

June 3, 2024

## Proxy Vote Reporting: Considerations for Institutional Investment Managers as the Form N-PX Filing Deadline Approaches

Seward & Kissel is publishing this memorandum to remind its clients about the SEC's new proxy vote reporting requirements that are applicable to 13F filers. With the **August 31, 2024** filing deadline fast approaching, we summarize the new requirements and discuss key considerations below.

### Reporting Requirement

New Rule 14Ad-1 under the Exchange Act<sup>1</sup> – which becomes effective on July 1, 2024 – will require “institutional investment managers” subject to the reporting requirements of Section 13(f) of the Exchange Act (known as “13F filers”)<sup>2</sup> to annually report on Form N-PX how they voted proxies relating to executive compensation (or “say-on-pay”) matters. (13F filers are referred to herein as “managers.”)

- If a manager does not have proxy voting authority or did not vote on any say-on-pay matters during the reporting period, the manager is still required to file Form N-PX.
- If a manager has one or more affiliates<sup>3</sup> that are also required to file Form N-PX, the manager and its affiliate(s) can file a single Form N-PX in accordance with the Joint Reporting Rules.<sup>4</sup>

### Filing Deadline

Managers are required to file their first reports on Form N-PX by **August 31, 2024**, covering the period of July 1, 2023 through June 30, 2024.<sup>5</sup>

Subsequent reports must be filed by August 31 of each year, covering the most recent 12-month period ended June 30.

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<sup>1</sup> See Enhanced Reporting of Proxy Votes by Registered Management Investment Companies; Reporting of Executive Compensation Votes by Institutional Investment Managers, Release No. 34-96206 (Nov. 2, 2022), available at <https://www.sec.gov/files/rules/final/2022/33-11131.pdf> (“Release”).

<sup>2</sup> For a general discussion of “institutional investment managers” and the Section 13(f) reporting requirements, see the SEC Division of Investment Management’s “Frequently Asked Questions About Form 13F,” available at <https://www.sec.gov/divisions/investment/13ffaq>.

<sup>3</sup> “Affiliate” means an “affiliated person” as defined in Section 2(a)(3) of the Investment Company Act of 1940.

<sup>4</sup> See Amended Form N-PX, General Instructions C.2, C.4 and C.5.

<sup>5</sup> A manager is not required to file a Form N-PX for the 12-month period ending June 30 of the calendar year in which the manager’s initial filing on Form 13F is due. Instead, the manager is required to file a Form N-PX for the period ending June 30 for the calendar year *following* its initial filing on Form 13F. See Rule 14Ad-1(b); Release at 73-75.

## Parts of Form N-PX

Form N-PX is comprised of three parts (in addition to a signature page):

- Cover Page;
- Summary Page; and
- Proxy Voting Information.

## Votes to be Reported

Managers are required to report on Form N-PX certain information concerning votes pursuant to Sections 14A(a) and (b) of the Exchange Act with respect to any securities over which they exercised voting power. Therefore, managers should consider (i) whether they “exercised voting power” over any securities and (ii) whether any votes were pursuant to Sections 14A(a) or (b).

### ➤ *Exercising Voting Power*

A manager “exercises voting power” over a security only if the manager:

- (i) has the power to vote, or direct the voting of, the security;<sup>6</sup> and
- (ii) exercises this power to influence a voting decision for the security.<sup>7</sup>

### ➤ *Votes Pursuant to Sections 14A(a) and (b)*

Sections 14A(a) and (b) of the Exchange Act generally require a public company to hold non-binding shareholder advisory votes to: (i) approve the compensation of its named executive officers; (ii) determine the frequency of such votes; and (iii) approve “golden parachute” compensation in connection with a merger or acquisition (collectively, “say-on-pay votes”).

A say-on-pay vote is “pursuant to” Section 14A(a) or (b) if it is held by an issuer that has a class of equity securities registered under Section 12 of the Exchange Act and that is subject to the SEC’s proxy rules.<sup>8</sup>

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<sup>6</sup> “Voting power” means the ability, through any contract, arrangement, understanding or relationship, to vote a security or direct the voting of a security, including the ability to determine whether to vote a security or to recall a loaned security. Rule 14Ad-1(d)(1).

<sup>7</sup> “Exercise” of voting power means using voting power to influence a voting decision with respect to a security. Rule 14Ad-1(d)(2).

<sup>8</sup> Say-on-pay votes that are not required by Sections 14A(a) and (b) – such as votes held by “foreign private issuers” (as defined in Rule 3b-4(c) under the Exchange Act) that are exempt from the SEC’s proxy rules – are not held pursuant to Section 14A and therefore are not required to be reported on Form N-PX.

### Categories of Voting Matters

Form N-PX contains a list of categories of voting matters. While registered investment companies are required to report information for voting matters in *all* of the categories, managers are only required to report information for voting matters in the “Section 14A say-on-pay votes” category.

### Voting Information to be Reported

Form N-PX requires a manager to report the following information for each Section 14A say-on-pay vote:

- (i) the name of the issuer of the security;
- (ii) the security’s CUSIP number or International Securities Identification Number (ISIN);
- (iii) the date of the shareholder meeting;
- (iv) an identification of the matter voted on;<sup>9</sup>
- (v) the number of shares voted;
- (vi) how those shares were voted (e.g., for or against the proposal, or abstain);<sup>10</sup>
- (vii) the number of shares the manager loaned and did not recall; and
- (viii) whether the votes were for or against management’s recommendation.

### How to File

Managers must file Form N-PX on the SEC’s EDGAR system in a custom eXtensible Markup Language (XML)-based structured data language created specifically for reports on Form N-PX.<sup>11</sup> Managers will have to (i) complete the “Filer Information,” “Cover Page,” “Summary – Included Managers” and “Signature Block” sections and (ii) attach their Proxy Voting Records on the “Attach Documents List” screen.

### Confidential Treatment

Managers can request confidential treatment of proxy voting information reported on Form N-PX.<sup>12</sup> The required content, the filing procedures and the standard for approving confidential treatment requests relating to Form N-PX are the same as for confidential treatment requests relating to Form 13F.

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<sup>9</sup> The identification must (i) use the *same language* that is on the form of proxy (or “proxy card”) to identify the matter and (ii) identify all matters in the *same order* as on the form of proxy.

<sup>10</sup> If the votes were cast in multiple manners (e.g., both for and against), the manager is required to disclose the number of shares voted in each manner.

<sup>11</sup> See Amended Form N-PX, General Instruction D.2; Release at 59.

<sup>12</sup> See Amended Form N-PX, Instructions for Confidential Treatment Requests.

## Key Considerations

### ➤ *Joint Reporting Rules*

Form N-PX contains “Joint Reporting Rules” that permit:

- (i) a single manager to report say-on-pay votes in cases where multiple managers exercise voting power over the same securities;
- (ii) a registered fund to report a manager’s say-on-pay votes on behalf of a manager that exercises voting power over some or all of the registered fund’s portfolio securities; and
- (iii) two or more affiliated managers to file a single Form N-PX for all affiliated managers within the group, even if they do not exercise voting power over the same securities.

Accordingly, the Joint Reporting Rules may be relevant where a manager:

- is one of *several managers* that exercise voting power over the *same securities*;
- serves as investment adviser or sub-adviser to a *registered fund*; or
- has one or more *affiliated managers*.

Managers should consider how the Joint Reporting Rules apply to their specific facts and circumstances. Managers will have to determine:

- on the Cover Page, which “Report Type” box to check:
  - Institutional Manager Voting Report
  - Institutional Manager Notice Report
  - Institutional Manager Combination Report
- on the Summary Page, which other managers (if any) to include.

Managers may have to coordinate with other entities in making those determinations. This circumstance may arise, for example, where the manager is either a sub-adviser to a fund or the investment adviser to a fund managed by one or more sub-advisers.

### ➤ *Categorizing Voting Matters*

Managers will have to review all of their proxy votes and determine which ones to categorize as “Section 14A say-on-pay votes.” In this regard, managers should keep in mind that not all compensation-related votes are *pursuant to* Section 14A(a) or (b).

➤ **Exercising Voting Power**

Whether a manager has exercised voting power will often be a straightforward determination. However, there are some circumstances in which it may not be immediately clear. Managers should keep in mind that the exercise of voting power means the *actual use* of voting power to influence a voting decision – i.e., the analysis focuses on the exercise, rather than mere possession, of voting power. Therefore, a manager exercises voting power when it votes, or influences a vote, using its own independent judgment. For example, a manager exercises voting power when it:

- votes (or directs another party to vote) in accordance with the manager’s own guidelines or based on the manager’s own judgment, including exercising independent judgment or expertise to determine how a client’s voting policies should apply to a vote;
- influences the decision of *whether* to vote a security (i.e., determining *not* to vote is exercising voting power); or
- influences the decision of whether to recall loaned securities in advance of a vote in order to vote the shares.

➤ **No Proxy Votes to Report**

Managers with no proxy votes to report will check the “Institutional Manager Notice Report” box on the Cover Page and will have to determine which of the following “notice report filing explanation” boxes to check:

- the manager did not exercise voting power for any reportable voting matter and therefore does not have any proxy votes to report
- the manager has a clearly disclosed policy of not voting, and did not vote, on any proxy voting matters

➤ **Filing Preparations; Timing**

Managers should begin preparing their Form N-PX reports – and conduct test filings on the EDGAR system – well in advance of the August 31 filing deadline in order to give themselves adequate time to work through the form’s substantive provisions and the EDGAR system’s technical requirements for the Proxy Voting Record and the custom XML-based structured data language.

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**See also:** S&K’s webinar on Form N-PX: [Click Here](#)

S&K’s previous client alert regarding the new Form N-PX requirements: [Click Here](#)

If you have any questions regarding the foregoing, please contact your Investment Management Group attorney at Seward & Kissel LLP.