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## Supreme Court Ends Dodd-Frank Whistleblower Protection for Internal Reporters

*by Gregory D. DiMeglio, Ellen Rosen Rogoff and Elizabeth A. Kuschel*

On Feb. 21, 2018, the Supreme Court of the United States settled a split in authority among the federal courts of appeals in the ruling *Digital Realty Trust, Inc., v. Somers* (https://www.supremecourt.gov/opinions/17pdf/16-1276_b0nd.pdf). The decision narrows anti-retaliation protection for corporate whistleblowers under the Dodd-Frank Wall Street Reform and Consumer Protection Act. Going forward, if an employee wants whistleblower protection, the employee must take his or her complaint to the Securities and Exchange Commission (SEC), not just report the issue internally. The Supreme Court refused to expand the interpretation of Dodd-Frank's statutory whistleblower language and rejected the SEC's position on this issue. Accordingly, Somers, a former vice-president at Digital Realty who made an internal complaint about suspected securities-law violations by the company but did not report his claim to the SEC, cannot avail himself of Dodd-Frank's protections against his allegedly retaliatory termination.

### Takeaways to Consider

- This decision is limited to whistleblower claims under Dodd-Frank. For example, the Sarbanes-Oxley Act's whistleblower provisions, which specifically provide anti-retaliation protection for complainants who report internally or to the SEC, remain unaffected by the Supreme Court's ruling.

- Employees may skip alerting the employer and go straight to the SEC. While narrowing the language of whistleblower protections under Dodd-Frank may seem like a victory for employers at first blush, upon a closer examination this decision may have far-reaching consequences. For example, historically, many more employees reported concerns internally rather than to the SEC – which enabled the employer to deal with the issue before the involvement of a regulatory agency. (See our prior coverage of this issue in the Securities Litigation & Enforcement Alert, "The SEC as the Whistleblower's Advocate (https://www.stradley.com/insights/publications/2015/05/securities-litigation-enforcement-alert-may-2015).") However, the Supreme Court's ruling may encourage employees to go straight to the SEC. Accordingly, we can expect more instances where the first time the employer hears of the complaint is when the SEC begins an investigation.

- This decision does not affect state whistleblower laws. Many states have whistleblower statutes that are unaffected by this ruling. For example, New Jersey has the Conscientious Employee Protection Act that prohibits all employers from retaliating against employees for reasons that include the employee's disclosure of information related to conduct that the employee believes violates law or public policy

to supervisors, other employers and public bodies. (Both Pennsylvania and New York have statutes that provide for narrower protections.) Employers must remain cognizant that state whistleblower statutes and protections remain in effect.

- Employers may want to re-examine policies. Employers may want to revisit their policies on internal reporting related to financial information so that they are consistent with the Supreme Court's decision and other applicable laws. The best policies encourage employees to raise concerns and incorporate a prompt and thorough response from the company, thus minimizing the potential for serious problems.



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