

Senators Introduce Bipartisan Legislation Strengthening Protections for Whistleblowers

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On September 23, 2019, Senators Chuck Grassley (R-IA), Tammy Baldwin (D-WI), Joni Ernst (R-IA), and Dick Durbin (D-IL) introduced the [Whistleblower Programs Improvement Act](#) (“WPIA”), S. 2529, to extend whistleblower protections to more individuals who report violations of securities and commodities laws. The bill is similar to the [Whistleblower Protection Reform Act of 2019](#), H.R. 2515, which the U.S. House of Representatives passed by a bipartisan majority of 410-12 in July 2019.

Like the House version, the Senate bill addresses a gap in the whistleblower protections afforded under the [Dodd-Frank Consumer Protection and Wall Street Reform Act of 2010](#) (“Dodd-Frank”), as a result of the Supreme Court’s interpretation in *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767 (2018). In *Digital Realty Trust*, the Supreme Court found that the definition of Whistleblower required whistleblowers to report a violation of securities law “to the commission” to be afforded protection under Dodd-Frank. In the wake of the Supreme Court’s decision, the anti-retaliation protection provision of Dodd-Frank only extends to whistleblowers who report violations of securities laws or commodities laws externally to the U.S. Securities and Exchange Commission (“SEC”) or Commodities Futures Trading Commission (“CFTC”) respectively. Employees who only report their concerns internally are protected by the [Sarbanes Oxley Act](#) but are left without the more robust protections available under Dodd-Frank, including a substantially longer statute of limitations and greater remedies.

The WPIA would close the gap left by the Supreme Court’s decision by extending [protection from retaliation](#) to whistleblowers who report wrongdoing internally, without also requiring them to report externally to financial regulators. In particular, the legislation amends the SEC whistleblower protection provision in Dodd-Frank, 15 U.S.C. § 78u-6, by protecting whistleblowers providing information regarding any conduct that they reasonably believe constitutes a violation of any law, rule, or regulation subject to the jurisdiction of the SEC to a supervisor or other individual they believe is in a position to take corrective action. As amended by the WPIA, Section 922(h) of Dodd-Frank also would cover employees of entities registered with the SEC, a self-regulatory organization, or a State securities commission or office performing like function. Accordingly, WPIA would arguably provide broader coverage to employees than the whistleblower protection provision of the Sarbanes-Oxley Act, which only covers employees of public companies and their subsidiaries, affiliates, and contractors. The legislation similarly amends the CFTC whistleblower protection provision in Dodd-Frank, 7 U.S.C. § 26, covering whistleblowers who internally report wrongdoing to their employer,

and also increases the amount the CFTC is able to retain in its Consumer Protection Fund from \$100 million to \$150 million.

In addition, the Senate bill includes a provision to encourage the prompt payment of awards to eligible whistleblowers. Dodd-Frank established that when a whistleblower provides original information to the SEC or CFTC which results in a successful enforcement action, the whistleblower is entitled to a portion of the monetary sanctions collected by the SEC or CFTC in successful enforcement actions. At this time, however, it can take years after a fine is collected for whistleblowers to receive the award. WPIA aims to resolve the issue of lengthy processing delays by requiring the SEC and CFTC to issue initial award determinations within one year of the deadline to apply for an award. The SEC and CFTC would have the ability to extend this deadline for up to an additional year for “good cause,” such as where an award claim is unusually complex or involves more than one whistleblower.

Although the Supreme Court’s ruling in *Digital Realty Trust* remains the law as of this date, the overwhelming bipartisan support for the House bill and the bipartisan introduction of WPIA in the Senate are strong indicators that Congress intends in the near future to eliminate the gap caused by the Court’s ruling.

This blog was subsequently published in [Law360](#).