

September 30, 2014

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

The General Assembly of Maryland has enacted Senate Bill 713 and the identical House Bill 916, which make several beneficial changes to the Maryland General Corporation Law (the “MGCL”) and the Maryland REIT Law (the “MRL”). Both Bills were signed by Governor O’Malley in May, and the amendments contained in the Bills will be effective October 1, 2014. We refer to the Bills herein as the 2014 Legislation.<sup>1</sup>

*AMENDMENTS RELATING TO THE BOARD OF DIRECTORS*

*Corporate Opportunity.* Under the common law doctrine of corporate opportunity, when a director or officer of a corporation is presented with a business opportunity in which the corporation has an interest or expectancy, the director or officer is generally required to present the opportunity to the corporation before pursuing it individually. If the corporation renounces the opportunity, the director or officer may pursue it individually. The 2014 Legislation amends MGCL Section 2-103 to clarify that a corporation or real estate investment trust formed under the MRL (a “REIT”) may renounce either a specific business opportunity or a class or category of business opportunities prospectively by provision in its charter or declaration of trust or by resolution of its board. While this provision does not change the common law doctrine, among other things, it will provide greater certainty for investors with nominees on the boards of entities that may have competing interests.

*Director Qualifications.* The 2014 Legislation amends MGCL Section 2-403 to require that any nominee for election as a director have the qualifications required by the corporation’s charter and bylaws. This amendment is intended to prevent the nomination of individuals who, if elected, would not be qualified to serve as a director. Section 2-404 is being further amended to require that, if so provided in the charter or bylaws, a director’s term ends if the director fails to maintain the qualifications required by the charter and bylaws. These amendments clarify that a charter or bylaws not only may require specific qualifications for directors but also may provide that, if the director ceases to have the specified qualifications after election, the director’s term will end at that time. However, a director’s term will not end early if the qualifications in question were adopted after the director’s election.

*Holdover Directors.* Because many corporations have moved from plurality to majority voting for the election of directors, the 2014 Legislation amends Section 2-405 to provide clarity on which directors may hold over when there has been a failed election. Previously, Section 2-405 was not clear regarding which directors hold over when there has been

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<sup>1</sup> While both identical bills were signed by the Governor (and the bills as enacted may be found in Chapters 550 and 551 of the Maryland Session Laws, respectively), House Bill 916 was signed later and is the controlling law in the event of any discrepancy between the bills.

a failed election and more than one serving director did not receive the votes necessary for reelection. Amended Section 2-405 generally provides that the directors properly elected at the meeting, together with any directors whose terms did not expire at the meeting (if the board is classified), will, by a majority vote, select the directors who will hold over. As amended, Section 2-405 also enables a corporation to provide for different procedures for selecting holdover directors in its charter or bylaws.

*Director Voting.* MGCL Section 2-408 is being amended to clarify the required vote of directors to approve a matter when directors have different voting rights. Amended Section 2-408 clarifies that, where certain directors are authorized to cast more than one vote on any matter, any statutory references to a “majority” refer to a majority of the votes entitled to be cast by directors.

#### *AMENDMENTS RELATING TO STOCKHOLDERS*

*Stock Dividends.* The 2014 Legislation deletes MGCL Section 2-309(c)(5), which restricted the ability of a Maryland corporation to pay dividends to holders of one class of stock in shares of another class of stock without a specific charter provision enabling the dividend or stockholder approval. No such restriction now applies unless expressly provided in the charter. The removal of the limitation of Section 2-309(c)(5) will provide Maryland corporations with more flexibility in the payment of dividends and in structuring or changing their capitalization.

*Redemption by Open-End Investment Companies.* MGCL Section 2-310.1 is amended to provide that a corporation registered as an open-end investment company (a mutual fund or an exchange-traded fund) under the Investment Company Act of 1940 may redeem shares of stock from stockholders holding less than \$2,000 worth of stock, unless redemption is expressly prohibited by its charter. The maximum account value previously permitted to be redeemed under this provision was \$1,000. Any redemption pursuant to this provision of the MGCL (1) remains subject to statutory notice and other requirements and (2) must be at the net asset value of the shares being redeemed. Section 2-310.1 is also amended to explicitly state that such small investor account redemptions may be effected by any registered open-end investment company unless specifically prohibited by the company’s charter. This change provides additional flexibility to investment companies with unduly restrictive redemption provisions but does not have any effect on the powers of open-end investment companies with charters providing for the redemption of more substantial holdings or a general right of redemption at the option of the corporation in connection with a reorganization, liquidation or other event or determination.

*Special Meetings of Stockholders.* The 2014 Legislation amends MGCL Section 2-502 to clarify that the power of the board of directors to set the record date, meeting date and certain other parameters of a special meeting of stockholders may be modified in the charter or bylaws.

*Voting Agreements.* MGCL Section 2-510.1 is added to clarify that stockholders may enter into a voting agreement and shares may be voted pursuant to the agreement, although we did not have any doubt about the right of stockholders to enter into such agreements prior to this amendment.

*Stockholder Meetings After Revival of Charter.* A corporation may inadvertently forfeit its charter for, among other reasons, failing to file its personal property return in Maryland, which is an annual requirement even when no personal property is held by the corporation in Maryland. In such circumstances, revival of the charter is straightforward. The 2014 Legislation removes the requirement under MGCL Section 3-511 that a meeting of stockholders be held promptly after the charter of a corporation is revived. In many instances, corporations that have forfeited their charters have held stockholder meetings in the interim and there is no purpose in requiring a redundant meeting and incurring the associated time and expense of preparing and soliciting for a stockholders meeting.

#### *AMENDMENTS RELATING TO EXTRAORDINARY ACTIONS*

*Merger Following Friendly Tender Offer.* A new Section 3-106.1 is added by the 2014 Legislation relating to a business combination of a public company effected by a two-step transaction in the form of a tender offer followed by a merger. Section 3-106.1 permits the board of a corporation or REIT that is to be acquired to elect to be subject to its provisions and thus applies only to friendly mergers and not to hostile takeovers. Section 3-106.1 allows the acquiring entity to approve the second-step merger by only the percentage of shares of the target corporation or REIT that would be required to approve the merger at a meeting of stockholders. Thus, if this new section is utilized, the vote required to approve the second step merger in a friendly takeover situation will no longer be the 90% vote required to effect a short-form merger under MGCL Section 3-106. For most corporations or REITs, the required vote will be a majority or two-thirds of the votes entitled to be cast on the merger, depending upon the provisions of the charter or declaration of trust. Like Section 251(h) of the Delaware General Corporation Law, MGCL Section 3-106.1 allows Maryland corporations and REITs engaging in a friendly merger to simplify and expedite the overall process, reducing the need for top-up options and other complex merger mechanisms to obtain the requisite vote for the second-step merger. Section 3-106.1 is available only to publicly reporting companies and, therefore, the tender offer would be subject to the filing and other requirements of the Securities Exchange Act of 1934, as amended.

*Articles of Consolidation, Merger, Share Exchange or Transfer.* Section 3-109 is amended to provide that certain information relating to the consideration to be paid in a transaction requiring articles of consolidation, merger, share exchange or transfer may be made dependent on an action, determination, agreement or other document or any other event referred to, but outside of, the articles. This amendment provides additional flexibility in describing the consideration to be received in an extraordinary transaction such as a merger. The MGCL already allows terms in the charter or bylaws to be made dependent upon facts ascertainable outside of those documents.

*AMENDMENT RELATING TO FORMATION OF REITS*

The 2014 Legislation amends Sections 8-102 and 8-201 of the MRL to clarify that a REIT is formed under the MRL by filing a declaration of trust with the State Department of Assessments and Taxation of Maryland (just as a statutory trust is formed under the Maryland Statutory Trust Act by filing a certificate of trust with the SDAT) and that the MRL is not merely a qualification statute.

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Each of us participated in the drafting of the 2014 Legislation through the Committee on Corporation Law of the Business Law Section of the Maryland State Bar Association, which proposed the legislation. Patsy McGowan was Chair of the Business Law Section when this legislation was proposed and passed and Michael Leber was, and remains, Chair of the Committee on Corporation Law. As always, please do not hesitate to call any of us or our colleagues if you have any questions or comments about any of the foregoing or any other matter of Maryland law.

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