Massachusetts Adopts New Business Corporation Act

On November 26, 2003, Governor Romney signed into law a sweeping overhaul of corporate law in the Commonwealth of Massachusetts. The Massachusetts Business Corporation Act (Massachusetts General Laws Chapter 156D or the “MBCA”) goes into effect July 1, 2004 and applies not only to all Massachusetts corporations but also to all foreign corporations doing business in Massachusetts. It replaces both the existing business corporation statute (Chapter 156B) and the law relating to non-Massachusetts corporations. It updates the existing law to reflect advances in technology and communications and developments in the corporate laws of other important commercial states. The MBCA will provide additional flexibility and clearer rules regarding governance and operation of Massachusetts’ business corporations.

The benefit of many of the new provisions, however, can be obtained only by amending the corporation’s charter or by-laws or by taking other action. This Alert summarizes some of the significant changes to existing law resulting from adoption of the MBCA.

How the MBCA May Affect You: Some of the changes listed below are likely to affect your business. Please contact your K&L attorney to discuss whether to implement those provisions that are optional and how to proceed to achieve compliance with the new law.

- **Registered Agent.** Every corporation doing business in Massachusetts must now have a registered agent in the Commonwealth. The agent may be an individual, including an officer of the corporation, or it may be a corporation doing business in Massachusetts. A modest filing fee can be avoided if you appoint your new agent before July 1.

- **Corporate Records.** The MBCA establishes new requirements regarding the types of corporate records that must be maintained, and where they must be kept. Additional technical requirements must be met if you’re interested in maintaining records electronically.

- **Dividends.** If your corporation issues dividends or otherwise distributes assets to shareholders, you should learn about the new requirements that will become applicable for distributions made on or after July 1.

- **Shareholder Meetings.** The new law permits shareholder meetings to be held anywhere in the world, and also permits shareholders to participate in meetings from remote locations. If you are a privately held company, you have the option of holding shareholder meetings entirely by means of a conference telephone call or other means of remote communication – but you must take affirmative action to take advantage of this option. If you would like the flexibility to hold meetings outside of Massachusetts, or if you would like to allow your shareholders the option of remote participation, inquire what amendments need to be made to your corporate bylaws.

- **Shareholder Consents.** It is now possible to adopt actions by shareholder consent that is less than unanimous. The consent is simply treated as though it is a vote taken at a shareholder meeting at which all the shareholders entitled to vote on the issue are present and voting. Because unanimity is not required, the new consent rules may be especially useful for corporations with shareholders who are difficult to reach or who may not be able to attend or participate in meetings. To take advantage of this option you will need to amend your corporate charter.

- **Electronic Communications.** It will now be possible to send and receive most communications electronically if you comply with certain requirements. This includes notices to shareholders and directors, proxies, consents and votes. However, you may need to amend your charter or bylaws.

- **Undesignated Shares.** The new law permits a corporation to authorize shares with no designation as to the rights and limitations of the shares. The board of
Directors can be granted the power to determine such rights and limitations when the shares are issued. If your corporation is likely to want to issue new classes of stock in the future, you may want to amend your charter to permit the authorization of undesignated shares. This would make it unnecessary to have to comply with the procedural and substantive requirements for adopting a charter amendment each time a new class of stock is issued. You should explore how this option might help your business.

- **Indemnification.** The new law alters the rules governing indemnification of officers and directors. It gives corporations greater leeway to determine the extent to which and the conditions under which the corporation will provide indemnification, but in some cases the MBCA actually requires indemnification where it is not required under existing law. In an era in which suits against officers and directors of corporations have become increasingly common, rights of indemnification are an important concern. You should consider how these changes affect your business and whether you should amend your corporate charter to expand or limit your existing indemnification provisions.

**Other Important Changes.** The MBCA will also make changes to existing law in a number of other areas:

- **Capital Structure.** The new law will affect the capital structure of corporations, including how shares are classified, valued and distributed, and will clarify the rules regarding the amount of dividends and other distributions a corporation may pay. Corporations will now be able to issue shares of capital stock for virtually any type of consideration determined to be adequate by the board of directors, including agreements for future services.

- **Corporate Governance.** The MBCA clarifies the requirements and procedures for enforceable voting agreements and trusts, and expressly authorizes cumulative voting. Loans to directors and directors’ conflicts of interest are addressed directly, as are the duties and standard of conduct expected of directors and officers. Dissenters’ appraisal rights are modified and limited in certain situations, and the rules regarding shareholder derivative actions are clarified.

- **Fundamental Transactions.** The new law provides additional flexibility for Massachusetts corporations to change their form, engage in new types of combinations and to participate in so-called short-form mergers with affiliated entities. It also clarifies the rights of shareholders with respect to fundamental transactions.

The MBCA is intended to make Massachusetts corporate law more responsive to the needs of a corporation in the twenty-first century. Many of the changes created by the law present opportunities that could help your business operate more efficiently.

This alert simply highlights certain key elements of the MBCA. It is not an exhaustive list of the changes in the new law. For a more complete analysis of how the MBCA will affect your corporation and business and how you can take advantage of it, please contact your K&L attorney.

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**FOR ADDITIONAL INFORMATION** concerning this topic or any Corporate issue, please consult one of the K&L office contacts listed below:

**Boston**
- Joel D. Almquist 617.261.3104 jalmquist@kl.com
- Edward J. Brennan, Jr. 617.951.9143 ebrennan@kl.com
- Eileen Smith Ewing 617.951.9227 eewing@kl.com
- Michael A. Hickey 617.951.9157 mhickey@kl.com
- John C. Hutchins 617.951.9165 jhutchins@kl.com
- Stephen E. Moore 617.951.9191 smoore@kl.com
- James P. O’Hare 617.261.3219 johare@kl.com
- Stephen L. Palmer 617.951.9211 spalmer@kl.com
- Stanley V. Ragalevsky 617.951.9203 sragalevsky@kl.com