

## Alert

### Regulated Funds: SEC Proposes Rule Amending Form N-PX and Requiring More Specific Disclosure On Proxy Votes Relating to Executive Compensation

October 28, 2021

On Sept. 29, 2021, the Securities and Exchange Commission proposed Rule 14Ad-1 and amendments to Form N-PX (collectively, “Proposal”) under the Investment Company Act of 1940, as amended (“1940 Act”), that, if adopted, would require more comprehensive information from mutual funds, exchange-traded funds and certain other investment companies registered under the 1940 Act that currently file reports on Form N-PX annually regarding their proxy votes, and would make that information provided easier to analyze. In addition, the Proposal would require all fund managers that are 13F filers<sup>1</sup> to disclose their proxy votes on executive compensation matters, otherwise called “say-on-pay” votes, annually on Form N-PX, regardless of whether or not they manage a registered investment company. The Proposal is intended to implement Section 951 of Dodd-Frank, which relates to managers’ reporting requirements.<sup>2</sup>

Below are some of the key proposals related to the amended Form N-PX that would be applicable to registered investment companies and their managers if the Proposal is adopted.

#### Scope of the Proposed Rule 14Ad-1 and Amendments to Item 1 of Form N-PX

Form N-PX is currently used by registered investment companies to file reports containing their proxy voting records pursuant to Section 30 of the 1940 Act, and requires funds to disclose votes considered at any shareholder meeting held during the reporting period with respect to which the fund was entitled to vote.<sup>3</sup> As noted in the proposing release, the intended purpose of Form N-PX is to “improve transparency” and “enable [registered] fund shareholders to monitor their funds’ involvement in the governance activities of portfolio companies.”<sup>4</sup>

The proposed Rule 14Ad-1 would amend the scope of voting decisions required to be disclosed on Form N-PX by requiring fund managers subject to the reporting requirements of Section 13(f) of the Securities

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<sup>1</sup> To clarify, the SEC’s proposed rule and amendments to Form N-PX do not include any proposed changes to Form 13F. The SEC is requiring that fund managers obligated under Section 13(f) of the Exchange Act to file Form 13F also disclose on their Form N-PX filings their say-on-pay votes. Because registered investment companies are already required to file annual reports on Form N-PX under Rule 30b1-4, *see infra* n.3, from the perspective of such registered funds and their managers, the proposed amendments primarily constitute changes to the format and level of detail required in such reports, rather than an entirely new filing obligation.

<sup>2</sup> “Enhanced Reporting of Proxy Votes by Registered Management Investment Companies; Reporting of Executive Compensation Votes by Institutional Investment Managers,” Exchange Act Release No. 34-93169 (Sept. 29, 2021), available [here](#).

<sup>3</sup> See 17 CFR 270.30b1-4.

<sup>4</sup> See Exchange Act Release No. 34-93169 at 9 and “Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies,” Investment Company Act Release No. 25922 (Jan. 31, 2003) at n.34.

Exchange Act of 1934, as amended (“Exchange Act”),<sup>5</sup> to annually report their say-on-pay votes on Form N-PX by Aug. 31 of each calendar year for the most recent 12-month period ended June 30.<sup>6</sup> Notably, while the foregoing disclosure requirement would apply to managers of both private funds and registered investment companies, the consolidated reporting provisions included in the Proposal will likely limit the additional reporting burden for managers of registered investment companies that are already required to report on Form N-PX. Additionally, the proposed amendments to Form N-PX’s instructions would further broaden the scope of voting decisions that registered investment companies must report on Form N-PX by expanding the definition of matters with respect to which a fund was “entitled to vote” to include portfolio securities that were on loan to a person other than the registered fund as of the record date for the relevant meeting.<sup>7</sup>

### *Types of Votes Reported*

Under the proposed Rule 14Ad-1, registered investment companies that are already subject to the requirement to publicly disclose their voting records annually on Form N-PX would be additionally required to include in such reports their say-on-pay votes. The say-on-pay votes required to be reported under the proposed rule are the types of votes outlined in Section 14A of the Exchange Act, and include votes on, among other categories:<sup>8</sup>

- The approval of executive compensation;
- The frequency of executive compensation votes; and
- The approval of executive compensation that relates to an acquisition, merger, consolidation or proposed sale or other disposition of all or substantially all of an issuer’s assets.

### *What Must Be Reported*

The proposed amendments to registered investment companies’ reporting obligations on Form N-PX would require the disclosure of the following information related to say-on-pay votes:

- The number of shares voted (or instructed to be voted); and
- How those shares were voted (e.g., for or against proposal, or abstain).
  - If the votes were cast both for and against, the proposed rule calls for “disclosure of the number of shares voted (or instructed to be voted) in each manner.”<sup>9</sup>

The proposed amendments to Form N-PX would also require disclosure of the number of shares the reporting person loaned and did not recall (both in the context of say-on-pay votes and otherwise) on

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<sup>5</sup> Section 13(f) of the Exchange Act, together with the rules thereunder, requires managers to file reports on Form 13F with the SEC if they exercise investment discretion with respect to accounts holding \$100 million or more of certain equity securities (such securities, “Section 13(f) securities”). See 17 CFR § 240.13f-1.

<sup>6</sup> See Exchange Act Release No. 34-93169 at 17 and 81-82.

<sup>7</sup> See *id.* at 16.

<sup>8</sup> See *id.* at 18.

<sup>9</sup> *Id.* at 43.

the theory that the context given by disclosing the number of shares voted would allow investors to better understand how securities lending activities affect the voting practices of the reporting person.<sup>10</sup>

### **Consolidated Reporting**

As part of the Proposal, the SEC also proposed several amendments to Form N-PX that, in some cases, would allow fund managers to jointly file Form N-PX, and would also permit a manager to a registered investment company to potentially rely on Form N-PX reports filed by that registered investment company in lieu of making its own separate filings.<sup>11</sup> As a result, a manager that exclusively advises one or more registered investment companies may be able to avoid the need to file its own separate Form N-PX, to the extent it meets the requirements to rely upon the Form N-PX filings made by the registered investment companies that it advises. These requirements are listed in the proposed General Instructions C.3 and C.4 of Form N-PX, which provide in relevant part that “[a]n Institutional Manager [i.e. a fund manager that is a 13F filer] is not required to report proxy votes that are reported on a Form N-PX report that is filed by a Fund,” provided that such report “identif[ies] each [such manager] and Fund” on whose behalf the voting securities are being reported and appropriately lists such manager on the Form N-PX cover page.<sup>12</sup> Such consolidated reporting will likely mitigate the reporting burden borne by managers to registered investment companies from the Proposal.

### **Other Proposed Updates to Form N-PX**

In addition to the revisions necessary to implement Rule 14Ad-1, the SEC proposed further revisions to Form N-PX to provide for standardized descriptions for certain proposals, with a view towards ease of comparison of the proxy voting records between reporting persons.<sup>13</sup> The SEC also proposed requiring reporting persons to categorize votes to allow investors to more quickly focus on topics of interest, including votes on matters such as environmental or climate, among others. Unlike the proposed revisions with respect to “say-on-pay” matters, which would impact both reporting managers and funds, these broader proposed revisions to Form N-PX would only impact Form N-PX reports filed by registered investment companies.

### **Potential Impact of the Proposal<sup>14</sup>**

The categorization of votes and other revisions reflected in the amended Form N-PX may encourage changes in the treatment of proxy voting by registered funds generally. In particular, many registered fund managers rely on third-party proxy advisory firms to provide recommendations with respect to proxy voting matters. An emphasis on categorizing proxy voting matters, which would ease comparisons between managers, may encourage certain registered fund managers to take a more active role in considering prospective proxy votes. Such a change may also encourage the SEC staff to provide further guidance regarding the ability of registered funds to “actively vote” shares they hold alongside affiliates within the framework of restrictions on affiliated transactions imposed under the 1940 Act.

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<sup>10</sup> See *id.* at 43-44.

<sup>11</sup> See *id.* at 62-64.

<sup>12</sup> See *id.* at 160 (proposed General Instruction C.3-C.4 of Form N-PX) and at 162-63 (proposed Special Instruction B.2.c-B.2.d of Form N-PX).

<sup>13</sup> See *id.* at 54-59.

<sup>14</sup> For a further discussion of the impact of the proposed amendments on private fund managers and their funds, please see “SEC Proposes Rules Requiring 13F Filers to Disclose ‘Say-on-Pay’ Votes,” SRZ Client Alert, (Oct. 12, 2021), available [here](#).

The SEC is soliciting comments on a wide range of items related to the proposed rule and changes to Form N-PX, with all comment letters due within 60 days after publication in the Federal Register.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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