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THE SEC'S "SWING PRICING" RULE

The SEC's amended rule will permit (but does not require) an open-end fund to use "swing pricing" to adjust its NAV under certain circumstances to effectively shift the costs stemming from shareholder purchases or redemptions onto purchasing or redeeming shareholders. The authors discuss the essential elements of the amendments to the rule, including the swing threshold, the swing factor, the role of the fund's board, and the additional financial and other required disclosures.

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On October 13, 2016, the Securities and Exchange Commission adopted amendments to Rule 22c-1 under the Investment Company Act of 1940 to permit open-end funds, but not exchange-traded funds ("ETFs") and money market funds, to use, under certain circumstances, "swing pricing" to adjust the fund's net asset value ("NAV") per share to effectively shift the costs stemming from shareholder purchases or redemptions onto purchasing or redeeming shareholders (the "Swing Pricing Rule").[1] There is much subjectivity in many of the decisions funds and advisers will need to make with respect to the Swing Pricing Rule, such as whether *sufficient* information about a fund's daily cash flow has been obtained to justify a swung price.

This article is intended to provide a summary of the Swing Pricing Rule.[2] We suspect that the extended

[1] Investment Company Swing Pricing, Investment Company Act Rel. No. 32316 (Oct. 13, 2016), *available at* https://www.sec.gov/rules/final/2016/33-10234.pdf (the "Swing Pricing Release"). For additional background on the rule as proposed, *see* Open-End Liquidity Risk Management Programs; Swing Pricing; Re-Opening of Comment Period for Investment Company Reporting Modernization Release, Investment Company Act Rel. No. 31835 (Sept. 22, 2015), *available at* https://www.sec.gov/rules/proposed/2015/33-9922.pdf (the "Proposing Release"). The liquidity rule, new Rule 22e-4 under the Investment Company Act, and the Swing Pricing Rule were

footnote continued from previous column…

both proposed in the Proposing Release, but were adopted in separate releases. An article on the liquidity rule by the present authors appears in the January 25, 2017 issue of this publication.

[2] The Swing Pricing Rule was adopted by a 2-to-1 vote (Commissioner Piwowar voting against). Commissioner Piwowar voted against the Swing Pricing Rule because he had investor protection concerns, including the potential for: (1) harmful gaming behavior (*e.g.*, timing purchases and redemptions based on the likelihood that a fund would adjust its NAV); (2) funds to artificially enhance returns by swinging in an amount greater than the costs of redemptions or subscriptions; and (3) funds to conceal from investors the true

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