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Crocodile Tears for Retail Investors: The Misleading Campaign Against Retail Voting Programs

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On September 15, the Securities and Exchange Commission (SEC) Office of Mergers and Acquisitions responded to a no-action request from Exxon Mobil Corporation (Exxon), confirming that it would not recommend enforcement action under Exchange Act Rule 14a-4(d)(2) or Rule 14a-4(d)(3) if the company adopted a proposed automatic retail voting program. The program, which Exxon began implementing with soliciting materials pursuant to Rule 14a-12 sent to investors on September 17, would allow retail holders to opt in to provide standing instructions to vote their shares at all future meetings in support of the board's recommendations (the retail voting program).

The announcement of the retail voting program was met with cries of disapproval by many self-identified proponents of "shareholder democracy," who argue that Exxon's actions are "stripping retail investors of their rights" in order to "unfairly advantage management in every proxy vote."

Although criticisms of the retail voting program have been framed as defenses of shareholder rights, it is notable that many of the activist investors and shareholder proponents who claim to defend shareholder interests benefit from a status quo where retail holders have a diminished voice. As a general matter, retail holders are significantly more likely to support management than institutional holders, as retail investors have greater flexibility to sell their shares when they disagree with a company's strategy or governance. While retail investors, who constitute 15% to 45% of ownership at many companies, may vote with their feet, in the current system, they very often do not vote with their proxy cards, often participating at levels below 25%. In a system where retail shareholders routinely do not vote, the influence of activists and shareholder proposal proponents becomes disproportionately amplified. This dynamic results in governance shaped more by the voting policies of a small group of stakeholders than by the broader voices of individual shareholders.

While the current voting landscape benefits special interests, it hardly resembles shareholder democracy. For most large public companies, voting is dominated by a handful of large passive institutional investors, such as index and exchange-traded funds, acting on behalf of millions of investors who generally have no inkling of the role these investors play in shaping corporate governance. Some of these investors develop their own proxy voting policies, but many simply outsource their voting judgment to one of two dominant proxy advisory firms, which have been subject to accusations of conflicts of interest and political bias.

In addition to proxy advisory firms, other advocacy organizations, such as As You Sow, offer their own proxy voting programs, through which subscribing funds automatically vote in alignment with such organizations' principles. For example, As You Sow's website touts its "As You Vote" sustainability- and justice-aligned proxy voting program and includes testimonials from educational institutions, such as "[w]e were very excited to learn how to put [our proxy voting] on autopilot. We'd not have the capacity to do that research and know how to vote all those issues... ." Yet in a petition to the SEC dripping with hypocrisy, As You Sow and the Interfaith Center for Corporate Responsibility (ICCR) asked the SEC to rescind its no-action relief for the retail voting program to protect retail investors from themselves. Robo-voting for me, but not for thee. In their request for rescission, As You Sow and ICCR argue that As You Vote and similar third-party voting programs differ from the retail voting program because sponsors of the third-party voting programs have no direct interest in the outcome of company votes – unlike Exxon's management. However, this claim strains credulity given the hundreds of shareholder proposals As You Sow and ICCR sponsor each year. Their consistent and active engagement in shaping corporate policy through these proposals clearly demonstrates a vested interest in voting outcomes.

Contrary to the allegations of the retail voting program's detractors, the SEC's no-action response provides clear guardrails to ensure that retail voting programs do not undermine shareholder choice. Under such programs, retail holders must actively opt in to provide standing instructions. Participating shareholders can also opt out at any time at no cost, and companies will be required to send annual reminders with instructions on how to opt out during the time period when the company is not soliciting votes for its annual shareholder meeting. In addition, participating shareholders can simply override their standing instructions by voting against management through

the normal proxy voting process.

Critics have noted that shareholders are only offered one automatic voting option – voting with management – without the ability to set a standing vote against management's recommendations. Their argument is framed as promoting a balanced approach to shareholder choice, but it fails a basic test of rationality and informed decision-making. A retail holder's standing vote in favor of management reflects a general trust in the company's leadership and strategic direction that aligns voting behavior with investment behavior. In contrast, a standing vote against management is, by definition, uninformed and misaligned. Unlike index fund holders, who cannot selectively divest from individual companies, retail shareholders have full control over their portfolios. If they fundamentally distrust a company's leadership, they can simply sell their shares. Continuing to hold stock while automatically rejecting every management proposal reflects a contradiction – a wholesale lack of trust in leadership coupled with a decision to remain invested.

Critics of the retail voting program also voice concerns that participating investors may no longer pay attention to annual proxy statements and shareholder proposals included therein. In other words, a cumbersome system that disenfranchises retail voters should not be reformed to make it too easy to vote, lest investors not sufficiently engage with the hundreds of shareholder proposals submitted to public companies every year, despite increasingly low levels of support and questions as to their legality under state law. This concern, however, misses a crucial point: Retail investors who opt in to a standing voting program still receive full proxy materials and retain the ability to review, override or change their votes at any time. Streamlining the voting process does not eliminate choice or transparency – it simply removes unnecessary friction that has historically discouraged retail participation. Moreover, it is inconsistent to demand heightened engagement from retail investors while overlooking the fact that many institutional investors have long outsourced their voting decisions to third-party advisors. If anything, efforts to empower retail shareholders with accessible, flexible voting tools should be applauded. These tools promote broader participation and reflect the reality that ease of access does not equate to lack of responsibility.

Undoubtedly many shareholders will choose not to participate in retail voting programs. For those who do, however, opting in represents a deliberate decision to vote their shares – an outcome unambiguously more aligned with the ideal of shareholder democracy than one where retail holders are largely silent and activist investors and special interest groups capitalize on their apathy.

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