

October 5, 2021

# SEC Proposes Enhanced Proxy Voting Disclosure by Investment Funds and Required Disclosure of “Say-on-Pay” Votes for Institutional Investment Managers

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## Proposal Shows SEC’s Focus on ESG Matters; Would Also Complete the SEC’s Rulemaking Under Section 951 of the Dodd-Frank Act

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### SUMMARY

On September 29, 2021, the SEC issued a proposed rulemaking to enhance the information mutual funds, exchange-traded funds and other registered management investment companies (“funds”) report annually about their proxy votes. The proposal also would require so-called “institutional investment managers” subject to section 13(f) of the Exchange Act (“managers”), which includes a broad range of investors in U.S. publicly traded equities, including some who are not “managers” in the conventional sense, to report annually regarding their voting of proxies related to executive compensation “say-on-pay” matters. The proposed rulemaking—the first to be issued under the leadership of SEC Chairman Gary Gensler—touches on key policy issues for the new Chairman, including ESG, proxy voting and greater transparency for securities lending.<sup>1</sup>

As described in greater detail below, the proposal, if adopted, would require:

- Managers to report annually on Form N-PX how they voted proxies on “say-on-pay” matters;
- Funds and managers to categorize their voting by type (such as environment or climate; human rights; corporate governance; diversity, equity and inclusion; political activity; and others) using the same language as the issuer’s form of proxy to identify proxy voting matters;
- Funds and managers to disclose the number of shares that were voted (or, if not known, the number of shares that were instructed to be cast) and the number of shares held by the funds that were loaned out on the record date and not recalled for voting;

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- Information reported on Form N-PX to be in a structured data language as a custom Extensible Markup Language (“XML”) file; and
- Funds to provide their proxy voting records on or through their websites.

The Commissioners voted 4-1 in favor of advancing the proposal, with Commissioner Hester Peirce dissenting. Comments on the proposed rulemaking are due 60 days after it is published in the Federal Register.

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### BACKGROUND

Section 951 of the Dodd-Frank Act added new section 14A to the Exchange Act, which generally requires public companies to hold non-binding shareholder advisory votes to: (1) approve the compensation of their named executive officers; (2) determine the frequency of such votes; and (3) approve “golden parachute” compensation in connection with a merger or acquisition (collectively, “say-on-pay votes”). Section 14A(d) requires that every manager report at least annually how it voted on say-on-pay votes, unless such vote is otherwise required to be reported publicly. In 2011, the SEC adopted rules concerning shareholder approval of executive compensation and “golden parachute” compensation arrangements.<sup>2</sup> The SEC, in 2010, also proposed rules to implement section 14A(d) of the Exchange Act that would have required managers to file their record of say-on-pay votes with the Commission annually on Form N-PX, and would have amended Form N-PX to accommodate the new manager filings (the “2010 proposal”). However, the 2010 proposal was never finalized.<sup>3</sup>

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### OVERVIEW OF THE PROPOSED RULEMAKING

#### A. SCOPE OF FUNDS’ FORM N-PX OBLIGATIONS

Currently, every registered management investment company (other than a small business investment company registered on Form N-5) must file its proxy voting record annually on Form N-PX. A fund must currently report information for each matter relating to a portfolio security considered at any shareholder meeting held during the reporting period with respect to which the fund was entitled to vote. The proposal would amend the scope of reporting obligations on Form N-PX by also including portfolio securities on loan as of the record date for the meeting because the fund could recall these securities and vote on them. The proposed amendment aims to ensure that a fund’s filings on Form N-PX reflects the effect of its securities lending activities on its proxy voting.

#### B. SCOPE OF MANAGERS’ FORM N-PX REPORTING OBLIGATIONS

The proposal would extend the Form N-PX reporting obligations for say-on-pay votes to each person that (i) is an “institutional investment manager” as defined in the Exchange Act and (ii) is required to file reports under section 13(f) of the Exchange Act. An “institutional investment manager” is any person, other than a natural person in certain limited circumstances, investing in or buying and selling securities for its own

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account, and any person exercising investment discretion with respect to the account of any other person.<sup>4</sup> This category is not limited to investment advisers or persons who otherwise render investment management services to others; rather, under the broad section 13(f) definition, non-financial businesses investing for their own account, including companies, investment partnerships and family offices, among others, may be considered “institutional investment managers.” An institutional investment manager (or “manager” in this memorandum) is generally required to file reports under section 13(f) of the Exchange Act on Form 13F if the manager exercises investment discretion with respect to accounts holding at least \$100 million in “section 13(f) securities.”<sup>5</sup>

Under the proposal, a manager required to report on Form 13F would be required to disclose its say-on-pay votes on Form N-PX. The proposal requires that a manager report a say-on-pay vote for a security only if the manager “exercised voting power” over the security.<sup>6</sup> This standard differs from that of the 2010 proposal, which would have covered securities with respect to which the manager “had or shared the power to vote, or to direct the voting of” the security.<sup>7</sup> Managers also would be required to report securities on loan as of the record date that are not recalled.

### C. PROXY VOTING INFORMATION REPORTED ON FORM N-PX

The proposal is intended to enhance current Form N-PX disclosures so investors can more easily understand and analyze proxy voting information. The proposal requires funds and managers (together, “reporting persons”) to use the same language from the issuer’s form of proxy to identify proxy voting matters on Form N-PX, and also requires reporting persons to select from standardized categories and subcategories to identify the subject matter of each of the reported proxy voting items. The proposed categories and subcategories, which are “designed to cover matters on which funds frequently vote,”<sup>8</sup> include:

- Board of directors (subcategories: director election, term limits, committees, size of board, or other board of directors matters (along with a brief description));
- Say-on-pay votes (subcategories: executive compensation, say-on-pay vote frequency, or votes on “golden parachute” compensation in M&A and similar transactions);
- Audit-related (subcategories: auditor ratification, auditor rotation, or other audit-related matters (along with a brief description));
- 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,<sup>9</sup> 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));
- 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));

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- Extraordinary transactions (subcategories: merger, asset sale, liquidation, buyout, joint venture, going private, spinoff, delisting, or other extraordinary transaction matters (along with a brief description));
- Security issuance (subcategories: equity, debt, convertible, warrants, units, rights, or other security issuance matters (along with a brief description));
- 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));
- Compensation (subcategories: board compensation, executive compensation (other than 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));
- Corporate governance (subcategories: articles of incorporation or bylaws, board committees, codes of ethics, or other corporate governance matters (along with a brief description));
- Meeting governance (subcategories: approval to adjourn, acceptance of minutes, or other meeting governance matters (along with a brief description));
- 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));
- 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));
- Diversity, equity, and inclusion (subcategories: board diversity, pay gap, or other diversity, equity, and inclusion matters (along with a brief description));
- Political activities (subcategories: lobbying, political contributions, or other political activity matters (along with a brief description)); or
- Other (along with a brief description).

When categorizing a particular voting matter, a reporting person would be required to select multiple categories or subcategories for the matter if applicable. If a vote did not fall within a specified subcategory, the reporting person would select the “other” subcategory and provide a brief description.<sup>10</sup>

### D. QUANTITATIVE DISCLOSURES

In an additional effort to enhance transparency, the proposal includes changes to Form N-PX to require information about the number of shares that were voted (or, if not known, the number of shares for which votes were instructed to be cast).<sup>11</sup> These quantitative disclosure requirements would apply to a manager’s say-on-pay votes and to *all* of a fund’s votes.

In addition, in a departure from the 2010 proposal, the proposal would require disclosure of the number of shares that the reporting person loaned and did not recall. In support of such quantitative disclosures, the proposal states, “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. Without

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disclosing the amount voted, the amount of shares on loan for a given vote would not provide meaningful insight into how a fund or manager voted.”<sup>12</sup> The disclosure aims to provide transparency with regard to whether a reporting person chose to recall a security and vote the accompanying proxy or to keep the security out on loan.

### **E. OTHER AMENDMENTS**

The proposal includes additional amendments to Form N-PX to improve the usability of Form N-PX reports and to clarify existing form requirements, including a standardized order to the Form N-PX disclosure requirements. The proposed amendments to Form N-PX also require a fund that offers multiple series of shares to provide Form N-PX disclosure separately by series (for example, provide Series A’s full proxy voting record, followed by Series B’s full proxy voting record). In addition, the SEC is proposing a technical amendment to require reporting persons to disclose whether each reported vote was “for or against management’s recommendation” as opposed to the current requirement to disclose whether a vote was “for or against management.” In circumstances where management may not provide a voting recommendation, reporting persons can disclose “none” for the applicable matter in response to the disclosure requirement.

### **F. JOINT REPORTING AND RELATED FORM N-PX AMENDMENTS TO ACCOMMODATE MANAGER REPORTING**

Unless such votes are otherwise required, section 14A(d) of the Exchange Act requires a manager to report its say-on-pay votes at least annually unless such vote is otherwise required to be reported publicly by a Commission rule or regulation. The proposal presents three sets of amendments to Form N-PX to implement this provision and allow joint reporting, as well as associated disclosure requirements to identify all of a given manager’s votes:

1. The first proposed amendment would permit a single manager to report say-on-pay votes in cases where multiple managers exercise voting power;
2. The second proposed amendment would permit a fund to report its say-on-pay votes on behalf of a manager exercising voting power over some or all of the fund’s securities; and
3. The third proposed amendment would permit affiliates to 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 say-on-pay 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(s) on whose behalf the filing is made and separately identify the securities over which the non-reporting manager exercised voting power.

The proposal also includes changes to the cover page of Form N-PX to include information to identify more readily whether the reporting person is a fund or a manager.<sup>13</sup> In addition to changes to the Form N-PX cover page, the proposal adds a new summary page to Form N-PX for investors to readily identify any

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additional managers other than the reporting person with say-on-pay votes included on the Form N-PX. The summary page would require identification of the names and total number of additional managers with say-on-pay votes included in the report.

### **G. FORM N-PX REPORTING DATA LANGUAGE**

The proposal would require reporting persons to file reports on Form N-PX in a structured data language in order to make the filings easier to analyze. Currently, reports on Form N-PX are required to be filed in HTML or ASCII. In an effort to make it easier for reporting person to prepare and submit information required by Form N-PX, and to make the submitted information more useful, the proposal would require filing Form N-PX reports in a custom eXtensible Markup Language (“XML”) -based structured data language created specifically for reports on Form N-PX.

### **H. TIME OF REPORTING**

The proposal would retain the current reporting timing for funds and apply it to managers’ reporting of say-on-pay votes. Accordingly, funds and managers would be required to report their proxy voting records and say-on-pay votes annually on Form N-PX no later than August 31 of each year, for the most recent 12-month period ending June 30.

### **I. REQUESTS FOR CONFIDENTIAL REPORTING**

Managers requesting confidential treatment of all or certain positions reported on their Form 13F may also request confidential treatment for such information reported on Form N-PX. However, the proposal notes that confidential treatment could be justified only in narrowly tailored circumstances and that such treatment would not be merited solely in order to prevent proxy voting information from being made public.<sup>14</sup>

### **J. PROPOSED WEBSITE AVAILABILITY OF FUND PROXY VOTING RECORDS**

The proposal would require a fund to disclose that its proxy voting record is publicly available on its website and available upon request, free of charge.<sup>15</sup> A fund can comply with this requirement by using the human-readable version of its Form N-PX report that would appear on EDGAR, for example by providing a direct link on its website to the HTML-rendered Form N-PX report on EDGAR.

### **K. COMPLIANCE DATES**

The proposal states that compliance dates would vary depending on when the amendments become effective relative to the Form N-PX reporting deadline. If the amendments are effective six months before June 30, the first reports on amended Form N-PX would be required to be filed by the August 31 that follows the rule’s effective date. For a fund, the first report would disclose votes occurring at least six months after the effective date in conformance with the amended form, while applicable votes occurring before this period could be reported in conformance with current form requirements. A manager’s requirement to report votes would begin six months after the effective date, since managers are not currently subject to

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Form N-PX reporting requirements. If the amendments are not effective six months before June 30, funds and managers would be required to file their first reports on amended Form N-PX by August 31 of the first complete reporting timeframe following the effective date of the proposed rule.

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ENDNOTES

- 1 See 17 C.F.R. Parts 232, 240, 249, 270, and 274, <https://www.sec.gov/rules/proposed/2021/34-93169.pdf>; See, e.g., Chair Gary Gensler, Testimony Before the House Committee on Financial Services (May 6, 2021), <https://www.sec.gov/news/testimony/gensler-testimony-20210505>.
- 2 See SEC Adopts Rules for Say-On-Pay and Golden Parachute Compensation as Required Under Dodd-Frank Act (Jan. 25, 2011), <https://www.sec.gov/news/press/2011/2011-25.htm>; see also Final Say-on-Pay and Say-on-Golden Parachute Rules (January 31, 2011), [https://www.sullcrom.com/siteFiles/Publications/SC\\_Publication\\_Final\\_Say\\_on\\_Pay\\_and\\_Say\\_on\\_Golden\\_Parachute\\_Rules.pdf](https://www.sullcrom.com/siteFiles/Publications/SC_Publication_Final_Say_on_Pay_and_Say_on_Golden_Parachute_Rules.pdf).
- 3 See Exchange Act Release No. 63123 (Oct. 18, 2010) [75 FR 66622 (Oct. 28, 2010)] (“2010 Proposing Release”); see also SEC Proposes Say-on-Pay and Golden Parachute Rules for Proxy Statements: Highlights Include: No Need for Preliminary Proxy for Say-on-Pay Votes; CD&A Must Address Previous Say-on-Pay Votes; New Detailed Disclosure of Golden Parachute Arrangements; and Annual Disclosure of Institutional Investment Managers’ Votes on These Matters (October 22, 2010), [https://www.sullcrom.com/siteFiles/Publications/SC\\_Publication\\_SEC\\_Proposes\\_Say\\_on\\_Pay\\_and\\_Golden\\_Parachute\\_Rules\\_for\\_Proxy\\_Statements.pdf](https://www.sullcrom.com/siteFiles/Publications/SC_Publication_SEC_Proposes_Say_on_Pay_and_Golden_Parachute_Rules_for_Proxy_Statements.pdf).
- 4 See 15 U.S.C. Section 78m(f).
- 5 “Section 13(f) securities” means equity securities of a class described in section 13(d)(1) of the Exchange Act that are admitted to trading on a national securities exchange or quoted on the automated quotation system of a registered securities association. In determining what classes of securities are section 13(f) securities, an institutional investment manager may rely on the most recent list of such securities published by the Commission pursuant to section 13(f)(4) of the Exchange Act (15 U.S.C. 78m(f)(4)). See 17 C.F.R. 240.13f-1.
- 6 See 17 C.F.R. Parts 232, 240, 249, 270, and 274, <https://www.sec.gov/rules/proposed/2021/34-93169.pdf>.
- 7 The language in the 2010 proposal was similar to the language of rule 13d-3(a) under the Exchange Act. See 17 C.F.R. 240.13d-3(a).
- 8 Commissioner Roisman expressed concern with the categorization framework. See Commissioner Elad L. Roisman, Statement on Proposed Changes to Asset Managers’ Proxy Voting Disclosures (September 29, 2021), [SEC.gov | Statement on Proposed Changes to Asset Managers’ Proxy Voting Disclosures](https://www.sec.gov/news/press/2021/2021-10-01-01).
- 9 It is not clear what is meant by “business development company approval of restricted securities.”
- 10 See 17 C.F.R. Parts 232, 240, 249, 270, and 274, <https://www.sec.gov/rules/proposed/2021/34-93169.pdf>.
- 11 The proposal modifies the 2010 proposal with respect to the disclosure of the number of shares voted because reporting persons may not be able to determine with certainty how many of the votes they instructed to be cast were actually voted in a particular matter. This change would permit a reporting person to use the number of shares voted as reflected in its 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, Form N-PX instead may reflect the number of shares instructed to be cast on the date of the vote. See 17 C.F.R. Parts 232, 240, 249, 270, and 274, <https://www.sec.gov/rules/proposed/2021/34-93169.pdf>.
- 12 See 17 C.F.R. Parts 232, 240, 249, 270, and 274, <https://www.sec.gov/rules/proposed/2021/34-93169.pdf>. Commissioner Roisman expressed concern with disclosures about securities out on loan, noting that there may be sound reasons for an investment manager to elect to leave securities out on loan rather than recalling them in order to vote them, and that the proposed disclosure requirement may operate to influence investment managers to recall loans when doing so may not be in the best interests of their clients. See Commissioner Elad L. Roisman, Statement on Proposed



ENDNOTES (CONTINUED)

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- Changes to Asset Managers' Proxy Voting Disclosures (September 29, 2021), [SEC.gov | Statement on Proposed Changes to Asset Managers' Proxy Voting Disclosures](#).
- <sup>13</sup> The reporting person would be required to check a box to identify the report as one of the following four types of reports: Registered management investment company report; Manager "voting" report when the report contains all say-on-pay votes of the manager; 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 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.
- <sup>14</sup> See 17 C.F.R. Parts 232, 240, 249, 270, and 274, <https://www.sec.gov/rules/proposed/2021/34-93169.pdf>.
- <sup>15</sup> The proposal notes that this would be accomplished with amendments to Forms N-1A, N-2 and N-3.

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