

1 **SECURITIES FRAUD REPORTING PROGRAM ACT**

2 2011 GENERAL SESSION

3 STATE OF UTAH

4 **Chief Sponsor: Benjamin M. McAdams**

5 House Sponsor: Jim Bird

6 Cosponsor: Karen W. Morgan

7

8 **LONG TITLE**

9 **General Description:**

10 This bill modifies the Utah Uniform Securities Act to address reporting of securities
11 violations.

12 **Highlighted Provisions:**

13 This bill:

- 14 ▶ enacts the Securities Fraud Reporting Program Act, including:
- 15 • defining terms;
 - 16 • establishing a procedure for disclosing information as a reporter;
 - 17 • providing protections against adverse employment action;
 - 18 • establishing remedies if adverse action is taken;
 - 19 • creating an award process for reporters;
 - 20 • imposing notice requirements;
 - 21 • prohibiting waiver of rights; and
 - 22 • establishing the scope of the program; and
- 23 ▶ makes technical and conforming amendments.

24 **Money Appropriated in this Bill:**

25 None

26 **Other Special Clauses:**

27 None

28 **Utah Code Sections Affected:**

29 AMENDS:

30 **61-1-18.7**, as last amended by Laws of Utah 2009, Chapter 351

31 ENACTS:

32 **61-1-101**, Utah Code Annotated 1953

33 **61-1-102**, Utah Code Annotated 1953

34 **61-1-103**, Utah Code Annotated 1953

35 **61-1-104**, Utah Code Annotated 1953

36 **61-1-105**, Utah Code Annotated 1953

37 **61-1-106**, Utah Code Annotated 1953

38 **61-1-107**, Utah Code Annotated 1953

39 **61-1-108**, Utah Code Annotated 1953

40

41 *Be it enacted by the Legislature of the state of Utah:*

42 Section 1. Section **61-1-18.7** is amended to read:

43 **61-1-18.7. Funding of securities investor education, training, and enforcement.**

44 (1) (a) There is created a restricted special revenue fund known as the "Securities
45 Investor Education [~~and~~], Training, and Enforcement Fund" to provide revenue for [~~educating~~
46 ~~the public and the securities industry as provided~~] the purposes stated in this section.

47 (b) For purposes of this section, "fund" means the Securities Investor Education [~~and~~],
48 Training, and Enforcement Fund.

49 (2) [~~All money~~] Money received by the state by reason of civil penalties ordered and
50 administrative fines collected pursuant to this chapter shall be deposited in the fund, and is
51 subject to the requirements of Title 51, Chapter 5, Funds Consolidation Act.

52 (3) A fine collected by the division after July 1, 1989, pursuant to a voluntary
53 settlement or administrative order shall be deposited into the fund.

54 (4) (a) The fund shall earn interest.

55 (b) [~~All interest~~] Interest earned on fund money shall be deposited into the fund.

56 (5) Notwithstanding Title 63J, Chapter 1, Budgetary Procedures Act, the director may

57 use money in the fund, upon concurrence of the commission and the executive director of the
58 Department of Commerce, in a manner consistent with the duties of the division and
59 commission under this chapter and only for any or all of the following and the expense of
60 providing them:

61 (a) education and training of Utah residents in matters concerning securities laws and
62 investment decisions, by publications or presentations;

63 (b) education of registrants and licensees under this chapter, by:

64 (i) publication of this chapter and rules and policy statements and opinion letters issued
65 under this chapter; and

66 (ii) sponsorship of seminars or meetings to educate registrants and licensees as to the
67 requirements of this chapter; [~~and~~]

68 (c) investigation and litigation[-]; and

69 (d) to pay an award to a reporter as provided in Part 1, Securities Fraud Reporting
70 Program Act.

71 (6) If the balance in the fund exceeds [~~\$100,000~~] \$500,000 at the close of any fiscal
72 year, the excess shall be transferred to the General Fund.

73 Section 2. Section **61-1-101** is enacted to read:

74 **Part 1. Securities Fraud Reporting Program Act**

75 **61-1-101. Title.**

76 This part is known as the "Securities Fraud Reporting Program Act."

77 Section 3. Section **61-1-102** is enacted to read:

78 **61-1-102. Definitions.**

79 As used in this part:

80 (1) "Adverse action" means to:

81 (a) discharge, threaten, or directly or indirectly harass an employee; or

82 (b) otherwise discriminate against an employee in any manner that affects the

83 employee's employment, including:

84 (i) compensation;

- 85 (ii) terms;
- 86 (iii) conditions;
- 87 (iv) location;
- 88 (v) rights;
- 89 (vi) immunities;
- 90 (vii) promotions; or
- 91 (viii) privileges.

92 (2) "Covered judicial or administrative action" means a judicial or administrative
93 action brought under this chapter that results in a monetary sanction exceeding \$50,000.

94 (3) "Employee" means an individual who performs a service for wages or other
95 remuneration under a contract of hire, written or oral, express or implied.

96 (4) "Fund" means the Securities Investor Education, Training, and Enforcement Fund
97 created in Section 61-1-18.7.

98 (5) "Original information" means information that is:

99 (a) derived from the independent knowledge or analysis of an individual;

100 (b) not known to the division or commission from a source other than the individual;

101 and

102 (c) unless the individual is the source of the information, not exclusively derived from:

103 (i) an allegation made in a judicial or administrative hearing;

104 (ii) a government report, hearing, audit, or investigation; or

105 (iii) the media.

106 (6) "Monetary sanction" means money required to be paid under this chapter as the
107 result of a judicial or administrative action, including a penalty or disgorgement.

108 (7) "Reporter" means an individual who provides original information relating to a
109 violation in accordance with Section 61-1-103.

110 Section 4. Section **61-1-103** is enacted to read:

111 **61-1-103. Procedure for disclosure.**

112 (1) To be a reporter for purposes of this part, the individual shall:

113 (a) provide original information to the division or commission;
114 (b) reasonably believe that the act that is disclosed by the original information is a
115 violation of this chapter; and
116 (c) provide the original information to the division or commission:
117 (i) in writing; and
118 (ii) in accordance with the procedures established by rule made by the division in
119 accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act.
120 (2) (a) Notwithstanding Title 63G, Chapter 2, Government Records Access and
121 Management Act, and except as provided in Subsection (2)(b), the division, commission, or an
122 employee of the division may not disclose information that could reasonably be expected to
123 reveal the identity of a reporter.
124 (b) This Subsection (2) is not intended to limit, and may not be construed to limit, the
125 ability of the attorney general or division to present evidence to a grand jury or to share
126 evidence with potential witnesses or defendants in the course of an ongoing criminal
127 investigation.

128 Section 5. Section **61-1-104** is enacted to read:

129 **61-1-104. Reporter protected from adverse action -- Exceptions.**

130 (1) An employer may not take adverse action against an employee who is a reporter
131 because of a lawful act of the employee, or a person authorized to act on behalf of the
132 employee, to:

133 (a) provide original information to the division or commission in accordance with
134 Section 61-1-103;

135 (b) initiate, testify in, or assist in any investigation, judicial action, or administrative
136 action based on or related to original information provided to the division or commission;

137 (c) disclose information required or protected under:

138 (i) Sarbanes-Oxley Act of 2002, 15 U.S.C. Sec. 7201 et seq.;

139 (ii) Securities Exchange Act of 1934, 15 U.S.C. Sec. 78a et seq.;

140 (iii) 18 U.S.C. Sec. 1523(e);

141 (iv) a regulation issued by the Securities Exchange Commission; or

142 (v) this chapter or a rule made under this chapter.

143 (2) Notwithstanding Subsection (1), an employee is not protected under this section if:

144 (a) the employee knowingly or recklessly makes a false, fictitious, or fraudulent
145 statement or misrepresentation;

146 (b) the employee uses a false writing or document knowing that, or with reckless
147 disregard as to whether, the writing or document contains false, fictitious, or fraudulent
148 information;

149 (c) the employee knows that, or has a reckless disregard as to whether, the disclosure is
150 of original information that is false or frivolous; or

151 (d) the employer or entity in the covered judicial or administrative action that relates to
152 the information provided by the reporter is subject to the jurisdiction of the Securities and
153 Exchange Commission under Section 21F of the Securities Exchange Act, 15 U.S.C. Sec.
154 78u-6, and regulations issued under that section.

155 Section 6. Section **61-1-105** is enacted to read:

156 **61-1-105. Remedies for employee bringing action.**

157 (1) As used in this section, "actual damages" means damages for injury or loss caused
158 by a violation of Section 61-1-104.

159 (2) (a) An employee who alleges a violation of Section 61-1-104 may bring a civil
160 action for injunctive relief, actual damages, or both.

161 (b) An employee may not bring a civil action under this section more than:

162 (i) four years after the day on which the violation of Section 61-1-104 occurs; or

163 (ii) two years after the date when facts material to the right of action are known or
164 reasonably should be known by the employee alleging a violation of Section 61-1-104.

165 (3) An employee may bring an action under this section in the district court for the
166 county where:

167 (a) the alleged violation occurs;

168 (b) the employee resides; or

169 (c) the person against whom the civil complaint is filed resides or has a principal place
170 of business.

171 (4) To prevail in an action brought under this section, an employee shall establish, by a
172 preponderance of the evidence, that the employee has suffered an adverse action because the
173 employee, or a person acting on the employee's behalf, engaged or intended to engage in an
174 activity protected under Section 61-1-104.

175 (5) A court may award as relief for an employee prevailing in an action brought under
176 this section:

177 (a) reinstatement with the same fringe benefits and seniority status that the individual
178 would have had, but for the adverse action;

179 (b) two times the amount of back pay otherwise owed to the individual, with interest;

180 (c) compensation for litigation costs, expert witness fees, and reasonable attorney fees;

181 (d) actual damages; or

182 (e) any combination of the remedies listed in this Subsection (5).

183 (6) (a) An employer may file a counter claim against an employee who files a civil
184 action under this section seeking attorney fees and costs incurred by the employer related to the
185 action filed by the employee and the counter claim.

186 (b) The court may award an employer who files a counter claim under this Subsection
187 (6) attorney fees and costs if the court finds that:

188 (i) there is no reasonable basis for the civil action filed by the employee; or

189 (ii) the employee is not protected under Section 61-1-104 because:

190 (A) the employee engaged in an act described in Subsections 61-1-104(2)(a) through
191 (c); or

192 (B) Subsection 61-1-104(2)(d) applies.

193 Section 7. Section **61-1-106** is enacted to read:

194 **61-1-106. Award for reporter.**

195 (1) Subject to Section 61-1-108 and the other provisions of this section, the
196 commission may award an award to one or more reporters who voluntarily provide original

197 information to the commission or division that leads to the successful enforcement of a covered
198 judicial or administrative action.

199 (2) The division shall pay an award under this section from the fund.

200 (3) (a) Subject to the other provisions of this section, the commission may determine
201 the amount of award paid under this section, except that in determining the amount the
202 commission shall consider:

203 (i) the significance of the original information provided by the reporter to the success
204 of the covered judicial or administrative action;

205 (ii) the degree of assistance provided by the reporter in relation to the covered judicial
206 or administrative action;

207 (iii) any costs of legal representation for the reporter in relation to the covered judicial
208 or administrative action;

209 (iv) the programmatic interest of the commission in deterring a violation of this chapter
210 by making an award to a reporter who provides original information that leads to the successful
211 enforcement of this chapter; and

212 (v) any other relevant factor that the division may establish by rule.

213 (b) The aggregate amount of awards that the commission may award for a specific
214 covered judicial or administrative action may not exceed:

215 (i) the balance in the fund as of the date the awards are determined; or

216 (ii) 30%, in total, of what is collected of the monetary sanction imposed in the judicial
217 or administrative action.

218 (4) The commission may not award a reporter under this section if the reporter:

219 (a) is convicted of a criminal violation related to the covered judicial or administrative
220 action for which the reporter otherwise could receive an award;

221 (b) gains the original information through the performance of an audit of financial
222 statements required under securities laws and for whom providing the original information
223 would violate 15 U.S.C. Sec. 78j-1;

224 (c) fails to provide the original information to the commission or division in

225 accordance with Section 61-1-103;

226 (d) knowingly or recklessly makes a false, fictitious, or fraudulent statement or
227 misrepresentation;

228 (e) uses a false writing or document knowing that, or with reckless disregard as to
229 whether, the writing or document contains false, fictitious, or fraudulent information;

230 (f) knows that, or has a reckless disregard as to whether, the disclosure is of original
231 information that is false or frivolous;

232 (g) has a legal duty to report the original information to the commission or division; or

233 (h) the employer or entity in the covered judicial or administrative action that relates to
234 the information provided by the reporter is subject to the jurisdiction of the Securities and
235 Exchange Commission under Section 21F of the Securities Exchange Act, 15 U.S.C. Sec.
236 78u-6, and regulations issued under this section.

237 Section 8. Section **61-1-107** is enacted to read:

238 **61-1-107. Procedures related to an award to a reporter.**

239 (1) If the commission determines to make an award under Section 61-1-106, the
240 commission shall make the award in accordance with a procedure adopted by the division by
241 rule.

242 (2) A contract with the commission is not necessary for a reporter to receive an award
243 under Section 61-1-106, unless otherwise required by the division by rule made under
244 Subsection (1).

245 (3) A reporter who makes a claim for an award under this section may hire an attorney
246 to represent the reporter.

247 (4) (a) The commission has discretion when making a determination under this section
248 or Section 61-1-106, including whether, to whom, or in what amount to make an award.

249 (b) In accordance with Title 63G, Chapter 4, Administrative Procedures Act, a person
250 aggrieved by a determination of the commission, except for a determination of the amount of
251 the award, may appeal the determination in the same manner as a formal adjudicative
252 proceeding.

253 (5) This part may not be construed to require the division or commission to
254 compensate a reporter for participation in an investigation, hearing, or inquiry held under this
255 chapter.

256 (6) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the
257 division shall make the rules described in Subsection (1) and Subsection 61-1-106(3)
258 consistent with this part.

259 Section 9. Section **61-1-108** is enacted to read:

260 **61-1-108. Notice of contents of this part -- May not waive -- Nonexclusive.**

261 (1) An employer who is licensed under this chapter shall post a notice and use other
262 appropriate means to inform an employee of rights, protections, and obligations under this part.

263 (2) An individual may not waive a right or protection provided by this part by
264 agreement, policy form, or condition of employment, including by a predispute arbitration
265 agreement.

266 (3) This part may not be considered to diminish the rights, privileges, or remedies of a
267 reporter under federal or state law, or under any collective bargaining agreement.