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After Digital Realty Trust: Bill Protecting Whistleblowers Heads to the Senate

By Matthew LaGarde
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On July 9, 2019, the U.S. House of Representatives passed H.R. 2515, also known as the Whistleblower Protection Reform Act of 2019 ("WPRA"). The WPRA is designed to address a gap in the whistleblower protections afforded under the Dodd-Frank Consumer Protection and Wall Street Reform Act of 2010 ("Dodd-Frank"), as interpreted by the Supreme Court in *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767 (2018). Specifically, the Supreme Court in *Digital Realty Trust* ruled that the anti-retaliation provision of Dodd-Frank does not extend to protect employees who only make reports concerning violations of securities laws internally, as opposed to individuals who made a report to the U.S. Securities and Exchange Commission ("SEC"). The WPRA is designed to amend Dodd-Frank to ensure the statute's protections extend to individuals who make internal reports of securities violations.

Prior to the Supreme Court's ruling in *Digital Realty Trust*, a circuit split existed. The Second and Ninth Circuits had ruled that Dodd-Frank's anti-retaliation protections covered whistleblowers who only reported internally, whereas the Fifth Circuit had held that Dodd-Frank did not protect such whistleblowers. The circuit split arose from a confusing section of the statutory text. Dodd-Frank's anti-retaliation provision prohibits an employer from retaliating against a *whistleblower* because the whistleblower, among other things, made "disclosures that are required or protected under the Sarbanes-Oxley Act of 2002." The Sarbanes-Oxley Act of 2002 ("SOX"), in turn, protects employees of publicly traded companies or their contractors or subcontractors who provide information regarding certain forms of fraud or violations of securities laws, including employees who only make those reports internally. Reading these provisions together, the Second and Ninth Circuits concluded that Dodd-Frank bolstered SOX's protection of whistleblowers, and, like SOX, protected those who made internal reports of wrongdoing.

The Supreme Court interpreted the scope of the anti-retaliation provision differently. Dodd-Frank defines the term "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws *to . . . the Commission*." Because the anti-retaliation provision extends only to *whistleblowers* that make disclosures protected by SOX, the Supreme Court in *Digital Realty Trust* ruled that an employee must have made a report to the SEC to receive Dodd-Frank's protections. As a result, employees who only report their concerns internally are left without the more robust protections available under Dodd-Frank, including a substantially longer statute of limitations and greater remedies.

The *Digital Realty Trust* ruling damaged whistleblowers by eliminating their protections from retaliation, but the ruling has likely harmed corporations, as well. As Lisa Banks and Matt Stiff explained in a recent column published in Law360, the business lobby has long

advocated for incentives to encourage whistleblowers to report internally and thereby allow companies to remedy wrongdoing and potentially "self-disclose" to the SEC prior to any Commission investigation. To the extent the *Digital Realty Trust* ruling strips internal whistleblowers of the significantly enhanced retaliation protections available under Dodd-Frank, employees are incentivized to report to the SEC first to ensure they have robust protections from retaliation.

To address the gap in protections and misaligned incentives created by *Digital Realty Trust*, Congressman Al Green (D-TX) introduced the WPRA. The WPRA seeks to amend Dodd-Frank to extend its protections to employees who provide information concerning violations of the securities laws to supervisors or individuals who have the authority to investigate, discover, or terminate the misconduct. The bill received overwhelming bipartisan support and co-sponsors, and passed the House on July 9, 2019, by a vote of 410-12.

Although the WPRA signifies a significant step forward for whistleblowers, it still represents a compromise. Specifically, the language of the bill makes clear that, if the WPRA becomes law, Dodd-Frank's protections would only extend to employees of publicly traded companies, self-regulatory organizations, and state securities commissions who report their concerns internally. This distinction is critical because it narrows the scope of individuals protected by the statute in a way that SOX does not. Under SOX, as interpreted by the Supreme Court in *Lawson v. FMR LLC*, 571 U.S. 429 (2014), protections against retaliation extend to employees of private contractors and subcontractors serving public companies. The WPRA would not extend the generous protections available under Dodd-Frank to those employees. While this compromise is disappointing, the elimination of the gap caused by *Digital Realty Trust* is an important advance and hopefully the Senate will take up the bipartisan WPRA and pass it in short order.

The blog was later published in *Law360*.