November 21, 2023

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

Re: *Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-PORT Reporting (File No. S7-26-22)*

Dear Ms. Countryman:

The Investment Company Institute and ICI Southwest are writing to express our joint concerns with the SEC's proposal to (i) amend the liquidity risk management rule (the "liquidity rule") for mutual funds and ETFs ("funds") and (ii) mandate that mutual funds impose a "hard close" on investors' orders and use swing pricing.[1] In so doing, we express support for the SEC's customary consideration of comments received after the close of formal comment periods.[2] Given the SEC's volume and pace of rulemaking, it is particularly important for the public to have the ongoing opportunity to comment on proposed rulemakings.[3]

If adopted, the proposed changes would fundamentally alter the management and operation of funds; the pricing of mutual fund shares; and how investors purchase and sell mutual fund shares. Main Street investors would bear the burden of higher fund costs, lower investment

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[1] *Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-PORT Reporting*, SEC Release No. 33-11130, 87 Fed. Reg. 77172 (Dec. 16, 2022) (the "proposal"). We exclude money market funds from the terms "mutual fund" and "fund" in this letter because they are not subject to these proposed changes.

[2] *See* Testimony of Chair Gary Gensler Before the United States House of Representatives Committee on Financial Services, April 18, 2023 ("With the closing of a formal comment period, staff begins its work to account for this important public input but continues to receive additional comments, which the Commission may consider. We greatly benefit from public input and consider adjustments that the staff, and ultimately the Commission, think are appropriate."); Oversight of the Securities and Exchange Commission, Hearing of the House Financial Services Committee (April 18, 2023) ("We also often consider comments well beyond that [formal comment] period of time and continue to receive comments."). *See also* *Market Data Infrastructure*, SEC Release No. 34-90610, 86 Fed. Reg. 18596 at 18601 (Apr. 9, 2021) ("The Commission has considered all comment letters received to date, including comments that were submitted after the comment deadline had passed.").

[3] ICI, along with 24 other trade organizations, previously expressed concerns about "[e]xceedingly short comment periods associated with numerous concurrent potentially interconnected rule proposals that touch on significant changes to the operational and regulatory regime applicable to financial firms." *See* Joint Trade Associations' Letter to SEC Chair Gensler (Apr. 5, 2022).

returns, reduced access to certain funds and investment strategies, and less transactional efficiency and transparency. While these negative impacts and costs are certain, the benefits are not, given that funds have managed liquidity successfully for decades (including in March 2020) and ICI has estimated that dilution for the large majority of mutual funds is *de minimis*. Moreover, the SEC's legal authority to impose the proposed liquidity requirements is very much in doubt.

We outline our chief concerns with the proposal below, most of which the ICI articulated in an earlier letter,[4] as did many other commenters.

Section 1: Comments on the Proposed Liquidity Amendments

Currently, the liquidity rule requires a fund to classify each portfolio investment into one of four liquidity "buckets"—highly liquid, moderately liquid, less liquid, and illiquid—at least monthly.[5] The proposal would amend the rule's bucketing requirements in several respects.[6]

We—and most other commenters—strongly oppose these changes. Collectively, they would:

- ***Make many funds look less liquid***. Many funds that routinely have large percentages of their portfolios in the "highly liquid" bucket would see a decline in this category and corresponding increases in the "moderately liquid" and/or "illiquid" categories.[7] This would be true even of some funds that are widely regarded as having highly liquid portfolios (e.g., equity funds). Public reporting of this information would exacerbate the problem and arbitrarily punish some funds in the marketplace.

- ***Impair certain funds' ability to comply with the rule's 15% illiquid limit***. These breaches would even occur in ordinary market conditions in highly liquid funds (including equity funds), forcing funds to sell investments that may in fact be highly liquid and hold cash or buy other investments that would fit within the SEC's

[4] ICI Comment Letter (Feb. 14, 2023) ("ICI Letter"). The ICI Letter also makes several recommendations (at 4-9) that we do not repeat here.

[5] This bucketing exercise requires a fund to determine how quickly (in days) it can convert to cash (or sell, depending on the bucket) a reasonably anticipated trading size ("RATS") of each investment, factoring in the sale's potential impact on the investment's market value ("value impact") and numerous other market, trading, and investment-specific considerations.

[6] The proposal would: (i) change the size assumption to 10% for each investment (from a fund-determined RATS); (ii) impose a fixed value impact requirement by defining "significantly changing the market value of an investment" to include precise numerical standards; (iii) eliminate the asset class classification method; (iv) eliminate the "less liquid" bucket, reducing the number of buckets from four to three, and change the definitions for the remaining three buckets to narrow the "highly liquid" bucket and expand the "illiquid" bucket; (v) change the method for counting days in a way that shaves a day off the highly liquid and illiquid buckets; and (vi) require daily bucketing.

[7] *See, e.g.*, Allspring Global Investments' comment letter (showing adverse effects of proposed bucketing changes on select small cap stock funds).

shrunken "highly liquid" bucket.[8] This would disrupt funds' abilities to pursue their investment objectives and potentially harm fund performance (e.g., if they are forced to hold less desirable investments). Some would close to new investors or liquidate, while others may split into smaller (and less economical) funds.

- ***Limit access to certain asset classes***. The proposal would cause a significant migration of (currently) liquid investments into the illiquid bucket. It would be fatal to funds investing primarily in bank loans (bank loans would be reclassified as illiquid, and these funds would be unable to comply with the 15% illiquid limit), which have weathered several stressed periods over the past 20 years without incident[9] and provided retail investors with access to a useful income-based asset class. Other funds would limit or reduce their use of certain asset classes and modify their investment strategies to comply with the more expansive and onerous illiquid limit.

- ***Increase compliance costs for all funds***. The costs associated with daily bucketing would be especially burdensome and hard to justify for highly liquid and smaller funds, whose daily bucketing outputs would rarely change even under the proposed changes.[10]

We also strongly oppose public reporting of bucketing information. The SEC correctly made all reported bucketing information non-public in 2018, pointing to the information's subjectivity; its lack of context; and its potential to highlight one risk (*i.e.*, liquidity risk) over others.[11] The proposal does not offer a convincing rationale to the contrary. The proposed bucketing changes would make public reporting even more problematic by distorting funds' liquidity risk profiles, including by misrepresenting the liquidity of larger funds.

Section 2: Assessment of the SEC's Authority to Impose Proposed Liquidity Requirements

The SEC appears to lack the statutory authority to impose the proposed liquidity requirements on funds. Rules that exceed the powers that Congress has conferred on an agency are void.[12]

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[8] *See* ICI Letter at Section 3 of Appendix A (demonstrating that certain stock funds would be unable to comply with the proposed bucketing changes and the 15% illiquid investments limit).

[9] *See, e.g.*, LSTA's February 2023 comment letter (showing how open-end bank loan funds have met redemptions in stressed periods).

[10] *See, e.g.*, Letter from the Independent Trustees of the Morningstar Funds Trust ("we believe that the Commission's proposal to require daily – rather than monthly – liquidity classifications will only add costs without adding insights that benefit shareholders.").

[11] *See generally* *Investment Company Liquidity Disclosure*, SEC Release No. IC-33142, 83 Fed. Reg. 31859 (July 10, 2018).

[12] *See, e.g.*, *NFIB v. OSHA*, 595 U.S. 109, 117-18 (2022).

For years, the SEC's authority to impose liquidity requirements has been in doubt. In 1992, SEC staff—specifically, those from the Division of Investment Management who are charged with advising the SEC on the Investment Company Act—called the existence of such authority "arguabl[e]," and asked Congress to enact legislation imposing a liquidity requirement and authorizing the SEC to enforce it.[13] Yet Congress never did so.[14]

A careful reading of the statutory provisions that the SEC now cites for its rulemaking authority makes clear why the SEC staff previously believed further Congressional action was needed for the SEC to impose specific liquidity requirements on funds. First, Section 22(c) of the Investment Company Act authorizes the SEC to "make rules and regulations applicable to registered investment companies … to the same extent, covering the same subject matter, and for the accomplishment of the same ends as are prescribed in [Section 22(a)]" for securities associations.[15] Section 22(c) thus lets the SEC make rules prescribing

> (1) "method[s] … for computing" minimum purchase prices and maximum sales prices to correspond to "the current net asset value of such security," and
> (2) "a minimum period … which must elapse … before any resale … or … redemption" of securities.[16]

These powers further must be exercised "for the purpose of eliminating or reducing … any dilution of the value of other outstanding securities of such company or any other result of such … redemption … which is unfair to holders of such other outstanding securities."[17]

Section 22(c) does not authorize the SEC to promulgate mandatory liquidity requirements of the kind found in the proposal. Requiring funds to maintain at least 10% of their net assets in "highly liquid investments" (as defined by the SEC), limiting amounts of fund assets in "illiquid investments" (an SEC-defined category so broad that it could include large cap stocks for some funds), and effectively prohibiting certain fund types (e.g., funds investing primarily in bank loans) cannot be considered to be "methods for computing" minimum purchase prices and maximum sales prices. Similarly, authority to promulgate rules setting a minimum resale period cannot fairly be translated into authority for the SEC's far-reaching proposal.

The SEC's rulemaking authority under Section 22(e) is similarly constrained. Section 22(e) requires investment companies to provide

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[13] *Protecting Investors: A Half Century of Investment Company Regulation*, Div. of Invest. Mgmt., U.S. Secs. & Exchange Comm'n 465 n.141, 471 (May 1992).

[14] The SEC cannot enlarge its rulemaking authority beyond the plain language of the Investment Company Act. *See Biden v. Nebraska*, 143 S. Ct. 2355, 2369-71 (2023).

[15] 15 U.S.C. § 80a-22(c).

[16] *Id.* § 80a-22(a)(1)-(2).

[17] *Id.* § 80a-22(a).

> "payment or satisfaction upon redemption of any redeemable security" within 7 days of tender, excluding (1) periods when the NYSE is closed or trading is restricted; (2) periods of emergency; or (3) other periods the SEC may determine for security holders' protection.[18]

The SEC, by rule, only may determine "conditions under which (i) trading shall be deemed to be restricted and (ii) an emergency shall be deemed to exist."[19] Thus, far from permitting the SEC to mandate portfolio construction requirements for funds, Section 22(e) only authorizes the SEC to engage in rulemaking that *excepts* funds from the 7-day redemption requirement.

The SEC instead broadly reads Section 22(e) to authorize any rules that enable the SEC to facilitate compliance with the 7-day redemption deadline.[20] But the SEC cannot ignore the express limitations of this provision and engage in this kind of prophylactic rulemaking.[21] And even if Section 22(e) *could* be read this way, the SEC has not adequately substantiated that the redemption problems it identifies actually exist to justify its proposal, which the Administrative Procedure Act requires.[22] In fact, the SEC concedes that, even upon the occurrence of a global pandemic in March 2020, "no funds sought to suspend redemptions."[23] Perhaps the reason the proposal has so little to say about funds' record in meeting redemptions is because a full accounting only could *weaken* its case for the proposed liquidity amendments.

The proposal briefly alludes to statutory provisions that allow the SEC to prohibit fraud, noting that liquidity requirements are needed to hold mutual funds to their representations "in their prospectuses that they will pay redemption proceeds on the next business day."[24] Here, the SEC

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[18] *Id*. § 80a-22(e).

[19] *Id.*

[20] Proposal at 77175.

[21] "To read out of a statutory provision a clause setting forth a specific condition or trigger to the provision's applicability is ... an entirely unacceptable method of construing statutes." *Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 488 (D.C. Cir. 2007) (quoting *NRDC v. EPA*, 822 F.2d 104, 113 (D.C. Cir. 1987)).

[22] The Fifth Circuit recently ruled that the SEC's failure to substantiate the existence of a problem to justify a new regulation was arbitrary and capricious under the Administrative Procedure Act. *Chamber of Comm. v. SEC*, No. 23-60255, 2023 WL 7147273, at *10-11 (5th Cir. Oct. 31, 2023).

[23] Proposal at 77183. *See also* ICI Letter at 17-18 (identifying only 12 instances in over 80 years where the SEC granted an exemptive order permitting one or more funds to suspend redemptions (excluding emergency situations outside the control of a fund's adviser) and noting that the SEC did not grant any such orders in 2008 or 2020).

[24] Proposal at 77176. The proposal cites as sources of rulemaking authority Section 34 of the Investment Company Act, Section 206 of the Investment Advisers Act, Section 10 of the Exchange Act, and Section 17 of the Securities Act. The SEC's theory for rulemaking authority under the federal securities laws' antifraud provisions was set forth in more detail in the liquidity rule's 2016 adopting release. In that release, the SEC stated that funds' liquidity management practices "implicate certain antifraud provisions of the securities laws;" pointed to fund prospectus representations about meeting redemptions on a timely basis; and noted that a failure by a fund to maintain a sufficiently liquid portfolio or to otherwise manage liquidity risk "calls into question the fund's ability to fulfill the representations" to meet redemptions and therefore "potentially exposes the fund [and other entities] to the possible

is conflating its enforcement powers with its rulemaking authority, and implying that it has substantive rulemaking authority over anything that "implicates" these antifraud provisions. This would make the SEC's fund rulemaking authority virtually limitless—almost *any* fund activity, in theory, could "implicate certain antifraud provisions"—and in the context of funds' liquidity risk management, the SEC could mandate anything that theoretically could increase the likelihood of funds' statements (e.g., about meeting redemptions) coming to pass.[25] In fact, the relevant antifraud provisions do not grant the SEC blanket authority to regulate funds in this way.

The proposal also identifies Section 38(a) of the Investment Company Act as a source of authority. Once again, the SEC's rulemaking authority here is not nearly as broad as it portrays. Section 38(a) permits SEC rulemaking in relevant part

> as … necessary or appropriate *to the exercise of the powers conferred upon the Commission elsewhere in this title…* .[26]

In other words, the scope of the SEC's Section 38(a) rulemaking authority is not independent and boundless—it is grounded in, and extends from, other grants of statutory rulemaking authority. But, as discussed above, the statute does not appear to provide the SEC with any other source of liquidity risk management rulemaking authority upon which Section 38(a) may attach.

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application of the antifraud provisions… ." *Investment Company Liquidity Risk Management Programs*, SEC Release No. IC–32315, 81 Fed. Reg. 82142 (Nov. 18, 2016), at 82147-82148.

This theory for rulemaking authority is misguided, as liquidity, redemptions, and dilution are unrelated to fraud. First, Section 34(b), the antifraud provision of the Investment Company Act, has its own rule that covers false statements. 15 U.S.C. § 80a-33(b); 17 C.F.R. §270.34b-1. Second, Section 206(4) of the Investment Advisers Act—applicable only to investment advisers, not funds or their boards—has its own rules that prohibit false statements and the misappropriation of investor funds. 15 U.S.C. §§ 80b-6; 17 C.F.R. § 275.206(4)-1 and 2. The SEC cannot rely upon the Investment Company Act's antifraud provisions or other statutes altogether to expand Congress's clear limitations on the SEC's authority as expressed in Section 22 of the Act. *See Nebraska*, 143 S. Ct. at 2369-71; *Fin. Planning Ass'n*, 482 F.3d at 488, 493.

[25] With respect to enhancing funds' ability to meet redemptions, the gains from *any* substantive SEC rulemaking would be infinitesimally small at best. As noted above, cases of funds failing to meet redemptions in a timely manner are exceedingly rare. *See supra*, note 23 and accompanying text.

Moreover, these supposed fund "representations" are not as absolute as the SEC's theory suggests. Funds commonly state in their prospectuses the circumstances under which they may *not* be able to meet redemptions in a timely manner, in accordance with Section 22(e)'s exceptions. Thus, in the highly unlikely event that a fund would be unable to meet redemptions in a timely manner, this delay likely would not run afoul of the fund's own disclosure to investors, much less be indicative of fraud. A legitimate fraud claim conceivably could arise if, for example, a fund intentionally and materially misrepresented to investors its liquidity risk management practices. But this is very different from merely failing to meet redemptions in a timely manner. And the SEC could address legitimate instances of fraud through its enforcement powers.

[26] 15 U.S.C. § 80a-37(a). (emphasis added)

Section 3: Comments on the Proposed Hard Close and Swing Pricing Requirements

We strongly oppose the proposed hard close[27] and mandatory swing pricing[28] for mutual funds. The harm and disruption for everyday mutual fund investors from the hard close would be far too high a price to make swing pricing "work." As a practical matter, a hard close would mean that many intermediaries would impose even earlier cut-off times on their investors (as early as 10:00 am ET) so that they (i.e., the intermediaries) can submit trades to funds on a timely basis. Investors working with these intermediaries would not be able to execute fund trades as they do today throughout normal market hours and still receive same-day pricing. This would place a unique burden on West Coast investors. Implementing a hard close would require significant systems rebuilds across the industry, affecting the entire fund ecosystem, including intermediaries.

With respect to swing pricing, aside from our concerns with the feasibility and cost of operationalizing a mandatory requirement,[29] the SEC's current *permissive* regime and European regulation are far better than the proposed highly prescriptive mandatory provisions.

We are not alone in expressing these views. The swing pricing/hard close proposal has been almost universally opposed by commenters, with dozens of letters providing detailed explanations. We provide a sample of that feedback below:

- A September bi-partisan letter from members of the US House of Representatives states that the hard close "would create a two-tiered market that would disadvantage retail and retirement investors;" expresses concern that the proposal "could have significant negative impacts on retail investors and retirement savers, while resulting in few if any benefits;" and requests that the SEC "withdraw this proposal."
- The Consumer Federation of America's comment letter states that the hard close would be "particularly detrimental to retail investors saving for a secure and dignified

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[27] Currently, if an investor submits a fund order to an intermediary, that order is executed at the current day's price if the *intermediary* receives it before the fund's set time for valuing its holdings and calculating its per-share net asset value (NAV) (typically 4:00 p.m.). To facilitate the proposed swing pricing mandate (e.g., by accelerating order processing), the proposal would require a hard close for mutual fund orders, which means the *fund* (not simply an intermediary) would have to receive the order before the pricing time.

[28] Rule 22c-1 under the Investment Company Act currently permits (but does not require) mutual funds to use swing pricing. To date, no US fund has used swing pricing. In Europe, some funds use swing pricing to allocate transaction costs to redeeming and purchasing shareholders in certain circumstances under permissive regulatory regimes. Swing pricing requires a fund to (i) measure daily net purchase or redemption activity, and (ii) when any pre-determined activity threshold (usually expressed as a percentage of the fund's net assets) is exceeded, adjust (or "swing") the per share NAV upward (in the case of a net purchase of fund shares, so that transacting shareholders bear the transaction costs from resulting fund purchases of portfolio investments) or downward (in the case of a net redemption of fund shares, so that transacting shareholders bear the transaction costs from resulting fund sales of portfolio investments).

[29] As ICI and many others have pointed out, for swing pricing to work, funds must have timely, accurate, and complete daily flow information around the time they calculate their NAVs. Presently, due to the highly intermediated nature of fund ownership, this prerequisite is not met.

retirement" and that "the tangible and significant costs associated with the proposed implementation of swing pricing are very likely to outweigh any perceived benefits."

- The American Benefits Council's comment letter expresses concerns with the proposal's harmful impact on millions of retirement plan participants due to increased costs, significant delays in transactions, and elimination beneficial features currently available to retirement savers.
- The College Savings Foundation's comment letter states that the proposal if adopted, "will harm families saving for college, and the states that sponsor 529 Plans, and that this harm outweighs any gains to be had by the Commission's related 'swing pricing' proposal."
- The American Bankers Association's comment letter states that the proposal would "(i) disrupt settlement transactions, (ii) interfere with the investor decision-making process, (iii) disadvantage individual investors, especially retirement plan investors, transacting through an intermediary, and (iv) drive up costs for investors."
- The February joint letter from American Council of Life Insurers and Committee of Annuity Insurers states that the hard close requirement would be "irreconcilable with the operation of both variable contracts offering underlying mutual fund investment options and retirement plans that millions of Americans rely upon for financial security and retirement income" and would "conflict… with investor expectations and insurer contractual obligations, as well as legal and regulatory requirements…"

The SEC's proposal makes no attempt to quantify the benefits or costs of the swing pricing/hard close combination. As we previously explained, the SEC has not adequately substantiated that the dilution problem it identifies actually exists to justify swing pricing or a hard close.[30] The ICI Letter estimates mutual fund dilution and finds that for the large majority of mutual funds, it is *de minimis*.[31] This in turn suggests that the benefits to these funds and their investors of these measures would be, at most, *de minimis*.

Focusing on costs, the U.S. Chamber of Commerce analyzed the swing pricing and hard close proposal and found that:

- Retirement plan assets would decrease by approximately $32 billion each year if swing pricing and a hard close were implemented.
- Implementation costs would further erode retirement plan assets by an additional $10 billion yearly.
- A long-term "set and forget" retirement plan participant with a small initial account balance could face an erosion of more than $50,000 over a 27-year period solely due to the costs of swing pricing with a hard close.[32]

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[30] Such a failure is arbitrary and capricious under the Administrative Procedure Act. *Chamber of Comm.*, 2023 WL 7147273, at *10-11.

[31] *See* ICI Letter at Section 2 of Appendix A.

[32] *See* U.S. Chamber of Commerce's July 2023 submission.

There is simply no basis for adopting this proposal, either from the SEC's own analysis or commenters.

Section 4: Comments on the Proposal's Anti-Dilution "Alternatives"

The proposal includes a sub-section titled "Alternatives to Swing Pricing and a Hard Close Requirement." The three alternatives discussed are liquidity fees, dual pricing, and swing pricing without a hard close (facilitated instead by permitting use of indicative and/or estimated flows).

These are not alternatives in any true sense of the term—they are, at best, partially sketched ideas, akin to what the SEC would discuss in a concept release or request for comment preceding a formal proposal. Take, for instance, the liquidity fee alternative.[33] This is presented as a general concept, with the proposal acknowledging the "many potential variations of a liquidity fee framework."[34] The proposal does not commit to any one of these "many potential variations." To highlight some of the key matters that the SEC raises without answering:

- To which funds would a liquidity fee apply?
- To which transactions would it apply (e.g., would there be a trigger, and if so, what would it be)?
  - Would it apply to both purchases and redemptions? All or only a sub-set of one or the other?
  - If the trigger were based on daily flows, would this be operationally feasible?
  - To what extent would any triggers require data that funds may not presently have?
  - Would there be any exceptions (e.g., for small trades)?
  - To what extent would application be subject to fund discretion?
- How frequently would the potential fee be determined?
  - Would the fee itself be more dynamic (e.g., changing daily) or static (e.g., remaining fixed for extended periods)?
- How would the fee be determined?
  - Would all implicit costs (e.g., market impact) be included?
  - When would or could default fees be used?
  - Would the fee be subject to a cap? If so, at what amount?
- What would be the responsibilities of intermediaries?
  - How would their processes for submitting orders to funds be affected?
  - Would some kind of hard close still be required?
  - When would the fee be collected and remitted to the fund?
- What would be the respective responsibilities of the fund adviser and board?
- How would this framework be disclosed to investors?

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[33] "A liquidity fee would apply as a separate charge to a transacting investor and would not change the fund's price. A liquidity fee could be used to impose liquidity costs on purchasing or redeeming investors and address dilution, much like a swing pricing-related price adjustment." Proposal at 77215-77216.

[34] *Id*. at 77216.

- What and how would a fund report about this activity to the SEC?

The proposal—quite literally—presents more questions than answers about this potential alternative, and the presentations of the other alternatives are similarly sparse.

Perhaps the SEC was seeking maximum flexibility to proceed straight from this proposal to adoption of final rule amendments, especially if it opted not to adopt swing pricing. The SEC recently adopted a mandatory liquidity fee (with certain swing pricing-related concepts) for certain money market funds in lieu of its proposed swing pricing framework.[35] We are concerned that this may indicate that the SEC is considering a similar switch for mutual funds.

The vagueness and lack of detail in this "alternatives" section severely limits the quality and quantity of feedback that commenters will, or even can, provide on the alternatives. In our view, all alternative anti-dilution measures discussed or alluded to in the proposal lack the requisite specificity for adoption without a new proposal, without violating the Administrative Procedure Act. Aside from this procedural matter, such an action would be deeply problematic as a matter of policy. Adoption of *any* of these alternatives without a new proposal is bound to be done with little meaningful input from the public. Indeed, as one would expect, commenters have focused far more intently on what the SEC actually proposed—mandatory swing pricing and a hard close for mutual funds—than the proposal's inchoate alternatives.

In a September 2023 hearing before the House Financial Service Committee, Chair Gensler described the SEC's approach to rulemaking: "We're focused on getting it right based upon the economics, the authorities promoting the mission, not against the clock." We hope this holds here, but the breakneck pace of this Commission gives us serious pause. We are concerned that the SEC could adopt something meaningfully different that the public has had no opportunity to assess and comment on. Doing so would be legally suspect, and almost certainly result in worse policy for funds and investors than would a deliberate rulemaking process. The SEC should follow the approach recently outlined by Commissioner Uyeda:

> Before the Commission adopts any final rule that significantly deviates from the proposal, it should seriously consider re-proposing the rule with revised rule text and an updated economic analysis. Doing so would provide the public with an opportunity to focus on aspects of the proposal that they did not initially consider, and perhaps more importantly, submit feedback on any revised requirements. Such a re-proposal may ultimately help the Commission craft a better rule for all market participants. The Commission should do everything possible to not promulgate a rule that is costly and ineffective, as doing so might be indicative of a flawed process that raises the question of whether the rule is arbitrary and capricious under the Administrative Procedure Act.[36]

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[35] *Money Market Fund Reforms; Form PF Reporting Requirements for Large Liquidity Fund Advisers; Technical Amendments to Form N–CSR and Form N–1A*, SEC Release No. IC–34959, 88 Fed. Reg. 51404 (Aug. 3, 2023).

[36] *Remarks at the Practising Law Institute's 55th Annual Institute on Securities Regulation*, SEC Commissioner Mark T. Uyeda (Nov. 7, 2023).

If, after evaluating the proposal's comment file, the SEC continues to believe that pursuing dilution-related rulemaking potentially has merit, it is imperative that it first analyze and quantify the benefits and costs of various anti-dilution measures, by sufficiently granular fund category (e.g., US large cap equity funds). If this analysis suggests the potential worthiness of a different anti-dilution approach, it then must issue a new proposal explaining the measure in detail along with a fulsome economic analysis, on which the public then could comment. This type of iterative process has worked well in the past, particularly for highly complex rulemaking,[37] and is far more likely to yield good policy and withstand judicial scrutiny.[38]

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We appreciate the SEC's consideration of these comments.

Sincerely,

Investment Company Institute ICI Southwest

[37] For instance, the SEC adopted a comprehensive rule governing funds' use of derivatives (Rule 18f-4 under the Investment Company Act) in 2020, following a 2011 concept release, a 2015 proposal, and a 2019 re-proposal.

[38] Final rules that are "not a logical outgrowth" of the proposed rule violate the Administrative Procedure Act. *Tex. Ass'n of Mfrs. v. CPSC*, 989 F.3d 368, 381-83 (5th Cir. 2021).