



ALERTS

SEC Adopts Say-on-Pay Voting Disclosure Requirements For Institutional Investment Managers

November 9, 2022

Highlights

New Rule 14Ad-1 requires “say-on-pay” proxy voting disclosure by investment managers who file Form 13F

Disclosure will be made annually on Form N-PX

There is time to get ready – managers’ first Form N-PX will be due in August 2024, reporting say-on-pay votes made during the 12 months ending June 30, 2024

On Nov. 2, 2022, the Securities and Exchange Commission fulfilled one of its remaining Dodd-Frank rulemaking obligations by adopting [new Rule 14Ad-1 under the Securities Exchange Act](#). Rule 14Ad-1 applies to institutional investment managers, including hedge fund managers, who are subject to reporting on Form 13F. The rule requires these managers to file an annual Form N-PX disclosing how they have voted proxies concerning specified executive compensation matters at their portfolio companies. The new reporting requirement will take effect on July 1, 2024.

Background

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The proxy voting disclosure regime introduced by Rule 14Ad-1 stems from Section 14A of the Exchange Act, which Congress enacted in 2010 as part of its Dodd-Frank legislation. Section 14A generally requires a U.S. public issuer to hold non-binding shareholder advisory votes to approve the compensation of the issuer's named executive officers, to determine how frequently those approval votes should occur, and to approve proposed "golden parachute" compensation relating to a merger, acquisition, or sale of the issuer (collectively, "say-on-pay votes").

Section 14A also provides that institutional investment managers subject to reporting under Section 13(f) of the Exchange Act shall publicly disclose their say-on-pay voting record at least annually, pursuant to implementing rules to be promulgated by the SEC. The SEC's adoption of Rule 14Ad-1 gives effect to that disclosure mandate.

Managers Subject to Rule 14Ad-1

Rule 14Ad-1 applies to any "institutional investment manager," as defined in Section 13(f) of the Exchange Act, who is required to file quarterly portfolio holdings reports on Form 13F. In general, that means managers of accounts holding U.S. listed equity securities with an aggregate market value of at least \$100 million. .

The rule thus applies to numerous hedge fund managers and other advisers who pursue U.S. equity investing strategies. The SEC has modified existing Form N-PX—historically used by registered investment companies to report their proxy voting activity—to serve also as the vehicle for say-on-pay voting disclosure by institutional investment managers .

Say-on-Pay Votes Subject to Disclosure on Form N-PX

Whether a manager must report any particular say-on-pay vote on Form N-PX depends on the satisfaction of a two-part test articulated in Rule 14Ad-1. First, the manager must have possessed "voting power" over the relevant issuer securities. Second, the manager must have "exercised" that voting power to influence a voting decision with respect to the securities.

A manager possesses voting power when it has the ability to vote or direct the voting of a security. This includes the ability to determine whether to vote the security at all, and the ability to recall a loaned security prior to the vote. Voting power may exist either directly or indirectly, by way of any contract, arrangement, understanding, or relationship.

A manager "exercises" its voting power by actually using it to make or influence a voting decision concerning the securities in question. The adopting release emphasizes that whether a manager exercises voting power essentially hinges on whether the manager is acting pursuant to its own independent judgment. For example, a manager would be seen as exercising voting power by acting in accordance with its internal proxy voting guidelines, by using its discretion to interpret how a client's voting policies apply, by deciding not to vote, or by deciding whether to recall loaned securities in advance of a vote. A manager would not be deemed to exercise voting power when voting in a manner determined entirely by a client or another party.

Required Information About Each Reported Vote

Form N-PX calls for the manager to disclose specified information regarding each reported say-on-pay vote. This information includes, among other things: (i) the number of securities voted; (ii) how the securities were voted (for, against, or abstain); and (iii) the number of securities the manager had out on loan but did not recall. The manager voluntarily may provide any other information it wishes concerning a voting decision.

Annual Form N-PX Filing Deadline

Form N-PX is an annual filing due every Aug. 31. It will disclose the manager's say-on-pay voting record for the most recent 12-month period ended June 30. Transitional filing provisions apply for a manager that has recently entered or exited the Form 13F reporting system.

Joint Filing Provisions and Confidential Treatment Requests

In order to ease the potential burden of duplicative disclosure, Form N-PX permits joint reporting where multiple managers have exercised voting power in respect of a particular say-on-pay vote. These joint-reporting provisions are similar to those under Form 13F.

A manager may ask the SEC to grant confidential treatment (not to exceed one year) for say-on-pay voting information that otherwise would be disclosed on Form N-PX. The procedures and standards for requesting such confidential treatment are again comparable to those for Form 13F. A manager must provide factual support for its request, including a demonstration that the manager customarily and actually keeps the information private, and that the denial of confidential treatment would be likely to harm the manager.

The SEC intends that Form N-PX confidential treatment will be available only in limited circumstances, such as where corresponding Form 13F confidential treatment is pending or has been granted; the adopting release notes in particular that confidential treatment would not be justified solely on the basis that a manager has agreed with a client not to disclose its portfolio holdings.

Effective Date

Rule 14Ad-1 will become effective on July 1, 2024. This means a manager's first report on Form N-PX will be due by August 31, 2024, and will cover the manager's say-on-pay voting record for the period July 1, 2023 through June 30, 2024. Managers subject to the new disclosure regime should take time prior to its effective date to familiarize themselves with Form N-PX and ensure their internal systems are capable of identifying and collecting the data it requires.

For more information, please contact the Barnes & Thornburg attorney with whom you work or Scott Budlong at 646-746-2036 or scott.budlong@btlaw.com.

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