

SECURITIES WHISTLEBLOWER 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.

Highlighted Provisions:

This bill:

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



28 AMENDS:

29 61-1-18.7, as last amended by Laws of Utah 2009, Chapter 351

30 ENACTS:

31 61-1-101, Utah Code Annotated 1953

32 61-1-102, Utah Code Annotated 1953

33 61-1-103, Utah Code Annotated 1953

34 61-1-104, Utah Code Annotated 1953

35 61-1-105, Utah Code Annotated 1953

36 61-1-106, Utah Code Annotated 1953

37 61-1-107, Utah Code Annotated 1953

38 61-1-108, Utah Code Annotated 1953

39 61-1-109, Utah Code Annotated 1953



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 whistleblower as provided in Part 1, Whistleblower Program
70 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. Whistleblower Program Act**

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

76 This part is known as the "Whistleblower 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) "Whistleblower" means an individual who provides original information relating to
109 a 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 whistleblower 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 whistleblower.

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. Whistleblower protected from adverse action -- Exceptions.**

130 (1) An employer may not take adverse action against an employee who is a
131 whistleblower because of a lawful act of the employee, or a person authorized to act on behalf
132 of the 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 and willfully makes a false, fictitious, or fraudulent
145 statement or misrepresentation;

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

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

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

151 **61-1-105. Remedies for employee bringing action.**

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

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

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

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

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

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

162 (a) the alleged violation occurs;

163 (b) the employee resides; or

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

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

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

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

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

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

176 (d) actual damages; or

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

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

179 **61-1-106. Administrative fine.**

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

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

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

184 **61-1-107. Award for whistleblower.**

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

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

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

193 (i) the significance of the original information provided by the whistleblower to the
194 success of the covered judicial or administrative action;

195 (ii) the degree of assistance provided by the whistleblower in relation to the covered
196 judicial or administrative action;

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

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

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

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

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

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

208 (4) The commission may not award a whistleblower under this section if the
209 whistleblower:

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

212 (b) gains the original information through the performance of an audit of financial
213 statements required under securities laws and for whom providing the original information

214 would violate 15 U.S.C. Sec. 78j-1;

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

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

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

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

223 (g) has a legal duty to report the original information to the commission or division.
224 Section 9. Section **61-1-108** is enacted to read:

225 **61-1-108. Procedures related to an award to a whistleblower.**

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

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

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

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

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

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

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

245 consistent with this part.

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

247 **61-1-109. Notice of contents of this part -- May not waive -- Nonexclusive.**

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

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

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

Legislative Review Note
as of 12-6-10 10:15 AM

Office of Legislative Research and General Counsel