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§ 5.5 ISSUANCE OF SHARES

Section 6.21 does not impose on the directors any special requirements for issuing shares other than the requirement in Section 6.21(c) that they determine before issuance that the “consideration received or to be received for shares to be issued is adequate.” Thus, unless the articles reserve to shareholders the powers granted by Section 6.21 to directors, or the articles or bylaws require a larger number of directors or a description of the purpose of a meeting at which issuances of shares are approved, Chapter 156D permits a majority of a quorum of directors to approve the issuance of shares at a regular or special meeting of directors without notice that the issuance of shares is to be considered at the meeting. Chapter 156D also permits directors to approve the issuance of shares by unanimous written consent or to delegate the authority to approve the issuance of shares to a committee of directors. [FN104a]

Note 104a:
See Ch. 156D §§ 6.21, 8.22, 8.24, 8.25 (and the seventh paragraph of the Massachusetts Comment on Section 8.25). In considering whether to invalidate shares of Delaware corporations whose issuance was defective in some way, the Delaware courts have drawn a distinction between shares that are void and that cannot be ratified and shares that are voidable and that can be ratified. Unfortunately, in addressing specific factual situations, those courts have blurred the line between void and voidable shares, creating a major problem for corporations and their counsel considering how to deal with a defect. See Bigler & Tillman, *Void or Voidable? Curing Defects in Stock Issuances under Delaware Law*, 63 Bus. Law. 1109 (2008). (In 2014, to ameliorate the problem, the Delaware legislature amended Section 224 of the Delaware General Corporation Law to provide corporations a procedure for ratifying the defective issuance of shares whether void or voidable.) Whether Massachusetts corporations with defective share issuances face a similar problem is uncertain, but a 2012 decision by a judge in the Business Litigation Session of the
Massachusetts Superior Court suggest that they do not. In *Finnegan v. Baker*, No. SUCV200903772BLS1, 2012 WL 6629636 (Mass. Super. Ct. Oct. 19, 2012), the court held that shares issued by a Delaware corporation upon conversion of notes were validly issued, or alternatively were voidable but their issuance had been ratified, in circumstances in which the Delaware courts likely would have held the shares void because their issuance, in the words of the Massachusetts court, “never adhered to the formalities required by Delaware law.” 2012 WL 6629636, at *23. In declining plaintiff's request that the shares be invalidated while acknowledging the directors' “disregard for any and all corporate formalities, never mind those provided for under Delaware law” (2012 WL 6629636, at *24), the decision in *Finnegan* provides hope that the Massachusetts courts will adopt a more forgiving approach than their Delaware counterparts when considering the effect of defects on the validity of shares issued by Massachusetts corporations.