

Department of Legislative Services
Maryland General Assembly
2014 Session

FISCAL AND POLICY NOTE

Senate Bill 713

(Senators Feldman and Raskin)

Judicial Proceedings

Economic Matters

Corporations and Real Estate Investment Trusts - Miscellaneous Provisions

This bill makes changes to miscellaneous provisions of the Corporations and Associations Article relating to corporations and real estate investment trusts (REITs).

Fiscal Summary

State Effect: The bill does not materially affect governmental operations or finances.

Local Effect: None.

Small Business Effect: Minimal.

Analysis

Bill Summary/Current Law:

General Powers of a Corporation: The bill authorizes a Maryland corporation to renounce, in its charter or by resolution of its board of directors, any interest or expectancy of the corporation in, or in being offered an opportunity to participate in, business opportunities or classes or categories of business opportunities that are presented to the corporation or developed by or presented to its directors or officers. Under current law, unless otherwise provided by law or its charter, a Maryland corporation has 17 statutorily enumerated general powers, including the ability to have perpetual existence.

Stock Dividends and Stock Splits: The bill repeals the requirement that a dividend payable in shares of one class of stock be approved by the board of directors or

stockholders in a specified manner before being declared or paid to holders of another class of stock. Under current law, the payment has to have been approved by either the board of directors in accordance with specific authority in the charter or at a meeting of stockholders by the affirmative vote of a majority of all the votes entitled to be cast on the matter of each class entitled to vote on it.

Redemption of Shares: The bill increases, from \$1,000 to \$2,000, the aggregate net asset value of the shares that may be redeemed by a corporation registered as an open-end company under the Investment Company Act of 1940 in the absence of express prohibition by the corporation's charter.

Under current law, such a corporation may redeem shares of its stock from any stockholder if the charter does not expressly prohibit the redemption of shares of its stock, the aggregate net asset value of the shares to be redeemed from the stockholder is, as of the date of the redemption, \$1,000 or less, and a specified written notice of the redemption is provided to the stockholder of record. Such a corporation may also redeem shares of its stock if the board authorizes the redemption and the charter expressly provides for the redemption.

If the aggregate net asset value of the shares to be redeemed increases to an amount greater than \$1,000 between the date of the notice of redemption and the date of the redemption, then the notice of redemption has no further force or effect.

Directors: The bill requires that each *nominee* for director of a corporation have the qualifications required by the corporation's charter or bylaws. If the charter or bylaws so required at the time a director was elected, the director's term must end upon the failure to meet qualifications required when initially elected. The bill establishes a specified method to determine the directors who will hold over in the event that the number of directors to be elected at the designated time, plus the number of directors who otherwise would hold over, is greater than the number of directors who were to be elected.

The bill also clarifies specified board voting procedures and allows a corporation's charter or bylaws to determine specified powers of the board.

Under current law, each director of a corporation must have the qualifications required by the corporation's charter or bylaws. Generally, the directors of a corporation hold office from the time elected until the earlier of (1) the next annual stockholder meeting and until their successors are elected and qualify or (2) the time provided in the terms of any class or series of stock pursuant to which such directors are elected.

In the event that there is a failure to elect directors to the board at the designated time, the directors holding over must continue to manage the corporation's business and affairs until their successors are elected and qualify.

Any action required or permitted to be taken at a meeting of the board of directors or committee of the board may be taken without a meeting if unanimous consent is given by each member of the board or committee and the action is filed with the minutes of proceedings of the board or committee. The charter may provide that one or more directors or a class of directors have more or less than one vote per director on any matter.

The board of directors has the sole power to fix specified details concerning a special meeting of the board. Additionally, a stockholder has the right to request that the board of directors provide a place for a stockholder meeting. Otherwise, the board is authorized to determine that the meeting may be held remotely.

Voting Agreement: The bill authorizes two or more stockholders of a corporation to enter into a written agreement that the stock held by the parties must be voted as provided in the agreement, as the parties may agree, or based on a procedure set forth in the agreement. Under current law, one or more stockholders of a corporation may confer the right to vote or otherwise represent their stock to a trustee by entering into a written voting trust agreement detailing the voting trust's terms and conditions. The stockholders must deposit an executed copy of the agreement with the corporation at its principal office and transfer the applicable stock to the trustee.

Exemption to Merger Procedure: The bill alters the manner in which a specified merger of a Maryland corporation or Maryland REIT must be approved.

Generally, a consolidation, merger, share exchange, or transfer of assets must be approved in a specified manner. However, State law establishes an exemption for a merger involving a Maryland successor corporation if the merger treats stock in a specified manner or there is no stock outstanding or subscribed for and entitled to be voted on the merger. State law establishes a similar exception for a Maryland successor REIT.

The bill provides another exception for a merger of a subject corporation (the subject of a tender or exchange offer, including a Maryland REIT) with or into an acquiring entity. The exemption applies to specified mergers involving a Maryland corporation that are consummated on or after October 1, 2014. Under the bill, unless the charter of a corporation or declaration of trust of a REIT provides otherwise, a merger of a subject corporation with or into an acquiring entity may be effected if:

- the shares of the subject corporation are registered under the Securities and Exchange Act of 1934 immediately prior to the execution of the agreement to merge by the subject corporation;
- the agreement to merge expressly provides that the merger is governed by a specified provision of the Corporations and Associations Article;
- an acquiring entity consummates a tender or exchange offer for any and all of the outstanding shares of the subject corporation that otherwise would entitle the holder of the outstanding shares to vote on the merger on the terms provided in the agreement to merge;
- following the consummation of the offer, the acquiring entity owns at least that percentage of the shares, and of each class or series of the shares, of the subject corporation that otherwise would be required to approve the merger under the Corporations and Associations Article and the charter of the subject corporation;
- the acquiring entity merges with or into the subject corporation; and
- the outstanding shares of each class or series of shares of the subject corporation not cancelled in the merger are converted in the merger 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 shares of the subject corporation on consummation of the offer.

The board of directors of each Maryland corporation proposing to become a party to the merger must adopt, by majority vote, a resolution that approves the proposed merger on substantially the terms and condition set forth or referred to in the resolution.

If any other entity is a party to the merger, the transaction must be advised, authorized, and approved by the other entity in the manner and by the vote required by its governing documents and the laws of the place where the other entity is organized.

Unless waived by all stockholders who would otherwise be entitled to vote on the merger, at least 30 days before the articles are filed with the State Department of Assessments and Taxation, an acquiring entity that owns less than all of the outstanding shares of the subject corporation as of immediately before the effective time of the merger must have given notice of the transaction to each of the subject corporation's stockholders of record. Otherwise these stockholders would be entitled to vote on the merger on the date that the notice is given or on a record date fixed for that purpose that is not more than 10 days before the date that notice is given.

A minority stockholder of the subject corporation has the right to demand and receive payment of the fair value of the minority stockholder's shares as, and to the extent provided to, objecting stockholders.

Contents of Articles: The bill authorizes the specified treatment of ownership interests disclosed in articles of consolidation, merger, or share exchange to be made dependent on facts ascertainable outside the articles. The bill also authorizes the description of the nature and amount of the consideration to be paid, transferred, or issued for the assets of the transferor disclosed in articles of transfer to be made dependent on facts ascertainable outside the articles of transfer.

Under current law, articles of consolidation, merger, share exchange, or transfer must include specified information about the nature and treatment of ownership interests. Articles of transfer must include the nature and amount of the consideration to be paid, transferred, or issued for the transferor's assets or a statement detailing how the consideration is to be determined.

Meetings of Stockholders After Revival: The bill repeals the requirement that the president or a director of a corporation must call a meeting of the stockholders to elect a full board of directors promptly after the charter of the corporation is revived.

REIT: The bill clarifies that a REIT is a separate legal entity and requires that a declaration of trust be filed for record with the State Department of Assessments and Taxation before the REIT is formed. The bill also authorizes a REIT to renounce, in its declaration of trust or by resolution of its board of trustees, any interest or expectancy of the REIT in, or in being offered an opportunity to participate in, business opportunities or classes or categories of business opportunities that are presented to the REIT or developed by or presented to its trustees or officers.

Under current law, a REIT is a permitted form of unincorporated business trust or association and may conduct business in the State if it complies with Title 8 of the Corporations and Associations Article. A REIT has 15 statutorily enumerated general powers, including the right to perpetual existence if the declaration of trust does not provide otherwise.

The bill alters the manner in which an "other entity" may convert to a REIT by requiring the entity to file a declaration of trust, executed in the manner required by § 8-202 of the Corporations and Associations Article. Under current law, the declaration of trust is required to be executed in the manner required by Title 1 of the Corporations and Associations Article.

Additional Information

Prior Introductions: SB 578 of 2013, a similar bill, passed the Senate, as amended, and was referred to the House Rules and Executive Nominations Committee where no further

action was taken. Its cross file, HB 882, passed the House and was heard by the Senate Judicial Proceedings Committee, but no further action was taken.

Cross File: HB 916 (Delegates Kramer and Mitchell) - Economic Matters.

Information Source(s): State Department of Assessments and Taxation, Department of Legislative Services

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ncs/kdm

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