



Managed Funds Association

November 16, 2022

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

Submitted via email to rule-comments@sec.gov

Re: Proposed Rules, Securities and Exchange Commission; Open-End Fund Liquidity Risk Management Programs and Swing Pricing, Form N-PORT; Outsourcing by Investment Advisers; File Nos. S7-26-22, S7-25-22; RIN 3325-AM98; RIN 3235-AN18 (November 2, 2022), (October 26, 2022)

Dear Ms. Countryman:

On behalf of the trade associations listed below, we request reasonable extensions of the comment periods for two significant, potentially transformative, proposed rulemakings. On November 2, 2022, the Securities and Exchange Commission (“SEC” or “Commission”) released a 444-page proposal, “Open-End Fund Liquidity Risk Management Programs and Swing Pricing, Form N-PORT” (“Liquidity and Swing Pricing Proposal”). That proposed rulemaking follows closely on the heels of the Commission’s release, on October 26, 2022, of a 232-page proposal, “Outsourcing by Investment Advisers” (“Outsourcing Proposal”). While we have material concerns with the substance of the proposals, if the Commission finds it necessary to proceed, at a minimum we request that the Commission extend the comment period for each of the proposals by 90 days.

The proposals set forth a vast array of complex and sweeping changes to the regulation of open-end management investment companies, other funds that report on Form N-PORT, and investment advisers, with major consequences for many stakeholders in multi-trillion-dollar financial industries. The Liquidity and Swing Pricing Proposal includes an assortment of technical, complicated, and significant changes to the liquidity risk management program rule

and its related reporting and disclosure requirements; mutual funds' daily pricing practices and their relationships with intermediaries; and funds' Form N-PORT reporting obligations. Just understanding the multi-part proposal and its potential implications will take significant effort.

Adding to the complexity of the proposal, the Commission seeks volumes of information from affected parties. The Commission "request[s] comment" on a wide range of topics in connection with the proposed overhaul of existing regulations and practices, including, "all aspects of the economic analysis of the proposed amendments."¹ The sheer scope of the information sought by the Commission is breathtaking: the Commission poses 261 separately enumerated questions (the majority of which embed multiple questions) for commenters to address.² Despite the breadth and complexity of the proposal, as well as the significant consequences the rule and form amendments would have for large sectors of the American economy, including the millions of Americans who invest in mutual funds and ETFs, the Commission set a comment deadline of only 60 days after *Federal Register* publication.³

Furthermore, the proposing release either is unable to quantify the costs involved or does not wrestle with the direct and indirect costs involved.⁴ If the Commission itself is unable to conduct a credible assessment with the benefit of well over a year to develop its proposal, expecting individual commenters to conduct a thorough economic analysis and provide data on a piecemeal basis is unrealistic.

The Outsourcing Proposal is also complicated and consequential. Indeed, the proposal would affect the entire ecosystem supporting the investment management industry, including existing contractual arrangements. Under the proposed rule, the Commission would impose expansive new regulations on an approximately \$100 trillion industry, forbidding investment advisers from outsourcing certain services or functions without satisfying prescriptive and burdensome requirements. These burdens would not only be borne by investment advisers to investment companies and other institutional and retail clients, but also by the broader population of service providers to the financial services industry, many of which are not currently regulated by the Commission. They will be particularly onerous for smaller advisers, especially when added to the cumulative burdens of other open rulemakings. Like the Liquidity and Swing Pricing Proposal, the Outsourcing Proposal broadly seeks comment on the proposal, including "on all aspects" of the Commission's "economic analysis," seeking all manner of quantitative and qualitative information.⁵ Also, like the Liquidity and Swing Pricing Proposal, the Outsourcing Proposal poses 101 specifically enumerated questions (often with multiple subparts).⁶ Despite the enormity of the information requested, the Commission requests

¹ Liquidity and Swing Pricing Proposal at 365; *id.* at 242 ("We seek comment on all aspects of the economic analysis, especially any data or information that would enable a quantification of the proposal's economic effects.").

² *See id.* at 48-49, 53-54, 57-58, 68-74, 76-77, 82-84, 89-90, 92-93, 100-104, 110-112, 114-116, 124-132, 137-139, 150-155, 157, 158, 164-172, 174-176, 180-182, 184-186, 187-188, 190-192, 194-200, 205-206, 210-212, 217-221, 231, 233-234, 235-236, 365-370.

³ *Id.* at 2.

⁴ *See id.* at 279, 303, 321.

⁵ Outsourcing Proposal at 179.

⁶ *See id.* at 30-40, 70-71, 76-78, 91-95, 96-98, 179-184.

comments a mere 30 days after publication in the *Federal Register*, or December 27, 2022, whichever is later.⁷

These industry-wide initiatives involve significant infrastructure concerns and will require multiple market participants to evaluate the proposals in a comprehensive and holistic manner. For example, the Commission posits in the Outsourcing Proposal that “[t]he use of service providers could create broader market-wide effects or systemic risk,”⁸ but provides little opportunity for advisers or service providers to evaluate the scope of this risk or address whether the proposed requirements would in fact limit or exacerbate any such risk. It similarly acknowledges that quantification of costs in that proposal “would require numerous assumptions to forecast how investment advisers, service providers, and other affected parties would respond to the proposed rule and amendments, and how those responses would in turn affect the broader markets in which they operate.”⁹ With respect to the Liquidity and Swing Pricing Proposal, the Commission recognizes the extensive effects these proposals will have on market participants, stating that: “[g]enerating fund flow information involves a broad network of market participants with multiple layers of systems, including, among others, funds, transfer agents, broker-dealers, retirement plan recordkeepers, banks, and the National Securities Clearing Corporation (“NSCC”).”¹⁰ It is imperative for a responsible regulator like the Commission to provide the industry with additional time to adequately respond to the complex issues raised by the proposals.

Further, the Liquidity and Swing Pricing Proposal would change the rules for instruments subject to the 15% illiquid maximum in a manner that may impact funds, investors, issuers, and others in the capital markets, and moving to a “hard close” will impact market participants in the broader mutual fund ecosystem that are not investment companies and are outside the scope of the proposed rule. Meanwhile, the Outsourcing Proposal could uproot long-standing arrangements between service providers and investment advisers in a manner that provides no additional protections and may harm investors. Funds’ and advisers’ robust frameworks have been built, refined, and strengthened over decades and should not be re-imagined through a 60- or 90-day comment period. The Commission forcing the industry to do so within such an unreasonable timeline is at odds with maintaining the orderliness and resiliency of the existing financial ecosystem. The structural, operational, legal, and technological implications are significant. Injecting instability into that infrastructure risks creating breakage for investors, including retail investors and retirement plans, and business disruptions for investment advisers and their clients. At a minimum, well-understood processes and operational plumbing will need to be re-designed and re-built. Behaviors of market participants will need to be re-considered and re-established.

Broad proposals impact many different functions and warrant broader consideration. For example, matters of fund liquidity risk management and swing pricing involve risk, compliance, fund accounting, pricing, and fund distribution. There could be implications for investment professionals and traders. Similarly, the sweeping Outsourcing Proposal will have broad

⁷ *Id.* at 2.

⁸ *Id.* at 15.

⁹ *Id.* at 98-99.

¹⁰ Liquidity and Swing Pricing Proposal at 20.

implications for the availability and cost of third-party services and for advisers' ability to manage their own and their clients' risks. The Commission has years of experience working methodically through broad industry-wide initiatives. Mechanisms such as concept releases; industry working groups on matters such as the moves to T+1 and T+2 settlement; and advisory committees, such as the recently utilized Asset Management Advisory Committee and Fixed Income Market Structure Advisory Committee, can be resources to facilitate solutions to complex industry-wide matters. We suggest these courses would—and still can—be better approaches.

Setting to one side our many serious and substantive policy concerns with the proposals and the problems the proposed rules purport to solve, the aggressive timetables set by the Commission for comment are wholly unrealistic, and they are in conflict with the core purpose of notice and comment rulemaking. Congress designed the Administrative Procedure Act's notice and comment requirements to ensure that stakeholders and the public would have a fair and meaningful opportunity to comment on proposed regulations. This was meant to benefit the public and commenters, as well as the agency itself, because information submitted by interested parties gives the agency crucial insights on its proposals' consequences and areas for improvement. Congress thus intended "the notice and comment provisions" of the APA "to assure fairness and mature consideration of rules."¹¹ Indeed, these bedrock procedural requirements are "one of Congress's most effective and enduring solutions to the central dilemma it encountered in writing the APA—reconciling the agencies' need to perform effectively with the necessity that the law must provide that . . . the regulator shall be regulated, if our present form of government is to endure."¹² For notice and comment to function as Congress intended, however, it is imperative that agencies afford stakeholders a meaningful opportunity to analyze and comment on proposed rules.

At best, rules implemented in haste likely will produce numerous requests for guidance and interpretive relief as the industry attempts to implement rules that have not been analyzed in appropriate detail during their development. At worst, rules implemented in haste create risk and additional cost, create unintended consequences that may harm investors and U.S. capital markets, and do not accomplish the desired public policy objectives.

The Commission appears, on the one hand, to recognize its need for substantial public input in these rulemakings, asking commenters to address literally hundreds of questions and requests for information. Yet on the other hand, the abbreviated comment periods set by the Commission are deeply inconsistent with the public's ability to provide the requested input and the Congressional goals described above. In light of the spectacular breadth, economic and operational significance, and complexity of the proposed rules, it would be all but impossible for stakeholders to provide comprehensive, meaningful comment on the proposed rules on the truncated timetable that the Commission has set, a period that spans Thanksgiving, Hanukkah, Kwanzaa, Christmas, and New Year's Day. Inadequate time is being given to submit information that the Commission has expressly recognized—in the hundreds of questions it

¹¹ *Brown Exp., Inc. v. United States*, 607 F.2d 695, 701 (5th Cir. 1979).

¹² *New Jersey Dep't of Env'tl. Prot. v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980).

posed—is necessary to do its job properly. It is erroneous for an agency to recognize a need for the public’s input but to deny the public the time they need to provide that input properly.

We therefore request, respectfully, that the Commission extend the comment period for each proposal identified above by an additional 90 days beyond the current deadlines. We do not make this extension request lightly, but instead we ask for a minimum amount of time reasonably necessary for stakeholders thoughtfully and meaningfully to assess the proposed rules; to marshal resources to coordinate among legal, operations, and compliance personnel and advisors; to formulate legal and policy positions on every aspect of the proposed rules; to collect and analyze quantitative and qualitative information bearing on the costs and benefits, as well as the necessity, of the rules; and to submit comprehensive written comments on the proposals. These are not tasks that can or should be performed on a truncated schedule, as the Commission appears to assume—they will require deliberation, research, legal analysis, and coordination by and with our member firms.

Unfortunately, this is not the first time that we have been compelled to request an extension to comment on major Commission rulemakings.¹³ Also, as the Commission is aware, bipartisan members of Congress and others have expressed increasing alarm at the Commission’s persistent, and needless, failure to afford sufficient time for stakeholders to comment on major proposals.¹⁴ A bare desire for administrative speed should not take precedence over ensuring a full and fair opportunity for major agency proposals to be put through the crucible of notice and comment. Indeed, the Commission’s unrealistically aggressive approach to comment periods is difficult to square with documented concerns with the Commission’s capacity to manage so many consequential rulemaking proceedings at once.¹⁵ The speed at which the Commission can produce proposing and adopting releases is entirely unrelated to the aggregate impact of those charged with complying with the many different policy prescriptions being imposed. This is a circumstance in which all parties, including registrants, investors, service providers, and the Commission, would benefit from a deliberate, orderly, and timely process for developing and formulating major regulatory policy decisions with cascading consequences for the economy.

¹³ See Letter from Mr. Elliot Ganz et al. to Ms. Vanessa A. Countryman, File Nos. S7-03-22, S7-01-22 (Mar. 1, 2022), at <https://www.sec.gov/comments/s7-01-22/s70122-20118198-271109.pdf>.

¹⁴ See, e.g., Letter from 47 Members of Congress to Mr. Gary Gensler (Apr. 13, 2022), <https://www.investmentcouncil.org/47-bipartisan-lawmakers-urge-the-sec-to-increase-comment-periods/>; see also Joint Trade Association Letter to Honorable Gary Gensler, *Importance of Appropriate Length of Comment Periods* (Apr. 5, 2022), at <https://www.ici.org/system/files/2022-04/22-ici-letter-to-sec-chair-gensler.pdf>.

¹⁵ See Office of the Inspector General, *The Inspector General’s Statement on the SEC’s Management and Performance Challenges*, at 1-3, 21 (Oct. 2022), at <https://www.sec.gov/files/inspector-generals-statement-sec-mgmt-and-perf-challenges-october-2022.pdf> (“[Some] managers from the SEC’s divisions of Trading and Markets, Investment Management, Corporation Finance, and Economic and Risk Analysis... raised concerns about increased risks and difficulties managing resources and other mission-related work because of the increase in the SEC’s rulemaking activities.” The Commission has forged ahead with its aggressive regulatory agenda despite “a significant increase in attrition over the last few years,” during which “managers reported relying on detailees, in some cases with little or no experience in rulemaking” and “[o]thers [indicated that] they may have not received as much feedback during the rulemaking process, either as a result of shortened timelines during the drafting process or because of shortened public comment periods.”).

The Commission's apparent desire to rush ahead precipitously with major regulations conflicts with those bedrock principles of good governance and administrative law.

For these reasons, we respectfully urge the Commission to reconsider the approach for these two proposals. If the Commission finds it necessary to proceed, at a minimum, we request that the Commission extend the comment period for each of the proposals by 90 days. Anything short of that risks irreparably compromising the process underlying these rulemakings at the outset and risks a result that would not be in the best interests of all involved.

We also request that the Commission consider these principles and concerns in the context of any proposals and adoptions currently under consideration. The risks of proposing and adopting multiple complex rules in close proximity should be viewed in the aggregate and not on a rule-by-rule basis. Many of the same Commission staff have been involved in developing multiple rules. Likewise, many of the same personnel of stakeholders are and have been involved in analyzing and implementing the rules in good faith. With the prospect of visits from the Commission's Enforcement and Examinations Divisions, they have no room for error.

Thank you for considering this request.

Sincerely,

/s/ Elliot Ganz
Elliot Ganz
General Counsel, Co-Head Public Policy
Loan Syndications and Trading Association

/s/ Gail Bernstein
Gail Bernstein
General Counsel
Investment Adviser Association

/s/ Lindsey W. Keljo
Lindsey W. Keljo
Head, Asset Management Group
Securities Industry and Financial Markets
Association

/s/ Rebekah Goshorn Jurata
Rebekah Goshorn Jurata
General Counsel
American Investment Council

/s/ Jiří Król
Jiří Król
Director of Government and Regulatory
Affairs
Alternative Investment Management
Association

/s/ Kristen Malinconico
Kristen Malinconico
Director
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce

/s/ Susan Olson
Susan Olson
General Counsel
Investment Company Institute

/s/ Jennifer W. Han
Jennifer W. Han
Executive Vice President
Chief Counsel & Head of Regulatory Affairs
Managed Funds Association

cc: The Honorable Gary Gensler, Chair
The Honorable Hester M. Peirce, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner
The Honorable Mark T. Uyeda, Commissioner
The Honorable Jaime Lizarraga, Commissioner
Securities and Exchange Commission

The Honorable Sherrod Brown, Chairman
The Honorable Patrick J. Toomey, Ranking Member
United States Senate Committee on Banking, Housing, and Urban Affairs

The Honorable Maxine Waters, Chairwoman
The Honorable Patrick McHenry, Ranking Member
United States House of Representatives Committee on Financial Services