



Stradley Ronon Stevens & Young, LLP  
1250 Connecticut Avenue, N.W., Suite 500  
Washington, DC 20036-2652  
Telephone 202.822.9611  
Fax 202.822.0140  
www.stradley.com

1940 Act/Section 7(a)

March 20, 2014

Mr. Douglas Scheidt, Esq.  
Associate Director and Chief Counsel  
Division of Investment Management  
United States Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-2736

Re: Invesco Advisers, Inc.

Dear Mr. Scheidt:

The purpose of this letter is to request assurance that the Staff of the Division of Investment Management (the "Staff") would not recommend enforcement action to the U.S. Securities and Exchange Commission (the "SEC") under section 7(a) of the Investment Company Act of 1940 (the "1940 Act") against insurance company separate accounts (the "Separate Accounts") that offer and sell group annuity contracts (the "Contracts"), as part of generic stable value investment option managed by Invesco Advisers, Inc. (as described in more detail below), if the sponsors of plans organized under section 403(b) of the Internal Revenue Code of 1986 (the "403(b) Plans") invest in such Separate Accounts (the "Proposed Arrangement").

The Proposed Arrangement will be structured and operated in a manner substantially similar to the one in H.E.B. Investment & Retirement Plan, *et al.* (pub. avail. May 18, 2001) (the "H.E.B. Letter"). That said, unlike in the H.E.B. Letter, the Contracts will not be offered and sold solely to qualified plans under section 401(a) of the Internal Revenue Code of 1986 (the "Code") that are subject to the provisions of the Employee Retirement Income Security Act of 1974 (the "Qualified Plans"). Instead, the Contracts would be offered and sold primarily to sponsors of 403(b) Plans that are not Qualified Plans and that offer multiple investment options. In addition, unlike Qualified Plans, the 403(b) Plans would not be funded through trusts. As more fully discussed below, however, we believe that the 403(b) Plans will be substantially similar to the Qualified Plans in the H.E.B. Letter because (1) a fiduciary, rather than the participants in the 403(b) Plan (the "Participants"), would be responsible for selecting the available 403(b) Plan investment options, and (2) the 403(b) Plan sponsor, rather than the Participants, would purchase the Contracts. As more fully explained below, the Participants would generally not know that they are investing in any particular Separate Account. Consequently, we believe that the Staff should grant the requested relief.

## **Background**

### **Invesco Advisers, Inc.**

Invesco Advisers, Inc. (“Invesco Advisers”) is an investment adviser registered under the Investment Advisers Act of 1940 (the “Advisers Act”). It provides discretionary advisory and asset management services to a variety of clients, including the sponsors of 403(b) Plans. As more fully discussed below, Invesco Advisers would manage the 403(b) Plan assets designated by Participants to a generic stable value investment option (the “Invesco Option”).

### **Separate Accounts and the Interests Therein**

The Separate Accounts are separate accounts of unaffiliated insurance companies that issue the Contracts, which will be privately offered in reliance on section 4(a)(2) of the Securities Act of 1933 (the “1933 Act”) or Regulation D thereunder. A group annuity is typically sold to an employer under one master policy to fund retirement plan benefits for multiple employee participants in the plan.

The Contract offers the employees a bundled investment and insurance product. Invesco Advisers will negotiate the features of each Contract with each issuing insurance company, including the terms of any insurance protection or wrapper. Assets deposited into a Separate Account are generally managed by an asset manager unaffiliated with Invesco Advisers.

### **403(b) Retirement Plans Generally**

A 403(b) plan is a tax-deferred retirement plan for employees of public schools, employees of certain tax-exempt organizations and certain ministers.<sup>1</sup> Under a 403(b) plan, employers may purchase for their eligible employees annuity contracts or establish custodial accounts invested only in mutual funds for the purpose of providing retirement income.<sup>2</sup>

403(b) plans are not qualified under section 401(a) of the Code.<sup>3</sup> They and their sponsors also may not be subject to the Employee Retirement Securities Act of 1974 (“ERISA”), including the ERISA fiduciary standard.<sup>4</sup> 403(b) plans sponsored by public schools, churches

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<sup>1</sup> See generally section 403(b)(1)(A) of the Code; Field Assistance Bulletin No. 2007-02 issued by the Department of Labor’s Employee Benefits Security Administration (“EBSA”) (pub. avail. Jul. 24, 2007) (the “2007-02 Bulletin”).

<sup>2</sup> See sections 403(b)(1)(A) and 403(b)(7) of the Code; 2007-02 Bulletin.

<sup>3</sup> See 2007-02 Bulletin (indicating that “[a]lthough not subject to the qualification requirements of section 401 of the Code, some of the requirements that apply to qualified plans also apply, with modifications, to 403(b) plans.”).

<sup>4</sup> The ERISA fiduciary standard generally requires that a fiduciary discharge his or her duties with respect to a plan solely in the interest of the participants and beneficiaries and (1) for the exclusive purpose of “providing benefits to participants and their beneficiaries” and “defraying reasonable expenses of administering the plan,” (2) “with the care, skill, prudence, and diligence under the

and ministers are excluded from coverage under Title I of ERISA by statute.<sup>5</sup> 403(b) plans sponsored by other tax-exempt organizations, however, cannot avail themselves of a statutory exclusion from Title I of ERISA.<sup>6</sup>

In addition, the vast majority of 403(b) plans are not funded through trusts with trustees that either make investment decisions on behalf of the trust or select a menu of investment options for plan participants. Instead, the employer that sponsors the plan typically would establish a limited investment menu of available investment options for the plan, subject to a fiduciary standard (e.g., under ERISA, state law or by contract), and participants direct the investment of their 403(b) plan balances in one or more of such investment options.

### **Proposed Arrangement**

The 403(b) Plans will offer their Participants multiple investment options, including the Invesco Option. Invesco Advisers would serve as the investment adviser to sponsors of 403(b) Plans that have assets designated by the Participants to the Invesco Option.<sup>7</sup> As further explained below, a Participant's investment discretion will be limited to allocating his or her account among a number of investment options available in the 403(b) Plan, including the Invesco Option, which has an identified generic investment objective. The Participant would generally not know that s/he is investing in a Separate Account.

Invesco Advisers will allocate the 403(b) Plan assets it advises among certain investments, such as the Contracts issued by the Separate Accounts.<sup>8</sup> The Separate Accounts essentially serve as building blocks to help achieve the Invesco Option's investment objective.

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circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims," (3) "by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so," and (4) "in accordance with the documents and instruments governing the plan . . . ." See section 404(a)(1) of ERISA.

<sup>5</sup> Sections 4(b)(1) and (2) of ERISA (statutory exclusions for governmental and church plans from coverage under Title I of ERISA); 2007-02 Bulletin n. 1.

<sup>6</sup> Field Assistance Bulletin No. 2009-02 issued by EBSA (pub. avail. Jul. 20, 2009) (stating that a "403(b) plan established or maintained by a tax-exempt organization . . . would be covered by Title I pursuant to section 4(a) of ERISA."). That said, 403(b) plans sponsored by a tax-exempt organizations may qualify for a safe harbor that would effectively remove a qualifying plan from coverage under Title I of ERISA. See 2007-02 (reaffirming availability of safe harbor in light of new regulations adopted, and interpretive guidance issued, by the Department of Treasury/Internal Revenue Service).

<sup>7</sup> In the future, Invesco Advisers may serve as the investment adviser to other generic investment options offered by the Plans.

<sup>8</sup> Other investments of the Option will likely include a rule 2a-7 money market fund registered under the 1940 Act. The purchase of mutual fund shares will require the creation of a custodial arrangement pursuant to section 403(b)(7) of the Code. See note 2 *supra* and accompany text.

Before allocating 403(b) Plan assets to a Separate Account, however, Invesco Advisers would consult with the 403(b) Plan sponsor and recommend Separate Accounts in which the Invesco Option would invest. Ultimately, the decision to invest the assets of the Invesco Option in a Separate Account relying on section 3(c)(7)'s exclusion from the definition of investment company (such exclusion explained in greater detail below) is the sole responsibility of the 403(b) Plan sponsor, without direction from or consultation with any Participant other than the 403(b) Plan sponsor acting in its capacity as a 403(b) Plan sponsor.<sup>9</sup>

The targeted market for the Invesco Option will be 403(b) plans sponsored by large institutions, such as universities and hospitals, and other 403(b) Plans that are not Qualified Plans. These Plans are generally not organized as trusts and do not have trustees that either make the investment decisions on behalf of the trust or select investment options for Participants. Instead, typically the sponsoring employer of the 403(b) Plan, or a committee appointed by the sponsoring employer, serves as the Plan's fiduciary and designs the Plan's investment menu (e.g., a menu that could include the Invesco Option), subject to a fiduciary standard. In addition, in lieu of the trust structure employed by Qualified Plans in which that Plan's trust is the purchaser of the particular investment, the sponsor to the 403(b) Plan would purchase the Contract.

### **Issue Presented**

Section 7(a) of the 1940 Act prohibits an investment company organized or otherwise created under the laws of the United States or of a state and having a board of directors from, among other things, offering or selling any security (or engaging in certain other activities) by use of the mails or any means or instrumentality of interstate commerce unless the company is registered under the 1940 Act. Section 3(c)(7) of the 1940 Act excludes from the definition of "investment company" any issuer whose outstanding securities are owned exclusively by persons who, at the time of acquisition of the securities, are qualified purchasers, and which is not making and does not propose to make a public offering of its securities (*i.e.*, a 3(c)(7) Fund).

Section 2(a)(51)(A)(iv) of the 1940 Act defines "qualified purchaser" to include, among others, "any person, acting for its own account or the accounts of other qualified purchasers, who in the aggregate owns and invests, on a discretionary basis, not less than \$25,000,000 in investments."

In the H.E.B. Letter, the Staff indicated that it would not recommend enforcement action to the SEC under section 7(a) of the 1940 Act against 3(c)(7) Funds in which a 401(k) plan invests a portion of its assets if the 3(c)(7) Funds treats the 401(k) plan as a qualified purchaser under section 2(a)(51)(A)(iv). In granting its enforcement-only relief in the H.E.B. Letter, the Staff indicated that it was relying on the representation, among others, that the 401(k) plan, which is subject to the provisions of ERISA, and the trustees to the 401(k) plan, who are

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<sup>9</sup> Participants direct the investment of their 403(b) Plan balances in one or more of the menu's investment options, and, if the Invesco Option were selected, the 403(b) Plan sponsor would invest the proceeds in one or more Separate Accounts.

fiduciaries subject to the fiduciary provisions of ERISA, make all of the investment decisions for the Plan.

The Proposed Arrangement will be structured and operated in a manner substantially similar to the one in the H.E.B. Letter. That said, unlike in the H.E.B. Letter, the Contracts will not be offered and sold solely to Qualified Plans. Instead, the Contracts would be offered and sold primarily to the sponsors of 403(b) Plans that are not Qualified Plans and that offer multiple investment options. In addition, unlike Qualified Plans, the 403(b) Plans would not be funded through trusts. We believe, however, that the 403(b) Plans will be substantially similar to the Qualified Plans in the H.E.B. Letter because (1) a fiduciary, rather than Participants, would be responsible for selecting the available 403(b) Plan investment options, including the Invesco Option, and (2) the 403(b) Plan sponsor, rather than the Participants, would purchase the Contracts. As a result, we believe that a fund relying on the exclusion from the definition of investment company in section 3(c)(7) of the 1940 Act (*i.e.*, a Separate Account) in which the Invesco Option invests may treat the 403(b) Plan, and should not be required to treat each Participant, as a qualified purchaser for section 3(c)(7) purposes.

### **Analysis**

The 403(b) Plan sponsors create the menu of investment options available to the Participants, including the Invesco Option. A Participant's investment discretion will be limited to allocating his or her account among a number of investment options, including, possibly, the Invesco Option.<sup>10</sup> No representation will be made to the Participants that any specific portion of their contributions to or account balances in the 403(b) Plan, or any specific portion of the Invesco Option, will be invested in any particular Separate Account. The Participants would generally not know that they are investing in a Separate Account. If the 403(b) Plan delivers any information to its Participants that mentions an investment in a particular Separate Account, it will be accompanied by a disclaimer to the effect that no assurances can be given that the Invesco Option will continue to invest its assets, or the same portion of its assets, in the Separate Account.

Further, each 403(b) Plan sponsor will be subject to a fiduciary standard (*i.e.*, the Prudent Man Standard (as defined below)) when selecting investment options and managers available under a Plan through which assets would be invested in a 3(c)(7) Fund, including the Invesco Option (which in turn invests a portion of its assets in a Separate Account) and its manager, Invesco Advisers, without direction from or consultation with any Participant other than the 403(b) Plan sponsor acting in its capacity as a 403(b) Plan sponsor.<sup>11</sup> The 403(b) Plan sponsors

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<sup>10</sup> Further, the Invesco Option will not be used to facilitate the individual investment decisions of Participants into any Separate Account.

<sup>11</sup> The Invesco Option may invest in the securities of multiple Separate Accounts, provided that, immediately following the purchase by the Invesco Option of a Separate Account's securities, no more than 50% of the Invesco Option's assets will consist of securities of any one particular Separate Account.

will either state that they are subject to the Prudent Man Standard<sup>12</sup> or contractually agree to be subject to the Prudent Man Standard. The selection of investment options by these Plan sponsors also may be subject to state law fiduciary standards. In addition, Invesco Advisers, an investment adviser registered under the Advisers Act, serves in a fiduciary capacity with respect to the 403(b) Plan assets that it allocates to the various Contracts pursuant to its advisory agreement with the applicable Plan sponsor.<sup>13</sup>

After the Staff issued the H.E. Letter, it indicated in The Goldman Sachs Group Inc. (pub. avail. Mar. 8, 2005) (the “Goldman Letter”) that it would not recommend enforcement action to the SEC under section 7(a) of the 1940 Act against 3(c)(1) and 3(c)(7) funds if these funds do not treat the participants of a deferred compensation plan, which is exempt from many of the provisions of ERISA (*e.g.*, the fiduciary standards of ERISA described above), as the beneficial owners and owners of their securities, respectively, for purposes of sections 3(c)(1) and 3(c)(7) of the 1940 Act. The Staff based this position upon, in part, the representation that the plan sponsor will act, or cause the committee administering the plan to act, in accordance with the “prudent man” standard set forth in section 404(a)(1)(B) of ERISA (the “Prudent Man Standard”), which is one component of the ERISA fiduciary standard (as described above).<sup>14</sup>

The Goldman Letter suggests that whether the selection process of available retirement plan investment options is subject to the ERISA fiduciary standard is less important than whether an entity, independent of the plan’s participants, is selecting the plan’s investment options subject to a fiduciary standard (*i.e.*, the Prudent Man Standard). Here, the 403(b) Plan sponsors, and not the Participants, will select the Invesco Option as an available Plan investment (and Invesco Advisers as a manager of the Option). Further, if the sponsor is not already subject to the ERISA fiduciary standard, the sponsors’ selection of investment options will be subject to, through plan documents or contractually, the Prudent Man Standard, plus any applicable state law fiduciary standards. In addition, Invesco Advisers serves in a fiduciary capacity with respect to the assets that it allocates to the various Contracts.

As mentioned previously, the 403(b) Plans will not be funded through trusts like the Qualified Plans in the H.E.B. Letter for a variety of reasons. 403(b) Plans are not required to be organized as trusts.<sup>15</sup> In addition, tax and federal securities laws essentially prohibit these Plans

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<sup>12</sup> For example, the 403(b) Plan documents may state that the sponsor is subject to the Prudent Man Standard.

<sup>13</sup> To the extent that Invesco Advisers manages 403(b) Plan assets that are subject to ERISA, it will comply with the provisions of ERISA and the rules and interpretations thereunder (*e.g.*, general ban on prohibited transactions under section 406 of ERISA).

<sup>14</sup> Section 404(a)(1)(B) of ERISA requires a fiduciary to discharge its duties with respect to a plan solely in the interest of the participants and beneficiaries and “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.”

<sup>15</sup> See note 2 *supra*. See also 403(b)(1) of ERISA (excluding from the trust requirement of 403(a) of ERISA the “assets of a plan which consist of insurance contracts or policies issued by an insurance

from combining their assets and forming a collective trust through which the Plans could invest in the Separate Accounts. A group trust's inclusion of 403(b) plan assets that invest in an annuity could jeopardize the trust's tax-advantaged status.<sup>16</sup> Further, a group trust that includes 403(b) plan assets that invest in an annuity, such as a Contract, would not be able to rely on the exclusion from the definition of an investment company that collective trusts typically rely on -- section 3(c)(11) of the 1940 Act. This section excludes from the definition of an investment company a collective trust fund consisting solely of assets of government plans (as defined in section 3(a)(2)(C) of the 1933 Act), but section 3(a)(2)(C) does not include a "plan funded by an annuity contract described in Section 403(b) of the Code." The SEC's Division of Trading and Markets has implicitly recognized that not all retirement plans lend themselves to a trust format and has presumably not recommended enforcement action, in part, on that basis.<sup>17</sup>

Notwithstanding the fact that the 403(b) Plans will not be funded through trusts that would purchase the Contracts, the sponsors of the Plans would purchase the Contracts instead on behalf of the Participants. Each 403(b) Plan sponsor would be a qualified purchaser under section 2(a)(51)(A)(iv) of the 1940 Act and would not have been formed for the specific purpose of acquiring securities offered by a 3(c)(7) Fund.<sup>18</sup>

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For the reasons set forth above, we respectfully request that the Staff confirm that it will not recommend enforcement action to the SEC under section 7(a) of the 1940 Act against the Separate Accounts that offer and sell the Contracts, as part of the Invesco Option, if the 403(b) Plan sponsors invest in such Separate Accounts.

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company . . ."); David Pratt, To (B) or not to (B): Is that the Question? Twenty-First Century Schizoid Plans under Section 403(B) of the Internal Revenue Code, 73.1 Alb. L. Rev. 139 (2010) nn. 255-57 and accompanying text.

<sup>16</sup> See Internal Revenue Service Revenue Ruling 2011-1 (Jan. 2011) (extending eligibility for group trust participation to certain 403(b) plans but not those that invest in annuities).

<sup>17</sup> See, e.g., Charles Schwab & Co., Inc. (pub. avail. Jul. 16, 1998) (not recommending enforcement action under rule 10b-10 under the Securities Exchange Act of 1934 against Charles Schwab & Co. Inc. if it were to deliver confirmations to an unaffiliated custodian of 403(b) accounts rather than the beneficial owners of the 403(b) accounts").

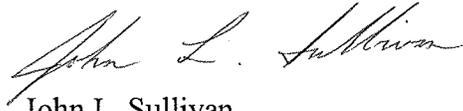
<sup>18</sup> Each 403(b) Plan will own and invest on a discretionary basis not less than \$25 million in investments and will be acting for its own account. Most of the Participants will not meet the "qualified purchaser" definition.

Should you require additional factual information or further analysis, please contact either Larry P. Stadulis at (202) 419-8407 or John L. Sullivan at (202) 292-4524. If the staff is unable to confirm that it will not seek enforcement action based on this letter, we would appreciate it if you would contact either of us to discuss possible revisions or additional submissions. Thank you for your consideration of this matter.

Sincerely,

Handwritten signature of Lawrence P. Stadulis in cursive script, followed by a forward slash and the number 525.

Lawrence P. Stadulis

Handwritten signature of John L. Sullivan in cursive script.

John L. Sullivan