

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.]