

June 22, 2009

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

The General Assembly of Maryland has enacted Senate Bill 626, making several changes to the Maryland General Corporation Law (the "MGCL"), and House Bill 245, making two changes to the Maryland REIT Law (the "MRL"). Both of these bills have now been signed by Governor O'Malley. The effective date of each bill is October 1, 2009.

**Senate Bill 626 – Amendments to the MGCL**

Changes Relating to Distributions:

**Restrictions on Making Distributions.** Under existing Section 2-311(a), a corporation may not make a distribution if, after giving effect to the distribution, (i) the corporation would not be able to pay its debts as they become due in the usual course of business ("equity solvency test") or (ii) the corporation's total assets would be less than the sum of the corporation's total liabilities plus, unless the charter permits otherwise, the amount that would be needed, if the corporation were to be dissolved at the time of the distribution, to satisfy the preferential rights upon dissolution of stockholders whose preferential rights on dissolution are superior to those receiving the distribution ("balance sheet solvency test").

Section 2-311(a) will be amended by adding new subsection (a)(2), permitting a distribution even if the corporation's total assets are less than the amount necessary to satisfy the balance sheet solvency test, if the distribution is made from (i) the net earnings of the corporation for the fiscal year in which the distribution is made, (ii) its net earnings for the preceding fiscal year or (iii) the sum of its net earnings for the preceding eight fiscal quarters.

**Surplus Considered Capital Surplus.** Section 2-308(b) will be amended to exclude the provisions of new Section 2-311(a)(2), referenced above, from the requirement that the net assets of a corporation remaining after a distribution or payment to stockholders or a reduction of liability shall be at least equal to the aggregate preferential amount that is payable in the event of voluntary liquidation to the holders of all stock having rights preferred to the rights of holders who received the distribution or payment or whose liability was reduced.

*These amendments were proposed to mitigate the adverse impact of the current economic downturn on compliance with the balance sheet solvency test, including charges unrelated to business operations or cash flow. For example, as a result of recent volatility in the securities and currency markets, the stockholders' equity of a Maryland corporation with a defined benefit pension plan or significant overseas business may be substantially reduced, even though the corporation is highly profitable and has enough positive cash flow to pay its debts as*

*they become due. Although Section 2-311(b) permits preparation of a balance sheet on the basis of a "fair valuation or other method that is reasonable in the circumstances," directors may be reluctant to incur the time, expense and potential second-guessing of a valuation or the preparation of a non-GAAP balance sheet. Accordingly, if a distribution by the corporation would not comply with the balance sheet solvency test, new Section 2-311(a)(2) will permit payment of a distribution if the corporation has net earnings for the current fiscal year or had net earnings for the preceding fiscal year or for the preceding eight fiscal quarters. These amendments do not affect the requirement that a corporation satisfy the equity solvency test.*

#### Changes Related to Stock:

Fractional Shares. Section 2-214 will be amended to provide that, if a fractional share of stock is being eliminated by rounding, it must be rounded "up" to a full share, rather than "off" to a full share.

*This change to Section 2-214 is intended to provide clarity and consistency by requiring fractional shares to always be rounded up, rather than sometimes be eliminated by rounding down. Under the statute, in addition to rounding up, a corporation may also issue fractional shares, arrange for disposition of a fractional interest by the person entitled to it, pay cash for the fair value of a fractional share or issue scrip or other evidence of ownership of a fractional share.*

#### Changes Related to Corporate Records:

Keeping of Bylaws. Section 2-110(c), requiring that an original or certified copy of the bylaws be kept at a corporation's principal office, will be deleted.

Annual Statement of Affairs. Section 2-313(b) and (c), requiring that the annual statement of affairs be placed on file at a corporation's principal office within 20 days after the annual meeting, or within 120 days after the end of the fiscal year for a corporation registered as an open-end company under the Investment Company Act of 1940 and not required to hold an annual meeting, will be amended to allow the annual statement of affairs to be placed at a corporation's principal office or at any other office or agency specified in the bylaws of the corporation, in written form or in any other form that may be converted within a reasonable time into written form for visual inspection.

*Corporations may want to take advantage of this new flexibility when next amending their bylaws.*

Stockholder's Right of Inspection. Section 2-512(a) currently provides that any stockholder, holder of a voting trust certificate, or his or her agent, may inspect and copy during usual business hours, the bylaws, minutes of the proceedings of the stockholders, annual statements of affairs and voting trust agreements on file at the corporation's principal office. Section 2-512(a) will be amended to provide that inspection may be made only on written request and that the corporation must have the requested documents available on file at its principal office within seven days after such a request has been presented to an officer or resident agent of the corporation. It will also eliminate the requirement that voting trust agreements be

kept on file at the principal office and will instead require only that such agreements must be deposited there.

*These amendments were proposed to reflect the practical reality that corporations, especially those headquartered outside of Maryland, generally do not maintain records at the principal office located in Maryland, which is often a location at which no business is conducted, and also to recognize that corporate records are increasingly being kept in electronic form.*

#### Changes Related to Investment Companies:

Redemption of Own Stock – Open-End Investment Companies. Section 2-310.1 will be amended to permit a corporation registered as an open-end company under the Investment Company Act of 1940 whose charter does not expressly provide for redemption of shares of its stock to redeem shares if the aggregate net asset value of the shares to be redeemed is, as of the date of the redemption, \$1,000 or less.

*This provision was amended to increase the maximum aggregate net asset value from \$500 to \$1000 for shares to be redeemed without a specific charter provision providing for redemption, in order to make such redemptions easier. It is the first increase in the maximum aggregate net asset value of these shares since this statute was first adopted in 1992.*

#### House Bill 245 – Amendments to the MRL

##### Changes Related to REIT Declaration of Trust and Bylaws:

Section 8-202(b)(iv) will be amended to delete a requirement that a real estate investment trust provide, in its declaration of trust, for the annual meeting of shareholders to be held after the delivery of the annual report, since the annual report is no longer required. Section 8-202(e)(2), governing facts ascertainable outside of the bylaws, will be amended to delete an incorrect and unnecessary cross-reference.

*We shall be deleting references to delivery of the annual report in declarations of trusts for newly formed trust REITs and recommending deletion for trust REITs that propose to restate their declarations.*

As always, please do not hesitate to call either of us or our colleagues if you have any questions or comments about any of the foregoing or any other matter of Maryland law.

Jim Hanks  
Patsy McGowan

This memorandum is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations for which Venable has accepted an engagement as counsel to address.