

September 23, 2019

The Honorable Charles Grassley
Chairman
Committee on Finance
United States Senate
219 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Tammy Baldwin
United States Senate
709 Hart Senate Office Building
Washington, DC 20510

The Honorable Dick Durbin
United States Senate
711 Hart Senate Office Building
Washington, DC 20510

The Honorable Joni Ernst
United States Senate
730 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Grassley, Senator Baldwin, Senator Durbin and Senator Ernst:

Thank you for your leadership in introducing The Whistleblower Programs Improvement Act, legislation to clarify the scope of protection for whistleblowers disclosing securities fraud or commodities fraud and to expedite the processing of applications for Dodd-Frank whistleblower awards. This legislation establishes greater parity with other modern federal whistleblower statutes and supports timely awards, among other common-sense reforms.

Consistent with H.R. 2515, which the House passed by an overwhelming bipartisan majority of 410 - 12, your legislation would clarify that whistleblowers disclosing potential violations of federal securities or commodities laws to their employers are protected from retaliation. That was the intent of Congress when it included whistleblower protections in the Dodd-Frank Act, but 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 protected whistleblowing is limited to disclosures to the Securities and Exchange Commission (SEC).ⁱ It would also promote uniformity and consistency in these two anti-retaliation provisions by adding to Section 922 a provision in the Commodity Futures Trading Commission (CFTC) anti-retaliation law barring the use of non-disclosure agreements and pre-dispute arbitration agreements – tactics to prevent whistleblowers from making disclosures or pursuing their claims in court.

Your continued leadership is greatly needed. 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. In the wake of the worst financial crisis since the Great Depression, Congress included in the Dodd-Frank Act incentives for whistleblowers to report fraud and protections against retaliation. But post-*Digital Realty*, the anti-retaliation provisions apply only where a whistleblower has made a disclosure to the SEC or CFTC.

Limiting Dodd-Frank whistleblower protection solely to external 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.ⁱⁱ *Digital Realty* renders Dodd-Frank's whistleblower protection provision for that 97 percent inaccessible, thereby dissuading whistleblowers from reporting potential securities or commodities violations to their employers.

As you pointed out in your *amicus curiae* brief for the *Digital Realty* case, 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. That is arguably why the business community successfully lobbied the SEC to adopt rules favoring internal reporting.ⁱⁱⁱ Moreover, failing to protect internal whistleblowing would undermine corporate compliance programs by encouraging whistleblowers to bypass their employers and report directly to the SEC or CFTC. Absent a fix to *Digital Realty*, businesses will be deprived of the myriad benefits that flow from internal reporting. Further, corrective action for violations inherently will have to wait for completion of lengthy SEC proceedings, rather than timely corrective action by honest corporate leadership after learning of illegality through its employees.

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 who is fired for opposing insider trading has no remedy under SOX. Failing to fix the drafting errors in Section 922 of Dodd-Frank would leave most corporate whistleblowers at non-public companies without any remedy, and vulnerable to tactics to gag employees from disclosing misconduct.

Thank you for your leadership on this legislation. We look forward to continuing to work with your office to strengthen and establish consistency with financial industry whistleblower laws.

Sincerely,

ACORN 8
Government Accountability Project
Kohn, Kohn and Colapinto
Liberty Coalition
National Whistleblower Center
Project On Government Oversight
Public Citizen
Taxpayers Protection Alliance
Whistleblowers of America
Zuckerman Law

ⁱ Although *Digital Realty* construes Section 922(h) of the Dodd-Frank Act (the provision protecting disclosures of potential violations of federal securities laws), the reasoning of the decision applies to Section 23(h) of the Commodity Exchange Act, which protects disclosures about potential violations of the federal commodities laws.

ⁱⁱ 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>.

ⁱⁱⁱ 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/2UXMy5>.