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February 14, 2023

VIA ELECTRONIC SUBMISSION

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

Re: Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-PORT Reporting, Investment Company Act Rel. No. 34746 (Nov. 2, 2022) (File Number S7-26-22)

Dear Ms. Countryman:

We appreciate the opportunity to respond to the request by the U.S. Securities and Exchange Commission ("***Commission***" or "***SEC***") for comments on the proposed rulemaking relating to swing pricing and liquidity risk management for registered open-end funds.[1] The SEC intends the proposed rulemaking to: (1) improve liquidity risk management programs for mutual funds and ETFs and improve their resiliency during periods of market stress; and (2) mitigate the potential for shareholder dilution by mandating swing pricing for mutual funds. The Commission proposed this rulemaking in response to the market disruptions in March 2020 (caused by COVID-19) and perceived "weaknesses in funds' liquidity risk management programs."

We recognize the Commission's legitimate interest in periodically reassessing its rules to determine whether they continue to protect shareholders, particularly in light of events that substantially impact public markets. Shareholder protection has been the bedrock principle of registered fund regulation since the adoption of the Investment Company Act of 1940 ("***1940 Act***"). We believe, however, that the SEC has not adequately justified the proposed rule amendments, which could irrevocably alter the fundamental features of an investment product that is effectively used by over 100 million individual American shareholders[2] without resulting in any material increase in shareholder protection or improvement in liquidity risk management practices.

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[1] *See* Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-PORT Reporting, Investment Company Act Rel. No. 34746 (Nov. 2, 2022) [87 FR 77172 (Dec. 16, 2022)] ("***Proposing Release***"). For purposes of this comment letter, a "fund" generally refers to a registered mutual fund or exchange-traded fund ("***ETF***") (excluding registered money market funds).

[2] *See* Investment Company Institute, Investment Company Fact Book (2022).

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Dechert LLP is an international law firm with a wide-ranging financial services practice that serves clients in the United States and abroad. In the United States, we represent a substantial number of mutual funds, closed-end funds, ETFs, private funds, fund boards of directors/trustees, investment advisers and fund service providers. In developing these comments, we have drawn on our extensive experience in the financial services industry generally. Although many of our clients share similar concerns about this rulemaking, the comments that follow reflect only the views of a group of attorneys in our firm, and do not necessarily reflect the views of our clients, other members of our financial services group or the firm generally.

I. Introduction

The U.S. registered fund industry is one of the largest and most developed in the world, with funds that invest in a wide range of distinct asset classes, consistent with a wide range of shareholder investment objectives and risk tolerances. Mutual funds and ETFs offer shareholders professional management, investment accessibility, and diversification at competitive prices. But unlike certain other types of pooled investment vehicles, mutual funds and ETFs operate within the strict regulatory framework of the 1940 Act, which includes a robust governance structure and independent board oversight. Congress, in partnership with the SEC, has created and refined (and continues to refine) the statutory and regulatory framework for these types of investment products, and millions of Americans have chosen them to meet their most important financial objectives. In short, mutual funds and ETFs have succeeded in "democratizing" finance for the benefit of retail shareholders.

The SEC is now proposing to amend Rules 22c-1 and 22e-4 under the 1940 Act in response to the significant market disruptions caused by the onset of the COVID-19 pandemic in March 2020 (despite no fund suspending the right of redemption or postponing the payment of redemption proceeds beyond the statutorily required seven-day period during March 2020). The proposed amendments to Rule 22c-1 would *require* mutual funds to adopt swing pricing. Although mutual funds are currently *permitted* to adopt swing pricing under Rule 22c-1, no mutual fund has adopted swing pricing in the United States since being permitted to do so in 2016, in part because of operational hurdles.[3] To overcome these operational hurdles, the SEC is now proposing a "hard close" for mutual funds that would generally require purchase and redemption orders to be submitted and received by the fund or its transfer agent (or the NSCC) by the fund's

[3] *See* Investment Company Swing Pricing, Investment Company Act Rel. No. 32316 (Oct. 13, 2016). At the time the SEC adopted the amendments to Rule 22c-1 to permit mutual fund swing pricing, the SEC delayed the effectiveness of the amendments for two years because it recognized the significant operational hurdles to implement swing pricing in the United States. Despite significant efforts, the mutual fund industry recognized that there were "no clear industry solutions" to these operational hurdles. *See* Investment Company Institute, Evaluating Swing Pricing: Operational Considerations (Addendum) (June 2017).

pricing time (generally, 4:00 PM ET) to receive same-day pricing. The proposed amendments to Rule 22e-4 would, among other provisions: (1) mandate assumptions of extreme market stress in, and significantly curtail customized approaches to, daily liquidity classifications; (2) collapse the "less liquid" classification category into the "illiquid" category; and (3) require all funds (except "in-kind ETFs") to adopt a mandatory "highly liquid investment minimum" of at least 10% of net assets.

II. Executive Summary

The proposed amendments to Rules 22c-1 and 22e-4 would: (1) fundamentally change the market for how mutual fund shares are purchased and redeemed; and (2) replace prudent liquidity risk management that is subject to independent board oversight with a "one-size-fits-all" framework that reduces the role of professional management and limits investment accessibility, in each case, to the detriment of shareholders (particularly retail shareholders). However, the SEC has not provided sufficient justification for the dramatic policy changes contemplated by these proposed rule amendments. In light of the fund industry's success in "weathering the storm" during March 2020, on the one hand, and the potential costs and impact of this proposed rulemaking, on the other, we believe the Commission must provide more justification for its seemingly disproportionate policy choices (based on empirical data, to the extent available). If it cannot do this, the SEC should instead consider more incremental and targeted changes to liquidity risk management programs.

We also believe that the SEC has not provided support for its conclusion that it has the legal authority to adopt the proposed rule amendments. The SEC should more clearly explain its statutory authority to adopt these proposed rule amendments in light of their potential impact and economic consequences. It is similarly unlikely that Congress contemplated that the rulemaking authority under the 1940 Act on which the Commission claims to rely could be used to so fundamentally change the core features of, and the market for purchasing and redeeming shares of, mutual funds.

III. SEC Must Provide More Justification for Proposed Rulemaking

A. Mutual Funds and ETFs Weathered the COVID-19 Storm

COVID-19 caused significant market disruption and challenged liquidity in March 2020.[4] While a complex array of factors likely contributed to and amplified the market turmoil in March 2020, the fact remains that the U.S. registered fund industry proved to be resilient

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[4] *See generally* Securities and Exchange Commission, Division of Economic and Risk Analysis, *U.S. Credit Markets Interconnectedness and the Effects of the COVID-19 Economic Shock* (Oct. 2020), *available at* https://www.sec.gov/files/US-Credit-Markets_COVID-19_Report.pdf; Investment Company Institute, Report of the COVID-19 Market Impact Working Group, *The Impact of COVID-19 on Economies and Financial Markets* (Oct. 2020), *available at* https://www.ici.org/doc-server/pdf%3A20_rpt_covid1.pdf.

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during that time. During March 2020, no fund suspended the right of redemption or postponed the payment of redemption proceeds beyond the statutorily required seven-day period under Section 22(e) of the 1940 Act. Moreover, notwithstanding the stressed market conditions, March 2020 did not reveal structural vulnerabilities in fund operations. For example, the Staff of the SEC's Division of Economic and Risk Analysis, in its report on the interconnectedness of the U.S. credit markets and the impact of COVID-19 ("***DERA Report***"), stated 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 [2020]*."[5] The DERA Report further stated that "it is reasonable to conclude that bond fund redemptions did not materially disrupt [the corporate bond] market or materially add to stresses experienced by the market."[6]

Although the SEC primarily focuses on the risk of potential dilution to justify its proposed rulemaking, the Proposing Release concedes that specific data about dilution from March 2020 is not known.[7] Moreover, the Commission's own economic analysis of the proposed rulemaking acknowledges that "[m]any of the benefits and costs … are difficult to quantify" and that the SEC lacks the data to fully analyze the consequences of the proposed rulemaking.[8] The Proposing Release then states that, "[w]hile we have attempted to quantify economic effects where possible, much of the discussion of economic effects is qualitative in nature."[9] At present, without a more thorough appraisal of the costs and economic consequences of the proposed rule amendments and their impact to shareholders (discussed below), the SEC has not provided sufficient justification for the dramatic policy changes contemplated by this rulemaking.[10]

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5 *See* DERA Study, *supra* note 4, at 7 (emphasis added).

6 *See* id.

7 *See* Proposing Release, *supra* note 1, at footnote 40 ("We do not have specific data about the dilution fund shareholders experienced in [March] 2020 because funds do not report information about their trading activity and the prices at which they purchase and sell each instrument.").

8 *See* id., at 77236 ("[W]e 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).").

9 *See* id.

10 Under Section 706 of the Administrative Procedure Act, courts must set aside any agency action that is arbitrary or capricious. Under that standard, the SEC must demonstrate that it has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choices made." *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). In addition, if an agency relies on "insufficient empirical data"

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B. Mandatory Swing Pricing and Hard Close

Swing pricing may be an effective tool for some mutual funds to mitigate the potential for dilution during some market conditions, but those mutual funds are in the best position to determine when and under what circumstances it is in their best interests to use swing pricing. The proposed amendments to Rule 22c-1 do not provide mutual funds with the discretion to choose when to adopt swing pricing. Accordingly, the combination of *mandatory* swing pricing for all mutual funds, together with the proposed hard close to "operationalize" swing pricing in the United States, would: (1) fundamentally change the market for how mutual fund shares are purchased and redeemed; (2) disrupt longstanding networks of intermediary-agency relationships; and (3) likely disadvantage mutual funds in favor of other investment vehicles. In addition to these and other concerns raised by the fund industry, we also observe that implementing these changes would be complex, time-consuming, and expensive.[11] Before the SEC adopts rule amendments with such a disruptive and costly impact, it should make a stronger case for their justification (based on empirical data, if available), rather than relying only on speculative, theoretical benefits.

The hard close would be particularly harmful to most shareholders. To address the proposed hard close, intermediaries would likely impose earlier cut-off times for purchase and redemption orders. In some cases, we understand that these cut-off times could be as early as 10:00 AM ET (which would substantially shorten the investment window for shareholders subject to these early cut-off times and that desire to purchase or redeem shares on a same-day basis). Moreover, these cut-off times would likely vary from intermediary to intermediary, which would compel shareholders to navigate a range of cut-off times to effect purchases and redemptions on a same-day basis. This would disadvantage most shareholders (namely the overwhelming majority of shareholders that transact through intermediaries and retirement plans[12]), while some shareholders would appear to gain an unfair advantage (namely those shareholders that are able to transact directly with the fund and other shareholders that are able to transact closer to 4:00 PM ET). We agree with the SEC that, with a hard close, "it seems likely that many investors

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or data that does not support its conclusions, its rulemaking is arbitrary and capricious. *See Business Roundtable v. S.E.C.*, 647 F.3d 1144, 1150-51 (D.C. Cir. 2011).

[11] *See e.g.*, Proposing Release, *supra* note 1, at 77212 ("In response to the proposed hard close requirement, funds and intermediaries would need to make significant changes to their business practices, including updating their computer systems, altering their batch processes, or integrating new technologies that facilitate faster order submission. Intermediaries would need to reengineer their systems to ensure disseminated order information reaches the transfer agent or Fund/SERV before 4 p.m., unless they determine to process fund orders at the next day's price as a matter of practice.").

[12] *See* id. at 77212 ("We understand that retirement plan recordkeepers may face particular challenges with adhering to the proposed hard close requirement."). Mandatory swing pricing and the hard close would also appear to have a disproportionate impact on funds of funds and variable annuity and variable life contract owners, although the Proposing Release does not address these products in any great detail.

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would experience a significant change in when they must submit their orders to intermediaries," but the Commission has not sufficiently justified the disruption to established investor expectations and longstanding networks of intermediary-agency relationships that have existed for over 50 years[13] and that have enabled shareholders to submit purchase and redemption orders through intermediaries and retirement plans up to 4:00 PM ET and still receive the price calculated as of that time. Nor has the SEC provided sufficient justification for its stated belief that, because most shareholders are long-term investors, "most fund orders are not time sensitive."[14] Irrespective of whether purchase and redemption orders are "time sensitive," whether an investor has market exposure on a particular day can have significant economic consequences (by either forcing an investor to bear an extra day of market risk or causing an investor to forego an extra day of market exposure).

We also question the SEC's basis for mandating swing pricing for all mutual funds, irrespective of investment strategy or shareholder composition. The SEC's primary justification for mandatory swing pricing is to address a perceived collective action problem.[15] The Proposing Release does not provide sufficient evidence or examples to justify this position and ignores the real possibility that, for some mutual funds, the costs of implementing swing pricing (which would be borne by shareholders), even after an industry-wide operational shift, will exceed any of the theoretical benefits.[16]

C. Liquidity Rule Amendments

While we acknowledge the role of the Federal government in helping to stabilize the broader financial markets (and a large portion of the U.S. population) during a global pandemic, we believe that prudent liquidity risk management was an essential component of the resiliency demonstrated by funds in March 2020.[17] We are concerned that the proposed amendments to Rule 22e-4 would replace prudent liquidity risk management that is subject to independent board oversight with a "one-size-fits-all" framework that

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13 *See* Letter from Allan S. Mostoff, Director, Division of Investment Management, Securities and Exchange Commission, to Robert L. Augenblick, President, Investment Company Institute (Feb. 9, 1973); SEC Staff Interpretative Positions Relating to Rule 22c-1, Investment Company Act Rel. No. 5569 (Dec. 27, 1968).

14 *See* Proposing Release, *supra* note 1, at 77213.

15 *See* id. at 77200 ("We believe that a regulatory requirement, rather than a permissive framework, would accrue benefits to investors that justify the implementation costs and would overcome these collective action problems that may have prevented swing pricing implementation.").

16 For example, the risk of dilution appears to be more remote for mutual funds that primarily invest in large cap equities, or mutual funds with more consistent flows.

17 We understand that the comment letter to be filed by the Investment Company Institute will include data and analysis demonstrating funds' resilience during this period.

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will not meaningfully enhance liquidity risk management practices during stressed market conditions.

We believe that the proposed amendments to Rule 22e-4 would likely result in the understatement of the actual liquidity profile of a fund[18] and prevent some funds from offering investment strategies that are consistent with current shareholder investment objectives and reasonable risk tolerances. For example, incorporating assumptions of extreme market stress into daily liquidity classifications would risk degrading funds' regulatory liquidity classifications arbitrarily, as it reflects a seemingly arbitrary policy choice based in the far end of the range of scenarios that investors experience.[19] Moreover, the proposed amendments are antithetical to the philosophical underpinnings of the SEC's core mission: to protect investors by requiring funds to disclose and to be managed consistently with key information about their investment strategies and risks, to protect investors from abusive and unfair practices, and to assist investors in making informed investment decisions. The proposed amendments go far beyond investor protection and are more akin to macroprudential and/or merit regulation. For example, under the proposed amendments, funds would likely find it more challenging to invest in certain asset classes, including bank loans, irrespective of a shareholder's investment objectives, risk tolerance, and assumption of risk.[20]

There are costs and economic consequences to these policy choices. For example: (1) the changes could significantly alter the investment strategies and risk-return profiles offered in the registered open-end fund structure, potentially limiting a shareholder's investment choices and their ability to meet their investment objectives; and (2) the changes could prompt shareholders to seek investment opportunities in less-regulated and less-transparent investment products (outside of the strict regulatory framework of the 1940 Act), in search of higher returns and more freedom of investment choice. The Commission's economic analysis, while acknowledging some of these costs and

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[18] *See* Comment Letter from MSCI Inc. (Feb. 8, 2023), *available at* https://www.sec.gov/comments/s7-26-22/s72622-20156867-325037.pdf ("If the Commission adopts a fixed percentage rule [for trade sizes], the 10% figure is likely to decrease the share of investments classified as highly liquid and increase the share of illiquid holdings for most funds, as most of our clients currently assume trade sizes that are smaller than 10%. *Our analysis of the largest equity mutual funds showed that 9 out of 9 would have exceeded the 15% illiquid holding cap more than once every 10 weeks over the period January 2020 to November 2022, assuming weekly classification frequency*."). (emphasis added) ("***MSCI Comment Letter***").

[19] *See* Proposing Release, *supra* note 1, at 77187 ("[W]e estimate that a random fund in a random week has approximately a 0.5% chance of experiencing redemptions in excess of the 10% stressed trade size ….").

[20] *See* MSCI Comment Letter, *supra* note 18 ("[T]he proposed change may create challenges for diversified fixed-income funds that invest in moderately liquid assets and also bank loans. While bank loans will become inherently illiquid, during volatile periods, the moderately liquid fixed-income assets may also move to the illiquid bucket due to the above-mentioned behavior.").

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economic consequences, falls far short in meaningfully discussing, quantifying, or justifying the impact to funds and shareholders.

D. More Justification for Proposed Rulemaking; Alternatives

Given the absence of: (1) a *single* instance during March 2020 where a fund was unable to timely satisfy shareholder redemption requests or where a fund suspended the right of redemption; (2) *actual* data about the dilution fund shareholders experienced in March 2020; or (3) a more thorough appraisal of the costs and economic consequences of the proposed amendments to Rules 22c-1 and 22e-4 and their impact to shareholders,[21] we believe that the proposed rulemaking is neither necessary nor adequately justified. The Commission must provide more justification for its seemingly disproportionate policy choices (based on empirical data, to the extent available). If it cannot do this, the SEC should instead consider more incremental and targeted changes to liquidity risk management programs, if it deems such changes necessary – for example, a requirement to assess and mitigate shareholder dilution during periods of market stress. If the Commission continues to pursue the type of fundamental policy changes contemplated by the proposed rulemaking, we respectfully urge the Commission to take more time, gather more data, consult more broadly with the public and the industry, and more thoroughly assess the potential costs, benefits, and impact of its policy choices.

IV. Assessment of Statutory Authority for Proposed Rulemaking

The Commission appears to rely primarily on Section 22 of the 1940 Act to support its belief that it has the authority to adopt the proposed amendments to Rules 22c-1 and 22e-4, although the SEC cites to several other sections of the 1940 Act. As justification for this proposed rulemaking, the Commission cites to the legislative history of the 1940 Act and historical concerns of shareholder dilution. We believe that the SEC has not yet provided the support for its conclusion that Section 22 provides the SEC with the authority to adopt the proposed rule amendments in light of their potential impact and the legislative history of the 1940 Act. The SEC should more clearly explain its statutory authority to adopt the proposed rule amendments.

Section 22(a) generally conveys rulemaking authority to registered securities associations related to the method for computing the price at which their members may purchase and redeem a mutual fund's shares "so that the price in each case will bear such relation to the current net asset value" as of the mutual fund's pricing time, for the purpose of reducing or eliminating shareholder dilution and other unfair results. Section 22(c) generally conveys rulemaking authority to the Commission "to the same extent, covering the same subject matter and for the accomplishment of the same ends as are prescribed in" Section 22(a). Although Sections 22(a) and (c) convey rulemaking authority to the SEC related

[21] The SEC is required to consider the effect of the proposed rulemaking on "efficiency, competition, and capital formation."

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to reducing or eliminating shareholder dilution and other unfair results, the legislative history of this rulemaking authority implies that it was intended to address the type of dilution that resulted from the pre-1940 "two-price" system (*i.e.*, backwards pricing)[22] and related insider abuses (*i.e.*, riskless trading).[23] However, this type of dilution was addressed when the SEC adopted Rule 22c-1 under the 1940 Act in 1968. When adopting Rule 22c-1, which established the current forward pricing framework, the SEC explained that it was largely addressing these two historical concerns.[24] Mandatory swing pricing goes far beyond the historical concerns to which Sections 22(a) and (c) were designed to address. Mutualization of fees, risks and expenses is a feature of mutual funds, not a defect.[25]

Similarly, the proposed amendments to Rule 22e-4 go far beyond the primary statutory purpose of Section 22(e). Section 22(e) generally makes it unlawful for a fund to suspend the right of redemption, or to postpone the payment of redemption proceeds for more than seven days, except under very limited circumstances. However, this section authorizes limited rulemaking related to the conditions under which a fund may suspend the right of redemption or postpone the payment of redemption proceeds for more than seven days. In a departure from the statutory purpose and rulemaking authority provided by Congress, the proposed amendments to Rule 22e-4 are primarily designed to increase the liquidity of a fund's portfolio in an attempt to minimize the potential for shareholder dilution in times of market stress. Before the SEC adopts this type of macroprudential regulation, the SEC must clearly articulate the basis for its authority to adopt these amendments under the 1940 Act.

Additionally, the combination of mandatory swing pricing ("operationalized" by the proposed hard close), together with the proposed amendments to Rule 22e-4, have the

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[22] The "two-price" system was a function of the fund pricing system that existed before 1940. The two-price system was essentially backwards pricing: "[i]n the pre-1940 market, funds calculated the value of their portfolios at the close of the market," and "[t]hat valuation set the price at which shares were sold during the *following* day." (emphasis added) Under this pricing system, "[b]y waiting until late afternoon, an investor could predict the closing prices for the securities in the fund's portfolio and accurately predict the next day's price for shares of the fund." *See* Distribution of Mutual Fund Shares – Recent Developments in SEC Regulation, 1975 WASH. U. L. Q. 1153, 1163 (1975) (*citing* Report of the SEC, Investment Trusts and Investment Companies, 852 (1939)). *See also* S. Rep. No. 1775, 76th Cong., 3d Sess. (1940) (accompanying S. 4108, 76th Cong., 3d Sess. (1940)); Statement of Baldwin B. Bane, Director, Registration Division, Securities and Exchange Commission, Washington D.C., Hearings before a Subcommittee of the Committee on Banking and Currency on S. 3580, U.S. Senate, 76th Cong., 3d Sess. (1940).

[23] Fund insiders, in particular, were able to exploit the two-price system because they had access to non-public information and generally paid a reduced or no sales loads. *See id.* ("the 'backward' pricing system offered a continuous opportunity for riskless profit-taking by insiders").

[24] *See* Pricing of Redeemable Securities for Distribution, Redemption and Repurchase and Time-Stamping of Orders by Dealers, Investment Company Act Rel. No. 5519 (Oct. 16, 1968).

[25] This is not to say that a mutual fund board of directors/trustees should be precluded from addressing potential dilution in their reasonable business judgment.

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potential to irrevocably alter the fundamental features of an investment product that is effectively used by millions of individual American shareholders, including for retirement. There are monetary and non-monetary costs and economic consequences to the Commission's policy choices (as discussed above). If adopted, the United States would be the only major fund formation jurisdiction in the world to *require* swing pricing for mutual funds. In doing so, the hard close would disrupt long-standing fund distribution channels (including, in particular, the retirement channel), in addition to the other impacts discussed above. It is unlikely that Congress contemplated that the rulemaking authority under the 1940 Act on which the Commission claims to rely could be used to so fundamentally change the core features of, and the market for purchasing and redeeming shares of, mutual funds. The proposed rulemaking also comes at the same time that Congress, on a bipartisan basis, passed the SECURE 2.0 Act of 2022, which was intended to strengthen the retirement system in the United States. The proposed rulemaking also ignores the concerns expressed by members of Congress when the Commission proposed a hard close similar to the current proposal in the early 2000s to address late trading. During that rulemaking, several members of the U.S. House of Representatives wrote to the SEC voicing their concern that the hard close would have a disproportionate impact on retirement plan participants.[26] At the same time, the Chairman and Ranking Member of the U.S. Senate Committee on Finance voiced similar concerns.[27] Given the importance of mutual funds in the United States, their successful track record in enabling U.S. households to build wealth for retirement, how they provide retail shareholders with access to investment opportunities that are not otherwise accessible, and the previous

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[26] In their letter, these Members stated that:

> [U]nder the proposed amendment, investors who trade directly with primary transfer agents will have an advantage over retirement plan participants, whose trades typically are effected through plan administrators or intermediaries. The SEC's discussion of the proposed rule appears to assume that investors who are concerned about same day pricing 'tend to be short-term traders or market-timers,' and that same day pricing is therefore not important to retirement plan participants. We disagree. While retirement plan participants are long-term investors, they make specific investment decisions at a particular point in time just like anyone else. Retirement plan participants deserve to have their transactions completed within the same time frame as other investors, and retirement plans across the country have invested considerable time and resources in meeting the needs of plan participants by providing them with daily valuations and same day pricing.

See Comment Letter from Rep. Rob Portman, Rep. Judy Biggert, Rep. Sam Johnson, Rep. Jim Ramstad, Rep. Johnny Isakson, Rep. Edward R. Royce, Rep. Benjamin L. Cardin, Rep. Earl Pomeroy, Rep. Robert E. Andrews, Rep. Dennis Moore, and Rep. Artur Davis, U.S. Congress (Mar. 22, 2004), *available at* https://www.sec.gov/rules/proposed/s72703/s72703-227.pdf.

[27] *See* Comment Letter from Sen. Charles E. Grassley, Chairman, and Sen. Max Baucus, Ranking Member, U.S. Senate Committee on Finance (Mar. 22, 2004), *available at* https://www.sec.gov/rules/proposed/s72703/s72703-225.pdf.

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concerns raised by members of Congress, the SEC should identify "clear congressional authorization"[28] before proceeding with this rulemaking.

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We appreciate the opportunity to comment on this proposed rulemaking. Please feel free to contact Brenden P. Carroll at (202) 261-3458, Steven A. Engel at (202) 261-3369, Christopher P. Harvey at (617) 728-7167, Mark D. Perlow at (415) 262-4530, Aaron D. Withrow at (202) 261-3442, Robert Spiro at (212) 649-8707, and Monica R. Patel at (415) 262-4552 with any questions about this submission.

Very truly yours,

/s/ Dechert LLP

Dechert LLP

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

William Birdthistle, Director
Sarah ten Siethoff, Deputy Director
Division of Investment Management

28 *See* West Virginia v. EPA, 577 U.S. 1126 (2016) (holding that, when addressing a "major question" of "vast economic and political significance," an administrative agency must identify a clear legislative statement that Congress granted the agency authority to address that question with rulemaking).