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June 29, 2020

Ms. Lynne Egan, Chair of the State Legislation Committee
Ms. Faith Anderson, Chair of the Whistleblower Protections/Awards Working Group
North American Securities Administrators Association
750 First Street, NE
Suite 1140
Washington, DC 20002

RE: Request for Public Comments on Proposed Model Whistleblower Award and Protection Act

Dear Lynne and Faith:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to comment on NASAA’s recently proposed Model Whistleblower Award and Protection Act.

SIFMA supports federal and state efforts to identify and address potential violations of the securities laws. We recognize the value of robust and effective whistleblower rules in that process. We generally supported the Securities and Exchange Commission’s (“SEC”) current whistleblower rules when they were first proposed in 2010.² More recently, in response to the SEC’s request for comment on proposed changes to these rules, we provided suggestions on how the SEC can improve its whistleblower program.³

It is our understanding that the SEC could finalize proposed revisions to its whistleblower program before year-end. We would encourage you to wait for those revisions before moving forward on model legislation. This is particularly true since the NASAA proposal expressly draws upon Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010⁴ and the SEC’s related rules in Regulation 21F.⁵

¹ SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

² Letter from Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA, to Elizabeth Murphy, Secretary, SEC re: Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 (Dec. 17, 2010), <https://www.sec.gov/comments/s7-33-10/s73310-161.pdf>

³ Letter from Ira D. Hammerman, Executive Vice President and General Counsel, SIFMA, to Brent Fields, Secretary, SEC, re: Whistleblower Program Rules (Sept. 18, 2018), <https://www.sec.gov/comments/s7-16-18/s71618-4373269-175549.pdf>

⁴ <https://www.sec.gov/about/offices/owb/dodd-frank-sec-922.pdf>

⁵ <https://www.sec.gov/about/offices/owb/reg-21f.pdf>

In the interim, we would respectfully suggest an ongoing dialogue with industry on the goal of the legislation. We understand that the proposal seeks to incentivize individuals to report violations, but such incentives already exist in the federal program. Are there types of cases not being brought under the federal whistleblower program that a state program would address? For example, since the SEC's statutory focus is on cases involving monetary sanctions of more than \$1 million, will the NASAA proposal focus on those monetary sanctions totaling less than \$1 million?

We would also appreciate additional data on the two states which currently have state whistleblower programs. As you reference in the proposal, Utah's whistleblower law has had one award for \$15,000 since 2011. Indiana has had one award for \$95,000 since 2012. While we understand this is a small sampling, these numbers do not seem to substantiate the need for or value of additional state whistleblower incentives and workplace protections.

In addition to these general comments, we do have some specific comments on the proposed language. As you further develop your proposal, we would encourage you to consider the following:

- Internal Reporting. SIFMA strongly believes that whistleblower rules should encourage internal corporate compliance reporting systems, which the SEC has acknowledged are a critical line of defense against securities violations.⁶ Internal reporting provides an opportunity for a firm to resolve issues early in order to strengthen policies and processes to enhance client protection. While the Supreme Court's decision in *Digital Realty Trust v. Somers*⁷ impacts the SEC's ability to recognize internal reporting without statutory changes, we would encourage NASAA to consider statutory language⁸ protecting both internal reporting systems and internal whistleblowers. At a minimum, NASAA should consider adopting still valid SEC language explicitly providing that voluntary internal reporting can increase the amount of an award and interfering with internal compliance and reporting systems can decrease the amount of an award.⁹
- Culpable Whistleblowers. SIFMA has long believed that employees who participate in a securities law violation should not be eligible to profit from that violation by making a whistleblower complaint. SIFMA's view was based on the commonsense notion that crime should not pay and that whistleblower rules should not provide financial incentives through which individuals can profit from their own misconduct. Section 8(1) of the proposal would prohibit a whistleblower who "is convicted of a felony in connection with the administrative or judicial action" from receiving an award. We would encourage you to expand that prohibition beyond felony convictions. We would also urge you to include a whistleblower's general culpability as a factor that is expressly considered in determining the amount of the award.
- Compliance Personnel. SIFMA similarly believes that certain employees should not be entitled to the legislation's awards and protections if they report problems directly to the regulator without first escalating the issue or reporting the original information to the firm. Employees performing legal, audit or compliance functions that fail to escalate issues internally deny firms

⁶ See e.g., Adopting Release, Implementing Whistleblower Provisions of Section 21F of the Securities Exchange Act, Exch. Act Rel. No 64545, at p. 90 (May 25, 2011) ("2011 Adopting Release") (<https://www.sec.gov/rules/final/2011/34-64545.pdf>) ("compliance with the federal securities laws is promoted when companies have effective programs for identifying, correcting, and self-reporting unlawful conduct by company officers or employees").

⁷ https://www.supremecourt.gov/opinions/17pdf/16-1276_b0nd.pdf

⁸ SIFMA proposed statutory language to the SEC in its September 18, 2018 submission. <https://www.sec.gov/comments/s7-16-18/s71618-4373269-175549.pdf>.

⁹ See Reg 21 F-6.

the opportunity to correct issues in a timely manner. We would recommend that you expand the “disqualification from award” language in Section 8(2) to include a broader range of functional responsibilities.

- Language to prevent double dipping. Should you decide to move forward, we would recommend that you include language preventing whistleblowers from seeking awards in multiple forums. The SEC expressly prohibits whistleblowers from getting an award through its program if an award has already been granted by the Commodity Futures Trading Commission program. Whistleblowers should not be forum shopping or getting multiple awards for reporting the same conduct.
- Award Amounts. The proposal provides for whistleblower awards of no less than 10 percent and no more than 30 percent of the monetary sanctions collected. Thirty percent can be a huge windfall in large cases, and 10 percent can be insufficient in smaller cases. We encourage you to consider tying the minimum and maximum percentage to the size of the award. The SEC Proposal suggests giving the Commission the discretion to adjust small awards upward and large awards downward. As we detail in our SEC Comments, SIFMA believes that providing a marginally greater incentive to whistleblowers at the lower end of the award scale (and funding that incentive through a marginal reduction in the payouts at the very highest end of the scale) is a beneficial tradeoff that, among other things, would produce the most valuable mix of whistleblower tips.
- Source of Awards. Under the proposal, awards are to be paid from a fund established elsewhere under state law. We would note that fines and sanctions are often deposited into a state treasury/general fund. It can be very difficult to get monies out of the general treasury even for earmarked purposes. We would encourage you to consider language which would protect separate funds from being swept into the general fund which could affect program payouts, ongoing securities division operations, or other division priorities such as investor education and senior investor protection.
- Enforcement Definition. Section 3 permits the Securities Administrator to make a whistleblower award for original information “that leads to the successful enforcement of an administrative or judicial action” under the state securities act. “Successful enforcement” however is not defined. Does this include, for example, settlement of an administrative action? What other types of case resolutions would fall within this definition?

We appreciate the opportunity to provide feedback. Please feel free to contact us if you have any questions or would like to speak further.

Sincerely,

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