

May 23, 2008

**Maryland Legislature Approves Changes to Maryland General Corporation Law  
and Maryland REIT Law**

Last month, the General Assembly of Maryland enacted House Bill 743 and Senate Bill 556, making various changes to the Maryland General Corporation Law (the "MGCL"), and Senate Bill 548, making two changes to the Maryland REIT Law (the "MRL"). All of these bills have now been signed by Governor O'Malley. The effective date of each bill is June 1, 2008. (Unless otherwise specified, all Section references below are to the MGCL.)

House Bill 743

**Subscription for Stock.** Section 2-202(c)(2) and (3), requiring ten-days notice by a corporation of a call for payment under a subscription agreement and requiring that any call for payment be uniform as to all stock of the same class, will be deleted.

*We suggested this amendment as we saw no reason not to permit the terms of payment under subscription agreements to be determined by contract.*

**Preemptive Rights.** Since 1995, Section 2-205 has stated that unless the charter provides otherwise, a stockholder does not have any preemptive rights to subscribe for additional issues of stock or for any security convertible into an additional issue of stock. Although not noted in the codified provisions of the MGCL, this statute only applied prospectively to corporations formed after October 1, 1995. In order to clarify the application of this provision, Section 2-205(b) will be added to provide that for a corporation incorporated before October 1, 1995, a stockholder has the preemptive rights existing prior to that time unless and until the charter is amended to expressly change or terminate those rights.

*This change to Section 2-205 does not effect a change in law, but merely transfers existing uncodified law into the codified provisions of the MGCL in an attempt to avoid a trap for the unwary.*

**Certificateless Shares.** Section 2-210(c) will be amended to eliminate the requirement that a corporation send to the stockholder, upon issuance or transfer of shares without certificates, a written statement of the information required to be on stock certificates. Under new Section 2-210(c), a corporation will only be required to send such a written statement, without charge, upon request of the stockholder.

*Subject to concerns regarding notice of restrictions on transfer (e.g., charter restrictions on transfers of shares of corporations that are real estate investment trusts under the Internal Revenue Code), this change will make it administratively easier for public corporations*

*to participate in the Direct Registration System of The Depository Trust Company and for both public and private corporations to issue uncertificated shares.*

Director Resignation. Section 2-406 will be amended to add subsection (c) permitting a resignation of a director given in writing or by electronic transmission to provide that it will be effective at a later time or on the occurrence of a future event and also to provide that the resignation will be irrevocable on the occurrence of the event or, if the resignation will be effective on the failure of the director to receive a specified vote for reelection, that the resignation is irrevocable.

*This provision was added because of the many corporations that have adopted some form of “majority voting” for uncontested elections of directors. While we continue to have concerns about “majority voting” in uncontested director elections (particularly when coupled with RiskMetrics’s policy of recommending withholding as to directors who have not voted to implement a stockholder-approved proposal), we believe that this provision will clarify any question about the validity of irrevocable director resignations. Indeed, we suggested that it be drafted to apply not only to director resignations in connection with majority voting for election but also to other situations.*

Delegation to a Board Committee. Under existing Section 2-411(a), the board is prohibited from delegating to a committee the power to recommend to the stockholders any action requiring stockholder approval. This provision will be amended to carve out the election of directors.

*This amendment was suggested in recognition of the enhanced role of independent nominating committees in recommending candidates for election.*

Also, the power delegable to a board committee will be expanded in Section 2-411(b) to permit a committee to authorize or fix the terms of stock not only where the board has established a method or procedure for determining the maximum number of shares to be issued but also where the board has established the maximum aggregate offering price of the shares.

*This amendment was suggested to recognize that it is common for boards of directors to set an aggregate offering price, rather than a maximum share number.*

Director and Officer Indemnification. Section 2-418(a) will be amended by adding limited liability company to the list of entities as to which a director or officer may be indemnified for serving as a director or officer or other responsible person at the request of the corporation.

Also, Section 2-418(f)(3) will be amended to eliminate the requirement to comply with those portions of Section 2-418(e) that are not relevant to the payment of expenses.

Annual Meetings. Section 2-501(c) will be amended to provide that the annual meeting of stockholders shall be held at the time or in the manner provided in the bylaws, eliminating the requirement that the bylaws specify either a specific time or a 31-day period during which the annual meeting must be held.

*This amendment will allow a corporation to provide in its bylaws that the annual meeting will be held at such time as may be determined by the board of directors, without the necessity for specifying a specific month or 31-day period. Corporations may want to take advantage of this new flexibility when next amending their bylaws.*

Stockholder Action by Less than Unanimous Consent. Section 2-505(b)(2), which permits the charter to authorize the taking of stockholder action by less than unanimous consent (but not less than the minimum number of votes that would be necessary to take the action at a meeting), will be amended to require that the corporation give notice of the action not later than ten days after its effective date to each holder of common stock and to each other holder who, if the action had been taken at a meeting, would have been entitled to notice of the meeting.

*The purpose of this amendment is to clarify that holders entitled to notice of a meeting are also entitled to notice of action taken without a meeting.*

Quorum. Section 2-506 will be amended by adding new subsection (c), providing that a quorum for a corporation with a class of equity securities registered under the Securities Exchange Act of 1934 and at least three non-officer/non-employee directors or for an open-end investment company is a majority of all the votes entitled to be cast unless the charter or bylaws provide otherwise and that a quorum provision in the bylaws may not be for less than one-third of the votes entitled to be cast at the meeting.

*This amendment is intended to allow public companies to provide for a quorum of less than a majority of the votes entitled to be cast, but not less than one-third of the votes entitled to be cast, in its bylaws, which may often be amended by board action alone. This provision will also permit a subject corporation to decrease its quorum requirement in order to counter someone who solicits proxies and then withholds them to try to defeat a quorum. A New York Stock Exchange-listed corporation should first discuss any change in its quorum requirement with the Exchange. This amendment will not impact the availability of providing in the charter for a quorum of more or less than a majority of the votes entitled to be cast.*

Mergers, etc. – Directors and Officers of Surviving Entity. Section 3-109 will be amended by adding new subsection (f), clarifying that articles of merger, consolidation or share exchange may provide for the number and names of directors, trustees and officers or persons acting in similar positions for the successor entity.

*It is common for merger agreements to provide that the post-merger directors and officers will be named in the articles of merger; however, the MGCL currently does not specifically provide for doing so. Thus, the parties to the merger have to generate extra paper electing the new directors and officers. The amendment, suggested by us, will allow these elections to be effected directly in the articles of merger, consolidation or share exchange.*

## Senate Bill 548

Definition of “Real Estate Investment Trust”. The word “business” will be added to precede the word “trust” to further clarify that a REIT is a business entity.

Certificateless Shares. Section 8-203(f) will be amended to eliminate the requirement that a real estate investment trust send to the shareholder, upon issuance or transfer of shares without certificates, a written statement of the information required to be on share certificates. Under new 8-203(f), a real estate investment trust will only be required to send such a written statement, without charge, upon request of the shareholder.

*Subject to concerns regarding notice of restrictions on transfer of shares, this change will make it administratively easier for public real estate investment trusts to participate in the Direct Registration System of The Depository Trust Company and for both public and private real estate investment trusts to issue uncertificated shares.*

## Senate Bill 556

Rights of Objecting Stockholders. Section 3-210 will be amended to provide appraisal rights to stockholders of an exchange-listed corporation that are receiving cash (other than in lieu of fractional shares), or consideration other than stock or depository receipts of the successor, in a merger, consolidation or share exchange in which the directors and executive officers were the beneficial owners, in the aggregate, of 5% or more of the outstanding voting stock of the corporation at any time during the prior year and the stock held by the directors and executive officers, or any of them, is converted or exchanged in the transaction for stock of a person, or an affiliate of a person, who is a party to the transaction on terms that are not otherwise available to all holders. This provision does not apply when the directors' and officers' stock is held in a compensatory plan or arrangement approved by the board of directors and the treatment of the stock in the transaction is approved by the board.

*This amendment, which was submitted by T. Rowe Price, which had been a holder of a Maryland corporation that went private, will narrow the "market-out" exemption from the appraisal rights statute for publicly-listed corporations in order to provide appraisal rights in future going private transactions where management holds or takes an equity stake on terms not available to stockholders generally. It does not impact other exemptions available under the appraisal rights statute, including an opt-out from appraisal rights in the charter, an exemption that the legislature enacted several years ago at our suggestion.*

As always, please do not hesitate to call any of us or our colleagues if you have any questions or comments.

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