

SENATE No. 2457

The Commonwealth of Massachusetts

In the Year Two Thousand Ten

An Act Text of amendment (46) offered by Messrs. Montigny and Kennedy to the pending Senate Ways and Means amendment (Senate, No. 4) to the House Bill making appropriations for the fiscal year 2010 for the maintenance of the departments, boards, commissions, institutions and certain activities of the Commonwealth, for interest, sinking fund and serial bond requirements and for certain permanent improvements.

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___. Chapter 180 of the General Laws, as appearing in the 2008 Official
2 Edition, is hereby amended by:

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

4 “Section 30. Executive Compensation Caps

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

10 Section 31. Waiver Hearing

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

16 Any public charity seeking said waiver shall comply with the following requirements (a)
17 request a hearing in writing to the Commission indicating good cause for any deviation from the
18 limits set forth in Section 30; (b) such hearing shall be conducted before the Commission within
19 six months of receipt of a written request by a public charity; (c) the board of the public charity
20 shall be responsible for the compensation of an independent auditor. The Auditor of the
21 Commonwealth shall certify the independent auditor’s professional competence; certify that the
22 independent auditor has no material financial interest in any entity doing significant business
23 with the public charity; and that the independent auditor has not engaged in any related party
24 transactions within the three years preceding appointment. The Auditor of the Commonwealth
25 shall provide written confirmation to the Commission that these requirements have been
26 satisfied.

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

29 The Commission shall review and consider the independent auditor’s report at the waiver
30 hearing. The public charity and members of the general public shall be permitted to present
31 additional evidence in support or opposition to such a waiver; all audit documents and any

32 additional evidence submitted at a waiver hearing shall be deemed public records subject to
33 section ten of chapter sixty-six of the general laws.

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

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

41 Section 32. Penalties

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

45 SECTION _____. Section 8A of chapter 12 of the General Laws, as appearing in the 2008
46 Official Edition, is hereby amended by:

47 (a) striking out, in lines 1 and 2, the words “sections B to eight M” and inserting
48 in place thereof the following words:- “sections eight B to eight Q”.

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

50 “Related party” shall have the same meaning as the term “disqualified person”
51 under section 4958 of the Internal Revenue Code and the treasury regulations promulgated
52 thereunder.”

53 SECTION _____. Section 8E of chapter 12 of the General Laws, as appearing in the
54 2006 Official Edition, is hereby amended by:

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

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

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

61 SECTION _____. Section 8F of chapter 12 of the General Laws, as appearing in the
62 2008 Official Edition, is hereby amended by:

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

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

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

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

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

74 (f) inserting after the fourth sentence of the second paragraph, the following
75 sentence:-

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

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

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

90 The annual reports for any public charity which is required to submit audited
91 financial statements and received more than five hundred thousand dollars in gross support and
92 revenue during its fiscal year or held more than five million dollars in net assets at the close of its
93 fiscal year shall be signed by the chair, president or principal officer of the governing board and

94 by the chief executive officer, executive director or the most senior employee in the public
95 charity. Where an organization has no employees, the annual report shall be signed by the chair,
96 president, principal officer of the governing board and by the treasurer or board member or
97 trustee acting as chief financial officer of the public charity. The individuals who sign the annual
98 report shall each verify under oath as to the board’s review and acceptance of such report and of
99 the audit required pursuant to this section.

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

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

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

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

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

110 SECTION_____. Chapter 12 of the General Laws, as appearing in the 2008 Official
111 Edition, is hereby amended by:

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

113 Section 8O. Whistleblower complaints

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

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

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

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

133 Section 8P. Audit committee policies and procedures

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

137 If a public charity is required to file an audit with its annual report pursuant to section
138 eight F, the trustees or governing board shall appoint an audit committee of not fewer than three
139 persons. The audit committee may include persons who are not members of the board so long as
140 the majority of the audit committee is made up of members of the board, but the members of the
141 audit committee shall not include any employees of the public charity. Members of the audit
142 committee may not receive any compensation from the organization in excess of the standard
143 compensation, if any, received by all trustees or members of the board in exchange for their
144 service as trustees or as members of the board. No member of the audit committee shall have
145 any material financial interest in any entity doing significant business with the public charity, nor
146 have engaged in any related party transactions within the three years preceding appointment to
147 the audit committee. The board may designate its finance committee or other permanent
148 committee of the board to perform the audit committee function, so long as it is in compliance
149 with all of the audit committee membership requirements of this paragraph. If a charitable
150 corporation that is required to have an audit committee is under the control of another charitable
151 corporation, the controlled organization's audit committee may be the audit committee of the
152 controlling corporation, so long as that audit committee complies with all of the requirements of
153 this section.

154 Subject to the supervision of the board, the audit committee, or other such committee
155 functioning as the audit committee, shall be responsible for making recommendations to the
156 board regarding: (a) the selection, retention and termination of an independent auditor; (b) the

157 compensation of the auditor; (c) measures to ensure that the internal controls are documented by
158 management and evaluated as part of the audit; (d) the process by which the audit committee
159 shall review the audit and the management letter, if any, with the auditor and work with the
160 auditor and management of the organization to resolve or recommend resolution to the board of
161 any issues of concern arising from the audit or the management letter; and (e) measures to ensure
162 that any non-audit services provided by the auditing firm conform with the standards of
163 independence required in section eight F. Prior to the board's consideration of and action on the
164 independent auditor's report, the audit committee shall report to the board on the results of the
165 audit.

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

167 In the administration and operation of any public charity, the following acts shall be
168 prohibited: (a) engaging in any act that the Internal Revenue Service determines constitutes an
169 "excess benefit transaction" under section 4958 of the Internal Revenue Code; and (b) engaging
170 in any act that would constitute an "excess benefit transaction" under the standards of section
171 4958 of the Internal Revenue Code.

172 The documentation required by 26 C.F.R. section 53.4958-6(a)(3) shall be maintained for
173 at least four years after the transaction was approved and shall be made available to the attorney
174 general upon request of the attorney general. These documents shall not constitute public
175 records subject to section eight M or section ten of chapter sixty-six of the general laws.

176 If the attorney general determines that any contract, compensation arrangement or
177 transaction is an excess benefit under this section or constitutes "self-dealing" under chapter
178 sixty-eight A, section (1)(a), the attorney general may, in addition to any other remedies

179 available under statutory or common law, bring an action in superior court to: (a) impose a fine
180 equal to the value of what the Internal Revenue Code permits as a fine if the contract,
181 compensation agreement or transaction was an Internal Revenue Code sanctioned transaction;
182 (b) recover restitution from the related party; and/or (c) obtain any other appropriate legal or
183 equitable relief in the public interest, including removal of trustees, directors or officers.

184 References to the Internal Revenue Code and the regulations promulgated thereunder in
185 this section and in section eight A shall mean the United States Internal Revenue Code of 1986,
186 as amended, and the regulations promulgated thereunder as such are in effect on the effective
187 date of this section.

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

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

194 SECTION _____. Chapter 12 of the General Laws, as appearing in the 2008 Official
195 Edition, is hereby amended by:

196 (a) striking out in section eight B, in line 4, the words “section eight to eight M,
197 inclusive” and inserting in place thereof the following words:- “A section eight to eight Q,
198 inclusive”.

199 (b) striking out in section eight G, in line 3, the words “sections eight to eight M,
200 inclusive” and inserting in place thereof the following words:- “sections eight to eight Q,
201 inclusive”.

202 (c) striking out in section eight J, in line 3, the words “sections eight to eight M,
203 inclusive” and inserting in place thereof the following words:- “sections eight to eight Q,
204 inclusive”.

205 (d) striking out in section eight M, in line 3, the words “sections eight to eight
206 M, inclusive” and inserting in place thereof the following words:- “sections eight to eight Q,
207 inclusive”.

208 (e) striking out in section 8N, in lines 2 and 3, the words “sections eight through
209 eight M” and inserting in place thereof the following words:- “sections eight through eight Q”.