

Rulemaking Commenters Debate the SEC's Proposed Changes to Its Whistleblower Program

立法评议者就美证交会对举报计划的变更提议开展 辩论

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Over 3,000 commenters submitted letters to the Securities and Exchange Commission ("SEC") concerning the agency's recently proposed amendments to its whistleblower rules.¹ This response reflects the perceived importance of the SEC's proposal to companies and employees.

超过 3,000 名评议者就美国证券交易委员会（“证交会”）最近对其举报规则的修订提议致函证交会。² 此反响表明了企业和雇员对证交会上上述提议的重视程度。

The most controversial of the proposed amendments would allow the SEC discretion to decrease the size of an award if it determines that the award would otherwise be too large to advance the goals of the whistleblower program.³ Under current rules, if a whistleblower qualifies for an award, the SEC determines the size of the award by considering a number of specified factors that can increase or decrease the award amount within the range of 10 to 30 percent of the monetary sanctions recovered.⁴ To decrease the amount of an award, the SEC can consider only the culpability of the whistleblower; whether the whistleblower unreasonably

¹ Comments on Proposed Rule: Amendments to the Commission's Whistleblower Program Rules, Release No. 34-83557; File No. S7-16-18, <https://www.sec.gov/comments/s7-16-18/s71618.htm>.

² 关于提议规则的意见：委员会举报人计划规则修订，公告第 34-83557 号；文件号 S7-16-18, <https://www.sec.gov/comments/s7-16-18/s71618.htm>。

³ Proposed Rule Amendments, "Whistleblower Program Rules," SEC Release No. 34-83557 (Jun. 28, 2018), at 40-56, available at <https://www.sec.gov/rules/proposed/2018/34-83557.pdf>.

⁴ *Id.* at 41.

delayed reporting the misconduct to the SEC; and whether the whistleblower interfered with the company's internal compliance and reporting systems.⁵

修订的提议中最具争议的一点是允许证交会在其认为奖励过大以至于会影响举报计划目标实现的情况下酌情减少奖励金额。⁶ 根据目前的规则，如果举报人有资格获得奖励，证交会将通过考虑若干规定的因素来确定奖励金额，基于这些因素，奖励金额可在罚款的 10%至 30%区间内增加或减少。⁷ 要减少奖励金额，证交会只能考虑举报人的过失、举报人是否不合理地推迟了向证交会报告不当行为，以及举报人是否妨碍了公司的内部合规和举报制度。⁸

The SEC has taken the position that the existing rules give it no discretion to take an award's size into account when determining how much money to give a whistleblower. This approach has resulted in several awards that are so large that they present the question whether the SEC's whistleblower program has made good use of taxpayer dollars. For example, the SEC recently awarded \$54 million to two whistleblowers⁹ and \$83 million to three others.¹⁰ Indeed, without a change in the SEC's approach, awards based on the largest SEC and Department of Justice settlements could reach into the hundreds of millions of dollars. Seeing the possibility of grossly excessive awards in the future, the SEC has proposed giving itself discretion to decrease awards in cases involving monetary sanctions exceeding \$100 million, when a single whistleblower would receive more than \$30 million.¹¹

证交会采取的立场是，现有规则使其在确定给予举报人多大奖励时无法酌情考虑奖励的金额。这种情况导致有些奖励太大以至于令人疑虑证交会的举报计划是否有效地利用了纳税人的钱。例如，证交会最近向两名举报人发放了 5,400 万美元的奖励，¹² 并向另外三名举报人发放了 8,300 万美元的奖励。¹³ 实际上，如果按照证交会现有规定，基于一些最大数额的证交会和司法部和解，奖励可能高达数亿美元。证交会意识到将来产生过大奖励的可能性，于是提议，在涉及超过 1 亿美元罚金的案件中，单一举报人可能获得超过 3,000 万美元的奖励的情形下，证交会应当可以酌情减少奖励。¹⁴

The overwhelming majority of comments were in form letters supporting the position of the National Whistleblower Center ("NWC"), which opposed what it called a "cap" on awards.¹⁵ The NWC argued that such a cap would deter well-compensated insiders at large financial

⁵ *Id.*

⁶ 提议规则修订：“举报人计划规则”，证交会公告第 34-83557 号（2018 年 6 月 28 日），第 40-56 页，网址：<https://www.sec.gov/rules/proposed/2018/34-83557.pdf>。

⁷ 同上，第 41 页。

⁸ 同上。

⁹ SEC Press Release, *SEC Awards More Than \$54 Million to Two Whistleblowers* (Sept. 6, 2018), <https://www.sec.gov/news/press-release/2018-179>.

¹⁰ Proposed Whistleblower Program Rule Amendments, *supra*, at 12 n. 9.

¹¹ *Id.* at 44.

¹² 证交会新闻稿，《证交会奖励两名举报人超过 5,400 万美元》（2018 年 9 月 6 日），<https://www.sec.gov/news/press-release/2018-179>。

¹³ 提议举报人计划规则修订，见上文，第 12 页第 9 段。

¹⁴ 同上，第 44 页。

¹⁵ Letter Type A, <https://www.sec.gov/comments/s7-16-18/s71618-typea.htm>; Letter Type B, <https://www.sec.gov/comments/s7-16-18/s71618-typeb.htm>.

institutions from coming forward with evidence of violations.¹⁶ The NWC also cited its own analysis concluding that "larger rewards generate significantly greater publicity which both incentivizes perspective whistleblowers and deters criminal activity/securities fraud."¹⁷ Senator Charles Grassley (R-Iowa), the Chairman of the Senate Committee on the Judiciary, submitted a comment letter contending that the SEC had failed to point "to any compelling reason to veer from award levels that are working and that are comparable to other federal award programs."¹⁸ Chairman Grassley cited a 2013 SEC Inspector General report finding that SEC whistleblower awards were calibrated appropriately, but without considering the SEC's largest awards, which were granted after the report was written.

绝大多数意见是采用信函形式的支持国家举报中心的立场，反对所谓的奖励“上限”。¹⁹ 国家举报中心认为，此上限可能会阻止大型金融机构的高薪内部人士提交违法证据。²⁰ 国家举报中心还援引自己的分析推断称，“更多的奖励能起到更大的宣传效应，既能鼓励潜在举报人又能阻止犯罪行为 and 证券欺诈。”²¹ 参议院司法委员会主席查尔斯·格拉斯利参议员（共和党，艾奥瓦州）提交了一份意见函。他认为，证交会未能“为废弃目前行之有效且与其他联邦奖励计划相当的奖励水平提出有说服力的理由”。²² 格拉斯利主席援引 2013 年证交会总巡视长报告称，证交会举报人奖励作过适当调整，但调整未考虑证交会最大的奖励，而这些奖励是在该报告撰写完后授予的。

In contrast, the Securities Industry and Financial Markets Association ("SIFMA"), a securities industry trade association, supported giving the SEC discretion to reduce large awards. According to SIFMA, recoveries over \$30 million provide "little marginal incentive" for whistleblowers to come forward, especially when the amount of a "potential penalty is virtually impossible for a whistleblower to predict in the first place."²³

¹⁶ National Whistleblower Center (NWC) Comment Letter, Sept., 2018, at 2, <https://www.sec.gov/comments/s7-16-18/s71618-4371152-175237.pdf>.

¹⁷ NWC Comment Letter, *supra*, at 3; see also Comment Letter of Markopolos Research LLC, Sept. 14, 2018, at 4, <https://www.sec.gov/comments/s7-16-18/s71618-4351184-173304.pdf>.

¹⁸ Comment Letter of Grassley, Sen. Charles E., U.S. Senate Committee on the Judiciary, Sept. 18, 2018, at 2, <https://www.sec.gov/comments/s7-16-18/s71618-4373264-175545.pdf>.

¹⁹ A 类函, <https://www.sec.gov/comments/s7-16-18/s71618-typea.htm>; B 类函, <https://www.sec.gov/comments/s7-16-18/s71618-typeb.htm>.

²⁰ 国家举报中心意见函, 2018 年 9 月, 第 2 页, <https://www.sec.gov/comments/s7-16-18/s71618-4371152-175237.pdf>.

²¹ 国家举报中心意见函, 见上文, 第 3 页; 参见 Markopolos Research LLC 的意见函, 2018 年 9 月 14 日, 第 4 页, <https://www.sec.gov/comments/s7-16-18/s71618-4351184-173304.pdf>.

²² 查尔斯·E·格拉斯利参议员的意见函, 美国参议院司法委员会, 2018 年 9 月 18 日, 第 2 页, <https://www.sec.gov/comments/s7-16-18/s71618-4373264-175545.pdf>.

²³ SIFMA Comment Letter, Sept. 18, 2018, at 4, <https://www.sec.gov/comments/s7-16-18/s71618-4373269-175549.pdf>.

对比之下，证券行业和金融市场协会（一家证券行业协会）支持赋予证交会酌情减少大额奖励的权力。根据该协会，超过 3,000 万美元的罚没款对于敢于站出来的举报人提供的“边际激励甚小”，在“举报人几乎不可能首先预测潜在罚款”金额的情况下尤其如此。²⁴

Another significant SEC proposal is to allow whistleblower awards when the SEC or other governmental agencies, such as DOJ in criminal cases, enter into deferred prosecution agreements ("DPAs") or non-prosecution agreements ("NPAs") that include monetary remedies.²⁵ Currently, whistleblowers are denied an award when information they provide leads only to a DPA or an NPA rather than a civil action or administrative proceeding. Positing that DPAs and NPAs accomplish the same goals as more formal enforcement actions, the SEC seeks to treat them the same under its whistleblower program.²⁶ This change, if adopted, would likely lead to some very large whistleblower awards based on criminal DPAs or NPAs involving substantial monetary sanctions.

另一项重要的证交会提议是，当证交会或其他政府机构（如刑事案中的司法部）签订包含金钱救济的暂缓起诉协议或不起诉协议时，允许发放举报人奖励。²⁷ 目前，在举报人提供的信息仅导致暂缓起诉协议或不起诉协议而非民事诉讼或行政程序的情况下，举报人不会被授予奖励。证交会认为暂缓起诉协议和不起诉协议可实现与更正式的执法行动相同的目标，因而希望在其举报人计划下给予暂缓起诉协议和不起诉协议相同的待遇。²⁸ 此项变更一旦采用很可能会因涉及大额罚款的刑事暂缓起诉协议或不起诉协议产生一些非常巨额的举报人奖励。

The U.S. Chamber of Commerce and SIFMA took opposing views on this proposal. The Chamber, representing a broad base of U.S. companies, criticized it as outside the agency's authority under the Dodd-Frank Act.²⁹ SIFMA, on the other hand, endorsed the proposal, arguing that it would "fairly balance the important goals of both rewarding whistleblowers, and also encouraging companies to adopt effective compliance programs and to cooperate fully during investigations in the hope of obtaining a DPA or NPA."³⁰

美国商会和证券行业和金融市场协会对此项提议持有相反观点。代表各类美国企业的商会批评其超出了该机构在《多德-弗兰克法案》下的权限。³¹ 证券行业和金融市场协会则支持该项提议，其认为，该项提议会“很好地平衡奖励举报人和鼓励企业为争取获得暂缓起诉协议或不起诉协议而采用有效合规计划和充分配合调查这两大重要目标。”³²

²⁴ 证券行业和金融市场协会意见函，2018年9月18日，第4页，<https://www.sec.gov/comments/s7-16-18/s71618-4373269-175549.pdf>。

²⁵ *Id.* at 16-22.

²⁶ *Id.* at 19.

²⁷ 同上，第16-22页。

²⁸ 同上，第19页。

²⁹ Comment Letter of U.S. Chamber of Commerce, Center for Capital Markets Competitiveness, Sept. 18, 2018, at 5, <https://www.sec.gov/comments/s7-16-18/s71618-4370851-175223.pdf>.

³⁰ SIFMA Comment Letter, *supra*, at 4.

³¹ 美国商会意见函，资本市场竞争性中心，2018年9月18日，第5页，<https://www.sec.gov/comments/s7-16-18/s71618-4370851-175223.pdf>。

³² SIFMA 意见函，见上文，第4页。

The SEC will review the public's comments when drafting the final rule amendments, and has not announced a date for their issuance. As is evident from the public debate concerning the merit of the proposals, the final result is likely to have significant consequences for companies and potential whistleblowers, and may result in protracted litigation over their legality.

证交会在起草最终规则修订稿时将审阅公众的意见，但其尚未公布发布最终规则修订稿的日期。关于上述提议的公众辩论表明，最终结果很可能会对企业和潜在举报人产生重大影响，且可能会导致关于新规则合法性的持久诉讼。

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