



Supreme Court Interprets Dodd-Frank Whistleblower Protections: Implications for Securities Law and Beyond

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On February 21, 2018, the Supreme Court [decided](#) in *Digital Realty Trust, Inc. v. Somers* that the anti-retaliation protections in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) apply only to whistleblowers who report suspected securities law violations to the Securities and Exchange Commission (SEC or Commission). In so doing, the Court rejected a more expansive reading of Dodd-Frank that would have extended its whistleblower protections to those who report securities violations internally within their organization and suffer retaliation, even if they did not take the additional step of reporting to the SEC. The ruling not only has potentially important implications for the nature and quantity of potential whistleblower actions brought under federal securities law, but *Digital Realty* also provides broader insights into the Supreme Court's current approach toward statutory interpretation.

The details of the *Digital Realty* case and the circuit court split leading up to the Court's review are discussed in a prior [Sidebar](#). In short, the respondent Somers argued that Dodd-Frank whistleblower protections applied to his reports of suspected securities law violations to upper management at Digital Realty, even though he only reported internally and not to the SEC. While the Sarbanes-Oxley Act of 2002 (SOX) already affords employees certain anti-retaliation [protections](#) for internal reporting, Dodd-Frank provides more generous [protections](#) for "whistleblowers," including the ability to file suit directly in federal district court without first exhausting an administrative process, a longer statute of limitations, and recovery of double back-pay with interest. *Digital Realty* hinged on whether Dodd-Frank protects a narrower class of individuals than SOX based on Dodd-Frank's definition of the term "whistleblower." The relevant section of Dodd-Frank [defines](#) a "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws *to the Commission.*" However, setting up the parties' dispute, Dodd-Frank's anti-retaliation provision also prohibits an employer from discriminating

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against a “whistleblower” who, among other things, makes “disclosures that are required or protected under” SOX. Because SOX, in turn, protects internal reporting, Somers argued that the Dodd-Frank provision encompassed internal reporters as well.

The Supreme Court unanimously [held](#) that the definition of “whistleblower” provided “an unequivocal answer” that resolved the case, affirming the principle that “[w]hen a statute includes an explicit definition, we must follow that definition.” The Court distinguished the case from prior instances in which it did not hold a statutory definition to control because, unlike those cases, the results here would not be incongruous with Congress’s regulatory scheme. Namely, the Court [emphasized](#) several times throughout its opinion that the purpose of the enhanced whistleblower provision was “to motivate people who know of securities law violations *to tell the SEC*,” quoting a [Senate Report](#) regarding Dodd-Frank. Moreover, the Court [rejected](#) Somers’s arguments that requiring reporting to the SEC to qualify as a “whistleblower” would lead to results incompatible with Congress’s intent. For example, the Court reasoned that the Dodd-Frank anti-retaliation provision’s reference to SOX would still be meaningful under the narrower definition because it would protect those who report *both* internally and to the SEC, but incur retaliation for the internal report. The Court observed that such a scenario may in fact be commonplace because, as data from the SEC presented to the Court showed, approximately [80%](#) of those receiving SEC whistleblower awards in 2016 had indeed reported internally before making their complaints to the SEC.

The ultimate impact of *Digital Realty*’s more narrow scope for Dodd-Frank’s whistleblower provisions is unclear. In supporting the petitioner’s arguments in *Digital Realty*, notable *amici* like the U.S. Chamber of Commerce favored the narrower whistleblower definition because, in their [view](#), an expansive definition encompassing internal reporters would have allowed for a greater quantity of costly whistleblower suits to be filed against companies in federal court, while spurning internal and administrative processes set up by SOX. However, [commentators](#) have also noted that the Court’s ruling may have the practical effect of incentivizing whistleblowers to report complaints directly to the SEC instead of attempting resolutions to complaints internally, potentially leading to increased regulatory action and greater costs for companies.

Digital Realty also provides several statutory interpretation takeaways. In addition to affirming the importance of a statute’s definitions section, as noted above, the *Digital Realty* decision also presented an opportunity for the Supreme Court to revisit—and differ on—the propriety of considering legislative history when interpreting statutory language. While concurring that the “whistleblower” definition controlled the outcome of the case, Justice Thomas, joined by Justices Alito and Gorsuch, [wrote](#) separately regarding their disagreement with the Court opinion’s reliance on the Senate Report in interpreting the definition of whistleblower. Rather, they “join[ed] the Court’s opinion only to the extent it relies on the text of Dodd-Frank,” elaborating that the language of a statute enacted by Congress should ultimately control, rather than potentially unreliable documents explaining congressional intent. Justice Sotomayor, on the other hand, authored another concurring [opinion](#), joined by Justice Breyer, in which she stressed that it is appropriate to look to legislative history as an interpretive aid, “even when, as here, a statute’s meaning can clearly be discerned from its text,” in order to confirm and enhance the Court’s understanding of the language. In these respects, the *Digital Realty* case has potentially broad import for Congress in considering how courts may view statutory definitions and legislative history.