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A legal update from Dechert's White Collar Litigation and Financial Services and Securities Litigation Groups

Arthur Andersen LLP v. United States: Implications for Future Investigations and Corporate Document Retention Policies

The indictment of Arthur Andersen in 2002 contributed mightily to the demise of the accounting firm and continues to cast a huge shadow on all corporate investigations. The reversal of that conviction may be of little solace to former Andersen partners and employees, but *may* have significant implications for future government investigations and for the manner in which companies implement their document retention policies.

The impact of the opinion, however, is tempered by Congress' passage of an even broader obstruction of justice statute as part of the Sarbanes-Oxley Act. Companies should continue to act vigilantly when circumstances warrant preservation of documents.

The Supreme Court's Decision

The Government's indictment alleged that Andersen conducted a massive campaign to destroy documents relating to Enron starting in October 2001 after the SEC had opened an informal investigation of Enron's accounting practices and after an Andersen in-house attorney had characterized the likelihood of an SEC investigation as "highly probable." The alleged document destruction continued for several weeks. Andersen was prosecuted under 18 U.S.C. 1512(b)(2), which makes it illegal to "knowingly ... corruptly persuad[e] another person ... with intent to ... cause" that person to "withhold" documents from, or "alter" documents for use in, an "official proceeding."

At trial, the district court instructed the jury that Arthur Andersen could be convicted for requiring its employees to adhere to the company's document retention policy even if it "honestly and sincerely believed that its conduct was lawful" and without proof of any nexus between the document destruction and any particular official proceeding. The jury originally deadlocked but ultimately convicted Andersen. The Fifth Circuit rejected Andersen's challenge to the adequacy of the jury instructions.

The Supreme Court reversed, holding that the jury instructions "failed to convey properly the elements of a 'corrup[t] persuas[ion]' conviction under § 1512(b)." The Court's opinion was short, to the point, and unanimous. First, and significantly, the Court noted that document retention policies, which "are created in part to keep certain information from getting into the hands of others, including the Government," are not inherently wrongful and are a common business practice. Moreover, it said, the traditional restraint used in construing criminal statutes is "particularly appropriate here, where the act underlying the conviction—'persua[sion]'—is by itself innocuous."

The Court then explained that the jury instructions failed to properly define what it means to "knowingly . . . corruptly persuade[e]" another to destroy documents under the statute. The Court first noted that persuading a person to withhold testimony or documents from the Government is "not inherently malign," citing as examples advising another to withhold information by invoking the Fifth Amendment or the attorney-client privilege. The Court then defined the statutory elements "knowing" and "corrupt." Read together, the Court held, the two phrases require proof of "*conscious wrongdoing*."

Although the Court did not elaborate on what "conscious wrongdoing" entails, it held that the "outer limits of this element need not be explored here . . . because the jury instructions at issue simply failed to convey the requisite consciousness of wrongdoing." The justices were troubled by the instructions because they permitted conviction even if Andersen had a good-faith belief that its conduct was lawful, and even if the Government proved no more than an intent to "impede" an investigation, which could be read to include "anyone who innocently persuades another to withhold information from the Government."

The Court also held that the instructions were infirm because they did not require the Government to prove "any nexus between the 'persua[sion]' to destroy documents and any *particular* proceeding." (emphasis added). While the Court acknowledged the Government's argument that under the express terms of the statute an official proceeding need not be pending at the time of the offense, the Court held that the statute is not violated by "someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material."

Implications for Other Government Investigations

The Supreme Court's *Arthur Andersen* decision is a positive development for companies trying to implement and apply document retention policies in an era of great uncertainty. The potential impact of the decision, however, is tempered by Congress' passage of a potentially even broader and more alarming statute as part of the Sarbanes-Oxley Act, now codified at 18 U.S.C. Section 1519. That law provides, in part, that "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 in relation to or contemplation of any such matter*" has committed a federal felony punishable by imprisonment of up to 20 years. 18 U.S.C. Section 1519 (emphasis added).

Section 1519 on its face seems much broader than the statute used to convict Arthur Andersen. For instance, it does not contain a requirement that the destruction or alteration of documents be done "corruptly." Moreover, it has been argued that Section 1519 criminalizes the destruction of documents even before a government investigation is foreseeable, as long as the defendant acts with the intent to obstruct a "matter that is within the jurisdiction of a department or agency of the United States, or in relation to . . . any such matter." The Senate Report, in fact, states that the statute was designed "not to include any technical requirement . . . to tie the obstructive conduct to a pending or imminent proceeding or matter by intent or otherwise." Senate Report No. 146 107th Cong., 2nd Sess. 2002 (May 6, 2003) (statement of Sen. Leahy). Moreover, the statute was apparently intended "to do away with the distinctions . . . between court proceedings, investigations, regulatory or administrative proceedings (whether formal or not), and less formal government inquiries." *Id*.

The Supreme Court's decision in *Andersen* suggests that the Court might be reluctant to read Section 1519 as broadly as its extraordinarily vague language might allow. The Court recognized that there is nothing morally repugnant about document preservation/destruction policies designed to prevent documents from being used against a company in litigation or government investigations. The Court might well reject an application of the statute to the destruction of documents before a government investigation is foreseeable, even if the purpose is to make those documents unavailable in such a proceeding. It is also quite possible that the Court would read into the statute a mens rea standard that requires some knowledge of wrongdoing.

One possible consequence of the *Andersen* decision is that (despite the legislative history of Section 1519 referred to above) the SEC may transition its inquiries to "formal" status and issue subpoenas or take other steps to establish that a given investigation has become a pending proceeding. This has practical implications as such steps tend to impart momentum to an investigation.

For now, however, there is very little guidance from the courts to temper the potentially breathtaking scope of Section 1519. Moreover, the unprecedented interest in document preservation issues has moved well beyond the criminal context and has led to enormous sanctions in SEC enforcement matters as well as purely private civil litigation. Document preservation and production issues must continue to be areas that require great care.

Practical Guidance

Even armed with the *Andersen* opinion, it should be obvious that in the current climate document collection is not a task that can be taken lightly by corporate counsel. What specific measures should your corporation take?

- While the Court has reinforced the legitimacy of document retention policies, corporations should strongly consider the suspension of those policies

when sufficient facts come to light which, if known to the government, would likely lead to an investigation. With the benefit of perfect hindsight, the government might view a failure to respond in such a way as implicating Section 1519, or as inconsistent with the company's stated intention to cooperate fully in the investigation.

- When circumstances require the need to preserve documents, an e-mail or other memorandum should be sent *immediately* requiring that all document destruction procedures be suspended, and that individuals retain hard-copy documents (including calendars and appointment books), electronic files, e-mails, voice mails, data compilations and/or tangible objects pertaining to the relevant time frame and relevant events or issues. Individuals should be instructed to maintain electronic data whether on the network, desktop, hard-drive, laptop, blackberry, PDA, diskette, and/or CD-ROM and whether at home or at work. Employees should also be instructed not to modify relevant documents.
- The list of individuals to whom this e-mail or memorandum is sent, the categories of documents, and the time frame should be overbroad, at least initially.
- Counsel should have a conversation with the individuals most likely to have relevant information to explain and underscore the document preservation instruction. Counsel should remind such individuals periodically of the need to preserve documents.
- Consideration should be given to requiring employees to certify compliance with the document hold and production obligation.
- Counsel should contact the IT department to learn about the company's relevant systems, prevent automatic e-mail deletion, suspend recycling or overwriting of backup tapes, and possibly image hard drives of key players.
- Counsel should contact the document storage department, outside storage facility, and/or third parties holding records on the company's behalf, to prevent any automatic destruction of records.

Practice group contacts

If you have questions regarding the information in this legal update, please contact the Dechert attorney with whom you regularly work, or any of the attorneys listed. Visit us at www.dechert.com/criminal or www.dechert.com/financialserviceslit.

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