

October 20, 2021

The Honorable Al Green
2347 Rayburn House Office Building
Washington, DC 20515

Dear Representative Green:

Thank you for sponsoring the Whistleblower Protection Reform Act of 2021 (H.R. [5485](#)), a bill to amend the Securities and Exchange Act of 1934 to strengthen protections for SEC whistleblowers and fortify the SEC's whistleblower reward program.

We especially appreciate the bill's provisions to modernize Section 21F(h)(1) of the Exchange Act (the anti-retaliation provision of the Dodd Frank Act that protects whistleblowers against retaliation). That law is very weak in several respects:

- It is the only corporate whistleblower legislation enacted since the millennium that does not protect in-house disclosures, which leaves defenseless over 95% of whistleblowers who never break institutional ranks.
- It does not include a fair burden of proof, which enables arbitrary rulings.
- It does not include access for whistleblowers to seek justice in jury trials from the citizens they are defending when they risk their careers.
- It does not have "anti-gag" provisions to override Nondisclosure Agreements that often are job prerequisites.

HR 5485 closes all these loopholes.

In the wake of the worst financial crisis since the Great Depression, Congress sought to protect corporate whistleblowers to prevent another financial crisis. Unfortunately due to a drafting error in the legislation, the Supreme Court held in *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767 (2018) that the definition of "whistleblower" in Section 21F(a)(6) of the Exchange Act requires that an individual report a possible securities law violation to the SEC to qualify for protection against retaliation.

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. To prevent another crisis, Congress included in the Dodd-Frank Act incentives for whistleblowers to report fraud and protections against retaliation.

Limiting Dodd-Frank whistleblower protection to government 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.[\[1\]](#) *Digital Realty* significantly weakens Dodd-Frank's whistleblower protection provision, thereby dissuading whistleblowers from reporting potential securities law violations to their employers.

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. Moreover, failing to protect internal whistleblowing would undermine corporate compliance programs by encouraging whistleblowers to report directly to the SEC.

HR 2515 should not be the least bit controversial because it essentially corrects a drafting error and effectuates Congressional intent. When Congress enacted Section 922, it was widely understood to protect internal whistleblowing. As Senator Grassley points out in the *amicus curiae* brief that he submitted in *Digital Realty*,

[T]he testimony to Congress suggests that members of the business community, while advocating for internal reporting requirements, assumed or took for granted that Dodd-Frank's anti-retaliation provisions apply to internal whistleblowers. . . . Similarly, it was the business community that successfully lobbied the SEC to adopt rules favoring internal reporting. See 76 Fed. Reg. at 34,300, 34,323.[\[2\]](#)

Absent a fix to *Digital Realty*, businesses will be deprived of the myriad benefits that flow from internal reporting.

HR 5845 would also fortify the SEC whistleblower reward program by:

- Authorizing the payment of awards to whistleblowers based on recoveries by a bankruptcy trustee in a proceeding stemming from original information provided by a whistleblower, a critical fix highlighted in a recent *Wall Street Journal* article.[\[3\]](#);
- Requiring timely processing of whistleblower award applications;
- Authorizing the Office of the Whistleblower to increase its limited staffing without using taxpayer dollars by permitting it to fund operations from the Investor Protection Fund;
- Preventing arbitrary reductions of whistleblower awards; and
- Nullifying a September 2020 amendments to the SEC's whistleblower rules that precludes the SEC in some instances from making an award in related enforcement actions brought by other law-enforcement and regulatory authorities. [\[4\]](#)

During the 116th Congress, the House passed similar legislation that you sponsored (H.R. 2515) by a vote of 410 to 12. We hope that Congress will swiftly enact H.R. 5485.

Sincerely,

Accountability Lab
Acorn 8
American-Arab Anti-Discrimination Committee (ADC)
Defending Rights & Dissent
Essential Information
Government Accountability Project
Government Information Watch
National Whistleblower Center
Open The Government
Project On Government Oversight
Public Citizen
Public Employees for Environmental Responsibility
Shadow World Investigations
Taxpayers Against Fraud
Taxpayers Protection Alliance
Transparency International — U.S. Office
Union of Concerned Scientists
Whistleblowers of America
Zuckerman Law Firm, LLC

cc: The Honorable Maxine Waters, Chairwoman, U.S. House Financial Services Committee
The Honorable Patrick McHenry, Ranking Member, U.S. House Financial Services
Committee

[1] 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>.

[2] 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/2UXMyy5>.

[3] Maremont, Mark. "Whistleblower Thought He Would Get a Big Payout. Instead He Got Nothing and Went Broke." *The Wall Street Journal*, Dow Jones & Company, 27 June 2021, available at <https://on.wsj.com/3uZiNQ0>.

[4] This issue is discussed in more detail in recent letters from Taxpayers Against Fraud and the National Whistleblower Center to SEC Chair Gensler. See Taxpayers Against Fraud Offers Suggestions for Improving the SEC Whistleblower Program (Aug 10, 2021), available at <https://bit.ly/3oSVAOG>; Whistleblower Advocates Suggest Fixes to the SEC's Related Action Rule (Aug. 19, 2021), available at <https://bit.ly/2YBzC8d>; see also Kohn, Stephen. "SEC Acts to Save the 'Related Action' Whistleblower Rule." *JD Subra*, 9 Aug. 2021, available at <https://bit.ly/3AxiHQI>.