

SEC STAFF AUTHORIZES USE OF STANDING VOTING INSTRUCTIONS BY RETAIL SHAREHOLDERS AS WAY TO BOOST PARTICIPATION

Sep 30, 2025

WHAT HAPPENED

Earlier this month, the SEC staff granted [no-action relief](#) allowing Exxon Mobil to establish a retail voting program. The company plans to solicit customers of brokers and other nominees to opt-in to standing instructions that require the company to vote their shares based on the recommendation of the board of directors.

The program has the goal of increasing participation by shareholders with traditionally low rates of voting.

Key elements include:

- Retail holders can opt-out at any time and can override the instructions for any particular proposal.
- They will continue to receive proxy materials and may vote at any time using those materials for any meeting.
- They will receive annual reminders that they've opted in, and that they can opt out and cancel their standing instructions.
- Registered investment advisers with voting authority over client securities cannot participate.

TAKEAWAYS

For companies with significant numbers of retail holders, a voting instruction program may provide a way to promote voting by retail investors by reducing the time and inconvenience associated with traditional proxy voting.

To the extent that retail investors have traditionally supported management, this kind of program may have the potential to benefit incumbent management in activist campaigns, as well as proxy

votes generally.

Before adopting programs, companies should consider:

- **Validity under state law.** Reviewing the legality of the program under relevant state laws, focusing on those related to the validity of proxies.
- **Proportion of retail holders.** The number and percentage of retail holders in their shareholder bases and their historic voting patterns.
 - Although retail holders are thought to side with management, companies should, of course, confirm that's true for them.
- **Calendar and lead time.** Annual meeting calendars and the appropriate lead-time to educate and enroll retail holders.
- **Cost-benefit analysis.** Costs and effort to adopt and implement a program, including:
 - Out-of-pocket costs for communications to banks and brokers related to implementation, distribution of materials and onboarding.
 - Internal costs to prepare communication materials and coordinate with relevant parties, including transfer agents, Broadridge and others.
- **Track record of early adopters.** Evaluating the success of Exxon Mobil's program and those of other early movers.
- **Need for SEC staff discussion.** Whether to contact the SEC staff, particularly to the extent a program may vary in relevant respects from Exxon Mobil's.
- **Proxy advisor reaction.** Monitoring the reaction, if any, of proxy advisors such as ISS or Glass Lewis.

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BACKGROUND

Almost 40% of the company's shares are held by retail investors, but only 25% of those shares were voted at the last annual meeting. Since 90% of retail investors supported the board's recommendations over the last five years, the company believes they would welcome the ability to choose whether to give standing voting instructions.

KEY FEATURES

In granting no-action relief, the SEC staff highlighted the following:

- *Open to all retail holders.* The program would be available to all retail investors, including any registered owner or beneficial owner (via their bank, broker or plan administrator) of company shares at no cost, and each would be offered the same opportunity to enroll in the program.
- *Investment advisers excluded.* The program would not be available to investment advisers registered under the Investment Advisers Act of 1940 exercising voting authority with respect to client securities.
- *Annual reminders of status.* Retail shareholders that have opted in to the program will receive an annual reminder -- during the time period when the company is not soliciting votes for its annual shareholder meeting -- of their opt-in status and selection. They will also be reminded they can opt out and cancel their standing voting instruction with respect to subsequent meetings.
- *Ability to opt-out or override.* Participating retail shareholders will have the ability and choice to opt out and cancel the standing voting instruction at no cost, as well as the ability to override the instruction with respect to any particular proposal or proposals at no cost.
- *Continued delivery of proxy materials.* Participating retail shareholders will continue to receive all proxy materials filed for upcoming shareholder meetings and the program will not limit or restrict shareholders from voting at any time using those materials.
- *Disclosure.* The company will fully disclose the program on its website and in its proxy statements.

The company recently filed its solicitation materials, which consist of email invitations to beneficial and registered holders, including opt-in instructions, along with printed letters, website instructions and confirmation page.

OPT-IN AND OPT-OUT PROCESSES

Participants can choose for their standing voting instruction to apply to either:

- All matters; or
- All matters except contested director elections or any M&A transaction that, under applicable state law or stock exchange rules, requires approval of shareholders.

Opt-out and cancellation. They can opt out and cancel their standing voting instruction at any time and at no cost. Under the program, the standing voting instruction will be cast on the same day that the definitive proxy statement is filed. As a result, cancellation will only apply to future meetings -- those where the company hasn't already filed a definitive proxy statement.

Annual reminders. Participants will receive annual reminders of their enrollment and their standing voting instruction. Reminders will include explicit language informing them of their ability to opt out and cancel their standing voting instruction. Participants that selected to have shares voted on “all matters” will receive an additional reminder before any meeting involving a contested director election or an M&A transaction. They can then decide whether to opt out or override the standing voting instruction before that meeting.

Ability to override. While participants can only opt out for future meetings, they can always override the votes cast by the company through the standing 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. In every reminder communication, participants will be informed that at any time, even after the company has filed a definitive proxy statement, they can override the standing voting instruction and cast their own votes with respect to any proposal.

STATE LAW

The company believes the laws of New Jersey (its state of incorporation) and Delaware permit the giving of a standing voting instruction that does not expire so long as the instruction provides for such extended duration. For example, Delaware § 212(b) authorizes the use of proxies with durations of up to three years, “unless the proxy provides for a longer period.”

COMPLIANCE WITH PROXY RULES

The company believes that the program is not inconsistent with the proxy rules:

- Rule 14a-12 permits the solicitation of proxies before a proxy statement is furnished to security holders, so long as the relevant materials are filed with the SEC pursuant to that rule and the proxy statement is distributed once available.
- The program does not “lock in” the proxy or the vote as it allows participants to opt out at any time and to override the standing instruction by voting at the upcoming meeting using the proxy materials they receive.

RELATED CAPABILITIES

- Securities & Corporate Governance

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