

Memorandum

GAMCO Investors Becomes First to Use Proxy Access in the U.S.

November 15, 2016

On November 10, 2016, Mario Gabelli's GAMCO Investors, Inc. disclosed its intention to nominate a director to the board of National Fuel Gas Company pursuant to the company's proxy access bylaw, seemingly making GAMCO the first investor to exercise proxy access in the United States. In its Schedule 13D and 14N filings, GAMCO, which holds approximately 7.8% of National Fuel Gas Company's outstanding shares, announced that it was seeking to nominate to the board Lance A. Bakrow, "the co-founder and a director of Greenwich Energy Solutions, a private company that provides independent energy solutions in the northeastern United States."¹

GAMCO has previously attempted to effect change at National Fuel Gas Company, submitting a shareholder proposal for the company's 2015 annual meeting requesting that the board and management "engage an investment banking firm to effectuate a spin-off of the Company's utility segment . . . into a separate publicly traded C-corporation." That proposal received approximately 17.8% shareholder support. By invoking proxy access, GAMCO may be attempting a different approach to achieve this goal.

Since National Fuel Gas Company has a classified board, only three of its directors (including its Chief Executive Officer) will be up for reelection at the company's 2017 annual meeting. GAMCO has not indicated whether it is targeting a specific director with its proxy access nominee.

Significance of GAMCO's Proxy Access Nomination

Over the last two years, as hundreds of companies adopted proxy access bylaws, a question has arisen as to whether proxy access would actually be used; while we believed that it would, others were more skeptical.

¹ National Fuel Gas Company, [Schedule 13D of GAMCO Investors, Inc.](#) (Nov. 10, 2016); National Fuel Gas Company, [Schedule 14N of GAMCO Asset Management Inc. and Gabelli Funds, LLC](#) (Nov. 10, 2016).

GAMCO's recent nomination answers that question – proxy access *will* be used. The only questions that remain are how often and to what ends it will be used.

Additionally, the fact that a more traditional investor, which has shown activist tendencies at times, opted to use proxy access has come as a surprise to many. GAMCO's use of proxy access leaves open the question of whether, if GAMCO is successful, other investors, including hedge funds, will be similarly emboldened to exercise proxy access or whether they will continue to wage proxy fights to get their nominees elected to a company's board. It remains to be seen, therefore, whether GAMCO's exercise of proxy access is the beginning of a trend.

If you have any questions or would like additional information, please do not hesitate to contact **Yafit Cohn** at +1-212-455-3815 or yafit.cohn@stblaw.com, any other member of the Firm's Public Company Advisory Practice.

The contents of this publication are for informational purposes only. Neither this publication nor the lawyers who authored it are rendering legal or other professional advice or opinions on specific facts or matters, nor does the distribution of this publication to any person constitute the establishment of an attorney-client relationship. Simpson Thacher & Bartlett LLP assumes no liability in connection with the use of this publication. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as our recent memoranda, can be obtained from our website, www.simpsonthacher.com.



UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Houston
600 Travis Street, Suite 5400
Houston, TX 77002
+1-713-821-5650

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.
900 G Street, NW
Washington, D.C. 20001
+1-202-636-5500

EUROPE

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA

Beijing
3901 China World Tower
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Seoul
25th Floor, West Tower
Mirae Asset Center 1
26 Eulji-ro 5-Gil, Jung-Gu
Seoul 100-210
Korea
+82-2-6030-3800

Tokyo
Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino
Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000