

Company Disputes Validity of First Proxy Access Nominee

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National Fuel Gas (NFG) [has informed](#) GAMCO Asset Management (GAMCO) that its board has concluded that the company does not need to include GAMCO's nominee in its 2017 proxy materials because GAMCO did not comply with the proxy access bylaws. We previously discussed the background of the nomination [here](#).

Like other proxy access bylaws, NFG's bylaws require a shareholder making a nomination to represent that it acquired the shares in the ordinary course of business and not with the intent to change or influence control of the company, and does not presently have such intent. NFG argues that GAMCO has failed this standard by continuing to advocate for a spinoff of parts of its business. The amended Schedule 13D that GAMCO filed and the shareholder's supporting statement contained only information about the nominee.

NFG stated that GAMCO's head analyst had confirmed to the company in November that GAMCO continues to believe that the company should be split up. The company pointed to other statements made by GAMCO about the proxy access nomination as an indication that the investor is advocating for "financial engineering" at the company, including quotes from GAMCO that the proxy access nominee is skilled in "financial engineering and can bring a new approach" to the board. The company also believes that GAMCO's public support of using proxy access in order to "reduc[e] the costs of activism" and as a "friendlier approach" compared to a proxy contest further evidences GAMCO's intent to change or influence control.

In its letter, NFG said that the proxy access representation "is derived from the standard under which an investor is required to file a Schedule 13D versus a Schedule 13G," and a shareholder is not qualified to file a Schedule 13G if it has a control intent. It referred to a recent July 2016 SEC staff compliance and disclosure interpretation (CDI) that further defines when a shareholder is unable to report using a Schedule 13G. The SEC Staff explained that eligibility to use that schedule depends on the facts and circumstances and need not correlate directly with the HSR Act investment-only exemption. According to the CDI, a Schedule 13G cannot be used when a shareholder engaged with an issuer's management on matters that call for the sale of the company, the sale of a significant amount of assets, the restructuring of the issuer or a contested election.

The original SEC rules on proxy access had anticipated these types of disputes, and had included the possibility of the SEC Staff resolving them regarding the presence or absence of intent to control through a no-action letter process.

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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