



HR | Payroll | Benefits | Insurance

February 14, 2023

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

Re: Comments on Proposal to Mandate Swing Pricing and Hard Close for Mutual Funds [Release Nos. 33-11130; IC-34746; File No. S7-26-22]

Dear Ms. Countryman:

Paychex, Inc. ("Paychex") appreciates the opportunity to comment on the proposal by the Securities and Exchange Commission (the "SEC") that would amend the current rules for open-end funds regarding their liquidity risk management programs, require the use of swing pricing by open-end funds, other than a money market fund or exchange-traded fund ("mutual funds"), and implement a "hard close" for mutual funds (the "Proposal").

Paychex serves more than 100,000 401(k) plans and is consistently ranked among the nation's largest 401(k) recordkeepers when measured according to the number of plans served. Paychex also is recognized as the country's largest recordkeeper of 401(k) plans that have less than \$10 million in total assets. We believe this background information is important for the SEC to understand because many small businesses use our services to provide 401(k) plans for their employees, who are normal, everyday retail investors. We can truly say that we represent the small business community and "Main Street" investors.

We want to express our serious concerns regarding the negative impact of the swing pricing and hard close proposals on small businesses and their retirement plan participants. We believe that the Proposal, if adopted, will chill small business interest in establishing 401(k) plans for their employees due to the increased costs of establishing such plans. In addition, we believe the Proposal, if adopted, will put retirement plan participants at a disadvantage relative to other market participants and will negatively impact them. We think both of these consequences are expressly contrary to a primary purpose of SECURE 2.0,¹ which was signed into law on December 29, 2022, and meant to encourage small businesses to adopt retirement plans for their employees.

This letter only comments on the swing pricing and hard close aspects of the Proposal. Also, it does not directly address any specific request for comment in the Proposal. As a result, the SEC should not view any lack of response to a request for comment as an indication that Paychex is in favor of the issues implicated by any such request.

¹ Securing a Strong Retirement Act of 2022.

I. Concerns Regarding Swing Pricing Aspects of Proposal

The Proposal would mandate the use of swing pricing at all times for mutual funds. When there are any net redemptions or net purchases in excess of 2%, a swing factor (or fee) will be applied to the share price of the mutual funds.

We are concerned that this change would have negative consequences for small businesses offering 401(k) plans and their plan participants. When small businesses come to us to consider adopting a 401(k) plan for the benefit of their employees, they are looking to us to offer solutions that will help them make the process easier. With the increased complexity that swing pricing brings to mutual funds, it sets up a barrier to that process, which could lead more small businesses to decide that it is not worth their time or resources to offer a 401(k) plan.

In addition, we believe swing pricing will be harmful for retirement plan participants. Typically, plan participants in small 401(k) plans are not sophisticated investors. They are generally small retail investors. When they first commence their participation in a plan, it often is the first time they are investing in the market. The current process for buying or selling mutual funds is easy for retirement plan participants to understand and easy to explain. Namely, if you invest in a mutual fund, you will receive the next determined net asset value per share for your investment.

However, with swing pricing, the process becomes much more complex and harder to explain. Retirement plan participants will no longer receive the net asset value per share. Instead, at times that likely will appear random to them, a "hidden" fee might be imposed on their transaction. We are concerned that this will cause investor confusion. For example, it is possible that our retirement plan participants could view that fee as being charged by us. In addition, to the extent retirement plan participants are confused about how their transactions work under the Proposal, they may be reluctant to participate in the plan and save for their retirement. Moreover, if swing pricing is introduced, we would need to hire additional staff to explain that process to participants. Ultimately, that would have the effect of driving up recordkeeping costs, which would likely be borne, at least in part, by the small businesses and plan participants that use such services. Given that small businesses are generally price sensitive, additional costs could inhibit small business from adopting employer-sponsored retirement plans for their employees.

We think the SEC needs to take into account these likely negative consequences before adopting the Proposal.

II. Concerns Regarding Hard Close Aspects of Proposal

a. Retirement Plan Participants are Disadvantaged

To operationalize swing pricing, the Proposal would impose a hard close requirement that will require a mutual fund, its transfer agent or a registered clearing agency to receive an order to buy or sell shares by the time the mutual fund sets its net asset value. This requirement will

place retirement plan participants at a severe disadvantage versus many other participants in the market.

When a plan participant submits an order to their retirement plan, the submission is entered into our online system for processing. We, then, transmit the order to the transfer agent, mutual fund or, in most circumstances, another intermediary to complete the order request. However, before we transmit the order to the transfer agent or mutual fund, there are a number of checks that we need to perform. These checks involve compliance with the terms of the given retirement plan and certain other statutes, rules, and regulations, such as the Internal Revenue Code of 1986, as amended, and the Employee Retirement Income Security Act of 1974, as amended. This is a complicated process because it involves checks with multiple, different sets of requirements. We also do checks to ensure the accuracy of the order. The entire process takes time to complete and is not always automatic. It may also vary from plan to plan, given that retirement plans have different terms.

If the Proposal is adopted, we believe that we may need to set a cutoff time up to four hours prior to the time as of which a mutual fund determines its net asset value to ensure we are able to conduct all the necessary checks. This will mean that retirement plan participants will need to transmit their orders by around Noon ET in order to receive a same-day price, assuming the net asset value of the mutual fund is priced as of 4:00 pm ET. Orders received after that cutoff time would not be processed until the next day. A new earlier cutoff time will place retirement plan participants at a significant disadvantage versus other market participants since other market participants would be able to transact on information much closer to the close of the market. The SEC states that it does not believe that purchase or redemption orders are time sensitive for long-term investors.² We respectfully disagree. Retirement plan participants do care about the timing of their transactions. In our experience, when they place an order, they expect it to be made on the same day; indeed, it is not uncommon for retirement plan participants to check the status of their orders after they have been placed.

In addition, the Proposal would mean retirement plan participants would be made second-class investors within the mutual funds in which they invest. Other shareholders in the mutual fund, if they are transacting directly with the mutual fund (which retirement plan participants would not even have as an option), would have a much later cutoff time. This means that they would be able to transact on the same day with a much later cutoff time. For example, if there was an event after our cutoff time that impacted a mutual fund, retirement plan participants would not be able to act on that information. Their transaction would not be processed until the next day, possibly to their detriment. While retirement plan participants are “long-term investors,” this ignores the reality that long-term investors conduct transactions throughout the course of their investment life, including in these types of situations. It is simply not true to say that long-term investors do not care about receiving same day pricing. The timing of transactions is important to them.

² Securities and Exchange Commission, Release Nos. 33-11130; IC-34746; File No. S7-26-22 (December 16, 2022), 87 FR 77172, at 77213, available at <https://www.sec.gov/rules/proposed/2022/33-11130.pdf>. (“Proposing Release”).

The Proposal also would worsen the time zone issues that retirement plan participants in the West already face. With an earlier cutoff time, all investors on the West Coast would no longer be able to transact during normal business hours and would need to get up early in the day to make any transactions on the same day.

b. Proposal has Substantial Implementation Costs

The Proposal would impose substantial costs to implement because our current system relies on knowing the net asset value to process transactions because many of our transactions are for a specific dollar amount (e.g., \$100 per pay period). The Proposal would require us to rebuild all of our systems. Our initial estimate is that such a system rebuild would be in the multiple millions of dollars.³ However, the relevant costs are not limited to rebuilding our systems. We expect to incur additional staffing costs relating to client service, administration, legal and compliance because the Proposal will require additional personnel in those areas given the other changes that we would need to make to agreements and services.

All of the additional costs will mean that the cost of providing recordkeeping services will similarly increase. Some or all of those additional costs will, of necessity, be added to current recordkeeping costs borne by plan sponsors and/or participants. As a result, the increased costs could lead fewer small businesses to make 401(k) retirement plans available to their employees.

c. Concerns with Certain Transactions Under the Proposal

We are concerned with how the Proposal would impact certain transactions that we regularly undertake. There are a number of transactions that require us to know the net asset value to properly process. Such transactions include loans, hardship distributions, asset allocation programs and account rebalancing. The Proposal will require those transactions to be processed over multiple days because, under the Proposal, we will no longer know the net asset value prior to submitting the final order.

Those changes will negatively impact retirement plan participants because their retirement plan contributions will not be invested or will be allocated incorrectly for longer periods of time. For example, in a retirement plan account rebalancing, each step of the account rebalancing would need to be done separately to ensure that it is done properly. For a complex rebalancing, this could take up to a week to complete because each step of the transaction needs to be completed prior to taking the next step. We see this as a real problem for retirement plan participants.

In addition, for certain transactions, such as a loan or hardship distribution, retirement plan participants may end up receiving more or less than they request. That result could have significant long-term negative consequences for them. For example, if a retirement plan participant requests a loan or hardship distribution for \$1,000 from their account, with a hard

³ Given the short comment period, we are not able to provide a better estimate of costs.

close, we will likely end up distributing to them more or less than the requested amount. When they receive less than \$1,000, the retirement plan participant may not have sufficient funds to cover the underlying reason for the loan or hardship distribution. Conversely, if the retirement plan participant receives more than \$1,000, this could result in the participant missing out over time on potential market returns for the excess amount that will now go uninvested. It could also result in additional taxation or other adverse consequences for the participant.

The SEC states that plan participants generally do not receive immediate execution for these types of requests such that the impact of the hard close on these transactions is not significant.⁴ We respectfully disagree. Our system is set up to process these transactions on the same day and our plan participants have come to expect same-day processing from us for these types of transactions. The Proposal would be a step backwards from our current process for these transactions and the expectations of retirement plan participants. The Proposal will have a significant negative impact on retirement plan participants and how we process these transactions.

d. Anti-Competition Concerns and the Proposal

We are concerned about the anti-competitive incentives in the Proposal. The Proposal could encourage retirement plan sponsors to use only retirement plan recordkeepers that have proprietary mutual funds, since they may be able to offer later cutoff times with respect to their own mutual funds. If that occurs, retirement plan recordkeepers that do not offer proprietary mutual funds would be at a distinct competitive disadvantage solely due to the Proposal, even if they offer better services or better pricing. The Proposal may also encourage later and later “cut-off wars” among recordkeepers in order to entice retirement plan sponsors to use their services. The SEC needs to provide more analysis on the impact that the Proposal would have on these types of anti-competitive incentives in the Proposal.

e. Proposal Encourages Regulatory Arbitrage

The SEC states that the Proposal could cause other investment vehicles, such as collective investment trusts, exchange traded funds or other less regulated vehicles, to be used instead of mutual funds since those other investment vehicles would not be subject to the Proposal. We are concerned that the Proposal would encourage this type of regulatory arbitrage, which we do not believe is beneficial for small businesses, retirement plans or plan participants. Moving mutual funds in a retirement plans to collective investment trusts or other less regulated vehicles transfers the same risk to less regulated and less transparent vehicles. In addition, while we can service these other offerings, our preference is to use the mutual fund because industry systems are built around them and other investment vehicles come with additional compliance costs. In addition, we believe the potential to have all of these products on the same platform, especially products that appear similar to mutual funds creates the risk for

⁴ See *Proposing Release* at 77213.

further investor confusion since investors would not know why there are these limitations for the mutual funds on the platform, which do not apply to other products.

III. Alternatives to Hard Close

We do not believe that a hard close, with the many costs and the problems it creates for numerous transactions, is necessary to operationalize the swing pricing requirement. If the SEC does choose to adopt swing pricing, we believe either a large trade notification or encouraging more widespread use of redemption fees would work just as effectively as a hard close in providing the information needed for mutual funds to implement swing pricing. We invite the SEC to consider carefully whether these other much less costly alternatives would work just as well as implementing a hard close. If the SEC still believes a hard close is needed, we ask the SEC to consider allowing retirement plan recordkeepers either (1) to have a later cutoff time or (2) to be excluded from the hard close entirely if they have an automated system to ensure any orders received after the time a mutual fund prices its shares receives the next day's price. Otherwise, we believe the hard close requirement will have a substantial negative impact on small businesses, their retirement plans, and their employees.

IV. Lengthy Transition Period Needed

While we have serious concerns about the Proposal that we believe the SEC needs to address prior to adopting the Proposal, if the SEC still chooses to adopt it, we urge the SEC to provide for a lengthy transition period. As discussed above, our systems would need to be rebuilt because they rely on knowing the net asset value to process the transaction. Sufficient time will be needed to build new systems and to properly test them due to the volume of transactions we process each day. If the Proposal is adopted and there is not a lengthy transition period, we are concerned that the relevant systems either may not be ready in time or may not be properly tested to ensure they work correctly. In either case, small businesses, their retirement plans, and their employees could be directly impacted and harmed.

V. Concerns About Process with the Proposal

Finally, we have concerns about the process that was used for this Proposal. The Proposal came as a shock to us because we had no notice that this type of change was even under consideration by the SEC. We were also surprised to learn that it was not anticipated by others in the industry, which is concerning given the nature and scope of changes under consideration for the entire industry. Given this lack of engagement by the SEC with the industry on the Proposal, we would have anticipated a lengthy comment period to address the multitude of issues and requests for comment raised by the Proposal. However, that was not the case.

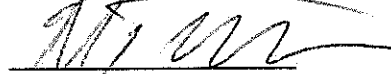
We urge the SEC to slow down the process and engage with us and other entities impacted by the Proposal to understand how the Proposal, if adopted in its current form, will adversely affect small businesses and their employees, require costly changes to recordkeeping systems, and disrupt the way that transactions are processed. We believe that doing so will allow the

SEC to adopt new rules or rule amendments that protect shareholders without the many negative consequences created by the Proposal in its current form.

VI. Conclusion

While we believe the goals of the SEC are admirable, we urge the SEC to reconsider the Proposal because many of its assumptions do not seem accurate relevant to our observations and experience.. For all the reasons stated herein, we respectfully request that the SEC withdraw the Proposal and engage with us and other relevant stakeholders to understand the negative impacts that the Proposal will have on small businesses, their employees, retirement plans, and recordkeepers.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "M. J. Trabold", written over a horizontal line.

Michael J. Trabold

Director, Compliance Risk