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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:

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

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

“Section 30. Executive Compensation Caps

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

Section 31. Waiver Hearing

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

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

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

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

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

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

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

Section 32. Penalties

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 8O. Whistleblower complaints

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

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

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

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

Section 8P. Audit committee policies and procedures

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

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

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

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

Section 8Q: Related party contracts, transactions and compensation

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

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

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

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

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

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

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

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

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

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

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

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

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