



## ALERTS

### **Say-on-Pay Vote Reporting Under Rule 14Ad-1: Investment Managers Should Start To Focus Now On Form N-PX**

June 14, 2023

#### **Highlights**

Rule 14Ad-1 applies to investment managers who are subject to Form 13F reporting

The rule requires annual disclosure on Form N-PX of a manager's say-on-pay proxy voting record

The first annual reporting period for Form N-PX begins on July 1, 2023, such that subject managers need to begin recording their voting activity this summer

As described in an earlier [client alert](#), in November 2022 the Securities and Exchange Commission (the SEC) [adopted Rule 14Ad-1](#) under the Securities Exchange Act (the Exchange Act). Rule 14Ad-1 applies to any institutional investment manager, as defined in Section 13(f) of the Exchange Act, that is subject to reporting on Form 13F. The rule thus covers managers of hedge funds, endowments, and other institutions whose investment portfolios include at least \$100 million of U.S.-listed equity or equity-related securities.

Rule 14Ad-1 will require subject managers to file an annual Form N-PX

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disclosing how they have voted proxies concerning “say-on-pay” matters at public company shareholder meetings. Form N-PX is due by Aug. 31 of each year, and covers the one-year reporting period ending on the preceding June 30.

Rule 14Ad-1 will take effect on July 1, 2024. A manager subject to the rule therefore will have to file its initial Form N-PX by Aug. 31, 2024.

## **Managers Should Focus Now on Form N-PX**

While the initial Form N-PX is not due until August 2024, the reporting period covered by that filing will be the year beginning July 1, 2023. A manager that is subject to Rule 14Ad-1 therefore should start this summer to record its say-on-pay voting activity in a manner that anticipates the disclosure requirements of Form N-PX.

## **When a Say-on-Pay Vote Must Be Reported on Form N-PX**

Say-on-pay votes comprise shareholder votes on any of three matters concerning a public company’s executive compensation: (i) periodic advisory votes on the approval of executive compensation; (ii) votes on the frequency with which those advisory votes should occur; and (iii) votes to approve “golden parachute” compensation in connection with mergers and acquisitions. (1)

Rule 14Ad-1 requires a subject manager to report on Form N-PX each say-on-pay vote for which the manager “exercised voting power” over the issuer securities in question. Exercising voting power means the manager made or influenced a voting decision by using its ability to vote or direct the voting of securities, including the ability decide whether to vote the securities or to recall loaned securities in advance of the vote. (2) Thus, a manager can be deemed to have exercised voting power even if it abstains from voting or elects not to recall loaned securities in order to cast a say-on-pay vote.

Whether a manager exercises voting power regarding a say-on-pay vote essentially hinges on whether the manager is acting pursuant to its independent judgment – for example, by following its own proxy voting policy or using its discretion to interpret a client’s policy. A manager would not be deemed to exercise voting power when acting entirely at the direction of a client or another third party.

## **What a Manager Will Report on Form N-PX**

Form N-PX historically has been the annual disclosure form used by registered investment companies to report their proxy voting record on a wide range of matters. The SEC now has modified Form N-PX to accommodate the annual say-on-pay voting disclosure required of managers that are subject to Rule 14Ad-1.

For each say-on-pay vote that a manager reports on Form N-PX, the manager must disclose the information specified in Item 1 of the form. That information primarily includes:

- The name of the issuer and the date of the shareholder meeting

- The say-on-pay matter that was voted on at the meeting (i.e., “executive compensation,” “executive compensation vote frequency,” or “extraordinary transaction executive compensation”)
- The number of shares the manager voted on the matter (with the number zero entered if no shares were voted)
- How the manager voted those shares (for, against, or abstain)
- Whether or not the manager’s vote agreed with the board of directors’ recommendation;
- The number of shares the manager had loaned but did not recall prior to the meeting (3)
- Any additional contextual information the manager optionally might wish to provide

Reports on Form N-PX will be filed via EDGAR in a custom XML-based structured data language, using a web-based application to be provided by the SEC. The SEC plans to make available an EDGAR pilot that will allow managers to test the filing process before the initial Form N-PX is due.

## Streamlined Notice Reports

There are no de minimis or other exemptions from the obligation to file Form N-PX. In some cases, however, a manager may be eligible to take advantage of a streamlined “notice” reporting approach that simply involves checking a box on the Form N-PX cover page. Notice reporting will be available when: (i) all say-on-pay votes for which the manager exercised voting power during the annual period are reported on another reporting person’s Form N-PX; (ii) the manager did not exercise voting power for any say-on-pay matter during the annual period and therefore has no votes to report; or (iii) the manager has a clearly disclosed policy of not voting proxies on any matters, and thus did not exercise voting power regarding any say-on-pay matter during the annual period.

## What Managers Should Do Now

As noted, given the annual reporting period covered by Form N-PX, managers subject to Rule 14Ad-1 must track their say-on-pay voting activity starting on July 1, 2023. This means that in respect of each portfolio company say-on-pay vote, the manager must: (i) determine whether it exercised voting power over the securities it held; and (ii) if it did, record the information corresponding to the Form N-PX disclosure requirements described above. (4)

More broadly, managers should be prepared for the fact that reporting on Form N-PX will cast a spotlight on their say-on-pay voting behavior (including in comparison to peer firms), as well as rendering more visible their approach to lending and recalling shares. Managers subject to Rule 14Ad-1 may wish to consider these issues from an investor relations and market-perception perspective as they prepare to enter the Form N-PX disclosure regime. (5)

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](mailto:scott.budlong@btlaw.com) or Scott Beal at 646-746-2021 or [sbeal@btlaw.com](mailto:sbeal@btlaw.com).

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(1) See Sections 14A(a) and (b) of the Exchange Act.

(2) See Rule 14Ad-1(d).

(3) This includes having loaned the securities directly, or indirectly through a lending agent. See Special Instruction D.7 to Form N-PX. The SEC's adopting release makes clear, however, that disclosure is not required where the manager is not involved in lending shares in a client's account, either directly or indirectly. For example, if a manager is not a party to the client's securities lending agreement and has not itself loaned the securities, such as when a manager's prime broker has rehypothecated securities in a manager's margin account, then the manager would not be involved in decisions to lend securities or recall loaned securities for that account.

(4) See Special Instruction B.2.d to Form N-PX. With regard to a policy of not voting proxies, a manager that is a registered investment adviser would achieve the requisite disclosure by describing the policy in Part 2A of Form ADV.

(5) A manager should remember in particular to record the number of issuer shares, if any, that it had on loan at the time of the vote.