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Delaware Supreme Court Requires Stockholders to Comply or Object to Supplemental Information Requests by Deadline in Nominating Directors

In *BlackRock Credit Allocation Income Trust v. Saba Capital Master Fund, Ltd.* (available [here](#)), the Delaware Supreme Court held that two publicly traded, closed-end fund trusts advised by BlackRock Advisors, LLC were not required to count votes for director nominees submitted by Saba, a dissident stockholder, at their annual meetings because, even though Saba submitted its initial nominations to the trusts on time, Saba failed to respond or object to supplemental information requests regarding its nominees within a five-business-day deadline imposed by the trusts' bylaws. The Supreme Court emphasized that the five-business-day deadline was unambiguous, that the BlackRock trusts adopted the requirements "on a clear day" and that Saba admitted at least one-third of the questions were proper (even though at least another third were overly broad).

The Supreme Court's *Saba* decision demonstrates the usefulness and importance of all aspects of these so-called "advance notice" bylaws, which are used by the vast majority of public companies to set notice and information requirements for stockholders to submit proposals and director nominations at annual or special meetings, thereby allowing the company sufficient time and information to make recommendations to the stockholders generally. These bylaws also often include requirements to provide supplemental information on relatively short deadlines. Delaware courts consider advance notice bylaws to be important tools in ensuring certainty with regard to director elections and proxy contests relating to other stockholder proposals, and have upheld their general validity on numerous occasions. The *Saba* decision makes clear that what might seem like mere ancillary provisions of an advance notice bylaw nevertheless will be enforced by Delaware courts.

Public companies that do not have bylaws requiring stockholders to disclose and supplement information regarding their nominees or proposals within specified deadlines should take comfort in this decision and consider adopting them now. Similarly, public companies that have self-imposed constraints on the categories of information that can be requested, limits on the use or purpose of any requested information, or non-existent or ambiguous deadlines for response should consider eliminating the constraints and limits (or stating explicitly that information may be used for any purpose) and clarifying deadlines for response.

Background

Saba timely delivered a director-nomination notice in advance of the BlackRock trusts' 2019 annual

meetings. The trusts' bylaws further required nominations to be supplemented "if necessary" with any information "reasonably requested" by the trusts' boards to determine that the nominees met various qualifications specified elsewhere in the bylaws and to do so within five business days. Approximately three weeks after Saba's initial, timely nomination notice, the boards requested Saba to complete an approximately 50-page, 100-question questionnaire. The trusts admitted that the questionnaire was not "crafted for this instance" and that at least one-third of the questions did not relate to the nominees' qualifications under the bylaws. However, Saba also admitted that at least one-third of the questions related to qualification considerations. Initially believing its response was not required until the record date for the annual meetings, Saba did not return the questionnaires within the five-business-day deadline. After the trusts notified Saba that its nominees were ineligible for election due to Saba's failure to deliver the information requests, Saba further argued that it should be excused from complying with the five-business-day deadline because the questionnaire was overbroad. Before the annual meetings, Saba commenced litigation in the Delaware Court of Chancery seeking a court order that its nominees were eligible for election.

Delaware Court of Chancery Opinion

In granting Saba's request for a preliminary injunction ordering votes for its nominees to be counted at the annual meetings, the Court of Chancery held (in an opinion discussed [here](#)) that, although the five-business-day deadline was unambiguous and Saba was required to comply with it even though the record date had not occurred, the information sought by the questionnaire was not, as required by the bylaws, "reasonably requested" or "necessary" to determine whether Saba's nominees met the relevant director qualifications. Therefore, the Court of Chancery did not enforce the five-business-day deadline for Saba to respond to the questionnaire and ordered that votes for its nominees be counted at the annual meeting.

Delaware Supreme Court Opinion

On appeal, the Delaware Supreme Court affirmed in part and reversed in part. While the Supreme Court agreed with the Court of Chancery that the bylaws were unambiguous and set a five-business-day deadline to respond to the trusts' questionnaires, it held that Saba's failure to object to or comply with the questionnaire within that deadline disqualified its nominees from being eligible for election at the annual meeting. In particular, the Supreme Court reasoned that Saba likely misinterpreted the bylaws, did not think the deadline applied, and then came up with "after-the-fact excuses" as to the breadth of the questionnaire. As a result, the Supreme Court said that it was "reluctant to hold that it is acceptable to simply let pass a clear and unambiguous deadline contained in an advance-notice bylaw, particularly one that had been adopted on a 'clear day'" without manipulative conduct by the trusts and that excusing Saba's compliance would "create uncertainty in the electoral setting" by permitting "election-participants to ignore a clear deadline and then, without having raised any objection, proffer after-the-fact reasons."

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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