



11-16-2020

## Securities Scholars' Comment Letter on Draft Whistleblower Award and Protection Act

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### Recommended Citation

Andrew K. Jennings, Samantha J. Prince, Benjamin P. Edwards, and Andrew C. Baker, *Securities Scholars' Comment Letter on Draft Whistleblower Award and Protection Act* (2020).

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**Securities Scholars' Comment Letter on  
Draft Model Whistleblower Award and Protection Act**

November 16, 2020

*Introductory note:*

In May 2020, the North American Securities Administrators Association (NASAA), an organization representing state and provincial securities regulators in Canada, the United States, and Mexico, released a draft Model Whistleblower Award and Protection Act (the Proposed Act) for public comment. The Proposed Act drew from securities-whistleblower statutes in Utah and Indiana, as well as the federal Sarbanes-Oxley and Dodd-Frank Acts. In brief, the Proposed Act provided for a state-level securities whistleblower-award program and an anti-retaliation private right of action.

NASAA received seven comment letters, including one from securities scholars. Our securities scholars' letter highlighted two areas of concern. First, we noted that in *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 778 (2018), the Supreme Court held that the Dodd-Frank Act did not protect from employer retaliation those who blow the whistle only internally. Given that the Proposed Act's text closely tracked Dodd-Frank's anti-retaliation provision, we observed that it had the same problem seen in *Digital Realty*. We urged a revision to close this gap, a change that would give internal securities whistleblowers at least a state retaliation right of action. Second, we urged that the whistleblower-award provision allow for attorney-mediated anonymous reporting.

In late August 2020, NASAA released the final version of the act (the Final Act). The Final Act's Section 10 resolved our *Digital Realty* concern by extending anti-retaliation protections to those who report only internally. The Final Act's Section 4 addressed our concern that whistleblowers who submit anonymous reports pre-award should remain eligible for whistleblower awards. A copy of our comment letter follows this introductory note. The Proposed Act is attached as Exhibit A and the Final Act as Exhibit B.

—AKJ

June 29, 2020

Via Email

Lynne Egan, Chair, State Legislation Committee  
Faith Anderson, Chair, Whistleblower Protections/Awards Working Group

North American Securities Administrators Association  
750 First Street NE, Suite 1140  
Washington, DC 20002

**RE: Proposed Model Whistleblower Award and Protection Act**

Dear Chairs Egan and Anderson:

We are scholars of securities regulation and appreciate the opportunity to comment on the North American Securities Administrators Association (“NASAA”)’s Model Whistleblower Award and Protection Act (as drafted, the “Proposed Act,” and as to be adopted, the “Final Act”). Although we identify our affiliations below, we write solely in our personal capacities; the views we express are ours alone.

**I. Introduction**

We recognize the potential for the Final Act to become an important new tool in detecting securities violations and promoting integrity in the capital markets. The Final Act could expand on Congress’s prior efforts in the Sarbanes-Oxley and Dodd-Frank Acts to incent whistleblowing and to protect those who risk their careers to do the right thing. Often times, securities misconduct simply will not come to light unless whistleblowers decide to step forward, and the Final Act stands to advance state efforts to combat that misconduct.

In this comment letter, however, we do highlight two concerns that we believe could limit the efficacy of the Final Act. First, the Proposed Act’s Section 9 excludes internal whistleblowing from its anti-retaliation provisions, while at the same time it unnecessarily privileges whistleblowing to federal agencies or related to federal law or regulations. Second, the Proposed Act does not immediately contemplate the practice of whistleblowers who provide information anonymously via counsel.

**II. States Have an Opportunity to Close Gaps in the Dodd-Frank’s Anti-Retaliation Provision**

Although financial awards can motivate whistleblowing, many insiders simply want to do the right thing. Often, the greatest barrier to their doing so is fear over impacts to current and future employment. Given this barrier, the Final Act’s anti-retaliation provision is likely to be its most important feature. Below, however, we identify concerns

related to the protection of internal whistleblowers, as well as privileges the Proposed Act gives disclosures related to *federal* (but not *state*) law, regulations, and agencies.

### **A. Avoiding the *Digital Realty* Problem in Defining “Whistleblower”**

NASAA’s Notice of Request for Public Comments notes that the Proposed Act draws from the Dodd-Frank Act’s securities anti-retaliation provision (the “Dodd-Frank Provision”), as well as the Indiana and Utah securities-whistleblower statutes. Indeed, the Proposed Act borrows the Dodd-Frank Provision’s definition of “whistleblower,” as well as its substantive terms for the types of whistleblowing conduct that will receive retaliation protection. Given the post-enactment history of the Dodd-Frank Provision, however, there should be caution around how closely the Final Act tracks it.

The Dodd-Frank Provision restricts “whistleblower” to being someone who provides “information relating to a violation of the securities laws *to the Commission.*”<sup>1</sup>

Substantively, the Dodd-Frank Provision sets conduct that extends retaliation protections to “whistleblowers.” The provision does so in part by incorporating conduct protected under the Sarbanes-Oxley Act’s whistleblower provision (the “SoX Provision”).<sup>2</sup> Looking just to the incorporation of the SoX Provision’s protected conduct suggests that there is broad protection under the Dodd-Frank Provision. Examples include protecting those who report suspected securities violations to federal regulators or law enforcement, members or committees of Congress, or to “a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).”<sup>3</sup> The Dodd-Frank Provision also incorporates 18 U.S.C. § 1513(e)’s prohibition on workplace retaliation against law-enforcement informants, which is not specific to securities violations.<sup>4</sup>

Our concern around the Proposed Act’s “whistleblower” definition is as follows:

After Congress enacted the Dodd-Frank Provision, the SEC interpreted the provision to require direct reporting to the SEC for award eligibility, while reporting through certain non-SEC channels, including internally, would suffice for retaliation protection.<sup>5</sup> This interpretation offered pragmatic appeal. Employees who spot potential securities violations might first speak to supervisors or others up the chain. Calling a prominent federal regulatory agency to report wrongdoing, however, is a more intimidating and daunting prospect than raising concerns internally. And whistleblowers who are willing to report to the government might not know to whom they should go or how, and thus they might go to the Federal Bureau of Investigation or another agency.

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<sup>1</sup> 15 U.S.C. § 78u–6(a)(6) (defining “whistleblower”) (emphasis added).

<sup>2</sup> 15 U.S.C. § 78u–6(h)(1)(A)(iii) (incorporating “disclosures that are required or protected under the Sarbanes-Oxley Act of 2002” into the Dodd-Frank Provision’s retaliation protections).

<sup>3</sup> See 18 U.S.C. § 1514A(a)(1). The SoX Provision, however, creates liability only for retaliatory acts by Exchange Act reporting companies. See *id.*

<sup>4</sup> 15 U.S.C. § 78u–6(h)(1)(A)(iii) (incorporating 18 U.S.C. § 1513(e)).

<sup>5</sup> See 17 C.F.R. § 240.21F-2(a)(1), (b)(1) (eff. Aug. 12, 2011).

(Or, in the state context, they might call the state's securities regulator, its attorney general, a local police department, or another agency.)

Yet, the Dodd-Frank Provision's definition of "whistleblower" as someone who provides information "to the Commission" raises the question whether someone who reports internally, or to an agency other than the SEC, receives retaliation protection. In *Digital Realty*, the Supreme Court addressed this question directly. It held that given the Dodd-Frank Provision's "whistleblower" definition, its retaliation protections cover only those who provide information directly *to the Commission*.<sup>6</sup> That restriction applies even though the conduct protected under the Dodd-Frank Provision—assuming "whistleblower" had been defined generically—would have protected those who made disclosures to a wider array of actors, including Congress, internal company personnel, and non-SEC federal regulators and law enforcement.<sup>7</sup>

Section 2(3) of the Proposed Act tracks the Dodd-Frank Provision in defining a whistleblower as someone who "*provides the [Securities Division] with information . . .*". Its Section 9 lists protected reporting conduct that also tracks the Dodd-Frank Provision. Thus, if a state court followed *Digital Realty's* reasoning, it would hold that whistleblowers must report to the state's securities regulator before receiving retaliation protection. We believe, however, that including this restriction in the Final Act would represent an unfortunate narrowing of whistleblower protection, particularly as it relates to internal reporting. Instead, a Final Act that serves to incent internal reporting would advance a number of law-enforcement purposes, including:

- a. Encouraging whistleblowers to speak up even if they are intimidated by, or otherwise wish to avoid speaking to, the state securities regulator, or they are unaware of the option to speak to the state securities regulator;
- b. Prompting firms to conduct internal investigations sparked by internal reports, which in turn would allocate some investigative burden to firms and thereby preserve securities regulators' enforcement resources;
- c. Causing the creation of documents and other evidence that might support public enforcement actions, particularly if they show failures by management to investigate, take action, or self-report; or
- d. Incenting whistleblowers who do not desire financial awards (but rather who just want to be protected from retaliation) to report, thereby preserving whistleblower funds for other matters.

This problem can be avoided by removing the provide-to-regulator restriction in the Proposed Act's definition of "whistleblower" and adding the SoX Provision's internal-whistleblowing term. Doing so will not cause the legislation to become overly broad in its coverage because Sections 3 through 8 substantively limit who may receive whistleblower

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<sup>6</sup> *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 778 (2018) (Ginsburg, J.) (8-0 in the judgment).

<sup>7</sup> *Cf. id.* at 778 (noting that a brief submitted by the United States as amicus curiae urged a construction of "whistleblower" consistent with that word's "ordinary" meaning).

awards and Section 9 substantively restricts the conduct that qualifies for retaliation protection.

## **B. Avoiding Overly Strict Requirements to Obtain Retaliation Protection**

We also identify a potential ambiguity in the Proposed Act's Section 9(1)(a) in which "in accordance with the act" could be construed as requiring whistleblowers to report under Section 3, implying that they must comply with specific reporting requirements established by securities administrators. It is worth considering the types of whistleblowers the states might see. Many will be scared, legally unsophisticated, unrepresented, or all of these things, and so requiring technical reporting compliance to receive retaliation protection is inconsistent with a purpose of protecting those who risk their livelihoods to speak up. We instead view the Proposed Act as intending to provide retaliation protection to a broader class of whistleblowers than those who might receive a financial award (who must satisfy securities administrators' reporting requirements). Modest clarification of Section 9 would avoid any ambiguity over that aim.

In keeping with these observations, we respectfully recommend the following amendments to Sections 2 and 9 of the Proposed Act for your consideration:

### **Section 2**

(3) "Whistleblower" means an individual who, alone or jointly with others, provides ~~the [Securities Division] with~~ information pursuant to the ~~provisions~~**procedures** set forth in this act, and the information relates to a possible violation of state or federal securities laws, including any rules or regulations thereunder, that has occurred, is ongoing, or is about to occur.

### **Section 9**

(1) Prohibition against retaliation. No employer may terminate, discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner retaliate against, a whistleblower because of any lawful act done by the whistleblower:

a. in providing information to the [Securities Division] in accordance with this Act, ***provided that such information need not be provided in accordance with Section 3;***

b. in initiating, testifying in, or assisting in any investigation or administrative or judicial action of the [Securities Administrator] or [Securities Division] based upon or related to such information;~~or~~

c. in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.); the Securities Act of 1933 (15 U.S.C. 77a et seq.); the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.); 18

U.S.C. 1513(e); any other law, rule, or regulation subject to the jurisdiction of the Securities and Exchange Commission; or [the Securities Act of this State] or a rule adopted thereunder; **or**

***d. in making disclosures to a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct) regarding matters subject to the jurisdiction of the [Securities Administrator], [Securities Division], or Securities and Exchange Commission.***<sup>8</sup>

### **C. Incorporating Federal Interests into State Legislation**

We draw attention to the federal statutes that the Proposed Act's Section 9(1)(c) incorporates by reference.<sup>9</sup> These incorporated statutes privilege federal securities statutes and regulations and federal law-enforcement and regulatory agencies. We believe that after *Digital Realty* that this coverage is important for providing federal whistleblowers state-law claims against retaliation. In drawing attention to this subsection, however, we encourage amendments to Section 9(1)(c) that would extend equal status to state law, regulations, and agencies.

### **III. Allowing Anonymous Reporting Via Counsel Will Encourage More Reporting and More Useful Disclosures**

The SEC whistleblower program established by the Dodd-Frank Act routinely involves anonymous, attorney-mediated tips up until the point that the SEC is ready to make an award. This allowance encourages whistleblowing by mitigating potential reporters' understandable anxieties around preserving anonymity. Whistleblower counsel are also able to professionally vet tips and prepare submissions that articulate legal issues and marshal evidence in ways that save considerable time for a regulator's attorneys and investigators.

To extend this benefit to the states, we respectfully recommend the following amendments to the Proposed Act for your consideration:<sup>10</sup>

#### **Section 6**

Section 6: Source of payment of whistleblower award ***and whistleblower identity***

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<sup>8</sup> This proposed language tracks the SoX Provision, 18 U.S.C § 1514A(a)(1)(c).

<sup>9</sup> See notes 2–3 and accompanying text.

<sup>10</sup> This proposed amendment tracks 15 U.S.C. § 78u–6(d)(2) in the Dodd-Frank Act's securities whistleblower-awards provision.

**(1)** Any whistleblower awards paid under this act shall be paid from the fund established in [state code citation].

**(2) *Any whistleblower who makes a claim for an award under Section 3 shall be represented by counsel if the whistleblower anonymously submits the information upon which the claim is based. Prior to the payment of an award, a whistleblower shall disclose the identity of the whistleblower and provide such other information as the [Securities Administrator] may require, directly or through counsel for the whistleblower.***

#### **IV. Conclusion**

We applaud NASAA's introduction of the Proposed Act and believe that the Final Act could prove an important tool within this country's federalist securities-enforcement system. We believe that the anti-retaliation provision will prove the most important feature of the Final Act, and so we encourage NASAA to consider ways to avoid the restrictive interpretation of "whistleblowing" that the *Digital Realty* Court applied to the Dodd-Frank Provision. We further encourage NASAA to consider adopting statutory language that recognizes the value of pre-award anonymous whistleblowing.

Respectfully submitted,<sup>11</sup>

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<sup>11</sup> Institutional affiliations and titles for identification purposes only.



## EXHIBIT A

### NOTICE OF REQUEST FOR PUBLIC COMMENTS ON PROPOSED MODEL WHISTLEBLOWER AWARD AND PROTECTION ACT

May 26, 2020

NASAA is seeking public comments on the attached proposed Model Whistleblower Award and Protection Act (the “Act”). The proposed Act draws upon the whistleblower award provisions contained in Section [922](#) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, the SEC’s related rules in Regulation [21F](#), Indiana Code § [23-19-7](#), and Utah Code § [61-1-101](#) et. seq. In summary, the proposed Act:

- Provides a state’s securities regulator with the authority to make monetary awards to whistleblowers based on the amount of monetary sanctions collected in the related administrative or judicial action.
- Provides that the aggregate amount of awards made in connection with an administrative or judicial action shall be 10-30% of the monetary sanctions collected.
- Sets forth certain non-exclusive factors to be considered in determining the amount of an award.
- Disqualifies certain individuals from being eligible to receive a whistleblower award.
- Prohibits retaliation by an employer against a whistleblower.
- Creates a cause of action and establishes relief for whistleblowers that are retaliated against by their employer.
- Exempts information that would identify the whistleblower from public disclosure.
- Invalidates waivers of the rights and remedies available under the Act.
- Contains an optional bracketed provision granting rulemaking authority under the Act to the securities regulator.

Comments on the proposed Act are due by June 30, 2020. To facilitate consideration of comments, please email comments to Lynne Egan, Chair of the State Legislation Committee, at [legan@mt.gov](mailto:legan@mt.gov), and Faith Anderson, Chair of the Whistleblower Protections/Awards working group, at [faith.anderson@dfi.wa.gov](mailto:faith.anderson@dfi.wa.gov). In addition, please copy the NASAA Corporate Office at [nasaacomment@nasaa.org](mailto:nasaacomment@nasaa.org). In light of remote working environments during the COVID-19 outbreak, commenters are discouraged from sending comments through physical mail.

## Introduction

NASAA is seeking public comments on a proposed Model Whistleblower Award and Protection Act (the “Act”). The intent of this legislation is to incentivize individuals who have knowledge of potential securities law violations to make reports to state regulators in the interest of investor protection. The Act provides not only for monetary awards to whistleblowers, but also protections for those who make whistleblower complaints, including an express cause of action against employers that retaliate against whistleblowers. The Act draws upon the whistleblower award provisions contained in Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act”), the SEC’s related rules in Regulation 21F, Indiana Code § 23-19-7, and Utah Code § 61-1-101 et. seq. The Act is intended to be fully operational upon adoption with no need for the promulgation of administrative rules, although it does contain an optional bracketed provision to provide the Securities Administrator with rule-making authority.

The two states that have already enacted whistleblower award legislation have reported that they have received a small number of complaints by purported whistleblowers and have made a total of two whistleblower awards. Since Indiana’s law was enacted in 2012, the Securities Division has made one whistleblower award in the amount of \$95,000<sup>1</sup> in connection with a \$950,000 settlement with JPMorgan Chase Bank, N.A. and J.P. Morgan Securities LLC.<sup>2</sup> In the Securities Division’s press release announcing the whistleblower award, the Indiana Secretary of State indicated that this case was “a perfect example of why the whistleblower statute is in place” because in the absence of the whistleblower complaint “the office would not have uncovered this issue and Hoosiers would still be at risk. Thanks to [Indiana’s whistleblower law], we are able to provide a safe environment for individuals to come forth and protect Hoosiers from wrongful securities practices.”<sup>3</sup> Utah has also reported making one whistleblower award since its whistleblower legislation was enacted in 2011. In its first whistleblower award, the Utah Securities Division awarded \$15,000 to a Utah financial adviser that reported a suspicious investment sold to one of his clients.<sup>4</sup>

## Section-by-Section Analysis of the Proposal

Section 1 establishes a short title for the Act: the “Whistleblower Award and Protection Act.”

Section 2 defines necessary terms, specifically “original information,” “monetary sanction,” and “whistleblower.” While additional terms are defined under the laws of Illinois and Utah, as well as under the federal whistleblower rules, the members of the working group opted to include only those definitions deemed essential to the operation of the law in the interest of efficiency.

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<sup>1</sup> JP Morgan Whistleblower Awarded \$95,000 First whistleblower award in the state, Indiana Secretary of State (Aug. 19, 2016), available at <https://calendar.in.gov/site/sos/event/sos-jp-morgan-whistleblower-awarded-95000-first-whistleblower-award-in-the-state/>

<sup>2</sup> In the Matter of JPMorgan Chase Bank, N.A. and J.P. Morgan Securities, LLC, Cause No. 16-0003 CA (July 27, 2016).

<sup>3</sup> JP Morgan Whistleblower Awarded \$95,000 First whistleblower award in the state, *supra* note 1.

<sup>4</sup> Securities Commission approves first whistleblower award for \$15K since S.B.100 *Securities Fraud Reporting Program Act* passed in 2011, State of Utah Department of Commerce Securities Division (May 22, 2014), available at [https://commerce.utah.gov/releases/14-05-22\\_sec-whistleblower-award.pdf](https://commerce.utah.gov/releases/14-05-22_sec-whistleblower-award.pdf).

Section 3 establishes the authority of the Securities Administrator to make whistleblower awards to one or more individuals that provide original information that leads to the successful enforcement of an administrative or judicial action under the securities laws of the state.

Section 4 specifies that if the Securities Administrator determines to make one or more whistleblower awards under Section 3, the aggregate amount of the awards made shall be no less than 10% of the monetary sanctions collected nor more than 30% of the monetary sanctions collected. This provision is based on the range of whistleblower awards provided for in Sec. 922 of the Dodd-Frank Act. The members of the working group opted to follow the language of the Dodd-Frank Act with respect to the amount of whistleblower awards, including the 10% floor, to ensure that potential whistleblowers are appropriately incentivized to file whistleblower reports.

Section 5 provides that the amount of a whistleblower award shall be determined in the discretion of the Securities Administrator consistent with Sections 4 and 7 of the Act.

Section 6 provides that any whistleblower awards paid under the Act shall be paid from a fund established elsewhere under state law. Under the Dodd-Frank Act, whistleblower awards are paid from the Investor Protection Fund. Under Indiana law, whistleblower awards are paid from its securities restitution fund. Under Utah law, whistleblower awards are paid from its Securities Investor Education, Training, and Enforcement Fund. Each state that enacts the Act will need to determine the source of payment of whistleblower awards, which can be expected to vary.

Section 7 sets forth a brief, non-exclusive list of factors that the Securities Administrator shall consider in determining the amount of an award under the Act. This list includes the core provisions included in the Dodd-Frank Act, as well as the state whistleblower laws enacted by Utah and Indiana. In the interest of brevity, the list is more abbreviated than the more exhaustive list of factors included in the SEC's whistleblower rules, which span several pages.

Section 8 establishes an exhaustive list of disqualifications for receiving a whistleblower award based on the Dodd-Frank Act, the SEC's whistleblower rules, and the laws enacted by Indiana and Utah.

Section 9 provides protections for individuals who file whistleblower complaints. The protections include: a prohibition on retaliation by an employer, the creation of a cause of action for retaliation by an employer, remedies that may be awarded to a whistleblower who prevails against an employer for retaliation, an exemption from public disclosure of information that could reasonably be expected to reveal the identity of a whistleblower, and a provision providing that the rights and remedies provided for in the Act may not be waived.

Section 10 is an optional bracketed provision that would provide a securities administrator with authority to adopt rules and regulation as necessary or appropriate to implement the Act. The members of the working group included all relevant provisions deemed necessary to implement and operate a whistleblower program in the proposed Act itself. Some states may, however, want authority to issue rules under the Act and so we have included this bracketed provision.

## **Conclusion**

The State Legislation Committee seeks internal member comments on the proposed Model Whistleblower Award and Protection Act by June 30, 2020. We look forward to hearing from you.

## EXHIBIT B

# Model Whistleblower Award and Protection Act Proposed for Public Comment May 15, 2020

**Section 1: Short title.** Sections 2 to 9 may be cited as the “Whistleblower Award and Protection Act.”

**Section 2: Definitions.** In this act, unless the context otherwise requires:

- (1) **“Original information”** means information that is:
  - a. derived from the independent knowledge or analysis of a whistleblower;
  - b. not already known to the [Securities Administrator] or [Securities Division] from any other source, unless the whistleblower is the original source of the information;
  - c. not exclusively derived from an allegation made in an administrative or judicial hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is the source of the information; and
  - d. provided to the [Securities Division] for the first time after the date of the enactment of this act.
- (2) **“Monetary sanction”** means any monies, including penalties, disgorgement, and interest ordered to be paid as a result of an administrative or judicial action. However, the term does not include any amounts ordered or identified as restitution.
- (3) **“Whistleblower”** means an individual who, alone or jointly with others, provides the [Securities Division] with information pursuant to the procedures set forth in this act, and the information relates to a possible violation of state or federal securities laws, including any rules or regulations thereunder, that has occurred, is ongoing, or is about to occur.

**Section 3: Authority to make a whistleblower award.** Subject to the provisions of this act, the [Securities Administrator] may award an amount to one or more individuals who voluntarily provide original information in writing, and in the form and manner required by the [Securities Administrator], to the [Securities Division] that leads to the successful enforcement of an administrative or judicial action under [the Securities Act of this State].

**Section 4: Amount of a whistleblower award.** If the [Securities Administrator] determines to make one or more awards under Section 3, the aggregate amount of awards that may be awarded in connection with an administrative or judicial action may not be less than ten percent (10%) nor more than thirty percent (30%) of the monetary sanctions imposed and collected in the related administrative or judicial action.

**Section 5: Discretion to determine the amount of a whistleblower award.** The determination of the amount of an award made under this act shall be in the discretion of the [Securities Administrator] consistent with Section 4 and Section 7.

**Section 6: Source of payment of whistleblower award.** Any whistleblower awards paid under this act shall be paid from the fund established in [state code citation].

**Section 7: Factors used to determine the amount of a whistleblower award.** In determining the amount of an award under this act, the [Securities Administrator] shall consider:

- (1) the significance of the original information provided by the whistleblower to the success of the administrative or judicial action;
- (2) the degree of assistance provided by the whistleblower in connection with the administrative or judicial action;
- (3) the programmatic interest of the [Securities Administrator] in deterring violations of the securities laws by making awards to whistleblowers who provide original information that leads to the successful enforcement of such laws; and
- (4) any other factors the [Securities Administrator] considers relevant.

**Section 8: Disqualification from award.** The [Securities Administrator] shall not provide an award to a whistleblower under this section if the whistleblower:

- (1) is convicted of a felony in connection with the administrative or judicial action for which the whistleblower otherwise could receive an award;
- (2) acquires the original information through the performance of an audit of financial statements required under the securities laws and for whom providing the original information violates 15 U.S.C. 78j-1;
- (3) fails to submit information to the [Securities Division] in such form as the [Securities Administrator] may prescribe;
- (4) knowingly or recklessly makes a false, fictitious, or fraudulent statement or misrepresentation as part of, or in connection with, the original information provided or the administrative or judicial proceeding for which the original information was provided;
- (5) in the whistleblower's submission, its other dealings with the [Securities Administrator], or in its dealings with another authority in connection with a related action, knowingly and willfully makes any false, fictitious, or fraudulent statement or representation, or uses any false writing or document knowing that it contains any false, fictitious, or fraudulent

statement or entry with intent to mislead or otherwise hinder the [Securities Administrator] or another authority;

- (6) knows that, or has a reckless disregard as to whether, the original information provided is false, fictitious, or fraudulent;
- (7) has a legal duty to report the original information to the [Securities Administrator] or [Securities Division];
- (8) is, or was at the time the whistleblower acquired the original information submitted to the [Securities Division], a member, officer, or employee of the [Securities Division], the Securities and Exchange Commission, any other state securities regulatory authority, a self-regulatory organization, the Public Company Accounting Oversight Board, or any law enforcement organization;
- (9) is, or was at the time the whistleblower acquired the original information submitted to the [Securities Division], a member, officer, or employee of a foreign government, any political subdivision, department, agency, or instrumentality of a foreign government, or any other foreign financial regulatory authority as that term is defined in 15 U.S.C. 78c(a)(52); or
- (10) is the spouse, parent, child, or sibling of the [Securities Administrator] or an employee of the [Securities Division], or resides in the same household as the [Securities Administrator] or an employee of the [Securities Division]; or
- (11) directly or indirectly acquires the original information provided to the [Securities Division] from a person:
  - a. who is subject to subsection (2) of this section, unless the information is not excluded from that person's use, or provides the [Securities Division] with information about possible violations involving that person;
  - b. who is a person described in subsections (8), (9), or (10) of this section; or
  - c. with the intent to evade any provision of this chapter.

## **Section 9: Protection of whistleblower**

- (1) **Prohibition against retaliation.** No employer may terminate, discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner retaliate against, a whistleblower because of any lawful act done by the whistleblower:
  - a. in providing information to the [Securities Division] in accordance with this Act;

- b. in initiating, testifying in, or assisting in any investigation or administrative or judicial action of the [Securities Administrator] or [Securities Division] based upon or related to such information; or
- c. in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.); the Securities Act of 1933 (15 U.S.C. 77a et seq.); the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.); 18 U.S.C. 1513(e); any other law, rule, or regulation subject to the jurisdiction of the Securities and Exchange Commission; or [the Securities Act of this State] or a rule adopted thereunder.

(2) **Exceptions from protection against retaliation.** Notwithstanding subsection (1) of this section, a whistleblower is not protected under this section if:

- a. the whistleblower knowingly [or recklessly] makes a false, fictitious, or fraudulent statement or misrepresentation;
- b. the whistleblower uses a false writing or document knowing that[, or with reckless disregard as to whether,] the writing or document contains false, fictitious, or fraudulent information; or
- c. the whistleblower knows that[, or has a reckless disregard as to whether,] the disclosure is of original information that is false or frivolous.

(3) **Cause of Action.** A whistleblower, who alleges any act of retaliation in violation of subsection (1) of this section may bring an action for the relief provided in subsection (6) of this section in the court of original jurisdiction for the county or state where the alleged violation occurs, the whistleblower resides, or the person against whom the action is filed resides or has a principal place of business.

(4) **Subpoenas.** A subpoena requiring the attendance of a witness at a trial or hearing conducted under subsection (3) of this section may be served at any place in the United States.

(5) **Statute of limitations.** An action under subsection (3) of this section may not be brought:

- a. more than 6 years after the date on which the violation of subsection (1) of this section occurred; or
- b. more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the employee alleging a violation of subsection (1) of this section.



Notwithstanding the above limitations, an action under subsection (3) of this section may not in any circumstance be brought more than 10 years after the date on which the violation occurs.

(6) **Relief.** A court may award as relief for a whistleblower prevailing in an action brought under this section:

- a. reinstatement with the same compensation, fringe benefits, and seniority status that the individual would have had, but for the retaliation;
- b. two (2) times the amount of back pay otherwise owed to the individual, with interest;
- c. compensation for litigation costs, expert witness fees, and reasonable attorneys' fees;
- d. actual damages; or
- e. any combination of these remedies.

(7) **Confidentiality.** Information that could reasonably be expected to reveal the identity of a whistleblower is exempt from public disclosure under [citation to state public records act]. This subsection does not limit the ability of the any person to present evidence to a grand jury or to share evidence with potential witnesses or defendants in the course of an ongoing criminal investigation.

(8) **Non-enforceability of confidentiality agreements with respect to communications with the [Securities Division].** No person may take any action to impede an individual from communicating directly with the [Securities Division] staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement with respect to such communications, except with respect to:

- a. agreements concerning communications covered by the attorney-client privilege, unless disclosure of that information would otherwise be permitted by an attorney under applicable state attorney conduct rules or otherwise; and
- b. information obtained in connection with legal representation of a client on whose behalf an individual or the individual's employer or firm are providing services, and the individual is seeking to use the information to make a whistleblower submission for the individual's own benefit, unless disclosure would otherwise be permitted by an attorney pursuant to applicable state attorney conduct rules or otherwise.

(9) **Waiver of rights and remedies.** The rights and remedies provided for in this Act may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement.

**[Section 10: Rulemaking authority.** The [Securities Administrator] may adopt such rules and regulations as may be necessary or appropriate to implement the provisions of this act consistent with its purpose.]

# Model Whistleblower Award and Protection Act

*Adopted August 31, 2020*

**Prefatory Notes:** This Act is intended to be fully operational upon adoption with no need for the promulgation of administrative rules, although an optional bracketed provision is included as Section 11 to provide the Securities Administrator with express rule-making authority. States are encouraged to keep procedural requirements for making a whistleblower complaint, as referenced in Section 3, simple and accessible. States should also consider keeping the source of funds specified in Section 7 out of which whistleblower awards will be paid segregated from the operational funds of the state regulatory agency. It is within the discretion of the Securities Administrator whether to make an award based on an order of restitution. Administrators making this determination should take into consideration the goal of returning funds to harmed investors and the balance of the fund specified in Section 7. Administrators are also encouraged to adopt a policy that presumes an award will be made for valid reports that conform to all of the law's requirements and that result in one or more enforcement actions. Finally, the interpretation of this Act may be guided by reference to the whistleblower rules adopted by the Securities and Exchange Commission in Rule 21F where those rules are not inconsistent with this Act.

**Section 1: Short title.** Sections 2 to 9 may be cited as the "Whistleblower Award and Protection Act."

**Section 2: Definitions.** In this act, unless the context otherwise requires:

- (1) "**Original information**" means information that is:
  - a. derived from the independent knowledge or analysis of a whistleblower;
  - b. not already known to the [Securities Administrator] or [Securities Division] from any other source, unless the whistleblower is the original source of the information;
  - c. not exclusively derived from an allegation made in an administrative or judicial hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is the source of the information; and
  - d. provided to the [Securities Division] for the first time after the date of the enactment of this act.
- (2) "**Monetary sanction**" means any monies, including penalties, disgorgement, and interest ordered to be paid as a result of an administrative or judicial action.
- (3) "**Whistleblower**" means an individual who, alone or jointly with others, provides the state or other law enforcement agency with information pursuant to the provisions set

forth in this act, and the information relates to a possible violation of state or federal securities laws, including any rules or regulations thereunder, that has occurred, is ongoing, or is about to occur.

**Section 3: Authority to make a whistleblower award.** Subject to the provisions of this act, the [Securities Administrator] may award an amount to one or more whistleblowers who voluntarily provide original information in writing, and in the form and manner required by the [Securities Administrator], to the [Securities Division] that leads to the successful enforcement of an administrative or judicial action under [the Securities Act of this State].

**Section 4: Anonymous whistleblower complaints.** Any individual who anonymously makes a claim for a whistleblower award shall be represented by counsel if the individual anonymously submits the information upon which the claim is based. Prior to the payment of an award, a whistleblower shall disclose their identity and provide such other information as the [Securities Division] may require, directly or through counsel, for the whistleblower.

**Section 5: Amount of a whistleblower award.** If the [Securities Administrator] determines to make one or more awards under Section 3, the aggregate amount of awards that may be awarded in connection with an administrative or judicial action may not be less than ten percent (10%) nor more than thirty percent (30%) of the monetary sanctions imposed and collected in the related administrative or judicial action.

**Section 6: Discretion to determine the amount of a whistleblower award.** The determination of the amount of an award made under this act shall be in the discretion of the [Securities Administrator] consistent with Section 5 and Section 7.

**Section 7: Source of payment of whistleblower award.** Any whistleblower awards paid under this act shall be paid from the fund established in [state code citation].

**Section 8: Factors used to determine the amount of a whistleblower award.** In determining the amount of an award under this act, the [Securities Administrator] shall consider:

- (1) the significance of the original information provided by the whistleblower to the success of the administrative or judicial action;
- (2) the degree of assistance provided by the whistleblower in connection with the administrative or judicial action;
- (3) the programmatic interest of the [Securities Administrator] in deterring violations of the securities laws by making awards to whistleblowers who provide original information that leads to the successful enforcement of such laws; and
- (4) any other factors the [Securities Administrator] considers relevant.

**Section 9: Disqualification from award.** The [Securities Administrator] shall not provide an award to a whistleblower under this section if the whistleblower:

- (1) is convicted of a felony in connection with the administrative or judicial action for which the whistleblower otherwise could receive an award;
- (2) acquires the original information through the performance of an audit of financial statements required under the securities laws and for whom providing the original information violates 15 U.S.C. 78j-1;
- (3) fails to submit information to the [Securities Division] in such form as the [Securities Administrator] may prescribe;
- (4) knowingly or recklessly makes a false, fictitious, or fraudulent statement or misrepresentation as part of, or in connection with, the original information provided or the administrative or judicial proceeding for which the original information was provided;
- (5) in the whistleblower's submission, its other dealings with the [Securities Administrator], or in its dealings with another authority in connection with a related action, knowingly and willfully makes any false, fictitious, or fraudulent statement or representation, or uses any false writing or document knowing that it contains any false, fictitious, or fraudulent statement or entry with intent to mislead or otherwise hinder the [Securities Administrator] or another authority;
- (6) knows that, or has a reckless disregard as to whether, the original information provided is false, fictitious, or fraudulent;
- (7) has a legal duty to report the original information to the [Securities Administrator] or [Securities Division];
- (8) is, or was at the time the whistleblower acquired the original information submitted to the [Securities Division], a member, officer, or employee of the [Securities Division], the Securities and Exchange Commission, any other state securities regulatory authority, a self-regulatory organization, the Public Company Accounting Oversight Board, or any law enforcement organization;
- (9) is, or was at the time the whistleblower acquired the original information submitted to the [Securities Division], a member, officer, or employee of a foreign government, any political subdivision, department, agency, or instrumentality of a foreign government, or any other foreign financial regulatory authority as that term is defined in 15 U.S.C. 78c(a)(52);
- (10) is the spouse, parent, child, or sibling of the [Securities Administrator] or an employee of the [Securities Division], or resides in the same household as the [Securities Administrator] or an employee of the [Securities Division]; or

- (11) directly or indirectly acquires the original information provided to the [Securities Division] from a person:
- a. who is subject to subsection (2) of this section, unless the information is not excluded from that person's use, or provides the [Securities Division] with information about possible violations involving that person;
  - b. who is a person described in subsections (8), (9), or (10) of this section; or
  - c. with the intent to evade any provision of this chapter.

**Section 10: Protection of whistleblowers and internal reporters.**

- (1) **Prohibition against retaliation.** No employer may terminate, discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner retaliate against, an individual because of any lawful act done by the individual:
- a. in providing information to the state or other law enforcement agency concerning a possible violation of state or federal securities laws, including any rules or regulations thereunder, that has occurred, is ongoing, or is about to occur;
  - b. in initiating, testifying in, or assisting in any investigation or administrative or judicial action of the [Securities Administrator], [Securities Division], or other law enforcement agency based upon or related to such information;
  - c. in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.); the Securities Act of 1933 (15 U.S.C. 77a et seq.); the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.); 18 U.S.C. 1513(e); any other law, rule, or regulation subject to the jurisdiction of the Securities and Exchange Commission; or [the Securities Act of this State] or a rule adopted thereunder; or
  - d. in making disclosures to a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct) regarding matters subject to the jurisdiction of the [Securities Administrator], [Securities Division], or the Securities and Exchange Commission.
- (2) **Exceptions from protection against retaliation.** Notwithstanding subsection (1) of this section, an individual is not protected under this section if:
- a. the individual knowingly [or recklessly] makes a false, fictitious, or fraudulent statement or misrepresentation;

- b. the individual uses a false writing or document knowing that[, or with reckless disregard as to whether,] the writing or document contains false, fictitious, or fraudulent information; or
  - c. the individual knows that[, or has a reckless disregard as to whether,] the disclosure is of original information that is false or frivolous.
- (3) **Cause of Action.** An individual, who alleges any act of retaliation in violation of subsection (1) of this section may bring an action for the relief provided in subsection (6) of this section in the court of original jurisdiction for the county or state where the alleged violation occurs, the individual resides, or the person against whom the action is filed resides or has a principal place of business.
- (4) **Subpoenas.** A subpoena requiring the attendance of a witness at a trial or hearing conducted under subsection (3) of this section may be served at any place in the United States.
- (5) **Statute of limitations.** An action under subsection (3) of this section may not be brought:
- a. more than 6 years after the date on which the violation of subsection (1) of this section occurred; or
  - b. more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the employee alleging a violation of subsection (1) of this section.

Notwithstanding the above limitations, an action under subsection (3) of this section may not in any circumstance be brought more than 10 years after the date on which the violation occurs.

- (6) **Relief.** A court may award as relief for an individual prevailing in an action brought under this section:
- a. reinstatement with the same compensation, fringe benefits, and seniority status that the individual would have had, but for the retaliation;
  - b. two (2) times the amount of back pay otherwise owed to the individual, with interest;
  - c. compensation for litigation costs, expert witness fees, and reasonable attorneys' fees;

- d. actual damages;
  - e. an injunction to restrain a violation; or
  - f. any combination of these remedies.
- (7) **Confidentiality.** Information that could reasonably be expected to reveal the identity of a whistleblower is exempt from public disclosure under [citation to state public records act]. This subsection does not limit the ability of any person to present evidence to a grand jury or to share evidence with potential witnesses or defendants in the course of an ongoing criminal investigation.
- (8) **Non-enforceability of confidentiality agreements with respect to communications with the [Securities Division].** No person may take any action to impede an individual from communicating directly with the [Securities Division] staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement with respect to such communications, except with respect to:
- a. agreements concerning communications covered by the attorney-client privilege, unless disclosure of that information would otherwise be permitted by an attorney under applicable state attorney conduct rules or otherwise; and
  - b. information obtained in connection with legal representation of a client on whose behalf an individual or the individual's employer or firm are providing services, and the individual is seeking to use the information to make a whistleblower submission for the individual's own benefit, unless disclosure would otherwise be permitted by an attorney pursuant to applicable state attorney conduct rules or otherwise.
- (9) **Waiver of rights and remedies.** The rights and remedies provided for in this act may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement.
- (10) **Rights retained.** Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any individual under any federal or state law, or under any collective bargaining agreement.

**[Section 11: Rulemaking authority.** The [Securities Administrator] may adopt such rules and regulations as may be necessary or appropriate to implement the provisions of this act consistent with its purpose.]