

November 9, 2021

## SEC Proposes Expanded Proxy Voting Reporting by Registered Funds and New Reporting of Executive Compensation Votes by Form 13F Filers

On September 29, 2021, the SEC issued a [proposing release](#) (the “Release”) containing rule and form amendments that, if adopted, would:

- expand the proxy voting information that each registered fund is required to report on Form N-PX and
- **require each Form 13F filer, for the first time**, to annually report on Form N-PX how it had voted proxies concerning certain *shareholder advisory votes on executive compensation*.

Note: Like Form 13F, this filing requirement would apply to each “institutional investment manager,” which generally encompasses any investment manager that exercises investment discretion with respect to accounts holding U.S. equity securities having an **aggregate value of at least \$100 million** (each, a “Manager”).

### SUMMARY

**Registered Funds.** The Release would expand the proxy voting information that a fund is required to report by requiring each fund’s report on Form N-PX:

- to employ the same language employed in an issuer’s form of proxy to identify proxy voting matters, presented in the same order employed in an issuer’s form of proxy;
- to categorize the subject matter of each of the reported proxy voting matters using a specified list of categories and subcategories;
- (for securities that have been loaned) to disclose the number of shares that were loaned and not recalled to vote;
- to be filed in a structured data language.

Each registered fund would also be required to disclose that its proxy voting record is publicly available on (or through) its website and available upon request, free of charge.

**Managers.** The Release would require each Manager to annually report on Form N-PX how it had voted proxies concerning certain *shareholder advisory votes on executive compensation*.

- A Manager’s Form N-PX would be required to satisfy all of the requirements of a registered fund’s Form N-PX summarized above, including disclosing the number of shares that were loaned and not recalled to vote, but only with respect to advisory votes on executive compensation.
- In addition, unlike registered funds, a Manager would not be required to disclose on its website that its proxy voting record is publicly available.

The Release is discussed in detail below.

## I. Formal Elements of the Release

Section 951 of the Dodd-Frank Act added Section 14A to the Exchange Act. Broadly speaking, Section 14A provides that public companies must hold shareholder advisory votes to (i) approve its executive officers' compensations, (ii) choose whether the frequency of these votes will occur every one, two or three years and (iii) approve so-called "golden parachute" arrangements that arise in connection with a merger or acquisition (collectively, "say-on-pay votes").

Section 14A(d) of the Exchange Act provides that every Manager must report at least annually how it voted on any say-on-pay vote, unless such vote is otherwise required to be reported publicly. The SEC first proposed rule and form changes in October 2010 to implement the Section 14A(d) Manager-reporting requirements,<sup>1</sup> but the SEC did not finalize the 2010 proposals.

Taking into account comments it received to its 2010 proposals, the Release proposes new Rule 14Ad-1 under the Exchange Act and form changes to require each Manager to report annually using Form N-PX how the Manager voted proxies concerning say-on-pay votes. Thus, a portion of the Release is intended to complete the SEC's implementation of Section 14A.

The remainder of the Release, while covering public disclosure of proxy voting of funds, is unrelated to the Dodd-Frank Act and Section 14A of the Exchange Act. In particular, the remainder of the Release would effect changes to Form N-PX to significantly enhance and make readily accessible already-public disclosure of registered funds' proxy voting on all topics, including voting on ESG matters and other social justice issues.

## II. Managers Subject to Form N-PX and Categories of Votes They Must Report

Form N-PX was adopted under the 1940 Act. The Release would adopt Form N-PX under the Exchange Act and, combined with new Rule 14Ad-1, require each Manager to use the form to report its proxy voting record regarding say-on-pay votes. Rule 14Ad-1 would require that a Manager report a say-on-pay vote if the Manager "exercised voting power" over the security. As defined, voting power exists if a Manager has the ability to vote the security or direct the voting of the security, including the ability to determine whether to vote the security at all, or *to recall a loaned security* before a vote.<sup>2</sup> Exercise of voting power means using voting power to influence a voting decision with respect to a security.

## III. Identification of Proxy Voting Matters

The Release would require fund and Manager ("Reporting Persons") reports on Form N-PX (i) to employ the same language employed in an issuer's form of proxy to identify proxy voting matters and (ii) to be reported in the same order employed in an issuer's form of proxy. The SEC believes these changes will enhance "the ability of investors to better understand fund and manager proxy disclosure and compare voting records."

## IV. Categorization of Proxy Voting Matters

The Release would require Reporting Persons to categorize the subject matter of each of the reported proxy voting matters based on a specified list of categories and subcategories. In addition to topics that may readily come to mind (e.g., board of directors, investment company matters, extraordinary transactions), the categories and subcategories

<sup>1</sup> See [Release No. 34-63123](#) (Oct. 18, 2010).

<sup>2</sup> Rule 14Ad-1(d) defines "voting power" as "the ability, through any contract, arrangement, understanding, or relationship, to vote the security or direct the voting of a security, including the ability to determine whether to vote the security or to recall a loaned security."

include various ESG and social justice topics. The following are examples of categories and their subcategories in proposed Form N-PX. The full list of categories and subcategories in the proposed form is reproduced in the [Appendix](#).

- Environment or climate (subcategories: greenhouse gas emissions, transition planning or reporting, biodiversity or ecosystem risk, water issues or waste or pollution);
- Human rights or human capital/workforce (subcategories: supply chain exposure to human rights risks, outsourcing or offshoring or workplace sexual harassment);
- Diversity, equity, and inclusion (subcategories: board diversity, pay gap or other diversity, equity, and inclusion matters);
- Political activities (subcategories: lobbying, political contributions or other political activity matters); and
- Other social (subcategories: data privacy, responsible tax policies or consumer protection).

While a Manager’s proxy voting disclosure requirement is limited to say-on-pay votes, registered funds’ proxy votes are determined by their investment advisers, most of which are Managers. Therefore, the enhanced disclosure and accessibility of funds’ proxy voting on all topics proposed by the Release, including voting on ESG matters and other social justice issues, could reveal how fund investment advisers vote on these matters.

## V. Voting and Securities Lending

As noted in section II, above, Managers are deemed to have voting power if the Manager, among other things, has the ability to recall a loaned security before a vote. The Release would amend Form N-PX to require disclosure of the number of shares that Reporting Persons loaned and did not recall. This information is not currently reported on Form N-PX. With respect to registered funds, the Release notes that:

Funds commonly engage in securities lending activities to generate additional revenue for the fund . . . Recalling loaned securities may decrease the revenue a fund generates from securities lending activity.

According to the Release, this proposed change “is designed to ensure that a fund’s filings on Form N-PX reflect the effect of its securities lending activities on its proxy voting, providing context to the information funds already provide about revenue from securities lending.”

In discussing this change as it would apply to both funds and Managers, the Release states that “advisers have a fiduciary duty to consider the tradeoffs between continuing to keep securities on loan, or recalling loaned securities in order to vote.” The proposed additional disclosure

would provide transparency regarding whether a reporting person has opted to recall a security and vote . . . or to keep the security out on loan. Absent this disclosure, investors would not have information about a manager’s decision not to recall a loaned security.

## VI. Quantitative Disclosure

The Release would amend Form N-PX to require disclosure of information about the number of shares that were voted. Both funds and Managers reporting on Form N-PX would be required to disclose (i) the number of shares voted (or instructed to be voted) and (ii) how those shares were voted (*e.g.*, for or against a proposal, or abstain). If there are instances in how votes were voted in more than one manner (*e.g.*, both for and abstain), the Reporting Person would be required to disclose the number of shares voted (or instructed to be voted) in each manner.

## VII. Form N-PX Reporting Data Language

The Release would require Form N-PX reports to be filed in a custom eXtensible Markup Language (“XML”) -based structured data language created specifically for reports on Form N-PX (“custom XML”). According to the Release, this would allow Reporting Persons, at their option, to either submit XML reports directly or use a web-based reporting application developed by the SEC to generate the reports, as Managers are now able to do when submitting Form 13F holdings reports.

## VIII. Timeframe for Reporting

Rule 30b1-4 under the 1940 Act requires registered funds to annually file their proxy voting records using Form N-PX, which must be filed with the SEC no later than August 31 of each year, for the most recent 12-month period ended June 30. The Release would not change this requirement. The Release proposes applying this reporting timeframe to Managers’ reporting of say-on-pay votes on Form N-PX.

## IX. Website Availability of Fund Proxy Voting Records

When Form N-PX was adopted in 2003, it required a fund to disclose that its proxy voting record was available to shareholders, either on (or through) the fund’s website or upon request. The Release asserts that, currently, “most funds make their proxy voting records available to shareholders upon request but do not provide this information on their websites.”

Accordingly, the Release proposes amendments to Forms N-1A, N-2 and N-3 to require a fund to disclose that its proxy voting record is publicly available on (or through) its website and available upon request, free of charge in both cases.

Because the proposal would require funds to file Form N-PX reports in a custom XML language, the Release specifies that the proxy voting record that a fund posts on its website and provides upon request must be in a human-readable format. A fund may comply by using the human-readable version of its Form N-PX report that would appear on EDGAR (e.g., by providing a direct link on its website to the HTML-rendered Form N-PX report on EDGAR).

The Release also proposes conforming changes to Form N-1A and Form N-3 language (which currently discusses how a fund may make its proxy voting record available on request) to require a fund to provide the email address, if any, that an investor may use to request the proxy voting record. Form N-2 already includes a similar provision, while Form N-1A and Form N-3 only refer to a fund providing a toll-free telephone number.

## X. Requests for Confidential Treatment

The Release states that a Manager may request that confidential information contained within its Form 13F reports may also receive confidential treatment if the information appears in the Manager’s Form N-PX reports. The instructions to seek confidential treatment of Form N-PX information appear in the form’s instructions.

## XI. Joint Reporting and Related Form N-PX Amendments

**Joint Reporting Provisions.** To avoid duplicative reporting, the Release contains three sets of amendments to Form N-PX to implement joint reporting, with related required disclosure to identify all of a Manager’s votes. Following the Form 13F model, Form N-PX would permit, but not require, consolidated reporting. Thus,

- A single Manager may report say-on-pay votes in cases where more than one Manager exercises voting power.

- A fund may report its say-on-pay votes on behalf of a Manager exercising voting power over some or all of the fund's securities. This provision permits a fund and its adviser to avoid filing a duplicative report regarding the same votes.
- Affiliates may file joint reports on Form N-PX notwithstanding that they do not exercise voting power over the same securities.

In all three cases, where another reporting person reports votes on a Manager's behalf, the report on Form N-PX that includes the Manager's votes would be required to identify the Manager (and any other Managers) to which the filing applies, including separately identifying securities over which the non-reporting Manager exercised voting power. A non-reporting Manager's Form N-PX report would also have to identify the other Managers or funds reporting on its behalf.

**Cover Page.** As proposed in the Release, Form N-PX's cover page would indicate whether the Reporting Person is a fund or a Manager. If the Reporting Person is a Manager, this cover-page information is to assist investors to identify Form N-PX reports filed by other funds and Managers that contain say-on-pay votes of the Reporting Person under the joint reporting provisions. Thus, the cover page would follow a check-a-box format to identify the Form N-PX report as one of these four types:

1. Registered investment company report;
2. Manager "voting" report when the report contains all say-on-pay votes of the Manager;
3. Manager "notice" when the report contains no say-on-pay votes of the Manager and all say-on-pay votes are reported by other Managers or funds under the joint reporting provisions; and
4. Manager "combination" report when the report contains some say-on-pay votes of the Manager and some say-on-pay votes of the Manager are reported by other Managers or funds under the joint reporting provisions.

**Summary Page.** As proposed, Form N-PX would include a new summary page to assist investors to identify additional Managers (in addition to the Reporting Person) with say-on-pay votes that are included in the Form N-PX report. This summary page would be required in any fund's Form N-PX report and in any Manager's Form N-PX report that is not a "notice" filing. The summary page would require the Reporting Persons to identify in a specific format the names and total number of Managers with say-on-pay votes included in the Form N-PX report.

## XII. Deadline for Comments on the Release

The Release states that comments should be submitted to the SEC no later than December 14, 2021.

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If you would like to learn more about the issues in this Alert, please contact your usual Ropes & Gray attorney contacts.

## Proposed Form N-PX Categories and Subcategories of Proxy Votes

### Item 1

(f) All categories and subcategories applicable to the matter voted on from the following list of categories and subcategories:

- A. Board of directors (subcategories: director election, term limits, committees, size of board, or other board of directors matters (along with a brief description));
- B. Section 14A say-on-pay votes (subcategories: 14A executive compensation, 14A executive compensation vote frequency, or 14A extraordinary transaction executive compensation (along with a brief description));
- C. Audit-related (subcategories: auditor ratification, auditor rotation, or other audit-related matters (along with a brief description));
- D. Investment company matters (subcategories: change to investment management agreement, new investment management agreement, assignment of investment management agreement, business development company approval of restricted securities, closed-end investment company issuance of shares below net asset value, business development company asset coverage ratio change, or other investment company matters (along with a brief description));
- E. Shareholder rights and defenses (subcategories: adoption or modification of a shareholder rights plan, control share acquisition provisions, fair price provisions, board classification, cumulative voting, or other shareholder rights and defenses matters (along with a brief description));
- F. Extraordinary transactions (subcategories: merger, asset sale, liquidation, buyout, joint venture, going private, spinoff, delisting, or other extraordinary transaction matters (along with a brief description));
- G. Security issuance (subcategories: equity, debt, convertible, warrants, units, rights, or other security issuance matters (along with a brief description));
- H. Capital structure (subcategories: stock split, reverse stock split, dividend, buyback, tracking stock, adjustment to par value, authorization of additional stock, or other capital structure matters (along with a brief description));
- I. Compensation (subcategories: board compensation, executive compensation (other than Section 14A say-on-pay), board or executive anti-hedging, board or executive anti-pledging, compensation clawback, 10b5-1 plans, or other compensation matters (along with a brief description));
- J. Corporate governance (subcategories: articles of incorporation or bylaws, board committees, codes of ethics, or other corporate governance matters (along with a brief description));
- K. Meeting governance (subcategories: approval to adjourn, acceptance of minutes, or other meeting governance matters (along with a brief description));
- L. Environment or climate (subcategories: greenhouse gas (GHG) emissions, transition planning or reporting, biodiversity or ecosystem risk, chemical footprint, renewable energy or energy efficiency, water issues, waste or

pollution, deforestation or land use, say-on-climate, environmental justice, or other environment or climate matters (along with a brief description));

- M. Human rights or human capital/workforce (subcategories: workforce-related mandatory arbitration, supply chain exposure to human rights risks, outsourcing or offshoring, workplace sexual harassment, or other human rights or human capital/workforce matters (along with a brief description));
- N. Diversity, equity, and inclusion (subcategories: board diversity, pay gap, or other diversity, equity, and inclusion matters (along with a brief description));
- O. Political activities (subcategories: lobbying, political contributions, or other political activity matters (along with a brief description));
- P. Other social (subcategories: data privacy, responsible tax policies, charitable contributions, consumer protection, or other social matters (along with a brief description)); or
- Q. Other (along with a brief description).