**2024 REPORT OF THE COMMITTEE ON CORPORATION LAW
OF THE SECTION ON BUSINESS LAW OF THE MARYLAND STATE BAR ASSOCIATION
WITH RESPECT TO**

**HOUSE BILL 749
"CORPORATIONS AND ASSOCIATIONS – DEFINITIONS, EMERGENCIES, AND
OUTSTANDING STOCK - REVISIONS"**

I. INTRODUCTION AND BACKGROUND

The Committee on Corporation Law of the Section on Business Law of the Maryland State Bar Association monitors the Maryland General Corporation Law, the Maryland REIT Law, and the application and utility of other Maryland business-related laws. To that end, the Committee on Corporation Law regularly proposes "Miscellaneous" Bills relating to corporations and REITs and, on occasion, Bills on specific topics to the General Assembly of the State of Maryland.

This Session's "MGCL-Miscellaneous" Bill, HB 749, the "Corporations and Associations – Definitions, Emergencies, and Outstanding Stock – Revisions" Bill, which has been cross-filed in the Senate as SB 400, addresses several revisions and clarifications.

OUR COMMITTEE IS FAVORABLE IN SUPPORT OF HB 749.

II. "CORPORATIONS AND ASSOCIATIONS - REVISIONS" PROPOSALS

Authorizing that a Corporation May Adopt
Emergency Bylaw Provisions

New Section 2-116 would provide statutory authority to adopt bylaw provisions to be effective during an emergency that exists because of a catastrophic event[1]. Notwithstanding the absence of explicit statutory authority to do so prior to new Section 2-116[2], many Maryland

[1] Consistent with the Model Business Corporation Act, the term "catastrophic event" is intentionally not defined in new Sections 2-116, 2-117 or 2-118. The Committee proposes that the legislative history include guidance that a "catastrophic event" could be of a widespread or company-specific nature, such as a nuclear or atomic disaster, a cyberattack, an epidemic or pandemic, a mass-casualty event, or an event that gives rise to a declaration of a state of emergency by the United States or by a state government.
[2] Maryland corporations with existing emergency bylaw provisions rely on the language in Section 2-110 of the MGCL stating that bylaws may contain any provisions not inconsistent with law or the charter of the corporation.

corporations and Title 8 REITs include emergency bylaw provisions in their existing bylaws in order to ensure continuity of responsibility and functioning of boards of directors during an emergency whereby it may be more difficult to call meetings of the board, achieve quorum requirements for a meeting, or otherwise meet approval thresholds for board action.

The emergency bylaw provisions may, for example, provide for the designation of officers or other persons to be designated as directors during the emergency. To encourage corporations to adopt emergency bylaw provisions, new Section 2-116(d) broadly validates all corporate actions taken "in good faith" pursuant to the emergency bylaw provisions and immunizes all directors, officers, employees, and agents of the corporation from liability as a result of such actions.

The phrase "corporate act taken in good faith and in accordance with the emergency bylaw provisions" intentionally lessens the standard of conduct for directors set forth in Section 2-405.1 of the MGCL to a more easily understood and applied "good faith" standard. The Committee on Corporation Law feels that directors, officers, employees, and agents may be more willing to act during an emergency, and with more expediency, if they are immune from liability as a result of such actions, by simply acting in good faith. Notwithstanding the lessened standard, new Section 2-116(e) permits a corporation to apply the heightened Section 2-405.1 standard of conduct on directors that may act pursuant to the emergency bylaw provisions by including an affirmative statement in the emergency bylaw provisions stating that such standard shall apply to directors during an emergency.

A corporation that does not adopt emergency bylaw provisions under new Section 2-116 may nevertheless exercise the powers described in new Sections 2-117 and 2-118 in the event of an emergency.

Authorizing that a Corporation May Exercise Certain Powers During an Emergency

New Sections 2-117 and 2-118, which should be read in conjunction with new Section 2-116, would provide statutory power for limited corporate acts during an emergency even though a corporation may not have adopted emergency bylaw provisions.

New Section 2-117(b) provides that, during an emergency, notice of a meeting of the board of directors may be given in any practicable manner, to only those directors whom it is practicable to reach in the circumstances, and with shorter advance notice as is reasonable in the circumstances. New Sections 2-118(b) and (c) provide further relief during an emergency for meetings of stockholders with respect to notice requirements, attendance by remote communication, and postponement of a meeting of stockholders.

Similar to new Section 2-116(d), new Sections 2-117(c) and 2-118(d) broadly validate all corporate actions taken "in good faith" during an emergency and in accordance with new Sections 2-117 and 2-118 and immunizes all directors, officers, employees, and agents of the corporation from liability as a result of such actions.

New Sections 2-116, 2-117, and 2-118 do not limit powers that otherwise exist in the absence of an emergency.

The amendment to Section 8-601.1 of Title 8 (which applies to real estate investment trusts) provides that new Sections 2-116, 2-117, and 2-118 would also apply to Title 8 REITs.

Clarifying When Stock Being Redeemed or Repurchased by a Corporation Shall No Longer Be Outstanding

By adding new Section 2-310(a)(4), the Committee on Corporation Law desires to clarify the timing of when shares of stock are no longer deemed to be outstanding following a redemption or repurchase of the shares of stock by a corporation. Under new Section 2-310(a)(4), unless the charter of a corporation provides otherwise, once the corporation has either paid for the shares of stock or set aside sufficient funds for the benefit of the holder of the shares of stock in accordance with a redemption right set forth in the charter of the corporation or pursuant to a duly adopted repurchase plan binding on the stockholder, the shares of stock redeemed or repurchased by the corporation cease to be outstanding. Current Section 2-310(a) permits a corporation to acquire its shares of stock and provides that when so acquired shares of stock become authorized but unissued shares. However, the MGCL does not currently expressly provide for the timing of when shares of stock acquired by a corporation are deemed to no longer be outstanding. Similar provisions are often included in charters of Maryland corporations and, to the extent an existing charter provision differs from new Section 2-310(a)(4), the existing charter provision would control. In addition, a similar provision is currently included in Section 160(d) of the Delaware General Corporation Law.

Other Clarifications and Changes

HB 749 also provide several other clarifications and changes, including the following:

- Permitting a limited partnership to also serve as a resident agent for a Maryland corporation and other Maryland entities.

- Clarifying the requirements for principal offices for limited liability companies and limited liability partnerships, which are addressed in title 4A and in Title 9, but not in the existing definition in Section 1-101(w).

Respectfully submitted,

MSBA Section of Business Law, Committee on Corporation Law

William E. Carlson, Chair
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