



Consumer Federation of America

February 14, 2022

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

**Re: File Number S7-26-22
Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form
N-PORT Reporting**

Dear Secretary Countryman,

On behalf of the Consumer Federation of America (CFA),¹ I write to express support for certain aspects of the above-captioned proposal and strong opposition to other aspects of the proposal.² Specifically, we support the amendments to the liquidity risk management framework, including: requiring funds to incorporate stress into their liquidity classifications; treating less liquid investments and assets whose fair value is measured using unobservable inputs as illiquid assets under the rule; and requiring funds to hold a minimum amount of highly liquid assets; among other modifications. By improving the quality and consistency of liquidity classifications, these targeted changes would help funds better prepare for and weather future stress events and periods of high levels of redemptions.

While we support the above amendments and urge the Commission to adopt them, we encourage the Commission to go a step further to strengthen the proposal rather than adopting other aspects of the proposal, namely the swing pricing and hard close amendments. Specifically, the Commission should lower the 15% limit on illiquid assets to 10% or require funds that hold more than 10% illiquid assets to also hold at least 15% highly liquid assets to counterbalance the fund's illiquid sleeve and the accompanying risk that such funds may have difficulty meeting redemption requests during times of stress without causing significant dilution of remaining investors' interests in the fund. Such changes would be targeted at improving the liquidity of

¹ The Consumer Federation of America is a non-profit association more than 250 consumer groups that was established in 1968 to advance the consumer interest through research, advocacy, and education.

² Proposed Rule, Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-PORT Reporting, Release Nos. 33-11130; IC-34746, November 2, 2022, <https://www.sec.gov/rules/proposed/2022/33-11130.pdf> ["Proposing Release"].

funds that hold a significant portion of illiquid holdings and that are therefore at greater risk of experiencing heightened redemptions during times of stress.³

As discussed below, however, we strongly oppose the proposed hard close requirement to implement swing pricing. The hard close would require a fund, its designated transfer agent, or registered securities clearing agency to receive orders *before* the time a fund calculates its NAV. As a practical matter, because most mutual fund orders are received *after* the time a fund calculates its NAV, these orders would be forced to receive next-day pricing.

While one of the purported benefits of swing pricing is that it could reduce potential first-mover advantages that might incentivize early redemptions to avoid anticipated trading costs and dilution associated with other investors' redemptions, the proposal would not accomplish this goal. On the contrary, the proposed hard close would create a two-tier market, putting investors who are able to structure their transactions so as to secure same-day pricing at an advantage relative to those who are unable to structure their transactions so as to secure same-day pricing. In so doing, sophisticated investors who are able to secure same-day pricing would continue to have an incentive to exercise a first-mover advantage, which would unfairly impose their trading costs and dilutionary behavior on other, less sophisticated investors. Because the proposed hard close would intensify disparities between more sophisticated and less sophisticated investors, to the detriment of market integrity and investor protection, and be particularly detrimental to retail investors saving for a secure and dignified retirement, we urge the Commission to dispense with the hard close requirement and forego any regulatory approach that causes retail investors to disproportionately shoulder any costs and delays associated with liquidity risk management.

While we agree *in theory* that swing pricing could be beneficial to the fund market, helping to ensure that investors internalize the costs or benefits associated with their trading practices, the Commission has not shown any indication that the proposal would accomplish this objective *in practice*. On the contrary, the Proposing Release suggests swing pricing, coupled with a hard close, cannot be operationalized without causing significant collateral damage to the open-end fund market and to retail investors. Furthermore, it is unlikely that the proposal would accomplish its objectives. Accordingly, the tangible and significant costs associated with the proposed implementation of swing pricing are very likely to outweigh any perceived benefits.

If the goal of this proposal is to protect existing fund shareholders from suffering dilution during periods of high levels of redemptions, the Commission should come up with a much more narrowly tailored approach that does not adversely impact tens of millions of U.S. investors in the process. We believe the amendments that we have suggested, which focus on improving the liquidity of funds that hold significant amounts of illiquid assets, is more narrowly tailored to accomplish these objectives.

³ See Proposing Release at 15 (“The less liquid the fund’s portfolio holdings, the greater the liquidity costs associated with redemption and purchase activity can become and the greater the possibility of dilution effects on fund shareholders.”).

I. We Support the Proposed Changes to the Liquidity Risk Management Program and Encourage the Commission to Take Further Steps to Improve Open-End Fund Liquidity.

The Commission first adopted rule 22e-4 in 2016, which required open-end funds to adopt and implement liquidity risk management programs. Rule 22e-4 was designed to address concerns that open-end funds investing in less liquid securities may have difficulty meeting redemption requests without causing significant dilution of remaining investors' interests in the fund. In the years since its adoption, the Commission and its staff have made adjustments to the rule and have continued to monitor and evaluate how the rule has worked in practice. Based on the Commission's experience with, and evaluation of, funds' liquidity risk management programs, the Proposing Release notes that the Commission has observed certain weaknesses in these programs, particularly in times of stress, including during the March 2020 market events.⁴ Based on these observed weaknesses, it is entirely reasonable and appropriate for the Commission to propose changes to ensure that funds are better prepared for future stress conditions.

The proposed amendments to rule 22e-4 are tailored to address these concerns. First, recognizing that it can be difficult to predict when market stress will occur, the proposal would require funds to incorporate stress into their liquidity classifications by assuming the sale of a stressed trade size, which would be 10% of each portfolio investment, rather than the rule's current approach of assuming the sale of a "reasonably anticipated trade size" in current market conditions. We agree that requiring a fund's classification model to assume the sale of larger-than-typical position sizes may better emulate the potential effects of stress on the fund's portfolio, similar to an ongoing stress test, and help better prepare a fund for future stress or other periods where the fund faces higher than typical redemptions.

The proposal also would establish other minimum standards for classifying the liquidity of an investment, which are designed to improve the quality of classifications of fund liquidity. According to the Proposing Release, whereas the existing rule provides funds with a considerable level of discretion regarding how fund investments are classified, these amendments would reduce that discretion and prevent funds from over- or under-estimating the liquidity of their investments, including in times of stress. Such changes would reflect more effective practices that the Commission has observed with regard to classification practices. We agree that these changes would standardize and strengthen the quality of liquidity classification, thereby enhancing fund liquidity and improving overall market resiliency, particularly during times of stress.

In addition, the proposal would remove the less liquid investment classification and instead treat these investments as illiquid. Currently, funds are allowed to invest in less liquid assets, despite the fact that less liquid investments take more than seven days to settle. We agree that this proposed change would reduce the mismatch between the receipt of cash for the sale of

⁴ According to the Proposing Release, "Overall, the market events in March 2020 show how liquidity can deteriorate rapidly and significantly. In the face of such rapid market changes, liquidity risk management program features of some funds adjusted slowly, making them less effective during the stress period for managing liquidity risk." Proposing Release at 33.

these assets and the payment of shareholder redemptions. In addition, the proposal would amend the definition of illiquid investment to include investments whose fair value is measured using an unobservable input that is significant to the overall measurement. We agree that these proposed amendments would more effectively constrain funds' ability to gain additional exposure, beyond the current 15% limit, to assets that are difficult to value or that do not trade frequently enough to have reliable prices. The proposal also would require funds to hold a minimum of 10% highly liquid assets, which would help to ensure funds operate with a sufficiently liquid base of assets during heightened levels of redemptions.

While we support these proposed changes and agree that, if finalized, they would enhance liquidity across open-end funds, we urge the Commission to strengthen the proposal even further by lowering the 15% limit on illiquid assets to 10% or by requiring funds that hold more than 10% illiquid assets to also hold at least 15% highly liquid assets to counterbalance the fund's illiquid sleeve and the accompanying risk that such funds may have difficulty meeting redemption requests during times of stress without causing significant dilution of remaining investors' interests in the fund. Such changes would be targeted at improving the liquidity of funds that hold a significant portion of illiquid holdings and that are therefore more likely to be at risk of experiencing heightened redemptions during times of stress.⁵

II. We Strongly Oppose the Required Hard Close to Implement Swing Pricing.

In our current market structure, open-end mutual funds can be purchased directly from a mutual fund company or indirectly through an intermediary, such as a retirement plan or broker-dealer.⁶ In either case, investors are able to receive same-day pricing if they submit their orders before the end of the trading day. Accordingly, while the vast majority of orders are received by funds after the end of the trading day—typically after funds have computed their NAVs—investors receive the benefit of same-day pricing.

Under the proposal, however, fund investors would no longer receive this benefit. The proposed hard close would require a fund, its designated transfer agent, or registered securities clearing agency⁷ to receive orders before the time a fund calculates its NAV. Because orders would need to be *received by funds before* the end of the trading day, orders that are *placed before* the end of the trading day *but received by funds after* the end of the trading day would receive next day pricing. As a practical matter, because most mutual fund orders are received

⁵ See Proposing Release at 15 (“The less liquid the fund’s portfolio holdings, the greater the liquidity costs associated with redemption and purchase activity can become and the greater the possibility of dilution effects on fund shareholders.”). Also, according to the Proposing Release, open-end funds held \$276 billion in assets that were reported as less liquid and \$198 billion in assets that were reported as illiquid, as of December 2021. Proposing Release at 257. In our view, improving the liquidity of funds holding these assets should be the primary focus of this rulemaking.

⁶ According to the Proposing Release, in 2021 an estimated 18% of U.S. households owning mutual funds purchased them directly from the mutual fund company. *Id.* at 21 (citing 2022 ICI Fact Book).

⁷ For simplicity, we will use “funds” as shorthand when referring to funds, funds’ transfer agent, or funds’ clearing agency.

after the time a fund calculates its NAV, these orders would be forced to receive next-day pricing.⁸

Retirement savers in particular would be adversely affected by this proposal.⁹ Retirement plans, including 401(k)s and 403(b)s, typically do not submit plan participant transaction data to funds until after funds have finalized and disseminated their NAVs.¹⁰ Retirement plans wait to send transaction data to funds because they first need to know funds' NAVs in order to process participants' orders, converting orders based on a percentage of holdings or shares into dollar figures. This process can extend several hours after NAVs are calculated.¹¹ While retirement plan participants currently receive same-day pricing for orders submitted before 4pm eastern, under the proposal retirement plan participants would in all likelihood be forced to wait until the following day to price their trades, given the fact that funds would receive participants' trade data well after 4pm eastern. While having to wait an extra day to price every trade may not seem significant, the cumulative impact of not being fully invested over the span of decades could be. In addition, having to wait an additional day to rebalance or trade out of a particular fund could expose retirement savers to additional risk and result in suboptimal allocation decisions. It also takes optionality away from investors.¹² At a time when securities transactions are being executed faster and faster and our regulatory framework is being modernized to impose a shorter settlement cycle on transactions,¹³ it seems odd that the Commission would propose to promulgate a rule that delays retail investors' ability to execute their mutual fund orders.

Such an approach would create a two-tier market, putting investors who are able to structure their transactions so as to secure same-day pricing at an advantage relative to those who are unable to structure their transactions so as to secure same-day pricing. If finalized, the proposed approach would likely create incentives for more sophisticated market participants to

⁸ One potential way of addressing this operational issue would be to require all intermediaries to provide investor cash flow information to funds before funds strike their NAV. However, given the fact that the Commission does not have authority over retirement plans, its ability to do so is constrained.

⁹ Customers of broker-dealers that use omnibus accounting may also be adversely affected to the extent broker-dealers wait until the end of the trading day to submit a single order to the fund that reflects the net dollar amount or the number of fund shares to be purchased or redeemed across all investors that submitted orders through that broker-dealer. *See* Proposing Release at 240-241.

¹⁰ Proposing Release at 141 (“For retirement plan recordkeepers, we understand that current recordkeeping systems require that day’s NAV before the participant’s plan instructions may be applied to the participant’s order. Once the order has been processed through the investment instructions specific to the participant’s plan, it can be placed for execution.”).

¹¹ *Id.* (“We understand that the time it currently takes between when some retirement plan recordkeepers begin to process their orders and when the order is finally submitted to the fund can take upward of six hours due to the limitations of their current processing systems and hardware. We believe that retirement plan recordkeepers would need to substantially update or alter their processes and systems to accommodate the proposed hard close requirement to submit orders more quickly.”).

¹² Currently, fund investors can trade near the close, when it’s reasonably clear what a fund’s daily performance will be. The ability to trade near the close provides optionality to investors. The proposal would take this optionality away. *See, e.g.,* Randy Frderick and Lee Bohl, Schwab, Trading Near the Bells, October 15, 2021, <https://www.schwab.com/learn/story/trading-near-bells> (“If you planned to sell a profitable position, this may be a good time to do it. You never know what news might hit after the close, and there's always the potential for the stock to gap lower the next trading day.”).

¹³ *See* U.S. Securities and Exchange Commission, Open Meeting Agenda – February 15, 2023, Item 1: Shortening the Settlement Cycle, <https://www.sec.gov/os/agenda-open-021523>.

engage in regulatory arbitrage to avoid being subject to swing pricing and its associated delays and costs. Specifically, sophisticated investors who currently use intermediaries to buy and sell mutual funds would have incentives to hold their mutual funds directly at fund complexes so they would be able to transact at the closing NAV, instead of having to wait an extra day to transact. Similarly, sophisticated investors would have incentives to move from open-end funds to ETFs or CITs to avoid being subject to the delays and costs associated with swing pricing. Less sophisticated investors, however, may not recognize the delays and costs associated with swing pricing and may not move out of open-end mutual funds. And some investors simply may not be able to move out of open-end mutual funds held through intermediaries. This potentially disparate treatment of different groups of fund shareholders is fundamentally unfair and could result in sophisticated investors' imposing liquidity, dilution, and other costs on less sophisticated investors.

In the retirement space, these costs and delays would likely be borne primarily by small retirement plan investors. This is because many employers who run small retirement plans do not have particular expertise in designing plan menus or choosing investment alternatives. After all, most employers are small businesses whose main job is not setting up and administering retirement plans.¹⁴ Because small plan employers are unlikely to understand the delays and costs associated with swing pricing, they may not move out of open-end mutual funds and participants in these plans (i.e., retirement savers) are likely to be stuck paying those costs and delays. Larger retirement plans, on the other hand, which are typically run by financially sophisticated investors, may move to lower cost CITs, which are not subject to swing pricing.

To the extent small plan employers are advised to move out of mutual funds and into available alternatives, it's not clear that plan participants would be better off. Because small plan employers are not typically retirement plan experts, they often rely on the investment recommendations of financial firms and their professionals who provide services to their plan.¹⁵ These financial firms and professionals are not typically legally required, under either ERISA or the securities laws, to recommend the best options for plans. Moreover, financial professionals and their firms often have conflicts of interest to recommend the options that pay them the most money, rather than the options that are the best for the employers' workers. And it can be very difficult for employers to assess the nature or extent of these conflicts of interest, factor these conflicts of interest into their decision making, or independently assess the quality of the recommendations they receive.

¹⁴ There is ample evidence that many employers create poorly constructed plan menus filled with high-cost, low-quality mutual funds that underperform. *See, e.g.*, Ian Ayres & Quinn Curtis, Beyond Diversification: The Pervasive Problem of Excessive Fees and "Dominated Funds" in 401(k) Plans, Yale Law Journal, March 2015, <https://www.yalelawjournal.org/article/excessive-fees-and-dominated-funds-in-401k-plans>.

¹⁵ *See, e.g.*, Comment by American Retirement Association to the Commission, Additional Comments on Applying the Protections of Regulation Best Interest to Small Retirement Plan Fiduciaries; Regulation Best Interest Release No. 34-83062; File Number S7-07-19, December 13, 2018, <https://www.sec.gov/comments/s7-07-18/s70718-4767567-176840.pdf> ("Broker-dealers routinely advise fiduciaries of small retirement plans concerning the investments that will be made available to participants under such plans. Like individual investors, most small plan business owners acting as retirement plan fiduciaries are not sophisticated investors. Most simply do not have retirement plan investment expertise.").

For example, to the extent small plan employers receive recommendations to move from open-end mutual funds to CITs, it's not clear that plan participants would be better off. As the Commission knows, CITs are not regulated by the Commission and, as a result, not subject to SEC registration or examination. These products typically operate with less transparency to investors and markets. For example, it is difficult to find information about CITs' daily prices or performance, which can make it challenging for investors to make informed investment decisions. In addition, CITs do not have the same strong corporate governance protections that investment companies have, including not having boards of directors. While CITs ostensibly operate pursuant to trust documents, there is no guarantee that CITs will operate according to the terms of those documents. As a practical matter, any protections that are afforded to CIT investors are by virtue of the fact that CITs are held in retirement accounts, which are subject to ERISA protections; those protections are not the result of CIT product regulation. To the extent that plan sponsors fail to adhere to their ERISA fiduciary duties, retirement investors would be vulnerable to suffering harm. On the other hand, to the extent plan sponsors are financially sophisticated and bargain for CITs that have lower costs than open-end mutual funds, plan investors could benefit.

The fact that some investors would be able to execute their orders on the same day while others would be forced to wait an extra day to execute their orders would also make swing pricing less effective, undermining one of the proposal's key goals of reducing the potential first-mover advantage that might incentivize early redemptions to avoid anticipated trading costs and dilution associated with other investors' redemptions. Under the proposal, sophisticated investors who move their fund holdings to be directly held at fund complexes would still be able to execute their orders on the same day, thus retaining a first mover's advantage. In times of stress, when these investors see liquidity in underlying fund holdings drying up, they could execute their fund orders at the closing NAV, potentially without being subject to swing pricing and therefore without internalizing the cost of taking liquidity from the fund. In contrast, less sophisticated investors who are forced to wait a day to execute their orders could be subject to swing pricing and shoulder the full cost of taking liquidity from the fund, even when both investors placed their orders at the same time.

Assume, for example, that the collateralized loan obligation (CLO) market experiences stress beginning on a Monday morning. An investor who owns shares of a mutual fund with significant exposure to CLOs directly at a mutual fund complex could place an order to sell her shares at 3pm eastern on Monday and be priced at the end of Monday's NAV. Because a small segment of fund holdings are held directly, it is unlikely that selling on Monday would cause the fund to swing significantly, if at all. Another investor who owns shares of the same fund through an intermediary that doesn't transmit its orders to the fund by 4pm could also place an order at 3pm eastern on Monday. However, because her order would be priced based on the end of Tuesday's NAV, the total sales pressure that was exerted effectively on Monday would not be fully incorporated into the fund's NAV on Monday. To the extent Monday's sales pressure is delayed until Tuesday and causes Tuesday's NAV to swing down, it would impose the full cost of taking Monday's liquidity a day late and onto the investor who uses the intermediary; meanwhile, the investor who holds the fund directly would not internalize the costs of liquidity and dilution that they imposed on the fund. This result would not be equitable and would encourage fund investors who hold funds at fund complexes to exercise a

first-mover advantage in order to avoid being subject to swing pricing. This would undermine the Commission’s intended goal of reducing the potential first-mover advantage that might incentivize early redemptions to avoid anticipated trading costs and dilution associated with other investors’ redemptions.

In addition, the proposal’s economic analysis for mandatory swing pricing and a hard close is deficient. The proposal does not properly weigh the likely costs and delays associated with implementing swing pricing against any potential benefits of swing pricing. If it did, it would find that the costs associated with swing pricing would be borne by *all* shareholders who continue to transact in open-end funds that have to wait an extra day to execute their orders, even when the funds in which those shareholders are invested don’t experience liquidity issues.¹⁶ For example, these investors likely would be forced to wait an extra day to execute their orders and bear the costs associated with swing pricing, even when transacting in the most liquid mutual funds that rarely if ever experience liquidity issues. As a result, there is unlikely to be much if any benefit to these funds or to the overall marketplace of swing pricing because in the vast majority of days, these funds would rarely if ever need to swing their pricing. Indeed, in the vast majority of instances, the funds that retirement savers purchase and sell are likely to be among the most liquid funds in the market and are therefore the least likely to benefit from swing pricing. Even in times of stress, the most liquid mutual funds are unlikely to experience significant shocks to liquidity such that any swing pricing that applied would likely be incredibly small.¹⁷ Thus, the benefits to the market of applying swing pricing to such funds is likely to be negligible, relative to the costs, which are likely to be significant and widespread.

In contrast, the types of funds that are likely to benefit the most from swing pricing are those that have significant holdings of illiquid securities.¹⁸ These are not typically the kinds of funds that are broadly held by retirement savers. Based on the Commission’s analysis, such assets comprise a very small percentage of total fund assets.¹⁹ In addition, the Commission’s analysis of daily fund flow data during the period of January 2009 and December 2021 suggests that very low percentages of funds experience significant flows on a daily basis.²⁰ This evidence suggests that only a small segment of the fund market would likely need to swing prices on a

¹⁶ Proposing Release at 15 (“The less liquid the fund’s portfolio holdings, the greater the liquidity costs associated with redemption and purchase activity can become and the greater the possibility of dilution effects on fund shareholders.”).

¹⁷ See, e.g., BlackRock, Policy Spotlight, Swing pricing – Raising the bar, September 2021, <https://www.blackrock.com/corporate/literature/whitepaper/spotlight-swing-pricing-raising-the-bar-september-2021.pdf>

¹⁸ Proposing Release at 249-250 (“Investor dilution associated with illiquidity of funds’ underlying investments may create a first-mover advantage that may lead to increased mutual fund redemptions similar to bank runs.... In addition, it has been shown that the effect of the first-mover advantage may be larger for funds that hold less liquid investments.”).

¹⁹ For example, according to the Commission’s analysis, as of December 2021, of more than \$28 trillion in total fund assets, \$276 billion were reported as less liquid and \$198 billion of all investments were reported as illiquid. Thus, roughly 1.7% of total fund assets were considered illiquid. Similarly, 2,006 open-end funds reported \$76.5 billion in investments that were valued using unobservable inputs that are significant to the overall measurement, which is approximately 0.27% of all open-end fund assets. Moreover, there are 746 open-end funds that classified approximately \$204 billion in bank loan interests, which represents approximately 0.7% of all open-end fund investments classified. Proposing Release 257.

²⁰ For example, according to the Commission’s analysis, daily outflows represented 1.6% in one of out one hundred observations and that 0.3% in five out of one hundred observations. Proposing Release at 260.

daily basis. Given the fact that the costs and delays associated with the proposed implementation of swing pricing would be borne broadly by a significant percentage of the market and the potential benefits would be experienced narrowly by a small segment of the fund market, we do not think the benefits of this aspect of the proposal would outweigh the costs.

Finally, to the extent some have argued that experience in Europe proves funds can successfully implement swing pricing in the U.S., those arguments ignore a fundamental difference in market structure between U.S. and European markets. Specifically, in order to successfully swing prices, funds need access to sufficient flow data to determine whether and by how much to swing prices before striking their NAV, such that they have a high degree of confidence that such data is accurate.²¹ In Europe, funds are able to obtain this data before striking their NAV, whereas in the U.S., funds are unable to obtain this data before striking their NAV. As discussed above, because intermediaries, including retirement plans, need fund NAVs in order to process investors' orders, intermediaries do not provide investor flow data to funds before funds strike their NAVs. Moreover, given the fact that the Commission does not have authority over retirement plans, its ability to require plans to provide transaction flow data to funds is constrained. Therefore, neither funds nor the Commission would be able to ensure that funds receive sufficient flow data before striking their NAV such that they have a high degree of confidence that such data is accurate.

Conclusion

The Commission has proposed thoughtful changes to the liquidity risk management program that would provide real improvements to fund liquidity, particularly for the funds that present the highest risks of becoming illiquid during times of stress. We urge the Commission to build on that framework rather than create an entirely new framework that is likely to harm retail investors and fail to address the Commission's objectives. Accordingly, we urge the Commission to finalize the liquidity risk management program changes and take further action, as we've suggested, to enhance fund liquidity in a direct and narrowly tailored way. In addition, we urge the Commission to dispense with the hard close implementation of swing pricing and forego any approach that causes retail investors, particularly those who are saving for a secure and dignified retirement, to disproportionately shoulder any costs and delays associated with liquidity risk management.

Respectfully submitted,



Micah Hauptman
Director of Investor Protection
Consumer Federation of America

²¹ If a fund doesn't have sufficient accurate and reliable flow information, it could result in the fund swinging its NAV in the wrong direction or by a wrong amount, which would harm investors insofar as doing so results in inaccurate fund pricing and imposes transaction costs on investors who should not bear them.