

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:*

SECTION 1. Chapter 149 of the General Laws is hereby amended by inserting after section 159B the following section: Section 159C. It shall be unlawful for any employer that is a publicly traded corporation, in connection with an employee benefit plan or pension account to which employees may contribute, to prevent or restrict an employee, benefit plan, or pension account from selling or otherwise divesting itself of the securities of the employer. For the purposes of this section, an "employee benefit plan" shall include, a profit-sharing plan, a stock bonus plan, an employee stock ownership plan in a publicly traded company, and a money purchase pension plan established before the effective date of the Employee Retirement Income Security Act of 1974. For the purposes of this section, the word "employer" shall include the employing organization and its majority-owned subsidiaries. For the purposes of this section, the word "employee" shall include an employee, independent contractor and consultant but shall not include an officer, director or trustee of the employer.

SECTION 2. Said chapter 149 is hereby further amended by striking out section 185, as appearing in the 2000 Official Edition, and inserting in place thereof the following section:-

Section 185. (a) As used in this section, the following words shall have the following meanings:- "Employee", any individual who performs services for and under the control and direction of an employer for wages or other remuneration. For purposes of this section, the word "employee" shall also include any individual who, pursuant to a contract with an employer, performs services which are substantially controlled and directed by the employer. "Employer", any individual, partnership, association, corporation, firm or any person or group of persons that hires or otherwise contracts for the services of employees, and the commonwealth and its agencies or political subdivisions, including, but not limited to cities, towns, counties and regional school districts or any authority, commission, board or instrumentality thereof; and any person or group of persons acting directly or indirectly on behalf of or in the interest of any employer with the employer's consent. "Public body", (i) the United States Congress, any state legislature, including the general court or any popularly elected local government body or any member or employee thereof; (ii) any federal, state or local judiciary, or any member or employee thereof; or any grand or petit jury; (iii) any federal, state or local regulatory, administrative or public agency or authority, or instrumentality thereof; (iv) any federal, state or local law enforcement agency, prosecutorial office, or police or peace officer; or (vi) any division, board, bureau, office, committee or commission of any of the public bodies described in this subsection. "Supervisor", any individual to whom an employer has given the authority to direct and control the work performance of the affected employee, who has authority to take corrective action regarding the violation of the law, rule, regulation or activity, policy or practice of which the employee complains, or who has been designated by the employer on the notice required under subsection (h). "Retaliatory action", the discharge, suspension or demotion of an employee or other adverse action taken against an

employee affecting the terms and conditions of employment or of the contract under which the employee provides services to the employer. (b) An employer shall not take any retaliatory action against an employee because the employee does any of the following: (1) Discloses or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer, or of another employer with whom the employee's employer has a business relationship, that the employee reasonably believes is in violation of a law or a rule or regulation promulgated pursuant to law, or activity, policy or practice which the employee reasonably believes defrauds the public or poses a risk to public health, safety or the environment; provided, that, for purposes of this section, public health and safety shall include the health and safety of an employee; or (2) Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law, or activity, policy or practice which the employee reasonably believes defrauds the public or poses a risk to public health, safety or the environment by the employer, or by another employer with whom the employee's employer has a business relationship; or (3) Objects to, or refuses to participate in any activity, policy or practice of the employer, or of another employer with whom the employee's employer has a business relationship, which the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law, or which the employee reasonably believes defrauds the public or poses a risk to public health, safety or the environment. (c) (1) Except as provided in paragraph (2) of this subsection, the protection against retaliatory action provided by paragraph (1) of subsection (b) shall not apply to an employee who makes a disclosure to a public body unless the employee has brought the activity, policy or practice in violation of a law, or a rule or regulation promulgated pursuant to law, or activity, policy or practice which

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

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

SECTION 3. Section 63 of chapter 277 of the General Laws, as so appearing, is hereby amended by adding the following paragraph:- An indictment for an offense set forth in chapter 110A or subsection (h) of section 185 of chapter 149 or for conspiracy to commit the offense or as an accessory thereto or any one or more of them may be found and filed within 10 years of the date of commission of the offense.

SECTION 4. The pension reserves investment management board established by subdivision (2A) of section 23 of chapter 32 of the General Laws and referred to as PRIM shall develop investment guidelines within 3 months of the effective date of this act. These guidelines shall serve as a code of conduct for money management agencies doing business with the PRIM, create a general policy for investments and lay out a strategy to use the proxy voting strength of the Pension Reserves Investment Trust Fund established under subdivision (8) of section 22 of said chapter 32 and referred to as PRIT to protect the integrity of investments and ensure at a minimum that: (1) Money management firms that manage funds for the PRIM shall disclose periodically any client relationship, including management of corporate 401(k) plans, where the money management firms could invest state or pension fund monies in the securities of the client. (2) Money management firms shall disclose annually the manner in which their portfolio managers and research analysts are compensated, including but not limited to any compensation resulting from the solicitation or acquisition of new clients or the retention of existing clients. (3) Money management firms affiliated with banks, investment banks, insurance companies or other financial services corporations shall adopt safeguards to ensure that client relationships of any affiliate company do not influence investment decisions of the money management firm. (4) In deciding whether to invest pension fund monies in a company, or to retain or augment an existing investment of pension fund monies in a company, money management firms first shall consider the corporate governance policies and practices of the subject company. The consideration shall include, but not be limited to, whether the board of directors has sufficient independence to act in the best interests of shareholders, and whether the company's outside auditors are prevented from providing consulting or other non-audit services to the company. (5) Develop a plan to use the proxy voting strength of PRIT to

ensure that votes are cast to require companies to create independent boards of directors, independent audit committees and compensation committees and generally promote corporate responsibility. (b) By December 31, 2003, the PRIM, shall disinvest in companies that have failed to develop and implement policies prohibiting auditing firms from having consulting contracts with the company being audited or that have failed to create audit and compensation committees composed of independent board members; but the PRIM shall not be required to disinvest by the date under this subparagraph if the PRIM determines that disinvestment would cause significant adverse impact to the PRIT. Nothing in this section shall require disinvestment in an index fund.

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

affiliate company do not influence investment decisions of the money management firm. (4) In deciding whether to invest pension fund monies in a company, or to retain or augment an existing investment of pension fund monies in a company, money management firms first shall consider the corporate governance policies and practices of the subject company. The consideration shall include, but not be limited to, whether the board of directors has sufficient independence to act in the best interests of shareholders, and whether the company's outside auditors are prevented from providing consulting or other non-audit services to the company.

(5) Develop a plan to use the authority of the commission to ensure that companies in which retirement boards are investing will create independent boards of directors, independent audit committees and compensation committees and generally promote corporate responsibility. (b)

By December 31, 2003, the public employee retirement administration commission, within its authority to do so, shall require retirement boards to disinvest in companies that have failed to develop and implement policies prohibiting auditing firms from having consulting contracts with the company being audited; or that have failed to create audit and compensation committees composed of independent board members; but the commission shall not require retirement boards to disinvest by the date under this subparagraph if the commission determines that disinvestment would cause significant adverse impact to a pension fund.

Nothing in this section shall require disinvestment in an index fund.

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

SECTION 7. Section 23 of said chapter 32, as so appearing, is hereby further amended by inserting after the word "engaged", in line 380, the following words:- and no funds shall be invested in a publicly held corporation which was formerly incorporated in the United States

and which after the year 1998 has incorporated in a foreign country, allowing it to avoid taxes imposed by the United States or a state thereof, referred to in this section as an "expatriate corporation". No pension funds shall remain invested in the stocks, securities or other obligations of an expatriate corporation after January 1, 2005 unless the disinvestment of the stocks, securities or other obligations is determined by the PRIM to be adverse to a pension fund. Nothing in this section shall require disinvestment in an index fund.

