July 14, 2014
Memorandum

From: Tom Devine, Government Accountability Project, tomd@whistleblower.org
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Re: Summary of July 21, 2014 Petition for Rulemaking to Protect the SEC Whistleblower Program

The SEC Whistleblower Program has enjoyed early success and shown great investor protection potential. This Dodd-Frank program offers eligible whistleblowers the ability to report anonymously, employment protections and monetary awards. As the probability of detection has grown because of the program, companies have become more aggressive and sophisticated in their efforts to silence corporate whistleblowers through the use of gag orders and other troubling legal tactics. Completing a Catch 22, companies have simultaneously argued in court that employees who raise the same concerns about possible securities violations internally have no anti-retaliation rights under Dodd-Frank and can be fired at will.

In response, GAP and Labaton have begun an "anti-gag campaign" to ensure that employees are free to report wrongdoing in the workplace to law enforcement and regulatory authorities without fear of retaliation—internally and externally. Accordingly, our organizations have a filed a formal petition for rulemaking with the SEC that seeks– 1) amendment of program rules to provide guidance to companies regarding what is permissible and what is not; and 2) the issuance of a policy statement that clarifies the scope of the anti-retaliation protections available to whistleblowers and warns companies of the Commission's intent to prosecute violators.

The problem: SEC Rule 21F-17 prohibits actions that "impede communications to the Commission about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement " or order. Notwithstanding this prohibition, corporations have become increasingly bold at defying, and creative in circumventing them. Examples imposed as job prerequisites include -- banning disclosing of the confidentiality agreements themselves; forbidding employees to seek advice of counsel on potential evidence; requiring them to waive any benefits from government programs created as incentives for disclosure; requiring witnesses to first share all evidence of wrongdoing with the company (and potential defendant) before disclosing it to law enforcement authorities; requiring them to certify that they have not already blown the whistle; requiring them to declare that they do not know of any wrongdoing by their employer; and suing them for damages if they breach secrecy contracts by helping SEC staff to enforce the law.

These tactics attack the heart of the whistleblower provisions of Dodd-Frank. They attempt effectively to overturn, by private agreement, the landmark incentives that Congress legislated to encourage greater reporting and cooperation with law enforcement and regulatory authorities—anonymity, employment protections, and monetary awards. Even when the gag orders are legal bluffs, they intimidate workers who are unsophisticated and cannot afford to risk unemployment. It is even worse when employers fire a whistleblower and then seek further damages and legal fees for violating the gag order, a common tactic to make an example that scares others into silence. Unemployed workers often cannot afford to defend themselves against such litigation, whether or not it has merit.

The solution: The SEC's "anti-gag" Rule 21F-17 should be updated to lock in safe internal channels and stay a step ahead of these evolving tactics. The revised rule would make it clear that it is illegal, directly or indirectly – to prevent employees from consulting independent legal counsel; requiring notice of external reporting, de-incentivizing tips by making employees waive any monetary award, issuing secrecy agreements, or intimidating potential whistleblowers with lawsuits to enforce them.