

**COMPARISON OF THE PRINCIPAL PROVISIONS OF THE**  
**DELAWARE AND MARYLAND CORPORATION STATUTES**

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## FOREWORD

For many years, it was commonly accepted that the corporation law of the State of Delaware was more “modern” or “advantageous” to corporations than the corporation law of most other states. In 1975, however, the General Assembly of Maryland completely recodified former Article 23 of the Annotated Code of Maryland into the Corporations and Associations Article. As a result of this recodification and many other substantive amendments since then, it is the opinion of many members of the bar that the basic corporation law of Maryland is at least as favorable to corporations as Delaware’s, and in many instances (*e.g.*, authorized shares, director and officer liability limitation and hostile takeovers) considerably more favorable. According to a recent survey, Maryland is the second most popular state of incorporation for New York Stock Exchange-listed corporations.

This *Comparison of the Principal Provisions of the Delaware and Maryland Corporation Statutes* is an attempt to facilitate a comparative analysis of the advantages and disadvantages of the two states’ corporation statutes for the benefit of someone who may be considering whether to form a corporation in one state or in the other. It is not exhaustive; it does not deal with every provision of the two statutes. Rather, it covers those provisions of the statutes which are generally of the most interest in the decision on where to incorporate. Also, it does not attempt to compare the case law of the two states concerning corporations. Delaware clearly has a more developed body of reported judicial decisions on many issues of corporation law than does Maryland, although in recent years not all of these decisions have been favorable to corporations or to management. *E.g.*, *In re Walt Disney Co. Derivative Litigation*, 907 A.2d 693, 697 (Del. Ch. 2005) (holding that the defendant directors did not breach their duties but observing “that the actions (and the failures to act) of the Disney board that gave rise to this

lawsuit took place ten years ago, and that applying 21st century notions of best practices in analyzing whether those decisions were actionable would be misplaced.”), *aff’d*, 906 A.2d 27 (Del. 2006). As another example, the futility exception to the demand requirement for bringing a derivative suit is much narrower in Maryland (*Werbowsky v. Collomb*, 362 Md. 581, 620, 766 A.2d 123, 144 (2001)), than in Delaware (*Aronson v. Lewis*, 473 A.2d 805, 814-15 (Del. 1984)). In addition, sometimes a party to litigation may prefer fewer rather than more cases.

In the absence of decided Maryland cases on an issue of law, the Maryland courts will regard cases decided by courts of other states as “persuasive authority” if supported by sound reasoning, *Cates v. State*, 21 Md. App. 363, 372, 320 A.2d 75 (1974), although the Maryland courts are not bound by such decisions even if they constitute the majority view. *Levin v. Singer*, 227 Md. 47, 57 A.2d 423 (1961).

In addition, many investment companies registered under the Investment Company Act of 1940 and many corporate real estate investment trusts have found that the Maryland General Corporation Law is particularly well suited to their needs. More than 80% of the public REITs are now formed under Maryland law. My colleagues and I have prepared separate information on the Maryland REIT Law, which governs REITs formed as trusts.

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**EXECUTIVE SUMMARY**

Although many provisions of the corporation statutes of Maryland and Delaware are similar, or even identical, many fundamental differences exist.\*

**ADVANTAGEOUS PROVISIONS OF THE  
MARYLAND GENERAL CORPORATION LAW**

Franchise Tax. In Maryland, no corporation is required to pay any type of franchise tax. In Delaware, however, such taxes apply to all corporations except certain financial associations, corporations formed to drain lowlands, associations formed to aid their own needy members or survivors of members, and religious, charitable or educational associations (§501). The Delaware franchise tax varies from a minimum of \$175, to a maximum of \$250,000 for some publicly traded corporations (§503(c)). Failure to pay the franchise tax in Delaware may result in fines, imprisonment, liens against corporate property or the voiding of the corporate charter (§§510, 511, 513).

Bylaws. In Maryland, the exclusive power to change the bylaws may be left with the stockholders, vested in the directors or shared by both groups (§2-109(b)). In Delaware, after the corporation has received payment for stock the power to change the bylaws belongs to the stockholders and, although it may be shared with the directors, the stockholders may never be divested of this power (§109(a)).

Stockholder Proposals – Advance Notice. In Maryland, the charter (a term defined in §1-101(f) to include the articles of incorporation as amended, corrected or

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\* Unless otherwise specifically noted, statutory citations are, in the case of Maryland, to the Corporations and Associations Article of the Annotated Code of Maryland and, in the case of Delaware, to Title 8 of the Delaware Code Annotated. References to the Court of Chancery are to the Court of Chancery of the State of Delaware.

supplemented by subsequent filings) or bylaws may require any stockholder proposing a nominee for election as a director or any other matter for consideration at an annual meeting of the stockholders to provide advance notice of the nomination or proposal to the corporation before a date or within a period of time specified in the charter or bylaws (§2-504(f)). Delaware has no comparable statutory provision, although the Court of Chancery has upheld bylaw provisions requiring a stockholder proposing a nominee for election as a director to provide 60 days notice of the nomination to the corporation.

Standard of Conduct for Directors. Unlike Delaware, Maryland has a statutory standard of conduct, based on the Model Business Corporation Act, requiring a director to perform his duties in good faith, in a manner the director reasonably believes to be in the best interests of the corporation and with the care of an ordinarily prudent person in a like position under similar circumstances (§2-405.1(c)). In addition, any act of a director of a Maryland corporation is presumed to be in accordance with the foregoing three-part statutory standard of conduct applicable to directors (§2-405.1(g)). A director of a Maryland corporation is subject to no higher duty or greater scrutiny because his or her act relates to or affects an acquisition or potential acquisition of control of the corporation or any other transaction or potential transaction involving the corporation (§2-405.1(h)), which is directly contrary to Delaware case law. Maryland also expressly provides that the standard of conduct applicable to directors does not require them to take certain actions, including (a) to act to accept, recommend or respond on behalf of the corporation to any proposal by an acquiring person (*i.e.*, a director can “just say no”) or (b) to act to authorize the corporation to redeem any rights under, modify or render inapplicable a stockholder rights plan (§2-405.1(f)). For a complete list of actions expressly excluded, see section 28, *infra*. In Maryland, the statute is the sole source of director duties,

regardless of whether a decision has been made to enter into an acquisition or a potential acquisition of control of the corporation or enter into any other transaction involving the corporation (§2-405.1(i)).

Director and Officer Liability. Maryland permits the charter of a corporation to include a provision “expanding or limiting the liability of its directors and officers to the corporation or its stockholders for money damages” with only two narrow exceptions: actual receipt of “an improper benefit or profit in money, property, or services” and “active and deliberate dishonesty” that is material to a cause of action resulting in a final judgment adverse to the director or officer (§§2-104(b)(8) and 2-405.2; Courts & Judicial Proceedings Article (“CJP”) of the Annotated Code of Maryland, §5-418). This same protection is also available to trustees and officers of real estate investment trusts formed as trusts under the Maryland REIT Law (the “MRL”). In Delaware, the liability-limitation statute (§102(b)(7)) applies only to directors, not to officers, and has six exceptions, some of them (*e.g.*, breach of the duty of loyalty and acts not in good faith) potentially quite expansive.

Indemnification. Maryland permits indemnification of directors, officers and employees unless it is “established” that the individual (1) acted “in bad faith” or with “active and deliberate dishonesty;” (2) actually received an improper personal benefit in money, property or services; or (3) in the case of a criminal proceeding, had reasonable cause to believe that his act or omission was unlawful (§2-418(b)(1),(j)). This same protection is available under the MRL to trustees and officers of Maryland trust REITs. In order for an individual to receive indemnification under the Delaware statute, it must be determined that the director, officer or employee “acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had

no reasonable cause to believe his conduct was unlawful” (§145(a), (b), (d)). Also, Maryland permits indemnification for settlements of derivative suits (§2-418(b)(2)) but Delaware does not (§145(b)).

Interested Directors. With respect to actions by directors of investment companies, as defined by the Investment Company Act of 1940 (the “1940 Act”), Maryland adopts the definition of “interested person” in that act, which specifically provides that a person is not “interested” solely by reason of being a director, owner of securities or family member of a director or owner of securities (§2-405.3). Delaware has no similar statute.

Resignation of Directors. In Maryland, a director’s resignation may provide that it will be effective at a later time or on the occurrence of an event, is irrevocable on the occurrence of the event and is irrevocable if the resignation will be effective on the failure of the director to receive a specified vote for reelection (§2-406(c)). Delaware permits a resignation to be irrevocable only when it is conditioned upon the director’s failing to receive a specified vote for reelection (§141(b)).

Increasing/Decreasing Number of Authorized Shares. Unlike Delaware, Maryland permits the charter of a Maryland corporation to include a provision permitting the board of directors, without stockholder approval, to amend the charter to increase or decrease the aggregate number of authorized shares of stock or the number of authorized shares of any class of stock (§2-105(a)(12)).

Certificate of Notice. A Maryland corporation may file a certificate of notice with the State Department of Assessments and Taxation (“SDAT”) describing any action of the corporation, its board or stockholders; the occurrence of or change to any facts ascertainable outside of the charter; the expiration of the period of existence of the corporation; or any other

information that the corporation determines should be disclosed (§1-207.1(a), (b)). The filing is completely voluntary; there is no event for which a certificate of notice is required to be filed and there is no obligation to update a previously filed certificate of notice (§1-207.1(e), (f)).

Delaware has no comparable provision.

Amendments to Charter or Certificate of Incorporation. Unless the certificate of incorporation of a Delaware corporation provides otherwise, amendments that make changes relating to the capital stock by increasing or decreasing the par value or the aggregate number of authorized shares of a class, by subordinating rights or by otherwise adversely reclassifying or changing preferences or powers require the majority vote of each class or series of stock adversely affected, even though such class would not otherwise have voting rights (§242(b)(2)).

Maryland has no such requirement.

Charter Amendments Without Stockholder Action. Unlike Delaware, Maryland permits the board of directors of a Maryland corporation, without stockholder approval, unless specifically negated in the charter, to amend the charter to change the name or other designation or the par value of any class or series of stock of the corporation and the aggregate par value of the stock of the corporation (§2-605(a)).

Reverse Stock Splits. Unlike Delaware, Maryland permits the board of directors of a corporation with a class of equity securities registered under the Securities Exchange Act of 1934, as amended (the “Exchange Act”), or a corporation registered as an open-end investment company under the 1940 Act (§2-309(e)(1)), subject to any restriction in its charter that explicitly provides otherwise by reference to Section 2-309(e) or its subject matter (*i.e.*, reverse stock splits), without stockholder action, to effect a reverse stock split resulting in a combination of shares at a ratio of not more than ten shares into one share in any twelve-month period (§2-

309(e)(2)). A reverse stock split is defined as a combination of outstanding shares of stock of a corporation into a lesser number of shares of stock of the same class without any change in the aggregate amount of stated capital of the corporation, except for a change resulting from an elimination of fractional shares (§2-309(a)).

Payment of Stock. Maryland expressly permits a corporation to issue stock without consideration of any kind, including as a gift or contribution to a governmental unit or a charitable organization (§§2-103(13), 2-203(f)). Delaware has no comparable provision.

Distributions. Maryland permits any distribution authorized by the board of directors to be made if, after the distribution, the corporation would not be insolvent in either the “equity sense” (inability to pay debts as they become due in the usual course) or the “balance sheet sense” (assets being less than the sum of liabilities plus senior liquidation preferences) (§§2-309, 2-311). In addition, the corporation is permitted to make a distribution even if it may be considered insolvent in the “balance sheet sense” so long as 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 (§2-311(a)(2)). Delaware’s dividend statute (§170) is based upon the artificial concept of “surplus” and the ambiguous concept of current “net profits.” In addition, for purposes of determining compliance with the insolvency tests, Maryland permits the assets to be valued on the basis of a “fair valuation” of the assets or upon any other “reasonable” method rather than limiting application of the tests to the financial statements (§2-311(b)). Delaware has no comparable statute.

Maryland also permits the board of directors to delegate to a committee of the board the power to authorize a distribution and to fix the amount and other terms of the

distribution (§2-411(a)). After authorizing a distribution and providing for a procedure for determining the maximum amount of the distribution, the board or a committee of the board may delegate to an officer of the corporation the power to fix the amount and other terms of the distribution (§2-309(d)). Delaware has no comparable statute, although (a) for a corporation formed before July 1, 1996, it does permit the certificate of incorporation, bylaws or board resolution to “expressly” provide for a committee to “declare a dividend” or “to authorize the issuance of stock”(§141(c)(1)) and (b) for all other corporations, it places no limit on the committee’s power to declare a dividend or other distribution (§141(c)(2)).

In Delaware, a director who approves an unlawful distribution is liable to both the corporation and the corporation’s creditors for the unlawful portion of the payment (§174(a)). Under the Maryland statute, a director is liable only to the corporation (§2-312(a)) and only if the director has not complied with the statutory standard of conduct in Section 2-405.1(c) (see “Standard of Conduct for Directors,” *supra*). Even if the director did not comply with Section 2-405.1(c), he may be exculpated from liability for money damages under Maryland law and an applicable charter provision (see “Director and Officer Liability,” *supra*). Delaware specifically provides that a director may not be exculpated for unlawful dividends (§102(b)(7)(iii)).

Stockholder Action Without a Meeting. A consent to any action in lieu of a meeting of stockholders of a Maryland corporation requires the written or electronically transmitted consent of the holders of all outstanding shares entitled to vote on the matter (§2-505(a)), except that holders of any class of stock, other than common stock entitled to vote generally in the election of directors, may (unless the charter requires otherwise and provided that the corporation gives notice of the action to each holder of the class of stock within ten days after the effective time of the action) take action or consent to any action by delivering a consent

in writing or by electronic transmission of the stockholders entitled to cast not less than the minimum number of votes that would be necessary to authorize or take the action at a stockholders meeting (§2-505(b)(1)). If authorized by the charter and provided that the corporation gives notice of the action within ten days after the effective time of the action to each holder of common stock and each other stockholder who, if the action had been taken at a meeting, would have been entitled to notice of the meeting, the holders of common stock entitled to vote generally in the election of directors may take action or consent to any action by delivering a consent in writing or by electronic transmission of the stockholders entitled to cast not less than the minimum number of votes that would be necessary to authorize or take the action at a stockholders meeting (§2-505(b)(2)). In Delaware, unless otherwise provided in the certificate of incorporation, actions in lieu of a meeting may be taken upon the written consent of those stockholders having not less than the minimum number of votes that would be necessary to take the action in question at a meeting at which all stockholders entitled to vote both were present and voted (§228). Corporations may want to avoid open-ended less-than-unanimous written consent provisions that may facilitate hostile stockholder activity as often occurs with Delaware corporations that have not adopted charter provisions limiting the unconditional power of stockholders to take action by written consent without a meeting.

Stockholder-Requested Special Meeting Procedures. Unless the charter or bylaws provide otherwise, the board of directors of a Maryland corporation has the sole power to fix the record date for determining stockholders entitled to request a special meeting, the record date for determining stockholders entitled to notice of and to vote at the special meeting and the date, time and place, if any, and the means of remote communication, if any, by which stockholders and proxy holders may be considered present in person and may vote at the special meeting (§2-

502(e)). Delaware has no comparable statute.

Takeovers. *Business Combination Statutes.* Subject to certain exceptions, Maryland prohibits certain “business combinations” between a corporation and an “interested stockholder” for five years after the most recent date on which the stockholder becomes an interested stockholder, and thereafter imposes special appraisal rights (§3-202(a)(5)) and special stockholder voting requirements (§§3-601 *et seq.*). The statute requires a business combination that is not excepted and that occurs after the five-year moratorium to be approved by the affirmative vote of at least (1) 80% of the votes entitled to be cast by the outstanding shares of voting stock of the corporation, voting together as a group; and (2) two-thirds of the votes entitled to be cast by holders of voting stock other than the interested stockholder who is a party to the combination, voting together as a group (§3-602). An “interested stockholder” is defined as a beneficial owner, directly or indirectly, of ten percent or more of the voting power of the outstanding voting stock of the corporation (§3-601(j)). However, a person is not an interested stockholder if, prior to the most recent time at which such person would otherwise have become an interested stockholder, the board of directors of the corporation approved the transaction which otherwise would have resulted in the person’s becoming an interested stockholder (which approval may be made subject to compliance, at or after the time of approval, with any terms and conditions determined by the board, *e.g.*, a standstill requirement) (§3-601(j)(3), (4)).

Delaware prohibits any “business combination” (defined to include mergers, liquidations and other “freeze-out” transactions) between an “interested stockholder” (defined as the owner of 15% or more of the voting stock) and the corporation for three years after the interested stockholder becomes an interested stockholder unless (1) the board has previously approved the business combination or the transaction resulting in the interested stockholder’s

becoming an interested stockholder, (2) immediately following the transaction in which the stockholder became an interested stockholder, the interested stockholders own at least 85% of the voting stock of the corporation (excluding stock owned by directors, officers or certain employee stock option plans) or (3) the business combination is approved by two-thirds of the outstanding voting stock not owned by the interested stockholder.

*Control Share Statute.* In addition to the foregoing business combination statute, Maryland provides, with certain exceptions, that the holders of “control shares” (generally, shares with more than one-tenth, one-third or a majority of the power to vote generally in the election of directors) of a corporation acquired in a “control share acquisition” have no voting rights with respect to the control shares except to the extent approved by the stockholders by the affirmative vote of at least two-thirds of all votes entitled to be cast on the matter, excluding interested shares (§3-702(a)(1)). If the stockholders do not accord voting rights to the control shares, the corporation may redeem the control shares under certain circumstances (§3-707). Unless the charter or bylaws provide otherwise, if voting rights are approved, and as a result the interested stockholder becomes entitled to exercise a majority or more of the voting power of all shares of the corporation, the corporation will be deemed a successor in a merger, and non-interested stockholders will have “dissenters’ rights” as provided in §§3-201 *et seq.* (§3-708). Delaware has no similar statute.

*Board Opt-In Provisions.* In addition, Maryland permits a corporation with a class of equity securities registered under the Exchange Act and at least three independent directors to elect to be subject, in whole or in part, by provision in its charter or bylaws or by a resolution of its board of directors (§3-802(a)), notwithstanding a contrary provision in the charter or bylaws, to any or all of five provisions: a classified board (§3-803), a two-thirds vote

requirement for removing a director (§3-804(a)), a requirement that the number of directors be fixed only by vote of the directors (§3-804(b)), a requirement that a vacancy on the board be filled only by vote of the remaining directors (§3-804(c)), and a majority requirement for the calling of a special meeting of stockholders (§3-805). Delaware has no similar statute.

*Non-Stockholder Constituencies.* Maryland permits the charter of a corporation to include a provision allowing the board of directors, in considering a potential acquisition of control of the corporation, to consider the effect of the potential acquisition of control on stockholders, employees, suppliers, customers and creditors of the corporation and on communities in which offices or other establishments of the corporation are located (§2-104(b)(9)). Delaware has no similar statute.

*Stockholder Rights Plans.* As discussed more fully in Section 47, *infra*, Maryland has legislatively validated stockholder rights plans, including both discriminatory “flip-over” and “flip-in” provisions and continuing director (or “slow-hand”) provisions of up to 180 days (§2-201(c)). While stockholder rights plans including “flip-over” and “flip-in” provisions have been upheld judicially in Delaware, the Supreme Court of Delaware in 1998 struck down a 180-day slow-hand provision of a stockholder rights plan.

Appraisal Rights. Unlike Delaware, Maryland permits the charter of a Maryland corporation to eliminate appraisal rights for one or more classes of stock and also generally eliminates appraisal rights for stock that is not entitled to be voted on a transaction (§3-202(c)(3), (4)). In Maryland, there is no limitation on the application to cash transactions of the “market-out” exception for appraisal rights but there is such a limitation in Delaware (§262(b)(2)).

Share Exchanges. The Delaware statute does not specially provide for share exchanges. Share exchanges are provided for in Maryland and need be approved only by the board of directors of the successor corporation (the corporation acquiring stock) (§3-105(a)(3)).

Inspection of Records. Maryland, unlike Delaware (§220(b)), does not include stock ledgers and stockholder lists among the corporate records generally available to any stockholder (§2-512). However, one or more persons who have been stockholders of a Maryland corporation for at least six months and who together hold at least five percent of the outstanding stock of any class may request a statement of the corporation's current assets and liabilities and may inspect and copy the corporation's books of account and stock ledger (§2-513).

Penalty for Failure to Produce Stockholder List. In Delaware, if a corporation, officer or agent thereof refuses to permit examination of the list of stockholders by a stockholder during the ten-day period prior to every stockholders meeting, the stockholder may apply to the Court of Chancery for an order to compel the corporation to permit such examination by the requesting stockholder. Furthermore, the court may make such additional orders as it deems appropriate, including, without limitation, postponing the meeting or voiding the results of the meeting (§219). Maryland has no similar provision.

Limitation on Classes of Directors. Although both Maryland and Delaware permit the division of the board of directors into classes of directors, Delaware permits the creation of no more than three such classes (§141(d)). The corresponding provision in Maryland contains no such limitation (§2-110(b)). Maryland also provides that the term of office of any director may not exceed five years (although the term of at least one class must expire each year) (§2-404(b)(2)). The term of any class in Delaware is limited to three years (§141(d)).

Charitable Contributions. Unlike Delaware, Maryland expressly permits a corporation to issue stock without consideration of any kind as a gift to a governmental unit or charitable organization (§§2-103(13), 2-203(f)).

Denial of Voting Rights. Maryland (§2-507(a)) permits the charter to deny voting rights to shares of any class of stock while Delaware (§242(b)(2)) prohibits denying voting rights to shares of a class in connection with an amendment to the certificate of incorporation if the amendment would change the aggregate number of authorized shares or the par value of the class or would adversely affect the powers, preferences or special rights of the class.

Judicial Dissolution. *Power to Dissolve.* In both Delaware (§226) and Maryland (§3-413), if a deadlock of the directors precludes corporate action, or if a division of the stockholders makes election of directors impossible, stockholders are permitted to seek judicial action. In Delaware, the Court of Chancery may appoint a custodian or receiver to continue the business of the corporation only when (a) the corporation (i) abandons its business and (ii) has failed within a reasonable time to take steps to dissolve, liquidate or distribute its assets and (b) the Court of Chancery orders a judicial dissolution. In Maryland, a court of equity may grant an involuntary dissolution if (a) there is a deadlock of directors regarding the management of the corporation's affairs, (b) stockholders are so divided that directors cannot be elected, (c) the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent or (d) the corporation is unable to meet its debts as they mature in the ordinary course of its business (except for railroad corporations).

Stockholders Eligible to Bring Action. In Delaware, such action may be instituted by any stockholder. In Maryland, however, involuntary dissolution by judicial order may be sought only by stockholders entitled to cast at least 25% of all of the votes entitled to be cast in

the election of directors (§3-413(a)); however, when the individuals in control of the corporation are alleged to be acting illegally, oppressively or fraudulently, or when the division among stockholders is so severe that for a period which includes at least two consecutive annual meeting dates the stockholders have failed to elect successors to directors whose terms should have expired, any stockholder entitled to vote in the election of directors may petition for dissolution (§3-413(b)). However, if a corporation has a class of equity securities registered under the Exchange Act, its stockholders are not permitted to petition a court of equity to dissolve the corporation, no matter how many votes they are entitled to cast (§3-413(d)).

Personal Jurisdiction. Unlike Maryland, directors and senior officers of a Delaware corporation are subject to personal jurisdiction in Delaware with respect to any civil action or proceeding brought in the State of Delaware, by or on behalf of, or against such corporation, in which such director or officer is a necessary or proper party, or in any action or proceeding against such director or officer for violation of a duty in such capacity, whether or not such person continues to serve as such director or officer at the time suit is commenced (Del. Code Ann. tit. 10, §3114). In Maryland, directors (and trustees of a trust REIT), whether elected, serving or both, are deemed to have consented to the appointment of the resident agent of the corporation (or trust REIT) or, if there is no resident agent, the SDAT, as an agent on which service of process may be made in any civil action or proceeding brought in the State of Maryland (a) by or on behalf of, or against, the corporation (or the trust REIT) and to which the director is a necessary or proper party, or (b) against the director in an Internal Corporate Claim (CJP, §6-102.1).

Abandoned Property. The Maryland Uniform Disposition of Abandoned Property Act (the “Abandoned Property Act”) expressly exempts gift certificates and business-to-business

credit balances and outstanding checks issued in the ordinary course of business from the provisions of the Abandoned Property Act (Commercial Law Article §17-101(m)). However, businesses incorporated in Delaware that hold unclaimed personal property, including business-to-business credit balances and gift certificates, for a period, in general, of five years from the date the property became payable (and not more than 10 years from that date) must report and pay such amounts to the Delaware State Escheator. As states have increased enforcement and turned unclaimed property programs into a means of financing state expenses, the business-to-business exemption available in Maryland is an advantage worth considering when determining where to incorporate. While the 2017 amendments to Delaware's unclaimed property law attempted to fix many of the problems associated with the regime, including implementing a ten-year statute of limitations and further incentivizing corporations to consider a voluntary settlement process, Delaware's unclaimed property law remains far less favorable than its Maryland counterpart.

## ADVANTAGEOUS PROVISIONS OF THE DELAWARE GENERAL CORPORATION LAW

Stockholder-Requested Special Meetings. In Delaware, stockholders may not force the corporation to call a special meeting unless the certificate of incorporation or bylaws provide otherwise (§211(d)). The secretary of a Maryland corporation must call a special meeting upon the written request of holders of 25% of the voting stock of the company (§2-502(b)). This percentage may be adjusted, however, in the charter or bylaws but may not exceed a majority (§2-502(b), (d)). In addition, the board of directors of a Maryland corporation with a class of equity securities registered under the Exchange Act and at least three independent directors may increase this requirement to a majority by resolution, notwithstanding a contrary charter or bylaw provision (§§3-802(a)(2), 3-805).

Voting by Stockholders. In Delaware, absent a contrary charter provision, the affirmative vote of a majority of stockholders present in person or by proxy shall be the vote of the stockholders (§216(2)) except for the election of directors (§216(3)). In Maryland, unless the charter provides otherwise, the majority of all votes cast at a meeting at which a quorum is present is the vote of the stockholders (§2-506(a)(2)) except in three instances: A plurality of all votes cast is necessary in Maryland for the election of directors (§2-404(d)); two-thirds of the votes entitled to be cast is necessary if the vote involves dissolution (§3-403(d)), consolidations, mergers, share exchanges or transfers of assets (§3-105(d)), amendments to the charter (§2-604(e)), reductions of stated capital (§2-306(b)(4)), reinstatement of corporate charters and extensions of corporate existence (§3-501(d)) or removal of directors if the corporation has elected to be subject to Section 3-804(a); and a majority of all the votes entitled to be cast for the election of directors is necessary to remove a director (§2-406(a)) (unless the corporation has elected to be subject to Section 3-804(a), in which case two-thirds of all the votes entitled to be

cast is necessary). However, Maryland permits the charter to provide for a greater or lesser proportion of votes than the proportion otherwise required by statute (§2-104(b)(4), (5)), but not less than a majority of all votes entitled to be cast on the matter (§2-104(b)(5)). If more than one class is entitled to vote separately on the matter, approval must be obtained from each class of stockholders (§2-506(b)). Delaware only requires that classes be allowed to vote separately when a proposed amendment to the charter would have certain adverse effects on those classes (§242(b)(2)).

Inspection of Records. In Delaware, a stockholder desiring access to any corporate records must present a written demand made under oath and stating a proper purpose (§220). The Maryland provisions pertaining to the right of stockholders to inspect certain corporate records do not contain such stringent prerequisites other than that the request must be in writing (§2-512). In addition, any stockholder of a Maryland corporation has the right to request the corporation to provide a sworn statement showing all stock and securities issued and all consideration received by the corporation within the preceding twelve months (§2-512(b)).

Power of Directors. The directors of a Delaware corporation are given the specific power to fix their own compensation (§141(h)), to adopt emergency bylaws in the event of a national disaster (§110) and to renounce any interest or expectancy of the corporation in, or in being offered an opportunity to participate in, specified business opportunities or specified classes or categories of business opportunities that are presented to the corporation (§122(17)). The first two powers are not mentioned in the Maryland statute. In Maryland, the directors may, by resolution, prospectively renounce corporate opportunities that are presented to the corporation or developed by or presented to one or more of its directors or officers (§2-103(15)).

Officers. Maryland requires a corporation to have at least three officers (president, secretary and treasurer) (§2-412); in Delaware, there are no prescribed officers (§142). Although both states permit an individual to hold more than one office, Maryland prohibits the same individual from serving as both president and vice-president (§2-415).

Payment of Expenses Prior to Final Disposition of a Proceeding. In both states, expenses incurred by a person who is named as a party to a proceeding by reason of the fact that he is or was a director, officer, employee or agent of the corporation may be paid by the corporation in advance of the final disposition of the proceeding if authorized in the specific case (§2-418(f), (j)(3); § 145(e)). The Maryland statute provides that, as a prerequisite to making such advances, the corporation must receive an undertaking by or on behalf of a director, officer, employee or agent to repay the amount advanced if it is ultimately determined that he was not entitled to be indemnified for such expenses (§2-418(f)). In Delaware, however, only present directors and officers are required to give such an undertaking. Former directors and officers or other employees and agents of the corporation or persons serving at the request of the corporation as directors, officers, employees or agents of another corporation, partnership, joint venture, trust or other enterprise may be paid upon such terms and conditions, if any, as the corporation deems appropriate (§ 145(e)).

Indemnification – Presumption. Both the Maryland and Delaware statutes authorize indemnification for directors, officers, employees and agents who have met the requisite statutory standard of conduct (§2-418(b), (e); §145(a), (b) and (d)).

The Maryland statute provides that the termination of any proceeding by judgment, by order or by settlement does not create a rebuttable presumption that the individual did not meet the requisite standard of conduct for indemnification (§2-418(b)(3)(i)); this is also

the case in Delaware. The Delaware statute also provides that the termination of a proceeding upon a conviction or a plea of *nolo contendere* does not, by itself, create a presumption that the individual did not meet the standard of conduct for indemnification (§145(a)); in Maryland, such a termination creates a presumption that the individual did not meet the standard of conduct for indemnification (§2-418(b)(3)(ii)).

Redemptions and Stock Purchases. Delaware permits redemptions or purchases of stock by a corporation if the corporation's capital will not be impaired (§160(a)). Delaware also permits redemptions and stock purchases even where impairment exists or will result if the shares to be redeemed or purchased are entitled to a preference over other stock as to dividends or liquidation and if such shares will be retired (§160(a)(1)). Maryland does not include these provisions, relying instead on two insolvency tests for all distributions (§2-311(a)).

Reduction in Stated Capital. In Maryland, a reduction in stated capital, other than by the retirement of stock held by the corporation or unless the charter provides otherwise, must be authorized by the board of directors and then be approved by two-thirds of each class entitled to vote on the matter (§2-306(b)). In Delaware, reduction of capital by resolution of the board of directors without stockholder approval is possible in more situations than in Maryland (§244(a)).

Ratification and Validation of Defective Corporate Acts. Delaware has adopted a "safe harbor" procedure for ratifying and validating defective corporate acts, transactions and stock that would have been "void or voidable" as a result of a failure of authorization at the time the act was taken (§204(a)). A defective corporate act includes an overissue of stock, an election or appointment of directors or any act or transaction taken by or on behalf of the corporation that is, and at the time such act or transaction was purportedly taken would have been, within the power of a corporation under Delaware law, but is void or voidable due to a failure of

authorization (§204(h)(1)). Previously, Delaware courts held that defective corporate acts or transactions which have failed to comply with the Delaware law or with the corporation's organizational documents were void and could not be ratified or validated. Delaware's safe harbor procedure for ratification and validation of defective corporate acts overturns the uncertainties presented in Delaware case law and defective corporate acts are no longer deemed void or voidable and such effect shall be retroactive to the time of the defective corporate act (§204(f)). Sections 204 and 205 are not considered the exclusive means of ratifying or validating any defective corporate act or any issuance of stock or of adopting or endorsing any corporate act or transaction prior to the existence of the corporation (§204(i)). The absence or failure of the statutory ratification does not affect the common law or other means of ratifying defective corporate acts or create any adverse presumption in this regard (§204(i)).

The safe harbor procedure permits a Delaware corporation to cure one or more defective corporate acts resulting from a failure in authorization either by ratification, with the approval of the board and/or stockholders, or by validation, with the approval of the Delaware Court of Chancery (§§204, 205). To ratify a defective corporate act, other than the ratification of a defective corporate act regarding the election of the initial board of directors, the board must adopt a resolution approving the ratification of the defective corporate act and obtain stockholder approval if a stockholder vote would have been required at the time the defective corporate act was taken or at the time of ratification (§204(b)(1), (c)). If ratification of a defective corporate act must be submitted to stockholders for approval, the corporation must give due notice to all current holders of valid stock and putative stock, whether voting or nonvoting, as of the time of the defective corporate act, unless their identities or addresses cannot be determined from the records of the corporation (§204(d)). In order to ratify a defective corporate act relating to the

election of the initial board of directors, a majority of the persons exercising powers of directors under claim and color of an appointment or election, at the time the resolutions are adopted, may adopt resolutions stating (a) the name of the person or persons on the initial board; (b) the earlier of the date the initial board acted in the name of the corporation or the date such person or persons were to have been elected to the initial board; and (c) that the ratification of the election is approved (§204(b)(2)).

Upon director and stockholder approval, if the defective corporate act would have required a filing of a certificate with the Secretary of State, then a certificate of validation with respect to such act must be filed with the Secretary of State, whether or not the required certificate was previously filed and in lieu of a previously required certificate (§204(e)). For each defective corporate act that requires a certificate of validation, a separate certificate of validation is required, subject to certain exceptions (§204(e)). Further, the corporation must provide prompt notice of all ratifications without stockholder approval to all holders of valid and putative stock, including stockholders of valid and putative stock as of the time of the defective corporate act, unless their identities and addresses cannot be determined from the records of the corporation (§204(g)).

The Court of Chancery is granted exclusive jurisdiction to hear and determine all actions brought under both Section 204 and Section 205 addressing ratification and validation of defective corporate acts and stock (§205(e)). For any defective corporate act or stock that is not ratified pursuant to Section 204 (*e.g.*, failure to receive the required stockholder vote), the Court of Chancery is granted jurisdiction to determine the validity of the defective corporate act or stock and to modify or waive the procedures in Section 204 to obtain ratification (§205(a)). The Court of Chancery is broadly empowered to determine the validity and effectiveness of any

defective corporate act ratified pursuant to Section 204 (§205(a)(1)). The corporation, any successor entity to the corporation, any director, any record or beneficial holder of valid stock or putative stock or any person claiming to be substantially and adversely affected by a ratification pursuant to Section 204 may apply to the Court of Chancery for redress (§205(a)).

Forum Selection. A Delaware corporation may include provisions in its certificate of incorporation or bylaws that require any or all “internal corporate claims” to be brought exclusively and solely in any or all of the courts in Delaware (§115). “Internal corporate claims” are defined as claims to which Title 8 of the Delaware Code grants jurisdiction to the Court of Chancery or claims based on a violation of a duty by a former or current stockholder, officer or director in such capacity (§115). Additionally, neither the certificate of incorporation nor the bylaws may contain a provision that prohibits bringing such claims in the courts of Delaware (§115). The charter or bylaws of a Maryland corporation may require that any “Internal Corporate Claims” be brought only in courts sitting in one or more specified jurisdictions, but must include the state and federal courts sitting in Maryland (§2-113(b)).

## I. ORGANIZATION

### 1. Incorporation

One or more adult individuals (§2-104(a)(1)) may form a Maryland corporation, with limited or perpetual existence (§2-103(1)), for any lawful purpose (§2-101(a)). In Delaware, one or more persons, partnerships, associations or corporations may form a corporation (§101(a)), with limited or perpetual existence (§122(1)), for any lawful purpose (§101(b)), which need not be stated (§102(a)(3)). There is no minimum capital requirement in either Maryland or Delaware. Foreign or domestic corporations or limited partnerships may file for record charters or limited partnership documents with the SDAT via electronic transmission (§1-201(c)). Delaware has a similar provision (§103(h)). If an entity electronically transmits documents, both the SDAT and the Delaware Secretary of State charge an extra fee for expedited service. A Maryland corporation may not designate a person as its resident agent without the person's prior written consent, which must be filed with the SDAT (§1-208).

In Delaware, an action to interpret, apply, enforce or determine any provision of the certificate of incorporation may be brought in the Court of Chancery, except to the extent that a statute confers exclusive jurisdiction on a court, agency or tribunal other than the Court of Chancery (§111). In accordance with relevant jurisdictional requirements, the certificate of incorporation (or bylaws, see Bylaws, *infra*) may contain provisions relating to forum selection of "internal corporate claims," which are defined as claims of the corporation that are based on a violation of duty by a former or current stockholder, officer or director or claims as to which Title 8 of the Delaware Code grants jurisdiction to the Court of Chancery (§115). A Delaware corporation may include provisions in its certificate of incorporation requiring any or all "internal corporate claims" to be brought solely and exclusively in the courts of Delaware (§115). The certificate of incorporation may not contain any provision that prohibits bringing

such claims in the courts of Delaware (§115). In Maryland, the charter or bylaws of a Maryland corporation may require that an “internal corporate claim” (as defined) be brought only in courts sitting in one or more specified jurisdictions but must include the state and federal courts sitting in Maryland. Any charter or bylaw provision adopted prior to October 1, 2017 that specifies only a court sitting in a jurisdiction other than Maryland is grandfathered until such provision is altered or repealed by amendment. This provision also applies to a Maryland trust REIT (§8-601.1).

## 2. Corporate Names

Maryland requires a corporate name to (a) indicate its corporate status, using an appropriate designation (§1-502(a)), (b) not state or imply that it is organized for a purpose not allowed by its charter (§1-503(a)) and (c) be “distinguishable upon the records of the [SDAT] from” the names of existing entities, names registered or reserved to entities, and names adopted by foreign entities (§1-504). Persons doing business in Maryland under a trade name, *i.e.*, a name other than the person’s own name, must file a certificate with the SDAT disclosing the true name of the business’s owner and the trade name that owner is utilizing (§1-406). A foreign corporation may register its name in Maryland if the name is distinguishable upon the records of the SDAT from the name of any Maryland corporation or recorded trade name (§7-101).

Delaware has no recordation requirement for trade names. Corporate names need only be “distinguishable” from other reserved or recorded names (§102(a)(1)). The requirement that a corporate name be distinguishable may be waived by the Division of Corporations if the corporation demonstrates that it or a predecessor entity previously has made “substantial use” of the name or a substantially similar name, that the corporation has made reasonable efforts to obtain written consent from the appropriate person or entity and that “such waiver is in the

interest of the State” (§102(a)(1)(ii)). Delaware relies on a body of case law in resolving trade name confusion with corporate names. A foreign corporation is not permitted to do business in Delaware if it has a name which “conflicts with” the name of a corporation or other entity reserved or recorded in Delaware. However, such a foreign corporation may be certified to do business in Delaware if it adopts an assumed name which does not conflict with the name of a Delaware entity that is used when doing business in Delaware (§371(c)).

### 3. Amendment to Charter or Certificate of Incorporation

A Maryland corporation may amend its charter (§2-601) by the affirmative vote of two-thirds of all outstanding stock entitled to vote (§2-604(e)) or of each class if more than one class is entitled to vote (§2-506(b)). However, if the charter so provides, the board of directors may, by a majority vote of the entire board, amend the charter to increase or decrease the aggregate number of authorized shares of stock or the number of authorized shares of any class of stock without stockholder approval (§2-105(a)(3)). In addition, unless specifically negated in the charter, a majority of the entire board of directors of a Maryland corporation may, without stockholder approval, amend the charter to change the name of the corporation or the name or other designation or the par value of any class or series of stock of the corporation and the aggregate par value of the stock of the corporation (§2-605). Nevertheless, in its charter, a Maryland corporation may provide that the holders of a class or series of stock have exclusive voting rights on a charter amendment that would alter only the contract rights of the specified class or series (§2-105(a)(2)). Unless otherwise provided in its certificate of incorporation, the affirmative vote of a majority of the outstanding stock entitled to vote is required to amend a Delaware corporation’s certificate of incorporation, except that, unless expressly required by the certificate of incorporation, no meeting or vote of stockholders is required to adopt an

amendment that: (1) changes the corporate name; or (2) deletes historical provisions about the incorporator, initial board of directors or original subscribers for shares and any provisions relating to a previously effected change, exchange, reclassification, subdivision, combination or cancellation of stock (§242(b)(1), (a)(1), (a)(7)). However, unless the certificate of incorporation provides otherwise, amendments which make changes relating to the capital stock by increasing or decreasing the par value or the aggregate number of authorized shares of a class, by subordinating rights, or by otherwise adversely reclassifying or changing preferences or powers require the majority vote of each class or series of stock adversely affected, even though such class would not otherwise have voting rights (§242(b)(2)). Delaware permits the board of directors to abandon any proposed amendment to the certificate of incorporation even though stockholders have approved such an amendment; however, the board's authority to abandon the amendment must have been contained in the resolution adopted by stockholders approving the proposed amendment (§242(c)).

#### 4. Extrinsic Events

In Delaware, any provision of the certificate of incorporation (other than name and address requirements, provisions limiting the life of the corporation, provisions limiting directors' liability and requirements concerning issuable securities) may be made dependent upon facts ascertainable outside the certificate, provided that the manner in which such facts operate is clearly and explicitly set forth in the certificate (§102(d)). Under Delaware law, the term "facts" includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation (§102(d)). In Maryland, any of the preferences, conversion or other rights, voting powers, restrictions, limitations as to dividends, qualifications or terms or conditions of redemption of any class or

series of stock may be made dependent upon facts ascertainable outside the charter, provided that the manner in which such facts operate is clearly and expressly set forth in the charter (§2-105(b)(2)). Maryland expressly defines “facts ascertainable outside the charter” to include an action or determination by any person, including the corporation, its board of directors, an officer or agent of the corporation, and any other person affiliated with the corporation; the contents of any agreement to which the corporation is a party or any other document; and any other event (§2-105(b)). Additionally, in Maryland, the preferences, conversion or other rights, voting powers, restrictions, limitations as to dividends, qualifications or terms or conditions of redemption of any class or series of stock may vary among holders thereof, provided that the manner in which such variations operate is clearly and expressly set forth in the charter (§2-105(b)(2)).

5. Certificate of Notice

A Maryland corporation may file a certificate of notice with the SDAT describing any action of the corporation, its board or stockholders; the occurrence of or change to any facts ascertainable outside of the charter; the expiration of the period of existence of the corporation; or any other information that the corporation determines should be disclosed (§1-207.1(a), (b)). A certificate of notice may not amend, supplement or correct the charter of the corporation in any manner or affect any rights or liabilities of stockholders, whether or not accrued or incurred before the certificate of notice is filed (§1-207.1(c)). The filing is completely voluntary; there is no event for which a certificate of notice is required to be filed and there is no obligation to update a previously filed certificate of notice (§1-207.1(e), (f)). A certificate of notice is not a part of the charter of a corporation (§1-207.1(d)). Delaware has no comparable provision.

## 6. Bylaws

The power to adopt, amend or repeal bylaws rests generally with the stockholders, although such power also may be conferred upon the board of directors or other governing body. In Delaware, the certificate of incorporation may confer this power upon the directors (§109(a)), although such provision will not limit or divest the power of stockholders or members to adopt, amend or repeal the bylaws. Further, a bylaw provision adopted or amended by the stockholders of a Delaware corporation that specifies the votes that are necessary to elect a director may not be further amended or repealed by the board of directors (§216(4)). In Maryland, a provision conferring upon the directors the power to adopt, amend or repeal the bylaws may be included in the charter or bylaws and, unless otherwise provided, *pro tanto* divests the stockholders of such power (§2-109(b)).

In Delaware, an action to interpret, apply, enforce or determine any provision of the bylaws may be brought in the Court of Chancery, except to the extent that a statute confers exclusive jurisdiction on a court, agency or tribunal other than the Court of Chancery (§111). Furthermore, the bylaws may contain provisions relating to forum selection of “internal corporate claims,” which are defined as (a) claims based on a violation of a duty by a former or current stockholder, officer or director in such capacity or (b) claims to which Title 8 of the Delaware Code grants jurisdiction to the Court of Chancery (§115). The bylaws may contain a provision requiring any or all internal corporate claims to be brought “solely and exclusively” in the Delaware courts (§115). The bylaws may not contain any provision that prohibits bringing such claims in Delaware courts (§115). In Maryland, the charter or bylaws of a Maryland corporation may require that an “Internal Corporate Claim” (as defined) be brought only in courts sitting in one or more specified jurisdictions but must include the state and federal courts

sitting in Maryland. Any charter or bylaw provision adopted prior to October 1, 2017 that specifies only a court sitting in a jurisdiction other than Maryland is grandfathered until such provision is altered or repealed by amendment. This provision also applies to Maryland trust REITs (§8-601.1).

7. Corporate Powers

Every Maryland corporation (§2-103) and every Delaware corporation (§§121, 122) has broad statutory powers which do not have to be enumerated in its charter.

8. Ultra Vires

Both Maryland (§1-403(a)) and Delaware (§124) provide that, unless a lack of power or capacity is asserted by a stockholder or the Attorney General of the state, any act of a corporation or a transfer of real or personal property by or to a corporation is not invalid or unenforceable solely because the corporation lacked the power or capacity to take such action.

9. Books and Records

The books and records of a Delaware corporation may be maintained on any form of information storage device for storage purposes so long as they can be reproduced within a reasonable time upon the request of any person entitled to inspect such records (§224). The Delaware statute explicitly permits Delaware corporations to create and maintain stock ledgers and other corporate records through the use of electronic databases and networks, including distributed ledgers and blockchain technology (§§219(c), 224, 232). A valid corporate stock ledger must serve three functions: *first*, it must enable the corporation to prepare the list of stockholders detailed above; *second*, it must be able to record the information required by the Delaware code; and *third*, it must properly record all transfers of stock.

The Maryland statute provides that minutes of meetings must be recorded in

written form and that the other books and records of the corporation may be kept in any form which can be converted in a reasonable time for visual inspection (§2-111). Each corporation also must maintain a stock ledger containing the name and address of each stockholder, as well as a notation of how many shares are held by each stockholder (§2-209). The stock ledger may be kept either in written form or in a form which can be converted into written form within a reasonable time (§2-209(b)). The Maryland State Bar Association's Committee on Corporation Law is in the process of drafting similar blockchain legislation to introduce in the 2018 session of the Maryland General Assembly.

## II. STOCKHOLDERS

### 10. Meetings of Stockholders

In Maryland, meetings of stockholders may be held as provided in the charter or the bylaws (§2-503(a)). In Delaware, meetings of stockholders may be held at any place, either within or without the State, as provided in the bylaws (§211(a)). In addition, unless restricted by the charter or bylaws, stockholders of a Maryland corporation may participate in a meeting by conference telephone or other communications equipment if all persons participating in the meeting can hear each other at the same time, and such participation constitutes the presence of that stockholder at the meeting (§2-502.1). In Maryland (§2-503(b)) and Delaware (§211(a)(1), (2)), if the board of directors is authorized to determine the place of a meeting of stockholders, the board of directors may determine that the meeting shall not be held at any place, but may instead be held solely by means of remote communication. However, the corporation must implement measures to (1) verify that the participants are stockholders and proxy holders authorized to vote, (2) provide the stockholders and proxy holders an opportunity to participate in and vote at the meeting and (3) record the vote and any other action taken by a stockholder or proxy holder participating by means of remote communication (§2-504(c); §211(a)(2)). Delaware also requires that an annual meeting of stockholders must be held within 13 months of the previous year's annual meeting (§211(c)).

The failure to hold an annual meeting will not invalidate the corporation's existence in Maryland (§2-501(e)) or in Delaware (§211(c)), and such failure will not affect any valid corporate act, unless otherwise provided in the charter. Delaware further provides that if no date is set for an annual meeting or, if a meeting is not held within 30 days after a date is set, the Court of Chancery upon the application of any stockholder or director may order a meeting to

be held to elect directors; if such a meeting is ordered, all shares of stock entitled to vote and represented in person or by proxy at said meeting shall constitute a quorum (§211(c)).

In Delaware (§211(d)), a special meeting of stockholders may be called by the board of directors or by anyone authorized in the certificate of incorporation or the bylaws. In Maryland (§2-502(a)), a special meeting may be called by the president, the board of directors or anyone authorized in the charter or the bylaws. Except for a corporation that has elected to be subject to Section 3-805, a special meeting must be called upon the written request of stockholders entitled to cast at least 25% of all the votes entitled to be cast at the meeting (§2-502(b)(1)). However, a corporation may opt out of this requirement by including in its charter or bylaws a provision that sets the percentage of votes necessary to require the secretary of the corporation to call a special meeting of stockholders, so long as the percentage is not more than a majority of all the votes entitled to be cast at the meeting (§2-502(d)). In addition, the board of directors of an eligible Maryland corporation may by resolution provide, notwithstanding contrary charter or bylaw provisions, that the secretary must call a special meeting only upon the written request of stockholders entitled to cast at least a majority of all the votes entitled to be cast at the meeting (§§3-802(a)(2), 3-805). Section 2-504(f) expressly validates bylaws requiring stockholders wishing to propose new business or nominate directors to notify the corporation before a date or within a period of time specified in the charter or bylaws (§2-504(f)). The stockholders who request a special meeting must pay the costs of preparing and mailing the notices (§2-502(b)(3)). Unless the meeting is requested by a majority of the stockholders entitled to vote, a special meeting need not be called to consider any matter which is substantially the same as a matter voted on at any special meeting of stockholders held during the preceding twelve months (§2-502(c)). Unless the charter or bylaws provide

otherwise, the board of directors has the sole power to fix the record date for determining stockholders entitled to request a special meeting, the record date for determining stockholders entitled to notice of and to vote at the special meeting and the date, time and place, if any, and the means of remote communication, if any, by which stockholders and proxy holders may be considered present in person and may vote at the special meeting (§2-502(e)).

11. Notice and Waiver of Notice

In Maryland, notice in writing or by electronic transmission of a stockholders' meeting must state the time of the meeting, the place of the meeting, if any, and the means of remote communication, if any, by which stockholders and proxy holders may be deemed to be present in person and may vote at the meeting, and, in the case of a special meeting, the purpose or purposes for which the meeting is called (§2-504(a), (b)). In Delaware, written notice of a stockholders' meeting must state the place, if any, date and hour of the meeting, the means of remote communications, if any, by which stockholders and proxy holders may be deemed to be present in person and to vote at such meeting, the record date for determining the stockholders entitled to vote at the meeting, if such date is different from the record date for determining stockholders entitled to notice of the meeting, and, in the case of a special meeting, the purpose or purposes for which the meeting is called (§222(a)).

In Maryland, the notice must be given personally or be mailed to each stockholder or, unless a stockholder requests otherwise, be transmitted to each stockholder by an electronic transmission, including electronic mail to any address or number at which a stockholder receives electronic transmissions, not less than ten nor more than 90 days before the date of the meeting (§2-504(a), (c)). However, in Maryland, consistent with federal securities laws, if a charter amendment is to be voted on at the meeting, a copy or summary of the proposed amendment may

be posted on the internet, rather than delivered by mail or electronic transmission (§2-604(d)(2)(ii)1.). To accommodate stockholders without internet access or with a preference for a hard copy, the notice is also required to provide a telephone number or address where a stockholder may request a paper copy without charge (§2-604(d)(2)(ii)2.). In the absence of actual fraud, an affidavit of the secretary, assistant secretary, transfer agent or other agent of the corporation that notice has been given by electronic transmission shall be *prima facie* evidence of that fact (§2-505(d)). Notice given by electronic transmission will be considered ineffective if the corporation is unable to deliver two consecutive notices and such inability becomes known to the secretary, assistant secretary, transfer agent or other person responsible for giving notice; however, the inadvertent failure to deliver notice given by electronic transmission will not invalidate the stockholders' meeting (§2-504(d)).

In Delaware, the notice must be given personally or be mailed to the stockholders, not less than ten nor more than 60 days before the date of the meeting (§222(b)). Delaware also provides, without limiting the manner by which notice otherwise may be given effectively to stockholders, that any notice to stockholders given by the corporation shall be effective if given by a form of electronic transmission consented to by the stockholder to whom the notice is given (§232(a)). A stockholder may revoke consent to receive notice in the form of an electronic transmission by giving notice to the corporation of such revocation (§232(a)). In addition, such consent shall be deemed revoked if (1) the corporation is unable to deliver by electronic transmission two consecutive notices and (2) such inability becomes known to the secretary, an assistant secretary, transfer agent or other person responsible for the giving of notice (§232(a)). Notice by electronic transmission shall be deemed given: (1) if by facsimile telecommunication, when directed to a number at which the stockholder has consented to receive notice; (2) if by

electronic mail, when directed to an electronic mail address at which the stockholder has consented to receive notice; (3) if by a posting on an electronic network together with separate notice to the stockholder of such specific posting, upon the later of (A) such posting and (B) the giving of such separate notice; and (4) if by any other form of electronic transmission, when directed to the stockholder (§232(b)).

In Maryland, a corporation is permitted to send a single notice to stockholders sharing a single address, without an advance notice requirement, unless a stockholder requests otherwise in writing or by electronic transmission (§2-504.1(a)). By contrast, in Delaware, any notice given by the corporation will be effective if given by a single notice to stockholders who share an address, provided that the stockholders at the address have consented to receiving a single notice; a stockholder may revoke such consent by giving written notice to the corporation (§233(a)). Any stockholder who fails to object in writing to the corporation, within 60 days of having been given written notice by the corporation of its intention to send the single notice, will be deemed to have consented to receiving such single notice (§233(b)). In Maryland, the single notice may be in writing or by electronic transmission (§2-504.1(a)); in Delaware, the single notice must be written (§233(a)).

In both states, a written or electronically transmitted waiver of notice may be delivered by a stockholder either before or after the meeting (§2-504(e)(1); §229). Delaware (§229) provides that the waiver of notice, whether for a special or regular meeting, need not specify the purpose of the meeting or the business to be transacted, unless required by the certificate of incorporation or by the bylaws. Also, the attendance at any meeting by a stockholder in person or by proxy constitutes a waiver of notice (§2-504(e)(2); §229) unless, as provided by the Delaware statute (§229), the stockholder attends a meeting for the express

purpose of objecting at the beginning of the meeting to the transaction of business on the grounds that the meeting was not lawfully called.

12. Consent to Action in Lieu of Meeting

Both Delaware (§228) and Maryland (§2-505) permit stockholders to take action without a meeting. In Delaware (§228(a)), unless the certificate of incorporation provides otherwise, the stockholders entitled to vote on any matter merely need to sign a written consent which sets forth the action to be taken. The written consent may be in the form of a telegram, cablegram or other electronic transmission, provided that written consent given in such a manner is delivered with information from which the corporation can determine that the consent was transmitted by the stockholder and the date the consent was transmitted (§228(d)(1)). The action may be taken without a meeting, notice, waiver of notice or vote. The minimum signatures necessary are those of the holders of outstanding stock having not less than the minimum number of votes necessary to authorize or take the action if all shares entitled to vote on the matter were present and voted at a meeting. Unless the vote is unanimous, the corporation must give prompt notice of the action to all stockholders who did not give their written consent and who, if the action had been taken at a meeting, would have been entitled to notice of the meeting if the record date for such meeting had been the date that written consents signed by a sufficient number of holders or members to take the action were delivered to the corporation (§228(e)). Any person executing a consent may instruct that the consent will be effective at some future time provided that such delay does not exceed 60 days (§228(c)).

In Maryland (§2-505(a)), the consent to action in lieu of a meeting must be given in writing or by electronic transmission by the holders of all outstanding shares entitled to vote on the matter and filed in paper or electronic form with the records of the stockholders'

meetings. In addition, unless the charter requires otherwise, the holders of any class of stock, other than common stock entitled to vote generally in the election of directors, may take action or consent to any action by delivering, in writing or by electronic transmission, consent of the stockholders entitled to cast not less than the minimum number of votes that would be necessary to authorize or take the action at a stockholders' meeting if the corporation gives notice of the action to each holder of the class of stock not later than ten days after the effective time of the action (§2-505(b)(1)). If authorized by the charter, holders of common stock entitled to vote generally in the election of directors may take action or consent to any action by delivering, in writing or by electronic transmission, consent of the stockholders entitled to cast at least the minimum number of votes that would be necessary to authorize or take the action at a meeting of stockholders if the corporation gives notice of the action within ten days after its effective date to each holder of the class of common stock and to each stockholder who, if the action had been taken at a meeting, would have been entitled to notice of the meeting (§2-505(b)(2)). A written consent may not take effect unless written consents signed by a sufficient number of stockholders to take action are delivered to the corporation within 60 days after the date of the earliest consent (§2-505(f)(1)). The board of directors is authorized to adopt reasonable procedures for delivering consents in lieu of holding a stockholders' meeting (§2-505(e)).

Both Maryland and Delaware permit any person executing a consent to instruct that the consent will be effective at some future time provided that such delay does not exceed 60 days (§§2-505(f)(2)(i), 2-505(f)(2)(ii); §228(c)). In Delaware, if evidence of the instruction or provision is given to the corporation, the specified future time will serve as the date of signature (§228(c)). In Maryland, if the person is a stockholder at the specified future time and did not revoke the consent prior to that time, the consent shall be deemed to have been given at the

specified future time (§2-502(f)(2)(iii)). The Maryland and Delaware statutes provide that any such consent is revocable prior to the specified future time, unless otherwise provided ((§2-505(f)(3); §228(c)).

13. Record Date and Stockholders List

Under the Maryland statute, a record date may be fixed by either the bylaws (§2-511(b)) or the board of directors (§2-511(a)), but must not be more than 90 days (and, in the case of a meeting of stockholders, not less than ten days) prior to the date on which the action requiring the determination will be taken (§2-511(b)). Shares of a corporation's own stock acquired by the corporation between the record date for a meeting of stockholders and the time of the meeting may be voted at the meeting by the holder of record as of the record date (§2-310(a)(3)). Under the Delaware statute (§213(a)), the board of directors may fix a record date, which shall not be less than ten nor more than 60 days prior to the meeting or the taking of any action. The board of directors may separate the record date for determining the stockholders entitled to vote at a meeting from the record date for determining those stockholders entitled to notice of the meeting (§213(a)). If the record date is not fixed by either the board of directors or the bylaws, the Delaware statute sets forth methods by which the record date is to be determined and includes provisions for the closing of the stock transfer books for a stated period of time to determine which stockholders are entitled to receive notice, to vote or to receive a dividend (§213(b)).

In lieu of fixing a record date, Maryland provides that, unless the bylaws provide otherwise, the directors may provide that the stock transfer books shall be closed for a stated period not to exceed 20 days (§2-511(a), (b)(2)). In the case of a meeting of stockholders, the record date or the closing of the transfer books shall be at least ten days before the meeting date

(§2-511(b)(3)).

If no record date is fixed and if the stock transfer books are not closed, Maryland provides that (1) the record date for the determination of stockholders entitled to notice shall be at the close of business on the day on which notice of the meeting is mailed or the 30th day before the meeting, whichever is later (§2-511(c)(1)), and (2) the record date for determining stockholders entitled to receive a dividend or an allotment of rights shall be at the close of business on the day on which the resolution of the directors declaring the dividend or allotment of rights is adopted, as long as this date shall not be more than 60 days after the adoption of the resolution (§2-511(c)(2)). Prior to being convened, a meeting of stockholders may be postponed to a date not more than 120 days after the original record date (§2-511(d)(2)). Once properly convened, a meeting of stockholders may be adjourned to a date not more than 120 days after the original record date (§2-511(d)(1)).

Delaware (§213(a)) provides that, if no date is fixed, the record date for determining stockholders entitled to receive notice of or to vote at a meeting of stockholders shall be at the close of business on the day next preceding the day on which notice is given. If notice is waived, the record date shall be at the close of business on the day next preceding the day on which the meeting is held. The record date for determining stockholders entitled to express written consent to corporate action without a meeting, when no prior action by the board of directors is necessary, shall be the date of the first written consent (§213(b)). The record date for determining stockholders for any other purpose shall be at the close of business on the day on which the board of directors adopts the resolution relating thereto (§213(c)). A determination of stockholders of record entitled to notice or to vote at a meeting of stockholders shall apply to any adjournment of the meeting, provided, however, that the board of directors may fix a new record

date for an adjourned meeting (§213(a)). If a meeting is adjourned for more than 30 days, the corporation must provide a new notice of the meeting to stockholders. This 30-day period is tied to the date of the adjournment, not to the record date (§222(c)).

Delaware (§219) provides that ten days before every meeting, the corporation must prepare and make available for inspection by the stockholders a list of stockholders as of the record date. This list must be arranged alphabetically and show the name, the address and the number of shares registered for each stockholder; however, the corporation is not required to include electronic mail addresses or other electronic contact information in the list. In addition, the list must be open to the examination of any stockholder for a period of at least ten days prior to the meeting on a reasonably accessible electronic network, or during ordinary business hours at the principal place of business of the corporation. The statute (§219(b)) further provides that if the corporation, or an officer or agent thereof, refuses to permit examination of the list by a stockholder, such stockholder may apply to the Court of Chancery for an order to compel the corporation to permit such examination with the burden of proof being on the corporation to establish that the examination such stockholder seeks is for a purpose not germane to the meeting. The statute (§219(b)) also authorizes the court to (a) order the corporation to permit examination of the list upon such conditions as the court may deem appropriate and (b) make such additional orders as may be appropriate, including, without limitation, postponing the meeting or voiding the results of the meeting. Finally, the statute permits stock lists to be created and maintained on electronic databases and networks, such as blockchain and other similar technologies. Maryland provides that any one or more persons who for at least six months have been record holders of at least five percent of any class of stock are entitled (a) to inspect and copy the stock ledger and (b) if the corporation does not maintain its stock ledger at its principal

office, to request in writing a list of stockholders. Within 20 days after receipt of a written request for a stockholder list, the corporation must make available a verified list setting forth its stockholders (including their addresses and numbers of shares) (§2-513).

#### 14. Proxies

Both Maryland (§2-507(b)) and Delaware (§212(b)) provide that a stockholder entitled to vote at a meeting may authorize another person to act for him by signing a written authorization in the form of a proxy. Neither statute specifies the form or content of a proxy, except for limiting its duration. In the case of a Maryland corporation, a proxy shall not be valid for more than eleven months from its date, unless otherwise provided in the proxy (§2-507(b)(2)). A proxy may be revoked by a stockholder of a Maryland corporation at any time, unless the proxy states that it is irrevocable and the proxy is coupled with an interest in the stock to be voted under the proxy, an interest as a party to a voting agreement created in accordance with §2-510.1 or another general interest in the corporation or its assets or liabilities (§2-507(d)). In the case of a Delaware corporation (§212(b)), the proxy is valid for three years, unless the proxy provides for a longer period, and it shall be irrevocable if, and only so long as, it is coupled with an interest sufficient in law to support an irrevocable power. Both Maryland (§2-507(c)(3)) and Delaware (§212(c)(2)) provide that a stockholder of record may grant a proxy by telegram, cable or any other electronic means. Maryland also provides that a stockholder of record may grant a proxy by electronic mail or any other telephonic means (§2-507(c)(3)). Delaware requires that sufficient information be provided in the transmission from which it can be determined that the transmission was authorized by the stockholder. If the transmission is determined to be a valid proxy, the person making the determination must specify the information upon which he relied (§212(c)(2)). In Delaware, an action to interpret, apply,

enforce or determine any provision of a proxy may be brought in the Court of Chancery, except to the extent that a statute confers exclusive jurisdiction on a court, agency or tribunal other than the Court of Chancery (§111).

In Delaware, bylaws may provide that if the corporation solicits proxies with respect to an election of directors, the corporation may be required to include in its proxy materials one or more nominees submitted by stockholders in addition to individuals nominated by the board of directors. The bylaws may impose any lawful condition on the right of access to the corporation's proxy materials, including a minimum level of stock ownership or duration of ownership (§112). The bylaws may also require the corporation to reimburse proxy solicitation expenses incurred by a stockholder. Any lawful condition may be imposed on such a right to reimbursement as well (§113). Maryland does not have a similar provision.

#### 15. Voting

A quorum is the presence at a meeting, either in person or by proxy, of the holders of the number of shares necessary to transact business. Both Maryland (§2-506(a)(1)) and Delaware (§216) provide that, in the absence of a contrary provision in the charter or certificate of incorporation, a quorum shall consist of the holders of a majority of all of the shares entitled to vote at the meeting. In Maryland, unless the charter or bylaws provide otherwise, a quorum for a corporation (a) with a class of equity securities registered under the Exchange Act and at least three directors who are not officers or employees of the corporation or (b) registered as an open-end investment company under the 1940 Act is a majority of all the votes entitled to be cast and a quorum provision in the bylaws may not be for less than one-third of the votes entitled to be cast at the meeting (§2-506(c)). Delaware provides that in no event shall a quorum consist of less than one-third of the shares entitled to vote at the meeting (§216).

Maryland (§2-507(a)) and Delaware (§212(a)) provide that unless the charter or certificate of incorporation provides otherwise, each share is entitled to one vote. Maryland provides that once a quorum is deemed present at a meeting, a majority of votes cast for any action shall be the vote of the stockholders, except in certain specified situations (§2-506(a)(2)); in Delaware, the vote of a majority of shares present (in person or by proxy) and entitled to vote constitutes the vote of the stockholders (§216(2)). In Maryland, situations which require the affirmative vote of two-thirds of all the votes entitled to be cast include consolidations, mergers, share exchanges and transfers of assets (§3-105(d)), dissolution (§3-403(d)), revival or amendment of charter (§§3-501(d), 2-604(d)), reductions in stated capital (§2-306(b)(4)) and removal of directors if the corporation has elected to be subject to Section 3-804(a). In addition, unless the charter or bylaws provide otherwise, a plurality of all the votes cast is sufficient to elect a director (§2-404(d)). The charter of a Maryland corporation, however, may provide for a greater or lesser proportion of votes than is required by the provisions above, but the proportion may never be less than a majority of all votes entitled to be cast on such matters (§2-104(b)(4), (5)). In Delaware (§216), the certificate of incorporation may provide that a vote of more than a majority of shares is required for certain matters; furthermore, classes of stock may be entitled to vote separately on any matter (§2-506(b); §216(4)).

Maryland (§2-507(a)) permits the charter to deny voting rights to shares of any class of stock while Delaware (§242(b)(2)) prohibits denying voting rights to shares of a class in connection with an amendment to the certificate of incorporation if the amendment would change the aggregate number of authorized shares or the par value of the class or would adversely affect the powers, preferences or special rights of the class.

Usually, the bylaws specify the form of voting. Both elections of directors of

Delaware corporations (§211(e)) and approvals of agreements of merger or consolidation of domestic non-stock, non-profit corporations (§255(c)) must be conducted by ballot, unless otherwise provided in the certificate of incorporation. When voting for members of the board of directors, ballots may be submitted by means of electronic transmission (§211(e)).

Delaware requires a corporation, the securities of which are publicly traded or which has over 2,000 stockholders, to appoint inspectors of election to determine the number and voting power of shares represented at the meeting and to tabulate ballots and proxies (§231). Each inspector must execute an oath of impartiality and competency (§231(a)). The inspectors may also determine the validity of proxies and ballots (§231(d)). They may examine documents or any other “reliable information,” including corporate books and records, to reconcile proxies or ballots cast by banks and brokers which might constitute “overvotes” – *i.e.*, proxies and ballots representing more votes than the proxyholder is authorized to cast or more votes than the stockholder holds of record. Maryland has no similar inspector provision.

In both Maryland (§3-105(d)) and Delaware (§146), a corporation may agree to submit a matter to a vote of its stockholders whether or not the board of directors determines at any time subsequent to approving the matter that the matter is no longer advisable and recommends that the stockholders reject or vote against the matter.

#### 16. Voting Trusts and Other Voting Agreements

Both Maryland (§2-510) and Delaware (§218) authorize the creation of voting trusts of unlimited duration.<sup>1</sup> Maryland permits two or more stockholders to enter into a written

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<sup>1</sup> In 1994, Delaware enacted legislation which amended §218 by removing a ten-year durational limit for voting trusts. 69 Del. Laws 264 (1994). This amendment became effective on July 1, 1994; however, it does not apply to any voting trust agreement, voting agreement or any amendment thereto entered into prior to July 1, 1994 unless (i) the voting trust agreement, voting agreement or amendment thereto had not expired as of July 1, 1994, and (ii) the voting trust agreement, voting agreement or amendment thereto provides that it will or may last beyond the ten-year period formerly permitted under §218 and expressly indicates that the parties intended to be bound by changes in the law increasing the permitted duration of such agreement or amendment.

voting agreement that specifies how the stock held by the parties will be voted, whether (1) as stated in the agreement, (2) as the parties agree or (3) according to a procedure outlined in the agreement (§2-510.1).

In Delaware, an action to interpret, apply, enforce or determine any provision of a voting trust or other voting agreement may be brought in the Court of Chancery except to the extent that a statute confers exclusive jurisdiction on a court, agency or tribunal other than the Court of Chancery (§111).

17. Conduct of Meetings and Minutes

The corporation statutes do not delineate a procedure for the conduct of stockholders' meetings; instead, they generally provide that the holding of such meetings shall be governed by the bylaws (§2-501; §211(a)). Maryland provides that, unless the charter or bylaws provide otherwise, the board of directors has the sole power to fix the record date for determining stockholders entitled to request a special meeting of the stockholders and the record date for determining stockholders entitled to notice of and to vote at the meeting and the date; time and place, if any, and the means of remote communication, if any, by which stockholders and proxy holders may be considered present in person and may vote at the special meeting (§2-502(e)). Delaware (§142(a)) provides that an officer of the corporation shall record the proceedings of meetings of the stockholders, and these records may be kept on, or by means of, or be in the form of, any information storage device or method or one or more electronic network or database (including the use of blockchain technology), provided that the records so kept can be converted into clearly legible paper form within a reasonable time (§224). Maryland (§2-111(a)(2)) provides that each corporation shall keep minutes of the proceedings of its stockholders; these records may be in written form or in any other form which can be converted

within a reasonable time into written form for visual inspection (§2-111(b)). Maryland also provides that the president or other executive officer shall prepare annually a statement of the affairs of the corporation, which includes a balance sheet and a financial statement of operations for the preceding fiscal year (§2-313(a)).

18. Stockholder's Right of Inspection

Any stockholder of record of a Delaware corporation shall, upon written demand under oath stating a proper purpose, have the right during usual business hours to inspect and copy the corporation's books, records, stock ledger and stockholder list (§220(b)). In addition, a stockholder of record of a Delaware corporation shall, upon written demand under oath stating a proper purpose, have the right during usual business hours to inspect and copy the books and records of a subsidiary of the corporation, to the extent that (1) the corporation has actual possession and control of such records of such subsidiary or (2) the corporation could obtain such records through the exercise of control over such subsidiary, provided that as of the date of the making of the demand (A) stockholder inspection of such books and records of the subsidiary would not constitute a breach of an agreement between the corporation or the subsidiary and a person or persons not affiliated with the corporation and (B) the subsidiary would not have the right under the law applicable to it to deny the corporation access to such books and records upon demand by the corporation (§220(b)). If the corporation refuses or does not reply to the stockholder's request within five business days, the stockholder may apply to the Delaware Court of Chancery for an order to compel inspection (§220(c)). Delaware also extends a similar guaranteed right of inspection to corporate directors (§220(d)).

A Delaware certificate of incorporation may provide that holders of any bonds, debentures or other obligations shall be deemed to be stockholders and shall have the right to

vote and to inspect the corporation's books and records, as provided in the statute (§221).

During usual business hours, any stockholder (or holder of a voting trust certificate) of a Maryland corporation, on written request, may inspect and copy the bylaws, minutes, annual reports or voting trust agreements deposited with the corporation at the corporation's principal office (§2-512(a)). Such individual may also make a written request for a statement by the corporation showing all stock and securities issued and consideration received by the corporation within the preceding twelve months; this sworn statement must be prepared within 20 days of the request (§2-512(b)(2)).

Additionally, one or more persons who together are, and for at least six months have been, stockholders of record (or holders of voting trust certificates) of at least five percent of the outstanding stock of any class of a Maryland corporation may (1) inspect and copy the corporation's books of account and its stock ledger during usual business hours, upon written request, (2) present to any officer or resident agent of the corporation a written request for a statement of its affairs, setting forth in reasonable detail the corporation's assets and liabilities as of a reasonably current date and (3) in the case of any corporation which does not maintain a stock ledger at its principal office, present to any officer or resident agent of the corporation a written request for a list of its stockholders, setting forth the name and address of each stockholder and the number of shares of each class which the stockholder holds. Within 20 days after such a request is made, the corporation shall prepare this information and have it available on file at its principal office (§2-513).

#### 19. Liabilities of Stockholders

The certificate of incorporation of a Delaware corporation may include a provision imposing personal liability on its stockholders to a specified extent for the debts of the

corporation (§102(b)(6)) in addition to liability for the unpaid balance of a subscription for stock (§162). In the absence of such a provision, the stockholders will not be personally liable for corporate debts, except by reason of their own conduct or acts (§102(b)(6)).

Stockholders pledging their stock as collateral may have their shares attached and sold, but only if the stockholder is the record owner on the books of the corporation. Further, if certificated securities are to be attached, the attachment must meet the requirements set forth in §8-112 of the Delaware Uniform Commercial Code (6 Del. C. §8-112) (§324).

In Maryland, a stockholder or subscriber for stock of a corporation is not obligated to the corporation or its creditors with respect to the stock, except to the extent that the subscription price or other agreed consideration for the stock has not been paid or liability is imposed under any provision of the Corporations and Associations Article other than Section 2-215.

Both Maryland and Delaware prohibit corporate charters (§2-113(a))/certificates of incorporation ((§102(f)) and bylaws (§2-113(a) and §109(b), respectively) of a stock corporation from including any provision imposing liability on a stockholder for the expenses or attorney fees of the corporation or any other party relating to an “internal corporate claim” (see sections 1 and 6, *supra*). In Maryland, this provision also applies to trust REITs (§8-601.1).

### III. DIRECTORS AND OFFICERS

#### 20. Board of Directors

The business and affairs of a corporation are managed under the direction of its board of directors (§2-401(a); §141(a)). In Maryland, this management responsibility is expressly extended to all business and affairs, whether or not in the ordinary course (§2-401(a)). The board of directors of a Delaware corporation shall consist of one or more members, each of whom must be a natural person (§141(b)). The number of directors shall be fixed by or pursuant to the bylaws, unless the certificate of incorporation fixes the number of directors, in which case a change in the number of directors shall be made only by amendment of the certificate. Directors need not be residents or stockholders unless required by the certificate of incorporation or by the bylaws. The certificate of incorporation or the bylaws may also prescribe other qualifications for directors (§141(b)).

A Maryland corporation shall have at least one director (§2-402(a)). Subject to the provisions governing the minimum number of directors, the number of directors set by the charter may be altered by the bylaws to a number greater or lesser than that set by the charter (§2-402(c)(1)), unless the corporation has elected by its charter or bylaws or by resolution of its board of directors to be subject to Section 3-804(b), in which case the number of directors shall be fixed only by vote of the board of directors, regardless of any contrary provision in the charter or bylaws (§§3-802(a)(2), 3-804(b)). The bylaws may authorize a majority of the entire board of directors to alter within specified limits the number of directors set by the charter or the bylaws, but the action may not affect the tenure of office of any director (§2-402(c)(2)). Directors of a Maryland corporation need not be residents or stockholders (§2-403(b)); qualifications for serving as a director are established by the charter or the bylaws of the corporation (§2-403(a)).

Every director, as well as every nominee for director, must meet the qualifications required by the charter or the bylaws of the corporation (§2-403(a)).

In Maryland, the charter or the bylaws may divide the directors into classes and may provide for a term of office of not more than five years. The term of at least one class of directors, however, must expire each year (§§2-110(b), 2-404 (b)(2)(ii)). The board of directors of an eligible Maryland corporation may, notwithstanding contrary charter or bylaw provisions, divide its members into three classes, which must to the extent possible have the same number of directors. If the board of directors classifies its members in this way, it must, prior to the first annual meeting of stockholders after doing so, designate members to serve as Class I, Class II and Class III directors (§3-803(a)(1)), who then serve until the ends of these terms. In Delaware, the certificate of incorporation, an initial bylaw or the bylaws adopted by the stockholders may provide for up to three classes of directors, with the term of each class expiring each succeeding year so that the term of any class may not be more than three years (§141(d)). The provision of the certificate of incorporation or bylaws classifying the board of directors may provide that the classification takes effect at a later time and may authorize the board of directors to assign to a class each member of the board in office at the time the classification becomes effective (§141(d)).

Maryland also permits the terms of any class or series of stock to provide that the term of a director elected by that class or series may expire sooner than the next annual meeting of stockholders, *e.g.*, upon the end of the event which gave rise to the election of the director (§2-404(b)(1)(ii)).

Directors of a Delaware corporation are given both the specific authority to fix the compensation of the directors (§141(h)) and the power to adopt emergency bylaws resulting

from a national disaster (§110).

21. Election and Meetings of Directors

Both Maryland (§§2-501(a), 2-404(b)) and Delaware (§211(b)) provide that an annual meeting of stockholders shall be held for the election of directors. In Delaware, directors may be elected by unanimous written consent in lieu of an annual meeting. Directors may also be elected by less-than-unanimous written consent, provided all of the directorships to which directors could be elected at an annual meeting held at the effective time of such action are vacant and are filled by such action (§211(b)). Unless the charter or certificate of incorporation or the bylaws create classes of directors in which a separate class is elected to office each year (or a Maryland corporation has elected to be subject to Section 3-803 regarding the classification of directors), each director is elected annually to hold office until (1) his successor is duly elected and qualifies (§2-404(b)(1)(i)) or until his earlier resignation or removal (§141(b)), (2) under the Maryland statute, until the time provided in the terms of any class or series of stock pursuant to which such directors are elected (§2-404(b)(1)(ii)) or (3) under the Maryland statute, until the time the director no longer meets the qualifications required by the charter or bylaws at the time of his or her election if the charter or bylaws at that time provided for a director's termination for failure to meet such qualifications (§2-404(b)(1)(iii)). A director's term will not end prematurely if the qualifications in question were adopted after such director's election.

Before the first annual meeting of stockholders after a Maryland corporation elects to be subject to the provisions of Title 3, Subtitle 8, the board of directors must designate by resolution, from among its members, directors to serve as Class I, Class II and Class III directors (§3-803(a)(1)). To the extent possible, the classes shall have the same number of directors (§3-803(a)(2)). Class I directors will serve until the first annual meeting of

stockholders after the date on which the corporation elects to be subject to the provisions and until their successors are elected and qualify (§3-803(b)). Class II and Class III directors will serve until the second and third following annual meetings, respectively, and until their successors are elected and qualify (§3-803(c), (d)). At each annual meeting, the successors to the class of directors whose term expires at that meeting will be elected to hold office for a term continuing until the annual meeting held in the third year following the year of their election and until their successors are elected and qualify (§3-803(e)). In Maryland (§2-404(d)) and Delaware (§216(3)), a plurality of all of the votes cast at a meeting at which a quorum is present is sufficient to elect a director. In Delaware, the certificate of incorporation or the bylaws may specify the vote that shall be necessary for the transaction of any business (§216); however, in the absence of such a provision, action may be taken by the affirmative vote of the majority of shares present in person or represented by proxy.

If the charter of a Maryland corporation (§2-104(b)(7); §2-404(c)) or the certificate of incorporation of a Delaware corporation (§214) provides for cumulative voting, each share otherwise entitled to one vote has one vote multiplied by the number of directors to be elected. Thus, the total votes to which each stockholder is entitled may be voted for one director or distributed in any manner. Cumulative voting is not otherwise permitted by these statutes, so that, in the absence of specific provision for cumulative voting, each share is entitled to one vote and may be voted once for each position on the board to be filled.

Both Maryland (§2-409(a)) and Delaware (§141(g)) provide that meetings of directors may be held at any place, either within or without the State, as designated in the bylaws. In Maryland, a meeting of directors may also be held by means of remote communication (§2-409(a)). Unless otherwise restricted in the charter or certificate of

incorporation or the bylaws, members of the board of directors may participate in a meeting of the board by means of a conference telephone or other communications equipment if all persons participating in the meeting can hear each other (§2-409(d); §141(i)).

## 22. Vacancies

In Maryland, unless the charter or bylaws provide otherwise, a majority of the remaining directors may appoint a director to fill a vacancy which results from any cause except an increase in the number of directors (§2-407(b)(1)(i)) and a majority of the entire board may fill a vacancy which results from an increase in the number of directors (§2-407(b)(1)(ii)). However, if the corporation has elected by its charter or bylaws or by a resolution of its board of directors to be subject to Section 3-804(c), each vacancy, whether resulting from an increase in the size of the board or the death, resignation or removal of a director, may be filled only by the affirmative vote of a majority of the remaining directors in office, even if the remaining directors do not constitute a quorum and regardless of any contrary provision in the charter or bylaws (§§3-802(a)(2), 3-804(c)). In Delaware, unless the certificate of incorporation or bylaws provide otherwise, a majority of the directors then in office may fill any vacancy (§223(a)). If the stockholders of any class or series are entitled separately to elect one or more directors, a majority of the remaining directors elected by that class or series or the sole remaining director elected by that class or series may fill a vacancy among the number of directors elected by that class or series (§2-407(b)(2); §223(a)(2)). The appointed director holds office until the next annual meeting held for the election of directors (§2-407(c)), unless appointed by the board pursuant to Section 3-804(c), in which case the appointed director holds office for the remainder of the full term of the class of directors in which the vacancy occurred and until a successor is elected and qualifies (§3-804(c)(3)). In Delaware, directors appointed under Section 223(a)

“shall hold office until the next election of the class for which such directors shall have been chosen, and until their successors shall be elected and qualified” (§223(b)). Maryland (§2-407(a)(1)) also provides that, unless the corporation has elected to be subject to Section 3-804(c), if a vacancy occurs in the board of directors because of the removal of a director (§2-406), the stockholders may elect a successor to fill any resulting vacancies for the unexpired term of the director who was removed. If stockholders of any class or series are entitled to separately elect one or more directors, the stockholders of that class or series may elect a successor to fill a vacancy resulting from the removal of a director elected by that class or series (§2-407(a)(2)).

Delaware (§223(a)) provides that, if there are no directors in office, any officer or stockholder, or the Court of Chancery, upon application, may call a special stockholders’ meeting to elect directors. If, at the time of filling a vacancy or a newly-created directorship, the directors then in office constitute less than a majority of the whole board, any stockholder(s) holding at least ten percent of the voting stock of the corporation may petition the Court of Chancery to order an election to be held by the stockholders in order to fill the vacancy or to replace directors chosen by the directors then in office (§223(c)). In addition, Delaware (§225) provides that, upon application by any stockholder or director, or any officer whose title to office is contested, or any member of a corporation without capital stock, the Court of Chancery may determine the validity of any election, appointment, removal or resignation of any director or officer, or the court may determine the persons entitled to an office claimed by more than one person; if it is found that no valid election took place, the court may order an election to be held. Further, upon application of any stockholder or any member of a corporation without capital stock, or upon application of the corporation itself, the court may determine the result of any stockholders vote on a matter other than the election of directors or officers (§225(b)).

23. Removal and Resignation of Directors

In Maryland, one or more directors (including the entire board) may be removed, with or without cause, by the holders of a majority of the shares then entitled to vote in an election of directors, except as the power of removal (including the requisite vote) is otherwise provided in the charter of the corporation (§2-406(a)). If the board is classified, then a director may be removed only for cause, unless the charter provides otherwise (§2-406(b)). In Delaware, a director may be removed with or without cause except where: (i) the corporation has cumulative voting, in which case special procedural provisions apply, and (ii) the corporation has a classified board, in which case a director may only be removed for cause unless the certificate of incorporation provides otherwise (§141(k)(1)). Regardless of any lesser proportion of votes required by a provision in the charter or bylaws, the stockholders of a corporation may remove any director only by the affirmative vote of at least two-thirds of all the votes entitled to be cast by the stockholders generally in the election of directors, if the corporation has elected by its charter or bylaws or by a resolution of its board to be subject to Section 3-804(a) (§§3-802(a)(2), 3-804(a)). If the holders of any class or series of stock are entitled to elect one or more directors, a director elected by those holders may be removed without cause upon the affirmative vote of a majority of all of the votes of the class entitled to elect that director unless the charter or certificate of incorporation provides otherwise (§2-406(b)(1); §141(k)).

If a corporation has cumulative voting and less than the entire board is to be removed, no director may be removed without cause if the votes cast against his removal would be sufficient to elect him through cumulative voting at an election of the entire board, or, if there are classes of directors, at an election of the class of which he is a part (§2-406(b)(2); §141(k)(2)).

Delaware grants the Court of Chancery the power to remove directors when the court determines that such director or directors did not act in good faith and that judicial removal is necessary to avoid irreparable harm to the corporation. An application must be brought directly by or derivatively in the right of the corporation and must be preceded by either a felony conviction in connection with the duties of such director or directors to the corporation, or a prior judgment on the merits by a court of competent jurisdiction that one or more directors has committed a breach of loyalty in connection with the duties of such director or directors to that corporation (§225(c)).

Delaware (§141(b)) provides that the resignation of a director may be made effective at a specified time or upon the occurrence of an event or events, and that a director's resignation that is conditioned on the director failing to receive a specified vote for reelection as a director may be made irrevocable. In Maryland, a director may submit a resignation that provides the resignation will be effective at a later time or on the occurrence of an event and that the resignation is irrevocable on the occurrence of the event or upon the director failing to receive a specified vote for reelection (§2-406(c)). Delaware (§223(d)) also provides that, unless the certificate of incorporation or the bylaws provide otherwise, when one or more directors have resigned, effective at a future date, a majority of the directors then in office, including those who have resigned, shall have the power to fill the resulting vacancies. The appointments are effective upon the date of the resignations. In Maryland, if the corporation has elected to be subject to Section 3-804(c), notwithstanding contrary provisions in the charter or bylaws, each vacancy on the board of directors resulting from an increase in the size of the board or the death, resignation or removal of a director may be filled only by the affirmative vote of a majority of the remaining directors in office, even if the remaining directors do not constitute a quorum.

## 24. Quorum and Voting Requirements

Both Maryland (§2-408(b)) and Delaware (§141(b)) provide that, subject to contrary provisions in the charter or certificate of incorporation or the bylaws, a majority of directors shall constitute a quorum. Under these statutes, the charter, certificate of incorporation or bylaws may specify a greater or lesser quorum requirement; however, under both statutes, not less than one third of the board may be set as a quorum (§2-408(b)(2); §141(b)). In Maryland, a quorum may not be less than two directors if there are only two or three directors (§2-408(b)(2)(ii)). If only one director is authorized, Maryland law expressly states that he or she shall constitute a quorum (§2-408(b)(2)(i)). Delaware law implicitly provides this through the quorum requirements of Section 141(b). Once a quorum is present, Maryland (§2-408(a)) and Delaware (§141(b)) both provide that the vote of a majority of directors present shall be the act of the board unless the charter or certificate of incorporation, the bylaws or the statute itself otherwise provide.

In Maryland, the charter may provide that one or more directors or a class of directors shall have more or less than one vote per director on any matter (§2-408(e)(1)). In addition, if the charter provides that one or more directors shall have more or less than one vote per director on any matter, every reference in the Corporations and Associations Article to a majority or other proportion of directors shall refer to a majority or other proportion of votes entitled to be cast by the directors (§2-408(e)(2)). Likewise, the voting powers of the directors of a Delaware corporation may be greater than or less than those of any other director or class of directors, whether or not such directors are separately elected by the holders of any class or series of stock (§141(d)). If the certificate of incorporation provides that directors elected by the holders of a class or series of stock shall have more or less than one vote per director on any

matter, every reference in Title 8 of the Delaware Code Annotated to a majority or other proportion of directors shall refer to a majority or other proportion of the votes of such directors (§141(d)). Further, Delaware law clarifies that if such a differential voting provision is contained in the certificate of incorporation, the greater or lesser voting power of a director also applies to voting by the director in any committees and subcommittees of the board, unless otherwise provided in the certificate of incorporation or the bylaws (§141(d)).

25. Notice and Waiver of Notice

Maryland (§2-409(b)) provides that notice of each meeting of the board of directors shall be given as provided in the bylaws, and that, unless otherwise provided in the bylaws, any notice must be in writing or delivered by electronic transmission and need not specify the purpose of the meeting. The required notice need not be given to a director who submits a written or electronically transmitted waiver of notice either before or after the meeting or who attends the meeting (§2-409(c)). Delaware sets forth no provisions with respect to notice; therefore, any requirements with respect to notice shall be as set forth in the bylaws.

26. Consent to Action in Lieu of Meeting

Both Maryland (§2-408(c)) and Delaware (§141(f)) permit the board of directors or any committee thereof to act without a meeting. Under the Maryland statute, directors or any committee of the board may act without a meeting if all of the members entitled to vote on the matter consent in writing or by electronic transmission (§2-408(c)(1)). This writing or electronic transmission must be filed with the minutes of the board or committee (§2-408(c)(2)). The Delaware statute permits directors and any committee of the board to act without a meeting if all of the members consent in writing or by electronic transmission, unless otherwise restricted by the certificate of incorporation or the bylaws (§141(f)). In both Maryland and Delaware, any

person, even if not a director at the time the consent is executed, may instruct that the consent is to be effective at some future time no later than 60 days after the consent is given (§§2-408(d)(1), 2-408(d)(2); §141(f)). If the person is then a director at the specified future time and did not revoke the consent prior to that time, the consent shall be deemed to have been given at the specified future time (§§2-408(d)(3)(i), (ii); §141(f)). In both states, the consent is revocable until the effective time, unless the consent provides otherwise (§2-408(d)(4); §141(f)).

27. Committees

Delaware (§141(c)) authorizes the directors to create one or more committees, each of which consists of one or more directors. Any Delaware corporation formed prior to July 1, 1996 is governed by Section 141(c)(1), unless it elects by resolution of a majority of the whole board to be governed by Section 141(c)(2). Under (c)(1), the board may, by resolution passed by a majority of the whole board, designate committees. Any such committee may exercise all of the powers of the whole board to the extent provided in a board resolution or in the bylaws; however, no committee may have the power to amend the bylaws, to take action to amend the certificate of incorporation or to recommend to the stockholders such actions as (1) an agreement of merger or consolidation, including merger or consolidation with non-stock corporations and other business entities, but not including parent-subsidary transactions contemplated by Section 253; (2) a plan to sell, to lease or to exchange all or substantially all of the corporation's assets or (3) a plan to dissolve the corporation. A committee may recommend to the stockholders the election and removal of directors (§141(c)(2)). A committee may not declare dividends, nor may it authorize the issuance of stock, unless it is specifically given such powers. A committee may adopt a certificate of ownership and merger pursuant to Section 253, Delaware's short-form merger statute, if such action is expressly authorized by the board

resolution creating the committee or in the corporation's certificate of incorporation or bylaws (§141(c)(1)). Corporations formed after July 1, 1996 are governed by Section 141(c)(2). Committees do not have to be formed by a majority of the whole board and may exercise all of the powers of the whole board to the extent provided in a board resolution or in the bylaws; however, no committee may have the power to amend the bylaws or to approve, adopt or recommend to the stockholders any matter that must be submitted to the stockholders for approval. Unless otherwise provided in the certificate of incorporation, the bylaws or the resolution of the board of directors designating the committee, any committee of the board of a Delaware corporation, regardless of when the corporation was formed, may create one or more subcommittees consisting of one or more members of the committee and delegate to that subcommittee any or all powers and authority of the committee (§141(c)(3)). A majority of the directors then serving on a committee or subcommittee constitutes a quorum for the transaction of business, unless the certification of incorporation, the bylaws, a resolution of the board of directors or a resolution of a committee provides for a greater or lesser number, which cannot be less than one-third of the directors then serving on the committee or subcommittee (§141(c)(4)). A majority vote of the members of a committee or subcommittee present at a meeting at which a quorum is present is considered the act of the committee or subcommittee, unless the certificate of incorporation, the bylaws, a resolution of the board of directors or a resolution of a committee that created the subcommittee requires a greater number (§141(c)(4)).

Maryland provides that the directors may create one or more committees composed of one or more directors (§2-411(a)(1)), and that any such committee may exercise any of the powers of the entire board to the extent provided either in a board resolution or in the bylaws (§2-411(a)(2)), including the power to authorize distributions (defined to include a

dividend, redemption or purchase of stock) and to fix the amount and other terms of the distribution. However, a committee may not be delegated the power to amend the bylaws, to recommend any action requiring stockholder approval (other than the election of directors), to approve a merger or share exchange which does not require stockholder approval or to issue stock in a manner different than as provided in Section 2-411(b) (§2-411(a)(2)). If the board of directors of a Maryland corporation has given general authorization for the issuance of stock providing for or establishing a method or procedure for determining the maximum number or the maximum aggregate offering price of shares to be issued, the committee may, in accordance with that general authorization or any stock option or other plan or program adopted by the board, authorize or fix the terms of stock subject to the classification and the terms on which any stock may be issued (§2-411(b)). Notwithstanding the power of the board of directors to create committees, the charter or bylaws of a Maryland corporation, or any agreement to which the corporation is a party and which has been approved by the board of directors, may provide for the establishment of one or more standing committees along with the composition of membership, the qualifications and the voting and other rights of members of any such committee (§2-411(e)).

Both Maryland (§2-411(c)) and Delaware (§141(c)) provide that the bylaws may authorize the members of a committee present at any meeting, whether or not they constitute a quorum, to appoint a director to act in the place of an absent member. Under Maryland law, the appointment of any committee, the delegation of authority to it or any action by it under that delegated authority does not *per se* constitute compliance by a director not a member of the committee with the statutory standard of care required of directors (§2-411(d)).

Under the laws of both Maryland (§2-409) and Delaware (§141), unless otherwise

provided in the charter or certificate of incorporation, the bylaws or a resolution of the board, meetings of a committee are generally conducted in the same manner as meetings of the board. A quorum is necessary to transact business. Action taken by a majority of the quorum is the action of the committee. Meetings of the committee may be held upon written or electronic waiver of notice (§2-409(c)), and members may participate by means of conference telephone or other communications equipment if permitted by the corporation's governing instrument (§2-409(d); §141(i)).

28. Standard of Conduct

In Maryland, a director is required to perform his duties in good faith, in a manner he reasonably believes to be in the corporation's best interests and with the care of an ordinarily prudent person in a like position under similar circumstances (§2-405.1(c)). A present or former director who complies with this standard is immune from liability in any action based on an act of the director (§2-405.1(e); CJP, §5-417). A director's duty does not require him or her to act to accept, recommend or respond on behalf of the corporation to any proposal by an acquiring person; to act to authorize the corporation to redeem any rights under, modify or render inapplicable a stockholder rights plan; to act to elect or refrain from electing on behalf of the corporation to be subject to any or all of the unsolicited takeover provisions of Subtitle 8 of Title 3; to act to make a determination under the business combination or control share acquisition statutes; or to act (or fail to act) solely because of the effect that the action (or failure to act) may have on an acquisition or potential acquisition of control of the corporation or because of the amount or type of any consideration that may be offered or paid to stockholders in an acquisition (§2-405.1(f)). In Maryland, a director's act is presumed to be in accordance with the standard of conduct (§2-405.1(g)), and a director is subject to no higher duty or greater scrutiny because his

or her act relates to or affects an acquisition or potential acquisition of control of a corporation or any other transaction or potential transaction involving the corporation (§2-405.1(h)). The Maryland statute is the sole source of duties of a director to the corporation or the stockholders of the corporation, whether or not a decision has been made to enter into an acquisition or a potential acquisition of control of the corporation or enter into any other transaction involving the corporation (§2-405.1(i)). The statute applies to any act of a director, including an act as a member of a committee of the board of directors (§2-405.1(i)). Delaware has no comparable statute; however, as to the issuance of a dividend or redemption of stock by a Delaware corporation, directors are “fully protected” if they rely in good faith upon the books, accounts and records of the corporation and upon the statements prepared by its officers, by an independent certified public accountant or by an appraiser selected with reasonable care (§172).

Both Maryland and Delaware (§2-405.1(d); §141(e)) permit directors to rely on any information, opinion, report or financial statement prepared by an officer or employee, a lawyer, a certified public accountant or other similar expert or a committee of the board that the director reasonably believes to merit confidence.

## 29. Liabilities of Directors

Directors of Maryland (§2-312(a)) and Delaware (§174(a)) corporations who approve the payment of unlawful dividends, redemptions or stock purchases are liable to the corporation (and, in Delaware, to the corporation’s creditors) for the unlawful portion of the payment.

In Maryland, a director may be liable to the corporation for unlawful distributions only if the director also violated the standard of conduct for directors under Section 2-405.1 (§2-312(a)); in Delaware, a director is liable only if the violation was “willful or negligent”

(§174(a)). In both states (§2-312(b); §174(a)), any director who is held liable for amounts unlawfully paid is entitled to contribution from stockholders who accepted the dividend or asset with knowledge of the violation of the law. In Delaware (§174(a)), directors are liable for a period of six years after such event for the full amount plus interest, unless the director recorded his dissent in the corporate minutes. In Maryland (§2-216(c)), directors also are criminally liable if they authorize or consent to the issuance of unauthorized stock of the corporation.

In both states, a corporation may, in its charter, eliminate or limit a director's (and, in Maryland, an officer's) personal liability to the corporation and its stockholders for monetary damages with certain exceptions. Under Delaware law, however, no such provision may eliminate or limit a director's liability for (i) breaching his duty of loyalty, (ii) failing to act in good faith, (iii) engaging in intentional misconduct, (iv) knowingly violating a law, (v) approving an unlawful dividend, redemption or stock repurchase under Section 174 or (vi) obtaining an improper personal benefit (§102(b)(7)).

In Maryland, under Section 2-405.1(e), a present or former director who performs his or her duties in accordance with the standard of conduct described in Section 2-405.1(c) is immune from liability in any action based on an act of the director (CJP, §5-417). Furthermore, under Section 5-418 of the CJP, a corporation's charter may either expand or limit directors' and officers' liability to the corporation or stockholders (§2-405.2). The only exceptions to the liability limitation permitted in the charter are: (a) actual receipt of an improper benefit or profit in money, property or services and (b) active and deliberate dishonesty established by a final judgment as material to the cause of action (CJP, §5-418). In both states, the corporation may only limit liability for monetary damages in suits by the corporation or the stockholders (and not by third parties) and may not limit the availability of equitable remedies.

30. Indemnification

Delaware (§145) and Maryland (§2-418) both authorize indemnification for certain corporate representatives with regard to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative. Both statutes provide for the circumstances in which indemnification is mandatory and for the circumstances in which it is merely permissive. In Delaware, indemnification is available to directors, officers, employees and agents of the corporation. Unless limited by the charter, an officer of a Maryland corporation who is not a director is entitled to indemnification and advance of expenses “to such further extent, consistent with law, as may be provided by” the charter, the bylaws, board resolution or contract (§2-418(j)(3)).

In Delaware, indemnification is mandatory where a present or former director or officer is successful on the merits or otherwise in any suit or matter covered by the indemnification statute (§145(c)). The Delaware statute covers expenses (including attorneys’ fees) actually and reasonably incurred by the director or officer in the matter. Permissive indemnification (§145(a), (b) and (d)) is authorized upon a determination that the corporate representative met the applicable standard of conduct required, *i.e.*, that he or she acted in good faith and in a manner reasonably believed to be in, or not opposed to, the best interests of the corporation and that, with respect to any criminal proceeding, he or she had no reason to believe the conduct was unlawful. In a proceeding other than an action by or in the right of the corporation, permissive indemnification may include judgment, fines, settlements and expenses; in a suit by or in the right of the corporation, indemnification may only cover expenses incurred in the defense or settlement of the action and no indemnification may be made if the individual was adjudged to be liable to the corporation unless approved by a court. Thus, amounts paid in

settlement of a derivative proceeding may not be indemnified in Delaware (§145(b)).

Furthermore, in Delaware, the determination that the standard of conduct for indemnification has been met, with respect to a person who is a director or officer of the corporation at the time of such determination, is to be made (1) by the board of directors by a majority vote of the directors who are not parties to the proceeding, whether or not they constitute a quorum of the board, (2) by a committee of directors who are not parties to the proceeding designated by majority vote of such directors, whether or not they constitute a quorum of the board, (3) by independent legal counsel in a written opinion if there are no such directors or if such directors so direct or (4) by the stockholders in accordance with the charter or the bylaws of the corporation (§145(d)). Authorization to advance expenses to former directors and officers or other employees and agents of the corporation does not require board approval (§145(e)). The termination of any proceeding by judgment, by order, by settlement, by conviction or upon a plea of *nolo contendere* does not, by itself, create a presumption that the corporate representative did not meet the standard of conduct required to permit indemnification (§145(a)). Indemnification continues for a corporate representative who ceases to be a director, officer, employee or agent and inures to the benefit of his heirs and personal representatives (§145(j)).

In Maryland, unless limited by charter, indemnification is mandatory if a director is successful on the merits or otherwise in the defense of any proceeding, or in the defense of any claim, issue or matter in the proceeding, covered by the indemnification statute (§2-418(d)(1)). Mandatory indemnification covers all reasonable expenses incurred by the director in connection with the proceeding, claim, issue or matter in which the director has been successful (§2-418(d)(1)), including attorneys' fees (§2-418(a)(3)). Indemnification is permissive unless it is

established that (1) the act or omission of the director was material to the matter giving rise to the proceeding and was committed in bad faith or was the result of active and deliberate dishonesty, (2) the director actually received an improper personal benefit in money, property or services or (3) in the case of a criminal proceeding, the director had reasonable cause to believe his conduct was unlawful. Permissive indemnification may extend to judgments, penalties, fines, settlements and reasonable expenses; however, if the proceeding was an action by or in the right of the corporation, no indemnification may be made if the individual is adjudged to be liable to the corporation – unless approved by a court (except where the individual is adjudged to be liable on the basis of improper receipt of a personal benefit) (§2-418(b)(2)(ii), (c), (d)(2)). Thus, amounts paid in settlement of a derivative proceeding may be indemnified in Maryland.

Where indemnification is permissive, it must be authorized (1) by the board of directors by a majority vote of a quorum consisting of directors who are not parties to the proceeding (if such a quorum cannot be obtained, the determination may be made by a majority vote of a committee of the board which consists solely of one or more directors who are not parties to the proceeding and who were designated to act by a majority of the full board); (2) by a special legal counsel selected by the board of directors or by a committee of the board (if the requisite quorum of the board cannot be obtained and the committee cannot be established, a majority of the full board, including directors who are parties, may select the special counsel); or (3) by the stockholders (§2-418(e)(2)). Thus, the requirements for permissively indemnifying a director made party to a proceeding are satisfied initially by a determination that it has not yet been proved that the director's conduct fell within any of the three exceptions listed in Section 2-418(b). The termination of any proceeding by conviction, a plea of *nolo contendere* or probation prior to judgment creates a rebuttable presumption that the director did not meet the requisite

standard of conduct (§2-418(b)(3)(ii)).

In both Maryland and Delaware, the corporation may pay, prior to final disposition, the expenses, including attorneys' fees, incurred by a corporate representative in defending the proceeding. In Maryland, expenses may be advanced to a director (§2-418(f)(1)), but advances to an officer, employee or agent who is not a director may be generally authorized in the corporation's charter or bylaws, by action of the board of directors or by contract (§2-418(j)(3)). Delaware law also permits such general authorization of advances to directors and officers, while advances to former directors and officers or other employees and agents may be paid upon such terms and conditions as the corporation deems appropriate (§145(e)).

In Maryland, a corporation may not indemnify a director or advance expenses for a proceeding brought by that director against the corporation, except (1) for a proceeding brought to enforce indemnification or (2) if the charter or bylaws, a resolution of the board of directors or an agreement approved by the board of directors to which the corporation is a party expressly provide otherwise (§2-418(b)(4)(i),(ii)).

In Maryland, the corporation must receive an undertaking by the corporate representative to repay advances made to the corporate representative if it is ultimately determined that the corporate representative is not entitled to indemnification. The corporation must also receive a written affirmation by the corporate representative of the corporate representative's good faith belief that the standard of conduct necessary for indemnification has been met (§2-418(f)(1)). Delaware provides that only present directors and officers of the corporation are required to give such an undertaking; former directors and officers or other employees and agents of the corporation or persons serving at the request of the corporation as directors, officers, employees or agents of another corporation, partnership, joint venture, trust or

other enterprise may receive advances from the corporation based on such terms and conditions, if any, as the corporation deems appropriate (§145(e)). The indemnification and advancement of expenses provided by the Maryland and Delaware statutes are not exclusive of any other rights, indemnification or otherwise, to which a director may be entitled under the charter, bylaws or resolutions of the corporation (§2-418(g); §145(f)). Delaware provides that a right to indemnification or advancement of expenses under a provision of a certificate of incorporation or bylaws may not be eliminated or impaired by an amendment to the certificate of incorporation or the bylaws after the occurrence of the act or omission to which indemnification or advancement of expenses relates, unless the provision contains, at the time of the act or omission, an explicit authorization of such elimination or limitation (§145(f)).

In Delaware, the Court of Chancery is vested with exclusive jurisdiction to hear and determine actions brought pursuant to charter and bylaw provisions, resolutions and contracts regarding indemnification and the advancement of expenses (§145(k)). This exclusive jurisdiction is intended to eliminate punitive damage awards relating to indemnification and advancement claims. Section 145(k) also allows the Court of Chancery to summarily determine a corporation's obligation to advance expenses prior to the final disposition of litigation.

Insurance against any liability incurred in an official capacity may be purchased and maintained by a corporation, or a subsidiary or affiliate, on behalf of any director, officer, employee or agent, regardless of whether the corporation would have the power to indemnify that person under the statute (§2-418(k)(1); §145(g)). In Maryland, a corporation may also provide other similar protection, including a trust fund, letter of credit or surety bond (§2-418(k)(2)).

31. Officers

A Maryland corporation must have a president, a secretary and a treasurer (§2-412(a)). A Maryland corporation may also have any other officer provided for in its bylaws (§2-412(b)). Unless the bylaws provide otherwise, the board of directors shall elect the officers (§2-413(a)), who shall then serve for one year (§2-413(b)). The bylaws may permit a person to hold more than one office (§2-415(a)), but the president may not serve concurrently as vice-president. A person who holds more than one office may not act in more than one capacity to execute, acknowledge or verify an instrument required by law to be executed, acknowledged or verified by more than one officer (§2-415(b)). The board of directors of a Maryland corporation may remove any officer or agent of the corporation if, in its judgment, it finds the best interests of the corporation will be served (§2-413(c)).

In Delaware (§142), there are no prescribed officers. A Delaware corporation may have such officers as may be necessary to enable it to sign instruments and stock certificates. These officers may be authorized in the bylaws or in a resolution of the board of directors; however, one officer shall have the duty to record the proceedings of meetings of the stockholders and directors. Unless the certificate of incorporation or the bylaws provide otherwise, any number of offices may be held by the same person. A failure to elect officers will not dissolve the corporation (§142(d)).

32. Loans to Insiders

Both Maryland (§2-416(a)(1)) and Delaware (§143) provide that any corporation may lend money to, guarantee any obligation of or otherwise assist any director, officer or other employee if, in the judgment of the directors, such loan, guarantee or assistance reasonably may be expected to benefit the corporation. In Maryland, the loan, guarantee or assistance may also

be made if it is an advance made against indemnification as described above pursuant to Section 2-418(f) (§2-416(a)(2)). The loan, guarantee or other assistance may be with or without interest, and it may be unsecured or secured in such manner as the board of directors shall approve, including, without limitation, a pledge of shares of stock of the corporation (§2-416(b); §143).

### 33. Interested Director Transactions

Maryland (§2-419) and Delaware (§144) have almost identical provisions relating to transactions between a corporation and any of its directors or between a corporation and any corporation or other entity in which any of its directors is a director or has a material financial interest. These statutes provide that no contract or transaction is void solely because of the common directorship or interest, or because a director, having a financial interest in a matter, is present at the meeting at which the matter is ratified or votes for such matter at said meeting, if: (1) the material facts are made known to the other directors and the contract or transaction is approved by a majority of disinterested directors although less than a quorum; (2) the material facts are made known to stockholders and the contract or transaction is approved by a majority of votes cast by disinterested stockholders; or (3) the contract or transaction is fair (and, in Maryland, “reasonable” (§2-419(b)(2))) to the corporation. In Delaware, ratification by the stockholders must be in good faith (§144(a)(2)). In Maryland, the ratification of a transaction by stockholders must be by a majority of the votes cast by disinterested stockholders (§2-419(b)(1)(ii)). The Maryland statute provides that any charter provision, bylaw, contract or transaction that requires or permits indemnification for directors in accordance with Section 2-418 (see section 30, *supra*) is fair and reasonable to the corporation (§2-419(d)(2)).

Maryland also provides that directors of investment companies (as defined by the 1940 Act) making any decision or taking any action as directors are deemed independent and

disinterested unless they fit the definition of “interested person” set forth in the 1940 Act (§2-405.3). The 1940 Act specifically provides that a person is not “interested” solely by reason of being a director, owner of securities or family member of a director or owner of securities. Delaware has no similar statute.

Interested directors may be counted in determining the presence of a quorum at a meeting of the board or of the stockholders at which the matter is considered (§2-419(c); §144(b)). Maryland provides that, if a matter is not approved, authorized or ratified according to the statute, the burden of proof that the transaction was fair and reasonable at the time it was ratified is on the person asserting the validity of the contract (§2-419(d)); however, this provision does not apply to the fixing by the board of directors of reasonable compensation for any director, whether as director or in any other capacity (§2-419(d)(2)).

#### 34. Ratification and Validation of Defective Corporate Acts

Delaware has adopted a “safe harbor” procedure for ratifying and validating defective corporate acts or putative stock that would have been “void or voidable” as a result of a failure of authorization at the time the act was taken (§204(a)). A defective corporate act includes an overissue of stock, an election or appointment of directors, or any act or transaction taken by or on behalf of the corporation that is, and at the time such act or transaction was purportedly taken would have been, within the power of a corporation under Delaware law, but is void or voidable due to a failure of authorization (§204(h)(1)). Sections 204 and 205 are not the exclusive means of ratifying or validating any defective corporate act or any issuance of stock or adopting or endorsing any corporate act or transaction prior to the existence of the corporation (§204(i)). The absence or failure of the statutory ratification does not affect the common law or other means of ratifying defective corporate acts or create any adverse

presumption in this regard (§204(i)).

The safe harbor procedure permits a Delaware corporation to cure a defective corporate act or acts resulting from a failure in authorization either by ratification, with the approval of the board and/or stockholders, or by validation, with the approval of the Court of Chancery (§§204, 205). To ratify a defective corporate act, other than the ratification of an election of the initial board of directors, the board must adopt resolutions approving the ratification of such act and obtain stockholder approval if a stockholder vote would have been required at the time the defective corporate act was taken or at the time of ratification, with certain exceptions (§204(b)(1), (c)). If stockholder approval is required for ratification, the corporation must give due notice of at least 20 days before the meeting to all current holders of valid stock and putative stock, whether voting or nonvoting, as of the time of the defective corporate act, unless their identities or addresses cannot be determined from the records of the corporation (§204(d)). In order to ratify a defective corporate act relating to the election of the initial board of directors, a majority of the persons exercising the powers of directors under claim and color of an appointment or election at the time the resolutions are adopted may adopt resolutions stating (a) the name of the person or persons who acted in the name of the corporation as the initial board of directors; (b) the earlier of the date on which such persons first acted in the name of the corporation or such person or persons were purported to have been elected to the initial board of directors; and (c) that the ratification of the election of such persons is approved (§204(b)(2)).

Upon director and stockholder approval, if the defective corporate act would have required a filing of a certificate with the Secretary of State, then a certificate of validation must be filed with the Secretary of State, whether or not the required certificate was previously filed

and in lieu of the previously required certificate (§204(e)). Each defective corporate act requires filing a separate certificate of validation, except in two limited instances: first, if the corporation filed, or would have filed, a single certificate pursuant to another provision of Title 8 of the Delaware Code (§204(e)); second, if an increase in the number of such authorized shares of each series or class is effective as of the date of the first such overissue (§204(e)).

A certificate of validation must include (a) each defective corporate act that is the subject of the certificate of validation, the date of such act and the nature of the failure of authorization regarding such act (§204(e)(1)); (b) a statement that such defective corporate act was ratified in accordance with Section 204, including the date on which the board ratified such act and the date, if any, on which the stockholders approved the ratification of such act (§204(e)(2)); and (c) information required by one of the following: (i) if a certificate was previously filed under Section 103 with respect to such defective corporate act and no changes to the prior certificate are required, the certificate of validation must include the name, title and filing date of the previously filed certificate, any correction thereto and a statement that a copy of the previously filed certification is attached as an exhibit to the certificate of validation; (ii) if a certificate was previously filed under Section 103 in respect to the defective corporate act and such certificate requires a change, then the certificate of validation must state the name, title, filing date and any certificate of correction to the previously filed certificate, a statement that a certificate containing all of the information required to give effect to the defective corporate act is attached as an exhibit to the certificate of validation and the date and time that such certificate will be deemed to have become effective under this Section; or (iii) if no certificate was previously filed under Section 103 with respect to the defective corporate act, and such act ratified pursuant to Section 204 would have required a filing of certificate under any other

section, the certificate of validation must include a statement that a certificate containing all of the information required to give effect to the defective corporate act is attached as an exhibit to the certificate of validation and the date and time that such certificate would be deemed to have become effective pursuant to Section 204 (§204(e)(3)).

Unless notice of the ratification of the defective corporate act is to be given in accordance with Section 204(d), the corporation must provide prompt notice of all ratifications without stockholder approval to all holders of valid and putative stock, including stockholders of valid and putative stock as of the time of the defective corporate act, unless their identities and addresses cannot be determined from the records of the corporation (§204(g)). Notwithstanding the foregoing, if a defective corporate act is approved by stockholders in accordance with Section 228, the notice required by Section 204(g) may be included in the notice mandated under Section 228(e), provided that the notice is sent to the parties entitled to receive notice under both Sections 204(g) and 228(e) (§204(g)). Further, a corporation that has a class of stock listed on a national securities exchange may give notice by submitting a public filing with the Securities and Exchange Commission pursuant to Sections 13, 14 or 15(d) of the Exchange Act or the corresponding provisions of any subsequent federal securities laws, rules or regulations (§204(g)).

The Court of Chancery is granted exclusive jurisdiction to hear and determine all actions brought under both Section 204 and Section 205 addressing ratification and validation of defective corporate acts and stock (§205(e)). For any defective corporate act or stock that is not ratified pursuant to §204 (for example, the failure to receive the required stockholder vote), the Court of Chancery is granted jurisdiction to determine the validity of the defective corporate act or stock and to modify or waive the procedures in Section 204 to obtain ratification (§205(a)).

The corporation, any successor entity to the corporation, any member of the board of directors, any record or beneficial holder of valid stock or putative stock or any person claiming to be substantially and adversely affected by a ratification pursuant to Section 204 may apply to the Court of Chancery for redress (§205(a)). Maryland does not have provisions comparable to Section 204 and 205.

#### IV. CAPITAL STOCK AND SECURITIES

##### 35. Issuance of Stock

The corporation's charter or certificate of incorporation set forth the authorized capital stock of the corporation consisting of the number of shares, their par value (or a statement that they are without par value), their class or classes (including the preferences, voting rights and other restrictions of each class) and any series (§2-104(a)(6); §102(a)(4)). Both states provide that any of the voting powers, preferences or other rights or restrictions of any such class of stock may be made dependent upon facts ascertainable outside the charter provided that the charter expressly sets forth the manner in which such extrinsic facts shall operate on the class of stock (§2-105(b); §151(a)). Maryland expressly defines "facts ascertainable outside the charter" to include the contents of any agreement to which the corporation is a party or any other document (§2-105(b)(ii)). In Maryland, stock or convertible securities may not be issued in violation of limitations or restrictions contained in the corporation's charter or bylaws (§2-204(a)). In both Maryland (§§2-203, 2-204) and Delaware (§151(a)), if the charter (Maryland) or certificate of incorporation (Delaware) so provides, the board of directors has the power to authorize the issuance of stock by adopting a resolution and by approving its terms. Maryland (§2-203(d)) provides two other mechanisms for the issuance of stock: (1) Stock may be issued through a reclassification effected by amendment of the charter, or (2) it may be issued through a consolidation, merger or share exchange, including a consolidation, merger or share exchange to which a wholly-owned subsidiary of the corporation is a party.

In both Delaware (§§152, 153) and Maryland (§2-206), the consideration for the purchase of shares may consist of money, other tangible or intangible property or other benefit to the corporation such as services already performed, a promissory note and a contract for future

labor or services. In Delaware, a resolution authorizing the issuance of capital stock may provide that any such stock may be issued in one or more transactions, in such numbers and at such times as provided in the resolution, which may include an action or determination by the corporation, or any other person or body (§152). The resolution must set a maximum number of shares that may be issued pursuant to the resolution, a time period during which such shares may be issued and a minimum amount of consideration for which such shares may be issued (§152). The directors of a Delaware corporation may set a minimum amount or approve a formula, which may include or depend on clearly expressed or ascertainable facts outside the formula, to determine the minimum amount of consideration for which shares may be issued (§152). In both Maryland (§2-203(b)) and Delaware (§152), in the absence of actual fraud in the transaction, the judgment of the directors as to the value of such consideration is conclusive. Further, the capital stock issued according to this formula is deemed fully paid and nonassessable stock upon receipt of the consideration by the corporation. In Maryland (§2-206(b)), the corporation may escrow or restrict the transfer of shares or credit any distributions until the labor or services are performed or the note is paid; in the absence of performance or payment, the shares and any credited distributions may be cancelled. Delaware has no such provision. In Maryland, a corporation may issue stock without consideration of any kind as a gift or contribution to a governmental unit or charitable organization (§§2-103(13), 2-203(f)). In addition, in Maryland, a corporation may issue shares of its stock to an unlimited number of persons without consideration for the purpose of qualifying the corporation as a real estate investment trust under the Internal Revenue Code (§2-206(d)).

In both Maryland (§2-203) and Delaware (§153(b)), unless the charter or certificate of incorporation provides otherwise, the power to fix the consideration for no par

value stock resides with the directors. When shares are issued, the role of the board is to ensure that the corporation receives consideration for the shares that is not less than their par value (unless otherwise authorized by the board of directors) or, in the case of stock without par value, not less than their stated value (determined pursuant to applicable law).

Before the issuance of stock or convertible securities, the board of directors of a Maryland corporation shall adopt a resolution which authorizes the issuance and which sets the minimum price, the value of its consideration or a formula for its determination (§2-203(a)). The board of a Maryland corporation may, if the charter so provides, be empowered to classify or to reclassify any unissued stock by setting or by changing the preferences, the voting powers, the restrictions, the qualifications, the limitations as to dividends, the terms and conditions of redemption and the conversion rights, which shall be set forth in articles supplementary signed by the proper officers of the corporation and filed with the SDAT (§2-208(a)). Any stock issued by a Maryland corporation prior to the time the articles supplementary with respect to the stock are effective will cease to be voidable as a result of the failure to file the articles supplementary at the time the articles supplementary become effective and a right or liability accrued by reason of the issuance of stock by a corporation prior to the time the articles supplementary with respect to the stock are effective will be extinguished at the time the articles supplementary become effective, except to the extent that the person having the right or liability has acted detrimentally in reliance on the right or liability solely by reason of issuance of the stock (§§2-208(e), 2-208.1(e)).

Maryland (§2-201) provides that shares of any class, as well as bonds, notes, debentures and other obligations, may be made convertible into shares of any other class. Convertible securities may be authorized in the manner prescribed for authorizing the stock into

which they are convertible. The authorization of the issuance of convertible securities constitutes the authorization of the issuance of the stock into which they are convertible (§2-204(d)). Delaware provides that any stock of any class or series may be made convertible into shares of any class or series upon the happening of some specified event or at the option of either the holder or the corporation; the exchange rate or adjustments must be set forth in the certificate of incorporation or in a resolution of the board (§151(e)).

Under Maryland law, the authorization of a grant of options or an issuance of warrants exercisable for stock or securities convertible into stock constitutes the authorization for the issuance of the stock into which the options or warrants or convertible securities are exercisable or convertible (§2-204(d)). A Delaware corporation may issue rights or options to purchase any shares of stock of any class, whether or not in connection with the issue and sale of any stock or other securities of the corporation, subject to any provisions in the certificate of incorporation (§157). In Delaware, the board of directors may delegate to one or more officers the authority to designate the officers and employees who will receive rights or options and establish the number of rights or options that each officer or employee will receive (§157(c)). The board, however, must determine both the total number of rights or options that may be awarded and the exercise price of those rights or options (or a formula by which the exercise price may be established). If determined by a formula, the formula may include or depend “upon facts ascertainable outside the formula,” so long as the manner in which the facts operate upon the formula “is clearly and expressly set forth in the formula or in the resolution approving the formula” (§157(b)).

As discussed more fully in Section 47, *infra*, the board of directors of a Maryland corporation may, in its sole discretion, set the terms and conditions of rights, options or warrants

under a stockholder rights plan and issue rights, options or warrants under a stockholder rights plan to designated persons or classes of persons (§2-201(c)(1)).

The failure of a stockholder to pay at least the par value or the agreed upon consideration of the no par value stock will cause the stock to be deemed to be partly paid, rather than fully paid, shares. The consequences of shares being deemed partly paid vary in each state. In Delaware (§156), the shares will be subject to calls and assessments for the payment of the balance of the consideration for the shares. Delaware requires a notation on stock certificates issued for partly paid shares and restricts the right of such shares to receive dividends. Maryland (§2-210(b)) provides that certificates may not be issued for partly paid shares and indicates (§2-507(a)) that a stockholder who has not paid the full amount of the consideration for his stock may not exercise the rights of a stockholder.

Both states provide that, generally, stockholders are entitled to receive stock certificates representing their shares (§2-210(a); §158), but that the board of directors may authorize the issuance of some or all shares of any or all classes of stock without certificates (§2-210(c); §158). Specific requirements for the contents of certificates are established by statute (§2-211; §158). The bylaws may specify requirements with respect to the form of stock certificate used by the corporation in addition to those specified by the statutes. In both states, certificates may be signed with facsimile signatures (§2-212(b)(2); §158). If the corporation is authorized to issue more than one class of stock or more than one series of any class of stock, or if transferability is restricted, then the powers, designations, preferences and relative, participating, optional or special rights of each class of stock or series thereof and the qualifications, limitations or restrictions of such preferences shall be set forth in full or summarized on the face or back of the certificate (§2-211(b), (d); §151(f)), or, in the case of

uncertificated stock, notice sent to the stockholder in writing or by electronic transmission (§2-210(c); §151(f)). Alternatively, the certificate may contain a statement that the corporation will furnish a full statement of this information to any stockholder upon request and without charge (§2-211(c)(2); §151(f)). In Maryland, the written statement of the information required on certificates by Section 2-211 is only required to be sent to a stockholder upon the request of such stockholder and the fact that a stock certificate does not contain or refer to a restriction on transferability that is adopted after the date of issuance of the stock certificate does not render the restriction invalid or unenforceable (§2-211(c), (e)). In Delaware, a corporation does not have the power to issue a certificate in bearer form (§158).

A Delaware corporation may restrict ownership as well as transferability of its securities (§202). Such restriction may be imposed by the certificate of incorporation, the bylaws or an agreement among securities holders or among such holders and the corporation (§202(b)). Such restriction is permitted if it provides the corporation, other securities holders or any other person a prior opportunity to acquire the restricted securities; obligates the corporation, other securities holders or any other person to purchase the restricted securities; requires the corporation or other securities holders to consent to proposed transfers or transferees of the restricted securities; obligates the holder of the restricted securities to sell (or causes an automatic sale of) the restricted securities to the corporation, other securities holders or any other person; or prohibits transfers to or ownership by designated persons, classes or groups (§202(c)). Restrictions for the purpose of maintaining a tax, statutory or regulatory advantage or complying with statutory or regulatory requirements are conclusively presumed reasonable (§202(d)).

### 36. Scrip and Fractional Shares

A Maryland corporation may, but shall not be obliged to, (1) issue fractions of a

share, (2) eliminate fractional interests by rounding up to a full share, (3) arrange for the disposition of fractional interests by those entitled thereto, (4) pay cash for the fair value of fractions of a share or (5) issue scrip or other evidence of ownership that entitles the holder to receive a certificate for a full share upon the surrender of such evidence of indebtedness aggregating a full share (§2-214(a)). Unless otherwise provided, the holder of such scrip or other evidence of ownership is not be entitled to exercise any voting rights, to receive dividends or to participate in any of the assets of the corporation in the event of liquidation (§2-214(a)(5)(ii)). Such scrip or evidence of ownership may be issued subject to any reasonable conditions that the board of directors deems advisable (§2-214(b)).

A Delaware corporation may, but is not required to, issue fractions of shares (§155). If it does not issue fractions of a share, it must do as provided in (3), (4) or (5) in the preceding paragraph. A certificate for a fractional share will entitle the holder to exercise voting rights, to receive dividends and to participate in the assets of the corporation in the event of liquidation. Scrip or warrants do not entitle the holder to such rights unless otherwise provided. As in Maryland (§2-214), the board of directors of a Delaware corporation also may cause scrip or warrants to be issued subject to the condition that they become void if not exchanged for certificates representing full shares before a certain date, or subject to the condition that the shares for which the scrip or warrants are exchangeable may be sold by the corporation and the proceeds distributed to the holders of scrip or warrants; however, in Delaware, scrip or warrants may also be issued subject to any other condition imposed by the board of directors (§155).

37. Allocation of Consideration Between Capital and Surplus

Maryland (§2-303(a)(1)) provides that consideration received for issuance of stock with par value constitutes stated capital equal to the par value of the stock. Any

consideration received in excess of par value constitutes capital surplus (§2-303(a)(2)). The entire consideration received for stock without par value constitutes stated capital, unless the board of directors, before the issuance of the no par value stock, allocates all or part of the consideration to capital surplus; however, with respect to shares without par value having a preference in the assets of the corporation in the event of involuntary liquidation, the board of directors may allocate to surplus only a portion that does not exceed the amount by which the consideration exceeds the aggregate amount of such preference (§2-303(b)).

Delaware (§154) provides that the board of directors may determine that only part of the consideration received for issued stock shall be capital; however, where any of the issued shares have a par value, the amount of consideration determined to be capital must be in excess of the aggregate par value of such shares having par value.

There are other provisions in the Maryland statute dealing with capital surplus; for example, a Maryland corporation may apply any part of its capital surplus for the reduction or elimination of a corporate deficit or for any other proper purpose (§2-304(a)). Any such application shall be disclosed to the stockholders in the next annual report (§2-304(b)).

### 38. Issuance of New Certificates

In place of a lost, stolen or destroyed stock certificate, both Maryland (§2-213(a)) and Delaware (§167) corporations are authorized to issue a new certificate; however, pursuant to the bylaws of the corporation, the owner may be required to give a bond to indemnify the corporation against any claim which may be made against it (§2-213(b); §167). If a Delaware corporation refuses to issue a new certificate, the owner may apply to the Court of Chancery for an order requiring the corporation to do so (§168).

39. Preemptive Rights

Delaware does not confer on stockholders any preemptive rights; however, such rights may be granted in the certificate of incorporation (§102(b)(3)).

Effective October 1, 1995, Maryland also does not confer preemptive rights on stockholders (§2-205), but a Maryland corporation is permitted to include a grant of preemptive rights in the charter (§2-105(a)(10)). However, the act enacting these provisions provides that it “shall be construed only prospectively and may not be applied or interpreted to have any effect on or application to any preemptive rights in existence before the effective date of this Act. Such preemptive rights shall remain in existence unaffected by this Act unless and until expressly changed or terminated by a charter amendment” (1995 Md. Laws ch. 449, Section 2). Therefore, for a Maryland corporation incorporated before October 1, 1995, a stockholder has preemptive rights as and to the extent in existence before October 1, 1995, unless and until expressly changed or terminated by charter amendment. For a Maryland corporation incorporated after October 1, 1995, a stockholder has no preemptive rights, unless expressly granted in the charter.

40. Redemption and Retirement of Stock

Delaware permits every corporation to purchase or redeem its own stock if the capital of the corporation is not impaired and if the purchase or redemption would not cause any impairment of the capital, unless the shares to be purchased or redeemed are entitled to a preference over other stock as to dividends or liquidation and if such shares will be retired upon their acquisition (§160(a)(1)). In Delaware, stock issued subject to a right of redemption may not be redeemed by the corporation at a price greater than the redemption price (§160(a)(2)). When stock is issued subject to a right of redemption, it may be redeemed for cash, property or rights, including securities of the same or another corporation, and at such time, price or rate, and

with such adjustments, as are stated in the charter or certificate of incorporation or in the resolution of the board of directors authorizing its issuance (§2-105(5); §151(b)), so long as, in Delaware, immediately after the redemption, there remains outstanding at least one share of stock, in one or more classes or series, which retains full voting power. This proviso does *not* require that all of the shares of any particular class or series of stock be non-redeemable but only that immediately after any redemption there is at least one share outstanding with full voting rights, whether redeemable or not (§151(b)).

A Maryland corporation may provide by its charter that any specified class of stock (including common stock) may be redeemed at the option of the corporation or the holders of the stock (§2-105(a)(5)) or as the result of facts ascertainable outside the charter (§2-105(b)). Maryland expressly defines “facts ascertainable outside the charter” to include the contents of any agreement to which the corporation is a party or any other document (§2-105(b)(ii)). The charter may provide that the board of directors may classify or reclassify any unissued stock by setting or changing terms or conditions of redemption (§2-105(a)(9)).

The stock of a Delaware corporation of any class or series may be made subject to redemption by the corporation at its option or at the option of the holders of such stock, or upon the happening of a specified event, provided that (except for the caveat noted below) at the time of the redemption the corporation has outstanding at least one class or series of stock with full voting powers that is not subject to redemption. This limitation does not apply to the redemption of stock of a regulated investment company that is registered under the 1940 Act or to the stock of a corporation that holds a government license or franchise or is a member of a national securities exchange, whose right to conduct business is conditional upon some or all of the holders of its stock possessing prescribed qualifications (§151(b)). The power to redeem must be

granted in the charter or, if the charter expressly vests such authority in the board of directors, by resolution of the board of directors providing for the issue of the stock (§§102(a)(4); 151(a), 151(b)).

In Delaware, an investment company registered under the 1940 Act may redeem common stock at the option of either the holder or the corporation (§151(b)(1)). Maryland has long had no limitations on the redeemability of common stock of Maryland corporations.

A Delaware corporation (§243(a)), by resolution of the board of directors, may retire any shares of stock that are issued but not outstanding. If the certificate of incorporation prohibits the reissuance of the retired shares, a certificate so stating and identifying the shares and reciting their retirement must be filed and recorded with the Secretary of State (§243(b)). No stockholder approval is required. When the certificate becomes effective, it has the effect of amending the certificate of incorporation so as to reduce the number of authorized shares by the number of shares retired; however, if the capital of the corporation is reduced by or in connection with the retirement of shares, the reduction of capital must be effected pursuant to Section 244 (§§243(c), 244).

Unless otherwise provided by charter, the directors of a Maryland corporation may, without stockholder approval, authorize a reduction of stated capital to be effected by retiring stock held by the corporation (§2-306(a)). Any reduction of stated capital to be effected in any other manner, with or without a charter amendment, must be authorized by a board resolution directing that the proposed reduction and amendment be submitted at a meeting of stockholders (§2-306(b)(2)), followed by notice to all stockholders entitled to vote thereon (§2-306(b)(3)). The proposed reduction and amendment must be approved by two-thirds of all the votes entitled to be cast or, if two or more classes are entitled to vote separately thereon, by

two-thirds of each class (§2-306(b)(4)).

Any reacquired stock constitutes “authorized but unissued shares,” thus eliminating treasury stock (§2-310(a)(2)).

#### 41. Dividends and Other Distributions

The directors of a Delaware corporation may declare dividends out of the corporation’s surplus (§170(a)). If there is no surplus, dividends may be paid out of the “net profits” of the corporation “for the fiscal year in which the dividend is declared and/or the preceding fiscal year,” unless the capital of the corporation becomes impaired thereby (§170(a)). It is unclear whether a corporation may pay out earnings periodically during the current fiscal year even if it would have a loss for the full year. It is also unclear whether earnings in the prior year and a loss in the current year (or vice versa) may or must be combined in calculating the amount of the limit on dividends.

The board may set apart, out of funds available for dividends, reserves for any proper purpose (§171). Dividends may be paid in cash, property or shares of the corporation’s capital stock (§173).

Maryland permits a corporation, subject to any restriction in its charter, to make any distribution authorized by the board of directors if, after the distribution, the corporation would not be insolvent in either the “equity sense” (inability to pay debts as they become due in the usual course) or the “balance sheet sense” (assets being less than the sum of liabilities plus, unless the charter permits otherwise, senior liquidation preferences) (§§2-309, 2-311). In addition, the corporation is permitted to make a distribution even if it may be considered insolvent in the “balance sheet sense” so long as 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 (§2-311(a)(2)). In addition, for purposes of determining compliance with the insolvency tests, Maryland permits assets to be valued on the basis of a “fair valuation” of the assets or upon any other “reasonable” method rather than limiting application of the tests to the financial statements (§2-311(b)). The corporation may make a distribution in money or in any other property of the corporation (§2-301(a)).

A division of issued shares into a greater number of shares of the same class without any change in the aggregate amount of stated capital is a stock split; a division with a change (increase) in the aggregate amount of stated capital is a stock dividend (§2-309(c)(1)). In Maryland, a dividend payable in one class of a corporation’s stock may be declared or paid to the holders of another class of stock, unless otherwise provided in the charter.

Maryland also permits the board of directors of a corporation with a class of equity securities registered under the Exchange Act or a corporation registered as an open-end investment company under the 1940 Act (§2-309(e)(1)), subject to any restriction in its charter that explicitly provides otherwise by reference to Section 2-309(e) or its subject matter (*i.e.*, reverse stock splits), without stockholder action, to effect a reverse stock split resulting in a combination of shares at a ratio of not more than ten shares into one share in any twelve-month period (§2-309(e)(2)). A reverse stock split is defined as a combination of outstanding shares of stock of a corporation into a lesser number of shares of stock of the same class without any change in the aggregate amount of stated capital of the corporation, except for a change resulting from an elimination of fractional shares (§2-309(a)). Within 20 days after the effective date of the reverse stock split, the corporation must give written notice of the reverse split to each holder of record of the combined shares of stock as of the effective date (§2-309(e)(3)).

## V. EXTRAORDINARY ACTIONS

### 42. Merger and Consolidation

The merger procedure in Delaware begins with the adoption of a resolution by the board of directors of each of two or more corporations approving an agreement of merger and declaring the merger advisable (§251(b)). This agreement must then be approved by the majority vote of the outstanding stock entitled to vote at an annual or special meeting of each corporation (§251(c)), and no class vote is required unless provided in the certificate of incorporation. Delaware permits an agreement of merger to contain a provision allowing the agreement to be terminated by the board of directors of either corporation, notwithstanding approval of the agreement by the stockholders of all or any of the corporations (1) at any time prior to the filing of the agreement with the Secretary of State or (2) after filing if the agreement contains a post-filing effective time and an appropriate filing is made with the Secretary of State to terminate the agreement before the effective time (§251(d)). In lieu of filing an agreement of merger, the surviving corporation may file a certificate of merger, executed in accordance with Section 103 of the Delaware statute (§251(c)). The surviving corporation is also permitted to amend and restate its certification of incorporation in its entirety (§251(c)(4)). The agreement of merger may also provide that it may be amended by the board of directors of either corporation prior to the time that the agreement filed with the Secretary of State becomes effective, even after approval by stockholders, so long as any amendment made after such approval does not adversely affect the rights of the stockholders of either corporation and does not change any term in the certificate of incorporation of the surviving corporation (§251(d)). If the agreement is amended after filing but before becoming effective, an appropriate amendment must be filed with the Secretary of State (§251(d)). If the surviving corporation is not a Delaware corporation,

it must consent to service of process for enforcement of any obligation of the corporation arising as a result of the merger; such obligations include any suit by a stockholder of the disappearing Delaware corporation to enforce appraisal rights under Delaware law (§252(d)). In Maryland (§3-108), a proposed merger may be abandoned before the effective date of the articles of merger (1) by a majority vote of the entire board of directors of any corporation a party to the merger if the articles so provide or (2) by majority vote of the entire board of directors of each Maryland corporation a party to the merger unless the articles provide otherwise. If the articles have been filed, notice of the abandonment must be given to the SDAT (§3-108(b)).

Unless otherwise provided in the certificate of incorporation, a stockholder vote is not required in the case of a Delaware corporation surviving a merger if (1) the agreement of merger does not amend in any respect the certificate of incorporation of the corporation, (2) each share of stock outstanding immediately prior to the effective date of the merger is to be an identical outstanding or treasury share of the surviving corporation after the effective date of the merger and (3) either (i) no shares of common stock of the surviving corporation and no shares, securities or obligations convertible into such stock are to be issued or delivered under the plan of merger or (ii) the authorized and unissued shares or the treasury shares of common stock of the surviving corporation to be issued or delivered under the plan of merger plus those initially issuable upon conversion of any other shares, securities or obligations to be issued or delivered under such plan, do not exceed 20% of the shares of common stock of the corporation outstanding immediately prior to the effective date of the merger (§251(f)).

Any of the terms or conditions of the merger or consolidation may be made dependent upon facts ascertainable outside of the agreement if the manner in which such facts will operate upon the agreement is clearly and expressly set forth in the agreement. These facts

may include the occurrence of any event, including a determination or action by any person or body, including the corporation (§252(b)).

A Maryland and Delaware corporation is permitted to reorganize into a holding company by merging with or into a direct or indirect wholly-owned subsidiary of the holding company without stockholder approval, unless such approval is expressly required by, in Maryland, the corporation's charter (§3-106.2) or, in Delaware, the corporation's certificate of incorporation (§251(g)). In Delaware, the wholly-owned subsidiary may be either a Delaware corporation or a Delaware limited liability company. The Delaware statutes contain several provisions designed to ensure that the rights of the stockholders of the corporation are not changed by the reorganization, except to the extent such rights could be changed without stockholder approval (§251(g)). Moreover, if the holding company reorganization involves a limited liability company, the limited liability company's organizational documents must include, or be amended to include, a provision imposing on the limited liability company's board of managers or other governing body the same fiduciary duties that are applicable to the directors of a Delaware corporation and holding the managers liable for breach of those duties to the same extent as the directors of a Delaware corporation (§251(g)(7)). The Maryland statute also seeks to ensure that stockholders' rights are not changed or diminished as a result of the transaction. Accordingly, in Maryland, the resulting holding company must be a Maryland corporation with the same charter, bylaws and other stockholder rights as the predecessor corporation (§3-106.2). Additionally, in Maryland, a reorganization into a holding company without a shareholder vote may also be achieved through a statutory share exchange, which requires only the approval of the board of directors of the successor corporation (the new holding company) (§§3-105(a)(3), 1-101(x)). The procedure for forming a Maryland holding company is also available to a trust

REIT (§8-501.1(c)(6)).

Both Maryland (§§3-102(a)(2), 3-105) and Delaware (§252) authorize the mergers of domestic stock corporations with corporations of other states or other jurisdictions, including the District of Columbia. Maryland nonstock corporations may only consolidate with other nonstock corporations and may only convert non-Maryland corporations that do not have the authority to issue stock (§5-207). In addition, Maryland expressly authorizes the merger of domestic corporations with corporations from foreign countries (§§3-102(a)(2), 3-105). A Delaware corporation may merge or consolidate with a non-Delaware corporation unless the law under which the non-Delaware corporation is organized “prohibit[s]” the transaction (§258(a)). The provisions that must be included in the agreement of merger are basically the same as those required for all mergers, except that the articles or certificate of merger must include other matters or provisions that are required to be set forth by the laws of the state of the surviving corporation (§258(b)).

The so-called “short-form” merger is available in Delaware (§253) in any case in which at least 90% of the outstanding shares of each class of the stock that would otherwise be entitled to vote on the merger is owned by another corporation. This type of merger requires at least one of the corporations to be a Delaware corporation, though the other corporation(s) involved may be foreign. The corporation having such stock ownership may either merge itself into its subsidiary or merge the subsidiary into itself by executing, acknowledging and filing a certificate of ownership and merger with the Secretary of State. If the subsidiary is not wholly-owned, the resolution must state the terms and conditions of the merger, including the consideration to be received by the minority stockholders of the subsidiary. If the subsidiary rather than the parent survives the merger, the resolution by the board of directors must also

include a provision for the *pro rata* issuance of stock of the surviving corporation to holders of stock of the parent corporation, and the certificate of ownership and merger must state that the proposed merger has been approved by a majority of the outstanding stock of the parent corporation entitled to vote at a meeting thereof duly called and held after 20 days' notice of the purpose of the meeting. Except in the above situation, no action by stockholders of either corporation is required in a short-form merger. In a transfer of assets, the property and assets of the corporation will be deemed to include the property and assets of any subsidiary of the corporation (§271(c)). Delaware does not authorize share exchanges.

Delaware law (§251(h)) also provides that the parties entering into a merger agreement may opt in to a streamlined back-end or two-step merger process by eliminating the need for a stockholder vote on the second step. The streamlined opt-in provisions in the Delaware law are available in mergers where (1) the target corporation has at least one class or series of stock that is listed on a national securities exchange or held of record by more than 2,000 holders immediately prior to the execution of the merger agreement and (2) the acquiring corporation, through a tender or exchange offer, acquires enough of the target corporation's stock to approve the merger. To qualify for these opt-in provisions, the following requirements must be met: (1) the merger agreement must (i) expressly permit or require that the merger be effected pursuant to the provisions of Section 251(h) and (ii) provide that the merger (the second step) will be effected as soon as practicable following the consummation of the tender or exchange offer (the first step); (2) the offer must have been for all of the outstanding stock of the target corporation that would have been entitled to vote on the adoption or rejection of the merger agreement, provided, however, that such offer may be conditioned on the tender of a minimum number or percentage of shares of the stock of the target corporation, or of any class or

series thereof, and such offer may exclude any “excluded stock” (defined to include (i) stock of the target corporation that is owned at the commencement of the offer by the target corporation itself, the acquiring corporation, any person that owns, directly or indirectly, all of the acquiring corporation’s stock, or any direct or indirect subsidiary of the foregoing and (ii) “rollover stock,” which is defined as any stock of the target corporation that is the subject of a written agreement requiring such shares to be transferred, contributed or delivered to the acquiring corporation or any of its affiliates in exchange for stock or other equity interest in the acquiring corporation or an affiliate), and provided further that the corporation may consummate separate offers for separate classes or series of the stock of the target corporation; (3) immediately following the consummation of the tender or exchange offer, the stock irrevocably accepted for purchase or exchange and received by the depository before the expiration of such offer, together with the stock otherwise owned by the acquiring corporation or its affiliates and any rollover stock, must equal at least the percentage of shares of stock of such target corporation that would have been required to adopt the merger agreement pursuant to Delaware law and the certificate of incorporation of the target corporation absent the opt-in provision of Section 251(h); (4) the acquiring corporation merges with or into the target corporation pursuant to the merger agreement; and (5) each outstanding target share (other than shares of excluded stock) that is the subject of and not irrevocably accepted for purchase or exchange in the offer is to be converted into the right to receive the same amount and kind of cash, property, rights or securities to be paid for shares of the same class or series of the target in the tender or exchange offer irrevocably accepted for purchase or exchange in such offer. Section 251(h) applies to merger agreements entered into on or after August 1, 2014. The streamlined opt-in provisions are available in any mergers permitted under Delaware law (§252(e)), however, the “opt-in” provisions are not

available if the target corporation's articles of incorporation require a stockholder vote, a supermajority vote, or a separate class vote to approve a merger.

Cash, property or rights or securities of another corporation may be used in exchange for, or upon conversion of, the shares or securities of the constituent corporation(s) in a merger in addition to the issuance of shares or securities of the surviving or resulting corporation (§251(b)).

Delaware also provides a mechanism enabling a "short-form" merger of a subsidiary corporation or corporations with a parent that is a non-corporate entity – defined as a partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)), limited liability company, any association of the kind commonly known as a joint-stock association or joint-stock company and any unincorporated association, trust or enterprise having members or having outstanding shares of stock or other evidences of financial or beneficial interest therein, whether formed by agreement or under statutory authority or otherwise (§267). Generally, this type of merger has the same requirements as a "short-form" merger involving two corporations (§§253, 267).

The merger procedure in Maryland (§3-102) begins with the adoption, by the board of directors of each corporation, of a resolution declaring that the proposed transaction is advisable and that it is to be submitted to the stockholders for a vote (§3-105(b)). After notice is given to all the stockholders (§3-105(c)), the merger must be approved by holders of two-thirds of all shares (§3-105(e)) or two-thirds of each class (§2-506(b)) entitled to vote on the matter, unless a different proportion is provided in the charter of the corporation, but not less than a majority (§2-104(b)(4), (5)). Maryland permits an agreement of consolidation, merger, share exchange or transfer of assets to contain a clause requiring the agreement to be submitted to the

stockholders for approval, even if the board of directors determines, at any time after having declared the advisability of the proposed transaction, that the proposed transaction is no longer advisable and either makes no recommendation to the stockholders or recommends that the stockholders reject the proposed transaction (§3-105(d)). Delaware has a similar provision (§146). Articles of merger shall then be filed with the SDAT (§3-107).

A consolidation, merger, share exchange or transfer of assets shall be approved as above, except that: (1) a merger of a 90% or greater subsidiary with or into (*i.e.*, “downstream” or “upstream”) its parent need be approved only by the board of directors of each merging corporation if the charter of the successor is not amended in the merger other than to change its name, the name or other designation or the par value of any class or series of its stock or the aggregate par value of its stock, and the contract rights of any stock of the successor issued in the merger in exchange for stock of the other corporation participating in the merger are identical to the contract rights of the stock for which the stock of the successor was exchanged (§§3-105(a)(1), 3-106); (2) a merger of a Maryland public corporation conducted through a two-step transaction in the form of a tender offer followed by a merger in accordance with §3-106.1 need be approved only in the manner provided in §3-106.1 (§§3-105(a)(2), 3-106.1); (3) a share exchange need be approved by a Maryland successor corporation only by its board of directors and by any other action required by its charter (§3-105(a)(3)); (3) a transfer of assets need be approved by a Maryland transferee corporation only by its board of directors and by any other action required by its charter (§3-105(a)(4)); (4) a foreign corporation party to the transaction shall have the transaction advised, authorized and approved in the manner and by the vote required by its charter and by the laws of the place where it is organized (§3-105(a)(5)); (5) a transfer of all or substantially all assets by a corporation to a wholly-owned entity or by a

corporation registered as an open-end investment company under the 1940 Act does not require stockholder approval or filing of articles of transfer (§3-104(a)(4), (5)). A merger need be approved by a Maryland successor corporation only by a majority of its entire board of directors if the merger does not reclassify or change the terms of any class or series of its stock that is outstanding immediately before the merger becomes effective or otherwise amend its charter and the number of its shares of stock of such class or series outstanding immediately after the effective time of the merger does not increase by more than 20% of the number of its shares of the class or series of stock that is outstanding immediately before the merger becomes effective (§3-105(a)(6)). Procedures for the merger of a subsidiary with or into its parent are set forth in the statute (§3-106). Unless waived by all stockholders who, except for Section 3-106, would be entitled to vote on the merger, at least 30 days before the articles of merger are filed, a parent corporation which owns less than all of the outstanding stock of the subsidiary as of immediately before the effective time of the merger must have given notice of the transaction to each of the subsidiary's stockholders of record who, except for Section 3-106, would be entitled to vote on the merger on the date of giving of the notice or on a record date fixed for that purpose which is not more than ten days before the date of giving notice (§3-106(d)(1)). A minority stockholder of the subsidiary has the right to demand and to receive payment of the fair value of his stock as provided in the Maryland statute (§3-106(d)(2)).

Following a tender or exchange offer, if the acquiring corporation owns a majority of the target corporation's stock but does not own the required 90% of the outstanding shares of each class of the target corporation's stock that would otherwise be entitled to vote to effect a short-form merger under Section 3-106, Maryland law provides that the parties entering into a merger agreement may "opt-in" to a streamlined back-end or two-step merger process (§3-

106.1). Similar to Delaware's Section 251(h), Section 3-106.1 allows Maryland corporations undergoing a friendly merger to simplify and speed up the overall process, reducing the need for top-up options and other complex merger mechanisms. Unless otherwise provided in a corporation's charter, the streamline "opt-in" provisions are available for a merger, if particular requirements are satisfied.

First, in order to utilize the "opt-in" provisions, the target corporation's shares must be registered under the Exchange Act immediately prior to the execution of the merger agreement (§3-106.1(c)(1)(i)). Second, the merger agreement must expressly allow or require the merger to be effected under Section 3-106.1 and provide that the merger will be effected following the consummation of the acquiring entity's tender or exchange offer (§3-106.1(c)(1)(ii)). A tender or exchange offer may exclude stock of the target corporation that is owed at the commencement of the offer by (a) the acquiring entity; (b) a person who owns, either directly or indirectly, all of the outstanding equity in the acquiring entity; (c) a direct or indirect wholly-owned subsidiary of the acquiring entity; or (d) a direct or indirect wholly-owned subsidiary of a person who directly or indirectly owns all of the outstanding equity interest in the acquiring entity (§3-106.1(c)(2)(i)-(iii)). Third, subject to Section 3-106.1(c)(2), the acquiring entity's tender or exchange offer must have been for any and all of the outstanding stock of the target corporation that would otherwise have been entitled to vote on the merger on the terms provided in the merger agreement (§3-106.1(c)(1)(iii)). Section 3-106.1(c)(1) also requires that, following the consummation of the tender or exchange offer, the stock irrevocably accepted for purchase or exchange under the terms of the offer and received by the depository before its expiration, together with the stock otherwise owned by certain specified parties, equals at least that percentage of stock that would have been required to approve the merger pursuant to Maryland

law and the charter of the target corporation absent the opt-in provisions of Section 3-601.1(c) (§3-106.1(c)(1)(iv)). These specified parties include: (1) the acquiring entity; (2) a person who owns, either directly or indirectly, all of the outstanding equity in the acquiring entity; (3) a direct or indirect wholly-owned subsidiary of the acquiring entity; or (4) a direct or indirect wholly-owned subsidiary of a person who directly or indirectly owns all of the outstanding equity interest in the acquiring entity (§3-106.1(c)(1)(iv)). Fourth, the acquiring corporation merges with or into the subject corporation (§3-106.1(c)(1)(v)). Finally, each outstanding target share that is the subject of and not irrevocably accepted for the purchase or exchange in the tender or exchange offer must be converted into, or into the right to receive, the same amount and kind of cash, property, rights, or securities paid for shares of the class or series of the target corporation irrevocably accepted for exchange or purchase in the acquiring entity's tender or exchange offer (§3-106.1(c)(1)(vi)).

The board of directors of each Maryland corporation that will be a party to the merger is required to adopt a resolution approving, by majority vote of the entire board of directors, the proposed merger, and a stockholders' meeting is not required (§3-106.1(d)(1)(i)-(iii)). If another entity, such as a foreign corporation, limited liability company, partnership or business trust, is a party to the merger, the merger must be advised, authorized and approved by that other entity in accordance with that entity's governing documents and the laws of the state in which the entity is organized (§3-106.1(d)(2)). Section 3-106.1 applies to merger agreements that provide for the consummation of the merger on or after October 1, 2014.

#### 43. Conversion of Form of Entity

Under Delaware law, a business entity which desires to change its underlying form may do so without having to create a new through which to effectuate the merger. Section

265 provides that a limited liability company, statutory trust, business trust or association, real estate investment trust, common-law trust or any other unincorporated business, including a partnership, whether general or limited (including a limited liability partnership and a limited liability limited partnership), or a foreign corporation, may convert to a corporation by filing an approved certificate of conversion and an approved certificate of incorporation with the Secretary of State. Both certificates must be filed simultaneously with the Secretary of State; if they are not to become effective upon filing, then each certificate shall provide for the same effective date or time, in accordance with Section 103(d) (§265(b)). The certificate of conversion to a corporation shall be signed by any person who is authorized to sign the certificate of conversion to a corporation on behalf of the other entity (§265(i)). The converting entity is not required to wind up its affairs or pay its liabilities and distribute its assets, and the conversion will not constitute a dissolution of the converting entity but rather a continuation of the converting entity's existence in the form of a corporation (§265(f)). The conversion will not affect the obligations or liabilities of the converting entity incurred prior to the conversion or the personal liability of any person incurred prior to the conversion, nor will it affect the choice of law applicable to the corporation with respect to matters arising prior to such conversion (§265(e)). The rights or securities of, or interests in, the entity which is converting to a corporation may be exchanged for or converted into cash, property or shares of stock, rights or securities of the corporation or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property or shares of stock, rights or securities of, or interests in, another domestic corporation or other entity or may be cancelled (§265(j)).

Section 266 provides that a corporation may convert to a limited liability company, statutory trust, business trust or association, real estate investment trust, common-law

trust or any other unincorporated business, including a partnership, whether general or limited (including a limited liability partnership and a limited liability limited partnership), or foreign corporation. In the event the corporation is converting to a non-Delaware entity, the certificate of conversion filed by the corporation with the Secretary of State must include, among other provisions, (i) an agreement of the corporation that it may be served with process in the State of Delaware in any action, suit or proceeding for enforcement of any obligation of the corporation arising while it was a Delaware corporation; (ii) an irrevocable appointment by the corporation of the Secretary of State as its agent to accept service of process in any such action, suit or proceeding; and (iii) the address to which the Secretary of State can mail such process (§266(c)). No stockholder vote is required to authorize a conversion if no shares of stock of the company have been issued prior to adoption by the board of directors of the resolution approving the conversion (§266(i)). The converting corporation is not required to wind up its affairs or pay its liabilities and distribute its assets, and the conversion will not constitute a dissolution of the converting corporation but rather a continuation of its existence in the form of the new entity (§266(f)). The conversion of a Delaware corporation to a non-Delaware entity and its cessation of its existence as a Delaware corporation does not affect any obligations or liabilities incurred by the corporation prior to its conversion, nor does it affect the choice of law applicable to the corporation with respect to matters arising prior to such conversion (§266(e)).

Maryland law authorizes the conversion of most types of Maryland business entities into other types of Maryland business entities or into business entities formed in other jurisdictions (§3-902(a)). Business entities formed in other jurisdictions are permitted to convert into Maryland business entities (§3-902(f)). Currently, a Maryland business entity may change its form or jurisdiction of organization by merging into, or transferring its assets to, a new entity of

the type desired. The important advantage of entity conversion is that, unlike in a merger or asset transfer, the resulting business entity is the *same entity* as the original entity. As a result, fewer third-party consents and regulatory approvals are typically required for a conversion than for a merger or asset transfer, which in turn reduces the expense and time required for a business to change its form or jurisdiction of organization and facilitates many transactions.

Under Maryland law, unless the entity's charter or other governing documents require a different approval for conversions, a conversion generally must be approved by the equity owners of the entity by the same vote as is required to approve a merger of the entity (§3-902(b), (e)). Objecting equity owners have appraisal rights as a result of a conversion to the same extent as they would have appraisal rights in a comparable merger (§3-904(b)(5)). Because the entity's existence continues, although in a different form, creditors of a converting Maryland business entity have the same rights with respect to claims arising before the conversion as though the conversion had not occurred, and a resulting Maryland business entity will remain liable for all of its pre-conversion obligations (§3-904(b)(6)). Under Maryland's conversion provisions, the converted entity will be deemed to have been formed as of the date of the original entity's formation (§3-904(b)(2)). An almost identical provision appears in the MRL pertaining to Maryland trust REITs.

#### 44. Dissolution

Delaware provides that the Court of Chancery, upon application by any stockholder, may appoint a custodian or receiver (1) if the stockholders are so divided that they have failed to elect successors to directors whose terms have expired, (2) if the business of the corporation is suffering or is threatened with irreparable injury because of a deadlock of directors or (3) if the corporation has abandoned its business but has not liquidated or distributed its assets

(§226). Alternatively, if, in the judgment of the board of directors, voluntary dissolution of the corporation is deemed advisable, a majority of the whole board may adopt a resolution to that effect (§275(a)). Notice subsequently must be sent to each stockholder entitled to vote on the adoption of the resolution (§275(a)). If a majority of the stockholders entitled to vote thereon votes for the proposed dissolution, a certificate stating that the dissolution has been authorized must be executed, acknowledged and filed with the Secretary of State (§275(b)). The stockholders entitled to vote on a dissolution also may consent in writing, thus rendering a meeting unnecessary (§275(c)); however, the written consent must be filed with the Secretary of State for the dissolution to be effective.

Maryland provides that stockholders entitled to cast at least 25% of all the votes which may be cast in the election of directors may petition a court of equity for an involuntary dissolution of the corporation on the ground that (1) the directors are so divided respecting the management of the corporation's affairs that the votes required for action by the board cannot be obtained or (2) the stockholders are so divided that directors cannot be elected (§3-413(a)). Any stockholder entitled to vote in the election of directors of a Maryland corporation that does not have a class of equity securities registered under the Exchange Act, however, may petition a court of equity to dissolve the corporation on the ground that (1) the stockholders are so divided that they have failed, for a period which includes at least two consecutive annual meeting dates, to elect successors to directors whose terms would have expired on the election and qualification of their successors or (2) the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent (§3-413(b)).

Maryland also provides for the voluntary dissolution of a corporation (§§3-402, 3-403). If there is stock outstanding, a majority of the entire board of directors must adopt a

resolution which declares that dissolution is advisable (§3-403). Each stockholder entitled to vote on the proposed dissolution must receive notice stating that a meeting will involve a vote on dissolution (§3-403(c)). A vote of two-thirds of all votes entitled to be cast on the matter is necessary to approve the dissolution (§3-403(d)). Thereafter, articles of dissolution must be filed with the SDAT (§§3-406, 3-407). Dissolution will be effective upon the acceptance of these articles (§3-408).

When a Maryland corporation is dissolved, until a court appoints a receiver, the business and affairs of the corporation are managed under the direction of the board of directors solely for the purpose of paying, satisfying and discharging any existing debts or obligations, collecting and distributing the corporation's assets and doing all other acts required to liquidate and wind up the corporation's business and affairs (§3-410(a)). On behalf of the corporation, the directors must collect and distribute the assets, apply them to the payment, satisfaction and discharge of existing debts and obligations of the corporation, including necessary expenses of liquidation, and distribute the remaining assets among the stockholders (§3-410(b)). The directors may carry out the contracts of the corporation, sell all or any part of the corporation's assets at public or private sale, sue or be sued in the name of the corporation and do all other acts consistent with law and the corporation's charter necessary or proper to liquidate the corporation and wind up its affairs (§3-410(c)). Dissolution of a corporation does not subject the directors to a standard of conduct other than the three-part standard of conduct for directors set forth in Section 2-405.1(c) (§3-410(d)).

Under Delaware law, a dissolving corporation or successor entity may give notice to all persons having a claim against the corporation, other than a claim against the corporation in a pending action, suit or proceeding. This notice must include (among other information): (i)

a date, not earlier than 60 days from the date of the notice, by which the person's claim must be received by the corporation and (ii) a statement which provides that the person's claim will be barred if not received by such date (§280(a)(1)). Section 280(a) provides that any claim by a claimant who receives actual notice of the dissolution pursuant to Section 280(a) is barred if the claim either (i) is not presented by the date specified in the notice or (ii) is presented but is rejected by the corporation or the successor entity and the claimant does not bring an action, suit or proceeding to enforce the claim within 120 days after the mailing of the rejection notice. If a corporation or successor entity so elects to provide notice under Section 280(a), it also must provide notice to persons with "contractual claims" against the corporation; but the term "contractual claim" does not include claims based on implied product warranties (§280(b)(1)). Furthermore, a corporation or successor entity which has provided notice in accordance with Section 280(a) must petition the Court of Chancery for a determination on the proper amount and form of security which the corporation must reserve (i) for claims which have not yet arisen, only if such claims are expected to arise within five years after the date of dissolution (extendable by the Court of Chancery to ten years after the date of dissolution), (ii) for any rejected offers of settlement to "contractual" claimants and (iii) for claims that are the subject of a pending action, suit or proceeding (§280(c)). Finally, a dissolved corporation or successor entity following the procedures in Section 280 must pay contractual claims that are "mature, known and uncontested or that have been finally determined to be owing" (§281(a)(iv)).

Corporations that do not follow Section 280 must adopt a plan of distribution prior to three years from the date of dissolution which (i) shall make reasonable provisions to pay all claims and obligations, including all contingent, conditional or unmatured contractual claims known to the corporation or the successor entity, (ii) shall make provisions as will be reasonably

likely to be sufficient to provide compensation for claims that have not yet arisen, only if such claims are expected to arise within ten years of the date of dissolution and (iii) shall make provisions as will be reasonably likely to provide compensation for claims that are the subject of a pending action, suit or proceeding (§281(b)).

#### 45. Stockholder Appraisal Rights

Where appraisal rights of stockholders are allowed, statutory provisions are specific regarding the procedure to be followed. Appraisal rights in Delaware (§262) are available only in a merger and only to stockholders who have neither voted in favor of the merger nor consented thereto in writing. Appraisal rights are also available in an opt-in streamlined back-end merger process (§251(h)), if appraisal rights would have otherwise been available (§262(b)). The stockholder must also file a written demand for appraisal prior to the vote for the merger (§262(d)(1)). Normally, appraisal rights are not available if the stock or the depository receipts related to the stock are listed on a national securities exchange or if there are more than 2,000 holders of such stock or depository receipts (§262(b)(1)); however, appraisal rights are available if the merger agreement requires the holders to accept anything other than (1) stock or depository receipts of stock in the surviving or resulting corporation (or cash in lieu of fractional shares of such stock or fractional depository receipts) or (2) stock or depository receipts of stock of a corporation having over 2,000 holders or listed on a national securities exchange (or cash in lieu of fractional shares of such stock or fractional depository receipts) (§262(b)(2)). Nonetheless, where the stock is listed on a national securities exchange, holders of such stock will still be denied appraisal rights unless (1) the total number of shares entitled to appraisal exceeds 1% of the outstanding shares of the class or series eligible for appraisal, (2) the value of the consideration provided in the merger for such total number of shares exceeds \$1

million, or (3) the merger was approved pursuant to Section 253 or Section 267 (§262(g)). The issues in an appraisal and the valuation process are tried directly by the Court of Chancery pursuant to a petition that must be filed within 120 days after the effective date of the merger (§262(e)). The Court of Chancery also may appoint a Master in Chancery to act as a special appraiser in connection with an appraisal action (Del. Code Ann. tit. 10, §372(a)). Appraisal rights have generally been given some of the characteristics of a class action (§262(j)); for example, the court is given the right to charge the expenses, including attorneys' fees of the dissenting stockholders, *pro rata*, among all of the shares being appraised.

Stockholders of any Maryland corporation have the right to demand and to receive payment of the fair value of their stock in the event of (1) a merger or consolidation, (2) a share exchange, (3) a transfer of assets, (4) a charter amendment altering contract rights of outstanding stock (unless the right to do so is reserved in the charter) or (5) a business combination governed by Section 3-602 or exempted by Section 3-603(b) (see section 45, *infra*) (§3-202(a)). The right to fair value does not apply if (1) the stock is listed on a national securities exchange (unless the transaction falls under §3-202(d) described below); (2) the stock is that of the successor in a merger (unless the merger alters the contract rights of the stock or converts the stock in whole or in part into something other than stock, cash, scrip or other interests); (3) the stock is not entitled, other than solely because of Section 3-106 or 3-106.1, to be voted on the transaction or the stockholder did not own the stock on the record date for determining stockholders entitled to vote on the transaction; (4) the charter provides that the holders of the stock are not entitled to exercise the rights of an objecting stockholder; or (5) the stock is that of an open-end investment company registered with the Securities and Exchange Commission under the 1940 Act and the stock is valued in the transaction at its net asset value

(§3-202(c)). These rights are available only when the stockholder (1) files with the corporation a timely, written objection to the transaction, (2) does not vote in favor of the transaction and (3) makes demand within 20 days on the successor corporation for payment of his stock or in actions taken under Section 2-505(b) (see section 12, *supra*), within ten days after the corporation gives the notice required by Section 2-505(b) (§3-203). In the event that the transaction is a business combination governed by Section 3-602 or exempted by Section 3-603(b), “fair value” will be determined in accordance with the “fair price” provisions of Section 3-603(b).

A stockholder of a Maryland corporation also has appraisal rights when the corporation amends its charter in a way which alters the contract rights of any outstanding stock and substantially and adversely affects the stockholder’s right unless the right to do so is reserved in the corporation’s charter (§§2-602, 3-202(a)(4)). Within 50 days after the recording of the articles, an objecting stockholder who has not received payment for his stock may petition a court of equity to determine the fair value of his stock (§3-208(a)). Such valuation may include interest (§3-211(c)). Dissenting stockholders may have to bear their own costs and expenses of appraisal if the court finds that their failure to accept an offer was arbitrary and vexatious or not in good faith (§3-211(c)(2)).

In 2008, Section 3-202(d) was added at the initiative of T. Rowe Price Associates, Inc. to slightly narrow the “market-out” exemption from the appraisal rights statute in order 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 depositary 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 (§3-202(d)).

46. Takeovers

*Maryland Business Combination Act.* In Maryland, any “business combination” between a corporation which has 100 or more beneficial owners of its stock and an “interested stockholder” (or an affiliate thereof) (1) is prohibited for five years after the most recent date on which the interested stockholder became an interested stockholder (§3-602(a)) and (2) thereafter must be approved by two “super-majority” votes, in addition to any other vote required by law or the charter (§3-602(b)), or must provide for payment of the so-called “fair price” to holders of the stock of the corporation (§3-603(b)). An “interested stockholder” is defined as either (1) the beneficial owner of ten percent or more of the voting power of the outstanding voting stock after the date on which the corporation had 100 or more beneficial stockowners or (2) an affiliate of the corporation who, at any time within the two-year period immediately prior to the date in question and after the date on which the corporation had 100 or more beneficial stockowners, was the beneficial owner of ten percent or more of the voting power of the then-outstanding voting stock of the corporation (§3-601(j)). However, a person is not an interested stockholder if, prior to the most recent time at which the person would otherwise have become an interested stockholder, the board of directors of the corporation approved the transaction which otherwise would have resulted in the person becoming an interested stockholder (§3-601(3)). In approving such a transaction, the board may provide that its approval is subject to compliance, at or after

the time of approval, with any terms or conditions determined by the board, *e.g.*, a standstill requirement (§3-601(4)). The two supermajority vote requirements are satisfied by the affirmative vote of at least (1) 80% of the votes entitled to be cast by outstanding shares of voting stock of the corporation, voting together as a single group and (2) two-thirds of the votes entitled to be cast by holders of voting stock (other than voting stock held by an interested stockholder who is, or whose affiliate is, a party to the business combination), voting as a single voting group (§3-602). In addition, any stockholder who objects to the transaction in the manner provided for dissenting stockholders (§§3-201 *et seq.*) is entitled to receive “fair value” for his stock determined in accordance with the “fair price” provisions of Section 3-603(b).

A “business combination” is defined (§3-601(e)) as:

(1) A merger; consolidation or share exchange of a corporation (or any subsidiary) with any interested stockholder or with any other corporation which is, or after the merger, consolidation or share exchange would be, an affiliate of an interested stockholder; however, any merger, consolidation or share exchange which does not alter the contract rights of the stock as set forth in the corporation’s charter or change or convert the outstanding shares of stock is not subject to the special voting requirements;

(2) Any sale, transfer, lease or other disposition, other than in the ordinary course of business or pursuant to a dividend or any other method affording substantially proportionate treatment to the holders of voting stock, in one transaction or a series of transactions in any twelve-month period, to an interested stockholder or affiliate thereof of any assets of the corporation having an aggregate book value of ten percent or more of the total market value of the outstanding stock of the corporation or of the corporation’s net worth;

(3) The issuance or transfer by the corporation (or any subsidiary) of

equity securities of the corporation having an aggregate market value of five percent or more of the total market value of the outstanding stock of the corporation to any interested stockholder (or affiliate), except on a substantially proportionate basis to all holders of voting stock;

(4) The adoption of a plan of liquidation or dissolution in which anything other than cash will be received by an interested stockholder (or an affiliate);

(5) Any reclassification, recapitalization, merger, consolidation or share exchange which has the effect of increasing by five percent or more the total number of outstanding shares owned directly or indirectly by an interested stockholder (or an affiliate); or

(6) The receipt by any interested stockholder or affiliate of the benefit of any loan, advance, guarantee, pledge or other financial assistance or any other tax credit or advantage provided by the corporation.

Both the moratorium and special voting requirements do not apply, however, to business combinations:

(1) That have been approved or otherwise exempted from the special voting requirements, specifically or generally, by resolution of the board of directors prior to September 1, 1983 (§3-603(c)(1)(i));

(2) That have been approved or otherwise exempted, specifically or generally, by resolution of the board of directors prior to the most recent time that the interested stockholder became an interested stockholder (§3-603(c)(1)(ii));

(3) Of a corporation that on July 1, 1983, had an existing interested stockholder, unless the charter or bylaws specifically provide otherwise or the board of directors has subsequently passed a resolution electing to be subject to the statute (§3-603(d)(1));

(4) Of a close corporation as defined in Section 4-101(b) (§3-

603(e)(1)(i);

(5) Of a corporation having fewer than 100 beneficial owners of its stock

(§3-603(e)(1)(ii));

(6) Of a corporation whose original articles of incorporation have a provision, or whose stockholders adopt a charter amendment after June 30, 1983, expressly electing not to be governed by the special voting requirements, provided that an amendment which is adopted after the corporation becomes subject to the business combination restrictions may not be effective until 18 months after the vote, and may not apply to a business combination with an interested stockholder who became an interested stockholder on or prior to the date of the vote (§3-603(e)(1)(iii));

(7) Of a corporation registered under the 1940 Act as an open-end investment company (§3-603(e)(1)(iv)); or

(8) Of a corporation registered under the 1940 Act as a closed-end investment company unless its board of directors adopts a resolution to be subject to Section 3-602 on or after June 1, 2000. However, the resolution will not be effective with respect to a business combination with any person who became an interested stockholder before the time that the resolution is adopted (§3-603(e)(1)(v)).

*Maryland Control Share Acquisition Act.* Maryland's Control Share Acquisition Act (§§3-701 through 3-710), enacted in 1989, provides that holders of control shares of a corporation acquired in a control share acquisition have no voting rights with respect to the control shares except to the extent approved by the stockholders by the affirmative vote of at least two-thirds of all the votes entitled to be cast on the matter, excluding all interested shares (§3-702(a)(1)).

“Control shares” are shares of stock of the corporation which, when aggregated with other shares controlled by the stockholder, entitle the person to exercise voting power in electing directors within any of the following ranges of voting power: (1) one-tenth or more, but less than one-third of all voting power; (2) one-third or more, but less than a majority of all voting power; or (3) a majority or more of all voting power (§3-701(d)(1)). Control shares include shares only to the extent that the “acquiring person,” following the acquisition of shares, is entitled to exercise voting power in electing directors within any of the foregoing levels of voting power for which stockholder approval has not been obtained (§3-701(d)(2)). An “acquiring person” is a person who makes or proposes to make a “control share acquisition” (§3-701(b)), which is defined as the direct or indirect acquisition of ownership or control of “control shares” (§3-701(e)(1)). Shares acquired within a 90-day period or pursuant to a plan to make a control share acquisition are considered to have been acquired in the same acquisition (§3-702(e)(1)).

Control share acquisitions do not include acquisitions of shares: (1) before November 4, 1988; (2) under a contract made before November 4, 1988; (3) under the laws of descent and distribution; (4) in satisfaction of a pledge or other security interest created in good faith and not for the purpose of circumventing the statute; (5) in a merger, consolidation or share exchange if the corporation is a party to the merger, consolidation or share exchange; or (6) within one-tenth or more but less than one-fifth of all voting power of outstanding shares of stock of the corporation before June 1, 2000 (§3-701(e)(2)).

The following corporations are exempt from the law: (1) a close corporation; (2) a corporation with fewer than 100 beneficial stockholders; (3) a corporation registered under the 1940 Act as an open-end investment company; or (4) a corporation registered under the 1940 Act

as a closed-end investment company unless its board of directors adopts a resolution to be subject to the Control Share Acquisition Act on or after June 1, 2000. However, the resolution will not be effective with respect to any person who became a holder of control shares before the time that the resolution is adopted (§3-702(c)).

The Control Share Acquisition Act does not apply to the voting rights of shares of stock if the acquisition of the shares, specifically or generally, has been approved or exempted by a provision contained in the charter or bylaws and adopted at any time before the acquisition of the shares (§3-702(b)).

The voting rights of any shares acquired in a control share acquisition must be approved at a meeting of the stockholders by the affirmative vote of two-thirds of all the votes entitled to be cast on the matter, excluding “interested shares” (§3-702(a)). “Interested shares” are shares whose voting power may be exercised by the person making or proposing the control share acquisition, an officer of the corporation or an employee of the corporation who is also a director (§3-701(f)).

Any person proposing to make or who has made a control share acquisition may cause the issue of approval of voting rights for the control shares owned by such person to be submitted to the stockholders by delivering to the board of directors of the corporation: (1) an acquiring person statement; (2) a request for a special meeting; and (3) a written undertaking to pay the corporation’s expenses of the meeting (except the expenses of opposing approval of voting rights) (§3-704(a)). In addition, if the control share acquisition requires financing to be provided by persons other than the acquiring person, the acquiring person must also deliver to the board of directors a copy of definitive financing agreements with responsible financial institutions providing for any financing not to be provided by the acquiring person (§3-705).

Within ten days after the corporation's receipt of the request and undertaking, the directors must call a special meeting to consider according voting rights to the shares acquired or to be acquired in the control share acquisition (§3-704(a)). Unless the acquiring person agrees to another date, the meeting must be held within 50 days after the corporation's receipt of the request and undertaking (§3-704(c)).

If no request to consider voting rights is made by the acquiring person pursuant to the procedure outlined above, the issue of the voting rights to be accorded the shares acquired in the control share acquisition may, at the option of the corporation, be presented for consideration at any meeting of stockholders, provided advance notice is given to the acquiring person (§3-704(e)).

Unless the corporation's charter or bylaws provide otherwise, control shares for which voting rights have not previously been approved may be redeemed by the corporation under the following circumstances: (1) within 60 days after any meeting at which voting rights were considered and not approved (§3-707(a)); or (2) if an acquiring person statement has not been delivered on or before the tenth day after the control share acquisition, at any time during a period commencing on the eleventh day after the control share acquisition and ending 60 days after the delivery of an acquiring person's statement (§3-707(b)). Any redemption of control shares under Section 3-707 must at the "fair value of the shares" (§3-707(c)). For this purpose, "fair value" is determined (a) as of the date of acquiring person's last acquisition of control shares in a control share acquisition or, if a meeting was held under Section 3-704, as of the date of the meeting (§3-707(c)(1)) and (b) without regard to the absence of voting rights for the control shares (§3-707(c)(2)).

Unless the corporation's charter or bylaws provide otherwise, if voting rights for

control shares are approved at a meeting, and, as a result, the acquiring person is entitled to exercise or direct the exercise of a majority or more of all voting power, the corporation shall be deemed to be a successor in a merger (§3-708(b)) and all stockholders other than the acquiring person shall have the right to demand and receive fair value for their stock (§3-708(a)), as provided in the “dissenters’ rights” provisions of the Maryland General Corporation Law (§§3-201 *et seq.*).

*Maryland Subtitle 8 Board Opt-in Statute.* Maryland permits an eligible corporation to elect to be subject, in whole or in part, by provision in its charter or bylaws or a resolution of its board of directors, notwithstanding contrary charter or bylaw provisions (§3-802(a)), to certain additional takeover provisions. To be eligible to make such an election, a corporation must have a class of equity securities registered under the Exchange Act (§3-802(a)) and at least three directors who, at the time of such election, are not officers or employees of the corporation, are not acquiring persons, are not directors, officers, affiliates or associates of an acquiring person and were not nominated or designated as directors by an acquiring person (§3-802(b)(1)). Directors do not fail to satisfy the aforementioned requirements because they own securities issued by the corporation, are entitled to compensation, retirement, severance or other benefits as directors of the corporation or might continue to serve as directors of the corporation or become directors of an acquiring person (§3-802(b)(2)).

A corporation may elect not to be subject to any provision of Title 3, Subtitle 8 to which it has previously elected to be subject, if it elects not to be subject to the provision in the same manner in which it elected to become subject to the provision (§3-802(b)(3)). In addition, a corporation’s charter may contain a provision or its board of directors may adopt a resolution that prohibits the corporation from electing to be subject to any or all provisions of Title 3,

Subtitle 8 (§3-802(c)).

Whenever a corporation elects by resolution of its board of directors or bylaw amendment to be subject to any or all of the provisions of Title 3, Subtitle 8, or whenever its board of directors adopts a resolution prohibiting the corporation from electing to be subject to any or all of its provisions, the corporation must file articles supplementary with the SDAT describing any provision to which the corporation has elected to become subject or may not elect to become subject (§3-802(d)). Stockholder approval is not required for the filing of the articles supplementary (§3-802(d)(3)).

If a corporation elects to classify its board of directors by resolution, the board of directors must, by resolution adopted before the first annual meeting of stockholders after the election, designate from among its members directors to serve as Class I, Class II and Class III directors (§3-803(a)(1)). To the extent possible, the classes shall have the same number of directors (§3-803(a)(2)). Class I directors serve until the first annual meeting of stockholders after the date on which the corporation elects to be subject to the provisions and until their successors are elected and qualify (§3-803(b)). Class II and Class III directors serve until the second and third such annual meetings respectively and until their successors are elected and qualify (§3-803(c), (d)). At each annual meeting, the successors to the class of directors whose term expires at that meeting will be elected to hold office for a term continuing until the annual meeting held in the third year following the year of their election and until their successors are elected and qualify (§3-803(e)).

An eligible corporation may also elect to provide that (i) a director may be removed only by an affirmative vote of at least two-thirds of all the votes entitled to be cast by the stockholders generally in the election of directors (§3-804(a)); (ii) the number of directors

may be fixed only by vote of the board of directors (§3-804(b)); (iii) any vacancy, whether resulting from an increase in the size of the board or the death, resignation or removal of a director, may be filled only by the affirmative vote of a majority of the remaining directors in office, even if the remaining directors do not constitute a quorum (§3-804(c)); and (iv) a special meeting may be called only on the written request of the stockholders entitled to cast at least a majority of all the votes entitled to be cast at the meeting (§3-805).

Maryland also permits the charter of a corporation to include a provision allowing the board of directors, in considering a potential acquisition of control of the corporation, to consider the effect of the potential acquisition of control on stockholders, employees, suppliers, customers and creditors of the corporation and on communities in which offices or other establishments of the corporation are located (§2-104(b)(9)). The statute expressly provides that the inclusion or omission of a provision in the charter that allows the board to consider the effect of a potential acquisition of control on such persons does not create an inference concerning factors that a board may consider regarding a potential acquisition of control (§2-104(c)).

*Delaware Business Combination Statute.* In 1988, Delaware enacted takeover provisions pertaining to business combinations with interested stockholders (§203). The statute covers a three-year period following the date that such holder becomes an interested stockholder, defined as either (1) the owner of 15% or more of the outstanding voting stock or (2) an affiliate or associate of the corporation who was the owner of 15% or more of the outstanding voting stock at any time within the three-year period immediately prior to the date that such person became an “interested stockholder” (§203(c)(5)). This definition is subject to certain exceptions which are summarized below.

Business combinations, as defined in Section 203(c)(3) are permitted if (1) prior

to such date the board of directors of the corporation approved either the business combination or the transaction which resulted in the stockholder becoming an interested stockholder; (2) upon consummation of the transaction which resulted in the stockholder becoming an interested stockholder, the interested stockholder owned at least 85% of the voting stock of the corporation outstanding at the time the transaction commenced, excluding for purposes of determining the voting stock outstanding (but not the outstanding voting stock owned by the interested stockholder) those shares owned by directors, officers or certain employee stock option plans; or (3) on or subsequent to such date the business combination is approved by the board of directors and authorized at an annual or special meeting of stockholders, and not by written consent, by the affirmative vote of at least 66-<sup>2</sup>/<sub>3</sub>% of the outstanding voting stock which is not owned by the interested stockholder (§203(a)).

A business combination is defined in Section 203(c)(3) as:

(1) A merger or consolidation of the corporation (or any subsidiary) with the interested stockholder or with any corporation, partnership, unincorporated association or other entity if the merger or consolidation is caused by the interested stockholder;

(2) Any sale, lease, exchange, mortgage, pledge, transfer, or other disposition of assets of the corporation (or any subsidiary) to the interested stockholder of any assets of the corporation having a market value equal to or greater than 10% of the aggregate market value of the corporation's assets;

A "business combination" also includes the transfer of stock of the corporation (or any subsidiary) to the interested stockholder (except for transfers in a conversion or exchange or a pro rata distribution which does not increase the interested stockholder's proportionate ownership of a class or series (§203(c)(3)(iii), (iv)). Any receipt by the interested stockholder

(except proportionately as a stockholder) of any loans, advances, guarantees, pledges or other financial benefits is also defined as a “business combination” (§203(c)(3)(v)).

The statute only applies to those corporations incorporated in Delaware which have a class of voting stock listed on a national securities exchange or which have over 2,000 holders of record of the corporation’s stock (§203(b)(4)). Those persons who became “interested stockholders” before December 23, 1987 are not covered by the statute (§203(c)(5)(x)(A)). A stockholder who is excluded from the coverage of Section 203 by this “grandfather clause” and transfers stock to become a less than 15% stockholder but continues to be an “affiliate” or “associate” of the corporation does not become an “interested stockholder” solely as a result of such affiliation or association under the “look back” provisions of Section 203(c)(5)(ii) (§203(c)(5)(x)(A)(II)). Corporations may elect not to be governed by the statute by a vote of stockholders or by adopting a charter or bylaw amendment (§203(b)(3)). The effective date of such an opt-out via charter or bylaw amendment varies. In the case of a corporation that has never had a class of voting stock listed on a national securities exchange nor held of record by more than 2,000 stockholders and that has not previously elected to be governed by Section 203(b)(1), opting out via charter amendment becomes effective upon the effective date and time of the certificate filed with the Secretary of State, while opting out via bylaw amendment becomes effective immediately upon adoption of the amendment. In the case of all other corporations, the opt-out becomes effective twelve months after the certificate becomes effective or twelve months after adopting the bylaw amendment (§203(b)(3)).

47. Stockholder Rights Plans

Maryland has legislatively validated stockholder rights plans, first upheld judicially in 1989. The board of directors of a Maryland corporation may, in its sole discretion,

set the terms and conditions of rights, options or warrants under a stockholder rights plan and issue rights, options or warrants under a stockholder rights plan to designated persons or classes of persons (§2-201(c)(1)). A stockholder rights plan is defined as “an agreement or other instrument under which a corporation issues rights to its stockholders that (1) may be exercised under specified circumstances to purchase stock or other securities of the corporation or any other person; and (2) may become void if owned by a designated person or class of persons under specified circumstances” (§1-101(aa)). In addition, the board is expressly authorized to include in the rights plan “any limitation, restriction, or condition that . . . precludes, limits, invalidates or voids the exercise, transfer, or receipt of the rights, options, or warrants by designated persons or classes of persons in specified circumstances . . . .” (§2-261(c)(2)(i)). Thus, discriminatory “flip-over” and “flip-in” provisions are expressly authorized under Maryland law.

While stockholder rights plans, including “flip-over” and “flip-in” provisions, have been upheld judicially in Delaware, they have not been validated legislatively.

Maryland has also expressly validated continuing director or “slow-hand” provisions in stockholder rights plans. The board of directors of a Maryland corporation is expressly authorized to include in a stockholder rights plan “any limitation, restriction, or condition that . . . limits for a period not to exceed 180 days the power of a future director, as defined in the stockholder rights plan, to vote for the redemption, modification, or termination of the rights, options or warrants” (§2-201(c)(2)(ii)).

In 1998, the Supreme Court of Delaware struck down a 180-day slow-hand provision in a stockholder rights plan. *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281 (Del. 1998).

## VI. TAXES AND FILING FEES

### 48. Franchise Tax

In Delaware (§501), an annual franchise tax must be paid by every non-exempt corporation incorporated under the laws of that state. Banking corporations, savings banks or building and loan associations, corporations formed to drain lowlands, religious corporations, charitable or educational associations or associations formed to aid their own needy members or survivors of their members are exempt. Each non-exempt corporation must also file a franchise tax report with the Secretary of State (§502(a)) and must include a statement of the corporation's total gross assets and, after January 1, 2008, the number of shares of each class of stock actually issued, if any (§503(b)). The alternate methods of computing the franchise tax are set forth in §503(a) and are based either (1) on the number of shares of capital stock authorized or (2) on an assumed par capital of the corporation. Corporations that compute the franchise tax in accordance with method (1) must pay \$175.00 for authorized capital stock that does not exceed 5,000 shares; \$250.00 for authorized capital stock greater than 5,000 shares but less than or equal to 10,000 shares; and the further sum of \$85.00 on each additional 10,000 shares or part thereof. Corporations computing the franchise tax in accordance with method (2) must pay \$175.00 where the assumed no-par capital does not exceed \$500,000; \$250.00 where the assumed no-par capital is greater than \$500,000 but less than \$1,000,000; and \$85.00 for each \$1,000,000 (or part thereof) of additional assumed no-par capital; the "assessed no-par capital" is computed by multiplying the number of authorized shares of no-par stock by \$100. In addition, under method (2), \$400.00 is added for each \$1,000,000 in excess of \$1,000,000 of assumed par value capital. In no case will the franchise tax computed under method (1) be more than \$200,000 nor less than \$175 and in no case will the franchise tax computed under method (2) be more than \$200,000

nor less than \$400 (§503(c)). Notwithstanding any computation under method (1) or (2), Delaware fixes the franchise tax at \$250,000 for a subset of large publicly-traded corporations that meet certain annual gross revenue and asset thresholds (“Large Corporate Filer[s]”) (§503(c)).

If Delaware franchise taxes are allowed to remain in arrears for three months after becoming payable, the Attorney General may seek an injunction to restrain the corporation from the exercise of any franchise or from the transaction of any business within the state (§508). If the taxes remain unpaid for one year, the Attorney General may seek the appointment of a receiver through the Court of Chancery (§509(a)), which also shall authorize the seizure and sale of corporate property to pay the amount found to be due and unpaid (§509(b)). If such property within the state is not sufficient to pay the decree, the court shall order the corporation to assign and transfer any chose in action or any patents or licenses for sale by the receiver. If any Delaware corporation fails to file a complete annual franchise tax report or pay the franchise tax for one year, the charter of the corporation will be voided (§§510, 511). Once the Governor proclaims that a charter is repealed, anyone who exercises any powers under the certificate of incorporation will be subject to fine or imprisonment (§513). Also, a Delaware corporation may not merge out of existence, dissolve, transfer (without continuing its existence as a Delaware corporation) or convert until all franchise taxes due have been paid and all annual franchise tax reports (including a final annual franchise tax report for the year in which such merger, dissolution, transfer or conversion becomes effective) have been filed (§277).

In Maryland, no corporation pays any type of franchise tax. Prior to 2001, certain financial institutions formed or transacting business in Maryland were subject to a franchise tax. However, the financial institutions franchise tax was terminated for all taxable years after

December 31, 2000 (Tax – General Article §8-202(a)(2)).

49. Organization and Incorporation Fees

Maryland and Delaware have both enacted organization and incorporation fees. Although these fees have different names in the respective states, they are very similar. In Delaware (§391(a)(1)), corporations having capital stock must pay a “bonus fee” upon the receipt for filing of an original certificate of incorporation. This “bonus fee” is computed on the basis of the total number of shares of the corporation’s authorized capital stock and not on the number of shares outstanding (§391(b)). The computation also depends on whether the stock has a par value or no par value. The minimum fee is \$15, and, when computing the fee on par value stock, each \$100 unit of the authorized capital stock is counted as one assessable share (§391(a)(1)).

If a Delaware corporation subsequently files a certificate of amendment of its certificate of incorporation, an amended certificate of incorporation before payment of capital or a restated certificate of incorporation, increasing its authorized capital stock by increasing the number of shares, or the par value of shares, or changing shares without par value into shares with par value, or *vice versa*, then an additional fee is due (§391(a)(2)). The additional fee is equal to the difference between the fee computed on the new total of authorized capital stock and the fee computed on the former total of authorized capital stock. In no case will the fee be less than \$30. Section 391(a)(26) requires a Delaware limited liability company, limited partnership or business trust filing a certificate of conversion to pay a fee of \$115, plus the fee payable upon the receipt for filing of an original certificate of incorporation. A corporation filing a certificate of conversion must pay a fee of \$165 (§391(a)(27)). A corporation filing a certificate of validation for the ratification and validation of defective corporate acts (§204) must pay a fee of

\$2,500 for the receiving and filing and/or indexing by the Secretary of State (§391(a)(28)). If the certificate of validation has the effect of increasing the authorized capital stock of a corporation, an additional fee must also be paid.

Every Maryland corporation which has capital stock must pay an “organization and capitalization fee” before any charter document that requires an organization and capitalization fee is recorded (§1-204(g)). Unlike Delaware’s fee, the Maryland fee is computed on the aggregate par value of the authorized capital stock by using the criteria set out in the statute. If the shares are without nominal or par value, each share is assigned a value of \$20 solely for the purpose of computing the fee (§1-204(a)(4)(ii)). The minimum fee is \$20. Savings and loan associations, credit unions and corporations without capital stock must pay a fee of \$20 (§1-204(c)(2)).

If a Maryland corporation increases the aggregate par value of its capital stock, it must pay an additional fee before any charter document is recorded (§1-204(d), (g)). The amount of the additional fee is equal to the difference between the fee computed at the rates set out in Section 1-204(c) in the total amount of the aggregate par value of its capital stock including the proposed increase and the fee computed on the total amount of the aggregate par value of its capital stock excluding the proposed increase (§1-204(d)(1)).

In the case of consolidation, no organization and capitalization fee is owed if the new corporation is not a Maryland corporation. If, however, the new corporation is a Maryland corporation, then it will be required to pay a fee for the amount of the aggregate par value of its authorized capital stock in excess of the aggregate par value of authorized capital stock of the consolidating corporations (§1-204(e)). For purposes of the organization and capitalization fee, a merger of existing corporations is treated as a consolidation of existing corporations

(§1-204(f)(1)). The minimum fee paid is \$20 (§1-204(d)(3), (f)(2)).

50. Annual Reports and Filing Fees

In Maryland, every corporation is required to file an annual business tax report with the SDAT on or before April 15 of each year after the year of incorporation. The annual report must be filed whether or not the corporation has been organized for business and whether or not the corporation owns any property. The fee for filing the annual business tax report is \$300 (§1-203(b)(3)). Although non-stock corporations are required to file an annual report, they are exempt from payment of a filing fee (§1-203(b)(3)).

In Delaware, every exempt corporation is required to pay a \$25 fee and all other corporations are required to pay a \$50 fee for the receiving and filing and/or indexing of the annual franchise tax report required by §502 (§391(a)(18)). For two-hour same day processing of these documents, the Division of Corporations may charge a fee of up to \$500; for one-hour same day processing of these documents, the Division of Corporations may charge a fee of up to \$1,000; for 30 minute processing of these documents, the Division of Corporations may charge a fee of up to \$7,500 (§391(h)(i)).

51. Securities Enforcement

In Maryland, the Securities Commissioner may issue interpretive opinions regarding certain transactions for a \$100 fee for each opinion (§11-206).

52. Preclearance

Both Maryland (§1-201(d)) and Delaware (§391(a)(17)) allow entities, for a fee, to submit their documents for preclearance by the SDAT or the Delaware Secretary of State. After review, the reviewing agency will return the document with either (a) a notice that the document is acceptable or (b) a list of the issues the agency found during its review. In

Delaware, this is a formal, printed list along with an actual letter indicating the Secretary of State's comments. In Maryland, the "list" is just notes that the SDAT has written in the margins of the submitted document. In Delaware, if the submitting party resubmits the document after making the changes recommended by the agency, along with the original document reviewed by the agency, the preclearance is binding. Currently, SDAT does not recognize preclearance as binding. Both states allow parties to expedite preclearance for an additional fee.