Managed Funds Association
The Voice of the Global Alternative Investment Industry
Washington, D.C. | New York

December 14, 2021

Via Electronic Mail: rule-comments@sec.gov
Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File Number S7-11-21; Enhanced Reporting of Proxy Votes by Registered Management Investment Companies; Reporting of Executive Compensation Votes by Institutional Investment Managers

Dear Ms. Countryman:

Managed Funds Association[1] ("MFA") welcomes the opportunity to comment on the Securities and Exchange Commission's ("SEC") proposal, "Enhanced Reporting of Proxy Votes by Registered Management Investment Companies; Reporting of Executive Compensation Votes by Institutional Investment Managers" (the "Release") and proposed Rule 14Ad-1 (the "proposed Rule").[2] The proposed Rule would require institutional investment managers subject to section 13(f) ("managers") of the Securities Exchange Act of 1934 (the "Exchange Act") to report how they vote proxies relating to certain executive compensation matters as required by section 14A of the Exchange Act and section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). Many of our member firms fall within the definition of an "institutional investment manager" and thus would be subject to the new reporting requirements.

I. Executive Summary

We support the Commission's efforts to complete the implementation of the Dodd-Frank Act and to enhance the transparency of shareholder votes on the executive compensation matters set out in sections 14A(a) and (b) of the Exchange Act (collectively, "say-on-pay votes"). As such, we generally support requiring managers who file Form 13F reports to report their say-on-pay votes on Form N-PX, as mandated by section 14A(d) of the Exchange Act, on an annual

[1] MFA represents the global alternative investment industry and its investors by advocating for regulatory, tax and other public policies that foster efficient, transparent, and fair capital markets. MFA's more than 150 member firms collectively manage nearly $1.6 trillion across a diverse group of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time. MFA has a global presence and is active in Washington, London, Brussels, and Asia.

[2] *See Enhanced Reporting of Proxy Votes by Registered Management Investment Companies; Reporting of Executive Compensation Votes by Institutional Investment Managers*, Exchange Act Release No. 93169 (Sept. 29, 2021) [86 FR 57478 (Oct. 15, 2021)], https://www.sec.gov/rules/proposed/2021/34-93169.pdf.

basis. In our view, however, the proposed Rule should be modified in a manner that would better serve investors by requiring managers to provide useful information on executive compensation matters while minimizing the high costs investors would need to pay for less pertinent data or information that could help other market participants glean confidential information on investment strategies with respect to an investor's portfolio or fund investment. In particular, we think investors would benefit if the proposed Rule better incorporated or took into consideration information that a manager already provides to prospective and existing clients on Form ADV Part 2A.

Specifically, we recommend that the Commission modify the proposed Rule by:

(1) Requiring a manager to report information only when the manager has actually voted or instructed an intermediary to vote its securities;

- In the event that the Commission determines to require managers to report nonvotes, it should except an investment adviser from such requirement if the investment adviser has disclosed on Form ADV Part 2A a policy of not generally voting proxies;

(2) Requiring reporting with respect to section 13(f) securities that are held at quarter-end, consistent with Form 13F reporting;

- In the event that the Commission determines to expand the scope of securities beyond those held at quarter-end, we recommend that it limit the reporting to section 13(f) securities held for at least 30 days;

(3) Applying the Form 13F de minimis thresholds to Form N-PX reporting;

(4) Permitting joint reporting on Form N-PX as proposed, but without separate attributions of each position on a manager-by-manager basis; and

(5) Automatically extending confidential treatment to Form N-PX if confidential treatment is granted for a position on Form 13F.

II. Comments

A. *The proposed Rule is properly tailored to encompass only managers that file Form 13F filings*

Section 14A(d) of the Exchange Act was designed by Congress to apply to managers that file Form 13F filings and we believe the Commission has appropriately tailored the proposed Rule to apply only to those managers. Form 13F filings are filed by managers that exercise investment discretion with respect to accounts holding "section 13(f) securities" having an aggregate fair market value on the last trading day of any month of any calendar year of at least $100,000,000.[3]

[3] *See* Exchange Act Rule 13f-1(c) (defining "section 13(f) securities").

Imposing the new reporting and record keeping requirements on managers that do not meet this threshold would place new reporting burdens on managers holding smaller positions in these widely held and traded securities. Typically, such managers have lower assets under management and revenues, and the impact of any new compliance burdens affects them disproportionately as compared to larger firms, and the costs of reporting burdens may ultimately be borne by their clients. Moreover, the smaller position sizes mean that such managers' voting decisions typically would have a significantly lower impact on the outcome of most say-on-pay votes, and thus data regarding their exercises of voting power would be less valuable to investors.

B. *The proposed Rule appropriately focuses on mangers' say-on-pay votes as required by section 951 of the Dodd-Frank Act*

Proposed rule 14Ad-1 would complete the implementation of section 951 of the Dodd-Frank Act and limit the reporting for managers to that which is mandated by section 14A(d) of the Exchange Act. Section 14A relates only to say-on-pay votes. We agree with the Commission in its belief "that it is appropriate to focus on managers' say-on-pay votes, consistent with the statutory mandate" rather requiring reporting of other types of votes.[4]

However, we note that there is a question in the release about extending the reporting requirement for managers to votes other than say-on-pay votes. It is not clear to us whether the Commission has the statutory authority to require managers to report votes on any category other than say-on-pay votes. In the event the Commission determines that it does have such statutory authority, any proposal by the Commission to require reporting on any other types of shareholder votes should be addressed in a separate rulemaking process with its own statutorily required comment period, to ensure that all interested parties have a meaningful opportunity to review and comment on such proposal.

C. *The proposed annual reporting requirement strikes an appropriate balance between statutory intent and the public interest*

We agree with the requirement in the proposed Rule for managers to annually report on Form N-PX. As noted in the Release, say-on-pay votes themselves are only held annually, biennially or triennially under section 14A of the Exchange Act, depending on the particular issuer. Reporting under the proposed Rule is premised upon these votes being required under section 14A, and there is no apparent reason why this reporting of votes should be required more frequently than the holding of votes is. The public interest in requiring the reporting of managers' votes does not outweigh the interest of managers and their clients and investors in protecting the confidentiality of the managers' positions.[5] More frequent reporting would directly and adversely expose managers' trading strategies to the risk that others will exploit their

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[4] 86 FR at 57842.

[5] Even if managers are ultimately permitted seek confidential treatment for reporting with respect to certain securities, the process of seeking such treatment and providing confidential and non-confidential reporting on a side-by-side basis would be burdensome.

intellectual property and the significant resources they devote to selecting investments for their clients and investors.

Furthermore, more frequent reporting would impose additional time and cost burdens on managers, especially given that the proposed Rule does not limit reportable securities to those which are held at the end of the quarter. An annual reporting requirement would fully comply with the language and intent of the statute, and we believe that annual reporting would strike the appropriate balance between furthering the statutory intent and the public interest, on the one hand, and the interests of managers and their clients and investors in avoiding undue burdens and protecting confidentiality, on the other hand.

D. *Managers should only be required to report say-on-pay proxy votes when they have actually voted*

Section 14A(d) of the Exchange Act requires that every manager report at least annually "how it voted" on say-on-pay votes, unless such vote is otherwise required to be reported publicly. The proposed Rule would require each manager that has and exercises voting power over a relevant security to report information relating to say-on-pay votes on Form N-PX, including instances in which a manager has voting power but elects not to vote its securities or recall loaned securities for purposes of voting them.

We believe that the proposed Rule should require a manager to report information only when the manager has actually voted or instructed an intermediary to vote its securities. Reporting information with respect to such nonvotes is not required by section 951 and would require managers to implement new compliance systems to track such nonvotes for reporting purposes, while being of minimal use to a manager's clients and other investors.

As fiduciaries, alternative investment and other managers are required to act in the best interests of their clients. With respect to proxy voting matters, managers determine whether it is in the best interests of their clients to participate in shareholder votes. For a variety of reasons, managers may elect to refrain from exercising their voting power. For example, a manager implementing an investment strategy that is designed to achieve returns primarily or exclusively through short-term trading may determine that the substantial costs associated with tracking votes and identifying matters to be voted outweigh the benefit of participating in a shareholder vote, particularly if the manager is unlikely to continue to hold the securities at or beyond the time of the shareholder meeting. Similarly, many managers loan out securities in order capture additional revenue for the benefit of clients, and any recall of loaned securities would forego some of that additional revenue. This balancing of costs and benefits in determining whether to vote proxies has previously been recognized by the Commission in its guidance regarding the proxy voting responsibilities of investment advisers under Rule 206(4)-6 under the Investment Advisers Act of 1940, as amended (the "Advisers Act").[6]

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[6] *See* Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, Advisers Act Release No. 5325 (September 10, 2019) [84 FR 47420 (September 10, 2019)]. In that release, the Commission provided certain examples illustrating the weighing of costs and benefits. One such example stated that a "client and its investment adviser may agree that the investment adviser would not exercise voting authority in circumstances

Requiring managers that determine not to exercise their voting power to report information about a say-on-pay vote on Form N-PX would not provide any clear benefit to, and could result in increased costs to, their clients or other investors. In the case of private fund managers such as our member firms, investors in funds they manage are sophisticated individuals and institutions that are aware of the manager's proxy voting policies. There is no obvious benefit to such investors or the public generally in requiring reporting and disclosure of voting information if a manager has declined to vote, and the additional burdens that will be imposed on certain managers will not be insignificant. Some managers that do not vote proxies at all have instructed their brokers to suppress information on proxy votes and thus do not currently have the information on the votes in which they do not participate. Such managers — and others — would likely need to engage third party proxy service providers to compile the information for them, the cost of which may ultimately be borne by their clients and investors.

With respect to loaned securities, brokers often have broad rights to rehypothecate securities under the terms of prime brokerage agreements, and in many instances managers do not have transparency as to which securities held in margin accounts with prime brokers have been loaned out by those prime brokers at any given time. Thus, it will be infeasible for many managers to identify whether securities that were subject to a say-on-pay vote were loaned out on the applicable record date. The Commission previously recognized that requiring managers to track record date holdings was problematic and removed that from the proposed Rule,[7] but the Commission has created substantially the same problem for managers by adding the new requirement that the number of securities loaned out and not recalled be entered in Item 1(h) of the main part of Form N-PX. Proposing that a manager report determinations not to recall loaned securities in advance of a record date separately from other nonvotes will create significant compliance difficulties without providing additional meaningful information for clients and other investors. The bottom line is that the manager determined not to vote the securities. Moreover, even in cases where a manager is aware that securities are loaned out in advance of a say-on-pay vote, but chooses not to recall them, the fact that they are loaned out would just be one of the factors in the manager's determination not to vote.

A requirement to report information only when the manager has actually voted or instructed an intermediary to vote its securities would elicit the most useful voting information from managers and avoid imposing unnecessary costs on managers that do not vote their securities, such as those that use investment strategies that are not related to the voting of proxies, and on their clients and investors in private funds that they manage, who may ultimately bear the burden of increased reporting costs. This approach would also be consistent with section 14A(d) of the Exchange Act, which does not require reporting when a manager has <u>not</u> voted ("every institutional investment manager subject to section 13(f) shall report . . . how it voted"). If the Commission nevertheless determines to require reporting of nonvotes, nonvotes where the manager did not recall loan securities should simply be treated the same as other nonvotes,

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under which voting would impose costs on the client, such as opportunity costs for the client resulting from restricting the use of securities for lending in order to preserve the right to vote."

[7] *See* 86 FR at 57484.

allowing a zero to be entered for Item 1(h) of the main part of Form N-PX if no shares were voted or recalled, and Item 1(i) should be deleted from Form N-PX.

E. *Investment advisers that disclose a policy of nonvoting on Form ADV should be exempt from reporting*

The proposed Rule would require managers to report on Form N-PX each say-on-pay vote over which the manager exercises voting power. As discussed above, MFA is of the view that managers should only report on Form N-PX say-on-pay votes when they have actually voted or instructed an intermediary to vote their securities. For managers whose investment strategy and, thus, policy does not incorporate the voting of proxies, we are concerned that it would not be beneficial but in fact harmful for their clients and investors if the manager had to develop and implement at great cost a mechanism to obtain or track information about proxies that they were not voting. We think the proposed Rule should build upon the fiduciary duties of managers that are registered as investment advisers under the Advisers Act, and take into consideration that such managers are already required to provide a description of their proxy voting policies and procedures to prospective and existing clients on Form ADV Part 2A, which is publicly available, and must be updated at least once a year.

A significant number of managers that would be subject to the reporting requirements under the proposed Rule — all of our member firms that are registered as investment advisers under the Advisers Act — would be required to provide a description of their proxy voting policies and procedures to prospective and existing clients on Form ADV Part 2A, which must be updated at least once a year, and to furnish a copy of such policies and procedures to their clients upon request. Section 14A(d) requires reporting of say-on-pay votes "unless such vote is otherwise required to be reported publicly by rule or regulation of the Commission." We believe that any manager that is a registered investment adviser that expressly discloses that its general policy is not to vote proxies,[8] should not also have the obligation to report nonvotes with respect to say-on-pay votes on Form NP-X for any period to which such disclosure on Form ADV applied. An adviser's Form ADV Part 2A is both available to the public and required to be delivered to the adviser's prospective and existing clients (and updated at least annually) and, accordingly, any such policy would be both publicly available and highlighted to the adviser's clients, providing a high level of transparency without the additional burden of preparing and filing a Form N-PX. An exception for advisers that expressly disclose such a policy on Form ADV Part 2A would be consistent with both the language of section 14A(d) and its underlying policy of transparency. If an adviser that has a general policy not to vote proxies, but makes an exception in a particular case and participates in a say-on-pay vote, the actual vote would then be subject to reporting on Form N-PX.

Alternatively, if the Commission nevertheless determines that such a disclosure on Form ADV should not be sufficient to relieve a manager's obligation to report nonvotes on Form N-

[8] As discussed above with respect to the proposed treatment of nonvotes as exercises of voting power that must be reported, any such policy would reflect the adviser's determination, as a fiduciary, as to whether participation in votes is merited given the adviser's strategy as well as the potential for lost revenues if loaned out securities were to be recalled.

PX, then we believe the Commission should simplify and streamline how such a manager is required to report on Form N-PX. Specifically, we would recommend in that case that Form N-PX include a box or boxes to be checked by managers that have a general policy of not participating in one or more categories of say-on-pay votes, which, if checked, would relieve the manager from reporting nonvotes in those categories. This would be more administratively and operationally efficient for those managers and provide clients and investors with the same quality of information as would reporting on specific nonvotes.

F. *Managers should only be required to report "section 13(f) securities"*

The proposed Rule would require managers to report say-on-pay votes with respect to any securities over which they exercise voting power. We disagree with proposed Rule and believe managers should only be required to report section 13(f) securities. Section 14A(d) of the Exchange Act and the proposed reporting requirements of Form N-PX specifically apply to those managers that are subject to the reporting requirements of section 13(f) of the Exchange Act. Section 13(f) applies to managers with investment discretion over $100 million or more in "section 13(f) securities." Given that the statute specifically references the section 13(f) requirements, the proposed Rule should also incorporate the scope of those requirements. Thus, we believe it would be appropriate to limit the securities subject to the reporting requirements of Form N-PX to section 13(f) securities and thus limit the new record keeping and reporting burdens that would be imposed on managers. This would be consistent with the public interest in transparency and a fulsome disclosure of a manager's voting record, because section 13(f) securities generally are the most widely held and traded securities in the United States and the definition of what constitutes a 13(f) security is broad and encompassing. It would also allow managers to leverage their existing Form 13F reporting processes, reducing costs and other burdens, as discussed above in relation to our recommendation that the Form 13F de minimis standards be incorporated in the proposed Rule.

G. *Managers should only report votes with respect to securities held at the end of a calendar quarter and held for more than a minimum period of time*

The proposed Rule would require managers to report positions held at any time. We believe managers should be permitted to omit votes on securities that were not held as of the end of a calendar quarter (as thus would not be reported on Form 13F). For the reasons set out above, we believe that tying Form N-PX reporting to the same positions that are being reported on Form 13F is appropriate. If the Commission nevertheless determines to require the reporting of positions held at any time, managers should be permitted to omit securities held for a period of less than 30 days. How a manager votes with respect to securities that are held for only a short period of time is not useful information to the manager's clients, who have no long-term or even medium-term financial exposure to the underlying issuers. The identity of these short-term positions is proprietary to the manager, and the reporting of these positions would expose managers' trading strategies to the risk that others will exploit their intellectual property and the significant monetary, intellectual and technological resources they devote to selecting investments for their clients and investors. Accordingly, we also recommend that the

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Commission modify the proposed Rule such that securities held for less than 30 days shall not be subject to the reporting obligation.

H. *Managers should only report securities that materially impact the market*

The proposed Rule did not include a de minimis reporting threshold for managers who would be required to report their say-on-pay votes on Form N-PX. As we noted above, section 14A(d) of the Exchange Act was designed by Congress to apply to managers that file Form 13F reports, and the Commission has appropriately tailored the proposed Rule to apply only to those managers. Given the statutory link between Form 13F and managers' Form N-PX filing obligations, it would be logical and reasonable to apply the Form 13F de minimis thresholds to Form N-PX, as well. Thus, we believe that a manager should be permitted to omit reporting votes with respect to holdings of fewer than 10,000 shares and less than $200,000 aggregate fair market value. The Commission included the de minimis threshold when it first adopted Form 13F because it viewed aggregate holdings in these amounts as unlikely to have the potential to materially impact the market.[9] Similarly, we believe that managers holding positions in securities below these thresholds will not have a material impact on the outcome of say-on-pay votes, and that the limited benefits investors might derive from such managers' disclosure of their "full voting record" are unlikely to outweigh the associated record keeping and reporting burdens that would be imposed on managers and their clients/investors with respect to de minimis holdings.

Additionally, it will be advantageous from an operational efficiency standpoint to apply the Form 13F de minimis thresholds to Form N-PX. Any manager that would be subject to filing a Form N-PX under the proposed Rule is already subject to filing a Form 13F. Operationally, these managers have existing processes and procedures in place to apply the relevant Form 13F thresholds and would be able to apply the same or substantially the same processes for Form N-PX. The clear disadvantages associated with the increased cost and time to implement new procedures with respect to reportable holdings outweigh the merely speculative advantages of reporting votes with respect to aggregate holdings in de minimis amounts which are highly unlikely to impact the outcome of say-on-pay votes and thus are not material elements of the manager's overall voting record.

I. *Managers should be permitted to jointly report without separate attribution to each specific manager*

MFA appreciates the Commission's efforts to provide flexibility both to managers that share voting power over securities with other managers and to affiliated managers (such as an investment adviser and its relying advisers) regardless of whether they share voting power. In this regard, we support the identification of each relevant manager on the Form N-PX Summary Page, as well as the filing of a Form N-PX Cover Page by managers whose votes are covered on another manager's or managers' report(s), indicating each such other reporting manager. The

[9] *See* Filing and Reporting Requirements Relating to Institutional Investment Managers, Exchange Act Release No. 14852 (June 15, 1978) [43 FR 26700, 26703 (June 22, 1978)]. The $200,000 threshold, of course, has only become more de minimis over time due to inflation.

requirement that the reporting manager further identify each relevant manager identified in relation to each specific say-on-pay vote in Item 1(l) of the main part of Form N-PX, however, will unnecessarily complicate the preparation of each filing. For example, large groups with multiple affiliated managers should be permitted to track and report on say-on-pay votes on an aggregated basis. Requiring attribution to each specific manager on a vote-by-vote basis would not only be burdensome but also provide persons who are not the manager's clients or investors greater transparency into specific underlying portfolios without providing any information of particular use to readers of the reports. Accordingly, we recommend that Item 1(l) be deleted from the form.

J. ***Automatic confidential treatment requests should apply***

We believe that automatic confidential treatment should apply, such that if confidential treatment is granted pursuant to a for a position reported on Form 13F, that treatment should be automatically extended to Form N-PX as well, for the same period of time. It would be efficient for both managers and Commission staff for such automatic treatment to apply because the standards and regulations related to Form 13F confidential treatment are well established and well known by managers and the staff. Such automatic treatment is also consistent with the scope of Section 14A(d).

Alternatively, if the Commission does not determine to implement such automatic treatment, we believe that there should be a streamlined process that allows for a combined confidential treatment request for both Form 13F and Form N-PX reporting at the same time. This would not only be less onerous for managers that have specific confidentiality concerns than requiring them to submit separate requests but also would relieve administrative burdens on Commission staff as well.

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MFA is supportive of the Commission's goal of enhancing the transparency of shareholder votes on executive compensation matters, and we believe our proposed modifications would achieve the objectives of the Dodd-Frank Act and provide meaningful, useful information to clients and other investors, while protecting other interests of clients and investors and avoiding placing undue burdens on managers.

MFA would be pleased to discuss the proposed Rule and the issues raised in this letter with Commission staff. Please do not hesitate to contact the undersigned at (202) 730-2600.

Respectfully Submitted,

/s/ Jennifer W. Han

Jennifer W. Han
Executive Vice President
Chief Counsel & Head of Regulatory Affairs

cc: The Hon. Gary Gensler, Chairman
The Hon. Hester M. Peirce, Commissioner
The Hon. Elad L. Roisman, Commissioner
The Hon. Allison Herren Lee, Commissioner
The Hon. Caroline A. Crenshaw
Ms. Sarah ten Siethoff, Acting Director, Division of Investment Management