

Sarbanes-Oxley's Impact on Record Retention Policy

Compliance brief by Benjamin Wright, JD

The Sarbanes-Oxley Act (SOX) is a key part of US law requiring corporations to maintain adequate records related to their assets, finances and internal control.

Since 1977, US securities law has said that publicly-held corporations must maintain reasonable records of assets and transactions and reasonable internal controls to protect assets and enable the preparation of financial statements. 15 U.S.C. §78m(b)(2), link to <http://www.law.cornell.edu/uscode/15/78m.html>

The rationale for these requirements is simple: Without good records and internal controls, investors are unable to evaluate the corporations they own or to which they lend money.

SOX reinforced these pre-existing recordkeeping and internal control requirements by mandating that auditors of publicly-owned corporations periodically evaluate compliance with the requirements. See SOX §103, link to <http://thecaq.aicpa.org/Resources/Sarbanes+Oxley/Summary+of+the+Provisions+of+the+Sarbanes-Oxley+Act+of+2002.htm#Section103>. Although, strictly speaking, this portion of SOX (periodic evaluation of records and controls) applies only to publicly-owned corporations, it influences more than just those firms. Many private and non-profit organizations seek to behave consistent with SOX.

Another aspect of SOX is relevant to records management. SOX changed the law of “obstruction of justice.” This change fits with a larger trend. The US legal system is today giving all enterprises reasons to be more liberal in their retention of records, especially e-mail. The following summarizes how SOX changed obstruction of justice law. Link to http://legal-beagle.typepad.com/wrights_legal_beagle/2008/10/sedona-guidelines-how-practical-are-they.html

The traditional obstruction of justice statute, 18 U.S.C. §1512(b), punishes anyone who corruptly persuades another person to destroy documents to impair their use in an official proceeding. Under that traditional statute, a criminal court convicted Arthur Andersen for destroying Enron-related papers and electronic records. The jury in Andersen's trial said Andersen's record management practices violated the statute.

But one month after Andersen's jury trial, Congress adopted SOX. SOX modified obstruction of justice law by making it easier to convict people who destroy records. SOX included new 18 U.S.C. §1519, link to http://www4.law.cornell.edu/uscode/18/usc_sec_18_00001519----000-.html, which now punishes anyone who destroys, conceals, or covers up any record to impede or influence a federal lawsuit or an investigation by any federal agency, or in relation to or contemplation of any such matter or case.

Notice the differences between the traditional §1512(b) and new §1519. Under traditional §1512(b) a crime was committed only if the defendant “corruptly persuaded another person” to destroy documents. It might be hard for a prosecutor in a criminal trial to show corrupt persuasion of a second person. Further, the exact words of §1512(b) seem not to apply if the defendant directly destroyed documents. In new §1519, however, Congress omits the traditional “corruptly persuades another person” element. Further, new §1519 employs expansive language -- “in relation to or contemplation of any such matter or case” – to stretch the law to cover destruction of records in any way connected to a specifically anticipated lawsuit or investigation.

Enterprises be aware. The effect of §1519 is powerful. To win an obstruction of justice conviction, the prosecutor does not have to work as hard as he or she did in the Andersen case. The prosecutor no longer has to show the defendant acted “corruptly” to “persuade” someone else to destroy documents. Now, it is enough for the prosecutor to simply show that the defendant intended to destroy records with federal litigation in mind.

With new §1519, Congress emphasized its intolerance of people who mulch records in view of a lawsuit or investigation, even one that is not pending or imminent. See http://legal-beagle.typepad.com/wrights_legal_beagle/2008/10/sarbanes-oxleys-impact-on-record-retention-policyarthur-andersens-crimethe-us-legal-system-is-generally-giving-all-ente.html

For a complex enterprise, it is tough to know what is and is not anticipated out there in the future. But the risk is that later, after the lawsuit gets going, the court may judge the enterprise’s decisions retrospectively, with the benefit of 20-20 hindsight. The court may determine, “Oh, you could have seen this coming (even though it was not imminent), so you should have implemented a legal hold.” See http://legal-beagle.typepad.com/wrights_legal_beagle/2008/08/healthcare-government-e-discovery-and-e-mail-destruction.html

Given that it is now easier to be convicted for destroying records, the logical response for an enterprise is to keep more records longer to give itself a wider margin for error.



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