

**SECURITIES WHISTLEBLOWER PROGRAM ACT**

2011 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Benjamin M. McAdams**

House Sponsor: \_\_\_\_\_

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**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:**

S.B. 100



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.

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

**Office of Legislative Research and General Counsel**

# FISCAL NOTE

## S.B. 100, 2011 General Session

SHORT TITLE: Securities Whistleblower Program Act

SPONSOR: McAdams, B.

STATE OF UTAH

### STATE GOVERNMENT (UCA 36-12-13(2)(b))

Enactment of this bill could result in additional fines collected. Assuming an increase 25 percent from whistleblower investigations and fines, the Department would collect an additional \$600,000. The annual net revenue to the State would be \$420,000 after the 30% award. However, with the limit on the Securities Investor Education, Training, and Enforcement Fund balance increased to \$500,000, the General Fund would experience a one-time loss of up to \$400,000.

### STATE BUDGET DETAIL TABLE

|  | FY 2011    | FY 2012          | FY 2013          |
|--|------------|------------------|------------------|
| <b>Revenue:</b>                            |            |                  |                  |
| General Fund                               | \$0        | \$420,000        | \$420,000        |
| General Fund, One-Time                     | \$0        | (\$400,000)      | \$0              |
| Restricted Funds                           | \$0        | \$180,000        | \$180,000        |
| <b>Total Revenue</b>                       | <b>\$0</b> | <b>\$200,000</b> | <b>\$600,000</b> |
| <b>Expenditure:</b>                        |            |                  |                  |
| Restricted Funds                           | \$0        | \$180,000        | \$180,000        |
| <b>Total Expenditure</b>                   | <b>\$0</b> | <b>\$180,000</b> | <b>\$180,000</b> |
| <b>Net Impact, All Funds (Rev.-Exp.)</b>   | <b>\$0</b> | <b>\$20,000</b>  | <b>\$420,000</b> |
| <b>Net Impact, General/Education Funds</b> | <b>\$0</b> | <b>\$20,000</b>  | <b>\$420,000</b> |

### LOCAL GOVERNMENTS (UCA 36-12-13(2)(c))

Enactment of this bill likely will not result in direct, measurable costs and/or benefits for local governments.

### DIRECT EXPENDITURES BY UTAH RESIDENTS AND BUSINESSES (UCA 36-12-13(2)(d))

To the extent that this legislation encourages more reporting of information, affected businesses would be required to pay the fines and sanctions. Employees who report violations under this act would be eligible to receive up to 30% of the fines subsequently collected.