2023 REPORT OF THE COMMITTEE ON CORPORATION LAW
OF THE SECTION ON BUSINESS LAW OF THE MARYLAND STATE BAR ASSOCIATION
WITH RESPECT TO

HOUSE BILL 209 / SENATE BILL 58
"CORPORATIONS AND ASSOCIATIONS - 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 "Corporations and Associations - Revisions" Bill, HB 209 and SB 58, which have been cross-filed, addresses several revisions and clarifications.

OUR COMMITTEE IS <u>FAVORABLE</u> IN SUPPORT OF HB 209 and SB 58.

II. "CORPORATIONS AND ASSOCIATIONS - REVISIONS" PROPOSALS

<u>Authorizing that a Corporation's Charter or Bylaws May Provide for *Ex Officio* Directors</u>

The proposed amendment to Section 5-202(b), which lists provisions that are permissible in the corporate charter or bylaws of a Maryland nonstock corporation, would permit a nonstock corporation's charter or bylaws to provide that an individual may serve as a director by reason of serving in a specified office or position within or outside the corporation.

A director who serves by reason of her or his office is commonly known as an *ex officio* director. Presently, a corporation desiring that its Executive Director, an officer of an affiliated organization, or a government official "automatically" serve as a director now must elect that director as it would elect its other directors. In practice (and as provided incorrectly in some corporate charters), some nonprofits assume that no vote is needed to elect an *ex officio* director to its board of directors. In these circumstances, the board may improperly count an unelected *ex officio* director toward a quorum or improperly recognize that director's vote on a matter before the board, which may result in an action of the board being invalid.

The term "*ex officio* director" intentionally is not proposed to be used in this amendment because there is confusion among some organizations as to what "*ex officio*" means. The term means "from the office." That is, a person serves because of the office which that person holds. The term does not mean "without a vote." All directors, in fulfilling their obligations as a director, have the right to vote.[1]

The Committee on Corporation Law, recognizing the importance of stockholders having a voice in corporate affairs, does not propose to expand the "*ex officio* director" concept into the Maryland General Corporation Law and apply it to corporations with stockholders.

Clarifying that Stock Certificates May Not Issued in Bearer Form

New Section 2-210(d), recognizing Section 2-211(a)(2)'s requirement that a stock certificate include the name of the stockholder or other person to whom it is issued, confirms the widely accepted view that stock certificates cannot be issued in bearer form (i.e., blank, with no name, or stating "Bearer"). Similar to Delaware's amendment to Section 158 of its General Corporation Law, the Committee on Corporation Law desires that this prohibition be expressly stated, especially as corporations prepare themselves for the requirements of the Federal Corporate Transparency Act.

In addition to the proposed amendment to Section 2-210, new Section 2-214(c) would prohibit certificates representing "scrip"[2] from being issued in bearer form and the proposed amendment to Section 4A-402(a)(5) of the Maryland Limited Liability Company Act would prohibit certificates representing membership interests from being issued in bearer form.

Harmonizing the MGCL's "Annual Meeting" Requirement with the Federal Investment Company Act of 1940

The technical amendment to Section 2-501(b)(1) would harmonize Section 2-501's "annual meeting" requirement with the Federal Investment Company Act of 1940, enabling all '40 Act companies to determine to not hold an annual meeting of its stockholders (unless required by the '40 Act), instead of the option being available to some, but not all Maryland corporations that are '40 Act companies. Presently, open-end management investment companies (e.g., many mutual funds) and face-amount certificate companies may avoid the "annual meeting" requirement, but closed-end management investment companies may not.

Changing "a corporation registered under the Investment Company Act of 1940" to "a corporation that is an investment company as defined in the Investment Company Act of 1940" would bring Section 2-501(b)(1) in line with Section 2-405.3 of the MGCL (which uses the latter formulation).

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[1] Section 2-409(e) of the MGCL permits a charter to provide that one or more directors may have more or less than one vote per director on any matter, but it does not permit non-voting directors. The MGCL is applicable to nonstock corporations by virtue of Section 5-201.

[2] "Scrip" is a rarely used certificate entitling the holder, upon certain conditions, to exchange the certificate for a certificate that represents a share.

Establishing a "Notice of Termination" Requirement for
"Title 8" Real Estate Investment Trusts upon Termination of Existence

After discussion with the State Department of Assessments and Taxation, the Committee on Corporation Law proposes establishing a "Notice of Termination" requirement and a process for when a "Title 8" real estate investment trust has determined to terminate its existence. Unlike corporations, limited liability companies, and other entities which have requirements under the Corporations and Associations Article as to how dissolutions are approved and what must be filed with the SDAT, Section 8-502 presently merely requires that "the Department shall be notified…." While the common practice is to file a "Notice" with the SDAT, the present section seemingly permits simply a letter or an email.

Other Clarifications and Changes

HB 209 and SB 58 also provide several other clarifications and changes, including the following:

- Applying the provisions of the Maryland Control Share Acquisition Act to closed-end investment companies under the Federal Investment Company Act of 1940, not only for closed-end investment companies that are corporations, but also ones that are "Title 12" statutory trusts, if the closed-end investment company desires that the Act be applicable to it.

- Clarifying the application of certain provisions of law to the conversion of the corporation.

Respectfully submitted,

MSBA Section of Business Law, Committee on
Corporation Law

William E. Carlson, Chair
Scott R. Wilson, Vice Chair

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