearing Entity that seeks to use the Qualified Treasury ETF to invest Customer Funds to be an Authorized Participant of the Qualified Treasury ETF (e.g., an Eligible Entity).
9. Each AP Agreement must require the Qualified Treasury ETF to provide the Eligible Entity or its AP agent with a Creation Basket in exchange for U.S. Treasury Obligations (or U.S. Dollars), based on the Qualified Treasury ETF’s NAV per share as determined in accordance with the Qualified Treasury ETF’s pricing procedures adopted in accordance

with the Investment Company Act. Each AP Agreement must also require each such exchange to occur on a Delivery Versus Payment basis.

10. Each AP Agreement must require the Qualified Treasury ETF to provide the Eligible Entity with U.S. Dollars in exchange for a Redemption Basket, based on the Qualified Treasury ETF's NAV per share as determined in accordance with the Qualified Treasury ETF's pricing procedures adopted in accordance with the Investment Company Act. Each AP Agreement must also require each such exchange to occur on a Delivery Versus Payment basis.
11. Each Qualified Treasury ETF must offer a mechanism, pursuant to its procedures enumerated in the prospectus and AP Agreement, to settle primary transactions in Creation Units with Authorized Participants on the same day as the trade (T+0 settlement).

## **VI. Conclusion**

Based on the foregoing, we respectfully request that the Commission adopt an amendment to CFTC Regulation 1.25 to permit Eligible Entities to invest Customer Funds in Qualified Treasury ETFs. The Petitioner believes that the requested Amendment is consistent with the public interest and the purposes of the Act and the Commission's rules. Such Amendment will be consistent with the objectives of preserving principal and maintaining liquidity as required under CFTC Regulation 1.25(b), while permitting Clearing Entities to manage more efficiently the investment of Customer Funds.

If you should have any questions or comments or require any further information regarding this petition for rulemaking, please do not hesitate to contact the undersigned at (630) 868-7179 or our outside counsel, Michael Philipp at (312) 324-1905 or Michael.philipp@morganlewis.com.

Sincerely,



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Anna Paglia  
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Invesco Capital Management LLC

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