

## SECURITIES AND CAPITAL MARKETS

February 2018

## Supreme Court Narrows Corporate Whistleblower Protections Under Dodd-Frank

In its recent decision in *Digital Realty Trust, Inc. v. Somers*,<sup>1</sup> the U.S. Supreme Court narrowed the scope of potential plaintiffs who can claim whistleblower protection under the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). In a unanimous decision, the court held employees are not protected under Dodd-Frank unless they report securities law violations directly to the Securities and Exchange Commission (SEC). Therefore, employees who only report wrongdoing to an internal supervisor within their company are *not* afforded Dodd-Frank's anti-retaliation protections.

## HIGHLIGHTS

U.S. Supreme Court narrows whistleblower protections under Dodd-Frank Act

Whistleblowers must provide information on violations to the SEC, and not just to their companies

May have implications for public companies

## Statutory Whistleblower Definition Applies

In the case, *Digital Realty Trust, Inc. (DRT)*, employed Paul Somers as vice president of portfolio management from 2010 until DRT fired him in April 2014. Shortly before Somers was terminated, he made several reports to DRT's senior management describing possible securities law violations by the company, but he did not report these concerns to the SEC.

After his termination, Somers sued DRT, alleging multiple state and federal law violations, including a claim under the anti-retaliation provisions of Dodd-Frank.<sup>2</sup> DRT filed a motion to dismiss based on grounds that Somers was not a whistleblower entitled to protection under Dodd-Frank, because Dodd-Frank defines a "whistleblower" as someone who provides pertinent information "to the Commission."

The district court rejected DRT's argument by noting the statutory definition of "whistleblower" is ambiguous and that reading the definition strictly would render other statutory provisions unnecessary. The district court primarily focused on the provision of the statute providing protection to individuals who report violations both externally and internally.<sup>3</sup> Because of this ambiguity, the district court adopted the SEC's more inclusive interpretation of the term "whistleblower." The U.S. Court of Appeals for the Ninth Circuit affirmed, explaining that

<sup>1</sup> No. 16-1276, 2018 WL 987345 (U.S. Feb. 21, 2018).

<sup>2</sup> See 17 C.F.R. § 240.21F-2 and 15 U.S.C. § 78u-6.

<sup>3</sup> **Prohibition against retaliation:** "No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower . . . in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission."

DRT's proposed interpretation would challenge Congress's intent to provide "broad whistleblower protections" and would make much of the language in Dodd-Frank excessive.

The Supreme Court, however, disagreed with the lower courts. The court concluded that the plain language of Dodd-Frank's anti-retaliation provision leaves no doubt that the term "whistleblower" carries the explicit definition set forth in the statute, and the court must follow this definition. In this regard, the statute explicitly states that "whistleblower" means "any individual who provides . . . information relating to a violation of the securities laws *to the Commission* (emphasis added)." Because Somers did not provide information "to the Commission" before his termination, Somers did not fit the definition of a whistleblower at the time of the alleged retaliation. The court ruled that Somers was ineligible to seek relief under the Dodd-Frank whistleblower protection provisions.

### Potential Implications for Public Companies

The Supreme Court's decision may have implications for public companies and their compliance programs. Because the court narrowly interprets the definition of "whistleblower," this may provide employees with incentives to report potential violations directly to the SEC rather than through the company's internal reporting procedures. These shifting incentives could frustrate a company's opportunity to hear employee concerns, investigate them internally, and address any potential issues. It is important to note that *Digital Realty Trust* does not address nor affect the anti-retaliation provisions of the Sarbanes-Oxley Act, which also provide recovery in the form of back pay, reinstatement, and attorneys' fees.<sup>4</sup>

To obtain more information regarding this alert, contact the Barnes & Thornburg attorney with whom you work or David P. Hooper at (317) 231-7333 or [dhooper@btlaw.com](mailto:dhooper@btlaw.com).

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<sup>4</sup> See Section 80 of SOX, 18 U.S.C. 1514A, which protects whistleblowers employed by publicly traded companies against employer retaliation in response to an employee who reports, *inter alia*, securities law violations occurring within the company. An employee prevailing in an action under this provision shall be entitled to "all relief necessary to make the employee whole," including compensatory damages and noneconomic damages, such as emotional distress and reputational harm damages.