CLIFFORD CHANCE

NEW SEC RULE PROPOSAL SEEKS TO MANDATE SWING PRICING AND IMPOSE A HARD CLOSE FOR MUTUAL FUNDS

On November 2, 2022, the U.S. Securities and Exchange Commission (the "SEC" or the "Commission") proposed comprehensive amendments to various rules under the Investment Company Act of 1940, as amended (the "Investment Company Act" or the "1940 Act"), concerning liquidity and dilution management for registered open-end funds, such as mutual funds (the "Proposal").[1] Among other things, the Proposal would amend Rule 22e-4 under the Investment Company Act to address ostensible weaknesses in open-end funds' liquidity risk management programs. The Proposal would also amend Rule 22c-1 to require open-end funds, other than money market funds and exchange-traded funds ("ETFs"), to implement swing pricing, and would impose a "hard close" for purchases and redemptions of mutual fund shares. The Proposal, if adopted in the proposed form, would have a far-reaching impact on the mutual funds industry. This client briefing provides an overview of the material changes included in the Proposal.

LIQUIDITY RISK MANAGEMENT PROGRAMS

Liquidity Classifications

The SEC currently requires mutual funds to classify each portfolio investment in accordance with the requirements under Rule 22e-4. Among other things, mutual funds must classify each portfolio investment into one of four liquidity classifications ("Liquidity Buckets"): highly liquid, moderately liquid, less liquid, or illiquid. Such classifications are generally based on relevant market, trading and investment-specific considerations. In the Proposing Release, the SEC noted that during the height of the COVID-19 pandemic it observed increased redemptions

[1] *Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-PORT*, SEC Release Nos. 33-11130; IC-34746 (Nov. 2, 2022) (the "Proposing Release"), available at www.sec.gov/rules/proposed/2022/33-11130.pdf.

from mutual funds and as a result, the SEC is of the view that certain weaknesses exist in mutual funds' liquidity risk management programs. In order to address these perceived weaknesses, the Commission believes that the proposed amendments would improve mutual funds' responses during future market dislocations by "promoting funds' ability to meet redemptions in a timely manner while limiting dilution of remaining shareholders' interests in the fund."[2] It must be acknowledged that while the events of March 2020, at the start of the COVID-19 pandemic, are cited in support of the Proposal, it is not clear whether widespread liquidity concerns in fact occurred during this time.

Currently, mutual funds bucket their investments into Liquidity Buckets based on the number of days in which a security can be expected to be converted to cash without significantly changing the value of such security using a reasonably anticipated trade size.[3] Using this analysis, which must be performed at least monthly, mutual funds sort investments into each of the four Liquidity Buckets.

Under the Proposal, the SEC proposes to remove the "less liquid investment" bucket in its entirety and in addition, update the definitions of each remaining Liquidity Bucket. As a result, if adopted as proposed, mutual funds would classify their investments into one of three Liquidity Buckets noted below. Further, mutual funds would also have to classify investments daily. As stated above, currently mutual funds are generally required to classify their investments monthly, but must review such classifications more frequently if there are market, trading or investment-specific considerations that can reasonably be expected to materially impact such liquidity classifications. The SEC noted in the Proposing Release that daily liquidity classifications would "promote better monitoring of a fund's liquidity" and would allow a fund to respond more quickly to changes that may impact the fund's liquidity.[4]

The following table sets forth the current Liquidity Buckets and the Liquidity Buckets under the Proposal:

Liquidity Classifications	Current Rule 22e-4	Proposed Rule 22-4
Highly Liquid Investment	Any cash held by a fund and any investment that the fund reasonably expects to be convertible into cash in current market conditions in three business days or less without the conversion to cash significantly changing the market value of the investment.	Any U.S. dollars held by a fund and any investment that the fund reasonably expects to be convertible to U.S. dollars in current market conditions in three business days or less without significantly changing the market value of the investment.

2 Proposing Release at 12.
3 *See* Rule 22e-4(b)(1)(ii)(B).
4 Proposing Release at 34.

Liquidity Classifications	Current Rule 22e-4	Proposed Rule 22-4
Moderately Liquid Investment	Any investment that the fund reasonably expects to be convertible into cash in current market conditions in more than three calendar days but in seven calendar days or less, without the conversion to cash significantly changing the market value of the investment.	Any investment that is neither a highly liquid investment nor an illiquid investment.
Less Liquid Investment	Any investment that the fund reasonably expects to be able to sell or dispose of in current market conditions in seven calendar days or less without the sale or disposition significantly changing the market value of the investment, but where the sale or disposition is reasonably expected to settle in more than seven calendar days.	Removed.
Illiquid Investment	Any investment that the fund reasonably expects cannot be sold or disposed of in current market conditions in seven calendar days or less without the sale or disposition significantly changing the market value of the investment.	Any investment that the fund reasonably expects not to be convertible to U.S. dollars in current market conditions in seven calendar days or less without significantly changing the market value of the investment and any investment whose fair value is measured using an unobservable input[5] that is significant to the overall measurement.

5 In the Proposing Release, the Commission acknowledges that that observability is a valuation concept and may not always correspond to liquidity. The Proposal would require those funds not already classifying investments valued using unobservable inputs that are significant to the overall measurement as illiquid to change their classification practices and may change the liquidity profile for those funds under the rule to be less liquid.

In addition, the Proposal proposes to update certain definitions related to liquidity classifications, including the definition of "convertible to cash/U.S. dollars" as "the ability to be sold or disposed of, with the sale or disposition settled in U.S. dollars." Currently, Rule 22e-4 defines "convertible to cash/U.S. dollars" as "the ability to be sold, with the sale settled." The Proposal also proposes to specify when a fund must start to measure the identified number of days in which it reasonably expects a stressed trade size of an investment would be convertible to cash/U.S. dollars without significantly changing its market value. The Proposing Release notes that Rule 22e-4, in its current form, does not specify when to begin counting the number of days an investment would be convertible to U.S. dollars, and as a result, open-end funds have inconsistent practices as to when they begin this measurement. According to the SEC, this allows for inconsistencies which may lead funds to overestimate their liquidity classifications. The proposed amendments would require funds to count the day of liquidity classification when determining the days in which an investment is reasonably expected to be convertible to U.S. dollars. By way of example, the Proposing Release notes that "in order for a fund to classify an investment as highly liquid on Monday, it would need to reasonably expect that the investment could be sold and settled to U.S. dollars by Wednesday at the latest."[6]

The Proposal also proposes to establish a standard that would define what constitutes a "significant change in market value." A significant change in market value for investments other than those listed on a national securities exchange or foreign exchange, such as fixed-income securities and derivatives, would be a sale that a fund reasonably expects would result in a decrease in sale price of the security of more than 1%.[7] For securities listed on a national securities exchange or foreign exchange, a significant change in market value would be anticipated if a fund sold more than 20% of the average daily trading volume of such listed security.[8]

In response to the perceived variability in funds' reasonably anticipated trade sizes and the perceived ineffectiveness of small trade sizes in helping a fund prepare for stress, SEC also proposes to require that funds assume the sale of a set stressed trade size. This is a change from the current requirement which allows for the use of reasonably anticipated trade size in classifying investments.

The Proposing Release asserts that using a small, reasonably anticipated trade size allows for a more liquid classification of portfolio holdings. Under the proposed amendments to Rule 22e-4, funds would need to measure the number of days in which an investment could reasonably be converted to cash without significantly changing the market value by using a stressed trade size of 10% of the fund's net assets by reducing each investment by 10%.[9]

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6 Proposing Release at 68.

7 The Proposing Release notes that in considering whether a sale is reasonably expected to result in a price decrease of more than 1%, a fund would be required to consider the size of the sale relative to the depth of the market for the instrument. As part of that analysis, the SEC believes a fund generally should consider, among other things, the width of bid-offer spreads. According to the SEC, the width of bid-offer spreads is an important consideration in analyzing the costs of selling a security and thus whether a sale would result in a price decrease exceeding 1%.

8 The Proposing Release notes that to determine average daily trading volume, the Proposal would require funds to measure the average daily trading volume over the preceding 20 business days. The SEC noted that using a period of 20 business days provides an appropriate measure of daily trading volume, which would reflect current market conditions as well as consider a period of recent market history.

9 Proposing Release at 45.

The Proposal also proposes to eliminate the ability for a fund to classify portfolio investments based on their asset class. Funds are currently permitted to classify investments according to their asset class but are required to separately classify investments within an asset class if the fund or its adviser has market, trading or investment-specific information that would reasonably be expected to impact the liquidity characteristics of such investment as compared to other investments within such asset class. The SEC notes in the Proposing Release that asset class level liquidity classifications are not widely used by funds and, where they are used, there is a risk of over-estimating the liquidity of a fund's investments. Additionally, the Proposing Release notes that the SEC staff has observed through outreach that liquidity risk management programs have developed so that specific and individual portfolio investment liquidity classifications are widely used and the removal of asset class level classifications is consistent with that approach.

Requirements Related to Highly Liquid Investment Minimum

Currently, Rule 22e-4 requires a fund that does not primarily hold highly liquid investments to determine a highly liquid investment minimum, review the minimum at least annually and adopt policies and procedures to respond in the event the fund's holdings fall below such minimum requirement. The Proposal proposes to require all funds to maintain a highly liquid investment minimum at least equal to the stressed trade size of 10% of the fund's net assets and would remove the exclusion for funds that hold primarily liquid investments (primary exclusion).[10] The SEC believes these amendments will allow funds to have sufficient liquid investments to manage stressed conditions and increased levels of redemptions. Moreover, the Proposing Release notes that while the proposed minimum of 10% of a fund's net assets may be a suitable highly liquid investment minimum for most funds, certain funds may find a higher amount appropriate depending on a fund's liquidity risk factors and investment objectives. Thus, a fund would be required to consider a specified set of liquidity risk factors to determine whether its highly liquid investment minimum should be above 10%.[11]

In addition to requiring that funds maintain a prescribed highly liquid investment minimum, the Proposal would require a fund to subtract the value of any highly liquid assets posted as margin or collateral in connection with derivatives transactions that are classified as moderately liquid or illiquid and any fund liabilities from the value of its highly liquid assets. This requirement aims to decrease the likelihood that a fund would be unable to meet its redemption obligations as those assets may not be available for the fund to use to meet such redemptions. According to the SEC, where a fund enters into a moderately liquid

[10] The Proposing Release notes that the SEC adopted the primarily exclusion because it believed the benefits associated with requiring such funds to determine and review a highly liquid investment minimum, or to adopt shortfall procedures, would not justify the associated burdens. However, since the adoption of the primary exclusion, the SEC and its staff have observed that a fund relying on the primarily exclusion may experience significant declines in its liquidity that result in the fund holding less than 50% of its portfolio in highly liquid investments. By way of example, the Proposing Release notes that a fund that invests significantly in a given foreign market and that generally classifies those investments as highly liquid can experience substantial declines in the amount of its highly liquid investments if, for example, there is political or economic turmoil in or an extended holiday closure of that foreign market. Furthermore, the Proposing Release posits that funds that currently use the primarily exclusion instead of determining and maintaining a highly liquid investment minimum do not have the benefit of shortfall procedures, including board oversight, to respond to events or market conditions that may cause the fund to fall under its previously determined level of primarily held highly liquid investments.

[11] Proposing Release at 80.

or illiquid derivative and posts highly liquid assets as margin or collateral, the posted collateral is highly liquid, but the fund cannot access the value of posted assets unless the fund exits the derivatives transaction.[12]

SWING PRICING PROPOSAL

What is Swing Pricing?

Swing pricing allows for the adjustment ("swing") of a fund's current net asset value ("NAV") when certain conditions are met to reflect the cost of trading activities. Thus, swing pricing allows funds to adjust their net asset value based on the transactions of the redeeming investors, such that trading costs are borne by the exiting investors.

Proponents of swing pricing see it as an effective tool to mitigate dilution and manage liquidity risks, particularly during periods of market volatility. By allowing funds to adjust their NAV, swing pricing effectively allows funds to pass on to the shareholders who buy or sell mutual fund shares the cost associated with those trading activities. Doing so prevents non-redeeming shareholders from bearing all the costs resulting from those transactions. It also removes the incentive for shareholders to redeem their shares early (the "first movers' advantage"), which could cause a decline in the fund's value if many shareholders are selling a large number of their shares simultaneously in a stressful market.

The SEC initially authorized the use of swing pricing in 2016, but no eligible fund has implemented swing pricing thus far. In the Proposing Release, the SEC acknowledges that several features of the current U.S. market structure may explain why funds have been reluctant or unable to adopt swing pricing. The largest hurdle to the use of swing pricing in the United States has been the fact that many funds currently do not receive all orders from intermediaries until after they have calculated their NAVs. This delay in information prevents funds from adjusting their NAVs to reflect the costs arising from those orders. In addition, the SEC recognizes that the potential cost of implementing swing pricing is a further reason why it would be burdensome for the industry.

Swing Pricing in Europe

While swing pricing has not yet gained traction in the U.S., many European countries use swing pricing as an anti-dilution method. The Proposing Release discusses the success that European jurisdictions have had using swing pricing, citing a survey showing that funds using swing pricing were able to recoup approximately 0.06% of total net assets, on average, from redeeming shareholders during the market volatility of March 2020.[13] The SEC has pointed to the success of swing pricing in these countries to further bolster the Proposal. However, it is important to note that the infrastructure existent in the European countries which allows for the ubiquitous implementation of swing pricing is not on par with existent infrastructure in the United States. In fact, International Monetary Fund noted in its October 2022 report[14] that while swing pricing is commonly used by funds in Europe, it has not been implemented by funds in the United States,

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12 Proposing Release at 85.

13 Proposing Release at 31.

14 Int'l Monetary Fund, Asset Price Fragility in Times of Stress: The Role of Open-End Investment Funds 80 (2022), https://www.imf.org/-/media/Files/Publications/GFSR/2022/October/English/ch3.ashx.

despite approval to do so by the SEC. IMF further notes that a key reason for this lack of adoption in the United States is that U.S. funds may not necessarily know the size of net flows into the fund before the price of a fund is determined and as a result, this precludes them from applying a swing factor that is based on net flows. In jurisdictions such as United States, alternative approaches may be better suited.

Proposed Amendments to Swing Pricing Rules

Mandatory use of swing pricing under certain circumstances

Under the current Rule 22c-1, open-end funds, except money market funds and ETFs, are permitted, but not required, to implement swing pricing. If a fund chooses to use swing pricing, the current rule gives the fund discretion to set the level of net purchases or redemptions (the "swing threshold") that would trigger when the specified adjustment to the NAV (the "swing factor") would be applied.

The proposed rule strips funds of this discretion. Instead, it would require mutual funds to use swing pricing whenever the fund has (1) net redemptions, and (2) net purchases exceeding 2% of a fund's net asset.

Changes to calculating the swing factor

The swing factor is the amount in which a fund adjusts its NAV per share when it is implementing swing pricing. The swing pricing administrator is the fund's investment adviser, officer, or officers responsible for administering the fund's swing pricing policies and procedures. As with the current rule, swing pricing policies and procedures would be subject to the fund board's approval. In determining the swing factor, the swing pricing administrator must make "good faith estimates, supported by data" of the cost the fund would incur.

- **The vertical slice approach**: Under the current rule, funds only need to consider near-term trading costs as well as borrowing costs resulting from satisfying shareholders' redemptions when calculating their swing factor. Under the proposed rule, funds would have to calculate their swing factor using the "vertical slice" approach, which the SEC believes would result in a better and more objective estimate of longer-term costs that funds would incur from shareholders' trading activities. This approach would require a fund to estimate the potential cost that may arise if it was to buy or sell a pro rata amount of each investment in its portfolio. The fund would then factor in this cost when determining the swing factor.

- **Market impact costs**: The Proposal would require funds to consider market impact costs under certain conditions. Market impact costs are described as the "costs incurred when the price of a security changes as a result of the effort to purchase or sell the security."[15] Specifically, a fund must consider market impact costs when its net redemptions exceed 1% of its NAV (the "market impact threshold") or when net purchases exceed 2% of their NAV (the "inflow swing threshold").[16]

[15] Proposing Release at 107.
[16] The swing pricing administrator may set a market impact threshold below 1% of the fund's NAV and an inflow swing threshold below 2% of the fund's NAV if doing so would be appropriate.

- **No upper limit on swing factor**: Currently, a fund that uses swing pricing may not adjust its NAV by more than 2%. The proposal removes this 2% upper limit on the swing factor. The SEC believes that an upper limit would no longer be necessary given the more specific framework it is proposing for calculating the swing factor.

Responsibilities of the Fund's Board

Under the SEC proposal, the board would need to approve the fund's swing pricing policies and procedures and review an annual written report of the fund's swing pricing practices. The board will also be responsible for designating the fund's swing pricing administrator[17] which must be reasonably segregated from portfolio management. The Proposing Release notes that consistent with the current rule, portfolio management would be excluded from being able to serve as the swing pricing administrator because "…arguably [portfolio management] might have the strongest incentives to over-estimate costs."[18]

HARD CLOSE PROPOSAL

As mentioned above, the biggest challenge to the use of swing pricing has been the institutional structure of the U.S. market infrastructure. Most investors trade mutual funds through an intermediary, such as a bank, a brokerage firm, or through their retirement account. Investors who place an order buying or selling shares before 4 p.m. ET will receive that day's trading price. Any orders placed after 4 p.m. ET will receive the next day's price. However, the current rule permits intermediaries to submit orders to funds later in the day or even the following morning. Most funds calculate their NAV once per day using the closing price at 4 p.m. ET and thus cannot consider any flow information intermediaries transmit to them after this time when calculating their NAV at 4 p.m. ET.

Accordingly, to facilitate the use of swing pricing, the SEC proposes a hard close for funds that would be required to use swing pricing under the Proposal. Under this approach, a fund (or its transfer agent, or a registered clearing agency) must receive a purchase or redemption order before the fund calculates its NAV for that order to receive that day's trading price. Orders received after the pricing time will receive the following day's price.

The SEC had previously proposed a similar hard close requirement in 2003 but did not adopt the amendment, likely due to widespread opposition from market participants.

Potential Effects of the Hard Close Proposal

Benefits of a hard close

The SEC believes that a hard close would facilitate a fund's compliance with the proposed swing pricing requirements and would help prevent late trading of fund

[17] The Proposing Release notes that the swing pricing administrator would be required to review investor flow information on a daily basis to determine: (1) if the fund experiences net purchases or net redemptions; and (2) the amount of net purchases or net redemptions. Moreover, the Proposing Release notes that it may be difficult to produce timely, good faith estimates of the market impact of purchasing or selling a pro rata portion of each instrument the fund holds. Due to these challenges, and because some securities held by open-end funds may have similar characteristics and would likely incur similar costs if purchased or sold, the Proposal would permit the swing pricing administrator to estimate costs and market impact factors for each type of investment with the same or substantially similar characteristics and apply those estimates to all investments of that type rather than analyze each investment separately.

[18] Proposing Release at 119.

shares. This would allow funds to calculate their NAV more accurately and would improve funds' operational risk management.

Operational challenges

The SEC acknowledges that the hard close would be the costliest aspect of the Proposal and would require funds and intermediaries to make significant changes to their business operations. The hard close proposal would likely have a disproportionate impact on smaller funds, some of which may not have the resources to implement the hard close and may cease to exist.

Effects on investors

The SEC expects funds and intermediaries to pass on the cost of implementing a hard close to investors. It anticipates that this could potentially make it more difficult for investors to invest in mutual funds and may lead investors to divest from mutual funds altogether.

In addition, intermediaries would likely have to set their own internal cut-off times to ensure that they can submit orders to funds by the 4 p.m. ET pricing time. This would shorten investors' mutual fund trading day, which could further lead to a decline in their appetite for mutual funds compared to other investment instruments. Commissioner Uyeda warns that a hard close may cause retirement plan sponsors to eliminate mutual funds as investment option. If that happens, collective investment trusts and other investment pools unregulated by the Investment Company Act may replace mutual funds, which would reduce investor choice and weaken investor protection.[19] Moreover, Commissioner Uyeda noted that events of March 2020 do not necessitate "wholesale changes to how fund investors purchase and redeem their shares." In her remarks, Commissioner Peirce states that the hard close proposal would have "cascading consequences"[20] as intermediaries set their own internal trading cut-off times. Administrators, intermediaries, and investors would all have to alter their current practices and expectations.

Alternatives Approaches

The Proposing Release includes several alternatives to the proposed swing pricing and hard close rules that the SEC considered.[21] With respect to swing pricing, the Proposing Release discusses the potential use of liquidity fees charged to the transacting investor and dual pricing[22] as alternative anti-dilution methods. With respect to a hard close, the Proposing Release examines the use of indicative flow information whereby intermediaries are required to provide an estimate for the anticipated flows for a given day, and later cut-off times for

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[19] *See* Mark T. Uyeda, Commissioner, U.S. Sec. & Exch. Comm'n, Statement on Proposed Rule: Open-End Fund Liquidity Programs and Swing Pricing; Form N-PORT Reporting (November 2, 2022). https://www.sec.gov/news/statement/uyedar-statement-open-end-funds-110222

[20] *See* Hester M. Peirce, Commissioner, U.S. Sec. & Exch. Comm'n., Closing Act: Statement on Proposed Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-PORT Reporting (November 2, 2022). https://www.sec.gov/news/statement/peirce-statement-open-end-funds-110222

[21] Proposing Release 158-200

[22] A fund that uses dual pricing, as discussed in the Proposing Release at 172, quotes two prices to shareholders – one for incoming shareholders (which reflects the cost of buying securities in the market) and one for redeeming shareholders (which reflects the proceeds the fund would receive from selling securities in the market).

intermediaries as alternative methods for funds to receive timely order flow information.

PROPOSED REPORTING REQUIREMENTS

The Proposal addresses various reporting requirements related to the proposed rule amendments. The amended rules would require funds to report the percentage of fund assets that fall into the updated liquidity categories on Form N-PORT. This information would be made publicly available while investment-specific classifications would remain non-public. Under the current rule, the liquidity classification information on Form N-PORT is not public.

Currently, funds are required to report their use of swing pricing on Form N-CEN. Under the Proposal, this reporting requirement would be replaced with a new Form N-PORT reporting requirement. Funds would be required to report the number of times the fund used a swing factor and the value of each such swing factor during a particular period. Funds would also be required to file Form N-PORT within 30 days following the end of each month. Currently, funds file Form N-PORT for each month but only on a quarterly basis. The SEC believes this increase in reporting will enhance its ability to assess potential market distress.

Certain requirements under Form N-1A would also be amended as a result of the Proposal. Funds would need to disclose that a financial intermediary may require that an investor submit its order earlier to receive the next calculated NAV. Form N-1A already requires that funds disclose information about swing pricing. Funds would need to comply with those requirements if mandatory swing pricing is implemented.

COMPLIANCE DATE

If adopted, the swing pricing and hard close proposals will come into effect 24 months after the effective date. The amendments to liquidity classification and reporting requirements will come into effect 12 months after the effective date.

KEY TAKEAWAYS

If adopted in its current form, we believe the Proposal would have far reaching implications for the mutual fund industry and intermediaries that transact with mutual funds and their sponsors. First, changes proposed with respect to the Liquidity Buckets will make it problematic for certain strategies to operate in an open-end fund wrapper. For example, the Proposing Release requests comment on whether the adoption of the Proposal would result in liquidation of certain strategies: "[a]re there certain categories of bank loans or other investments for which market participants may be unable to reduce the settlement time to seven calendar days or less? Which investments and why? What other effects may occur, for example, would some funds change their strategies, liquidate, or choose to be structured as a different investment vehicle, such as a closed-end fund? If some funds would convert to closed-end funds, what type of closed-end fund would they likely choose (*e.g.*, interval fund, or a closed-end fund listed on an exchange)?"[23] Similarly, the Proposing Release asks, "[w]ould the proposed changes to the liquidity classifications affect investment options available to investors? For example, would bank loan funds only be available in non open-end

[23] Proposing Release at 69.

investment vehicles? What effect would these proposed changes have on those asset classes that are less available for investment by open-end funds for liquidity reasons, the availability of credit to borrowers, and more generally, on capital formation?"[24]

The SEC understands that the Proposal presents viability issues for open-end funds. Specifically, the Proposing Release notes that two main economic effects may cause the change in the competitive landscape for open-end funds: (1) cost increases for funds, fund managers, and fund administrators stemming from proposed changes in the liquidity risk management program, proposed mandatory swing pricing, and the hard close; and (2) additional constraints on funds' holdings of certain investments that could limit these funds' investment strategies due to proposed changes to funds' liquidity classifications, the proposed definition of illiquid investments, and proposed changes to the highly liquid investment minimum.[25] As a result, if adopted in its current form, certain strategies would become unviable in an open-end fund wrapper and would lead to greater asset migration to products such as listed or unlisted closed-end funds, exchange traded funds (ETFs) or collective investment trusts (CITs). Furthermore, those asset managers that are well versed with the aforementioned structures may have an advantage over those that do not.

Implementation of swing pricing and related hard close requirement would also disadvantage open-end funds. Assuming that a hard close in the open-end fund space is feasible, the Proposing Release acknowledges that processes and systems related to executing investors' orders within their retirement plans require knowledge of NAVs prior to sending investors' trades to funds, and it may be costly to change these processes. To the extent that retirement plans can offer collective investment vehicles or ETFs that are not open-end funds but have similar investment strategies to open-end funds at a lower cost, open-end funds would become less competitive within the retirement sector. As a result, CITs may grow in popularity among retirement plan sponsors and make mutual funds less competitive.

COMMENT PERIOD

The public has 60 days to respond to the SEC proposal after its publication in the Federal Register.

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[24] Proposing Release at 72.
[25] Proposing Release at 331.

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