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Opting Out of “MUTA” Is Still a Bad Idea

Yesterday, Governance Monitor, edited by longtime REIT observer Barry Vinocur, resumed urging REITs to opt out of the Maryland Unsolicited Takeovers Act. (The principal provisions of this Act are contained in Subtitle 8 of Title 3 of the Maryland General Corporation Law and are often referred to, by Barry and others, as “MUTA”.)

We have been down this road before. Subtitle 8, enacted in 1999, permits the board of a Maryland corporation (or a Maryland Title 8 trust REIT) with a class of equity securities registered under the Securities Exchange Act of 1934 and at least three independent directors (or trustees) to, among other actions, classify itself without shareholder approval.

Barry continues to urge REIT boards to opt out of MUTA permanently unless shareholders vote to approve opting in. This effectively means that MUTA is unavailable because no public company would be able to hold a shareholder vote in time for the self-classification to provide any protection against a hostile attacker that the board opposed for any of several plausible business reasons, *e.g.*, opposing an undervalued offer or resisting a proposed break-up of the company.

We continue to believe that boards are wise to resist the pressure to give up the choice to self-classify. In this regard, we find it inconsistent that there is general market acceptance for a unilaterally board-adopted limited-duration shareholder rights plan giving the board leverage to evaluate a hostile tender offer and negotiate more favorable terms but not for allowing a board to self-classify in the face of a hostile proxy contest, even for limited periods. Indeed, analogously to the adoption and termination of a limited-duration rights plan, some REITs have used Subtitle 8 to protect themselves against sudden hostile attacks in order to gain time to evaluate offers and negotiate better terms and thereafter have declassified their boards without giving up the option to reclassify as future circumstances may warrant.

[Click to access the article *Getting Nothing for Something*](#), published by REIT Zone Publications in September 2014, concerning the Maryland Unsolicited Takeovers Act. Its reasons for not opting out of MUTA remain as valid today as two years ago.

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As always, our colleagues and we are available at any time to discuss these or other matters.

Jim Hanks
Hirsh Ament

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