

MAINE STATE LEGISLATURE

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SECOND REGULAR SESSION

ONE HUNDRED AND THIRTEENTH LEGISLATURE

Legislative Document

NO. 2384

H.P. 1738 House of Representatives, March 1, 1988
Approved for introduction by a majority of the
Legislative Council pursuant to Joint Rule 27.
Reference to the Committee on Business Legislation
suggested and ordered printed.

EDWIN H. PERT, Clerk
Presented by Representative ALLEN of Washington.

Cosponsored by Senators BALDACCI of Penobscot, WHITMORE
of Androscoggin, and Representative REED of Falmouth.

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND EIGHTY-EIGHT

1 AN ACT to Enhance the Voting Rights of Minority
2 Shareholders.
3

4 Emergency preamble. Whereas, Acts of the
5 Legislature do not become effective until 90 days
6 after adjournment unless enacted as emergencies; and

7 Whereas, the protection of shareholders of
8 domestic corporations against coercion and unfair
9 business dealings is vital to the State's interest; and

1 Whereas, regulation of the corporate governance of
2 domestic corporations is an essential means to the
3 protection and advancement of such vital state
4 interests; and

5 Whereas, certain takeovers of publicly-held
6 corporations, including those financed largely through
7 debt to be repaid by the sale of substantial assets of
8 the acquired corporation, or by the consummation of
9 self-interested transactions with the acquiror, on
10 terms established by the acquiror, present a grave
11 threat to the interests of shareholders of
12 publicly-held corporations; and

13 Whereas, in the context of publicly-held Maine
14 corporations, the current statutory and common law
15 protections of shareholders of Maine corporations from
16 such transactions involving or initiated by interested
17 shareholders are inadequate to protect shareholders of
18 Maine corporations; and

19 Whereas, the adoption of more rigorous shareholder
20 voting requirements for certain fundamental corporate
21 transactions involving or initiated by interested
22 shareholders will further protect shareholders of
23 publicly-held Maine corporations; and

24 Whereas, in the judgment of the Legislature, these
25 facts create an emergency within the meaning of the
26 Constitution of Maine and require the following
27 legislation as immediately necessary for the
28 preservation of the public peace, health and safety;
29 now, therefore,

30 Be it enacted by the People of the State of Maine as
31 follows:

32 13-A MRSA §611-A is enacted to read:

33 §611-A. Required vote of shareholders in certain
34 business combinations

35 1. Notwithstanding anything to the contrary in
36 this Act, except subsection 3, no domestic corporation
37 may engage in any business combination for a period of
38 5 years following an interested stockholder's stock

1 acquisition date unless that business combination is:

2 A. Approved by the board of directors of that
3 domestic corporation prior to that interested
4 stockholder's stock acquisition date; and

5 B. Approved, subsequent to that interested
6 stockholder's stock acquisition date, by the board
7 of directors of that domestic corporation and
8 authorized by the affirmative vote, at a meeting
9 called for that purpose, of at least 66 2/3% of
10 the outstanding voting stock not beneficially
11 owned by that interested stockholder or any
12 affiliate or associate of that interested
13 stockholder or by persons who are directors and
14 also officers of that domestic corporation.

15 2. After the 5-year period provided for by
16 subsection 1 has elapsed, except as provided in
17 subsection 3, no domestic corporation may engage in
18 any business combination other than any one of:

19 A. A business combination approved by the board
20 of directors of that domestic corporation prior to
21 that interested stockholder's stock acquisition
22 date;

23 B. A business combination approved by the
24 affirmative vote of the holders of at least 66
25 2/3% of the voting stock of that domestic
26 corporation not beneficially owned by that
27 interested stockholder or by persons who are
28 directors and also officers of the domestic
29 corporation at a meeting called for that purpose;
30 or

31 C. A business combination that meets all of the
32 following conditions:

33 (1) The aggregate amount of the cash and the
34 market value, as of the consummation date, of
35 consideration other than cash to be received
36 per share by holders of outstanding shares of
37 common stock of that domestic corporation in
38 that business combination is at least equal
39 to the higher of the following:

1 (a) The highest per share price,
2 including any brokerage commissions,
3 transfer taxes and soliciting dealers'
4 fees, paid by that interested
5 stockholder for any shares of common
6 stock of the same class or series of
7 that domestic corporation acquired by it
8 within the 5-year period immediately
9 prior to the announcement date with
10 respect to that business combination, or
11 within the 5-year period immediately
12 prior to, or in, the transaction in
13 which that interested stockholder became
14 an interested stockholder, whichever is
15 higher; plus, in either case, interest
16 compounded annually from the earliest
17 date on which that highest per share
18 acquisition price was paid for common
19 stock of that domestic corporation
20 through the consummation date at the
21 rate for one-year United States Treasury
22 obligations from time to time in effect;
23 less the aggregate amount of any cash
24 dividends paid, and the market value of
25 any dividends paid other than in cash,
26 per share of common stock of that
27 domestic corporation since that earliest
28 date, up to the amount of that interest;
29 or

30 (b) The market value per share of
31 common stock of that domestic
32 corporation on the announcement date
33 with respect to that business
34 combination or on that interested
35 stockholder's stock acquisition date,
36 whichever is higher; plus interest
37 compounded annually from that date
38 through the consummation date at the
39 rate for one-year United States Treasury
40 obligations from time to time in effect;
41 less the aggregate amount of any cash
42 dividends paid, and the market value of
43 any dividends paid other than in cash,

1 per share of common stock of that
2 domestic corporation since that date, up
3 to the amount of that interest;

4 (2) The aggregate amount of the cash and the
5 market value as of the consummation date of
6 consideration other than cash to be received
7 per share by holders of outstanding shares of
8 any class or series of stock, other than
9 common stock, of that domestic corporation is
10 at least equal to the highest of the
11 following, whether or not that interested
12 stockholder has previously acquired any
13 shares of that class or series of stock:

14 (a) The highest per share price,
15 including any brokerage commissions,
16 transfer taxes and soliciting dealers'
17 fees, paid by that interested
18 stockholder for any shares of that class
19 or series of stock of that domestic
20 corporation acquired by it within the
21 5-year period immediately prior to the
22 announcement date with respect to that
23 business combination, or within the
24 5-year period immediately prior to, or
25 in, the transaction in which that
26 interested stockholder became an
27 interested stockholder, whichever is
28 higher; plus, in either case, interest
29 compounded annually from the earliest
30 date on which that highest per share
31 acquisition price was paid for the stock
32 of that domestic corporation through the
33 consummation date at the rate for
34 one-year United States Treasury
35 obligations from time to time in effect;
36 less the aggregate amount of any cash
37 dividends paid, and the market value of
38 any dividends paid other than in cash,
39 per share of that class or series of
40 stock of that domestic corporation since
41 that earliest date, up to the amount of
42 that interest;

1 (b) The highest preferential amount per
2 share to which the holders of shares of
3 that class or series of stock of that
4 domestic corporation are entitled in the
5 event of any liquidation, dissolution or
6 winding up of that domestic corporation,
7 plus the aggregate amount of any
8 dividends declared or due as to which
9 those holders are entitled prior to
10 payment of dividends on some other class
11 or series of stock of that domestic
12 corporation, unless the aggregate amount
13 of those dividends is included in that
14 preferential amount; and

15 (c) The market value per share of that
16 class or series of stock of that
17 domestic corporation on the announcement
18 date with respect to that business
19 combination or on that interested
20 stockholder's stock acquisition date,
21 whichever is higher; plus interest
22 compounded annually from that date
23 through the consummation date at the
24 rate for one-year United States Treasury
25 obligations from time to time in effect;
26 less the aggregate amount of any cash
27 dividends paid, and the market value of
28 any dividends paid other than in cash,
29 per share of that class or series of
30 stock of that domestic corporation since
31 that date, up to the amount of that
32 interest;

33 (3) The consideration to be received by
34 holders of a particular class or series of
35 outstanding stock, including common stock, of
36 that domestic corporation in that business
37 combination is in cash or in the same form as
38 the interested stockholder has used to
39 acquire the largest number of shares of that
40 class or series of stock of that domestic
41 corporation previously acquired by it;

42 (4) The holders of all outstanding shares of

1 stock of that domestic corporation not
2 beneficially owned by that interested
3 stockholder immediately prior to the
4 consummation of the business combination are
5 entitled to receive in that business
6 combination cash or other consideration for
7 those shares in compliance with subparagraphs
8 (1), (2) and (3); and

9 (5) After that interested stockholder's
10 stock acquisition date and prior to the
11 consummation date with respect to that
12 business combination, that interested
13 stockholder has not become the beneficial
14 owner of any additional shares of stock of
15 that domestic corporation except:

16 (a) As part of the transaction which
17 resulted in that interested stockholder
18 becoming an interested stockholder;

19 (b) By virtue of proportionate stock
20 splits, stock dividends or other
21 distributions of stock in respect of
22 stock of that domestic corporation not
23 constituting a business combination
24 under subsection 4, paragraph E,
25 subparagraph (5);

26 (c) Through a business combination
27 meeting all of the conditions of
28 subparagraph (3) and this subparagraph;
29 or

30 (d) Through purchase by that interested
31 stockholder at any price which, if that
32 price had been paid in an otherwise
33 permissible business combination, the
34 announcement date and consummation date
35 of which were the date of that purchase,
36 would have satisfied the requirements of
37 subparagraphs (1), (2) and (3).

38 3. This section shall not apply to business
39 combinations as provided in this subsection.

1 A. Unless the articles of incorporation of a
2 domestic corporation provide otherwise, the
3 provisions of this section shall not apply to any
4 business combination of that domestic corporation
5 with an interested stockholder if that domestic
6 corporation did not have a class of voting stock
7 registered or traded on a national securities
8 exchange or registered with the Securities and
9 Exchange Commission pursuant to section 12(g) of
10 the Exchange Act on that interested stockholder's
11 stock acquisition date.

12 B. Unless the articles of incorporation of that
13 domestic corporation provide otherwise, the
14 provisions of this section shall not apply to any
15 business combination with an interested
16 stockholder who was an interested stockholder
17 prior to the effective date of this section unless
18 subsequent to the effective date that interested
19 stockholder increased his or its interested
20 stockholder's proportion of that domestic
21 corporation's outstanding voting stock to a
22 proportion in excess of the proportion of voting
23 stock that interested stockholder held prior to
24 the effective date of this section.

25 C. The provisions of this section shall not apply
26 to any business combination of a domestic
27 corporation with an interested stockholder of that
28 domestic corporation which became an interested
29 stockholder inadvertently, if that interested
30 stockholder:

31 (1) As soon as practicable, divests itself
32 or himself of a sufficient amount of the
33 voting stock of that domestic corporation so
34 that he or it no longer is the beneficial
35 owner, directly or indirectly, of 25% or more
36 of the outstanding voting stock of that
37 domestic corporation, or a subsidiary of that
38 domestic corporation; and

39 (2) Would not at any time within the 5-year
40 period preceding the announcement date with

1 respect to that business combination have
2 been an interested stockholder of that
3 domestic corporation but for that inadvertent
4 acquisition.

5 4. As used in this section, unless the context
6 indicates otherwise, the following terms have the
7 following meanings.

8 A. "Affiliate" means a person that directly, or
9 indirectly through one or more intermediaries,
10 controls, or is controlled by, or is under common
11 control with, a specified person.

12 B "Announcement date," when used in reference to
13 any business combination, means the date of the
14 first public announcement of the final, definitive
15 proposal for that business combination.

16 C. "Associate," when used to indicate a
17 relationship with any person means:

18 (1) Any corporation or organization of which
19 that person is a director, officer or partner
20 or is, directly or indirectly, the beneficial
21 owner of 10% or more of any class of voting
22 stock;

23 (2) Any trust or other estate in which that
24 person has a substantial beneficial interest
25 or as to which that person serves as trustee
26 or in a similar fiduciary capacity; and

27 (3) Any relative or spouse of that person,
28 or any relative of that spouse, who has the
29 same home as that person.

30 D. "Beneficial owner," when used with respect to
31 any stock, means a person:

32 (1) That, individually or with or through
33 any of its affiliates or associates,
34 beneficially owns that stock, directly or
35 indirectly;

36 (2) That, individually or with or through
37 any of its affiliates or associates, has the

1 right to acquire that stock, whether that
2 right is exercisable immediately or only
3 after the passage of time, pursuant to any
4 agreement, arrangement or understanding,
5 whether or not in writing, or upon the
6 exercise of conversion rights, exchange
7 rights, warrants or options, or otherwise;
8 provided, however, that a person shall not be
9 deemed the beneficial owner of stock tendered
10 pursuant to a tender or exchange offer made
11 by that person or any of that person's
12 affiliates or associates until that tendered
13 stock is accepted for purchase or exchange;
14 or the right to vote that stock pursuant to
15 any agreement, arrangement or understanding,
16 whether or not in writing; provided, however,
17 that a person shall not be deemed the
18 beneficial owner of any stock under this
19 subparagraph if the agreement, arrangement or
20 understanding to vote that stock arises
21 solely from a revocable proxy given in
22 response to a proxy solicitation made in
23 accordance with the applicable rules and
24 regulations under the Exchange Act, and is
25 not then reportable on a Schedule 13D under
26 the Exchange Act, or any comparable or
27 successor report; or

28 (3) That has any agreement, arrangement or
29 understanding, whether or not in writing, for
30 the purpose of acquiring, holding, voting,
31 except voting pursuant to a revocable proxy
32 as described in subparagraph (2), or
33 disposing of that stock with any other person
34 that beneficially owns, or whose affiliates
35 or associates beneficially own, directly or
36 indirectly, that stock.

37 E. "Business combination," when used in reference
38 to any domestic corporation and any interested
39 stockholder of that domestic corporation, means:

40 (1) Any merger or consolidation of that
41 domestic corporation or any subsidiary of

1 that domestic corporation with that
2 interested stockholder, any other
3 corporation, whether or not it is an
4 interested stockholder of that domestic
5 corporation, which is, or after a merger or
6 consolidation would be, an affiliate or
7 associate of that interested stockholder, or
8 any other corporation if the merger or
9 consolidation is caused by that interested
10 stockholder and as a result of that merger or
11 consolidation this section is not applicable
12 to the surviving corporation;

13 (2) Any sale, lease, exchange, mortgage,
14 pledge, transfer or other disposition, in one
15 transaction or a series of transactions, of
16 assets of that domestic corporation or any
17 subsidiary of that domestic corporation
18 having an aggregate market value equal to 10%
19 or more of the aggregate market value, or
20 book value determined in accordance with good
21 accounting practices, of all the assets,
22 determined on a consolidated basis, of that
23 domestic corporation, having an aggregate
24 market value equal to 10% or more of the
25 aggregate market value of all the outstanding
26 stock of that domestic corporation, or
27 representing 10% or more of the earning power
28 or income, determined on a consolidated
29 basis, of that domestic corporation;

30 (3) The issuance or transfer by that
31 domestic corporation or any subsidiary of
32 that domestic corporation, in one transaction
33 or a series of transactions, of any stock of
34 that domestic corporation or any subsidiary
35 of that domestic corporation which has an
36 aggregate market value equal to 5% or more of
37 the aggregate market value of all the
38 outstanding stock of that domestic
39 corporation to that interested stockholder or
40 any affiliate or associate of that interested
41 stockholder, except pursuant to the exercise
42 of warrants or rights to purchase stock
43 offered, or a dividend or distribution paid
44 or made, pro rata to all stockholders of that

1 domestic corporation;

2 (4) The adoption of any plan or proposal for
3 the liquidation or dissolution of that
4 domestic corporation proposed by, on behalf
5 of or pursuant to any agreement, arrangement
6 or understanding, whether or not in writing,
7 with that interested stockholder or any
8 affiliate or associate of that interested
9 stockholder;

10 (5) Any reclassification of securities,
11 including, without limitation, any stock
12 split, stock dividend or other distribution
13 of stock in respect of stock, or any reverse
14 stock split, or recapitalization of that
15 domestic corporation, or any merger or
16 consolidation of that domestic corporation,
17 with any subsidiary of that domestic
18 corporation, or any other transaction,
19 whether or not with, or into, or otherwise
20 involving that interested stockholder,
21 proposed by, on behalf of or pursuant to any
22 agreement, arrangement or understanding,
23 whether or not in writing, with that
24 interested stockholder or any affiliate or
25 associate of that interested stockholder,
26 which has the effect, directly or indirectly,
27 of increasing the proportionate share of the
28 outstanding shares of any class or series of
29 stock or securities convertible into voting
30 stock of that domestic corporation or any
31 subsidiary of that domestic corporation which
32 is directly or indirectly owned by that
33 interested stockholder or any affiliate or
34 associate of that interested stockholder,
35 except as a result of immaterial changes due
36 to fractional share adjustments; or

37 (6) Any receipt by that interested
38 stockholder or any affiliate or associate of
39 that interested stockholder of the benefit,
40 directly or indirectly, except
41 proportionately as a stockholder of the
42 domestic corporation, of any loans, advances,

1 guarantees, pledges or other financial
2 assistance or any tax credits or other tax
3 advantages provided by or through that
4 domestic corporation.

5 F. "Common stock" means any stock other than
6 preferred stock.

7 G. "Consummation date," with respect to any
8 business combination, means the date of
9 consummation of that business combination.

10 H. "Control," including the terms "controlling,"
11 "controlled by" and "under common control with,"
12 means the possession, directly or indirectly, of
13 the power to direct or cause the direction of the
14 management and policies of a person, whether
15 through the ownership of voting stock, by
16 contract, or otherwise. A person's beneficial
17 ownership of 10% or more of the outstanding voting
18 stock of a corporation shall create a presumption
19 that that person has control of that corporation.
20 Notwithstanding this paragraph, a person shall not
21 be deemed to have control of a corporation if that
22 person holds voting power, in good faith and not
23 for the purpose of circumventing this paragraph,
24 as an agent, bank, broker, nominee, custodian or
25 trustee for one or more beneficial owners who do
26 not individually or as a group have control of
27 that corporation.

28 I. "Domestic corporation" means an issuer of
29 voting stock which is organized under the laws of
30 this State.

31 J. "Exchange Act" means the "Securities Exchange
32 Act of 1934" as that Act has been or may be
33 amended from time to time.

34 K. "Interested stockholder," when used in
35 reference to any domestic corporation, means any
36 person, other than that domestic corporation or
37 any subsidiary of that domestic corporation that:

38 (1) Is the beneficial owner, directly or

1 indirectly, of 25% or more of the outstanding
2 voting stock of that domestic corporation; or

3 (2) Is an affiliate or associate of that
4 domestic corporation and at any time within
5 the 5-year period immediately prior to the
6 date in question was the beneficial owner,
7 directly or indirectly, of 25% or more of the
8 outstanding voting stock of that domestic
9 corporation. For the purpose of determining
10 whether a person is an interested stockholder
11 pursuant to this paragraph, the number of
12 shares of voting stock of that domestic
13 corporation deemed to be outstanding shall
14 include shares deemed to be beneficially
15 owned by the person through application of
16 paragraph D, but shall not include any other
17 unissued shares of voting stock of that
18 domestic corporation which may be issuable
19 pursuant to any agreement, arrangement or
20 understanding, or upon exercise of conversion
21 rights, warrants or options, or otherwise;
22 provided, however, that the term "interested
23 stockholder" shall not include any person
24 whose ownership of voting stock in excess of
25 the 25% limitation set forth in this section
26 is the result of action taken solely by the
27 corporation, provided that that person shall
28 be an interested stockholder if thereafter he
29 acquires additional shares of voting stock of
30 the corporation, except as a result of
31 further corporate action not caused, directly
32 or indirectly, by that person.

33 L. "Market value," when used in reference to
34 property of any domestic corporation, means:

35 (1) In the case of stock, the highest
36 closing sale price during the 30-day period
37 immediately preceding the date in question of
38 a share of that stock on the composite tape
39 for New York Stock Exchange listed stocks,
40 or, if that stock is not quoted on that
41 composite tape or if that stock is not listed
42 on that exchange, on the principal United

1 States Securities Exchange registered under
2 the Exchange Act on which that stock is
3 listed, or, if that stock is not listed on
4 any such exchange, the highest closing bid
5 quotation with respect to a share of that
6 stock during the 30-day period preceding the
7 date in question on the National Association
8 of Securities Dealers, Inc. Automated
9 Quotations System, or any system then in use,
10 or if no such quotations are available, the
11 fair market value on the date in question of
12 a share of that stock as determined in good
13 faith by the board of directors of that
14 corporation; and

15 (2) In the case of property other than cash
16 or stock, the fair market value of that
17 property on the date in question as
18 determined in good faith by the board of
19 directors of that domestic corporation.

20 M. "Preferred stock" means any class or series of
21 stock of a domestic corporation which, under the
22 bylaws or articles of incorporation of that
23 domestic corporation, is entitled to receive
24 payment of dividends prior to any payment of
25 dividends on some other class or series of stock,
26 or is entitled in the event of any voluntary
27 liquidation, dissolution or winding up of the
28 domestic corporation to receive payment or
29 distribution of a preferential amount before any
30 payments or distributions are received by some
31 other class or series of stock.

32 N. "Stock" means:

33 (1) Any stock or similar security, any
34 certificate of interest, any participation in
35 any profit-sharing agreement, any voting
36 trust certificate or any certificate of
37 deposit for stock; and

38 (2) Any security convertible, with or
39 without consideration, into stock or any
40 warrant, call or other option or privilege of

1 buying stock without being bound to do so, or
2 any other security carrying any right to
3 acquire, subscribe to or purchase stock.

4 O. "Stock acquisition date," with respect to any
5 person and any domestic corporation, means the
6 date that that person first becomes an interested
7 stockholder of that domestic corporation.

8 P. "Subsidiary" of any domestic corporation means
9 any other corporation of which voting stock having
10 a majority of the votes entitled to be cast is
11 owned, directly or indirectly, by that domestic
12 corporation.

13 Q. "Voting stock" means shares of stock of a
14 corporation entitled to vote generally in the
15 election of directors.

16 5. The requirements of this section shall be in
17 addition to the requirements of applicable law,
18 including this Act, and any additional requirements
19 contained in the articles of incorporation or bylaws
20 of a domestic corporation with respect to business
21 combinations as defined in this section.

22 Emergency clause. In view of the emergency
23 cited in the preamble, this Act shall take effect when
24 approved.

25 STATEMENT OF FACT

26 The purpose of this bill is to provide protection
27 to shareholders in publicly-held Maine corporations
28 when a dominant shareholder initiates certain
29 fundamental transactions.

30 The bill provides that, after a party has obtained
31 a significant share interest in a publicly-held Maine
32 corporation (25%) further fundamental transactions
33 involving the corporation and initiated by the
34 interested shareholder would have to be approved by a
35 vote of the disinterested shareholders unless the
36 proposed transaction had been approved by the board of
37 directors prior to the interested shareholder's stock

1 accumulation. The bill provides that, when a vote of
2 disinterested shareholders is required, the shares
3 held by inside directors are also not counted.

4 Historically, Maine has regulated the attributes
5 of corporations which it has created, as well as their
6 internal corporate governance. Early in its history,
7 the State required, for example, that certain
8 fundamental corporate transactions be approved by
9 unanimous shareholder vote. Similarly, transactions
10 between corporations and interested parties have
11 historically been treated specially by the courts.
12 The bill does not go as far as the old corporate law
13 requirement of unanimity, but does provide as a
14 safeguard to minority shareholders that significant
15 transactions initiated by a large interested
16 shareholder must be approved by collective action of
17 the minority shareholders.

18 The bill is necessary because certain takeover
19 techniques involve abusive and coercive actions on the
20 part of acquirors, resulting in significant
21 transactions which inure to the benefit of acquirors
22 and to the detriment of widely dispersed public
23 shareholders. Traditional statutory and judicial
24 remedies available to individual shareholders of Maine
25 corporations often, in practical effect, are
26 inadequate to protect shareholders. Consequently,
27 this bill is necessary to protect shareholders of
28 Maine corporations.

29

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