

1 _____ BILL NO. _____

2 INTRODUCED BY _____
3 (Primary Sponsor)

4 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR REASONABLE COMPENSATION FOR THE
5 DIRECTORS, OFFICERS, AND EMPLOYEES OF NONPROFIT CORPORATIONS; PROVIDING FOR A
6 METHOD TO DETERMINE REASONABLE COMPENSATION; PROVIDING FOR AN ACTION TO RECOVER
7 EXCESS COMPENSATION; PROHIBITING EXCESS BENEFIT TRANSACTIONS; PROVIDING DEFINITIONS;
8 AMENDING SECTIONS 35-2-114 AND 35-2-118, MCA; AND PROVIDING A DELAYED EFFECTIVE DATE AND
9 AN APPLICABILITY DATE."

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11 WHEREAS, nonprofit organizations are exempt from taxation because they are formed for a public or
12 charitable purpose; and

13 WHEREAS, the compensation of the officers of a nonprofit organization should reflect the public or
14 charitable purpose for which the organization is formed.

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16 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

17
18 NEW SECTION. **Section 1. Excess benefit transaction -- prohibited.** (1) A tax-exempt organization
19 may not engage in an excess benefit transaction with a disqualified person.

20 (2) As used in this section:

21 (a) "disqualified person" means an officer, director, trustee, highly compensated or high-level employee,
22 department or project manager, major donor, or anyone who has been in a position to exert substantial influence
23 over a tax-exempt organization within the prior 3 years and whose decisions can be implemented with further
24 approval from a higher official;

25 (b) "excess benefit transaction" means any transaction in which an economic benefit is provided by a
26 tax-exempt organization directly or indirectly to any person if the value of the economic benefit exceeds the value
27 of consideration. The term includes but is not limited to:

28 (i) severance pay;

29 (ii) transfers of property and use by a disqualified person of opportunities that would otherwise have
30 been used by the tax-exempt organization;



1 (iii) paying for directors' luxury or spousal expenses for board meetings; and

2 (iv) payment of directors and officers personal liability insurance premiums.

3 (c) "tax-exempt organization" means an organization described under section 501(c)(3) or (c)(4) of the
4 Internal Revenue Code and exempt from taxation under section 501(a) of the Internal Revenue Code.

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6 **NEW SECTION. Section 2. Compensation of officers.** (1) The directors shall set the compensation
7 of officers as provided in this section.

8 (2) The directors shall review, research, and approve all compensation contracts for officers and
9 high-level employees of the corporation. The board of directors, or its designee, may engage a compensation
10 analyst to assist establishing an independent board.

11 (3) (a) Compensation must be based on current compensation comparability data for Montana by using
12 industry surveys that include documented compensation of persons holding similar positions in similar
13 organizations in similar communities or be based on expert compensation studies. The directors shall adopt
14 procedures and documentation to establish a rebuttable presumption that compensation is reasonable.

15 (b) If the directors do not establish salaries as provided in subsection (3)(a), then the maximum salary
16 of any director, officer, or employee of the nonprofit corporation may not exceed 10 times the average Montana
17 wage as determined by the annual statistical report published by the department of labor and industry.

18 (4) The directors shall disclose the compensation of directors, officers, and employees of the
19 corporation to the attorney general. The compensation information is confidential.

20 (5) Members who set salaries may not be related to or be under the control of anyone involved in the
21 compensation arrangement and may not be unjustly compensated.

22
23 **NEW SECTION. Section 3. Prohibited compensation.** A compensation contract may not include
24 severance pay, the transfer of property, loans, or any other benefit for a person that would otherwise have been
25 used for the intended purposes of the nonprofit corporation.

26
27 **NEW SECTION. Section 4. Action to recover excess compensation.** The attorney general may
28 bring an action against an officer or employee to recover compensation paid in violation of [section 2 or 3]. After
29 deducting the costs incurred in bringing the action, the attorney general shall return the recovered compensation
30 to the nonprofit corporation to be used for the purposes for which the corporation was established.

- 1
- 2 **Section 5.** Section 35-2-114, MCA, is amended to read:
- 3 **"35-2-114. Definitions.** As used in this chapter, the following definitions apply:
- 4 (1) "Approved by the members" means approved and ratified by the affirmative vote:
- 5 (a) of a majority of the votes represented and voting:
- 6 (i) at a meeting at which a quorum is present and the affirmative votes constitute a majority of the
- 7 required quorum;
- 8 (ii) by a written ballot or written consent in conformity with this chapter; or
- 9 (iii) by the affirmative vote, written ballot, or written consent of the majority; and
- 10 (b) that includes the votes of all the members of any class, unit, or grouping that may be required by
- 11 the articles, bylaws, or this chapter for any specified member action.
- 12 (2) "Articles of incorporation" or "articles" include amended and restated articles of incorporation and
- 13 articles of merger.
- 14 (3) "Board" or "board of directors" means the board of directors except that a person or group of persons
- 15 is not the board of directors because of powers delegated to that person or group pursuant to 35-2-414.
- 16 (4) "Bylaws" means the code, codes, or rules, other than the articles, adopted pursuant to this chapter
- 17 for the regulation or management of the affairs of the corporation, regardless of the name or names by which
- 18 the code, codes, or rules are designated.
- 19 (5) "Class" refers to a group of memberships that have the same rights with respect to voting,
- 20 dissolution, redemption and transfer. For the purpose of this section, rights must be considered the same if they
- 21 are determined by a formula applied uniformly.
- 22 (6) "Compensation" means salary, bonus, deferred compensation, noncash compensation, retirement
- 23 funds, medical and liability insurance, loans, use of vehicles, expense accounts, and reimbursement for personal
- 24 food, housing, and clothing expenses.
- 25 ~~(6)~~(7) "Corporation" means a public benefit corporation, mutual benefit corporation, or religious
- 26 corporation.
- 27 ~~(7)~~(8) "Delegates" means those persons elected or appointed to vote in a representative assembly for
- 28 the election of a director or directors or on other matters.
- 29 ~~(8)~~(9) "Deliver" includes mail.
- 30 ~~(9)~~(10) "Directors" means individuals:

- 1 (a) designated in the articles or bylaws or elected by the incorporators and their successors; and
2 (b) elected or appointed by any other name or title to act as members of the board.
- 3 ~~(10)~~(11) "Distribution" means the payment of a dividend or any part of the income or profit of a
4 corporation to its members, directors, or officers.
- 5 ~~(11)~~(12) "Domestic corporation" means a corporation.
- 6 ~~(12)~~(13) "Effective date of notice" has the meaning provided in 35-2-115(5).
- 7 ~~(13)~~(14) "Employee" does not include an officer or director who is not otherwise employed by the
8 corporation.
- 9 ~~(14)~~(15) "Entity" includes:
- 10 (a) a corporation and foreign corporation;
11 (b) a business corporation and foreign business corporation;
12 (c) a profit and nonprofit unincorporated association;
13 (d) a corporation sole;
14 (e) a business trust, an estate, a partnership, a trust, and two or more persons having a joint or common
15 economic interest; and
16 (f) a state, the United States, and a foreign government.
- 17 ~~(15)~~(16) "File", "filed", or "filing" means filed in the office of the secretary of state.
- 18 ~~(16)~~(17) "Foreign corporation" means a corporation that is organized under a law other than the law of
19 this state and that would be a nonprofit corporation if formed under the laws of this state.
- 20 ~~(17)~~(18) "Governmental subdivision" includes an authority, county, district, and municipality.
- 21 ~~(18)~~(19) "Includes" denotes a partial definition.
- 22 ~~(19)~~(20) "Individual" includes the estate of an incompetent individual.
- 23 ~~(20)~~(21) "Means" denotes a complete definition.
- 24 ~~(21)~~(22) (a) "Member" means, without regard to what a person is called in the articles or bylaws, a
25 person or persons who, on more than one occasion and pursuant to a provision of a corporation's articles or
26 bylaws, have the right to vote for the election of a director or directors.
- 27 (b) A person is not a member by virtue of any of the following:
28 (i) any rights the person has as a delegate;
29 (ii) any rights the person has to designate a director or directors; or
30 (iii) any rights the person has as a director.

1 ~~(22)~~(23) "Membership" refers to the rights and obligations a member or members have pursuant to a
2 corporation's articles, bylaws, and this chapter.

3 ~~(23)~~(24) "Mutual benefit corporation" means a domestic corporation designated as a mutual benefit
4 corporation.

5 ~~(24)~~(25) "Notice" means that term as described in 35-2-115.

6 ~~(25)~~(26) "Person" includes any individual or entity.

7 ~~(26)~~(27) "Principal office" means the office, in the state or out of the state, that is designated in the
8 annual report filed pursuant to 35-2-904 as the place where the principal office of a domestic or foreign
9 corporation is located.

10 ~~(27)~~(28) "Proceeding" includes a civil suit and a criminal, administrative, and investigatory action.

11 ~~(28)~~(29) "Public benefit corporation" means a domestic corporation designated as a public benefit
12 corporation.

13 ~~(29)~~(30) "Record date" means the date established under part 5 on which a corporation determines the
14 identity of its members for the purposes of this chapter.

15 ~~(30)~~(31) "Religious corporation" means a domestic corporation designated as a religious corporation.

16 ~~(31)~~(32) "Secretary" means the corporate officer to whom the board of directors has delegated
17 responsibility under 35-2-439(2) for custody of the minutes of the directors' and members' meetings and for
18 authenticating the records of the corporation.

19 ~~(32)~~(33) "State", when referring to a part of the United States, includes:

20 (a) a state and commonwealth and their agencies and governmental subdivisions; and

21 (b) a territory and insular possession, their agencies, and governmental subdivisions of the United
22 States.

23 ~~(33)~~(34) "United States" includes a district, an authority, a bureau, a commission, a department, and any
24 other agency of the United States.

25 ~~(34)~~(35) "Vote" includes authorization by written ballot and written consent.

26 ~~(35)~~(36) (a) "Voting power" means the total number of votes entitled to be cast for the election of
27 directors at the time the determination of voting power is made.

28 (b) The term excludes a vote that is contingent upon the happening of a condition or event that has not
29 occurred at the time.

30 (c) When a class is entitled to vote as a class for directors, the determination of voting power of the

1 class must be based on the percentage of the number of directors the class is entitled to elect out of the total
2 number of authorized directors."
3

4 **Section 6.** Section 35-2-118, MCA, is amended to read:

5 **"35-2-118. General powers.** (1) Unless its articles of incorporation provide otherwise, a corporation
6 has perpetual duration and succession in its corporate name and has the same powers as an individual to do
7 all things necessary or convenient to carry out its affairs including, without limitation, power:

8 (a) to sue and be sued, complain, and defend in its corporate name;

9 (b) to have a corporate seal, which may be altered at will, and to use it or a facsimile of the seal by
10 impressing, affixing, or in any other manner reproducing it;

11 (c) to make and amend bylaws, consistent with its articles of incorporation or with the laws of this state,
12 for regulating and managing the affairs of the corporation;

13 (d) to purchase, receive, lease, or otherwise acquire and to own, hold, improve, use, and otherwise deal
14 with real or personal property or any legal or equitable interest in property, wherever located;

15 (e) to sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of all or any part of its
16 property;

17 (f) to purchase, receive, subscribe for, or otherwise acquire any other entity; to own, hold, vote, use, sell,
18 mortgage, lend, pledge, or otherwise dispose of any other entity; and to deal in and with shares or other interests
19 in or obligations of any other entity;

20 (g) to make contracts and guaranties; to incur liabilities; to borrow money; to issue notes, bonds, and
21 other obligations; and to secure any of its obligations by mortgage or pledge of any of its property, franchises,
22 or income;

23 (h) to lend money, invest and reinvest its funds, and receive and hold real and personal property as
24 security for repayment, except as limited by 35-2-435;

25 (i) to be a promoter, partner, member, associate, or manager of any partnership, joint venture, trust, or
26 other entity;

27 (j) to conduct its activities, locate offices, and exercise the powers granted by this chapter in the state
28 or out of the state;

29 (k) to elect or appoint directors, officers, employees, and agents of the corporation; to define their duties;
30 and to fix their compensation pursuant to [section 2];

1 (l) to pay pensions and establish pension plans, pension trusts, and other benefit and incentive plans
2 for any or all of its current or former directors, officers, employees, and agents;

3 (m) to make donations consistent with law for the public welfare or for charitable, religious, scientific,
4 or educational purposes and for other purposes that further the corporate interest;

5 (n) to impose dues, assessments, admission, and transfer fees upon its members;

6 (o) to establish conditions for admission of members, admit members, and issue memberships;

7 (p) to carry on a business; or

8 (q) to do all things necessary or convenient consistent with law to further the activities and affairs of the
9 corporation.

10 (2) A corporation may not have or issue shares of stock."
11

12 NEW SECTION. **Section 7. Codification instruction.** [Sections 1 through 4] are intended to be
13 codified as an integral part of Title 32, chapter 2, part 5, and the provisions of Title 32, chapter 2, part 5, apply
14 to [sections 1 through 4].
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16 NEW SECTION. **Section 8. Effective date.** [This act] is effective January 1, 2006.
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18 NEW SECTION. **Section 9. Applicability.** [This act] applies to contracts entered into or renewed on
19 or after [the effective date of this act].
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