

Regulatory and Enforcement Alert

Senate Bill Proposes to Extend Dodd-Frank Anti-Retaliation Protection to Employees Who File Whistleblower Complaints Internally

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On September 24, 2019, bipartisan members of the Senate Finance Committee introduced a bill that would extend the Dodd-Frank Act's anti-retaliation protections for whistleblowers to individuals who report potential securities violations internally within their companies, even if the individual does not also report the information to the Securities and Exchange Commission. While it is not yet clear whether the bill has traction or what any final legislation would look like, as currently drafted, our view is that the Whistleblower Programs Improvement Act ("WPIA") would be a positive development for the business community. It would help incentivize employees to report suspected misconduct internally before contacting regulators, and any increased internal reporting would give companies more opportunities to detect and promptly remediate substantiated misconduct as well as consider self-reporting the issue to regulators.

The WPIA appears to be a direct response to the Supreme Court's recent decision in *Digital Realty Trust, Inc. v. Paul Somers* (2018), which interpreted the meaning of the term "whistleblower" in the anti-retaliation provision of the Dodd-Frank Act's whistleblower program. Based on the statutory definition of "whistleblower", the Supreme Court held that only employees who report information directly to the SEC qualify as "whistleblowers" entitled to this anti-retaliation protection. Accordingly, the Court held that employees who report information only internally within their company, and not directly to the SEC, are not "whistleblowers" protected from retaliation under Dodd-Frank. The WPIA would expand the definition of "whistleblower" for purposes of Dodd-Frank's anti-retaliation provision to include both employees who provide relevant information to the SEC and employees who provide information to "a person with supervisory authority over the whistleblower at the employer of the whistleblower" or "another individual working for the employer . . . who the whistleblower reasonably believes has the authority . . . to investigate, discover, or terminate the misconduct; or . . . to take any other action to address the misconduct."

As the WPIA is currently drafted, the anti-retaliation protections of Dodd-Frank would apply as long as an employee reports information to someone in a "supervisory" position over the employee. In a perfect world, the bill would require an employee to report the suspected misconduct through formal designated reporting channels (such as an ethics hotline) or to specific senior-level individuals or specific departments (such as internal audit, compliance, or legal) that are best positioned to address the issue. At the very least, however, the WPIA stands to help ensure that employees are not discouraged from internal reporting, particularly employees who are simply trying to do the right thing by speaking out but who are not interested in triggering full-blown government

inquiries. Ultimately, any increase in internal reporting, even if only to supervisors, would better position companies to proactively investigate and remediate problems before the government comes knocking.

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