

MAINE STATE LEGISLATURE

The following document is provided by the
LAW AND LEGISLATIVE DIGITAL LIBRARY
at the Maine State Law and Legislative Reference Library
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied
(searchable text may contain some errors and/or omissions)

(EMERGENCY)
(NEW DRAFT OF H.P. 1738, L.D. 2384)
SECOND REGULAR SESSION

ONE HUNDRED AND THIRTEENTH LEGISLATURE

Legislative Document

NO. 2596

H.P. 1900 House of Representatives, March 30, 1988
Reported by Representative STEVENS from the Committee on
Business Legislation and printed under Joint Rule 2.

EDWIN H. PERT, Clerk
Original bill sponsored 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**
2 **Minority 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 take-overs 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 publicly
12 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 2, no domestic corporation

1 may engage in any business combination for a period of
2 5 years following an interested stockholder's stock
3 acquisition date unless that business combination is:

4 A. Approved by the board of directors of that
5 domestic corporation prior to that interested
6 stockholder's stock acquisition date; or

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

18 2. This section shall not apply to business
19 combinations as provided in this subsection.

20 A. Unless the articles of incorporation of a
21 domestic corporation provide otherwise, the
22 provisions of this section shall not apply to any
23 business combination of that domestic corporation
24 if that domestic corporation did not have a class
25 of voting stock registered or traded on a national
26 securities exchange or registered with the United
27 States Securities and Exchange Commission pursuant
28 to the United States Code, Title 15, Section 78
29 l(g) on that interested stockholder's stock
30 acquisition date.

31 B. Unless the articles of incorporation of that
32 domestic corporation provide otherwise, the
33 provisions of this section shall not apply to any
34 business combination involving a domestic
35 corporation which has no interested stockholders
36 other than an interested stockholder who was an
37 interested stockholder immediately prior to the
38 effective date of this section unless, subsequent
39 to the effective date of this section, that
40 interested stockholder increased its proportion of
41 that domestic corporation's outstanding voting

1 stock to a proportion in excess of the proportion
2 of voting stock that interested stockholder held
3 immediately prior to the effective date of this
4 section.

5 C. The provisions of this section shall not apply
6 to any business combination involving a domestic
7 corporation which has no interested stockholders
8 other than an interested stockholder of that
9 domestic corporation which became an interested
10 stockholder inadvertently if that interested
11 stockholder:

12 (1) As soon as practicable, divests itself
13 of a sufficient amount of the voting stock of
14 that domestic corporation so that the
15 interested stockholder no longer is the
16 beneficial owner, directly or indirectly, of
17 25% or more of the outstanding voting stock
18 of that domestic corporation; and

19 (2) Has not been at any time within the
20 5-year period preceding the announcement date
21 with respect to that business combination, an
22 interested stockholder of that domestic
23 corporation but for that inadvertent
24 acquisition.

25 3. As used in this section, unless the context
26 indicates otherwise, the following terms have the
27 following meanings.

28 A. "Affiliate" means a person that directly, or
29 indirectly through one or more intermediaries,
30 controls, is controlled by or is under common
31 control with a specified person.

32 B "Announcement date," when used in reference to
33 any business combination, means the date of the
34 first public announcement of the final, definitive
35 proposal for that business combination.

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

1 (1) Any corporation or organization of which
2 that person is a director, officer or partner
3 or is, directly or indirectly, the beneficial
4 owner of 10% or more of any class of voting
5 stock;

6 (2) Any trust or other estate in which that
7 person has a substantial beneficial interest
8 or to which that person serves as trustee or
9 in a similar fiduciary capacity; and

10 (3) Any relative or spouse of that person,
11 or any relative of that spouse, who has the
12 same home as that person.

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

15 (1) That, individually or with or through
16 any affiliate or associate, beneficially owns
17 that stock, directly or indirectly;

18 (2) That, individually or with or through
19 any affiliate or associate, has the right to
20 acquire that stock, whether that right is
21 exercisable immediately or only after the
22 passage of time, pursuant to any agreement,
23 arrangement or understanding, whether or not
24 in writing, or upon the exercise of
25 conversion rights, exchange rights, warrants
26 or options, or otherwise; provided that a
27 person is not deemed the beneficial owner of
28 stock tendered pursuant to a tender or
29 exchange offer made by that person or any of
30 that person's affiliates or associates until
31 that tendered stock is accepted for purchase
32 or exchange; or the right to vote that stock
33 pursuant to any agreement, arrangement or
34 understanding, whether or not in writing;
35 provided that a person is not deemed the
36 beneficial owner of any stock under this
37 subparagraph if the agreement, arrangement or
38 understanding to vote that stock arises

1 solely from a revocable proxy given in
2 response to a proxy solicitation made in
3 accordance with the applicable rules and
4 regulations under the Exchange Act, and is
5 not then reportable on a Schedule 13D under
6 the Exchange Act, or any comparable or
7 successor report; or

8 (3) That has any agreement, arrangement or
9 understanding, whether or not in writing, for
10 the purpose of acquiring, holding, voting,
11 except voting pursuant to a revocable proxy
12 as described in subparagraph (2), or
13 disposing of that stock with any other person
14 that beneficially owns, or whose affiliates
15 or associates beneficially own, directly or
16 indirectly, that stock.

17 E. "Business combination," when used in reference
18 to any domestic corporation and any interested
19 stockholder of that domestic corporation, means:

20 (1) Any merger or consolidation of that
21 domestic corporation or any subsidiary of
22 that domestic corporation with that
23 interested stockholder, any other
24 corporation, whether or not it is an
25 interested stockholder of that domestic
26 corporation, which is, or after a merger or
27 consolidation would be, an affiliate or
28 associate of that interested stockholder, or
29 any other corporation if the merger or
30 consolidation is caused by that interested
31 stockholder and as a result of that merger or
32 consolidation this section is not applicable
33 to the surviving corporation;

34 (2) Any sale, lease, exchange, mortgage,
35 pledge, transfer or other disposition, in one
36 transaction or a series of transactions, of
37 assets of that domestic corporation or any
38 subsidiary of that domestic corporation
39 having an aggregate market value equal to 10%
40 or more of the aggregate market value, or
41 book value determined in accordance with good

1 accounting practices, of all the assets,
2 determined on a consolidated basis, of that
3 domestic corporation, having an aggregate
4 market value equal to 10% or more of the
5 aggregate market value of all the outstanding
6 stock of that domestic corporation, or
7 representing 10% or more of the earning power
8 or income, determined on a consolidated
9 basis, of that domestic corporation proposed
10 by, on behalf of or pursuant to any
11 agreement, arrangement or understanding,
12 whether or not in writing, with that
13 interested stockholder or any affiliate or
14 associate of that interested stockholder;

15 (3) The issuance or transfer by that
16 domestic corporation or any subsidiary of
17 that domestic corporation, in one transaction
18 or a series of transactions, of any stock of
19 that domestic corporation or any subsidiary
20 of that domestic corporation which has an
21 aggregate market value equal to 5% or more of
22 the aggregate market value of all the
23 outstanding stock of that domestic
24 corporation to that interested stockholder or
25 any affiliate or associate of that interested
26 stockholder, except pursuant to the exercise
27 of warrants or rights to purchase stock
28 offered, or a dividend or distribution paid
29 or made, pro rata to all stockholders of that
30 domestic corporation;

31 (4) The adoption of any plan or proposal for
32 the liquidation or dissolution of that
33 domestic corporation proposed by, on behalf
34 of or pursuant to any agreement, arrangement
35 or understanding, whether or not in writing,
36 with that interested stockholder or any
37 affiliate or associate of that interested
38 stockholder;

39 (5) Any reclassification of securities,
40 including, without limitation, any stock
41 split, stock dividend or other distribution
42 of stock in respect of stock, or any reverse

1 stock split, or recapitalization of that
2 domestic corporation, or any merger or
3 consolidation of that domestic corporation,
4 with any subsidiary of that domestic
5 corporation, or any other transaction,
6 whether or not with, or into, or otherwise
7 involving that interested stockholder,
8 proposed by, on behalf of or pursuant to any
9 agreement, arrangement or understanding,
10 whether or not in writing, with that
11 interested stockholder or any affiliate or
12 associate of that interested stockholder, any
13 of which has the effect, directly or
14 indirectly, of increasing the proportionate
15 share of the outstanding shares of any class
16 or series of voting stock or securities
17 convertible into voting stock of that
18 domestic corporation or any subsidiary of
19 that domestic corporation which is directly
20 or indirectly owned by that interested
21 stockholder or any affiliate or associate of
22 that interested stockholder, except as a
23 result of immaterial changes due to
24 fractional share adjustments; or

25 (6) Any receipt by that interested
26 stockholder or any affiliate or associate of
27 that interested stockholder of the benefit,
28 directly or indirectly, except
29 proportionately as a stockholder of the
30 domestic corporation, of any loans, advances,
31 guarantees, pledges or other financial
32 assistance or any tax credits or other tax
33 advantages provided by or through that
34 domestic corporation.

35 F. "Control," including the terms "controlling,"
36 "controlled by" and "under common control with,"
37 means the possession, directly or indirectly, of
38 the power to direct or cause the direction of the
39 management and policies of a person, whether
40 through the ownership of voting stock, by contract
41 or otherwise. A person's beneficial ownership of
42 10% or more of the outstanding voting stock of a
43 corporation shall create a presumption

1 that that person has control of that corporation.
2 Notwithstanding this paragraph, a person is not
3 deemed to have control of a corporation if that
4 person holds voting power, in good faith and not
5 for the purpose of circumventing this paragraph,
6 as an agent, bank, broker, nominee, custodian or
7 trustee for one or more beneficial owners who do
8 not individually or as a group have control of
9 that corporation.

10 G. "Exchange Act" means the "United States
11 Securities Exchange Act of 1934" as that Act has
12 been or may be amended from time to time.

13 H. "Interested stockholder," when used in
14 reference to any domestic corporation, means any
15 person, other than that domestic corporation or
16 any subsidiary of that domestic corporation, that:

17 (1) Is the beneficial owner, directly or
18 indirectly, of 25% or more of the outstanding
19 voting stock of that domestic corporation; or

20 (2) Is an affiliate or associate of that
21 domestic corporation and at any time within
22 the 5-year period immediately prior to the
23 date in question was the beneficial owner,
24 directly or indirectly, of 25% or more of the
25 outstanding voting stock of that domestic
26 corporation. For the purpose of determining
27 whether a person is an interested stockholder
28 pursuant to this paragraph, the number of
29 shares of voting stock of that domestic
30 corporation deemed to be outstanding shall
31 include shares deemed to be beneficially
32 owned by the person through application of
33 paragraph D, but shall not include any other
34 unissued shares of voting stock of that
35 domestic corporation which may be issuable
36 pursuant to any agreement, arrangement or
37 understanding, or upon exercise of conversion
38 rights, warrants or options, or otherwise;
39 provided that the term "interested
40 stockholder" does not include any person
41 whose ownership of voting stock in excess of

1 the 25% limitation set forth in this section
2 is the result of action taken solely by the
3 corporation and not caused directly or
4 indirectly by that person, provided that that
5 person is an interested stockholder if
6 thereafter that person acquires additional
7 shares of voting stock of the corporation,
8 except as a result of further corporate
9 action not caused, directly or indirectly, by
10 that person.

11 I. "Market value," when used in reference to
12 property of any domestic corporation, means:

13 (1) In the case of stock, the highest
14 closing sale price during the 30-day period
15 immediately preceding the date in question of
16 a share of that stock on the composite tape
17 for New York Stock Exchange listed stocks,
18 or, if that stock is not quoted on that
19 composite tape or, if that stock is not
20 listed on that exchange, on the principal
21 United States Securities Exchange registered
22 under the Exchange Act on which that stock is
23 listed, or, if that stock is not listed on
24 any such exchange, the highest closing bid
25 quotation with respect to a share of that
26 stock during the 30-day period preceding the
27 date in question on the National Association
28 of Securities Dealers, Inc. Automated
29 Quotations System, or any system then in use,
30 or, if no such quotations are available, the
31 fair market value on the date in question of
32 a share of that stock as determined in good
33 faith by the board of directors of that
34 corporation; and

35 (2) In the case of property other than cash
36 or stock, the fair market value of that
37 property on the date in question as
38 determined in good faith by the board of
39 directors of that domestic corporation.

40 J. "Stock" means:

1 The new draft provides that, after a party has
2 obtained a significant share interest (25%) in a
3 publicly held Maine corporation, further fundamental
4 transactions involving the corporation and initiated
5 by the interested shareholder, within 5 years, would
6 have to be approved by a vote of the disinterested
7 shareholders, unless the proposed transaction had been
8 approved by the board of directors prior to the
9 interested shareholder's stock accumulation. The new
10 draft provides that, when a vote of disinterested
11 shareholders is required, the shares held by inside
12 directors are also not counted.

13 Historically, Maine has regulated the attributes
14 of corporations which it has created, as well as their
15 internal corporate governance. Early in its history,
16 the State required, for example, that certain
17 fundamental corporate transactions be approved by
18 unanimous shareholder vote. Similarly, transactions
19 between corporations and interested parties have
20 historically been treated specially by the courts.
21 The new draft does not go as far as the old corporate
22 law requirement of unanimity, but does provide as a
23 safeguard to minority shareholders that significant
24 transactions initiated by a large interested
25 shareholder must be approved by collective action of
26 the minority shareholders.

27 The new draft is necessary because certain
28 take-over techniques involve abusive and coercive
29 actions on the part of acquirors, resulting in
30 significant transactions which inure to the benefit of
31 acquirors and to the detriment of widely dispersed
32 public shareholders. Traditional statutory and
33 judicial remedies available to individual shareholders
34 of Maine corporations often, in practical effect, are
35 inadequate to protect shareholders. Consequently,
36 this new draft is necessary to protect shareholders of
37 Maine corporations.

38

5158032488