

**SENATE . . . . . No.**

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**The Commonwealth of Massachusetts**

PRESENTED BY:

**Mr. 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 Regulation and Oversight of Public Charities.**

PETITION OF:

NAME:

Mr. Montigny

DISTRICT/ADDRESS:

Second Bristol and Plymouth

# The Commonwealth of Massachusetts

In the Year Two Thousand and Nine

## AN ACT RELATIVE TO REGULATION AND OVERSIGHT OF 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 180 of the General Laws, as appearing in the 2006 Official  
2 Edition, is hereby amended by:

3  
4 (a) inserting after section 29 the following sections:-

5  
6 “Section 30. Executive Compensation Caps

7  
8 Any public charity with annual gross revenues in excess of \$1,000,000.00 are subject to the  
9 following provisions: (a) no officer, director, trustee or senior manager shall receive annual  
10 compensation in excess of \$500,000.00; (b) compensation, as defined by this Section, includes  
11 salary, bonus payments, incentive payments, deferred compensation, severance payments, below  
12 market rate loans, and the lease or rental of any vehicle.

13  
14 Section 31. Waiver Hearing

15  
16 Any public charity as defined in Section 30 of this chapter seeking to compensate an officer,  
17 director, trustee, or senior manager in excess of the executive compensation cap as defined in  
18 Section 30 of this chapter shall be entitled to a public hearing before the a commission comprised  
19 of the secretary of the commonwealth, inspector general and attorney general (“Commission”).

20  
21 Any public charity seeking said waiver shall comply with the following requirements (a) request  
22 a hearing in writing to the Commission indicating good cause for any deviation from the limits  
23 set forth in Section 30; (b) such hearing shall be conducted before the Commission within six  
24 months of receipt of a written request by a public charity; (c) the board of the public charity shall  
25 be responsible for the compensation of an independent auditor. The Auditor of the  
26 Commonwealth shall certify the independent auditor’s professional competence; certify that the

27 independent auditor has no material financial interest in any entity doing significant business  
28 with the public charity; and that the independent auditor has not engaged in any related party  
29 transactions within the three years preceding appointment. The Auditor of the Commonwealth  
30 shall provide written confirmation to the Commission that these requirements have been  
31 satisfied.

32

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

35

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

41

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

44

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

50 Section 32. Penalties

51

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

55 SECTION 2. Section 8A of chapter 12 of the General Laws, as appearing in the 2006 Official

56 Edition, is hereby amended by:

57 (a) striking out, in lines 1 and 2, the words "sections B to eight M" and inserting in  
58 place thereof the following words:- "sections eight B to eight Q".

59 (b) inserting a new paragraph at the end of the section:-

60 "Related party" shall have the same meaning as the term "disqualified person"  
61 under section 4958 of the Internal Revenue Code and the treasury regulations  
62 promulgated thereunder."

63 SECTION 3. Section 8E of chapter 12 of the General Laws, as appearing in the 2006 Official  
64 Edition, is hereby amended by:

65 (a) striking out the word “corporations” in the title and inserting in place thereof the  
66 following word:- “organizations”.

67 (b) striking out the phrase “filing of information” in the title and inserting in place  
68 thereof the following word:- “registration”.

69 (c) striking out, in line 21, the word “hundred” and inserting in place thereof the  
70 following word:- “thousand”.

71 SECTION 4. Section 8F of chapter 12 of the General Laws, as appearing in the 2006 Official  
72 Edition, is hereby amended by:

73 (a) striking out, in line 1, the word “every” and inserting in place thereof the  
74 following word:- “any”.

75 (b) inserting after the words “public charity”, in line 2, the following words:- “subject  
76 to the registration requirement of section eight E”.

77 (c) striking out, in line 5, the words “such financial” and inserting in place thereof the  
78 following words:- “the information required herein and such additional financial,  
79 governance,”.

80 (d) inserting after the words “covered by its report”, in line 14, the following words:-  
81 “or held more than five million dollars in net assets at the close of its fiscal year”.

82 (e) striking out, in line 18, the word “and” and inserting in place thereof the following  
83 words:- “(GAAP) and nonprofit financial”.

84 (f) inserting after the fourth sentence of the second paragraph, the following  
85 sentence:-

86 “For any non-audit services performed by the firm conducting the audit or review,  
87 the firm and its individual accountants and auditors shall adhere to the standards  
88 for auditor independence set forth in the latest revision of the Government  
89 Auditing Standards, issued by the Comptroller General of the United States (the  
90 Yellow Book).”

91 (g) inserting after the second paragraph the following paragraphs:-

92 “The annual reports for any public charity which received more than one hundred  
93 thousand dollars but not more than five hundred thousand dollars in gross support  
94 and revenue during the fiscal year covered by its report shall be signed by the  
95 chair, president or principal officer of the governing board and by the chief  
96 executive officer, executive director or the most senior employee in the public  
97 charity. Where there are no employees of the organization, the annual report shall  
98 be signed by the chair, president or principal officer of the governing board and  
99 by the treasurer or board member or trustee acting as chief financial officer of the  
100 public charity. The individuals who sign the annual report shall each verify under  
101 oath as to the board’s review and acceptance of such report.

102 The annual reports for any public charity which is required to submit audited  
103 financial statements and received more than five hundred thousand dollars in  
104 gross support and revenue during its fiscal year or held more than five million  
105 dollars in net assets at the close of its fiscal year shall be signed by the chair,  
106 president or principal officer of the governing board and by the chief executive  
107 officer, executive director or the most senior employee in the public charity.

108 Where an organization has no employees, the annual report shall be signed by the

109 chair, president, principal officer of the governing board and by the treasurer or  
110 board member or trustee acting as chief financial officer of the public charity.  
111 The individuals who sign the annual report shall each verify under oath as to the  
112 board's review and acceptance of such report and of the audit required pursuant to  
113 this section.

114 Nothing contained in this section shall be construed as creating a private right  
115 of action against any signing officer, board member, director, trustee or audit  
116 committee member based upon a certification made pursuant to this section,  
117 provided that this paragraph shall not preclude any private right of action which  
118 would exist regardless of such certification.”

119 (h) striking out the first sentence of the third paragraph.

120 (i) striking out the word “hundred”, in line 53, and inserting in place thereof the  
121 following word:- “thousand”.

122 (j) adding after the fifth paragraph the following new paragraph:-

123 “The director may, by regulation, establish fees for public charities that fail to  
124 file in a timely manner.”

125 SECTION 5. Chapter 12 of the General Laws, as appearing in the 2006 Official Edition, is  
126 hereby amended by:

127 (a) inserting after section eight N the following sections:-

128 **“Section 8O. Whistleblower complaints**

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

132           A public charity shall not retaliate against any employee of the public charity  
133 who has filed a complaint with the governing board, directors or trustees, the  
134 attorney general or any other government agency pertaining to the following: (a)  
135 dissipation of the charity's assets; (b) the mishandling or misuse of restricted  
136 funds; (c) related party transactions; (d) compliance with state or federal reporting  
137 requirements; (e) overriding or circumventing of the charity's internal controls; (f)  
138 private inurement; and (g) fraud.

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

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

150           Section 8P.    Audit committee policies and procedures

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

154           If a public charity is required to file an audit with its annual report pursuant to  
155 section eight F, the trustees or governing board shall appoint an audit committee  
156 of not fewer than three persons. The audit committee may include persons who  
157 are not members of the board so long as the majority of the audit committee is  
158 made up of members of the board, but the members of the audit committee shall  
159 not include any employees of the public charity. Members of the audit committee  
160 may not receive any compensation from the organization in excess of the standard  
161 compensation, if any, received by all trustees or members of the board in  
162 exchange for their service as trustees or as members of the board. No member of  
163 the audit committee shall have any material financial interest in any entity doing  
164 significant business with the public charity, nor have engaged in any related party  
165 transactions within the three years preceding appointment to the audit committee.  
166 The board may designate its finance committee or other permanent committee of  
167 the board to perform the audit committee function, so long as it is in compliance  
168 with all of the audit committee membership requirements of this paragraph. If a  
169 charitable corporation that is required to have an audit committee is under the  
170 control of another charitable corporation, the controlled organization's audit  
171 committee may be the audit committee of the controlling corporation, so long as  
172 that audit committee complies with all of the requirements of this section.

173           Subject to the supervision of the board, the audit committee, or other such  
174 committee functioning as the audit committee, shall be responsible for making  
175 recommendations to the board regarding: (a) the selection, retention and  
176 termination of an independent auditor; (b) the compensation of the auditor; (c)



177 measures to ensure that the internal controls are documented by management and  
178 evaluated as part of the audit; (d) the process by which the audit committee shall  
179 review the audit and the management letter, if any, with the auditor and work with  
180 the auditor and management of the organization to resolve or recommend  
181 resolution to the board of any issues of concern arising from the audit or the  
182 management letter; and (e) measures to ensure that any non-audit services  
183 provided by the auditing firm conform with the standards of independence  
184 required in section eight F. Prior to the board's consideration of and action on the  
185 independent auditor's report, the audit committee shall report to the board on the  
186 results of the audit.

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

188 In the administration and operation of any public charity, the following acts  
189 shall be prohibited: (a) engaging in any act that the Internal Revenue Service  
190 determines constitutes an "excess benefit transaction" under section 4958 of the  
191 Internal Revenue Code; and (b) engaging in any act that would constitute an  
192 "excess benefit transaction" under the standards of section 4958 of the Internal  
193 Revenue Code.

194 The documentation required by 26 C.F.R. section 53.4958-6(a)(3) shall be  
195 maintained for at least four years after the transaction was approved and shall be  
196 made available to the attorney general upon request of the attorney general.

197 These documents shall not constitute public records subject to section eight M or  
198 section ten of chapter sixty-six of the general laws.

199           If the attorney general determines that any contract, compensation  
200 arrangement or transaction is an excess benefit under this section or constitutes  
201 “self-dealing” under chapter sixty-eight A, section (1)(a), the attorney general  
202 may, in addition to any other remedies available under statutory or common law,  
203 bring an action in superior court to: (a) impose a fine equal to the value of what  
204 the Internal Revenue Code permits as a fine if the contract, compensation  
205 agreement or transaction was an Internal Revenue Code sanctioned transaction;  
206 (b) recover restitution from the related party; and/or (c) obtain any other  
207 appropriate legal or equitable relief in the public interest, including removal of  
208 trustees, directors or officers.

209           References to the Internal Revenue Code and the regulations promulgated  
210 thereunder in this section and in section eight A shall mean the United States  
211 Internal Revenue Code of 1986, as amended, and the regulations promulgated  
212 thereunder as such are in effect on the effective date of this section.

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

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

220 SECTION 5: Chapter 12 of the General Laws, as appearing in the 2006 Official Edition, is  
221 hereby amended by:

- 222 (a) striking out in section eight B, in line 4, the words “section eight to eight M,  
223 inclusive” and inserting in place thereof the following words:- “A section eight to  
224 eight Q, inclusive”.
- 225 (b) striking out in section eight G, in line 3, the words “sections eight to eight M,  
226 inclusive” and inserting in place thereof the following words:- “sections eight to  
227 eight Q, inclusive”.
- 228 (c) striking out in section eight J, in line 3, the words “sections eight to eight M,  
229 inclusive” and inserting in place thereof the following words:- “sections eight to  
230 eight Q, inclusive”.
- 231 (d) striking out in section eight M, in line 3, the words “sections eight to eight M,  
232 inclusive” and inserting in place thereof the following words:- “sections eight to  
233 eight Q, inclusive”.
- 234 (e) striking out in section 8N, in lines 2 and 3, the words “sections eight through eight  
235 M” and inserting in place thereof the following words:- “sections eight through eight Q”.