

Pension Fund Advised by the Harvard Shareholder Rights Project Withdraws Declassification Proposal Amid Lawsuit Challenging Eligibility

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National Fuel Gas Company's ("NFG") recent legal challenge to a board declassification shareholder proposal submitted under Rule 14a-8 has resulted in the proponent, a public pension fund represented and advised by Harvard Law School's Shareholder Rights Project ("SRP"), withdrawing the proposal.

After receiving the proposal, NFG scrutinized the pension fund's procedural eligibility to advance its efforts to declassify NFG's board through the Rule 14a-8 advisory shareholder proposal mechanism. While the proponent asserted that it met Rule 14a-8's eligibility requirements of having continuously held for the prior year at least \$2,000 worth of NFG common stock eligible to vote on the proposal and intending to hold the securities through the date of the upcoming annual meeting, enterprising detective work by NFG revealed potential infirmities in the proponent's claims. The lack of Form 13F filings by the proponent pension fund stimulated the company's initial research efforts, and after scouring public filings and the proponent's own website, invoking information rights under state-level FOIA and public records law, and engaging with SRP in correspondence that included an objection to the proponent's eligibility, NFG discovered that the pension fund appeared not to hold voting authority or trading authority over the shares, having outsourced such authority to third-party investment managers.

Concluding that the proponent failed to satisfy Rule 14a-8's procedural eligibility requirements, NFG informed the SEC that it intended to exclude the fund's proposal (see October 24, 2012 NFG letter to SEC) and, in lieu of seeking no-action relief from the SEC, sought a declaratory judgment in the U.S. District Court for the Western District of New York confirming NFG's right to exclude the proposal and that the proponent had failed to meet its burden of proof on eligibility. NFG contended that in the absence of voting authority and investment power over the securities held, the proponent had

failed to demonstrate that it had continuous ownership of securities actually entitled to be voted by the proponent at the annual meeting and could not credibly assert that it would hold the requisite amount of shares through the date of the annual meeting as required by Rule 14a-8. Prior to a court decision on the merits, the pension fund withdrew its declassification proposal in exchange for NFG withdrawing its lawsuit. The Council of Institutional Investors publicly quoted the pension fund's general counsel as follows: "At Harvard's request, [the fund] had agreed to participate in the program, and had Harvard chosen to defend the litigation, [the fund] would have been agreeable to having the defense proceed, but [the fund] chose not to commit its pension resources to engage in what was essentially peripheral litigation in Buffalo, New York."

As with Apache Corporation's successful legal challenges to procedurally deficient shareholder proposals from activist John Chevedden (see our March 2010 commentary), the outcome of NFG's examination of a proponent's *bona fides* underscores the options available when responding to shareholder proposals and serves as a welcome reminder that eligibility assertions made by proponents (or their advisors) need not be taken at face value. Many factors come to bear in formulating responses to proposals, including the nature of the proposal and its policy merits (or lack thereof), the character of the proponent, and the prevailing corporate governance landscape, in addition to the company's own circumstances. Ultimately, no single approach will be right for every company or every proposal. In some cases, engaging in dialogue with proponents may prove productive; in others, insisting, through litigation if necessary, on strict compliance with the spirit and letter of federal eligibility criteria may be appropriate.

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