

SEC Votes in Favor of Proposal to Amend Whistleblower Rules to Comport with U.S. Supreme Court's Holding in Digital Realty Trust

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On June 28, 2018, the U.S. Securities and Exchange Commission (“SEC” or “Commission”) voted in an open meeting on several final rules and rule proposals that will have a material impact on the Commission’s whistleblower program. Most notably, the SEC approved a rule proposal that would modify its Rule 21F, which defines who is a whistleblower and establishes anti-retaliation protection, to comport with the U.S. Supreme Court’s holding in *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767 (2018).

As [detailed on our blog](#), in February, the U.S. Supreme Court unanimously held that the anti-retaliation provision of the Dodd-Frank Act only applies to individuals who have provided information regarding a violation of the securities laws to the SEC. In so holding, the Court ruled that the SEC’s Rule 21F-2, which enabled an individual to gain anti-retaliation protection from complaints not made directly to the SEC (such as internal company complaints), was in clear contravention of Congress’s instruction that a “whistleblower” is a person who provides “information relating to a violation of the securities laws *to the Commission*.”

The SEC’s proposed rule will comport with the Court’s holding by requiring, *inter alia*, that an individual seeking anti-retaliation protection report, in writing, information about possible securities laws violations to the SEC itself. The proposed rule would apply uniformly: to the SEC’s whistleblower award program, the heightened confidentiality program, as well as for employment anti-retaliation protection.

In addition, the SEC approved a proposed amendment to Rule 21F that would allow the Commission to grant whistleblowers a bounty award when their tips lead to deferred prosecution agreements and non-prosecution agreements with the Justice Department or a state attorney general, not just judicial or administrative proceedings. Further, the SEC approved a proposed rule which would allow the Commission to adjust a whistleblower's award upward (although by no more than 30%) when the award formula would yield a payout of less than \$2 million. The Commission stated that the additional discretion could help "better achieve the program's objectives of rewarding meritorious whistleblowers and sufficiently incentivizing future whistleblowers."

The Commission also included in its proposed rules a general inquiry for public comment as to whether it could establish a discretionary bounty award for whistleblowers whose tips lead to actions that do not currently meet the SEC's requirements, either because the action is under the SEC's \$1 million threshold, the tip is based on publicly-available information, or where the monetary sanctions collected are minimal.

These proposed rule changes may be a latent response by the SEC to the fact that the number of whistleblower tips it receives annually has been leveling off in recent years. As documented in the [SEC's 2017 Annual Whistleblower Report](#), while the number of tips received by the Commission has increased year-on-year since the whistleblower program's inception in 2011, the growth in the number of tips has slowed for three consecutive years. And, as in past years, the percentage of whistleblower tips that lead to actual awards is very low (that said, some believe that *Digital Realty Trust* itself may prompt an uptick in whistleblower tips, given that only complaints to the SEC are now protected).

As the Commission highlighted in its [recent release](#), forty percent of the aggregate funds that the SEC's whistleblower program has paid out across its seven-year history have been via a mere three awards. Accordingly, the SEC also voted in its open meeting to approve a proposed rule that would allow it to adjust large bounty awards (those above \$30 million) downwards in order, in its own estimation, for it to be "a responsible steward of the public trust." All of the SEC's proposed rules will be open to public comment for sixty days following publication of the SEC's release in the Federal Register.

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