

## [Securities Regulation Daily Wrap Up, WHISTLEBLOWER NEWS—U.S.: Digital Realty argues against Chevron deference to whistleblower rule, \(Nov. 13, 2017\)](#)

Securities Regulation Daily Wrap Up

[Click to open document in a browser](#)

By [Anne Sherry, J.D.](#)

Dodd-Frank's employee whistleblower protections are unambiguously triggered only upon SEC reporting, according to Digital Realty Trust, which is appealing an adverse ruling to the Supreme Court. Its reply brief challenges the idea that *Chevron* deference is in play; even if it is, the Court should not defer to the SEC's whistleblower rule because of procedural defects. The petitioner also urges that if the Court determines that the statute is ambiguous and the procedural defects should be excused, it should order supplemental briefing to consider whether *Chevron* should be overruled (*Digital Realty Trust, Inc. v. Somers*, November 9, 2017).

**Statutory definition.** Exchange Act Section 21F, added by Dodd-Frank, bars employers from discriminating against "a whistleblower" for providing information to the SEC; being involved in an investigation or action based on the information; or (in the controversial subsection (iii)) making disclosures required or protected under the securities laws. That third category of protected disclosures includes certain categories of internal reporting and other reports that are not necessarily made to the SEC. But "whistleblower" is defined elsewhere in Section 21F as "any individual who provides ... information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." In light of this apparent tension, many employees argue that the statute is ambiguous, warranting *Chevron* deference to the SEC's [rule](#), which does not require reporting to the agency.

**Circuit split.** The Court [granted](#) certiorari to review the Ninth Circuit [holding](#) that internal whistleblowers are protected from employment retaliation. The plaintiff in the Ninth Circuit case was a vice president of portfolio management at Digital Realty Trust. According to his complaint, he reported to senior management actions by his supervisor that eliminated internal controls over certain corporate actions in violation of the Sarbanes-Oxley Act. He was fired shortly afterwards. Digital Realty moved to dismiss his complaint for employment retaliation for failure to report any of the alleged internal controls violations to the SEC. But the district court [denied](#) the motion, holding that Dodd-Frank is ambiguous and that the SEC's rule was a reasonable interpretation of the statute under *Chevron*. The court also [certified](#) the action for interlocutory appeal to allow the Ninth Circuit to clarify the law.

The Ninth Circuit agreed with the district court that the SEC's rule aligned with Congress's overall purpose to protect whistleblowers, whether they report violations internally or to the government. The language of subsection (iii) illuminates Congress's intent to protect certain professionals, namely auditors and attorneys, who are required to report violations internally before they can do so externally. The fact that the statute describes whistleblowers as employees who report to the SEC did not dispose of the employee's argument because terms can operate differently in different contexts, as the Supreme Court reasoned in upholding most of the Affordable Care Act (*King v. Burwell* (U.S. 2015)). One judge on the panel dissented on the grounds that this case should be "quarantined" to its specific facts.

The Ninth Circuit holding deepened a circuit split by joining the Second Circuit in favor of protecting internal whistleblowers, while the Fifth Circuit—the first to rule on this question—read the plain language of the statute to require SEC reporting.

**Petitioner's reply brief.** Digital Realty Trust argues that the statute is unambiguous and that applying the plain text as written does not produce absurd results. In *Lamie v. United States Trustee* (U.S. 2004), it wrote,

the Court construed a provision of the Bankruptcy Code that gave a trustee, an examiner, or a professional person employed under certain code provisions the right to compensation for "services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person." The petitioner there argued that the statute was ambiguous because of a tension between the individuals covered and the right afforded. But the Court concluded that the type of compensation awarded was irrelevant to the threshold question of which individuals were covered. The same logic applies to the whistleblower case, Digital Realty argues, even though *Lamie* did not involve an explicit statutory definition.

There is nothing absurd about construing Dodd-Frank as withholding protections for lawyers and auditors, Digital Realty continues—it was Sarbanes-Oxley that was concerned with those professionals, and the respondent conceded that SOX protections would still be available. The petitioner also denies that the plain-text interpretation would lead to odd outcomes because the whistleblower provisions do not specify a substantive or temporal connection between the SEC report that triggers statutory protection and the disclosure that leads to the retaliation itself. "Congress could reasonably have made the policy judgment that individuals who report securities-law violations to the SEC should receive broad protection over time against retaliation for a variety of disclosures. That would be consistent with the Act's broader goal of promoting reporting to the SEC."

The petitioner urges further that the SEC's whistleblower rulemaking is not entitled to deference. Even if the Court reached the second step of *Chevron* by finding the statute ambiguous, the rule is procedurally defective. The SEC initially proposed a rule consistent with the statutory definition of "whistleblower," but expanded the definition in its final rule. The proposed rule accordingly failed to give fair notice of the contents of the final rule. Furthermore, Digital Realty did not waive this argument because it goes squarely to the *Chevron* argument that it did argue below. And the fact that the SEC's rule is no longer subject to challenge under the Administrative Procedure Act is irrelevant—the petitioner is not bringing an affirmative claim to take action against the rule, but is arguing in a private lawsuit that its procedural defects preclude deference.

Finally, Digital Realty includes a footnote urging the Court to order supplemental briefing to consider whether *Chevron* should be overruled, in the event it concludes both that the statutory text is ambiguous and that the defects in the rulemaking can be excused.

Oral argument is [scheduled](#) for November 28.

The case is [No. 16-1276](#).

Attorneys: Kannon K. Shanmugam (Williams & Connolly LLP) for Digital Realty Trust, Inc. Daniel L. Geyser (Stris & Maher LLP) for Paul Somers.

Companies: Digital Realty Trust, Inc.

LitigationEnforcement: DoddFrankAct SarbanesOxleyAct WhistleblowerNews SupremeCtNews