Congress of the United States
Washington, DC 20510

April 28, 2023

Gary Gensler
Chair
U.S. Securities and Exchange Commission
100 F Street, NE
Washington D.C. 20549-1090

Dear Chair Gensler:

We are deeply concerned about the Securities and Exchange Commission's ("SEC") proposed rule on Open-End Fund Liquidity Risk Management Programs and Swing Pricing.[1] The proposal falls short in several areas. First, it fails to consider potential market failures or harm to investors. Second, it lacks a thorough cost-benefit analysis. Finally, it fails to incorporate sufficient input from the millions of U.S. investors and retirement savers who would be directly impacted by these regulatory changes. This misguided proposal would unfairly disadvantage retail investors and third-party investors. Therefore, we strongly urge the SEC to refrain from taking further action on this proposed rule.

The proposal would upend existing investment practices and create a two-tiered market that unfairly benefits sophisticated investors at the expense of retail investors. This includes retirees who rely on third-party intermediaries. If finalized, the proposal would lead to higher costs and discourage investment. For example, swing pricing is a fee that unfairly discourages investment in our capital markets. Your proposal lacks any evidence to support its necessity. Furthermore, a hard close would effectively end trading hours before their traditional closing times effectively discriminating against Americans residing in western time zones who often rely on third-party intermediaries to invest and save for retirement.

The resulting two-tiered market would grant certain institutional and sophisticated investors a "first mover" advantage over the vast majority of retail and retirement investors who use third-party intermediaries. This includes over 80 percent of Americans who hold mutual funds in their retirement plans.[2] Commissioner Peirce observed this trend in her dissent on November 2, 2022. She highlighted the fact that "more than 102 million Americans owned these funds at the end of last year, and the funds were valued at $26 trillion."[3] The inherent unfairness of a two-tiered market would have significant detrimental effects on U.S. capital markets.

Furthermore, the SEC acknowledges in its proposal that it lacks sufficient data. The SEC's proposal does not quantify the actual level of dilution that fund shareholders experienced during the March 2020 shock.[4] Data reported by U.S. market participants demonstrated that

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[1] *See* Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-PORT Reporting, SEC Release Nos. 33-11130; IC-34746 (November 2, 2022) ("Proposing Release"), available at https://www.sec.gov/rules/proposed/2022/33-11130.pdf.
[2] *See* https://www.ici.org/system/files/2021-12/21_rpt_profiles.pdf.
[3] *See* https://www.sec.gov/news/statement/peirce-statement-open-end-funds-110222.
[4] *See* Proposing Release at 23, note 40.

traditional long-term open-end funds performed well during 2020.[5] However, the proposal relies on the increased utilization of swing pricing by funds in Europe to assume dilution. This posture fails to recognize the significant differences that exist between the regulatory frameworks and markets of U.S. and European open-end funds, including their retirement plan systems. This further undermines the validity of using the experience in one jurisdiction to inform the development of regulatory policy in the other.[6]

In addition, the proposed rule would significantly alter how open-end funds manage their liquidity risk programs. This potentially limits the strategies accessible to retail investors and lowers returns. For example, the proposal would explicitly prohibit open-end mutual funds from pursuing bank loan strategies which are critical and growing investment strategies used in times of rising interest rates. This would have a direct and negative impact on small public companies that rely on the bank loan market for financing, as well as their employees and the communities they support. Additionally, prohibiting or limiting widely used strategies would lower returns for fund shareholders, including many retirement savers.

We are also concerned the SEC has not adequately considered the overall impact this proposed rule will have on American investors and capital markets. The SEC acknowledges that the proposal would impose significant costs on market participants, including the retirement plan recordkeepers of American families. However, the SEC acknowledges that it lacks the data necessary to accurately quantify most of the associated costs. Moreover, the potential impact of this rule, combined with other pending SEC proposed rules, raises further concerns about its real impact.

The SEC's public comment file consists of a large and diverse group of stakeholders and market participants, including thousands of retail investors who are our constituents. These stakeholders and participants have expressed concern about the impact of this proposal on their savings. Members of Congress from both parties and chambers have further expressed their reservations about the proposal. Given the broad opposition and the proposal's potential impact on more than 100 million Americans, we recommend that the public comment period be extended beyond 60 days. It is important to note that the SEC's own Division of Economic and Risk Analysis did not have the time or ability to accurately assess the proposal's impact, making it even more critical to provide adequate time for public comment.

In conclusion, the current regulatory regime is functioning effectively and has allowed investors to benefit more than ever before. Like the other rulemakings the SEC has prioritized, this proposal could potentially harm the future financial security of millions of our constituents who are investing for their retirement. This posture is at odds with the SEC's mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation.

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[5] *See* Comment Letter from Investment Company Institute on Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-PORT Reporting, at Appendix A ("ICI Economic Analysis of Open-End Funds' Liquidity Risk Management and Swing Pricing Proposal"), available at https://www.sec.gov/comments/s7-26-22/s72622-20157306-325651.pdf.

[6] *See* Aggregated Balance Sheet of the Euro Area Pension Fund Sector, Section 1.1.1, European Central Bank Statistical Data Warehouse, available at https://sdw.ecb.europa.eu/reports.do? node=1000006465.

We strongly urge the SEC to immediately halt any action on these harmful proposals.

Thank you,

Tim Scott
Ranking Member
Senate Committee on Banking, Housing, and Urban Affairs

Patrick McHenry
Chairman
House Committee on Financial Services