

The SEC Tweaks Its Booming Whistleblower Program

美国证交会调整其成功的举报人计划

September 29, 2020
2020年9月29日

Securities Litigation and Enforcement and White Collar Defense and Investigations
证券诉讼和执法及白领犯罪辩护和调查

Recently, a divided Securities and Exchange Commission amended its whistleblower rules, hailing the changes as adding “clarity, efficiency and transparency to its successful whistleblower program.”¹ Although the agency made a large number of changes to the program, the amendments should not have a significant overall effect on SEC whistleblower activity, which we expect to continue at a high level.

上周，美国证券交易委员会（下称“证交会”）在分歧中修订了其举报规则，并称修订为“其成功的举报人计划增加了清晰度、效率和透明度”。² 尽管证交会对计划进行了大量修改，这些修订应该不会对证交会举报活动产生重大的整体影响。我们预计举报活动将继续保持高水平。

The SEC’s whistleblower program, created nearly ten years ago as mandated by the Dodd-Frank Act, transformed the agency’s enforcement program. Since its first whistleblower award in 2012, the SEC has awarded over \$527 million to 100 individuals, who collectively provided information leading to over 80 enforcement actions obtaining more than \$2.5 billion in financial remedies.³ The awards, which have ranged from \$50,000⁴ to a staggering sum of nearly \$50 million,⁵ have provided powerful incentives to individuals with information concerning potential securities-law violations to share it with the SEC.

¹ SEC Press Release 2020-219 (Sept. 23, 2020), <https://www.sec.gov/news/press-release/2020-219>.

² 证交会新闻稿 2020-219（2020年9月23日），<https://www.sec.gov/news/press-release/2020-219>。

³ SEC Whistleblower Program Rules, SEC Release No. 34-89963, File No. S7-16-18, at 6 (Sept. 23, 2020), <https://www.sec.gov/rules/final/2020/34-89963.pdf>; SEC Press Release No. 2020-231 (Sept. 28, 2020), <https://www.sec.gov/news/press-release/2020-231>.

⁴ “SEC Issues First Whistleblower Program Award,” SEC Press Release 2012-162 (Aug. 21, 2012), <https://www.sec.gov/news/press-release/2012-2012-162htm>.

⁵ “SEC Awards Record Payout of Nearly \$50 Million to Whistleblower,” SEC Press Release 202-126 (Jun. 4, 2020), <https://www.sec.gov/news/press-release/2020-126>.

证交会的举报人计划是近十年前根据《多德-弗兰克法案》（Dodd-Frank Act）的规定制定的，它改变了该机构的执法计划。自 2012 年首次发放举报人奖励以来，证交会已向 100 名个人发放了超过 5.27 亿美元的奖励。这 100 人提供的信息促成了 80 多次执法行动，并为证交会取得了总计超过 25 亿美元的经济救济。⁶ 该奖项的范围从 5 万美元⁷到惊人的近 5,000 万美元⁸不等，这强有力地激励了知晓潜在违反证券法情况的个人与证交会分享这些信息。

The most controversial element of the rule amendments was the Commission's decision *not* to adopt its own 2018 proposal to create a formal mechanism to allow it to reduce the largest whistleblower awards (above \$30 million) if it determined that a particular dollar amount would not be necessary to advance the goals of the whistleblower program.⁹ As we discussed in a prior [alert](#), a large number of commenters had criticized this proposal, arguing that it would impose an arbitrary cap on awards and disincentivize whistleblowers who may have information on massive frauds.¹⁰ Although the SEC scrapped its proposal, it announced that it had determined that the proposal was “not necessary” after all, because the agency already had discretion to reduce an award based solely on its dollar amount.¹¹ Two dissenting Commissioners expressed strong reservations concerning whether the Commission has such discretion.¹² Nonetheless, unless and until a court overturns the SEC's position on this point, we do not expect to see a change in the size or frequency of the largest whistleblower awards.

该规则的修订中最具争议的要素是委员会决定不采纳其在 2018 年一项提议，即建立一个正式机制，使其在确定不需要特定的金额以实现举报人计划目标的情况下，能够减少最高举报人奖励（3,000 万美元以上）。¹³ 正如我们在先前的[期刊](#)中讨论的那样，许多评论家批评了该项提议，认为这将对奖励施加武断的上限，并打击可能了解大规模欺诈行为的举报者的积极性。¹⁴ 尽管证交会取消了该提议，但其宣布已确定该提议其实“没有必要”，因为该机构已有仅根据奖励金额来减少奖励的裁量权。¹⁵ 两位持不同意见的委员对委员会是否具有这种裁量权表示持强烈保留意见。¹⁶ 尽管如此，除非且直到法院推翻证交会在这一点上的立场，我们预计最高举报奖励的金额或频率不会发生变化。

⁶ 《证交会举报人计划规则》，证交会第 34-89963 号发布稿，文件号 S7-16-18，第 6 页（2020 年 9 月 23 日），<https://www.sec.gov/rules/final/2020/34-89963.pdf>；证交会第 2020-231 号新闻稿（2020 年 9 月 28 日），<https://www.sec.gov/news/press-release/2020-231>。

⁷ “证交会发放首笔举报人计划奖励”，证交会第 2012-162 号新闻稿（2012 年 8 月 21 日），<https://www.sec.gov/news/press-release/2012-2012-162htm>。

⁸ “证交会向举报人发放创记录的近 5,000 万美元奖励”，证交会第 202-126 号新闻稿（2020 年 6 月 4 日），<https://www.sec.gov/news/press-release/2020-126>。

⁹ SEC Whistleblower Program Rules, *supra*, at 8-9, 61.

¹⁰ *Id.* at 58-61.

¹¹ *Id.* at 8, 46-50, 61.

¹² “June Bug vs. Hurricane: Whistleblowers Fight Tremendous Odds and Deserve Better,” Commissioner Allison Herren Lee (Sept. 23, 2020), <https://www.sec.gov/news/public-statement/lee-whistleblower-2020-09-23>; Statement of Commissioner Caroline Crenshaw (Sept. 23, 2020), <https://www.sec.gov/news/public-statement/crenshaw-whistleblower-2020-09-23>.

¹³ 《证交会举报人计划规则》，见上，第 8-9 页、61 页。

¹⁴ 同上，第 58-61 页。

¹⁵ 同上，第 8、46-50、61 页。

¹⁶ “June Bug 诉 Hurricane 案：举报人克服巨大的困难，理应获得更多回报”，Allison Herren Lee 委员，（2020 年 9 月 23 日），<https://www.sec.gov/news/public-statement/lee-whistleblower->

On the other hand, the amendments may modestly increase the size of awards at the lower end of the range, under \$5 million, which have comprised three-quarters of the number of awards given to date.¹⁷ The Commission created a new presumption that whistleblowers who meet the criteria for awards in that range will receive the statutory maximum of 30 percent of the monetary sanctions awarded in the relevant enforcement action.¹⁸ The presumption is subject to exceptions when the Commission determines that a claimant provided only limited assistance or engaged in certain types of culpable conduct.¹⁹

另一方面，这些修订可能会稍微增加较低奖励区间（即不超过 500 万美元，迄今为止占所授予奖励数量的四分之三）的奖励金额。²⁰ 委员会提出了一个新的推定，即达到该范围内奖励标准的举报人将获得相关执法行动所判处金钱处罚的 30% 的法定最高奖励。²¹ 若委员会确定奖励申领人仅提供了有限的协助或参与了某些类型的犯罪行为，则该推定不成立。²²

Another expansion of the program is a new rule allowing awards based on deferred prosecution agreements (DPAs) or non-prosecution agreements (NPAs) entered into by the U.S. Department of Justice.²³ Such DPAs and NPAs can involve very large payments, sometimes in the hundreds of millions or even above \$1 billion. Related SEC whistleblower awards, which are calculated based on a percentage of the financial penalty, could therefore be enormous. The new rule also allows awards based on DPAs or NPAs entered into by the SEC (although such resolutions are rare), and codifies the Commission's existing practice of prohibiting an SEC whistleblower award where a separate whistleblower award program more appropriately applies to the related non-SEC action.²⁴

该计划的另一项扩充内容是一项新规则，该规则允许根据美国司法部签订的暂缓起诉协议（DPA）或不起诉协议（NPA）给予奖励。²⁵ 此类 DPA 和 NPA 可能涉及非常大的付款金额，有时为数亿甚至 10 亿美元以上。因此，相关根据经济处罚的比例计算的证交会举报人奖励可能是巨大的。该新规则还允许根据证交会签订的 DPA 或 NPA 给予奖励（尽管此类协议很少见），并将委员会现行的一个做法确立为成文规定——当其他举报人奖励计划更适合相关非证交会的执法行动时，该做法禁止给予证交会举报人奖励。²⁶

2020-09-23: Caroline Crenshaw 委员声明（2020 年 9 月 23 日），
<https://www.sec.gov/news/public-statement/crenshaw-whistleblower-2020-09-23>。

¹⁷ at 7-8, 138-39.

¹⁸ *Id.* at 9, 50-57; SEC Rule 21F-6(c).

¹⁹ SEC Whistleblower Program Rules, *supra*, at 9, 54-55.

²⁰ 第 7-8、138-39 页。

²¹ 同上，第 9、50-57 页；《证交会规则》21F-6(c)。

²² 《证交会举报人计划规则》，见上，第 9、54-55 页。

²³ *Id.* at 10, 13-23, 149-50; SEC Rule 21F-4(d)(3).

²⁴ SEC Whistleblower Program Rules, *supra*, at 10, 33-46, 147-49, 170-71; SEC Rule 21F-3(b)(3).

²⁵ 同上，第 10、13-23、149-50 页；《证交会规则》21F-4(d)(3)。

²⁶ 《证交会举报人计划规则》，见上，第 10、33-46、147-49、170-71 页。《证交会规则》21F-3(b)(3)。

One of the dissenting Commissioners criticized a new requirement that a whistleblower submit qualifying information in writing in order to qualify for anti-retaliation protection.²⁷ We doubt that this requirement will significantly diminish protection against retaliation because most whistleblowers submit information in writing, and now are even more likely to do so since the agency has made the requirement explicit and has created an online “Tip, Complaint, or Referral” portal.²⁸

一位持异议的委员批评了一项新要求，即举报人必须以书面形式提交合资格信息，以便有资格获得反报复保护。²⁹ 我们怀疑此要求会否显著削弱对报复的保护，因为大多数举报人都以书面形式提交信息，而现在更可能这样做，因为该机构已明确该要求并创建了一个在线“举报、投诉或转介”门户。³⁰

The SEC adopted a large number of other amendments to its whistleblower rules, but most of them involve the SEC’s internal processes. For example, a new provision codifies the Commission’s practice of barring applicants who submit materially false information or abuse the award application process (such as by submitting three frivolous award applications).³¹ These amendments may improve the efficiency of the SEC’s whistleblower program, but should not affect the magnitude or number of awards.

证交会对其举报人规则进行了许多其他修订，但其中大多数涉及证交会的内部流程。例如，委员会将提交实质性虚假信息或滥用奖励申请程序的申请人（例如通过提交三项无意义的奖励申请）列入黑名单的做法确立为一项成文规定。³² 这些修订可能会提高证交会举报人计划的效率，但应该不会影响奖励的数额或数量。

In short, nothing in last week’s rule amendments should be expected to diminish the vigor of the SEC’s whistleblower program. It remains essential that companies continue to ensure that their culture and processes encourage whistleblowers to address issues internally, and prevent managers from retaliating against employees who report potential wrongdoing internally or to the government.

简而言之，上周的规则修订不会削弱证交会举报人计划的活力。企业必须继续确保其文化和流程鼓励举报者在内部解决问题，并防止管理人员对于在内部或向政府举报潜在不法行为的员工实施报复。

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²⁷ Statement of Commissioner Crenshaw (Sept. 23, 2020, *supra*) (“[B]y limited the anti-retaliation protections to whistleblowers who submit information *in writing*, we fail to do all we can to protect those who cooperate with our exams and investigations.”) (emphasis in original); SEC Whistleblower Program Rules, *supra*, at 68-69; SEC Rule 21F-2.

²⁸ SEC Rule 21F-9(a)(1).

²⁹ 《Crenshaw 委员声明》（2020年9月23日，见上）（“鉴于我们仅限于向以书面方式提交信息的举报人提供反报复保护，我们在保护配合我们的检查和调查的人员方面没有竭尽所能。”）（原文强调）；《证交会举报人计划规则》，见上，第68-69页；《证交会规则》21F-2。

³⁰ 《证交会规则》21F-9(1)(1)。

³¹ SEC Rule 21F-8(e); SEC Whistleblower Program Rules, *supra*, at 11-12, 87-93.

³² 《证交会规则》21F-8(e)；《证交会举报人计划规则》，见上，第11-12、87-93页。

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