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DIGITAL REALTY AND THE NARROWING OF WHISTLEBLOWER PROTECTIONS

In Digital Realty, the Supreme Court held that only a whistleblower who reports misconduct to the SEC is entitled to the protections of the Dodd-Frank Act. In his discussion of the case, the author begins by describing the SEC's whistleblower incentive program and its enforcement actions against firms for impeding communication by whistleblowers and retaliating against them. He then turns to the case itself. He closes with an appraisal of the consequences of the decision for whistleblowers, corporate compliance programs, and the SEC.

By Kurt Wolfe *

In *Digital Realty Trust Inc. v. Somers*, the U.S. Supreme Court held that an anti-retaliation provision in the Dodd-Frank Wall Street Reform and Consumer Protection Act is available only to individuals who provide whistleblower tips to the U.S. Securities and Exchange Commission. Over arguments for a more expansive reading, a unanimous Court found that it was constrained by the unambiguous statutory definition of “whistleblower”: for purposes of the Dodd-Frank anti-retaliation provision, a “whistleblower” is “any individual who provides...information relating to a violation of the securities laws to the Commission.”¹ Therefore, an employee who suffered workplace retaliation after reporting suspected misconduct internally (e.g., to a supervisor or using an anonymous complaints hotline), but did not make a report to the

Commission, “is ineligible to seek redress under the statute.”²

Much ink has been spilled on the potentially far-reaching consequences of *Digital Realty*. Whistleblower advocates and compliance professionals lament possible unintended consequences of the ruling, warning that it may undermine the goals of the SEC whistleblower program, disincentivize whistleblowers to report possible violations internally, and deprive companies of the opportunity to investigate and voluntarily disclose, when appropriate, alleged violations of the securities laws.

It is, indeed, possible that whistleblowers, corporations, and the SEC will be impacted by *Digital Realty*. This article considers the scope of Dodd-Frank’s whistleblower protections, the reach of the *Digital Realty* decision, and the range of potential consequences

¹ *Digital Realty Trust, Inc. v. Somers*, No. 16-1276 at 9 (U.S. Feb. 21, 2018) quoting §78u-6(a)(6) (emphasis added), available at https://www.supremecourt.gov/opinions/17pdf/16-1276_b0nd.pdf.

² *Id.* at 10.

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INSIDE THIS ISSUE

● CLE QUESTIONS, Page 132