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Director Nominations and Overbroad Questionnaires

Posted by Steve Wolosky, Andrew M. Freedman, and Lori Marks-Esterman, Olshan Frome Wolosky LLP, on Monday, July 15, 2019

Editor's note: Steve Wolosky, Andrew Freedman, and Lori Marks-Esterman are partners at Olshan Frome Wolosky LLP. This post is based on an Olshan memorandum by Mr. Wolosky, Mr. Freedman, and Ms. Marks-Esterman, Ron S. Berenblat, and Kyle J. Kolb. This post is part of the Delaware law series; links to other posts in the series are available here.

On June 27, 2019, the Delaware Chancery Court entered an injunction requiring the boards of trustees (the "Boards") of two closed-end investment funds (the "Funds") to count the votes in favor of director candidates nominated by shareholder Saba Capital at the annual meetings scheduled for July 8, 2019. In the case captioned *Saba Capital Master Fund, Ltd. v. BlackRock Credit Allocation Income Trust, et al.*, C.A. No. 2019-0416-MTZ, 2019 WL 2711281 (Del. Ch. Jun 27, 2019), Vice Chancellor Zurn granted Saba Capital's request for injunctive relief, finding that the Funds' rejection of the nominations submitted by Saba Capital violated the Funds' bylaws. The Court's ruling is consistent with views recently expressed by Olshan that overzealous defense advisors continue to "cross the line" by using onerous, overbroad questionnaires as traps to thwart shareholder nominations and chill activist campaigns.

Saba Capital had timely given notice of its nominations in compliance with the Funds' advance notification bylaws. In a response weeks later, the Funds asked that the nominees complete a supplemental questionnaire, which had "nearly one hundred questions over forty-seven pages, and was due in five business days." The Funds declared the nominations invalid after Saba Capital missed the five-day deadline for submitting the questionnaires (although Saba Capital eventually provided the completed questionnaires).

Saba Capital filed suit on June 4 and sought expedited injunctive relief, bringing claims for breach of the Funds' bylaws and breach of the Boards' fiduciary duties. The Court denied injunctive relief on the fiduciary claims, but granted an injunction on the claim for breach of the bylaws, prohibiting the Boards from invalidating Saba Capital's nominations and allowing votes in favor of its competing slate to be counted.

The Court viewed Saba Capital's request for injunctive relief from the bylaw infractions as a breach of contract claim based on the unambiguous provisions of the bylaws. Section 1 of Article II of the bylaws ("Section 1") sets forth a list of qualifications that trustees must satisfy in order to serve on the Boards. Saba Capital's nomination letters addressed these trustee qualification requirements, "albeit at a high level and without much context or explanation."

Section 7(e) of Article I of the bylaws ("Section 7(e)") allows the Boards to ask nominating shareholders to provide supplemental information regarding their nominees, stating:

> A shareholder of record, or group of shareholders of record, providing notice of any nomination … shall further update and supplement such notice, **if necessary,** so that: … (ii) **any subsequent information reasonably requested by the Board of Directors to determine that the Proposed Nominee has met the director qualifications as set out in Section 1 of Article II is provided**, and such update and supplement shall be delivered to or be mailed and received by the Secretary at the principal executive offices of the Fund **no later than five (5) business days after the request by the Board of Directors for subsequent information** regarding director qualifications has been delivered to or mailed and received by such shareholder of record, or group of shareholders of record providing notice of any nomination. (emphasis added)

Relying on this language, the Court found that the bylaws "imposed three restrictions on the Boards' right to request updates and supplements to the Nomination Letters: the desired information must be (a) for the purpose of determining whether Saba's nominees met Section 1's enumerated [trustee qualification] requirements, (b) 'reasonably requested' with that scope in mind, and (c) 'necessary' for the Boards' determinations."

The Court stated that while the Boards were entitled to ask for additional information under Section 7(e) to evaluate whether the nominees met the trustee qualification requirements of Section 1 and a subset of the questions contained in the questionnaire related to these trustee qualifications, the Boards "went too far . . . By including in the Questionnaire a substantial number of questions unrelated to Section 1's director qualifications, and nonetheless enforcing the strict five-day deadline to invalidate Saba's nominations, Defendants overstepped their authority under [Section 7(e)] while demanding strict compliance from Saba." Accordingly, the Court found that the questionnaire "was not 'reasonably requested' or 'necessary' to determine whether Saba's nominees met Section 1's requirements."

Separately, the Court ruled that, based on the limited, pre-discovery record before it, Saba Capital had not established a likelihood of success on its claim for breach of the fiduciary duties by the Funds' trustees. Notably, the Court criticized Saba Capital for delaying in filing suit, thus hampering its ability to obtain discovery in the case to support its factual allegations, noting that it could have filed suit roughly four weeks earlier than it had.

While this case involved a specific set of facts and circumstances regarding advance notice bylaws and corresponding nominee questionnaires, the decision nevertheless represents an important development in furtherance of quelling the continuing attempts by defense advisors to use onerous, open-ended nomination requirements as an entrenchment tool to thwart shareholder nominations and chill activist campaigns. We will continue to monitor and report on developments in this all-important area of shareholder rights.