



NASAA Model Whistleblower Award and Protection Act

Legislative Text & Commentary for
the 2020-2021 Legislative Session

North American Securities Administrators Association

About NASAA

The oldest international organization devoted to investor protection, the North American Securities Administrators, Inc. (“NASAA”) was organized in 1919. Its membership consists of the securities administrators in the 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Canada, and Mexico. NASAA is the voice of securities agencies responsible for grass-roots investor protection and responsible capital formation.

You can learn more about NASAA and the activities of its members at www.nasaa.org.

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Background

Rationale

Among their statutory responsibilities, state securities regulators investigate violations of state securities laws and bring enforcement actions where appropriate. Complaints often serve as the basis for those investigations and enforcement actions.ⁱ In particular, NASAA members recognize the value of whistleblower complaints. Employees and other individuals who report securities law violations can provide valuable firsthand accounts of financial fraud and wrongdoing. Such information can play a crucial role in the ability of state securities regulators to prevent or stop the wrongdoing and recover ill-gotten profits.

The NASAA Model Whistleblower Award and Protection Act (“Model Whistleblower Act” or “Model Act”) is designed, in part, to provide monetary incentives to individuals with relevant information concerning potential violations of state securities laws to report such information to state securities regulators. Further, since whistleblowers run the risk of retaliation, including loss of a job, the Model Act also includes provisions to protect whistleblowers and internal reporters that come forward from various forms of retribution.

Providing monetary incentives and a safe environment for whistleblowers to come forward can lead to the earlier detection of securities law violations, which, in turn, provides regulators with a greater opportunity to stop the alleged conduct sooner and prevent additional investors from being harmed.

Existing Securities Whistleblower Programs

Currently, there are three securities-based whistleblower programs in the U.S. At the federal level, Congress established the SEC Whistleblower Program through the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.ⁱⁱ Shortly thereafter, Utah and Indiana enacted similar programs in 2010 and 2011, respectively.ⁱⁱⁱ

The Model Act operates similarly to the securities whistleblower programs in Utah and Indiana. Utah law provides awards and anti-retaliation protections, whereas Indiana offers awards only. Since the inception of these programs, each state has issued one whistleblower award.

In 2014, the Utah Securities Division issued a \$15,000 award to an investment adviser representative that reported a suspicious investment sold to a potential client.^{iv} The investment adviser told investigators that a Canadian national was targeting a recent widow, who inherited a large sum of money, by promising a low-risk investment with high returns. Later investigations revealed that the perpetrator spent the funds on personal expenses.

In 2016, the Indiana Securities Division awarded \$95,000 to a whistleblower in connection with a \$950,000 settlement with JPMorgan Chase Bank, N.A. and J.P. Morgan Securities LLC.^v The whistleblower assisted investigators by providing information about improprieties in JPMorgan's asset management unit, including its practice of guiding clients towards in-house funds that carried higher costs or generated greater fees to the bank.^{vi} This information enabled the Division to bring an enforcement action against JPMorgan for failing to disclose certain conflicts of interest to clients about the way the bank invested their money.

Development of the NASAA Model Act

The Model Whistleblower Act originated as a project of the NASAA State Legislation Committee.^{vii} On April 2, 2020, the Committee circulated a draft of the Model Act for internal comments from NASAA member jurisdictions. On May 26, 2020, NASAA released a draft of the Model Act for a 30-day public comment period.^{viii} The Committee considered comments from other state securities regulators. The Committee also received and considered comments from interested parties including investor protection advocacy organizations, trade associations representing the broker-dealer industry and investment adviser industry, private legal practitioners, and academics.^{ix}

On August 28, 2020, the NASAA Board of Directors approved the Committee's request to submit the proposed Model Act to the NASAA membership for a vote. NASAA members subsequently voted to approve it on August 31, 2020.

The NASAA Model Whistleblower Award and Protection Act establishes a state-level program that (1) provides monetary awards to whistleblowers and (2) protects whistleblowers and internal reporters from retaliation. The commentary included herein offers additional information on each of the provisions that make up the Model Act.

Text of the NASAA Model Act and Commentary

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.^x 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.

Commentary: *The prefatory notes list a number of considerations that the adopting jurisdiction should consider. These considerations consist of express rulemaking authority, simple and accessible procedural requirements, separate funding sources for whistleblower awards, adoption of a clear policy on award-making by the securities administrator, and reference to the rules under SEC Regulation 21F where not inconsistent with the Act.*

Section 1: Short title. Sections 2 to 11 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.

Commentary: Section 2 defines key terms used throughout the Model Act. The Model Act only defines terms necessary to its operation. The whistleblower laws of Indiana and Utah and the federal securities laws include additional defined terms.^{xi}

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].

Commentary: Section 3 authorizes the securities administrator to issue monetary awards to qualifying whistleblowers. Several commentators suggested that whistleblowers should first report securities violations internally. Internal reports are not required for consideration of an award under existing federal or state securities laws. The Committee also declined to make internal reporting a prerequisite out of concern that it may discourage whistleblower complaints. However, state securities regulators may wish to consider it among the factors listed under Section 8.

A “successful enforcement of an administrative or judicial action” includes settlements.

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.

Commentary: Section 4 permits awards to whistleblowers who file anonymous complaints if represented by counsel and the whistleblower’s identity is disclosed prior to the payment of an award. The option to file complaints anonymously in this way encourages potential whistleblowers to come forward by reducing the risk of retaliation

while ensuring that the award is not made to someone who would be disqualified under Section 9.

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.

Commentary: *Section 5 sets a minimum and maximum amount of an award that is the same under the SEC Whistleblower Program.^{xii} The 10% floor ensures that potential whistleblowers are appropriately incentivized to report.*

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.

Commentary: *While the securities administrator has the discretion to determine the amount of an award, the amount must fall within the minimum and maximum amounts set forth in Section 5 and must be paid from the fund specified in Section 7. The securities administrator shall consider factors for determining the amount of an award listed in Section 8.*

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].

Commentary: *Section 7 identifies a funding source for whistleblower awards. Funding sources will vary by jurisdiction.^{xiii} For example, Indiana draws from its securities restitution fund comprised of 5% of money received for deposit in the securities division enforcement account, and appropriated funds.^{xiv} Utah uses its securities investor education, training, and enforcement fund, which is supported by civil penalties and administrative fines from settlements and administrative orders.^{xv} The SEC issues awards from its investor protection fund, which is financed by monetary sanctions paid to the agency.^{xvi}*

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.

Commentary: Section 8 sets forth a brief, non-exclusive list of factors that the securities administrator shall consider in determining the amount of an award. Additional factors can be found in SEC Regulation 21F.^{xvii}

The securities administrator has broad flexibility to consider any other factors deemed relevant. These factors can include whether a whistleblower has complied with internal reporting requirements, whether a whistleblower has some degree of culpability but falls short of a felony conviction, and whether a whistleblower has received an award in another jurisdiction for making a report based on the same information.

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.

Commentary: Section 9 disqualifies certain whistleblowers from receiving a monetary award. While the failure to file information in the form and manner that the securities administrator prescribes is a disqualifying factor, onerous procedural requirements should be avoided so as not to diminish the efficacy of the Act.

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 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.
- (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.

Commentary: Section 10 provides protections for whistleblowers and internal reporters. These protections include prohibiting retaliation by an employer, establishing a cause of action against retaliation by an employer, exempting from state public disclosure laws information reasonably expected to reveal the identity of a whistleblower, and prohibiting waiver of rights and remedies afforded under the Model Act. Individuals are afforded these protections if they report to the state securities regulator, a law enforcement agency, or report internally.

Under subsection 2, the adopting jurisdiction has the choice of applying a reckless standard to exceptions from protections against retaliation. While the Dodd-Frank Act limited the standard to when an individual provides false information knowingly, Indiana and Utah laws incorporate a reckless standard.

The statute of limitations for a cause of action under subsection 5 is the same as what is outlined in the Dodd-Frank Act.

Section 9 broadly reflects what exists in the federal statutes and has already been the subject of successful enforcement actions.

[**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.]

Commentary: Section 11 is an optional bracketed provision for jurisdictions who wish to have rulemaking authority under this Act.

Endnotes

ⁱ For instance, in 2018, NASAA members received 8,814 complaints, which led to 5,320 investigations and 1,672 enforcement actions. *See* NASAA 2019 Enforcement Report, available at <https://www.nasaa.org/wp-content/uploads/2019/11/2019-Enforcement-Report-Based-on-2018-Data-FINAL.pdf>.

ⁱⁱ *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1841 (2010).

ⁱⁱⁱ *See* Utah S.B. 100 (2011); Indiana H.B. 1294 (2012).

^{iv} Securities Commission Approves First Whistleblower Award for \$15K since S.B. 100 Securities Fraud Reporting Program Act Passed in 2011, Utah Dept. of Commerce (May 22, 2014), available at https://commerce.utah.gov/releases/14-05-22_sec-whistleblower-award.pdf.

^v To Crack Down on Securities Fraud, States Reward Whistle-Blowers, N.Y. Times (Aug. 21, 2016), <https://www.nytimes.com/2016/08/22/business/to-crack-down-on-securities-fraud-states-reward-whistle-blowers.html>.

^{vi} *Id.*

^{vii} The 2019-2020 NASAA State Legislation Committee members were Lynne Egan (MT), Faith Anderson (WA), Jeremy Bardsley (MA), Karla Black (ME), Lilah Blackstone (DC), Will Brainard (IN), Kelly Janes (WY), Cheryn Netz (TX), Michael Nusbaum (WV), Megan Verdeja (MN), and Melissa Wood (OH). NASAA staff liaisons were Michael Canning, Suzanne Riopel, and Vince Martinez.

^{viii} Notice of Request for Comments, NASAA's Proposed Model Whistleblower Award and Protection Act (May 26, 2020), available at <https://www.nasaa.org/wp-content/uploads/2020/05/Model-Whistleblower-Award-and-Protection-Act-Request-for-Public-Comment-052620.pdf>.

^{ix} *See* <https://www.nasaa.org/nasaa-proposals>.

^x The State Legislation Committee did not draft the Model Act to mandate the payment of whistleblower awards out of concern that states may encounter insufficient funds. However, the Committee strongly encourages that state securities administrators adopt a policy of issuing awards to qualifying whistleblowers. Potential whistleblowers are unlikely to put their careers at risk without assurances that they will receive an award for doing so.

^{xi} *See* 17 C.F.R. § 240.21F-4 (also defining "voluntary submission of information," "independent knowledge," "independent analysis," "appropriate regulatory agency," "appropriate regulatory authority," and "self-regulatory organization"); Ind. Code § 23-19-7 (also defining "commissioner," "division," and "fund"); Utah Code § 61-1-106 (also defining "adverse action," "covered judicial or administrative action," "employee," and "fund").

^{xii} 17 C.F.R. § 240.21F-5(c).

^{xiii} In its comment letter, FSI expressed that funding derived from broker-dealers and investment advisers should come from those who have violated the securities laws, not from industry as a whole.

^{xiv} Ind. Code § 23-19-6-1.

^{xv} Utah Code § 61-1-18.7.

^{xvi} 17 C.F.R. § 240.21F- 14.

^{xvii} 17 C.F.R. § 240.21F-6.