Automatic voting program for retail investors: A brief Canadian perspective

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An auto-voting program for retail shareholders proposed by Exxon Mobil Corporation has captured the attention of market participants in the wake of the U.S. Securities and Exchange Commission's (SEC) no-action letter related thereto. In particular, Canadian corporations may be wondering whether they could benefit from a similar program in Canada.

Background

As set out in Exxon's Sept. 15, 2025, press release and letter to the SEC, the purpose of the voting program is to encourage voting by retail shareholders. Exxon notes that "[a]cross corporate America, retail investors' voices are often not heard… because individual investors lack access to numerous services that make voting fast and easy for larger institutional investors."

As proposed, the auto-voting program will be available to all retail investors and is expected to allow them to provide "standing voting instructions" to have their shares automatically voted in accordance with the board's recommendations at future shareholder meetings held from time to time, other than in respect of contested elections and certain corporate transactions. Shareholders that have opted in to the program would be permitted to opt out at any time, or to override prior instructions.

Could auto-voting come to Canada?

While jurisdictionally specific, without regulatory relief, it may be challenging for a Canadian company to implement a similar auto-voting program that involves the solicitation of proxies. Canadian corporate and securities law regulate the solicitation of proxies by, and the proxy requirements for, companies that offer their securities to the public. Such companies are known as "distributing corporations" under the *Canada Business Corporations Act* (CBCA), "offering corporations" under Ontario's *Business Corporations Act* (OBCA), and "reporting issuers" under Canadian securities law.

For example, certain corporate statutes limit the effective period of proxies. Under both the CBCA and Alberta's *Business Corporations Act* (ABCA), a proxy is only valid at the

meeting for which it was given (or any adjournment thereof), whereas under the OBCA, a proxy ceases to be valid one year from its date. British Columbia's *Business Corporations Act* (BCBCA) is silent on this question. The effective period of a proxy represents an important distinction between Canadian corporate law and that of New Jersey (Exxon's jurisdiction of incorporation) and Delaware (the most influential corporate law jurisdiction in the U.S.). As Exxon's letter to the SEC explained, the New Jersey and Delaware corporate statutes each permit a proxy to remain valid for an indefinite period of time, provided it is expressly provided in the proxy.

While U.S. securities law may attempt to limit the authority provided in a proxy to only the most immediate meeting following the date the proxy was signed, Exxon submitted that, given the annual reminders to shareholders, and the ability to opt out and override built into the program, the voting program would not be contrary to this requirement. In its no-action letter, the SEC indicated in turn that it would not recommend enforcement action against the voting program as described. Unfortunately, these types of "no-action letters" are not available under Canadian corporate and securities laws.

Applicable Canadian laws also generally require the solicitation of proxies for a particular meeting of shareholders, subject to certain exceptions. These requirements do not contemplate the delivery of proxies for meetings that have not yet been called. Corporations considering the implementation of an automatic voting program for their shareholders (retail or otherwise) will need to consider whether the offer of participation in such a program may be considered a solicitation, and whether the ability to provide standing voting instructions may be considered a request to provide a proxy.

Importantly, the act of solicitation will trigger requirements to prepare and mail a proxy circular to shareholders. When determining whether the ability of shareholders to participate in the program is in substance the solicitation of a proxy, factors to consider include the presence of an opt-out feature, the nature of annual reminders to shareholders, and the process for identifying the shares to which the instructions apply for a particular meeting.

Importantly, whether an auto-voting program would satisfy Canadian corporate governance requirements and stakeholder expectations should be at the forefront of issuers' considerations when assessing an auto-voting program. The composition of an issuer's shareholder base will also be important, with many Canadian issuers having significant institutional investors who will be unlikely to subscribe to an auto-voting program.

The Canadian proxy voting system is a comprehensive regulatory regime with detailed procedures designed to enable all security holders, including retail security holders, to easily vote at shareholder meetings. Whether such infrastructure can support an automatic voting program without the benefit of relief or amendment of certain statutory and regulatory requirements remains to be seen.

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