

AN ACT TO PROMOTE THE FINANCIAL INTEGRITY OF PUBLIC CHARITIES

- SECTION 1: Definitions in Chapter 12 1
- SECTION 2: Certification of Financial Reports 6
- SECTION 3: Audit Committees; Procedures for Submission of Complaints and Concerns. 12
- SECTION 4: Related Party Contracts or Transactions; Compensation 16
- SECTION 5: Remedies for Violations 21
- SECTION 6: Consistency with Other Provisions 23

Be it enacted by the Senate and House of Representatives in General Court assembled, and by

the authority of the same, as follows:

SECTION 1: Definitions in Chapter 12

Section 8A of Chapter 12 of the General Laws, as appearing in the 1998 Official Edition, shall be amended by striking the existing text and inserting in place thereof:

“Section 8A. As used in this section and in sections 8 to 8Q, inclusive, the following words and phrases shall, unless a different meaning is plainly required by the context, have the following meanings:--

“compensation” includes: salary, deferred compensation, retirement and other benefits, personal use of housing, automobiles or other assets owned, leased or otherwise provided to the public charity, and any other economic benefits;

**Office of Massachusetts Attorney General Tom Reilly
An act to Promote the Financial Integrity of Public Charities: Draft 1.0**

“director” means: the director of public charities appointed pursuant to the provisions of section 8C.

“disclosure controls and procedures” means: controls and other procedures of a public charity that are designed to ensure that information required to be disclosed by the public charity pursuant to section 8F of this chapter is timely recorded, processed, summarized and reported. Disclosure controls and procedures include, without limitation, controls and procedures designed to ensure that information required to be disclosed by a public charity in the reports that it files or submits pursuant to section 8F of this chapter is accumulated and communicated to the public charity’s management, including its principal executive and principal financial officers, or persons performing similar functions, as appropriate to allow timely decisions regarding required disclosure.

“division” means: the division of public charities established under section

8B.

“internal control over financial reporting” means: a process designed by, or under the supervision of, the public charity’s principal executive and principal financial officers, or persons performing similar functions, and effected by the public charity’s board of directors and/or trustees, management, and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles and includes those policies and procedures that:

- (1) pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the public charity;
- (2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the public charity are being made only in accordance with authorizations of the management, directors and/or trustees of the public charity; and
- (3) provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the public charity’s assets that could have a material effect on the financial statements.

“related party” means:

- (a) An officer, director, or trustee (or an individual having powers or responsibilities similar to those of an officer, director, or trustee) of the public charity; or
- (b) An employee of the public charity who has management responsibilities for achieving the objectives of the public charity and who is authorized to establish institution-wide policies or make institution-wide decisions by which those objectives are to be achieved, including, without limitation, the chief executive officer, chief operating officer, and vice presidents in charge of principal functions with institution-wide

responsibilities; or

(c) A spouse (other than a spouse who is legally divorced from the individual or who is residing apart under a decree of separate maintenance), a child (including legally adopted children), grandchild, sibling, parent, and grandparent of individuals described in (a) or (b) above; or

(d) Any entity (whether nonprofit or for-profit) (1) which is directly or indirectly owned or controlled by an individual, or individuals, described at (a), (b) or (c) above; or (2) of which an individual identified at (c) above is an officer or director, trustee, or partner. For this purpose, “owned” means an individual, or individuals, described at (a), (b) or (c) above, who alone or collectively, directly or indirectly hold more than 35% of voting membership rights or voting stock in an entity other than the public charity.

“Controlled” means an individual or individuals described at (a), (b) or (c) above, who alone or collectively comprise over 35% of the directors, trustees, or other members of the governing body of an entity other than the public charity.”

SECTION 2: Certification of Financial Reports

Section 8F of Chapter 12 of the General Laws, as appearing in the 1998 Official Edition, shall be amended by:

- (1) Numbering the individual paragraphs in existing section 8F as follows: The first paragraph, beginning with “The trustee”, shall be numbered paragraph “(1)”, the second paragraph, beginning with “A public charity”, shall be numbered paragraph “(2)”, the third paragraph, which shall be shortened to consist solely of the sentence beginning “The annual report”, shall be numbered paragraph “(3)”, the remaining sentences in the existing third paragraph, beginning with “For each report,” shall be

**Office of Massachusetts Attorney General Tom Reilly
An act to Promote the Financial Integrity of Public Charities: Draft 1.0**

numbered paragraph “(5)”, the existing fourth paragraph, beginning with “This section”, shall be numbered paragraph “(6)”, and the existing fifth paragraph, beginning with “Any public charity”, shall be numbered paragraph “(7)”.

- (2) Striking, in paragraph (2), the words: “two hundred and fifty thousand dollars” and replacing them with: “seven hundred and fifty thousand dollars”;
- (3) Striking the entirety of the third paragraph (which, as a result of subsection (a) above now consists of one sentence beginning with “The annual reports”) and inserting in place thereof:

“(3) The annual reports and any other documents prescribed by the Director shall be signed by the president or other authorized officer or trustee of the public charity who shall certify, under oath, the accuracy of the report and documents and, in addition, shall certify that, based upon his or her knowledge, the financial information included in the report and documents fairly represents in all material respects the financial condition and results of operations of the charity as of, and for, the periods presented in the report and documents.”

- (4) Inserting, as a new fourth paragraph, the following:

“(4) The president or the chief executive officer, and the treasurer or the chief financial officer, of any public charity subject to Chapter 12, Section 8E of the General Laws which receives or accrues in any fiscal year gross revenue and support of at least seven hundred and fifty thousand dollars, shall each sign the annual reports and any other documents prescribed by the Director, and shall thereby certify, under oath, the

following:

- (4) the signing officer has reviewed the report and documents, and based on the officer's knowledge: (i) the report and documents do not contain any untrue statements of material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by the report and documents; and (ii) the financial information included in the report and documents fairly presents in all material respects the financial condition and results of operations of the public charity as of, and for, the periods presented in the report and documents;
- (5) the signing officer and other signing officer(s) of the public charity are responsible for establishing and maintaining disclosure controls and procedures (as defined in section 8A of this chapter) and internal control over financial reporting (as defined in section 8A of this chapter) for the public charity and have:
 - (1) designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under the supervision of the signing officer(s), to ensure that material information relating to the public charity is made known to the signing officer(s) by others within the public charity;
 - (2) designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under the supervision of the signing officer(s), to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
 - (3) evaluated the effectiveness of the public charity's disclosure controls and procedures for the period covered by the report and documents and presented in the report and documents the conclusion of the signing officer(s) about the effectiveness of the disclosure controls and procedures, based on such evaluation; and
 - (4) disclosed in the report and documents any change in the public charity's internal control over financial reporting that occurred during the periods

**Office of Massachusetts Attorney General Tom Reilly
An act to Promote the Financial Integrity of Public Charities: Draft 1.0**

covered by the report and documents that has materially affected, or is reasonably likely to materially affect, the public charity's internal control over financial reporting; and

- (6) the signing officer and other signing officer(s) have disclosed, based on the most recent evaluation made by the signing officer(s) of internal control over financial reporting, to the public charity's auditors and the audit committee of the public charity's board of directors (or persons performing the equivalent functions):
 - (1) all significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the public charity's ability to record, process, summarize and report financial information; and
 - (2) any fraud, whether or not material, that involves a trustee or a member of the board of directors or management or other employee, including those who have a significant role in the public charity's internal control over financial reporting.”

- (5) Adding, as a new eighth paragraph, the following:

“(8) Nothing contained in this section shall be construed as creating a private right of action against any signing officer, director or trustee 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.”

SECTION 3: Audit Committees; Procedures for Submission of Complaints and Concerns

Chapter 12 of the General Laws, as appearing in the 1998 Official Edition, shall be amended by adding the following new Section 80:

“Section 80: Establishment of audit committees; role of audit committees in

overseeing auditors; procedures for submission of complaints and concerns

(1) In the case of any public charity which receives or accrues in any fiscal year gross revenue and support of at least seven hundred and fifty thousand dollars, the trustees or board of directors, by resolution adopted by a majority of the trustees or the entire board, shall designate from among its members an audit committee consisting of three or more trustees or directors.

(2) The audit committee shall be directly responsible for the appointment, compensation, and oversight of the work of any independent certified public accountant or independent certified public accounting firm employed by that public charity (including resolution of disagreements between management and the auditor regarding financial reporting) for the purpose of preparing or issuing an audit report or related work, and each such independent certified public accountant or independent certified public accounting firm shall report directly to the audit committee and to the entire board.

(3) Each member of the audit committee shall be a member of the trustees or the board of directors of the public charity, and shall not, other than in his or her capacity as a member of the audit committee, the trustees, the board of directors, or any other board

committee: (i) accept any consulting fee, advisory fee, or other compensation or other benefits from the public charity; or (ii) have participated, at any point in the past, in any related party contracts or transactions within the meaning of section 8P.

(4) Each audit committee shall establish procedures for: (i) the receipt, retention, and treatment of complaints received by the public charity regarding accounting, internal control over financial reporting, auditing matters and other financial matters; and (ii) the confidential, anonymous submission, by employees, officers, directors and/or trustees of the public charity, of concerns regarding illegal or improper accounting, internal control over financial reporting, auditing matters and other financial matters.

(5) Each audit committee shall: (i) forward to the attorney general, upon receipt, copies of all written complaints and concerns, and transcriptions of any oral complaints and concerns, received by the public charity pursuant to the procedures established under paragraph (4) above; and (ii) on at least an annual basis, or upon demand by the attorney general, forward to the attorney general a description of the measures undertaken by the public charity to address each such complaint and concern and to prevent their reoccurrence. The forwarded documents described in this paragraph shall not constitute public records subject to Section 10 of Chapter 66 of the General Laws.

(6) No public charity may remove, discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee, officer, director or trustee because the employee, officer, director or trustee submitted a concern or complaint: (i) to the audit committee pursuant to the procedures established under paragraph (4) above; or (ii) to the attorney general or any other governmental authority. In order to fall within the protections of this paragraph, an employee, officer, director or trustee who submits a complaint or concern to the public charity or to the attorney general or any other governmental authority must submit his or her complaint or concern in good faith and in the reasonable belief that the public charity had engaged or was engaging in illegal or improper conduct.”

SECTION 4: Related Party Contracts or Transactions; Compensation

Chapter 12 of the General Laws, as appearing in the 1998 Official Edition, shall be amended by adding the following new Section 8P:

“Section 8P: Related party contracts or transactions; compensation

(1) A contract or transaction, or compensation approved in accordance with paragraph (5) or (6), entered into, directly or indirectly, between a public charity and a related party as defined in section 8A of this chapter, may be voided, modified or subjected to the other remedies made available in paragraph (3) in an action filed by the attorney general unless the public charity affirmatively establishes in such action that the contract, transaction or compensation was fair and reasonable as to the public charity at the time it was entered; provided, however, that acts of self-dealing in connection with a private foundation, as such acts are defined in Internal Revenue Code § 4941(d) and its implementing regulations, are per se unreasonable; provided further, that no other contract, transaction or compensation other than an act of self-dealing subject to Internal Revenue Code § 4941(d), shall be either void or voidable solely by reason of the fact that the contract, transaction or compensation is between the public charity and a related party or because the officer, director or trustee to whom the related party is related was present at the meeting of the board or a committee thereof, which authorized such contract, transaction or compensation, or because the vote of any such director or officer was counted in authorizing such contract, transaction or compensation.

(2) A related party contract, transaction or compensation within the meaning of paragraph (1), other than an act of self-dealing in connection with a private foundation, as such acts are defined in Internal Revenue Code § 4941(d) and its implementing regulations, shall be presumed to be fair and reasonable to the public charity if all of the following conditions are satisfied: (a) the contract, transaction or compensation was approved in advance by the applicable board or committee by a two-thirds vote of all members of such board and committee entitled to vote on such contract, transaction or compensation without counting the vote or votes of the officer, director or trustee related to the related party; and (b) the material facts as to such contract, transaction or compensation, and any compensation paid by an entity which is a “related party”, as defined in section 8A of this chapter, for services related or substantially similar to the services performed on behalf of the public charity, and such trustee’s, director’s or officer’s interest therein were disclosed in good faith or otherwise known to all of the board or committee members entitled to vote on the contract, transaction or compensation; (c) the board or committee obtained and relied upon appropriate data as to comparability, prior to approving the contract, transaction or compensation, and provided such data to the members entitled to vote thereon; and (d) the board or committee adequately documented the basis for the approval of the contract, transaction or

compensation at the time of such approval, which documentation included: (i) the terms of the contract, transaction or compensation, that was approved and the date it was approved; (ii) the members of the board or committee who were present during discussion of the contract, transaction or compensation that was approved and those who voted on it; (iii) the comparability data obtained and relied upon by the board or committee and a description of how the data was obtained; and (iv) any actions taken by the trustee, director or officer related to the related party with respect to consideration of the contract, transaction or compensation.

(3) Whenever, in an action filed by the attorney general: (a) a public charity fails to establish the conditions set forth under paragraph (2) and otherwise fails to affirmatively establish that any related party contract, transaction or compensation was fair and reasonable under paragraph (1); or (b) the attorney general rebuts any presumption established under paragraph (2) by affirmatively establishing that any related party contract, transaction or compensation was not fair or reasonable, the attorney general may: (i) void or modify the contract, transaction or compensation, unless such voidance or modification would place the public charity in a position worse than if the contract, transaction or compensation were not voided or modified; (ii) seek to recover restitution from the related party, the trustee, director or officer related to the related party and/or

the approving board or committee; and/or (iii) subject the trustees, directors or officers to all remedies as may be provided by law, including removal or reassignment of certain trustees, directors or officers.

(4) The certificate of incorporation or the by-laws of a charitable corporation may contain additional restrictions on contracts, transactions or compensation between a public charity and its directors or officers or other persons and may provide that contracts, transactions or compensation in violation of such restrictions shall be void or voidable.

(5) Compensation of officers, trustees or directors for serving in their capacity as officers, trustees or on the board of directors or any committee shall be fixed by the affirmative vote of a majority of the trustees or the entire board of directors, although a charitable corporation can require a vote of greater than a majority of the board in its certificate of incorporation or by-laws, and such compensation shall be in an amount that is fair and reasonable.

(6) Compensation of officers, trustees and directors in any capacity (other than for serving as officers, trustees, or on the board of directors or any committee) for service rendered to the public charity, including for services rendered in the person's capacity as

a trustee, director or officer of another corporation, firm, association or other entity, shall be fixed by the trustees or board, or by a committee of the trustees or board authorized to vote thereon, that is comprised solely of trustees or directors who are not compensated by the public charity other than in their capacity as trustees or directors.”

SECTION 5: Remedies for Violations

- (a) Chapter 12 of the General Laws, as appearing in the 1998 Official Edition, shall be amended by adding the following new Section 8Q:

“Section 8Q:

Notwithstanding, and in addition to, any other remedy provided under sections 8 to 8P inclusive or otherwise available under law, whenever the attorney general has reason to believe that a public charity, or a director, trustee, officer or employee of a public charity, has violated or is violating any of the provisions set forth in sections 8 through 8P inclusive, or has made, executed, filed or certified a statement that is false in any material representation, the attorney general may bring an action in superior court against the public charity, directors, trustees, officers, and/or employees, as appropriate, seeking, as appropriate, any of the following remedies: (i) an order compelling compliance with any provision in sections 8 through 8P inclusive; (ii) a civil penalty for willful violation of any provision of sections 8O and 8P in the amount of five hundred dollars per violation; (iii) the removal or reassignment of any director, trustee or officer; (iv) a prohibition upon the transaction of any business in the Commonwealth by the public charity; (v) the dissolution of the public charity; and/or (vi) any other appropriate relief that would be in the public interest. The foregoing in no way precludes the attorney general from seeking other appropriate equitable relief. In addition, whenever the alleged violation concerns the public charity’s alleged removal, discharge, demotion, suspension, threat, harassment, or discrimination against an employee, officer, director or trustee for submitting a complaint or concern in violation of section 8O (6), the attorney general, in addition to the other remedies set forth in this section, may seek: (i) the reinstatement of the employee, officer, director or trustee, (ii) compensation for the employee, officer,

director or trustee; (iii) back pay for the employee, officer, director or trustee; and/or (iv) any appropriate orders prohibiting the reoccurrence of the unlawful conduct.”

SECTION 6: Consistency with Other Provisions

(a) Section 8B of Chapter 12 of the General Laws, as appearing in the 1998 Official Edition, shall be amended by striking the words “section eight to eight M, inclusive” and inserting in place thereof “section 8 to 8Q, inclusive”.

(b) Section 8G of Chapter 12 of the General Laws, as appearing in the 1998 Official Edition, shall be amended by striking the words “section eight to eight M, inclusive” and inserting in place thereof “section 8 to 8Q, inclusive”.

(c) Section 8M of Chapter 12 of the General Laws, as appearing in the 1998 Official Edition, shall be amended by striking the words “section eight to eight M, inclusive” and inserting in place thereof “section 8 to 8Q, inclusive”.

(d) Section 8N of Chapter 12 of the General Laws, as appearing in the 1998 Official Edition, shall be amended by striking the words “section eight through eight M” and inserting in place

thereof “section 8 through 8Q”.