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Recent Proxy Access Developments

To date, nearly 300 companies have adopted proxy access bylaws, including over 40% of S&P 500 companies. Given the widespread adoption of proxy access by large U.S. companies, it was only a matter of time before a shareholder actually used proxy access. And, on November 10, 2016, activist investor firm, GAMCO Investors ("GAMCO"), became the first investor in the United States to use a company's proxy access bylaw to nominate a director candidate for inclusion in a company's proxy materials.

Separately, the staff of the SEC's Division of Corporation Finance recently issued four no-action letters involving requests to exclude shareholder proposals seeking to amend certain provisions of existing proxy access bylaws (each, a "proxy access amendment proposal").

This Alert discusses GAMCO's use of proxy access, the staff's recent no-action letters regarding proxy access amendment proposals, and the potential implications for companies that are evaluating proxy access.

GAMCO's Use of Proxy Access

GAMCO used the proxy access bylaw that National Fuel Gas Company ("NFG"), a diversified energy company, adopted in March 2016. GAMCO and its related investment funds have held at least a 5% stake in NFG since August 2010 and, based on GAMCO's latest Schedule 13D, currently own nearly 8% of NFG's outstanding common stock. NFG's proxy access bylaw contains "market standard" provisions, which permit a shareholder, or a group of up to 20 shareholders, owning 3% or more of NFG's outstanding common stock continuously for at least 3 years to nominate up to 20% of NFG's board. NFG's bylaws limit the number of proxy access candidates to "the largest whole number that does not exceed twenty percent (20%) of the number of directors in office as of the last day on which a Proxy Access Notice may be delivered." Since NFG currently has a nine-person, staggered board, GAMCO was eligible to nominate only one candidate pursuant to NFG's proxy access procedures. Based on the Schedule 14N filed by GAMCO's wholly owned subsidiaries, GAMCO Asset Management Inc. and Gabelli Funds, LLC, GAMCO nominated Lance A. Bakrow as a director candidate for election at NFG's 2017 annual meeting of shareholders. Mr. Bakrow is the co-founder and a director of Greenwich Energy Solutions, a private company that provides independent energy solutions in the northeastern United States, and a former partner of Goldman Sachs, where he ran energy and other related commodity trading for the firm.

Whether NFG will attempt to disqualify GAMCO or seek to exclude the nomination of Mr. Bakrow from its proxy materials is unclear. NFG's proxy access bylaw contains a typical provision that requires nominating shareholders to represent that they acquired the requisite shares to satisfy the minimum ownership threshold in the ordinary course of business and not with the intent to change or influence control of the company. GAMCO's use of NFG's proxy access procedures alone should not (ostensibly) count against GAMCO when analyzing its "control" intent, but GAMCO has previously engaged with NFG by calling for the spin-off of NFG's utility segment. In 2014, GAMCO submitted a shareholder proposal for NFG's 2015 annual meeting, requesting that the board engage an investment banking firm to effect a spin-off of NFG's utility segment. GAMCO's proposal failed to attain significant shareholder support, garnering about 18% of the votes cast, at a time when GAMCO held approximately 9% of NFG's outstanding shares.

Prior to GAMCO's Schedule 14N filing, conventional wisdom suggested that activist investors would not use proxy access provisions because of the bylaw's typical 3-year holding requirement and restrictions on an eligible shareholder's control intent and solicitation activity. Whether other activist firms, especially those that generally have long-term investment horizons, will also use proxy access as a tool in their playbooks should be considered by companies that are evaluating proxy access.

Recent SEC No-Action Letters on Shareholder Proxy Access Amendment Proposals

In several recently issued no-action letters, the staff reinforced its view of substantial implementation in the proxy access context by declining to grant no-action relief to Walgreens Boots Alliance, Inc., Whole Foods Markets, Inc. and The Walt Disney Company, where each company had sought to exclude a shareholder proxy access amendment proposal. These companies advanced two separate (and mutually exclusive) arguments: (1) based on non-compliance with Rule 14a-8(c), which limits a shareholder to the submission of one proposal per shareholder meeting, and (2) based on Rule 14a-8(i)(10) "substantial implementation" grounds.

With respect to Rule 14a-8(c), each of these companies argued that the proxy access amendment proposal constituted more than one proposal and lacked a single, well-defined unifying concept, and therefore should be excluded as being inconsistent with the requirements of Rule 14a-8(c). The staff disagreed and stated that it viewed the shareholder proponent's proxy access amendment proposal as only one proposal.

In the alternative, these companies argued that, if the staff determined that there was a single, well-defined unifying concept, the proxy access amendment proposal should be excluded on Rule 14a-8(i)(10) grounds because the proposal's "essential objective" – e.g., to provide shareholders with a proxy access right – had been implemented through the original adoption of a proxy access bylaw. The staff did not find this argument persuasive. Instead, the staff's no-action responses to Walgreens, Whole Foods, and Walt Disney are consistent with the no-action letters to H&R Block, Microsoft and Apple, and reflect the staff's view that, where a shareholder proponent submits a proxy access amendment proposal, the company's original adoption of a proxy access bylaw will not be considered as having "substantially implemented" the essential objective of the proxy access amendment proposal.

In contrast to the foregoing no-action letters, the staff granted no-action relief on Rule 14a-8(i)(10) grounds to Oshkosh Corporation, which also requested the exclusion of a proxy access amendment proposal. After receiving such a proposal, Oshkosh amended its existing proxy access bylaw to implement three of six requested changes – specifically, Oshkosh reduced the ownership requirement from 5% to 3%, eliminated the requirement that a proxy access nominee receive at least 25% of the votes cast to be eligible for re-nomination, and eliminated the requirement to provide a representation that the nominating shareholder would hold the minimum number of shares for at least one year following the annual meeting. Oshkosh did not implement the other three amendments relating to the number of nominees, limitation on group size, and provisions for when loaned securities should be treated as "owned." The staff found Oshkosh's policies, practices and procedures compared favorably with the guidelines of the proxy access amendment proposal, even though Oshkosh had not adopted three of the six requested amendments.

There are few bright lines in the new staff's substantial implementation guidance in the context of proxy access amendment proposals. The no-action letter to Oshkosh appears generally consistent with the position that the staff took in the February 12th no-action letters (which we described in a previous Alert) to the extent that alignment between the ownership threshold adopted by the company and that requested in the shareholder proposal may be sufficient for obtaining no-action relief on the basis of Rule 14a-8(i)(10), despite differences between the company's bylaw and the proposal relating to other proxy access provisions, such as the number of nominees, limitations on group size, etc. However, the staff's action in Oshkosh raises many unanswered questions regarding the basis for the staff's actions. For example, would the staff have granted no-action relief to Oshkosh on (i)(10) grounds if it had adopted only one of the six requested changes, where the one change related to the ownership threshold? Conversely, would the staff have granted no-action relief if Oshkosh had adopted five of the six requested changes, where the one change that was not made related to the ownership threshold? Given the staff's no-action responses, a company that has adopted proxy access may not succeed in excluding a future proxy access amendment proposal without making some revisions to its existing proxy access bylaw. Unfortunately, the scope and amount of changes required to obtain no-action relief on substantial implementation grounds is unclear.

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