



July 31, 2020

Via Email

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Chair
NASAA Restitution Assistance Working Group
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Lynn Egan, Esq.
Chair
NASAA State Legislation Committee
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**Re: Proposed Model Act to Create a Restitution
Assistance Fund for Victims of Securities Violations**

Dear Ms. Black and Ms. Egan:

This will serve as comments from Cetera Financial Group (“Cetera”) with respect to the Proposed Model Act to Create a Restitution Assistance Fund for Victims of Securities Violations (the “Model Act”), which was published by the North American Securities Administrators Association (“NASAA”) on June 30, 2020. Cetera is the corporate parent of five broker-dealers and three Registered Investment Advisers. Our firms conduct business in all 50 states.

Cetera supports the establishment of state-run restitution assistance funds for victims of securities law violations. As a member of the community of financial advisers, we have an abiding interest in promoting good conduct among members of the profession, enhancing investor protection, and assisting the public in recovering investment losses when they are victims of bad actors. The percentage of financial advisers who commit wrongdoing is extremely small, but their actions can have devastating effects on investors and we are in favor of facilities that assist victims in situations where violations of securities laws have led to financial losses. We have comments below regarding a couple of specific issues, but we believe that the overall approach set forth in the Model Act is a correct one.

We offer the following suggestions for clarifications and/or improvements in the Model Act:

1. **Sources of Funding** - The Model Act does not propose a single source of funding for restitution funds, but instead suggests a number of possible alternatives. Each of these has advantages and disadvantages, but the guiding principle in any legislation should be that the primary funding source for any restitution fund should be civil fines or administrative penalties that are assessed by the jurisdiction. This recognizes the connection between the wrongful conduct and recipients of the payments and establishes the proposition that the violator should be responsible for compensating the victims of their wrongdoing.

Another key principle is that restitution programs should not be funded through general assessments on either individuals or businesses who are not involved in the wrongdoing that led to investor losses. It has been suggested in some jurisdictions that the securities industry at large should be responsible for funding a mechanism to compensate victims of securities law violations regardless of their own conduct or involvement in the wrongdoing. This approach is misguided because it transfers the cost of bad conduct to firms or individuals who are not responsible for it. Disconnecting the cost from the consequences fails to deter bad conduct and may create a moral hazard in that it offers wrongdoers a means to satisfy claims of their victims without bearing the cost directly. In addition, general assessments on the securities industry would become a cost of doing business which would ultimately be borne by consumers of financial advice. Neither of these is desirable.

Two jurisdictions (Maine and Montana) apply a portion of the licensing and registration fees paid by some combination of broker-dealers, Registered Investment Advisers, and individual financial professionals to victim restitution funds. This approach appears neutral on its face, but may tend to become a disguised tax on the financial services industry and create the same negative consequences as general assessments on industry members. If licensing fees become a significant source of funding for victim compensation funds, there will be a natural temptation for legislators or state regulatory agencies to raise such fees in order to replenish restitution funds. The Model Act should include a provision which specifies that if licensing, registration, or other similar fees will be a funding source, either those fees should be capped at the then-current level or that the portion of any such fee that can be devoted to a restitution fund be capped at a specified dollar amount. We understand that in Montana, \$5.00 of each licensing fee is deposited in the restitution fund. This is a reasonable limit, but it should not be any higher.

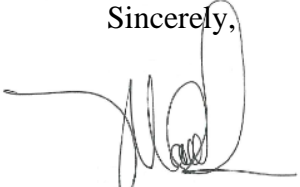
2. **Procedural Issues** - The Model Act would be improved by including provisions that more specifically delineate the circumstances under which individual claimants may receive payments from a restitution fund. The current version contains appropriate limits on awards, disqualification of individuals involved in wrongdoing from receiving awards, and subrogation of the fund to any rights that a victim may have against the wrongdoers if there are other sources of recovery. There are, however, a few areas that deserve further consideration:

- a. Section 9 of the Model Act provides two alternatives for situations in which claimants have received payments from a restitution fund and the order requiring restitution is overturned on appeal. Either the fund can seek reimbursement of an award from the claimant or the fund could delay payment of any awards until such time as all appeals have been exhausted. One function of restitution funds is to get relief to victims of wrongdoing expeditiously, and in general, we support streamlining the process as much as possible. However, making any award to a claimant prior to the conclusion of all appeals will create substantive logistical issues, including the following:
 - Claimants need certainty regarding payments they receive from the fund. If the fund can seek reimbursement after an appeal, recipients of restitution payments would not have certainty about their ability to retain them.
 - Many award recipients will lack the financial resources to reimburse restitution awards. Victims of securities fraud have already been traumatized. Receiving compensation from a restitution fund and then being forced to defend a lawsuit seeking return of the payment will only exacerbate this trauma.
 - Awards under the Model Act would be limited \$25,000 or \$50,000, depending on the status of the victim. If an award recipient is unable or unwilling to repay it after conclusion of an appeal of a restitution order, the cost of legal action by the fund will likely be higher than the amount recovered. The economics of that will be untenable for the fund and claimants will have an incentive to spend the money quickly rather than repaying it.
- b. Section 2 of the Model Act defines the terms “Claimant” and “Victim” and establish them as foundational elements for who is eligible to receive restitution awards. “Victim” is defined as “A person awarded restitution in a final order...”. “Claimant” is defined to include “Victims” and their executors, heirs and assigns. These definitions should be expanded and/or clarified to make clear that specified entities could also qualify as Victims. For example, many individuals hold all or substantially all of their personal assets in revocable trusts as part of their estate planning. The definition of “Victim” should be expanded to include “pass-through” entities such as trusts, limited partnerships, LLCs and other forms of small business organization of which one or a few individuals are the beneficial owners. We would also suggest allowing charitable organizations qualified under Internal Revenue Code Section 501(c)(3) or similar state statutes to qualify as both victims and claimants.
- c. The Model Act should include a provision requiring the jurisdiction to adopt regulations setting forth the process under which awards and payments to victims are determined. The regulations should require submission of standardized proofs of claim or similar attestations and provide for appropriate documentation of both the amount of the claimant’s losses and all actual and potential sources of recovery for the claimant.

Karla Black Esquire and Lynn Egan Esquire
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We appreciate the opportunity to provide these comments and commend both NASAA and your respective committees for undertaking this effort. If you have questions or we may offer any further information, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark Quinn', with a long horizontal flourish extending to the left.

Mark Quinn
Director of Regulatory Affairs