

Memorandum

GAMCO Investors' Proxy Access Nominee Rejected by National Fuel Gas Company and Withdrawn

December 1, 2016

On November 23, 2016, nearly two weeks after Mario Gabelli's GAMCO Investors, Inc. ("GAMCO") disclosed its intention to nominate a director to the board of National Fuel Gas Company ("NFG") pursuant to the company's proxy access bylaw, NFG notified GAMCO that it is not eligible to submit a proxy access nominee and that the company will therefore not include GAMCO's nominee in its 2017 proxy materials.¹

As NFG explained in its letter to GAMCO, a nominating shareholder is required to make certain representations and warranties to the company in connection with its attempted use of proxy access, and if any of these representations is incorrect, the nominating shareholder is disqualified from using proxy access to nominate a director. As is common, one such representation pursuant to NFG's bylaw is that the nominating shareholder acquired its shares "in the ordinary course of business and not with the intent to change or influence control of the Corporation, and does not presently have such intent." NFG noted that this representation stems from the standard under which an investor is required to file a Schedule 13D, as opposed to a Schedule 13G. NFG thus cited to SEC guidance regarding Exchange Act Sections 13(d) and 13(g), which indicates that "[t]he SEC deems a shareholder to have 'acquired or [be] holding equity securities for the purpose or effect of changing or influencing control of the issuer' if, based on relevant facts and circumstances, a shareholder 'engages with the issuer's management on matters that specifically call for the sale of the issuer to another company, the sale of a significant amount of the issuer's assets, the restructuring of the issuer, or a contested election of directors.'"

According to NFG, GAMCO, which has "long advocated" for a spin-off at the company, acquired its proxy access shares with the intent to change or influence control of the company. NFG asserted that this intent is reflected in GAMCO's Schedule 13D filings. Additionally, NFG maintained that "GAMCO continues to have

¹ See National Fuel Gas Company, [Form 8-K, Exhibit 99](#) (Nov. 23, 2016).

the intent to change or influence control of the Company.” According to NFG, GAMCO “continues to communicate its ‘disappointment’ in the Company’s decision not to pursue a spin-off despite GAMCO’s urgings,” including in its recent statement of support of its proxy access nominee. Furthermore, NFG stated that statements made by Gabelli and GAMCO’s general counsel since GAMCO submitted its proxy access notice “continue to reflect GAMCO’s desire to influence management on matters of control and do not disavow earlier support for splitting up the Company’s business.” In sum, NFG indicated that these recent statements, “which are consistent with positions long held and advocated by GAMCO, reflect a current intent to ‘change or influence control of the Corporation’” in violation of the company’s proxy access bylaw.

On November 28, GAMCO withdrew its proxy access nominee, disclosing in a Schedule 13D that it “will not pursue proxy access.”²

Significance of NFG’s Rejection of GAMCO’s Proxy Access Nominee

Nearly all companies that have adopted proxy access thus far have included a provision in their bylaw requiring the nominating shareholder to represent that it bought its shares in the ordinary course and not with the intent to change or influence control and that it presently does not have such intent. NFG’s letter to GAMCO reflects the company’s belief that advocacy in favor of a spin-off constitutes an intent to change or influence control of the company.

In light of NFG’s rejection of GAMCO’s proxy access nominee, other issuers will likely attempt to disqualify proxy access nominees that they perceive did not accurately represent their lack of intent to change or influence control of the company. Assuming that the issuer community follows in NFG’s footsteps, interpreting “control” in this context as it is defined for purposes of Section 13, enforcement of this common proxy access bylaw provision may deter activist investors who have expressed a desire to change or influence control of the company – by disclosing any plan or proposal involving an extraordinary corporate transaction or a sale or transfer of a material amount of assets of the issuer or one of its subsidiaries, or otherwise – from using proxy access as a tool to achieve their goals.

² National Fuel Gas Company, [Schedule 13D of GAMCO Investors, Inc.](#) (Nov. 28, 2016).

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.

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