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March 17, 2003

Honorable Diana E. Murphy, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Sarbanes-Oxley Act

Dear Chair Murphy and Commissioners:

I am writing to provide the following public comment on the Commission's proposed amendment to implement the Sarbanes-Oxley Act of 2002 ("the Act"). Numerous commentators have submitted comprehensive comments. I am writing to address a particular issue of substantial concern that is raised by one particular aspect of the Act.¹

Section 802 of the Act amended Chapter 73 of title 18, United States Code, by adding a new Section 1519, entitled "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy." Unlike other aspects of the Act, this amendment is not limited to corporate accounting misconduct and its effects on capital markets that served as the instigation for the Act. Instead, it creates a broad new law addressing Obstruction of Justice and does so in the broadest terms of any such statute to date.

As others have noted, Section 1519 makes clear that the government can now seek to prosecute an individual for document destruction prior to the existence of any official proceeding or investigation.² Specifically, Section 1519 provides:

¹ I am a partner in the law firm of Hunton & Williams, and I present these comments as an individual attorney. The views expressed herein are my own and should not be construed to represent those of my firm, or of our clients, or of the Commission's Practitioners' Advisory Group (PAG) of which I am a member. However, these comments have been briefly reviewed by Barry Boss, co-chair of the PAG who believes that the invited downward departure proposed in this letter should be given serious consideration by the Commission.

² See, e.g., *Life After Sarbanes-Oxley: New Criminal Penalties for Fraud and Obstruction Affect All Companies*, Hamel, Kelly, Dolan, Legal Times, October 7, 2002. Vol. XXV, No. 39

Honorable Diana E. Murphy, Chair

March 17, 2003

Page 2

Whoever knowingly alters, destroys . . . 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 or case*, shall be . . . imprisoned not more than 20 years. (emphasis added).

Significantly for the purposes of these comments, Section 1519 makes it a crime to destroy documents "in relation to or contemplation of any such matter or case." This new language appears to expand the crime of obstruction to a new territory by creating potential criminal liability for the destruction of a document, even if done pursuant to an otherwise appropriate document retention policy and even if there was no federal proceeding or investigation under way at the time the document was destroyed.

Businesses routinely and legitimately destroy documents and other materials pursuant to document retention policies when such materials are no longer required to be maintained by law or business need. It would impose a totally unreasonable burden if huge numbers of such records were thought to be required to be retained, perhaps indefinitely, because some future reviewer may conclude that it was "contemplated" at the time of destruction that such records might be of some interest to a then non-existent future government inquiry.

Such concerns about the impacts of expanding document retention requirements are far from speculative. For example, the sheer impact of a vastly expanded record-keeping obligation has lead to reconsideration of the Environmental Protection Agency's (EPA) so-called CROMERRR rule, which was designed "primarily to ensure that . . . documents and records are preserved . . . so that they continue to provide strong evidence of what was intended by the individuals who created and/or signed and certified them."³ The EPA is reconsidering the rule in light of, among other things, estimates that the overall cost to the affected organizations of initially implementing the rule could be as high as \$68 billion dollars.⁴

³ 66 Fed. Reg. at 46164.

⁴ See, <http://www.epa.gov/website1/cromerrr/propose/index.html>, for the text of public comments filed with EPA regarding the proposed rule. Similarly, the Food and Drug Administration is considering curtailing enforcement of a rule regulating electronic filing of records and data by pharmaceutical manufacturers due to concerns about the costs involved in implementing and in the annual compliance with the rule; 21 CFR Part 11.

Honorable Diana E. Murphy, Chair
March 17, 2003
Page 3

The Commission is well aware that provisions such as Section 1519, and the direction provided to U.S. courts under the Guidelines, have a powerful effect on corporate management practices. Since the Commission issued the Organizational Guidelines in 1991, there have been massive increases in the development and implementation of internal programs to prevent, detect and report violations by organizations. Moreover, the structure of these compliance programs have unquestionably been shaped by the language of the Organizational Guidelines.

The Organizational Guidelines have also profoundly influenced bargaining between prosecutors and defendant corporations. They have become central to the resolution of the vast majority of investigations involving alleged corporate crime and play a central (if not widely recognized) role in the fact and charge bargains struck between prosecutors and defendants.

These impacts far outweigh the role of the Organizational Guidelines in setting criminal sentences,⁵ and that this broader role was in fact the Commission's goal. The Commission sought to use the Organizational Guidelines to enroll organizations in the effort to prevent crime, by rewarding such efforts with meaningful reductions in liability when violations occur despite good faith efforts to comply.

A similar effort by the Commission is warranted regarding the Guidelines implementation of Section 1519. Without further guidance from the Commission regarding the application of Section 1519 it will be extraordinarily difficult for companies to develop and implement appropriate document retention policies without fear that almost any failure to maintain a document could, in hindsight, be viewed as an act of obstruction. Moreover, without limiting language, Section 1519 may impose potentially impracticable if not impossible costs of keeping a seemingly limitless class of records for future review akin to those imposed by the EPA and FDA rules referenced above.

It is helpful, in this regard, to refer to the language found in the Senate Report on the Act⁶. Recognizing the broad reach of Section 1519, the Report notes:

⁵ As recognized by one close observer who noted that the Guidelines "biggest influence may be behind the scenes, in plea negotiations . . .", *Sentencing Reformers*, NYLJ, March 18, 2002, p.A15.

⁶ S. Rep. No. 107-146 (2002).

Honorable Diana E. Murphy, Chair
March 17, 2003
Page 4

In our view, section 1519 should be used to prosecute only those individuals who destroy evidence with the *specific intent* to impede or obstruct a pending or future criminal investigation, a formal administrative proceeding, or bankruptcy case. *It should not cover the destruction of documents in the ordinary course of business, even where the individual may have reason to believe that the documents may tangentially relate to some future matter within the conceivable jurisdiction of an arm of the federal bureaucracy.*

S. Rep. 107-146, at 27. (emphasis added). Without similar clarification in the Guidelines the Act in its naked form could punish exactly the conduct described in the Senate Report as not intended to be covered by Section 1519 and would fail to provide consideration for good faith efforts to implement a proper document retention policy.

As it did in the Organizational Guidelines⁷, the Commission could directly address these concerns either in the form of Commentary or downward Adjustments to the Offense Level for violations of Section 1519. At the very least, the Committee should include an invited downward departure where the defendant has made efforts to implement a sound document retention policy. In considering whether to grant such a departure, the Commission should propose that a court consider the following non-exclusive factors as indicators of a sound document retention policy: providing a written document policy to employees involved in or responsible for records management activities; clear direction to employees who are uncertain as to what to do with a particular document or record to seek advice from the company's counsel; and, a policy that directs that time periods set for destruction of records do not apply when there is a clear direction that certain records or categories of records should be retained.

Moreover, courts should be encouraged to give recognition to the varying document retention policies that may be employed given the size of the organization involved; to the likelihood that a specific category of documents would be of interest; to the sensitivity of the document with respect to their impact on individual privacy concerns; and, to the prior history of the organization in consistently carrying out the requirements of its document policy as opposed to last-minute efforts aimed at destroying records. This general guidance would be consistent with the recognition in the context of the Organizational Guidelines by Chair Murphy, who noted that:

⁷ United States Sentencing Commission, Guidelines Manual § 8A1.2, Commentary, Application Note 3(k); §8C2.5 (f) (November 2002).

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Honorable Diana E. Murphy, Chair
March 17, 2003
Page 5

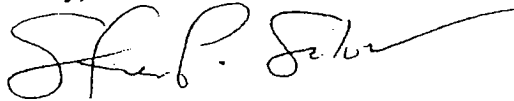
the guidelines must be general enough to be used by all types of organizations engaged in a wide variety of activities. The standards and procedures for effective compliance programs in one industry may not be the same in another.⁸

Such an invited downward departure for Section 1519 would accommodate concerns about destruction of inculpatory records while providing recognition and encouragement in the Guidelines for efforts to implement a sound document retention policy; meaning a policy that has been reasonably designed, implemented and enforced so that it generally will be effective in preventing or detecting document destruction undertaken with the specific intent to obstruct justice.

In so doing, the Commission can provide guidance to those covered by Section 1519, and those given the discretion to use its seemingly overbroad language, so as to support the goals of the law while preventing abuse in the context of 20-20 hindsight that seeks to make otherwise innocent conduct appear criminal. Such liability without moderation could impose unreasonable expectations on efforts to manage the ever-expanding list of required record keeping covered by Section 1519.

I appreciate the opportunity to present these views on this important issue.

Sincerely,



Steven P. Solow

cc: Charles Tetzlaff, Esq.
Paula Desio, Esq.
Barry Boss, Esq.
Jim Felman, Esq.

⁸ Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 Iowa L. Rev. 697, 715-16 (2002).