

October 31, 2007

### **DRS Eligibility and Maryland Law**

The January 1, 2008 deadline for compliance with the stock exchanges' Direct Registration System ("DRS") eligibility requirements is rapidly approaching. We want to highlight certain Maryland law issues related to the issuance of uncertificated shares by corporations under the Maryland General Corporation Law (the "MGCL") and by real estate investment trusts ("trust REITs") under the Maryland REIT Law (the "MRL").

In August 2006, the Securities and Exchange Commission approved proposed rule changes for each of the New York Stock Exchange, the American Stock Exchange and The NASDAQ Stock Market that generally require, effective January 1, 2008, that listed company equity securities be eligible for the DRS operated by The Depository Trust Company (or other DRS operated by another clearing agency registered with the SEC under the Securities Exchange Act of 1934). A DRS enables a stockholder to hold his or her shares *of record on the books of the issuer without the issuance of stock certificates* and to transfer ownership of those shares electronically. Accordingly, in order for an issuer's stock to be DRS-eligible, the issuer must have the power to issue shares without certificates.

The following discussion of Maryland corporation law is generally applicable to trust REITs and, where provisions of the MGCL are first noted, the analogous provision of the MRL follows in parenthesis.

**Charter and Bylaw Provisions Regarding Uncertificated Shares.** Section 2-210(c) of the MGCL (MRL Section 8-203(f)) provides that "[u]nless the charter or bylaws provide otherwise, the board of directors of a corporation may authorize the issue of some or all of the shares of any or all of its classes and series without certificates." Accordingly, if the charter or bylaws of the corporation are silent on the matter, there is no limitation under the MGCL on the power of a Maryland corporation to issue shares in uncertificated form. However, it is common for bylaws to include provisions regarding stock certificates, and these should be reviewed to be sure that they do not prohibit or restrict the issuance of uncertificated shares. Although it is not in our experience very common for the charter of a publicly traded Maryland corporation to contain provisions regarding stock certificates, it is possible that an older charter may contain such provisions. We have forms of bylaws regarding stock certificates that expressly authorize the issuance of uncertificated shares or establish that shares will be uncertificated unless otherwise determined by the board of directors.

**Summary of Information Required on Stock Certificates.** A provision of the MGCL that is sometimes overlooked in connection with the issuance of uncertificated shares is the requirement of Section 2-210(c) (MRL Section 8-203(f)) that the corporation send to a record stockholder a written statement of the information required on stock certificates by MGCL Section 2-211 (MRL Sections 8-203(d) and (e)) at the time of issuance or transfer of shares without certificates. While there is no express requirement that the Section 2-211 information be

sent to a beneficial owner that holds shares in "street name," such information must be sent to each stockholder that holds shares of record through the DRS.

The form of transaction statement issued to the stockholder by the Maryland corporation's transfer agent in a DRS transaction should be reviewed to ensure that it contains the information and legends required on certificates by MGCL Section 2-211, including, if applicable, the statement or summary relating to the power of the corporation to issue shares of more than one class, and the statement relating to any restrictions on transferability, such as those typically contained in the charter of a corporation that is a real estate investment trust under the Internal Revenue Code.

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We are available to discuss any questions you may have concerning Maryland law as it applies to DRS eligibility.

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