GAMCO's counter arguments aplenty in National Fuel Gas's proxy access effort – advisors
by Ed Mullane in New York
December 7, 2016

- Demands for company split may not be a control issue
- Spirit of proxy access appears to be missing

GAMCO Investors could have countered **National Fuel Gas**'s (NYSE: NFG) proxy access bylaws saying it restricted shareholder rights if the investment firm had wanted to further pursue the matter, said two activist advisors following the situation.

The Rye, New York-based investor could also have fought whether its call for the company's split should be viewed "as being a control issue", these advisors said.

In early November, GAMCO delivered a letter to National Fuel nominating Lance Bakrow, the founder of Greenwich Energy Solutions, for election to its board of directors at its 2017 AGM. Bakrow withdrew his name as a candidate on 28 November.

By using proxy access, GAMCO would have been allowed to place the name of its director nominee on National Fuel's proxy card. The nomination was viewed as a way for GAMCO to bring change at the Williamsville, New York-based company without going through a costly proxy battle.

In March 2016, National Fuel adopted a proxy access bylaw that allows shareholders who own 3% of the company's shares for more than three years to nominate up to 20% of its directors. GAMCO first filed a 13D in August 2010.

The GAMCO nomination would have been the first attempt by an investor to use proxy access to gain a board seat.

Calls for change by the 7.7% stakeholder have largely been ignored by the company. In 2014, GAMCO founder Mario Gabelli submitted a shareholder proposal for National Fuel to split its utility business from its pipeline and drilling business, arguing that this would provide the company with greater flexibility to increase the value of the company. Some 17.8% of shareholders voted for the proposal.

Proxy access

Proxy access was introduced by Congress in 2010 with a provision in the Dodd-Frank Wall Street Reform and Consumer Protection Act, to allow larger, longer-term shareholders to have greater influence. Dodd-Frank reaffirmed that the Securities and Exchange Commission (SEC) had the authority to issue a proxy access rule.

The provision was viewed as a way to make companies more responsive to shareholders.

But a lawsuit challenging the rule succeeded and the SEC vacated its proxy access rule prior to taking effect. Today, shareholders file a proxy resolution on a company by company basis. According to a 28 June Skadden report, more than 35% of S&P 500 companies now have a proxy access bylaw, up from a few dozen companies at the end of 2014.

Despite the increasing adoption of proxy access, it is used mostly by larger institutions to influence social agendas, such as sustainable investments and supporting diversity in promotions and hiring, and not taking the shorter-term steps to increase a company's value, as many higher-profile activists demand.

Proxy access bylaws often mirror National Fuel's, allowing shareholders who own 3% of the company's shares for more than three years to nominate up to 20% of its directors.

The counter arguments

National Fuel challenged the GAMCO nominee, noting the investor “wasn’t eligible to use the process because the investor has long advocated a desire to split up the company and its stance hasn’t changed.”

In its proxy access bylaws, National Fuel said that shares need to be acquired in the “ordinary course of business and not with the intent to change or influence control of the corporation.”

However, there can be legal arguments over the precise meaning of “intent to change or influence control”. GAMCO might argue that it seeks to influence policy, but not control, if control is defined as gaining a majority of board seats, said Ken Bertsch, executive director for the Council of Institutional Investors.

Christopher Davis, head of the M&A Activism practice at Kleinberg Kaplan and a pure-play counsel for activists, said the proxy access bylaw reads the way the board wants it to read.

“It is just essentially a bylaw created from the beginning to only allow it to be used by their least engaged shareholders and my question would be: Why have a bylaw where you are purposely excluding your most involved and your most informed shareholders?” said Davis.

Davis said the board wants to create the impression that it is opening itself up to shareholder communication, but it really doesn’t want anyone on the board that does not effectively completely agree with them. The argument against activists is that they don’t hold shares for a long time, but Gamco has held for a long time, he noted.

One sector advisor said it is clear that the company is arguing that the goal of splitting the company is in itself a control issue. But that provision is a perversion of the spirit behind proxy access, which is that long-term, substantial shareholders should be able to have their board nominees included in a company's proxy statement, regardless of the shareholder's intentions, this advisor noted.

A shareholder pushing a company to do a split is pretty clearly active rather than passive, but unless they're trying to obtain majority board representation - and even arguably not then- it's really not a control issue, it's a policy issue, the first advisor said.

While GAMCO was first to put out the effort to use proxy access to gain board influence, the GAMCO founder is not a big fan of this tool. Mario Gabelli told the *Financial Times*’ Money-Media on 14 November that he thinks it’s a bad idea for companies to allow investors to use proxy assess.

It’s a mistake for a shareholder who owns 3% of a company’s shares and knows little about a business’s fundamentals to use proxy for a non-economic agenda, he noted.

GAMCO declined a request for comment.

330 Hudson Street, FL 4, New York, NY 10013 USA tel: +1 212-686-5606 www.*Activistmonitor*.com