

Supreme Court Narrows Whistleblower Protections Under Dodd-Frank

PENpoints

The court's unanimous decision found that Dodd-Frank's whistleblower anti-retaliation protections only apply after an individual reports violations directly to the SEC.

The 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act directed the SEC to pay an award to a whistleblower who provides the SEC with original information about a securities law violation leading to a successful enforcement and/or related action resulting in monetary sanctions exceeding \$1 million.¹ Dodd-Frank and the related SEC rules also (1) provide a whistleblower the right to sue² if he or she is discharged, demoted or discriminated against for reporting potential securities law violations, and (2) prohibit a firm from taking any action to impede a whistleblower from communicating directly with SEC staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement.

On February 21, 2018, the U.S. Supreme Court issued a unanimous decision in *Digital Realty Trust, Inc. v. Somers*, finding that the whistleblower anti-retaliation protections of Dodd-Frank³ only apply after an individual reports federal securities law violations directly to the SEC. In doing so, it rejected a rule created by the SEC under Dodd-Frank extending anti-retaliation protections to, among others, individuals who only report securities law violations internally to their employer or supervisor.

Potential Impact of the *Digital Realty* Decision

The *Digital Realty* decision may incentivize employees to report concerns to the SEC before or at the same

time they report internally so they can take advantage of Dodd-Frank anti-retaliation protections and relief. This could deprive companies and firms of the opportunity to first identify and address issues internally and increase the likelihood of an SEC investigation.

Private equity managers and other companies subject to SEC oversight should consider:

- reviewing whether their policies and procedures encourage internal whistleblower reporting and prohibit retaliation;
- ensuring employees and former employees have no impediments (e.g., overly broad confidentiality provisions) to disclosing information about securities law violations to the SEC; and
- developing a plan to properly evaluate and address reports of potential securities law violations in light of employees' increased incentive to contact the SEC with concerns and the potential that any matters uncovered in internal investigations, even if minor, could be disclosed to the SEC.

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¹ The following categories of people, among others, are generally not eligible for a whistleblower award: (a) attorneys using client information, (b) compliance and internal audit personnel, (c) public accountants working on SEC client engagements, and (d) persons who obtain the information in violation of federal or state criminal law.

² If successful, a whistleblower can receive relief consisting of employment re-instatement, double back pay and expenses (including attorneys fees and expenses).

³ The Sarbanes-Oxley Act of 2002 also provides certain whistleblower protections but was not the direct subject of *Digital Realty*.

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PENbriefs

New North Korea Sanctions Impact Shipping Transactions Worldwide

The U.S. Department of Treasury's Office of Foreign Assets Control recently issued some of the widest sweeping North Korea-related sanctions imposed to date, aimed at disrupting companies from doing business with North Korean shipping, trading companies and vessels. These sanctions directly target North Korean parties, but more notably extend to parties from any country seen as doing business with North Korea. To learn more, see our recent [Alert](#).

Key Takeaways from the SEC's 2018 Cybersecurity Guidance

The U.S. Securities and Exchange Commission recently published new guidance regarding public company disclosure of cybersecurity risks and incidents. Consistent with the SEC's approach to disclosure, companies will have to develop a tailored approach to materiality determinations and cannot necessarily rely on approaches taken by other companies. To learn more, see our recent [Alert](#).

PENnotes

Wharton Private Equity & Venture Capital Conference New York, NY, March 16, 2018

The Wharton School's Private Equity and Venture Capital Conference will showcase several keynote speeches and panel discussions on the state of the private equity and venture capital industries. Kirkland partner Robert Blaustein will moderate the Funds panel, and partner Stephen Hessler will moderate the Distressed Opportunities panel. Click [here](#) for more information or to register.

2018 Kellogg Private Equity and Venture Capital Conference Chicago, IL, April 25, 2018

Kirkland is a sponsor of this annual student-led conference, which brings industry professionals, alumni, students and Kellogg faculty together for a day of discussion on the current state of the industry and its most

pressing issues. Kirkland partner Richard Campbell will moderate a panel on "Add-On Acquisitions as a Source of Value." Click [here](#) for more information.

Private Debt Investor CFOs & COOs Forum 2018 New York, NY, June 20-21, 2018

Kirkland is a sponsor of this event, which will delve into the complexities of managing the finance and operations of firms that invest across the capital structure, including senior secured loans, subordinated debt, hybrid financing and more. Kirkland partner Stephanie Berdik will address how LPs evaluate private debt and credit funds, and partner Norm Champ will discuss the before and after of an SEC exam. Click [here](#) for more information or to register.

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Kirkland & Ellis' nearly 500 private equity attorneys handle leveraged buyouts, growth equity transactions, recapitalizations, going-private transactions and fund formations on behalf of more than 400 private equity firms and hedge funds around the world.

Kirkland has been widely recognized for its preeminent private equity practice. The Firm was named "Private Equity Group of the Year" in each of the last seven years by *Law360* and was commended as being the most active private equity law firm of the last decade in *The PitchBook Decade Report*. U.S. News Media Group and Best Lawyers have ranked Kirkland as a Tier 1 law firm for Leveraged Buyouts and Private Equity Law for seven consecutive years and as a top-tier firm for Private Funds/Hedge Funds Law since 2012. The Firm was recognized as the #1 law firm for private equity in the 2018 Vault 100 rankings, and, in 2016, Private Equity International named the Firm "Law Firm of the Year in North America: Fund Formation" for the third year in a row.

In 2012-2017, Chambers and Partners ranked Kirkland as a Tier 1 law firm for Investment Funds in the United States, United Kingdom, Asia-Pacific and globally. The Firm was ranked as the #1 law firm for both Global and U.S. Buyouts by deal volume in Mergermarket's *League Tables of Legal Advisors to Global M&A for Full Year 2011-2017*, and has consistently received top rankings among law firms in Private Equity by The Legal 500, the Practical Law Company and IFLR, among others.

The Lawyer magazine has recognized Kirkland as one of its "Transatlantic Elite," having noted that the Firm is "leading the transatlantic market for the provision of top-end transactional services ... on the basis of a stellar client base, regular roles on top deals, market-leading finances and the cream of the legal market talent."

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