February 14, 2023

Filed electronically

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

Re: Proposed Rule: Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-PORT Reporting (RIN 3235-AM98)

Dear Ms. Countryman:

On behalf of the SPARK Institute, Inc., we are writing to express our *strong opposition and great concern* regarding the Securities and Exchange Commission's (the "Commission") proposed rule to implement a "hard close" requirement on mutual fund investments under Rule 22c-1.[1] While the Commission's proposed rule includes multiple proposals, our comments focus primarily on the hard close requirement. Such a requirement will *break* the existing defined contribution system, resulting in significant harms to retirement plan participants and adverse consequences for the retirement services industry. We are conscious of the Commission's goal to implement swing pricing in order to ensure that transaction costs are appropriately priced into a mutual fund's net asset value ("NAV"). However, the reality is that any benefits that swing pricing could bring to retirement savers are miniscule compared to the cost of breaking the current defined contribution system and making retirement savers "second-class" investors, while burdening those same retirement savers with the costs and disruption required to rebuild plan recordkeeping from scratch. **Accordingly, we strongly urge the Commission not to adopt the proposed hard close requirement.**

The SPARK Institute rarely needs to comment on a Commission rulemaking, even though many of them impose costs on intermediaries such as plan recordkeepers. But this one is fundamentally different because of the severe harm it will cause to American savers. Explained in greater detail below are the reasons that the SPARK Institute opposes a hard close requirement:

- A hard close would greatly harm retirement plan participants by making them "second-class" investors, as they would be pushed out of the market much earlier in the day than other investors to meet the earlier cut-off that would be required under a hard close.

[1] 87 Fed. Reg. 77,172 (Dec. 16, 2022) [hereinafter "Proposed Rule"].

- Second, a hard close would greatly harm retirement savers by burdening them with a worse investing experience and significantly increased costs. A hard close is not feasible without dramatic, complex, and costly changes to existing trade processing procedures. The very nature of defined contribution recordkeeping makes submitting trades made on a dollar basis (as virtually all defined contribution plan transactions are made) by 4 p.m. ET impossible. It is thus important to emphasize – as we do throughout this letter – that the damage wrought by a hard close requirement is not simply an earlier cut-off. The impact is to fundamentally break the defined contribution system, rendering many routine and beneficial transactions that Americans make every day in their plan not possible to process accurately or timely. This means retirement savers will be out of the market longer and will need to wait longer to have access to their retirement savings.

- Third, under the Commission's swing pricing "solution," any potential benefits to retirement savers that would stem from swing pricing are vastly outweighed by the harm that a hard close would cause everyday investors saving for retirement.

The SPARK Institute represents retirement plan recordkeepers, mutual fund companies, brokerage firms, insurance companies, banks, consultants, trade clearing firms, and investment managers. Collectively, our member firms administer the retirement plans for over 100 million American workers.

I. Background and Context: Millions of Americans Own Mutual Funds Through Their Retirement Accounts

A. Defined contribution plans are the way that average Americans participate in capital markets.

As the Commission itself acknowledges,[2] for the majority of Americans, the primary way that they own mutual funds and participate in the capital markets is through a 401(k), 403(b) or 457(b) plan. These plans are collectively known as defined contribution plans. A recent Pew Research Center study reported that only about 35% of Americans are personally invested in stocks, bonds or mutual funds outside of an IRA or 401(k), while the remaining percentage of respondents were invested in a 401(k) or similar type of retirement account, IRA, or had a savings account.[3] As of June 2021, mutual fund assets held in retirement accounts totaled an

[2] *Id.* at 77,178 (stating that "we understand that the majority of mutual fund orders are placed with intermediaries, such as broker-dealers, banks, and retirement plan recordkeepers").

[3] Ruth Igielnik, *Few in U.S. owned stocks outside of 401(k)s in 2019, fewer said market had a big impact on their view of economy*, Pew Res. Ctr. (Sept. 25, 2020), https://www.pewresearch.org/fact-tank/2020/09/25/few-in-u-s-owned-stocks-outside-of-401ks-in-2019-fewer-said-market-had-a-big-impact-on-their-view-of-economy/.

astonishing $12.1 trillion, or 47% of overall mutual fund assets.[4] In 2022, an estimated 68.6 million – or 52.3% of – households in the United States owned mutual funds.[5]

These numbers include not just individuals saving in corporate 401(k) plans, but also mutual funds held through 403(b) plans by teachers, nurses, and school janitors, and through 457(b) plans by firefighters, police officers, and county clerks.

More than just the sheer number of retirement savers that invest in mutual funds through a 401(k), 403(b), or 457(b) plan, mutual funds held through retirement plans are also critical to helping lower-income Americans save. In 2022, more than two-thirds of U.S. households owning mutual funds had incomes less than $150,000, including one-third with incomes less than $75,000.[6] Except for the very wealthiest individuals in the country, the largest pool of investable assets that provide Americans security for the future are the investments held in their retirement plan (or in an IRA that was rolled over from their plan).

As explained in detail below, the Commission's hard close proposal will turn *all* of these savers into "second-class" investors by forcing them out of the market much earlier than other types of investors. Wealthy Americans and institutions that directly own mutual funds will not face the same restrictions on investing or costs, thereby giving them an unfair "leg up."

Additionally, as explained below, the Commission's comparison to the European market and its conclusion that swing pricing can be implemented without significant issues in the U.S. because it has been implemented in Europe is misplaced. Europe does not have anywhere close to the advanced defined contribution system that the U.S. has developed, which provides meaningful and powerful opportunities for Americans to save through work at very low cost. Ultimately, the ones who will be harmed the most by the Commission's proposal are the people it is trying to protect – millions of ordinary Americans saving for retirement.

B. The modern defined contribution recordkeeping system has evolved to maximize benefits to retirement savers.

Prompted by fiduciary oversight and regulatory guidance from the U.S. Department of Labor, the defined contribution recordkeeping system has evolved over decades with two goals: (a) prioritizing prompt and continuous investment of funds dedicated to retirement savings, with the goal of providing the best possible chance for earnings and/or capital appreciation, and (b) ensuring that plan benefits are distributed promptly to provide retirement income.

To help the Commission understand the magnitude of the changes that would be required to implement a hard close, below is a high-level description of current trade processing procedures.

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[4] *Frequently Asked Questions About 401(k) Plan Research*, Inv. Co. Inst. (Oct. 11, 2021), https://www.ici.org/faqs/faq/401k/faqs_401k.

[5] *Mutual Funds are Key to Building Wealth for Majority of US Households*, Inv. Co. Inst. (Oct. 31, 2022), https://www.ici.org/news-release/22-news-ownership.

[6] *See id.*

While there are variations among omnibus recordkeeping procedures, they tend to involve three systems or steps:

- The "front-end" processing system accepts plan instructions from plan sponsors and participants that generate investment instructions; these transactions are date-time stamped. These instructions include participant instructions for the allocation of periodic plan contributions; requests for exchanges among plan investment choices; requests for loans, benefits and other distributions; plan sponsor instructions as to the investment of amounts participants do not direct; plan conversions; and other sponsor-level transactions. At this point, transactions are tested to ensure that any applicable plan rules are satisfied.[7] Once accepted, the transactions are held for later processing, generally on a daily cycle in the case of "daily valued" plans that permit participants to provide investment instructions on any business day. Any investment instructions that are received after the cut-off time are held and processed the next business day and will receive the next day's NAV.

- Transactions that have been posted to the front-end system by the cut-off time are transferred to the "primary" recordkeeping system for processing. The primary recordkeeping system maintains participant and plan records, applies various plan rules, and performs reconciliations with trade confirmations. ***Recordkeeping systems require fund price information in order to start performing daily processing.*** Said another way, processing *cannot begin* until the NAV is known, typically within a short period after 4 p.m.[8] In the case of large plans or where service provider systems process a large number of plans, this processing can take *several hours or longer*. In practice, this may mean that the mutual fund trade file is sent to the "back-end" processing system (described below) in the early hours of the next day, e.g., between 2 a.m. and 6 a.m.[9]

- The "back-end" processing system processes "outputs" of the primary recordkeeping system. This system typically receives and transmits trade orders directly or through the plan's institutional custodian[10] to the fund's transfer or clearing agent after the markets close on a business day, usually overnight. The scope of trades that are processed daily is massive, and while thousands of trades occur throughout the day, the settlement of such trades occurs only once daily.[11]

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[7] For example, the recordkeeper will ensure that a contribution is not in excess of contribution limits, or that a participant is eligible for a distribution.

[8] Depending on market conditions, the NAV is typically received one to six hours after 4 p.m.

[9] One recordkeeper and SPARK member told us that on days without substantial transaction activity, its system can finish by 1 or 2 a.m., but on heavy-volume days, the system does not finish until closer to 5 a.m., with the result that the recordkeeper cannot submit trades until 5:30 a.m.

[10] Often, small- and medium-sized recordkeepers utilize a separate independent custodian to further aggregate and transmit orders to the fund or their transfer agent.

[11] The scale of this process that occurs after the NAV is provided is massive, even among smaller recordkeepers. One SPARK member (who is a top-20 provider but not in the top five) reported that in 2022, an average of 9,000 trades were processed daily, with more than $100 million in purchases and redemptions. This can

After this process is completed and all trades are settled, the recordkeeper electronically transmits the trade files and order "flow" information to the mutual fund's inventory system.

Because defined contribution plans hold a combination of investment types – mutual funds, collective investment trusts ("CITs"), separate accounts, and individual employer securities – the processes need to coordinate so that plan transactions work to achieve prompt and continuous investment of a participant's plan account, regardless of the type of vehicle in which the participant is invested. But there is enormous complexity in this coordination, partly because of the rules that govern defined contribution plans.

The processing systems that require prices before transaction requests can be processed into omnibus trade instructions have many benefits for plan participants. It is the omnibus system that allows individuals with balances well below mutual fund minimums to have access to pooled investments, and sometimes to have access to institutional share classes requiring significantly higher balances than many participants would have on their own. Omnibus trading also can bring more competitive pricing for participants, since the plan is buying and selling "in bulk." As noted earlier, the system as it has developed in the U.S. has allowed participants to be invested promptly and to stay invested as continuously as possible, all without repeated interactions on the part of participants.

This system also provides enormous benefits to the capital markets as a whole. Because of the sheer volume of trading that is processed by defined contribution recordkeepers, mutual funds and their transfer agents do not need to maintain detailed records for the millions of savers in retirement plans. Funds receive a "batch" trade from recordkeepers, and do not need to have systems designed to comply with the complex tax, ERISA, and plan rules that govern defined contribution plans.

II. IMPLEMENTATION OF A HARD CLOSE IS NOT FEASIBLE WITHOUT BREAKING THE CURRENT RECORDKEEPING SYSTEM AND REBUILDING IT FROM SCRATCH

A. A hard close would <u>break</u> the current trade processing system and compromise how participants manage their accounts.

If the Commission adopts a hard close, retirement savers will find that transactions they make every day to manage their account will no longer be possible, leading to delays and a much worse experience. Below we provide examples of four participants (Julie, Jane, Joan, and Jennifer) who will be worse off under a hard close.

To explain why this will occur, it is critical to understand that implementing a hard close will be impossible without *dramatic*, *complex, and costly* changes to existing trade processing procedures. Under the hard close proposal, an order to purchase or redeem a fund's shares

represent as much as *1.5 million unit values* calculated every single day. And that is just one recordkeeper, and not one of the largest.

would be executed at the current day's price only if the fund, its designated transfer agent, or a registered securities clearing agency receives the order before the pricing time as of which the fund calculates its NAV. In its proposal, the Commission acknowledges that "retirement plan recordkeepers may face particular challenges with adhering to" a hard close and recognizes that recordkeepers will be required to "make significant changes" to their business practices in order to accommodate a hard close.[12] But despite these acknowledgements, the Commission vastly underestimates the disruption, harm, and cost that would result from the implementation of a hard close.

The proposal is fundamentally incompatible with the current trade processing system. Therefore, implementing a hard close requires the existing system to be broken and completely redeveloped. Because current omnibus trading depends on having the NAV available, under a hard close, a 401(k), 403(b) or 457(b) plan could never process a participant transaction knowing the price of the mutual fund at the time that the trade is processed. As explained later, one consequence of a hard close is that plans will need to have a cut-off time well before 4 p.m. Consider a transaction cut-off time of noon ET; any participant-directed transactions not received by noon would not be processed or valued until the following day after the market closes. Under this scenario, a recordkeeper would be required to process two separate "batches" of trades: one that summarizes trades to be sent to the mutual funds prior to the 4 p.m. cut-off, and one after prices are received to update the accounts of participants with trades and calculate current values. This is a significant change from the current system, under which only one "batch" job is run after prices are received. Moreover, transactions that can currently be processed relatively quickly could take multiple days. **A hard close would do more than simply "move the finish line" on processing trades – it would force transactions that happen in a single day to be spread out over potentially several days, involving many more steps than before.**

There are multiple plan transactions that simply cannot be processed properly if the NAV is not known:

> **Example 1: *Exchange of Two Investments.*** Our first example is the simplest account transaction. Suppose that Julie, a participant, has turned age 55 and wants to reduce her allocation to Fund A, an equity fund, for Fund B, a bond fund, to reduce her risk as she approaches retirement. She goes online to her plan's online account and directs that $15,000 be redeemed from Fund A and used to purchase Fund B. This can happen overnight without Julie being out of the market. Her recordkeeper receives her request before 4 p.m., and then sometime after 4 p.m. receives the NAV of Fund A and B. This allows the recordkeeper to know how many shares of Fund A must be redeemed, and how many shares of Fund B must be purchased. By the next day, her account reflects the transaction.
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> ***Impact of Hard Close.*** Under a hard close, the recordkeeper cannot process this transaction over a single evening. The recordkeeper must send an instruction to Fund A to redeem $15,000 (and cannot send this in shares because the NAV is not

[12] Proposed Rule, at 77,212.

known when the instruction is sent). The $15,000 then must be held in some sort of cash holding account to be used to purchase Fund B at least one day later; this trade may not settle until day 3. Julie is out of the market for at least one day, possibly more.

Example 2: ***Account Reallocation.*** Many retirement plans offer asset allocation and rebalancing features, which allow participants to modify the allocation of investments in their accounts. Imagine that Jane, a participant, notices that market movement has resulted in her asset allocation drifting from her optimal allocation. Imagine that she wishes to reallocate 30% of her 401(k) account in Mutual Fund A, 30% in Mutual Fund B, and 40% in Mutual Fund C. Because the performance of the funds is subject to change as the market fluctuates, the plan's recordkeeper or third-party administrator ("TPA") rebalances Jane's account to maintain her designated percentages. In order to properly rebalance, the recordkeeper or TPA must know the NAV of each fund and the total value of Jane's account. Today, this is done same-day in a seamless way using the three-step process described above—once the NAV of Mutual Funds A, B, and C are received, the recordkeeper can determine how many shares of each fund to buy or sell for Jane and then send orders to the three funds after 4 p.m.

Impact of Hard Close. Under a hard close, because the NAV would be unknown at the time that the reallocation was processed, a recordkeeper would be forced to rely on a mere estimate of what the NAV of each fund will be at the end of the day, possibly based on the prior day's NAV. Any allocations would only be approximations of the allocation that Jane designated for her account. And a simple reallocation might take days, during which Jane might have funds that are not invested in Mutual Fund A, B, *or* C, but instead are in cash awaiting rebalancing.

Example 3: ***Participant Loan.*** Consider a loan taken pro rata from a participant's investments. Assume that Joan, a participant, requests a $25,000 loan from her 401(k) account. In order to comply with tax code rules, which require that the loan be not more than 50% of the participant's account,[13] the recordkeeping system must know the participant's accurate account balance to ensure the 50% rule is met. In order to maintain the existing asset allocation of the account, Joan requests that the distribution be made pro rata across all of the account's investments. (Many plans actually require by plan terms that loans and distributions are processed pro rata among the funds in the account.) Under current omnibus recordkeeping procedures, the recordkeeper receives the NAV after 4 p.m. Because the recordkeeper knows the NAV of all the funds, the recordkeeper can properly process the pro rata loan, because having the NAV allows the recordkeeper to determine how many shares of each fund need to be

[13] Internal Revenue Code § 72(p)(2)(A)(ii).

redeemed to obtain a total of $25,000. And because the recordkeeper knows the NAV of each fund, the recordkeeper can ensure that the 50% rule is met.

Impact of Hard Close. A hard close requirement would not allow participants to receive pro rata loans. As with Example 2 involving account reallocation, recordkeepers would be forced to rely on an estimate of a fund's price, possibly based on the prior day's pricing. Consequently, it would not be possible to accurately allocate the distributions for the loan from the participant's account, nor would it be possible accurately comply with certain legal requirements, such as the 50% limit imposed by the tax code.

Example 4: *Hardship and Emergency Distributions.* The Commission's discussion of its proposal seems to assume that retirement plan savers are long-term savers who do not need to have transactions processed quickly. That is, very often, not true. Under current law, a participant may request a hardship distribution, but the law requires that the amount of the distribution must be limited to the amount of the need. In the SECURE 2.0 Act, which was enacted at the end of 2022, Congress created new plan features to facilitate distributions to address emergencies.[14] These distributions are, by definition, needed quickly because the worker has some sort of immediate personal need, such as to avoid eviction, pay medical expenses, or fix a car to get to work. The defined contribution recordkeeping system has evolved over many years to provide for prompt distribution from the plan, and this is possible despite the significant complexity of plan investment platforms because the recordkeeper processes transactions knowing the price of the funds in a participant's account. Thus, these critical distributions can be processed quickly to meet the emergency need.

Suppose that Jennifer, another participant, has just received an eviction notice, which states that if past-due rent is not paid within five days, she will be put out on the street. Under modern defined contribution recordkeeping, Jennifer can receive a hardship distribution from her plan quickly—she enters the request into the plan's distribution system, attaches the necessary documentation, and overnight, the necessary funds in her account are redeemed pro rata.

Impact of Hard Close. If a hard close is implemented, the steps that are required to process hardship and emergency expense distribution requests will need to be completely unbundled and processed in steps. Because the recordkeeper does not know the price of the mutual funds in Jennifer's account when it sends the trade, to process the distribution pro rata, the recordkeeper will need to either overestimate the number of shares needed (which is more than the law allows to be distributed) or underestimate the number of shares needed (which is not

[14] SECURE 2.0 Act of 2022, Pub. L. No. 117-328, §§ 115, 127 (2022).

enough to keep Jennifer off the street). If not enough shares were liquidated, it would take another day for Jennifer to have the funds needed to pay the rent.

In practice, many retirement savers make contributions, account reallocations, loans and distributions based on dollars, not shares. Under the current system, an exchange from one equity mutual fund to another is straightforward because both funds know the NAV, which is provided by mutual funds shortly after 4 p.m. But a hard close would complicate even the simplest of transactions, likely requiring processing in multiple steps. The consequence is that the plan participant is removed from the market for an entire day.

In other words, the hard close proposal ignores the reality that the NAV is critical to processing trades, and would create a reconciliation nightmare by changing the ability of recordkeepers to determine the value of a fund in dollar amounts. This uncertainty also affects plan participants, who will not know the true value of their trades until well after their order is placed.

In the proposal, the Commission suggests that concerns about exchanges among funds are mitigated by a rule in the proposal that an "eligible order" would include a direction to purchase one fund's shares using the proceeds of a contemporaneous order to redeem a specific number of shares of another mutual fund. Perhaps the Commission believes that transactions such as those described in Example 1, above, might still be possible in one day. That is not correct; this is no solution for the problems created for retirement plans. First, without knowing the NAV, the recordkeeper cannot send an instruction based on a specific number of shares, and very few transactions within plans are based on shares rather than dollar amounts. In addition, only a small number of defined contribution transactions are a simple exchange of one mutual fund for another.

B. A hard close is not possible using current recordkeeping technology.

In its proposal, the Commission states that "because technology has advanced since the Commission last considered a hard close in 2003, we generally do not believe . . . that intermediaries would need to establish cut-off times significantly earlier than the pricing time set by the fund."[15] This is not correct. While there have been developments in recordkeeping and trade processing technology in the 20 years since the Commission first proposed – but eventually abandoned – a hard close requirement in 2003, those developments have been in service of improving omnibus recordkeeping and making front-end web-based systems easier to use,[16] not developing technology to completely unbundle the current omnibus recordkeeping system. Ultimately, the same operational difficulties that existed 20 years ago still exist today, and there

[15] Proposed Rule, at 77,212 (referring to the Commission's 2003 hard close proposal, at 68 Fed. Reg. 70,388 (Dec. 17, 2003) [hereinafter "2003 Proposed Rule"]).

[16] The participant and plan sponsor experience of interacting with the plan via web-based technology is significantly improved in the last 20 years, allowing faster execution of retirement transactions.

is no technology that exists now that would facilitate simple compliance with a hard close.[17] A major overhaul of the current system would be required to implement a hard close, and such an overhaul would do away with the resources the retirement plan industry has invested in recent decades to improve recordkeeping for the benefit of participants. It is also possible that even designing and implementing such a system, considering its complexity and the volume of transactions involved, would not be possible given the computer processing capacity currently economically viable for retirement plans.

The reason the technology to implement a hard close does not exist is *not* because no one has bothered to develop it. The reason is that the omnibus recordkeeping that SPARK members currently use is the best approach. No one would deliberately develop the systems that will be needed to implement the Commission's hard close proposal, because, as we discussed above, retirement plan savers would be much worse off by completely unbundling transactions to support a 4 p.m. hard close.

III. A HARD CLOSE WOULD GREATLY HARM RETIREMENT PLAN PARTICIPANTS BY MAKING THEM "SECOND-CLASS" INVESTORS

If the Commission implements a hard close requirement, the millions of retirement plan participants who own mutual funds through their retirement accounts would be reduced to "second-class" investors. A hard close would disadvantage retirement savers by forcing them out of the market early in the day, reducing the information they have available to make investment decisions, and forcing them to shoulder the extreme costs of reconfiguring the existing 401(k) trade processing system. Because retirement plans are major investors in mutual funds, the implementation of a hard close would have extensive negative impacts.

A. A hard close would force an early cut-off time on retirement plan participants.

A hard close would create a two-tier system – one for those who directly invest with a mutual fund, and another for those that invest through intermediaries, such as the typical retirement plan participant – that disadvantages the latter group by cutting them off from market participation much earlier in the day than other investors.

Currently, an investor can submit an order to purchase or redeem a mutual fund share and receive the current day's price if the order is placed with an intermediary, e.g., a retirement plan recordkeeper or TPA, before the fund's pricing time, at which point the fund calculates the NAV. The process to calculate the NAV typically starts at 4 p.m. ET. A particular day's pricing is still available to the investor even if the order is actually received by the fund, its designated transfer agent, or a registered securities clearing agency *after* the pricing time, as long as the order was placed before the pricing time. Orders placed after the pricing time on a particular day receive the next day's NAV. Under the hard close proposal, an order to purchase or redeem a fund's shares would be executed at the current day's price *only if* the fund, its designated transfer agent,

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[17] Even newer technologies such as distributed ledger or blockchain would not solve the technology issues applicable to implementing a hard close.

or a registered securities clearing agency receives the order *before* the pricing time as of which the fund calculates its NAV.

The Commission's proposal would cause significant harm to retirement plan participants. Those who invest directly with a mutual fund – typically wealthier individual investors or large institutions – could place orders to purchase or redeem shares up until a fund's pricing time, i.e., up to 3:59 p.m. Conversely, participants in retirement plans, and others that invest in mutual funds through intermediaries, would be subject to a much earlier cut-off time. In order to deliver plan-level trade orders to a mutual fund ahead of the 4 p.m. hard close, participant-level transaction instructions would need to be cut off well before – likely *many hours before* – 4 p.m.

One SPARK member has estimated that all website-, paper-, and phone-based participant transactions would need to be cut off at least by noon ET, and probably earlier, in order to facilitate a hard close. Others have told us that even noon ET may not be soon enough; in fact, depending on how the trading systems are put back together after the Commission's proposal smashes them to pieces, the cut-off might be the prior day. Whatever the cut-off time, on early market close days, the cut-off time is even earlier. Retirement plan participants on the West Coast may have a cut-off time that is during breakfast, or perhaps before they have woken up in the morning. Participants who did not submit orders before the cut-off time would receive the next day's NAV despite the fact that they may have placed the order early in the day. In addition, as described in Part II, the processing of a trade could take multiple additional days compared to current procedures.

The truth is, we cannot say with certainty when the cut-off time will be, because we do not have any experience in rebuilding an omnibus trading system from scratch using a hard close requirement – if one could even call it "omnibus" anymore.

While the number of direct investors is much smaller than the number of investors who invest via an intermediary, a hard close would nevertheless create an imbalance between those two sets of investors. A hard close would also have wide-ranging impacts on investments beyond mutual funds, likely requiring this earlier cut-off time to apply across all plan investment options, including CITs and separate accounts.[18] An earlier cut-off time would also likely apply to broker-dealers. Not only would cut-off times be earlier, but there would also be significant variation in cut-off times across the retirement industry, depending on the particular investment and the capabilities of each recordkeeping firm.

The effects of an earlier cut-off time on retirement plan participants would be disastrous. First, the *quality* of investments available to plan participants would diminish. A hard close would put participants in a position where they would be required to execute trades with less information on the day's market because an order would have to be placed hours before the pricing time. This would result in exposure to investment risk, that is, the financial impacts of

[18] Alternatively, recordkeepers could develop a non-mutual fund recordkeeping system without an earlier cut-off time, but this would likely only be useful for larger plans, and would create additional fiduciary challenges for plan fiduciaries.

market movements which occur after the pre-market close cut-off necessitated by this rule. A narrow order window would have harmful effects on the quality of the available investment menu and would also expose participants to short-term price volatility, which, contrary to the Commission's assertion in its proposal,[19] is a real concern even for long-term investors. Retirement savers not located on the East Coast, particularly those on the West Coast, would be especially disadvantaged, with their window for orders shaved down by an additional three hours or more. In contrast, investors placing orders directly with a mutual fund would retain the ability to react to developments in the market right up until the pricing time. Plan participants would have less information than other investors on which to base a decision that affects – in most cases – their single largest investment asset.[20] This all leads to confusion for retirement savers and to a much worse investing experience.

Second (and discussed at greater length in Part II), an earlier cut-off would cause real delays in participants receiving their retirement funds. In its proposal, the Commission expressed the view that it believes "most fund orders are not time sensitive." This is not true. The need for funds may be urgent in many cases, and not all individuals can wait several days to receive their funds. Many retirees ***depend*** on timely access to their retirement savings for rent, food and medical expenses. These types of needs cannot be put on hold for multiple days while transactions are processed under a hard close.[21]

Lastly, implementing a hard close would disrupt the existing retirement savings system in a way that would cause confusion among participants and erode confidence in the employment-based retirement savings system. Retirement savers understand how the existing system works; they expect that they are able to submit orders up until a fund's pricing time just like any other investor, that the processing of their trades will be efficient, and that they will have relatively quick and easy access to their funds when they need it. Upending the existing retirement system would lead to confusion among participants because of delays in the pricing of trades. For example, even with new disclosures of the new cut-off times, some individuals will be surprised to find that a trade placed at the same time in a 401(k) plan and directly with the mutual fund *might have a completely different price*, with no reasonable explanation for the discrepancy.

In today's retirement industry, SPARK members generally apply the same market close cut-off time (typically 4 p.m. ET) for trading. The hard close requirement would introduce

[19] Proposed Rule, at 77,213 (stating the view that "[m]ost fund shareholders are long-term investors, and thus we believe that most fund orders are not time sensitive").

[20] For many reasons, participants could not simply avoid these harmful results by choosing to invest in other investment options, such as CITs. 403(b) plans, for example, do not currently have the ability to offer CITs in the same manner as 401(k)s, and even if they could be offered as an investment option in a plan, CITs are not necessarily available to plans of all sizes.

[21] Americans can count themselves lucky that the Commission had not implemented this hard close when the pandemic hit. Congress acted quickly to allow for "coronavirus-related distributions" in the CARES Act, which allowed for emergency access to retirement funds for those Americans who needed emergency savings to deal with hardship created by COVID-19. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 2202, 134 Stat. 281, 340 (2020). Had the Commission's hard close been in place, distributions allowed by the CARES Act would have been delayed.

significant variation in potential cut-off times across the industry, depending on the investment and capabilities of each recordkeeping firm. This would be a particularly challenging issue for participants with multiple retirement plans, which could potentially all have different deadlines for the individual to place his or her trade. Retaining participant confidence in the retirement system is paramount to ensuring that Americans have enough retirement savings, especially when so many Americans are behind on what they need to save for retirement.[22]

These extremely negative impacts would incentivize changes to the existing mutual fund system that would only further harm retirement savers. For example, one could envision that a response to the Commission's proposal might be to place pressure on recordkeepers to offer only in-house investment products, because it would be much easier to process trades on proprietary products.[23] SPARK members have also speculated that some plans might simply avoid registered mutual funds altogether, or move to alternative investments that are exempt from the proposal. The truth is that we cannot fully predict what might happen in terms of market changes, but we know that it will not be beneficial. We very much hope that retirement savers do not become guinea pigs in the dangerous experiment that the hard close proposal would create.

B. A hard close would create the risk of harmful market practices because of asymmetry of market information.

Imposing an earlier cut-off time applicable only to some mutual fund investors but not others would create market distortions and provide opportunities for some to develop sophisticated techniques to capitalize on asymmetrical market information. A hard close would require retirement plan participants that invest through intermediaries to place orders many hours before 4 p.m., while institutional mutual fund investors would continue to be able to place orders up until 3:59 p.m. on the same day. In practice, this would mean that institutional mutual fund investors have – *every single day* – more market information than those saving in defined contribution plans. Consider, for example, that a major event occurs at 2 p.m. ET and results in a significant shift in the market. An institutional investor has two hours to process and react to the event and then place an order to purchase or redeem a mutual fund share before the day's NAV is calculated. A retirement plan participant, on the other hand, already placed any orders for the day well before the event even occurred and is completely helpless to react to the market-shifting event in any way until the following day. In fact, imagine a participant who puts in a trade at 12:30 p.m. ET, shortly after the plan's new 12 p.m. cut-off. Such a participant is left to wait 27.5 hours while the market shifts beneath her feet before that trade is executed.

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[22] James Royal, *Survey: 55% of working Americans say they're behind on retirement savings*, Bankrate (Oct. 24, 2022), https://www.bankrate.com/retirement/retirement-savings-survey-october-2022/ (reporting that 55% of respondents stated that they are behind on saving for retirement).

[23] Another possible consequence of a hard close would be to force investors who wish to avoid an early cut-off time to hold multiple direct accounts with multiple separate funds. While some investors could take this approach, this would not be available to retirement plan participants.

We are extremely concerned that this information asymmetry will be exploited at the expense of those who cannot have their contributions, distributions, and account reallocations processed at the same time as other fund investors.

C. Retirement plan participants would bear the costs of reconfiguring the existing recordkeeping system to accommodate a hard close.

In the preamble to the proposed rule, the Commission suggests that the cost of reconfiguring trade processing systems to accommodate a hard close will fall on recordkeepers. This assumption is incorrect. As described in greater detail in Part II, the process of reconfiguring recordkeeping and trade processing systems will be extremely complex and expensive because a hard close could would *break* the existing 401(k) system and require a completely new software architecture. The sheer volume of transactions undertaken with respect to mutual funds, the complexity of plan and fund rules applied, and the variety of reconciliations with trustees and funds performed mean that modifications to existing trade processing systems would be complex and costly.

The costs of implementing a hard close go beyond those associated with designing and implementing a new trade processing system – recordkeepers would also incur additional administrative costs, including the costs associated with making amendments to trading agreements and plan provisions; communicating changes in plan procedures and plan terms (e.g., for submitting participant investment instructions and processes for rebalancing transactions, loans and withdrawals); modifying plan administrative procedures (e.g., by changing the price used to determine rebalancing transactions from the current day's prices to a previous day's prices); and updating service agreements. In some circumstances, a recordkeeper or plan may have a legal obligation – such as in a service contract or the plan document – to give a participant a particular day's price for a transaction. As discussed above, a hard close may require the use of an estimated NAV rather than the actual NAV for the day. In those cases, recordkeepers or plans might be responsible for absorbing any difference in price resulting from the use of an estimated NAV – which could be significant if there is any market outlier activity during the day. Alternatively, plans and recordkeepers would have to bear the expense of renegotiating contracts or amending plan documents to prevent these situations from happening. One SPARK member estimated that the cost of implementing the necessary changes would cost that one firm *at least $25 million – and likely much more*.

Recordkeeping is a low margin business, so it is not possible for recordkeepers to absorb these costs. Ultimately, it is plan participants that would bear the expense of a massive transformation of the existing 401(k) system, directly through recordkeeping charges or indirectly through additional fund-level charges.

If costs are significant enough, some recordkeepers and administrators **may exit the business**. Long-term, this would reduce industry competition and ultimately increase plan administration costs. There has been significant consolidation in the recordkeeping industry because of low profit margins, and if smaller recordkeepers cannot afford the systems changes, we will see even more consolidation. Some of SPARK's providers might benefit, but even so, the concern about this proposal is universal among our membership.

A hard close would also favor "bundled" plan service models provided by fund transfer agents, which would create market distortions that will result in less choice for employers and higher expenses for participants. Under a bundled service model, a fund transfer agent providing recordkeeping and administrative services limits plan investment options to mutual funds offered by the transfer agent's investment manager affiliates (as opposed to offering participants mutual funds from different fund complexes, as is the case in an "open architecture" or "unbundled" service model). The open architecture/unbundled service model has reduced plan costs and allows plans to seek out better performing plan investment options.

A bundled system could also incentivize transfer agents that also provide recordkeeping services to create "proprietary fund only" recordkeeping offerings to avoid earlier cut-off times. This would have a negative effect on plan fiduciaries by forcing them to choose between the potentially more expensive proprietary offerings and open architecture/bundled offerings with an earlier cut-off. Overall, the favoring of a bundled system would result in less choice and higher expenses for participants and would interfere with a plan sponsor's ability to search for the best fund for each type of investment option offered to participants.

D. A hard close would result in a massive diversion of resources from improving the defined contribution system and would undermine bipartisan improvements such as SECURE 2.0.

The cost and time of implementing a hard close would divert recordkeepers' budgets and other resources away from participant-related issues, further harming participants. The process of overhauling trade processing procedures would be an overwhelming task. Recordkeepers would be required to expend a significant amount of time and money implementing the required changes to their systems in lieu of focusing on issues such as enhancing participant education and improving the general retirement plan experience. One SPARK member estimated that the time it would take to implement a hard close would be – at a minimum – two to three years, and would require at least 200 business resources and hundreds of thousands of hours to support, plus additional training and education for staff. Critical projects, such as those improving systems to enhance benefits to plan sponsors and participants, would need to be deferred or never undertaken at all.

Congress recently enacted two major pieces of bipartisan retirement legislation – the SECURE Act of 2019 and the SECURE 2.0 Act, which was enacted at the end of 2022[24] – that make major upgrades to the private retirement system.[25] Many of the changes in these laws will

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[24] Setting Every Community Up for Retirement Enhancement Act of 2019, Pub. L. No. 116-94 (2019); SECURE 2.0 Act of 2022, Pub. L. No. 117-328 (2022).

[25] Many of these changes are optional, such as new features for emergency savings and student loans. Faced with optional technology builds to offer these features or forced changes to implement the Commission's hard close, the favorable, optional improvements will be pushed back by many years.

result in defined contribution plans better serving participants by making it easier for them to save for their future and streamline loans, withdrawals, and distributions. To implement those changes and make available the variety of new savings tools over the next few years, recordkeepers must make major investments. Completely rebuilding trading systems from scratch will divert recordkeepers' energy and attention and undermine these bipartisan improvements.

E. A hard close would result in millions in lost earnings as retirement savers are out of the market.

Efficiencies allowed by daily trading through 401(k) and similar plans have substantially eliminated legal and fiduciary issues relating to plan funds that are held uninvested for short periods of time. As noted above, a significant goal of how the modern recordkeeping system is designed is to ensure that participants saving for retirement stay invested. Delays in participant transaction processing, especially in the case of exchanges, would result in more plan funds held uninvested, which will have costs that build up over time. The built-up costs of retirement savings held uninvested will harm participants – costs which would overwhelm any benefits associated with swing pricing.

F. A hard close would cause a variety of troubling issues under ERISA's fiduciary rules.

Because processing of contributions, asset allocations, loans, and distributions will completely change under a hard close, a variety of troubling issues under ERISA's fiduciary rule will be created. Given the short comment window and the Commission's refusal to extend the comment period, we have only begun to explore these issues. We are also somewhat hampered in fully analyzing these issues because, as noted earlier, the truth is that we cannot fully predict what might happen in the dangerous experiment that the hard close proposal would create. Nonetheless, we believe that, at a minimum, the following ERISA issues would need to be solved:

- Under ERISA, plan fiduciaries must comply with the plan document; failing to do so is a breach of ERISA.[26] For example, if a plan document states that a loan may not exceed 50% of the participant's account balance, or that distributions must be made pro rata, "close enough" is not good enough.

- Recordkeepers may need to process transactions using estimates. This could suggest that recordkeepers are acting as ERISA fiduciaries because they are exercising discretion by estimating amounts involved in a transaction. But recordkeepers cannot and will not take on fiduciary responsibility and liability, at least not without significantly increased fees. The existing defined contribution system is built on recordkeepers acting under the direction of the plan's fiduciaries and following the plan document and operational procedures, *without* exercising discretion.

[26] ERISA § 404(a)(1)(D).

- If transactions are processed using estimates which are later reconciled to the actual NAV, this creates questions as to who pays for, or keeps, the difference between the estimate and the actual NAV. The Department of Labor has, for example, taken the position that corrections of trade errors create ERISA issues which must be carefully addressed.[27]

- Because transactions may need to be processed in stages, an ERISA plan, or its recordkeeper, may need to have a cash holding account (similar to what most retail brokerage accounts use). Depending on how such an account is designed, it may or may not constitute "plan assets." It is unclear if such a cash holding account would be what the Department of Labor calls a "designated investment alternative" or not.[28] It is also unclear what additional disclosure, if any, would be needed.[29] And to the extent the cash holding account generated interest, or "float," this might create a number of disclosure and other issues.[30]

The foregoing likely only scratches the surface of the fiduciary issues that may be created if the Commission's hard close proposal is adopted. We have already met with senior officials at the Department of Labor's Employee Benefits Security Administration to alert them to this, and they requested that we provide them with a copy of our comment letter once filed.[31]

IV. THE COMMISSION'S PURPORTED "CURE" IS WORSE THAN THE DISEASE

The SPARK Institute recognizes that the Commission believes that a hard close requirement is necessary to facilitate its goal of implementing swing pricing in order to ensure that transaction costs are appropriately priced into a mutual fund's NAV. However, the perceived benefits of the swing pricing proposal are *vastly outweighed* by the harm, disruption, and cost that would fall on retirement savers and the chaos that a hard close would cause by breaking the existing omnibus recordkeeping system. The Commission is proposing to shoot a mosquito with a bazooka.

A. The concern over late trading is overstated.

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[27] For example, the Department of Labor takes the position that any gains that are kept in connection with a trade error create additional compensation with must be disclosed in accordance with ERISA section 408(b)(2). *See News Release*, Dep't of Lab. (Feb. 4, 2013), https://www.dol.gov/newsroom/releases/ebsa/ebsa20130204.

[28] *See* 29 C.F.R. § 2550.404c-1.

[29] *See id.* § 2550.404a-5.

[30] *See* Department of Labor Field Assistance Bulletin No. 2002-03 (Nov. 5, 2002), https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2002-03. To be clear, we are not saying that interest on such account is definitely "float" for ERISA purposes. This is just one of the issues that would need to be considered.

[31] The Commission's proposal gives no indication that the Commission consulted with the Department of Labor before proposing a rule change that, as the Commission itself lays out, will harm retirement plan savers.

In the proposal, the Commission states that a hard close would help prevent abuses related to late trading of fund shares.[32] Having discovered and investigated several high-profile instances of late trading in the early 2000s, late trading in connection with after-hours trade processing was one of the Commission's primary concerns in 2003 when it last considered, but did not adopt, a hard close.[33] But today, late trading is a non-issue. Recordkeepers and other intermediaries take steps to prevent late trading abuses and ensure the integrity of their systems. Late trading in 2023 is extremely rare, if it happens at all. In the wake of the late trading issues of the early 2000s, the Commission also took its own steps to combat late trading by adopting rules to address those concerns.[34] In any event, the Commission does not actually cite to any evidence of continued late trading, and therefore suggestions in the release that the hard close rule is necessary or helpful to avoiding trades that violate the current pricing rules are unfounded.

If the Commission continues to believe that there is a valid risk of late trading, an alternative to a hard close requirement would address this issue. In 2003 and 2004, the SPARK Institute met multiple times with the Commission to discuss a variety of ways to implement third party "time-stamping" or similar technologies to address late trading without a hard close.[35] Under that alternative proposal, all critical trade information needed to prepare orders for purchases or sales of shares, other than the fund price, would be captured electronically and time-stamped before the pricing time each day; the time stamp would be applied by a third party and would be tamper proof. We would be happy to reengage in those discussions with the Commission and demonstrate that any substantiated late trading concerns can be addressed without implementing a hard close.

B. Any potential benefit from swing pricing for retirement savers is significantly outweighed by the harms of a hard close.

We understand that the goal of the Commission's swing pricing proposal is to allocate transaction costs fairly and mitigate dilution in order to protect investors, such as retirement plan participants. However, the issues that swing pricing are designed to solve are simply not of great significance to retirement plan investors, who both make regular contributions and take regular distributions. The gains and losses experienced over a lifetime of participation in the 401(k) system largely all net to the same result. Whatever benefits that retirement plan participants would experience as a result of the swing pricing proposal would be *significantly less* than the harms that a hard close would cause. This is true in terms of the costs of implementing a hard

[32] Proposed Rule, at 77,184, 77,209. We note, however, that the Commission's only reference to actual late trading is from 2003; the Commission provides no evidence of any late trading in the last 20 years, and certainly no evidence the issue is widespread.

[33] *Id.* at 77,209; 2003 Proposed Rule, at 70,389.

[34] *See, e.g.*, Rule 38a-1 of the Investment Company Act of 1940, 17 C.F.R. § 270.38a-1 (requiring written policies and procedures reasonably designed to prevent violation of the securities laws, oversight of compliance by the fund's service providers, and designation of a chief compliance officer).

[35] *See, e.g.*, Letter from The SPARK Institute to Penelope Saltzman, Branch Chief, Office of Regulatory Policy, Div. of Inv. Mgmt., Sec. and Exch. Comm'n (Jan. 4, 2005) (available at https://www.sec.gov/rules/proposed/s72703/spark010405.pdf).

close and the ongoing costs of an earlier cut-off and multiple-day delays in processing contributions, distributions, loans, and investment allocations.

We would also note that swing pricing is of most value with respect to small mutual funds, such as newer funds, sector funds, and other niche funds, where large swings in purchases and redemptions are common. These funds may have a redemption that exceeds 1-2% of the fund from time to time. But 401(k) and similar plans invest primarily in very large, low-cost mutual funds, including index funds, low-cost actively managed funds, and large target date funds. These funds rarely experience the kind of redemptions that would necessitate a swing in price. ***In other words, the <u>disadvantages</u> of a hard close requirement would fall on retirement savers, but those retirement savers would not enjoy the <u>advantages</u> of swing pricing.***

In the proposed rule, as justification for the swing pricing proposal, the Commission focuses on the market disruptions in March 2020 brought on by the COVID-19 pandemic. Large market movements like the events of March 2020 are exceedingly rare, and, in the end, the capital markets proved able to weather these types of events.[36] While the benefits of swing pricing may be felt by retirement plan participants in these rare circumstances, the hard close proposal will impose *daily* hardships on participants and permanently reduce them to "second-class" investors.[37] The catastrophic effects of a hard close cannot compensate for the modest benefits that swing pricing would afford investors.

C. Comparisons to the European mutual fund system are misplaced.

In the proposal, the Commission draws comparisons to the European mutual fund system – where swing pricing is common – and states that swing pricing could be a useful tool in the U.S. to weather events like those in March 2020. As discussed above, we believe strongly that any benefit of swing pricing to retirement plan participants cannot compare to the harms of a hard close. We also believe that the comparison to the European mutual fund system is misplaced, and the ability of Europe to implement swing pricing without harming investors has no bearing

[36] The government has taken a variety of actions to address unusual market stresses and liquidity challenges. In fact, a separate part of the Commission's proposal addresses liquidity. Many of these proposals and actions focus, appropriately, on fixed income securities and illiquid securities. These various proposals and actions are beyond the scope of this comment letter, but what they all have in common is that they can be implemented without breaking the 401(k) system.

[37] And while swing pricing may have benefits when these types of rare circumstances occur, there are also costs associated with the implementation of swing pricing that could affect retirement plan participants, as the Commission itself acknowledged when it finalized its voluntary swing pricing rule in 2016. *See* 81 Fed. Reg. 82,084, 82,092, 82,123 (Nov. 18, 2016) ("[Some commenters] argued that swing pricing may not necessarily be appropriate for all funds, as some funds may be more susceptible to significant and costly shareholder transaction activity than others, and thus requiring all funds to implement swing pricing and bear its associated costs is not justified. . . . We appreciate the commenters' concerns that swing pricing may have costs that, for some funds, may not be justified by the benefits. . . . Commenters also expressed concern that the analysis of costs [associated with the Commission's proposed rule] did not consider the substantial costs and technology and operational hurdles that must be resolved for intermediaries to provide the net flow information necessary to perform swing pricing. ***We agree that there may be significant costs for many fund complexes and intermediaries to implement swing pricing*** . . . .") (emphasis added).

on the impacts of swing pricing and a hard close in the U.S. There are several key differences between the European and U.S. systems that make swing pricing more difficult to implement in the U.S. First, the U.S. defined contribution system is unique in its size, diversity, and complexity. Data from the Organisation for Economic Co-operation and Development ("OECD") shows that U.S. retirement plan assets are much larger relative to Europe.[38] Europe does not have as many products that are dependent on the production of a NAV – such as 529 plans or variable annuities – that make up a major part of the U.S. market. Nor does Europe possess the diversity of fund companies that exist in the U.S. While Europe does have some fund of funds products, their use is much more limited in scope.

In addition, due to the time difference between Europe and the U.S., in Europe, the NAV is published in the evening, which gives European funds (particularly those tied to the U.S. markets) much more time to await necessary flow information. Because the European system is smaller and less complex, it is much easier for European mutual funds to receive full flow information every day. Consequently, the fact that the European markets have adopted swing pricing is not a reflection that swing pricing is appropriate for the U.S. While the European defined contribution system has its benefits, the U.S.'s highly developed and diverse defined contribution system provides far greater benefits, allowing Americans to collectively accumulate trillions of dollars in savings.

Critically, under the current regulatory framework in Europe, it is *optional* to adopt swing pricing. European funds also have the ability to set their own thresholds based on fund-specific factors and set their own swing factors. This versatility, plus the fundamental differences in market structure described above, is why many European funds have implemented swing pricing. *Mandatory* and rigid swing pricing as the Commission has proposed would not necessarily work well in the U.S. merely because *optional* swing pricing functions well on another continent.

Most importantly, Europe does not have the kind of omnibus recordkeeping services that have been developed in the U.S. The U.S. 401(k) system is sophisticated and mature, and it is the envy of the world, or at least it is so long as it is not broken apart by the Commission's proposal.

V. BEFORE CONSIDERING ANY ALTERNATIVES, THE COMMISSION SHOULD START FROM SCRATCH AND ENGAGE THE INDUSTRY

The entire retirement plan community was blindsided by this proposal. To our knowledge, neither the Commission nor the staff had ***any*** meaningful discussions with the plan recordkeeping industry on what systems changes might be possible in furtherance of the Commission's goal of addressing liquidity concerns and pricing procedures. The Commission did not respond to multiple requests for an extension of this very short comment period. We

[38] *Pension Markets in Focus: Preliminary 2021 Data on Pension Funds*, Org. for Econ. Co-operation and Dev. (June 2022), https://oecd.org/daf/fin/private-pensions/Pension-Markets-in-Focus-Preliminary-2021-Data-on-Pension-Funds.pdf.

have done the best we can to meaningfully respond to the Commission's proposal in the short time frame provided.

We have reviewed the Commission's requests for comments on alternatives to its hard close proposal and discussed them with our members. These alternatives are barely formed ideas and would require detailed study and discussion with the Commission and the staff, but by and large we think they would come with many of the same costs and concerns detailed above.

We are happy to have further discussions. There may be improvements that could be made to the system to allow mutual funds to avoid liquidity problems, such as improving the system of large trade notifications that is already common. Because of the relatively meager benefits we believe swing pricing would have for the vast majority of average American savers, the immense cost and disruption of the hard close proposal, and the various sketches of ideas the Commission mentioned as alternatives, until the Commission and the staff can gather meaningful input from stakeholders, the only prudent approach is to drop the hard close proposal and start from scratch, this time with honest engagement with plan recordkeepers and other intermediaries.

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For all of the reasons above, we urge the Commission not to adopt a hard close requirement, as implementing such a requirement would harm the millions of Americans saving for retirement.

If you have any questions or would like more information regarding this letter, please contact the SPARK Institute's outside counsel, Michael Hadley, Davis & Harman LLP (mlhadley@davis-harman.com). We will be contacting Commissioners and the staff to discuss our comments in person.

Sincerely,

Tim Rouse
Executive Director