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Delaware Supreme Court Requires Strict Compliance with Deadlines in Advance Notice Bylaw

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In *Saba Capital Master Fund, Ltd. v. Blackrock Credit Allocation Income Trust*,¹ the Delaware Supreme Court, reversing the earlier decision of the Court of Chancery,² held that two closed-end funds properly excluded the shareholder-plaintiff's dissident nominees at their annual meetings on the basis that the nominating shareholder failed to comply with the deadlines in the funds' advance notice bylaws. The opinion signals that the Delaware courts, in recognition of the important function of advance notice bylaws in promoting orderly annual

meetings and informed decision-making in director elections, will enforce clear and unambiguous advance notice bylaws. The opinion also provides corporations substantial guidance in preparing for proxy contests and in taking appropriate measures to review and assess materials furnished pursuant to their advance notice bylaws and to enforce the terms of those bylaws.

Background

The case arose out of the proxy contest in which Saba Capital Master Fund, Ltd. sought to elect four directors to the boards of BlackRock Credit Allocation Income Trust and BlackRock New York Municipal Bond Trust (Trusts), two closed-end funds registered under the federal Investment Company Act of 1940.³ On March 30, 2019, Saba delivered a timely notice of its intention to nominate directors at the Trusts' upcoming annual meetings pursuant to the Trusts' advance notice bylaws. That notice "generally contained" the information required by the Trusts' advance notice bylaws.⁴

On April 22, 2019, the Trusts' counsel contacted Saba by email with a request for additional information, directing Saba to have each of its nominees complete, sign, and return an attached director questionnaire. The Trusts made the request pursuant to a specific provision of their respective bylaws

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requiring a nominating shareholder to update and supplement its nomination notice to include, among other things, “any subsequent information reasonably requested by the Board of Directors to determine that the Proposed Nominee has met the director qualifications” enumerated in the bylaws within five business days after the request. Although the Trusts’ request made reference to the section of the bylaws containing the advance notice provisions, it did not specify that it was being made pursuant to that specific subsection requiring supplemental information regarding the nominees’ satisfaction of the director qualifications, nor did it expressly reference the five business day deadline.⁵ Under the five business day deadline, Saba’s response would have been due by April 29, 2019.

On May 1, 2019, the Trusts’ counsel contacted Saba to advise that, because the questionnaires were not received by the deadline, Saba’s nomination notices were invalid.⁶ Saba’s counsel disputed that assertion, claiming that Saba was not required to respond to the questionnaire request on the grounds that the questionnaire sought information that was duplicative of the information included in its nomination notice and that, to the extent any information requests were not duplicative, they were unreasonable in that they sought information unrelated to the nominees’ satisfaction of the director qualifications.⁷ Saba’s counsel also argued that, even if a response were required, the five business day deadline had not lapsed, claiming that the provision requiring additional information requested by the Trusts with respect to the nominees’ qualifications as directors had to be read in conjunction with a separate provision of the bylaws requiring the nominating shareholder to update its nomination notice so that the information provided therein would be true and correct as of the record date for the annual meeting. Those two separate provisions, they argued, had to be read in conjunction such that any supplemental information request regarding director qualifications could not be triggered until after the record date had passed.⁸ The Court referred to this argument as Saba’s “Trigger Theory.”⁹

While maintaining that it was under no obligation to do so, Saba completed the questionnaires and returned them to the Trusts, which promptly rejected them, reiterating their position that the nominations were invalid and stating that the Trusts’ boards, exercising their business judgment, determined not to waive compliance with the deadline in the advance notice bylaws. Despite the Trusts’ assertion that the nominations were invalid, a proxy contest ensued, and in their respective proxy materials, the Trusts and Saba asserted opposing positions regarding the validity of Saba’s nominations.

The Court of Chancery’s Opinion

On June 4, 2019, weeks after the filing of the preliminary proxy statements, Saba filed its initial complaint with the Delaware Court of Chancery, seeking, among other things, injunctive relief on its claims that the Trusts breached the bylaws enjoining the Trusts from interfering with the presentation of Saba’s nominees and directing the Trusts to count proxies and votes cast for those nominees.¹⁰ Saba claimed that it had submitted timely nomination notices, that the director questionnaires were not required to be included in the nomination notices, that the advance notice bylaw did not give the boards wide-ranging rights to make general information requests, that, under the Trigger Theory, the five business day deadline had not lapsed, and that, because the questionnaire was not limited to the director qualifications, it exceeded the scope of information permitted to be requested as supplemental information under the bylaws.¹¹

On June 27, 2019, the Chancery Court, on a highly expedited and pre-discovery record, granted mandatory relief on Saba’s claim that the Trusts had breached the bylaws.¹² While the Chancery Court found the provision of the Trusts’ advance notice bylaw requiring supplemental information relating to director qualifications to be provided within five business days after a request to be unambiguous and rejected Saba’s Trigger Theory, it held that the Trusts “went too far” with the questionnaire.¹³ The

Chancery Court found that the bylaw provision at issue limited the Trusts to requesting supplemental information for the purpose of assessing the nominees' satisfaction of the director qualification requirements in the bylaws.¹⁴ According to the Chancery Court, the questionnaire contained information unrelated to the bylaws' qualification requirements and, as a whole, was not reasonably requested or necessary to determine whether Saba's nominees met the qualification requirements.¹⁵ On that basis, the Chancery Court enjoined the Trusts from deeming Saba's nominees ineligible and required the Trusts to count the proxies and votes for Saba's nominees.¹⁶ The defendants appealed, claiming that the Chancery Court erred in entering that relief in light of the plain language of the advance notice bylaw.¹⁷

The Supreme Court's Reversal

Noting that bylaws are construed according to Delaware's objective theory of contract construction, the Supreme Court found that the Chancery Court was correct in concluding that the relevant provisions of the advance notice bylaws were clear and unambiguous and in rejecting Saba's Trigger Theory.¹⁸ The Supreme Court disagreed, however, with the Chancery Court's analysis of whether Saba was required to comply with the additional information request. The Supreme Court stated that "under the clear language of the Bylaws, Saba had an obligation to respond to the request before the expiration of the deadline," but "did nothing and let the deadline pass."¹⁹

The Supreme Court noted that, as the Trusts had conceded, there were items in the questionnaire that were "untethered" to the director qualification provisions in the bylaws.²⁰ That fact alone, however, was not sufficient to excuse Saba's compliance with the deadline for providing the supplemental information required by the advance notice bylaw. "If, after reviewing the Questionnaire, Saba believed that the Questionnaire exceeded the scope of the [director qualification requirements], it should have raised that concern with the Trusts before the expiration of

the deadline," but it could not "without risking disqualification of its nominees . . . do nothing and let the deadline pass."²¹ Indeed, Saba's silence, according to the Supreme Court, undercut its challenges to the questionnaire based on its over-breadth as well as its arguments as to the boards' entrenchment motives.²²

The Supreme Court suggested that, "[i]n a perfect world," the Trusts' requests for supplemental information would have identified the portions of the questionnaire that were tied to the director qualification requirements and that its response to Saba would have stated the five-business day deadline.²³ Nevertheless, the Supreme Court was unwilling to establish a rule that would allow a shareholder to flout a deadline in an unambiguous advance notice bylaw, "particularly one that had been adopted on a 'clear day.'"²⁴ Although the Supreme Court observed that it would "resolve any doubt" arising from an ambiguous bylaw "in favor of stockholders' electoral rights," the Trusts' advance notice bylaws were unambiguous. The Supreme Court therefore declined the invitation to adopt a "rule that would permit election-contest participants to ignore a clear deadline and then, without having raised any objection, proffer after-the-fact reasons for their non-compliance."²⁵ Allowing such after-the-fact inquiries, the Supreme Court noted, would frustrate the key purpose of advance notice bylaws—namely, to permit orderly meetings and provide the corporation with fair notice to review and respond to nominations.²⁶

Takeaways

The Supreme Court's opinion in *Saba* underscores that the Delaware courts recognize the important role that advance notice bylaws play in ensuring fair and orderly stockholder meetings and will enforce those bylaws in accordance with their clear and unambiguous terms.²⁷ More specifically, the opinion recognizes that questionnaire and supplemental information requirements that require nominees to timely submit additional information requested by the corporation after its initial advance notice

deadline are among the conditions corporations may clearly and unambiguously impose on nominations in advance notice bylaws.

Although the Supreme Court invalidated *Saba's* nominees on the basis of a questionnaire with items “untethered” to the matters for which supplemental information requests could be made under the Trusts’ bylaws, *Saba* does not entirely foreclose the prospect of a dissident objecting to information requests outside of the scope permitted under the relevant advance notice provision.²⁸ The Supreme Court instead acknowledged that, “in a perfect world,” the items in the Trusts’ questionnaires would have aligned with the director qualification requirements and advised that if *Saba* believed that the Trusts’ questionnaire exceeded the limits of the advance notice bylaw, “it should have raised that concern with the Trusts before the expiration of the deadline.”²⁹ To limit these types of objections and challenges to the scope of supplemental information requests, advance notice bylaws imposing such requirements may be best-served if they are not cabined by reasonableness requirements or otherwise limited by inquiries into expressly enumerated matters.

The Supreme Court’s opinion in *Saba* also provides guidance on how corporations should proceed in making supplemental information requests under advance notice bylaws, and how nominating stockholders should respond to those requests. Nominating stockholders should be acutely aware of each of the deadlines set forth in the bylaws and should make every effort to comply with any potentially applicable deadline. If the corporation’s supplemental information requests appear to exceed any limits set forth in the bylaws, the nominating stockholder should raise its objections, but should nevertheless respond before the applicable deadline. What a stockholder cannot do, “without risking disqualification of its nominees, [i]s to stay silent, do nothing, and let the deadline pass.”³⁰

The Supreme Court’s reversal of the Court of Chancery’s decision in *Saba* would appear to afford corporations more leeway in requesting supplemental

information under their advance notice bylaws. The fact that supplemental information requests made under an advance notice requirement extend beyond the scope permitted by that requirement should not, in and of itself, excuse the nominating stockholder and its nominees of compliance with their obligations. But corporations cannot make extensive supplemental information requests solely for the purpose of unduly burdening stockholders and their nominees and effectively impeding nominations. As the Supreme Court recognized, “Delaware law protects stockholders in instances where there is manipulative conduct or where the electoral machinery is applied inequitably.”³¹ Corporations therefore must employ supplemental information requirements in advance notice provisions in a manner that does not unreasonably infringe on the stockholders’ right to nominate directors and affords them “a fair opportunity to nominate candidates.”³² Accordingly, questionnaires and other supplemental requests should be prepared with an eye toward the key objective of advance notice bylaws—ensuring that stockholders have adequate time, and are furnished sufficient information, to review and assess nominees on a fully informed basis.³³ For corporations not subject to the types of onerous regulatory requirements applicable to the Trusts, it may be difficult to justify supplemental information requests as broad as the nearly 100-question questionnaire sought by the Trusts in *Saba*.

Notes

1. *Saba Cap. Master Fund, Ltd. v. Blackrock Credit Allocation Income Trust*, --- A.3d ---, 2020 WL 131370 (Del. Jan. 13, 2020).
2. *Saba Capital Master Fund, Ltd. v. Blackrock Credit Allocation Income Trust*, 2019 WL 2711281 (Del. Ch. June 27, 2019), *aff'd in part, rev'd in part*, 2020 WL 131370. For a discussion of the Chancery Court’s opinion, see John Mark Zeberkiewicz and Robert B. Greco, “Delaware Court of Chancery Addresses Director Questionnaire Requirements in Advance Notice Bylaws,” 33 *Insights* 9, 1 (Sept. 2019).
3. *Saba*, 2020 WL 131370, at *2.

4. *Id.* at *3.
5. *Id.*
6. *Id.*
7. *Id.* at *4.
8. *Id.* at *2–3.
9. *Id.* at *4.
10. *Id.* at *7.
11. *Id.* at *7.
12. *Id.*
13. *Saba*, 2019 WL 2711281, at *5.
14. *Id.*
15. *Id.* at *6.
16. *Id.*
17. *Saba*, 2020 WL 131370, at *9.
18. *Id.*
19. *Id.* at *10.
20. *Id.* at *11.
21. *Id.*
22. *Id.*
23. *Id.* at *12.
24. *Id.*
25. *Id.*
26. *Id.*
27. The Supreme Court’s holding in *Saba* strictly construing the technical requirements of the Trusts’ advance notice bylaws is consistent with other rulings of the Delaware courts, including most recently in *Bay Capital Fin., LLC v. Barnes & Noble Educ., Inc.*, C.A. No. 2019-0539-KSJM (Del. Ch. Aug. 14, 2019) (TRANSCRIPT), where the Court denied a nominating stockholder’s request for a preliminary injunction to allow it to submit its slate of nominees where it had failed to comply with the requirement to be a record holder—and not simply a beneficial owner—of the corporation’s stock. It should be noted, however, that the Supreme Court in *Saba*, after stating that there was “no evidence of any manipulative conduct on the part of the Trusts,” still observed that “Delaware law protects stockholders in instances where there is manipulative conduct or where the electoral machinery is applied inequitably.” *Saba*, 2020 WL 131370, at *13.
28. *Id.* at *11.
29. *Id.* at *11–12.
30. *Id.* at *11.
31. *Id.* at *13.
32. *Hubbard v. Hollywood Park Realty Enters., Inc.*, 1991 WL 3151, at *11 (Del. Ch. Jan. 14, 1991).
33. *See Saba*, 2020 WL 131370, at *12 (“[A]dvance notice bylaws . . . ‘are designed to and function to permit orderly meetings and election contests and to provide fair warning to the corporation so that it may have sufficient time to respond to shareholder nominations.’”) (*quoting* *Openwave Sys. Inc. v. Harbinger Capital P’rs Master Fund I, Ltd.*, 924 A.2d 228, 239 (Del. Ch. 2007)).

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