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Via Electronic Submission

February 11, 2016

Mr. Brent J. Fields
Secretary
United States Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: File No. S7-16-15
Release No. IC-31835
Proposal Regarding Open-End Fund Liquidity Risk Management Programs

Dear Mr. Fields:

This letter is submitted on behalf of the Federal Regulation of Securities Committee (the "Committee" or "we") of the Section of Business Law of the American Bar Association (the "ABA"), in response to the request for comment by the U.S. Securities and Exchange Commission (the "Commission") presented in the proposing release referenced above (the "Proposing Release"). As set out in the Proposing Release, the Commission has proposed (1) new rule 22e-4, which would require registered open-end investment companies, including open-end exchange-traded funds ("ETFs") but not including money market funds ("Funds," which include, as appropriate, separate series of multiple series companies), to establish a liquidity risk management program; (2) amendments to rule 22c-1 to permit registered open-end funds (other than money market funds) to use "swing pricing" under certain circumstances; and (3) related amendments to Form N-1A, proposed Form N-PORT and proposed Form N-CEN.

Members of the Committee regularly advise investment companies and their directors with respect to matters arising under the Investment Company Act of 1940, as amended (the "1940 Act"). The comments in this letter (this "Comment Letter") represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and, therefore, do not represent the official position of the ABA. In addition, this Comment Letter does not represent the official position of the Section of Business Law of the ABA.

The Committee thanks the Commission for this opportunity to comment on the Proposing Release. Set out below is a general summary of the Committee's views, followed by specific comments related to the Proposing Release.

General Comments

The Proposed Rule is Unduly Limiting and Prescriptive.

In general, the Committee concurs with the Commission's view of the importance of the role of liquidity management. We do not believe, however, that the Commission needs to adopt a prescriptive rule that requires funds to adopt a specific model of liquidity risk management, particularly if doing so might deter a Fund from making appropriate decisions when faced with unforeseen circumstances or rapidly changing market events. It is the Committee's view that the longstanding seven-day liquidity tests in Section 22(e) have served the public well and almost entirely without fail. On that basis, a principles-based approach or Commission guidance, including a thorough discussion of best practices identified by the Commission's staff, may better enable Funds to benefit from the staff's experience with industry participants, while respecting the current framework based on Section 22(e) and preserving the ability to adjust to changing market dynamics. For example, the liquidity classification factors set forth in proposed rule 22e-4 could be more readily modified in response to unforeseen market developments if they are part of Commission guidance rather than prescribed in a rule.

As Proposed, the Definition of Liquidity Risk is Inconsistent with Existing Standards.

As proposed, rule 22e-4 would require Funds to establish a written liquidity risk management program, while defining "liquidity risk" as the risk that a Fund could not meet redemption requests that are expected under normal conditions, or reasonably foreseeable under stressed conditions, without materially affecting the Fund's net asset value. The Committee is concerned that "reasonably foreseeable under stressed conditions" and "materially affecting the fund's net asset value" are standards best suited to evaluation in hindsight. The Committee recommends that the Commission instead define liquidity risk in a manner consistent with that applied to money market funds under rule 2a-7(d)(4) (a money market fund must hold securities that are "sufficiently liquid to meet *reasonably foreseeable shareholder redemptions in light of the fund's obligations under section 22(e)*" (emphasis added)).

As Proposed, the Role of the Fund Board is Unnecessarily Extended.

The Committee urges the Commission to reconsider the role of a Fund's board in connection with proposed rule 22e-4. Under the proposed rule, a Fund's board would be required to approve the Fund's liquidity risk management program, any material changes to the program, and the Fund's designation of the Fund's investment adviser or officers as responsible for administering the Fund's liquidity risk management program. The Committee believes that the Commission should clarify that the board's role related to liquidity risk management should be consistent with its role under rule 38a-1, which mandates that funds adopt written compliance policies and procedures subject to board approval and oversight. The Committee notes that a liquidity risk management program under proposed rule 22e-4 must be "*reasonably designed* to assess and manage the fund's liquidity risk." The Committee submits that a similar approach to oversight and approval of liquidity risk management programs as that set forth in Rule 38a-1 (that is, annual reporting on the adequacy of the liquidity risk management program and the effectiveness of its implementation, together with the "reasonably designed" standard already included in the proposed rule) is the appropriate role for a Fund's board.

The Committee also is concerned that the Proposing Release mischaracterizes the respective roles of investment advisers and boards and in doing so suggests an entirely new legal standard for oversight of conflicts of interest that is not based in the statutory language or the legislative history of the 1940 Act or the Investment Advisers Act of 1940. In the Proposing Release, the Commission suggests that management of liquidity risk could present a conflict of interest between a Fund and its investment adviser "because [less liquid]…assets may result in higher total returns for a fund, even though a low [liquid asset] minimum may not reflect an appropriate alignment between the fund's portfolio liquidity profile and the fund's liquidity needs."

The Commission suggests that board approval and on-going review of a liquidity risk management program and, in particular, a Fund's three-day liquid asset minimum would add the level of independent oversight necessary because of such conflict. The Committee respectfully suggests that the same conflict of interest exists, to the extent one exists at all, when an investment adviser selects any asset for investment by a fund. Investment advisers typically buy and sell securities in order to meet the investment objectives of a fund, for the ultimate benefit of the fund's shareholders. The management of a fund's investment portfolio is the proper activity of its investment adviser, which has a fiduciary duty to the fund in doing so. The proper role of the fund board is oversight (but not micromanagement).

The Committee suggests revisions to certain provisions of proposed Rule 22e-4 relating to the role of fund boards in the implementation of swing pricing, including revisions that would permit a fund board to delegate to the fund's adviser or appropriate officers the ability to adjust the swing thresholds. The Committee also recommends that the adopting release for the final rule provide assurances to fund boards regarding review of their decisions in respect of swing pricing by the Commission staff.

The Committee urges the Commission to reconsider and revise in the adopting release for any final rule, its statements in the Proposing Release about conflicts and confirm that nothing in the final rule or the adopting release changes the relevant legal standard in respect of board oversight of funds and their investment advisers.

Changes to the Swing Pricing Provisions of the Proposed Rule, and Additional Guidance, Are Required

As discussed in detail under "Swing Pricing" below, the Committee is concerned that Fund boards may be unwilling to implement swing pricing, which could be in the best interests of many Funds, unless various provisions of the proposed rule are revised, and additional guidance is provided. Among other things, the Committee recommends that the Commission acknowledge in the adopting release that difficult judgments may be required in the implementation of swing pricing, and indicate that the Commission's Staff, with the benefit of hindsight, will not second guess responsible judgments made in good faith.

Specific Comments

As presented in the Proposing Release, a liquidity risk management program would be required to include three elements:

1. Classification and on-going monitoring of each portfolio holding and, if applicable, portions of each holding.

2. Assessment and review of a Fund's liquidity risk.

3. Management of liquidity risk, including investment of some portion of a Fund's net assets in assets that are convertible to cash within three business days at a price that does not materially affect the value of the assets immediately prior to sale.

We discuss each of these proposed elements, along with the proposal regarding swing pricing and certain other matters, below.

Classification and Monitoring of Portfolio Holdings

The Required Liquidity Factors

The Proposing Release expresses concern that imposing Commission-mandated liquidity classifications "would be overly rigid and would be difficult to adjust quickly to reflect changing market conditions." The Committee agrees with that concern, but has similar concerns about imposing standardized factors to be considered and documented at all times, even if market conditions indicate that different factors are relevant at different times. Also, while the Commission states that "individual funds would be more effective in assessing and reviewing their portfolio positions' liquidity based on an evaluation of market and asset-specific factors," the proposed rule nevertheless includes mandatory factors that must be considered in assessing the liquidity of every portfolio asset regardless of type in all circumstances. The proposed rule, as worded, would create regulatory uncertainty about both the use of other factors that could be very relevant to the liquidity determination of a particular instrument and the failure to document consideration of factors of minimal utility during a crisis, and leave Funds open to retrospective review and criticism.

The Committee is also concerned that, even if the final rule includes a list of prescribed factors, addressing each such factor may not adequately allow a Fund to implement the rule.[1] As a result, the rule (as proposed) may force a Fund's board to adopt overly rigid policies and procedures related to the evaluation of the liquidity of each portfolio asset based on those factors, which could reduce a Fund's flexibility in times of rapidly changing market conditions—the exact situation the Commission seeks to avoid.

The Committee submits that only those with sophisticated knowledge of day-to-day trading for a particular portion of the securities market can know whether a security or portion thereof is liquid on a given day. The liquidity of any security can change intra-day, as well. The markets for different types of securities may have very different characteristics and may change quickly. As a result, in practice, many investment advisers have different groups covering different types of assets, including, for example, high yield, municipal and corporate bonds, mortgage-backed securities, and small-cap and large-cap equities. Given this reality, the Committee believes that objective liquidity factors are only helpful up to a point and, although rigid application of rules-based factors may appear to provide liability protection under proposed rule 22e-4, that application may lead to undesirable results by resulting in the mischaracterization of assets. The mischaracterization of assets could, in turn, create legal uncertainty for those charged with compliance with the rule.

The Committee is also concerned that the "after reasonable inquiry" standard embedded in proposed rule 22e-4 is ambiguous, particularly in the context of daily liquidity determinations. This standard assumes that there is a service or market clearinghouse to which funds can inquire about liquidity. The Committee is particularly troubled by the "reasonable inquiry" standard in light of the *Morgan Keegan* precedent. In that instance, although there were admittedly other factors at issue, the Commission took the view that inquiring about various pricing data from the brokerage community "could not have sufficed as the primary valuation method, given the open-end [f]und series' obligation to daily price the securities and the closed-end funds daily publication of their NAVs."[2] The standard set forth in the proposed rule would force Funds to rely on precisely that type of information.

The Committee is also concerned by the use of the term "reasonable," which can always be viewed in hindsight in ideal terms, not real life practical terms.[3] Therefore, we do not believe that creating an extensive liability regime against funds, their advisers and directors based on what is inherently a subjective determination (and about which board members have no independent insight) would be helpful. In our

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1 J. Kenneth Alderman, CPA, et al., Investment Company Act Release No. 30557 (June 13, 2013) ("Other than listing [the fair valuation] factors . . . the [v]aluation [p]rocedures provided no meaningful methodology or other specific direction on *how* to make fair value determination for specific portfolio assets or classes of assets").

2 *Id.*

3 Mitu Gulati, Jeffrey J. Rachlinski & Donald C. Langevoort, *Fraud by Hindsight*, 98 NW. U. L. REV. 773, 774 (2004) ("People believe they could have predicted events better than was actually the case and believe that others should have been able to predict them. Consequently, they blame others for failing to have foreseen events that reasonable people in foresight could not have foreseen.")

view, the added potential liability to directors and advisers does not justify the minimal benefits of adopting a standard not susceptible to precise evaluation.

The Liquidity Classification Categories

With regard to the "spectrum"-based liquidity classification categories, we agree that liquidity is not merely binary (i.e., either liquid or illiquid) and that further evaluation and classification are advisable. However, the Committee believes that the six basket approach is overly complex and creates artificial designations. As an alternative, the rule could require three categories: one - three business days (matching current settlement cycles which, the Committee notes, are widely expected to change in the reasonably near term to two business days), four - seven days (matching Section 22(e)), and greater than seven days. A simpler approach likely would capture the information that the Commission needs with less burden to reporting funds. While Funds may monitor liquidity beyond these three categories, they should not be mandated to do so.

Many funds, as noted in the Proposing Release, "tend to view the liquidity of their portfolio assets in terms of a more-liquid to less-liquid spectrum." The six basket approach proposed by the Commission, however, is not within the norm of industry practice as we understand it. Moreover, the complexity of this approach will lead to greater confusion and will not, in our view, enhance liquidity management. It could also have the unintended consequence of creating an incentive for funds to be the "first mover" in periods of market volatility, and thereby contribute to illiquidity in the markets if funds find that they have to sell assets as the liquidity buckets of those assets change, a risk that is likely exaggerated with six separate categories. The six basket approach also will create compliance risk for failing to properly assess artificial categories.

The standard proposed by the Committee was not picked at random. It is generally based upon the period for honoring redemptions mandated by Section 22(e). In addition, the proposed one – three business day basket reflects current equity market settlement practices without potentially imposing any requirements for Funds under Rule 15c6-1 under the Securities Exchange Act of 1934 (the "Exchange Act").

To the extent the Commission proposed its six liquidity classification baskets, in part, to receive data for Form N-PORT, we caution that this structure does not fully take into account the subjective nature of the data and the speed at which liquidity conditions can change (in either direction). Consequently, the Commission risks missing the dynamic nature of the data, which would be disclosed on a monthly basis, and treating the liquidity determinations as if they were hard data. In the view of the Committee, the Commission may therefore put itself – and investors who may rely on quarterly publication of the data - at risk of relying on stale and inapplicable data.

In addition, the classification scheme appears to presage an intention that the Commission contact funds when it disagrees with their liquidity determinations on Form

N-PORT.[4] In the Committee's view, such actions should be undertaken only in the event of the most serious concerns unless the Commission intends to substantively regulate (or at least second-guess) liquidity determinations made by a Fund. We believe that these actions, if taken, would represent a fairly dramatic step towards substantive regulation of Fund portfolio management decisions.

Varying Definitions Related to Liquidity

Proposed Rule 22e-4 creates two different standards for assessing liquidity, which increases the likelihood of inadvertent compliance exceptions. For example, in order to classify an asset (or portion of an asset) in the proposed four – seven day basket, the asset must be convertible to cash within four - seven calendar days "at a price that does not *materially* affect the value of that asset immediately prior to sale." The proposed "15% Standard Assets" (as discussed in more detail below) defines liquidity by reference to sale or disposition of an asset "in the ordinary course of business within seven calendar days at *approximately* the value ascribed to it by the fund." In addition, for purposes of the 15% Standard Assets definition, "the fund does not need to consider the size of the fund's position of the asset or the number of days associated with the receipt of proceeds of sale of disposition of the asset," which appears to run contrary to the requirements associated with classifying an asset (or portion of an asset) in one of the liquidity baskets. Moreover, the proposed 15% Standard Assets definition does not take account of whether the sale itself will "affect the value" of that asset.

The Committee also notes that "materially" is a different standard than "approximately." As a result, a security could be liquid for purposes of the 15% Standard Assets definition because it could be sold or disposed of in seven days, but still not treated as liquid for the purposes of the 4-7 day basket because the receipt of proceeds from that same sale or disposition may take longer than seven days. The Committee is concerned that adopting these two different and legally complex standards is unnecessarily confusing and, as a result, may lead to avoidable compliance errors.[5] If the SEC adopts these standards substantially as proposed, we suggest that the adopting release acknowledge that a security may be considered liquid for one purpose and illiquid for another purpose under the materiality standards.

Assessment of Liquidity Risk

The Committee acknowledges the Commission's thoughtful review of factors it expects would be considered in assessing a Fund's liquidity risk and setting its three-day liquid asset minimum (as discussed in more detail below). Moreover, the Committee

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4 Proposing Release at 69 ("we note that if a fund is an outlier with respect to its liquidity classifications, Commission staff would be able to identify such outlier classifications based on the fund's position-level liquidity disclosure and Form N-PORT and determine whether further inquiry is appropriate").

5 *See, e.g.*, Matt Levine, *SEC Accuses Legg Mason of Some Accidental Fraud*, BloombergView (Jan. 27, 2014, 6:26 PM), http://www.bloombergview.com/articles/2014-01-27/sec-accuses-legg-mason-of-some-accidental-fraud ("it's interesting to see [financial regulation] complexity in action here – not in anything super high-stakes and dramatic and systematically important, but just in the guts of getting a big organization to comply with a set of rules that no single person could comprehend").

appreciates that the Commission has chosen to utilize the same list of factors for both purposes. However, we respectfully encourage the Commission to revisit that discussion with an eye to clearly delineating which factors and considerations are required and which are simply guidance.

The Committee suggests that the final rulemaking should better clarify what a Fund is *required* to consider and what is contextual guidance (including the language in the release itself). In particular, the Committee requests that the Commission specifically acknowledge that Funds' circumstances may differ, and thus a Fund will not be penalized for not reviewing every one of the items listed, or for giving one factor more weight than another factor, as determined in good faith by the Fund in light of its particular circumstances. As drafted, for example, the discussion in the Proposing Release includes (by our count) more than 30 sub-items in the list of four factors in proposed rule 22e-4(b)(2)(iii).[6]

Management of Liquidity Risk

Three-Day Liquid Asset Proposal

The very concept of a Three Day Liquid Asset Minimum ("3DLAM") is highly prescriptive and therefore contrary to our central comment that the Commission should reconsider whether a more principles-based approach would be effective in meeting the Commission's policy goals. That said, if the Commission elects to retain such a mandate, the Committee respectfully suggests that the Commission should more fully rationalize the 3DLAM and its stated purpose of facilitating timely Fund redemptions in light of the statutory requirement for a seven-day redemption payout period set forth in section 22(e) of the 1940 Act. Clear rationalization of proposed rule 22e-4(b)(2)(iv)(A) with this directly contrary statutory requirement is especially important given that some may question the Proposing Release's characterization of the 3DLAM as "voluntary."

The Committee acknowledges that, as proposed, the 3DLAM is voluntary insofar as each Fund would set its own minimum. Accordingly, a Fund could theoretically set its 3DLAM at zero or another very low level. In practice, however, although the language in the Proposing Release does not have the force of regulation we believe that the discussion in the Proposing Release would make a zero 3DLAM unlikely for most Funds. Consider, for example, the Commission's observation that it believes it would be "extremely difficult" to support a zero 3DLAM, even after taking into account other elements of liquidity risk management, such as disclosures, monitoring of individual portfolio holdings, the existence of credit lines and lines of credit. As an alternate approach, we suggest that the final rule provide that if a Fund chooses to establish a zero 3DLAM, it should disclose why that decision was made. This approach is similar to

[6] To illustrate, while the first of the four proposed factors is a Fund's "short-term and long-term cash flow projections," the corresponding discussion of just this one factor encourages or requires consideration of a lengthy list of sub-items. We have set forth in Appendix A the complete list of such sub-items.

the disclosure requirement that applies to disclosure of whether a Fund has designated an Audit Committee Financial Expert.[7]

The Committee is also concerned about the prospect for confusion arising from repeated references in the Proposing Release to Rule 15c6-1 under the Exchange Act. We are not aware of any prior Commission position that links mutual fund liquidity or redemption practices with Rule 15c6-1, and we assume no change to the Commission's position is implied here. In that case, the Committee urges the Commission to clarify that Rule 15c6-1, while of general market interest, implies no specific responsibilities under the 1940 Act for registered investment companies to facilitate third-party trade settlement compliance in respect of a Fund's shares.

The Commission proposes amendments to Form N-PORT and Form N-1A that would require a Fund's specific 3DLAM be stated in the Fund's Form N-PORT but would not require similar disclosure in the prospectus and SAI. We presume this reflects a conclusion, with which we agree, that the precise percentage settled upon as a Fund's 3DLAM often will not be material. Because of the inherently shifting nature of a Fund's 3DLAM percentage, it is the Committee's view that any specific number is likely to be both immaterial and potentially confusing if presented and then repeatedly updated in a prospectus.

In the same vein, the Committee observes that the Commission does not propose to mandate disclosure of the factors given weight by a Fund or its board in setting its 3DLAM. We agree. That information is commercially sensitive and potentially confidential. It also appears to be too detailed to be relevant to the typical investor.

15% Standard Assets

Proposed rule 22e-4 includes a limit on a Fund's ability to acquire any "15% Standard Assets" if, immediately after the acquisition, the Fund would have invested more than 15 percent of its net assets in 15% Standard Assets. As proposed, a "15% Standard Asset" is defined as any asset that may not be sold or disposed of in the ordinary course of business within seven calendar days at approximately the value ascribed to it by a Fund. As a preliminary matter, the Committee suggests that the phrase "15% Standard Asset" is inherently confusing and would be more appropriately identified as "Baseline Illiquid Assets," or a similar phrase, because the apparent purpose of the proposed 15 percent standard is to provide a baseline cap on illiquidity in a Fund consistent with the SEC's historical guidance.

As to the merits of the standard, and building on our discussion of varying definitions above, we first observe that notwithstanding the Commission's view that the proposed limit on 15% Standard Assets and the proposed 3DLAM "each serve distinctly important, but interrelated, roles in managing liquidity risk," it is the Committee's view that two standards is one too many. The imposition of two distinct liquidity limits,

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[7] See, *Disclosures Required by Sections 406 and 407 of the Sarbanes Oxley Act of 2002,* Securities Act Rel. No. 8177 (Jan. 23, 2003) ("A company disclosing that it does not have an audit committee financial expert must explain why it does not have such an expert.).

together with the similarity between the definition of 15% Standard Assets and that of an asset that cannot be converted to cash within seven days, is likely to be confusing in application.

If the Commission provides additional guidance in connection with the proposed definition of 15% Standard Assets, the Committee urges the Commission to provide guidance in the adopting release that a Fund manager's determination that an asset is outside the definition of "15% Standard Assets" (or "Baseline Illiquid Assets"), if made in good faith, is presumptively compliant with the rule.

Similarly, the inclusion of certain types of securities whose acquisition would be limited by the 15% standard, or other factors for funds to consider in determining whether an asset is a 15% Standard Asset would necessarily be incomplete and thus would increase Fund managers' uncertainty about whether they are complying with the proposed rule. Accordingly, the Committee urges the Commission to adopt the "good faith" guidance suggested above.

Applicability to ETFs and ETMFs

The Committee is also of the view that ETFs and ETMFs that create and redeem shares principally on an in-kind basis[8] should be exempt from Rule 22e-4. The liquidity of the underlying securities in portfolios of ETFs or ETMFs does not have the same relevance to their operations as it does to other open-end funds because ETFs and ETMFs generally do not redeem their shares for cash. Instead, these ETFs and ETMFs generally transact with authorized participants on an in-kind basis through the exchange of creation units, which consist of a "basket" of underlying portfolio securities, for shares of the ETF or ETMF (or vice versa). Investors have the ability to sell their shares in the secondary market, and should an authorized participant gather enough shares to form a creation unit, the authorized participant can exchange the unit for the portfolio of underlying securities.

The key distinction is that ETFs and ETMFs generally do not need to sell portfolio securities in order to meet redemptions; they simply can exchange the underlying securities, rather than cash, for the creation unit. In times of market stress, in fact, ETFs and ETMFs that transact on an in-kind basis can provide a major source of liquidity to the market.[9] As a result of this fundamental distinction from open-end mutual funds, the

[8] We note that a small number of ETFs create and redeem shares solely in cash. Our comment in this section does not apply to these ETFs.

[9] For example, during the collapse of the Third Avenue Focused Credit Fund, a mutual fund that principally invested in high-yield bonds, ETFs that track high-yield bond indices posted record trading volumes, providing a major source of liquidity to investors, regardless of the market liquidity for underlying securities held by the ETF or ETMF. *See* Eric Balchunas, *Five Mind-Blowing Stats from the Selloff in the Biggest Junk Bond ETF*, BLOOMBERBUSINESS (Dec. 14, 2015, 7:31 AM), http://www.bloomberg.com/news/articles/2015-12-14/five-mind-blowing-stats-from-the-selloff-in-the-biggest-junk-bond-etf ("If Friday was a test, then the fixed income ETF experiment appears to be working. . . . [The iShares iBoxx High Yield Corporate Bond ETF ("HYG")] saw outflows of $560 million on Friday, its third worst day ever. But this was only 13 percent of its total $4.3 billion in trading volume, meaning 87 percent of the trading didn't involve touching the underlying bonds. To put it another way, 87 percent of the trading was between two parties over an exchange and/or through a market-maker

Committee urges the Commission to exempt these types of ETFs and ETMFs from the proposed Rule.

Safe Harbor

Finally, given the prescriptive nature of the proposed rule, the many factors enumerated, the extensive use of judgment based on materiality and reasonableness, and the likelihood of second-guessing following any loss to a Fund, the Committee urges the Commission to consider a compliance program safe harbor. Specifically, Funds, their advisers and boards should not be subject to second-guessing on each specific factor and its application under the liquidity risk management program if the rule is adopted as proposed.

Disclosure

The Committee is concerned that certain public disclosures proposed in the Proposing Release are, paradoxically, more likely to spur irrational behavior by investors than to assist them. In the first place, public disclosure of a Fund's expectation to redeem shares in a shorter period than a week may spark concern, if not panic, should a Fund, caught in a liquidity squeeze that affects the type of securities in which it invests, be temporarily unable to meet the shorter than seven-day period investors believe was promised.

Second, disclosures in a Fund's most recent Form N-PORT, or other filings, may depict the characteristics of the portfolio as much as ninety days earlier, which may be materially out of date due to normal movement in the portfolio or because of the unexpected decline in the ability to sell certain types of instruments. Shareholders, analysts and journalists may be misled by, or may mislead others by citing, snapshot disclosure that is stale or reflects an evanescent state of affairs.

As reflected in the 2008 crisis, often the investors who act most quickly are institutional investors that may have sudden liquidity needs of their own. Rather than diversifying their redemption requests, investors that are quick on the trigger may focus their requests on funds that, pursuant to the proposed disclosures, stated an intention to provide redemption proceeds most quickly or that publicly disclosed the lowest levels of liquidity. This kind of investment behavior may exacerbate difficulties at these funds.

The Committee believes that the seven-day period established by Section 22(e) strikes a well-crafted balance between investors' right to redeem and funds' need for a period to adjust their portfolios to address market conditions. Narrowing of settlement periods, effected by Exchange Act rules, is designed to reduce the counterparty risk of dealing with a failing broker, a concern that is of little bearing on the transmission of redemption proceeds from a limited purpose fund distributor.

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taking the other side. Some 13 percent, however, involved the redemption of HYG shares to the ETF's provider, Blackrock, in exchange for a basket of junk bonds. If you throw in options activity, it's more like 95 percent.").

While the Commission is right to require funds to prepare for a possible liquidity event by adopting internal policies and procedures, the Commission should also encourage funds to maximize flexibility in a crisis, rather than insisting upon disclosures that can be viewed as advertising false strengths or revealing apparent weaknesses. Liquidity crises tend to occur suddenly, when unexpected risks surface. Portfolio managers need to build processes to exercise agility in such situations, rather than find themselves constrained by required disclosure.

For the reasons outlined above, the Committee suggests that any reporting of liquidity information to the Commission for purposes of the Commission's assessment of systemic risk be submitted in non-public form (similar to Form PF).

Fund Boards' Role

Three-Day Liquid Asset Minimum

If and to the extent that the Commission requires a Fund to have and disclose a 3DLAM, the Committee agrees that a Fund's board should approve the minimum 3DLAM and any material changes to it.[10] Board approval would be consistent with the role of Fund boards in other areas, such as the approval of non-fundamental investment policies that are disclosed in Fund registration statements.[11]

The Committee does not believe that the proposed requirement to approve a Fund's 3DLAM should be understood to change how a board relies on a Fund's adviser to manage the Fund's portfolio or its liquidity. Nor, as suggested by our General Comments above and our discussion below, does the Committee accept that a board's role in this area should be framed in terms of checking a conflict of interest.

It also is not clear how a board's review of reports showing the maintenance of a specified amount of three-day liquid assets would address a Fund's redemption obligations under the 1940 Act. Regardless of the imposition of a specific liquidity minimum and any board reporting, the Committee observes that unanticipated market conditions could alter the liquidity profile of a Fund in the sense that although a Fund might be able to sell assets, it might not be able to sell assets at or near the price at which the Fund carried them. In that case, although a Fund would be able to meet is redemption obligations under section 22(e) of the 1940 Act (and, presumably, a selling broker-dealer would be able to meet its obligations under Rule 15c6-1 under the Exchange Act), a shareholder might receive an amount of redemption proceeds that is sharply reduced. The investor's loss would be due to market events, which are beyond

[10] As discussed above, however, this Committee has reservations regarding the appropriateness of requiring a 3DLAM.

[11] As noted previously, however, the Committee is concerned about the proposed level of board involvement in the portfolio management process and believes that the board's approval of a fund's fundamental investment policies (i.e., its strategy) is distinguishable from the types of conflicts of interest inherent in the investment adviser choosing assets for a fund (i.e., implementation of the strategy). We respectfully suggest that imposing board involvement in the latter, in the manner contemplated in the Proposing Release, is inconsistent with the board's role of oversight.

adviser, board and shareholder control and do not necessarily implicate the legal requirements relating to the ability of a Fund to meet redemptions. Failure to accurately predict liquidity is comparable to failure to forecast that buyers will drop out of the market due to a sudden reevaluation of investment risk and the failure to anticipate a related market decline for assets subject to that risk. The Committee believes that the Commission should carefully craft the final rules to ensure that investors cannot use the language of the rule or the related releases to effectively transfer market risk to advisers and fund boards.

Suspension of Redemptions

The Commission asked if it should propose a rule that would permit mutual funds (other than money market funds) to suspend redemptions and postpone payment of redemptions proceeds in an orderly liquidation of the Fund under certain circumstances. The Committee would support a proposal allowing suspension of redemptions under limited circumstances. In our view, a proposed rule to limit redemptions should contain minimum requirements, such as: irrevocable board approval of the liquidation of the Fund and prior notification of the liquidation to the Commission's staff. In addition, consistent with Rule 22e-3(c), such a rule should allow the Commission to intercede by order to rescind or modify the suspension of redemptions or liquidation. The Commission need not require a Fund board to make any particular findings in suspending redemptions in reliance on such a rule since, in the Committee's view, state law standards applicable to board decisions will suffice.

Approval and Oversight of the Liquidity Risk Management Program

The Committee observes that, by necessity, a liquidity risk management program requires the day-to-day asset management expertise of the investment adviser, and a Fund board is not in a position to judge the adviser's investment, categorization or other relevant decisions in real time.[12] The Committee notes that Fund boards are already charged with oversight of investment advisers and Fund compliance programs under rule 38a-1. Accordingly, if the Commission adopts rule 22e-4 as proposed, it should incorporate board oversight of a liquidity risk management program into the board's existing obligations under Rule 38a-1, rather than imposing differing oversight standards. The Committee recommends that, in its adopting release, the Commission provide further guidance to Fund boards related to a board's consideration of a liquidity risk management program in the context of its existing Rule 38a-1 processes.

The Commission should state clearly that a Fund board is expected to, and may, rely on experts in fulfilling its responsibilities under the proposed rule, including the Fund's investment adviser. The Proposed rule calls for factually demanding and complex determinations to be made about specific portfolio holdings, which can only be undertaken by investment professionals. Moreover, given the likely variability in liquidity needs over time and under differing market scenarios, the Committee expects that the

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[12] A board is best suited to policing conflicts and not making factual determinations. The Commission should recognize that the proper role of the board is oversight and not micromanagement.

boards of Funds may wish to delegate more flexibility to management than the present rulemaking appears to contemplate. The Committee encourages the Commission to permit such delegation, recognizing that the required determinations may be fact-intensive and involve difficult judgments and analysis.

The Committee also respectfully suggests that the board of a Fund, by itself, is not in a position to ensure a Fund's liquidity. Identifying and monitoring the liquidity classification of each portfolio holding, setting and resetting a Fund's 3DLAM and otherwise overseeing a liquidity risk management program of the nature contemplated by the Commission are fact-intensive tasks and will require a variety of uncertain and forward-looking assessments. The Committee recommends that the Commission make explicit that fund boards serve in an oversight role and can satisfy their obligations by being informed and exercising their business judgment.

Moreover, the Committee believes that a Fund board should be able to rely on the reports it receives from the Fund's adviser to determine the adequacy and effectiveness of a Fund's liquidity risk management program, and that the adviser, as a fiduciary, has an obligation to make sure the board has sufficient information to be fully informed. These reports should provide a basis for a board to avail itself of protections of the business judgment rule in meeting its obligations under the proposed rule.

While we recognize that the Commission recently noted, in the context of another rulemaking,[13] that its adoption of the common-law "business judgment rule" in a rule would be inappropriate, the Commission staff has previously provided guidance to the effect that "in the absence of facts showing that… directors have not acted in good faith or exercised care and diligence… the staff would not seek to retroactively question their judgments."[14] The Committee urges the Commission to recognize those concepts explicitly in the release adopting the final rules with respect to board determinations under both proposed rule 22e-4 and proposed rule 22c-1(a)(3). For instance, fund directors may be more likely to adopt swing pricing policies, which may provide meaningful protection against shareholder dilution, if they are assured that the Commission's staff will be reluctant to second-guess their good faith judgments.

Swing Pricing

The Committee supports the Commission's initiative to allow funds to use swing pricing, which may provide funds with another tool to manage liquidity.

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[13] *See* "Money Market Fund Reform; Amendments to Form PF," 71 Federal Register 157 at 47761 (August 14, 2014). There, in the context of discussing liquidity fees and redemption gates for money market mutual funds, the Commission acknowledged a commenter who supported adopting a business judgement rule standard for fund boards due to a particular concern about the threat of litigation against fund boards. However, the Commission found that it would be inappropriate to adopt the business judgment rule standard in federal regulation, as it is "a construct of state law and not the federal securities law." *Id.*

[14] SEC No-Action Letter to the Investment Company Institute. Investment Company Act of 1940 – Rule 0-1(a)(6); 2a-19 (February 12, 2002), *available at* *http://www.sec.gov/divisions/investment/noaction/ici021202.htm* at 2.

To the extent the Commission determines to adopt proposed rule 22c-1(a)(3) permitting registered open-end investment companies, other than money market funds ("mutual funds"), to implement swing pricing, the Committee recommends certain revisions to the proposed rule and the inclusion of additional and revised guidance in the adopting release or in instructions to the final rule. The Committee's comments are generally intended to encourage the Commission to provide guidance to mutual fund boards charged with approving and supervising swing pricing programs, and to mutual fund advisers or officers responsible for implementing them. The Committee urges the Commission to clearly acknowledge the difficult judgments that must be made by mutual fund boards, advisers and officers in implementing swing pricing.

The Committee is concerned that, without such guidance, mutual fund directors, advisers and officers may be reluctant to implement swing pricing regimes that are in the best interests of funds due to fears that their good faith judgments in adopting and operating swing pricing may be called into question by the Commission's staff. This is particularly troubling when the staff may have the benefit of hindsight in the type of volatile market conditions where swing pricing may provide the greatest benefits to mutual funds and their shareholders. The Committee urges the Commission to squarely address this important issue in the final rule and the related adopting release.

Establishing Swing Thresholds and Swing Factors.

The Proposing Release includes general guidance on the type of diligence and investigation that might be undertaken by mutual fund boards and compliance staff in establishing and operating a swing pricing policy, including setting the swing threshold and the swing factor on any given day. The Committee believes, however, that modified guidance, as suggested below, would assist mutual funds in designing and operating swing pricing programs.

<u>Establishment of Swing Thresholds</u>. The Proposing Release states that "a fund's swing threshold should generally reflect the estimated point at which net purchases or net redemptions would trigger the fund's investment adviser to trade portfolio assets in the near term, to a degree or of a type that may generate *material* liquidity or transaction costs for the fund" and the proposed rule requires a mutual fund's board to approve the swing threshold. The Committee notes, however, that the text of proposed rule 22c-1(a)(3) itself does not use the word "material" in respect of the swing threshold and has concerns with the term as used in the Proposing Release.

The section of the Proposing Release on determining the swing threshold uses the term "material" repeatedly, but does not give examples of what the Commission views as a "material" liquidity or transaction costs for a mutual fund. Rather, the Proposing Release suggests that consideration of the various factors specified in proposed rule 22c-1(a)(3)(i)(B) (that is, the size, frequency and volatility of historical net purchases and sales of mutual fund shares during normal and stressed conditions, a mutual fund's investment strategy, the liquidity of its holdings and available sources of liquidity, and the transaction costs associated with trading in the relevant markets) would allow mutual funds to accurately estimate the point at which net flows would result in material liquidity or transaction costs for a mutual fund, and thus set an appropriate swing threshold.

The Committee believes that mutual funds and their boards will be concerned that the Commission's staff may question a mutual fund's chosen swing threshold based on divergent, and potentially retrospective, views of materiality. The Committee is of the view that in determining a swing threshold a mutual fund's board should be guided by its business judgment as to what an appropriate swing threshold is for that mutual fund in light of all of the facts and circumstances that the board deems relevant. The Committee therefore suggests that in the adopting release, the Commission should clarify its statement in the Proposing Release that that the swing threshold may be based on a determination as to when net flows will result in "material" liquidity and transaction costs for a fund. In the Committee's view, that standard suggests a level of precisions that may not be realistic, particularly for some mutual funds and some markets. Instead, the Committee suggests that the Commission acknowledge, in the adopting release, the concerns raised by commenters about the references to materiality in the Proposing Release, and go on to state that the setting of the threshold is up to the judgment of fund boards, subject to their consideration of the enumerated factors and such other factors as members of the board deem relevant to their determination.

Moreover, while the Committee agrees that the required factors proposed to be considered are all potentially relevant to a determination of a swing threshold, the Committee believes that mutual funds and their directors may determine that other factors may also be relevant in determining a swing threshold. The proposed rule should not, therefore, preclude consideration of such other factors. For this reason, the Committee recommends that the list of specified factors in paragraph (a)(3)(i)(B) be specified as non-exclusive. This would permit a mutual fund to incorporate other factors that its board deems relevant in determining potential costs and thus an appropriate swing threshold.

In addition, the Committee recommends that the adopting release contain an updated section for "Determining the Fund's Swing Threshold" that would: (i) disavow the references to materiality in the Proposing Release, (ii) note that boards of similar mutual funds may conclude that significantly different swing thresholds are appropriate, and (iii) make it clear that a mutual fund's board should determine a swing threshold that it deems appropriate, taking into account the specified factors and any others that it deems to be relevant to the determination.

Swing Factors. With regard to establishing a mutual fund's swing factor, the proposed rule requires that the mutual fund's swing factor policies and procedures specify how the swing factor shall be determined, and further requires that the determination of the swing factor, as well as the determination of any upper limit thereof, must take into account certain specified factors, including market impact costs, spread costs, transaction fees, and charges arising from asset purchases or sales to satisfy purchases and redemptions, as well as borrowing related costs and the value of assets to be purchased or sold if appropriate in the circumstances. The Committee appreciates the Commission's acknowledgement that these cost measures will likely vary on a daily basis for a host of reasons, and thus that mutual funds are permitted to vary the specific swing factor implemented from day to day.

The Committee is concerned, however, by the description in the Proposing Release of the requirement that mutual fund policies must explain how each factor assists the fund in calculating its swing factor on any day. While the Proposing Release provides a thorough and careful account of how mutual funds might reasonably calculate a swing factor on a particular day, including examples and descriptions that highlight the difficulty of accurately estimating the prescribed factors in a timely manner, the text of the proposed rule does not acknowledge these challenges and the concomitant need for flexibility and allowances. The Committee believes that while it would be reasonable for the proposed rule to require a non-exclusive listing of the factors that should be considered in setting a swing factor, it is not practicable to require mutual funds to specify in procedures precisely how each factor should be applied in determining the swing factor on any particular day.

As one example, subparagraph (a)(3)(i)(D)(2) requires that consideration be given to the value of assets purchased or sold by a mutual fund as a result of net purchases or net redemptions that occur on the day the swing factor is used, if that information would not be reflected in the current NAV of the fund computed that day. However, as the Commission acknowledges and as discussed further below, the swing factor will need to be determined based on highly imperfect information in most cases because the net redemption or net purchase amount will not be known until many hours after the swing factor must be established. Accordingly, in most cases a mutual fund cannot be expected to know the value of assets to be purchased or sold by the fund as a result of net flows at the time it must establish the swing factor for a given day. The Committee therefore believes that it is inappropriate for the proposed rule to require that this amount be considered.

The Committee believes mutual funds and their boards will benefit from examples or descriptions acknowledging the Commission's acceptance of mutual funds' use of estimates based on highly imperfect available information and widely varying procedures in calculating a swing factor in both the text of the rule itself (perhaps in an instruction to the rule) and in the adopting release.

Full Swing Pricing. The Proposing Release contemplates the potential for mutual funds to set an extremely low swing threshold, essentially achieving something very close to full swing pricing. Yet the Proposing Release also makes it clear that the Commission considered and rejected providing mutual funds with the option of implementing full swing pricing in favor of partial swing pricing. Moreover, the Commission does "not anticipate that a fund would generally wish to set a very low swing threshold, because we believe that a fund would not want to incur the increased NAV volatility associated with full (or nearly full) swing pricing."

Although the Commission goes on to explain why it is not proposing a swing threshold floor, and notes that there are no across-the-board swing threshold floors in Europe, the Committee is concerned that the Commission's comments may have a chilling effect on a mutual fund board's willingness to set a swing threshold close to zero. This may be the case even when the board has concluded that, after careful analysis of the relevant facts and circumstances, it would be in the mutual fund's best interests to do so. For this reason, we urge the Commission to include language in the adopting release or in an instruction to the final rule that supports a zero or near-zero threshold if a mutual fund's board, after consideration of the prescribed factors, determines that such a floor would be in the best interests of the fund.

Detailed Periodic Review of a Fund's Swing Threshold. The Committee believes it would be helpful for the Commission to provide additional guidance on what would constitute a sufficient review of a mutual fund's swing threshold. Specifically, the Committee suggests that the final rule make clear that the required annual review should be similar in nature to the review that led to the determination of a mutual fund's swing threshold in the first place, and that conducting such a relatively comprehensive review on an annual basis, absent a material change in market conditions since the date of the most recent annual review, would be sufficient. As discussed below, the Committee does not agree with the Commission that any change of a swing threshold should require board approval, and believes that it would be reasonable for a mutual fund board to permit the fund's adviser or specified officers to modify the threshold within specified limits, subject to a board notification requirement.

The Committee notes that there is no suggestion in the proposed rule that the annual review of a fund's swing pricing threshold should result in a report to the mutual fund's board, except to the extent that such a review would lead to material changes that must be approved by the fund board, The Committee requests that the adopting release clarify both that this is the case and that only special factors, such as a material change in market conditions for the types of securities in which a mutual fund invests, should ordinarily result in that fund's swing threshold being reviewed more frequently than annually.

Estimating Whether Daily Fund Flows Will Exceed the Swing Threshold.

The Proposing Release acknowledges that mutual funds that choose to adopt swing pricing policies may have to determine whether a fund's NAV will swing on a given day prior to receiving all fund flow information for that day. The Committee understands that most mutual funds are marketed primarily through intermediaries that, due to operational considerations, provide information about orders received before a relevant cut off time long after the fund strikes its NAV. Indeed, many order types that are particularly beneficial to mutual fund shareholders (*e.g.*, same-day exchanges, dividend reinvestments and many retirement plan orders) depend on the ability of funds to accept orders after a mutual fund strikes its daily NAV.

As a result, most mutual funds will not have good information on a day's net flows until many hours after a fund must make a determination of whether a swing threshold has been breached. Moreover, the determination that the threshold has been breached will most likely be made based not only on imperfect estimated fund flows but also during periods of market stress, which makes accurately predicting fund flows more difficult than under normal market conditions.

Given the difficulty of predicting fund flows and the fact that swing pricing determinations will in most cases be made on the basis of incomplete information, the Committee believes that the Commission should significantly strengthen the language in the Proposing Release about the constraints on funds in evaluating whether or not to determine that the swing threshold has been breached on any given day.

The Committee also suggests that the adopting release should include confirmation that the Commission does not expect its staff to question judgments in this regard made by mutual funds in good faith. The Committee is concerned that failure to clarify the Commission's expectations in this regard may result in mutual funds' reluctance to implement swing pricing that would be in the best interests of funds and their shareholders due to fears that reasonable good faith judgments made in volatile environments (when swing pricing may be most useful) may be second guessed by the Commission's staff operating with the benefit of hindsight.

Specify that Evaluating Swing Pricing is Voluntary.

The Committee notes that proposed Rule 22c-1(a)(3) is permissive and that there is no suggestion in the proposing release that a mutual fund board has a duty to consider implementing swing pricing. As noted in the Proposing Release, swing pricing has advantages and disadvantages. The Committee believes that the availability of swing pricing as an option is likely to result in most mutual fund boards considering whether or not adoption of some version of swing pricing is in the best interests of any of the eligible funds they oversee. The Committee recommends, however that the Commission include language in the adopting release clarifying that a mutual fund's board is not required to consider implementing swing pricing.

Swing Pricing for Certain ETFs.

Under the proposed rule, the option to adopt a swing pricing policy is not available for any ETF. We appreciate the SEC's argument that that in-kind creation units, which are typical in the ETF setting, do not present the same transaction costs as cash subscriptions and redemptions in a mutual fund, which in turn warrant swing pricing as a mechanism to prevent shareholder dilution. The Committee notes, however, that a limited number of ETFs create and redeem solely in cash (for example, due to foreign settlement requirements that prohibit free deliveries of securities). The Committee believes that such ETFs face dilution problems substantially similar to those of mutual funds. For these ETFs, swing pricing could serve as a robust liquidity management and dilution prevention tool. While the Commission suggests that ETFs already hold sufficient flexibility using permissible fees to protect against dilution issues, swing pricing, for cash-only creation and redemption unit ETFs, may be another useful tool in their toolbox to prevent dilution.

We are sensitive to the Commission's concern, as noted in the Proposing Release, that if swing pricing were expanded to ETFs, arbitrageurs would be less likely to trade ETF shares given the enhanced unpredictability of day-end pricing. Since ETFs rely on ongoing arbitrage to maintain share prices at approximately the current market value of and ETF's holdings, a swing pricing option could fundamentally undermine the functioning of the ETF market. However, the Committee believes that because the adoption of swing pricing policies is voluntary, any cash-only ETFs which experience price volatility due to swing pricing would simply modify their policies accordingly. Thus, we request that the final rule change the definition of "Exchange Traded Fund" at proposed rule 22c-1(a)(3)(v)(A) to carve out an exception for ETFs that utilize cash-only creation and redemption units.

Management of Swing Pricing Program.

The proposed rule requires mutual fund boards to delegate management and day-to-day oversight of swing pricing policies to mutual fund staff, whose decisions must be "reasonably segregated" from the portfolio management function of a fund. Under the proposed rule, the staff responsible for administering a mutual fund's swing pricing policies would be permitted to determine whether the fund's NAV should swing on the basis of information obtained after "reasonable inquiry." The Proposing Release explains the careful balance between compliance and investment staff as requiring "effective communication channels between the persons charged with implementing the fund's swing pricing policies and procedures, the fund's investment professionals, and personnel charged with day-to-day pricing responsibility."

While the Committee understands the importance of separating the compliance and investment functions of any fund, we are concerned that under the proposed rule, the division between personnel with responsibility for operating the swing pricing policy and personnel with responsibility for portfolio management is unclear. The Committee assumes that the Commission's intent is that while investment staff have input in the process, the decision making authority must rest with the compliance or other staff with primary responsibility to administer swing pricing, including a funds' operational staff and trading desks, and not portfolio management. The Committee welcomes additional guidance from the Commission to this effect in the adopting release. While many potential arrangements could suffice, the Committee notes the Commission's recognition of certain foreign-domiciled funds' use of swing-pricing committees. The Committee agrees that swing-pricing committees may effectively bring together relevant compliance and investment staff, taking into account potential conflicts of interest, to assess the most up-to-date information about market conditions and fund holdings. This would allow staff responsible for the operation of a mutual fund's swing pricing program to accurately and effectively determine both an appropriate swing threshold and factor, as well as the mechanism to swing the fund's NAV on a given day.

The Board's Role in Swing Pricing

The proposed swing pricing rules create a variety of new obligations for mutual fund boards and independent directors. The Committee notes that over the years the Commission has adopted numerous rules that have added to the list of specific responsibilities of, and required determinations by, fund boards and independent fund directors. As a result, concerns have been raised by many directors that the lengthy and growing list of requirements has made board meetings much longer than in the past, and may diminish the amount of time available for attention to matters that they reasonably believe require reports and discussion as part of their general oversight responsibilities.

The Committee notes that swing pricing does not appear to involve the sort of conflicts between the interests of a fund and its investment adviser that independent directors are intended to be especially attentive to. The Committee agrees with the Commission's explicit recognition that day-to-day implementation of swing pricing, including the determination of the daily swing pricing factor, would be the responsibility of the fund's adviser or fund officers as designated by the fund board (including a majority of independent directors). The Committee requests that the Commission allow the board to delegate the decision to adjust the swing threshold to the adviser or appropriate fund officers (with prompt reporting to the board), subject to limits specified in the fund's swing pricing procedures. The ability to effect such delegation is important because rapidly changing market conditions may require decisions to be taken on very short notice in circumstances in which it may be difficult or impossible to convene a board meeting.

Similar to concerns raised above with respect to the board's oversight and involvement in decisions related to the liquidity risk management program and a fund's 3DLAM, the Committee is concerned that the judgment of fund boards with respect to swing pricing will be called into question by the Commission staff, with the benefit of hindsight, under an opaque standard of review. We request that the Commission clarify in the adopting release the general approach the Commission's staff will be directed to take when reviewing fund boards' decisions to establish (or not establish) swing pricing programs and the determination of swing thresholds, as well as judgments made by fund advisers or officers in determining swing factors and overseeing swing pricing programs.

In the Proposing Release, the Commission questioned whether guidance is necessary regarding circumstances in which misapplication of a fund's swing pricing policy could result in a material NAV error. We believe that such guidance is not necessary. Nor should mutual funds be required to have specific policies and procedures to address possible NAV errors. Fund boards can effectively establish and oversee appropriate practices relating to the identification and correction of NAV errors in connection with swing pricing just as they oversee such practices with respect to errors that can be associated with other aspects of Fund operations.

The Committee notes, and was perplexed as to the relevance of, the SEC's comment in a footnote of the Proposing Release noting the "historical role that a fund's board and independent directors have held with respect to issues involving valuation." We are concerned by the SEC's comment referencing board duties under the statutory valuation processes referred to in Section 2(a)(41) of the 1940 Act and Rule 2a-4 thereunder or rule 2a-7(c)(1)(i) and rule 2a-7(g)(1)(i)(A)-(C), which require directors to, in good faith, determine the fair value of securities for which market quotations are not readily available, may indicate a view by the Commission that fund boards' duties with regard to swing pricing policies are in some way similar to the cited duties. We request that the Commission clarify in the adopting release that, notwithstanding the statement in footnote 514 of the proposing release, swing pricing policy decisions by a fund's board are not subject to the same requirements as the valuation obligations noted above.

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We appreciate the opportunity to comment on the Proposing Release and proposed rules 22e-4 and 22c-1(a)(3), and respectfully request that the Commission consider our recommendations and suggestions. We are available to meet and discuss these matters with the Commission and its staff, and to respond to any questions.

Very truly yours,

David M. Lynn
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APPENDIX A

The first of the four proposed factors that a Fund would be expected to consider in assessing its liquidity risk and setting its 3DLAM is "short-term and long-term cash flow projections." The corresponding discussion in the Proposing Release of just this one factor, however, encourages or requires consideration of a lengthy list of sub-items, including the following:

1. Size, frequency, and volatility of historical purchases and redemptions of Fund shares during normal and stressed periods;

    i. When the Fund's highest, lowest, most frequent, and most volatile purchases and redemptions occurred within various time horizons, such as the past one, five, ten and 20 years
    ii. Corresponding information for funds with similar investment strategies
    iii. Patterns regarding flows relating to, for example:
        1. Seasonality;
        2. shareholder tax considerations;
        3. Fund advertising;
        4. departure of a Fund manager; and
        5. performance rating changes
    iv. Whether the Fund's investment strategy contributes to shareholder flows
    v. Whether the Fund's AUM size impacts flow volatility

2. The Fund's redemption policies, including:

    i. whether its policies and prospectus disclosure or advertising materials indicate that redemption payments will be made in a specified period of time
    ii. Whether its redemption policies vary based on the distribution channels the Fund employs

3. The Fund's shareholder ownership concentration;

4. The Fund's distribution channels;

    i. Whether the Fund is sold through broker-dealers
    ii. Whether Fund shares are held in omnibus accounts
    iii. Whether different types of distribution channels correlate with different redemption/purchase patterns
    iv. Whether investors in a given channel are incentivized by capital gains distribution dates or other tax incentives

5. Degree of certainty associated with the Fund's short-term and long-term cash flow projections

    i. Length of its operating history (experience with periods of volatility)
    ii. Observed purchase and redemption patterns
    iii. Whether to use ranges for projecting cash flows

Whether certain shareholders have been encouraged to provide advanced notice of intent to redeem