

November 21, 2022

SEC Adopts Enhanced Proxy Voting Disclosure Requirements for Investment Funds and Requires Disclosure of “Say-on-Pay” Votes for Institutional Investment Managers

SEC Action Imposes Substantial Additional Reporting Obligations

SUMMARY

On November 2, 2022, the SEC voted 3 to 2 (Commissioners Hester Peirce and Mark Uyeda dissenting) to adopt amendments to Form N-PX to enhance the information mutual funds, exchange-traded funds and certain other registered funds (“funds”) report about their proxy votes (together, the “final rules”).¹ In addition, the final rules will require disclosure on Form N-PX of how institutional investment managers (“managers”) voted on “say-on-pay” matters.² The final rules will be effective on July 1, 2024, covering votes occurring on or after July 1, 2023.

The principal requirements imposed by the final rules include:

- **Identification of proxy voting matters:** for proxy votes in which a proxy card is required to be filed with the SEC, funds will be required to use the same language as the issuer’s proxy card to identify matters on which the fund has voted, presented in the same order as the issuer’s proxy card.
- **Identification of proxy voting categories:** funds will be required to categorize their voting by type (including environment or climate, human rights or human capital/workforce, corporate governance, diversity, equity and inclusion).
- **Quantitative disclosure and securities lending:** reporting persons will be required to disclose the number of shares voted or instructed to be cast, as well as the number of shares loaned but not recalled.

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- **Structured data language and standardized reporting format:** reporting persons will be required to file their reports using an XML structured data language. The amendments to Form N-PX also standardize the order of disclosure requirements and require that each fund—including each series of a multi-series trust—present its voting record separately.
- **Website availability of fund proxy voting records:** funds will be required to disclose that their proxy voting records are publicly available on (or through) their websites and available upon request, free of charge in both cases.
- **Disclosure of say-on-pay votes by managers:** new Rule 14Ad-1 will require managers to report annually on Form N-PX each say-on-pay vote over which the manager exercised voting power.

The final rules reflect several key policy issues for SEC Chair Gensler, including ESG, proxy voting and greater transparency on securities lending,³ which also underlie many other recent matters on the SEC's active rulemaking agenda.⁴

The final rules are substantially similar to those proposed by the SEC in September 2021. Our summary of the proposed rules is available [here](#). This publication summarizes key differences between the proposed rules and the final rules.

BACKGROUND

In order to increase the transparency of mutual funds' proxy voting policies, procedures and actual voting, the SEC adopted Form N-PX in 2003 and required companies to report annually their proxy voting records on the form.⁵ Citing investors' difficulties in analyzing the current reports and the need to improve the utility of Form N-PX information for investors, the SEC proposed amendments to Form N-PX in September 2021 (the "proposed rules"). In addition, the proposed rules included a new requirement for managers to report annually on Form N-PX how they voted proxies relating to say-on-pay. This new requirement was intended to complete implementation of Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"), which amended the Securities and Exchange Act of 1934 (the "Exchange Act") by adding Section 14A.

The new Form N-PX disclosure requirements highlight the SEC's continued focus on ESG-related topics, particularly in the investment management space. The final rules will require standardized disclosure, in structured data format, of various categories of proxy voting, including environmental or climate; human rights or human capital/workforce; diversity, equity and inclusion; and other social issues, allowing the Commission, investors and others to more easily analyze, and potentially scrutinize, funds' and managers' proxy voting records. Together with the SEC's recently proposed ESG-related fund rules⁶ and other ESG-related initiatives,⁷ these requirements will likely lead to increased scrutiny on funds that incorporate ESG considerations into their investment strategies.

More generally, the expanded Form N-PX disclosure requirements, which are more expansive than those the SEC proposed in 2010 with respect to managers' Form N-PX reporting obligations, reflect the SEC's

recent focus on enhancing transparency for investors through standardized disclosure requirements. As the adopting release makes clear, the SEC is focused on the role funds and managers play in voting investor securities, as well as investors' ability to analyze fund and manager voting behaviors, especially in light of the significant holdings of funds in U.S. public companies today. The Commission was also concerned with funds' securities lending practices, noting that, without understanding a fund's securities lending activities, the fund's investors do not have a complete understanding of the fund's proxy voting practices since funds lose the ability to vote the proxies of loaned securities unless such securities are recalled in time to permit them to be voted.⁸

As has been the case with many of the SEC's recent rulemaking, the adoption of the final rules reflects a Commission deeply divided along political lines, with the three Democrat Commissioners supporting, and both Republican Commissioners voting against, their adoption. Chair Gensler and Commissioners Caroline Crenshaw and Jaime Lizárraga emphasized the need to strengthen fund and manager accountability in light of the substantial size of funds and the voting managers' exercise of voting power on behalf of investors.⁹ Both Commissioners Hester Peirce and Mark Uyeda criticized the Commission's process for finalizing these rules, with Commissioner Uyeda noting that he was never provided with complete comment summaries.¹⁰ In terms of the substance of the final rules, Commissioner Peirce expressed concern that the adopted rulemaking expanded rules beyond what the Dodd-Frank Act required, and Commissioner Uyeda predicted that funds seeking to look "more responsible" on their Form N-PX might be incentivized to recall their loaned securities despite additive returns from the loans. At the open meeting announcing the final rules, Commissioner Uyeda also questioned whether the rulemaking may be inconsistent with the SEC Appropriations Act, which restricts the SEC from issuing rules on the disclosure of tax, political or charitable activity.¹¹

OVERVIEW OF KEY DIFFERENCES BETWEEN THE FINAL AND PROPOSED RULES

The final rules to expand Form N-PX disclosures are generally consistent with the proposed rules. In response to comments received, however, the SEC has made limited modifications, including on the following aspects of the proposed rules:

- **Changes to proposed scope of Form N-PX obligations for managers:** As proposed, all managers would have been required to report "say-on-pay" votes on Form N-PX with respect to any security over which they exercised voting power.¹² Under the final rules, managers that have an explicitly disclosed policy of not voting proxies and that actually do not vote proxies during the reporting period are not subject to a reporting obligation. Such managers are allowed to so indicate on Form N-PX without providing additional information about each voting matter individually.
- **Changes to requirement to match language in issuer's form of proxy:** As proposed, reporting persons will need to identify proxy voting matters using the same language as disclosed in the issuer's form of proxy, presented in the same order as the matters appear in the form of proxy, and identify directors separately for director election matters. However, these requirements will only

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apply if a form of proxy in connection with a matter is subject to the requirements of Rule 14a-4 under the Exchange Act (*i.e.*, if an SEC proxy card is available for the matter). In all other cases, reporting persons will be subject to the current requirement to provide a “brief identification of the matter voted on,” and under the final rules descriptions of these matters will be limited to the abbreviations that are commonly understood terms or terms that the issuer abbreviated in its description of the matter.

- **Changes to proxy voting categories on Form N-PX:** As proposed, reporting persons must select from specified, standardized categories of proxy voting subject matters, but three of the proposed categories were consolidated with other categories in the final rules. The SEC’s adopting release noted that the categories are designed to “cover matters on which funds frequently vote,” but have been “streamlined” based on suggestions from commenters “to reduce overlap and make the categories easier to use.”¹³ (See [Appendix A](#) for a table setting forth the differences between the proposed and final categories.) In addition, the SEC has eliminated the proposed requirement to select from a list of approximately 90 subcategories, responding to commenters’ concern that the granularity of the proposed subcategories could be detrimental to investors’ ability to compare different filings to locate matters relating to particular categories.

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ENDNOTES

- 1 *Enhanced Reporting of Proxy Votes by Registered Management Investment Companies; Reporting of Executive Compensation Votes by Institutional Investment Managers*, SEC Release No. 33-11131 (Nov. 2, 2022) (“Adopting Release”).
- 2 A manager is generally required to file reports on Form 13F if it exercises investment discretion with respect to accounts holding at least \$100 million in securities reportable on that form as of the last trading day of any month of any calendar year. This definition captures a broad range of investors in U.S. publicly traded equities, including some that are not “managers” in the conventional sense.
- 3 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>.
- 4 See, e.g., Sullivan & Cromwell LLP, SEC Proposes Enhanced ESG Disclosure Requirements for Investment Advisers and Investment Companies: Proposal Would Apply to Investment Advisers, Registered Investment Companies and Business Development Companies That Consider ESG Factors (June 6, 2022), <https://www.sullcrom.com/files/upload/sc-publication-sec-proposes-enhanced-funds-esg-disclosure-requirements.pdf>; Sullivan & Cromwell LLP, SEC Proposes Expansive Climate-Related Disclosure Rules: Would Require Public Companies to Disclose Detailed Greenhouse Gas Emissions, Climate Transition Plans, Targets and Progress Against Targets, Long-Term Climate Risks and Business Impacts, and Climate-Related Corporate Governance, Including New Information in Notes to Audited Financial Statements (Mar. 28, 2022), <https://www.sullcrom.com/files/upload/sc-publication-sec-proposes-expansive-climate-related-disclosure-rules.pdf>.
- 5 See 17 C.F.R. § 274.130 (2022); Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies, Investment Company Act Release No. 25922 (Jan. 31, 2003) [68 FR 6563 (Feb. 7, 2003)].
- 6 See, e.g., Sullivan & Cromwell LLP, SEC Proposes Enhanced ESG Disclosure Requirements for Investment Advisers and Investment Companies: Proposal Would Apply to Investment Advisers, Registered Investment Companies and Business Development Companies That Consider ESG Factors (June 6, 2022), <https://www.sullcrom.com/files/upload/sc-publication-sec-proposes-enhanced-funds-esg-disclosure-requirements.pdf>.
- 7 See, e.g., Press Release, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021), available at <https://www.sec.gov/news/press-release/2021-42>.
- 8 See Chair Gary Gensler, Statement on Final Amendments to Form N-PX (Nov. 2, 2022), <https://www.sec.gov/news/statement/gensler-statement-amendments-form-npx-110222>.
- 9 See e.g., Commissioner Caroline Crenshaw, Statement on Enhanced Reporting of Proxy Votes (Nov. 2, 2022), <https://www.sec.gov/news/statement/crenshaw-statement-amendments-form-npx-110222>; Commissioner Jaime Lizárraga, Enhanced Fund Voting Reporting (Nov. 2, 2022), <https://www.sec.gov/news/statement/lizarraga-statement-amendments-form-npx-110222>.
- 10 See Commissioner Hester M. Peirce, Voting Obsession: Statement on Final Enhanced Reporting of Proxy Votes by Registered Management Investment Companies; Reporting of Executive Compensation Votes by Institutional Investment Managers (Nov. 2, 2022), <https://www.sec.gov/news/statement/peirce-statement-amendments-form-npx-110222>; see also Commissioner Mark Uyeda, Statement on the Final Rule: Enhanced Reporting of Proxy Votes by Registered Management Investment Companies; Reporting of Executive Compensation Votes by Institutional Investment Managers (Nov. 2, 2022), <https://www.sec.gov/news/statement/uyeda-statement-amendments-form-npx-110222>.
- 11 The Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, § 707, 129 Stat. 2242 (2015) (“None of the funds made available by any division of this Act shall be used by the Securities and

ENDNOTES (CONTINUED)

Exchange Commission to finalize, issue, or implement any rule, regulation, or order regarding the disclosure of political contributions, contributions to tax exempt organizations, or dues paid to trade associations.”).

¹² These requirements apply to each person that is (1) an “institutional investment manager” under the Exchange Act and (2) required to file reports under section 13(f) of the Exchange Act.

These requirements include, among other things, quantitative disclosure requirements applicable to a manager’s say-on-pay votes and to all of a fund’s votes, such as the number of shares that were voted (or, if not known, the number of shares for which votes were instructed to be cast), as well as the number of shares that the reporting person loaned and did not recall.

¹³ Adopting Release, *supra* note 1, at 28.

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APPENDIX A

Source: Adopting Release, *supra* note 1, at 32–33.

Proposed Category	Adopted Category	Change from Proposal
Board of directors	Director elections	Limited to elections; other board matters categorized as corporate governance
Section 14A	Section 14A	None
Audit-related	Audit-related	None
Investment company matters	Investment company matters	None
Shareholder rights and defenses	Shareholder rights and defenses	None
Extraordinary transactions	Extraordinary transactions	None
Security Issuance	n/a	Consolidated with capital structure
Capital structure	Capital structure	Now includes security issuance
Compensation	Compensation	None
Corporate governance	Corporate governance	Includes board matters other than director elections and meeting governance
Meeting governance	n/a	Consolidated with corporate governance
Environment or climate	Environment or climate	None
Human rights or human capital/workforce	Human rights or human capital/workforce	None
Diversity, equity, and inclusion	Diversity, equity, and inclusion	None
Political activities	n/a	Consolidated with other social issues
Other social issues	Other social issues	Now includes political activities
Other	Other	None