

# SENATE . . . . . No. 824

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## 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 adoption of the accompanying bill:

An Act relative to public charities.

PETITION OF:

NAME:

*Mark C. Montigny*

DISTRICT/ADDRESS:

# SENATE . . . . . No. 824

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By Mr. Montigny, a petition (accompanied by bill, Senate, No. 824) of Mark C. Montigny for legislation relative to public charities. The Judiciary.

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## The Commonwealth of Massachusetts

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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  
2 Edition, 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  
5 file an annual report pursuant to section eight F shall comply with the requirements of this  
6 section.

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

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

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

#### 23 Section 8P. Audit committee policies and procedures

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

27 If a public charity is required to file an audit with its annual report pursuant to section  
28 eight F, the trustees or governing board shall appoint an audit committee of not fewer than three  
29 persons. The audit committee may include persons who are not members of the board so long as  
30 the majority of the audit committee is made up of members of the board, but the members of the  
31 audit committee shall not include any employees of the public charity. Members of the audit  
32 committee may not receive any compensation from the organization in excess of the standard  
33 compensation, if any, received by all trustees or members of the board in exchange for their  
34 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

57 In the administration and operation of any public charity, the following acts shall be  
58 prohibited: (a) engaging in any act that the Internal Revenue Service determines constitutes an  
59 “excess benefit transaction” under section 4958 of the Internal Revenue Code; and (b) engaging  
60 in any act that would constitute an “excess benefit transaction” under the standards of section  
61 4958 of the Internal Revenue Code.

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

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

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

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

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

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

87 Section 30. Executive Compensation Caps

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

93 Section 31. Waiver Hearing

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

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

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

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

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

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

125                   Section 32. Penalties

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