Massachusetts' New Business Corporation Act–
New Chapter 156D Compared with Old Chapter 156B[1][*]

The following is a summary, with commentary, of the changes to Massachusetts corporation law wrought by Chapter 156D—the new Massachusetts Business Corporation Act. For more information about the act and its impact on your company, please contact your Swiggart & Agin, LLC attorney.

1. General. Chapter 156D is much longer than the old statute, but it is well organized, and imports many useful procedures and a measure of greater flexibility from the model corporate act, and from Delaware law. It also codifies a significant amount of Massachusetts corporate case law such as the Donahue v. Rodd line of cases regarding minority shareholder rights, and cases on shareholder derivative actions.
2. Effectiveness. Chapter 156D applies to all domestic corporations or foreign corporations doing business in Massachusetts whether or not incorporated under the Act. §24. Chapter 156D was enacted as Chapter 127 of the Acts of 2003. Chapter 156D was signed into law by Governor Mitt Romney November 26, 2003, but takes effect July 1, 2004.
3. Clarity.
    a. Chapter 156D adheres to the traditional English rule that the third person male pronoun may mean either male or female, thus avoiding awkward neologisms such as s/he his/her, or the confusing alternating of 'she' with 'he'.
    b. Prior law scattered much procedural information, such as requirements and timing for the giving of notice, the issuance of certificates by the state secretary, etc., throughout the chapter. Chapter 156D consolidates much of this information in separately headed sections that apply to the entire chapter, and therefore should be easier to follow despite its greater length and detail.
4. Chapter 156D Penalties:
    a. NEW! Any person that knowingly executes a false document to be filed with the Secretary of State may now be charged with civil misdemeanor and subject to fine up to $100,000–much higher than prior law. §1.29.
    b. NEW! Similar infractions by officers of foreign corporations continue to be penalized only up to $5,000, though they may bear personal, civil liability for materially false statements. §15.11. Thus, §1.29 impliedly applies only to officers of domestic corporations.
5. NEW! Filing of Documents. Any document may now specify a delayed effective date of up to 90 days after date of filing with the Secretary of State. §1.23. Prior law allowed only certain, specified filings to be delayed, and only by up to 30 days.

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6. Certificates. Chapter 156D provides, in a single section, for the Secretary of State to issue a variety of certificates over and above that of legal existence including certificates of merger, dissolution, and authority of a foreign corporation to do business in the commonwealth. §1.28. Prior law scattered the authority to issue certificates throughout the chapter.
7. Definitions. §§1.41–42.
    a. Notably missing from Chapter 156D's many defined terms is "independent" director. *But see* §7.44©, (listing circumstances that are not to disqualify a director from independence for the purposes of stockholder derivative proceedings).
    b. "Organic Law," defined as the law governing the internal affairs of an entity. (Equals "Private Organic Law," i.e. Bylaws, vs. "Public Organic Law," i.e. Articles, etc.), appears frequently in Chapter 156D.
    c. "Secretary" replaces Clerk, but "Articles" (not "Certificate," as in Delaware) remain the primary fling document in Chapter 156D.
    d. "Secretary of State" replaces the "state secretary" of prior law.
    e. "Notice" gets an entire new section. §1.41.
8. NEW! Emergency provisions added by Chapter 156D include §2.07 for bylaws, and §3.03 for powers during an Emergency, defined as a catastrophic event preventing the assembly of a quorum of directors.
9. NEW! §3.04 on ultra vires defines just three circumstances under which corporation's power to act may be challenged: (1) in a proceeding by a shareholder against the corporation to enjoin the act, (2) in a proceeding by the corporation against a director, officer, agent, etc. and (3) in a proceeding of judicial dissolution.
10. Name. §4.01
    a. Prior law required only that the corporation "assume any name which, in the judgment of the state secretary, indicates that it is incorporated." Chapter 156D specifies the words that must be included in the name, such as "Inc.," "Corporation," and "Company". §4.01(a).
    b. NEW! A foreign corporation whose name is unavailable due to a conflicting filing may register to do business under a "fictitious name." §4.01(b).
    c. NEW! Requires a person aggrieved by the filing of a conflicting corporation name to complain to the Secretary of State within 90 days. §4.01(e).
11. NEW! Chapter 156D doubles the period to reserve a name from 30 to 60 days, but then allows only a single extension by another 60. §4.02.
12. Shares. One of the most noticeable differences between Massachusetts and Delaware in the past was the difference in the method by which corporations were taxed based on their number of authorized shares. This difference should remain, as the Secretary of State is granted continued power to regulate the method of taxation. §6.
13. Distributions. §§6.40-41.
    a. Codifies decisional law making directors liable for authorizing an improper distribution in liquidation. NEW! Where the Act departs from current law is in an express provision for a right of contribution among liable directors. §6.41

b. Provides for recovery from a shareholder or director, within a two-year limitations period, of an improper distribution.

14. Meetings. §7.
    a. Annual. Prior law required locus within Commonwealth unless expressly allowed in the Articles. NEW! The bylaws may now specify this instead. §7(b).
    b. Special. The calling of a special meeting by holders of as few as 10% of the outstanding stock of a privately held corporation, and at least 40% for public corporations is unchanged from prior law.
    c. NEW! Court Ordered. Limited court intervention to command that a corporation meeting be convened. §7.03. Heads off the prior, extreme remedy of court ordered dissolution for failure to hold one.
    d. NEW! Majority Consent in Lieu of Meeting. §7.04. Chapter 156D adopts the Delaware method whereby a stockholders holding shares sufficient to pass action an action by signing consents in lieu of a meeting, *provided that*
        i. the Articles expressly allow it,
        ii. each signature bears the date of signing,
        iii. all consents are delivered for filing in the minute book within 60 days of first signature, and
        iv. 7-60 days' prior notice of the consent was given at least to nonconsenting shareholders.

    N.b., these requirements are much stricter than Delaware, which only requires prompt notice afterwards to nonsigning shareholders.

    e. Notice of Meeting and Waiver. Requires 7-60 days prior notice of any shareholder meeting. §7.05. NEW! A shareholder's attendance waives objection to lack of notice of the discussion of a matter of which notice was not given *unless* the shareholder objects at the meeting.
    f. Shareholder List for Meeting. Chapter 156D provides detailed instructions for compilation of a shareholder list prior to a meeting, and the shareholders' right to inspect the same, including on a Web site. §7.20. NEW! Web display of the list is required if the meeting is to be convened only electronically. As with §7.03, court intervention is provided for specifically to enforce the shareholders' inspection right.
    g. NEW! Proxies. Chapter 156D specifies the duration of proxies, and, helpfully, adds a detailed list of the circumstances whereby a proxy may be deemed coupled with an interest, and therefore be irrevocable. §7.22
    h. Cumulative Voting. §7.28 allows for cumulative voting for Directors if specified in the By-Laws.
    i. Voting Agreements. Chapter 156D provides for the enforceability of voting agreements. Court intervention is again invited with the statement that voting agreements may be specifically enforced. §7.29.
    j. Shareholder Agreements. Proffers useful list of purposes for which a shareholder agreement may be entered into. §7.32. Adds a default term limit of 10 years. NEW! Notably, §7.32 (d) provides for automatic termination in the event of an IPO, etc., obviating IPO termination clauses that appear in most shareholder agreement forms. §7.32(d).

k. NEW! Derivative Proceedings. §§7.40-46 of Chapter 156D provide for commencement and conduct of, including:
    i. Stay of court proceedings if the corporation commences an investigation;
    ii. Dismissal if a court determines that a majority vote of "independent directors" or "independent persons" appointed by the court has determined that dismissal is in the "best interests of the corporation;"
    iii. That the court may award counsel fees to the winning party—in contravention of the American rule; and
    iv. Special rules for foreign corporations.

15. Board of Directors. §8
    a. Chapter 156D continues the old rule that the number of directors expands to the number of shareholders up to three *unless* NEW! provided otherwise in the Articles.
        i. *Also*, the Board of directors may now establish a variable number of directors instead of a fixed number.
    b. As with existing law, directors' terms may be staggered for privately held corporations, but must be staggered for public ones (unless voted otherwise by 2/3 of each class of shareholders).
    c. Chapter 156D includes many other directorship provisions that apply only to public corporations.
    d. NEW! Unanimous consents may be delivered electronically in lieu of meeting.
    e. NEW! New provisions for the creation and operation of committees.
    f. Elucidates standard of care for directorship that codifies existing Massachusetts anti-takeover law (in contrast w/ that of Delaware) by specifying the director may consider the "economy of the state, the region and the nation, community and societal considerations, … and the long-term and short-term interests of the corporation and its shareholders, including the possibility that these interests may best be served by the corporation's remaining independent."
    g. Both defines a director conflict of interest, and sets forth a procedure for director to disclose same to the rest of the board of directors, and thereby obtain waiver of the conflict. §8.31.
    h. The provision regarding loans to directors is of particular interest given the federal enactment of the Sarbanes-Oxley bill, and other reform provisions in the wake of the Enron, Worldcom, Xerox, Arthur Andersen, etc. scandals and accounting restatements. The provision that a loan or loan guarantee is acceptable if the board of directors determines that it "benefits the corporation and either approves the specific loan or guarantee or authorizes a general plan authorizing loans and guarantees" seems out of step with these reforms. It might have been more appropriate to require the board to entertain specific justifications for such commitments, including reasons why they *didn't* constitute the potential

for a conflict of interest or impose undue influence on the director's independent judgment. §8.32.

i. Permits the corporation to indemnify an officer or director against personal liability: "if he reasonably believed that his conduct was in the best interests of the corporation, or at least not opposed to the best interests of the corporation." §8.51.
j. Entirely new sections cover indemnification. §8.52 *requires* the corporation to indemnify a director against "reasonable expenses" incurred in a defense that is "wholly successful" in any proceeding to which he was a party. This default provision, together with succeeding sections that provide for advances on expenses—either corporation-authorized or court-ordered—reduce the necessity of including special rights of indemnification within the Articles to attract qualified director candidates. §§8.52-55.
k. Applies the same indemnification to officers save "for liability arising out of acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of the law." §8.56.
l. Expressly authorizes directors' and officers' liability insurance. §8.57.
m. Allows the corporation, as with existing law, to obligate itself in advance to indemnify by contract, Article or bylaw provision, or expressly to *opt out* of statutory indemnification. §8.58

16. NEW! Domestication. Chapter 156D here adds a new method to change the state of a corporation's domicile—either into Massachusetts or outbound to any other state that allows the same procedure. §§9.20-25. Domestication differs from a merger in that no new corporation is created in the new jurisdiction—the old entity is instead adapted to the laws and requirements of the new domicile. Domestication may be desirable or convenient where the parties wish to avoid the appraisal rights attendant upon a merger, or where it is important for some other reason for the business to retain exactly the same entity. In other instances, though, domestication may prove to be more cumbersome than the creation from scratch of a new entity in the new domicile for the purpose of a merger.
    a. N.b., the Articles must authorize shareholder approval of domestication by any lesser percentage than 2/3 vote.
17. NEW! Conversion. Chapter 156D here adds the new concept of conversion—similar to domestication—whereby an entity converts to a completely different form directly, and *without* merging into a different entity. §§9.30-35 allow a domestic business corporation to be converted into either a domestic or foreign nonprofit corporation. Very similar §§9.40-56 provide for an entity other than a corporation to be converted into a completely different entity. If the entity is of foreign domicile the entity's organic law, and the laws of its jurisdiction determine whether it may be converted into a domestic entity, and vice versa if a domestic entity journeys outbound to a foreign jurisdiction.
    a. Conversion takes place as provided through the entity's adoption of a plan of entity conversion per §9.51.

b. The board of directors of a corporation adopt the plan subject to approval by a 2/3 vote of the shareholders per §9.52. N.b., if one wishes to allow approval by lesser number, the Articles must say so.
c. If the entity remains domiciled in Massachusetts, Articles of Entity Conversion must be filed with the Secretary of State per §9.53. In the case of nonprofits, these are Articles of Nonprofit Conversion per §9.32. In either case, copies of articles must be filed with the *registries of deeds* where the converting entities own real property. §9.32 (d) & §9.53(e).
d. If the entity is converting to a foreign domiciled entity though, Articles of Charter Surrender must be filed with the Secretary of State per §9.54.

18. Amendment of the Articles of Organization.
    a. The provisions of Chapter 156D to amend the articles of organization resemble existing law, except that some of the gaps are filled in, e.g., with a detailed list of situations where shareholders must approve amendments by class vote.
    b. NEW! Major change: Chapter 156D here allows amendment *solely by directors' vote* for the following ministerial changes:
        i. If no shares have yet been issued (incorporator may also amend), §10.02;
        ii. Per §10.05:
            1. Amendment to extend the corporation's duration if it originally had limited life;
            2. If the corporation as only one class of shares outstanding,
                a. Amendment to increase each share equally; or
                b. Amendment to increase the number of authorized shares for the purpose of a share dividend.
            3. Amendment to change the corporate suffix or geographical designation.
            4. Amendment to reduce the number of authorized shares if the corporation acquired some of its own shares Articles prohibited their reissuance; and
            5. Amendment to delete a class or series of shares when the corporation acquired all issued shares of that class and the Articles prohibited their reissuance, all of the shares thereof have been acquired, or when all the shares of the class or series have been converted into other securities, and the articles prohibit their reissuance. [Quaere: should the drafters have included a similar right to terminate all the shares of a class that were *never* issued?]
        iii. Follows Delaware in providing expressly for the filing of restated articles of organization to "supercede the original articles of organization, and all amendments thereto." §10.07.
19. Amendment of Bylaws. Bylaws (hyphen now dropped) may be amended only by the shareholders unless the Articles provide for amendment by the directors. Quorum and shareholder voting requirement provision added. §10.20.
20. Mergers & Share Exchanges.

a. Chapter 156D governs mergers, and seems largely unchanged from existing law. §§11.01-02.
b. NEW! Chapter 156D now provides for share exchange, a new procedure whereby the shares of a corporation may be exchanged for the shares or property of the acquiring corporation. §11.03.
c. NEW! Eliminates the need for shareholder approval, per §11.04(7), for a merger or share exchange if:
    i. The corporation will survive;

    ii. The articles will be unchanged except for mendments otherwise permitted to be taken without shareholder approval;

    iii. Each shareholder of the surviving corporation will hold the same number of shares, with the same preferences, etc., immediately afterwards as beforehand; and

    iv. The shares of the surviving corporation to be issued pursuant to the merger or share exchange does not exceed 20% of the existing shares.
d. NEW! Chapter 156D permits there to be no shareholder *or* director approval for a merger or share exchange of a subsidiary into a parent. §11.04(8).

21. Chapter 156D requires approval of 2/3s of the shareholders for the "sale, lease, exchange or other disposition" of assets of the corporation outside the regular course of its business. §12.
22. NEW! Chapter 156D sets forth a detailed procedure for shareholders to dissent and obtain appraisal and payment for the "fair value" of their shares. Prior law triggered appraisal only in the event of a merger or sale of all or substantially all of the corporation's assets. §13. The new law includes these (subject to many enumerated exceptions) and adds:
    a. Consummation of a plan of share exchange;
    b. Amendment to the articles that "materially and adversely affects" the shareholder's shares in respect to a detailed list that includes rights or preferences vis a vis dissolution, etc., voting rights, preemptive rights, or reduces the shares owned by the shareholder to a fractional share that is to be cashed out;
    c. Amendment to the articles, or bylaws, or the entering into of an agreement that adds restrictions on the transfer of the shareholder's shares; and
    d. Conversion of the corporation to nonprofit status or other entity.
23. Appraisal operates as follows per Subdivisions B & C:
    a. §13.21. Shareholder notifies that shareholder intends to demand payment for his shareholders, and refuses to vote for the action requiring appraisal;
    b. §13.22. Corporation sends shareholder an appraisal notice that sets the date of the first announcement to the shareholders of the principal terms of the proposed corporate action, with a form for the shareholder to fill out, a and fair market value appraisal;
    c. §13.23. Shareholder fills in the form, certifying timely beneficial ownership of the shareholders prior to the announcement date, and returns it to the corporation within 40-60 days;

d. §13.24. Corporation pays the fair market value plus interest, and includes various enumerated financial statements of the corporation, including "the latest interim financial statements, if any;"
e. §13.25. Corporation may withhold payment for shareholders not certified as beneficially owned by the announcement date.
f. §13.26. The shareholder may demand more money for the shareholders within 30 days of receiving payment and financial statements;
g. §13.30. The corporation must pay the shareholder demand, or commence an equitable court proceeding within 60 days of the shareholder's demand;
h. §13.31. The court may award the difference, and assess counsel fees and costs against either party.

24. Many types of dissolution, both voluntary and otherwise, are covered at length at Chapter 156D §14.

25. NEW! Chapter 156D, §15, helpfully, but not exhaustively (per §15(d)) lists some activities that constitute doing business in the commonwealth, *and many that do not:*

a. Those that do are: (1) buying or leasing real estate, (2) engaging in the construction or repair of any structure, railway or road, and (3) engaging in any activity requiring the performance of labor. Of these, (1) and (3) will affect the most corporations. Thus a startup corporation incorporated in Delaware, but simply developing its products out of a founder's garage, and employing no workers will not be required to qualify in Massachusetts.
b. Of the 11 activities that do *not* constitute doing business, probably the most significant are "selling through independent contractors," and "conducting an isolated transaction that is not in the course of repeated transactions of like nature." Thus, the California corporation selling its products in Massachusetts through independent contractors does not have to qualify to do business here in the absence of other qualifying factors. Nor does the Nevada software services company that sends its people to a single Massachusetts based company to design and install a single system have to qualify here.
c. Penalties for Failure to Qualify
    i. The sole penalty for failing to qualify to do business is that it may not maintain a proceeding in any court in the Commonwealth until a certificate is of foreign corporation is delivered and filed, along with all past due certificates, plus late fees. §15.02. Failure to qualify does not impair the validity of the corporation's corporate acts, or its ability to defend itself in court. §15.02(e).

    ii. Unchanged from prior law, a party wishing to sue a foreign corporation that is doing business here, and who is unable to locate a registered agent therefor may serve the foreign corporation care of the Secretary of State, which must then forward a copy of the service to the corporation's last known address. §15.10.

d. Qualifying in Massachusetts.

i. The procedure for a foreign corporation to qualify in Massachusetts is unchanged except that if its own corporate name is unavailable due to a conflict with another filing, it may file under a "fictitious" name if approved by the board of directors.

e. Other Penalties.
f. Any officer of a foreign corporation that executes a document to be filed with the Secretary of State that he knows or has reason to know is materially false may be held personally liable for damages sustained by any creditor to the extent that he relied on such document. §15.11(a).
g. *However*, officer not liable *if* exercised appropriate business judgment, due diligence, etc. §15.11(b). Liability of each director subject to a right of contribution from other director. §15.11(c).
h. The civil penalty for filing false documents is a maximum of $5,000. §15.11(d) & (e).

26. NEW! Chapter 156D, §16 provides detailed requirements for the keeping and corporate records, and provides for a broadened right of inspection by shareholders and directors, including:
    a. Complete minute book and corporate filings, and
    b. The corporation's accounting records or, if it is subject audit, its financial statements and supporting records.