End of the First Proxy Access Campaign

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America's first proxy access campaign ended this week. In early November, funds controlled by Mario Gabelli nominated a candidate for election to the board of directors of National Fuel Gas Company ("NFG") using the company's proxy access bylaw. NFG then challenged the Gabelli funds' eligibility under the proxy access bylaw. This Monday, the Gabelli funds' nominee withdrew and the funds announced that they would not pursue proxy access.

NFG rejected the nomination after concluding that the Gabelli funds did not satisfy NFG's proxy access bylaw's customary "passive investment" requirement, which required the nominating stockholder to have acquired its shares in NFG "in the ordinary course of business and not with the intent to change or influence control of [NFG]," and that the stockholder could "not presently have such intent." The Gabelli funds' practice of reporting their share ownership on a Schedule 13D instead of Schedule 13G caused NFG to doubt the Gabelli funds' claim that they lacked an intent to change or influence control of NFG, as did the funds' public advocacy in 2014 and 2015 for a spin-off of NFG's regulated natural gas utility business and presentation of a Rule 14a-8 shareholder proposal to that effect at NFG's 2015 annual meeting (which proposal lost by 82% of votes cast thanks to NFG's strong shareholder engagement and shareholder-focused practices). The Gabelli funds' head utilities analyst had recently informed NFG that Gabelli continued to believe the company should be split up. Moreover, the Gabelli funds' statement in support of their nominee was revised to delete references to the 2015 proposal, despite the originally submitted statement referring positively to the 2015 proposal. In its letter to the Gabelli funds rejecting the nomination, NFG referenced public statements by Mr. Gabelli favoring "financial engineering" at NFG as well as statements by the funds' representatives that proxy access was an appealing way to reduce the costs of traditional activism.

This episode illustrates one of the options available to companies responding to a proxy access nomination and highlights the fact that eligibility assertions made by proponents (or their advisors) need not be taken at face value. For companies that have not adopted proxy access, this week's outcome underscores the importance of designing a thoughtful proxy access bylaw with appropriate, carefully-tailored eligibility requirements.

Proxy access bylaws can, and eventually will, be used appropriately by qualified shareholders seeking to add directors to company boards, but proxy access was never intended as a low-cost activism tool for those seeking to change or influence control. The outcome of the first proxy access campaign is a reminder that companies can and should enforce their bylaws against those that try to misuse the machinery of corporate governance.