

SENATE NO. 1054

AN ACT TO PROTECT CORPORATE WHISTLEBLOWERS AND STATE PENSIONS

*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 149 of the General Laws is hereby amended by inserting after
2 section 159B the following section: Section 159C. It shall be unlawful for any employer that is
3 a publicly traded corporation, in connection with an employee benefit plan or pension account
4 to which employees may contribute, to prevent or restrict an employee, benefit plan, or pension
5 account from selling or otherwise divesting itself of the securities of the employer. For the
6 purposes of this section, an "employee benefit plan" shall include, a profit-sharing plan, a stock
7 bonus plan, an employee stock ownership plan in a publicly traded company, and a money
8 purchase pension plan established before the effective date of the Employee Retirement
9 Income Security Act of 1974. For the purposes of this section, the word "employer" shall
10 include the employing organization and its majority-owned subsidiaries. For the purposes of
11 this section, the word "employee" shall include an employee, independent contractor and
12 consultant but shall not include an officer, director or trustee of the employer.

13 SECTION 2. Said chapter 149 is hereby further amended by striking out section 185,
14 as appearing in the 2000 Official Edition, and inserting in place thereof the following section:-
15 Section 185. (a) As used in this section, the following words shall have the following
16 meanings:- "Employee", any individual who performs services for and under the control and
17 direction of an employer for wages or other remuneration. For purposes of this section, the
18 word "employee" shall also include any individual who, pursuant to a contract with an
19 employer, performs services which are substantially controlled and directed by the employer.
20 "Employer", any individual, partnership, association, corporation, firm or any person or group
21 of persons that hires or otherwise contracts for the services of employees, and the
22 commonwealth and its agencies or political subdivisions, including, but not limited to cities,
23 towns, counties and regional school districts or any authority, commission, board or
24 instrumentality thereof; and any person or group of persons acting directly or indirectly on
25 behalf of or in the interest of any employer with the employer's consent. "Public body", (i) the
26 United States Congress, any state legislature, including the general court or any popularly
27 elected local government body or any member or employee thereof; (ii) any federal, state or
28 local judiciary, or any member or employee thereof; or any grand or petit jury; (iii) any federal,
29 state or local regulatory, administrative or public agency or authority, or instrumentality
30 thereof; (iv) any federal, state or local law enforcement agency, prosecutorial office, or police
31 or peace officer; or (vi) any division, board, bureau, office, committee or commission of any of
32 the public bodies described in this subsection. "Supervisor", any individual to whom an
33 employer has given the authority to direct and control the work performance of the affected
34 employee, who has authority to take corrective action regarding the violation of the law, rule,
35 regulation or activity, policy or practice of which the employee complains, or who has been

36 designated by the employer on the notice required under subsection (h). "Retaliatory action",
37 the discharge, suspension or demotion of an employee or other adverse action taken against an
38 employee affecting the terms and conditions of employment or of the contract under which the
39 employee provides services to the employer. (b) An employer shall not take any retaliatory
40 action against an employee because the employee does any of the following: (1) Discloses or
41 threatens to disclose to a supervisor or to a public body an activity, policy or practice of the
42 employer, or of another employer with whom the employee's employer has a business
43 relationship, that the employee reasonably believes is in violation of a law or a rule or
44 regulation promulgated pursuant to law, or activity, policy or practice which the employee
45 reasonably believes defrauds the public or poses a risk to public health, safety or the
46 environment; provided, that, for purposes of this section, public health and safety shall include
47 the health and safety of an employee; or (2) Provides information to, or testifies before, any
48 public body conducting an investigation, hearing or inquiry into any violation of law, or a rule
49 or regulation promulgated pursuant to law, or activity, policy or practice which the employee
50 reasonably believes defrauds the public or poses a risk to public health, safety or the
51 environment by the employer, or by another employer with whom the employee's employer has
52 a business relationship; or (3) Objects to, or refuses to participate in any activity, policy or
53 practice of the employer, or of another employer with whom the employee's employer has a
54 business relationship, which the employee reasonably believes is in violation of a law, or a rule
55 or regulation promulgated pursuant to law, or which the employee reasonably believes
56 defrauds the public or poses a risk to public health, safety or the environment. (c) (1) Except as
57 provided in paragraph (2) of this subsection, the protection against retaliatory action provided
58 by paragraph (1) of subsection (b) shall not apply to an employee who makes a disclosure to a

59 public body unless the employee has brought the activity, policy or practice in violation of a
60 law, or a rule or regulation promulgated pursuant to law, or activity, policy or practice which
61 the employee reasonably believes defrauds the public or poses a risk to public health, safety or
62 the environment, to the attention of a supervisor of the employee by written notice and has
63 afforded the employer a reasonable opportunity to correct the activity, policy or practice. (2)
64 An employee is not required to comply with paragraph (1) if he: (i) is reasonably certain that
65 the activity, policy or practice is known to one or more supervisors of the employer and the
66 situation is emergency in nature; (ii) reasonably fears physical harm as a result of the
67 disclosure provided; or (iii) makes the disclosure to a public body as defined in clause (ii) or
68 (iv) of the definition for "Public body" in subsection (a) for the purpose of providing evidence
69 of what the employee reasonably believes to be a crime. (d) Any employee or former employee
70 aggrieved by a violation of this section may, within 2 years, institute a civil action in the
71 superior court. Any party to the action shall be entitled to claim a jury trial. All remedies
72 available in common law tort actions shall be available to prevailing plaintiffs. These remedies
73 are in addition to any legal or equitable relief provided herein. The court may: (1) issue
74 temporary restraining orders or preliminary or permanent injunctions to restrain continued
75 violation of this section; (2) reinstate the employee to the same position held before the
76 retaliatory action, or to an equivalent position; (3) reinstate full fringe benefits and seniority
77 rights to the employee; (4) compensate the employee for 3 times the lost wages, benefits and
78 other remuneration, and interest thereon; and (5) order payment by the employer of reasonable
79 costs and attorneys' fees. (e) (1) Except as provided in paragraph (2), in any action brought by
80 an employee under subsection (d), if the court finds the action was without basis in law or in
81 fact, the court may award reasonable attorneys' fees and court costs to the employer. (2) An

82 employee shall not be assessed attorneys' fees under paragraph (1) if after exercising
83 reasonable and diligent efforts after filing a suit the employee moves to dismiss the action
84 against the employer or files a notice agreeing to a voluntary dismissal within a reasonable
85 time after determining that the employer would not be found liable for damages. (f) Whenever
86 he believes it to be in the public interest, the attorney general may bring an action in the name
87 of the commonwealth against any employer violating subsection (b) or (h). The action may be
88 brought in the superior court, and any party thereto may claim trial by jury. In the action, the
89 court may provide the remedies set forth in subsection (d) and may, in addition, require the
90 employer to pay to the commonwealth a civil penalty of not more than \$25,000 for each such
91 violation, as well as the cost of reasonable attorneys' fees and expert witness fees. (g) Nothing
92 in this section shall be deemed to diminish the rights, or remedies of any employee under any
93 other federal or state law or regulation, or under any collective bargaining agreement or
94 employment contract. (h) An employer shall conspicuously display notices reasonably
95 designed to inform its employees of their protection and obligations under this section, and use
96 other appropriate means to keep its employees so informed. Each notice posted pursuant to this
97 subsection shall include the name of the person or persons the employer has designated to
98 receive written notifications pursuant to subsection (c). Any employer who violates this
99 subsection shall be punished by a fine of not less than \$250 nor more than \$2,500. This
100 subsection shall be enforced by the attorney general.

101 SECTION 3. Section 63 of chapter 277 of the General Laws, as so appearing, is
102 hereby amended by adding the following paragraph:- An indictment for an offense set forth in
103 chapter 110A or subsection (h) of section 185 of chapter 149 or for conspiracy to commit the

104 offense or as an accessory thereto or any one or more of them may be found and filed within 10
105 years of the date of commission of the offense.

106 SECTION 4. The pension reserves investment management board established by
107 subdivision (2A) of section 23 of chapter 32 of the General Laws and referred to as PRIM shall
108 develop investment guidelines within 3 months of the effective date of this act. These
109 guidelines shall serve as a code of conduct for money management agencies doing business
110 with the PRIM, create a general policy for investments and lay out a strategy to use the proxy
111 voting strength of the Pension Reserves Investment Trust Fund established under subdivision
112 (8) of section 22 of said chapter 32 and referred to as PRIT to protect the integrity of
113 investments and ensure at a minimum that: (1) Money management firms that manage funds
114 for the PRIM shall disclose periodically any client relationship, including management of
115 corporate 401(k) plans, where the money management firms could invest state or pension fund
116 monies in the securities of the client. (2) Money management firms shall disclose annually the
117 manner in which their portfolio managers and research analysts are compensated, including but
118 not limited to any compensation resulting from the solicitation or acquisition of new clients or
119 the retention of existing clients. (3) Money management firms affiliated with banks, investment
120 banks, insurance companies or other financial services corporations shall adopt safeguards to
121 ensure that client relationships of any affiliate company do not influence investment decisions
122 of the money management firm. (4) In deciding whether to invest pension fund monies in a
123 company, or to retain or augment an existing investment of pension fund monies in a company,
124 money management firms first shall consider the corporate governance policies and practices
125 of the subject company. The consideration shall include, but not be limited to, whether the
126 board of directors has sufficient independence to act in the best interests of shareholders, and

127 whether the company's outside auditors are prevented from providing consulting or other non-
128 audit services to the company. (5) Develop a plan to use the proxy voting strength of PRIT to
129 ensure that votes are cast to require companies to create independent boards of directors,
130 independent audit committees and compensation committees and generally promote corporate
131 responsibility. (b) By December 31, 2003, the PRIM, shall disinvest in companies that have
132 failed to develop and implement policies prohibiting auditing firms from having consulting
133 contracts with the company being audited or that have failed to create audit and compensation
134 committees composed of independent board members; but the PRIM shall not be required to
135 disinvest by the date under this subparagraph if the PRIM determines that disinvestment would
136 cause significant adverse impact to the PRIT. Nothing in this section shall require
137 disinvestment in an index fund.

138 SECTION 5. The public employee retirement administration commission established
139 by section 4A of chapter 7 of the General Laws shall develop investment guidelines within 3
140 months of the effective date of this act. These guidelines shall serve as a code of conduct for
141 money management agencies managing funds for a public retirement board, create a general
142 policy for investments and lay out a strategy to use the authority of the commission to protect
143 the integrity of investments of retirement boards and ensure at a minimum that: (1) Money
144 management firms that manage funds for retirement boards shall disclose periodically any
145 client relationship, including management of corporate 401(k) plans, where the money
146 management firms could invest state or pension fund monies in the securities of the client. (2)
147 Money management firms shall disclose annually the manner in which their portfolio managers
148 and research analysts are compensated, including but not limited to any compensation resulting
149 from the solicitation or acquisition of new clients or the retention of existing clients. (3) Money

150 management firms affiliated with banks, investment banks, insurance companies or other
151 financial services corporations shall adopt safeguards to ensure that client relationships of any
152 affiliate company do not influence investment decisions of the money management firm. (4) In
153 deciding whether to invest pension fund monies in a company, or to retain or augment an
154 existing investment of pension fund monies in a company, money management firms first shall
155 consider the corporate governance policies and practices of the subject company. The
156 consideration shall include, but not be limited to, whether the board of directors has sufficient
157 independence to act in the best interests of shareholders, and whether the company's outside
158 auditors are prevented from providing consulting or other non-audit services to the company.
159 (5) Develop a plan to use the authority of the commission to ensure that companies in which
160 retirement boards are investing will create independent boards of directors, independent audit
161 committees and compensation committees and generally promote corporate responsibility. (b)
162 By December 31, 2003, the public employee retirement administration commission, within its
163 authority to do so, shall require retirement boards to disinvest in companies that have failed to
164 develop and implement policies prohibiting auditing firms from having consulting contracts
165 with the company being audited; or that have failed to create audit and compensation
166 committees composed of independent board members; but the commission shall not require
167 retirement boards to disinvest by the date under this subparagraph if the commission
168 determines that disinvestment would cause significant adverse impact to a pension fund.
169 Nothing in this section shall require disinvestment in an index fund.

170 SECTION 6. Section 23 of chapter 32 of the General Laws, as so appearing, is hereby
171 amended by striking out, in line 378, the word "and".

172 SECTION 7. Section 23 of said chapter 32, as so appearing, is hereby further amended
173 by inserting after the word "engaged", in line 380, the following words:- and no funds shall be
174 invested in a publicly held corporation which was formerly incorporated in the United States
175 and which after the year 1998 has incorporated in a foreign country, allowing it to avoid taxes
176 imposed by the United States or a state thereof, referred to in this section as an "expatriate
177 corporation". No pension funds shall remain invested in the stocks, securities or other
178 obligations of an expatriate corporation after January 1, 2005 unless the disinvestment of the
179 stocks, securities or other obligations is determined by the PRIM to be adverse to a pension
180 fund. Nothing in this section shall require disinvestment in an index fund.

181 To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in the
182 General Court assembled.

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184 The undersigned, citizen of _____, respectfully petitions for the passage
185 of the accompanying bill and for legislation.

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190 TO PROTECT CORPORATE WHISTLEBLOWERS AND STATE PENSIONS

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Gale Candaras(GDC0)
Bruce Tarr(BET0)

First Hampden and Hampshire
First Essex and Middlesex

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