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Company Seeks Court Injunction to Stop Declassification Proposal on Procedural Grounds

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National Fuel Gas Company has sent a **letter** to the SEC regarding a common shareholder proposal that authorizes the Harvard Shareholder Rights Project (HSRP) to ask the company?s board to declassify. The proposal was submitted on behalf of the Massachusetts Pension Reserves Investment Trust Fund (PRIT) by its trustee, the Pension Reserves Investment Management Board (PRIM). The letter states that the company is not seeking no-action relief from the SEC staff as it has instead elected to seek an injunction in U.S. District Court for the Western District of New York on procedural grounds under Rule 14a-8.

The company argues that the proponent has failed to meet its burden of proving continuous share ownership for a year from the date of submission and providing an express statement of an intent to hold the securities through the annual meeting because the proponent indicates that it uses outside investment managers and does not exercise investment discretion over the securities. Since the proponent does not make the investment decision, the company claims that it cannot credibly confirm its intent that it will continue to hold the securities as required.

In addition, the company argues that because the proponent has failed to provide any evidence as to whether it has voting authority over the securities, it has failed to satisfy the procedural requirement under Rule 14a-8 that a shareholder proponent must be entitled to vote at the meeting. Under its own research based on the state?s public records law, the company alleges that it was able to identify the proponent?s investment manager, which in its Form 13F filing reports sole voting authority as to these securities.

Given that the SEC staff has not been asked for its views, it is unlikely to respond in any way. We will have to wait and see how the court decides on the matter.

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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