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

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

Dear Ms. Countryman:

Calamos Investments LLC ("Calamos") appreciates the opportunity to comment on the U.S. Securities and Exchange Commission's (the "Commission") proposal to amend Rule 22e-4 (the "Liquidity Rule Proposal") under the Investment Company Act of 1940, as amended (the "1940 Act"), the proposal to amend Rule 22c-1 under the 1940 Act (the "Swing Pricing Proposal"), and the proposal to amend the requirements related to Form N-PORT (the "N-PORT Proposal"). [1] Calamos has served the needs of investors since its founding in 1977 by John P. Calamos Sr. With over $36 billion in assets under management in both registered funds and other investments,[2] Calamos is a global investment firm committed to excellence in investment management and client services. Calamos' subsidiary, Calamos Advisors LLC, is the investment adviser (or investment sub-adviser) to 22 series of three registered open-end management investment companies operated as mutual funds, one registered open-end management investment company operated as an Exchange Traded Fund, and seven registered closed-end investment companies. Calamos believes it has a useful perspective on the Liquidity Rule Proposal, the Swing Pricing Proposal and the N-PORT Proposal.

I. Summary of Comments

As discussed in this letter, Calamos generally believes that Rule 22e-4 is not ripe for further change at this point, but notes that if the Commission is determined to move forward, any final rule should be adjusted to ensure that the "less liquid" liquidity category is retained, to ensure Level 3 securities are not deemed illiquid by default, to eliminate the requirement of settlement into U.S. Dollars, and to permit flexibility in assessing a reasonably anticipated trade size.

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[1] See Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-PORT, SEC Rel. No. IC-34746 (Nov. 2, 2022) (the "Proposing Release").

[2] AUM as of January 31, 2023.

With respect to the Swing Pricing Proposal, Calamos believes that that the proposal to mandate swing pricing and a fixed cutoff time, although well intentioned and providing certain benefits on paper, is ultimately deleterious to retail investors and their $26 trillion of investments in mutual funds. As discussed more fully below, we believe the rule proposal mandating swing pricing is outside the scope of the Commission's rulemaking authority, and that even if a colorable claim exists that Section 22(c) provides such rulemaking authority, the effect of the rule, including the wholesale revision of the economic and legal rights of existing investors and related cost-shifting is of such great significance, that the Swing Pricing Proposal creates a "major question" for which the Commission lacks rulemaking authority in the absence of clear congressional authorization. Furthermore, we believe that there are significant policy issues militating against moving forward with this rulemaking, and we have concerns that the economic analysis does not evince enough hard data or analysis to support moving forward with either swing pricing or a hard close. Finally, we have issues with some of the proposed changes to N-PORT filing that we do not believe would be beneficial to fund investors.

In sum, although we respectfully appreciate the Commission's well intentioned goals and attempts to improve the structure of mutual funds, we do not believe it is prudent for the Commission to move forward with the swing pricing and hard close provisions.[3]

II. The Liquidity Rule Proposal

The Commission proposes several changes to Rule 22e-4, which was first adopted in 2016, and fully implemented in December of 2018 for larger entities and July 2019 for smaller entities. As a result, prior to the Liquidity Rule Proposal, investment companies subject to Rule 22e-4 had expended significant cost, resources and energy to implement the rule to build a system in which they operated for *less than four years prior to the current SEC proposal*.

Now, the Commission seeks to reopen rulemaking and amend the rule at a time when fund groups have only just acclimated to the existing rule and have just started to enter business as usual. Any such course correction should be supported by compelling reasons. The Commission stated its belief that the events of March of 2020 and the initial outbreak of the COVID-19 pandemic was just such a compelling reason. Although the Commission has shared its belief, it has not shared its evidence.

We agree that the events of March of 2020 were challenging. The market, as a reflection of society as a whole, was plagued by fear, uncertainty, and confusion. We agree there was significant redemption activity in the industry, and concerns with short-term financing, the stock market, corporate bond markets, and the economy in general. We acknowledge that significant economic stress existed, which justified significant intervention by the Treasury department and the Federal Reserve, and the regulatory flexibility shown by the Commission.

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[3] In taking this position, we agree with the statements of Commissioner Peirce https://www.sec.gov/news/statement/peirce-statement-open-end-funds-110222 and Commission Uyeda https://www.sec.gov/news/statement/uyedar-statement-open-end-funds-110222.

But it is not clear from the proposing release exactly how fund liquidity was a causational problem during this period. The Commission points to "likely dilution" but then admits it has no specific data.[4] It outlines the market stresses but does not tie them to fund liquidity. It notes that certain fund managers approached the staff for relief to help funds meet redemptions but does not establish whether the requested relief was essential due to regulatory failure or simply an exercise of prudence by a fiduciary. In sum, we believe that the Commission has failed to establish both the existence and scope of any fund problems. There appeared to be sufficient liquidity during the period: the Commission notes "our data indicate that in March 2020 cash levels in the aggregate increased and relatively few funds made use of borrowing to meet redemptions, suggesting that funds generally were selling portfolio assets to meet redemptions and potentially for other purposes, such as to raise cash in anticipation of future redemptions." Furthermore, the Commission neither cites, nor attempts to reconcile previous conclusions from its staff, including the Commission's Chief Economist, that: "though many observers have been concerned about the ability of bond funds to access liquidity to meet redemption requests during periods of market stress, these concerns did not materialize during the market turmoil in March." In sum, although March of 2020 was a challenging time, it appears that Rule 22e-4 was a resounding success, and operated exactly as it was intended, ensuring sufficient liquidity for mutual funds and their investors.

In the absence of a compelling, supported reason to engage in a significant course correction, we submit that the more prudent approach – and certainly the less costly approach – would be for the Commission to engage in a much deeper dive to identify and support actual weaknesses in the Rule 22e-4 (as opposed to nonspecific academic dissatisfaction) before proposing to engage in a course correction four years after the implementation of the existing rule.

If the Commission still believes that cost and disruption of revising the mechanics of Rule 22e-4 are absolutely necessary – despite what appears to be evidence to the contrary – then we suggest the following adjustments:

- Retain the categorization of less liquid securities. The Commission got it right the first time. Although securities that are sold within seven days, but take longer to clear are not highly liquid, they are also not illiquid. For example, syndicated bank loans can easily be disposed of at value within seven days. Although settlement may take longer, it is also possible to accelerate settlement, engage in short-term borrowings that are covered by a known, fixed receivable, or take similar actions to ensure a timely settlement. The proposed rules would likely require some of the funds advised by Calamos to reduce holdings of certain instruments (notably bank loans) in a manner detrimental to investors, to solve for liquidity problems that have never been an issue for these funds including in 2008 and 2020.
- Eliminate the default conclusion that a Level 3 security is illiquid.[5] Availability of pricing information may be one factor in determining liquidity, but it does not

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[4] See Proposing Release at n. 40 and accompanying text.

[5] Level 3 Securities are securities that are valued using unobserved inputs. See ASC Topic 820.

automatically equate to an inability to sell and settle a security within seven days. Furthermore, the Commission's proposal does not address why a security that is temporarily a Level 3 security equates to an inability to sell and settle within seven days. Although many Level 3 securities may be illiquid, this may not be the case in all instances. Furthermore, some level 3 securities (for example new fixed income issuances not yet priced by a pricing service, or non-U.S. securities whose trading has been suspended pending certain corporate actions) can quickly become level 2 or level 1 securities, with no change of their underlying liquidity. Forcing funds to treat such transitory assets as illiquid may interfere with portfolio management without providing any real liquidity protections.

- Eliminate the requirement to settle in U.S. dollars. This proposed change could create a negative feed-back loop for funds that are invested in foreign countries that suddenly adopt currency controls on the repatriation of local currencies. For example, if a fund is invested in securities denominated in a foreign currency, imposition of local governmental currency exchange controls that prevented conversion into U.S. dollars in more than seven days, would cause both the security and the underlying currency to be deemed to be illiquid. Depending on a fund's holdings of illiquid securities, such a result could cause the fund to exceed a 15% limit on illiquid assets. If that were to occur, a fund would not be able to sell any of those emerging market securities (due to the sales proceeds themselves being deemed to be an illiquid asset). As a result, the fund's foreign securities would be frozen in place, locked and unable to be sold unless and until the foreign government removed the currency controls, or the fund reduced its other illiquid holdings to level sufficient to permit an exit of the securities denominated in the foreign currency. We do not think a plan intended to address liquidity should exacerbate illiquidity and prevent a fund from engaging in a defensive posture relating to its foreign investments.
- Retain the current framework's reasonably anticipated trade size in lieu of adopting a mandatory 10% calculation. We believe it remains in the best interest of investors to provide funds with flexibility to tailor the reasonably anticipated trade size to their particular circumstances.

III. Swing Pricing Proposal

A. The Commission Does Not Have Sufficient Rulemaking Authority Under Section 22(c) of the 1940 Act.

We have significant concerns that the Commission does not have authority under Section 22(c) of the 1940 Act to implement mandatory swing pricing.

The Commission has regulatory authority under Section 22(c) to make rules that address dilution.[6] The Commission asserts that dilution includes "transaction activity of certain investors

[6] Section 22(c) of the 1940 Act provides that the Commission the same rulemaking authority granted to a "securities association registered under Section 15A of the Securities Exchange Act of 1934" (i.e., FINRA) under Section 22(a). Section 22(a)(1), in turn, provides that such rule making authority allows for rules that prescribe "a method or methods for computing" the price of a redeemable security for sale or redemption "for

[that] leads to costs that are distributed across all shareholders, unfairly reducing the value (or 'diluting') the interests of shareholders who did not engage in the underlying transactions." [7] However, the legislative history of Section 22 indicates that "dilution" was a specific term of art that takes a much narrower meaning. Specifically, the Commission was very clear in its Senate testimony that "dilution" involved transaction prices that differed from NAV (i.e., purchasing at a discount to NAV or redeeming at a premium to NAV.)[8] The Commission and industry participants provided significant testimony on dilution,[9] and nowhere is there an indication it encompassed the Commission's current, more expansive definition.[10] Subsequent Commission actions regarding Section 22 support this view.[11] In sum, the Commission appears to be expanding the definition of dilution to justify rulemaking authority to regulate an issue for which Congress did not intend the Commission to have authority.

Furthermore, as the Supreme Court noted in West Virginia v. Environmental Protection Agency, [12] even if there were a colorable argument that rulemaking authority exists, the Swing Pricing Proposal involves a "major question" that the Commission may not regulate in the absence of clear congressional authorization. The Supreme Court noted that even when a regulation is based on a "colorable textual basis…common sense as to the manner in which

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the purpose of eliminating or reducing so far as reasonably practicable any dilution of the value of other outstanding securities of such company or any other result of such purchase, redemption, or sale which is unfair to holders of such other outstanding securities."

[7] See Proposing Release at 15.

[8] Hearings before a Subcommittee of the Committee on Banking and Currency on S. 3580, U.S. Senate, 76th Cong., 3d Sess. (1940) at 137 ("Senate Hearings") (Statement of Statement of Baldwin B. Bane, Director, Registration Division, Securities and Exchange Commission Baldwin Bane) (discussing the effect of selling shares at a stale price noting that the value of existing shareholders was reduced due to sales below NAV. He stated: "That is what is generally referred to in the investment-trust industry, and that is what I will refer to when I use the word here, as dilution. The interest of that first security holder has been diluted by allowing the second security holder to go in and purchase at less than the value of the share at the time he bought it."

[9] See Senate Hearings at pp.135-145; pp. 187-188; pp. 835-863 (statements of Baldwin Bane regarding dilution); Mr. Bane discussed the effect of selling shares at a stale price noting that the value of existing shareholders was reduced due to sales below NAV. He stated: "That is what is generally referred to in the investment-trust industry, and that is what I will refer to when I use the word here, as dilution. The interest of that first security holder has been diluted by allowing the second security holder to go in and purchase at less than the value of the share at the time he bought it."

[10] Id. We note that the current expansive definition of "dilution" was present in the 2016 adoption of voluntary swing pricing. Investment Company Swing Pricing, SEC Rel. No. IC-32316 (Oct. 13, 2016). That rule release took a similarly broad reading of dilution, and we question the authority for that rulemaking as well.

[11] In the matter of a Proposed Amendment to the Rules of Fair Practice of National Association of Securities Dealers, Inc., SEC Rel. No. IC-118 (April 12, 1941); Notice of Proposal to Adopt Rule 22c–1 Under the Investment Company Act of 1940 Prescribing the Time of Pricing of Redeemable Securities for Distribution Redemption and Repurchase, SEC Rel No. IC-5413 (June 25, 1968)(proposing release), and SEC Rel. No. IC-5519 (Oct. 16, 1968)(adopting release).

[12] See W. Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2607-08 (2022) ("When the statute at issue is one that confers authority upon an administrative agency, that inquiry must be 'shaped at least in some measure, by the nature of the questions presented' – whether Congress in fact meant to confer the power asserted.")

Congress [would have been] likely to delegate…such power to an agency make it unlikely that Congress has actually done so."[13] Noting that "Congress [does not] typically use oblique or elliptical language to empower an agency to make a 'radical or fundamental' change to a statutory scheme", the Court noted that such "major questions" require "something more than a merely plausible textual basis for the agency action"; it requires evidence of "clear congressional authorization."[14]

We submit that the Swing Pricing Proposal is a major question requiring evidence of "clear congressional authorization." The Commission seeks to use rulemaking authority contained in the 1940 Act that, as discussed above, was intended for a specific, circumscribed purpose, to radically rewrite the economic rights of investors with respect to the **$26 trillion** of mutual fund shares they hold. In doing such a rewrite, the rule would pre-empt the corporate and business trust laws of multiple states, displace the contractual rights between funds and their shareholders, and impose significant costs on funds, fund investors, investment advisers and intermediaries.

And clear congressional authorization is nowhere to be found. The "problem" of funds (and indirectly their shareholders) bearing the attendant costs of redemptions and purchases has been a feature of mutual funds since their creation, including at the time the 1940 Act was adopted. The "problem" of bearing these costs has gone unremarked and untouched by either the Commission or Congress for 63 years (notwithstanding at least two major SEC staff studies[15] and two major legislative amendments of the 1940 Act[16] during the intervening period.) The proposed changes to a shareholder's rights to net asset value conflicts with Congress's understanding of what a redeemable security is,[17] and would force a mutual fund to be operated or managed in the interest of special classes of their securities holders – ironically one of the precise enumerated abuses the 1940 Act was expressly adopted to prevent.[18]

We urge the commission to put aside the Swing Pricing Proposal, unless and until it has obtained clear congressional authorization for its adoption.

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13 W. Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2609 (2022)

14 Id.

15 SEC, *Report on the Public Policy Implications of Investment Company Growth*, H.R. Rep. No. 2337, 89th Cong., 2d Sess. 328 (1966); SEC Division of Investment Management, *Protecting Investors: A Half Century of Investment Company Regulation* (May 1992).

16 Investment Company Act Amendments of 1970, Pub. L. No. 91547, 84 Stat. 1413 (1970); National Securities Markets Improvements Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416 (1996).

17 See Section 2(a)(32) of the 1940 Act.

18 See Section 1(b)(2) ("[T]he national public interest and the interest of investors are adversely affected…[w]hen investment companies are…**operated, [or] managed**…**in the interest of special classes of their security holders…** rather than in the **interest of all classes** of such companies' security holders. It is hereby declared that the policy and purposes of this title, in accordance with which the provisions of this title shall be interpreted, are to mitigate and, so far as is feasible, to eliminate the conditions enumerated in this section which adversely affect the national public interest and the interest of investors.") (emphasis added).

B. Swing Pricing Proposal Raises Significant Legal and Policy Concerns

In addition to our concerns that the Commission does not have authority under Section 22(c) to implement mandatory swing pricing, we believe the Swing Pricing Proposal raises a number of significant legal and policy concerns that, in our view, the Commission has not fully addressed.

1. The Swing Pricing Proposal Changes the Bargain Investors Have Made

Since at least 1940, investors have invested in mutual funds in reliance on their fundamental structure. Part of this structure is that, absent redemption fees, expenses related to purchases and redemptions are fund expenses, and not individual investor expenses. The Commission's Swing Pricing Proposal would upend this established understanding and shift these costs to redeeming shareholders. In doing so, the Commission would be effectively penalizing these shareholders by forcing them to pay their own redemption, effectively rewriting the contractual rights they have through their share ownership of mutual funds.[19]

The Commission appears to have lost sight of the fact that mutual funds are just that: mutual endeavors. They are not a form of separately managed accounts.[20] They are not direct ownership by investors in a basket of specific, identifiable, un-pooled securities.[21] They are not brokerage accounts owning curated portfolios of fractional shares.[22] They are companies that are "a mutual enterprise" with investors acting as "partners in a common venture" who "all stand to gain and lose" equally.[23] Yes, it is true – as is the case of corporate ownership more generally – that existing shareholders bear the burden of selling shares to cover the redemption costs of a redeeming shareholder. But every investor in a mutual fund also knows they can rely on the fact that when it is their time to redeem, the fund will bear their costs of redemption. Yes, it is true – as is the case of corporate ownership more generally – that the continuing shareholders bear the burden of investing sales proceeds. But all shareholders bear those costs *equally*, just as all

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[19] We believe there is an important distinction to be drawn between mandatory swing pricing and voluntary redemption fees designed to address short-term trading. Unlike mandatory swing pricing, voluntary redemption fees are typically calculated as a fixed percentage, are easily understood by investors, are applicable only for limited periods intended to address short-term trading. See Rule 22c-2. As a result, unlike mandatory swing pricing, redemption fees are usually entirely avoidable by long term shareholders when they ultimately redeem.

[20] See Rule 3a-4.

[21] HOLDRs, SEC No-Action Letter (pub. avail. Sept. 3, 1999).

[22] The ICI petitioned the SEC in 2000 to treat these accounts as investment companies. See ICI Attachment to Letter on Web-Based Investment Programs, available at https://www.ici.org/policy/comments/cov_comment/00_SEC_WEB_PORTFOLIOS_ATTACH. See also SEC Asked to Review Foliofn Product, Washington Business Journal (Oct. 30, 2000) available at https://www.bizjournals.com/washington/stories/2000/10/30/story3 html. The SEC declined to proceed.

[23] Senate Hearings at 270 (statement of David Schenker).

benefit *equally* from the benefits generated by increased assets, and just as was the case for every continuing shareholder when *they* bought into the fund. In fact, this type of mutual relationship in which individuals come together to share the expenses with their neighbors in return for the promise of their neighbors reciprocating in the future is a quintessential part of the American experience.[24] It is simply not dilution, and it is not unfair.

2. The Swing Pricing Proposal Would Exacerbate, Not Reduce First Mover Actions

The Commission states that part of the purpose of the Swing Pricing Proposal is to limit "first-mover" advantage, which the Commission defines as an attempt by shareholders to redeem in order to "avoid[ ] anticipated trading costs and dilution associated with other investors' redemptions."[25] The Commission appears to base this view on the theory that, in the absence of swing pricing, a shareholder has an incentive to redeem before other redemptions cause a material impact on the net asset value at a subsequent date.

If this conclusion is correct, it is not clear why swing pricing would not amplify and accelerate such redemptions. Under the Swing Pricing Proposal, redeeming investors will be penalized with a swing factor adjustment regardless of the timing of the redemption. The only question is how much of a swing pricing penalty there will be. If an investor believes it is time to redeem, then it is in their economic interest to redeem as quickly as possible in hopes of being in the vanguard of redeeming shareholders, before a bulk of anticipated redemptions occurs, thus minimizing their swing pricing discount. As a result, we fear that swing pricing could provide an incentive for shareholders who might otherwise be on the fence about redeeming to move forward as quickly as possible to redeem before other redeeming shareholders make redemptions even more costly. We see no reduction of first-mover advantage, but see every incentive to accelerate redemptions in order to maintain first-mover advantage. While swing pricing may help to defray the costs of such early redemptions, we do not believe it is in a fund's best interest to incentivize such behavior and the disruption it would cause.

3. The Swing Pricing Proposal Could Permit Instances of What is Purely a Redistribution of Investor Wealth

We understand the SEC's desire to shift expenses to redeeming shareholders and purchasing shareholders. However, the model that the Commission proposes to impose has two flaws: (1) the amount of the swing pricing factor is based on what is effectively nothing more

[24] Examples of such mutual assistance where people agree to "pay it forward" include the Social Security System, mutual insurance companies, burial societies, mutual aid societies or even neighboring farmers taking turns assisting each other in the harvesting or threshing of their crops. See Threshing Machine: Farmers working together: the People in Pictures available at https://www.pbslearningmedia.org/resource/b2b8294d-d4ac-4def-9e9c-8befefba171d/threshing-machine-farmers-working-together/. The concept is so engrained in our public consciousness that it has been featured in our popular culture. See PAY IT FORWARD (Warner Bros. Pictures 2000).

[25] Proposing Release at 16.

than educated guesswork,[26] and (2) the model is based solely on a focus on daily net flows which ignores short-term netting.

The swing factor is set using "good faith estimates, supported by data." This means that if reality deviates in any significant way from the assumptions underlying the estimates, or there are subsequent off-setting flows in the following days, purchasing or redeeming shareholders move from bearing expenses of their transactions to simply transferring wealth to the existing or remaining shareholders.

For further illustration, please consider the following. According to the proposed Rule, the swing factor is generally based on: (a) spread costs; (b) brokerage commissions, custody fees, and any other charges, fees, and taxes; and (c) market impact of the purchase and redemption. All of these are required to be based on good faith estimates. Of these, only the second set of considerations is relatively stable on a day-to-day basis. Spreads and markets are continually changing. If an investment adviser to a mutual fund served as the swing pricing administrator, it would of course do its best to make a good faith estimate, supported by data, of the costs to be incurred by the fund. Unfortunately, even if the investment advisory firm provided its very best, most supported estimate of spreads and market impact, investment advisers simply cannot predict the future. An unexpected near-term tightening in spreads or a reduction in market impact over the days following net redemptions could greatly reduce the amount of costs a redemption generates, perhaps materially so. If this were to occur, redeeming shareholders would not be paying the costs of their own actions, they would be paying a windfall to the fund and its remaining shareholders.

Similarly, if there are offsetting flows over a period of two or more days (e.g., net redemptions on one day followed by equal or greater dollar amount of net inflows the following day) the amount coming into the fund and the amount flowing out of the fund will equalize and will greatly reduce or eliminate the amount of securities that need to be purchased or sold by the fund, thus significantly reducing costs. As a result, the costs the swing pricing adjustment is intended to address could be greatly reduced, or even eliminated. This converts a cost-shifting exercise into a pure wealth transfer.

Third, on days in which there is swing pricing adjustment, swing pricing will penalize those investors who happen to be purchasing and redeeming in-kind. Although both cash and in-kind transactions would occur at the swing adjusted price on that day,[27] the investors engaging in in-kind transactions would not generate the costs the Swing Pricing Proposal is intended to ameliorate but would nonetheless be potentially required to redeem at a lower swing adjusted basis and to purchase at a higher swing adjusted basis. In essence these in-kind investors would be subsidizing the cash investors.

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[26] We are not aware of any uniformly accepted, back-tested quantitative methods for appropriately determining the swing pricing adjustment.

[27] We acknowledge that in-kind purchase and redemptions would not be counted in determining whether swing pricing was required to be implemented, but once implemented the swing adjusted price would apply to all shareholders transacting with a fund.

Congress stated in Section 1(b)(2) of the 1940 Act that "that the national public interest and the interest of investors are adversely affected…[w]hen investment companies are organized, operated, [or] managed…in the interest of special classes of their security holders… rather than in the interest of all classes of such companies' security holders. It is hereby declared that the policy and purposes of this title, in accordance with which the provisions of this title shall be interpreted, are to mitigate and, so far as is feasible, to eliminate the conditions enumerated in this section which adversely affect the national public interest and the interest of investors." Given that the proposed rule poses a real risk of simply acting as a wealth redistribution device that will disadvantage some shareholders to the benefit of others, we ask the Commission: how is the proposed rulemaking in any way consistent with the protection of investors and not in contravention of this Congressional finding?

4. The Swing Pricing Proposal Creates the Possibility of Significant Uncertainty Surrounding the Interplay Between State and Federal Law

If adopted, the Swing Pricing Proposal would impose a federal obligation to sell and redeem a mutual fund's shares at a price that is not the fund's net asset value. This requirement is in direct conflict with the provision of many investment trusts' state law formation documents (e.g., their declarations of trust). For example, Calamos Investment Trust's Fourth Amended and Restated Agreement and Declaration of Trust, which is binding upon the Trust's actions under state law, states that "[e]ach holder of Shares…shall have the right…to require the Trust to redeem all or any part of such holder's Shares…at a redemption price equal to the net asset value per Share…next determined in accordance with" the Declaration of Trust. The Declaration of Trust states that the net asset value per Share…shall be (i) …the quotient obtained by dividing…the value of the assets…less the liabilities [of the fund]…by the total number of Shares…outstanding …."[28] This trust provision does not contemplate swing pricing, and unless (a) the Swing Pricing Proposal is deemed to preempt the provisions state law, or (b) the provisions of the declaration of trust are changed pursuant to shareholder vote,[29] the two provisions would be mutually conflicting.

We agree as a matter of law that "state law is nullified to the extent that it actually conflicts with federal law" and that "such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility.'" [30] The Supreme Court has noted that "[f]ederal regulations have no less pre-emptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to

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[28] We suspect that the Calamos mutual funds are not alone in having such provisions in their organizational documents. As a consequence, we believe that others may have this issue as well.

[29] Such material changes to the trust documents affecting shareholder rights must be approved by shareholders.

[30] Fidelity Federal Sav. and Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982) (citing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–143 (1963)) .

determine whether he has exceeded his statutory authority or acted arbitrarily."[31] The courts will not disturb such a rulemaking "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."[32]

As noted supra in section III.A. of this letter, however, it is far from clear whether the Swing Pricing Proposal is supported by the text or the legislative history of Section 22, or even if so whether the Commission can point to "'clear congressional authorization' to regulate in that manner."[33] As a result, the legal status of preemption is murky and frankly hangs by a thread.

We respectfully submit that if the rule goes forward as proposed, it will create a morass of uncertainty regarding the interpretive issues that mutual funds, their investment advisers and their boards will be forced to resolve, and without any clear path forward regarding how to do so. Given this level of uncertainty, mutual funds may be forced to seek to obtain shareholder approval to change the rights of redemption. However, obtaining such a vote would be a costly endeavor (with all expenses borne by shareholders) and raises the possibility that such a deeply unpopular change would not garner enough shareholder votes, thus putting that option potentially out of reach.[34]

5. The Swing Pricing Proposal Exposes Fund Advisers to New Types of Civil and Regulatory Liability

We have noticed a recent rulemaking trend in which the Commission drafts rules contemplating a central role for funds' investment advisers. For example, a fund's investment adviser or its personnel are effectively required to act as a fund's liquidity risk manager, derivatives risk manager, and valuation designee.[35] We believe that investment advisors have generally been comfortable taking on these roles, as each role flows organically out of activities an investment adviser would be providing to its fund clients as a matter of course, i.e., investment advisers were involved in managing derivatives and liquidity and assisting in valuation issues well before the related rules were adopted, and are happy to continue doing so.

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[31] Id. at 153-54.

[32] Id. at 154.

[33] W. Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2614 (2022).

[34] In addition, to the extent the Commission moves forward with the Swing Pricing Proposal, we also believe it would be helpful for the Commission to issue guidance as to the scope and nature of disclosure that would be required in a mutual fund's registration statement to the extent that additional amount of net assets lost due to the application of the rule could be deemed to be an additional payment related to the security under state law such that outside counsel was prevented from providing an unqualified opinion that the securities issued by the fund are fully paid and non-assessable under state law. See Staff Legal Bulletin No. 19 (Oct. 14, 2011) at Pt. II.B.1.a.

[35] We recognize that an adviser is not mandated to serve in these roles as a matter of law, but based on industry implementation of these rules, it would be highly unusual for an investment adviser to not do so as a practical matter.

Swing pricing, however, is different. Unlike valuation, managing liquidity or overseeing derivative usage, adjusting NAV pursuant to swing pricing has no pre-existing analog involving services provided by investment advisers.[36] Simply put, swing pricing is not part of the historic business of providing investment advice.

All things being equal, we believe that investment advisory firms would prefer not to take on this role and its attendant liability.[37] First, as the Commission itself readily notes, serving as the swing pricing administrator puts a fund's investment adviser in a conflicted position.[38] While we agree that board reporting and oversight would help to provide an effective check on any overreaching by investment advisers in general, and while we are also supremely confident that investment advisors to registered investment companies would be able to satisfy their fiduciary obligations while serving in such a role, we are left with the fact that acting as swing pricing administrator requires an exercise of good faith business judgment that if applied incorrectly potentially harms shareholders.

We recognize that the rule only requires an "exercise of good faith supported by data." However, this standard is subjective and vague. How much data is required? What if the data is ambiguous, or there is a close call, will it still support actions taken? It is difficult to understand why investment advisers should be pushed into a role outside of the historic norms of their fiduciary obligations, a role that the Commission acknowledges creates potential conflicts of interest, and a role that subjects those investment advisers to a subjective standard of determining whether they have acted appropriately.

In light of these concerns, we urge the Commission to abandon the idea of mandatory swing pricing, but if the Commission nonetheless believes it is appropriate to move forward, we urge that the Commission adopt a clear and specific safe harbor for persons acting as the swing pricing administrator that would provide legal protection for actions taken in compliance with the terms of the safe harbor[39] (and we note that any safe harbor should also extend to the officers and directors of the fund, both interested and disinterested).

6. Questions Remain Regarding Ancillary Actions in Light of the Proposal to Make Swing Pricing Mandatory.

When the Commission adopted the original, voluntary swing pricing rule in 2016, they provided a significant amount of guidance regarding how funds should treat swing pricing for

[36] In fact, in the absence of Rule 22c-1, it is likely that such activities would be illegal for an investment adviser to perform. See Section 206(2) of the Investment Advisers Act of 1940 (making it unlawful to directly or indirectly engage in any transaction practice or course of business which operates as a fraud or deceit upon any client or prospective client.).

[37] Nor would they prefer to take on the cost. It is not immediately clear whether investment advisers could be reimbursed for these costs, effectively implementing an unfunded mandate on investment advisers.

[38] See Proposing Release at 107.

[39] A safe harbor may also help militate what would otherwise likely be an increase in professional liability insurance premiums.

accounting, performance presentations and shareholder disclosures. Each of these statements and positions was made and adopted in the context of a voluntary swing pricing regime. They were not resolved in the context of a mandatory, industry wide rulemaking. There is no discussion in the proposing release of the Swing Pricing Proposal analyzing whether these approaches remain valid, and whether they still make sense in the context of a mandatory, industry wide approach to swing pricing. We believe that the Commission should re-open the comment period to permit solicitation of additional comments regarding these intertwined issues.

C. **The Hard Close is Disruptive, Serves no Real Independent Purpose Other Than an Attempt to Push Swing Pricing, and Should be Abandoned**

The Swing Pricing Proposal also contains a so-called "hard close" requirement. Currently, all investors who invest in mutual funds through intermediaries must submit their final orders (either for purchases or redemptions) to the intermediary by the fund's asset pricing time (currently 4:00 pm ET for most funds). All orders received by the intermediary before 4:00 p.m. cut-off receive that day's price, even if processing delays at the intermediaries mean that actual, final orders are not received by the fund until later, sometimes even the next day. Under the proposed amendments to Rule 22c-1, all purchase and redemption orders would have to be received by the fund, its designated transfer agent, or a registered securities clearing agency (collectively, "designated parties") prior to an established pricing time. This process would mean that investors no longer have until 4 p.m. ET (which is also generally market close) to submit their orders to intermediaries. Rather, the intermediaries would have to push back their internal order cut-off deadline in order to accommodate the additional time needed to process, aggregate, and net orders so that the intermediaries can provide the consolidated order to the fund, its designated transfer agent, or a registered securities clearing agency.

The Commission has indicated that the purpose of the is rule change is two-fold. First, the rule change is intended to address potential late trading (i.e., backwards pricing) similar to the market timing scandals of twenty years ago. Second, the change is being proposed to facilitate swing pricing. Each purpose raises different issues and we address each in turn.

It is not clear what the Commission is seeking to solve for with respect to late trading. The Commission considered a hard close in 2003 to address late trading, and ultimately determined it was not feasible, such that the rule was never adopted.[40] Instead, the Commission implemented Rule 38a-1 and its far-reaching and robust compliance regime (including implementing a requirement for a fund chief compliance officer that reports to a fund's independent directors). The Commission also adopted additional disclosure requirements and issued guidance around selective disclosure, which addressed another element of the market timing scandal. This two-prong approach appears to have worked quite well. Although we agree that the late trading should never again be permitted to happen, it is not clear to us why the Commission has a current concern in this area. If the concern is that the existing measures are insufficient, we believe a better approach would be to address the existing measures adopted by

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[40] Amendments to Rules Governing Pricing of Mutual Fund Shares, SEC Rel. No. IC-26288 (Dec. 11, 2003).

the Commission to address this issue rather than dusting off a 20-year-old policy initiative that did not move forward and that had limited support at best even at the time.[41]

That leaves the implementation of a hard close to facilitate swing pricing, which appears to be the actual, sole reason for including it in the Swing Pricing Proposal. We believe that the concerns related to a hard close that were present in 2003 remain today. Implementing it would be expensive and operationally complicated and the costs would greatly outweigh the benefits. One would expect a fulsome discussion of what has changed since 2003 that identifies the changes that have now made this more operationally feasible and less expensive to implement. Unfortunately, the proposing release was disappointingly silent on this point. It leads to the unfortunate conclusion that nothing has changed, and the passage of twenty years has done nothing to make this undertaking easier or cheaper to implement. As discussed later in this letter, we believe it is incumbent on the Commission to justify such a monumental change as part of its cost benefit analysis.

D. Amendments to N-PORT Requirements are Burdensome

The N-PORT Proposal would alter fund filing requirements to require filing Forms N-PORT on a monthly basis, rather than quarterly basis, and within thirty days after months end instead of 60 days after quarter's end. In addition, more data would be required to be publicly disseminated. We believe that the truncated time frame for filing, coupled with the requirement of additional filings, would increase the costs to fund shareholders, with no appreciable benefit flowing to those shareholders. We believe it is important for the funds to maintain flexibility in this area and urge the Commission to maintain the current reporting requirements as currently structured.

E. The Economic Analysis is Insufficient

The Commission is proposing changes that we believe will have very real effects on American investors and on funds and intermediaries. Section 2(c) of the 1940 Act requires the Commission to "consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." We lack confidence in the Commission's economic analysis.

1. What Has Changed?

The implementation of a hard close was last considered in 2003, although we lack a public administrative record to which we can point, it is our understanding that the significant

[41] The last time the hard close was proposed even the Consumer Federation of America gave it only tepid support. See Testimony of Barbara Roper, Director of Investor Protection, Consumer Federation of America Before Committee on Banking, Housing and Urban Affairs U.S. Senate (Mar. 23, 2004) (noting "iniquities associated with the hard 4 p m. close" and stating "While we do not oppose the hard 4 p.m. close as a short-term solution to late trading abuses, we believe an alternative long-term solution must be found.") available at https://www.banking.senate.gov/imo/media/doc/roper.pdf

costs weighed against the limited benefits scuttled the proposal. We have a better record of costs in the context of swing pricing, however.

The current swing pricing procedures were previously considered in 2016, and mandatory swing pricing was rejected. This appears due in part to the cost/benefit tradeoff. The Commission (circa 2016) noted that "[w]e appreciate the commenters' concerns that swing pricing may have costs that, for some funds, may not be justified by the benefits." The Commission further elaborated that mandating swing pricing "would have the benefit of establishing a uniform regulatory framework to prevent potential shareholder dilution, and might lower the per fund cost of implementing swing pricing due to economies of scale. But because funds differ notably in terms of their particular circumstances and risks, as well as with respect to the tools funds use to manage risks relating to liquidity and shareholder purchases and redemptions, we decided to adopt a rule that would permit swing pricing as a voluntary tool for funds. The adopted approach will allow funds to weigh the advantages of swing pricing (e.g., improved allocation of trading costs) against potential disadvantages (e.g., the potential for swing pricing to increase the volatility of a fund's NAV in the short term and its operational costs)."[42]

Given that these current proposals were unsupported when considered in 2003 and 2016, we are forced to ask the question: what has changed? What has changed in the cost benefit analysis to turn two policies for which the costs outweighed the benefits to suddenly inverting such that the benefits outweigh the costs? The Commission should address that in its cost benefit analysis, but it does not.

2. The Cost Benefit Analysis Speaks in Hypotheticals and Cites to Untested Research

The Commission's economic analysis appears to lack the level of certainty one would expect for a rulemaking of this magnitude. We note that instead of referring to case studies with hard, empirical data – for example any lessons learned from any actual runs on a mutual fund that may have caused the redemption function to break – the economic analysis devolves into a what appears to be a thought experiment that relies on what the Commission readily admits are "stylized examples"[43] and "hypothetical scenarios."[44] While such stylized and hypothetical examples may be useful in conceptualizing theoretical issues, it is not clear that they provide the kind of measurable quantifiable data necessary for a useful economic analysis. Furthermore, the economic analysis includes a series of citations to academic papers that are captioned as "working papers." These citations indicate that the papers are – as implied by the name – works in progress that have not yet been fully vetted or subject to peer review to test their theses and

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42 Investment Company Swing Pricing, SEC Rel. No. IC-32316 (Oct. 13, 2016) at 156.

43 See Proposing Release at 245.

44 See Proposing Release at 246.

support.[45] As a result, we question whether such works in progress support a conclusion that such a major undertaking is supported by a reasonable cost-benefit analysis.

3. The Economic Analysis Lacks Significant Quantifiable Evidence

The cost-benefit analysis, particularly the cost-benefit analysis related to mandatory swing pricing is lacking in quantification. We cannot say it better than the Commission did itself:

> Many of the benefits and costs discussed below are difficult to quantify. For example, we lack data that would help us predict how funds may adjust the liquidity of their portfolios in response to the proposed liquidity rule amendments; the extent to which investors may reduce their holdings in open-end funds as a result of the proposed swing pricing requirement and other amendments; the extent to which investors may move capital from mutual funds to other investment vehicles, such as closed-end funds, ETFs, or CITs; and the reduction in dilution costs to investors in open-end funds as a result of the proposed amendments (which would depend on investor subscription and redemption activity and the liquidity risk of underlying fund investments). Form N-PORT data is not sufficiently granular to allow such quantification, and many of these effects will depend on how affected funds and investors would react to the proposed amendments. While we have attempted to quantify economic effects where possible, much of the discussion of economic effects is qualitative in nature. We seek comment on all aspects of the economic analysis, especially any data or information that would enable a quantification of the proposal's economic effects.

We are left with a very simple question: if you cannot quantify the cost (which common sense indicates may be significant) how can you in good conscience move forward with a rulemaking that addresses untested thesis and has uncertain effects? [46] We recognize that the Commission has solicited comments in this area, but the burden of establishing the cost-benefit analysis is on the Commission, not on the public.

4. **The Paperwork Reduction Act Estimates Are Too Low.**

We believe that the Paperwork Reduction Act Estimates significantly underestimates both the time and cost involved in implementing the proposed rule changes. One example: table 9 of the Proposing Release contemplates a two-hour, annual hour expenditure for board reporting of Swing Pricing, and $531 for one hour of outside legal services. Let us deconstruct that.

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[45] Even economists recognize the challenges in using working papers for support. See "Working Papers are NOT Working." Posting of Berk Özler to World Bank Blogs, https://blogs.worldbank.org/impactevaluations/working-papers-are-not-working.

[46] Cf. Chamber of Com. of U.S. v. Sec. & Exch. Comm'n, 412 F.3d 133, 144 (D.C. Cir. 2005)("[U]ncertainty may limit what the Commission can do, but it does not excuse the Commission from its statutory obligation to do what it can to apprise itself – and hence the public and the Congress – of the economic consequences of a proposed regulation before it decides whether to adopt the measure.")

Given the significant effect on shareholder's pocketbooks, we anticipate fund boards being exceedingly focused on this matter. Most fund boards meet at least four times per year, so as a starting point the estimate means that the Commission anticipates that fund advisers would expend 30 minutes of internal time on each quarterly report, and outside legal review would involve a first year associate expending 15 minutes reviewing each quarterly report.[47] Based on this example, we submit that the actual time and costs are likely to be multiples of the estimated amounts, such that the estimated costs should be re-evaluated.

F. Alternatives

We recognize that providing alternatives to the proposal will assist the Commission in determining the regulatory approach that is in the best interests of the investing public. We submit that the best approach is for the Commission to consider, subject to notice and comment, how to expand and adapt Rule 22c-2's existing provisions on redemption fees. We believe that the provision of more flexible, voluntary redemption fees would permit for a more nuanced approach that could be tailored to each fund's unique circumstances and needs. To the extent that the Commission is set on moving forward with the Swing Pricing Proposal, we further believe that the Commission should first engage in a study to generate the quantitative data necessary to support a conclusion that moving forward is necessary, and to ensure the Commission can quantify the costs and disruptions related to the proposal and solicit further public comment on the results before moving forward.

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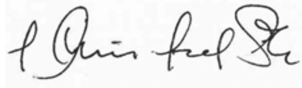
[47] We base the analysis of outside legal cost on the fact that the Commission's $531 estimate is directionally in the range of the hourly billing rate for a first year associate at a major law firm with a credible 1940 Act practice. If a more experienced partner at such a law firm reviewed it, the $531 dollars divided by four meetings could equate to a per meeting expenditure of the lowest billing increment most law firms have: 6 minutes.

Calamos Investments appreciates the opportunity to comment on this rulemaking. We would welcome the opportunity to further discuss our views with you. Please feel free to contact the undersigned at [redacted] or [redacted] if you should like to do so.

Very truly yours,



J. Christopher Jackson
Sr. Vice President & General Counsel

cc: The Honorable Gary Gensler
The Honorable Caroline A. Crenshaw
The Honorable Jaime Lizárraga
The Honorable Hester M. Peirce
The Honorable Mark T. Uyeda

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