February 14, 2023

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

Re: File No. S7-26-22; Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-PORT Reporting

Dear Ms. Countryman,

The Independent Trustees of Professionally Managed Portfolios ("PMP") appreciate the opportunity to comment on the proposal made by the U.S. Securities and Exchange Commission ("SEC") to require swing pricing and a hard close for open-end funds (the "Proposal")[1]. PMP is a registered investment management company consisting of 27 separate series ("Funds") managed by 10 unaffiliated investment advisers with $24.6 billion in assets as of January 31, 2023. The PMP Board is comprised entirely of trustees who are not Interested Persons as defined in the Investment Company Act of 1940 (the "1940 Act").

The PMP Board takes seriously its role as a watchdog for the interests of shareholders.[2] The PMP Board believes that Proposal is misguided, lacks sufficient analytical support regarding the problems it seeks to address, and fails to consider the impact and ramifications of its adoption on the industry as a whole and on small funds in particular. We believe that, if adopted, the Proposal would present a substantial risk not only to the mutual fund industry in general, but to our shareholders whose interests we represent.

We have reviewed many of the comment letters objecting to various elements of the Proposal and add our voice to these concerns. In particular, we agree with the comments made by the Independent Directors Council ("IDC") in their letter. Nevertheless, we believe it is important for us to submit our own letter to express our concerns about the impact that we believe the Proposal, and the hard close requirement in particular, would have on our Funds' shareholders.

The investment advisers of the Funds within PMP fall into the category of smaller fund complexes. We believe that the presence of healthy smaller fund complexes is important to foster investor choice and competition. However, the onerous burdens and costs of compliance,

[1] *Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-PORT Reporting*, SEC Release No. 33-11130; IC-34746 (Nov. 2, 2022).

[2] See Burks v. Lasker, 441 U.S. 471, 484–85, 99 S. Ct. 1831, 1840–41, 60 L. Ed. 2d 404, 416–17 (1979) (The independent directors have "the primary responsibility for looking after the interests of the funds' shareholders.)

drains on staffing resources, and operational challenges that smaller funds currently face are already significant. The imposition of additional compliance burdens, when warranted, is surely appropriate. However, when burdens are imposed that will significantly affect smaller funds without sufficient identification as to their necessity or analysis of the impact of these burdens on smaller funds and competition within the mutual fund industry, then the imposition of these burdens is not appropriate. We believe that such is the case with the Proposal and therefore urge that the SEC withdraw the Proposal.

Discussion

One of the key characteristics of open-end mutual funds is that a shareholder who places an order for a purchase or sale of fund shares before the markets close receives the fund's net asset value ("NAV") for that day. The hard close requirement would result in a drastic change in experience for shareholders transacting through intermediary accounts as their orders would have to be submitted substantially earlier in the trading day in order to receive that day's NAV. Smaller fund complexes in particular, including PMP, rely heavily on the intermediary channel as they do not independently possess large distribution and shareholder servicing infrastructures. We believe that the Proposal would place our Funds shareholders at a disadvantage compared to shareholders holding accounts directly with a fund as a result of the hard close requirement. The Proposal, if adopted, would create a system where shareholders holding shares through intermediary accounts would be treated differently from direct shareholders as order cut-off times for investors would differ based on how they are holding those shares. We agree with the IDC's comment that this results in a large number of investors - those in intermediated accounts, including retirement plans, 529 plans, and variable insurance products – being treated as "second class" investors by limiting the time frame in which they have to make an investment decision in order to receive that day's price. In fact, the staff of the SEC has previously recognized the importance of allowing intermediaries to send customer orders to fund groups after markets close to receive that day's NAV so long as the orders were placed prior to the close and were processed prior to the markets opening on the following day.[3]

In the Proposal, the SEC acknowledges that the hard close requirement would require funds and intermediaries to make extensive and expensive operational changes. The SEC also acknowledges that retirement plan recordkeepers may face particular challenges with adhering to the proposed hard close requirement due to the manner in which fund purchases and redemptions are processed for retirement accounts. The SEC admits in the Proposal that it is "not able to quantify many of the costs associated with the proposed swing pricing framework"[4]. There is also nothing in the Proposal that indicates that the SEC has sufficiently analyzed the impact that creating this de-facto dual class regime would have on the industry or on smaller funds who rely heavily on the intermediary channel. We believe this is a fatal flaw in the Proposal.

[3] See Staff Interpretive Positions Relating to Rule 22c-1, Investment Company Act, Release No. 5569 (Dec. 27, 1968) (Rule 22c-1 "contemplates that the time of receipt of the order by the retail dealer is controlling" for purposes of determining the price obtained by the dealer).

[4] Proposal at 292.

In fact, the SEC acknowledges, and we agree, that it could result in the replacement on intermediary platforms and in retirement plans of mutual funds with other investment vehicles that do not require these system changes and are less costly due to fewer regulatory burdens. It is reasonably foreseeable, for example, that collective investment trusts ("CITs") could replace mutual funds on many platforms, as CITs are not subject to the 1940 Act and would not be subject to the hard close requirement. If this happens, and we believe it very well may, then the Proposal will do significant harm to the industry and will effectively promote the use of CITs or other types of investment vehicles over mutual funds for retirement and other intermediated accounts where investors would have both less choice and less protection. In fact, the SEC recognizes in the Proposal that CITs "do not offer the same investment strategies or do not provide the same benefits and protections as the open-end funds to investors [so] investors may find such investment avenues less favorable compared to open-end funds".[5]

We believe the Proposal does not present appropriate evidence that the costs and risks associated with the Proposal are justified. The Proposal states that the swing pricing and hard close requirements, when coupled with current rules, would more effectively "prevent late trading"[6]. However, the late trading concerns that the SEC points to in the Proposal are those that occurred over twenty years ago, in the early 2000s. As the SEC is aware, these concerns were addressed by the adoption of new rules at that time, including Rule 38a-1 and the Proposal cites no evidence that these rules have become ineffective or that late trading has reemerged as a problem. With respect to the concern that potential dilution might have occurred in March of 2020, the SEC admits that it "do[es] not have specific data about the dilution fund shareholder experienced in Mar. 2020."[7]

Conclusion

We are alarmed that in the pursuit of a solution to a theoretical problem, the SEC has failed to adequately establish that the problem exists in the first place. In addition, the SEC appears to have failed to appropriately analyze and consider the costs and ramifications of the Proposal on the industry as a whole, on smaller funds in particular and on competition. Creating inequities among investors and promoting shareholder money flows into less regulated vehicles seems like a result not in alignment with the SEC's mission to protect investors. We are confident that, as history shows, if a problem does exist, then working with the industry, the SEC can develop a set of thoughtful and appropriate remedies to address these issues.

[5] Proposal at 273.

[6] Proposal at 38.

[7] Proposal at 23, footnote 40.

We appreciate the SEC's consideration of our comments.

Sincerely, /s/ Eric Falkeis
Eric Falkeis
Independent Trustee and Chair
of the Board of Professionally Managed
Portfolios

Sincerely, /s/ Kathleen T. Barr
Kathleen T. Barr
Independent Trustee and
Chair of the Nominating and
Governance Committee of
Professionally Managed
Portfolios

On behalf of:
The Independent Trustees of Professionally
Managed Portfolios

cc: The Hon. Gary Gensler, Chair, U.S. Securities and Exchange Commission
The Hon. Hester M. Peirce, Commissioner, U.S. Securities and Exchange Commission
The Hon. Caroline A. Crenshaw, Commissioner, U.S. Securities and Exchange Commission
The Hon. Mark T. Uyeda, Commissioner, U.S. Securities and Exchange Commission
The Hon. Jaime Lizárraga, Commissioner, U.S. Securities and Exchange Commission
Mr. William A. Birdthistle, Director, Division of Investment Management, U.S. Securities and Exchange Commission