

November 9, 2022

## SEC Expands Proxy Voting Reporting by Registered Funds and Requires Reporting of Executive Compensation Votes by Form 13F Filers

On November 2, 2022, the SEC issued a release (the “[Release](#)”) containing rule and form amendments that:

- 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, the filing requirement applies to each “institutional investment manager,” which generally encompasses any 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”).<sup>1</sup>

### SUMMARY

**Registered Funds.** The Release expands the proxy voting information that a fund is required to report by requiring each 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
- For securities that have been loaned, to disclose the number of shares that were loaned and not recalled to vote.

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

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

- A Manager’s Form N-PX must satisfy all of the requirements of a registered fund’s Form N-PX summarized above (even if the shares are not owned by a registered fund), including disclosing the number of shares that were loaned and not recalled to vote, but only with respect to votes on executive compensation; and
- Unlike registered funds, a Manager is not required to disclose on its website that its proxy voting record is publicly available.

The Release is discussed in detail below.

## Background to 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 their executive officers' compensation, (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, but the SEC did not finalize the 2010 proposals. In September 2021, the SEC published a proposing release, which is now substantially adopted by the Release.

Taking into account comments it received to the 2021 proposing release, the Release adopts 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 amends 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.

## Compliance Date

The effective date for the Release's rule and form amendments is July 1, 2024. Thus, Managers and funds will be required to file their first reports on amended Form N-PX by August 31, 2024, with these reports covering the period July 1, 2023 to June 30, 2024.

## Requirements

### I. Scope of Managers' Form N-PX Reporting Obligations

Although Form N-PX was originally adopted under the 1940 Act, the Release adopts Form N-PX under the Exchange Act and, combined with new Rule 14Ad-1, requires each Manager to use the form to report its proxy voting record regarding say-on-pay votes. Rule 14Ad-1 requires that a Manager report a say-on-pay vote if the Manager "exercised voting power" over the security.

As defined in Rule 14Ad-1, 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."<sup>3</sup>

The Release also adopts a "streamlined reporting option for Managers that have a disclosed policy of not voting proxies and in fact have not voted proxies during the reporting period."<sup>4</sup>

### II. Scope of Funds' Form N-PX Reporting Obligations

Every registered fund is currently required to file its proxy voting record annually on Form N-PX. The existing requirement is that registered funds must report information for each matter relating to a portfolio security considered at any shareholder meeting held during the reporting period and with respect to which the fund was entitled to vote.

The Release amends this standard to provide that, for purposes of Form N-PX, a fund would be entitled to vote on a matter if its portfolio securities are on loan as of the record date for the meeting. Because a reporting fund can recall and vote loaned securities, the Release states that the new standard 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.”

### III. Identification of Proxy Voting Matters

The Release requires reports on Form N-PX by funds and Managers (“Reporting Persons”) (i) to employ the same language employed in an issuer’s form of proxy to identify proxy voting matters and (ii) to report such votes in the same order employed in an issuer’s form of proxy, including identifying each director separately in the same order as on the form of proxy, even if the election of directors is presented as a single matter on the form of proxy (“voting matter identification requirements”).

- These requirements will apply to proxy votes only if a form of proxy in connection with a matter is subject to Exchange Act Rule 14a-4, which requires the form of proxy, or “proxy card,” included in the proxy materials to clearly and impartially identify each voting matter and to be in English (an “SEC proxy card”). SEC proxy cards contain the information necessary for Reporting Persons to comply with the new voting matter identification requirements.<sup>5</sup> In general, Rule 14a-4 applies to every solicitation of a proxy with respect to securities registered pursuant to Section 12 of the Exchange Act.
- In all other cases, Reporting Persons will be subject to Form N-PX’s current requirement to provide a “brief identification of the matter voted on,” limiting the use of abbreviations to commonly understood terms or terms that the issuer abbreviated in its description of the matter.

### IV. Categorization of Proxy Voting Matters

The Form N-PX amendments require Reporting Persons to categorize the subject matter of each of the reported proxy voting matters using a specified list of categories. In addition to topics that may readily come to mind (*e.g.*, board of directors, shareholder rights and defenses, extraordinary transactions), the categories include various ESG topics. The following are examples of categories in amended Form N-PX. The full list of categories in the amended Form N-PX is reproduced in the Appendix.

- Corporate governance (examples: term limits, board committee issues, size of board, articles of incorporation or bylaws, codes of ethics, approval to adjourn, acceptance of minutes, proxy access);
- Environment or climate (examples: 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);
- Human rights or human capital/workforce (examples: workforce-related mandatory arbitration, supply chain exposure to human rights risks, outsourcing or offshoring, workplace sexual harassment);
- Diversity, equity and inclusion (examples: board diversity, pay gap); and
- Other social issues (examples: lobbying, political or charitable activities, data privacy, responsible tax policies, consumer protection).

### V. Reporting Votes

Amended Form N-PX requires Reporting Persons to disclose the number of shares voted (or instructed to be voted) and how those shares were voted (*e.g.*, for or against proposal, or abstain), as reflected in their records at the time of filing a report on Form N-PX. If a Reporting Person has not received confirmation of the actual number of votes cast, the Form

N-PX report instead may reflect the number of shares instructed to be cast on the date of the vote. If the votes were cast in multiple manners (*e.g.*, both for and against), Reporting Persons must disclose the number of shares voted (or instructed to be voted) in each manner.

## VI. SEC Comments on Securities Lending

As noted above, a Reporting Person is deemed to have voting power if the Reporting Person, among other things, has the ability to recall a loaned security before a vote. Amended Form N-PX requires disclosure of the number of shares the Reporting Person loaned and did not recall in addition to the number of shares a Reporting Person voted. This requirement “is designed to provide transparency into how a reporting person’s securities lending activities affect[] its proxy voting.”

In addition to quantitative disclosures, amended Form N-PX permits a Reporting Person to provide additional narrative information to assist investors’ understanding of Reporting Persons’ determinations whether to recall a loaned security. The Release states:

We appreciate that the quantitative disclosures, alone, will not provide the full context of a decision of whether to recall a security on loan. An adviser must make a determination regarding whether to retain a security and vote the accompanying proxy or lend out the security that is in the client’s best interest. The considerations underlying this analysis will not be reflected in the disclosed number of shares on loan and not recalled. Reporting persons will, however, have the option to provide this or other information on Form N-PX. The form as amended permits a reporting person to provide additional information on the cover page and/or on a vote-by-vote basis. This flexibility will facilitate a reporting person’s ability to provide additional information about a particular vote, such as with respect to portfolio securities on loan, or about the reporting person’s voting practices in general, if the reporting person so chooses.

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[W]e recognize that an adviser and its client may agree that the adviser would not vote due to the opportunity costs of recalling the loaned securities in order to vote and that it can be in the client’s best interest not to recall the loaned securities. There are legitimate reasons why an adviser or other reporting person may decide not to recall any loaned securities. The quantitative disclosure we are adopting is designed to provide investors with additional information about a reporting person’s proxy voting activities. The disclosure requirement is not intended to change the analysis reporting persons may undertake currently as to whether to recall a loaned security.

## Timeframe for Reporting

Funds will continue to be required to report their proxy voting records, and Managers will be required to report say-on-pay votes, annually on Form N-PX no later than August 31 of each year for the most recent 12-month period ended June 30.

## Website Availability of Fund Proxy Voting Records

The Release amends 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. Accordingly, a fund must file Form N-PX reports, post the fund’s proxy voting record on the fund’s website if it has one, and provide the voting record upon request. Funds may comply with the website disclosure requirement by providing a direct link on their website to the HTML-rendered Form N-PX report on EDGAR. The Release also amends Form N-1A and Form N-3 to require that a fund provide the email address, if any, that an investor may use to request the proxy voting record.

## Form N-PX Reporting Data Language

The Release requires Reporting Persons to file reports on Form N-PX in a structured data language. The amendments require that Form N-PX reports be filed in a custom eXtensible Markup Language (“XML”) -based structured data language created specifically for reports on Form N-PX. The Release reports that, to further increase the accessibility of Form N-PX data, the SEC is developing electronic “style sheets” that, when applied to the reported XML data, will present Form N-PX data in human-readable form.

## Joint Reporting and Related Form N-PX Amendments

### I. Joint Reporting Provisions

To avoid duplicative reporting, the Release contains three sets of amendments to Form N-PX to implement joint reporting on say-on-pay votes, with related required disclosure to identify all of a fund/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); and
- Two or more affiliated Managers may file joint reports on Form N-PX notwithstanding that they do not exercise voting power over the same securities.

### II. Cover Page

Amended Form N-PX’s cover page indicates whether the Reporting Person is a fund or a Manager. Reporting Persons will be required to check a box in order to identify the report as one of the following types:

- Fund Voting Report, to be used when the fund holds one or more securities it is entitled to vote;
- Fund Notice Report, to be used when the fund does not hold any securities it is entitled to vote;
- Institutional Manager Voting Report, to be used when a Manager is reporting all of its proxy votes that are required to be reported in a single report where the report contains all say-on-pay votes of the Manager;
- Institutional Manager Notice Report, to be used when the report contains no say-on-pay votes of the Manager because (i) all of the Manager’s say-on-pay votes are reported by other Managers or funds under the joint reporting provisions, (ii) the Manager did not exercise voting power for any say-on-pay matters during the reporting period or (iii) the Manager has a disclosed policy of not voting proxies and did not vote during the reporting period; and
- Institutional Manager Combination Report, to be used when the report contains some say-on-pay votes of the Manager, but additional votes are reported by other Managers or funds under the joint reporting provisions.

### III. Summary Page

The Release adds a new summary page to Form N-PX to simplify the joint-reporting framework adopted by the Release. This is intended to assist investors to readily identify which fund series are intended to be covered by the report, as well as any Managers (in addition to the Reporting Person) with say-on-pay votes included in the Form N-PX report. The summary page will be required on all Form N-PX reports by funds as well as Manager “voting” and “combination” filings.

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For further information about how the issues described in this Alert may impact your interests, please contact your regular Ropes & Gray attorney.

1. An investment adviser can be an “institutional investment manager” required to file on Form N-PX even if it does not advise registered funds.
2. Rule 14Ad-1(d) defines “voting power” as “the ability, through any contract, arrangement, understanding, or relationship, to vote a security or direct the voting of a security, including the ability to determine whether to vote a security or to recall a loaned security.”
3. *See id.*
4. Specifically, the Release amends Form N-PX to add a check-the-box designation to Form N-PX’s cover page permitting Managers that (i) have a disclosed policy of not voting proxies and (ii) did not in fact vote during the reporting period, to indicate these facts in a notice report. A Manager filing a notice report is not required to report any information on a security-by-security basis and, instead, is required only to file N-PX’s cover page with the appropriate designation and a required signature.
5. The Release recognizes that Reporting Persons may hold securities for which voting matters are not subject to U.S. proxy rules and for which an SEC proxy card is unavailable. In such cases, the Release notes, “the associated proxy materials may not clearly provide the information required to satisfy the voting matter identification requirements, or may not provide that information in English.”

## Appendix

### Form N-PX Categories of Proxy Votes

Item 1. Proxy Voting Record.

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(g) All categories applicable to the matter voted on from the following list of categories:

- A. Director elections;
- B. Section 14A say-on-pay votes (examples: section 14A executive compensation, section 14A executive compensation vote frequency, section 14A extraordinary transaction executive compensation);
- C. Audit-related (examples: auditor ratification, auditor rotation);
- D. Investment company matters (examples: new or changed investment management agreement, assignment of investment management agreement, business development company approval of restricted securities or asset coverage ratio change, closed-end investment company issuance of shares below net asset value);
- E. Shareholder rights and defenses (examples: adoption or modification of a shareholder rights plan, control share acquisition provisions, fair price provisions, board classification, cumulative voting);
- F. Extraordinary transactions (examples: merger, asset sale, liquidation, buyout, joint venture, going private, spinoff, delisting);
- G. Capital structure (examples: security issuance, stock split, reverse stock split, dividend, buyback, tracking stock, adjustment to par value, authorization of additional stock);
- H. Compensation (examples: 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);
- I. Corporate governance (examples: term limits, board committee issues, size of board, articles of incorporation or bylaws, codes of ethics, approval to adjourn, acceptance of minutes, proxy access);
- J. Environment or climate (examples: 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);
- K. Human rights or human capital/workforce (examples: workforce-related mandatory arbitration, supply chain exposure to human rights risks, outsourcing or offshoring, workplace sexual harassment);
- L. Diversity, equity, and inclusion (examples: board diversity, pay gap);
- M. Other social issues (examples: lobbying, political or charitable activities, data privacy, responsible tax policies, consumer protection); or
- N. Other (along with a brief description).