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SEC Invokes "120-day" Rule to Enhance Award to Internally Reporting Whistleblower Despite *Digital Realty*

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The Securities and Exchange Commission recently approved[2] a $4.5 million whistleblower award, the first issued under its rule governing internal whistleblowing and its first since the Supreme Court's decision last year in *Digital Realty Trust, Inc. v. Somers*.[3]

Digital Realty held that employees who blew the whistle internally on potential securities violations did not qualify as a whistleblower under Dodd-Frank's anti-retaliation provisions unless they also submitted the tips to the SEC.[4] That decision led to speculation about whether the SEC would continue to issue whistleblower awards for internal reporting. The SEC's recent award is evidence that it will continue to reward individuals who first utilize their company's internal reporting mechanisms—as long as they also provide the same information to the SEC within 120 days thereafter (and satisfy the other components of the rule).

In the recent matter, the whistleblower's anonymous tip within the company triggered an internal investigation, the results of which the company reported to the SEC and another agency. The whistleblower also sent the tip to the SEC within 120 days of reporting it to the company, satisfying the requirements of the internal reporting rule.[5] In issuing the award, the SEC noted that the claimant's information was "highly significant" because it "caused the Company first to alert the Commission and the Other Agency to the Company's ongoing violations, and then to perform an internal investigation," and also cited the difficulty in discovering the violations due to the company's extensive operations outside of the U.S.

The Supreme Court Pushes Internal Reporting Outside in *Digital Realty*

In the years following the 2010 enactment of the Dodd-Frank Act, a split of authorities arose regarding whether whistleblowers were eligible for SEC awards upon making reports

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[2] https://www.sec.gov/news/press-release/2019-76; Order approving award available here: https://www.sec.gov/rules/other/2019/34-85936.pdf

[3] *Dig. Realty Tr., Inc. v. Somers*, 138 S.Ct. 767 (2018).

[4] *Id*. at 772-73.

[5] 17 C.F.R. § 240.21F-4(c).

internally — as they were for the anti-retaliation provisions under Sarbanes-Oxley (SOX) — or whether the language of Dodd-Frank compelled them to report externally to the SEC or other agencies in order to qualify. The SEC's regulations[6] and the Ninth Circuit adopted the former approach, while the Second and Fifth Circuits required external reporting. The Supreme Court's decision in *Digital Realty* resolved this conflict by siding with the external reporting requirement.[7]

Initial reactions to that decision suggested that internal reporting was a practical dead end for employees seeking to qualify as whistleblowers under Dodd-Frank Act. Critics of the decision voiced concerns that it would weaken incentives for employees to report internally and allow companies to police misconduct independent of regulators.

What This Means for Whistleblowers and Companies

Indeed, employees are now more likely to forgo internal reporting and only report to the SEC, since doing so would qualify them under the anti-retaliation provisions of both SOX and Dodd-Frank (which offers additional damages, such as double back-pay). It also is more difficult for diligent and compliance-minded companies to independently review and address issues that employees observe without regulator involvement.

Nevertheless, despite *Digital Realty*, the SEC has continued to stress the importance of internal reporting channels and investigations. The SEC has indicated that it views whistleblowers' use of internal compliance systems a positive factor that may increase the amount of the award.[8] The recent award underscores that employees can still be protected for first reporting internally, so long as they provide the same information to the SEC within 120 days, and the other elements of Rule 21F-4(c)(3) are satisfied.

The recent $4.5 million award suggests that the SEC will continue to take whatever actions it can to incentivize and reward internal whistleblowers in a post -*Digital Realty* world.

[6] 17 C.F.R. § 240.21F–2(b)(1)(i)–(ii) (2008 version)
[7] *See id*.
[8] *See* 17 C.F.R. § 240.21F-6(a)(4).