

April 23, 2010

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

The General Assembly of Maryland has enacted House Bill 972 and House Bill 412, making several changes to the Maryland General Corporation Law (the “MGCL”) and the Maryland REIT Law (the “MRL”), respectively. Each of these two bills was signed by Governor O’Malley last week. The effective date of each bill is June 1, 2010.

In addition, the General Assembly overhauled the Maryland Business Trust Act, which is now titled the Maryland Statutory Trust Act, by adopting Senate Bill 784 and House Bill 971. One of these two identical bills is expected to be signed into law by the Governor shortly, to be effective on June 1, 2010. Due to the extensive revisions made to this statute, the Maryland Statutory Trust Act will be addressed in a separate memorandum.

Finally, by enacting House Bill 1009, effective October 1, 2010, the General Assembly of Maryland added Subtitle 6C (“Subtitle 6C”) to Title 5 of the Corporations and Associations Article of the Annotated Code of Maryland. New Subtitle 6C provides that a Maryland corporation may elect to become a “benefit corporation” by a provision in its charter. A Maryland corporation that elects status as a benefit corporation must provide a material positive impact on society and the environment, as measured by a third-party standard, through activities that promote some combination of specific public benefits, such as preserving the environment, promoting the arts or improving human health, and must comply with certain other requirements. Because of the limited applicability of this statute, we have not addressed it here, but are available to discuss it in more detail. Unlike the preceding bills, which were proposed and drafted by the Corporate Laws Committee of the Business Law Section of the Maryland State Bar Association, Subtitle 6C was sponsored and passed at the request of participants in the benefit (or B) corporation movement.

**House Bill 972 – Amendments to the MGCL**

Execution of Articles. House Bill 972 expands Section 1-301 of the MGCL to add the chief financial officer and any other officer or agent authorized by the bylaws or board of directors (or board of trustees) as persons authorized to execute and verify under oath various articles to be filed with the State Department of Assessments and Taxation of Maryland (“SDAT”). In addition, the treasurer, chief financial officer and any assistant treasurer have been added to Section 1-301 as persons authorized to attest such articles. These changes provide Maryland corporations and real estate investment trusts (“REITs”) with more options and flexibility in executing articles to be filed with the SDAT.

Amendments to the Terms of Classes and Series of Stock. The charters of many Maryland corporations, as permitted by the MGCL, permit the board of directors, without stockholder approval, to classify or reclassify authorized but unissued shares of stock into shares of another class or series, set the terms of such class or series and authorize the corporation to

issue the newly classified or reclassified shares. The terms of such class or series of stock frequently specify the voting rights of the holders, including with respect to any amendments to the terms of the class or series of stock. Notwithstanding the power of the board of directors to classify and authorize the issuance of shares without common stockholder approval, common stockholders are generally entitled to vote on amendments to the terms of other classes or series of stock, even if the contract rights of the common stock are not affected by the amendment, because the terms of each class and series of stock are part of the corporation's charter.

House Bill 972 amends Section 2-105 to clearly establish that a Maryland corporation may provide, in its charter (including the articles supplementary setting the terms of the class or series), that the holders of a class or series of stock may have exclusive voting rights on a charter amendment that would alter only the contract rights of the specified class or series. For example, articles supplementary for a series of preferred stock could specify that charter amendments altering only the terms of that series require a two-thirds vote of the holders of the series, but do not require any other vote of the corporation's stockholders. As a result, no approval by common stockholders of such an amendment would be required. However, any charter amendment, including an amendment to articles supplementary, requires a board determination that the amendment is advisable. In drafting under the new provision, consideration should be given as to how expansive any exclusive voting rights of the preferred stockholders should be, for example, whether preferred stockholders should be permitted to amend the charter to increase their dividend and liquidation preference.

Dividends and Committee Delegations. House Bill 972 deletes Section 2-411(a)(2)(i) of the MGCL to eliminate a restriction on the power of the board of directors of a Maryland corporation to delegate the power to authorize dividends and other distributions to a committee of the board. Currently, a board must generally authorize and set a maximum amount of a distribution before delegating either to a committee or an officer the power to fix the exact amount or other terms of the distribution. The amendment to Section 2-411 (and a corresponding amendment to Section 2-309) allows a board to delegate the power to authorize distributions to a committee without restriction and allows both a board and a committee to delegate to an officer the power to authorize a distribution if the board or committee generally authorizes the distribution and provides for, or establishes a method or procedure for determining, the maximum amount of the distribution.

Reverse Stock Splits. Section 2-309(e) of the MGCL currently allows a Maryland corporation with a class of securities registered under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), to amend its charter to effect a reverse stock split without stockholder approval, at a ratio of not more than 10 shares of stock into one share of stock in any 12-month period, unless the charter provides otherwise. House Bill 972 amends Section 2-309(e) to specify that, to require stockholder approval of such an amendment, the corporation's charter must make a specific reference to Section 2-309(e) by subsection or subject matter. This clarifies that a charter provision generally specifying the required vote for stockholder approval of charter amendments should not be interpreted to require stockholder approval of a reverse stock split under Section 2-309 unless Section 2-309 or reverse stock splits are explicitly referenced in the charter provision.

Advance Notice Bylaws. Section 2-504(f) of the MGCL currently provides that the charter and bylaws of a Maryland corporation may require any stockholder proposing a nominee for election as a director or other business to be considered at a stockholder meeting to provide advance notice of such nomination or other business within certain times specified in the charter or bylaws, such as 90 days before the meeting date, or during another time period specified in the charter or bylaws. House Bill 972 deletes the references to the specific time periods, as these periods are subsumed by the broader reference to “another time period.”

Householding. Under federal securities laws and regulations, a public company may give a single notice of a stockholders’ meeting to all stockholders who share an address. Section 2-504.1 of the MGCL was initially adopted to provide a similar “householding” mechanism under state law. However, it requires that a Maryland corporation provide 60 days’ advance notice of its intent to give a single notice to all stockholders entitled to notice of the meeting, nullifying the benefit of reducing mailing costs. House Bill 972 amends Section 2-504.1 to permit a Maryland corporation to send a single notice of a stockholders’ meeting to a single address, without an advance notice requirement, unless a stockholder requests otherwise. This is both cost-saving and environmentally friendly and permits a Maryland corporation to more easily take advantage of the householding provisions of the federal securities laws.

Postponements. House Bill 972 amends Section 2-511 of the MGCL to provide a mechanism, similar to the process for adjournments, for postponing a meeting of stockholders. Until the amendment, the MGCL was silent on postponements, although many corporations provided for them in their bylaws or referred to them in the notice of meeting provided to stockholders. The amendment provides certainty for a postponement of a stockholders’ meeting of a Maryland corporation and limits the time that a meeting may be postponed, without setting a new record date, to 120 days after the original record date, which is the same as the existing limit on adjournments. The MGCL does not specify a mechanism for notice of a postponement, and we recommend that Maryland corporations provide a method in their bylaws to notify stockholders of a postponement. Companies that have adopted postponement procedures in their bylaws prior to the enactment of House Bill 972 may have more restrictive timing provisions and may want to amend their bylaws to benefit from this amendment.

Internet Access and Charter Amendments. Section 2-604 of the MGCL currently requires a Maryland corporation to deliver a copy or summary of a proposed charter amendment with the notice of the meeting at which such amendment is to be considered. However, consistent with federal securities laws and modern practice, many companies are delivering notice of the meeting by mail but posting the meeting materials (including the copy or summary of the charter amendment) on the internet for stockholders to access. This is cost-saving, environmentally friendly and more convenient for many stockholders. House Bill 972 revises Section 2-604 to permit the required copy or summary of a proposed charter amendment to also be posted on the internet, rather than delivered by mail or electronic transmission. In order to accommodate stockholders without internet access or with a preference for a hard copy, the amendment also requires the notice to provide not only the website for accessing the copy or summary but also a telephone number or address where a stockholder may request a paper copy without charge. This is consistent with the requirements of the federal proxy rules governing the

Notice Regarding the Availability of Proxy Materials, which require the notice to include instructions regarding how a securityholder may request a paper or e-mail copy of the proxy materials at no charge.

Dissolutions. Section 3-413 of the MGCL provides that stockholders of a Maryland corporation entitled to cast at least 25% of all the votes entitled to be cast in the election of directors may petition a court of equity to dissolve the corporation if the stockholders are so divided that they cannot elect directors and provides further that any stockholder can so petition if the stockholders are so divided that they have failed to elect directors for at least two consecutive annual meeting dates. House Bill 972 excludes corporations with a class of securities registered under the Exchange Act from these statutory dissolution provisions.

Control Share Acquisition Act. House Bill 972 amends Section 3-702(a)(1) of the MGCL to clarify that under the Control Share Acquisition Act it is the holders of control shares who are not entitled to exercise voting rights and that the shares remain voting stock. If the shares are transferred to a holder in whose hands the shares are not control shares, the voting restrictions imposed by the Control Share Acquisition Act do not apply to the new holder.

#### **House Bill 412 – Amendments to the MRL**

Declaration of Trust. House Bill 412 expands Section 8-101 of the MRL to add a definition of “declaration of trust.” The MRL uses the term declaration of trust throughout, but there has previously been no statutory definition.

Amendments to the Terms of Classes and Series of Shares. As is the case for Maryland corporations, the declarations of trust of many REITs formed in Maryland, consistent with Maryland law, provide that the board of trustees, without shareholder approval, may classify or reclassify authorized but unissued shares of beneficial interest into shares of another class or series, set the terms of such class or series and authorize the REIT to issue the newly-classified or reclassified shares. The terms of such class or series of shares frequently specify the voting rights of the holders of the shares, including with respect to any amendments to the terms of the class or series. Notwithstanding the power of the board of trustees to classify and authorize the issuance of such shares without common shareholder approval, common shareholders are generally entitled to vote on amendments to the terms of other classes or series of shares, even if the contract rights of the common shares are not affected by the amendment, because the terms of each class and series of shares are part of the declaration of trust.

Amendments to Section 8-203 of the MRL in House Bill 412 are analogous to the amendments to Section 2-105 of the MGCL made by House Bill 972 (see above) and clearly establish that a Maryland REIT may provide, in its declaration of trust (including the articles supplementary setting the terms of the class or series), that the holders of a class or series of shares of beneficial interest may have exclusive voting rights on an amendment to the declaration of trust that would alter only the contract rights of that particular class or series. For example, articles supplementary for a series of preferred shares could provide that amendments to the declaration of trust altering only the terms of such series require a two-thirds vote of the holders

of the series, but do not require any other vote of the REIT's shareholders. As a result, no approval by common shareholders of such amendment would be required. However, any amendment to the declaration of trust, including an amendment to articles supplementary, requires a board determination that the amendment is advisable. As noted above, in drafting under the new provision, consideration should be given as to how expansive any exclusive voting rights of the preferred shareholders should be.

Facts Ascertainable. House Bill 412 amends Section 8-203(c) of the MRL, which describes "facts" ascertainable outside the declaration of trust and conforms the description more closely to a corresponding provision in the MGCL.

Amendments. House Bill 412 provides in Section 8-501(e) of the MRL that amendments to the declaration of trust of a Maryland REIT that may be made to the charter of a Maryland corporation under the MGCL without a stockholder vote (*i.e.*, to change the entity's name or the designation or par value of any class or series of shares) may be approved by the board of trustees of the REIT, without a shareholder vote, unless the REIT's declaration of trust expressly provides otherwise, either by reference to Section 8-501(e) or its subject matter.

Reverse Share Splits. House Bill 412 adds new Section 8-501(f) to the MRL to permit a Maryland REIT with a class of securities registered under the Exchange Act to effect a reverse split of its shares without shareholder approval to the same extent that a Maryland corporation with a class of securities registered under the Exchange Act may do so under the MGCL.

Certificates of Notice. House Bill 412 adds new Section 8-503 to the MRL to permit a Maryland REIT to file a certificate of notice with the SDAT, providing public notice of actions, occurrences or information, to the same extent that a Maryland corporation may file a certificate of notice under the MGCL.

\* \* \* \*

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

Patsy McGowan  
Jim Hanks

*This memorandum is provided for information purposes only and is not intended to provide legal advice. Such advice can be provided only after analysis of specific facts and circumstances and consideration of issues that may not be addressed in this document.*