Davis Polk

Implementation by other companies of the retail investor voting program developed by ExxonMobil

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Since our client update on September 15, we have heard from many companies and advisors with questions about ExxonMobil's innovative Retail Voting Program, which has clearly generated enormous interest. Below are responses to some of the many questions related to implementation of the program.

Can another company implement the same program?

Yes. As detailed in our previous client update, extensive work has been done primarily by ExxonMobil, along with Broadridge and Davis Polk, to develop the Retail Voting Program along the specific parameters outlined in the SEC's no-action letter of September 15. The program, including the underlying technology and web-based online interface, can be made available to other companies who have determined that it's right for them and their retail investors. Companies that are evaluating adoption prior to the next shareholder meeting are encouraged to consider their meeting calendar and agenda, and the timing of initial invitations to retail shareholders to enroll in the program.

What are the related costs and internal resources necessary?

In terms of costs, Broadridge and other similar providers forward communications to retail investors through the channels they service. The communications to account holders of banks and broker-dealers are subject to NYSE Regulated fees and out-of-pocket costs, like any distribution of proxy materials. Companies should expect to incur other reasonable fees and costs for onboarding by the providers (e.g., incorporation of company branding guidelines into enrollment invitations) and the providers' ongoing platform management (e.g., capturing and processing opt-ins and opt-outs), which would be discussed directly with Broadridge and other communications services providers.

After signing on to the program, a company would, like ExxonMobil, file the platform materials. This filing consists largely of screen shots of the web-based program. While the rate of change in the retail investor base and overall level of retail holdings are considerations in evaluating the suitability of the program, there is no inherent requirement in the program to monitor retail investor turnover, or any ongoing administration or maintenance of the program by companies.

Like ExxonMobil, a company would disclose information about the program in their proxy statements and annually distribute a reminder email that retail investors who have opted-in have the choice to opt-out of the program.

What documents must be prepared?

As noted above, the basic program materials can be tailored for use by a specific company. Broadridge has indicated that it is prepared to work with companies on certain design elements associated with the communications it forwards through its broker network and sends to registered shareholders.

How does a company know how many retail investors it has among its shareholders?

Companies should contact Broadridge to obtain information on the number of shareholders it services on behalf of its broker-dealer network. Companies would also need to look at the number of retail holders on their share registries and in other service providers and brokers who are not in these groups.

How do we reach the retail investors who are beneficial owners in “street name”?

Brokerage communications services providers such as Broadridge forward materials to retail shareholders through the banks and brokers they service, leveraging the systems and infrastructure that are in use for sending non-proxy “interim” communications and proxy materials in connection with shareholder meetings. Communications are sent according to the delivery preferences that account holders already have on file with their brokerage firms. The vast majority of communications are typically electronic. Communications are made by mail for shareholders who rely solely on mail delivery.

Can other companies rely on the ExxonMobil No-Action Letter relief?

Yes, so long as that company’s program fits within the parameters of the ExxonMobil program as described in the ExxonMobil no-action letter, then the company can rely on the ExxonMobil letter and need not obtain its own no-action letter. In that case, we have confirmed with the SEC Staff that there is no requirement for the other company to talk to the SEC Staff about the program or pre-clear the program with them.

Given the novelty of the program, we understand that the SEC Staff welcomes any questions that companies may have.

We advise that companies continue to ask questions and seek information as they evaluate the merits of the program for their specific circumstances.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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