

**MEMO# 31108**

February 23, 2018

# **Supreme Court Requires Whistleblowers to Report to the SEC to Rely on Dodd-Frank's Anti-Retaliatory Protections**

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February 23, 2018 TO: ICI Members

Investment Company Directors

ICI Global Members

Chief Compliance Officer Committee SUBJECTS: Compliance RE: Supreme Court Requires Whistleblowers to Report to the SEC to Rely on Dodd-Frank's Anti-Retaliatory Protections

As you may recall, the Dodd-Frank Act (Act) included a provision relating to “whistleblowers.” In addition to authorizing the SEC to pay awards to whistleblowers, this provision protected whistleblowers from an employer’s retaliation for reporting violation of the securities laws. See 15 U.S.C §78u-6. For purposes of these new provisions, the Act defined the term “whistleblower” to mean a person who provides information relating to a violation of the federal securities laws to the SEC. Notwithstanding this, when the SEC adopted rules to implement the Act, for purposes of the anti-retaliation provision, SEC Rule 21F-2 adopted a broader definition of the term. Rule 21F-2 defined the term to mean any person who reports *either* to the SEC or to the employer.

As a result of the SEC adopting a definition of “whistleblower” that was broader than the Act’s definition, courts of appeals have differed on the issue of whether the anti-retaliatory provision in the Act protects persons who only report violations to their employer and not to the SEC. The U.S. Supreme Court has resolved this issue. The case of *Digital Realty Trust, Inc. v. Somers*<sup>[1]</sup> presented the Court the question of whether “the anti-retaliation provisions of [the Act] extend to an individual who has not reported a violation of the securities laws to the SEC and therefore fall outside the Act’s definition of ‘whistleblower’?” Citing the Act’s unambiguous definition of “whistleblower,” the Court answered “. . . that question ‘No’: To sue under Dodd-Frank’s anti-retaliation provision, a person must first ‘provid[e] . . . information relating to a violation of the securities laws to the Commission.’”<sup>[2]</sup> In the Court’s view, the Act’s “unambiguous whistleblower definition, in short, precludes the Commission from more expansively interpreting this term.”<sup>[3]</sup> Also, “Courts are not at liberty to dispense with the condition – tell the SEC – Congress imposed.”<sup>[4]</sup>

**endnotes**

[1] See 583 U.S. \_\_ (2018). The Court's slip opinion was issued on February 21, 2018 and is available at: [https://www.supremecourt.gov/opinions/17pdf/16-1276\\_b0nd.pdf](https://www.supremecourt.gov/opinions/17pdf/16-1276_b0nd.pdf). The underlying facts of the case involved an employee, Paul Somers, who was employed by Digital Realty Trust, a real estate investment trust. Somers alleged that Digital Realty terminated him shortly after he reported to senior management suspected securities-law violations by the company. Somers did not report these suspected violations to the SEC prior to his termination. He also did not file an administrative complaint within 180 days of his termination, which might have provided him protection under the broader anti-retaliation provisions in the Sarbanes-Oxley Act.

[2] Decision at p. 2.

[3] Decision at p. 19.

[4] Decision at p. 11.