

**HOUSE . . . . . No. 1723**

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**The Commonwealth of Massachusetts**

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**In the Year Two Thousand Nine**  
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An Act relative to substantive changes to the Massachusetts Business Act..

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1           ( ) Section 1.40 of Chapter 156D is amended by adding at the end of subsection (a) the  
2 following paragraph:

3           “Voting power” means the current power to vote in the election of directors.

4           ( ) Section 2.02(b)(4) of Chapter 156D is deleted in its entirety and replaced with the  
5 following:

6           A provision eliminating or limiting the personal liability of a director to the corporation  
7 or its shareholders for monetary damages for breach of fiduciary duty as a director  
8 notwithstanding any provision of law imposing such liability; but the provision shall not  
9 eliminate or limit the liability of a director (i) for any breach of the director’s duty of loyalty to  
10 the corporation or its shareholders, (ii) for acts or omissions not in good faith or which involve  
11 intentional misconduct or a knowing violation of law, (iii) for improper distributions under  
12 section 6.40, or (iv) for any transaction from which the director derived an improper personal  
13 benefit.

14 ( ) Section 7.07(c) of Chapter 156D is deleted in its entirety and replaced with the  
15 following:

16 A determination of shareholders entitled to notice of or to vote at a shareholders' meeting  
17 is effective for any adjournment of the meeting unless the board of directors fixes a new record  
18 date, which it shall do if the meeting is adjourned to a date more than 120 days after the record  
19 date fixed for the original meeting.

20 ( ) Section 7.44(a) of Chapter 156D is deleted in its entirety and replaced with the  
21 following:

22 A derivative proceeding commenced after rejection of a demand shall be dismissed by  
23 the court on motion by the corporation if the court finds that either: (1) 1 of the groups specified  
24 in subsections (b)(1) and (2) or (f) has determined in good faith after conducting a reasonable  
25 inquiry upon which its conclusions are based that the maintenance of the derivative proceeding is  
26 not in the best interests of the corporation; or (2) shareholders specified in subsection (b)(3) have  
27 determined that the maintenance of the derivative proceeding is not in the best interests of the  
28 corporation.

29 ( ) Section 7.44(e) of Chapter 156D is deleted in its entirety and replaced with the  
30 following:

31 If a majority of the board of directors does not consist of independent directors at the time  
32 the determination by independent directors is made, the corporation shall have the burden of  
33 proving that the requirements of subsection (a) have been met and that the determination that  
34 maintenance of the derivative proceeding is not in the best interests of the corporation was  
35 reasonable and principled. If a majority of the board of directors consists of independent

36 directors at the time the determination is made or if the determination is made by shareholders  
37 pursuant to clause (3) of subsection (b) or is made pursuant to subsection (f), the plaintiff shall  
38 have the burden of proving that the requirements of subsection (a) have not been met and, if the  
39 determination is made by a group specified in clauses (1) or (2) of subsection (b), that the  
40 independent directors, in making the determination, have not met the standard set forth in  
41 Section 8.30.

42 ( ) Section 8.21(a) of Chapter 156D is deleted in its entirety and replaced with the  
43 following:

44 Unless the articles of organization or bylaws provide that action required or permitted by  
45 this chapter to be taken by the directors may be taken only at a meeting, the action may be taken  
46 without a meeting if the action is taken by the unanimous consent of the members of the board of  
47 directors. The action must be evidenced by 1 or more consents describing the action taken, in  
48 writing, signed by each director, or delivered to the corporation by electronic transmission, to the  
49 address specified by the corporation for the purpose or, if no address has been specified, to the  
50 principal office of the corporation, addressed to the secretary or other officer or agent having  
51 custody of the records of proceedings of directors for inclusion in the records of meetings.

52 ( ) Section 9.52(6) of Chapter 156D is amended by deleting clause (1) thereof in its  
53 entirety and replacing it with the following:

54 Would have a right to vote as a separate voting group on a provision in the plan that, if  
55 contained in a proposed amendment to articles of organization, would require action by separate  
56 voting groups under section 10.04; provided, however, that receipt of interests in another entity  
57 in exchange for shares pursuant to a plan of conversion shall not entitle holders of the exchanged

58 class or series to vote as a separate voting group based solely on the grounds that they were  
59 receiving interests in a different issuer; or

60 ( ) Section 10.04(a) is amended by inserting at the beginning thereof the following:

61 Subject to section 10.05,

62 ( ) Section 11.04(6) of Chapter 156D is deleted in its entirety and replaced with the  
63 following:

64 Except as otherwise expressly provided in the article of organization, voting by a class or  
65 series of shares as a separate voting group is required on a plan of merger or share exchange if  
66 the plan contains a provision that, if contained in a proposed amendment to articles of  
67 organization, would entitle such class or series to vote as a separate voting group on the proposed  
68 amendment under section 10.04; provided however, that (i) receipt of shares of a class or series  
69 of shares in exchange for shares pursuant to a plan of merger or share exchange involving each  
70 outstanding class and series shall not entitle holders of the exchanged class or series to vote as a  
71 separate voting group based solely on the grounds that they are receiving shares of a different  
72 issuer or that clauses (1) or (5) of section 10.04 would apply if the change were contained in a  
73 proposed amendment to the articles of organization, and (ii) if the proposed provision would, as  
74 an amendment, entitle two or more classes or series of shares to vote separately but would affect  
75 those classes or series in the same or a substantially similar way, the shares of all such classes or  
76 series shall, unless the articles of organization provide otherwise, vote together as a single voting  
77 group on the plan.

78 ( ) Section 13.01 of Chapter 156D is amended by deleting the paragraph beginning  
79 “Marketable securities” in its entirety and replacing it with the following:

80 “Marketable securities”, securities held of record by, or by financial intermediaries or  
81 depositories on behalf of, at least 1,000 persons and which were

82 (a) listed on a national securities exchange, or

83 (b) listed on a regional securities exchange or traded in an interdealer quotation system or  
84 other trading system and had at least 250,000 outstanding shares, exclusive of shares held by  
85 officers, directors and affiliates, which have a market value of at least \$5,000,000.

86 ( ) Section 13.02(a)(1) of Chapter 156D is deleted in its entirety and replaced with the  
87 following:

88 (a) A shareholder is entitled to appraisal rights, and obtain payment of the fair value of  
89 his shares in the event of, any of the following corporate or other actions:

90 (1) consummation of a plan of merger to which the corporation is a party if shareholder  
91 approval is required for the merger by section 11.04 or the articles of organization or if the  
92 corporation is a subsidiary that is merged with its parent or another subsidiary under section  
93 11.05, unless, in either case, (A) all shareholders are to receive only cash for their shares in  
94 amounts proportionate to what they would receive upon a dissolution of the corporation or, in the  
95 case of shareholders already holding marketable securities in the merging corporation, only  
96 marketable securities of the surviving corporation, marketable securities of the parent in the case  
97 of a merger with a subsidiary and/or cash and (B) no director, officer or controlling shareholder  
98 has a direct or indirect material financial interest in the merger other than (i) in his capacity as a  
99 shareholder of the corporation or as a director, officer, employee or consultant of either the  
100 merging or the surviving corporation or of any affiliate of the surviving corporation if his  
101 financial interest is pursuant to bona fide arrangements with either corporation or any such

102 affiliate, or (ii) in any other capacity so long as the shareholder owns not more than five percent  
103 of the voting shares of all classes and series of the corporation in the aggregate;

104 ( ) Section 13.02(a) of Chapter 156D is amended by adding at the end thereof the  
105 following:

106 (9) consummation of a domestication if the shareholder would have had appraisal rights  
107 if the transaction had been effected as a merger.

108 ( ) Section 13.02(b) of Chapter 156D is deleted in its entirety and replaced with the  
109 following:

110 Except as otherwise provided in subsection (a) of section 13.03, in the event of corporate  
111 action specified in clauses (1), (2), (3), (7), (8) or (9) of subsection (a), a shareholder may assert  
112 appraisal rights only if he seeks them with respect to all of his shares of whatever class or series.

113 ( ) Section 16.20(c) of Chapter 156D is deleted in its entirety and replaced with the  
114 following:

115 A corporation shall deliver the annual financial statements, or a written notice of their  
116 availability, to each shareholder before the earlier to occur of the annual meeting of shareholders  
117 or 120 days after the close of the fiscal year. Thereafter, the corporation shall deliver its most  
118 recent annual financial statements upon the written request of any shareholder to whom the  
119 statements were not delivered.