

May 8, 2019

The Honorable Al Green
2347 Rayburn House Office Building
Washington, DC 20515

Dear Representative Green:

Thank you for sponsoring H.R. 2515, a bill to amend the Securities and Exchange Act of 1934 to amend the definition of whistleblower to protect whistleblowers that report potential violations of federal securities laws to their employers. We are grateful for your efforts to restore the intent of the whistleblower protection provision of Section 922 of the Dodd-Frank Act to protect internal whistleblowing.

In the wake of the worst financial crisis since the Great Depression, Congress sought to protect corporate whistleblowers to prevent another financial crisis. Unfortunately due to an apparent drafting error in the legislation, the Supreme Court held in *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767 (2018) that the definition of “whistleblower” in Section 922 of the Dodd-Frank Act requires that an individual report a possible securities law violation to the SEC to qualify for protection against retaliation.

Whistleblowers must be protected when they make internal disclosures, or they will be discouraged from sounding the alarm in the first place. We cannot afford to deter would-be whistleblowers since they serve as our eyes and ears to detect and report corporate fraud. The 2008 financial crisis cost the United States approximately \$20 trillion. To prevent another crisis, Congress included in the Dodd-Frank Act incentives for whistleblowers to report fraud and protections against retaliation.

Limiting Dodd-Frank whistleblower protection to internal disclosures excludes most corporate whistleblowers from protection against retaliation. A report by the Ethics & Compliance Initiative (ECI, formerly the Ethics Resource Center) found that 97 percent of employees blow the whistle internally at first.¹ *Digital Realty* significantly weakens Dodd-Frank’s whistleblower protection provision, thereby dissuading whistleblowers from reporting potential securities law violations to their employers.

Internal reporting benefits companies and their shareholders by alerting them early of potential fraud and offering an opportunity to take corrective action before investors are harmed or providing a chance to halt a fraud scheme. Moreover, failing to protect internal whistleblowing would undermine corporate compliance programs by encouraging whistleblowers to report directly to the SEC.

HR 2515 should not be the least bit controversial because it essentially corrects a drafting error and effectuates Congressional intent. When Congress enacted Section 922, it was widely

¹ Ethics Resource Center, *Inside the Mind of a Whistleblower: A Supplemental Report of the 2011 Nat’l Business Ethics Survey* 7, 13 (2012), available at <https://bit.ly/2TFKljQ>.

understood to protect internal whistleblowing. As Senator Grassley points out in the *amicus curiae* brief that he submitted in *Digital Realty*,

[T]he testimony to Congress suggests that members of the business community, while advocating for internal reporting requirements, assumed or took for granted that Dodd-Frank’s anti-retaliation provisions apply to internal whistleblowers. . . . Similarly, it was the business community that successfully lobbied the SEC to adopt rules favoring internal reporting. See 76 Fed. Reg. at 34,300, 34,323.²

Absent a fix to *Digital Realty*, businesses will be deprived of the myriad benefits that flow from internal reporting.

Note also that Section 922 of Dodd-Frank is not redundant to Section 806 of the Sarbanes-Oxley Act (SOX). The anti-retaliation provision of SOX primarily protects employees of public companies. In contrast, Section 922 of Dodd-Frank Act protects an employee at any employer who reports a potential violation of federal securities law. SOX offers no protection to employees of private companies, hedge funds, private equity funds, and most investment advisers. For example, an employee at a hedge fund that is fired for opposing insider trading has no remedy under SOX. Failing to fix the drafting error in Section 922 of Dodd-Frank would leave most corporate whistleblowers at non-public companies without any remedy. Thank you for your leadership on this legislation.

Sincerely,

Government Accountability Project
Liberty Coalition
Project On Government Oversight
Public Citizen
Taxpayers Against Fraud
Zuckerman Law

Cc: The Honorable Maxine Waters, Chairwoman, U.S. House Financial Services Committee
The Honorable Patrick McHenry, Ranking Member, U.S. House Financial Services Committee

² Brief for Senator Charles Grassley as Amicus Curiae, 2, *Digital Realty Trust, Inc. v. Paul Somers*, No. 16-1276 (U.S. Supreme Court, 2018) available at <https://bit.ly/2UXMyy5>.