February 10, 2023
Filed Electronically
Vanessa A. Countryman
Secretary, Securities and Exchange Commission
100 F. Street NE
Washington, DC 20549-1090
File Number: S7-26-22

Re: *Proposed Rule – Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-PORT (File No. S7-26-22)*

Dear Ms. Countryman:

Thank you for the opportunity to provide comment on the proposed rulemaking for Open-End Fund Liquidity Risk Management Programs and Swing Pricing; N-PORT ("Proposed Rule"). Empower administers approximately $1.4 trillion[1] in assets for more than 17 million retirement plan participants and is the nation's second-largest retirement plan recordkeeper by total participants. Empower serves all segments of the employer-sponsored retirement plan market: government 457 plans; Taft-Hartley plans, small, mid-size and large corporate 401(k) clients; nonprofit 403 (b) entities; private-label recordkeeping clients; and IRA customers. As part of Empower's recordkeeping service, it serves as a trading intermediary to over 37,000 open-end mutual funds as well as several thousand collective investment trusts and variable annuities.

Empower applauds the Securities and Exchange Commission ("Commission") in their ongoing and continual efforts to effectively regulate the securities industry. We believe the Commission often promulgates common sense, principles-based regulations that provide reasonable guidelines for the securities industry, protect individual investors and foster a competitive market. Regulation Best Interest is a recent example of such rulemaking.

[1] As of September, 30, 2022, information refers to all retirement business of Empower Annuity Insurance Company of America (EAIC) and its subsidiaries, including Empower Retirement, LLC; Empower Life & Annuity Insurance Company of New York (ELAINY); and Empower Annuity Insurance Company (EIC), marketed under the Empower brand.

Edmund F. Murphy, III
President & CEO

8515 E. Orchard Rd.
Greenwood Village, CO 80111
empower.com

However, Empower has significant concerns about this Proposed Rule, particularly as it relates to the SEC's "Hard Close" proposal ("Hard Close Proposal"). For all open-end mutual funds (except for money market funds), the proposed amendments to rule 22c-1 would require all orders to purchase or redeem a fund's shares to be received by the fund, its designated transfer agent, or a registered clearing agency ("designated parties") by 4p.m. ET in order for the investor to be eligible for a given day's price.[2] The Hard Close Proposal represents a paradigm shift for investors accessing markets through intermediaries, like retirement plan recordkeepers. This paradigm shift will fundamentally change time-tested, successful, and necessary retirement plan recordkeeping processes, negatively impact plan sponsors and most importantly cause individual plan participants[3] that trade through intermediaries to become "second class investors" in the mutual fund trading market.

For the reasons presented in this letter, we strongly urge the Commission to rescind the Hard Close Proposal and, as an alternative, issue a Request for Information, which will allow relevant stakeholders from across the securities and retirement industry to provide thoughtful input to more efficiently address the concerns raised by the Commission in the proposing release.

EXECUTIVE SUMMARY

Empower's comments are summarized below:

- **The Hard Close Proposal drastically underestimates the impact to intermediary trading.**
- **The Hard Close Proposal will negatively impact retirement plan participants.**
- **The Hard Close Proposal will harm investors in collective investment trusts, insurance company separate accounts and custom fund-of-fund arrangements.**
- **The Hard Close Proposal will hinder plan fiduciaries from meeting their investment selection fiduciary duties.**

I. The Hard Close Proposal drastically underestimates the impact to intermediary trading

In the proposing release, the Commission indicates that the "proposed hard close requirement would provide that a direction to purchase or redeem a fund's shares is eligible to receive the price established at the current day's price solely if the fund, its designated transfer agent, or its registered securities agency…receives an eligible order before the pricing time as of which the fund calculates its

[2] 87 Fed. Reg. 77209 (December 16, 2022)
[3] We note that the discussion in this letter focuses on retirement plan participants. Many IRA owners and other retail investors also trade through intermediaries. Those particular IRA owners and retail investors will experience many of the same impacts as retirement plan participants.

NAV."[4] This pricing time is typically 4pm Eastern time. That 4p.m. ET cut-off represents a "hard close" for open-end mutual fund trading. The Commission states the hard close requirement is used to facilitate its swing pricing proposal.[5]

Further, in the proposing release, the Commission identifies the impact the Hard Close Proposal has on intermediaries, particularly retirement plan recordkeepers.[6] We appreciate and agree with the Commission's acknowledgement of these impacts. However, the Commission's discussion significantly underrepresents the extensive *direct* impact this Hard Close Proposal will have to retirement plan recordkeeper trading operations and, more importantly, the significant *indirect* downstream impact to participant servicing conducted by the recordkeepers. Ultimately, these substantial impacts will unnecessarily harm individual retirement participants, including the more than 17 million participants serviced by Empower, in the form of restricted access to markets relative to many other investors operating outside of retirement plans.

a. Background and rationale of batch trading

Retirement plan recordkeepers are trading intermediaries, like clearing brokers. They serve a critical role to retirement plan participants in that they perform two primary functions - - - providing comprehensive administrative services to plans and participants (e.g. processing participant distributions and loans; providing plan educational information and providing all other necessary services based on plan rules) and allowing plans and participants to access to plan investments, particularly registered, open-end mutual funds.

Throughout the day, recordkeepers are:

- Receiving money through payroll information from employers to deposit into retirement accounts and plans converting from other recordkeepers. These contributions are invested in an array of investments, most prominently open-end mutual funds;
- Distributing money from retirement accounts (thereby divesting from mutual funds) in the form of participant distributions and plans moving to other recordkeepers;
- Reallocating amounts between eligible plan investments; and
- Administering specific plan rules, such as those that govern when participants can make contributions, take loans and contribute to their plan.

[4] 87 Fed. Reg. 77209 (December 16, 2022)
[5] *Id*
[6] 87 Fed. Reg. 77212; 77222 (December 16, 2022)

These basic, daily retirement plan recordkeeping functions are predicated on the recordkeeper transacting with mutual funds' net asset values or "NAVs". If the recordkeeper does not have access to the NAV, it cannot process transactions using current day prices. This fundamental concept drives Empower's objections to the Hard Close Proposal.

Once mutual funds establish each day's NAVs, the recordkeeper begins the process of batch trading. Recordkeepers use bundle or "batch" trading by aggregating all daily plan and participant trading on the recordkeeper's platform and conducting expedient and cost-efficient transactions with the underlying mutual fund houses and clearing firms. This batch trading process (most prominently trading through the NSCC) was developed in the late 1990s to counter trading inefficiencies.[7] This trading process is therefore essential for all retirement plan recordkeeping as it reduces costs and allows trades to be reconciled across multiple entities within the trading chain.

The trading chain in the retirement industry is a complex, yet reliable, interdependent system of institutions working together to receive, process and reconcile trade requests between institutions in order to ultimately settle proceeds, reflect the trade on recordkeeping and trustee systems, and display that information to participants through various electronic platforms.

Without batch trading, the assets and information received from plans and participants would require separate, and independent trading through recordkeepers (or other intermediaries thereof) to the fund house which, in turn, would require significantly more personnel and resources to effectively service retirement plans. The requisite increase in resources, in order for retirement plan recordkeepers to maintain a process other than batch trading, would ultimately result in increased costs to retirement plans and individual participants.

As Congress seeks to expand access to the retirement system through the passage of legislation such as the SECURE Act in 2019 and the Secure 2.0 Act in 2022, retirement savers will increase.[8] This increase in retirement savers means recordkeepers serve an increasingly important role in the lives of millions of people who are savings for their future. Batch trading is a building block function for all recordkeepers as they provide retirement plan participants with access to capital markets, financial education and advice tools and necessary administrative services to the plan.

---

[7] DTCC, "Defined Contribution Clearance & Settlement," 2023, dtcc.com/wealth-management-services/mutual-fund-services/defined-contribution-clearance-and-settlement. "Prior to the introduction of DCCC&S in 1997, the growing retirement industry was grappling with processing inefficiencies and navigating the changing regulatory landscape. In order to meet these challenges, DTCC enhanced Fund/SERV and established DCC&S as the premier solution for standardization in the defined contribution landscape."

[8] Pub. L. No. 116-94 (2019); Pub. L. No. 117-328 (2022)

b. Details of the trading process highlights the complexity of recordkeeping

Existing SEC regulations generally allow open-end mutual funds to calculate one NAV, based on trading activity, until 4 p.m. ET. If a participant submits a trade to the recordkeeper in good order before 4 p.m. ET, the participant will receive that day's NAV. If the participant submits a trade after 4 p.m. ET, they will receive the following day's NAV.

The NAV calculation is seamless to the participant. However, beginning at 4 p.m. ET on a trading day, the recordkeeper begins a complex behind-the-scenes process.

We generally agree with the Commission's overview of the trading process, as described in Section III.B.2. of the proposing release, but we do not believe it fully captures the necessary steps or more importantly - - the timelines involved to complete this critical process. The process described below is a step-by-step summary of the trading process on a chronological basis:

Day 1 (4 p.m. ET – 11:59 p.m.ET):

- Participant A submits a full withdrawal from their 401(k) plan before 4pmET.
- Because the trade is received in good order before 4pm ET, Recordkeeper C compiles all participant and plan-level activity associated with impacted mutual funds and group or 'batch' the trades together. This activity is separately processed as an accounting entry.
- Recordkeeper C then captures that trading day's mutual fund NAV and reflects it on Recordkeeper C's recordkeeper system.
- The batched trades are submitted to Recordkeeper C's back-end processing system.
- Recordkeeper C sends batched trades to either the National Securities Clearing Corporation ("NSCC") or directly to the fund house if the fund house does not trade through the NSCC.
- Recordkeeper C ultimately reflects Participant A's transaction on its recordkeeping system. Participant A can then see the transaction in their account.

Day 2 12:00 a.m. ET – 4:30 p.m.ET):

- The NSCC edits the trades and passes to the fund houses.
- The mutual fund then confirms the trade.
- The NSCC issues settlement records to the fund and Recordkeeper C.

- Recordkeeper C interacts across various plan custodial bank accounts and clearing accounts to settle the trades.
- Proceeds from any participant distributions or loans are then sent out since settlement is expected from the fund.

Day 3 – 4:

- In the subsequent days after the initial withdrawal, the recordkeeper, NSCC and the funds houses continue to conduct reconciliations of the Day 1 trading activity.

While the process is complex, it allows participants to transact in retirement accounts using current day NAVs. The Proposed Rule fundamentally changes this process to the detriment of participants.

c. The Proposed Rule will cause retirement plan recordkeepers to establish an earlier cut-off time for trades and the batch process would have to be reconstructed

Batch trading is only possible when participant activity concludes at one point in time – currently 4 p.m. Eastern time, using one price – that day's mutual fund NAV. This allows the recordkeeper, NSCC, fund houses and banks to effectively transact with one set of data. The only reasonably functional way to maintain this relationship to receive all activity to the recordkeeper by 4 p.m. ET. Alternatively, as required under the Hard Close Proposal, if all trading activity must be received to designated parties by 4 p.m. ET, recordkeepers will be forced to impose a trading cut-off time far enough in advance of 4 p.m. ET in order to accommodate this critical batch trading process.

We appreciate the Commission acknowledging this administrative reality in the proposing release, as follows: "To help ensure that order flow information is provided to a designated party before the established pricing time, the proposed rule would likely cause some intermediaries to set their own internal cut-off time for receiving orders to purchase or redeem fund shares that is earlier than the pricing time established by the fund."[9] However, the Commission goes on to state that, "Because technology has advanced since the Commission last considered a hard close in 2003, we generally do not believe, however, that intermediaries would need to establish cut-off times significantly earlier than the pricing time set by the fund."[10]

---

[9] 87 Fed. Reg. 77212 (December 16, 2022)
[10] *Id.*

We believe this statement dramatically over-simplifies the process and significantly under-estimates the complexity and impact of changing it.

As detailed in the chronological process above, recordkeeper trading can be characterized as a "hub-and-spoke" activity with the recordkeeper representing a hub for all trading activity coming in-and-out and then interacting with multiple institutions to ensure that back-office trading activity ultimately matches to the recordkeeping platform. If the Proposed Rule is finalized and cut-offs are established, the structure of recordkeeping batch trading must be significantly redesigned. The current batch process typically requires the recordkeeper to aggregate participant activity up to five hours after the 4 p.m. ET close deadline. Applying that existing framework to the Proposed Rule, recordkeepers would be required to cut-off trading and begin the batching process earlier than 12 p.m. ET.

However, this potential cut-off time does not factor in the additional complexity of creating a bifurcated trading process. Specifically, recordkeepers would have to effectively duplicate the trading process for participant activity before and after the cut-off. Consequently, this duplicative administration may require recordkeepers to establish an even earlier cut-off time.

Establishing a trading cut-off and redesigning all downstream recordkeeping processes is a significant undertaking with major ramifications.

To the extent the Hard Close Proposal is finalized, recordkeepers will be forced to completely redesign its systems and processes. We estimate that the Proposed Rule will require at least 110,000 hours to update both the trading and recordkeeping systems. This time estimate and the corresponding costs are significant.

The impacted processes and systems requiring redesign would include, but would not be limited to, the following:

- Payroll processes
- Web sites
- Plan and participant statements
- Multi-day processing reconfiguration
- Batch trading reconfiguration
- The implementation of cut-off time processing

These changes are likely to increase administration costs to plan sponsor and participants. However, these potential cost increases represent only one consequence of the Hard Close Proposal as we believe the hard close is fundamentally unfair to participants and makes them second class investors in the market.

II. The Hard Close Rule will negatively impact retirement plan participants

a. All participant transactional activity involving open-end mutual funds will be detrimentally impacted by a Hard Close

As noted above, recordkeepers drive many of their critical processes using the mutual fund NAV. Consequently, if NAVs are delayed due to trading cut-offs, participant services become delayed. In the case of the Hard Close Proposal, participant trading activity facilitated through recordkeepers will likely be delayed at least one trading day (also referred to as T+1 trading). This is best described, from a recordkeeper standpoint, by the scenarios presented below.

Scenario 1: Payroll processing and fund-to-fund transfers on a dollar basis

Processing under existing rules: Plan A submits payroll files to the recordkeeper at 3:45 p.m. ET on a Monday. Because payroll is submitted before 4 p.m. ET, Participant C will see the deposit in their account reflecting Monday's NAV.

Processing under Hard Close: Recordkeeper B imposes a 10am ET cut-off in order to complete batching by the 4 p.m. ET hard close. Employer D runs its standard payroll cycle at 12 p.m. ET on Monday. Employer D's payroll includes deferrals to the Employer D 401(k) plan. Because the cut-off is 10 a.m. ET, Employer D's standard payroll process cannot submit payroll in time for the cut-off. The payroll-based contribution will not be sent until Tuesday. Participant A's contribution will be out of the market for one trading day and the contribution will reflect Tuesday's NAV.

This cut-off time will also impact participants who reallocate specific dollar amounts across available mutual funds in their plan. For example, if Participant A reallocated $3000 from Mutual Fund W into Mutual Fund Z after the established cut-off time, the sale from Mutual Fund W and subsequent buy into Mutual Fund Z would both occur with the next trading day's NAV.

Scenario 2: Fund to fund transfers on a percentage basis

Processing under existing rules: Participant A reallocates among eligible investment options to maintain an even percentage among 10 different mutual funds at 1 p.m. ET on Monday. Because Participant A initiates the trade before 4p.m. ET, Recordkeeper C will process a sale and buy using the current day NAV among all 10 mutual funds. Participant A is never out of the market.
Processing under Hard Close rule: Same facts but Recordkeeper C has a trade cut-off at 10 a.m. ET.

- Monday – Because Participant A submitted a mutual fund redemption requests after the 10 a.m. ET cut-off, Participant A is now locked into this trade regardless of market activity on Monday, Tuesday, or Wednesday. (This is because the recordkeeper cannot place trades on a percentage basis without knowing the NAV for that day. In order to accomplish the sell and buy process, the trades must be placed on separate business days as detailed below.)
- Tuesday - Participant A's trade request is batched in the standard Tuesday cycle. Mutual fund shares are sent to the fund house office by 4 p.m. ET. The dollar amounts from the redemption of the shares is submitted back to Recordkeeper C to process the transfer from the fund.
- Wednesday – The purchase/transfer into the other mutual funds is submitted because Recordkeeper C now knows the dollar value of the transfer. This information is submitted to the other mutual funds in the Wednesday morning batch. On Wednesday evening, the dollars are sent back to Recordkeeper C and the purchase of the other mutual funds is reflected on Recordkeeper C's system.

The impact to participant-initiated rebalancing will also apply to automated rebalancing and to model portfolio services designed to provide participants the ability to diversify their investments within the retirement plan. The Commission acknowledges this in the proposing release, as follows, "…the proposed hard close requirement could extend the period of time for executing an investor's request to rebalance its holdings to a target asset allocation or model portfolio."[11] Further, the Commission goes on to accurately state that, "The proposed rule would not permit these orders to receive same-day pricing if they are submitted after the pricing time, and therefore may require the intermediary to achieve the desired rebalancing through a series of orders over more than one day or to rebalance using prices from the prior day."[12]

[11] 87 Fed. Reg. 77213 (December 16, 2022)
[12] *Id.*

These rebalancing impacts also apply to registered fund-of-fund mutual funds and managed account programs. Given the prevalence of managed accounts in retirement plans[13], T+1 trading will require substantial reprogramming and will likely cause rebalances to be less responsive to market conditions.

Scenario 3: Distributions and loans.

> **Processing under existing rules:** Participant A initiates an in-service distribution request of \$3000 from all plan investments at 1 p.m. ET on Monday through Recordkeeper C. Because the distribution request was made to Recordkeeper C in good order before 4 p.m. ET, it is processed using Monday's NAVs. The check is then issued from the bank.
>
> **Processing under Hard Close rule:** Same facts but Recordkeeper C imposes a 10 a.m. ET trading cut-off. Because Participant A made the distribution after Recordkeeper C's cut-off time, Participant A would receive Tuesday's NAV. Proceeds from the redemption would be transmitted back to Recordkeeper C on Tuesday night. The bank would then issue the check

Early cut-off times are imperative to meet the 4 p.m. ET hard close deadline of the Proposed Rule. However, these early cut-off times will create transaction delays for many participants who periodically need urgent access to their assets in response to unforeseen hardships or, in the cases of reallocations, reacting to market conditions.

Potential transaction delays due to the Hard Close Proposal will create legitimate issues for participants which can be avoided through a more thorough and inclusive rulemaking process beginning with a Request for Information to the industry.

b. *T+1 trading creates uninvested cash for payroll contributions and fund reallocations which may not inure to the participant*

As described above, the majority of participant trading activity will occur after a cut-off time and will therefore be conducted on a T+1 basis from an omnibus account using the batch trading process. T+1 trading through this omnibus account has a particular negative impact on payroll deferrals and reallocations. Any payroll deferrals received after the cut-off time will be invested in cash or cash equivalent until invested the next trading day. Uninvested participants assets will remain in a suspense account until they are invested at close the following trading day.

---

[13] Cerulli, "Managed Accounts Assets Climb to \$10.7 trillion," October 2022, cerulli.com/press-releases/managed-accounts-assets-climb-to-10.7-trillion.

While the uninvested assets earn a small interest accrual in the suspense account, there is currently no functional way to allocate that accrued interest to the plan participant. Consequently, the participant is out-of-the market and unable to directly benefit from any modest accrued interest before investment.

This suspense account issue also arises in a fund reallocation. If a participant conducts a fund reallocation on a percentage basis (see Scenario 2 above) after a cut-off, the recordkeeper must process the sell from one mutual fund and buy into the other mutual fund over a three-day period. After the sell occurs on Day 2, the buy cannot execute until Day 3 which means the participant is again out of the market. The proceeds from the mutual fund sale are held in the suspense account until the buy occurs the next day without the participant directly receiving interest on the uninvested proceeds.

c. *Participants will become second class investors to those investors who transact directly and not through intermediaries*

To justify the Commission's proposed rulemaking, the proposing release cites market events from March 2020 where "resulting outflows from many open-end funds placed pressure on these funds to generate liquidity quickly in order to meet investor redemptions."[14] The Commission goes on to say the "large outflows open-end funds faced during March 2020, combined with the widening bid-ask spreads funds encountered when purchasing or selling portfolio investments at that time, likely contributed to dilution of the value of the funds' shares for remaining investors."[15] To counter this potential dilution risk, the Commission proposes swing pricing. The Commission states that swing pricing "may reduce potential first-mover advantages that might incentivize early redemptions to avoid anticipated trading costs and dilution associated with other investors' redemptions."[16] In order to operationalize swing pricing, the Commission proposes a hard close process.

As noted above, the practical effect of the Hard Close Proposal is a very early trading cut-off for retirement plan participants. The potential impact is profound. It would create investor inequities that are antithetical to the Commission's intended goal of reducing dilution risk. For example, other non-retirement investors, many of which are institutions, are currently able to trade directly with fund houses and would unfairly benefit from transacting current day (a T+0 basis) whereas participants in retirement plans would be relegated to a position of either trading far earlier in the day or, more likely due to a recordkeeper cut-off, a full day later.

[14] 87 Fed. Reg. 77178 (December 16, 2022)
[15] *Id*.
[16] 87 Fed. Reg. 77184 (December 16, 2022)

This outcome is illustrated below:

- Investor A invests in Small Cap Growth Fund Z through a mutual fund trading account rather than through an intermediary. Investor A notices market declines at 1 p.m. ET and submits a request to reallocate from Small Cap Growth Fund Z at 2 p.m. ET. Investor A will receive that day's NAV on the sale.
- Participant B in the ABC 401(k) plan invests in the same Small Cap Growth Fund Z through Recordkeeper C. Participant B sees the same market declines at 1 p.m. ET and submits a request to Recordkeeper C to reallocate out of the Small Cap Growth Fund Z at 2 p.m. ET. Participant B receives the next day's NAV on the sale due to the earlier trading deadline that Recordkeeper C must impose.

Participant trading before cut-off times is arguably more distorted because the participant will be trading using prior day prices. As described above, recordkeepers must have mutual fund NAV to effectively process trades. Because trades are transacted between the recordkeeper and fund house after market close in today's environment, participants who transfer before 4 p.m. ET know their trades are based on that day's price for trading activity and that price will be reflected through their participant account at the recordkeeper. Because trading is allowed until 4 p.m. ET, the participant has an opportunity to monitor the current day's events in the market prior to requesting a transaction or allocation change prior to market close. However, in a situation where a participant submits a trade before the much earlier trade cut-off the participant is transacting on stale market information.

This trading asymmetry becomes more acute for participants living in the western United States. For example, a trade cut-off at 12 p.m. ET means participants living in the Pacific time zone must submit all trading activity to the recordkeeper by 9 a.m. PT. That would give a participant from 6:30 a.m. PT to 9 a.m. PT to receive the prior day's NAV.

Consequently, in most situations under the Hard Close Proposal, participants transacting on any particular trading day will not receive that day's NAV. They will either receive the prior day's NAV or the next day NAV.

Therefore, the Hard Close Proposal creates a new inequity between retirement plan participants (and other investors) who trade through intermediaries and those investors that can trade directly with designated parties. In addition, it exacerbates an existing geographic disparity by disadvantaging participants in western time zones.

Taken together, these inequities make retirement plan participants "second class investors" relative to direct trading investors.

The Commission states these proposed amendments are "designed to provide investors with increased protection regarding how liquidity in their funds is managed, thereby reducing the risk that funds will be unable to meet redemptions and mitigating dilution of interests of fund shareholders."[17] While the swing pricing requirement may reduce this liquidity risk, it creates a new timing risk for funds that will negatively impact participants who remain in the fund. Isn't this result, of treating participants as "second-class investors," among the outcomes the Commission sought to avoid in this rulemaking initiative?

III. The Hard Close proposal also harms participants in collective investment trusts, insurance company separate accounts and custom fund-of-fund arrangements

The Commission acknowledges that the Hard Close Proposal will disadvantage open-end mutual funds against other investment options, like collective investment trusts (CITs).[18] The Commission states "processes and systems related to executing investors' orders within their retirement plans require knowledge of NAVs prior to sending investors' trades to funds, and it may be costly to change these processes. To the extent that retirement plans can offer collective investment vehicles or ETFs that are not open-end funds but have similar investment strategies to open-end funds at a lower cost, open-end funds would become less competitive within the retirement sector."[19] We agree with the Commission's acknowledgement but question why disadvantaging open-end mutual funds in retirement plans is a positive outcome when it would also decrease the available investment options for participants and increase costs to plan administrators.

However, the competitive disadvantage highlighted by the Commission understates the broader indirect impact to many CITs, variable annuities (VAs) and custom fund-of-fund arrangements. Any recordkeeper trading cut-off time will not only delay investment in open-end mutual funds but also investments that are not covered by the Proposed Rule because valuation of those investments is based on underlying mutual fund NAVs. This is most clearly seen with many CITs and VAs. Both investment vehicles are used extensively in retirement plans.

CIT providers (banks and trust companies) often use underlying mutual funds as part of their investment strategies. Similarly, insurance companies offer participants the ability to invest in certain mutual funds through separate accounts. These CITs and VAs reflect daily values through units. In situations where mutual fund NAVs comprise the whole or part of CITs or VAs, the investment vehicle's unit value is entirely predicated on the availability of the mutual funds' NAVs.

---

[17] 87 Fed. Reg. 77185 (December 16, 2022)
[18] 87 Fed. Reg. 77264 (December 16, 2022)
[19] *Id.*

The unitization process is also used in custom fund-of-fund structures or "model portfolios" (see additional discussion in Section II.a. Scenario 2). Similar to managed account and rebalancing programs, recordkeepers will offer model portfolio programs (based on plan fiduciary instruction) to create a "white label" investment option that represents one unitized value for particular investment vehicles. This unit value is calculated using other investment options in the retirement plan, and in many cases those investments are open-end mutual funds. This white label investment allows participants to easily diversify investments within their available plan investment options.

Consequently, if a recordkeeper establishes an earlier trading cut-off time for a mutual fund on its platform, the cut-off time will logically apply to any CIT, VA or custom fund-of-fund investment vehicle that calculates unit values using the underlying mutual fund NAVs.

Therefore, the Proposed Rule not only creates a competitive disadvantage between open-end mutual funds and other investment options but also creates disparities between those investment vehicles basing unit values on underlying mutual fund NAVs and those investment vehicles not utilizing open-end mutual funds in the investment strategy. Because the Proposed Rule does not formally analyze these indirect impacts, this is further evidence that the Commission needs to retract the Proposed Rule and more carefully consider next steps.

IV. The Hard Close proposal hinders plan fiduciaries from meeting their investment selection fiduciary duties

In November 2022, the Department of Labor ("DOL") finalized its *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights* regulation ("ERISA Investment Duties Regulation") .[20] The final ERISA Investment Duties Regulation concluded a comprehensive and thoughtful rulemaking exercise from the DOL that establishes rules for ERISA plan fiduciaries in selecting plan investments. The ERISA Investment Duties Regulation states that ERISA plan fiduciaries have both a duty of prudence and care in selecting plan investments.

The duty of prudence is met when the plan fiduciary gives "appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan's investment portfolio or menu with respect to which the fiduciary has investment duties."[21] The DOL goes onto define "appropriate consideration", in part, to include but not be limited to "A

[20] 87 Fed. Reg. 73822 – 73886 (December 1, 2022)
[21] 87 Fed. Reg. 73885 (December 1, 2022)

determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties) or menu, to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action compared to the opportunity for gain (or other return) associated with reasonably available alternatives with similar risks."[22]

The Prudence prong of the ERISA Investment Duties rule focuses on plan fiduciary evaluation of an individual investment's economic profile. The DOL indicates that an economic analysis is central to the prudence standard.[23]

The final ERISA Investment Duties Regulation requires the plan fiduciary to select plan investments prudently based on an economic risk and return analysis. While the DOL allows plan fiduciaries to apply facts and circumstances relevant to the investment selection, it is unclear how this principles-based approach would apply to situations where financial intermediaries apply an early cut-off to mutual fund trading. Is an early cut-off time imposed by the intermediary an economic factor to evaluate a mutual fund? If a mutual fund is well performing but is subjected to an early cut-off time, how does a plan fiduciary prudently evaluate this mutual fund? Must a plan fiduciary evaluate financial intermediary cut-off times as part of its investment selection process?

These questions raise practical considerations for plan fiduciaries but could also spawn an unintended larger issue. From a practical standpoint, plan fiduciaries may have increased fiduciary liability in evaluating both the independent performance of a mutual fund but also how that mutual fund is traded on an intermediary's platform. This evaluation will potentially increase costs to the plan fiduciary. Beyond the additional costs, this ambiguity and uncertainty can lead to an unintended consequence. Plan fiduciaries may disfavor mutual funds in their plans which would reduce the availability of beneficial plan investment options. Both of these impacts can harm participants as they can increase plan administration costs and reduce beneficial investment options in retirement plans.

---

[22] *Id.*

[23] 87 Fed, Reg, 73831 (December 16, 2022): "First, a fiduciary's determination with respect to an investment or investment course of action must be based on factors that the fiduciary reasonably determines are relevant to a risk and return analysis…"

As we demonstrate in this comment letter, the Hard Close Proposal will increase costs, create market distortions, and fundamentally disadvantage retirement savers. We welcome the ability to further discuss the impacts discussed in this letter.

Thank you for your consideration.

Sincerely,

Edmund F. Murphy, III
President & CEO
Empower