

# CAMBERVIEW

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## **Activist First to Use Proxy Access in US: GAMCO Targets National Fuel Gas**

Mario Gabelli's GAMCO Investors became on November 10, 2016 the first investor to publicly announce its intention to use a company's proxy access bylaw to nominate its own director candidate for inclusion in the company's proxy materials, including its proxy card. According to the GAMCO [13D filing](#), the investor is seeking to nominate Lance A. Bakrow, co-founder and director of Greenwich Energy Solutions, to the National Fuel Gas (NFG) board of directors for election at the 2017 Annual Meeting (typically held in late January). NFG has a "market standard" proxy access bylaw, allowing a shareholder or group of up to 20 shareholders holding 3% of NFG's common stock for at least 3 years to include director nominees representing up to 20% of the seats on the board on the company's proxy card.

GAMCO currently owns 7.8% of NFG's outstanding common stock and has publicly agitated for a change to the company's business strategy since at least 2014. In 2015, GAMCO submitted a shareholder proposal asking that NFG hire an investment bank to explore a spinoff of its utility business. This proposal received only 18% support (which included GAMCO's then-9% stake).

It is important to consider the nature of GAMCO's typical approach, which may limit the ability to draw conclusions from this particular situation about the use of proxy access by traditional activist investors. GAMCO has run 42 campaigns for board representation in the past 6 years, securing seats at 16 companies.<sup>1</sup> These campaigns are in addition to numerous other GAMCO campaigns against management proposals and mergers, and in support of shareholder proposals. GAMCO typically utilizes tactics requiring lower cost and time investment by eschewing the detailed investor presentations and other advocacy tools typically deployed by a dissident. Furthermore, GAMCO's nominees are often closely associated with the fund, in contrast to the high-profile independent nominees typically proposed by more traditional activist investors.

GAMCO's cost-conscious strategy makes proxy access a logical method for the fund to seek board representation. However, it is unlikely most activist investors will use proxy access due to, among other things, the need to satisfy the bylaw's typical three-year holding period requirement, a willingness to expend significant resources on a proxy fight, typical company bylaw restrictions on an activist's intent regarding changing or influencing control at the company through the proxy access mechanism, and additional restrictions on the activist's solicitation efforts.

There are a number of questions from this first use of proxy access that remain to be answered:

- How might this contest inform the debate about the implications of the SEC's newly-proposed amendments to the universal proxy card?
- What impact will the filing of a Schedule 14N have on the dynamics of a contest?
- Will target companies maintain their board size in light of a proxy access nominee, thus triggering a plurality vote standard at most companies and the prospect of the removal of a company-nominated director?

These are only a few of the questions raised by this first use of proxy access. However, one question that has now been answered, is whether and when we will see proxy access utilized by an investor. We will keep you updated on the proxy access landscape, and this attempt to use it, as events progress.

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<sup>1</sup> Source: SharkRepellent.net as of November 10, 2016.

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## About CamberView

*CamberView Partners is the leading provider of independent, investor-led advice to public companies on how to successfully manage investor engagement, contested situations and complex and challenging corporate governance issues. We advise company executives and boards on a wide range of events including contested merger situations, hedge fund activism, director elections, compensation matters, difficult shareholder proposals, sustainability and more. CamberView helps its clients succeed with their investors by providing insight into the investor's perspective, explaining how investors will respond to the company's proposals, and creating successful proactive strategies for investor engagement.*

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