February 14, 2023

Submitted via SEC's Internet Comment Form at: (https://www.sec.gov/cgi-bin/ruling-comments)

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: File Number S7-26-22

Dear Ms. Countryman:

On behalf of our members, the Insured Retirement Institute ("IRI")[1] appreciates the opportunity to comment on the Securities and Exchange Commission's ("SEC") proposal titled, ***Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-PORT Reporting***, RIN 3235-AM98 (the "Proposed Rule")[2], which would amend the current rules for open-end management investment companies ("open-end funds") to require the use of swing pricing[3] and a "hard close" for these funds.[4] For the reasons set forth below, IRI and its members oppose the Proposed Rule and respectfully request that it be withdrawn.

Executive Summary

These comments were prepared following careful review and consideration of the Proposed Rule by IRI's members.[5] Our members have identified a number of wide-reaching and fundamental problems

---

[1] The Insured Retirement Institute (IRI) is the leading association for the entire supply chain of insured retirement strategies, including life insurers, asset managers, broker-dealers, banks, marketing organizations, law firms, and solution providers. IRI members account for 90 percent of annuity assets in the U.S., include the foremost distributors of protected lifetime income solutions, and are represented by financial professionals serving millions of Americans. IRI champions retirement security for all through leadership in advocacy, awareness, research, and the advancement of digital solutions within a collaborative industry community.
[2] 87 FR 77172 (Dec. 16, 2022).
[3] *Id*., Sec. II.B. at page 92, *citing* proposed Rule 22c-1(b); *see also* Investment Company Swing Pricing, Investment Company Act Release No. 32316 (Oct. 13, 2016) [81 FR 82084 (Nov. 18, 2016)]; *see also* Swing Pricing Adopting Release; Rule 22c-1(a)(3).
[4] *Id*. Sec. II.C. at page 128.
[5] While this letter is being submitted by the deadline initially set by the SEC, IRI and numerous other stakeholders submitted reasonable and timely requests for an extension of the comment period on the Proposed Rule, and we were extremely troubled and disappointed by the SEC's refusal to grant this request. The Proposed Rule was not issued in an effort to protect investors against any sort of emergency or imminent threat of harm, and therefore an extension would not have adversely impacted investors. However, as acknowledged by the SEC in proposing release and as explained in our comments below, the Proposed Rule will have an extremely significant impact on the markets and investors. Additional time to analyze the Proposed Rule would have allowed IRI and other stakeholders to develop far more robust feedback for the SEC about the real-world implications of the Proposed

with the Proposed Rule and have expressed significant concerns about the harmful effects the Proposed Rule would have on the insured retirement industry (including variable insurance product manufacturers, retirement plan providers, and recordkeepers), and the investors we serve. While we appreciate the SEC bears the burden of ensuring that investor protections adapt in a timely and appropriate manner to reflect the current marketplace, we believe the Proposed Rule's prescriptions of swing pricing and a hard close will have a significantly adverse impact on investors that will greatly outweigh the benefits that could potentially result from the Proposed Rule.[6]

In this letter, we focus on the impact of the Proposed Rule on variable insurance account holders[7] and retirement plan participants (referred to collectively throughout this letter as "Investors").[8] While investors across the board will be impacted by the swing pricing and hard close proposal, retirement savers are at a particular disadvantage given the steps plan recordkeepers and intermediaries must take to execute trade orders in compliance with plan rules. The Proposed Rule's prescriptions for swing pricing and a hard close will have a direct negative impact on millions of mainstream, middle-income Americans who are trying to save for a secure and dignified retirement and will greatly disrupt the processes that are essential to effective, successful, and compliant operations to effectuate returns to Investors. Adoption of a rule that would have such an effect would be inconsistent and incompatible with the SEC's published mission of "protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation," and "… protecting Main Street investors and others who rely on our markets to secure their financial futures."[9] The Proposed Rule would also run counter to the objectives, continuing efforts, and several work streams of Congress, which recently re-affirmed its commitment to bolstering retirement savings and expanding savings opportunities to a wider spectrum of American investors through the enactment of bipartisan, common-sense, and comprehensive legislation – including the SECURE Act[10], SECURE 2.0[11], and the RILA Act.[12]

In the pages that follow, we will provide data and information to demonstrate why and how the Proposed Rule will be harmful to Investors, as well as background information to help the SEC better understand why the Proposed Rule is unworkable for retirement recordkeepers and intermediaries that are essential to the effective management of retirement plans and variable insurance products. Our comments detail how the industry's current practices for execution of trades on behalf of Investors is

---

Rule. In the absence of extenuating circumstances, the SEC should be far more interested in reaching the right result (*i.e.*, a final rule that will most effectively protect investors), rather than simply reaching the fastest outcome possible. We are significantly concerned that the needlessly rushed and abbreviated comment period in this case will lead to an outcome that will seriously harm investors.

[6] 87 FR 77172, Sec. I.A.1., Liquidity Risk Management, *citing* Rule 22e-4 under the Act (the "liquidity rule") to require open-end funds to adopt and implement liquidity risk management programs; see also Sec. II.A., Amendments Concerning Funds' Liquidity Risk Management Programs, et. al.

[7] For the purposes of these comments "variable insurance account holders" includes variable annuity and variable life account holders.

[8] As used in this letter, the defined, capitalized term "Investors" refers to variable insurance account holders and retirement plan participants, while the lower-case term "investors" refers to all investors in the marketplace, generally.

[9] U.S. Securities and Exchange Commission Website, "What We Do," *available at* https://www.sec.gov/about/what-we-do

[10] Public Law 116-94

[11] *SECURE 2.0 Act of 2022* (Public Law – 117-328 – Division T)

[12] Public Law 117-328 – Division AA, Title 1

effective and ensures quality returns for Investors' accounts and retirement savings. The Proposed Rule would require a total overhaul of the industry's compliance and operational systems and would have profound and adverse impacts on Investors and their retirement savings.

Lastly, we note that the SEC issued a similar proposal to require a hard close in 2003.[13] While the rationale for the 2003 proposal was different from the current Proposed Rule, the hard close requirement currently under consideration is nearly identical to the version put forth nearly twenty years ago. The 2003 hard close proposal led to public comments from members of Congress, industry and consumer representatives expressing concern that a hard close proposal would likely result in harm or inequities to retirement savers. Based on this extensive public opposition, the 2003 proposal was withdrawn by the SEC.[14] The Proposed Rule suffers from many of the same problems raised by IRI and others regarding the 2003 proposal, and ultimately, we believe the Proposed Rule should meet the same fate as its predecessor.

The Proposed Rule's Hard Close Requirement is Fundamentally Incompatible with a Properly Functioning Process for Execution of Trades in the Variable Insurance Contract and Retirement Plan Contexts.

Everyday Investors throughout the United States rely heavily upon the relationship and existing processes in place between intermediaries and funds to execute trade orders on their behalf. The Proposed Rule overstates the potential benefits from swing pricing and dangerously underestimates the adverse impacts of how the SEC has proposed to implement swing pricing, meaning the 4 pm ET hard close prescription. In underestimating those adverse impacts, the Proposed Rule, if enacted, would disrupt the backbone of current efficient market processes. That backbone consists of three sequential and mutually dependent steps:

- Step 1: Collection of fund trading instructions by the fund and its intermediaries, which includes insurance company separate accounts, broker dealers, and retirement plan recordkeepers, up to 4PM ET ("market close"). This deadline is rigorously applied by the funds themselves and by those intermediaries and allows for intermediaries to accept trade instructions from Investors up to the time of market close that would then be traded at that day's market price.
- Step 2: Determination by the fund of its new net asset value ("NAV") following the market close, and dissemination of the NAV to those same intermediary agents of the funds.
- Step 3: The overnight batch processing by those many intermediaries of large volumes of transactions received prior to market close, relying exclusively on the fund's new NAV, and transmittal of net trading activity to the funds (also known as omnibus trading).

These steps and knowledge of the fund's new NAV are absolutely essential to the entire backbone of the Investor-intermediary-fund relationship and trading processes. The hard close proposal would require those intermediaries to transmit their final trades to the fund before market close, and thus also before

---

[13] 17 CFR 270.22c–1 under the Investment Company Act of 1940 [15 U.S.C. 80a] (the ''Investment Company Act'' or the ''Act''), *available at*: https://www.sec.gov/rules/proposed/ic-26288.pdf
[14] 87 FR 77172 (Dec. 16, 2022) at Page 224, and Fn. 224.

the fund has determined its new NAV. This places Step 3 in front of Step 2 and such a change is not just a question of reordering action steps; rather, it is simply not possible. The Proposed Rule will cause disruption in account and plan transaction processing, creating further friction at a time when there is bipartisan support for simplifying plan requirements and encouraging plan participation.

In order for an intermediary to submit its trades, it must net out purchases and sales across a number of different individual investment options, and that requires knowledge of each fund's new NAV. Most transactions within an individual account are allocated proportionately across multiple funds, and many accounts can have multiple transactions in a single day (*e.g.*, in the case of a retirement plan account, purchase of shares with a contribution, and sale of shares to fund a participant loan). For a given intermediary, that level of activity can be multiplied across tens of thousands and even millions, of accounts. This large volume of transactions gives rise to a still larger set of simultaneous mathematical equations, waiting only for the new NAV to be dropped in and allow the calculations to be completed. If that NAV is not provided, then it will not matter whether the intermediary accepts trades up to market close or imposes an earlier cutoff; in either case, they cannot calculate the net purchases or sales for any single fund. If they are nevertheless required to provide trade activity to the fund by the market close despite the absence of the NAV, then they will need to use a proxy for the new NAV. Yet that also is not a solution, as it would result in substantial market disruption.

The intermediary would need to use a proxy for the new NAV (*e.g.*, the prior day's NAV) and would be required to run the overnight batch cycle prior to market close in order to generate the transaction activity. This, in turn, would require the intermediary to impose an earlier cut-off time for accepting trade orders, perhaps before the market even opens. Once the actual NAV is determined, the intermediary would once again have to run its batch cycle, and through the process, reconcile the differences between the two batch cycles, which gives rise to what some refer to as "breakage." There is a variance when pulling assets out of the separate account on "Day 1" with assumed same day pricing and then subsequently having to apply "Day 2's" NAV to those same funds. This "breaks" the system and results in an imbalance between the Investor's unit value and the share value in the separate account.

This breakage and any new costs generated as a result of the Proposed Rule represent very real costs that would be borne by individual Investors, either directly or indirectly.[15] Implementation of this Proposed Rule will cause our members to see more breakage throughout the current processes. Financially, firms, recordkeepers, and funds will be forced to determine if the separate account can bear the associated breakage costs, or if the general account will assume the breakage costs, if possible. This ignores potential legal consequences of either choice. Either way, Investors, shareholders, or both will be affected by the higher expenses due to the breakage incurred by a hard close.

While it might be suggested that some or all the intermediaries could absorb such breakage, we believe that to be highly unlikely, at best, and certainly not a foundation for a final rule without further study. Specifically:

- State law governs variable insurance contracts. Potential legal issues arise based on applicable state laws and regulations, including states' non-discrimination statutes, which would impact

[15] Per Fn. 5 *supra*, based on a lack of time to comment with more through economic analysis and impact to Investors, we could have provided real-life examples and calculations of the costs borne by Investors.

each contract holder of variable insurance products. Consequently, state laws and regulations would effectively interfere with intermediaries absorbing the costs associated with implementation of mandatory swing pricing. The result would lead to a disparate impact for these variable insurance contract holders. Therefore, prior to intermediaries absorbing such costs, state laws governing insurance accounts must be considered and applied where applicable. Similar legal considerations could apply at the federal level to a large volume of service contracts, and for investments offered under ERISA plans, under ERISA provisions intended to protect plan investors.[16]

- Even if such obligations could be legally assumed, doing so would not be economically viable for many intermediaries. Even though the ills sought to be addressed through swing pricing would continue to be outlier events, the new hard close requirements would apply every day that the markets are open. That would put the intermediary in the position of "floating" every single day's market movements, for all transactions entered for that day. Even if the "float" cost could be absorbed generally for many market days, those very same outlier market days could be devastating to most or all intermediaries.

<u>The Proposed Rule's Hard Close Requirement Will Have Extensive Negative Impacts on Investors.</u>

<u>Perpetual Cycle of Trades and Corrections Will Cause Investor Confusion</u>

The hard close proposal would require intermediaries to use a proxy for the new NAV (*e.g.*, the prior day's NAV) which is not a viable solution and will cause extreme disruption in the backbone of current efficient market processes, including numerous client-facing issues. If funds are required to execute trades without knowing the correct NAV, trades would invariably have to be followed by corrective transactions once the correct NAV is determined. Investors would see a never-ending cycle of trades and corrections (*e.g.*, cancelled trades, corrected statements, explanation letters, corrected benefit checks and EFTs to Investor bank accounts) that will inevitably cause extreme confusion, frustration, and diminished confidence in the intermediary's ability to provide effective services. This experience could discourage some from even considering whether to purchase a variable product that would otherwise be in their best interest and best suit their financial needs.

<u>Risk of Valuation Errors, Transactions and Costs Will Increase Due to the Proposed Rule's Hard Close Requirement</u>

Executing trades without the actual NAV will also increase the risk of valuation errors. This would be especially problematic with respect to transactions involving the disbursement of funds to Investors from their retirement plans (*e.g.*, full surrenders, partial withdrawals, loans). Actual NAV calculations are necessary for intermediaries to determine whether particular transactions are allowable under applicable law and the relevant plan's rules. Distributions made in violation of law or plan rules can have serious negative consequences for Investors. The SEC should not adopt a rule that would expose Investors to the risk of involuntarily violating other regulatory regimes.

---

[16] The Employee Retirement Income Security Act of 1974 ("ERISA").

The hard close proposal would require intermediaries to transmit final trades to the fund before market close. In order for intermediaries to batch trade orders to the fund prior to market close, they would be required to set an earlier internal cutoff time for receiving trade orders. Due to the large volume of transactions and larger set of simultaneous mathematical conversations and calculations, the nightly batch process can take several hours, or more, to complete and essentially requires for all client-facing administrative systems to be offline and unavailable for use. The nightly batch process is crucial to preventing disruption of daily operations and client interactions during business hours which is why this process could not take place earlier in the day or during hours of operation.

Batch processing and omnibus trading are most common and essential to the efficiencies, of both, time, and cost, of transactions within variable products and retirement plans. Each individual account can experience multiple transactions in a day, most of which are allocated proportionately across multiple funds, which means the intermediary is batching and trading tens of thousands of such trades across their customer base. Therefore, it would be worthwhile to look at the cost of trades at the omnibus level versus an individual level. The industry most commonly uses an omnibus methodology to complete the trade process and moving to an individual methodology will create an overwhelmingly large uptick in the number of trades being reported to national clearing corporations. Such a change in methodology would eliminate all of the efficiencies enjoyed with omnibus trading and replace them with significantly more complex processes that require more time and more cost to complete. These changes could result in firms not being able to use data file transfers currently in use as they would be “too large” to report under the individual methodology. Furthermore, it could also restrict competition in the market as smaller intermediaries are unable to absorb these increased costs and processing requirements.

We have serious concerns about whether the national clearing corporations could adjust to facilitate such a significant increase in the physical count of trades received on an ongoing basis. If transactions were to be “unraveled” and conducted using the individual methodology this would exponentially increase the volume of information being passed from the intermediary to the fund. For example, a member provided real data based on a typical month using the omnibus methodology that batched 22,976 trades at $.06 each for a cost of $1,387.55. If they were to use the individual methodology, without the use of batching, this would result in 668,717 individual trades at $.06 each for a cost of $40,123.02. That is a cost increase of approximately $450,000 annually in trading expenses, and almost 30 times as many trade transactions and with no benefits to the Investor.

Retirement Savers – Especially Those Outside the Eastern Time Zone – Would be Unfairly Disadvantaged by the Proposed Rule’s Hard Close Requirement

The Proposed Rule’s earlier cutoff time would “shorten the trading day” and prevent Investors who submit trade orders prior to market close, but after the intermediary’s cutoff, from participating in that day’s market price. Instead that trade would likely be processed at the next day’s market price which may not be advantageous, timely enough, or in the best interest of the Investor. The Proposed Rule does not account for the fact that trade orders are not all received electronically. They come from various other sources, including by phone, USPS mail, fax, or other systems to accommodate the preferences and needs of all Investors. Additionally, by shortening the trading day, the Proposed Rule imposes an unfair disadvantage on Investors based on their location and differences in time zones.

Investors on the West coast would be subject to even larger disadvantages than Investors located in Eastern Time, potentially facing a scenario where they are never able to receive same day pricing.

A Hard Close Requirement Will Make it Harder to Satisfy Best Interest and Best Execution Obligations

In addition to the operational impossibilities, implementing a hard close will create conflicts with existing regulatory obligations under Best Execution[17] regarding certain transactional obligations, and best interest recommendations under the SEC's Regulation Best Interest[18]. Intermediaries, including the individual financial professionals working for them, would be forced to make trade, product, and other transactional recommendations much earlier in the day without the full knowledge of the day's market activity. Individual Investors often rely heavily upon intermediaries and chose not to monitor market trends or attempt to time their transactions accordingly. Lacking this information, and the help of the fully informed intermediary, Investors would face unnecessary confusion and added complexity surrounding their financial decisions, making it hard to determine what activity is in their best interest.

We are confident that the existing processes used by intermediaries and funds to execute trade orders on Investors' behalf is appropriate, effective, and aligned with current legal and regulatory standards of care and execution. Further, we have demonstrated how a hard close of 4 pm ET would be so disruptive to this system, it would conclusively lead to a negative Investor impact. In sum, we strongly disagree with the SEC's suggestion that implementation of swing pricing and the related hard close could be accomplished through rather simplistic technology updates and undertaking operational changes. The SEC's assertion is premised on the false notion that implementation costs and resistance to change are the primary reasons why the industry has not already adopted a hard close to implement swing pricing under the voluntary framework currently in place. In reality, as we explained above, a hard close requirement as contemplated by the Proposed Rule would be logistically and practically impossible for the variable annuity and retirement plan industries to implement. This fact, in combination with the harmful, inequitable, and disparate impact the Proposed Rule would have for Investors (*e.g.*, increased costs, likely disruption in account and plan transaction processing, and unnecessary confusion and transaction complexity), makes it abundantly clear that the SEC must withdraw the Proposed Rule and abandon this rulemaking effort.

The Proposed Rule Suffers From Many of the Same Problems as the Failed 2003 Hard Close Proposal.

As the SEC is aware, based on references within the Proposed Rule, this is not the first time the SEC has proposed a hard close of 4 pm ET in an effort to resolve a perceived problem in the markets. In 2003, the SEC proposed a hard close of 4 pm ET as part of the *Amendments to Rules Governing Pricing of Mutual Fund Share* (the "2003 proposed rule"),[19] which was meant to address and eliminate late trading abuses. The current Proposed Rule is intended to mandate the use of swing pricing to address perceived concerns of possible future market volatility, and to aid in liquidity and anti-dilution issues. Although the rational and proposed solution for the 2003 proposed rule clearly differs from the current Proposed Rule, they incorporate identical implementation and operationalization methods, a hard close of 4 pm ET. As stated above, the SEC ultimately did not proceed with the 2003 proposed rule largely due to

[17] FINRA *Rule 5310 – Best Execution and Interpositioning*
[18] SEC *Regulation Best Interest: The Broker-Dealer Standard of Conduct*
[19] See supra note 10.

industry and consumer groups' pushback around the harm it would cause to Investors. Below, we will highlight some of the most prominent comments submitted in response to the 2003 proposed rule as they underscore the fact that, like in 2003, a 4 pm ET hard close would have a negative impact on retirement savers and create inequities for investors.

The 2003 proposed rule was met with significant opposition from the financial services and retirement plans industries, but notably, concerns over its negative impact on retirement savers was also expressed in comments from members of both Houses of Congress and consumer groups.

A group comprised of members of the House Representatives stated as follows:

> "[T]he SEC's proposed amendments to rule 22c- 1, which would deny same-day pricing to mutual fund trade orders that are not received by the fund, the fund's primary transfer agent, or a registered clearing agency by 4 PM Eastern Time, would continue to favor certain investors over others, and could, therefore fail to restore investor confidence in mutual funds…While retirement plan participants are long-term investors, they make specific investment decisions at a particular point in time just like anyone else. Retirement plan participants deserve to have their transactions completed within the same time frame as other investors, and retirement plans across the country have invested considerable time and resources in meeting the needs of plan participants by providing them with daily valuations and same day pricing."[20]

The Senate Committee on Finance also submitted comments to the SEC on the 2003 proposed rule, expressing concern that a 4 pm ET hard close could result in inadvertent harm to retirement plan participants. The 2004 Senate letter explained:

> "At a minimum, retirement plan investors will face earlier trading deadlines in order that plan administrators may perform the various administrative and required compliance functions prior to submission the orders to the fund by 4 p.m. These deadlines will be set even earlier in the day for retirement plan investors in more Western regions of the United States given the time zone differential with the east coast-based stock markets. The effect will be the end of same-day execution of trades for many retirement plan investors, and more complex trading orders may stretch over several days."[21]

Notably, even prominent consumer representatives expressed concern over how implementation of the hard close in the 2003 proposed rule would have resulted in inequities to consumers and investors.[22]

Again, we acknowledge that the rationale for the 2003 proposed rule and the current Proposed Rule were different, but the associated hard close component of both proposals is essentially identical. What does remain identical are the harms that would occur to Investors and retirement savers across the country. The proposed hard close in 2023, like the one in 2003, would relegate retirement plan participants and variable insurance account holders to second class citizen status, and add unnecessary

---

[20] Comments on SEC Proposed Rule, S7-27-03, by Members of Congress, dated Mar. 22, 2004.

[21] Comments on SEC Proposed Rule, S7-27-03, by the U.S. Senate Committee on Finance, dated Mar. 29, 2004

[22] Testimony of Barbara Roper, Director of Investor Protection Consumer Federation of America, Before the Committee on Banking, Housing and Urban Affairs U.S. Senate, "Review of Current Investigations and Regulatory Actions Regarding the Mutual Fund Industry: Fund Operations and Governance," dated Mar. 23, 2004.

cost and complexity to the processes that support those products and savers. Hard close was abandoned following the 2003 proposal and it should be abandoned again in 2023.

The Proposed Rule Fails to Demonstrate that Requiring the Use of Swing Pricing in the United States Would Achieve the Intended Benefits of the Proposed Rule as Seen in Other Countries.

Our comments thus far have focused on the hard close requirement contemplated by the Proposed Rule, but IRI and our members also have concerns about the Proposed Rule's swing pricing provisions. As a preliminary matter, we note that there would be no mechanism to operationalize the swing pricing aspect of the Proposed Rule if the SEC eliminates the unworkable hard close requirement. Below we address additional concerns as they specifically relate to recordkeepers, intermediaries, and funds being regulatory required to incorporate swing pricing into their existing processing of Investors' trades.

The Proposed Rule is a departure from the existing discretionary framework for swing pricing under Rule 22c-1,[23]mandating the use of swing pricing to address perceived or potential issues with liquidity and anti-dilution. The SEC notes in the Proposed Rule that no U.S. fund has ever implemented the use of swing pricing, despite the ability for a fund to choose to do so.[24] We believe this can be largely attributed to the logistical and operational challenges and Investor harm that would result from a 4PM ET hard close, which we discussed in greater detail above, and the lack of benefit derived from swing pricing in general.

While the Proposed Rule proffers that "observations from the events in March 2020, including in other jurisdictions where swing pricing is a common tool, requiring funds to use swing pricing could result in benefits for investors,"[25] the SEC does not follow on with a valid or directly applicable analysis to support that assumption. The SEC's entire argument for the effectiveness of swing pricing is based on its use in foreign markets, none of which enjoy the same quantity or activity of individual investor or private retirement Investors that the U.S. markets do., The Proposed Rule also fails to offer any explanation as to how swing pricing was operationalized in other countries in the absence of a hard close requirement.[26] Further, we note that swing pricing is permissive, not mandatory, in those foreign jurisdictions where the SEC assets that swing pricing is being used effectively. The use and effectiveness of swing pricing in foreign jurisdictions as referenced in the Proposed Rule is a largely irrelevant and academic view that offers no reasonable comparison, or even sufficient acknowledgement of the significant structural and practical differences of U.S. and European markets. As explicitly stated in Footnote 40 of the Proposed Rule, "European funds are subject to regulatory regimes that differ in some respects from the U.S. regime for open-end funds. We are not aware, however, of differences between the regimes that would have significantly reduced dilution for U.S. funds relative to European funds during this period [March 2020], such that European funds needed to use swing pricing to mitigate dilution that U.S. funds were not experiencing due to regulatory or other difference."[27]

---

[23] *Supra* Note 3, Sec. II.B. at page 92, citing proposed Rule 22c-1(b); see also Investment Company Swing Pricing, Investment Company Act Release No. 32316 (Oct. 13, 2016) [81 FR 82084 (Nov. 18, 2016)]; see also Swing Pricing Adopting Release; Rule 22c-1(a)(3).

[24] 87 FR 77172 (Dec. 16, 2022) at Page 93.

[25] 87 FR 77172 (Dec. 16, 2022) at Page 93, and Fn. 93

[26] *Id*. at Pages 29-34.

[27] *Id*. at Fn. 40.

The Proposed Rule fails to prove the need to mandate swing pricing from a cost-benefit analysis. In the Proposed Rule's Rulemaking Overview, the SEC discusses a period of market stress in March 2020 and recommends "funds should be better prepared for future stressed conditions."[28] While the SEC points out a brief period of stress, they fail to demonstrate sufficient harm caused by that stress, and therefore the Proposed Rule appears to be a significant overreaction to an event that has not yet occurred and is not even expected to occur. The text of the Proposed Rule explicitly recognizes the difficulty to predict market stress, but nonetheless recommends requiring funds to incorporate stress into their liquidity classifications. Further, such market stresses are highly unpredictable by nature, often occurring as outlier events to induce enhanced volatility or market stressors. While simultaneously acknowledging that such events and their scope are unknowable, the Proposed Rule recommends funds to make "assumptions" for a sale of a "reasonably anticipated trade size,"[29] based on absolutely nothing. As discussed in our comments above, making such assumptions would incur unreasonable costs and transactional problems that would result in substantial compliance obstacles coupled with increased costs to both intermediaries and Investors. Such assumptions do not qualify as benefits to Investors especially in comparison to the extremely high associated costs of the implementation and ongoing execution of swing pricing under the hard close prescription. The Proposed Rule's does not present a valid cost-benefit analysis.

<u>Conclusion</u>

In closing, we respectfully question whether any Investor protection purposes would be served by mandating swing pricing and operationalizing it by means of a 4 pm ET hard close. As we have set forth above, the Proposed Rule's recommendations for mandated swing pricing and a hard close does not equate to any recognizable benefits to Investors and retirement savers, only harms. In contrast, we have detailed how the current system of existing processes in place between intermediaries and funds is fair, orderly, and efficient, to the direct benefit of Investors and retirement savers. We have provided step-by-step background information on how implementation of a hard close requirement would fundamentally disrupt the backbone of current efficient market processes. We have provided conclusive evidence that implementation of a hard close would result in increased costs for Investors. In addition to increased costs and diminished returns, changes to the current system could interfere with established regulatory standards of best execution for transactions and best interest for recommendations to Investors. Such interference would also cause unnecessary confusion and complexity surrounding whether a particular transaction is in the Investor's best interest. All of this is coupled with unresolved questions of whether mandating swing pricing would even successfully aid in diminishing potential future market stressors, addressing liquidity framework and dilution concerns by forcing retirement recordkeepers, intermediaries and funds to make assumptions or estimates on pricing.

Therefore, based on our comments and analysis in response to the Proposed Rule, we assert that mandating swing pricing and requiring a hard close of 4 pm ET for trade processing would run counter to the stated intend of the Proposed Rule, and also the SEC's own stated mission, of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation. In conclusion, IRI respectfully recommends that the SEC withdraw and reconsider this rulemaking due to the unavoidable

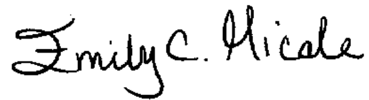
[28] *Id*. at Page 34.
[29] *Id*.

logistical impossibilities it would create, with emphasis on the direct negative impact it would ultimately have on retirement plan participants and variable insurance account holders as they save towards a secure and dignified retirement.

* * * * *

Thank you again for the opportunity to provide these comments. If you have questions about our comments on the Request, or if we can be of any further assistance in connection with these important regulatory questions and considerations, please feel free to contact the undersigned at emicale@irionline.org.

Sincerely,



Emily C. Micale
Director, Federal Regulatory Affairs
Insured Retirement Institute