

SENATE No. 00824

The Commonwealth of Massachusetts

PRESENTED BY:

Mark C. Montigny

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

An Act relative to public charities.

PETITION OF:

NAME:

Mark C. Montigny

DISTRICT/ADDRESS:

Second Bristol and Plymouth

SENATE No. 00824

By Mr. Montigny, petition (accompanied by bill, Senate, No. 824) of Montigny for legislation relative to public charities [Joint Committee on the Judiciary].

The Commonwealth of Massachusetts

—————
In the Year Two Thousand Eleven
—————

An Act relative to public charities.

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. Chapter 12 of the General Laws, as appearing in the 2008 Official Edition,
2 is amended by inserting after Section 8N, the following new sections:-

3 Section 8O. Whistleblower complaints

4 Any public charity, with the exception of charities with no paid employees, required to file an
5 annual report pursuant to section eight F shall comply with the requirements of this section.

6 A public charity shall not retaliate against any employee of the public charity who has filed a
7 complaint with the governing board, directors or trustees, the attorney general or any other

8 government agency pertaining to the following: (a) dissipation of the charity’s assets; (b) the
9 mishandling or misuse of restricted funds; (c) related party transactions; (d) compliance with

10 state or federal reporting requirements; (e) overriding or circumventing of the charity’s internal
11 controls; (f) private inurement; and (g) fraud.

12 All records pertaining to any complaint that falls under this section and its resolution shall be
13 retained by the public charity for four years from the date the complaint was filed and shall also
14 be made available to the attorney general upon request of the attorney general. These documents
15 shall not constitute public records subject to section eight M or section ten of chapter sixty-six of
16 the general laws.

17 If a public charity or the responsible officer or agent willfully retaliates against an employee for a
18 complaint that falls under this section, the attorney general, in addition to any other statutory or
19 common law remedies, may seek: (a) compensation for the employee; (b) back pay for the
20 employee; or (c) any appropriate order prohibiting the reoccurrence of the unlawful conduct.

21 Section 8P. Audit committee policies and procedures

22 Any public charity, with the exception of testamentary or inter vivos trusts, required to file an
23 annual report pursuant to section eight F shall comply with the requirements of this section.

24 If a public charity is required to file an audit with its annual report pursuant to section eight F,
25 the trustees or governing board shall appoint an audit committee of not fewer than three persons.

26 The audit committee may include persons who are not members of the board so long as the
27 majority of the audit committee is made up of members of the board, but the members of the
28 audit committee shall not include any employees of the public charity. Members of the audit
29 committee may not receive any compensation from the organization in excess of the standard
30 compensation, if any, received by all trustees or members of the board in exchange for their
31 service as trustees or as members of the board. No member of the audit committee shall have
32 any material financial interest in any entity doing significant business with the public charity, nor
33 have engaged in any related party transactions within the three years preceding appointment to

34 the audit committee. The board may designate its finance committee or other permanent
35 committee of the board to perform the audit committee function, so long as it is in compliance
36 with all of the audit committee membership requirements of this paragraph. If a charitable
37 corporation that is required to have an audit committee is under the control of another charitable
38 corporation, the controlled organization's audit committee may be the audit committee of the
39 controlling corporation, so long as that audit committee complies with all of the requirements of
40 this section.

41 Subject to the supervision of the board, the audit committee, or other such committee functioning
42 as the audit committee, shall be responsible for making recommendations to the board regarding:
43 (a) the selection, retention and termination of an independent auditor; (b) the compensation of
44 the auditor; (c) measures to ensure that the internal controls are documented by management and
45 evaluated as part of the audit; (d) the process by which the audit committee shall review the audit
46 and the management letter, if any, with the auditor and work with the auditor and management of
47 the organization to resolve or recommend resolution to the board of any issues of concern arising
48 from the audit or the management letter; and (e) measures to ensure that any non-audit services
49 provided by the auditing firm conform with the standards of independence required in section
50 eight F. Prior to the board's consideration of and action on the independent auditor's report, the
51 audit committee shall report to the board on the results of the audit.

52 Section 8Q: Related party contracts, transactions and compensation

53 In the administration and operation of any public charity, the following acts shall be prohibited:

54 (a) engaging in any act that the Internal Revenue Service determines constitutes an "excess
55 benefit transaction" under section 4958 of the Internal Revenue Code; and (b) engaging in any

56 act that would constitute an “excess benefit transaction” under the standards of section 4958 of
57 the Internal Revenue Code.

58 The documentation required by 26 C.F.R. section 53.4958-6(a)(3) shall be maintained
59 for at least four years after the transaction was approved and shall be made available to the
60 attorney general upon request of the attorney general. These documents shall not constitute
61 public records subject to section eight M or section ten of chapter sixty-six of the general laws.
62 If the attorney general determines that any contract, compensation arrangement or transaction is
63 an excess benefit under this section or constitutes “self-dealing” under chapter sixty-eight A,
64 section (1)(a), the attorney general may, in addition to any other remedies available under
65 statutory or common law, bring an action in superior court to: (a) impose a fine equal to the
66 value of what the Internal Revenue Code permits as a fine if the contract, compensation
67 agreement or transaction was an Internal Revenue Code sanctioned transaction; (b) recover
68 restitution from the related party; and/or (c) obtain any other appropriate legal or equitable relief
69 in the public interest, including removal of trustees, directors or officers.

70 References to the Internal Revenue Code and the regulations promulgated thereunder in this
71 section and in section eight A shall mean the United States Internal Revenue Code of 1986, as
72 amended, and the regulations promulgated thereunder as such are in effect on the effective date
73 of this section.

74 If said Internal Revenue Code or said regulations are amended after the effective date
75 of this section, then, unless the director shall determine otherwise, by regulation, said references
76 shall mean the Internal Revenue Code and regulations as so amended.

77 The director may exempt certain de minimis contracts, transactions or compensation
78 from the requirements of this section if the director determines that such exemptions are in the
79 public interest.”

80 SECTION 2. Chapter 180 of the General Laws, as appearing in the 2008 Official
81 Edition, is hereby amended by inserting after section 29 the following sections:-

82 Section 30. Executive Compensation Caps

83 Any public charity with annual gross revenues in excess of \$1,000,000.00 are subject
84 to the following provisions: (a) no officer, director, trustee or senior manager shall receive
85 annual compensation in excess of \$500,000.00; (b) compensation, as defined by this Section,
86 includes salary, bonus payments, incentive payments, deferred compensation, severance
87 payments, below market rate loans, and the lease or rental of any vehicle.

88 Section 31. Waiver Hearing

89 Any public charity as defined in Section 30 of this chapter seeking to compensate an
90 officer, director, trustee, or senior manager in excess of the executive compensation cap as
91 defined in Section 30 of this chapter shall be entitled to a public hearing before the a commission
92 comprised of the secretary of the commonwealth, inspector general and attorney general
93 (“Commission”).

94 Any public charity seeking said waiver shall comply with the following requirements
95 (a) request a hearing in writing to the Commission indicating good cause for any deviation from
96 the limits set forth in Section 30; (b) such hearing shall be conducted before the Commission
97 within six months of receipt of a written request by a public charity; (c) the board of the public

98 charity shall be responsible for the compensation of an independent auditor. The Auditor of the
99 Commonwealth shall certify the independent auditor's professional competence; certify that the
100 independent auditor has no material financial interest in any entity doing significant business
101 with the public charity; and that the independent auditor has not engaged in any related party
102 transactions within the three years preceding appointment. The Auditor of the Commonwealth
103 shall provide written confirmation to the Commission that these requirements have been
104 satisfied.

105 The independent auditor shall provide a written report to the Commission seven days prior to any
106 hearing conducted pursuant to this Section.

107 The Commission shall review and consider the independent auditor's report at the
108 waiver hearing. The public charity and members of the general public shall be permitted to
109 present additional evidence in support or opposition to such a waiver; all audit documents and
110 any additional evidence submitted at a waiver hearing shall be deemed public records subject to
111 section ten of chapter sixty-six of the general laws.

112 At the close of the waiver hearing, the Commission shall weigh all evidence presented,
113 the charitable purpose of the public charity, and the public interest of the Commonwealth.

114 Final determination as to whether a waiver shall be granted shall rest with the
115 Commission who shall make said determination in writing within thirty days of the waiver
116 hearing. Such a waiver shall be granted only if deemed in the public interest of the
117 Commonwealth. If a waiver is granted, it shall be valid only for a period of two years from the
118 date of the decision of the Secretary of the Commonwealth.

119 Section 32. Penalties

120 Any public charity found in violation of Section 30 of this chapter, and having failed to obtain a
121 waiver pursuant to Sections 31 of this chapter, shall lose its status as a public charity as it is
122 organized and operates under the general laws.