Congress of the United States

Washington, D.C. 20515

June 28, 2023

VIA ELECTRONIC TRANSMISSION

The Honorable Gary Gensler
Chairman
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. S7-26-22
Proposed Rule: Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-PORT Reporting [Release Nos. 33-11130; IC-34746; RIN 3235-AM98]

Dear Chairman Gensler:

We write to express our strong opposition to the Securities and Exchange Commission's (SEC) proposed rule titled "Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-Port Reporting" (the "Proposal"), which could have devastating consequences for millions of America's retirement savers.[1] With fewer Americans prepared for retirement, the last thing the federal government should be doing is taking steps to hinder savers' access to a secure retirement.

More than 140 million American workers participate in employer-sponsored private retirement plans, including over 700,000 defined contribution plans.[2] Mutual funds are a key investment tool for retirement savers because they allow access to professional asset managers at a low cost. Mutual funds are already highly regulated and have been operating successfully since the inception of the modern defined contribution plan retirement system. To quote Commissioner Uyeda, "The growth of mutual funds is also an American success story."[3]

The Proposal is intended to provide additional safeguards to prepare for stressed market conditions—for example, in an economic shock. However, we are concerned that the harm the Proposal would cause to the retirement savings of American workers far outweighs any benefits. A similar 2003 SEC proposal was found to be unworkable, and the concept remains unworkable today.[4] In March 2004, bipartisan Members of Congress wrote to express their concerns about

---

[1] Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-Port Reporting, 87 Fed. Reg. 77,172 (proposed Dec. 16, 2022).
[2] U.S. DEP'T OF LABOR, EMP. BENEFITS SEC. ADMIN., PRIVATE PENSION PLAN BULLETIN. VER. 1. (2022).
[3] Commissioner Mark. T. Uyeda, Statement on Proposed Rule: Open-End Fund Liquidity Programs and Swing Pricing, Form N-PORT Reporting (Nov. 2, 2022), https://www.sec.gov/news/statement/uyedar-statement-open-end-funds-110222.
[4] *See* March 22, 2004, Congressional letter from Sens. Portman and Cardin and Reps. Biggert, Pomeroy, Johnson, Andrews, Ramstad, Moore, Isakson, Davis, and Royce to The Honorable William Donaldson expressing nearly identical concerns to those set forth in this letter, http://www.eric.org/forms/uploadFiles/2F8A0000000B.filename.03-04_p-c_let.pdf.

the adverse impact to retirement plans in response to the 2003 proposal (the "2004 Congressional Letter"). Now, 20 years later, we continue to share their concerns as we review the SEC's 2022 proposal.

The Proposal would deny same-day pricing for mutual fund trade orders that are not received by the mutual fund, its transfer agent, or a registered clearing agency by an established cut-off time (a "hard close"), typically 4 p.m. Eastern Time.[5] As a result, investors who trade directly with a fund's transfer agent will have a significant advantage over retirement plan participants, whose trades are typically placed through recordkeepers.

The Proposal claims, "Most fund shareholders are long-term investors, and thus we believe that most fund orders are not time sensitive."[6] We disagree. As explained in the 2004 Congressional Letter, "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 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." This remains as true in 2023 as it was in 2004.

Through the SECURE Act of 2019 and the *Securing a Strong Retirement Act of 2022*, Congress has taken significant action to make it easier for hardworking Americans to achieve a prosperous retirement. We are concerned that a hard close would hinder this progress. We encourage the SEC to reverse course and eliminate a hard close from any future rulemakings.

Sincerely,

Bill Cassidy, M.D.

Bill Cassidy
Ranking Member
Senate Committee on Health,
Education, Labor, and Pensions

Virginia Foxx

Virginia Foxx
Chairwoman
House Committee on Education
and the Workforce

cc: Commissioner Hester Peirce
Commissioner Caroline Crenshaw
Commissioner Mark Uyeda
Commissioner Jaime Lizarraga
Secretary Vanessa Countryman

[5] Preamble to the Proposal, 87 Fed. Reg. at 77814.
[6] Preamble to the Proposal, 87 Fed. Reg. at 77213.