

DAVIS MALM & D'AGOSTINE P.C.

A T T O R N E Y S A T L A W



25 YEARS ON THE LEGAL FRONTIER

≡ Business Law Client Alert ≡

MAY 2004

NEW MASSACHUSETTS BUSINESS CORPORATION ACT TO TAKE EFFECT JULY 1, 2004 FAQs FOR MASSACHUSETTS CORPORATIONS

On July 1, 2004, the new Massachusetts Business Corporation Act (Chapter 156D) will become effective and replace the old Massachusetts Business Corporation Law (Chapter 156B), originally enacted in 1964.

Q. What corporations are affected by the new act?

- A. All business corporations incorporated in Massachusetts will be affected. The act does not affect non-profit corporations, professional corporations, or special classes of corporations such as banks, insurance companies and public utilities. The rules for registration of foreign (non-Massachusetts) corporations doing business in Massachusetts, formerly contained in Chapter 181, are now contained in the new act, but the act does not affect the law otherwise governing foreign corporations.

Q. What actions must existing corporations take to comply with the new act?

- A. Surprisingly few. The drafters of the new act tried to minimize the necessity for defensive action on the part of existing corporations in order to maintain the *status quo*.

However, one step which must be taken is the appointment of a “*registered*” agent. The new act requires all Massachusetts business corporations to appoint a “registered” agent with an office in Massachusetts. The new “registered” agent may be an officer of or an attorney for the corporation. Existing law requires the appointment of a “*resident*” agent only if the corporate Clerk is not a Massachusetts resident.

If a corporation presently does not have a “resident” agent, it must either appoint one before July 1, or appoint a “registered” agent once the new act becomes effective on July 1. There is no filing fee for appointment of a “resident” agent before July 1, thus providing a modest incentive to do so before the new act takes effect.

Q. What actions should existing corporations take in response to the new act?

- A. Every corporation should review its articles of organization and by-laws with counsel to (1) assure that the changes made by the act do not adversely affect the corporation—a very unlikely scenario, and (2) take advantage of the flexibility that the new act provides for corporate governance rules. For example, under the new act, notices can be given to directors and shareholders electronically,

but only if the bylaws are amended to so provide; and shareholders can take action by less than unanimous written consent, but only if the articles of organization are amended to so provide.

Q. What changes will the new act make in the law applicable to existing corporations?

A. It would not be practical to list all of the many changes made by the new act in this Client Alert. The act comprehensively rewrites the Massachusetts business corporation law to conform to the American Bar Association's Model Business Corporation Act, which is now in effect in 37 states; the statutory text and commentary of the new act are over 500 pages long. However, a very brief and selective summary of the highlights of the new act follows:

- ♦ The types of consideration for which shares may be issued are liberalized.
- ♦ Shareholders may take action by less than unanimous written consent, provided that seven days advance notice is given to all shareholders.
- ♦ Corporations may have less than three directors if the articles of organization so provide.
- ♦ Electronic communications with shareholders and directors, and electronic filings with the Secretary of State are facilitated.
- ♦ New insolvency tests are prescribed for dividends and stock repurchases.
- ♦ A simple procedure for "domestication" (converting a Massachusetts corporation into a foreign corporation and *vice versa*) is provided.
- ♦ Conversions of corporations into "other entities" (such as LLCs or limited partnerships) are now permitted.

- ♦ "Share exchanges" by shareholder vote, rather than by tender offer, are now permitted.
- ♦ The corporate "Clerk" will now become the "Secretary."
- ♦ The word "Company" may be part of a corporate name, without the words "Inc." or "Corp."
- ♦ Agreements among all shareholders may vary the statutory provisions of the act.
- ♦ Annual financial statements must be provided to shareholders.

For a more detailed summary of changes made by the new act, please look on our web site, www.davismalm.com, for the article on "Comparison of Corporation Laws" written by William F. Griffin, Jr., or contact Jeanie Griggs at 617.589.3895 for a written copy of the summary. ♦

Business Law Group Corporate Law Section

John D. Chambliss	617.589.3860
Amy L. Fracassini	617.589.3862
William F. Griffin, Jr.	617.367.2500
John T. Lynch	617.589.3820
C. Michael Malm	617.589.3803
Kenneth J. Mickiewicz	617.589.3872
Andrew D. Myers	617.589.3835

Robert J. Diettrich	617.589.3871
Sohie C. Migliazzo	617.589.3845
Shannon M. Tomai	617.589.3884

Fred C. Chase, Paralegal	617.589-3897
--------------------------	--------------

DAVIS MALM & D'AGOSTINE P.C.

A T T O R N E Y S A T L A W

Should you have questions about this article, please contact :

Jeanie Griggs (617) 589-3895 or jgriggs@davismalm.com • One Boston Place • Boston, MA 02108

© 2004 Davis, Malm & D'Agostine, P.C. This publication may constitute advertising under the Rules of the Supreme Judicial Court. It should not be considered as a substitute for legal advice on particular fact situations.