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**Supreme Court Rules No Private Right of Action under Section 47(b) of the 1940 Act: Implications for the Maryland Control Share Act**

The United States Supreme Court recently held in *FS Credit Opportunities Corp. v. Saba Capital Master Fund, Ltd.,* 146 S. Ct. 1546 (2026), that Section 47(b) of the Investment Company Act of 1940, as amended (the "1940 Act"), does not create a private right of action to seek rescission of contracts that allegedly violate the 1940 Act. As discussed below, this decision has important implications for the Maryland Control Share Acquisition Act (the "Control Share Act") as applied to Maryland-formed closed-end investment companies under the 1940 Act.

**Background**

Publicly traded closed-end funds have been subjected to persistent attack over many years by various stockholder activists with different objectives from long-term investors. Some activists are arbitrageurs attempting to make a short-term profit in closed-end funds trading at a discount to net asset value by purchasing shares at the discount and then exerting pressure on the fund to open-end, liquidate or take other action such as a tender offer to eliminate the discount. Activists may also seek to obtain control of a fund board through a proxy contest in order to replace the existing investment adviser with a new adviser, perhaps one affiliated with the insurgent stockholder.

In light of these continuing attacks, and in response to the withdrawal by the Staff of the Division of Investment Management of the Securities and Exchange Commission of a no-action letter issued in 2010, in which the Staff expressed the view at that time that it would be "inconsistent" with Section 18(i) of the 1940 Act for a closed-end investment company to be subject to the Control Share Act, many closed-end investment companies elected to be subject to the Control Share Act, which generally limits the voting rights of an unfriendly more-than-ten-percent stockholder.[1]

In response, Saba brought suit against several Maryland-incorporated closed-end investment companies that elected to be subject to the Control Share Act. Saba alleged that the closed-end funds' election to be subject to the Control Share Act violated Section 18(i) of the 1940 Act, which requires that each share of stock issued by an investment company "shall be a voting stock." The District Court held that Section 47(b) creates an implied private right of action and, turning to the merits of Saba's claim, that opting in to the Control Share Act violated

[1] A registered closed-end fund incorporated in Maryland may opt in to the Control Share Act by board resolution (and typically a conforming bylaw provision). A closed-end fund that is a Maryland corporation not registered under Section 8 of the 1940 Act but regulated as a business development company (a "BDC") under the 1940 Act is subject to the Control Share Act unless it opts out. Additionally, the Maryland Statutory Trust Act provides that the Control Share Act applies to statutory trusts that are closed-end investment companies (registered funds and BDCs) formed after October 1, 2023 unless they opt out, and funds formed prior to such date may opt in by provision in the trust's governing instrument.

the 1940 Act. The Court of Appeals for the Second Circuit affirmed. The Supreme Court reversed, holding that private parties may not utilize Section 47(b) of the 1940 Act to litigate for rescission of board resolutions or bylaw provisions opting in to the Control Share Act and reinforcing that the Securities and Exchange Commission is responsible for the interpretation and enforcement of Section 18(i) voting rights under the 1940 Act.[2]

**Implications**

With the ability to attack a Control Share Act provision under the 1940 Act limited by the United States Supreme Court, Maryland-incorporated closed-end investment companies should prepare for the possibility that activists will attempt to bring state law duties claims challenging a board's decision to make a closed-end fund subject to the Control Share Act (or a determination not to opt out). In our view, any such claim with respect to a fully-informed board determination should fail in Maryland. The Maryland General Assembly has twice enacted legislation to make the Control Share Act available to closed-end funds. The Control Share Act was amended in 2000 to permit a registered closed-end fund to opt in by board action (prior to that, registered investment companies were generally excluded). The Maryland Statutory Trust Act was amended in 2023 to make the Control Share Act applicable to closed-end funds formed as Maryland statutory trusts. These statutory changes were in response to the well-known challenges facing listed closed-end funds.

Each director of a Maryland corporation and each trustee of a Maryland statutory trust is subject to the same three-part statutory standard of conduct, which governs all determinations by a director or trustee. The Maryland General Corporation Law is clear that a director's determination with respect to the Control Share Act, or any other governance measure, is not subject to any higher duty or greater scrutiny than that applicable to any other act of a director, and a trustee's duties should be interpreted in the same manner under the Maryland Statutory Trust Act. Nevertheless, any determination with respect to the application of the Control Share Act should be made only after careful deliberation by a fully informed and well-advised board.

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As always, we and our colleagues are available at any time to discuss these or other matters.

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[2] The Section 18(i) voting rights question was not before the Supreme Court.