

January 13, 2020

Delaware Supreme Court Upholds Strict Deadline in Advance Notice Bylaws

In an [important decision issued today](#), the Delaware Supreme Court emphasized the importance of advance notice bylaws and the right of a company responding to a shareholder proposal or nomination to insist on strict adherence to the requirements, including deadlines, unambiguously specified in those bylaws.

This opinion reversed a decision last year (see our [memorandum](#)) in which the Court of Chancery ruled that two closed-end funds “went too far” in disqualifying board candidates proposed by an activist hedge fund based on its failure to respond within the five-business-day deadline stipulated in the funds’ bylaws to a lengthy supplemental questionnaire that included questions unrelated to the specified director qualification requirements.

The Supreme Court held that, even if some of the questions asked went beyond the bounds of the bylaw, it is not acceptable for a shareholder “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.’” Writing for the Court, Justice Valihura stated:

Bylaws, including advance notice bylaws, are “commonplace” and are interpreted using contractual principles. If such provisions are unclear, we resolve any doubt in favor of stockholders’ electoral rights. But the provisions at issue here were clear, as the Court of Chancery held. 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 with it, would create uncertainty in the electoral setting.

In the context of a contested election, companies should carefully review nominations and submissions for compliance and accuracy, consider appropriate action to enforce bylaw requirements and insist that nominating stockholders and their nominees complete appropriate questionnaires and submit timely, accurate and complete answers to follow-up inquiries where permitted. An orderly and transparent process, ensuring that the board has all of the information it needs to make an informed recommendation to stockholders, and that investors are apprised of the eligibility and suitability of dissident candidates, benefits the company and all stockholders.

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