

## ORGANIZING THE CORPORATION

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## **INTRODUCTION**

There exists a variety of technical considerations relating to the organization of any Massachusetts business corporation, regardless of the number or nature of its shareholders. There are, of course, many special issues relating to the particular situation of any specific new business. It is likely, however, that the practitioner will have to deal with the matters discussed herein in connection with the organization of virtually every new business corporation in this state.

## **ACKNOWLEDGEMENT**

This chapter is a comprehensive revision of its predecessor written by Andrew L. Nichols of Choate, Hall & Stewart. The changes to Massachusetts corporate practice wrought by the new Massachusetts Business Corporation Act have (as Andy presciently observed in his last revision of this chapter) required extensive editing. Nevertheless, Andy's work remains an unparalleled combination of erudition, practical wisdom, and lucid legal writing, upon which one could hardly hope to improve. For this reason, I have tried to retain the basic style and format and much of the text of Andy's opus and I express my sincere gratitude and appreciation for his efforts.

## THE MASSACHUSETTS BUSINESS CORPORATION ACT

The predominant authority for the organization of a Massachusetts business corporation is G.L. c. 156D, provisions of which are discussed in greater detail throughout this chapter.

Chapter 156D, the Massachusetts Business Corporation Act, was enacted on November 26, 2003 (St. 2003, c. 127) and became effective on July 1, 2004. It replaces Chapter 156B, the Massachusetts Business Corporation Law (“BCL”), first enacted in 1964. At this writing, Chapter 156D has already been amended once (by St. 2004, c. 178) and further technical corrections are expected to be adopted by the Legislature.

Chapter 156D is based on the format of the American Bar Association’s Revised Model Business Corporation Act (“RMBCA “), with many variations to conform to established Massachusetts policies and practices. The RMBCA has been adopted in some form in 37 states. General Laws c. 156D, §1.50 provides that in the absence of controlling Massachusetts precedent, significant weight should be given to the interpretations of courts of other jurisdictions of substantially equivalent provisions of the corporate laws of such jurisdictions.

The drafters of the act have added extensive comments to the various sections of Chapter 156D. These comments discuss the differences between the new act and the RMBCA and the BCL, contain useful cross-references to other relevant sections of the statute, and are a valuable source of information as to the meaning and interpretation of the new law.

In addition, the Corporations Division of the Massachusetts secretary of state has adopted regulations, codified at 950 CMR 113.00 *et seq.*, relating to compliance with the new legislation.

A thorough understanding of the new statute, as amended, the regulations and the drafter’s comments is essential to effective Massachusetts corporate practice.

### NAME

General Laws c. 156D, §4.01 provides that a Massachusetts corporation must assume a name which indicates that it is a corporation and is not the same as, or likely to be mistaken for, the name of another entity.



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### **Corporate Status Designation**

General Laws c. 156D, §4.01(a) requires that a corporate name contain the word “corporation,” “incorporated,” “company,” or “limited,” or the abbreviations “corp.,” “inc.,” or “ltd.,” or words or abbreviations of like import in another language. The secretary of state’s regulations under Chapter 156B had excluded the word “company,” which is now explicitly permitted.

### **Reserving the Corporate Name**

Names can be cleared and reserved in advance. A preliminary check for availability can be done over the telephone, but reservation must be accomplished in writing or electronically, accompanied by the payment of a modest fee (currently \$30). Reservation is good for 60 days and may be extended for an additional 60 days. *See* GL. c. 156D, §4.02. If you want to extend the reservation beyond this 120 day period, you must wait at least one day (to allow someone else to step in front of you) before filing for a new 60-day period. This process can be repeated as often as you wish.

### **Conflicting Names**

General Laws c. 156D, §4.01(b) requires that the corporate name “may not be the same as, or so similar as to be likely to be mistaken for” certain classes of names.

The classes of potentially conflicting names include corporate or trade names of for-profit or not-for-profit corporations, corporate names under reservation, fictitious names adopted by a foreign corporation or entity, the names or trade names of partnerships, business trusts, or other entities, organized, authorized to transact business, or otherwise lawfully conducting business in Massachusetts, and trademarks or service marks registered with the Corporations Division under Chapter 110B. *See* G.L. c. 156D, §4.01(b) and 950 CMR 113.18. The secretary of state has no legal responsibility to identify name conflicts, although current administrative practice is for the Corporations Division staff to check the files for name conflicts prior to approval of an incorporation.

Section 4.01(c) permits name conflicts to be resolved by a simple written consent by the user of the conflicting name. This is consistent with prior administrative practice. Name conflicts may also be resolved by written undertakings to change a conflicting name, or by court order. Section 4.01(d) permits conflicting names to be used following a corporate merger, reorganization or sale of assets.

## Protests; Administrative Hearing

Any person who is registered, qualified or otherwise lawfully carrying on business in Massachusetts or who has reserved a corporate name, may protest to the Corporations Division that the name assumed by a corporation violates the statutory standard. The protest must be in writing and received by the Corporations Division within 90 days after the articles of organization or amendment affecting the adoption or change of the corporate name have been filed. *See* G.L. c. 156D, §4.01(e).

## Researching the Name

It is *always* desirable to check the availability of any name before preparing corporate documents. The process is painless and quick, and there is no excuse for showing up at the secretary's office with your articles of organization ready for filing, only to be told that the name is not available.

Securing the right to use a name for the corporation from the secretary of state does not necessarily mean that you are free to use it in commerce generally. Prior users of the name may have secured protection under federal and state trade name and trademark statutes or under common law. If your client intends to market actively under its corporate (or any other) name, a search should be conducted to determine whether there are other users with prior rights. Such searches are ordinarily done through search firms that specialize in this activity and that typically have automated databases and other means available to facilitate the search. The cost is a few hundred dollars for each name searched and is well worth it if your client intends to invest even modestly in marketing under the name.

Besides the precautions already described, a further step should be taken when your client expects to use its name actively in a particular location. General Laws c. 110, § 5 requires any person, including individuals and organizations as well as corporations, doing business in other than his or her true name to file with the city or town clerk of the place where the business is conducted a certificate showing both the name under which he or she is doing business and also his or her correct true name. A search of the relevant records should uncover the identity of anyone actually conducting business in that city or town under the desired name.

## **Using Fictitious Names**

Incidentally, using a “fictitious name” (with the required local filing) is an alternative to adopting a corporate name. Sometimes the desired name has been reserved but is not being actively used or is being used in a totally unrelated field. If you do not want to ask the other user to relinquish the name, or if such a request is unsuccessful, your client can incorporate under a totally different name and actually conduct business under the name desired. Keep in mind, however, that this tactic works only in cases where your client’s use of the name does not infringe any trademark registration or common law rights of the prior user.

## **Other Considerations Concerning Use of Name**

Two final comments are in order concerning the corporate name. First, all the comments above relate to use of a name in Massachusetts. If your client expects to conduct an active multistate business, all the same issues arise in each state in which the business is to be conducted. Therefore, it is highly advisable to conduct the same kinds of searches in each state in which the client intends to do business. Indeed, the situation can be even more difficult if your client has invested a substantial amount in its name in Massachusetts, only later to find that name cannot be used when it moves to open a New York office. Second, no matter what precautions are taken to protect your client’s right to use a particular name, there can always be surprises. Common law rights can be acquired by anyone actually using a name in the conduct of a business, regardless of whether public filings have been made, and it is very difficult to be certain that no such rights exist, particularly when your client is not intimately familiar with the situation in a community some distance away. Having a full search done by a qualified search firm is probably about the best you can do as a lawyer; your client may be able to conduct further investigation in the place where the name is actually expected to be used, but there is no foolproof system to provide guaranteed assurance.

## **AVAILABILITY OF FORMS AND OTHER INFORMATION**

Under prior law, virtually all Massachusetts corporate filings had to be made on preprinted forms available from the Corporations Division. Although Chapter 156D provides that the secretary of state may prescribe mandatory forms or permit filers to create their own forms Delaware-style, the Corporations Division has charted a middle course. The Division provides forms for corporate

filings, but also permits filers to use their own forms *if formatted in the same manner as the Division's forms*.

In addition to the hard-copy versions of these forms available at the Corporations Division, the forms are also available via the Internet. The Corporations Division has a website, which can be found at <http://www.sec.state.ma.us>. In addition to downloadable image copies of forms, the site has guidelines for completing them and other useful information. Many of the forms on the website are "fillable" forms, which contain blanks which may be completed online and downloaded as image files. Filings of many forms, including articles of organization, may be made electronically, a topic more fully discussed later in this chapter.

In all of the forms provided by the Corporation's Division, continuation sheets must be used for text which does not fit within the space provided in the pre-printed form. However, since the Corporations Division will accept for filing forms which are formatted in the same manner as the Division's forms, filers can create word processing documents which meet the legal requirements and eliminate the annoyance of using continuation sheets.

## **ARTICLES OF ORGANIZATION**

A Massachusetts corporation must have articles of organization, the contents of which are provided for in G.L. c. 156D, § 2.02. This is the basic corporate document, generally referred to as its charter. (The equivalent document goes by various names in different states. For example, in Delaware it is called the "certificate of incorporation.") An example of a completed set of articles of organization is attached as **Exhibit 2**. The various components of the charter are discussed below in the order presented in the form of articles of organization.

The articles of organization are executed by the one or more persons or entities identified in the articles as the incorporators of the corporation. Under §2.01, any "person" may be an incorporator. It would seem that an individual incorporator must be at least age 18, but there are no other limitations. The term "person" is defined in §1.40 as including an individual and an "entity." The term "entity" is defined in that section as including domestic and foreign business corporations, nonprofit corporation, limited liability companies, business trusts, partnerships, and various other entities.

Except in unusual cases, the incorporators typically consist, for reasons of convenience, of a single individual, often the lawyer preparing the document. The role and risks of the incorporators are discussed later in this chapter.

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### **Contents of the Articles of Organization**

General Laws c. 156D, §2.02(a) requires that the articles of organization set forth only three items: (1) the corporate name, (2) the number of shares and any description of additional classes or series of shares required under §6.01, and (3) the name and address of each incorporator. However, 950 CMR 113.16 requires that the articles of organization have eight articles, which closely resemble the form prescribed under Chapter 156B. Articles of organization must specify, in exact order, the following:

Article I	Corporate Name
Article II	Purpose
Article III	Authorized Shares
Article IV	Preferences, Limitations and Rights of Any Class or Series
Article V	Restrictions on Transfer
Article VI	Other Lawful Provisions
Article VII	Effective Date
Article VIII	Supplemental Information

### **Name**

The name of the corporation is the first item required to be set forth in the articles of organization. Considerations relating to the name have already been discussed above.

### **Purpose**

#### ***Massachusetts No Longer Requires A Purpose Clause***

General Laws c. 156B, §13 required a statement of corporate purpose, which could be general or specific. In practice, most business corporations specified the principal activity they expected to conduct, followed by “and to carry on any other business that may lawfully be conducted by a corporation organized under Chapter 156B of the General Laws of Massachusetts,” or words of like effect.

Under G.L. c. 156D, §3.01, a corporation formed without a purpose clause will automatically have the purpose of “engaging in any lawful business” unless a more limited purpose is specified in the articles of organization. Accordingly, no specific purpose clause is necessary and the secretary of state’s form so states. *See* 950 CMR 113.16(3)(b). The principal exception to this practice arises when the corporation is being formed by several parties for a particular purpose only

(a so-called “joint venture corporation”), and each party wants to be sure that the corporation does not stray into other fields; in such cases, the purposes would be strictly limited.

Even though it is no longer necessary to state a specific purpose, the “supplemental information” required by Article VIII must include a brief description of the type of business in which the corporation intends to engage. 950 CMR 113.16 (3)(h). Moreover, the annual report filed with the secretary of state must, under 950 CMR 113.56, include a brief description of the corporation’s business. The secretary of state uses this information to verify whether the business is being incorporated under the appropriate statute.

### ***Corporations Not Covered by Chapter 156D***

Chapter 156D is the statute applicable to business corporations generally, but there are other chapters of the General Laws applicable to corporations organized for certain specific purposes, including banks, insurance companies and other activities listed in G.L. c. 156D, § 17.01. A purpose clause that includes one of these activities is not acceptable for filing under Chapter 156D, and considerations relating to corporations organized for such activities are beyond the scope of this chapter.

Professional corporations organized under Chapter 156A *are* subject to the provisions of Chapter 156D except to the extent that application of Chapter 156D would be inconsistent with Chapter 156A. *See* GL. c. 156A, §4(a), as amended by St. 2004, c. 178, §16.

Chapter 156D is not applicable to non-profit corporations organized under G.L. c. 180 or cooperative corporations organized under G.L. c. 157, since they are not corporations organized “for the purpose of carrying on business for profit” under §17.01(1).

Chapter 156D does not apply to non-corporate entities, such as Massachusetts business trusts under G.L. c. 182, general and limited liability partnerships under G.L. c. 108A, limited partnerships under G.L. c. 109, or limited liability companies under G.L. c. 156C.

### ***Purposes Distinguished From Powers***

You should keep in mind the sometimes less-than-clear distinction between purposes and powers. A number of years ago the statute was less helpful than it is now in this regard, and it was common to set forth in the articles of organization a long list of activities, designated as both purposes and powers, including pow-

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ers to lend, borrow, make contracts and conduct many other general activities. There are many corporations still in existence whose articles of organization still contain such now unnecessary lists. General Laws c. 156D, § 3.02 now contains a list of these activities and specifies that all business corporations have the listed powers unless the articles of organization otherwise provide. Except under highly unusual circumstances, and except in certain instances mentioned later in this chapter, it is unnecessary to supplement the statutory list in the articles of organization. Except for “joint venture corporations,” discussed above, it is extremely rare to find an instance where it is useful to limit the statutory powers in the articles of organization, although you have the right to do so.

### ***Corporate Guaranties***

General Laws c. 156D, §3.02(b) deals with guaranties of the obligations of affiliates. Like its predecessor, G.L. c. 156B, §9B, the purpose of this provision can easily be misunderstood. Section 3.02(a)(7) makes it clear that a Massachusetts corporation has the power to make “contracts and guarantees” which are “necessary or convenient to carry out its business and affairs.” For example, a manufacturing corporation clearly has the power to guaranty the indebtedness of a dealer for money borrowed to finance the purchase of the manufacturer’s goods, since the guaranty would directly relate to carrying out the guarantor’s business.

However, it can be questioned whether a guaranty of the obligations of a subsidiary or affiliate is necessary or convenient to carry out the business *of the guarantor* (that is, if the guarantor is not generally engaged in the business of providing guaranties). If a parent corporation guarantees the debts of a subsidiary engaged in a separate business, is this action necessary or convenient to carry out the business of the *parent*? Section 3.02(b) provides a “safe harbor” for guaranties of affiliates in such circumstances. There is a conclusive statutory presumption that such guaranties are made in furtherance of the business of the guarantor.

Note that §§3.02(a)(7) and 3.02(b) deal only with the issue of the corporate *power* to make guaranties. These provisions do not affect the rights of creditors under bankruptcy or fraudulent transfer laws or the fiduciary duties of officers and directors engaging in self-dealing transactions. *See* Comment to §3.02

## Authorized Shares

### *Number of Shares and Filing Fees*

The number of shares of the authorized capital stock of the corporation are to be set forth in Article III of the articles of organization.

General Laws c. 156D, §6.01(a) provides that the articles of organization shall prescribe the total number of shares the corporation is authorized to issue. Section 6.01(b) provides that a corporation must have at least one class or series of shares that have unlimited voting rights and one or more classes or series of shares that together are entitled to receive the net assets of the corporation upon dissolution. It is not necessary to designate shares as “common stock” or “preferred stock,” and Chapter 156D does not use this terminology. Nonetheless, most corporations will continue to use this traditional nomenclature.

Chapter 156D takes a flexible approach to the designation of classes and series of authorized shares. Section 6.01(a) provides that the articles of organization shall, *before the issuance of any shares of a class or series*, prescribe the number of authorized shares of the class or series, and the distinguishing designation, preferences, limitations and relative rights thereof.

Chapter 156D therefore permits articles of organization to simply specify a *total number of shares, of all classes and series*, and grant the shareholders or the directors the authority subsequently to create classes and series of shares, subject to the aggregate limitation on the number of shares specified in the articles. *See* Comment No. 1 to §6.01(a). The comments to §6.01 make it clear that when the articles of organization authorize the issuance of only one class of shares, no designation or description of the shares is required, it being understood that the shares have both the power to vote and to receive the net assets of the corporation upon dissolution. *Id.*

Keep in mind that the number of the authorized (not the actually issued) shares govern the filing fee to be paid to the secretary of state. There is a minimum filing fee for the filing of the initial articles of organization, which is currently \$275 (\$265 for electronic filing). Once the minimum authorized capital is exceeded, the filing fee is \$100 for each additional 100,000 shares. A little arithmetic demonstrates that the highest number of shares the corporation can authorize for the minimum filing fee is 275,000, and unless there is a reason to limit the number of shares that the corporation can issue without going back to the shareholders for approval, it is customary to authorize at least this number of shares at the outset.



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### ***Concept of Par Value Abolished***

Chapter 156D abolishes the concept of par value. However, a corporation may specify a par value in Article III. A reference to par value shall not itself be deemed to be a specification of the minimum amount for which shares may be issued. If it is desired to specify the minimum amount of consideration for which shares of a class or series may be issued, a specific provision to this effect must be stated specifically in Article IV. *See* §6.21(d) and 950 CMR 113.16(3)(c).

What then is the effect of specifying a par value? Comment No. 3(c) to §2.02 cryptically suggests that such provisions “have the same effect as permissible contract provisions in the absence of a prohibition by statute.” To avoid uncertainty, avoid par value shares altogether.

Comment No. 3(c) to §2.02 suggests that specifying par value may be useful to corporations qualified to do business in foreign jurisdictions where franchise or other taxes are computed on the basis of par value. It is difficult to envision any other reason for specifying par value in Article III.

### ***Adequate Consideration***

In the absence of a specific provision in the articles of organization mandating a minimum consideration for the issuance of shares, there is no minimum dollar amount of consideration for which the corporation must issue its shares. The requirements for adequate consideration for the issuance of shares under §6.21 is discussed later in this chapter.

### **Classes and Series of Shares**

If the corporation is to have more than one class of shares, the differences among the classes, and the differences among any series within a class, must be set forth in the articles of organization. This simple requirement introduces a subject of potentially enormous complexity. The creation and description of the different classes and series represents one of the most challenging tasks for corporate lawyers. There is an infinite range of possibilities for creating relative rights among different types of stock, with each situation requiring its own unique solution. Although preferred stock and common stock are often spoken of as if there is a well-understood distinction, in fact there are many degrees of preference and titles alone are by no means descriptive of the distinctions. A few of the most common topics are discussed below.

### ***No Practical Distinction Between Classes and Series***

Shares are often issued in “classes” (such as “Preferred Stock”), containing one or more “series” within a class (such as “Series A Preferred Stock” and “Series B Preferred Stock”). One might think that since a “series” of shares is a subset of a larger “class,” all shares of the class (and thus all shares of each series) must have some features in common. This is essentially the approach of the RMBCA. However, Chapter 156D adopts the general approach that there is no substantive difference between a “class” and a “series within a class.” The nomenclature of “class” and “series” is basically a matter of convenience, and a series of shares may have terms entirely different from all other series within the same class, although all shares of a given series must have identical provisions. *See* G.L. c. 6.01(a) and the comments thereto.

### ***Voting Rights***

Each class or series of shares can be given different voting rights, including no right to vote at all. *See* §6.01(c)(1). This ability is subject to certain mandatory statutory voting rights with respect to specific matters. Of course, there must be at least one class of voting shares, typically the most junior class of common stock. However, other classes or series can be given the right to vote on particular matters, either together with other voting shares or as a separate voting group. Shares of a class or series can be given the right to cast more than one vote per share. Some common patterns include

- two classes of common stock, having identical rights in all respects except that one has no voting rights;
- two or more classes of stock, which may or may not have identical rights in other respects, with each class having the right to elect a specified number of directors but otherwise voting as a single class;
- two or more classes of stock, which may or may not have identical rights in other respects, with some classes having the right to vote only on certain fundamental issues, such as merger or sale of the corporation, the right to vote being sometimes together with the class having the general voting rights and sometimes as a separate class;
- two or more classes of stock where one is convertible into the other, with both classes voting together as a single class on all matters, the convertible class having a number of votes per share

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equal to the number the holders would have if the shares had been converted into the other class; and

- two or more classes of stock, with the preferred class or classes having no voting rights except on the happening of specified events, such as the right to elect one or more directors if specified dividends are not paid on their shares for a specified period.

### ***Voting Groups***

Chapter 156D introduces the concept of “voting groups.” As defined in §1.40, a “voting group” consists of all shares of *one or more classes or series* which under the statute or the articles of organization are entitled to vote and be counted together collectively on a matter. Since, as discussed above, the statute places little emphasis on the distinction between classes and series, it is possible for two or more classes or series to be grouped together for purposes of voting generally or on specific matters. For example, the shares of Common Stock and Series A Preferred Stock may be entitled to vote collectively on the election of directors, and the shares of Series B Preferred Stock may not be entitled to vote on the election of directors at all. At the same time, the shares of Common Stock and Preferred Stock could be defined as separate voting groups entitled to vote on all other matters, such as amendments of the articles of organization, mergers or sales of assets. The concept of voting groups is essential to understanding the quorum and voting requirements of Chapter 156D.

### ***Cumulative Voting Now Permitted***

Cumulative voting is a rarely-used system for electing directors that allows shareholders to cast more than one vote for a particular director (for example, if nine directors are to be elected, the holder of one share of stock can cast a total of nine votes, which may all be cast for the same candidate or allocated among more than one candidate, as he or she wishes). Since Chapter 156B contained no provisions specifically authorizing cumulative voting, most practitioners agreed that cumulative voting was unlawful. General Laws c. 156D, §7.28(b) now provides that cumulative voting is permitted if the articles of organization so provide. The comments to §7.28 contain a good discussion of the mechanics of cumulative voting.

### ***Dividend and Liquidation Preferences***

The rights of separate classes and series to receive dividends and distributions from the corporation can be different. *See* G.L. c. 156D, §6.01(c)(3). These dif-

ferences constitute the typical rights of “preferred stock,” although many variations are possible. Dividend preferences typically specify that the preferred class is entitled to dividends at a specified rate before any dividends can be paid to holders of shares of a lower class. Dividend preferences are usually, but not always, cumulative, so that dividends not paid in any year are carried forward and must be paid in later years before subordinate classes can receive dividends. Liquidation preferences typically provide that no payments can be made in redemption of shares of a subordinate class until all shares of the preferred class have been redeemed for a specified price (together, in most cases, with any accrued and unpaid preferred dividends). There can be a number of classes or series having preferred rights (not all of which need be the same) that are ranked in a hierarchy. A class may be preferred on liquidation but not as to dividends (for example, when the preferred shares have been issued to investors while the common shares are owned by management); the reverse is less common but is certainly possible.

### ***Redemption and Call Rights***

Shares of one or more classes and series may be made callable by the corporation (that is to say, at a certain time or on the happening of certain events the corporation may have the right to reacquire the shares on the payment of a specified price), or the holders of the shares may have the rights to redeem them (again, at a certain time or on the happening of certain events, the holders may require the corporation to reacquire the shares for a specified price). *See* G.L. c. 156D, §6.01(c)(2). Any such provisions should deal with the possibility that the financial condition of the corporation may limit its ability to purchase its shares; G.L. c. 156D, § 6.41 imposes personal liability on the directors for distributions to shareholders when the corporation is, or would thereby be, rendered insolvent.

### ***Conversion Rights***

Shares of one or more classes and series may be made convertible into shares of any other class or series, or into cash, indebtedness, securities, or other property, including shares of a parent or other corporation or entity. *See* G.L. c. 156D, §6.01(c)(2). Conversion provisions are among the most complicated provisions of a corporation’s capital structure, and should contain “antidilution” provisions dealing with the consequences of stock splits, stock dividends, issuance of additional shares (particularly shares issued for consideration below the conversion price), mergers, sales of assets and similar events.

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### ***Authority for the Directors to Define the Terms of New Classes and Series of Shares***

The description of each class or series of shares must be in the articles of organization, and the articles, including amendments thereto, must be approved by the shareholders (except, as already noted, that the original articles are approved by the incorporators). However, in many cases, the corporation may need flexibility to meet its financing needs by issuing shares with characteristics that cannot be determined far in advance. Such things as voting rights, dividend rights, liquidation preferences and redemption rights may be negotiated with investors shortly before the shares are actually issued. If the corporation has a large number of shareholders, it can be very cumbersome to secure the necessary shareholder approval on a timely basis. Therefore, G.L. c. 156D, § 6.02 allows delegating the determination of the characteristics of any class or series of shares to the directors, provided that the articles of organization grant such power. When the directors act to determine the characteristics of the class or series, articles of amendment describing these characteristics are filed with the secretary of state and become a part of the articles of organization for all purposes.

Section 6.02 is similar in concept to G.L. c. 156B, §26, but provides directors with the flexibility to determine the number of shares in any class or series created by the board, and to alter the terms of any class or series prior to the issuance of any shares of that class or series.

Shares of stock to be issued in different classes or series upon terms set forth by the board of directors are often referred to as “blank check stock,” or “blank stock.” Exercise of this power to issue shares may in some circumstances dilute the interest of existing shareholders.

### **Transfer Restrictions**

Article V of the secretary of state’s form for articles of organization relates to restrictions on the transfer of shares. Specifically, the form calls for a statement of “the restrictions, if any, *imposed by the articles of organization* on the transfer of shares of any class or series of stock” (emphasis supplied). Note that there is no requirement, either in the form of articles of organization or in the statute or the regulations, that such restrictions must be in the articles to be effective. There are good reasons why such restrictions may not be placed in the articles of organization but instead in the bylaws or in a contract. This subject is dealt with later in this chapter.

## Other Lawful Provisions

The secretary of state's form for articles of organization permits, but does not require, the inclusion of other material in Article VI. Good practice contemplates consideration of the following subjects for inclusion.

### *Indemnification of Directors, Officers and Others*

Under appropriate circumstances, it usually is prudent to provide indemnification for directors and officers, and possibly for others, somewhere in the organic corporate documents. If such provisions are to be placed in the articles of organization (which is not uncommon, though not uniform), they belong in Article VI of the document. **Exhibit 3.6** contains a representative indemnification provision.

General Laws c. 156D, §§8.50-8.59 provide comprehensive rules regulating indemnification of officers, directors and other persons by Massachusetts corporations. A full discussion of these provisions is beyond the scope of this chapter. Section 8.58(a) provides that a corporation may by its articles of organization or bylaws or a resolution adopted or a contract approved by the board of directors or shareholders, obligate itself in advance to provide directors and officers with indemnification against claims asserted against them for acting as directors or officers, or to advance funds for expenses of defending against such claims. While §8.51(a) limits the extent of permitted indemnification, the statute does not otherwise specify the nature of the indemnity that can be provided. Moreover, §8.59 provides that the indemnification provisions of the statute "shall not be considered exclusive." This "write your own ticket" approach has both supporters and critics. Whatever your views, it requires you to consider the indemnification clause carefully. Among the basic issues to consider, for example, is the question of whether you want to provide in advance for indemnity on a blanket basis for more than the directors. Usually, at a minimum, the directors are covered, and, typically (but not always), the officers are also given blanket advance assurances. Employees and other agents may more often be left to await the particular event on the theory that the directors can decide to cover them when the event arises if the directors believe it is appropriate to do so under the circumstances. **Exhibit 3.6** adopts this approach, but many other variations are possible.

### *Limitation of Director Liability*

In 1986, G.L. c. 156B, § 13 was amended to permit the articles of organization to contain a provision eliminating the personal liability of directors to the corpo-

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ration or its shareholders for monetary damages for breach of fiduciary duty as a director. *See* GL. c. 156B, §13(b)(1½). This amendment was in response to widely-expressed concerns that courts may be eroding the traditional protection of directors afforded by the business judgment rule and that directors should not be second-guessed by the courts. Chapter 156D continues to permit corporations to protect directors by including such exculpatory provisions in the articles of organization. *See* G.L. c, 156D, §2.02(b)(4).

The statute does not permit protection of directors who breach the duty of loyalty, do not act in good faith, engage in intentional misconduct or derive an improper personal benefit from their actions, nor does it limit injunctions or other equitable relief that might be imposed by the courts. Note also that the statute does not provide protection against liability, except to the corporation or its shareholders. However, claims by third parties against directors for breach of their fiduciary duty to the corporation are difficult to envisage. It is now quite standard to include in the articles of organization a provision taking advantage of the amendment, and the sample articles of organization contain a typical such provision that must be in the articles of organization to be effective.

### ***Interested Director Provisions***

It is likely that during the life of most corporations issues will arise with respect to dealings between the corporation and its directors or their affiliates. Prior to the enactment of Chapter 156D, most corporate practitioners included in the articles of organization or bylaws provisions that blessed such dealings if certain standards were met. Typical standards included full disclosure in advance, abstention by interested directors from voting to approve the transaction, or ratification by the shareholders after full disclosure. Such charter provisions are now superseded by G.L. c. 156D, §8.31 and are no longer necessary in view of the statutory rules with respect to director conflicts of interest in §§8.31 and 8.32.

### ***Preemptive Rights***

General Laws c. 156D, § 6.30 requires that, to be effective, preemptive rights (the right of a shareholder to purchase his or her *pro rata* share of any newly issued stock) must be in the articles of organization or in a contract to which the corporation is a party. Note that preemptive rights provisions may not be included in the bylaws (even though the comments to §6.30 so state).

### ***Place of Shareholder Meetings***

For historical reasons, G.L. c. 156B, § 35 required that shareholder meetings be held in Massachusetts unless the articles of organization permitted them to be held elsewhere within the United States. This requirement was eliminated by G.L. c. 156D, §7.01. Shareholder meetings may now be held anywhere in the world, and the articles of organization need contain no provision to this effect.

### ***Power to Amend Bylaws***

General Laws c. 156D, § 10.20 provides, as did prior law, that the bylaws may be amended only by the shareholders unless the articles of organization also grant this power to the directors. (There are certain bylaws that can not be amended by the directors. The principal examples are discussed elsewhere in this chapter.) It is typical to grant the directors the power to amend the bylaws, and the sample articles of organization in **Exhibit 2** contain an appropriate provision. The principal exception to such a grant arises in the instance where the bylaws contain terms granting or limiting rights among shareholders or groups of shareholders when the balance of power is important and has been carefully negotiated.

### ***Power to Act as Partner***

Under G.L. c. 156B, §9A, a corporation could not act as a partner in a partnership unless the power was specifically set forth in the articles of organization. Such a provision is no longer necessary, since G.L. c. 156D, §3.02(a)(9) includes the power to act as a partner as one of the powers exercisable by all corporations.

### ***Number of Directors***

Under prior law, a Massachusetts corporation had to have at least three directors unless there were fewer than three shareholders, in which case the number of directors could equal the number of shareholders. *See* GL. c. 156B, §47. General Laws c. 156D, §8.03(a) continues this rule *unless otherwise provided in the articles of organization*. Accordingly, the articles of organization can now provide for a greater or lesser number of directors, and can give the shareholders or directors the right to fix the number of directors from time to time. The sample articles of organization in **Exhibit 2** give the shareholders the maximum flexibility.



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### ***Shareholder Action Without a Meeting***

Under G.L. c. 156B, §43, the shareholders of a Massachusetts corporation entitled to vote on an issue could take action by *unanimous* written consent without a meeting. Under G.L. c. 156D, §7.04, shareholders may now act by unanimous consent, or, *to the extent permitted by the articles of organization*, by the less-than-unanimous written consent of shareholders having the requisite number of votes. The new statute imposes a curious requirement that action taken by written consent of less than all shareholders may not take effect until seven days notice is given to all non-consenting shareholders. *See* GL. c. 156D, §7.04(d). Massachusetts corporations may utilize this new voting procedure, but only if a specific provision to that effect is included in the articles of organization. The sample articles of organization in **Exhibit 2** contain an appropriate provision.

### ***Action by Less than Two-Thirds of the Shareholders***

Most amendments of the articles of organization, as well as mergers and sales of substantially all the assets of the corporation, require the approval of the holders of at least two-thirds of the shares entitled to vote. However, this requirement can be reduced to as low as a majority by a provision in the articles of organization. *See* GL. c. 156D, §§ 7.27(b), 10.03, 11.04, 12.02. Usually, this result is not desired, but if it is, an appropriate provision should be inserted in Article VI of the articles of organization.

### **Effective Date**

Unless otherwise provided in the articles of organization, the effective date of the incorporation of the corporation is the date and time the articles of organization were received for filing by the Corporations Division, unless the articles are rejected within the time prescribed by law and 950 CMR 113.

The secretary of state has five days from the date of receipt to reject the filing of articles of organization. *See* 950 CMR 113.10. In practice, Corporations Division staff reviews and approves or rejects most filings on the same day. Notice of rejection is given by mail, or in the case of electronic filings, by e-mail.

When it is particularly important to achieve immediate corporate existence or the immediate effectiveness of another corporate filing, you should contact the Corporations Division for a pre-clearance of your filing. The staff is generally quite cooperative and pre-clearance can spare you the embarrassment of having an important business transaction delayed as the result of a technicality.

Also keep in mind that you may designate a delayed effective date. General Laws c. 156D, §1.23(b) allows the articles of organization to specify an effective date that may be as much as 90 days after filing.

A delayed effective date may assist in avoiding the \$456.00 minimum corporation excise tax applicable to year-end incorporations. For example, a calendar year corporation which organizes on December 31, 2004 will owe the minimum tax for the one day of its first fiscal year; selecting a deferred effective date of January 1, 2005 will save the client this money.

## **Supplemental Information**

Article VIII of the secretary of state's form requires certain supplemental information, which is not considered part of the articles of organization (and therefore requires no amendment if there is a change). These items include

- the street address of the initial registered office of the corporation (a post office box is not a sufficient address);
- the name of its initial registered agent at its registered office;
- the identity of its president, treasurer and secretary and their residential or business addresses;
- the identity and residential or business addresses of its directors;
- the date of the end of its fiscal year;
- a brief description of the type of business in which the corporation intends to engage;
- the street address of the corporation's principal office; and
- the street address where the records of the corporation required by G.L. c. 156D, §16.01 to be kept in the commonwealth are located.

## **Registered Agent and Registered Office**

Under Chapter 156B, a Massachusetts corporation that elected a clerk who was not a Massachusetts resident, was required to designate a "resident agent" to accept service of process in Massachusetts. Chapter 156D adopts a somewhat different approach: Each Massachusetts corporation *must* have a "registered agent" (note the difference in terminology), which may be an individual or a

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domestic or foreign business corporation or non-profit corporation with a “registered office” in Massachusetts. In many cases, a corporate officer, such as the secretary, will be designated as the registered agent, and the corporation’s principal place of business in Massachusetts will be designated as its registered office. *See* GL. c. 156D, §§5.01-5.04. Changes in the registered agent or registered office must be filed with the secretary of state on prescribed forms. *See* 950 CMR 113.21-113.23.

### **Errors in Articles of Organization**

Occasionally articles of organization or other documents filed with the secretary of state contain errors or are incorrectly executed. G.L. c. 156D, § 1.24 allows for corrective filings in such cases, with retroactive effect back to the date of filing of the document being corrected. Included as correctible errors are typographical errors or incorrect statements and defective execution, attestation, sealing, verification or acknowledgement of documents. However, if the error is not obvious from the face of the original filing, you may be required to submit copies of minutes as evidence that an error occurred. There is no filing fee for articles of correction.

### **Placement of Provisions in Articles of Organization, Bylaws or Contracts**

Except for a few items that, as noted above, must by statute be placed in the articles of organization, the drafter has some choices as to where various items may be located. In some cases the choice is between the articles of organization and the bylaws, and in other cases the item may alternatively be included in a contract. In general, any item in the articles receives the highest level of prominence (it is publicly on file with the secretary of state) and is relatively more awkward to change; a vote of two-thirds (a majority in a few cases) of all the shareholders and the filing of articles of amendment with the secretary of state is usually required. Bylaws are usually amendable in most respects by the directors, and in any event by the shareholders, and no public filing of the amendment is required. A contract, of course, is amendable by the parties thereto in accordance with the amendment provisions contained in it or by the consent of all parties if the contract is silent as to the amendment procedure. These basic notions govern the question of location of any particular item when there is a choice, and the choice varies depending on your point of view; there is no single right answer.

Often the location of an item depends on how it arose. Restrictions on transfer of shares are a good example. Such restrictions may arise at the time the corpora-

tion is first organized as a part of the discussions among the initial shareholders. In that case, the restrictions are often found in the articles of organization (or sometimes the bylaws, but not amendable by the directors) because they are very important to the parties, have been carefully negotiated by all shareholders and are intended to be hard to change. Such restrictions can also arise at a later date or under circumstances where they are not intended to apply to all shareholders. For example, investors may impose restrictions on the transfer of the shares held by the founders but do not intend themselves to be similarly bound, or the corporation may impose restrictions on the transfer of shares issued to new employees when the founders are not themselves bound. In these cases, the restrictions are invariably found in contracts among the affected parties. Good drafting dictates that provision be made for waiving the restrictions in appropriate cases. For example, if shares must first be offered to the corporation before they are transferred, it should be stated that the board of directors may waive this requirement. This is important whether the restrictions are in the articles of organization, the bylaws, or a contract.

Although in many cases it may appear that convenience, especially in making changes, favors putting some provisions in a contract and not in the articles of organization or even the bylaws, there is a contrary consideration in some cases. Instances may arise where someone may claim he or she is not bound by some provision because of lack of notice. A provision contained in the articles of organization, a document in the public record, may allow you to defend against the claim on the grounds of constructive notice. In the case of transfer restrictions, this defense will likely fail since G.L. c. 156D, § 6.27 requires notice of such restrictions on stock certificates and U.C.C. § 8-204 provides that a purchaser of shares is bound by a limitation if it is noted on the stock certificate. However, there may be other situations where constructive notice could be helpful.

In making decisions as to the location of such items when you have a choice, you should explain the choices to your client and for the most part be guided by its decision.

## **Filing Procedures**

To achieve corporate existence, the articles of organization must be filed with the secretary of state, accompanied by the appropriate filing fee, and the articles must be approved by the secretary of state. The computation of the filing fee has been mentioned above; as noted, it depends on the number of authorized shares, subject to the minimum fee. Fees can be changed from time to time by the commissioner of administration. *See* G.L. c. 156D, §1.22; 801 CMR 4.00. If you are unsure of the applicable fee, check with the Corporations Division in advance. (There is information about fees on the website.)

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The Corporations Division of the Office of Secretary of State is currently located at One Ashburton Place, 17th floor, Boston, Massachusetts 02108-1512, and its telephone number is 617-727-9640. As previously mentioned, the Corporations Division also has a very helpful website, which can be found at <http://www.sec.state.ma.us>. Among other things, the site contains copies of the corporate forms required to be filed in Massachusetts.

Filings may be made in paper form, by fax or electronically. Documents must be in the English language, but a corporate name need not be in English if written in the English alphabet or with Arabic or Roman numerals. *See* G.L. c. 156D, §1.20(e). Documents must be typed or printed on 8 ½ x 11 inch paper; no handwritten documents are acceptable. *See* 950 CMR 113.06(2), 113.07. Documents must be signed by an authorized officer or incorporator and show the name and capacity of the signatory. *See* G.L. c. 156D, §1.20(f), 950 CMR 113.06(4). Although G.L. c. 156D, §1.20(h) requires the delivery to the secretary of state of a conformed copy of certain filings, the secretary of state has waived this requirement. *See* 950 CMR 113.08.

Paper filings will be accepted at any time from 8:45 a.m. to 4:00 p.m. on business days; authorized fax transmissions and online filings may be made 24 hours a day, 365 days per year, subject to scheduled maintenance and unscheduled interruptions of service. *See* 950 CMR 113.05.

### ***Electronic Filing***

Prior to the effectiveness of Chapter 156D, electronic filing procedures were developed by the Corporations Division and made available to the general public by online access to the Division's website. Under Chapter 156D, the utilization of such electronic means of corporate filing has become considerably more commonplace and the success of the Division's electronic procedures has been widely hailed. The design, functionality and user interface of the Division's system have in fact been adopted by other jurisdictions and may become a standard against which such online filing methods are compared.

Presently, the types of business corporation filings which may be effected through electronic means include articles of organization, articles of amendment, annual reports, statements of change of supplemental information and any filing respecting the status of registered agents. A comparable range of filing capability exists for use by other types of entities subject to the Division's regulations, such as not-for-profit corporations, professional corporations, limited partnerships, limited liability companies and limited liability partnerships. Certain filings are not acceptable by online access, principally articles of merger and the entire spectrum of "conversion" filings introduced by Chapter 156D.

Online transmission of documents for filing with the Division affords several advantages over customary paper filings, including 24-hour availability, worldwide access, elimination of the need for original signatures and reduced filing fees when compared with manually-filed documents. By way of example, articles of organization filed under Chapter 156D and submitted online are subject to a minimum filing fee of \$265, whereas the paper version of such filing is currently subject to a minimum filing fee of \$275. In addition, electronically-filed documents are more readily available for review and acceptance by Division staff and are more immediately posted to the Division database than paper filings, since there is no need for the scanning of paper documents. Filings completed online are reviewed on a rolling basis by Division staff throughout the business day and during certain evening and weekend hours.

The user interface developed by the Division is intuitive and will be user friendly to most practitioners. Online filers view data entry fields corresponding to the informational requirements of the type of form they seek to file. Information fields for electronic documents have been designed to conform as closely as possible to the format of their paper counterparts. Fillable boxes have been designed to accept filer responses, in some cases limiting the filer's entry to a predetermined number of characters (such as the fields provided for stated authorized capital under Article III of articles of organization) and, in other instances, accepting unlimited pages of text by cut-and-paste editing (as, for example, under Article VI). In this manner, users are free to draft provisions precisely as they would otherwise prepare in paper filings. In addition, online filing by existing entities facilitates accuracy in the preparation of documents since certain identifying information for the entity is added automatically to electronic filings by the Division's computer system.

Existing entities in the Commonwealth must request assignment by the Division of a CID (customer identification) number and a corresponding PIN number to take advantage of electronic filing capabilities. These numbers may be obtained by email request to the Division using a link established on the website. In recent experience, such numbers are assigned promptly and notification is accomplished by email reply. It should be noted that legal counsel may request these numbers on behalf of client entities, and that the Division is able to process "bulk" requests by law firms and other frequent filers as expeditiously as single entity requests. Entities formed by an initial electronic filing, such as articles of organization filed online under Chapter 156D, are issued CID and PIN designations immediately upon organization.

At present, electronic transactions requiring payment of a filing fee require online payment by credit card. The Commonwealth does not yet maintain depository accounts for use in connection with filings effected with the Division.

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Filings successfully completed online yield official acknowledgment of acceptance upon submission, including display of the “filing number” and “transaction ID” generated. This identifying information, which should be printed and retained by the filer, serves as a useful tool by which the Division may promptly respond to inquiries concerning the transaction, if necessary. Although the acknowledgment unmistakably confirms the receipt, acceptance and approval of the filing by the Division’s automated system, the document is subject to more substantive review by Division staff in the same manner as paper filings presented to the Division by hand or mail. According to the Division, there is little risk that a deficient filing will not be promptly brought to the attention of an online filer. The Division staff endeavors to provide prompt notification of rejection of e-filings to the submitting party, often within minutes of transmissions by telephone or email message.

### **The Secretary of State’s Index**

The Corporations Division maintains an index of certain supplemental information regarding Massachusetts business corporations, including: The street address of the corporation’s registered office; the name of its registered agent; the names and addresses of the corporation’s directors and the president, treasurer and secretary; the corporation’s fiscal year; and the street address of the corporation’s principal office. *See* 950 CMR 113.17(1). This information may be accessed via the secretary of state’s website. Changes to these items on the index may be made only by filing a Statement of Change of Supplemental Information (and payment of the \$25 filing fee) or, in the case of a change in the name or address of the registered agent by filing the appropriate form. *See* 950 CMR 113.17(1), 113.21–113.23. Filing of an annual report will *not* effect a change in those items on the index. It is no longer necessary to file a special form for changes of directors and officers, fiscal year or principal office as was the case under Chapter 156B.

Any other supplemental information contained in Article VIII of the articles of organization and not shown on the index may be made either by a statement of supplemental change or a notation on an annual report. *See* 950 CMR 113.17(2).

General Laws c. 156D, §8.45 requires the filing by the corporation of a certificate of change in officers and directors. A Statement of Change of Supplemental Information is used for this purpose; the special form of change of officers or directors under Chapter 156B is no longer used. If the corporation fails to file a statement within 30 days following the change of officers or directors, any director or officer involved with the change may file a Certificate of Change or Resignation, with a copy to the corporation. *See* 950 CMR 113.17(3).

It is worth pointing out that keeping the information on the secretary's index accurate and current is the responsibility of the corporation. Since many corporations are less than diligent in updating the index, it is not always reliable and you should exercise caution in relying upon it.

## **BYLAWS**

Every Massachusetts corporation is required to have bylaws. *See* G.L. c. 156D, § 2.06(a). Even if the statute did not so require, every corporation would have them anyway, since they contain the basic rules by which the corporation's formal processes are governed. It is good practice to set forth in the bylaws all these rules even when the statute contains the identical provision, if for no other reason than to provide a single source of the rules for the convenience of the affected parties. The form of bylaws set forth in **Exhibit 4** reflects this approach.

Chapter 156D contains a number of rules that remain in effect for a given corporation unless the bylaws or the articles of organization provide otherwise. The Massachusetts statute, as is the case with all modern corporate statutes, is intended to give the corporation a great deal of flexibility in its internal rules. While probably in a majority of cases the statutory provision represents the typical and, normally, most appropriate rule, considerable variation is possible. The following discussion, which generally is organized to coincide with the format of the sample bylaws, identifies the principal areas where flexibility may be considered, but each situation may differ and, therefore, the bylaws should not be thought of as a simple form to be printed off the word processor, requiring no thought.

## **Shareholder Matters**

### *Annual and Special Meetings*

Every Massachusetts corporation is required to have an annual meeting of shareholders "at a time stated in or fixed in accordance with the bylaws." *See* G.L. c. 156D, § 7.01(a). It is no longer necessary to hold a meeting of shareholders within six months of the end of the corporation's fiscal year. However, G.L. c. 156D, § 7.03 does allow any shareholder to compel an annual meeting by court order if a meeting is not held within the earlier of that six month period or fifteen months after the last annual meeting. According to the Comment to § 7.01, it is no longer necessary to refer to an annual meeting as a "special meeting in lieu of the annual meeting," if it is not held on the prescribed date.



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The statute permits the details of the time, place and manner of conduct of the meeting to be dealt with in the bylaws. As the sample bylaws illustrate, the bylaws often delegate many of these details to the board of directors, which is perfectly appropriate in almost all cases. The exception would be the case where there are shareholders with potentially divergent points of view, in which case it may be that less discretion is delegated to the board, a notion that affects many parts of the bylaws.

While the bylaws always contain a requirement that meets the obligation of the statute concerning the holding of the annual meeting, many corporations, particularly smaller ones, tend to honor this requirement more in the breach than in the observance. Under G.L. c. 156D, §7.01(c), the failure to hold an annual meeting does not affect the validity of any corporate action.

The question may be asked: What happens to the directors if the annual meeting is never held? A concern might arise whether a result of the failure to hold the annual meeting would be that there are no validly elected directors. As you might expect, the statute protects against such a risk. General Laws c. 156D, § 8.05(e) provides that the term of the directors extends until the next annual meeting and the selection and qualification of their successors. Moreover, there is no penalty applied to officers and directors who fail or neglect to call the annual meeting of shareholders.

General Laws c. 156D, § 7.02 allows the board of directors or a person authorized to do so by the articles of organization or bylaws (usually a senior officer), to call a special meeting of shareholders. Section 7.02 also allows the holders of 10 percent or more of the shares (40 percent in the case of a corporation with publicly held securities) to require the holding of a special meeting of shareholders.

### ***Notice and Waiver of Notice of Meetings***

At least seven days' prior written notice of shareholder meetings is required by G.L. c. 156D, §7.05, unless notice is waived pursuant to §7.06. The shareholder's waiver must be in writing but it may be executed after the meeting, a provision that has saved many a defectively-noticed meeting after the fact. Although the statute requires at least seven days' notice, it is possible to require a longer notice period, up to a maximum of sixty days. *See* GL. c. 156D, §7.05(a). This is sometimes done, particularly for corporations with large numbers of shareholders, or with shareholders who may negotiate for a longer notice period. All such provisions will always appear in the bylaws, as the sample bylaws illustrate. As a practical matter, public companies furnish notice several weeks in

advance of most meetings, no matter what their bylaws say, in order to have time to secure adequate proxies for a quorum.

### ***Purpose of Meeting***

General Laws c. 156D, §§7.01(d) and 7.02(d) provide that the purpose or purposes of an annual or special meeting must be described in the notice of meeting and only business within the stated purposes may be conducted at the meeting. This provision is intended to protect shareholders who choose not to attend a meeting, or who give a proxy in lieu of attending, from unfair surprise if action not related to the specified purposes is taken at the meeting. The customary language in meeting notices that the shareholders may consider “any other matter properly brought before the meeting” does not permit a departure from the rule that only matters related to the specified purposes may be considered. *See* Comment to §7.01.

### ***Action by Written Consent***

As discussed above, G.L. c. 156D, §7.04 permits shareholders to take corporate action without a meeting by unanimous written consent, or, to the extent provided in the articles of organization, by less-than-unanimous written consent. If action is taken by written consent of less than all shareholders, notice must be given to all non-consenting shareholders entitled to vote on the matter at least seven days prior to the taking of any action pursuant to the consents. (Notice must also be given to any shareholders who are *not* entitled to vote on the matter, but who would be entitled to notice of a shareholders meeting called to consider the matter. *See, e.g.*, §§7.04(d), 10.03, 11.03, 12.03 and 14.02.)

There is no requirement that written consents all be on the same piece of paper, but all consents must be filed with the corporate secretary. When there is more than one form of written consent, all must be filed with the corporate secretary within sixty days of the earliest dated consent.

In contrast, §228 of the Delaware General Corporation Law provides for action by less-than-unanimous consent *unless* the certificate of incorporation otherwise provides, and requires notice to non-consenting shareholders *after* the effective date of the consent.

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### ***Meetings by Remote Communications***

Chapter 156B contained no provision permitting shareholders to meet by telephone or similar communications equipment. *Compare* GL. c. 156B, §59 (permitting directors meetings to be so held).

General Laws c. 156D, §7.08 permits the board of directors to authorize annual or special shareholders meetings to be held “solely by means of remote communications” or to authorize shareholders not physically present to participate by remote communications in traditional meetings held at a specific location. However, §7.08 does not permit shareholders of a “public corporation” (as defined in §1.40) to participate in meetings held *entirely* by remote communications, but does permit shareholder participation by remote communications in meetings held at a specific location. Proxy holders are treated as shareholders under this section.

Shareholders participating in meetings by remote participation must be able to *read or hear* the proceedings as they take place and to participate in the meeting and vote.

Meetings by conference telephone calls and videoconferences are clearly permitted and this section is intended to encourage the use of new technologies, such as “Internet chat rooms or their equivalent.” *See* Comment to §7.08.

### ***Mechanics of Meetings***

Both the statute and the bylaws touch on a variety of mechanical matters having to do with shareholder meetings. Such matters include the requirement for a quorum, voting requirements, whether the corporation can vote its own shares (it cannot under §7.21(c), no matter what the bylaws say), proxy voting and the fixing of a record date. Some of these matters cannot be varied from the statutory norm in the bylaws, and others can to a greater or lesser degree. All of them are typically reflected in the bylaws in any event. With respect to those matters as to which the statute provides leeway, the following comments may be useful.

### ***Quorum***

General Laws c. 156D, §7.25(a) specifies that a quorum is a majority of the outstanding shares of a voting group entitled to vote on a matter, but the bylaws, the articles of organization or a directors resolution can provide otherwise. Section 7.27 permits the articles of organization or a bylaw adopted by the shareholders to provide greater or lesser quorum requirements for action by any voting group (*see* GL. c. 156D, §10.21) and permits the directors to increase (but

not decrease) quorum requirements. Lower quorums are very rare in the case of business corporations; the risk that less than a majority may take shareholder action is almost never worth taking, even in the case of a corporation with a very large number of shareholders who do not participate in its affairs. Higher quorums are sometimes used, principally in circumstances where there are different blocks of shareholders who may be concerned about action taken by others without a chance at least to be heard. However, such concerns are more typically addressed by higher voting requirements.

### ***Voting Requirements***

Unless otherwise provided in the articles of organization or bylaws, directors are to be elected by a plurality of the votes cast by the relevant voting group, assuming a quorum is present. *See* G.L. c. 156D, §7.28(a). This of course means that directors may be elected by less than a majority of the shares outstanding. For example, if 100 shares of common stock are outstanding, and a bare majority of 51 shares is present (in person or by proxy) at a meeting, then 26 votes are the most necessary to elect directors. If 10 shares abstain from voting, then 21 of the 41 “votes cast” will be sufficient to elect directors. Even fewer votes may suffice if there are more than two candidates for a single vacancy.

Chapter 156D contains statutory voting requirements for certain fundamental corporate actions, such as amendments of the articles of organization, mergers, or sales of assets. *See* G.L. c. 156D, §§10.03, 11.03 and 12.02. Section 7.25(c) provides that for all other matters, if a quorum is present, the affirmative vote of a majority of the votes cast by a voting group is necessary for approval. Contrary to the traditional common law rule, abstentions are not counted. For example, if a quorum of 51 shares is present, and 10 shares abstain, only 21 of the 41 votes cast are necessary to approve the matter.

Section 7.27(a) permits the articles of organization, a bylaw adopted by the shareholders, or a directors resolution to provide for a greater affirmative voting requirement than that prescribed by the statute. *See* G.L. c. 156D, §10.21. The articles of organization may provide for a lesser voting requirement than that prescribed by the statute, but in any case, not less than a majority. *See* G.L. c. 156D, §7.27(b).

### ***Record Date***

General Laws c. 156D, § 7.07(b) provides that the record date for determining shareholders entitled to vote at a meeting cannot be more than seventy days prior to the meeting. (Section 7.07(c) provides special rules for adjourned meet-

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ings.) Otherwise, the manner of fixing the record date for one or more voting groups may be fixed by the bylaws.

### **Director Matters**

#### ***Number***

General Laws c. 156D, §8.03(a) provides that, unless otherwise provided in the articles of organization, a Massachusetts corporation must have at least three directors, except that if it has fewer than three shareholders, it may limit the minimum number of directors to the number of shareholders. As discussed above, a provision in the articles or organization permitting a smaller number of directors may be advisable for many corporations. A provision relating to the number of directors is usually contained in the bylaws, except in the case of classified boards, discussed below, and in the case of boards consisting of representatives of various shareholder factions, in which case a more elaborate bylaw provision is drafted, invariably, however, in conjunction with related provisions in the articles of organization, discussed above.

#### ***Qualifications***

Directors do not have to be shareholders or residents of Massachusetts unless the articles of organization or bylaws so provide. *See* GL. c. 156D, § 8.02. Such provisions are in almost all cases a burdensome limitation and are not typically imposed; in fact, most bylaws specify the opposite. *See* the sample bylaws in **Exhibit 4**. In those rare cases where a need exists, qualifications for directors may be imposed by the articles of organization. *See* G.L. c. 156D, §8.02.

#### ***Election***

As already noted, directors are ordinarily elected by the shareholders at the annual meeting and hold office until the next annual meeting. The sole exception, other than in the case of removal, referred to below, is in the case of classified boards. *See* GL. c. 156D, §8.05. Again, the bylaws invariably repeat the statutory provision.

#### ***Classified Boards***

General Laws c. 156D, § 8.06 permits a corporation to divide its directors into classes and to elect one class each year. There may be up to three classes, and the directors of each class hold office for a number of years equal to the number

of classes (that is, the directors of each class stand for reelection only when that class is being voted on). It is important to note that this arrangement must appear in the articles of organization in order to be effective, although the bylaws would typically contain comparable language at the same time.

In addition to the foregoing permissive statutory provisions, G.L. c. 156D, § 8.06 continues the rule, added to Chapter 156B in 1990, requiring that the board of directors of a publicly held corporation be divided into three classes, each class to serve for a three-year term. *See* GL. c. 156B, §50A. This provision is mandatory unless the corporation opts out by a vote of its directors or by a vote of two-thirds of each class of its outstanding shares. (The statute does not specify that the classes required to vote on the matter must otherwise be entitled to vote on any matter, so a class of otherwise nonvoting shares is required to vote, as a separate class, on an opt out proposal.) This statute was originally adopted during the pendency of an attempted hostile takeover of a Massachusetts corporation in an (unsuccessful) effort to maintain the independence of the corporation.

### ***Enlargement of the Board and Filling Vacancies Between Shareholder Meetings***

General Laws c. 156D, § 8.03 permits the articles of organization or the bylaws to grant the directors the power to increase the number of directors between meetings of shareholders, and § 8.10 permits the shareholders or the directors to fill vacancies, including those arising from an enlargement of the board, between meetings of shareholders, unless the articles of organization otherwise provide. Articles of organization do not ordinarily deal with this situation except in the case of boards whose specific composition is worked out among shareholder factions in advance. The bylaws should certainly address the subject. The bylaws in **Exhibit 4** contain very flexible and reasonably typical provisions; they provide that there is no limit on the maximum number of directors and that the directors can increase their number between meetings of shareholders and fill all vacancies, however caused. Certainly it is possible to draft bylaws containing more restrictive provisions. However, if a director ceases to serve for any reason and must be replaced, or if external events make it desirable to add one or more directors, it is very useful to allow the directors to deal with the situation without calling a meeting of shareholders.

### ***Removal***

General Laws c. 156D, § 8.08 permits, unless the articles of organization or bylaws otherwise provide, shareholders to remove directors at any time with or without cause. Directors may also be removed at any time for cause by vote of a

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majority of the directors then in office. However, directors elected by a particular voting group can only be removed by the voting group electing them. A director may be removed by the shareholders or directors only at a meeting called for the purpose of removing him, and the notice of meeting must so state.

### ***Board Committees***

General Laws c. 156D, § 8.25 permits the board of directors to appoint committees consisting of one or more of its members and to delegate substantial powers to these committees, unless the articles of organization or bylaws provide otherwise. Standard bylaws, including those in **Exhibit 4**, grant the directors maximum authority to appoint and delegate powers to committees. It is important to keep in mind the limits imposed by the statute on this delegation. Among the more important limits, committees of the board may not: authorize dividends or distributions, approve or propose to shareholders actions which Chapter 156D require be approved by shareholders, change the number of directors, remove directors or fill vacancies on the board of directors, amend the articles of organization under §10.02, or authorize or approve the repurchase of shares (except in accordance with a formula or method prescribed by the board). *See* GL.c.156D, §8.25(e).

### ***Meetings and Consents***

Meetings of the board of directors may be held anywhere, including outside the country. *See* GL. c. 156D, § 8.20(a).

General Laws c. 156D, § 8.20(b) permits directors to participate in meetings by “any means of communication by which all directors participating may simultaneously hear each other during the meeting,” unless the articles of organization or bylaws provide otherwise. (The statute requires that participation by such means be accomplished in a manner that allows all directors to *hear* each other; polling the directors serially to solicit approval of some action does not qualify.) Participating by e-mail is not allowed since the statute requires the parties to be able to *hear* each other. Note that it is not required that the articles of organization or bylaws affirmatively allow these activities, although well-drafted bylaws will do so. The sample bylaws in **Exhibit 4** so provide.

General Laws c. 156D, §8.21 provides that, unless the articles of organization or bylaws provide otherwise, directors may take action without a meeting by *unanimous* written consent delivered to the secretary of the corporation and filed with the corporate minutes. *Compare* GL. c. 156D, §7.29, which permits shareholders to act by less-than-unanimous consent if authorized by the articles of organization. Directors may act by separate written consents; there is no re-

quirement that the consent be in a single document. The ability of directors to act by written consent is a convenient and frequently-used device and should be a part of any well-drafted set of bylaws.

### ***Voting by Proxy***

Although the shareholders are authorized by the statute to vote by proxy (*see* §7.22), there is no comparable provision with respect to directors. In the absence of such express statutory authority, the directors may *not* vote by proxy. The rationale for the requirement that the directors must act in person is that they are charged with the general management of the business of the corporation (*see* G.L. c. 156D, § 8.01(b)) and this duty may not be delegated. The sample bylaws in **Exhibit 4** are intentionally silent on this point.

### ***Notice and Waiver***

General Laws c. 156D, § 8.22 governs notices of meetings of directors. It provides that unless the articles of organization or bylaws provide otherwise, regular meetings of the board may be held without notice of the date, time, place or purpose of the meeting. Regular meetings are normally held in accordance with a fixed schedule set in advance by the directors. Special meetings of the board may be held upon at least two days notice of the date, time and place of the meeting. The purposes of a regular or special meeting need not be stated in the notice unless required by the articles of organization or bylaws (or unless the meeting is called to remove a director for cause under §8.08). Section 8.23 permits notice to be omitted if the director not receiving notice waives it in writing, before or after the meeting, or attends or participates in the meeting without objection.

The statute does not require any special form of notice. *See* GL. c. 156D, §1.41. However, it is regarded as good practice, despite the latitude afforded by the statute, to provide in the bylaws for written or, sometimes, telephonic notice and for notice to be given at least some time prior to the meeting. *See* the sample bylaws in **Exhibit 4** for a typical provision. As a word of caution, despite the wide latitude afforded by the statute, bylaw notice provisions that do not afford the directors a reasonable opportunity to find out about meetings a reasonable time in advance, that do not provide good evidence that notice was in fact given and that vary considerably from the norm invite challenge should disputes arise.



## **Officer Matters**

### ***Required Positions***

General Laws c. 156D, § 8.40 requires that there be a president, a treasurer and a secretary, although these offices can be held by the same person. Other positions are entirely optional. Bylaws invariably repeat the statutory mandate. It is sometimes desired that there be an officer designated, for example, as “chief executive officer” or “chief financial officer.” Such designations can be included as a part of the title of such an officer but do not eliminate the requirement that there be a president and a treasurer. It is acceptable to have an officer designated “president and chief executive officer” or “treasurer and chief financial officer,” if desired. It is also acceptable to have officers other than the president and the treasurer be elected as the chief executive officer and the chief financial officer (*e.g.*, the chairman and the vice-president for finance).

The secretary performs the functions of a “clerk” under prior law. Section 1.40 provides that a person elected as a “clerk” shall become the officer responsible to act as the secretary. The intention is to phase out the office of “clerk” which is unique to Massachusetts and is often confusing to parties and governmental officials in other jurisdictions. *See* Comment No. 11 to §1.40.

### ***Qualifications***

Unlike Chapter 156B, there is no requirement in Chapter 156D that the president must be a director unless the bylaws provide otherwise, or that the clerk be a Massachusetts resident unless the corporation appoints a resident agent.

### ***Duties***

The only statutory provision regarding the duties of officers is the requirement of G.L. c. 156D, § 8.40(c) that the secretary keep the minutes and authenticate the records of the corporation. A secretary’s certificate as to a corporate vote or other corporate records ordinarily estops the corporation from claiming otherwise. Bylaws ordinarily address the duties of the officers, at least the key ones, and some bylaws devote a great deal of space to the subject. However, there is no particular benefit to an extensive exposition of the duties of officers in the bylaws, and the sample bylaws in **Exhibit 4** illustrate moderation in this respect.

### ***Term***

Chapter 156D is silent on the subject of the term of office of officers. Typically, the bylaws provide that they serve at the will of the board of directors. *See* the sample bylaws in **Exhibit 4**.

### ***Election***

General Laws c. 156D, § 8.40 provides all officers are to be appointed by the directors. *See* the sample bylaws in **Exhibit 4** Section 8.40(b) also allows officers to be appointed by another, presumably senior, officer if authorized by the bylaws or by the board of directors.

### ***Removal***

General Laws c. 156D, § 8.43 specifies that officers can be removed with or without cause by the directors. Unlike prior law, there is no requirement that the officer must be given notice and an opportunity to be heard. Under §8.44, the appointment of an officer shall not itself create contract rights, and the removal of an officer with contract rights is effective, even though the officer may have a claim for damages (but not specific performance) under his contract. *See* Comment to §8.43.

### **Fiscal Year**

There is no statutory requirement that the fiscal year be addressed in the bylaws, although it frequently is; **Exhibit 4** contains such a provision. The only statutory reference to the fiscal year is the requirement of G.L. c. 156D, § 2.02(d)(4) that the fiscal year initially adopted by the corporation be included in the articles of organization for informational purposes. The statute makes it clear that the fiscal year is not a part of the articles of organization, which means that a change in the fiscal year does not require an amendment of the articles of organization.

### **Amendments**

General Laws c. 156D, § 10.20 provides that the shareholders have the power to make, amend or repeal the bylaws. However, it also provides that if the articles of organization permit, then the directors may also amend the bylaws, except that a bylaw dealing with quorum or voting requirements for shareholders, including voting groups, may not be adopted, amended or repealed by the directors. *See* GL. c. 156D, §10.21(c).

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If the directors amend the bylaws, they have an obligation to notify the shareholders prior to the next meeting of shareholders, whether it is an annual or special meeting. (Note that it is easy to overlook this obligation.) Most articles of organization grant full power to the directors to amend the bylaws to the extent the law allows, and the bylaws recite corresponding authority. *See* the sample articles of organization and bylaws in **Exhibits 2** and **4**, which so provide.

### **Emergency Bylaws and Emergency Powers**

Chapter 156D introduces to Massachusetts the concepts of “emergency bylaws” and “emergency powers.” *See* G.L. c. 156D, §§2.07 and 3.03. An “emergency” is deemed to exist if a quorum of the corporation’s directors cannot readily be assembled because of some catastrophic event. Unless the articles of organization provide otherwise, the board of directors may adopt emergency bylaws, subject to amendment or repeal by the shareholders, making provisions necessary to manage the corporation during an emergency. Even if the corporation has not adopted emergency bylaws, in the case of an emergency, the board of directors may relax notice and quorum requirements for meetings of directors, treat officers of the corporation as directors, modify lines of succession or relocate the principal office of the corporation. *See* G.L. c. 156D, §3.03. Corporate action taken in good faith during an emergency binds the corporation and will not impose liability on directors, officers, employees or agents participating in that action.

## **SHAREHOLDER AGREEMENTS**

Chapter 156D contains a new and far-reaching provision authorizing *all* of the shareholders to enter into agreements governing the operation of the corporation in ways which conflict with the usual corporate rules and norms, including those set forth in the statute. Agreements among shareholders adopted in accordance with G.L. c. 156D, §7.32 may go far beyond the typical voting agreements, stock restrictions, buy-sell agreements and rights of first refusal authorized elsewhere in the statute (*e.g.*, G.L. c. 156D, §6.27 and §7.31).

Section 7.32(a) contains a non-exclusive list of examples of the type of provisions which may be the subject of such shareholder agreements. These include provisions which:

- (1) eliminate the board of directors or restrict the discretion or powers of the board of directors;

- (2) govern the authorization or making of distributions whether or not in proportion to ownership of shares, subject to the limitations in §6.40;
- (3) establish who shall be directors or officers of the corporation, or their terms of office or manner of selection or removal;
- (4) govern, in general or in regard to specific matters, the exercise or division of voting power by or between the shareholders and directors or by or among any of them, including use of weighted voting rights or director proxies;
- (5) establish the terms and conditions of any agreement for the transfer or use of property or the provision of services between the corporation and any shareholder, director, officer or employee of the corporation or among any of them;
- (6) transfer to one or more shareholders or other persons all or part of the authority to exercise corporate powers or to manage the business and affairs of the corporation, including the resolution of any issue about which there exists a deadlock among directors or shareholders;
- (7) require dissolution of the corporation at the request of one or more of the shareholders or upon the occurrence of a specified event or contingency; or
- (8) otherwise govern exercise of the corporate powers or management of the business and affairs of the corporation or the relationship among the shareholders, the directors and the corporation, or among any of them, and are not contrary to public policy.

An agreement subject to §7.32 is valid for ten years unless it provides otherwise. The existence of the agreement must be noted conspicuously on the front or back of each share certificate. *See* G.L. c. 156D, §7.32(c). Such agreements automatically expire when the corporation's shares are listed on a national securities exchange or are regularly traded on a market maintained by one or more members of a national securities association. *See* GL. c. 156D, §7.32(d).

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Although §7.32 is captioned “Shareholder Agreements,” it covers more than contracts among shareholders. It also includes agreements set forth in the articles of organization or bylaws which are approved by all persons who are shareholders at the time of the agreement. (Note that approval by a single shareholder will suffice, and that approval by non-voting shareholders is necessary). The filing of the initial articles of organization by the incorporators will constitute a shareholder agreement under §7.32(g).

### **INCORPORATOR ACTION; ROLE OF INCORPORATORS**

As already mentioned, a new corporation is organized by one or more incorporators. In the vast majority of cases, the role of the incorporators is ephemeral. Their duties, as set forth in G.L. c. 156D, § 2.01, are merely to sign and file the articles of organization with the secretary of state. Section 2.05(a) permits, but does not require, the incorporators to hold an initial organizational meeting (usually by written consent) to adopt bylaws and elect the initial officers and directors. A form of written consent of the incorporators is set forth in **Exhibit 1**. Once these tasks are accomplished, the incorporators’ role is complete in almost all cases. Incorporators therefore incur essentially no risk of liability since they do not participate in any business decisions and take no actions that involve potential conflict between the corporation and its shareholders or creditors. For this reason lawyers, legal assistants, secretaries and others typically act as incorporators without concern.

In lieu of an organizational meeting of the incorporators, §2.05(a)(2) allows the initial directors named in the articles of organization to hold an organizational meeting to adopt bylaws and elect initial officers. This is a perfectly acceptable alternative, but the practice of having the incorporators take this action seems to have continued by force of habit since the enactment of Chapter 156D, and may be preferable since it avoids delays in the filing of the articles of organization usually required by the need to collect the signatures of all of the directors.

There is one important exception to the foregoing description of the limited role of incorporators. As discussed below, §6.21 provides that shares are to be issued by the directors, unless the power to do so is reserved exclusively or concurrently in the shareholders by the articles of organization. If the power to issue shares is *exclusively* reserved to the shareholders, then the initial issuance of shares *must* be authorized by the incorporators pursuant to §2.01, which provides that the incorporators have all the rights and powers of the shareholders to take corporate action prior to the time when the shares actually are issued. In that case, the incorporators would have to be concerned about possible liabilities

for their actions, *e.g.*, if shares are issued for insufficient consideration. This concern is certainly a reason for any lawyer, legal assistant or other person serving as an incorporator as an accommodation to see that the corporation acts promptly and properly to issue and receive proper payment for its shares, thereby concluding the duties and risks of the incorporators.

## **FIRST MEETING OF DIRECTORS**

A standard part of the incorporation process is the first meeting of directors. There is no authority for the directors or officers to take any action until the corporation legally exists, which means that the first meeting of directors, or written consent in lieu thereof, should not take place until you are confident that the articles of organization have been approved by, not just filed with, the secretary of state. *See* GL. c. 156D, §2.03(a). At that time, the directors are free to act and should do so promptly since there are a variety of important steps to be taken.

The most important substantive step to be taken by the directors at the outset is to approve the issuance of shares. Some of the considerations relating to this action are discussed below.

Other more routine actions include adopting a corporate seal, approving the forms of stock certificates and opening a bank account. Virtually all banks have preprinted forms containing resolutions for adoption by the board of directors. Copies of these forms are readily available from the bank where the account is to be opened. Incidentally, many bank tellers, and many clients, do not appreciate the significance of the forms and seem content to have them filled out on the spot by the secretary, disregarding the language of the form, which recites that the specified resolutions have been adopted by a vote of the directors at a meeting on a specified date. While it is sometimes a burden to take the trouble to vote on such a normally routine event, and while it can be questioned why banks universally require such a formality, the fact is that they do, and a certificate that contains an erroneous recital is incorrect and potentially defective.

The directors may take any other action within their powers at the first meeting. Examples of typical steps initially taken include the approval of a lease for space, the election of officers in addition to those chosen by the incorporators and the approval of the acquisition of assets needed to operate the business.

A form of written consent in lieu of the first meeting of directors is set forth in **Exhibit 7.3**.

## **ISSUANCE OF SHARES**

A few basic aspects of the issuance and transfer of shares may be useful in connection with the initial issuance of shares by a new corporation.

### **Required Action**

General Laws c. 156D, § 6.21 provides that shares can be issued by the board of directors, unless the power to do so is reserved, either exclusively or concurrently, to the shareholders by the articles of organization. Normally, the power to issue shares is given exclusively to the directors. There are times, however, when the shareholders are reluctant to provide such blanket authority to the directors, for example, in cases where the exact number of outstanding shares is important to the maintenance of a balance of power. In such cases, a specific provision to this effect must be contained in the articles of organization.

Since G.L. c. 156D, § 2.01 provides that the incorporators—at their first meeting and, thereafter, prior to the initial issue of shares by the corporation—have all the powers of shareholders. Thus, the incorporators must approve the initial issuance of shares where the articles of organization grant exclusive authority to the shareholders, and may do so where the shareholders have concurrent authority. In either case, the incorporators could be exposed to potential liabilities, as discussed above. A lawyer, for example, acting as an incorporator as a service to his or her client, should not have to run such a risk.

### **Consideration for Shares**

#### ***Types of Consideration***

General Laws c. 156D, §6.21(b) provides great flexibility in respect of the consideration for which shares may be issued. The board of directors may authorize shares to be issued for consideration consisting of “any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, contracts for services to be performed or other securities of the corporation.” The term “benefit” is to be broadly construed. *See* Comment to §6.21.

As discussed above, Chapter 156D does away with the concept of par value. Nevertheless, a corporation may limit the type or specify the minimum amount of consideration for which shares may be issued by an appropriate provision in the articles of organization. *See* GL. c. 156D, §6.21(d). There is rarely a good reason to adopt such a provision.

### ***Timing of Receipt***

General Laws c. 156D, § 6.21(e) provides that shares issued by the corporation are fully paid and non-assessable when the corporation receives the authorized consideration.

### ***Preincorporation Subscription Agreements***

On occasion, particularly when a corporation is raising capital from outside investors, it may enter into subscription agreements for the purchase of shares. General Laws c. 156D, §6.20 regulates “preincorporation subscriptions,” *i.e.* subscriptions entered into before the corporation is formed. These rules are necessary because of the legal uncertainty as to the enforceability of a contract with the corporation, a party which is not yet in existence. It should be noted that these uncertainties can be avoided by the simple expedient of incorporating the corporation before entering into subscription agreements.

A preincorporation subscription is irrevocable for six months unless the subscription agreement provides otherwise or all the subscribers agree to revocation or extension. A subscription agreement is not binding on the corporation until it is incorporated and the directors accept the subscription. Shares issued pursuant to preincorporation subscriptions are fully-paid and non-assessable when the corporation receives the agreed-upon consideration.

If a subscriber defaults in payment of an amount due under his subscription agreement, the corporation may collect the amount owed as a debt due the corporation, or (unless the subscription agreement otherwise provides) rescind the agreement and may sell the shares if the debt remains outstanding for twenty days after written demand.

Post-subscription agreements are contracts subject to §6.20 and not §6.21. *See* G.L. c. 156D, §6.21(e) and the Comment to §6.21.

### **Adequacy of Consideration**

General Laws c. 156D, §§6.21(c) requires that before the corporation issues shares, the directors must determine that the consideration to be received is adequate. That determination, without more, is conclusive insofar as adequacy of consideration is relevant to whether the shares are validly issued, fully-paid, and non-assessable.

Protection against the possibility of shareholder dilution by issuance of shares for less than their fair value is said to be provided by the fiduciary standards



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applicable to directors under §8.30 and (in the case of director conflicts of interest) by §8.31. *See* Comment to §6.21.

### ***Paid-in Capital Requirements***

There is no statutory requirement in Massachusetts that a corporation have any minimum amount of paid-in capital. In a few states, such requirements are still in place, and it may be that a Massachusetts corporation seeking to qualify as a foreign corporation in such a state would have to meet the required minimum of that state. This will have to be checked on a state-by-state basis.

There is also a nonstatutory issue to consider when determining the amount of paid-in capital. In some cases when creditors are unpaid, they will seek to “pierce the corporate veil”—in other words, to request a court, on equitable grounds, to impose liability directly on the shareholders of the corporation. There are a variety of grounds that might cause a court to impose such liability, one of which is that the corporation never had adequate capital to conduct its contemplated business. Therefore, clients should be discouraged from deliberately undercapitalizing a new corporation in the light of its contemplated activities.

### ***Value of Consideration***

When the directors vote to issue shares for property other than cash, they should in most cases determine, for the record, the value of the consideration. This determination enables the accounting records of the corporation to reflect this value in the equity section of the balance sheet and reduces the risk of challenge at a later date. On the other hand, the action of the directors may be open to challenge if the value determined by them is suspect, which in some cases might suggest that the value not be determined by the directors. The proper course of action in such cases is a matter of judgment. *See* Comment to §6.21.

### ***Stock Certificates***

General Laws c. 156D, §§ 6.25 and 6.26 require that outstanding shares either be represented by stock certificates or comply with the requirements for “uncertificated shares,” a not widely used concept except in the case of large, publicly traded corporations and investment vehicles such as mutual funds. The technical requirements for stock certificates are contained in §6.25: Each certificate shall state on its face the name of the corporation and that it is organized under the laws of the Commonwealth, the name of the shareholder and the number and class of shares and the designation of the series, if any, the certificate represents. Stock certificates (and information statements, which are required in the case of

uncertificated shares) are required to note “conspicuously” the existence of all transfer restrictions applicable to the shares (*see* §6.27) and to contain a summary of all rights of each class or series of shares when multiple classes or series are authorized or a statement that the corporation will furnish this information on written request (*see* §6.25(c)). In almost all cases, it is impractical to set forth on the certificate the full text or a comprehensive summary of such restrictions or rights, so the certificate usually only provides notice of the existence of the restrictions or rights and specifies that a copy of the full text of the restrictions or rights will be furnished without charge upon the corporation’s receipt of a written request.

Separately from the requirements of the corporate statute, it is good practice to state on any stock certificate representing shares issued in a transaction not registered under the federal Securities Act of 1933 and applicable state securities laws (which means, as a practical matter, in almost all cases involving closely-held corporations) that the shares may not be transferred without compliance with or an exemption from the requirements of that act and applicable state securities laws.

It is worth keeping in mind that U.C.C. §8-204 requires that for any purchaser of a security to be bound by a restriction on, or other interest in, the security, the restriction or interest must be noted on the certificate unless the purchaser has knowledge of it. This requirement adds a reason, if another reason is necessary, to comply with the provisions described above.

Share certificates must be signed (manually or in facsimile) by two officers or the board of directors. Section 6.25(d) as originally enacted, required the corporate seal to be affixed; corrective legislation adopted in 2004 made affixing the corporate seal optional, thus eliminating a needless technicality. *See* St. 2004, c. 178, §37.

## **Stock Ledger**

A sometimes neglected formality is a written record of the issued and outstanding shares of the corporation. Some form of stock ledger or stock record book is critical in keeping track of the outstanding stock and the identity of the shareholders. This record should include not only the current list of outstanding stock but also a means for preserving and accounting for canceled stock certificates when shares have been reacquired by the corporation or transferred among the shareholders. General Laws c. 156D, § 16.01(c) requires that such records be maintained. However, it should not be necessary to point only to the requirement of the statute to ensure that the records are kept. Disaster can result if the corpo-

## **ORGANIZING THE CORPORATION**

ration loses track of the number of its outstanding shares or the identity of its shareholders.

## **ADDITIONAL CONSIDERATIONS**

### **Corporate Records**

General Laws c. 156D, §16.01 requires that a corporation keep as permanent records, minutes of all meetings of its shareholders, directors and board committees (including actions by consent), appropriate accounting records and stock transfer records. In addition, under §16.01(e) a corporation must maintain *within the commonwealth*, at its principal office or an office of its transfer agent or its secretary or assistant secretary or registered agent: its articles of organization and bylaws and all amendments thereto, directors resolutions establishing classes or series of stock, minutes of shareholder meetings for the past three years, all written communications to shareholders (including annual financial statements) for the past three years, a list of the names and business addresses of its current directors and officers and its most recent annual report to the secretary of state.

These records are extremely important to any corporation. Case law provides that the records are presumed to reflect correctly all actions shown in them as taken by the shareholders and directors unless there is material evidence that they are incorrect. When, as sometimes happens, these records are lost, the corporation may be seriously handicapped in establishing the identity and authority of its shareholders, directors and officers and the legitimacy of actions it and they have taken in the past. Therefore, you should impress on your client the importance of preserving the records and take care if you yourself are, as is often the case, the custodian of the records.

### **Shareholder Inspection Rights**

General Laws c. 156D, §16.02(a) provides that a shareholder (including a beneficial owner) is entitled to inspect and copy, as of right, the records required to be maintained in Massachusetts under §16.01(e). Under §16.02(b), a shareholder may inspect and copy the corporate minutes, accounting records and stock records, but only for a “proper purpose” and subject to the other conditions described in §16.02(c). *See* Comment No. 3 to §16.02.

Massachusetts common law has long provided a broad right of inspection of corporate records independent of the corporation statute. *See Varney v. Baker*,

194 Mass. 239 (1907), and Comment No. 2 to §16.02. Section 16.02(c) preserves these rights (subject to the requirements of §16.02(c)), as well as the right to discovery of corporate records in litigation.

## **Annual Financial Statements**

General Laws, c. 156D, §16.20 adopts a new requirement that a corporation furnish to its shareholders upon request annual financial statements, including a balance sheet, income statement and changes in shareholders equity, together with an auditors report or an officer's certificate. Financial statements, or a notice of their availability, must be provided to each shareholder before the earlier to occur of the annual meeting of shareholders or 120 days after the end of the corporation's fiscal year.

## **Annual Report**

General Laws c. 156D, §16.22 continues the requirement that each Massachusetts corporation (and each foreign corporation authorized to transact business in Massachusetts) file an annual report with the secretary of state within two and one-half months after the end of its fiscal year. The annual report must contain the name of the corporation, its jurisdiction of incorporation, the name and address of its registered agent, the address of its principal office, the names and business address of its directors, president, treasurer and secretary (and chief executive officer and chief financial officer, if different), a brief description of its activities in the Commonwealth, the total number of authorized, issued and outstanding shares of each class or series, and its fiscal year. *See* G.L. c. 156D, §16.22, as amended by St. 2004, c. 178, §§43-45.

The secretary of state is empowered under G.L. c. 156D, §14.20 to dissolve any Massachusetts corporation that has not made the required filings for at least two years. It is the practice of the Corporations Division to engage in massive house-cleaning every few years to wipe out all delinquent corporations, and it can be embarrassing, to say the least, to be swept away in this fashion. (All is not lost, however; §14.22 provides a statutory process for reinstatement, if this happens.) You should impress on your client at the outset the importance of staying current. Whether you wish to assume the responsibility for filing the annual report with the secretary of state is up to you. In any case you should communicate with the corporation and its accountants to make sure that there is no misunderstanding of responsibilities for this filing.

## **Corporate Minutes**

A question that should be considered in connection with corporate records, particularly minutes of meetings of directors, is the style with which the deliberations of the group are recorded. At one extreme are minutes that record the proceedings in almost stenographic detail, noting, for example, who said exactly what on each point discussed. At the other extreme are minutes that record only the bare actions actually approved, setting out none of the reasoning of the participants. While the style chosen is not dictated by any technical requirements, other than the necessity of recording all votes taken, most experienced practitioners tend to avoid great detail concerning discussions at meetings unless there is a reason to be more elaborate in a particular case—for example, if a director specifically wishes his or her position to be noted in the record or if it is useful to record the considerations taken into account by the directors in determining a particular course of action. It can be awkward later to read about disputes or doubts when the minutes are examined in the light of challenges to the actions actually approved.

## **Corporate Seal**

General Laws, c. 156D, §3.02(2) permits a business corporation to have a corporate seal. Many corporate bylaws provide for a seal, although the sample bylaws annexed as **Exhibit 4** omit this provision. Massachusetts law gives special treatment to “contracts under seal” (including a longer statute of limitations and, in many cases, a presumption of consideration). A discussion of this topic is beyond the scope of this chapter, but for our purposes, it should suffice to observe that a *recitation* that a contract is made “under seal” is sufficient and no formal affixation of a corporate seal is necessary to create a contract under seal. In most cases, a corporate seal is merely an anachronism, but on relatively rare occasions, governmental bodies may require a seal to be affixed as a condition to the acceptance of corporate action. One example is the assignment of claims under U.S. Government contracts. Some foreign governments also attach great importance to the affixation of a corporate seal. For this reason, it is advisable for corporations to adopt and maintain a corporate seal.

## **Qualification to Do Business in Other States**

A corporation organized under the laws of one state that does business in another is required to take steps to qualify in the other state. In the case of a Massachusetts corporation, this requirement means that you have to consider this subject if your client expects to conduct material activities in other states. If your client expects to open an office or have employees located in another state, it is rare

that qualification would not be required in that state. You should note that the need for qualification can be triggered by a number of other activities as well. Consequently, you have to research and be sure your client meets the qualification requirements in each state in which he or she is conducting the covered activities.

## **Legal Existence and Good Standing Certificates**

General Laws c. 156D, §1.28 continues the Massachusetts practice of authorizing the secretary of state to provide certificates which may be relied upon as conclusive evidence of the facts stated therein.

A certificate of legal existence may be issued in several forms, as determined by the secretary. These include:

- a short form which contains the corporate name and date of incorporation and states that the corporation has legal existence so far as it appears of record with the secretary of state.
- An optional long form which also includes a listing of all amendments to the articles of organization.

The secretary of state will also issue a certificate of corporate good standing, which includes a statement that the corporation is in good standing so far as it appears from the records of the secretary of state. A corporation is in good standing if it has filed all annual reports with the secretary of state and paid all fees due with respect thereto. The distinction is sometimes drawn between this kind of “corporate good standing,” and “tax good standing,” discussed below.

The secretary of state may issue other types of certificates regarding facts of record in his office, including certificates of merger, certificates of dissolution and certificates of authority of foreign corporations authorized to do business in Massachusetts. The secretary of state will also issue certified copies of documents on file with his office.

The Massachusetts Department of Revenue is authorized by G.L. c. 62C, §52 to issue certificates of tax good standing, which certify that the corporation has filed all Massachusetts tax returns required by law and paid all taxes shown thereon. Unlike certificates of legal existence and good standing from the secretary of state, which usually are available within one or two days, a tax good standing certificate may take months to obtain.

## **The Lawyer as Director or Officer**

You may well be asked to serve as the secretary of your corporate client, and possibly as a director. Less commonly, you may play a more active role as an officer.

### *As Secretary*

Attorneys frequently serve as the secretary of corporate clients and this practice should not present unusual problems, since the role is ministerial. However, be aware that the federal bankruptcy rules, as applied in the Massachusetts district, disqualify you from acting as counsel for a debtor in possession if you have acted as its secretary, since the bankruptcy court, at least, considers this connection with the debtor to impair your independence. Most likely, this outcome is sufficiently remote that it does not, by itself, deter you from serving your client in this fairly traditional way if it so requests.

### *As Director*

Serving as a director raises more serious concerns. It is fair to say that in recent years there has been a movement away from lawyers serving as directors of their corporate clients. Concerns have been expressed about the impact such a role has on the independence of the lawyer when advising a client. This concern contrasts with the traditional view that service as a director may put the lawyer in a position to identify issues earlier and render more effective advice. An answer to this view is that there is no reason why the lawyer may not attend meetings of the directors *without* serving as a director in a formal capacity, which, in fact, is being done with greater frequency, particularly when the attorney is the corporate secretary. Attendance at board meetings without serving as a director also addresses another concern that has been raised—the possible loss of the lawyer-client privilege if counsel is also a director. If counsel is also a director, it often may be unclear when counsel is acting as a director (in which case there is no privilege) and when he or she is acting as counsel. If counsel is not a director or officer, obviously he or she can never be acting in any capacity other than counsel.

There is another consideration involved in serving as a director of a closely held corporation. In such a case, the board of directors may consist of the majority shareholder, his or her spouse and, perhaps, you as his or her lawyer. This situation can be the worst of all possible worlds for you, since you have all of the duties of a director but no effective way to execute them. Practically speaking, you may not even be consulted about many important things done by the con-

trolling shareholder, and you risk your relationship with the client if you try to intercede. If there is a complaint by minority shareholders, you would certainly be a personal target.

### *As Other Officer*

It is less common that a lawyer serves as an active officer of a corporate client. This situation implies a degree of business involvement that is unusual. To the extent that such involvement exists as a matter of fact, it suggests that the lawyer may be, in reality, a businessperson first and a lawyer second. If so, the lawyer assumes all the risks of the business role, but this risk may not be considered objectionable if there are sufficient business rewards. What is really sacrificed in this case is the lawyer function and the benefit of privileged communications; perhaps the corporation should consider getting itself a different and truly independent counsel.

### *Issues of Privilege and Insurance Coverage*

When a lawyer serves as a director or officer of a corporate client, complex questions arise in two areas: the impact on the privilege afforded disclosures by a client to his or her lawyer and the impact on the lawyer's liability insurance coverage. These are complex matters that are only referred to here in summary form.

Concerning the privilege issue, if an individual acts in more than one capacity and is furnished information that would be privileged if disclosed to the client's lawyer, the question must be faced whether the information was furnished to the lawyer in his or her capacity as lawyer or as a director or officer. If a court determines that the information was furnished to the person as a director or officer, there will be no privilege even though the person is also the lawyer for the client. Many battles have been fought on this point and privilege has been denied in more than one case, to the chagrin of both the lawyer and the client.

Concerning the insurance issue, the liability insurance coverage of normal policies is limited to actions taken by the lawyer acting only as such. If the lawyer also acts in some other capacity, the insurance is not likely to cover the actions taken in that other capacity. (Keeping corporate records as secretary is usually an exception to this exclusion.) Insurers generally are vigilant in denying coverage in such cases, and, again, many battles have been fought on the point.



## **Obligations of the Lawyer; Who Is the Client?**

The Massachusetts Code of Professional Conduct makes it clear that a corporate attorney who represents a corporation or other “organization,” represents “the organization acting through its duly authorized constituents.” See Mass. R. Prof. C., Rule 1.13.

If counsel represents “the corporation,” the question arises: Who is the corporation? A corporation is a fictitious legal entity that acts through real people. In theory, it acts, in the first instance, through its board of directors, but it does not follow that the board always speaks with a single voice. In representing the corporation on a day-to-day basis, the lawyer works with the officers of the corporation; therefore, the lawyer’s natural allegiance runs presumably to the chief executive officer. This might become problematic, however, in cases where the chief executive officer is at odds with the board. Discussion of this issue is beyond the scope of this chapter.

Moreover, a business entity rarely consists of one person who is sole shareholder and director and the holder of all its offices. The normal case involves at least several people who have come together to conduct an enterprise, which, therefore, creates a situation where differences among the objectives of the participants can readily occur and often do. However, until it is apparent to the participants that their objectives differ and cannot readily be reconciled, it is uncommon that they each seek separate counsel. Thus, the lawyer often is said to represent “the situation.” The result, at best, requires great sensitivity on the part of the lawyer seeking to help all parties. It may lead, in some cases, to the need to recommend that the various parties secure independent counsel.

### **EXHIBITS**

The following exhibits consist of typical forms used in the organization of a simple Massachusetts business corporation under G.L. c. 156D. Note that there are many instances where these forms are not sufficient. For example, the forms provide for only a single class of stock, with no provision for the subsequent issuance of “blank check” stock, contain no restrictions on the transfer of shares and do not provide for a classified board. The forms are also intended to grant to the directors and shareholders the maximum flexibility permitted by Massachusetts law. For example, there are no special provisions increasing the percentage votes required to approve various corporate transactions, and the notice provisions for meetings are the shortest permitted by law.

The exhibits have been annotated with references to the applicable sections of G.L. c. 156D, where appropriate.