

110



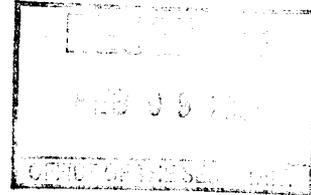
714 Hopmeadow Street, Suite 3
Simsbury, Ct 06070

1701 Pennsylvania Avenue, NW, Suite 1200
Washington, D.C. 20006
(866) 658-5058

February 6, 2004

Submitted Electronically

Jonathon G. Katz
Secretary, Securities and Exchange Commission
450 5th Street, N.W.
Washington, D.C. 20549



**Re: Proposed Amendments to Rules Governing Pricing of Mutual Fund Shares
(Release No. IC-26288; File No. S7-27-03)**

Dear Mr. Katz:

On behalf of the SPARK Institute, this letter comments on the proposed amendments to rule 22c-1 under the Investment Company Act of 1940, as amended (the "Investment Company Act"), which governs the pricing of mutual fund shares. The proposed rule amendments would impose a "hard" 4 p.m. cut-off for submitting purchase and sale orders for mutual fund shares to a designated fund transfer agent or registered clearing agency (e.g., Fund/SERV). The SPARK Institute is an educational trade council affiliated with the Society of Professional Administrators and Recordkeepers ("SPARK"). SPARK brings together members of banks, insurance companies, mutual fund managers, third party administrators and benefit consultants providing services to 401(k) and other participant-directed defined contribution retirement plans ("plans"). SPARK member companies provide services to approximately 97% of the approximately 45 million defined contribution plan participants in this country. SPARK Institute members represent a broad cross section of those provider groups, including many of the major players in the defined contribution retirement plan industry.

The SPARK Institute believes that adopting a hard 4 p.m. close for mutual fund orders would have a significant adverse impact on American workers participating in 401(k) and other defined contribution retirement plans, and this impact will not be justified by potential benefits to participants as long-term investors. Therefore, we strongly urge the Commission to adopt an alternative approach that would allow intermediaries, including plan recordkeepers and administrators, to submit mutual fund orders after 4 p.m., subject to specific protections against late trading. We discuss below the specific consequences of the proposed hard 4 p.m. close for plan participants and the

retirement plan services industry. We also explain how an alternative approach based on an annual audit of internal controls and procedures would provide certainty against the possibility of unlawful late trading, while avoiding the extremely detrimental consequences of the "hard" 4 p.m. close. Some specific comments on the proposed rule amendments and retirement plan processing solutions recently proposed by the National Securities Clearing Corporation ("NSCC") are also provided.

A. Impact of a "Hard" 4 p.m. Cut-off Rule

At our October 2003 meeting with Paul Roye, Cindy Fornelli and other members of the Commission's staff, and in a comment letter following that meeting (dated October 31, 2003), we discussed in some detail how the proposed hard 4 p.m. close would adversely affect services to plans and plan participants. We provide below additional comments on these problems. Importantly, the NSCC's proposed solutions, while helpful in reducing some issues raised by the hard 4 p.m. close, do not resolve these problems.

1. Harm to Plan Participants Most plan participants currently have access to plan administration services that allow the participants to submit investment instructions relating to their plan investment options up until 4 p.m. Eastern Time on any business day and receive the price determined for mutual fund shares as of 4 p.m. on that business day. This allows participants to make their investment decisions based on current market information on a basis similar to that available to "retail" shareholders who submit instructions to a mutual fund transfer agent. This is possible only because plan recordkeepers and administrators receiving investment instructions from participants can process and transmit participants' investment instructions to funds, fund transfer agents or to Fund/SERV after 4 p.m. In this regard, as a result of complex plan rules, it may take recordkeepers several hours to determine the mutual fund purchase and sale orders that are required to effect required plan transactions on any business day.

As the Commission recognizes in proposing the rule amendments, the change to a hard 4 p.m. close would mean that plan recordkeepers and administrators will be required to impose earlier daily cut-off times for plan participant investment instructions — and, in many cases, participant investment instructions will not be effected on the day made by participants. This will be a dramatic change for plan participants, putting them at a significant disadvantage as compared to "retail" mutual fund investors who may continue to submit orders to mutual funds up until 4 p.m. and receive the share price for the fund on that business day. Further, this outcome would be at odds with an important purpose of the Investment Company Act — to eliminate conditions that adversely affect investors

such as operating mutual funds in the interest of special classes of security holders and failing to protect privileges of holders of outstanding securities.¹

The Commission suggests that the burden on most plan participants from this change will be "small" because most are not sensitive to the time at which their purchase and redemption orders are priced.² We respectfully disagree. In this regard, even if plan participants generally are long-term investors, they remain sensitive to short-term price volatility. An assumption that long-term investors are not sensitive to the timing of their purchase or redemption orders assumes that only short-term traders care about when their orders are effected. In fact, plan participants care about every investment instruction they actively direct, including exchanges to seek principal preservation, re-enter the stock market, or rebalance a portfolio, and loans, withdrawals and distributions for many purposes, including financial hardship, home purchases, college education and retirement.³ For example, in plans with an employer stock investment option, delays in mutual fund trading could also delay participant trades in employer stock through the plan. In addition, participants making exchanges between plan investment options, or taking a loan or other plan distribution, are sensitive to how their instructions are priced. For example, if a participant takes a "lump sum" distribution of his or her entire balance from a plan, a small difference in the price between two business days could mean a significant dollar value difference in the lump sum value received.⁴ Therefore, we urge the Commission to take into account the profound impact that a hard 4 p.m. close could have on American workers participating in 401(k) and other defined contribution retirement plans when considering the proposed rule amendments.

2. Substantial Systems Modification Costs A change to a hard 4 p.m. close will require substantial and expensive changes to most plan recordkeeping and trade processing systems. In this regard, most plan recordkeeping and trade processing systems in use today require daily price information to process participant investment instructions and other plan transactions. If plan orders must be determined before 4 p.m.,

¹ See Sections 1(b)(2) and (3) of the Investment Company Act ("the national public interest and the interest of investors is adversely affected — . . . [w]hen investment companies . . . [are operated] in the interest of special classes of security holders . . . rather than in the interest of all classes of such companies' security holders; . . . [or] fail to protect the preferences and privileges of the holders of their outstanding securities.")

² Amendments to Rules Governing Pricing of Mutual Fund Shares, Investment Company Act Release No. 26288, 68 Fed. Reg. 70388, 70390 (December 17, 2003) ("Proposing Release").

³ The fact that most plan contributions are made through payroll deduction and therefore, participants cannot determine when the orders are placed, does not reduce their interest in the timing of investment transactions that they actively direct.

⁴ A similar example could occur where a participant preparing for retirement intends to purchase an annuity, and therefore, shifts his or her plan account balance into a quality bond fund to immunize the future purchase (e.g., if interest rates rise, the value of the bond fund falls but the cost of an annuity falls). A surprising shift in interest rates (a frequent occurrence) in the extra day the participant waits to effect the bond fund purchase could have a significant impact on the participant's future retirement income.

the necessary pricing information will not be available — therefore, plan recordkeeping and trade processing systems will have to be modified so that plan transactions can be processed without this information. In many cases, this will require changes to plan administrative procedures (e.g., by changing the price used to determine "rebalancing" transactions from the current day prices to a previous days' prices). Amendments to plan provisions also may be required (e.g., where the plan includes "hierarchy" rules specifying how participant sub-accounts are liquidated for plan loans and other withdrawals). Additional costs will be incurred to communicate changes in plan procedures and plan terms for submitting participant investment instructions and processes for rebalancing transactions, loans and withdrawals. Our members estimate that administrative and systems modification costs may run into the tens of millions of dollars. Again, we urge Commission to consider the impact on American workers participating in 401(k) and other defined contribution retirement plans because, ultimately, these costs will be passed through to these plan participants.

3. Adverse Impact on Defined Contribution Industry Competition SPARK Institute members also believe that a hard 4 p.m. close for submitting orders to funds, fund transfer agents and Fund/SERV would have a significant, long-term and unfavorable impact on the defined contribution services industry. Initially, the significant costs of reprogramming plan recordkeeping and trade processing systems to accommodate a hard 4 p.m. close will mean that some plan recordkeepers and administrators will exit the business. This will reduce industry competition and increase plan administration costs.

More importantly, because the proposed rule amendments will permit fund transfer agents to accept orders for purchases and sales of mutual fund shares up until 4 p.m., and process those orders after 4 p.m., the proposed rule amendments will favor "bundled" plan service models provided by fund transfer agents. Under a "bundled" service model, a fund transfer agent providing plan recordkeeping and administrative services limits plan investment options to mutual funds offered by the transfer agent's investment manager affiliates. In comparison, under "open architecture" or "unbundled" service models that have emerged during the last decade, plans may offer participants mutual funds from a variety of different fund complexes and engage an independent plan recordkeeper and administrator. The SPARK Institute believes that development of the open architecture service model has limited increases in fees paid by plans investing in mutual funds and provided plans the opportunity to seek out better performing plan investment options. Indeed, the U.S. Department of Labor has encouraged plan sponsors to select open architecture service models because they offer plans more flexibility in selecting and changing plan investment options and obtaining appropriate plan recordkeeping and administration services.

The proposed rule amendments will favor bundled plan service models provided by fund transfer agents in two ways. First, plan recordkeepers and administrators who

already are designated as fund transfer agents will not have to expend substantial resources to reprogram systems, rewrite procedures and even modify plan documents, because they can continue to process participant investment instructions after 4 p.m. Obviously, this will provide bundled providers who are fund transfer agents with a short-term advantage over other plan recordkeepers and administrators who will have to incur substantial costs to process retirement plan transactions in a "hard" 4 p.m. close regime. Over the long term, these bundled service providers will benefit because they will be able to offer plan participants the ability to submit investment instructions up to a later cut-off time (e.g., up until 4 p.m. Eastern Time) than other plan recordkeepers and administrators who will have to impose early cut-off times (e.g., before noon) to meet the Commission's hard 4 p.m. cut-off.

By favoring bundled providers, the proposed rule amendments are likely to result in less choice and higher expenses for plan participants and interfere dramatically with plan sponsors' ability to search for the best fund for each type of investment option offered to participants. For example, if a plan sponsor currently wishes to select a mutual fund managed by Fidelity Investments as a plan investment option, plan participants can submit investment instructions relating to the Fidelity fund and non-Fidelity funds under the plan up to 4 p.m. on a business day and receive that day's price, regardless of whether the recordkeeper or administrator is affiliated with Fidelity Investments. However, if the proposed rule amendments are adopted, participants will be able to submit investment instructions for the Fidelity fund close to a 4 p.m. cut-off time only if the plan engages the Fidelity Investments' designated transfer agent to provide recordkeeping services. Further, if the plan sponsor engages the Fidelity Investments' designated transfer agent to provide the plan services, participants will not have the ability to submit instructions close to a 4 p.m. cut-off time for any non-Fidelity funds. Under these circumstances, plan sponsors may select at least some of the plan's investment options primarily based on administrative convenience rather than on investment criteria. Further, to change funds offered to participants under the plan, a plan sponsor will have to change the plan's recordkeeper as well as plan investment options.

Therefore, as compared to open architecture models, bundled service models will provide plans and participants fewer investment choices and, over time, competition among fund investment managers would be harmed. Industry consolidation is likely as plan sponsors choose bundled products over open architecture models. In particular, small fund complexes and independent plan recordkeepers and administrators are likely to suffer. In addition, expenses charged for plan recordkeeping and administration will likely increase — where a transfer agent, in effect, provides each participant with a level of service similar to that received by its "retail" shareholders, the services will be more expensive to participants. For example, while plans are typically eligible for less expensive fund share classes, these discounts may not be available if the fund is responsible for maintaining individual participant records. Also, this "retail" shareholder

level of service may not be available to plans or plan participants who maintain small account balances.⁵

The Commission's comments to the proposed rule amendments suggest that these anti-competitive issues will not be significant because, with time, competition will result in recordkeeping systems that will solve some of the trading delay issues.⁶ However, even if future technology developments may solve some trading delay issues, the imposition of a hard 4 p.m. close will mean dramatic disruption in the defined contribution plan services industry, specifically — (1) costs of accommodating the 4 p.m. close will cause some plan recordkeepers and administrators to exit the business, (2) plan participants will generally have access to fewer investment choices among mutual funds, (3) small plans or participants with small plan accounts may be subject to prohibitive administration costs or even pushed from market, and (4) by shifting plan sponsors' attention to costly administrative procedures that restore or partially restore pricing fairness for plan participants, reduce competitive pressure on bundled providers to reduce management fees and enhance the quality of the investment management process. The SPARK Institute believes that, together, these problems will have a significant, long-term and unfavorable impact on the retirement plan services industry and the rate of retirement savings by American workers.

4. New Opportunities for Abuse A hard 4 p.m. close also may create new market inefficiencies and provide new opportunities for potentially fraudulent activities. For example, mutual fund insiders and unscrupulous persons could take advantage of knowledge (or even assumptions) regarding the queue of plan investment instructions waiting to be processed and use that knowledge to "front-run" the fund, resulting in losses to plan participants. An investor with direct and timely access to his or her mutual fund shares (*e.g.* a retail investor) could simply place orders directly with the mutual fund shortly before market close, knowing whether a large number of buy or sell orders for shares in the fund were already placed. This would be a new brand of insider trading and/or market timing misconduct, made possible by the hard 4 p.m. close rule.

Imposition of a hard 4 p.m. close may also increase the likelihood that large market swings today may be repeated the following day as the reaction to significant news is executed over two days. This may provide investors new opportunities to "game" a system that, in effect, will provide for two "classes" of investors — that is, retail investors who can deal directly with a transfer agent and submit orders up to 4 p.m.,

⁵ Indeed, the services provided to 401(k) and similar plans were developed in part to address the problem that fund transfer agents typically were not willing to hold and process orders for very small accounts (*e.g.*, new investments of only a few dollars, small account balances). In comparison, the 401(k) recordkeeping industry has been very successful in providing individuals with only small dollar amounts a means to invest in mutual funds at a reasonable cost.

⁶ Proposing Release, 68 Fed. Reg. at 70392.

and plan participants, whose orders will not be executed until the next day after the participant submits investment instructions. Thus, the hard 4 p.m. close, touted as the fix to trading abuses, could become a tool for new forms of arbitrage.

We urge the Commission to evaluate carefully this potential for abuse before adopting the proposed rule amendments. Given the substantial cost to plan participants if a hard 4 p.m. close is imposed, it is critical that the remedy for unlawful late trading does not result in new harm to plan participants and other mutual fund investors.

5. NSCC Solutions Do Not Resolve Hard 4 p.m. Close Issues We appreciate the opportunity provided to SPARK Institute members to participate in working groups established by the NSCC to consider processing solutions that will minimize the impact of the proposed rule amendments, and we commend the NSCC and its staff for its efforts on this very difficult problem. Our members reviewed the most recent NSCC proposals and believe that the NSCC staff has devised the most workable solution, given the limits of the hard 4 p.m. close. Importantly, the NSCC's recently proposed solutions will allow plan recordkeepers and administrators to process plan participants' requests for exchanges between plan investment options on the same day, which will avoid some problems in implementing a hard 4 p.m. close for retirement plan trade processing.⁷

Nevertheless, the NSCC's processing solutions do not resolve any of the problems arising from a hard 4 p.m. close that are identified above. First, our members believe that, generally, they will still be required to impose early cut-off times for participant investment instructions in order to complete their recordkeeping and order processing in time to submit the orders to Fund/SERV by 4 p.m. Second, to accommodate the NSCC's processing procedures, recordkeeping and trade processing systems will still need to be reprogrammed, and plan procedures and in some cases, plan terms, will still need to be changed. Third, on an ongoing basis, the NSCC's processing solutions will be more cumbersome and more costly than current order processing systems because the number of exchange transactions submitted to NSCC is doubled (the "buy" side of each exchange must be submitted twice) and it will be impossible to net exchanges with other plan transactions such as payroll contributions and annuitized pay-outs. Fourth, unless the Commission requires that all retirement plan transactions are processed through Fund/SERV, fund transfer agents offering bundled products will still enjoy a significant competitive advantage. Finally, since the NSCC processing solutions will still require early cut-off times for most plan participants, plan participants' investment instructions

⁷ Our letter dated October 31, 2003 discussed our concerns about the possibility that a hard 4 p.m. close could mean that participant exchanges between plan options would have to be executed over a two or more day period (i.e., executed as a "sell" on one day and a "buy" on the next day). These concerns included the potential increase in uninvested funds held for plans pending reinvestment in connection with exchange transactions, recordkeeping reconciliation issues raised where trades are "pended" over a two or more day period, as well as significant delays in executing the "buy" side of any exchange transaction.

will continue to be held over by one trading day and could be a source of new opportunities for insider trading and other trading abuses.

Therefore, the SPARK Institute views the NSCC's proposals as only "second best" to the alternative approach that would allow intermediaries to submit orders for purchases and sales of mutual funds to funds, fund transfer agents and to Fund/SERV after 4 p.m., where there are appropriate conditions to protect against illegal late trading.

B. Alternative Approach

In comments to the proposed rule amendments, the Commission discussed the protections that would be required under an alternative approach to preventing unlawful late trading in mutual funds. Specifically, an alternative approach that would allow intermediaries to process mutual fund purchase and redemption orders after 4 p.m. would require that intermediaries comply with three requirements —⁸

- electronic or physical time stamping of orders in a manner that cannot be altered or discarded once the order is entered into the trading system;
- annual certification that the intermediary has policies and procedures in place designed to prevent late trades, and that no late trades were submitted to the fund or its designated transfer agent during the period; and
- submission of the intermediary to an annual audit of its controls conducted by an independent public accountant who would submit his report to the fund's chief compliance officer.

The SPARK Institute believes that these protections, taken together, would be sufficient to prevent unlawful late trading, while permitting intermediaries to continue to process purchase and redemption orders after 4 p.m. We also believe that these protections can be implemented with far less cost than the costs of implementing the hard 4 p.m. close.

1. Electronic Time Stamping Technologies We understand that Commission staff has been concerned about whether any electronic time stamping systems can be "tamper-proof," so that there cannot be any alteration or change in the orders once the order is entered. Some of our members have recently reviewed one patented methodology that could provide the process for electronically time stamping orders that the Commission seeks. Specifically, this technology uses mathematical algorithms to apply an electronic transaction identification (a "hash") to each transaction. These identifications are then "linked" using additional mathematical algorithms, so that any tampering of records can be identified. Using these methods, it is possible to establish processes for validating both the time of creation and content of records, and the

⁸ Proposing Release, 68 Fed. Reg. at 70390.

information necessary to validate records can be maintained as long as needed for later review and examination. Importantly, it appears that this type of process can be relatively easily applied to existing recordkeeping and trade processing systems.

We understand that other methods are already available or easily developed from existing technology to ensure the integrity of records. Therefore, the SPARK Institute believes that the Commission should adopt rules that will encourage the development and application of these types of methodologies. Indeed, we believe that it is critical to do so to protect against further unlawful late trading. In this regard, as the Commission notes in connection with the proposed rule amendments, fund managers themselves have accepted late orders from favored investors, and other regulated entities have successfully concealed illegal late trading activities from the Commission and self-regulatory organizations.⁹ Unlawful late trading abuses (even if the Commission imposes a hard 4 p.m. close rule affecting intermediaries) will continue to be possible at these regulated entities until a "tamper proof" process for ensuring the integrity of order receipt systems is developed and applied to all entities receiving and processing orders for purchases and sales of shares of mutual funds, including funds and fund transfer agents.

2. Annual Audit and Certification Requirements As we discussed in written submissions to Commission staff on October 31 and November 11, 2003, SPARK Institute members have identified several critical "controls,"¹⁰ that could be included in policies and procedures designed to prevent late trading. These controls could be tested by independent auditors and would provide a basis for certainty that no late trades are submitted. We encourage the Commission to consider whether these controls should be adopted by plan recordkeepers and administrators for purposes of the annual certification and independent audit requirements under an alternative proposal.

a. Controls to ensure that each plan and participant account is a valid, properly classified account. Virtually all plan service providers maintain controls to ensure that customer accounts are valid and identified as an appropriate client of the service provider. Each trade order placed also must be identified to a known,

⁹ Proposing Release, 68 Fed. Reg. at 70389.

¹⁰ On November 11, 2003, we provided the Division of Investment Management staff with samples of "SAS-70" reports. The SAS 70 is a report on controls in operation and tests of operating effectiveness under Statement of Auditing Standards No. 70. Generally, these reports describe the internal controls and procedures of an organization and provide the auditor's opinion as to (a) whether the described controls are placed in operation, (b) whether the described controls are suitably designed to provide reasonable assurance that the control objectives are achieved if the controls are complied with satisfactorily, and (c) whether those controls that are tested are operating with sufficient effectiveness to provide reasonable assurance that the control objectives were achieved. Organizations obtaining a SAS 70 report typically provide the auditor with a written description of their internal control procedures for use in the report and identify the controls that are tested. However, contractual or regulatory requirements applicable to an organization may define the controls that will be covered by the SAS 70 report.

valid customer account. Generally, these controls include documentation and supervisory control of account authorization, and for any tax-qualified plan, validation of plan and plan administrator identification numbers against Labor Department Form 5500 records.

b. Procedures that provide for an electronic date-time stamp of all investment instructions. Virtually all commercial plan recordkeeping systems already place an electronic date-time stamp and unique transaction identification on each transaction record generated by the system and retain this information through the processing cycle. All commercial voice response units and web-based applications for participant investment instructions also date-time stamp any instructions received. In addition, all instructions processed from paper instructions are typically scanned into processing systems and date-time stamped in the scanning process.

As noted, it may be possible to apply additional technology solutions to these existing systems to provide a process for validating the content and creation time of records, at far less cost than will be incurred if the Commission imposes the "hard" 4 p.m. close with no exceptions. This would ensure the order integrity that the Commission seeks.

c. Control of the timely cut-off of investment instructions provided for processing. The cut-off of participant instructions for a business day is typically controlled automatically by a controlling computer routine or it may be initiated by an established administrative process that is applied consistently within an organization. Internal control and audit programs can be used to ensure that daily cut-offs are made in a timely manner each business day.

d. Auditability of transactions from point of origination through receipt by a fund company. Plan service providers that contract with intermediaries or funds to transmit orders typically must agree to make their books and records available upon request by the intermediary or fund. These contractual rights to inspect books and records could be expanded to include obligations to establish audit chains for trade instructions, including transactions represented by aggregated or "omnibus" orders. Each service provider's processing systems would provide the ability to track transactions from origination to transmittal to an intermediary or fund company.

e. Control over exceptions, corrections and cancellations. It is inevitable that mistakes may occur in processing the large volume of daily transactions typical for many plan recordkeepers. (Indeed, many may process hundreds of thousands of transactions each day). Errors are typically identified by exception reports

generated by recordkeeping systems. Internal controls would require that any corrections or cancellations are identified to a specific plan and participant account, documented as a correcting trade with a clear and comprehensive description of the error being corrected, approved by a supervisor and senior management, and reviewed by an independent compliance officer.

f. Effective daily share position and reconciliation processes. Fund company confirmations and holdings reports as of a specific date generally are reconciled to corresponding positions on the primary recordkeeping system on a trade-by-trade basis. This control ensures that unauthorized transactions will be detected because they will not reconcile or balance with transactions that have been posted on the recordkeeping system.

We believe that funds or fund transfer agents would be able to contract with plan recordkeepers and administrators acting as intermediaries to implement these controls, annually certify to the existence of these controls, and obtain an annual audit of these controls. Further, funds should be able to enforce these contractual requirements by requiring each intermediary to provide to the fund's transfer agent for review its annual certification and its annual audit report, and if the intermediary does not timely provide these, the fund should refuse to accept any orders processed after 4 p.m. from that intermediary.¹¹ In this regard, mutual funds already enter into detailed contracts with intermediaries, including plan recordkeepers and administrators, and it would be fairly simple to add these requirements to those existing contracts. In addition, the Commission might permit funds to rely on intermediary certifications and audit reports that are reviewed and maintained by independent third parties.

C. Additional Comments on Proposed Rules/NSCC Proposal

The clear preference of SPARK Institute members is that the Commission adopt the alternative proposal described above. However, if the Commission disagrees and concludes that it will adopt a hard 4 p.m. close, the SPARK Institute requests the Commission consider the following additional comments on the proposed rule amendments and the NSCC's proposed processing solutions.

1. Changes to Facilitate the NSCC Processing Proposal Two changes to the Commission's proposed rule amendments will improve the workability of the NSCC processing proposals.

¹¹ As a practical matter, this remedy would be a substantial penalty for intermediaries, such as plan recordkeepers and administrators, who would breach their contracts with plan customers if they cannot timely submit plan orders for purchases and sales of shares of mutual funds.

a. Definition of Order. As proposed, the Commission's definition of "order" will not allow exchanges between all types of retirement plan investment options. In this regard, the Commission proposed to facilitate same-day exchange order processing by defining "order" to include a direction to purchase redeemable securities of a fund using the proceeds of a contemporaneous order to redeem a specific number of shares of another fund.¹² For this purpose, a "fund" is "any registered investment company issuing redeemable securities."¹³

Plans often include investment vehicles other than shares of registered investment companies, such as "stable value funds" (usually structured as bank collective trust funds), employer securities funds maintained under plans, and plan investment options based on a separate account managed for the plan by an independent investment manager. Therefore, the proposed definition of "order" should also include directions to purchase using the proceeds of these other types of plan investment options.

If this change is not made, the proposed NSCC processing solutions for exchanges will not allow exchanges between mutual funds and non-mutual fund plan options. This would impact most retirement plans and make the NSCC processing solutions far less helpful because many exchanges between plan investment options would still have to be executed over a two-day period (i.e., executed as a "sell" on one day, followed by a "buy" on the next day).

b. Emergency Exception for Fund/SERV Failures. Emergency exceptions in the proposed rule amendments would permit orders to be deemed to have been timely received even if an emergency prevents Fund/SERV from receiving the order.¹⁴ However, the Commission's comments suggest that an "emergency" might not include "internal operational difficulties."¹⁵

Because intermediaries will be required to submit all orders daily to Fund/SERV no later than 4 p.m., it is critical that the intermediaries are protected in the event of a Fund/SERV failure that prevents them from timely submitting their order information. Therefore, the Commission should clarify that the emergency exception will apply to orders not timely received by Fund/SERV due to any Fund/SERV failure, whether resulting from an "external" emergency such as a natural disaster, or from an internal operational Fund/SERV failure.

¹² Proposing Release, 68 Fed. Reg. at 70398 (proposed rule 22c-1(c)(3)).

¹³ Proposing Release, 68 Fed. Reg. at 70398 (proposed rule 22c-1(a)).

¹⁴ Proposing Release, 68 Fed. Reg. at 70398 (proposed rule 22c-1(b)(1)(B)).

¹⁵ Proposing Release, 68 Fed. Reg. at 70391 (n.36 and accompanying text).

2. Application of Rules to Funds/Fund Transfer Agents The SPARK Institute believes that funds and fund transfer agents should be subject to the same processing rules that will apply to intermediaries. Specifically, if plan recordkeepers and administrators are forced to submit all orders to NSCC by 4 p.m., fund transfer agents also providing plan recordkeeping and administration services should similarly be required to submit orders to NSCC by 4 p.m. Similarly, if the Commission adopts an alternative approach, the time-stamping, internal policies and controls, and record retention requirements that would apply to intermediaries also should apply to funds and fund transfer agents.

In addition to addressing concerns about the impact on industry competition, we believe that it is critical that similar rules are applied to funds and fund transfer agents to ensure that protections to prevent late trading in the future are in fact established. In this regard, new rules directed at the activities of intermediaries, including plan recordkeepers and administrators, will not prevent unlawful late trading allowed by funds and fund transfer agents. And, as noted, the Commission's investigations have revealed that regulated entities, including fund managers, have allowed late trades by favored clients.

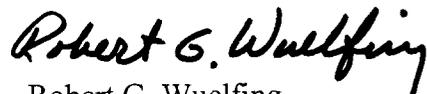
* * * * *

In conclusion, the SPARK Institute believes that the hard 4 p.m. close proposed by the Commission will have significant adverse effects on American workers participating in 401(k) and other defined contribution retirement savings plans, which will not be justified by any corresponding benefit to these plan participant investors. In this regard, a hard 4 p.m. close that requires early cut-off times for participant instructions will dramatically impact plan participant's legitimate trading activities, making them in effect "second class" investors compared to retail investors who will be able to submit investment instructions to fund transfer agents up until 4 p.m. on a business day. This result seems particularly unfair and inappropriate where the Commission's investigations have not identified any evidence that plan participants have been a source of late-trading abuses. Indeed, the fund investors least impacted by the hard 4 p.m. close, i.e., short-term retail investors, appear to be the type of investor most likely to seek out late trading opportunities. Therefore, the proposed hard 4 p.m. close remedy for unlawful late trading will harm the investors it seeks to protect, while short-term investors are not affected.

Jonathon G. Katz
Secretary, Securities and Exchange Commission
February 6, 2004
Page 14

We hope that these comments are helpful. We will be glad to answer your additional questions and provide any additional information that may be helpful to you. Please feel free to call me (860-658-5058) or Steve Saxon or Roberta Ufford at the Groom Law Group (202-857-0621) if you have questions or comments.

Very truly yours,


Robert G. Wuefing

cc: Paul F. Roye
Cynthia M. Fornelli