VitalLaw Legislation and Rules News, VITAL BRIEFING—Year-end replay and update: Exxon to offer shareholders automated standing voting procedure, (Dec 8, 2025)

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Groups push back against Exxon's plan to give shareholders who don't vote at the company's AGM the ability to vote for management via standing voting instructions.

It is the end of the year and, thus, time to take a second look at one of 2025's most intriguing stories. In September, Exxon Mobil Corporation won the SEC staff's approval to create a Board Recommendation Policy voting program in which retail shareholders can opt to have the their shares voted according to the wishes of Exxon's Board rather than allow their shares to go unvoted because they lack the resources to attend or otherwise vote their shares at the company's annual general meeting (AGM) or at special meetings. The SEC staff said in a no-action letter that it would not recommend that the Commission bring an enforcement action if Exxon implemented the standing voting instruction or Retail Voting Program (RVP). Significantly, Exxon did not seek no-action relief regarding the question of whether the program may involve proxy solicitation.

The ease with which Exxon appears to have won over SEC staff, however, may not see a repeat occurrence with shareholder groups now that multiple groups have begun to push back against the company's plan. In one instance, groups asked the SEC to rescind the no-action letter issued to Exxon. In another instance, a group has filed a lawsuit to halt implementation of Exxon's RVP.

SEC staff view. According to a no-action letter issued by the SEC's Division of Corporation Finance (CorpFin), the Division determined that it will not recommend enforcement action to the Commission under Exchange Act Rules 14a-4(d)(2) or 14a-4(d)(3) if Exxon implements its program to allow the company's retail shareholders to elect to have a standing voting instruction by which their shares will be voted according to the recommendations of the company's board.

The SEC staff agreed to permit the program to go forward, provided that the program adheres to multiple representations made by Exxon in its letter requesting no-action relief, including that the program:

- be made available at no cost to all Exxon retail investors (including any registered owner or beneficial owner) via their bank, broker or plan administrator;
- will not be available to registered investment advisers exercising voting authority regarding client securities;
- afford retail shareholders who opt in to the program an annual reminder (during a time when Exxon is not soliciting votes for its AGM), of their opt-in status, selection, and their ability to opt out and cancel their standing voting instruction regarding future meetings;
- afford retail shareholders the ability and choice to opt out and cancel the standing voting instruction at no cost, plus the ability to override the instruction for any particular proposal(s), at no cost;
- continue to provide retail shareholders with all proxy materials without limiting shareholders from voting using those proxy materials; and
- ensure that Exxon fully discloses the program on its website and in its proxy statements.

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Exxon had requested that the relief be granted in light of the requirements of Exchange Act Rules 14a-4(d)(2) and 14a-4(d)(3), which collectively provide that no party to a proxy shall confer authority to: (1) vote at any annual meeting other than the next annual meeting (or any adjournment thereof) to be held after the date on which the proxy statement and form of proxy are first sent or given to security holders; or (2) to vote with respect to more than one meeting (and any adjournment thereof) or more than one consent solicitation.

By way of background, these provisions, when adopted, largely left the substance of corporate governance to the states, except to the extent the SEC's proxy rules limited the ability under state law to have proxies of unlimited duration. "The proxy rules limit the duration of a proxy. A proxy for an annual meeting may confer voting authority only for the next annual meeting and any adjournment. The requirement ensures that shareholders make decisions with respect to the execution, withholding, or revocation of a proxy based upon current information. As the Commission has noted, limitation on the duration of a proxy prevents 'the use of proxies solicited on the basis of out-of-date information.'" (See the Wolters Kluwer publication Meetings of Stockholders - Balotti, Finkelstein and Williams at § 4.14, Proxy Form (footnotes omitted)).

With respect to Exxon's opt out of the program, one quirk is that the opt out will apply only to future meetings. Exxon explained in its letter to the SEC that it will cast the votes it receives via standing voting instructions on the same day it files its definitive proxy statement. As a result, the opt out applies only to future meetings, which Exxon defined to mean meetings for which it has not yet filed a definitive proxy statement.

But Exxon would allow vote overrides. Said Exxon: "While participating shareholders can only opt out of the standing voting instruction for future meetings, they can always override the votes cast by the Company through the standing voting instruction by voting using the proxy materials they received for that meeting. Vote overrides will apply to upcoming meetings for which the Company has filed a definitive proxy statement."

Exxon's argument. According to Exxon, there is pent up demand among its retail shareholders to be able to vote their shares at the company's AGM and at special meetings, but that these shareholders lack the resources to effectively vote their shares without the standing vote instruction program.

Exxon's letter to CorpFin staff cited several data points. Exxon asserted, for example, that, over the last five years, 90 percent of retail shareholders who voted their shares backed the recommendations made by the company's board. However, with respect to the company's latest AGM, data analysis showed that 40 percent of the company's shares are held by retail investors but that only 25 percent of these shares were actually voted.

Exxon further explained that it believes retail shareholders tend not to vote their shares because they are disadvantaged by time constraints and other impediments that make it challenging for them to vote at the company's AGM. Exxon also noted that retail shareholders typically lack access to professional voting advice.

As a result, Exxon said it wanted to give its retail shareholders the opportunity to use standing voting instructions to either vote for all matters in the manner recommended by the company's board or on all matters as recommended by the company's board except for contested matters that require shareholder approval (e.g., contested director elections and M&A activities). Exxon averred that its proposal met state law in New Jersey, its state of incorporation, and that it had reviewed Delaware law and reached a similar conclusion.

With respect to proxy solicitations for which Exxon did not seek no-action relief, the company averred that the standing voting instruction program would satisfy the SEC's Regulation 14A because the company would file all materials required by Exchange Act Rule 14a-12 (solicitation before furnishing a proxy statement) and that retail shareholders' proxies or votes are not "lock[ed] in" because shareholders can opt out of or override their standing voting instructions.

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Push to rescind no-action letter. The shareholder groups As You Sow and the Interfaith Center On Corporate Responsibility announced that they had submitted a letter to CorpFin's Office of Mergers and Acquisitions asking SEC staff to rescind the no-action letter previously issued to Exxon allowing the company to proceed with its RVP. The As You Sow/IFCCR letter noted numerous conflicts between the no-action relief and Exxon's argument in support of such relief and the requirements of Regulation 14A. As You Sow and IFCCR also recited the legislative history of the SEC's proxy regulations, which the groups said were designed to ensure that shareholders would not be blindsided by managements seeking to perpetuate themselves through misuse of the proxy apparatus.

"[T]he purported ability of the Retail Voting Program to 'help' retail voters navigate the voting system does not extend to those investors that may want to vote ***against*** management, **thereby raising the concern that Exxon's intent is not to encourage retail investor participation, but to unfairly advantage management in every proxy vote**," said the As You Sow/IFCCR letter in one of its concluding paragraphs (emphases in original).

According to As You Sow's and IFCCR's legal argument, Exxon's RVP may run afoul of multiple provisions within Regulation 14A, including:

- *Exchange Act Rules 14a-4(d)(2) and 14a-4(d)(3)*—The groups suggested that even if New Jersey and Delaware law might allow multi-year proxies, Exxon must still comply with federal proxy regulations that curb the use of proxies beyond a single meeting. These rules provide first that no proxy shall confer authority to vote at any annual meeting other than the next annual meeting (or any adjournment thereof) to be held after the date on which the proxy statement and form of proxy are first sent or given to security holders. Second, no proxy shall confer authority to vote with respect to more than one meeting (and any adjournment thereof) or more than one consent solicitation.

- *Exchange Act Rule 14a-4(f)*—This rule provides that no person conducting a solicitation…shall deliver a form of proxy, consent or authorization to any security holder unless the security holder concurrently receives, or has previously received, a definitive proxy statement that has been filed with the Commission.

- *Exchange Act Rule 14a-4(a)(2)*—According to the rule, the form of proxy must provide a specifically designated blank space for dating the proxy card.

- *Exchange Act Rule 14a-4(a)(3)*—The rule generally provides that the form of proxy must identify clearly and impartially each separate matter intended to be acted upon, whether or not related to or conditioned on the approval of other matters, and whether proposed by the registrant or by security holders.

- *Exchange Act Rule 14a-4(b)(1)*—This rule provides that, with a few exceptions, the person solicited [must be] afforded an opportunity to specify by boxes a choice between approval or disapproval of, or abstention with respect to, each separate matter referred to therein as intended to be acted upon.

Taking Exxon's RVP to court. The City of Hollywood Police Officers' Retirement System filed a lawsuit against Exxon and its directors in the U.S. District Court for the District of New Jersey in which it asserted multiple breach of fiduciary duty theories for why the court should shutter the RVP. Overall, the complaint depicted the RVP as an attempt to "weaponize a largely disengaged body of retail shareholders" for the purpose of silencing shareholders whose views may not align with those of the company.

According to the complaint, the RVP is an unlawful solicitation under federal securities laws for a variety of reasons, including many cited in As You Sow's and IFCCR's letter to the SEC. The complaint also alleges that the RVP

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impairs the rights of Exxon's public shareholders by failing to give shareholders who opt-in to the RVP sufficient disclosures and by diluting the votes of shareholders who are either ineligible to opt-in or who choose not to opt-in. Lastly, the complaint alleges that the RVP would entrench Exxon's board. As a result, the complaint asserts that the RVP is a breach of Exxon's directors' fiduciary duty of loyalty.

The complaint explained why, in the plaintiffs' view, Exxon allegedly sought to curb shareholder input by creating the RVP. "Despite the Board's efforts to throttle shareholder activism, shareholders nonetheless prevailed in a landmark contested proxy contest that saw three new directors elected to the Board, and between 2015 and 2023, shareholder proposals concerning corporate governance and environmental issues routinely earned substantial, and in many instances majority, support from voting shareholders."

The complaint defined the class period to include all Exxon shareholders who held Exxon shares (subject to certain exclusions) beginning September 15, 2025, until Exxon terminates the RVP. The complaint sought class certification and declaratory and injunctive relief.

Exxon recently filed a brief in opposition to the plaintiff's motion to expedite the case. According to both parties' briefs, Exxon believes the plaintiff seeks to entrench the view of institutional shareholders, and the plaintiff also believes Exxon seeks to entrench the views of its board to the exclusion of the views of retail shareholders.

In terms of its legal argument, Exxon cited the Private Securities Litigation Reform Act (PSLRA) automatic discovery stay provision, which it said the plaintiff had not sufficiently alleged should be lifted (e.g., Exxon said the plaintiff both did not argue that the stay should be lifted and made overbroad discovery requests). Exxon also said the plaintiff failed to explain why discovery would be needed after waiting two months to serve discovery requests and having never participated in the required meet-and-confer process. Exxon said it plans to file a motion to dismiss by mid-December 2025 and to file a related motion to transfer venue to the U.S. District Court for the Southern District of Texas.

The plaintiff argued in a reply brief that the PSLRA automatic stay is inapplicable because the complaint asserted state fiduciary duty claims only and the fact that federal proxy rules underlie those claims does not make them subject to the PSLRA stay provision. The plaintiff also disputed that their discovery requests were not sufficiently tailored to achieve their purpose. Moreover, the plaintiff said the court should move forward with a ruling on the motion to expedite despite Exxon's plans to file dispositive motions in the case so the validity of the RVP can be resolved before Exxon's next annual shareholders' meeting.

Companies: Exxon Mobil Corporation

MainStory: Securities

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