UNITED STATES OF AMERICA
Before the
UNITED STATES SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-22165

In the Matter of **Invesco Distributors, Inc. and Invesco Advisers, Inc.,** **Respondents.**	**Respondents Invesco Distributors, Inc. and Invesco Advisers, Inc.'s Reply in Support of Motion to Amend Order Instituting Proceedings and Motion to Stay Implementation of Order Instituting Proceedings**

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I. INTRODUCTION

Respondents Invesco Advisers, Inc. ("IAI") and Invesco Distributors, Inc. ("IDI," and with IAI "Respondents" or "Invesco"), by and through their undersigned counsel, Ropes & Gray LLP, respectfully submit this reply in support of Invesco's Motion to Amend and Motion to Stay (together, the "Motions") the September 24, 2024 Order Instituting Administrative Proceedings (the "Order"), which was part of the Commission's multi-year electronic communications sweep (the "Electronic Communications Sweep") that resulted in over 70 settlements. *See* Motion to Amend at 1-2.[1]

Invesco has gone to great lengths to comply with the terms of the Order: Invesco has paid a $35 million penalty, and retained at great expense an independent compliance consultant and is currently working with its consultant to complete a comprehensive compliance assessment related to electronic communications under the precise terms of the Order. In parallel, Invesco has filed the Motions to seek equitable treatment with respect to the remaining prospective settlement terms. Invesco simply seeks to align its settlement terms with those that the Commission recently deemed appropriate for similarly situated firms that settled for the exact same recordkeeping violations on substantially less burdensome terms shortly after Invesco. All of Invesco's requested modifications, which are targeted in nature, are in line with the January 2025 settlements, and are not intended to diminish Invesco's ongoing compliance with its recordkeeping obligations on a go-forward basis. The Division of Enforcement's (the "Division" assertion that Invesco seeks to "back out of [its settlement] agreement," is factually incorrect and disingenuous.

[1] Page references to the Motion to Amend and the Motion to Stay refer to the pages of the brief in support of those Motions.

Invesco seeks only to restore fairness and be afforded the same treatment as the group of twelve firms that settled indistinguishable violations in January 2025. There is specific unfairness that flows from Invesco being made to retain an independent compliance consultant versus being allowed to use its internal audit function to complete the same review and, as a result of the structure of the Order, being subjected to increased supervision by FINRA while firms that settled the exact same violations just three months later are not.[2] The Division's opposition does not even attempt to justify this acute inequity. In fact, in its opposition brief (the "Opposition" or "Opp."), the Division does not dispute that Invesco is similarly or better situated than those firms that settled in January 2025 nor that Invesco was uniquely collaborative throughout the SEC's inquiry. Nevertheless, those firms, most of which received SEC inquiries several months *before* Invesco but resolved their inquiries *after* Invesco, received preferential settlement terms that were denied to Invesco just three months earlier.

Equally as unavailing is the Division's misleading assertion that the thrust of Invesco's request is simply its deciding not to negotiate for a "better deal" and subsequently regretting that

[2] Because the Order asserts a willful violation and failure to supervise under Exchange Act Section 15(b) and orders, via Section IV.D, ongoing efforts that are "still in effect" because they will occur over a year or more from the entry of the Order, Invesco completed a continuing membership application with FINRA. *See* FINRA Regulatory Notice 09-19 (Apr. 9, 2009) ("With respect to disqualifications arising solely from findings specified in Exchange Act Section 15(b)(4)(D) or (E) by the SEC . . . a member shall file [a continuing membership application] with RAD if the sanction is **still in effect** . . .") (emphasis added). In connection with this process, FINRA required that Invesco consent to a heightened plan of supervision, which imposes additional requirements beyond those contained in the Order, including *inter alia* an increased schedule of examination and supervision by FINRA for a period of six years. However, it is our understanding that if the ongoing efforts are part of a voluntary undertaking, as is the case for the January 2025 settlements, then for FINRA purposes, sanctions are not still in effect, and no continuing membership application is required. This would benefit Invesco, but would also mean that FINRA would not need to dedicate unnecessary resources on additional supervision for this relatively minor issue and could focus its efforts on more meaningful matters.

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decision. This is plainly incorrect. While Invesco shares Commissioner Peirce and Uyeda's "deep reservations" regarding the Electronic Communications Sweep, specifically with respect to the Commission's attempt to "enforce [its] way to compliance" during the height of a global pandemic with limited technological solutions to facilitate compliant communications, Invesco is not complaining about being included in the sweep while other parties were not. *See* Commissioner Hester M. Peirce and Mark T. Uyeda, *A Catalyst: Statement on Qatalyst Partners LP* (Sept. 24, 2024), https://www.sec.gov/newsroom/speeches-statements/statement-peirce-uyeda-qatalyst-09242024. Rather, Invesco is requesting modifications because it did everything that the staff of the SEC's Fort Worth Regional Office (the "Staff") asked of it, and as recently as a few months prior to those January 2025 settlements, Invesco was told by the Division that there was no room for further negotiation of the terms of settlement being offered. Quite plainly, Invesco was told that the terms were being offered on a take-it-or-leave-it basis: there was no "better deal" to be had and refusing to settle meant an aggressive, lengthy, intrusive, and expensive, as well as likely unnecessary, investigation.[3]

Invesco has been significantly prejudiced by this disparate treatment and as a result has been subjected to fundamental unfairness. Notably, the former Director of the Division, arguably one of the primary architects of the Electronic Communications Sweep, recently sounded the alarm with respect to this very issue:

[3] At a minimum, this inquiry would have required the review and production of communications collected from employees' personal devices, which implicates serious privacy concerns that have recently been identified by members of the Commission. *See* Commissioner Hester M. Peirce and Mark T. Uyeda, *A Catalyst: Statement on Qatalyst Partners LP* (Sept. 24, 2024), https://www.sec.gov/newsroom/speeches-statements/statement-peirce-uyeda-qatalyst-09242024 (underscoring the "privacy concerns" associated with "subjecting employees' personal means of communication to constant surveillance" and that "[d]oing so is offensive to employees' privacy and may have legal implications in some jurisdictions").

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> "[S]weeps and initiatives are effective . . . [but] you need to be figuring out what the ramp down is going to be . . . and **how do you draw that line in fairness to the first person who comes in to address an issue and then maybe somebody in that same first batch of the sweep drags their feet and just because they drag their feet until two years later you know should they benefit . . . how is that fair to the entities that came in and resolved things more quickly** . . ."
>
> Docket Media LLC, *Keynote Q&A Discussion with Gurbir Grewal* (Jan. 30, 2025), https://youtu.be/T9rcDp0aRxk?si=euI9tu3MShkomi8W (emphasis added).

And while the Division argues that the Commission's grant of the Motions would "open the floodgates" of relitigation over settled administrative proceedings, (Opp. at 2), it only does so by entirely disregarding the facts unique to this matter that plainly indicate otherwise. As detailed in the Motion to Amend and reiterated in this reply, this case involves a broad enforcement sweep involving similarly situated firms regarding materially similar violations in the same type of proceedings that has resulted in highly inequitable outcomes to the detriment of *more* collaborative parties. The circumstances here are precisely the type of "rare circumstances" for which the Commission should grant limited modification to the undertakings. Rather, what would truly "undermine the credibility and efficacy of the Commission's enforcement program," Opp. at 7, is the prejudicial treatment of cooperative firms such as Invesco in favor of firms that settled towards the end of a lengthy process.[4] *See* Motion to Amend at 2; *cf.* Opp. at 1-7.

In the Motion to Stay, Invesco details the reasons for why the Commission should grant the stay under the standards that apply to the Commission's Rules of Practice. Whether under Rule 401(a), 401(c), or 100(c), the Commission indisputably has the authority to enter a stay in this matter. In fact, the Commission orders quoted by the Division squarely support granting a

[4] We acknowledge that every party in an enforcement action typically has its own unique circumstances that merits different attention, but the nature of the violations here were very common such that differences in settlement approaches should not have been as drastic as those presented here.

stay in this instance as they illustrate how Invesco satisfies all four factors that the Commission considers when determining whether to grant a stay.

Given the applicable standards that apply to the Commission's Rules of Practice that are supported by Commission precedent cited by both Invesco and the Division, the Commission should grant both Motions.

II. ARGUMENT

A. The Commission Should Grant the Motion to Amend

Without explanation, the Division's Opposition fails to address in any way the applicable standard under Rule of Practice 200(d)(1), 17 C.F.R. § 201.200(d)(1), which expressly allows the Commission to amend an order instituting proceedings "to take into account subsequent developments which should be considered in disposing of a proceeding" and recognizes that "amendment of orders instituting proceeding should be freely granted." Rule of Practice Comment (d) to Rule 200, 60 Fed. Reg. 32738, 32757 (June 23, 1995); *see generally* Motion to Amend at 10. The Division similarly ignores Rule of Practice 100(c)'s general directive that "[t]he Commission, upon its determination that to do so would **serve the interests of justice** . . . may by order direct, in a particular proceeding, that an alternative procedure shall apply or that compliance with an otherwise applicable rule is unnecessary." 17 C.F.R. § 201.100(c) (emphasis added).

As detailed in the Motion to Amend, the specific facts of this case considered under the applicable standard make clear that the "interests of justice" warrant a grant of the Motion to Amend. On May 15, 2023, Invesco received document requests as part of the Electronic Communications Sweep (the "Inquiry"); these requests were received after those received by many of the firms who became subject to nearly identical inquires. *See* Motion to Amend at 5. From the outset, Invesco took a uniquely collaborative approach that facilitated an early

discussion with the Staff regarding a possible resolution and ultimately led to a settlement in just over a year, consistent with the Staff's stated plan from the outset of the Inquiry. Even though Invesco followed through and cooperated with the Staff in its inquiry, it was nevertheless denied a meaningful opportunity to negotiate a settlement by the enforcement Staff. *Id.* at 8. In discussing potential resolution of the matter, Invesco was told that there were certain features of a settlement that were non-negotiable, including the independent compliance consultant. In a perverse twist, the firms that settled in January 2025 were able to negotiate on these terms and received materially less prejudicial settlements despite having taken significantly longer than Invesco to resolve their inquiries. *Id.* at 6-8. This is patently unfair and the Division does not argue otherwise.

This type of disparate treatment, which prejudices *more* cooperative parties, undermines the legitimacy and efficacy of the SEC's enforcement program and creates adverse incentives for firms to delay rather than cooperate with the SEC. *Cf.* Report of Investigation and Commission Statement, Exchange Act Release No. 44969 (Oct. 23, 2001) ("When businesses . . . cooperate with Commission staff, large expenditures of government and shareholder resources can be avoided and investors can benefit more promptly."); *Remarks at SEC Speaks, 2024*, SEC (Apr. 3, 2024), https://www.sec.gov/newsroom/speeches-statements/sanjay-wadhwa-secspeaks-2024-04032024 (In April 2024, the SEC recognized that in the context of the Electronic Communications Sweep "[f]irms that do not self report can still receive credit based on their cooperation with ENF staff during our investigation."); *see also* Motion to Amend at 13-14. The fact that the former Director of the Division recognized this very unfairness is telling. *See* Docket Media LLC, Keynote Q&A Discussion with Gurbir Grewal (Jan. 30, 2025), https://youtu.be/T9rcDp0aRxk?si=euI9tu3MShkomi8W (questioning, in the context of the

Electronic Communications Sweep, how allowing firms that "drag their feet" to receive more favorable settlement outcomes could be "fair to the entities that came in and resolved things more quickly").

In its Opposition, the Division reduces this detailed factual background and fundamentally unfair treatment of Invesco into one statement—"Respondents' sole argument [is] that purportedly similarly situated respondents in separate proceedings later received a better outcome" (Opp. at 2)—and argues that this oversimplified version of the facts should be analogized to cases applying Rule 60(b) of the Federal Rules.[5] However, the applicable standard for motions to amend orders instituting proceedings before the Commission is Rule of Practice 200(d), 17 C.F.R. 201.200(d). Tellingly, the Division's Opposition fails to even mention the rule, much less acknowledge the many available cases invoking Rule 200(d) and directly undermining its position here. And even an analysis of the cases cited by the Division in support of the Rule 60(b) standard, which again is not controlling, reveals that the cases are not apposite to the facts of this matter. For example, in *United States v. Radiology Grp. LLC*, the litigant attempted to vacate a consent judgment from a federal court for an agreed upon settlement amount based on financial difficulties. 2024 WL 2547887, at *2 (S.D.N.Y. Dec. 30, 2024). Invesco, however, does not in any way seek to modify the $35 million civil monetary penalty that it has already paid in full, or the multiple other actions it has already undertaken consistent with the Order's terms. Invesco simply seeks to modify its continuing obligations in a targeted and precise manner to be in line with those of similarly situated firms.[6] Invesco is not seeking to

[5] Federal Rule 60(b) allows *litigants* to seek relief from judgments or orders of a federal court.
[6] Other cases are equally inapposite. In *SEC v. Allaire*, the defendant "fail[ed] to allege a jurisdictional defect or violation of due process that would permit relief under Rule 60(b)(4) [a void judgment]." *Compare* No. 03-cv-4087, 2019 WL 6114484, at *1 (S.D.N.Y. Nov. 18, 2019), *with* Motion to Amend at 5 (Invesco alleging prejudicial treatment from similarly situated

undo the Order, in fact, none of the modifications sought will negatively impact Invesco's ability or need to comply with its recordkeeping obligations on a go-forward basis. For example, changing the nature of the undertakings from ordered to voluntary has no impact on go-forward compliance, but would alleviate a fundamental unfairness that required Invesco to consent to a heightened plan of supervision with FINRA, while the January 2025 firms have no such obligations, simply because Section IV of their orders does not include a requirement to comply with the undertakings. *See* Motion to Amend at 7-8.

The Commission precedent cited by the Division are just as unavailing. For example, in *In the Matter of Gregory Bolan*, two co-respondents pursued different procedural paths; one agreed to settle with the SEC while the other litigated the case in federal court. Exchange Act Release No. 85971 at 1 (May 30, 2019). The respondent who settled with the SEC attempted to vacate the settlement based on findings from the litigation, and the Commission in *Bolan* specifically highlighted how the "outcomes of settled and litigated proceedings need not be the same and cannot be compared." *Id.* at 4. *Bolan* is plainly irrelevant. Invesco is not asking to receive the same treatment received by a litigant; it is asking to receive the same treatment as firms who, as part of the same sweep, violated the same exact rules, and underwent the same settlement process, but obtained drastically more favorable settlement terms that were denied to

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firms that resolved analogous matters). In *SEC v. Alexander*, the defendant did "not assert a significant change to securities laws" from the time of the judgment and offered no new factual circumstances other than "the passage of time." *Compare* No. 06-cv-3844, 2013 WL 5774152, at *3-5 (E.D.N.Y. Oct. 24, 2013), *with* Motion to Amend at 8 (detailing a "subsequent development" that brought to light the prejudicial treatment of Invesco). In *Sampson v. Radio Corp. of America*, a litigant attempted to vacate a consent judgment in a case with one company (RCA) because the litigant misjudged the impact of the settlement with RCA on disputes with other companies in cases that were already pending before the time of the settlement. *Compare* 434 F.2d 315, 317 (2d Cir. 1970), *with* Motion to Amend at 8 (detailing how Invesco was denied a meaningful opportunity to negotiate any other type of settlement with the Staff).

Invesco. *See* Motion to Amend at 9. Federal courts have expressed concern with such disparate treatment. *See* Motion to Amend at 12 (citing *Gupta v. S.E.C.*, 796 F. Supp. 2d 503, 514 (S.D.N.Y. 2011) (denying SEC's motion to dismiss plaintiff's equal protection claims on the grounds that "there is already a well-developed public record of [plaintiff] being treated [by the SEC] substantially disparately from 28 essentially identical defendants . . .")).

And while the Division attempts to summarily dismiss the Commission precedent in *Millenium Partners* and the related market timing cases, it offers no rebuttal as to the similarities with the situation at hand. As in *Millenium Partners*, Invesco has complied with several relevant undertakings since the issuance of the Order, including by retaining an independent compliance consultant that is currently working to complete a comprehensive assessment of Invesco's electronic communications compliance program. *See* Motion to Amend at 6-7. As in *Millenium Partners*, Invesco seeks to modify terms relating only to ongoing obligations on a go-forward basis; it does not seek to claw back the $35 million already paid in full. And as in *Millenium Partners*, the terms that Invesco seeks to modify have become "impractical" and "outdated" given the Commission's recent determination in the January 2025 Settlements that those terms are not necessary to remedy the same violations and ensure prospective compliance.

B. The Commission Should Grant the Motion to Stay Pending its Decision on the Motion to Amend

The Commission's Rules of Practice give the Commission broad authority to issue stays. *See* 17 C.F.R. § 201.401(a) (providing that "[t]he Commission may issue a stay [on a party's motion] or on its own motion"); *see also* 17 C.F.R. § 201.100(c) ("The Commission, upon its determination that to do so would serve the interests of justice and not result in prejudice to the parties to the proceeding, may by order direct, in a particular proceeding, that an alternative procedure shall apply or that compliance with an otherwise applicable rule is unnecessary.").

Notably, the primary case cited by the Division to illustrate the standard for issuance of a stay, *Scottsdale*, strongly supports Invesco's position, and the ruling in *Micah J. Eldred* that the Division cites to suggest Rule 401 cannot be used to seek a stay under these circumstances is inapposite. *See generally, In the Matter of the Application of Scottsdale Cap. Advisors Corp.*, Exchange Act Release No. 83783 (Aug. 6, 2018); *In the Matter of Micah J. Eldred.*, Exchange Act Release No. 34-96083, 2022 WL 9195015, at *1 (Oct. 14, 2022) (relating to a motion for a stay brought in an *ongoing* proceeding in which the Commission decides to construe the motion for a stay as a "request under Rule 161" for an adjournment).

In *Scottsdale*, the Commission granted the respondent's motion for a stay, explaining in detail why the respondent satisfied all four factors of the standard. *First*, on the likelihood of success on the merits, *Scottsdale* illustrates that the key inquiry is whether a "serious legal question" is raised; the Commission is not required to make a final determination on the merits. *Scottsdale*, Exchange Act Release No. 83783 at 2-3. Here, Invesco raises serious concerns relating to the fundamental unfairness and prejudice that subsequent developments since the Order have revealed. *See* Motion to Stay at 5-6. The Division's Opposition does nothing to allay those concerns and if anything confirms them by implicitly recognizing that Invesco was similarly situated to the firms that settled in January 2025 and received far less prejudicial terms. *See* Opp. at 2 (stating that the Respondents' basis for seeking to modify the terms of its Order was "that purportedly similarly situated respondents in separate proceedings later received a better outcome for themselves," but making no opposition to the premise).

Second, on irreparable harm in *Scottsdale*, the Commission found that while "the fact that an applicant may suffer financial detriment does not rise to the level of irreparable injury warranting issuance of a stay," the threat of significant financial harm that is not "merely

theoretical or speculative" with "no practical way to undo those consequences should [the respondent] prevail on appeal" did amount to irreparable harm that warranted issuance of the stay in that case. *Scottsdale*, Exchange Act Release No. 83783 at 5. Similarly, here, per the undertakings defined in the Order, Invesco's independent compliance consultant will have to complete a comprehensive evaluation of Invesco's compliance program by February 24, 2025, and just 45 days later submit to the SEC a report regarding the same. *See* Motion to Stay at 1. This would lead to significant additional expense—none of which would be recoverable—for Invesco and its shareholders despite the likelihood of those obligations being rendered moot should the Commission grant the Motion to Amend. *Id.* at 6.

Third, on whether the stay would substantially harm others, the Commission in *Scottsdale* discounted an argument by FINRA that a stay would allow the respondent "with the potential to continue to flood the US markets with millions of shares of unregistered microcap securities" in light of the fact that FINRA had not found the respondent to be a necessary participant or substantial factor in the sale of unregistered securities. Similarly in this case, there is no risk of harm to the investing public. Invesco has already paid an eight-figure civil monetary penalty, retained an independent compliance consultant, and is exceedingly well positioned to comply with its recordkeeping obligations on a go-forward basis—none of which is addressed by the Division in its Opposition. *See* Motion to Stay at 6-7. Moreover, it is unclear—and the Division offers no justification to explain—why allowing Invesco to receive the same settlement terms afforded to the twelve firms that settled in January 2025 would cause substantial harm. Again, if these terms were so harmful, it begs the question of why the Division would recommend them to the Commission just one month prior. *See also* Commissioner Hester M. Peirce and Mark T. Uyeda, *A Catalyst: Statement on Qatalyst Partners LP* (Sept. 24, 2024),

https://www.sec.gov/newsroom/speeches-statements/statement-peirce-uyeda-qatalyst-09242024 ("We need to work with the industry and other interested members of the public to develop a pragmatic and privacy-respecting approach that enables firms and the Commission to have the records they need for compliance, examination, and enforcement at a reasonable cost in both financial and privacy terms."). And while the Division argues an ethereal harm to investors that would follow if the undertakings were not carried out, delaying any of the remaining obligations until the Commission decides on the Motion to Amend would not have any effect on Invesco's compliance with its recordkeeping obligations.

Finally, on whether a stay would serve the public interest, the Commission in *Scottsdale* found that the "balance of the hardships tips decidedly in favor of a stay" given that no investor would be harmed while there would be irreparable harm for the respondent. *Scottsdale,* Exchange Act Release No. 83783 at 3. The same balance of hardships applies here. As a last resort, the Division argues that a stay would harm the public's interest in the finality of Commission settlements in this case. But the Division fails to explain how a stay pending a decision on the merits of the Motion to Amend by the Commission possibly affects the finality of Commission settlements. Rather, the only potential harm that could result is harm to Invesco's shareholders in the case that a stay is *not* granted and Invesco is forced to comply with onerous and costly obligations likely to be rendered moot. Motion to Stay at 7. Invesco is well aware of its compliance obligations under the relevant rules and its own policies and is not seeking to avoid such duties through a stay while its Motions are considered.

III. CONCLUSION

For the foregoing reasons, Invesco respectfully requests that the Commission grant the Motion to Amend and the Motion to Stay the Order as requested.

Dated: February 19, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rules of Practice 150 and 151, 17 C.F.R. §§ 201.150 & 201.151, I certify that I filed this document using the eFAP system; I further certify that, on **February 19, 2025,** a true and correct copy of **Respondents Invesco Advisers, Inc. and Invesco Distributors, Inc.'s Reply in Support of Motion to Amend and Motion to Stay Order Instituting Proceedings** was served via electronic mail on the following:

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CERTIFICATE OF COMPLIANCE

In accordance with Rule of Practice 151(e), 17 C.F.R. § 201.151(e), I certify that on February 19, 2025, I have omitted any sensitive personal information, as required by Rule of Practice 151(e)(3) from this filing.

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