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SEC Rulemaking Petition Advocates for Retail Investors to Provide Standing Voting Instructions for Corporate Election in Order to Increase Voter Participation

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Retail investors own about 30% of shares but only vote 29% of the time, compared to institutional investors voting 91% of the shares they own, according to a rulemaking petition to the SEC by the American Business Conference (ABC) that asks the Commission to facilitate advanced voting instructions (AVI), also known as client directed voting or standing voting instructions. According to its website, ABC was founded in 1981 by Arthur Levitt and is focused on advocating for mid-sized companies.

ABC laments that the views of retail shareholders are not adequately represented even as corporate ballots contain increasingly contentious governance issues. The organization cites as an example that institutional investors cast 66% of support in favor of climate change proposals, compared to only 13% of retail shares voted. In addition, notice and access may have led to decreased retail investor participation. Chairman Clayton has expressed concerns about low levels of retail investor participation in his comments highlighting the need to overhaul the proxy voting system.

AVI would allow individual investors to register voting preferences with their brokers for every stock they own in advance, with shareholders able to change those instructions before submitting ballots. The technology that permits institutional investors to easily establish voting preferences ahead of time should be readily adaptable to retail holders, argues the petitioner.

The rulemaking petition cites to a 2017 law review paper on how using standing voting instructions could empower the retail voter. The paper rebuts the oft-cited reasons that the SEC and others have given about the risks of AVIs, namely, that they would lead to uninformed voting decisions since the “votes” may be cast before proxy statements are issued. The article points out that such concerns are not similarly expressed for institutional investors, even though unlike retail shareholders, institutional investors are often acting as third-party agents or intermediaries rather than voting their own shares. Retail investors, by contrast, have a direct economic stake through their equity ownership.

In addition, even retail investors are unlikely to rely solely on proxy statements with information about companies and corporate governance now proliferating through multiple channels. Safeguards, including the ability to override any standing instructions, could also be developed.

Finally, as the rulemaking petition reiterates from the law review paper, the federal proxy rules are merely a conduit for implementing the state law voting rights for shareholders, and nothing in state law requires informed voting. In fact, Delaware state law has recognized that shareholders may validly cast votes out of selfishness or merely on a whim. Even the SEC’s disclosure-based regime places primacy on issuers to provide information, which investors may freely choose to ignore.

While the fact that the retail investors who do vote tend to favor boards and management, leading the corporate community to generally express support for the notion of standing voting instructions by individual investors, there is some debate about whether that trend would hold if more retail investors were motivated to take part in corporate elections.

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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