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~~{SECURITIES FRAUD REPORTING}~~ Senator Benjamin McAdams proposes the following substitute bill:

SECURITIES FRAUD REPORTING PROGRAM ACT

2011 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Benjamin M. McAdams

House Sponsor: _____

LONG TITLE

General Description:

This bill modifies the Utah Uniform Securities Act to address

~~{whistleblowing}~~ reporting of securities violations.

Highlighted Provisions:

This bill:

- ▶ enacts the ~~{Whistleblower}~~ Securities Fraud Reporting Program Act, including:
 - defining terms;
 - establishing a procedure for disclosing information as a ~~{whistleblower}~~ reporter;
 - providing protections against adverse employment action;
 - establishing remedies if adverse action is taken;
 - providing administrative fines;
 - creating an award process for ~~{whistleblowers}~~ reporters;
 - imposing notice requirements;
 - prohibiting waiver of rights; and

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- establishing the scope of the program; and
- ▶ makes technical and conforming amendments.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

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

ENACTS:

61-1-101, Utah Code Annotated 1953

61-1-102, Utah Code Annotated 1953

61-1-103, Utah Code Annotated 1953

61-1-104, Utah Code Annotated 1953

61-1-105, Utah Code Annotated 1953

61-1-106, Utah Code Annotated 1953

61-1-107, Utah Code Annotated 1953

61-1-108, Utah Code Annotated 1953

61-1-109, Utah Code Annotated 1953

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

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

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

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

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

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

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

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

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

(5) Notwithstanding Title 63J, Chapter 1, Budgetary Procedures Act, the director may use money in the fund, upon concurrence of the commission and the executive director of the Department of Commerce, in a manner consistent with the duties of the division and commission under this chapter and only for any or all of the following and the expense of providing them:

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

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

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

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

(c) investigation and litigation[-]; and

(d) to pay an award to a {whistleblower} reporter as provided in Part 1, {Whistleblower} Securities Fraud Reporting Program Act.

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

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

Part 1. {Whistleblower} Securities Fraud Reporting Program Act

61-1-101. Title.

This part is known as the "{Whistleblower} Securities Fraud Reporting Program Act."

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

61-1-102. Definitions.

As used in this part:

(1) "Adverse action" means to:

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

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

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employee's employment, including:

(i) compensation;

(ii) terms;

(iii) conditions;

(iv) location;

(v) rights;

(vi) immunities;

(vii) promotions; or

(viii) privileges.

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

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

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

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

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

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

and

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

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

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

(iii) the media.

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

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

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

61-1-103. Procedure for disclosure.

(1) To be a ~~{whistleblower}~~reporter for purposes of this part, the individual shall:

(a) provide original information to the division or commission;

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(b) reasonably believe that the act that is disclosed by the original information is a violation of this chapter; and

(c) provide the original information to the division or commission:

(i) in writing; and

(ii) in accordance with the procedures established by rule made by the division in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

(2) (a) Notwithstanding Title 63G, Chapter 2, Government Records Access and Management Act, and except as provided in Subsection (2)(b), the division, commission, or an employee of the division may not disclose information that could reasonably be expected to reveal the identity of a ~~{whistleblower}~~reporter.

(b) This Subsection (2) is not intended to limit, and may not be construed to limit, the ability of the attorney general or division to present evidence to a grand jury or to share evidence with potential witnesses or defendants in the course of an ongoing criminal investigation.

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

61-1-104. ~~{Whistleblower}~~ Reporter protected from adverse action -- Exceptions.

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

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

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

(c) disclose information required or protected under:

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

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

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

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

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

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

(a) the employee knowingly and willfully makes a false, fictitious, or fraudulent

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statement or misrepresentation;

(b) uses a false writing or document knowing the writing or document contains false, fictitious, or fraudulent information; or

(c) knows or reasonably should know that the disclosure is of original information that is false or frivolous.

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

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

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

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

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

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

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

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

(a) the alleged violation occurs;

(b) the employee resides; or

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

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

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

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

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

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

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(d) actual damages; or

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

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

61-1-106. Administrative fine.

(1) The commission may impose an administrative fine not to exceed \$500 against a person required to be licensed under this chapter who violates Section 61-1-104.

(2) An administrative fine ordered under this section shall be deposited in the fund.

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

61-1-107. Award for {whistleblower}reporter.

(1) Subject to Section 61-1-108 and the other provisions of this section, the commission may award an award to one or more {whistleblowers}reporters who voluntarily provide original information to the commission or division that leads to the successful enforcement of a covered judicial or administrative action.

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

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

(i) the significance of the original information provided by the {whistleblower}reporter to the success of the covered judicial or administrative action;

(ii) the degree of assistance provided by the {whistleblower}reporter in relation to the covered judicial or administrative action;

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

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

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

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

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

(ii) 30%, in total, of what is collected of the monetary sanction imposed in the judicial

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or administrative action.

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

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

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

(c) fails to provide the original information to the commission or division in accordance with Section 61-1-103;

(d) knowingly and willfully makes a false, fictitious, or fraudulent statement or misrepresentation;

(e) uses a false writing or document knowing the writing or document contains false, fictitious, or fraudulent information;

(f) knows or reasonably should know that the disclosure is of original information that is false or frivolous; or

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

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

61-1-108. Procedures related to an award to a {whistleblower}reporter.

(1) If the commission determines to make an award under Section 61-1-107, the commission shall make the award in accordance with a procedure adopted by the division by rule.

(2) A contract with the commission is not necessary for a {whistleblower}reporter to receive an award under Section 61-1-107, unless otherwise required by the division by rule made under Subsection (1).

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

(4) (a) The commission has discretion when making a determination under this section or Section 61-1-107, including whether, to whom, or in what amount to make an award.

(b) In accordance with Title 63G, Chapter 4, Administrative Procedures Act, a person aggrieved by a determination of the commission, except for a determination of the amount of

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the award, may appeal the determination in the same manner as a formal adjudicative proceeding.

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

(6) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the division shall make the rules described in Subsection (1) and Subsection 61-1-108(3) consistent with this part.

Section 10. Section **61-1-109** is enacted to read:

61-1-109. Notice of contents of this part -- May not waive -- Nonexclusive.

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

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

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

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Legislative Review Note

~~as of 12-6-10 10:15 AM~~

~~Office of Legislative Research and General Counsel}~~