

## The Corporate Document Management Policy: Impact of the Supreme Court's Reversal of Andersen

We have discussed the current legal framework for document management policies in MLA's Corporate Governance Guide and in our advisory entitled "*Corporate Records Retention Policy Critical in Current Environment*," which was issued on September 3, 2002 in the wake of Andersen's conviction for obstruction of justice and the passage of the Sarbanes-Oxley Act of 2002 (the "Act").

As a practical matter, the U.S. Supreme Court's narrowly-framed decision to reverse the Andersen conviction has little to no impact on our view of how corporations should structure, monitor and enforce their document management policies. Even if the bar to criminal prosecution for obstruction of justice has arguably been raised, the associated potential for civil liability remains a very real concern for corporations, mitigating against any changes in current policies and procedures.

Nonetheless, corporations, stockholders and employees may take comfort that this high-profile Supreme Court decision validates and encourages much needed public debate about the overzealous prosecution of corporate defendants for the actions of a handful of their employees. The deeds of some Andersen employees may well have merited the harsh scrutiny of the Securities and Exchange Commission and the U.S. Department of Justice. The question is, however, whether the resulting destruction of one of the five firms that audited the majority of large, publicly-held corporations justified the high cost to society in the long run due to the reduced competition in the marketplace and the loss of over 28,000 jobs.

The Supreme Court reversed Andersen's conviction because the District Court's jury instructions did not convey the requisite consciousness of wrongdoing required to convict under the 2000 version of Section 1512(b)(2)(A) and (B) of Title 18 of the United States Code, which governs witness tampering. At that time, Section 1512(b) punished for

**knowingly ... corruptly persuad[ing]** another person ... with intent to ... cause or induce any person to (A) ... withhold a record ... from an official proceeding; [or] (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding ...

The Supreme Court relied upon the natural meaning of "knowingly ... corruptly" to interpret the statute, associating "knowingly" with awareness, understanding or

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consciousness and “corruptly” with wrongful, immoral, depraved or evil. Joining the meaning of these terms together, the Supreme Court determined that only the actions of persuaders who are conscious of their wrongdoing rise to the level of culpability required to impose criminal liability under the statute.

Significantly, the Supreme Court also found the jury instructions to be infirm because the wording led the jury to believe that it did not have to find a **causal nexus** between the persuasion to destroy documents and a particular official proceeding. As articulated by the Supreme Court, “[a] ‘knowingly ... corrup[t] persuade[r]’ **cannot** be 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.” The official proceeding must at least be foreseeable.

The Supreme Court’s interpretation of these two key elements will be critical to future decisions under Section 1512(b), which was amended by the Act effective July 30, 2002. The revised statute criminalizes the actions of any person who “corruptly alters, destroys, mutilates, or conceals a record ... with the intent to impair the object’s integrity or availability for use in an official proceeding or otherwise obstructs, influences or impedes any official proceeding ... .” The amendments will likely be impacted in light of the following aspects of Andersen:

- Although the term “knowingly” has been omitted, the Supreme Court’s decision mandates a finding of dishonesty or corruptness to ensure that innocent persuasion falls outside the boundaries of the statute; the Court stressed a standard that requires “consciousness of wrongdoing” in applying Section 1512(b), a requirement that would be equally applicable, under the Court’s reasoning, to the amended Section 1512(b).
- In addition, the Court stressed the need for a particular official proceeding to be on the horizon. Accordingly, if the “persuader” encouraging compliance with a corporation’s existing document management policy is completely unaware of any official proceeding looming on the horizon, it appears unlikely that such person could be properly convicted under Section 1512(b).

There is support in the decision for the use of document management policies. Chief Justice William Rehnquist, writing for the unanimous Supreme Court in Andersen, 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 common in business.” The Court further noted, “[i]t is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances.” A well-conceived and consistently-enforced document management policy remains, therefore, the best defense to any charge of obstruction of justice under the Act or during the course of litigation.

Later in June 2005, MLA will distribute updates to the Corporate Governance Guide, including a replacement Chapter 14. This replacement chapter will separate the current chapter into two detailed chapters entitled “*Document Management*” and “*Sentencing Guidelines / Compliance Programs*.”

[Click here](#), for information on our Corporate Governance Guide.

If you do not already have a copy of the Corporate Governance Guide and would like to receive one, please contact us at [cgguide@mckennalong.com](mailto:cgguide@mckennalong.com).

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