South Carolina Law Review

Volume 54 | Issue 2 Article 6

Winter 2002

Corporate Fraud and Accountability: A Primer on Sarbanes-Oxley Act of 2002

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CORPORATE FRAUD AND ACCOUNTABILITY: A PRIMER ON SARBANES-OXLEY ACT OF 2002

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I. INTRODUCTION

The photographs of WorldCom and Adelphia executives escorted by federal law enforcement officials to federal courtrooms illustrate a stark new reality to corporate executives across the country. For many of America's business leaders who lead their organizations responsibly, this new reality is of

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no consequence. For others, perhaps many others, a time of reckoning has arrived, and they must now deal with the consequences of their drive for short-term profits and big-time incomes.

It has been an interesting and irrational few years for the business community in our country. Two years ago, Americans were lured away from their jobs to spend hours grabbing for the gold ring in day-trading rooms. For many investors, the reality of the market was the momentum of dot-com technology company stocks and the chance to hit home runs, even when these tech dealings produced no revenue, much less profits. Investors, even brokers, became addicted to the rush of the quick financial fix, ignoring basic business fundamentals and concepts of stock value. As technology stocks skyrocketed on the announcement of some new technology application, the concept of shareholder value became more illusive. Traditional companies and new entrants that applied traditional standards for judging success suddenly fell out of favor when their stock price did not escalate at the explosive speed of the dot-com wonders. The result was significant pressure on corporate executives to find ways, some simply illusionary, to increase value. Coupled with the insatiable appetite of some corporate executives to acquire wealth and its indicia, a culture ripe for corporate fraud was created. Perhaps more disturbing was the willingness of accounting professionals—the very people on whom the public necessarily relied for honest and objective financial reporting—to ignore and sometimes even encourage shady accounting transactions. Possibly most disturbing of all was the willingness of some accounting firms' partners and employees to cover up corporate wrongdoing.

It was this culture and the increased disclosure of abuses resulting from it that caused Congress to conclude that corporate America was not policing itself and that federal scrutiny was required. This new scrutiny in the form of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley" or the "Act")[1] will change corporate accountability dramatically.

Sarbanes-Oxley in many respects imposes what responsible corporate executives have urged in the past—honesty in financial disclosures, management accountability for the financial affairs of the corporation, and avoidance of personal financial interest or conflict in decision-making by corporate executives. The Business Roundtable reiterated these guiding principles in its May 2002 White Paper on corporate governance:

> Senior management is expected to know how the corporation earns its income and what risks the corporation is undertaking in the course of carrying out its business. Management should never put personal interests ahead of or in conflict with the interests of the corporation.

1. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

> . . . [I]t is the responsibility of management, under the oversight of the board and its audit committee, to produce financial statements that fairly present the financial condition and results of operations of the corporation, and to make the timely disclosures investors need to permit them to assess the financial and business soundness and risks of the corporation.[2]

What The Business Roundtable urged, Sarbanes-Oxley now requires. This new corporate fraud statute imposes criminal liability for violating these duties and for obstructing investigations into corporate wrongdoing. A summary review of these new laws of corporate accountability reveals how this legislation impacts corporate business in our country.[3]

II. ENHANCED CRIMINAL PENALTIES FOR WHITE COLLAR OFFENSES

The Act increases the criminal penalties for mail and wire fraud, violations of the Employee Retirement Income Security Act of 1974 ("ERISA"),[4] and the Securities Exchange Act of 1934 ("Exchange Act").[5]

A. *Increased Mail and Wire Fraud Penalties*

Prior to the Act, the maximum period of incarceration for mail[6] and wire fraud[7] violations was five years, excluding schemes to defraud a financial institution, for which the maximum term of imprisonment was thirty years. Section 903 of the Act amended the mail and wire fraud statutes to increase the maximum period of incarceration for mail or wire fraud to twenty years.[8] The maximum term of incarceration for fraud affecting a financial institution remains thirty years.

B. *Increased ERISA Penalties*

With respect to ERISA, prior to the Act, willful violation of the reporting and disclosure provisions of 29 U.S.C. §§ 1021-1031, or any regulation or

2. *Principles of Corporate Governance*, A WHITE PAPER FROM THE BUSINESS ROUNDTABLE (The Bus. Roundtable, Wash., D.C.), May 2002, at iv.

3. A number of the Act's criminal provisions remain subject to interpretation particularly by means of administrative rulemaking. Than is, several provisions are enabling and await further action by, among other, the Securities and Exchange Commissions and the United States Sentencing Commission.

4. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (2000).

5. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78mm (2000).

6. 18 U.S.C. § 1341 (2000).

7. *Id.* § 1343.

8. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 903, 116 Stat. 745, 805 (2002).

order issued thereunder, subjected the violator to punishment pursuant to 29 U.S.C. § 1131 by a maximum fine of $5,000 (for an individual) or $100,000 (for persons other than an individual) in addition to the possibility of a term of imprisonment not to exceed one year.[9] Section 904 of the Act has amended § 1131, increasing the maximum term of incarceration for individuals from one year (a misdemeanor) to ten years. Section 904 has also increased the fines for ERISA reporting and disclosure violations to $100,000 for an individual and to $500,000 for organizations.[10]

Because an ERISA disclosure or reporting violation now constitutes a felony, individuals convicted under § 1131 are subject to the alternative fine provisions of 18 U.S.C. § 3571,[11] authorizing imposition of a fine that is the greater of $250,000[12] or twice the defendant's gross pecuniary gain or twice the victim's gross pecuniary loss.[13] While section 904 has also increased the fine under ERISA § 1131 to $500,000 for artificial persons, this is also the maximum allowable fine corresponding to organizational felonies under § 3571.[14] Accordingly, artificial persons now face a maximum permissible fine under ERISA § 1131 that is the greater of $500,000 or twice the defendant's gross pecuniary gain or twice the victim's gross pecuniary loss.[15]

C. Increased Penalties Under the Securities Exchange Act of 1934

Exchange Act section 32(a) formerly provided for a maximum criminal fine of $1,000,000, imprisonment of up to ten years, or both for individuals, and a maximum criminal fine of $2,500,000 for organizations convicted of federal securities law violations.[16] Pursuant to section 1106 of the Act, section 32(a)'s maximum fine for individuals has been increased to $5,000,000 and the maximum term of imprisonment to twenty years.[17] For organizational offenders, the maximum criminal fine has been increased ten fold to $25,000,000.[18]

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9. 29 U.S.C. § 1131.

10. § 904, 116 Stat. at 805.

11. This is because section 904 of the Act is silent with regard to excluding the maximum allowable individual fine under ERISA § 1131 from the scope of § 3571's alternative sentencing scheme. *See* 18 U.S.C. § 3571(e) (2000) (limiting the maximum allowable fine to the statutory maximum if the statutory fine is lower than the alternatives set forth in § 3571, and the statute "by specific reference, exempts the offense from the applicability of the fine otherwise applicable under this section").

12. 18 U.S.C. § 3571(b)(3).

13. *Id.* § 3571(d).

14. *Id.* § 3571(c)(3).

15. *Id.* § 3571(c)(2)-(3).

16. 15 U.S.C. § 78ff(a) (2000).

17. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 1106, 116 Stat. 745, 810 (2002).

18. *Id.*

D. *Amendment of the Federal Sentencing Guidelines for Fraud-Related Offenses*

In light of the increased criminal penalties for mail, wire, securities, accounting, and pension fraud (and related offenses) set forth in the Act, as well as Congress's expressed intent that the Federal Sentencing Guidelines and associated policy statements adequately reflect the serious nature of such fraud, section 1104 of the Act directs the United States Sentencing Commission to study the existing guidelines pertaining to these offenses and consider expedited issuance of amended guidelines within 180 days of enactment.[19] The Attorney General has advised the Sentencing Commission of this provision and has asked that the Commission implement it fully and expeditiously.[20]

III. CORPORATE RESPONSIBILITY FOR VALIDITY OF FINANCIAL STATEMENTS

Under longstanding Securities and Exchange Commission ("SEC") practice, periodic reports made pursuant to sections 13(a) and 15(d) of the Exchange Act were required to be signed by the issuer's officers and, in the case of annual reports, by a majority of the issuer's directors.[21] However, these signing requirements did not include any type of certification or other attestation regarding the accuracy or completeness of the report.[22] Both the SEC and Congress have now acted to require certification by an issuer's principal executive and principal financial officers as to the validity of the financial statements contained in periodic Exchange Act reports.

A. *Certification Pursuant to SEC Rulemaking and SEC Investigative Order*

On June 20, 2002, the SEC published a Notice of Proposed Rulemaking, contemplating a requirement that an issuer's chief executive officer and chief financial officer certify that, to their knowledge, the information contained in

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19. Section 1104 specifically recommends that the Sentencing Commission consider promulgation of new or amended guidelines providing a sentencing enhancement for officers and directors of publicly traded corporations who commit fraud and related offenses. *Id.* § 1104(a)(2). In addition, among other considerations, section 1104 mandates that guideline offense levels and enhancements for an obstruction of justice offense adequately account for the destruction or fabrication of documents, and that they be sufficient for a fraud offense when the number of victims is significantly greater than fifty. *Id.* § 1104(b)(4)-(5).

20. *See* Press Release, United States Department of Justice, Attorney General Ashcroft Directs Federal Prosecutors to Implement The Corporate Fraud and Accountability Act of 2002 (July 31, 2002), http://www.usdoj.gov:80/opa/pr/2002/July/02_ag_443.htm.

21. *See* Certification of Disclosure in Companies' Quarterly and Annual Reports, 67 Fed. Reg. 41,877, 41,878-79 (proposed June 20, 2002) (to be codified at 17 C.F.R. §§ 232, 240, 249) (analyzing history of Exchange Act report certification).

22. *Id.*

the issuer's financial reports is complete and true in all significant respects.[23] The SEC's proposals would also require companies filing annual and quarterly reports "to maintain procedures [aimed at providing] reasonable assurance that the company is able to collect, process and disclose the information required"[24] in its Exchange Act reports, as well as require "periodic review and evaluation of these procedures"[25] and certification by the issuer's CEO and CFO as to the adequacy of the issuer's information gathering capabilities.[26] In addition, on June 27, 2002, the SEC issued an investigative order requiring that the principal executive officer and principal financial officer of the largest 947 companies whose securities are registered with the SEC (namely, issuers with revenues during their last fiscal year in excess of $1.2 billion) certify the completeness, truth, and accuracy of their most recent annual report, subsequent 10-Q and 10-K reports, and proxy materials filed with the SEC.[27] Certifications required by the SEC's June 27 investigative order became due on August 14, 2002 for companies whose Form 10-Q reports were due on that date.[28]

Effective August 29, 2002, the SEC adopted new Exchange Act Rules 13a-14 and 15d-14.[29] These provisions formally require that an issuer's principal executive officer or officers and principal financial officer or officers (or persons performing similar functions) certify in each quarterly and annual report under Exchange Act section 13(a) or 15(d)[30] that (among other things) he or she has personally reviewed the report, that it does not contain any material misstatements or omissions, that the certifying officers are responsible for establishing and maintaining "disclosure controls and procedures,"[31] that such disclosure controls and procedures have been designed to ensure that material information is made known to them, and that they have evaluated the issuer's disclosure controls and procedures within ninety days of the report's

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23. *See id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. File No. 4-460: Order Requiring the Filing of Sworn Statements Pursuant to Section 21(a)(1) of the Securities Exchange Act of 1934, (Sec. & Exch. Comm'n June 27, 2002) (to expire Jan. 31, 2003), http://www.sec.gov/rules/other/4-460.htm.

28. *Id.*

29. 17 C.F.R. §§ 240.13a-14 & 15d-14 (2002).

30. 15 U.S.C. §§ 78m(a), 78o(d) (2002). Exchange Act section 13(a) requires that every registrant under Exchange Act section 12, *id.* § 78*l*, file annual and quarterly reports as prescribed by the SEC. *Id.* § 78m(a). Exchange Act section 15(d) mandates that each issuer of securities that has filed a registration statement effective under the Securities Act of 1933, 15 U.S.C. § 77a, file such supplementary and periodic information as may be required pursuant to Exchange Act section 13 with respect to a security registered under Exchange Act section 12. *Id.* at § 78o(d).

31. "'Disclosure controls and procedures'" are defined as "controls and procedures designed to ensure that information required to be disclosed by an issuer in its Exchange Act reports is accumulated and communicated to the issuer's management, including its principal executive and financial officers, as appropriate to allow timely decisions regarding required disclosure." 67 Fed. Reg. at 57,278.

filing date and have presented their conclusions regarding the effectiveness of such controls and procedures to the issuer's auditors and to the audit committee of the board of directors.[32] The new rules apply to any issuer that files quarterly and annual reports under Exchange Act sections 13(a) or 15(d) with the SEC, including foreign private issuers, banks and savings associations, issuers of asset-backed securities, and small business issuers.[33]

B. Certification Pursuant to the Act

The Act incorporates two separate certification provisions, section 302 and section 906, each of which requires an issuer's CEO and CFO to certify certain matters disclosed in periodic reports filed with the SEC.[34] Section 302 amends the Exchange Act,[35] while section 906 enacts a new felony provision, 18 U.S.C. § 1350, of the federal criminal code.[36] Section 906 mandates that each periodic report which contains financial statements filed by an issuer with the SEC pursuant to Exchange Act sections 13(a) or 15(d) must be accompanied by a written statement by the issuer's CEO and CFO (or an equivalent financial official) certifying the accuracy of the issuer's financial disclosures.[37] Specifically, the statement must certify that "the periodic report containing the financial statements fully complies with the requirements of section 13(a) or 15(d) of the Securities Exchange Act [o]f 1934 . . . and that information contained in the periodic report fairly presents, in all material respects, the financial condition and results of operations of the issuer."[38]

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32. *Id.* at 57,277.
33. *Id.* at 57,278.
34. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 302, 906, 116 Stat. 745, 777, 806 (2002).
35. *Id.* § 302.
36. *Id.* § 906.
37. *Id.*
38. *Id.* § 906(a). New 18 U.S.C. § 1350 provides in full:

> (a) CERTIFICATION OF PERIODIC FINANCIAL REPORTS.—Each periodic report containing financial statements filed by an issuer with the Securities Exchange Commission pursuant to section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a) or 78o(d)) shall be accompanied by a written statement by the chief executive officer and chief financial officer (or equivalent thereof) of the issuer.
>
> (b) CONTENT.—The statement required under subsection (a) shall certify that the periodic report containing the financial statements fully complies with the requirements of section 13(a) or 15(d) of the Securities Exchange Act [o]f 1934 (15 U.S.C. 78m or 78o(d)) and that information contained in the periodic report fairly presents, in all material respects, the financial condition and results of operations of the issuer.
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> (c) CRIMINAL PENALTIES.—Whoever—
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> > (1) certifies any statement as set forth in subsections (a) and (b) of this section knowing that the periodic report accompanying the statement does not comport with all the requirements set forth in this section shall be fined not more than $1,000,000 or

Certifying a periodic report[39] while knowing that it does not comport with SEC requirements is punishable by a fine of up to $1,000,000, imprisonment of up to ten years, or both.[40] If the violation is willful, the certifying officer may be fined up to $5,000,000, imprisoned up to twenty years, or both.[41] Although the distinction between a "knowing" and "willful" violation is not stated in the Act, in the criminal context, willful misconduct normally requires a showing that the defendant had actual knowledge of a legal prohibition and specifically intended to do something the law forbids, while knowing misconduct involves voluntary action—without regard to knowledge of the law—that is not the product of mistake or accident.[42] Accordingly, certifying officers who are actually aware of SEC filing requirements may be held to a higher standard and face potentially greater criminal liability than less sophisticated certifying officials.

IV. NEW AND AMENDED OBSTRUCTION OF JUSTICE PROVISIONS

Section 802 of the Act has added two new obstruction of justice provisions to the federal criminal code, 18 U.S.C. §§ 1519 and 1520. Section 1519

> imprisoned not more than 10 years, or both; or
> (2) willfully certifies any statement as set forth in subsections (a) and (b) of this section knowing that the periodic report accompanying the statement does not comport with all the requirements set forth in this section shall be fined not more than $5,000,000, or imprisoned not more than 20 years, or both.

Id.

39. As opposed to section 302 certification, which on its face applies only to "annual or quarterly report[s]," the Act does not define "periodic report" for purposes of section 906 certification. *See* Sarbanes-Oxley Act of 2002, Publ. L. No. 107-204, § 302, § 906, 116 Stat. at 745, 806 (2002). Given that Form 8-K reports are event-based, rather than period-based, it is arguable whether Form 8-K reports containing financial information are subject to section 906 certification. *See* 17 C.F.R. §§ 249.13a-11 & 249.308 (2002) (specifying use of Form 8-K for the reporting of current information by registrants). It is similarly unclear whether reports of foreign private issuers on Form 6-K containing quarterly or semi-annual information require certification, as such reports, pursuant to Rule 13a-16, are not deemed "filed" under the Exchange Act. *See* 17 C.F.R. § 240.13a-16(c) (2002) ("Reports furnished pursuant to this rule shall not be deemed to be 'filed' for the purpose of section 18 of the [Exchange] Act or otherwise subject to the liabilities of that section."). In promulgating new Exchange Act Rules 13a-14 and 15d-14 (relating to certification under section 302 of the Act), the SEC expressly noted that section 302 certification applies to annual reports on Form 10-K, quarterly reports on Form 10-Q, and any amendments or transition reports pertaining thereto. 67 Fed. Reg. at 57,278. However, the Commission additionally noted, "Reports that are current reports, such as reports on Forms 6-K and 8-K, rather than periodic (quarterly and annual) reports are not covered by the certification requirement." *Id.* at 57,278-79 & nn.49-50.

40. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 906(c)(1), 116 Stat. 745, 806 (2002).

41. *Id.* § 906(c)(2).

42. *See, e.g.*, COMM. ON PATTERN JURY INSTRUCTIONS, DIST. JUDGES ASS'N, ELEVENTH CIR., PATTERN JURY INSTRUCTIONS—CRIMINAL CASES 33 (1997) (defining "knowingly" and "willfully" for purposes of criminal intent).

pertains to the destruction of records with intent to obstruct or impede a federal investigation, while § 1520 requires the retention of accounting work papers and related records for five years after the completion of a covered audit.[43] In addition, section 1102 of the Act has amended 18 U.S.C. § 1512, making it a felony to corruptly alter, destroy or conceal a document or record with intent to impair its integrity or availability for use in an official proceeding.[44] Each provision is discussed in turn below.

A. Destruction of Records in Federal Investigations

New § 1519 is designed to address certain gaps in coverage of the existing federal obstruction statutes, either by their express terms or as interpreted by the federal courts.[45] For example, 18 U.S.C. § 1512 makes it a crime to "corruptly persuade" another to destroy, alter, or conceal evidence with intent to obstruct an official proceeding, including a proceeding which has not yet commenced.[46] However, § 1512 does not reach the actual "shredder."[47] Similarly, while prosecution of obstruction under 18 U.S.C. § 1505 does in fact reach the actual participant in the document destruction or concealment, the statute requires the existence of a pending proceeding.[48] Other obstruction provisions distinguish between the type of government function that is impeded,[49] while still others apply only to obstruction in limited circumstances.[50]

Accordingly, § 1519 now expands existing law to cover the alteration, destruction or falsification of records, documents or tangible objects, by any person, "with intent to impede, obstruct, or influence the investigation or proper administration of any matter[s] within the jurisdiction of any department or

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43. § 802, 116 Stat. at 800.

44. *Id.* § 1102(c)(1).

45. *See* 148 CONG. REC. S7419 (daily ed. July 26, 2002) (statement of Sen. Leahy) ("Currently, provisions governing the destruction or fabrication of evidence are a patchwork that have been interpreted, often very narrowly, by federal courts.").

46. 18 U.S.C. § 1512(b), (e)(1) (2000).

47. *See* 148 CONG. REC. S7419 ("[C]ertain current provisions make it a crime to persuade another person to destroy documents, but not a crime to actually destroy the same documents yourself.").

48. *See* 18 U.S.C. § 1505 (2000) (requiring intent to evade a civil investigative demand made under the Antitrust Civil Process Act); *see also* 148 CONG. REC. S7419 ("Other provisions, such as 18 U.S.C. § 1503, have been narrowly interpreted by courts, including the Supreme Court in United States v. Aguillar[sic], 115 S. Ct. [2357] (1995), to apply only to situations where the obstruction of justice can be closely tied to a pending judicial proceeding.").

49. *See, e.g.*, 18 U.S.C. § 1507 (2000) (prohibiting picketing with intent to influence a juror or court officer in the performance of official duties); 18 U.S.C. § 1511 (2000) (proscribing conspiracy to obstruct state law enforcement with the intent to facilitate an illegal gambling business).

50. *See* 18 U.S.C. § 1516 (2000) (obstruction of federal audit); 18 U.S.C. § 1517 (2000) (obstruction of federal bank fraud examination); 18 U.S.C. § 1518 (2000) (obstruction of federal health care fraud investigation).

agency of the United States," any bankruptcy proceeding, or in relation to or contemplation of any such matter or proceeding.[51] As Senator Patrick Leahy summarized just prior to passage of the Act:

> Section 1519 is meant to apply broadly to any acts to destroy or fabricate physical evidence so long as they are done with the intent to obstruct, impede or influence the investigation or proper administration of any matter, and such matter is within the jurisdiction of an agency of the United States, or such acts [are] done either in relation to or in contemplation of such a matter or investigation. The fact that a matter is within the jurisdiction of a federal agency is intended to be a jurisdictional matter, and not in any way linked to the intent of the defendant. Rather, 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, which some courts have read into other obstruction of justice statutes, to tie the obstructive conduct to a pending or imminent proceeding or matter . . . . It is also meant to do away with the distinctions, which some courts have read into obstruction statutes, between court proceedings, investigations, regulatory or administrative proceedings (whether formal or not), and less formal government inquiries, regardless of their title. Destroying or falsifying documents to obstruct any of these types of matters or investigations, which in fact are proved to be within the jurisdiction of any federal agency are covered by this statute. . . . The intent of the provision is simple; people should not be destroying, altering, or falsifying documents to obstruct any government function.[52]

Violation of § 1519 is punishable by a fine, imprisonment of up to twenty years, or both.[53] New § 1519 should be read in conjunction with the amendment

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51. New § 1519 expressly provides:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in 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 any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 802(a), 116 Stat. 745, 800 (2002).

52. 148 CONG. REC. S7419.

53. § 802(a), 116 Stat. at 800.

to 18 U.S.C. § 1512 added by section 1102 of the Act which similarly bars corrupt acts to destroy, alter, mutilate, or conceal evidence in contemplation of an "official proceeding."[54]

B. Destruction of Corporate Audit Records

Section 802 of the Act, codified at 18 U.S.C. § 1520, makes it a felony for accountants to fail to preserve work papers and related documents of a covered audit for a period of five years[55] from the end of the fiscal year in which the audit or review is concluded.[56] Under rulemaking authority granted in § 1520(a)(2), the SEC will promulgate rules relating to the retention of work papers and other audit or review documents by January 26, 2003—180 days after enactment of § 1520. Whoever knowingly and willfully violates this section, or any SEC rules or regulations promulgated thereunder, is subject to a fine, imprisonment of up to ten years, or both.[57]

The audit materials covered by the statute and SEC regulation include

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54. *See* discussion *infra* Part IV.C.

55. A five year retention period was chosen because it corresponds to the statute of limitations for most federal economic crimes. 148 CONG. REC. S7419.

56. New § 1520 provides, in relevant part, the following:

> (a)(1) Any accountant who conducts an audit of an issuer of securities to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1(a)) applies, shall maintain all audit or review workpapers for a period of 5 years from the end of the fiscal period in which the audit or review was concluded.
>
> (2) The Securities and Exchange Commission shall promulgate, within 180 days, after adequate notice and an opportunity for comment, such rules and regulations, as are reasonably necessary, relating to the retention of relevant records such as workpapers, documents that form the basis of an audit or review, memoranda, correspondence, communications, other documents, and records (including electronic records) which are created, sent, or received in connection with an audit or review and contain conclusions, opinions, analyses, or financial data relating to such an audit or review, which is conducted by any accountant who conducts an audit of an issuer of securities to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1(a)) applies. The Commission may, from time to time, amend or supplement the rules and regulations that it is required to promulgate under this section, after adequate notice and an opportunity for comment, in order to ensure that such rules and regulations adequately comport with the purposes of this section.
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> (b) Whoever knowingly and willfully violates subsection (a)(1), or any rule or regulation promulgated by the Securities and Exchange Commission under subsection (a)(2), shall be fined under this title, imprisoned not more than 10 years, or both.
>
> (c) Nothing in this section shall be deemed to diminish or relieve any person of any other duty or obligation imposed by Federal or State law or regulation to maintain, or refrain from destroying, any document.

§ 802(a), 116 Stat. at 800.

57. § 802(a)(2), (b), 116 Stat. at 800.

> all . . . substantive [audit] material, whether or not the conclusions, opinions, analyses or data in such records support the final conclusions reached by the auditor or expressed in the final audit or review so that state and federal law enforcement officials and regulators and victims can conduct more effective inquiries into the decisions and determinations made by accountants in auditing public corporations.[58]

In short, the clear legislative intent is that documents pertinent to the substance of a financial audit or review shall be preserved; however, non-substantive materials, such as administrative records, need not be retained.[59] In addition, § 1520 expressly contemplates that the SEC will update its rules to "capture" additional types of records that become important as accounting technologies and accounting industry custom and practice change over time.[60]

C. Tampering with a Document to be Used In or Impeding an Official Proceeding

Formerly, 18 U.S.C. § 1512 provided a ten year maximum term of incarceration for an offender who corruptly persuades another person with the intent to destroy or alter evidence.[61] Section 1102 of the Act adds a new subsection (c) to § 1512 and renumbers existing subsections (c) through (i) as (d) through (j).[62] New subsection (c) imposes a fine, a term of imprisonment of up to twenty years, or both, upon any person who corruptly "alters, destroys, mutilates or conceals a record, document, or other object . . . with the intent to impair the object's integrity or availability for use in an official proceeding," or who otherwise corruptly "obstructs, influences or impedes" an official proceeding.[63] However, because the adulteration of a document material to an official proceeding may implicate the constitutional right to petition the government for the redress of grievances, in signing the Act, President Bush

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58. 148 CONG. REC. S7419.
59. *Id.*
60. *Id.*
61. 18 U.S.C. § 1512 (2000).
62. § 1102, 116 Stat. at 807.
63. *Id.* New § 1512 (c) expressly states:

> (c) Whoever corruptly—
>
> > (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or
> >
> > (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

Id.

noted that "the executive branch shall construe the term 'corruptly' in section 1512(c)(2) as requiring proof of a criminal state of mind on the part of the defendant."[64]

As amended, § 1512 should be read in conjunction with new § 1519, added by section 802 of the Act, which criminalizes certain acts intended to impede, obstruct, or influence any matter within the jurisdiction of any department or agency of the United States, or in relation to or contemplation of any such matter.[65]

D. *Review of Federal Sentencing Guidelines for Obstruction of Justice and Extensive Criminal Fraud*

Section 805 of the Act directs the Sentencing Commission to undertake an expedited review of the sufficiency of the Sentencing Guidelines and related policy statements[66] with respect to obstruction of justice, particularly in light of the new obstruction of justice provisions, 18 U.S.C. §§ 1512(c), 1519 and 1520, enacted by the Act.[67] Section 805 also directs the Sentencing Commission to consider a number of factors, such as destruction of a large amount of evidence, participation of a large number of individuals, or destruction of particularly probative or essential evidence, which might be considered sufficiently aggravating as to warrant additional enhancements or inclusion as offense characteristics.[68] As with section 1104 of the Act directing the Sentencing Commission to review its guidelines and policy statements for fraud-related offenses,[69] the Attorney General has advised the Sentencing Commission of section 805[70] and has asked the Commission to implement the statute's directives fully and expeditiously.[71]

64. President George W. Bush, Statement by the President (July 30, 2002), http://www.whitehouse.gov/news/releases/2002/07/20020730-10.html.

65. § 802, 116 Stat. at 800.

66. § 805, 116 Stat. at 802.

67. *See id.* § 805(a)(3). Section 805(b) imposes a 180 day deadline for Sentencing Commission action to propose revisions to the obstruction of justice guidelines and policy statements. *Id.* § 805(b).

68. *Id.* § 805(a)(2)(A)-(B).

69. *Id.* § 1104(a)(2).

70. § 805, 116 Stat. at 802.

71. *See supra* note 19.

V. RETALIATION AGAINST WHISTLEBLOWERS

Although pre-existing federal criminal law prohibited retaliation against a witness, victim, or informant in the form of bodily injury or damage to tangible property for providing information to a law enforcement officer relating to the commission of a federal offense,[72] no federal provision expressly covered retaliation in the form of interference with employment or income—namely, retaliation against whistleblowers by firing or other negative job impact. New subsection (e) of 18 U.S.C. § 1513, enacted by section 1107 of the Act, makes it a separate felony offense (punishable by a fine, imprisonment of up to ten years, or both) for any person knowingly to take any retaliatory action against a person who truthfully provides information to a law enforcement officer concerning the commission or possible commission of a federal offense.[73]

VI. RETROACTIVE APPLICATION OF NEW CRIMINAL PROVISIONS

The Ex Post Facto Clause of the United States Constitution[74] prohibits, inter alia, the punishment of an act that was not a crime when committed, but was subsequently made a crime. The clause also prohibits increasing the punishment for a crime after its commission.[75] The Act adds several new criminal provisions: 18 U.S.C. §§ 1519 and 1520;[76] 18 U.S.C. § 1350;[77] 18 U.S.C. § 1512(c);[78] and 18 U.S.C. § 1513(e).[79] These new criminal provisions will apply only to criminal conduct committed after July 30, 2002, the effective date of the Act.[80] The Act also includes criminal provisions increasing the punishment for certain existing criminal offenses.[81] Because they are newly enacted, the increased penalties set forth in these provisions also apply only to criminal conduct committed after July 30, 2002.

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72. 18 U.S.C. § 1513(b) (2000).

73. *See* § 1107, 116 Stat. at 810. Section 1107 states:

> Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

Id.

74. U.S. CONST. art. I, § 9, cl. 3.

75. *See, e.g.*, Carmell v. Texas, 529 U.S. 513, 522 (2000) (quoting Justice Chase's views in Calder v. Bull, 3 Dall. 386, 390 (1798), concerning prohibitions of the Ex Post Facto Clause); Collins v. Youngblood, 497 U.S. 37, 42 (1990) (quoting the same language from Calder v. Bull).

76. § 802, 116 Stat. at 800.

77. *Id.* § 906.

78. *Id.* § 1102.

79. *Id.* § 1107.

80. *Id.*

81. *Id.* §§ 904, 1106 (adding 29 U.S.C. § 1131 & 15 U.S.C. § 78ff, respectively).

Section 807 adds a new criminal provision that makes securities fraud a felony, punishable by up to twenty-five years imprisonment.[82] Section 903 amends the existing mail and wire fraud statutes to increase the maximum term of imprisonment to twenty years for schemes to defraud that do not affect financial institutions.[83] These provisions apply to any criminal conduct committed after the effective date of the Act. However, it is unclear whether they may be applied to schemes to defraud that straddle the effective date of the Act—namely, schemes begun before the effective date of the Act but continuing after its effective date. Generally, mail and wire fraud offenses are complete upon use of the mails or wires.[84] Similarly, the new securities fraud offense will likely be considered complete upon execution of the scheme.[85] The Ex Post Facto Clause likely bars applying the new provisions to schemes to defraud that extend beyond the effective date of the Act if the mails or wires are used in furtherance of the prohibited scheme, or in the execution of a securities fraud scheme, occurred before the effective date of the Act. Conversely, there should be no constitutional bar to applying these new provisions to schemes to defraud involving use of the mails or wires, or execution of a securities fraud scheme that began before the Act's effective date.

Finally, section 902 adds a new criminal provision that punishes attempts and conspiracies to commit fraud offenses, including the new securities fraud offense.[86] Because conspiracies are considered a continuing federal offense,[87] the Ex Post Facto Clause should not bar application of 18 U.S.C. § 1349 to conspiracies that straddle the effective date of the Act.

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82. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 807, 116 Stat. 745, 804 (2002) (adding 18 U.S.C. § 1348).

83. *Id.* § 903 (amending 18 U.S.C. §§ 1341, 1343).

84. *See, e.g.*, United States v. Barger, 178 F.3d 844, 847 (7th Cir. 1999) (stating that each instance of mail fraud, even if in furtherance of the same scheme, is a separate offense).

85. *Cf.* United States v. De La Mata, 266 F.3d 1275, 1287 (11th Cir. 2001), *cert. denied*, 122 S. Ct. 1543 (2002) ("[A] bank fraud offense is complete upon the 'execution,' or attempted execution of the scheme.").

86. § 902, 116 Stat. at 805 (adding 18 U.S.C. § 1349).

87. *See, e.g.*, United States v. Hersh, 297 F.3d 1233, 1244 (11th Cir. 2002) (quoting United States v. Terzado-Modruga, 897 F.2d 1099, 1124 (11th Cir. 1990), stating that "conspiracy is a continuous crime").