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February 3, 2021

Senate Judicial Proceedings Committee  
The Honorable William C. Smith, Jr.  
2 East Miller Senate Building  
Annapolis, Maryland 21401-1991

**RE: SB 263 – Corporations and Real Estate Investment Trusts – Miscellaneous**

Dear Chairman Smith and Members of the Committee:

I am pleased to introduce Senate Bill 263 which has been brought to me by the Maryland State Bar Association Section on Business Law. This Section represents all of the State's lawyers who practice business law. I served on the Executive Council of this MSBA Section for many years and can tell you that any work product of this organization represents the consensus view of the State's business law attorneys.

I want to start by thanking my co-sponsor, Senator Waldstreicher, for working on this bill with me. It's always great to partner with Senator Waldstreicher on important legislation.

As you can tell from the title of this bill, it is a miscellaneous bill, drafted to tweak the State's corporation laws in several respects in order to solve various problems with the existing statutory language.

The three principal changes made by this bill are as follows:

First, many states permit companies organized in those states to include forum selection provisions in their charter or bylaws specifying the court or courts in which litigation about corporate governance issues must be filed. Such provisions can prevent simultaneous lawsuits in different courts, perhaps in different states. They can also ensure that Maryland courts familiar with Maryland law will be handling the lawsuits. SB 263 will provide that any such forum selection provisions *must* include one or more courts in Maryland. The bill also resolves a dispute between various Maryland circuit courts by making it clear that the forum selection provision may specify a particular Maryland court as opposed to enabling a plaintiff to select any Maryland court, no matter how far away from where the litigants and their counsel are located.

Thus the bill will enable the forum selection provision to require that corporate governance suits be filed in the Circuit Court for Baltimore City or Montgomery County or another county in central Maryland and thus eliminate the possibility that the plaintiff might choose to file the case in the Circuit Court for Somerset County or Garrett County.

Secondly, on occasion, a corporation or real estate investment trust classifies or reclassifies stock or increases or decreases the permitted aggregate number of shares of stock and then proceeds forward with the classification, reclassification, increase or decrease prior to filing Articles Supplementary or Articles of Amendment with the State Department of Assessments and Taxation. In such rare situations, there is an argument that the shares of stock so affected are voidable. The same situation exists with respect to Declarations of Trust for Real Estate Investment Trusts; occasionally new shares of the REIT are issued before an amendment to the Declaration of Trust is filed. Senate Bill 263 provides that any such prematurely issued shares cease to be voidable at the time the appropriate Articles or amendment is filed.

Thirdly, the bill makes minor changes to the Maryland Control Share Acquisition Act to clarify the law and eliminate an apparent ambiguity that then-U. S. District Court Judge Andre Davis found in the 2007 reported decision of *Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B*. The revisions contained in this bill are consistent with the outcome reached by Judge Davis and eliminate the apparent ambiguity.

The bill also contains several technical amendments to existing Maryland corporation law.

I have with me William Carlson who will be able to expand more on the issues at hand in this bill and the effects this legislation would have. For these reasons I request a favorable report on Senate Bill 263.



**2021 REPORT OF THE COMMITTEE ON CORPORATION LAW  
OF THE SECTION ON BUSINESS LAW OF THE MARYLAND STATE BAR ASSOCIATION  
WITH RESPECT TO**

**SENATE BILL 263/HOUSE BILL 781  
“CORPORATIONS AND ASSOCIATIONS - CORPORATIONS AND REAL ESTATE INVESTMENT TRUSTS –  
MISCELLANEOUS”**

**I. INTRODUCTION AND BACKGROUND**

For many years, the Committee on Corporation Law of the Section on Business Law of the Maryland State Bar Association has monitored the Maryland General Corporation Law (the “MGCL”), 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 “Corporations and Real Estate Investment Trusts – Miscellaneous” Bills and, on occasion, Bills on specific topics to the General Assembly of the State of Maryland.

This Session’s “Corporations and Associations - Corporations and Real Estate Investment Trusts – Miscellaneous” Bill, SB 263 and HB 781, addresses several revisions and clarifications.

**II. “CORPORATIONS AND ASSOCIATIONS - CORPORATIONS AND REAL ESTATE INVESTMENT TRUSTS – MISCELLANEOUS” PROPOSALS**

**Clarifying that Charters or Bylaws of Maryland Corporations May Require  
that Internal Corporate Claims be brought in Specific Courts**

Under existing Section 2-113, Maryland corporations may adopt a bylaw or charter provision requiring that “Internal Corporate Claims” be brought only in courts sitting in one or more specified jurisdictions. Allowing such forum-selection provisions, which also are authorized under the laws of Delaware and other states, can both reduce forum-shopping and avoid the waste and inconvenience of simultaneous shareholder litigation in multiple venues, as well as ensure that such “Maryland law” claims are heard by the courts most familiar with Maryland law. At the same time, existing Section 2-113 also requires that a Maryland corporation not prohibit bringing an Internal Corporate Claim in State or federal courts sitting in Maryland.

Since its enactment, some have questioned whether Section 2-113 permits a bylaw or charter provision designating only one or more specific venues in the State of Maryland (e.g., the Baltimore City Circuit Court) or, alternatively, whether a bylaw must designate all Maryland state courts as permissible venues. Although this issue has not been addressed by Maryland appellate courts, Circuit Courts within the State have issued conflicting decisions.

To resolve any uncertainty over the correct application of Section 2-113, the proposed amendment clarifies that a Maryland corporation may enact a bylaw or charter provision that requires an Internal Corporate Claim to be brought either (1) in a specified circuit court (or courts) of the State or a federal court in the State or (2) in addition to these courts, also in courts sitting in one or more specified jurisdictions outside the state. Pursuant to Section 1-202 of the General Provisions Article, the term "court" denotes either a singular "court" or multiple "courts." Thus, a Maryland corporation could adopt a bylaw providing that an Internal Corporate Claim could be brought only in the Anne Arundel County Circuit Court or the United States District for the District of Maryland. Alternatively, that same corporation could adopt a bylaw requiring such claims to be brought either in the courts of the State of the corporation's principal place of business (e.g., Pennsylvania) or in the Anne Arundel County Circuit Court or the United States District Court for the District of Maryland. Section 2-113 would, however, prohibit that corporation from adopting a bylaw providing that Internal Corporate Claims could be brought only in the state of the corporation's principal place of business, if that state is not Maryland.

The proposed amendment is consistent Section 2-113's goal of reducing forum-shopping and wasteful duplicative shareholder litigation. And, although the proposed amendment will eliminate uncertainty, it is not expected to substantively impact any ongoing shareholder litigation within the State.

Clarifying that under the Maryland Control Share Acquisition Act an Opt-in subsequent to an Acquisition of Shares of a Closed-end Fund does not render such previously acquired Shares as "Control Shares"

The proposed amendments to Subtitle 7 of Title 3 of the Maryland General Corporation Law clarify the Maryland Control Share Acquisition Act in a balanced manner consistent with the opinion and *dicta* of Judge Andre Davis in *Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Tr. No. 1B*, 485 F. Supp. 2d 631, 641 (D. Md. 2007) (and its companion case). Specifically, consistent with Judge Davis's opinion, the amendments clarify that (1) shares of stock acquired in excess of the threshold holds established under 3-701(e) do not become "control shares" and the holder does not lose voting rights with respect to such shares, when a registered closed-end fund opts-in to the Maryland Control Share Acquisition Act and (2) the stockholder is essentially "capped" at the quantity of "control shares" that it owned as of such opt-in and not "free of the statute's restrictions for all shares it obtains even after the opt-in." The amendments further clarify that this position is the same for Maryland corporations other than closed-end funds. The proposed revisions are consistent with the original Model Control Share Act (and the commentary) drafted by the North American Securities Administrators Association in 1988. We believe that these

amendments will support the outcome Judge Davis reached in *Neuberger Berman* and eliminate the apparent ambiguity that he was called upon to resolve.

Providing that Corporate Stock Issued prior to a Charter Amendment Being Effective and REIT Shares Issued prior to Articles Supplementary Being Effective Shall Cease to be Voidable upon a “Late Filed” Amendment or “Late Filed” Articles Supplementary Being Effective

Many Maryland corporations and REITs permit their boards to classify or reclassify shares of unissued stock and to increase or decrease the aggregate number of shares or the number of shares in any particular class. Such classifications, reclassifications, increases, and decreases are undertaken by either Articles Supplementary or Articles of Amendment (or other form of an amendment) being approved by the board and filed with the State Department of Assessments and Taxation. Upon occasion, the Articles are filed late or lost and the newly classified or reclassified stock or newly authorized stock is issued before the Articles or other amendment are filed with the SDAT and accepted for record, becoming effective. On these occasions, the issued stock may be voidable.

Since 2003, under the present Section 2-208(e) and 2-208.1(e), shares of newly classified (or reclassified) stock or newly authorized stock issued prior to Articles Supplementary becoming effective cease to be voidable upon “late filed” Articles Supplementary being filed with the SDAT and accepted for record, thereby becoming effective. There is no similar provision addressing “late filed” Articles Supplementary filed by a Title 8 Real Estate Investment Trust, “late filed” Articles of Amendment (or other charter amendment) filed by a corporation, or a “late filed” amendment to the Declaration of Trust of a Title 8 REIT.

The proposed new Section 2-606.1 and the proposed new Section 8-501(h) address, respectively, Articles of Amendment (or other charter amendment) becoming effective after the issuance of shares by a corporation and an amendment to a REIT’s Declaration of Trust becoming effective after the issuance of shares by a Title 8 REIT. Similar to the handling of late filed Articles Supplementary under Sections 2-208(e) and 2.208.1(e), upon the amendment becoming effective, the shares issued prior to the amendment becoming effective would no longer be voidable.

The proposed new Section 8-203(c) addresses the issuance of shares by a Title 8 REIT before Articles Supplementary becoming effective.

Other Clarifications and Changes

SB 263 and HB 781 also provide several other clarifications and corrections, including the following:

- Last session (see Acts 2020, chs.292 and 293), Section 2-604 was amended to add a new subsection (b) providing that charter amendments by a Maryland corporation that is registered as an open-end investment company (a/k/a mutual fund) may be

approved by the board of directors without stockholder approval (harmonizing the MGCL requirements with the Federal Investment Act of 1940) unless the '40 Act requires stockholder approval. In light of the 2020 change in the charter amendment requirements under Section 2-604, the existing provision in Section 2-309(e)(1)(ii) enabling open-end investment companies to amend the charter to effectuate certain reverse stock splits is no longer necessary. Accordingly, because subsection (e)(1)(ii) is not necessary and to avoid confusion, the proposed amendment to Section 2-309(e) would drop the inclusion of open-end investment companies in that subsection.

- Under Section 2.405.1(c)(2), which is the second prong of Maryland's three-pronged standard of conduct for directors of a Maryland corporation, a director shall act in a manner the director reasonably believes to be in the best interest of the corporation. This standard applies to all acts by a director. Section 2-413(c)(1), which addresses a board's removal of an officer or agent, repeats the same standard for that particular act; no other provisions repeat the standard in Section 2-405.1(c)(2). Repeating this standard in Section 2-413(c)(1) is unnecessary and could lead to confusion.
- The proposed amendments to Section 2-502.1(a) and Section 2-503(b) clarify that meetings of stockholders may be virtual (without any "place") and tailor the MGCL's present requirements regarding the conduct of virtual meetings to practices as they have been conducted since the Governor declared a state of emergency and catastrophic health emergency to control and prevent the spread of COVID-19 and before. In this respect, we note that, in April 2020, the Governor issued Order number 20-04-14-02 enabling corporations that had called stockholder meetings at a physical location to switch to a virtual meeting, see <https://governor.maryland.gov/wp-content/uploads/2020/04/Shareholder-Meetings-4.14.20.pdf>
- The proposed amendment to Section 8-601.1, which adds Section 2-503(b) to the list of MGCL provisions that also apply to Title 8 REITs, addresses meetings of REIT shareholders being held remotely.

Respectfully submitted,

MSBA Section of Business Law, Committee on  
Corporation Law

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

January 29, 2021