J.P.Morgan
Asset Management

George C.W. Gatch
Chief Executive Officer

February 14, 2023

Vanessa Countryman
Secretary
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 (File No. S7-26-22)

Dear Ms. Countryman:

J.P. Morgan Asset Management ("JPMAM")[1] is pleased to respond to the Securities and Exchange Commission's (the "SEC" or the "Commission") proposal to amend its current rules for open-end management investment companies ("open-end funds") regarding liquidity risk management programs and swing pricing (the "proposed rule").[2] JPMAM offers 153 mutual funds and ETFs (together, "funds") in the US, excluding money market funds, with a total of approximately $550.2 billion in assets under management as of January 31, 2023.

JPMAM supports the SEC's goal of promoting effective liquidity risk management throughout the fund industry. However, we do not believe that the proposed amendments to Rule 22e-4 and related reporting requirements would improve oversight and governance of liquidity risks, or enhance investor understanding of fund liquidity. Instead, the proposed amendments would apply a one-size-fits-all approach that is counterproductive to the assessment and management of fund-specific liquidity risks. Certain of the proposed changes may also necessitate changes to portfolio construction that will not enhance liquidity but could negatively impact investment returns. Our letter offers alternative suggestions to address the SEC's concerns as articulated in the Proposing Release.[3]

We oppose the SEC's proposal to mandate swing pricing and impose a hard close. Although we were generally supportive of the SEC's 2016 rule that permitted funds to use swing pricing on a

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[1] J.P. Morgan Asset Management is a marketing name for the asset management subsidiaries of JPMorgan.

[2] Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-PORT, Release Nos. 33-11130; IC-34746 (November 2, 2022), 87 Fed. Reg. 77172 (December 16, 2022) ("Proposing Release").

[3] Although we currently operate pursuant to an exemptive order under Rule 22e-4, we believe that our detailed analysis of the rule in consideration of our exemptive application makes us well situated to assess the potential impact of any changes. *See* J.P. Morgan Investment Management Inc., et al., Investment Company Act Release No. 34180 (Jan. 21, 2021) ("Exemptive Order"); *see also infra* §I.c.

voluntary basis,[4] we believe the proposed rule is highly problematic due to the hard close, mandatory application across all funds, prescribed swing thresholds, and methods for calculating the swing factor including market impact. We do not believe the risks and costs of these proposals were adequately considered. Our comments can be summarized as follows:

- The proposed changes to Rule 22e-4 would not enhance risk management and could negatively impact portfolio management and investment returns. We recommend dropping the proposed stressed trade size and amending certain elements of how funds determine a significant change in market value, among other changes. We believe many of the SEC's stated concerns are more appropriately addressed by clarifying existing rules, and we offer suggestions for guidance to better clarify such expectations

- We strongly oppose the proposed 4 p.m. ET hard close. A 4 p.m. hard close would cause substantial harm to the fund intermediary and distribution ecosystem, force costly re-engineering of systems and processes, and ultimately raise costs and limit investor access to various models through which investors access mutual funds. We recommend that the SEC withdraw this proposal.

- The mandatory application of swing pricing across all funds, prescribed swing thresholds, and inclusion of market impact in the swing factor would result in a costly and complicated approach to swing pricing with negative impacts to investors. We recommend that the SEC withdraw this proposal; we offer suggestions that could enhance the uptake of the existing, voluntary regime.

I. Amendments Concerning Funds' Liquidity Risk Management Programs, Related Reporting Requirements, and JPMAM's Exemptive Order Recission

According to the Proposing Release, the rationale for the proposed amendments to Rule 22e-4 is based largely on the events of March 2020, and specifically the Commission's observation that some open-end funds were not prepared for the sudden market stress. We believe that the proposed amendments would not better prepare funds for future stressed conditions. The proposal would impose greater standardization in the liquidity classification process and require classifications using extreme expectations of market stress – in some cases over 10 times larger than what the fund experienced in March 2020. These modifications would reduce the utility of the rule as a liquidity risk management tool, further separating funds' compliance with Rule 22e-4 with how they actually manage liquidity risk and prepare for future stressed conditions.

The proposed modifications could also have a meaningful impact on portfolio management and investment performance. Using extreme and unrealistic assumptions of market stress will cause funds to overestimate the illiquidity of their portfolios, and may compel funds to adjust their strategies to avoid breaching the 15% illiquid asset limit. For example, fixed income funds may need

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[4] *See* Letter from George C.W. Gatch, CEO – Global Funds Management and Institutional, J.P. Morgan Asset Management to Mr. Brent Fields, Secretary, Securities and Exchange Commission, dated January 16, 2016, available at https://www.sec.gov/comments/s7-16-15/s71615-67.pdf.

to increase holdings of more liquid assets and reduce investment in assets previously characterized as moderately liquid or less liquid. This could reduce diversification in bond portfolios and limit investment in instruments that offer a more attractive return profile. In equities, funds may need to increase their number of holdings to reduce position sizes and avoid triggering average daily trading volume limits, particularly in small cap stocks or very large funds; this reduces portfolio managers' discretion on investment selection. For all funds, the changes could result in more cash drag, lower performance, and higher tracking error. Absent stronger evidence that the proposed modifications are necessary, the SEC should avoid such changes that would second-guess and limit the decisions of portfolio managers, while adding costs and diverting resources.

Our comments and suggestions are discussed in more detail below.

a. Amendments to the Classification Framework and Highly Liquid Investment Minimums (HLIM)

1. Replacing Reasonably Anticipated Trade Size with Stressed Trade Size

Currently, Rule 22e-4 permits each fund to establish a reasonably anticipated trade size ("RATS") in determining the liquidity classification of each investment.[5] While Rule 22e-4 does not stipulate the factors a fund must consider in setting its RATS, the adopting release accompanying the rule discussed how a fund's liquidity profile can affect its RATS.[6] The Proposing Release explains that the Commission observed a wide range of RATS across funds, and notes that a small RATS may not help a fund prepare for future stressed conditions. To address this concern, the proposed rule would eliminate variability in how a fund sets its RATS, and require all funds to assume a "stressed trade size" of 10% of each investment when making liquidity classifications. JPMAM believes that a uniform standard across funds is not appropriate and the 10% requirement is too large for most funds.

A further investigation into the data presented in the Proposing Release does not support the proposed 10% stressed trade size. The Proposing Release establishes the stressed trade size based on an SEC study of weekly fund flows over the past ten years.[7] The study found that outflows greater than 6.6% occurred 1% of the time. The Proposing Release then suggests that such 99th percentile flows are a useful approximation of future stress, and rounds up to a 10% threshold as it is "moderately higher" than 6.6%. While 99th percentile flows may be a useful approximation, the actual level of outflows at the 99th percentile will vary widely across funds; we also observe that rounding up from 6.6% to 10% is not a "moderate" increase.

We also conducted a similar analysis of our own funds over a recent two-year period. At an aggregate level we observed a comparable pattern: weekly outflows greater than 6% occurred

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[5] Rule 22e-4(b)(1)(ii)(B).

[6] For example, deteriorating market conditions may necessitate a larger RATS. A fund with a highly liquid portfolio and stable cash flow projections may set a low RATS, while a larger RATS may be needed for illiquid or concentrated holdings. *See* Investment Company Liquidity Risk Management Programs, Release Nos. 33-10233, IC-32315 (October 13, 2016), 81 Fed. Reg. 82142 (November 18, 2016), at 142.

[7] *See* Proposing Release at 46.

approximately 1% of the time.[8] However, a closer look at the data tells a different story. First, approximately one-third of our funds did not experience weekly net redemptions greater than 3% during this period. These funds tended to be larger and have a less concentrated investor base. Second, weekly net flows exceeding 10% occurred about 0.5% of the time, which is twice as "extreme" as a 99th percentile event. Finally, we sampled flows greater than 6% and found that they were often the result of a redemption or reallocation from a single large investor, and not directly connected to a specific market event.

Our findings indicate that the proposed stressed trade size would impose undue uniformity and is far too high in almost all circumstances. This is not academic – it could have real consequences for portfolio management decisions, resulting in inferior performance for investors, as discussed in more detail below.[9] The proposed uniformity would also further reduce the utility of the classification process, making it a blunt and extreme stress test, rather than a thoughtful assessment of a fund's liquidity profile.

We recommend that the Commission retain the existing definition of RATS. To the extent the Commission is concerned about a lack of specific parameters, it may choose to provide further guidance on how funds consider stress in determining a "reasonably anticipated" trade size. For example, it might address how each fund should consider factors such as its historical experience including extreme outflows, fund size, and investor concentration.

2. Determining a Significant Change to Market Value

Currently, when a fund makes liquidity classifications, it must analyze whether a sale or disposition would significantly change the market value of the investment. The rule is not specific about what constitutes a significant change in market value, and the Proposing Release observes that there are variations in the sophistication of funds' analyses of value impact. To improve the quality of funds' classifications, the proposed rule would establish a definition of "significant change in market value" that requires consideration of the size of the sale relative to market depth, with separate approaches for listed securities and other investments. We offer our comments on each of these below.

A. Shares listed on a national securities exchange or a foreign exchange

For listed securities, the proposed rule would identify a "significant change in market value" as a sale that is more than 20% of the average daily trading volume over the preceding 20 business days. For foreign securities, a fund would count days in which US markets are open but international markets are closed as zero volume days. The Proposing Release explains that selling more than 20% of average daily trading volume would indicate a significant level of market participation, and that a 20-day lookback period appropriately measures current conditions as well as recent history. We agree that the 20% volume threshold is appropriate. However, a 20-day lookback period is too short and

[8] We measured net weekly outflows from August 2020 through August 2022.

[9] *Infra* §I.a.2.A-B.

will lead to a distorted picture of trading conditions, and the adjustment for international market closures will not improve risk management.

20-day lookback: In our experience, industry-standard lookback periods typically range from one to three months. This range appropriately captures current and recent conditions. At JPMAM, our lookback period is administered by our model governance framework, and uses a default of three months. We think this is appropriate in normal markets, and we will revise the classification process and make it more dynamic in stressed conditions.

In contrast, because it is such a short period of time, the proposed 20-day lookback would introduce undesired skew from abnormally high or low trading volume, leading to distorted results. In short bouts of stress where trading volumes increase, the markets would appear deeper and funds would appear more liquid. Conversely, when trading volumes temporarily decrease, such as during holiday periods, funds would temporarily look less liquid, even if day to day liquidity risk had not increased.

For example, as we tested the parameters of the proposed rule, one JPMAM fund's illiquid bucket increased from 3% to 13% from November 2022 to January 2023, due to decreased trading volumes combined with the requirement to use a 10% stressed trade size. We do not believe that actual liquidity risk posed to the fund materially changed during this period, yet the fund would have been at risk of breaching the illiquid asset limit. To avoid this result, the fund's portfolio managers may be compelled to increase the portfolio's diversification. It should be noted that this fund has had strong performance; as of year-end 2022, the fund outperformed its benchmark over 1, 3, 5 and 10 year periods. In the absence of evidence that such funds present real liquidity risk, we believe the SEC should avoid dictating parameters that would necessitate changes to portfolio management.

We do not think any specific period is appropriate in all market conditions. To avoid distortion, and the potential implications for portfolio management, we recommend that the SEC not prescribe a specific lookback. Instead, the Commission should permit funds to determine lookback periods based on a documented governance process, which would establish an appropriate default averaging period, and allow funds to deviate as market conditions warrant.

International market closure: Adjusting trading volumes for the closure of international markets would be operationally complex and not improve funds' liquidity risk management. First, system enhancements would be necessary to maintain a set of security-specific liquidity estimates for the dates on which international stock and bond markets are closed. More importantly, assigning these dates as zero volume days would not help funds manage international market closures. Leading up to an international market closure, the lookback period would not reflect an upcoming zero volume day, and provide no indication of a forthcoming disruption. Once the international markets reopen, the zero volume days would impair the average daily trading volume and underestimate liquidity, even as normal trading volume resumed. Instead, we recommend that the Commission provide guidance that funds' liquidity programs should incorporate a process that addresses regular holidays, such as by alerting investment teams in advance of the event.

B. Other investments

For investments other than listed securities, the proposal would define a significant change in market value as any sale that a fund "reasonably expects would result in a decrease in sale price of more than 1%." The Proposing Release observes that funds currently use a variety of methods to determine significant changes in market value in fixed-income securities. We do not oppose the use of a price decrease measure to serve as a backstop against the risk of meeting redemptions in a manner that may adversely affect non-redeeming shareholders. However, we are concerned that the proposed rule and Proposing Release reflect an unrealistic expectation to forecast the volume of trading that would result in a 1% price decrease.

Sale price decreases are not directly measurable in live markets. It is not possible to isolate and measure the impact of any single transaction or participant. While estimates are possible, the data inputs and modelling process will vary widely,[10] and will produce results that are not consistent across vendor models. Additionally, following a transaction, the determination of market impact is itself an estimate based on modeled values. Thus, the proposed standard may not "improve funds' abilities to perform quality checks and back testing," contrary to the expectation set out in the Proposing Release.[11] This stands in contrast to other risk metrics, such as Value at Risk (VaR), which measures the risk of loss over a specific time period. While there are different types of VaR models, all models require the same inputs, will produce similar outputs, and the results can be back tested against actual losses.[12]

To ensure there is a reasonable expectation regarding the ability to estimate changes in market value, we recommend that the rule text be revised to describe any sale that a fund "<u>estimates</u> would result in a decrease in sale price of more than 1%." The adopting release could also make clear that price decrease measures are estimates and cannot be directly observed or back tested.

3. Removing the Less Liquid Investment Category and Classifying these Investments as Illiquid

Currently, funds classify their assets across four liquidity classifications: highly liquid, moderately liquid, less liquid, and illiquid. The proposed rule would eliminate the less liquid category, expand the definition of illiquid to include assets previously classified as less liquid, and maintain the existing 15% limit on illiquid assets. As a result, the proposed rule would limit to 15% the amount of fund assets that are not reasonably expected to be converted to US dollars in seven days. JPMAM

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[10] The Proposing Release describes the variety of methods and inputs that funds currently use including observations from comparable securities, asset class characteristics and volatility, number and depth of market makers, bid-offer spread size, volume of the security or similar securities, and elasticity of prices in the security or similar securities. *See* Proposing Release at 52.

[11] *Id.*

[12] VaR models require the same three input variables: time period, confidence interval, and expected loss. While there are different calculation methods, including historical, variance-covariance, and Monte Carlo simulations, they will all converge on similar results. A similar convergence is not expected for price decrease measures given the complexity of such models and inability to isolate the impact of individual transactions.

believes the current distinction between less liquid and illiquid assets is important from both liquidity risk management and portfolio management perspectives; we therefore do not support this change.

Rule 22e-4 currently makes an important distinction between less liquid and illiquid assets, which helps funds assess and manage the specific liquidity risks they face. Less liquid investments can be sold in current market conditions in seven calendar days or less, but the sale is expected to settle in more than seven calendar days. Gaps between sale and settlement can be managed using a variety of tools, including lines of credit, interfund lending, and the maintenance of sufficient highly liquid and moderately liquid investments. By contrast, the illiquid category is generally reserved for assets that are difficult or impossible to sell in the foreseeable future, such as restricted securities or securities of a company in bankruptcy proceedings. Merging the less liquid and illiquid categories would comingle securities that can and cannot be easily sold, respectively, and further reduce the classification process into a reporting exercise.

As with other elements of the proposal, this change could have real impact on how some portfolios are managed, to the detriment of investors. In particular, it would challenge funds' ability to invest in less liquid assets such as bank loans and certain foreign securities with extended settlement periods. These assets play an important role in portfolio management, providing income paid on a variable interest rate, and diversifying fixed income portfolios. They can be sold in the secondary markets, even in stressed conditions; their liquidity challenges arise from extended settlement periods. Because of these differences, we do not support merging the less liquid and illiquid buckets.

4. Amendment to the Definition of Illiquid Investment based on Unobservable Pricing Inputs

The proposed rule would expand the definition of illiquid investment to include investments whose fair value is measured using an unobservable input that is significant to the overall measurement. US GAAP establishes a fair value hierarchy that categorizes the inputs to valuation techniques into three levels. Each is distinguished by how easily assets can be accurately valued. Level 1 inputs are based on readily observable market prices, Level 2 inputs include dealer quotes and models with observable inputs such as interest rates, and Level 3 inputs rely on models and unobservable inputs. The Proposing Release states that valuation based on unobservable inputs may indicate that an active market for the investment does not exist, which may raise the risk that the fund cannot sell the investment in time to meet redemptions without dilution. While valuation inputs may be one factor in determining liquidity, we disagree that valuation inputs alone should be determinative of liquidity classifications.

The observability of pricing inputs is a valuation concept, and is not necessarily linked to the liquidity of an investment. For example, certain commercial mortgage-backed securities and other asset-backed securities can typically be sold in within several days, as dealers will readily make markets in these securities; however, they are often held to maturity and, therefore, not frequently traded or quoted by dealers. Thus, for valuation purposes a fund may use Level 3 inputs for these assets (if pricing services cannot obtain broker quotes or only obtain indicative broker quotes that cannot be corroborated by observable inputs), even though they can easily be sold and converted to

US dollars within several days. A requirement to classify all assets with Level 3 inputs as illiquid could overstate the illiquidity of a fund's portfolio, and in turn prevent funds from investing in assets that provide income and portfolio diversification, and can be readily disposed in a timely fashion.

5. Highly Liquid Investment Minimums (HLIM)

Rule 22e-4 requires each fund to determine an HLIM, unless the fund primarily invests in highly liquid investments (the "primarily exclusion"). A fund subject to the HLIM requirement must: (i) set an HLIM, considering several factors, (ii) review the HLIM at least annually, and (iii) adopt policies and procedures to respond to an HLIM shortfall. The proposed rule would remove the primarily exclusion, and require all funds to adopt an HLIM of at least 10% of the fund's net assets. The amendments are designed to ensure that all funds have the benefit of HLIM shortfall procedures; additionally, the 10% minimum would improve the ability of funds to meet shareholder redemptions in stressed scenarios. JPMAM believes that the benefits associated with the proposed changes as applied to primarily highly liquid funds would not justify the associated burdens, and recommends retaining the primarily exclusion. We also do not believe that imposing a standard 10% HLIM on all funds is appropriate.

For funds that primarily hold highly liquid investments, a universal HLIM requirement would necessitate an ongoing compliance program that would not improve how these funds prepare for and manage through stressed conditions. The Proposing Release cites a theoretical example in which a fund invested in a foreign market may experience substantial declines of highly liquid investments if there is economic turmoil or an extended holiday closure of that foreign market.[13] We believe these factors should already be considered as part of a fund's assessment, management, and periodic review of liquidity risks under the rule, rendering the imposition of an HLIM unnecessary.[14]

For funds that do not qualify for the exclusion, the proposed requirement to adopt at least a 10% HLIM minimum would not provide for tailoring to individual funds' redemption profiles. The 10% HLIM minimum is intended to work together with the stressed trade size. As discussed with respect to the stressed trade size proposal, a uniform HLIM minimum would not be tailored to each fund.[15]

We recommend that the Commission maintain the primarily exclusion, and provide further guidance on how funds in scope for this requirement should set an HLIM. Such guidance could include how funds consider stressed outflows, fund size, asset class(es), and investor concentration.

[13] *See* Proposing Release at 81.

[14] *See* Rule 22e-4 (b)(1)(i).

[15] *See supra* §I.a.1.

b. *Reporting Requirements*

1. Form N-PORT Publication Frequency

Currently, Form N-PORT is made public for the third month of every quarter, 60 days after the end of each quarter. The proposal would increase the frequency of public disclosure from quarterly to monthly, and such reports would be made public 60 days after the end of each month.[16] The Proposing Release observes that in 2017 the Commission recognized the risk that frequent public disclosure could lead to predatory trading. The release also observes that since that time, many funds have begun to publish complete portfolio holdings on a monthly basis, and concludes that the risk of predatory trading is justified by the benefit to investors of requiring all funds to publish this information. We disagree and recommend the Commission retain the existing disclosure frequency.

We are concerned that monthly disclosure of portfolio holdings could result in information leakage that is harmful to funds and their shareholders. Some funds forgo more frequent disclosure of portfolio holdings precisely due to these information leakage fears. Tripling the frequency of disclosure may cross a tipping point at which automated tools could be deployed to reverse engineer portfolio decisions and engage in predatory behavior such as front-running or free-riding. This concern is particularly acute for actively managed strategies, which seek to generate alpha through their proprietary research and market outlook.

We recommend the Commission retain the existing approach. We believe this frequency provides sufficient information to help investors make informed decisions, while avoiding the potential risks to investors from more frequent publication of holdings data.

2. Public Reporting of Aggregate Liquidity Classifications

Currently, funds report to the Commission the liquidity classification of each investment on a non-public basis. In 2018, the Commission replaced a requirement for funds to disclose aggregate liquidity percentages (which was final but not yet implemented) with a requirement for shareholder reports to provide a narrative discussion regarding the operation and effectiveness of a fund's liquidity program.[17] We supported that approach.[18] In 2022 the SEC adopted amendments to fund

[16] The proposed rule would also require monthly reporting of Form N-PORT, due 30 days after the end of each month. The Proposing Release explains that the current quarterly submission cadence and 60-day filing deadline can result in filings up to four months old; the proposed change is intended to provide more timely information to the SEC regarding the fund's portfolio. We do not oppose filing on a monthly basis; however, we recommend retaining the existing 60-day filing deadline. It takes our fund administration and reporting teams about 30 days to generate, review, and sign-off on our N-PORT filings. The 30-day filing timeline would put further pressure on these teams, who are managing numerous other reporting obligations and regulatory changes, and would reduce capacity to address issues or other complications that may arise. Under this approach, the SEC will receive filings no more than two months old.

[17] Investment Company Liquidity Disclosure, Release No. 33-10577 (June 28, 2018), 83 Fed. Reg 31859 (July 10, 2018).

[18] *See* Letter from George C.W. Gatch, CEO – Global Funds Management and Institutional, J.P. Morgan Asset Management to Brent Fields, Secretary, Securities and Exchange Commission, dated May 18, 2018, *available at* https://www.sec.gov/comments/s7-04-18/s70418-3665381-162427.pdf.

shareholder reports that, among other changes, removed the narrative liquidity discussion as the Commission found that such disclosures did not provide useful information.[19]

The proposed rule would amend Form N-PORT to include disclosure of the aggregate percentage of a fund's assets that fall into each of the three liquidity categories, on a monthly basis. The Commission believes that this information would allow investors to more readily observe changes to the fund's portfolio and compare a fund's report to similar funds, and would generally improve the mix of information available to investors.

JPMAM does not support the proposed requirement. Although the proposed rule includes measures to make liquidity reporting more standardized, we continue to believe that the classifications may confuse or mislead investors.[20] First, the standardized stressed trade size will cause larger funds to appear less liquid than a smaller fund of identical composition, even though larger funds may face less liquidity risk as they often have a less concentrated investor base. Next, the data may overstate illiquidity as classifications would be based on a stressed trade size that is significantly larger than what most funds experience in most market conditions. Indeed, the classifications would not reflect funds' individual liability profiles, a key factor in actual liquidity risk posed to a fund. In addition, the classifications would be impacted by market price impact models, which are estimates based on complex modeling.

We continue to believe that narrative disclosure is a more appropriate mechanism to convey relevant liquidity risk information. Prospectuses already provide investors with factors that may affect a fund's risks and returns, including liquidity. To the extent liquidity risk management had a material effect on performance, we believe this should already be included in the management's discussion of fund performance ("MDFP") section of a fund's annual and semi-annual reports.[21]

3. Part F of Form N-PORT

Currently, Part F of Form N-PORT requires funds to report portfolio holdings in an unstructured format in accordance with Regulation S-X twice per year (as of a fund's first and third fiscal quarter end). Funds' annual and semi-annual reports follow the same requirements, resulting in four such reports per year. The proposed rule would require funds to make eight additional Part F filings per year, so that investors would receive this information on a monthly basis. As noted above, we

[19] *See* Tailored Shareholder Reports for Mutual Funds and Exchange-Traded Funds; Fee Information in Investment Company Advertisements, Release Nos. 34-96158, IC-34731 (October 26, 2022), 87 Fed. Reg. 72758 (November 25, 2022).

[20] *See* Letter from George C.W. Gatch, *supra* note 18 ("We share the concerns, articulated in the Proposing Release, that this information will at best not be useful to investors, and at worst could be confusing or misleading.").

[21] As we said in 2018, given that liquidity can affect performance in certain market conditions and investment strategies, we believe the existing MDFP instructions already require consideration of liquidity risk. Nonetheless, to ensure material liquidity issues are discussed, the Commission may find it beneficial to clarify the MDFP instructions to also cover liquidity-related factors that affected fund performance. *See* Letter from George C.W. Gatch, *supra* note 18.

oppose monthly disclosure of portfolio holdings.[22] If the Commission proceeds with monthly disclosures, we oppose filing such reports in accordance with Part F.

Preparing reports pursuant to Part F of Form-PORT is extremely onerous. We must compile information from various sources, reflect month-end trade date activity, incorporate adjustments that arrive after the report date, and have multiple teams including portfolio management review the report. This process currently takes three to four weeks. Moreover, we do not agree that investors may find it challenging to use data in a structured format.[23] XML data can readily be viewed in Microsoft Excel; we believe investors who wish to access monthly data will find this format useful to sort and compare.

Instead of providing any additional reports in accordance with Part F, we would recommend requiring funds to post on their websites XML files based on Part C of Form N-PORT. If the Commission feels that a reader-friendly report would be useful for investors, it could require funds to post unstructured extracts based on Part C. This would minimize work necessary for conversion and preparation, while providing investors with information of substantially similar utility.

c. JPMAM Exemptive Order Rescission

JPMAM's Exemptive Order currently permits us to utilize core elements of the firm's own liquidity classification program, rather than comply with Rule 22e-4's liquidity classification requirements. In light of the proposed amendments, the Commission is proposing to rescind JPMAM's Exemptive Order. The Proposing Release explains that the Exemptive Order's representations and conditions, and the relief provided, are predicated on Rule 22e-4 in its current form. The proposed amendments, if adopted, would render the order moot, superseded, and inconsistent with the final rule amendments.

The Proposing Release does not provide a timeline for rescinding the Exemptive Order. In the event that the Commission determines that the final rule, as adopted, necessitates the rescission of JPMAM's Exemptive Order, we request that the Commission make clear that the order would not be withdrawn until the specified compliance date for final amendments to Rule 22e-4. Absent such clarification, a question could arise as to how JPMAM is complying with the existing Rule 22e-4 until such time as the industry is expected to implement the revisions.

II. Swing Pricing and Hard Close

To reduce shareholder dilution during stress and large flow activity, the Commission is proposing to amend Rule 22c-1 to require all open-end funds except ETFs and money market funds ("excluded funds") to implement swing pricing. The SEC also proposes to require a "hard close" of 4 p.m. ET,

[22] *See supra* §I.b.1.

[23] Proposing Release at 223.

to address funds' ability to have a full picture of fund flows in order to operationalize swing pricing. We oppose both of these proposals, and recommend that the SEC withdraw them.

The Proposing Release explains that swing pricing can more fairly allocate costs, reduce the potential for dilution associated with investor purchase and redemption activity, and reduce possible first-mover advantages. Swing pricing is also well-established in Europe; the Proposing Release points favorably to the anti-dilution effect in certain European funds. Indeed, JPMAM uses swing pricing in our Luxembourg and UK UCITS, and we have shared our experiences with the Commission and staff over the years in support of their consideration of swing pricing in the US.[24]

However, although swing pricing was made permissible in 2016, to date no US fund has implemented it. There are important distinctions between the European and US market structure and product offerings that create substantial challenges for the implementation of swing pricing in the US. The most fundamental problem is that, unlike in Europe, the US market has historically enabled fund subscriptions and redemptions to be delivered to the fund *after* the NAV is struck, while the implementation of swing pricing necessitates a fund knowing its net flows *before* striking the NAV.[25] The existing, voluntary swing pricing rule did not adequately address these challenges. The proposed, revised approach, including the 4 p.m. ET hard close as well as changes to the swing pricing framework, creates additional challenges which we believe would have drastic consequences for mutual funds and their investors.

Below we provide background on how we presently receive fund flows, the existing US regulatory framework, and swing pricing in Europe; next we describe the significant negative impacts of the proposed hard close on a range of mutual fund investors and the mutual fund market as a whole; then we discuss our concerns with the proposed changes to the swing pricing framework. We conclude with a set of recommendations to assist the SEC in moving toward a workable swing pricing framework.

a. Background

1. JPMAM analysis of fund flows

In consideration of the challenges identified with implementing swing pricing in the US – specifically, the lack of complete fund flow information at the time a NAV is struck – in 2021-22 we conducted analyses of intra-day fund flows to better understand when our funds receive flow information from various sources, and whether it would be possible to project or estimate flows that are received too late for consideration. Investors must submit an order to purchase or redeem fund shares by 4 p.m. ET to an intermediary, such as a broker-dealer or retirement recordkeeper, to have that order executed at the current day's price. However, the fund itself may not receive complete order information until as late as the following morning.

[24] *See, e.g.,* Letter from George C.W. Gatch, *supra* note 4.

[25] As discussed below, *infra* §II.a.1-2, the current rule contemplates a high degree of confidence in a fund's net flows in order to strike a NAV which, based on our own analysis, we do not believe is possible.

We studied the aggregate volume of flow information across our complex, as well as a selective sample of individual funds across a range of asset classes, sizes, and investor concentrations.[26] To analyze the timing of flows, we separated flows into three categories. First, we assessed flows that arrive by 6:45 p.m. ET.[27] These "pre-strike" flows represented roughly 60% of aggregate flows on average,[28] ranging from 45% to 95% by fund depending on the channels through which the funds are sold. Pre-strike flows are largely comprised of investors transacting through brokerage and advised accounts.

Next, we assessed flows that arrive after the NAV strike, from 6:45 p.m. ET through the end of the day. These "post-strike" flows do not typically comprise a substantial portion of overall flows (less than 5% on average) but provide an important mechanism for intermediaries to fix errors and submit corrections.

Finally, we examined the remaining flows, which arrive overnight and early the following morning.[29] These "next-day" flows reflect about 40% of aggregate flows on average, ranging from 5% to 50% by fund, again depending on the channels through which the funds are sold. Next-day flows are generally from retirement, model portfolios, variable insurance, funds of funds, education savings accounts (commonly known as "529 plans"), and similar arrangements that rely on receipt of a fund's NAV before they in turn calculate their values or provide final order information ("NAV-dependent" products). Not surprisingly, we observed much higher next-day flows in JPMAM funds that are commonly offered on 401(k) platforms and in model portfolios, such as our large cap growth and emerging markets debt funds.

After assessing the timing of flows, we sought to evaluate whether next-day flows could be modeled or estimated based on information available at the time NAV is struck; if this were possible, a fund could make a swing determination even without complete flow information. We considered whether next-day flows were directionally consistent with same-day flows, and found substantially zero correlation. Additionally, we could not identify a factor or combination of factors (*e.g.*, day of the week or market returns) that would reliably predict next-day flows.

We were primarily concerned with large next-day flows, as these would be more likely to influence a swing determination. We found that large next-day flows were rare and not readily modellable. A next-day flow less than -1% or greater than 1% occurred just 12 times in over 2,600 observations. Our inquiry into these large next-day flows suggest that they were driven by exogenous, idiosyncratic events, such as adviser or platform reallocations. Meanwhile, most next-day flows were small: 90%

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[26] The analyses were based on nine JPMAM funds over two six-month observation periods: June 2021 to December 2021 and March 2022 to September 2022.

[27] We chose 6:45 p.m. ET under the assumption that these flows could reasonably be incorporated into a swing pricing decision if they could be slightly expedited and the NAV strike could be slightly delayed.

[28] Of the pre-strike flows, roughly 60% is provided by 4 p.m. ET and the remaining 40% is provided between 4 p.m. and 6:45 p.m. ET.

[29] Financial intermediaries are permitted to submit orders received before 4:00 p.m. ET to a Designated Party after 4:00 p.m. ET for execution at that day's NAV.

of next-day flows were between -0.05% and 0.05% of fund AUM, and 95% of next-day flows were between -0.1% and 0.1% of fund AUM.

2. Existing Swing Pricing Rule and Challenges for Implementation

Currently, Rule 22c-1 permits all open-end funds except excluded funds to use swing pricing, and establishes parameters for its implementation:

- The swing factor (*i.e.,* the amount by which a NAV would be adjusted up or down) should reflect near-term costs expected to be incurred by the fund as a result of net purchase or redemptions that occur on the day the swing factor is used, including spreads, transaction fees, and borrowing-related costs.[30]
- The swing threshold(s) (*i.e.,* the level of flows at which a fund would swing a NAV) should be based on factors including the size and volatility of fund flows, the liquidity of the fund's investments, and the fund's holding of cash and other funding sources.[31]
- The determination to swing a NAV must be based on a sufficient level of flow information "to allow the fund to reasonably estimate whether it has crossed the swing threshold(s) with high confidence."[32]

As our fund flows analysis demonstrates, the lack of sufficient flow information at the time the NAV must be struck, combined with the rule's expectation for high confidence estimates, make it impractical to implement swing pricing under the present rule. Our analysis identified two specific challenges. First, absent a delay to the time NAV must be struck, we would need to expedite the roughly 40% of pre-strike flows that are provided between 4 p.m. and 6:45 p.m. ET.[33] Second and more importantly, on average approximately 40% of total flows arrive the following day. It does not appear that we can estimate these next-day flows with a high degree of confidence.

3. Swing Pricing in Europe

The European market structure and timing of fund flows are more favorable to operationalizing swing pricing. Europe operates under a hard close; for example, in Luxembourg all mutual fund orders must be submitted by 2:30 p.m., Central European Time, to receive that day's NAV. In fact, Europe has long operated under a hard close, and thus its systems of fund distribution and trade processing have never contemplated the permissibility of next-day flows. Importantly, the European market is largely institutional; it does not have a large share of flows from individual retirement investors or other types of investors that, in the US, rely on next-day trade processing.

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[30] Rule 22c-1 (a)(3)(i)(C).

[31] Rule 22c-1 (a)(3)(i)(B).

[32] Rule 22c-1 (a)(3)(i)(A).

[33] As noted below, *infra* §II.d, we believe expediting such flows is operationally practicable, but would need to be undertaken as part of an industry-wide effort; any single fund complex could not demand faster processing from its intermediaries.

Additionally, the distribution system does not broadly use omnibus accounting, *i.e.,* the aggregation and netting of individual orders, which can delay receipt of final orders to the fund.

The European regulatory framework also provides for flexibility in the implementation of swing pricing. In Luxembourg, our swing pricing program is administered by a committee that meets quarterly, and more frequently as market conditions warrant, to ensure the appropriate application of the swing threshold and factors.[34] Swing factors are designed to capture only directly observable and measurable costs, such as transaction costs, spreads, and taxes such as stamp duty. Swing thresholds are flexible; JPMAM sets ours to capture flows that represent "a significant amount of dilution" and we adjust them as market conditions warrant. For example, in response to the March 2020 market volatility, some funds lowered their swing thresholds to zero, and reestablished higher thresholds after market conditions normalized.

b. Hard Close: the Proposed Requirement and JPMAM Views

To enable funds to operationalize swing pricing, the proposed rule would impose a "hard close," under which all orders must be submitted to a fund, its designated transfer agent, or a registered securities clearing agency (collectively, "Designated Parties") by the time at which it calculates its NAV (typically 4 p.m. ET) in order to receive the current day's price. The Proposing Release explains that the hard close amendments would serve multiple goals, including facilitating mutual funds' ability to operationalize swing pricing by ensuring that funds receive timely flow information, modernizing and improving order processing, and helping to prevent late trading.[35]

JPMAM opposes the proposed 4 p.m. ET hard close requirement. While we recognize that current limitations on timely flow information make swing pricing challenging, we believe that a hard close would cause substantial harm to the fund intermediary and distribution ecosystem, force costly re-engineering of systems and processes, and ultimately raise costs and limit investor access to various models through which investors access mutual funds.[36] The benefits of swing pricing would not outweigh these significant costs and risks to funds and their investors, which have not been sufficiently considered. We also observe that there have been no indications that late trading remains a problem following the adoption of a series of rules and practices in 2003 and 2004

[34] *See* "Swing pricing: The J.P. Morgan Asset Management approach in the Luxembourg domiciled SICAVs JPMorgan Funds and JPMorgan Investment Funds," September 2020, available at https://am.jpmorgan.com/content/dam/jpm-am-aem/emea/lu/en/communications/lux-communication/swing-pricing-ce-en.pdf ("Swing Pricing Brochure").

[35] *See* Proposing Release at 133.

[36] Such system and technology enhancements must be considered alongside the industry-wide transition to t+1 securities settlement. The move to t+1 settlement demands substantial technical expertise and requires system enhancements for intermediaries, central counterparty clearing houses, and others. A hard close would necessitate time and expertise from many of these same entities.

designed to address them.[37] Indeed, in 2003 the Commission proposed a hard close requirement but did not adopt the proposed amendments.[38]

1. Impact on 401(k) Programs

In our view, the most significant risk from the proposed hard close requirement is the damage it could inflict on retirement investing. Over the past generation, employers have increasingly stopped offering defined benefit pension plans, in favor of defined contribution plans that place the responsibility of investing for retirement on individuals. Today in the US, roughly 70 million individuals, or over one-third of all working-age adults, have an employer-based 401(k)-style defined contribution retirement account.[39] These types of accounts, which commonly offer mutual funds as the primary investment option, are the primary means through which Americans save for retirement; indeed, they are 2.5 times more common than defined benefit plans. In recent years, Congress has passed various laws on a bipartisan basis to expand access to workplace retirement plans and improve opportunities to save for retirement.[40] The proposed hard close requirement could have a deleterious effect on the functioning of the 401(k) market and the investor experience, impairing Americans' ability and willingness to save for retirement.

Although the Proposing Release acknowledges that retirement plan recordkeepers would need to substantially update or alter their processes and systems to accommodate the proposed hard close requirement,[41] we do not believe it fully contemplates impacts to the system and costs that would be borne by retirement savers, the potential impacts on investment performance, or the unavoidable decline in investor experience. Retirement plan recordkeepers commonly allow for transactions that rely on the current day's NAV, such as allowing investors to rebalance holdings to a target allocation model and receive same-day pricing. Eliminating the ability to execute contemporaneous rebalancing transactions and transitioning to an alternative approach would not only require a significant reengineering across systems, but would provide for a suboptimal investor experience. For example, intermediaries may choose to use holdbacks, where they submit most of an order on the first day, and finalize the remaining 10%-20% the following trading day. Orders may also be broken up such that sells are executed on the first day, and the purchase is executed the following

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[37] *See* Compliance Programs of Investment Companies and Investment Advisers, Release No. IC-26299 (December 17, 2003), 68 Fed. Reg. 74714 (December 24, 2003), *see also* Disclosure Regarding Market Timing and Selective Disclosure of Portfolio Holdings, Release Nos. 33-8408, IC-26418 (April 19, 2004), 69 Fed. Reg. 22300 (April 23, 2004). Additionally, intermediaries have made system enhancements that also address this concern, such maintaining records of time-stamped trades.

[38] *See* Amendments to Rules Governing Pricing of Mutual Fund Shares, Release No. 26288 (December 11, 2003), 68 Fed. Reg. 70388 (December 17, 2003).

[39] Source: US Census Bureau, 2021 Survey of Income and Program Participation. Includes 401(k), 403(b), 503(b), and Thrift Savings Plans. *See* https://www.census.gov/library/stories/2022/08/who-has-retirement-accounts.html.

[40] See, *e.g.*, The SECURE 2.0 Act of 2022, which was included as part of the Consolidated Appropriations Act, 2023, H.R.2617, 117th Cong., (2022).

[41] *See* Proposing Release at 145.

day. In either case, there would be a gap in which investors would not be fully invested in their desired allocations; additionally, such arrangements would reflect on statements as a series of transactions rather than a single transfer. These outcomes would be confusing and detrimental to the ordinary American retirement saver.

Recordkeepers typically also aggregate individual participant orders to "omnibus" accounts before submitting orders. Omnibus accounts lower costs for investors by providing for more efficient transactions and accounting, but rely on a process that can take hours based on the number of participants and employer accounts. Any changes to this process would likely raise the cost of offering recordkeeping services, and potentially reduce access to 401(k)-style accounts. Small employers in particular are highly cost-sensitive; in our interviews with small business owners to help JPMAM build and refine a small company 401(k) plan offering, they cite costs as one of the biggest factors in the establishment and selection of a 401(k) provider.

2. Impact on Other NAV-Dependent Products

Similar challenges exist for model portfolios, variable insurance, funds of funds, education savings accounts, and other NAV-dependent products. Over the last 20 years since the SEC considered, but did not adopt, a hard close, the market has seen extraordinary growth in product offerings and development of systems that have enhanced investor experience. Model portfolios and automated investing techniques reduce costs and expand access to investment opportunities. Investors access variable annuities for regular income with market exposure. Fund of funds provide diversified, professionally managed exposure to certain investment allocations, including extremely popular "target-date" funds that automatically adjust allocations over time. 529 plans help families invest and pay for the ever-increasing costs of higher education. Intermediaries' systems have grown increasingly complex to accommodate a growing number of mutual funds and investors. All of these systems have been developed with a dependency on the ability to provide final orders based on the day's NAV.

3. Impact on Same-Day Flows

Even for trades that are not NAV-dependent, *i.e.,* investors in ordinary advised or self-directed brokerage accounts, the proposed hard close would also negatively impact their ability to obtain same-day pricing for orders initiated in the period before 4 p.m. ET. Intermediaries would have to set a cut-off time for investors before market close in order to submit all orders to a designated party by 4 p.m. ET. These cut-off times may vary depending on the size, complexity and systems of the intermediary; in conversations with intermediaries, we have heard that estimates of cutoff times could range between 11 a.m. and 2 p.m. ET. The Proposing Release states that "most fund orders are not time sensitive," and investors who wish to place orders up until 3:59 p.m. ET could do so with the fund's transfer agent.[42] We disagree. First, we believe that investors should be permitted to place orders up until market close. While mutual fund shareholders are long-term investors, they may wish to submit a time-sensitive order in response to market developments. Second, many investors work with advisers and/or transact fund shares on brokerage platforms; they benefit both

[42] *See* Proposing Release at 149.

from the advice they receive and the ability to invest in funds offered by a range of sponsors. It is not realistic to expect that fund investors broadly have, or desire, direct access to individual funds' transfer agents. Indeed, the industry has largely moved away from this model because it is a less efficient means of order processing than omnibus accounts, and the infrastructure to support an increase of direct client flow does not currently exist. The costs of these technology enhancements would ultimately be borne by shareholders.

4. Impact to Mutual Funds and Fund Investors

Since the proposed rule was released, there has been speculation about whether a hard close would cause investors to migrate away from mutual funds. Some have suggested that 401(k) plans would more heavily utilize collective investment trusts. Retail investors in taxable accounts may seek ETFs. Institutional investors have a range of possible alternatives, including ETFs and separately managed accounts. While we believe it is too early to forecast such changes with any confidence, we observe that if they came to pass, remaining fund investors would be harmed. Mutual funds – by definition – mutualize costs across a wide range of retail and institutional shareholders. As the mutual fund industry has grown, ordinary investors have benefited immensely from its scale – not just through low fees, but broad investment diversification, an extensive range of product offerings, and a simple investment process. The potential harm to remaining mutual fund investors should not be overlooked when analyzing the costs and benefits of the proposed rule.

c. Swing Pricing: the Proposed Requirement and JPMAM Views

The proposed amendments to Rule 22c-1 would make a number of changes to the swing pricing framework. Swing pricing would be mandatory for all open-end funds except excluded funds. The swing threshold would be mandated: funds would swing their NAV for all net redemptions, and for net purchases that exceed 2% of fund assets. The swing factor would constitute estimates of: (1) spread costs; (2) brokerage commissions and other fees associated with selling; and (3) market impact if net redemptions exceed 1% of fund assets, for selling a pro rata amount of the fund.[43] In the case of net purchases greater than 2% of fund assets, all three elements would be required. The swing factor could generally be determined on a periodic basis, as long as developments impacting the estimates of spreads, market impact, and other transactions costs prompt a quick reevaluation. JPMAM does not support the proposed changes.

We do not agree that swing pricing should be mandatory. The Proposing Release does not explain why the Commission took this over-inclusive approach other than observing that requiring swing pricing could have benefits for investors based on events in March 2020.[44] While we agree that swing pricing may provide benefits to long-term investors in some circumstances, such benefits will not accrue evenly across funds. For example, funds that are predominately invested in highly liquid

[43] Market impact is based on the change in value of an investment if a pro rata amount were purchased or sold to meet investor flows. Funds may estimate costs and market impact factors for each type of investment with the same or substantially similar characteristics, rather than analyze each investment separately. *See* proposed Rule 22c-1 (b)(2)(iii) and 22c-1 (b)(2)(iv).

[44] *See* Proposing Release at 95.

assets and/or that rarely experience large flows may not experience measurable dilution.[45] Funds that are unlikely to experience meaningful dilution should not be required to undertake the costs of establishing and managing a swing pricing program. Moreover, as discussed throughout this letter, we do not believe the SEC has adequately considered the costs and risks of implementing swing pricing, relative to the potential benefits that some investors may experience.

We also do not support the requirement to set the swing threshold at zero for net redemptions – that is, to require a swing for all net redemptions. The Proposing Release offered two justifications for this approach: first, that every net redemption could potentially involve trading or borrowing, and second, a concern that a high swing threshold would not appropriately be adjusted downward in times of stress.[46]

As to the first justification, we disagree. Small flows rarely trigger trading activity. Funds typically hold cash and cash equivalents to manage ordinary redemptions, and as our study described above shows, on most days flows are small: over 90% of the time, total net flows were between -0.5% and 0.5% of AUM. Managing typical order flows is a basic responsibility of portfolio management.[47] Imposing a swing on redeeming investors on days such as these amounts to an unsubstantiated exit fee. Meanwhile, these NAV adjustments could create the appearance of NAV volatility, and cause increased tracking error, both of which could be interpreted by investors as an increase in the inherent level of portfolio risk.

As to the SEC's concern about whether funds would adjust swing thresholds in times of stress, our experience in Luxembourg in March 2020 demonstrates that a thoughtful swing pricing program can be sufficiently dynamic in times of stress. In early March 2020, our Swing Pricing Committee increased its meeting frequency from quarterly to weekly or more, increased swing factors and reduced swing thresholds within days of initial stress, and continued to meet regularly until market conditions normalized later that summer.[48]

Finally, we oppose the inclusion of price impact in the swing factor. The Proposing Release acknowledges that it would be difficult to produce timely, good faith estimates of market impact, and the proposed rule would permit the swing pricing administrator to estimate costs and market impact factors across similar investments, rather than analyze each investment separately.[49] We have

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[45] *See supra* §I.a.1, explaining that large funds with an unconcentrated investor base may rarely experience large flows.

[46] *See* Proposing Release at 105-106.

[47] JPMAM uses a swing threshold of 1% for most of its Luxembourg-domiciled UCITS. A small number of highly liquid ultra-short bond funds use a threshold of 5%. As explained in the brochure, the swing threshold is set "at a level to ensure that those flows that would represent a significant amount of dilution in the sub-fund are captured. Small net inflows or outflows may not require any trading activity and would not justify swinging the NAV." *See* Swing Pricing Brochure, *supra* note 34.

[48] During peak stress events such as March 2020 and the early days of Russia's invasion of Ukraine, JPMAM held daily "war room" meetings; among the topics discussed was whether the Swing Pricing Committee should be convened.

[49] *See* Proposing Release at 121.

significant concerns about making adjustments to a fund's NAV based on such estimates. While there are other elements of the NAV that are based on estimates, they are typically small and/or subject to a robust framework of oversight and review.[50] Requiring a fund to make macro-level market impact adjustments in a short window brings additional risk and uncertainty to the NAV-determination process. Imprecise NAV adjustments could causing lasting impacts to a fund's performance and volatility, which shareholders commonly rely on to make investment decisions.[51]

d. Recommendations

As noted above, JPMAM employs swing pricing in our Luxembourg- and UK-domiciled UCITS, and we were generally supportive of the Commission's 2016 rule permitting swing pricing on a voluntary basis. As should be evident from our fund flows analysis, we have committed time and resources to consider how swing pricing might be implemented in the US. We concur with the SEC's perception, articulated in the Proposing Release, that there is a "collective action" problem, *i.e.,* that no single fund can overcome the market-wide operational impediments to implementing swing pricing.[52] However, we oppose the SEC's authoritarian approach to addressing this problem – both with respect to the hard close and prescriptive swing pricing proposal – particularly given the potential negative impacts on the industry and investors this approach could have. We recommend the Commission take a more collaborative approach to solving the fund flow data challenges; consider a broader safe harbor; and retain a more permissive swing pricing rule similar to existing Rule 22c-1.

1. Improving Fund Flow Data

As a preliminary matter, in order for funds to make swing determinations with any confidence, the uncertainties regarding fund flow information must be resolved, while minimizing impact to shareholders and intermediaries. We believe there is opportunity for improvement in both next-day and same-day flows.

Next-day flows. We believe that achieving better data on next-day flows without fundamentally altering the 401(k) landscape will require a collaborative industry approach. The SEC could convene industry participants to consider whether providing indicative flows is possible, and the costs and risks associated with doing so, similar to the alternative approach described in the Proposing Release.[53] Under this approach, an order submitted today would be eligible to receive today's price if the intermediary provides an indicative order by the fund's pricing time (see same-day flows below) and final order information the following day. Intermediaries could provide indicative flows

[50] *See, e.g.*, 17 CFR§270.2a-5, Fair Value Determination and Readily Available Market Quotations.

[51] We believe using market impact estimates to adjust the NAV is substantially different from incorporating it into a fund's liquidity risk management program, *see supra* §I.a.2.

[52] Proposing Release at 262.

[53] *See* Proposing Release at 178-180.

using orders received by market close, the prior day's NAV, and any other inputs that may improve the estimate.

While this approach would preserve the current approach to NAV-dependent products and reduce negative impacts on investor experience, it would require significant implementation time and costs to build a new process. The provision of indicative flows would require the entire network of market participants (including funds, transfer agents, broker-dealers, banks, and retirement plan recordkeepers) to establish a new system to process indicative flows that could subsequently be matched with and replaced by final order information. This is further complicated by factors such as retirement recordkeepers that use multiple levels of omnibus accounting, transact in hundreds of funds, and have thousands of clients. The required time and costs must be better understood.

Same-day flows. For same-day flows, we suggest further consideration of whether flow information could be provided by 6 p.m. ET, and the costs and risks of doing so. Under this approach, intermediaries would need to submit either final order information or indicative orders as described above by 6 p.m. ET in order to receive today's price. While we chose this time to allow investors to transact until market close, significant changes may be needed to the multiple layers of intermediary systems and the NAV dissemination process. Broker-dealers, banks, and other platforms that directly accept investors' orders may need to establish or expand intra-day order transmissions to reduce the share of processing that currently begins at market close. Transfer agents and clearing agencies may need to enhance systems and increase their own batch processing to provide more timely order information. There should also be consideration of the implications of eliminating the ability to submit errors and corrections, including how late trades are treated (*i.e.,* rejected or processed the next day) and any liability issues.

This approach would also require enhancements to funds' NAV calculation and dissemination process. Funds would have a shorter period of time to determine the NAV. NAV dissemination to vendors, media, and intermediaries may also be delayed The downstream effects of delaying the NAV should also be further considered.

2. Broader Safe Harbor

Although the recommendations above could substantially enhance the data available to funds at the time they strike their NAV, we are not convinced that the amount of available information would enable a fund to "reasonably estimate whether it has crossed the swing threshold(s) with high confidence," as required by the current rule.[54] As noted above, our analysis suggests that meaningful flows arise from exogenous events on a periodic basis; the indicative flow would effectively serve as an "early warning" for flows large enough to trigger a swing. That said, differences in how intermediaries estimate indicative flows for investors' purchases, redemptions, loans or withdrawals could potentially impact a swing, as could other factors. In short, we anticipate instances in which final order flow information could result in a different swing determination than orders and indicative orders available to the fund at its pricing time. Thus, the Commission may need to amend Rule 22c-1 to allow funds to use "reasonable estimates based on available information" instead of

[54] Rule 22c-1(a)(3)(i)(A).

high confidence estimates, and clarify that a fund would not need to correct its NAV in such instances.

3. A Permissive Swing Pricing Rule

If funds had reliable data available with which to make swing threshold determinations, and comfort that they would not face legal or regulatory risk for using imperfect data, we believe there would be a greater willingness to adopt swing pricing. Indeed, as we have seen in Europe, many firms find that using swing pricing presents a competitive advantage, and many institutional clients consider swing pricing favorably in choosing investment products.

However, as detailed above, a swing pricing mandate with predetermined swing thresholds and a market impact requirement are not in the best interest of shareholders. The contours of existing Rule 22c-1, including the flexibility to determine which funds should utilize swing pricing as well as the appropriate swing thresholds and factors, are far preferable. The SEC could also consider a "comply or explain" approach, whereby funds would be required to consider swing pricing, but have the ability to decline using it for some or all funds, subject to a requirement to disclose their rationale. We expect that some funds could demonstrate that they experience minimal dilution due to stable flows and/or low transaction costs associated with portfolio transactions, or that the costs to implement swing pricing outweigh the benefits to investors.

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JPMAM appreciates the opportunity to comment on the Commission's proposed rule. We would be pleased to provide any further information or respond to any questions that the Commission or the staff may have.

Very truly yours,

/s/ George C.W. Gatch

George C.W. Gatch

Cc: The Honorable Gary Gensler, Chair
The Honorable Hester M. Peirce, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner
The Honorable Mark T. Uyeda, Commissioner
The Honorable Jaime Lizárraga, Commissioner
William A. Birdthistle, Director, Division of Investment Management