February 14, 2023

Submitted electronically via https://www.sec.gov/rules/submitcomments.htm

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 2054 9

Re: Opposition to Proposed Hard Close (File No. S7-26-22)

Dear Ms. Countryman:

On behalf of the American Benefits Council ("the Council"), we are writing to express our strong concerns with the Securities and Exchange Commission's (SEC) hard close proposal and the impact that it would have on employer-sponsored retirement plans and the millions of Americans investing in mutual funds through such plans. The Council similarly expressed strong concerns with this proposal in 2004 and we were glad to see the SEC drop the idea after thoroughly considering its impact. We are disappointed that the SEC has revived this proposal, especially as the SEC acknowledges in the proposal that this change would have a very significant negative impact on retirement plan savers.

The Council is a Washington, D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and their families. Council members include more than 220 of the world's largest corporations and collectively either directly sponsor or support sponsors of health and retirement benefits for virtually all Americans covered by employer-provided plans.

Under the SEC's proposal, a direction to purchase or redeem mutual fund shares would only be eligible to receive the current day's price if the order is received by the fund, its designated transfer agent or a registered securities clearing agency before the fund's pricing time, which is generally 4 p.m. Eastern Time. Consequently, this "hard close" would prevent current day pricing, as permitted under the SEC's existing rules, when a direction to purchase or redeem mutual fund shares is received by an intermediary – such as a retirement plan recordkeeper or third-party administrator (TPA) – before the 4 p.m. deadline, and subsequently transmitted to the fund after such deadline. According to the preamble, the SEC is proposing this change to facilitate its broader swing pricing proposal and to help prevent late trading.

The Council is very concerned about the harmful impact that the SEC's proposed hard close would have on the millions of retirement plan participants who rely on intermediaries to process, verify and transmit their investment orders to mutual funds. Not only will this proposal increase the costs incurred by these retirement savers, it will also disadvantage them by unfairly forcing them to accept significant delays between the time that they provide investment directions and the time that their investments are valued – a delay that will not be encountered by investors that place their orders directly with mutual funds, and that will be much shorter for investors placing orders outside of a retirement plan.

In addition to disadvantaging retirement savers through these delays, the Council is also concerned about the ways in which a hard close would eliminate beneficial features that are currently available to retirement savers and distort the investment selection preferences of plan sponsors and fiduciaries. Moreover, in addition to creating all of these direct harms for retirement plans and their participants, a hard close would add significant costs to retirement plan administration and mutual fund order processing (costs that will be passed on, directly or indirectly, to Americans saving in plans).

It is critical to note that the impact of this proposal is not only that retirement plans will need to impose early order cut-off times and implement new technologies to shorten processing times. *The impact is to end defined contribution recordkeeping as it currently exists*: there are many beneficial retirement account transactions that cannot be processed any other way than after the market closes and knowing the price of the mutual fund. This change would not only affect the recordkeeping that supports retirement plans holding mutual funds in a trust, it would also negatively affect retirement plans that hire insurers to perform recordkeeping services as part of their annuity-based retirement products.

While the Council appreciates the SEC's desire to implement its swing pricing proposal in an effort to combat the fund dilution that can occur during high-volume trading periods, the Council is concerned that the ongoing costs that would be incurred to operationalize swing pricing will be more harmful to fund investors than the dilution problems it is seeking to address. Moreover, the harms that would result from a hard close ***far outweigh*** any benefits that plan investors would experience through mandatory swing pricing. That is, the reduced capabilities and increased costs that would be created by a hard close are worse than the dilution issues that the SEC is trying to address with its broader swing pricing proposal. Furthermore, the Council does not believe that a hard close is needed to prevent late trading abuses. We believe that existing industry practices and reforms put in place by the SEC in response to the late trading issues of the early 2000s have successfully addressed any concerns about late trading, and a hard close is totally unnecessary to prevent those types of abuses.[1] Accordingly, the Council is urging the SEC to withdraw and permanently abandon its hard close proposal.

BACKGROUND ON RETIREMENT PLAN ADMINISTRATION

Millions of Americans rely on employer-sponsored retirement plans to help them achieve a financially secure retirement. In defined contribution retirement plans, such as 401(k), 403(b), and governmental 457(b) plans, employees and their employers contribute to plan accounts maintained on behalf of each participating employee. These individual accounts are often invested in mutual funds. Although employers select the menu of investments that are offered, individual participants are typically responsible for managing their accounts among the different options.

Participant accounts within a retirement plan are very different from the brokerage accounts that individuals and institutions may set up outside of a retirement plan. For example, in order to maintain the tax benefits conferred upon retirement plans through the Internal Revenue Code ("the Code"), amounts held within retirement plan accounts may only be distributed in certain situations – e.g., following separation from service, after attaining age 59 ½, or upon financial hardship. This means that, in most cases, participants are not eligible to fully liquidate their accounts while they are actively employed. Additionally, unlike individuals purchasing retail investments through their brokerage accounts, retirement plan investors commonly obtain access to institutional investment products through their plans, including institutional mutual fund share classes. This is because a participant's interest in his or her own account is derivative of any investments purchased by the plan at an institutional level on behalf of its participants. Furthermore, nearly all defined contribution plans offer a limited menu of investments which are selected and monitored by plan fiduciaries; investments in defined contribution plans are concentrated in large low-cost mutual funds and other investments. The institutional nature of plan investing creates efficiencies and cost savings for retirement plan investors that cannot be achieved for individual retail investors executing similar transactions outside of their employer-sponsored retirement plans.

[1] We would note that the preamble accompanying the SEC's proposal offers no examples or evidence of late trading abuses that have occurred since the SEC instituted it reforms and industry updated its practices in the early 2000s.

Essential Compliance Functions of Recordkeepers and TPAs

In order to comply with the various rules imposed on retirement plans by the Code and the Employee Retirement Income Security Act of 1974 (ERISA), employers hire recordkeepers and TPAs to manage plan operations and to purchase, redeem, and account for plan investments held in trust on behalf of participants. Accordingly, when plan participants direct their accounts to purchase or redeem mutual fund shares, their individual accounts do not have an unfettered ability to place orders directly with any mutual funds. Instead, plan participants must first send their plan and investment instructions to the plan's recordkeeper or TPA for review and processing before any resulting orders are transmitted to a fund. Given the complexity of the regulatory requirements imposed on retirement plans by the Code and ERISA, plan sponsors typically cannot self-administer their own plans and must rely on their recordkeepers and TPAs to ensure that their plans are properly administered.

For example, consider a retirement plan participant who is currently employed, invests her 401(k) account exclusively in a target date mutual fund (Fund TDF), and wishes to receive a "hardship withdrawal" of $5,000 from her account. Before the plan can fund the participant's withdrawal request by placing an order to redeem $5,000 worth of Fund TDF, the plan's recordkeeper must first receive a withdrawal request, ensure that the employee is eligible to receive a hardship distribution under the terms of her employer's plan, ensure that the participant satisfies the plan's criteria for receiving hardship withdrawals, ensure that the distribution meets any other procedural requirements (such as spousal consent), and confirm that the investments held by the participant's account are capable of meeting the amount of the participant's withdrawal request. If any of these steps cannot be completed, the plan's recordkeeper or TPA cannot process the transaction.

Cost Savings Through Omnibus Trading

Not only do recordkeepers and TPAs ensure that a plan complies with its own rules and the applicable provisions of the Code and ERISA, they also typically create significant efficiencies and cost savings for retirement plans and participants by netting and batching all daily orders on behalf of all of their plan clients. That is, rather than individually transmitting every retirement plan participant's order to each mutual fund, recordkeepers aggregate all of the daily orders that they receive from all of their plan clients to create a single net purchase or net redemption order for a given fund. While all plan records and accounts maintained by a recordkeeper are reallocated to reflect each individual participant's instructions, this aggregation and batching process substantially limits the actual trading that occurs on behalf of retirement plan investors, thereby substantially limiting their trading costs. Under existing rules, in an effort to further simplify this type of omnibus trading, the netting and batching process only starts after the net asset values (NAVs) for all mutual funds are known. While it is hypothetically possible for intermediaries to create systems that would facilitate one-on-one order processing between individual participant accounts and individual mutual funds, such a system would be incredibly inefficient and costly for plans and participants.

Not only does this omnibus trading create efficiencies and cost savings for retirement plans and their participants, it also creates efficiencies and cost savings for other mutual fund shareholders. By processing transactions after mutual funds declare their NAVs and netting all trades on behalf of their retirement plan clients, recordkeepers and TPAs can send simple and straightforward orders to mutual funds – e.g., buy 100 shares of Fund X or sell 50 shares of Fund Y. Consequently, mutual funds do not receive and can avoid complex orders on behalf of retirement plan investors – e.g., buy 100 shares of Fund X, plus the value of 50 shares of Fund Y (to offset an exchange involving Fund X and Fund Y). In this regard, the role that retirement plan recordkeepers and TPAs play in the mutual fund order processing system not only reduces trading costs for plans and participants, it also helps to prevent the order processing costs that are attributable to plan investors from being passed on to other mutual fund investors.

It is worth emphasizing, again, that the very concept of omnibus trading depends on knowing the price of the mutual fund when the transactions are processed. It cannot work without that. If the price is not known, the recordkeeper can do nothing other than pass through every instruction; it is simply not possible to properly process plan transactions.

Plan Administration Not Instantaneous

The point of all of this background information is to illustrate that, because retirement plan investors must rely on, and benefit from, intermediaries processing their investment instructions, there is necessarily a delay between the time when a plan participant provides instructions to an intermediary and the time that the intermediary places the plan's order with a fund. While the length of time for this processing hypothetically can be small for some very simple transactions, in the real world, many routine plan transactions are complex and take hours to review and process as part of an omnibus order. And for certain plan transactions, there is simply no substitute for having a participant's directions manually reviewed and verified before placing any resulting order with a mutual fund. This delayed order processing for retirement plan participants is currently a practical necessity notwithstanding all of the technological advancements that have occurred since the SEC last considered a hard close nearly 20 years ago.[2]

[2] The preamble to the proposal expresses the SEC's belief that intermediaries will not need to establish cut-off times significantly earlier than the pricing time set by the fund "[b]ecause technology has advanced since the Commission last considered a hard close in 2003." 78 Fed. Reg. 77172, 77212 (Dec. 16,

A HARD CLOSE WOULD DISADVANTAGE RETIREMENT PLAN INVESTORS BY CREATING NEXT-DAY PRICING AND EARLY ORDER CUT-OFFS

Under existing SEC rules, a direction to purchase or redeem a mutual fund share can occur at the current day's price as long as the order is placed with an intermediary, such as a retirement plan recordkeeper or TPA, before the fund's pricing time. This current-day pricing is available even if the order is actually received by the fund, its transfer agent, or a registered securities clearing agency after a fund's pricing time.

Importantly, through this existing framework, retirement plan investors are able to place orders that take into account all market information that is available up until a mutual fund's pricing time – i.e., by placing orders right up until the 4 p.m. deadline. Although some retirement plan investors may choose to place their orders well in advance of the 4 p.m. deadline on any given day, all investors have the ability to place their orders until such deadline. This existing framework not only meets the reasonable expectations of retirement plan investors, thereby promoting confidence in the retirement savings system as a whole, it also places them on equal footing with retail and institutional mutual fund investors who access mutual funds outside of the retirement savings system.

Concerns with Delayed Pricing

If a hard close is adopted, retirement plan investors will lose their ability to place mutual fund orders up until the 4 p.m. deadline. This is because, as discussed above, it necessarily takes time for retirement plan recordkeepers and TPAs to review and process participant instructions before placing any resulting mutual fund orders on behalf of a plan and its participants. Accordingly, in order to allow for this review and processing, plan intermediaries will be forced to set early order deadlines that could be hours or even a full day before a fund's pricing time. At best, and even with substantial investments into the platforms that facilitate plan operations, the Council believes that a 12 p.m. ET (9 a.m. PT) deadline is the latest deadline that could be used by retirement plans and their service providers to achieve same-day pricing. And even with these early order deadlines, as discussed further below, many features and capabilities that are currently available to plan participants simply could not occur because order processing would have to commence before the NAV is known to plan intermediaries

The Council expects earlier and different order deadlines from different plans and service providers. These order deadlines would be concerning for all plan investors, but

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2022). While technology has accelerated many plan and fund operations over the past 20 years, the assumption quoted in the preceding sentence is wrong. If the SEC adopts a hard close, retirement plans will need to adopt order deadlines that are many hours or even a full day before a fund's pricing time.

would be especially concerning for participants who would be subject to incredibly early deadlines based on their time zone, such as retirement plan participants on the West Coast. Additionally, such a deadline would create confusion for plan participants who have become accustomed to the 4 p.m. deadline.

Such a result would unfairly disadvantage retirement plan investors relative to retail and institutional investors who would continue to be able to place orders directly with mutual funds, or otherwise qualify for later deadlines for orders placed outside of a retirement plan. This is fundamentally unfair because, unlike those other investors who could consider market developments right up until a fund's pricing time, retirement plan investors could not consider and respond to developments occurring after their plan's deadline. We are concerned that this sort of delayed trading will frustrate the reasonable expectations of plan participants and place participants at a significant disadvantage relative to mutual fund investors who access the very same funds outside of their retirement plans.

We are also concerned with how a hard close would disrupt retirement plan investments that are organized as a fund of funds. These investments may be comprised of mutual funds, which would be subject to a hard close, and collective investment trusts (CITs), which would not be subject to a hard close. In response to a hard close, this type of investment, which is not a mutual fund, may need to institute an early order deadline to ensure that any trading at the lower-tier fund-level reflects participant instructions received at the upper-tier fund-level. In a similar regard, the SEC's proposal raises many novel issues regarding how to value these arrangements and how to communicate fund performance to plan sponsors and participants.

Concerning Justifications

The Council is also concerned with the preamble's discussion anticipating the need for early order deadlines and the SEC's apparent dismissal of the harmful consequences that would result from such a change. For example, in anticipation of public concerns regarding the reduction or elimination of same-day pricing, the preamble apparently expresses the SEC's belief that "most fund orders are not time sensitive" because "[m]ost fund shareholders are long-term investors."[3] Additionally, elsewhere in the proposal, the SEC apparently expresses its belief that the reduction or elimination of same-day pricing is somehow insignificant or an acceptable result because "plan participants generally do not receive immediate execution of loan or withdrawal requests."[4]

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[3] 78 Fed. Reg. 77172, 77213 (Dec. 16, 2022).

[4] 78 Fed. Reg. 77172, 77213 (Dec. 16, 2022).

The Council strongly disagrees with all of these assertions. Retirement plan investors, regardless their investment horizons deserve to: (a) have mutual fund orders executed at a price that reasonably meets their expectations; and (b) have their orders executed on a level playing field with other types of investors. That is, if a retirement plan participant's instructions are provided to an intermediary before a fund's pricing time and the timing and substance of the order can be reasonably verified, the plan participant should be eligible to receive that day's price. Significant delays between participant instructions and a fund's pricing time could have devastating consequences for individual participant investment decisions depending on market developments that occur between the participant's instruction and the fund's pricing time. Even long-term investors can be very sensitive to short-term volatility. Consider, for example, a plan participant who wishes to receive a lump-sum distribution of his or her account. Daily volatility of even a few fractions of a percentage point can have a significant impact on their ability to retire with financial security, especially if a lump-sum distribution reflects a lifetime of savings. Similar concerns are also present when plan participants seek to convert an account balance into a guaranteed stream of lifetime payments through the purchase of an annuity.

Additionally, from a plan administration standpoint, same-day execution of withdrawals is available to some participants and becoming more of the norm. One technology improvement that *has* occurred since the SEC last proposed a hard close is recordkeeping systems are able to process loans and withdrawal requests more quickly. In fact, we expect that same-day execution of withdrawal requests will become even more widely available given recent legislative changes eliminating some of the administrative hurdles that have previously slowed the withdrawal process.[5] Congress recently enacted changes even allowing small amounts to be withdrawn from plans in the case of an emergency such as a medical bill or to pay rent;[6] such transactions *cannot wait* days. Thus, when a plan's operational capabilities put participants in a position to receive same-day pricing for withdrawal requests, the SEC's mutual fund order processing rules should not be unreasonably forcing plan participants into next-day pricing. Otherwise, participant instructions will be subject to short-term volatility that could severely and negatively impact their plan and investment instructions.

Participant Confusion

The Council is also concerned about the participant confusion that would likely result when different investment options offered under the same plan have different order deadlines. For example, a retirement plan that offers mutual funds and CITs could implement a 10 a.m. deadline for all of its mutual fund options, while retaining a

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[5] For example, Section 312 of the SECURE 2.0 Act of 2022 newly permits retirement plan administrators to rely on self-certification for hardship and unforeseeable emergency withdrawals.

[6] Section 127 of the SECURE 2.0 Act of 2022.

4 p.m. deadline for any CIT options. Participants who fail to provide instructions with respect to their mutual fund holdings by the earlier deadline could unwittingly be forced to accept next-day pricing, contrary to their desire to execute a given transaction at the current-day's price. Similar mistakes and confusion could also occur if proprietary funds offered by a plan's recordkeeper have order deadlines that differ from the deadlines for third-party mutual fund, and when an individual participates in multiple plans with different order deadlines.

A Hard Close Would Eliminate Beneficial Plan Features

Under existing SEC rules, retirement plan investors are permitted to engage in a series of plan transactions that can only occur if the plan's recordkeeper or TPA knows the NAV of the mutual funds involved in the transaction before processing participant instructions and updating accounts. Retirement plan participants have benefited from these features and capabilities as they have made it much easier for participants to manage their own retirement investments and encouraged plan participation.

And the key point is that a hard close would actually eliminate these features and capabilities altogether. They simply cannot or will not occur unless a plan's recordkeeper or TPA knows the NAV of the mutual funds involved in the transaction before order processing begins. The following examples illustrate the types of features and capabilities that would be eliminated by a hard close.

Same-Day Exchanges

Under existing SEC rules, retirement plan participants are able to direct efficient and intuitive same-day exchanges of mutual funds that are held within their accounts. Exchanges can be executed in terms of dollar amounts, the number of shares involved, or a percentage of a participant's account. This flexibility, however, largely depends on the ability of recordkeepers to know the NAVs of the funds being exchanged before transmitting any resulting orders from plans to the funds. If the SEC adopts a hard close, many of these exchange capabilities and features would be eliminated.

Consider, for example, a retirement plan participant who has invested his account balance equally in two different mutual funds – 50 shares of Fund A and 50 shares of Fund B – and wishes to reallocate all of his current investments to a single Fund TDF. Under existing SEC rules, and with the benefit of current-day NAVs, recordkeepers can place a redemption order for the combined value of Fund A and Fund B, while simultaneously placing a purchase order in the same amount for Fund TDF. This is possible because, even though the participant's reallocation instruction must be received by the recordkeeper before 4 p.m., the resulting mutual fund orders do not need to be received by the funds until after 4 p.m.

If, however, a plan's recordkeeper must begin its order processing before it knows any of the funds' NAVs, the exchange process becomes far more complex, and unworkable in many instances. For example, using the exchange transaction described above, a recordkeeper theoretically could, under the SEC's proposed exchange rules, place an order to redeem all shares of Fund A and Fund B, while simultaneously placing an order to purchase shares of Fund TDF in an amount that equals the proceeds of 50 shares of Fund A and 50 shares of Fund B.[7] That is, instead of using a definite number of fund shares or dollar amounts to place the purchase order, a recordkeeper could place variable exchange orders that depend on each fund's eventual NAV.

The Council is concerned that, while this type of variable order processing may be feasible in the case of an individual investor with only a few funds, it will not be feasible at an omnibus level when processing daily orders on behalf of millions of participants investing in thousands of funds. In particular, we are concerned that the complexity and cost that would be necessary to create and maintain such a system would be so substantial that retirement plan recordkeepers and mutual funds would not be able to accept these types of variable exchange orders. For example, in this context, if a recordkeeper or TPA included these exchanges as part of its omnibus order processing, a single purchase order sent to a fund could include a purchase order formula that depends on the unannounced NAVs of thousands of mutual funds that are simultaneously being redeemed.

In an attempt to replicate the types of exchanges that can currently occur, participants could direct exchange transactions that first redeem current investments for cash and subsequently purchase new investments at the next day's price. This approach, however, would be very dangerous as it could lead to retirement investors holding uninvested cash in their accounts. Even for a day, the possibility of uninvested cash is a tremendous risk that should not be imposed on plan participants when attempting to reallocate their retirement accounts. Not only would these amounts be out of the market, a plan's trustee or custodian would unlikely be able to credit interest on this uninvested cash, at least until systems can be restructured.

Participants could also attempt to execute exchange transactions by estimating the NAVs of the funds being redeemed and simultaneously placing orders to purchase an equal amount of the funds being acquired. If, however, a participant is too conservative in estimating the value of any redeemed funds, which would be necessary to ensure

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[7] According to the SEC's proposal, an order that is eligible to receive the price set at a fund's next pricing time includes: (1) an order to purchase or redeem a specific number of fund shares or an indeterminate number of fund shares of a specific value; or (2) an order to purchase fund shares using the proceeds of a contemporaneous order to redeem a specific number of shares of another registered investment company (an exchange). Proposed Rule 22c-1(d).

that the proceeds can actually cover a simultaneous purchase order, a participant's existing holdings could never fully be exchanged for other funds. If, alternatively, a participant is too aggressive in estimating the value of any redeemed funds, the redemption order will not create sufficient proceeds for completing any simultaneous purchase order. Unlike investors placing orders outside of their retirement accounts, retirement plan investors cannot simply make additional contributions to cover any purchase order that exceeds the proceeds of a simultaneous redemption.

Asset Allocation and Rebalancing

To help participants maintain their desired allocation of investments within their accounts, many retirement plans offer asset allocation and rebalancing features. These tools allow participants to specify how much of their account will be allocated to a given investment. For example, a participant may specify that he or she desires to have 25% of a retirement account invested in Fund W, 25% in Fund X, 25% in Fund Y, and 25% in Fund Z. As the performance of each fund varies over time, the plan's recordkeeper periodically rebalances the account to maintain the 25% allocation among each fund. Without this type of service, the performance of each investment option will cause the participant's account allocation to deviate from his or her desired asset allocation. This feature enables participants to maintain a consistent asset allocation without ongoing monitoring or multiple transactions.

Under the SEC rules in effect today, plan recordkeepers and TPAs can accurately allocate and rebalance participant accounts in accordance with participant instructions in a single day. This is only possible, however, because the plan's recordkeeper knows, before placing any necessary orders, the NAV of each fund and the total value of each participant's account. In the absence of this information, a recordkeeper can only estimate or guess what the NAV of each fund will be at the end of each day and estimate the dollar amount or number of shares that must be purchased or redeemed in order to achieve a desired allocation. Consequently, any resulting allocations will only approach, but never match, a participant's desired allocation. Furthermore, if the estimates used to perform rebalancing are materially different from the actual NAVs, a rebalancing tool would have to approach the desired allocation in multiple steps over multiple days. This strategy, however, would never match a participant's desired allocation and would create new allocation and trading costs that would likely be passed on to participants through increased fees.

Pro-Rata Distributions and Loans

Another feature that plan participants can utilize under the existing rules are pro-rata distributions and loans. For example, consider a participant who has equally allocated her $10,000 account among four funds and requests $1,000 from her account. If the participant wishes to maintain the existing asset allocation among the four funds, she can currently request a distribution to be made pro-rata from all of the account's investments, and under the terms of most plans, the participant has the right to receive a pro rata distribution. Thus, if each of the four funds is worth the same amount at the end of a day – i.e., $2,500 each – the plan can redeem $250 of each fund in order to fulfill the participant's $1,000 distribution request. The accurate completion of the participant's instruction is, however, contingent upon the plan's recordkeeper knowing the NAV of each fund before placing any redemption orders.

If a hard close is adopted, participants will no longer be able to receive pro rata distributions from different plan investments. Instead, any attempt to replicate a pro rata distribution would have to use estimates based on prior day pricing. If, for example, a plan fulfilled the $1,000 distribution request described in the preceding paragraph by redeeming $250 of each fund on the following day, any changes in the NAV of each fund would mean that the participant's distribution request would not be proportionally funded by each of the four funds. As a result, participant distributions would unnecessarily create deviations from a participant's desired asset allocation. Alternatively, the plan's recordkeeper would need to completely break apart this otherwise straightforward transaction—telling the participant that she must first sell whatever funds she wants to get to approximately $1,000, and then once those are liquidated to cash, request a distribution. Many—perhaps most—savers in a 401(k) plan would not understand such a process, as they have no other experience self-managing a brokerage account. Additionally, from a practical perspective, retirement plan recordkeepers and TPAs are not structured to support these types of transactions.

Plan Loan Limits

Pursuant to rules imposed on retirement plans by the Code, the maximum amount of a loan that a participant may receive from a retirement plan account is generally the lesser of: (a) 50% of the vested account balance; or (b) $50,000.[8] And plans generally give participants the right – a right enforceable under ERISA – to receive the maximum loan allowed by the Code. Under existing omnibus processing, plan participants with an account balance of less than $100,000 can actually receive loans of up to 50% of their current account balance because, before processing any loan request and redeeming any mutual fund shares to fund such loan, a plan's recordkeeper can know the NAV for all of the mutual funds held in a participant's account, and therefore, calculate the participant's total account balance, ensuring compliance with both the $50,000 and 50% limits. If, however, the SEC adopts a hard close, these participants will only be able to base their maximum loan amount on the prior day's NAVs. As a result, plans will have to estimate a participant's maximum loan amount and, to prevent participants from obtaining a loan that exceeds 50% of their vested account balance, plans will likely have

[8] An exception to this limit exists if 50% of the vested account balance is less than $10,000: in this case, some plans permit participants to borrow up to $10,000.

to limit participant loan requests to less than 50% of the prior day's vested account balance. Otherwise, if the value of a participant's account drops, the amount of the loan request could exceed the 50% threshold. Participants will therefore only be able to receive loans in an amount that is less than the amount to which they are entitled under the Code and under the terms of the plan.

Same-Day Hierarchy Distributions

As discussed in the preamble to the SEC's proposal, a hard close would eliminate the ability of retirement plan participants to fund distributions based on a hierarchy of investments on a single day – i.e., a hierarchy for which certain investments are only redeemed to fund a loan or withdrawal after the proceeds of another investment have been exhausted. As the preamble recognizes, these transactions can only occur on a single day if a retirement plan recordkeeper knows the NAVs of the relevant funds before placing orders on behalf of participants. The preamble offers no solution for this, nor is there one—this helpful feature for a participant would simply be sacrificed under the SEC's proposal for whatever pennies of incremental value swing pricing might provide them.

A HARD CLOSE WOULD DISTORT THE MARKETPLACE FOR INVESTMENT OPTIONS

Retirement plan sponsors and retirement plan fiduciaries are responsible for selecting the investment options that are available to plan participants. The Council is concerned that, if adopted, a hard close would distort this fiduciary decision-making process by creating unnecessary and artificial incentives for plan sponsors to select certain investment options over other available options. The Council believes that the fiduciary decision-making process should be driven by the fundamental risk-return characteristics of an investment option and its costs; not a product's ability or inability to provide same-day pricing. The Council believes that the flexibility afforded by the SEC's current pricing rules creates healthy competition among different fund managers and investment products to the benefit of investing plans and participants. Consequently, we are concerned about the ways in which a hard close would disrupt this competition.

Mutual Funds vs. CITs

As discussed earlier in this letter, if the SEC adopts a hard close, retirement plans that offer mutual funds would impose order deadlines that would be hours or even a full day before a fund's pricing time. By comparison, retirement plan platforms would not need to impose similar deadlines for orders involving CITs and exchange traded funds (ETFs) because those types of investments would not be subject to the SEC's swing pricing and hard close rules. The Council is concerned that these distinctions could distort the way in which plan sponsors evaluate these different investment options, without regard to their risk-return profile or costs.

The Council is similarly concerned about how a hard close would distort participant decision-making. For example, we are concerned that the disparities among different types of investments could inappropriately drive participants to invest in brokerage windows, ETFs, and other plan investments that are not subject a hard close. Also, to the extent that IRAs can offer later order deadlines or investments that are not subject to a hard close, we are concerned that participants may inappropriately choose to rollover into an IRA, when their employer-sponsored plan is an otherwise better option for them.

Proprietary v. Open Architecture Platforms

A hard close would also distort the fiduciary decision-making process by making it easier for retirement plan recordkeepers to offer same-day pricing for their own proprietary mutual funds and harder for them to offer same-day pricing for third-party mutual funds. Consequently, this will create artificial incentives for plan sponsors to select proprietary mutual funds over third-party mutual funds, without regard to the risk-return profiles or costs associated with the respective funds.

A HARD CLOSE WOULD SUBSTANTIALLY INCREASE RETIREMENT PLAN COSTS

In addition to all the harms discussed above, the Council is concerned about the increased costs that plan sponsors and participants are likely to face if the SEC proceeds with its hard close proposal. As recognized in the preamble to the SEC's proposal and discussed above, existing retirement plan recordkeeping systems are largely designed and operated to only begin processing mutual fund orders after the funds have announced their daily NAVs. Thus, in order to comply with a hard close, all of these systems would have to be reengineered to perform order processing without such information.

As a result, virtually every aspect of the recordkeeping and TPA business will need to be changed. These changes will affect not only technological recordkeeping systems but will also dramatically alter relationships with plan sponsors, plan participants, and other business partners, including institutional trustees and mutual fund complexes. Significant expenditures will be required to redesign recordkeeping systems, investment transaction processing systems, agreements and arrangements with fund families, participant-interactive systems, participant education and communication materials, as well as the contractual agreements with plan sponsors. In some cases, these changes will require amendments to plan documents. This is not just a matter of setting an earlier participant order deadline; this will require a whole new way of doing business for an industry that has already invested millions of dollars to construct the systems, operations, and complex business relationships that have facilitated the retirement savings system relied upon by millions of Americans.

The Council is concerned about the investment that will be necessary to make all of these changes because any costs incurred by plan service providers, including recordkeepers, TPAs, and mutual funds, are likely to be passed on to plan sponsors and participants in the form of increased fees. The Council is also concerned that some recordkeepers and TPAs may proactively decide to exit from this business of ever narrowing profit margins. Others (perhaps locked into contracts that preclude passing these costs along) may be unable to continue. Ultimately, such a decrease in competition would be harmful to plan sponsors and participants.

In this regard, the Council is also concerned with how the Economic Analysis accompanying the proposal indicates that the SEC is "not able to quantify many of the costs of the hard close requirement for several reasons."[9] It is very troubling to think that the SEC would propose such sweeping changes without a better sense of the actual costs that will be incurred to implement its proposal. Until the SEC has a better sense of these actual costs, and how they will impact the retirement savings of American workers, it should not proceed with its hard close proposal.

Over recent decades, Congress has taken significant action to make retirement plans more efficient, more flexible, and less expensive. These important efforts have most recently been embodied in the SECURE 2.0 Act of 2022 and the SECURE Act of 2019, which both received overwhelming bipartisan support. As retirement plan sponsors and their service providers are working to operationalize all of these changes to the benefit of retirement savers, we are concerned that a hard close would not only divert attention away from their implementation, it would also diminish some of these legislative efforts by making retirement plans less efficient, less flexible, and more expensive.

In a similar regard, it is also critical to recognize that, over recent decades, retirement plan sponsors and their service providers have made substantial investments in technology to the benefit of plan participants by harnessing economies of scale and the flexibility that is provided by the SEC's existing order processing rules. These efforts have yielded highly efficient omnibus order processing, lower plan expenses, and valuable features and capabilities that put plan participants in the best position to save for their own retirement and appropriately manage their investments. A hard close would reverse much of this progress and create obstacles for plans and service providers attempting to build flexible and efficient omnibus trading systems.

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[9] 78 Fed. Reg. 77172, 77261 (Dec. 16, 2022).

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Thank you for the opportunity to provide our views. If you have any questions or if we can be of further assistance, please contact me at [redacted] or [redacted].

Sincerely,

Lynn D Dudley

Lynn D. Dudley
Senior Vice President, Global Retirement & Compensation Policy