

**NOTICE OF REQUEST FOR PUBLIC COMMENTS ON
PROPOSED MODEL ACT TO CREATE A RESTITUTION ASSISTANCE FUND
FOR VICTIMS OF SECURITIES VIOLATIONS**

June 30, 2020

The North American Securities Administrators Association (NASAA) is seeking public comments on the attached proposed Model Act to Create a Restitution Assistance Fund for Victims of Securities Violations (the “Act”). The proposed Act draws upon Indiana Code § [23-20](#), Montana Code § [30-10](#), Vermont Code § [9-150-5616](#), Kansas [HB 2558](#) (2020), and Maine [LD 1704](#) (2019).

In summary, the proposed Act:

- Establishes a securities restitution assistance fund within the jurisdiction
- Provides examples of possible funding sources but leaves it in the jurisdiction’s discretion
- Creates a process for eligible victims of securities law violations to apply for restitution assistance
- Provides that restitution assistance awards are capped at the lesser of \$25,000 or 25% of the amount of unpaid restitution awarded, or the lesser of \$50,000 or 50%, if the victim is a vulnerable person, subject to waivers for good cause
- Disqualifies certain individuals from restitution assistance
- Provides that the jurisdiction may recover restitution assistance awards, or that restitution assistance awards are forfeited or must be refunded, in certain circumstances
- Provides that the jurisdiction is subrogated to the rights of the claimant
- Provides that the jurisdiction is entitled to a lien in the amount of any recovery made by or on behalf of the victim
- Allows the jurisdiction to suspend claims or prorate the payment of claims if the fund balance would fall below \$250,000
- Grants the jurisdiction rulemaking authority to carry out the purposes of the subchapter

Comments on the proposed Act are due by July 31, 2020. To facilitate consideration of comments, please email comments to Karla Black, Chair of the Restitution Assistance Working Group, at karla.black@maine.gov. Please also copy Lynne Egan, Chair of the State Legislation Committee, at legan@mt.gov, and the NASAA Corporate Office at nasaacomment@nasaa.org. Due to the remote working environments during the COVID-19 pandemic, commenters are discouraged from sending comments through physical mail.

Introduction

NASAA is seeking public comments on the proposed Model to Create a Restitution Assistance Fund for Victims of Securities Violations (the “Act”). The intent of this legislation is to provide financial assistance to victims of securities law violations who were awarded restitution but have not received full payment. The Act establishes a state securities restitution assistance fund, outlines eligibility requirements for victims seeking restitution assistance, sets payment caps on the amount of restitution assistance awards, prohibits and forfeits awards in certain circumstances, and provides for recovery mechanisms. The Act draws upon Indiana Code § [23-20](#), Montana Code § [30-10](#), Vermont Code § [9-150-5616](#), Kansas [HB 2558](#) (2020), and Maine [LD 1704](#) (2019). Certain provisions are left to the jurisdiction’s discretion, such as funding sources and other considerations described in the prefatory notes. The Act also contains a provision granting the jurisdiction with rulemaking authority.

Below is a section-by-section overview of the proposed Act, with explanations for why the Restitution Assistance Working Group chose certain language.

Section-by-Section Overview and Commentary

The Prefatory Notes provide several optional provisions and considerations for the adopting jurisdiction to include when drafting a bill based on this Model Act – (1) a confidentiality section for the victim’s or claimant’s personal information; (2) what the process will be for the agency to receive and review applications, and award or recommend an award of restitution assistance, and whether to have this process specified in a bill or rule; (3) possible funding sources; (4) whether the jurisdiction may need to amend its laws to include restitution as a specific remedy; (5) expanding eligibility requirements to include non-natural persons; (6) whether the jurisdiction wants to seek the return of restitution assistance, under Section 9, by administrative or judicial action; and (7) deleting Section 9 and awarding restitution assistance only when the case is no longer subject to appeal.

Section 1 establishes a title for the Act (“An Act to Create a Restitution Assistance Fund for Victims of Securities Violations”).

Section 2 defines the terms “claimant,” “final order,” “fund,” “securities violation,” “victim,” and “vulnerable person.”

Section 3 establishes a securities restitution assistance fund within the jurisdiction where restitution assistance awards would be paid out of.

Section 4 contains an open bracketed provision that would specify how the securities restitution assistance fund would be funded.

Section 5 clarifies that the monies received for the securities restitution assistance fund are for restitution assistance only and may not be placed in the state’s general fund. It also clarifies that the balance of the fund does not lapse and carries forward for the same purpose.

Section 6 covers the eligibility and application process for restitution assistance awards.

Section 7 sets forth limitations for restitution assistance awards. A jurisdiction can award restitution assistance to one claimant per victim. A claimant can receive the lesser of \$25,000 or 25% of the amount of unpaid restitution. If the victim is a vulnerable adult, he or she can receive the lesser of \$50,000 or 50% of the amount of unpaid restitution. However, a jurisdiction can waive these payment caps for good cause.

Section 8 prohibits a victim from receiving restitution assistance if he or she participated, committed, or profited in the securities violation.

Section 9 provides that a jurisdiction may recover the amount of restitution assistance, if the final order awarding restitution was overturned on appeal. Alternatively, as described in the Prefatory Notes, jurisdictions may choose to only award restitution assistance after appeal rights are exhausted.

Section 10 explains that restitution assistance is forfeited when the claimant is convicted of a securities law violation under that jurisdiction's law, and that the jurisdiction may bring a civil action to recover those funds.

Section 11 states that the jurisdiction is subrogated to the rights of the claimant awarded restitution assistance to the extent of the restitution assistance award, and the subrogation rights are against the person ordered to pay the restitution to the victim.

Section 12 provides that the jurisdiction is entitled to a lien in the amount of the restitution award on recovery.

Section 13 provides that a claimant must refund any excess amount of restitution.

Section 14 clarifies that any monies from restitution assistance awards recovered by the jurisdiction must be returned to the securities restitution assistance fund.

Section 15 permits the jurisdiction to suspend or prorate payment of claims, if payment of restitution assistance would result in a fund balance of \$250,000.

Section 16 provides that a restitution assistance award is not subject to execution, attachment, garnishment, or other process, except when brought by or on behalf of the jurisdiction.

Section 17 grants the jurisdiction rulemaking authority to carry out the purposes of the Act.

Section 18 clarifies that restitution assistance awards may be made for victims awarded restitution in a final order issued on or after the effective date of the Act.

Conclusion

NASAA seeks public comments on the proposed Model Securities Restitution Assistance Act by July 31, 2020.

NASAA MODEL LEGISLATION TO CREATE A RESTITUTION ASSISTANCE FUND FOR VICTIMS OF SECURITIES VIOLATIONS

Prefatory Notes:

Jurisdictions considering this legislation may want to consider certain small changes or additions, including the following:

- Adding a confidentiality section for a victim's/claimant's personal information included in an application for restitution assistance, that is consistent with your jurisdiction's constitution, laws and/or rules.
- The process the jurisdiction would like to use for review of applications. For example, will an appointed committee receive and review applications and decide on an award or make a recommendation to the jurisdiction's Board/Commissioner/Administrator? Or will the jurisdiction have a less formal process for internal review and decision? The process to be used could be specified in the legislation or developed later during rulemaking.
- Funding sources for the restitution assistance fund have not been specifically prescribed in Section 4 and should be identified and considered by each jurisdiction. Possible sources of funding include:
 - civil fines or administrative penalties assessed by the jurisdiction (*see* Montana 30-10-1004(2)(a)(i), M.C.A.; Vermont 9 V.S.A. 5616(f));
 - a portion of licensing or registration fees (*see* Maine LD 1704 (2019-2020 legislative session); Montana 30-10-1004(2)(a)(iii), M.C.A.);
 - funds received for deposit into the jurisdiction's enforcement account (*see* Indiana Ind. Code Ann. § 23-20-1-25(b)(1));
 - appropriations by the legislature (*see* Indiana Ind. Code Ann. § 23-20-1-25(b)(2));
 - gifts, grants, bequests or other donations or voluntary contributions received by the jurisdiction (*see* Maine LD 1704 (2019-2020 legislative session); Montana 30-10-1004(2)(a)(ii), M.C.A.; Kansas HB 2558 (2019-2020 legislative session)); and,
 - transfers from an investor education and protection fund (*see* Kansas HB 2558 (2019-2020 legislative session)).
- If the jurisdiction does not have restitution as a specific remedy for violations of the securities laws, the jurisdiction's statute may need to be amended in other places to include it.
- Section 6 limits eligibility for restitution assistance to a natural person who was a resident of the jurisdiction at the time of the securities violation. Jurisdictions may wish to broaden the eligibility criteria to also include a person, other than a natural person, domiciled in the jurisdiction. This change would allow trusts, partnerships and other entities to apply for restitution assistance if they are the victim of a securities violation.
- Section 9 allows the jurisdiction, in its discretion, to seek the return of restitution assistance if the relevant final order is overturned on appeal. However, Section 9 leaves

the means for doing so, whether through administrative or civil action, up to the jurisdiction.

- A jurisdiction may consider deleting Section 9 and amending the definition of “final order” in Section 2 to mean “a final order issued by the [jurisdiction] under this chapter or a final order issued by the court in a legal action initiated by the [jurisdiction] under this chapter that is not subject to further judicial review or appeal.” (*See* Kansas HB 2558 (2019-2020 legislative session)). This change would delay the award of restitution assistance until a case is no longer subject to review or appeal, while retaining the definition of “final order” in Section 2 as drafted and including the permissive recovery provision in Section 9, allows jurisdictions to provide restitution assistance to claimants sooner.

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*An Act to Create a Restitution Assistance Fund
for Victims of Securities Violations*

Section 1. Short Title. Sections 1 to 18 may be cited as “An Act to Create a Restitution Assistance Fund for Victims of Securities Violations” and in this subchapter as this act.

Section 2. Definitions.

As used in this subchapter, unless the context otherwise indicates, the following terms have the following meanings.

1. **Claimant.** “Claimant” means a victim that files an application for restitution assistance under this subchapter. “Claimant” includes the named party in a restitution award in a final order, the executor of a named party in a restitution award in a final order and the heirs and assigns of a named party in a restitution award in a final order.
2. **Final order.** “Final order” means a final order issued by the [jurisdiction] under this chapter or a final order issued by the court in a legal action initiated by the [jurisdiction] under this chapter.
3. **Fund.** “Fund” means the securities restitution assistance fund established by this subchapter.
4. **Securities violation.** “Securities violation” means a violation of this chapter and any related rules.
5. **Victim.** “Victim” means a person awarded restitution in a final order.
6. **Vulnerable person.** “Vulnerable person” means:
 - a. An individual [insert age] years of age or older; or
 - b. An individual protected under the [insert jurisdiction’s statute protecting vulnerable persons].

Section 3. Fund established. A securities restitution assistance fund is established within the [jurisdiction] [add specific location of fund if necessary] to provide funds for restitution assistance for victims that were awarded restitution in a final order issued by the [jurisdiction] under this chapter or were awarded restitution in a final order in a legal action initiated by the [jurisdiction] under this chapter and have not received the full amount of restitution ordered before the application for restitution assistance is due.

Section 4. Funding. The fund consists of amounts received by the [jurisdiction] from: [insert funding language].

Section 5. Funds do not lapse. The amounts received for the fund may be used by the [jurisdiction] only to pay awards of restitution assistance under this subchapter and to administer this subchapter and may not be placed in the General Fund. Any balance in the fund does not lapse but must be carried forward to be used for the same purposes.

Section 6. Application for restitution assistance.

1. **Eligibility.** A natural person who was a resident of [state/commonwealth/district/territory] at the time of the securities violation is eligible to apply for restitution assistance.
2. **Deadline.** The application for restitution assistance under this subchapter must be received by [jurisdiction] not more than one year after the date of the final order awarding restitution to the victim.
3. **Extension.** Notwithstanding subsection 2, the [jurisdiction] may grant an extension of time for submission of an application for restitution assistance for good cause shown by the claimant.
4. **Form.** A person that is eligible to apply for restitution assistance under this subchapter may submit an application in a manner and form prescribed by the [jurisdiction]. The [jurisdiction] may provide forms for the submission of applications.

Section 7. Restitution assistance awards.

1. **Payment caps.** The [jurisdiction] may award restitution assistance to a claimant that is:
 - a. The lesser of \$25,000 or 25% of the amount of unpaid restitution awarded in the final order; or
 - b. The lesser of \$50,000 or 50% of the amount of unpaid restitution awarded in the final order if the victim is a vulnerable person.
2. **Waiver.** These payment caps may be waived by [the jurisdiction] for good cause shown.
3. **Limits.** An award of restitution assistance under this subchapter may be made only to one claimant per victim.

Section 8. Restitution prohibited. The [jurisdiction] may not award restitution assistance if:

1. **Participating in or committing a securities violation.** The victim sustained the monetary injury primarily as a result of:
 - a. Participating or assisting in a securities violation; or
 - b. Attempting to commit or committing a securities violation; or
2. **Profit from securities violation.** The victim profited or would have profited from a securities violation.

Section 9. Final order overturned. If an award of restitution in a final order is overturned on appeal after restitution assistance has been made, the [jurisdiction] at its discretion may recover the restitution assistance from the claimant by [insert jurisdiction's preferred means of recovery, whether by issuing an administrative order or filing a civil suit].

Section 10. Restitution forfeited.

1. **Conviction in connection with claim.** A claimant convicted of any crime including [insert appropriate crimes such as: forgery, fraud, deception or falsification] in connection with a claim made under this subchapter forfeits any restitution assistance award paid to the claimant under the subchapter.
2. **Civil action for recovery.** The [jurisdiction] may [bring / request that the Attorney General bring] a civil action to recover funds awarded to a claimant convicted of any crime including [insert appropriate crimes such as: forgery, fraud, deception or falsification] in connection with a claim under this subchapter.

Section 11. Subrogation. The [jurisdiction] is subrogated to the rights of the claimant awarded restitution assistance under this subchapter to the extent of the restitution assistance award made. The subrogation rights are against the person ordered to pay restitution to the victim for the securities violation.

Section 12. Lien on recovery. The [jurisdiction] is entitled to a lien in the amount of the restitution assistance award on any recovery made by or on behalf of the victim. The [jurisdiction] may assert its right to this amount in a separate action or intervene in an action brought by or on behalf of the victim.

Section 13. Refund of excess award. A claimant must refund to the [jurisdiction] any amount of restitution received that when combined with the restitution assistance exceeds the restitution award in the final order.

Section 14. Return of recovered money to the fund. Any monies recovered by the [jurisdiction] pursuant to sections 9, 10(2), 11, 12 or 13 of this subchapter, must be returned to the fund.

Section 15. Suspension of claims. If payment of restitution assistance would result in a fund balance below \$250,000, the [jurisdiction] may suspend payment of claims or prorate payment of claims at the [jurisdiction's] discretion until such time as the [jurisdiction] determines a sufficient balance has been restored to the fund.

Section 16. Other process. A restitution assistance award made by the [jurisdiction] under this subchapter is not subject to execution, attachment, garnishment or other process, except those executions, attachments, garnishments or other processes brought by or on behalf of the [state/commonwealth/district/territory].

Section 17. Rulemaking. The [jurisdiction] may adopt rules pursuant to the [cite jurisdiction's Administrative Procedure Act and/or any other rulemaking authority] to carry out the purposes of this subchapter.

Section 18. Effective date. Restitution assistance awards may be made under this subchapter to victims awarded restitution in a final order issued on or after the effective date of this subchapter.