A Review of The Maryland Unsolicited Takeover Act ("MUTA") on its 25th Anniversary

May 16, 2024

Happy Birthday MUTA! The Maryland Unsolicited Takeover Act ("MUTA") marks its 25th anniversary on June 1. In honor of the anniversary, we review the current rate of MUTA take-up among Maryland companies.

The Maryland Unsolicited Takeover Act ("MUTA")

On May 13, 1999, Maryland's governor signed into law S.B. 169 titled "Corporations and Real Estate Investment Trusts – Unsolicited Takeovers", designed to protect Maryland companies from hostile takeovers. Commonly known as the Maryland Unsolicited Takeover Act ("MUTA"), the changes, which became effective on June 1, 1999, included endorsing the use of poison pills, advance notice requirements and expanded constituency provisions.

More importantly, MUTA also added a new "Subtitle 8. Corporations and Real Estate Investment Trusts – Unsolicited Takeovers" section to the Maryland General Corporation Law. Subtitle 8 includes five "opt-in" defense provisions that supersede any conflicting provisions in the company's charter and bylaws:

- **Section 3-803**: requiring classification of the board into three classes
- **Section 3-804(a):** requiring a two-thirds vote requirement for removing a director
- **Section 3-804(b)**: requiring that the number of directors be fixed only by vote of the board
- **Section 3-804(c)**: requiring any vacancy on the board of directors be filled only by the majority vote of the remaining directors and for the remainder of the full term in which the vacancy occurred and until a successor is elected and qualifies
- **Section 3-805**: requiring that special meetings may only be called by stockholders entitled to cast at least a majority of all the votes entitled to be cast at the meeting

The provisions are voluntary (i.e., no Maryland company is subject to Sections 3-803, 3-804 or 3-805 by default) and allow a Maryland public company with at least three independent directors to elect to be subject to (i.e., "opt-in") any or all of the provisions in its charter or bylaws or by a resolution of its board of directors. Any opt-in via a bylaw amendment or board resolution would not require stockholder approval (e.g., a company could classify the board without seeking stockholder approval).

Subtitle 8 also allows a Maryland company to include a provision in its charter, or the board of directors to adopt a resolution, that prohibits the company from electing in the future to be subject to any or all provisions of the subtitle (i.e., "opt-out"). This extra opt-out feature is unique among U.S. states and leads to confusion among governance researchers who are accustomed to viewing an opt-in or opt-out election as a binary choice (e.g., opting-out of coverage of the Delaware freeze-out statute where companies are subject to the statute by default, or opting-in to the Georgia freeze-out where companies are not covered unless they elect to be). Therefore, companies that have not elected to be covered by any of the five defense provisions may still hear from stockholders requesting that they "opt-out" (which is generally presented as requiring stockholder approval before electing to be covered by any or all of MUTA). For example, in a letter to stockholders of National Health Investors Inc on April 18, 2024, Land & Buildings Investment Management, LLC disclosed that it requested the board "permanently opt out of the Maryland Unsolicited Takeover Act".

MUTA Opt-In/Outs

While the protections afforded by Subtitle 8 are well-suited for today's environment where the threat of an activist campaign is much more likely than a hostile takeover of an entire company, opt-ins by Maryland companies are currently modest at best. While slightly more than half of the 198 Maryland companies in Deal Point Data's defense coverage universe have opted-in to at least one part of MUTA, most have been to the fairly innocuous setting of the board size (Section 3-804(b)) and filing board vacancies (Section 3-804(c)) provisions. The strongest defenses available via MUTA – classifying the board (Section 3-803), supermajority vote requirement for removing a director (Section 3-804(a)), and the majority of votes requirement to call a special meeting (Section 3-805), are largely being shunned. Only 2%, 3%, and 2% of companies have opted-in to Sections 3-803, 3-804(a), and 3-805, respectively. Undoubtedly, evolving governance expectations from stockholders and proxy advisory firms since MUTA was enacted has played a part in the lack of opt-ins. Indeed, in highlighting their Corporate Governance practices, Maryland companies will often point to the fact that they have not elected to be subject to the provisions of MUTA or have opted-out of all provisions of MUTA. However, it's worth noting that only 30% of companies have specifically opted-out of all or parts of MUTA, which means the board could quickly and unilaterally elect to be subject to a MUTA defense provision should the need arise.

	Maryland Companies	
Overall Take Up	**# Companies**	**% Total**
Opt-In (All/Parts)	84	42%
Opt-In (All/Parts)/Opt-Out (All/Parts)	24	12%
Opt-Out (All/Parts)	36	18%
Silent	54	27%
Total	**198**	**100%**

As of May 15, 2024. Based on the 198 Maryland companies in Deal Point Data's defense coverage universe (which includes all the major U.S. stock indexes).

	Opt-In		Opt-Out		Silent	
Provision	**# Cos**	**% Total**	**# Cos**	**% Total**	**# Cos**	**% Total**
Classified Board (3-803)	3	2%	55	28%	140	71%
Supermajority Director Removal (3-804(a))	5	3%	7	4%	186	94%
Board Size Fixed by Board (3-804(b))	26	13%	23	12%	149	75%
Board Fills Vacancies (3-804(c))	105	53%	17	9%	76	38%
Majority O/S to Call Special Meetings (3-805)	3	2%	6	3%	189	95%

As of May 15, 2024. Based on the 198 Maryland companies in Deal Point Data's defense coverage universe (which includes all the major U.S. stock indexes). MUTA provisions are voluntary – a company does not need to "opt-in" to a section (e.g., 3-803) in order to have a similar provision (e.g., a classified board) in its charter/bylaws.

About Deal Point Data

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