

Criminal Law, Regulation and Enforcement | March 22, 2006

## Document Destruction and Obstruction of Justice: Why *Arthur Andersen* Doesn't Matter

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### I. The Wisdom of Document Retention Policies

“Document retention policies,’ which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business. It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances.” *Arthur Andersen LLP v. United States*, 125 S. Ct. 2129, 2135 (2005) (Rehnquist, C.J.).

Imagine the following (entirely fictional) set of facts: You are the chief compliance officer at a company that manages several established, rapidly expanding hedge funds. The SEC continues to increase regulation and scrutiny of your industry. A number of stories critical of hedge funds appear in the newspapers. *The Wall Street Journal* has just run a series on the use of a little-understood and highly questionable accounting technique by some hedge funds that is likely to overstate the value of those funds' portfolio securities. You are not concerned. You believe that your fund is conservative, well managed and conscious of its compliance obligations. You have good people and adequate internal controls. As in large financial institutions, you have a written document retention policy that calls for the periodic purging of employees' paper and electronic files. Like many large financial institutions, however, compliance with your document policy by individual employees is inconsistent and difficult to enforce.

The vice president of finance comes to your office and tells you that he and a portfolio manager have been using the accounting methodology in the news in order to value one of your funds. In fact, the finance VP and portfolio manager had several meetings 18 months ago to discuss the benefits, drawbacks and propriety of the accounting treatment. The finance VP took notes by hand in his diary and on his laptop, and he still has them. The two also exchanged e-mails on the topic, and the finance VP has relevant accounting work papers in his office. The notes, e-mails, and most of the work papers should have been discarded a year ago under your document retention policy. The finance VP suggests that you should send out a reminder to all employees, attaching the document retention policy and discussing the importance of following it. He points out that this should be done before the SEC gets around to investigating the accounting treatment and issuing a subpoena to your company.

You immediately think of Arthur Andersen. You remember that Andersen was indicted, tried, and convicted for obstruction of justice when, as Enron collapsed, it handed out its document policy to its employees, who proceeded to shred two tons of documents. But you also remember that Andersen's conviction was reversed, 9-0, by the Supreme

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Court of the United States. You recall that it was reversed because, according to the highest court in the land, it is not “corrupt” within the meaning of the federal obstruction statute if someone destroys documents pursuant to a valid document retention policy. The Chief Justice of the United States said that such policies are “not wrongful,” even though they are *designed* “to keep certain information from getting into the hands of others, including the Government.”<sup>1</sup> You also recall that for a crime to have occurred, the Court insisted that a connection has to exist between the document destruction and a federal investigation: you must have in mind a particular, known SEC proceeding in which the documents might be material.

You think to yourself that with the Supreme Court on your side, you are on pretty firm ground. You have a valid policy. There is no proceeding. The SEC has not contacted you, and it may never even open an investigation, let alone issue a subpoena to your company. You sit down at your computer and draft an e-mail to all employees reminding them of the importance of following the company’s document retention rules. You attach the written policy and send the e-mail.

You have made a potentially tragic error.

## II. The Danger of Document Retention Policies

“Whoever knowingly alters, destroys, mutilates, conceals [or] covers up . . . any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . or in relation to or contemplation of any such matter or case, shall be fined under the title, imprisoned not more than 20 years, or both.” Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 800, § 802(a) (codified at 18 U.S.C. § 1519).

Although the Supreme Court issued its decision in *Arthur Andersen* just last year, the case is just one chapter in the

story of the federal obstruction laws, not the last. Ironically, Arthur Andersen was prosecuted under a twenty year-old federal witness tampering statute, Section 1512.<sup>2</sup> At the time Arthur Andersen destroyed its Enron documents, the patchwork of federal obstruction statutes was confusing and flawed. Section 1512 prohibited a person from persuading someone else to shred documents during a preliminary SEC investigation, but it did not cover the person who actually did the shredding. In fact, no statute clearly did. The Department of Justice dubbed this the “individual shredder” problem.<sup>3</sup> As of 2001, other statutes covered the person who destroyed documents himself, but they required a pending legal or administrative proceeding at the time of the destruction.<sup>4</sup> In Andersen’s case, there was no pending proceeding when it shredded, just an informal SEC inquiry. The Department of Justice had no choice. It had to use the witness tampering statute because nothing else fit Andersen’s conduct.

By now of course, everyone knows about Sarbanes-Oxley – the Patriot Act of corporate fraud. Few people have focused on the law’s Section 802. In July of 2002, with an eye cast directly on Arthur Andersen’s widely reported document destruction, Congress superseded the patchwork of obstruction provisions with a catch-all designed to do away with the “technicalities” of existing statutes. The new statute is codified at 18 U.S.C. § 1519, and is quoted above. It covers the individual shredder. It eliminates the requirement that someone must destroy documents “corruptly” in order to have obstructed. It eliminates the requirement that the destruction be designed to subvert a known, identifiable federal

<sup>2</sup> 18 U.S.C. § 1512 provides: “Whoever knowingly . . . corruptly persuades another person, or attempts to do so . . . with intent to . . . cause or induce any person to . . . alter, destroy, mutilate, or conceal an object with intent to impair the object’s integrity or availability for use in an official proceeding . . . shall be fined under this title or imprisoned not more than ten years, or both.”

<sup>3</sup> See, e.g., U.S. Department of Justice “Field Guidance on New Criminal Authorities Enacted in the Sarbanes-Oxley Act of 2002 (H.R. 3763) Concerning Corporate Fraud and Accountability” (Aug. 1, 2002), <http://www.usdoj.gov/ag/readingroom/sarox1.htm>.

<sup>4</sup> Title 18 U.S.C. §§ 1503 (prohibiting efforts to obstruct “the due administration of justice”), 1505 (prohibiting obstruction of “due and proper administration of the law under which any pending proceeding is being had” before a federal agency).

<sup>1</sup> *Arthur Andersen*, 125 S. Ct. at 2135.

investigation. In short, it does away with the two primary hurdles Chief Justice Rehnquist used to erase Arthur Andersen's conviction under Section 1512. To understand the new statute and how broad it is, one has to understand what led to Arthur Andersen's indictment and why the jury in the case – and the Supreme Court of the United States – struggled so much over its guilt.

#### A. Arthur Andersen's Conduct

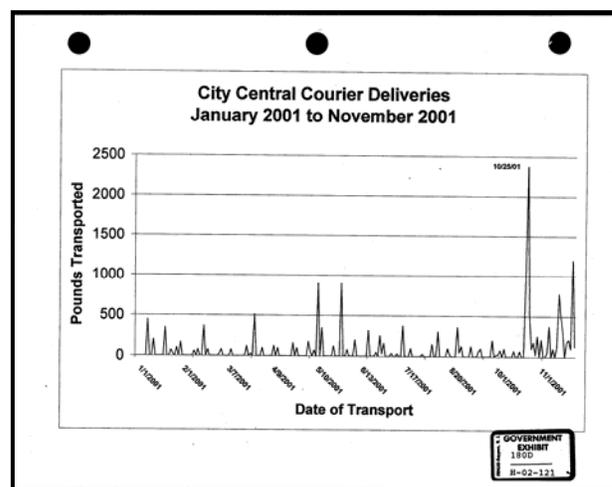
As allegations of accounting improprieties at Enron began to surface and after the SEC began an informal investigation,<sup>5</sup> Arthur Andersen, Enron's auditor, formed a "crisis response team" and retained outside counsel to address issues that might arise related to Enron. On October 9, 2001, Nancy Temple, Andersen's in-house counsel, handwrote that an Enron restatement was a "reasonable possibility," and that "some SEC investigation" was "highly probable." At an employee training session on October 10, Andersen partner Michael Odom, encouraged Andersen personnel (including some assigned to Enron) to follow the firm's document retention policy, stressing that "if it's destroyed in the course of normal policy and litigation is filed the next day, that's great . . . we've followed our own policy, and whatever was there that might have been of interest to somebody is gone and irretrievable."

Two days later, on October 12, Temple entered the Enron matter into the firm's internal tracking system as a "Government/Regulatory Inv[estigation]." That same day, she e-mailed Odom: "It might be useful to consider reminding the engagement team of our documentation and retention policy. It would be helpful to make sure that we have complied with the policy." Odom forwarded this e-mail to David Duncan, head of Enron's engagement team.

<sup>5</sup> At the beginning of a matter, the SEC Enforcement Division Staff can proceed in one of two ways. It can appear before the Commission and ask for a formal order authorizing it to issue subpoenas for documents and testimony. See 15 U.S.C. § 78u(a)-(b); 17 C.F.R. §202.5(a). Alternatively, it can open a "matter under inquiry," or informal investigation, and seek information from parties voluntarily. See *id.*

On October 16, Enron announced a \$1.2 billion balance sheet restatement. The next day, the SEC notified Enron of its informal investigation and requested documents. Enron forwarded the SEC's letter to Arthur Andersen on October 19. On the same day, Temple circulated Arthur Andersen's document retention policy by e-mail. The next day, during an Enron "crisis response team" conference call, Temple urged everyone to "[m]ake sure to follow the [document] policy." On October 23, after Enron CEO Ken Lay had declined to answer analysts' questions based on "potential lawsuits, as well as the SEC inquiry," Duncan instructed his engagement team to make sure they were complying with the document retention policy, handing out copies.

Andersen's repeated reminders about the policy worked. Andersen employees shredded over two tons of documents in Houston alone. The government offered an exhibit at Andersen's trial charting the removal of waste paper from the company by its vendor in 2001. The chart was fairly damning:



Andersen shredded documents until November 9, after the SEC initiated a formal investigation and served a document subpoena. Duncan's secretary sent out an e-mail which said, simply: "Per Dave—No more shredding . . . We have been officially served for our documents." A few months later, the Department of Justice obtained a one count indictment charging that Andersen "did knowingly, intentionally and corruptly persuade and attempt to persuade other persons, to wit: ANDERSEN employees, with intent to cause and induce such persons to . . . alter, destroy, mutilate and conceal objects with intent to

impair the objects' integrity and availability for use in [] official proceedings," in violation of Section 1512.

Andersen exercised its right to a trial, and on June 15, 2002, the jury returned a guilty verdict. Despite the Government's (and the federal courts') focus on Andersen's document destruction, post-verdict interviews indicated that at least some jurors actually rejected the shredding as a basis to convict. Instead, the jury apparently convicted on a theory that was not in the indictment, isolating an e-mail by Andersen lawyer Nancy Temple that advised Duncan to alter a press release about Enron's financial statements. According to the jury foreman, "[a]ll this business about telling people to shred documents was largely superficial and largely circumstantial." He stated that the jury's effort to settle upon a "corrupt persuader" under Section 1512 "almost had nothing to do with shredding documents."<sup>6</sup> It is settled law, however, that the courts will not look behind a jury's decision. Andersen's post-trial attack on the verdict failed. It was forced to surrender its professional licenses and it proceeded to collapse.

#### B. The Supreme Court's Decision in Andersen

The jury in Andersen was told that the word "corruptly" in Section 1512 meant "having an improper purpose," and that "[a]n improper purpose, for this case, is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding":

Thus, if you find beyond a reasonable doubt that an agent, such as a partner of Andersen acting within the scope of his or her employment, induced or attempted to induce another employee or partner of the firm or some other person to withhold, alter, destroy, mutilate, or conceal an object, and that the agent did so with the intent, at least in part, to subvert, undermine, or impede the fact-finding ability of an

official proceeding, then you may find that Andersen committed the first element of the charged offense.

The jury was also instructed that an "official proceeding" included "a regulatory proceeding or investigation whether or not that proceeding had begun or whether or not a subpoena had been served." The trial court rejected Andersen's request for an instruction requiring the jury to find that it "had in mind a particular proceeding that it sought to obstruct."<sup>7</sup>

Andersen challenged both of these instructions on appeal. It argued that the lower court's definition of "corruptly" improperly included innocent conduct, like document destruction pursuant to a regular policy. It also argued that by refusing to require Andersen to have a concrete expectation of a particular federal proceeding, the trial court effectively "criminaliz[ed] the widespread use of records retention programs, all of which have a general purpose of not retaining documents that might be helpful to some later appearing adversary."<sup>8</sup> The intermediate federal Court of Appeals, the Fifth Circuit, rejected these arguments and sided with the Government. The Supreme Court agreed with Andersen and reversed the conviction on both bases.

First, the Supreme Court held that the jury instructions "failed to convey the requisite consciousness of wrongdoing" required by Section 1512's use of the phrase "knowingly . . . corruptly." To the Supreme Court, the word "corruptly" requires "wrongful, immoral, depraved or evil" conduct. The Court rejected the idea that "corrupt" persuasion could be found if Andersen merely "impeded" the regulatory proceeding:

No longer was any type of "dishonest[y]" necessary to a finding of guilt, and it was enough for [Andersen] to have simply "impede[d]" the Government's factfinding ability. As the Government conceded at oral argument, "'impede' has broader connotations than 'subvert'" or even "undermine," and many of these connotations do not incorporate "corruptness" at all."

<sup>6</sup> See Mary Flood, *Decision by Jurors Hinged on Memo*, Houston Chronicle, June 16, 2002, at 1A; "Jury Finds Arthur Andersen Guilty of Obstruction," National Public Radio Broadcast, June 15, 2002, audio available at <http://www.npr.org/templates/story/story.php?storyId=1145071>, cited in Dana E. Hill, Note: *Anticipatory Obstruction of Justice: Pre-emptive Document Destruction Under the Sarbanes-Oxley Anti-Shredding Statute*, 18 U.S.C. § 1519, 89 Cornell L. Rev. 1519, 1552 nn. 210-11 (2004).

<sup>7</sup> *United States v. Arthur Andersen LLP*, 374 F.3d 281, 298 (5th Cir. 2004).

<sup>8</sup> *Id.*

According to the Court, Section 1512 could not cover someone who simply “impedes” an investigation, because that word means only “to interfere with or get in the way of the progress of” or “hold up” or “detract from.” “By definition, anyone who innocently persuades another to withhold information from the government ‘get[s] in the way of the progress of’ the Government.”<sup>9</sup>

Second, the Court held that the jury instructions failed to require “any nexus between the ‘persuas[ion]’ to destroy documents and any particular proceeding.” Although the Court acknowledged that the statute expressly did not require an official proceeding to be pending, the Court said that a defendant “must have in contemplation [a] particular official proceeding in which those documents might be material.” The Court indicated that in order to obstruct justice, a person must act with “with knowledge that his actions are likely to affect” a particular proceeding, not just that they “might or might not.”<sup>10</sup>

#### C. Sarbanes-Oxley’s Section 802 (18 U.S.C. § 1519)

It is almost as if Congress foresaw the *Andersen* decision three years before the Supreme Court issued the opinion. Even though the Court in *Andersen* made it harder to convict a defendant under Section 1512, the witness tampering law, it was dealing with an arguably obsolete and irrelevant statute.

It is generally accepted that Enron’s collapse and Andersen’s document shredding led Congress to pass a whole host of corporate regulatory reforms with unusual speed.<sup>11</sup> The new obstruction provision’s primary sponsor, Senator Patrick Leahy (D-Vt), tied his bill directly to Arthur Andersen, declaring that “[h]ad such clear requirements been in place at the time that Arthur Andersen was considering what to do with its audit documents, countless documents might have been saved from the shredder.”<sup>12</sup>

When Senator Leahy introduced the legislation that became Section 1519, he declared that “the intent of the provision is simple; people should not be destroying, altering or falsifying documents to obstruct any government function.”<sup>13</sup> To the extent that *Arthur Andersen* set up obstacles to a criminal conviction under the old obstruction regime – “corrupt” intent and knowledge of a particular federal proceeding – Sarbanes-Oxley dismantled them in Section 1519.

First, Section 1519 did everything that Chief Justice Rehnquist criticized about the *Andersen* jury instructions. It eliminated “corrupt” intent as a requirement for criminal liability. Under the new statute, a person needs only to act “knowingly.” That phrase is well defined in criminal jurisprudence, and it does not require much. According to the Supreme Court in *Andersen*, “[k]nowledge’ and ‘knowing’ are normally associated with awareness, understanding, or consciousness.”<sup>14</sup> Juries are routinely instructed that a person acts “knowingly” if he is simply “aware of the act and does not act/fail to act through ignorance, mistake, or accident.”<sup>15</sup> But the “dishonesty,” the “wrongful,” “immoral,” “depraved” or “evil” conduct that the Supreme Court required for Section 1512, is completely absent from Section 1519.

As a result, Chief Justice Rehnquist’s stated fear in *Andersen* that a person could be convicted of obstruction for normally “innocent” conduct, may well have come to pass with Section 1519. According to *Andersen*, the word “corrupt” in former Section 1512 required a “consciousness of wrongdoing” which “sensibly” allowed the statute “to reach only those with the level of culpability . . . we usually require in order to impose criminal liability.”<sup>16</sup> Yet Congress intentionally purged the new statute of this limitation, and by doing so seems to have swept in conduct of any sort that hampers the government – whether or not it is objectively “wrongful.”

<sup>9</sup> *Arthur Andersen*, 125 S. Ct. 2136-37 (quoting *Webster’s Third New International Dictionary* 1132 (1993)).

<sup>10</sup> *Id.* at 2127 (citing *United States v. Aguilar*, 515 U.S. 593, 599 (1995)).

<sup>11</sup> See Richard A. Oppel Jr., Enron’s Many Strands: Capital Rule Makers; Democrats Try to Surpass Bush In Tough Post-Enron Fraud Laws, *New York Times*, Mar. 13, 2002, at C-3.

<sup>12</sup> 148 Cong. Rec. S1785-86 (Mar. 12, 2002) (statement of Sen. Leahy)

<sup>13</sup> 148 Cong. Rec. S7419 (July 26, 2002) (statement of Sen. Leahy).

<sup>14</sup> *Andersen*, 125 S. Ct. at 2135-36 (citing *Black’s Law Dictionary* 888 (8th ed. 2004)).

<sup>15</sup> Ninth Cir. Man. Model Crim. Jury Instr. 5.6, <http://www.ce9.uscourts.gov/web/sdocuments.nsf/crim>.

<sup>16</sup> *Andersen*, 125 S. Ct. at 2136.

A second change supports a broad interpretation that 1519 was intended to apply to otherwise “legal” or “innocent” conduct that is designed to interfere with a federal investigation. The statute uses the word “impede,” the term that troubled the Supreme Court so much when it considered the *Andersen* jury instructions. Under the new statute, a violation occurs if someone acts “with intent to impede, obstruct or influence the investigation . . . of any matter within the jurisdiction” of a federal agency. The Court has already told us in *Andersen* just how low this threshold is, and how it can embrace innocent conduct such as the destruction of documents pursuant to a regular document retention policy. Recall Chief Justice Rehnquist’s warning that, “[b]y definition, anyone who innocently persuades another to withhold information from the Government” impedes or “gets in the way of the progress of the Government.”<sup>17</sup> By placing such conduct outside the now-obsolete statute, the Supreme Court seems to have inadvertently defined what falls within the new statute.

If Section 1519 requires as little as (or less than) the discredited jury instructions in *Andersen* to establish “the requisite consciousness of wrongdoing” for an obstruction conviction, business people everywhere should be gravely concerned. As Chief Justice Rehnquist noted, “it is striking how little culpability the [*Andersen*] instructions required . . . The instructions [] diluted the meaning of ‘corruptly’ so that it covered innocent conduct.”<sup>18</sup> Section 1519 did more than dilute the protection afforded to a defendant by the word “corruptly.” The statute did away with it altogether.

On a less dramatic level, Section 1519 also broadened the application of obstruction to any “matter” that a person “contemplates.” As interpreted in *Andersen*, Section 1512 required the obstructer to have knowledge of an identifiable “proceeding.” Again, according to its principal sponsor Senator Leahy, the new statute covers acts that are “in contemplation of or in relation to” an “investigation or matter that is, as a factual matter, within the jurisdiction of

any federal agency.”<sup>19</sup> The new statute seems designed to eliminate the need for a “nexus” between the document destruction and a particular, known agency investigation. Put another way, the defendant need not have a particular, known proceeding in mind when he obstructs. “The intent required is the intent to obstruct, not some level of knowledge about the agency processes [or] the precise nature of the agency [or] court’s jurisdiction. *This statute is specifically meant not to include any technical requirement . . . to tie the obstructive conduct to a pending or imminent proceeding or matter by intent or otherwise.*”<sup>20</sup>

Congress’ choice of words to define the new obstruction law could well forbid “preemptive” or “anticipatory” document destruction – that is, shredding or deletion designed to thwart regulators before they even know that they have something to investigate. The phrase “in contemplation of or in relation to” did not appear in any prior obstruction statute. Senator Leahy explained that the Section “extends to acts done in contemplation of such federal matters so that the timing of the act in relation to the beginning of the matter or investigation is [] not a bar to prosecution.”<sup>21</sup> The dictionary upon which the Supreme Court relied in *Andersen* defines “contemplation” as, among other things, “the act of looking forward to an event: the act of intending or considering a future event.”<sup>22</sup> All of this points to an application of the statute to obstructive conduct that occurs before the federal government has even considered whether to look into the matter.

In summary, Section 1519 was meant to do away with the “ambiguities and technical limitations” of the former “patchwork” of obstruction statutes. The Supreme Court in *Andersen* characterized these “technicalities” – such as “corrupt” intent and knowledge of an actual proceeding – as important preconditions for imposing criminal liability and possibly sending someone to prison. Yet Section 1519 seems to reach precisely the kind of conduct that the Supreme Court said in *Andersen* should *not* be criminal under Section 1512.

<sup>17</sup> *Id.* at 2136.

<sup>18</sup> *Id.*

<sup>19</sup> 148 Cong. Rec. at S7418-19.

<sup>20</sup> *Id.* (emphasis added).

<sup>21</sup> *Id.*

<sup>22</sup> *Webster’s Third New Int’l Dictionary* 491 (1993).

### III. Section 1519: A Practical Application

What does all of this mean for the financial industry, or any business enterprise for that matter, that wants to know when it can shred its documents without worrying about committing a crime? Let's return to our hypothetical. Our chief compliance officer's knowledge of the details of the *Andersen* decision was impressive, but *Andersen* will not save him (or his company) from Section 1519. He has acted "knowingly" (he is conscious of his conduct, and does not act because of mistake or accident). Assuming employees within the organization (including the finance VP) act on his e-mail, he probably caused the alteration, destruction and mutilation of documents.<sup>23</sup> The evidence indicates that he contemplated the possibility of a federal "matter," and that he is sending the reminder e-mail with intent to "impede" (or get in the way of) that matter by making relevant but damaging documents unavailable if it ever occurs. Though he remains unaware of any actual SEC proceeding, the statute may well reach him anyway. Indeed, the purpose of the statute was to do away with "technicalities" such as knowledge of an actual proceeding. Many prosecutors would conclude that the conduct fits the statute.

Would the Department of Justice bring such a case? We noted above that the compliance officer's error was a "potentially" tragic one. Many thought the Department would not actually seek an indictment against Arthur Andersen, and yet it did. On the other hand, that case taught the Department some hard lessons. One factor that weighs heavily in a prosecutor's mind, however, is what Congress meant by passing a law. Here, that intent is relatively clear: Congress wants prosecutors to pursue the destruction of evidence that was undertaken to frustrate the federal government's ability to investigate financial fraud. If an individual or company consciously undertakes to destroy particular documents, specifically

for the purpose of keeping them away from the SEC in case an investigation arises in the future, that set of facts is going to attract the Department's attention.

The incentive not to run astray of this statute is strong. Sarbanes-Oxley didn't just create a series of new corporate crimes, it also created new penalties. Section 1519 contains a 20-year statutory maximum – longer than just about any federal crime that does not involve a gun, violence or narcotics. Of course, statutory maximums rarely dictate the actual sentence. Those are set by a series of sentencing guidelines created by a sentencing commission, a federally appointed panel of lawyers and judges. As of a year ago, federal judges are not bound by these guidelines, but they still tend to follow them. Sarbanes-Oxley mandated that the sentencing commission revisit the punishment for obstruction of justice, and it did. In 2002, a person who destroyed documents in connection with an SEC investigation was likely to receive 18 to 24 months in prison. Under the revisions required by Sarbanes-Oxley, a person who obstructs by destroying large numbers of documents would face about 30 to 37 months in prison.

What should an officer at a financial institution do in light of this harrowing development? Keeping a few simple rules in mind should help.

- *Rule 1: A company's best strategy to avoid running afoul of Section 1519 remains the regular, institutional, and automatic destruction of documents pursuant to a written policy that is neutral as to content.* Reminders about the policy from the Compliance Department to employees should be automated as well, not *ad hoc*. Even under the new statute, if documents and records of a certain age are destroyed like clockwork every month by a technician or clerical employee who knows little to nothing about their content or the company's regulatory risks, any prosecutor will be hard pressed to prove beyond a reasonable doubt that the destruction was motivated by an intent to impede the federal government's fact-finding abilities as to a particular subject matter. If the Government opens an investigation and asks for the destroyed documents,

<sup>23</sup> Under a principle applicable to all federal crimes, someone who counsels or causes another person to commit a criminal act is as liable for the act as they would be if they had committed it themselves. This is known as "aiding and abetting" liability. See 18 U.S.C. § 2.

this strategy cannot guarantee that prosecutors will not challenge the destruction, but the record of your company's conduct severely undermines the argument that the destruction occurred "in contemplation of or in relation" to its investigation.

- **Rule 2:** *You cannot dust off a seldom-followed document retention plan because you are worried about the possibility of an investigation in a particular area and you do not want the regulators to see certain documents.* Arthur Andersen thought it could do this under the old obstruction regime; that legal analysis did not serve the institution very well. If this standard seemed ambiguous then, it is not any longer. The sudden invocation or re-distribution of a document policy obviously cannot be used as a code or signal to employees to get rid of documents. If your reminder is prompted by the knowledge that bad documents exist and/or the fear of a coming investigation – rather than the routine need to manage paper and computer files – the reminder will create serious problems for you and your company.
- **Rule 3:** *If you have or may have problematic documents on a particular topic and can anticipate the benefits of destroying them because you think they are likely to be the subject of an SEC investigation in*

*the future, your e-mail to employees should contain a freeze order, not a reminder of the company's destruction policy.* When you can reasonably anticipate that a governmental inquiry on an identifiable topic might come your way (or, to use Congress' word, "contemplat[e]" such an inquiry), that marks the point you ought to suspend the document policy as to reasonably relevant documents.

These rules, along with the new obstruction statute, still contain dangerous ambiguities and demand difficult line-drawing. For better or for worse, the Department has not yet charged any person or company with Section 1519 who has fought the application of the new statute, so there is little guidance beyond the language of the statute and statements of congressional intent. The statute's ambiguities, however, are what Enron, Arthur Andersen, and Sarbanes-Oxley have wrought. As a manager at a financial institution responsible in any way for compliance, the theme that should run through your mind is this: You must err on the side of caution. Enforce your document retention policy when you have no reason to expect an investigation. Suspend it when you do.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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