

SEC Demonstrates Commitment to Protecting Whistleblowers

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Last month, the Securities and Exchange Commission (“SEC” or the “Commission”) charged New York-based investment firm GPB Capital Holdings, LLC (“GPB”), and three affiliated individuals, with multiple counts of securities fraud. The complaint, filed by the SEC in the Eastern District of New York, alleges that the defendants ran a Ponzi-like scheme that raised over \$1.7 billion while defrauding over 17,000 retail investors. It also alleges that the defendants violated the [whistleblower protections of the Securities and Exchange Act](#) by impeding two other employees from communicating with the SEC about these violations, and retaliating against a third employee who blew the whistle on this illegal scheme.

Whistleblower Protections in the Exchange Act

In 2010, the [Dodd-Frank Wall Street Reform and Consumer Protection Act](#) (“Dodd-Frank”) amended the Securities and Exchange Act of 1934 (the “Exchange Act”), to add Section 21F, the “Securities Whistleblower Incentives and Protection.” Section 21F establishes a whistleblower program that requires the SEC to pay an award, subject to certain limitations, to whistleblowers who voluntarily provide the Commission with original information about a violation of federal securities law that leads to a successful enforcement action.

Section 21F also protects a whistleblower’s ability to report potential securities fraud to the SEC without fear of [retaliation](#). As relevant here, Section 21F prohibits an employer from retaliating against an employee who comes forward with original information, and it also prohibits anyone from taking any action to impede an individual from communicating with the SEC about a possible securities law violation. More specifically, SEC Rule 21F-17(a) states that “[n]o person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement ... with respect to such communications.” This rule prohibits interference by any person, not just a whistleblower’s employer.

Alleged Whistleblower Violations by GPB

A. Reporting interference

The SEC complaint alleges that GPB and associated individuals executed agreements with two former senior-level employees that violated provisions of the Exchange Act by interfering with their ability to communicate with the SEC.

A senior GPB Capital employee, identified as “Employee 1” raised concerns internally about

GPB's use of investor funds to make distribution payments to investors. In 2017, GPB executed a Transition Agreement and General Release with Employee 1. The agreement contained a confidentiality provision, stating, "You shall not, without the prior written consent of [GPB Capital] or as required by law, use or disclose or enable anyone else to use or disclose any Confidential Information of [GPB Capital]." This provision did not carve out any exceptions for communications with the SEC, and therefore, prohibited Employee 1 from providing information to the SEC about the concerns that Employee 1 had raised internally, without GPB's consent.

In 2018, GPB executed a Separation Agreement and General Release with another senior GPB Capital employee, identified as "Employee 2". This agreement stated that if Employee 2 were "contracted by any regulatory agency or authority, including, but not limited to, the Securities and Exchange Commission or Financial Industry Regulatory Authority," Employee 2 had to "immediately notify GPB."

According to the SEC complaint, these provisions in Employee 1's and Employee 2's agreements constitute actions that "impede an individual from communicating directly with the Commission staff about a possible securities law violation" under Rule 21F-17. Neither provision directly prohibits either employee from communicating with the SEC, but requires Employee 1 to obtain GPB's consent before disclosing information to anyone, presumably including the SEC, and requires Employee 2 to notify GPB of any communication with the SEC. However, the effect of both provisions is to allow GPB to assert control over these former employees' communications with the SEC, and position GPB as a gatekeeper to those communications. The SEC complaint demonstrates that, in the view of the SEC, an employer's acting as a gatekeeper likely will deter employees from reporting, and that is sufficient to constitute illegal interference with a whistleblower's ability to speak to the Commission about potential securities violations.

B. Retaliation

In addition, the complaint alleges that GPB retaliated against a senior employee working in automotive operations, identified as "Employee 3," in violation of Section 21F's anti-retaliation provisions.

In 2019, Employee 3 raised numerous concerns internally, including about GPB's use of investor funds to make distribution payments to investors. In May 2019, GPB's auditors told Employee 3 to submit a "related party questionnaire" ("RPQ"), which Employee 3 completed and submitted directly to the auditors. In this RPQ, Employee 3 stated concerns about performance guarantees and possible misstatements to investors. GPB's counsel informed Employee 3 that his submission of the RPQ directly to auditors was improper. Later in May, GPB hired a new member of the board of directors, identified in the complaint as "Board Member 1" of the automotive operations. GPB identified Board Member 1 "as a contingency plan on [Employee 3]."

The next month, Employee 3 made a presentation to the board explaining in detail the facts supporting the statements he made in the RPQ. Immediately after his presentation, Board Member 1 began interviewing members of Employee 3's team and taking over aspects of

Employee 3's job. The following week, Employee 3, through counsel, submitted his board presentation to the SEC. Counsel for GPB were copied on the email submission, and Employee 3 later directly informed executive officials at GPB about his SEC submission.

The following week, GPB sent Employee 3 a letter stating that Board Member 1 was providing "managerial assistance and oversight" going forward. Soon afterwards, Employee 3 learned of a text message from a GPB managing partner referring to Board Member 1 as Employee 3's "replacement." Over the ensuing months, GPB Capital began to exclude Employee 3 from board meetings, in which Employee 3 had a right to participate according to the operating agreements he had with GPB. During board meetings held without Employee 3's knowledge or participation, the board made decisions to limit Employee 3's authority. On September 16, 2019, GPB terminated Employee 3's employment, and on the same day, announced Board Member 1 was Employee 3's replacement.

According to the SEC complaint, GPB's actions in excluding Employee 3 from meetings, reducing his responsibilities, and ultimately terminating him because he had expressed concerns about potential fraud and had filed an SEC whistleblower complaint constituted illegal employment retaliation in violation of Section 21F of the Exchange Act.

Conclusion

The SEC charges against GPB and affiliated individuals demonstrate the Commission's willingness to hold companies responsible for violations of whistleblower protections. The central mission of the SEC is to protect investors and the national banking system by enforcing securities laws. However, achieving this mission requires the identification and successful investigation of securities violations. Employees of companies that engage in securities violations are invaluable sources of information, and therefore, crucial to the SEC's mission.

Under the law, employers may neither prevent employees from, nor punish employees for, reporting violations of securities law. Employees who are contemplating reporting securities violations committed by their employers have a legal right to do so without fear of retaliation. Employees who believe they have information about securities violations should seek legal advice from experienced counsel to help ensure that their rights are protected.