

September 29, 2022

Changes to Maryland General Corporation Law and Maryland REIT Law
Effective October 1, 2022

The General Assembly of Maryland has enacted House Bill 996/Senate Bill 879 (Chapters 289 and 290 of the Laws of Maryland 2022) and House Bill 999/Senate Bill 431 (Chapters 292 and 293 of the Laws of Maryland 2022), amending several provisions of the Maryland General Corporation Law (the “MGCL”) and the Maryland REIT Law (the “MRL”). The legislation was signed by Governor Hogan and is effective as of October 1, 2022. Unless otherwise noted, all section references below are to the MGCL. Here are the key provisions of the legislation:

RATIFICATION OF DEFECTIVE CORPORATE ACTS

General. House Bill 996/Senate Bill 879 adds a new Subtitle 7 to Article 2 of the MGCL, “Ratification of Defective Corporate Acts” (“Subtitle 7”), which provides an express statutory procedure for ratification of defective corporate acts by the board of directors and, if the context requires, the stockholders of a Maryland corporation. The statute defines a defective corporate act as (1) any corporate act purportedly taken that, at the date of the defective corporate act, would have been within the power of the corporation but is void or voidable due to a failure of authorization or (2) an overissue, which is defined as the issuance by the corporation of shares of stock of a class or series in excess of the number of shares of stock of the class or series authorized by the charter. The new subtitle also includes a new charter filing, articles of validation, and a specific judicial proceeding for review of a ratification, each described more fully below. Section 8-601.1 of the MRL is amended to make Subtitle 7 expressly applicable to defective trust acts of a real estate investment trust formed under the MRL.* Subtitle 7 is a statutory safe harbor only and is not the exclusive means to ratify or validate a defective corporate or trust act.

Ratification by the Board and the Stockholders. Pursuant to Section 2-702, the board of directors may ratify a defective corporate act by adopting a resolution describing the defective corporate act and the failure of authorization and containing certain other information required by the statute. However, if stockholder action is required at the time of ratification, or if the board could not have approved the defective corporate act without stockholder approval on the date of the defective corporate act, the board must submit the ratification for consideration at a meeting of stockholders and the stockholders must approve the proposal by adopting a resolution comparable to the requirements for a board ratification.

* While Subtitle 7 is applicable to Maryland real estate investment trusts, we will refer only to corporations for the remainder of this discussion.

If stockholder action is required, the applicable quorum and voting requirements are the greater of (a) the requirements applicable to the defective corporate act at the time of ratification or (b) the requirements that would have been applicable to the defective corporate act on the date of the defective corporate act. The statute provides that only holders of validly issued stock outstanding on the applicable record date for determining stockholders entitled to vote on the ratification may vote on the proposed matter. Holders of putative stock (which is defined as stock created or issued as a result of a defective act that cannot be determined by the board of directors to be valid stock) are not entitled to vote or be counted for purposes of determining a quorum. If feasible, stockholder ratification may also be effected by unanimous consent or other applicable consent requirements under Section 2-505 and the charter and bylaws.

Effectiveness of Ratification and Articles of Validation. Pursuant to Section 2-703, a ratification of a defective corporate act is effective on the date of the board adoption or, if stockholder action is required, the date of stockholder adoption, of the resolution required under Section 2-702. However, if the defective corporate act would have required the filing of a charter document with the State Department of Assessments and Taxation of Maryland (the “SDAT”), the ratification becomes effective on the later of (a) the date that articles of validation are accepted for record by the SDAT or (b) the date set forth in the articles of validation, which may not be more than 30 days after the date that the SDAT accepts the filing for record. A defective corporate act ratified in accordance with Subtitle 7 is no longer void or voidable as a result of the failure of authorization and shall be deemed a valid corporate act effective as of the date of the defective corporate act. This retroactive effect also applies to the issuance of putative stock, which shall be deemed validly issued as of the time it was purportedly issued. The effectiveness of the ratification would remain subject to court review under Section 2-706 during the timeframes discussed below.

Section 2-704 sets forth the stockholder notice requirements in connection with a stockholder meeting, including the requirement that notice of a stockholder meeting to consider a ratification be given to holders of putative stock, even though they are not entitled to vote on a ratification proposal or be counted for quorum purposes. Section 2-704 also provides for permissive notice of a board-approved ratification which, if given, will commence the 120-day period during which judicial review may be requested, as further described below. For corporations with a class of equity securities registered under the Securities Exchange Act of 1934, notice of a board-approved ratification will be deemed given when the ratification is disclosed in a document publicly filed with the Securities and Exchange Commission.

Section 2-705 establishes the requirements for articles of validation, which are required to be filed in certain circumstances and may be filed in the discretion of the board of directors in others. In the case of a failure to file a charter document that was required to be filed with respect to a defective corporate act, articles of validation must be filed in lieu of filing the charter document that was originally required to be filed. Articles of validation may also be filed to confirm that no changes are required with respect to a charter document previously filed in

connection with a defective corporate act or to effect any changes to a charter document previously filed in connection with a defective corporate act.

Judicial Proceeding. Pursuant to Section 2-706, upon application by the corporation, any successor entity to the corporation, any director of the corporation, any record or beneficial holder of valid stock or putative stock, any record or beneficial holder of putative stock as of the date of the defective corporate act, any holder of a voting trust certificate, any holder of a voting trust certificate as of the date of the defective corporate act or any other person claiming to be substantially and adversely affected by a ratification under Subtitle 7, a court may determine the validity of any ratification under Subtitle 7 or modify or waive any of the procedures required by Subtitle 7 to ratify a defective corporate act. The statute requires that any action under this section be brought within 120 days after (a) the date the ratification was approved by stockholders, if applicable, or (b) if notice was given or deemed given under Section 2-704 within 60 days after the ratification, the date on which notice was given or deemed given.

Safe Harbor Only. Section 2-707 provides that Subtitle 7 is not the exclusive means of ratifying or validating a defective corporate act and the subtitle does not limit the ability of a corporation to file certificates or charter documents in accordance with other provisions of the MGCL. Additionally, the absence or failure of ratification in accordance with Subtitle 7 does not, of itself, affect the validity or effectiveness or any corporate act otherwise lawfully ratified, nor create a presumption that any corporate act is or was a defective corporate act or void or voidable.

Many corporations include ratification provisions in the charter or, more typically, the bylaws. The new legislation does not supplant those provisions and, assuming that they are otherwise consistent with principles of corporation law, existing charter and bylaws provisions regarding ratification will remain valid. However, when confronted with a defective corporate act, a board of directors will want to carefully evaluate the steps to be taken in ratifying the defective corporate act in light of the procedures available under the new legislation.

MISCELLANEOUS MGCL AMENDMENTS

General. House Bill 999/Senate Bill 431 enact miscellaneous clarifications and refinements to the MGCL and the MRL, the most significant of which are summarized below. There were no major changes in this year's miscellaneous legislation.

Corporations with a Limited Period of Existence. MGCL Sections 2-103 and 2-104 are amended to clarify that a corporation may have a limited period of existence set forth in its charter that may be extended, continued or terminated upon the occurrence of an event, action or determination set forth in the charter. Accordingly, there is now express statutory authorization for providing in a charter that a corporation has an initial term of existence that may be extended or converted to perpetual life upon the occurrence of certain events.

Remote Stockholder Meetings. MGCL Section 2-502.1, which dealt with stockholder participation in a stockholders meeting by telephone, is deleted as being redundant with the more fully developed provisions for remote stockholder meetings set forth in Section 2-503.

Abandonment of Merger. MGCL Section 3-108 is amended to clarify the procedure for abandonment of a proposed consolidation, merger or statutory share exchange before the effective time of articles of consolidation, merger or share exchange that have been filed with the SDAT. While abandonments after filing with the SDAT are very unusual, the previous version of the statute was not clear as to which party or parties were required to provide notice of abandonment to the SDAT.

Effective Time of Dissolution. MGCL Section 3-408 is amended to provide that articles of dissolution may have a later effective time, not to exceed 30 days after acceptance for record by the SDAT, consistent with other charter filings that corporations make with the SDAT.

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

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