

PUBLICATION

Dodd-Frank Whistleblower Protection Restricted by Supreme Court

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Courts have been split as to whether the 2010 Dodd-Frank Act protected both employees reporting misconduct only to company management as well as those also reporting issues to the U.S. Securities and Exchange Commission (SEC). The Supreme Court unanimously settled the question in *Digital Realty Trust, Inc. v. Somers* on February 21, 2018, disqualifying the first group of whistleblowers from the statute's protections. Even these internal-only whistleblowers, however, retain protection under the 2002 Sarbanes-Oxley Act.

While Sarbanes-Oxley applies to all "employees" reporting to the SEC, another federal agency, Congress or an internal supervisor, the Dodd-Frank provision applies to "any individual" reporting securities law violations to the SEC. The differences result in variations in benefits and protections to whistleblowers.

Dodd-Frank SEC whistleblowers can be monetarily rewarded if the information leads to a successful enforcement action, and can gain protection from retaliation. Dodd-Frank whistleblowers can also sue an employer directly in federal court and enjoy up to a six-year statute of limitations. Sarbanes-Oxley has no reward mechanism for the whistleblowers it covers and limits anti-retaliation options through requiring administrative exhaustion and a complaint-filing deadline within 180 days of the retaliatory conduct.

Since the Court's review of the text and legislative history led it to confirm that Dodd-Frank's focus was to incentivize via monetary awards telling the SEC of securities law violations, reporting to the SEC was necessary as well for the statute's enhanced anti-retaliation provisions. The Court noted, however, that even those auditors, attorneys, or other employees required to report misconduct internally before making an external disclosure to the government could still get Dodd-Frank protection by reporting internally and then disclosing relevant information to the SEC. Additionally, were the retaliation to occur based on the non-SEC disclosure, reporting to the SEC would still extend Dodd-Frank protection. Thus, the Court also declined to defer to the contrary SEC position in its Rule 21F-2.

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