

ONPOINT / A legal update from Dechert's Financial Services Group

SEC Proposes to Increase Reporting of Proxy Votes by Registered Management Investment Companies and Reporting of Executive Compensation Votes by Institutional Investment Managers

Authored by Stephen T. Cohen, Megan C. Johnson, Mark D. Perlow, Michael L. Sherman, Kathleen Hyer, and Jessica Warshaw

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The Securities and Exchange Commission has proposed amendments to Form N-PX under the Investment Company Act of 1940 to increase the utility to investors of proxy voting information reported on Form N-PX by mutual funds, exchange-traded funds and certain other funds (collectively, funds) (Proposal).¹ The Proposal also includes rule and form amendments under the Securities Exchange Act of 1934 that would require institutional investment managers subject to reporting requirements under Section 13(f) of the Exchange Act (managers) to annually report their proxy voting record on Form N-PX with respect to proxies relating to certain shareholder advisory votes on executive compensation matters. At the open meeting during which the Proposal was approved, SEC Chairman Gary Gensler stated that the Proposal will “make the information on Form N-PX more consistent, comparable, and decision-useful for investors.”

If the Proposal is adopted in its current form, it would:

- Expand the scope of funds’ Form N-PX reporting obligations
- Subject managers to Form N-PX reporting obligations
- Enhance Form N-PX disclosures
- Permit joint reporting on Form N-PX
- Change Form N-PX reporting data language
- Require website availability of fund proxy voting records

This *Dechert OnPoint* summarizes the above key components of the Proposal, and highlights issues that may be raised by the proposed changes to the proxy voting reporting regime.

Expansion of Scope of Funds’ Form N-PX Reporting Obligations

Currently, all registered investment companies (other than small business investment companies registered on Form N-5) must file reports on Form N-PX with the SEC, not later than August 31 of each year, containing their proxy voting records for the most recent 12-month period ended June 30. Although the Proposal does not change the

¹ Enhanced Reporting of Proxy Votes by Registered Management Investment Companies; Reporting of Executive Compensation Votes by Institutional Investment Managers, Release Nos. 34-93169; IC-34389; File No. S7-11-21 (Proposing Release). At times, this OnPoint tracks the Proposal without the use of quotation marks.

scope of the funds or reporting period subject to Form N-PX reporting obligations, the Proposal does modify the scope of voting decisions that funds are required to report.

Under current Form N-PX, funds are required to report information for each matter relating to a portfolio security considered at any shareholder meeting during the reporting period and with respect to which the fund was entitled to vote. To address funds' securities lending activities and the impact of such activities on proxy voting, the Proposal expands this standard by specifying that a fund would be required to report on portfolio securities for which the fund is "entitled to vote," which term includes portfolio securities that are on loan as of the record date for the meeting. The Proposal indicates the SEC's view that this updated standard is appropriate because a fund could recall its loaned securities and vote them.

The SEC requests comments on whether all registered management investment companies (other than small business investment companies registered on Form N-5) should continue to be required to report on Form N-PX, as well as other types of registered investment companies (e.g., unit investment trusts) that should be required to report their proxy votes on Form N-PX.

Managers Subject to Form N-PX Reporting Obligations

In connection with the Proposal, the SEC proposed new Rule 14Ad-1, which would require "institutional investment managers" (as defined in the Exchange Act) that are required to file reports under Exchange Act Section 13(f) to report their proxy voting record with respect to certain shareholder advisory votes on executive compensation. Section 14A of the Exchange Act generally requires public companies to: hold shareholder advisory votes to approve the compensation of named executive officers; determine the frequency of such votes; and approve "golden parachute" compensation in connection with a merger or acquisition (collectively, say-on-pay votes).

Under Rule 14Ad-1, managers would be required to report say-on-pay votes for securities only if the manager "exercised voting power" over the security. A manager has "exercised voting power" if the manager: has the power to vote or cause another party to vote the security; and has used that power to influence the voting decision. In a change from a similar proposal in 2010, this standard focuses on the "*exercise*, rather than mere *possession*, of voting power."² The Proposal states that "voting power would exist when 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." The "exercise" prong of this test would not be satisfied in instances where a "third party makes all decisions of whether to vote the security." The Proposal states, for example, that managers are not required to report votes on Form N-PX when the voting decision is made entirely by the client, either through direct instructions or client proxy policies.

Further, in instances when a manager did not exercise voting power over any securities that held say-on-pay votes during a reporting period, the Proposal would require that the manager affirmatively report on Form N-PX that no votes were cast. The Proposal would permit managers to request confidential treatment of information reported on Form N-PX. The Proposing Release indicates that such confidential treatment would be requested in the same manner as set forth on Form 13F.

The SEC has requested comment on whether: certain manager votes should be omitted; the SEC should permit or require any disclosure on Form N-PX or elsewhere to explain differences between information reported on Form N-

² See Exchange Act Release No. 63123 (Oct. 18, 2010) [75 FR 66622 (Oct. 28, 2010)] (emphasis in original).

PX and information reported on Form 13F or related circumstances; and the SEC should expand or limit in any other way the securities with respect to which managers would be required to report say-on-pay votes.

Enhanced Form N-PX Disclosures

The Proposal includes what the SEC describes as several enhancements to enable investors and other stakeholders to more easily comprehend and analyze proxy voting information reported on Form N-PX.

- *Mirroring Language and Order of Issuers' Proxies.* The Proposal would require reports on Form N-PX to disclose proxy voting matters using the same language presented in the issuer's form of proxy. The Proposal also would require each voting matter, including say-on-pay votes, to be reported in the same order as disclosed in the issuer's proxy. The Proposing Release states that these changes are proposed to "facilitate identification of identical matters included on different Form N-PX filings by different reporting persons."
- *Identification of Proxy Voting Categories.* The Proposal would require reporting persons, including managers and funds, to choose from one or more standardized categories and subcategories to identify the subject matter of each reported proxy voting item, which includes ESG factors. The main categories are:
 - Board of directors
 - Section 14A say-on-pay votes
 - Audit-related
 - Investment company matters
 - Shareholder rights and defenses
 - Extraordinary transactions
 - Security issuance
 - Capital structure
 - Compensation
 - Corporate governance
 - Meeting governance
 - Environment or climate
 - Human rights or human capital/workforce
 - Diversity, equity, and inclusion
 - Political activities and

- Other social³

In the event a relevant category or subcategory is not available, the fund or manager would be required to select “other” and provide a brief description of the subject matter of the vote.

The Proposing Release states that the above categories and subcategories are designed to cover matters on which funds frequently vote, based on the SEC staff’s experience and review of the matters on which funds voted in 2020.⁴ Commissioner Hester M. Peirce expressed concern that “filers are unlikely to categorize particular voting matters uniformly, which seems a rather significant defect in a proposal seeking to impose standardization.”⁵ On the other hand, Commissioner Caroline A. Crenshaw stated that “[t]his consistency is fundamental to investors’ ability, and perhaps will incentivize investors, to assess how their money is voted.... [I]nvestors will be able to compare and evaluate voting decisions across the entire market of funds vying for their investing dollars. When shareholders have readily available information about how funds vote their interests, they can hold them to account, which, in turn, could enhance corporate decision making.”⁶

The SEC has requested comment on, among other matters: the advantages and disadvantages of the proposed categorization requirements; and whether the proposed categories or subcategories effectively capture the range of proxy voting matters; and whether there are certain types of votes where the categorization would be unclear or where reporting persons might reasonably select different categories for the same vote.

- *Quantitative Disclosures.* The Proposal would require disclosure of the number of shares that were voted, or if unknown, the number of shares that were instructed to be cast.⁷ In addition, the fund or manager would be required to disclose how shares were voted (e.g., for, against or abstain). In instances where a vote is cast in multiple manners, the Proposal would require disclosure of the number of shares cast in each manner. The Proposal also would require disclosure of the number of shares the reporting person loaned and did not recall. Disclosure of loaned securities would be required in situations where the reporting person loans the

³ “Other social” includes the following subcategories: data privacy; responsible tax policies; charitable contributions; consumer protection; or other social matters (along with a brief description).

⁴ In his statement at the open meeting, Commissioner Elad L. Roisman objected to the process of determining these categories, because “the process by which we have devised this framework does not appear to be based on rigorous analysis. Rather than grounding it on a review of proxy voting matters from several prior years, we focused only on the most recent proxy season for which information was available—2020—and started sorting from there.... By freezing in place categories that reflect issues *last year’s* shareholders care about, we risk relegating future shareholders’ interests to an ‘Other’ category that likely will be as useful to investors as the line items appearing as ‘Miscellaneous’ on today’s forms.” Elad L. Roisman, U.S. Securities and Exchange Commission, *Statement on Proposed Changes to Asset Managers’ Proxy Voting Disclosures* (Sept. 29, 2021) (emphasis in original).

⁵ Hester M. Peirce, U.S. Securities and Exchange Commission, *Statement on Enhanced Reporting of Proxy Votes by Registered Management Investment Companies; Reporting of Executive Compensation Votes by Institutional Investment Managers* (Sept. 29, 2021).

⁶ Caroline A. Crenshaw, U.S. Securities and Exchange Commission, *Statement on N-PX Proposal* (Sept. 29, 2021).

⁷ The Proposal would not require a fund or manager to confirm the number of votes cast if the information is not otherwise readily available. However, the Proposal would require that the fund or manager report the actual number of votes cast if that information is learned prior to filing of Form N-PX. Amendments to Form N-PX would not be required if such information was learned after Form N-PX is filed. The SEC has requested comment on the requirement to report the number of shares voted or instructed to be cast, including with respect to whether there are other ways to better inform investors of reporting persons’ voting practices (such as by using another metric).

securities directly or indirectly through an agent. The Proposing Release states that without disclosure of securities that were loaned and not recalled, “investors would not have information about a manager’s decision not to recall a loaned security, which is similar to the decision not to vote on a matter.” However, Commissioner Elad L. Roisman expressed concern that the requirement of reporting shares that were loaned and not recalled “seems ill-designed to communicate to investors the balancing that funds go through when considering how to maximize value for fund investors” and “gives a distorted view of how managers make decisions and potentially implies that voting shares *should be* a fund’s priority rather than lending out those shares for a return.”⁸ The SEC has requested comment on the requirement to report shares that were loaned and not recalled (including with respect to whether this information is valuable to investors) and whether: there are limitations regarding the ability of reporting persons to disclose the number of shares loaned and not recalled; and such a requirement would affect the decisions a fund or manager currently makes on when to recall a loaned security for purposes of voting and when to keep a security on loan.

- *Standardized Order.* The Proposal would require Form N-PX disclosures to be reported in a standardized order. In addition, funds with multiple series would be required to separately report each series’ voting record.
- *Security Identifier.* The Proposal would require reporting of only one security identifier. Form N-PX currently requires that a fund report a security’s CUSIP number and ticker symbol. Funds and managers would be required to report a security’s CUSIP or, if unavailable, its ISIN. If either a security’s CUSIP or ISIN are not available through “reasonably practicable means,” the reporting person could omit disclosure of a security identifier.
- *Cover Page.* The Proposal would update the cover page of Form N-PX to include a new section to be used for filing of amendments to a previously filed Form N-PX. Under the Proposal, amendments would either be required to restate the Form N-PX report in its entirety or include only the additional information provided by the amendment. The Proposal also would allow additional information to be included, provided that the additional information does not “impede the understanding or presentation of the required information.”⁹
- *Proposal or Counterproposal.* The Proposal would require funds to identify whether a matter proposed by a security holder is a proposal or counterproposal. This requirement would not be applicable to managers because say-on-pay votes relate exclusively to matters proposed by issuers and not security holders.
- *Technical Amendment.* The Proposal would update Form N-PX to require reporting persons to disclose whether each vote was voted “for or against management’s recommendation.” Form N-PX currently requires that a fund disclose whether a vote was cast “for or against management.” The Proposing Release indicates that the updated requirement is intended to clarify that funds must disclose whether they are voting for or against management’s recommendation on a particular matter, as opposed to how the vote might affect management. If management has not put forth any recommendation, reporting persons may disclose “none” for the applicable matter.

⁸ Elad L. Roisman, *supra* note 2 (emphasis in original).

⁹ The optional disclosure permitted by the Proposal would be included at the end of the cover page or in connection with the specific vote at issue.

Joint Reporting on Form N-PX

The Proposal includes certain amendments to Form N-PX to permit joint reporting by funds and managers.

- *Single Manager Reporting.* The Proposal would allow a single manager to report say-on-pay votes where multiple managers exercise voting power in order to prevent duplicative reporting.¹⁰
- *Fund Say-On-Pay Reporting.* The Proposal would allow a fund to report say-on-pay votes on behalf of a manager exercising voting power over some or all of the fund's securities. This amendment is intended to prevent duplicative filings by funds and their advisers.
- *Affiliate Reporting.* The Proposal would allow two or more affiliates to file a single report on Form N-PX. Affiliates would be permitted to file joint reports even in instances where they do not exercise voting power over the same securities.

Under each of the three joint filing options permitted by the Proposal, a report that includes a manager's say-on-pay votes would need to identify the manager(s) on whose behalf the filing is made, and separately identify the securities over which any non-reporting manager has exercised voting power. In addition, the manager would be required to file a Form N-PX identifying the other managers or funds that have reported on the manager's behalf.

In addition to permitting funds and managers to file jointly, the Proposal would amend the cover page of Form N-PX to include information that more readily identifies whether the reporting person is a fund or manager. The Proposal also would add a summary page, requiring reporting persons to identify the names and number of additional managers with say-on-pay votes included in the report in list format.¹¹

The SEC has requested comment on, among other matters, whether: a single manager should be permitted to report say-on-pay votes in cases where multiple managers exercise voting power; a manager should be permitted to satisfy its reporting obligations by reference to the Form N-PX report of a fund that includes the manager's say-on-pay votes; there are any reasons not to permit joint reporting (e.g., investor confusion); and there are other means by which duplicative reporting could be addressed that are consistent with Section 14A(d) of the Exchange Act.

Form N-PX Reporting Data Language

Form N-PX reports currently are filed in HTML or ASCII format. The Proposal would require such information to be reported either through a web-based form supplied by the SEC or in an Extensible Markup Language (XML) file. The Proposing Release states that the updated file format would allow investors to aggregate and analyze reported data in a less labor-intensive manner. In support of the use of structured data language, Commissioner Allison Herren Lee stated that "[v]oting data is important not just at the micro level—meaning a specific vote on a specific ballot issue at a specific company—but also at the macro level and in various aggregate forms—meaning whether and how funds, fund complexes, and managers vote broadly when it comes to contested issues or certain kinds of public policy

¹⁰ The Proposing Release indicates that this reporting method would be similar to that employed by Form 13F.

¹¹ If additional managers are included in a Form N-PX report, the reportX must include each manager's Form 13F file numbers, CRD numbers and other SEC file numbers, as applicable.

proposals and how that voting compares to the voting of others. Structured data will facilitate both types of analyses.”¹²

The SEC has requested comment on, among other matters, whether: a custom XML language is the appropriate type of data language for Form N-PX reports or if another structured data language would be more appropriate; this proposed requirement would yield reported data that is more useful to investors; the standardized identification requirements in the Proposal would be compatible with the proposed reporting data language; and any subset of funds or managers should be exempt from the proposed structured data reporting requirement.

Website Availability of Fund Proxy Voting Records

Under current Forms N-1A, N-2 and N-3, a fund must disclose that its proxy voting record is available to shareholders *either* on the fund’s website or upon request. In order to make a fund’s proxy voting record more accessible to investors, the Proposal would amend Forms N-1A, N-2, and N-3 to require a fund to disclose its proxy voting record publicly on or through its website *and* to make such record available upon request, free of charge. The proxy voting record posted on a fund’s website or provided upon request must be in a human-readable format.¹³

Requested comments include whether: the SEC should require a fund to disclose that its proxy voting record is publicly available on (or through) its website without also requiring disclosure that the record is available upon request; investors need the option to request a copy of a fund’s proxy voting record if the website availability is sufficient; and there are other ways the SEC could improve the accessibility of funds’ proxy voting records for investors.

Time of Reporting and Proposed Compliance Dates

Currently, funds must report their proxy voting records annually on Form N-PX no later than August 31 of each year, for the most recent 12-month period ended June 30. The Proposal would not make any changes to the reporting timeframe for funds, and would apply the same reporting timeframe to managers’ reporting of say-on-pay votes.

The SEC proposed two alternate compliance timeframes for funds and managers, depending on the effective date of the Proposal. Under the first alternative, if the Proposal is effective six months before June 30, the first reports on amended Form N-PX would be required to be filed by the August 31 following the Proposal’s effective date. Managers would be required to report votes beginning six months after the effective date of the Proposal. Under the second alternative, if the Proposal is 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 Proposal. In either case, funds would disclose votes occurring at least six months after the effective date of the Proposal in conformance with amended Form N-PX and any votes occurring before such period in conformance with current Form N-PX requirements.

¹² [Allison Herren Lee](#), U.S. Securities and Exchange Commission, *Shining a Light on Corporate Democracy: Statement on Updates to Form N-PX*, (Sept. 29, 2021).

¹³ The Proposing Release states that a fund could comply with this requirement by using the human-readable version of its Form N-PX report that would appear on EDGAR (*i.e.*, by providing a direct link on its website to the HTML-rendered Form N-PX report on EDGAR).

Commissioner Herren Lee encourages investors and the public to help determine whether more timely disclosure would be beneficial and, if so, how that could be accomplished.¹⁴

Conclusion

The Proposal sets forth potential changes to the reporting regime for funds and managers that the SEC states are intended to increase consistency, transparency and usability of Form N-PX. It is notable that some of the changes appear to be designed to highlight, and make more easily searchable and organizable, funds' (and to a lesser extent) managers' votes on certain ESG matters. One potential effect of the Proposal would be to increase the amount of public attention and investor debate around these proxy and shareholder proposals. Comments have been requested not only about the proposed amendments, but also as to whether the SEC should eliminate mandatory public disclosure of fund votes altogether.

Comments on the Proposal are due by December 14, 2021 (60 days after publication in the Federal Register).¹⁵

¹⁴ [Allison Herren Lee](#), *supra* note 11.

¹⁵ Enhanced Reporting of Proxy Votes by Registered Management Investment Companies; Reporting of Executive Compensation Votes by Institutional Investment Managers, 86 Fed. Reg. 57,478 (Oct. 15, 2021).

This update was authored by:



Stephen T. Cohen
Partner
Washington, D.C.
+1 202 261 3304
stephen.cohen@dechert.com



Megan C. Johnson
Partner
Washington, D.C.
+1 202 261 3351
megan.johnson@dechert.com



Mark D. Perlow
Partner
San Francisco
+1 415 262 4530
mark.perlow@dechert.com



Michael L. Sherman
Partner
Washington, D.C.
+1 202 261 3449
michael.sherman@dechert.com



Kathleen Hyer
Associate
Washington, D.C.
+1 202 261 3471
kathleen.hyer@dechert.com

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