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Employers Take Heed: The SEC Is Preparing for a Greatly Enhanced Reliance on Whistleblowers

BY ANTHONY PACHECO, SIGAL P. MANDELKER, AND MASSIEL PEDREIRA

Employers beware; the Securities and Exchange Commission (SEC) is intensifying its reliance on whistleblowers. Since the 2010 passage of the Dodd-Frank Act, which included key enhancements to the SEC's whistleblower program, white-collar and compliance lawyers alike have been consumed by the potential consequences to companies of Congress's decision to elevate the role of and empower whistleblowers. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1841 (2010) (to be

codified at 15 U.S.C. § 78u-6). Is all the hype warranted? Should employers fear that there will be an increase in the number of whistleblowers and that those whistleblowers will view the new whistleblower program solely as a means to cash in?

The answer is that the new changes could result in a sea change in the number of actions brought against companies by the SEC. Indeed, the program under the act effectively "deputizes" employees as agents for the SEC in the enforcement of purported securities violations.

Previously, the SEC's whistleblower

program, confined to insider-trading cases, capped awards at 10 percent of the collected penalties. *See* Press Release, Sec. & Exch. Comm'n, SEC Proposes New Whistleblower Program Under Dodd-Frank Act (Nov. 3, 2010), *available at* www.sec.gov/news/press/2010/2010-213.htm. Now, the commission is empowered to compensate whistleblowers with 10 to 30 percent of the total monetary sanctions resulting from the successful enforcement of a judicial or an administrative action based on the whistleblower's information. *See*

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When to "Reasonably Anticipate" a Government Investigation

BY ROBERT HOFF AND NATALIE SHONKA

The exponential growth in electronic discovery in the recent past has resulted in a corresponding increase in case law addressing e-discovery issues. Perhaps not surprisingly, most cases address e-discovery issues in the context of civil litigation between private parties. But e-discovery issues must be considered carefully in government investigations as well, for the failure to follow the rules governing e-discovery when faced with a government investigation can have dire consequences.

One of the most important issues to

arise from the onslaught of e-discovery is when to "reasonably anticipate" litigation or a government investigation, which triggers a company's obligation to implement a document-preservation notice or "litigation hold." The determination of when such a duty should attach is necessarily fact-intensive and varies on a case-by-case basis. (Companies in some industries, such as broker-dealers, are required to retain documents for a certain period pursuant to rules or regulations governing those industries. We do not address those circumstances

here.) Companies and their counsel must act reasonably and in good faith, considering all information available to them to determine when it is time to implement a litigation hold.

What "Reasonably Anticipate" Means Generally

It is firmly established that a duty to preserve evidence, including electronically stored information (ESI) arises when litigation is "reasonably anticipated." *E.g.*,

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Message from the Chairs

BY STACEY F. GOTTLIEB, D. GRAYSON YEARGIN,
AND KENNETH C. PICKERING

Galleon Group Founder Convicted on All Counts

The high-profile case against Raj Rajaratnam, founder of Galleon Group, ended in the conviction of Mr. Rajaratnam on all 14 counts of securities fraud and conspiracy. What has been called the biggest insider-trading case in history is notable for a number of reasons. The case was one of the first insider-trading cases in which the government made extensive use of wiretaps in its investigation and at trial. The government wiretapped 18,150 conversations over a 16-month period. Forty-five of the wiretap recordings were used at trial. Even though Mr. Rajaratnam did not testify at trial, the wiretap recordings permitted members of the jury to hear Mr. Rajaratnam engaged in numerous conversations. If the government relies on wiretaps in future white-collar prosecutions, wiretap evidence will no doubt be a significant factor in deciding whether a defendant should take the stand.

The wiretap transcripts also became an issue in the SEC's parallel civil investigation of Mr. Rajaratnam. Prior to the criminal trial, the U.S. Attorney's Office turned over the 18,150 wiretap transcripts to Mr. Rajaratnam. The U.S. Attorney's Office is prohibited from sharing wiretap evidence with the SEC. But once the transcripts were in Mr. Rajaratnam's possession, the SEC issued a document request seeking the transcripts—evidence the SEC admits it would not have been able to obtain directly from the U.S. Attorney's Office. The district court ordered the production of all of the wiretap transcripts, and Mr. Rajaratnam appealed. In *SEC v. Rajaratnam*, 622 F.3d 159 (2nd Cir. 2010), the Second Circuit upheld the production of the transcripts, as long as they had been legally obtained by the government, and to the extent that they were relevant to SEC's investigation. The Second Circuit spoke of the privacy interest of the many people who unknowingly had their conversations

with Mr. Rajaratnam wiretapped. Though ultimately, the Second Circuit ordered the production of "relevant" wiretap transcripts, and did not apply a heightened production standard.

Criminal Litigation Newsletter Goes Electronic

We are excited to announce that future editions of the *Criminal Litigation* newsletter will be distributed electronically. This is the last print version to be published. As part of the electronic format, you will be able to view and print individual articles. You will also have the option to print the entire newsletter in PDF format, similar to the layout of the current newsletter.

Written Materials from Section Annual Conference

This year's Section Annual Conference was a terrific success. The conference, jointly sponsored by the Section of Litigation and the Criminal Justice Section, was particularly well suited for Criminal Litigation Committee members. The sessions focused on both civil and criminal issues, and the special concerns that arise in parallel civil and criminal proceedings. If you were unable to attend the conference in person, the written materials are a terrific resource and are available separately.

Upcoming ABA Annual Meeting

The ABA Annual Meeting will be held August 4–6, 2011, in Toronto, Canada. The Section of Litigation is presenting two Presidential Showcase Programs: "Trial Practice and Tactics in Canada and the United States" and "Implicit Bias and the Myth of Equal Justice."

Former Canadian Prime Minister Jean Chrétien will be the featured speaker at the International Human Rights Award and Passing of the Gavel Luncheon. The Section's International Human Rights Award will be presented to Hon. Louise Arbour, the former U.N. High Commissioner for

Human Rights. Please remember that you will need a valid passport to travel to Canada for the Annual Meeting. ■

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Whistleblowers

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Dodd-Frank Act, *supra* (to be codified at 15 U.S.C. § 78u-6(b)). Those percentages can be enormous, particularly in Foreign Corrupt Practices Act matters, where fines and penalties have been in the hundreds of millions.

To qualify, a whistleblower must provide “original information.” This can be information derived from the independent knowledge or analysis of the whistleblower that is neither known to the SEC from any other source nor exclusively derived from an allegation made in a judicial or an administrative hearing or other public forum, unless the whistleblower was the source of information. *Id.* (to be codified at 15 U.S.C. § 78u-6(a)(3)).

And guess what? The SEC will have virtually unfettered discretion to determine the amount of the award within the 10 to 30 percent range. The SEC should, under the act, consider the significance of the original information to the success of the covered action; the degree of assistance provided by the whistleblower; the programmatic interest of the SEC in deterring violations of the securities laws by making such awards, and any additional relevant factors established by rule or regulation. *Id.* (to be codified at 15 U.S.C. § 78u-6(c)(1)).

The SEC Investor Protection Fund, which was created by the act, provides funding for the whistleblower program, including remuneration for whistleblowers and, as of September 30, 2010, had an ending balance of \$451,909,854.07. *Id.* (to be codified at 15 U.S.C. § 78u-6(g)(2)(A)); *see also* Corruption Currents, *SEC*

Whistleblower Fund is Juiced Up, Wall St. J., Nov. 1, 2010, *available at* <http://blogs.wsj.com/corruption-currents/2010/11/01/sec-whistleblower-fund-is-juiced>. The fund will also fund the operations of the SEC Office of the Inspector General’s suggestion program. Dodd-Frank Act *supra* (to be codified at 15 U.S.C. § 78u-6(g)(2)(B)). While the SEC apparently cannot consider the balance in the fund when making whistleblower awards, in practice it remains to be seen whether the SEC will turn a blind eye to its own financial interest when adjudicating whistleblower cases.

The act not only provides huge incentives for whistleblowers to report, but also there are now even stronger protections to prevent and punish retaliation against a whistleblower. *See id.* (to be codified at 15 U.S.C. § 78u-6(h)(1)(A) (listing prohibited retaliatory acts)). The act creates a new private right of action that exposes employers to double back pay with interest; litigation costs including reasonable attorney fees and expert witness fees; and reinstatement of the whistleblower to the same seniority status. *See id.* (to be codified at 15 U.S.C. § 78u-6(h)(1)(C)).

The SEC’s Proposed Rules Implementing the Dodd-Frank Act

In the fall of 2010, the SEC proposed rules, in over 180 pages, to implement the whistleblower program. Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 Fed. Reg. 70,488 (proposed Nov. 3, 2010) (to be codified at 17 C.F.R. 240.21F). These rules intend to “explain the scope of the whistleblower program” and “outline the procedures for applying for awards.” *Id.* The SEC stated that it considered and weighed a number of competing interests resulting from the act’s implementation. *Id.*

The SEC curiously stated in the rules that it recognized that the monetary incentives provided to whistleblowers could reduce the effectiveness of a company’s existing compliance and internal-reporting procedures. But under the proposed rules, whistleblowers will not have to first report internally a suspected or an actual violation before going to the SEC. The SEC

Message from the Editor

Once again, thank you to all of our committee members, contributors, and devoted readers for their continued support. As you will see, this issue contains an interesting “Q & A,” the first such piece that I have received. I am anxious to receive others; indeed, the more creative, the better. Book reviews would also be welcome.

Please forward any newsletter submissions to me (either electronically or in hard copy):

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also considered the effect of whether the whistleblower rewards would incentivize attorneys, independent auditors, and compliance personnel to make whistleblower claims based on information they obtained through their positions. *Id.* at 70488; *see also id.* at 70,520–21 (to be codified at 17 C.F.R. 240.21F-4(b)(4)) (listing types of information ineligible for a whistleblower award). During the comment period, companies have expressed concern that employees will bypass compliance procedures, but it is unclear whether the SEC will take those concerns into account in the final rule, which will be released between May and July 2011, despite a mandated April 21, 2011, deadline.

The SEC has done little to remedy this problem that its proposed rules would embolden whistleblowers to report to the SEC and forego internal-compliance

reporting. As a somewhat remedial measure, the SEC's proposed rules protect a whistleblower's "place in line" for 90 days if he or she chooses to first report internally before reporting to the SEC as a means to support the effective functioning of compliance and internal-reporting procedures. *Id.* at 70,495–96. This means the SEC will consider the date the whistleblower reported internally as the date reported to the SEC as long as it is submitted to the SEC within 90 days. 75 Fed. Reg. 70,495–96. However, in practice, this will do little to address the concern that whistleblowers will forego internal reporting, denying companies the opportunity to investigate and take appropriate remedial measures. An incentivized whistleblower will want to maximize recovery by reporting to the SEC and not giving the company the ability to take corrective measures. The SEC's efforts to address this situation fall short of meaningfully addressing the issue.

Companies should be aware that both the act and the implementing regulations, once final, give the SEC unfettered discretion in setting whistleblower awards. There are no appropriate checks and balances over the SEC's powers regarding the use of and financial incentives to whistleblowers. The SEC does set forth additional factors it will "consider" in making whistleblower awards, such as whether a whistleblower first reported the potential violation internally before reporting to the SEC. *See id.* at 70,500 (describing the additional factors). The SEC, however, falls short by not setting these so-called factors in the actual rules. In other words, these are factors that the SEC may, but does not have to, take into consideration.

What does this practically mean? As long as the SEC does not take into account the balance of the fund and makes an award between 10 and 30 percent of the total monetary sanctions imposed, a whistleblower award is entirely in the SEC's discretion. *Id.*; *see also* Dodd-Frank Act, *supra* (to be codified at 15 U.S.C. § 78u-6(c)). The act prohibits the SEC from looking at the balance of the fund, but the proposed implementing rules are silent on this. The act itself, however, provides no relief if the SEC was to consider

the balance of the fund prior to determining the whistleblower award amount.

And more troubling, there is no judicial review for an award under the act, as long as the whistleblower's award is within the 10 to 30 percent range. Dodd-Frank Act, *supra* (to be codified at 15 U.S.C. § 78u-6(f)). The fund itself is financed by monetary sanctions collected by the SEC in judicial or administrative actions and from disgorgement funds not already distributed to victims. *Id.* (to be codified at 15 U.S.C. § 78u-6(g)(3)(A)). Furthermore, the Dodd-Frank Act dictates that a whistleblower's interest in receiving

The SEC is incentivized to encourage whistleblowing, at the expense of critical policy concerns, to bring bigger cases and obtain larger sanctions and penalties.

an award outweighs a victim's interest in recouping his or her losses as a result of the securities-law violations. *Id.*

The potential conflicts are evident. *Id.* (to be codified at 15 U.S.C. § 78u-6(g)(2)(B)). The SEC is incentivized to encourage whistleblowing, at the expense of critical policy concerns, to bring bigger cases and obtain larger sanctions and penalties. The sanctions and penalties against companies and employers are expected to increase significantly. The SEC will plainly be mindful that it has sufficient funds to pay victims of securities violations and maintain the fund to not only further incentivize whistleblowers to come forward but also to continue its own operations. With little, if any, meaningful judicial review, there are virtually no checks and balances on the SEC's enhanced powers.

What This Means: Prepared Is Forewarned

Given the substantially increased risk that employees will now run to the SEC before reporting potential problems internally, employers need to review and perhaps revise their compliance programs so that they encourage would-be whistleblowers to report internally rather than report for the first time to the SEC. Indeed, the employer's first line of defense is an effective compliance program.

Employers can do this in a number of ways, such as creating effective internal reporting procedures, ensuring those procedures are well publicized, encouraging reporting, and instituting strong anti-retaliation policies. Employers should also consider faster and more thorough self-reporting.

Employers should make sure that they have robust reporting procedures. A step in the right direction is to establish a 24-hour whistleblower hotline. The hotline should be made available on an anonymous basis and staffed by qualified compliance personnel. What not to do? An employer should not create a hotline that is ineffective. If employees are placed on hold for 20 minutes and required to follow a long series of prompts, employees will be less likely to use the company's hotline. The hotline number should be provided to third parties such as an employer's customers, suppliers, and business partners.

No matter how well crafted internal-reporting procedures are, if they are not well publicized, they are of limited use. Employers should provide employees with frequent training regarding their compliance programs and internal-reporting procedures. Employees need to not only know what policies and procedures are in place but also understand their underlying purpose. Frequent education of employees, managers, and human-resources personnel will demonstrate a company's commitment to compliance and ethical conduct. It will also encourage employees to make use of the resources available and ensure that all complaints are treated properly. Creating a comfortable environment for employees to report within their chain of command can be critically important.

Employers should consider offering incentives that encourage internal reporting. For example, employers can make it mandatory to report violations in a timely manner. Employers can also restructure their policies to ensure employees may not launch their own investigation, without first reporting internally.

At the same time, employers must ensure that whistleblowers are not subject to any form of retaliatory conduct. Retaliation has been interpreted to be any form of employment action that tends to chill an employee's exercise of his or her lawfully protected rights. Thus, employers should develop with the employee an overall plan for managing the employee's terms during and after an investigation. The employer must carefully monitor the whistleblower's employment conditions and thoroughly vet any changes, including both overt adverse employment actions and subtle versions, to ensure they are consistent with the agreed-upon plan and avoid creating facts that could later be construed as retaliatory.

Employers often have to balance between establishing appropriate protections for a whistleblower while maintaining the integrity of the investigatory process. Careful thought and planning is required to avoid unjustly isolating the whistleblower or undermining his or her career path, while concurrently avoiding causing unfair damage (prior to a final determination of wrongdoing) to the career and reputation of the alleged wrongdoer.

The manner and speed with which companies self-report will be affected in light of the whistleblower program. Self-reporting is often the most important way to obtain leniency from the SEC and other regulators or prosecutors. Prior to the whistleblower program, companies would conduct thorough internal investigations into often complex matters and then determine whether to self-report. Under the act, companies will have to perform internal investigations much quicker—all in an effort to report the violation prior to any potential whistleblower. Further complicating the self-reporting process, companies run the risk of not being as thorough and comprehensive in their internal investigations. A company could miss issues that

could potentially be reported by a whistleblower, resulting in the appearance of inadequate self-reporting and in an incomplete evaluation of the company's potential risk or actual exposure.

For example, on March 14, 2010, Renault issued an apology to three senior managers the company had fired after receiving a tip that the managers had negotiated a bribe. Subsequent investigations by Renault and the prosecutor's office concluded that the tips were likely fraudulent. This highlights the very real and potentially embarrassing risks companies face if they hurry internal investigations in response to fears from whistleblowers. Sebastian Moffett & David Pearson, *Renault Apologizes to Fired Employees*, Wall St. J., Mar. 15, 2011.

With the implementation of the act, companies have fewer available options and greater risks of regulatory actions and civil lawsuits fueled by whistleblowers

emboldened by the act. Being prepared is forewarned. An employer's best defense is implementing an effective compliance and internal-reporting program and designing appropriate incentives. Responding quickly and effectively to internal reports of wrongdoing is all the more important in this constantly changing environment. The consequences of not doing so can be detrimental, particularly in this new era of the SEC's heightened reliance on whistleblowers. ■

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SEC Approves Final Rules

On May 25, 2011, a divided SEC (3–2 vote) approved the final rule for the Implementation of the Whistleblower Provisions of section 21F of the Securities Exchange Act of 1934. The final rule is set to take effect on August 12, 2011. The SEC's final rule made a number of "revisions and refinements" to the proposed rule. Most significantly, for purposes of this article, the SEC decided not to require whistleblowers to report violations internally as a requirement to receiving an award. The final rules provide that a whistleblower's participation in a company's internal compliance and reporting mechanisms is a factor that may increase the whistleblower's award, while a whistleblower's interference with internal compliance and reporting mechanisms is a factor that can decrease the award. The final rules added a new provision that permits a whistleblower to receive an award when she first reports internally and the employer reports information obtained from its investigation to the SEC. The whistleblower would obtain full credit for all the information provided by the employer to the SEC as if the whistleblower itself had provided that information; the result being that the whistleblower would receive credit for more information and a potentially greater award (based on the factors the SEC uses to determine whistleblower awards). Under the final rules, therefore, a whistleblower could interfere with or disregard a company's internal compliance procedures and nonetheless be eligible for an award.

International Disdain for Life-Without-Parole Sentences and the Supreme Court's Interpretations of the Eighth Amendment

BY CONNIE DE LA VEGA AND AMANDA SOLTER

As much as Justice Antonin Scalia may not like it, the reality is that the U.S. Supreme Court is regularly influenced by international law. In both *Roper v. Simmons* and *Graham v. Florida*, the Court referred to global consensus on specific sentencing practices to bolster their decision. *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 130 S.Ct. 2011 (2010). Continuing in that vein, current research indicates that the international community does not use life-without-parole sentences for adults with the same frequency as the United States. As controversial as it may be in the United States, the fact that the international community generally eschews the practice of sentencing people to die in prison could provide a supplementary argument in cases challenging these sentences under the Eighth Amendment's prohibition on cruel and unusual punishment.

The reasoning expressed in *Graham* and *Roper* reveals that the U.S. Supreme Court takes into account international law and practices in certain contexts. While stopping short of ruling that international law was binding on the United States, the Court has used the practice of nations to provide support for its decisions. The Court recognizes that nations are implementing international law domestically, and their laws and practices reinforce the Court's interpretation of the Eighth Amendment. This is profoundly important because it demonstrates that the Supreme Court does not view American jurisprudence as completely isolated from international law. What the rest of the world does matters, even if the Court doesn't actually consider itself controlled by international law.

Roper v. Simmons is a seminal case in which the Court found that capital punishment imposed on juveniles under the age of 18 violated the Eighth Amendment's prohibition against cruel and unusual punishment. Justice Kennedy authored the majority opinion and expressly referred to

international practice as providing support for the conclusion that capital punishment for juveniles is unconstitutional. *Roper*, 543 U.S. 551 at 554. He stated that,

[t]he overwhelming weight of international opinion against the juvenile death penalty is not controlling here, but provides respected and significant confirmation for the Court's determination that the penalty is disproportionate punishment for offenders under 18. The United States is the only country in the world that continues to give official sanction to the juvenile penalty. It does not lessen fidelity to the Constitution or pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples underscores the centrality of those same rights within our own heritage of freedom.

Roper, 543 U.S. 551 at 554. The analysis continued with a breakdown of relevant treaty provisions and the number of countries that engaged in the practice, but the point was made in the succinct summary: The actions of the international community do not escape notice of the Supreme Court.

Justice Kennedy continued this line of reasoning when the Supreme Court decided *Graham v. Florida*. In that instance, the Court found that sentencing juveniles who had committed non-homicide crimes to life without the possibility of parole was unconstitutional. The majority stated that

[a]dditional support for the Court's conclusion lies in the fact that the sentencing practice at issue has been rejected the world over: the United States is the only Nation that imposes this type of sentence. While the judgments of other nations and the international community are not dispositive as to the meaning of the

Eighth Amendment, the Court has looked abroad to support its independent conclusion that a particular punishment is cruel and unusual.

Graham, 130 S. Ct. at 2017.

International Law

The fact that the Supreme Court is looking at international practice (inherently influenced by international law) has profound implications for future criminal-defense litigation. Article 10(3) of the International Covenant on Civil and Political Rights (ICCPR) states that "[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation." International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95-20 (1992), 999 U.N.T.S. 171. The ICCPR has been signed and ratified by the United States and is therefore considered binding under the Constitution. The United States attached a declaration to the treaty asserting that none of the provisions is self-executing and that ratification was not intended to create a private cause of action in U.S. courts. Despite the declaration, which has been questioned by the treaty body overseeing compliance with the ICCPR, the United States is still bound by its provisions, and arguably these provisions could be raised as a defense in criminal court. U.N. Human Rights Comm. *General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.6 § 8 (1994). International legal experts also argue that some provisions of the ICCPR constitute customary international law and therefore are still binding on the United States. Customary international law requires that two conditions are met: first, that there is uniform or close to uniform practice within the community of

nations, and second, that these countries are acting under what they perceive as an existing legal obligation, or *opinio juris*. The fact that over 160 countries are party to the ICCPR, Article 10(3) can be considered the *opinio juris* under which the vast majority of countries are modeling themselves on and thus can constitute customary international law. Evidence of state practice

demonstrates a general acceptance of the legal obligation, which in turn can be considered to create a customary norm and is therefore binding on nations whether or not they have formally recognized it. Connie de la Vega, *Protecting Economic, Social, and Cultural Rights*, 15 Whittier L. Rev. 471, 478 (1994).

While these arguments continue to

be debated, there is no question that the U.S. Supreme Court looks to the actual practices of the international community to support their own decisions in regard to discredited sentencing practices. Article 10(3) of the ICCPR is important because the majority of countries in the world do consider the ICCPR to be binding international law and therefore have worked

International Practice

Early-stage research, generously financed by the Ford Foundation, indicates that the international community generally disavows life-without-parole sentences. Focusing on reformation and social rehabilitation as required by the ICCPR means that countries are increasingly ensuring that their penitentiary systems are not simply retributive. In the community of nations, life-without-parole sentences are a rarity and even life sentences are not used with regular frequency.

In Latin America, a number of countries go as far as to have constitutional provisions that prohibit “perpetual sentences” (*penas perpetuas*), or life sentences. Brazil, Colombia, Costa Rica, El Salvador, and Venezuela all constitutionally prohibit perpetual sentences. Constituição Federal [C.F.] [Constitution] art. XLVII (3) (Braz.); Constitución Política de Colombia [C.P.] art. 34, Constitución Política de la República de Costa Rica 1949 [Constitution] art. 40; Constitución de la República de El Salvador 1983 [Constitution] art. 27; Constitución de la República Bolivariana de Venezuela Dec. 30, 1999 [Constitution] art. 44 § 3. Many of the countries in the region cap their maximum sentences in their criminal codes or constitutions, essentially prohibiting an indefinite whole life sentence. For instance, Panama caps its maximum sentence at 20 years, while Paraguay caps it at 25 years. Código Penal [Cód. Pen.] art. 47 (Pan.); Código Penal [Cód. Pen.]

art. 38 (Para.). Nicaragua, Bolivia, Brazil, the Dominican Republic, Honduras, Uruguay, and Venezuela have provisions that provide for 30-year maximum sentences. Constitución Política de la República de Nicaragua [Constitution] art. 37; Código Penal [Cód. Pen.] art. 27(1) (Bol.); Código Penal [C.P.] art. 75 (Braz.); Código Penal de la República Dominicana [Cód. Pen.] art. 18 (Dom. Rep.); Código Penal [Cód. Pen.] art. 35 (Hond.); Código Penal de Uruguay [Cód. Pen.] art. 68; Código Penal [Cód. Pen.] art. 94 (Venez.). Ecuador allows for a maximum single sentence of 25 years and consecutive sentences of no more than 35 years. Código Penal [Cód. Pen.] arts. 53, 81 (Ecuador). Guatemala and Costa Rica cap their maximum sentences at 50 years. Código Penal [Cód. Pen.] art. 69 (Guat.); Código Penal [Cód. Pen.] art. 51 (Costa Rica). In 2001, Mexico’s Supreme Court of Justice ruled that life sentences are prohibited by Mexico’s constitution. Rodrigo Labardini, *Life Imprisonment and Extradition: Historical Development, International Context, and the Current Situation in Mexico and the United States*, 11 Sw. J. L. & Trade Am. 1, 2 (2005). Prior to December 2010, the maximum sentence available in El Salvador was 75 years. A recent decision by El Salvador’s supreme court declared the sentence unconstitutional, arguing that it goes against the prohibition of life imprisonment set in the constitution and contradicts the constitutional object of punishment, which is to rehabilitate

and resocialize. *Salvadoran High Court Says 75-Year Jail Term Unconstitutional*, Latin American Herald Tribune, available at <http://laht.com/article.asp?ArticleId=382266&CategoryId=23558>.

Most of Europe also eschews life-without-parole sentences. Portugal has a constitutional prohibition, while Norway and Spain do not even have provisions for life sentences in their criminal codes. Dirk van Zyl Smilt, *Outlawing Irreducible Life Sentences: Europe on the Brink?*, 23 Fed. Sent’g Rep. 1, 41 (2010). Many of the European countries have life sentences where release must be considered after a certain period has been served: Belgium, with a 10-year period; Austria, Germany, Luxemburg, and Switzerland with 15 years; the Czech Republic, Romania, and Turkey with 20 years; Poland, Russia, Slovenia, and Slovakia with 25 years; Lithuania with 26 years; and Estonia with 30 years. *Id.* at 41.

Research into the practices in the rest of the world is still being done, but superficial investigation indicates that while life sentences may exist, they are generally accompanied by a mechanism for early release. When exceptions exist, they are usually only in rare instances such as terrorist acts. Sentencing a person to die in prison is by and large an American practice, and comparatively no other country has the rates of prisoners serving this type of sentence.

toward implementing its provisions in their own system. The Human Rights Committee, the oversight body for the ICCPR, has provided general comments to assist in the interpretation of the treaty. In the general comment on Article 10, the committee stated that “[a]s to article 10, paragraph 3, which concerns convicted persons, the Committee wishes to have detailed information on the operation of the penitentiary system of the State party. No penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner.” U.N. Human Rights Comm., *General Comment No. 21: Concerning Humane Treatment of Persons Deprived of Liberty (Article 10)* U.N. Doc. HRI/GEN/1/Rev.1 at 33 (1994). A logical inference is that a system that is ordered toward reformation and social rehabilitation of prisoners does not at the outset sentence someone to a term in which he or she holds no hope of ever being released. Inherent in a system oriented toward social rehabilitation is the idea that the system will work with the offender so that if the offender can prove he or she merits release, that such a mechanism exists to provide that release. Few will argue that there are convicted offenders who prove to be too dangerous to be released under the current paradigm, but the point is that the system will attempt to weed out those individuals while providing an earned

opportunity for release for others.

Life-without-parole sentences in the United States run contrary to the notion that a prison system’s essential aim is the reformation and social rehabilitation of the prisoners. Justice Kennedy, writing for the majority, recognized this fact and stated that “[a] sentence of life imprisonment without parole, however, cannot be justified by the goal of rehabilitation. The penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person’s value and place in society.” *Graham*, 130 S. Ct. at 2029–2030. It is therefore clear in this instance that the United States is not following legal guidelines put forth in a treaty that it has signed and ratified. While the Supreme Court may not look for direct guidance in the language of Article 10 of the ICCPR, there is no doubt that the Court has been influenced by the overwhelming weight of global practice in the past and will likely continue to be influenced in the future.

Life-Without-Parole Sentences in the United States

Considering that the rest of the world rarely invokes life sentences, the statistics on these sentences in the United States provide striking contrast. According to the Sentencing Project, there are currently

140,610 individuals in the United States serving life sentences (one out of every eleven prisoners), with 41,095 of them serving life-without-parole sentences. Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 Fed. Sent’g Rep. 1, 27 (2010). Equally shocking is the fact that the population of individuals serving life without parole has increased significantly compared to the parole-eligible population. The number of offenders sentenced to life without parole has increased by 22 percent from 2003 to 2008, from 33,633 to 41,095. *Id.* at 27. These statistics do not include individuals who have received life sentences but are eligible for parole, roughly 140,000 people. *Id.* at 32. These enormous numbers represent the move that the United States has made away from any focus on rehabilitation to simply meeting the goals of incapacitation and retribution. The United States continues to proceed in the opposite direction from the rest of the world.

Conclusion

Signatories to the International Covenant on Civil and Political Rights are bound to ensure that their penitentiary system should not be solely retributive under Article 10(3) of the treaty. As a result, countries are disavowing life-without-parole sentences and looking for ways to incorporate the goal of reformation and social rehabilitation into their systems. As research continues to document this fact, briefs challenging life-without-parole sentences and consecutive sentences amounting to life without parole should include the fact that the United States is completely out of step with the rest of the world. Pursuant to Justice Kennedy’s majority opinions in *Roper* and *Graham*, the weight of world opinion under international law can serve to aid U.S. courts in further interpreting protections under the U.S. Constitution. ■

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Former First Assistant U.S. Attorney, Southern District of Texas, Talks about Trends and Issues

BY VICTOR VITAL

Government enforcement activity in the export-controls area has become increasingly prevalent in recent years. Victor Vital, a trial lawyer handling white-collar crime matters at Greenberg Traurig, LLP, recently sat down to have a discussion about that issue with Jeff Vaden, who is a white-collar criminal defense lawyer at Bracewell & Giuliani LLP. Jeff is the former first assistant U.S. attorney for the Southern District of Texas. In addition to export controls, Victor and Jeff discussed the issues of cyber-security and “hactivism.” Here is a transcript of their discussion.

Vital: Tell us about your background.

Vaden: I am a former federal prosecutor in the Southern District of Texas, and started as a partner in Bracewell & Giuliani’s White Collar Defense Practice Group on February 28, 2011. Prior to joining the firm, I served for almost 12 years in the U.S. Attorney’s Office, Southern District of Texas, based in Houston, as an assistant U.S. attorney, senior litigation counsel, and finally as the first assistant U.S. attorney.

While at the Department of Justice, I was honored to receive the Director’s Award for Superior Performance in 2008, the Immigration and Customs Enforcement Assistant Secretary’s Award in 2007, and the 20th Anniversary National Award, Organized Crime and Drug Enforcement Task Force in 2002. Before joining the Department of Justice, I served as an assistant district attorney in Harris County, Texas (Houston) for five years, trying 60 first-chair jury trials to verdict.

Vital: What were your responsibilities with the U.S. Attorney’s Office, and what were your areas of expertise?

Vaden: During my tenure at the Department of Justice, I was responsible for directing criminal prosecutions and grand-jury investigations in areas including U.S. export controls and economic sanctions,

bank fraud, public corruption, immigration, money laundering, counterterrorism, and national security. The focus of my practice the last few years at the U.S. Attorney’s Office was on export controls and economic sanctions, particularly in the oil-field-services industry.

Vital: Let’s talk about export controls enforcement. What do you see as the enforcement priorities, trends, and areas of principal focus for this year and the next few years?

Vaden: Since 2007, the Department of Justice has made it a priority to have a more collective, coordinated effort to enforce the various export-control regimes. It is viewed as a national-security issue because so many of the economic sanctions are in place to prevent countries with links to terrorism or human-rights abuses from reaping the financial benefit of having access to U.S. products and services. Additionally, the United States wants to limit access to goods and technologies that erode the advantage our military possesses by having superior technology. Given the ever-increasing reliance and value of technology, the U.S. government will continue to use every tool available to enforce these laws designed to protect American commercial and security interests. In fact, as recently as March 2011, the U.S. Government Accountability Office asked the U.S. Department of Commerce to work with the FBI and U.S. Immigration and Customs Enforcement to prevent military technology from reaching threat countries.

Vital: In light of current trends in the export-control and other areas, talk about what multinationals should be doing from a compliance standpoint.

Vaden: First and foremost, multinationals should establish, and enforce, a culture of compliance from the top down. Most of the compliance failures I saw were due to a company’s lack of rigor and diligence in

the execution of their compliance policies, rather than a problem with the policy in place. Also, they have to conduct intelligent risk assessments, tailored to the geographic or regional realities they face. This is particularly true in regard to their third-party relationships, such as agents, distributors, consultants, and joint-venture partners. Finally, if there is a compliance failure, the company should aggressively investigate the matter, and take corrective action.

Vital: There has been an ever-increasing focus on FCPA compliance over the past few years. Are companies and their counsel overlooking export control and economic-sanction compliance? And is the government underemphasizing or not sufficiently highlighting enforcement actions and prosecutions of export and economic-sanction violations vis-à-vis FCPA enforcement and prosecution?

Vaden: Generally speaking, I don’t think either is the case. I think most responsible companies take the necessary steps to ensure they are compliant with the law and regulations. However, I do believe a small percentage of companies, or at least individuals employed by them, do take calculated risks that the odds are in their favor that they will not be caught engaging in illegal behavior. That is an unfortunate part of human behavior. I think the government does a good job of highlighting enforcement actions and prosecutions across the board. Clearly, the FCPA cases have received the lion’s share of the publicity in recent years, but that is because there have been some significant monetary settlements with some of the world’s biggest companies. When there are significant settlements of export-control or economic-sanctions matters, for example BAE or Credit Suisse, they garnered widespread media coverage.

Vital: Talk about corporate and cyber-espionage and what you see on the horizon.

Vaden: This is another area that is the focus

of increased enforcement activity. Crimes such as economic espionage and theft of trade secrets are on the radar screen for the Department of Justice, and resources have been dedicated to investigate and prosecute alleged violations. If you think about it, there are only three ways to obtain new technology: 1) research and development, 2) purchase, or 3) theft. The first two can be expensive and time consuming, and the third is what drives the increased law-enforcement focus in this area. For the foreseeable future, especially in parts of the country with large concentrations of technology-based companies, you will see a lot of activity in this area.

Vital: WikiLeaks has been a hot topic over the past year. What are the criminal implications for such leaks, and what compliance issues are implicated?

Vaden: First and foremost, the unauthorized release of classified information is a matter the government takes very seriously. While many investigations in this area are high-profile, even less significant violations garner law enforcement's attention because it is one of those "zero-tolerance" areas. Additionally, when defense counsel signs up to handle one of these matters, they have to submit to a background check before they can be "cleared" to see the evidence in the investigation. That can slow down the process, and it might discourage

some from getting involved altogether.

On the compliance side, it is an important point to remember that only authorized government agencies can "classify" information, and its unauthorized release doesn't "declassify" it. So in the context of a WikiLeaks-type scenario, just because someone with access to classified information makes it public, it isn't then "declassified." Subsequent users or possessors of such information could face criminal liability themselves. Employers or contractors who function in an environment with classified information should be diligent in conducting background checks on those who will have access to such material, and to ensure that access is limited to those with a legitimate "need to know." Physical limitations should also be put into place, for example, any type of personal portable or removable storage media should be banned from the workplace. Additionally, electronic barriers such as firewalls should be used to limit access, and hopefully detect the unauthorized access to classified information.

Vital: Defense lawyers and corporate America expect a significant uptick in enforcement and prosecution activity in light of Dodd-Frank. It seems that disclosures of alleged corporate wrongdoing by WikiLeaks also could lead to an increase in SEC enforcement actions as well as

DOJ prosecutions. What's your view on that point? And will (and, in fact, should) the government put its imprimatur on WikiLeaks by pursuing matters related to its disclosures?

Vaden: I think public disclosures of wrongdoing will generate activity by both the SEC and DOJ, regardless of the source. The manner in which the discloser obtained the information may be of more importance. Generally speaking, if the source obtained the information in a way that is unethical or illegal, the government would be very reluctant to act on it, as they should. However, the more grave or substantial the substance of the WikiLeaks' disclosure, the more likely it seems that the government would be to pursue enforcement or prosecution. This would involve an independent, law-enforcement investigation to corroborate, supplement, and position the evidence for the government's use. This is an area that requires a careful balancing and consideration of many issues, such as respect for law and order, punishment and deterrence, and not undermining privacy rights and corporate fiduciary duties.

Vital: Thanks, Jeff. ■

Victor Vital is a shareholder in Greenberg Traurig, LLP in Dallas, Texas.

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Government Investigation

continued from front cover

Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC, 05 Civ. 9016 (SAS), 2010 U.S. Dist. LEXIS 4546, at *14–15 (S.D.N.Y. Jan. 15, 2010). The SEC Enforcement Manual has adopted this standard: “A duty to preserve ESI and paper records generally arises when litigation is reasonably anticipated or foreseeable, as well as when litigation is pending.” SEC Enforcement Manual § 3.2.6.4.1.3 at 71 (Feb. 8, 2011), available at www.sec.gov/divisions/enforce/enforcementmanual.pdf. It is beyond dispute that the duty to issue a litigation hold is triggered when a party reasonably anticipates not just a civil litigation, but also a civil or criminal government investigation. “[O]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.” *Pension Comm.*, 2010 U.S. Dist. LEXIS 4546, at *15 (citations and internal quotation marks omitted).

The standard governing when to implement a litigation hold is easy enough to express. What is much more difficult is determining precisely what it means and how it should be applied in a given case. Courts and commentators have set forth several definitions of what it means to reasonably anticipate litigation or a government investigation. For instance, the Sedona Conference Working Group on Electronic Document Retention & Production, a resource that courts often rely upon when addressing ESI issues, states that “[a] reasonable anticipation of litigation arises when an organization is on notice of a *credible probability* that it will become involved in litigation . . .” *Sedona Conference Commentary On Legal Holds: The Trigger & The Process*, 11 Sedona Conf. J. 265, 271 (2010) (Guideline 1) (emphasis added).

Similarly, courts have held that the duty to preserve evidence attaches “when a party *should have known* that the evidence may be relevant to future litigation.” *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216

(S.D.N.Y. 2003) (emphasis added). “The future litigation must be ‘*probable*,’ which has been held to mean ‘*more than a possibility*.’” *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1068 (N.D. Cal. 2006) (emphasis added). “[A] litigant’s duty to preserve evidence arises when ‘he *knows or should know* [it] is relevant to *imminent or ongoing* litigation.’” *Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc.*, 621 F. Supp. 2d 1173, 1190 (D. Utah 2009) (emphasis added; citation omitted). Even these definitions are not exhaustive.

Applying these standards in the context of a government investigation, one might say that a party has a duty to preserve evidence when a government investigation is a credible probability or when a party should have known that an investigation was imminent. The standards are notably flexible, however, and no potential investigation-inducing event occurs in a vacuum. Courts scrutinize the circumstances of a particular case to determine when the duty to preserve is triggered.

Factors for Companies to Consider

Some events unambiguously trigger a duty to preserve documents, for example, the receipt of a civil or criminal complaint, information, or indictment. Likewise, the receipt of a subpoena, civil investigative demand, or other demand for documents, triggers the obligation. It is in the gray area between idle threat and receipt of a complaint or demand for documents where the difficult issues arise. To address these difficult issues, companies should consider the following factors among many others that could be applicable in any given case. Moreover, a company that decides a litigation hold is not necessary at one phase should constantly reconsider these factors, among others, to determine whether a subsequent event or new information should trigger a litigation hold. See, e.g., *Sedona Conference Commentary on Litigation Holds*, 11 Sedona Conf. J. at 272 (“Of course, later information may require an organization to reevaluate its determination and may result in a conclusion that litigation that previously had not been reasonably anticipated . . . is then reasonably anticipated.”).

The Specificity and Source of Warnings or Concerns

Companies and their counsel should consider the specificity of a warning about misconduct that could trigger a government investigation. In the civil context, courts have closely analyzed the specificity of a potential plaintiff’s communications and threats to determine whether a duty to preserve was triggered. See, e.g., *Viramontes v. U.S. Bancorp*, No. 10C761, 2011 U.S. Dist. LEXIS 7850, at *9–11 (N.D. Ill. Jan. 27, 2010) (holding that the plaintiff’s letter to human resources was insufficient to trigger a preservation obligation because nothing in it suggested “that litigation concerning the matters at issue in this case was imminent or reasonably foreseeable” where the letter complained that the plaintiff’s supervisor treated employees and customers in an unprofessional manner, but did not state that the employee might assert possible claims against the defendant).

Applying this principle in the investigation context, a company should consider whether it has received a specific threat or warning about conduct that can lead to a government investigation. For example, a warning from an employee in the accounting department that the controller is “cooking the books” should certainly trigger some level of inquiry, but may not be sufficient to trigger a litigation hold. On the other hand, the duty may be triggered if an employee reports that, at the end of the fiscal year, the controller sold \$100,000 worth of widgets to ABC Co., and then bought them back as soon as the next fiscal year started, in an effort to artificially increase revenue in the current fiscal year.

Not only should companies measure the specificity of a threat or warning about misconduct, but also they should consider the specificity of their own employees’ and officers’ beliefs about whether an investigation is likely, which of their employees hold such beliefs, and what positions such employees hold. In *Cenveo Corp. v. Southern Graphic Systems, Inc.*, No. 08–5521, 2010 U.S. Dist. LEXIS 104211 (D. Minn. Sept. 30, 2010), the duty to preserve arose at the time the defendant’s CEO told other employees of the company that “he was concerned about a lawsuit.” *Id.* at *4,

10–11. In *Viramontes*, however, although a supervisor later testified that “soon” after he first read the plaintiff’s letter, he thought it gave rise to “some possible legal ramifications for either” him or the defendant employer, the court held that the subjective thought of one employee was not sufficient to impose a firm-wide duty to preserve. 2011 U.S. Dist. LEXIS 7850, at *12.

Thus, a statement by a mid-level manager of a company that “we should be careful because the government may take issue with this” could be viewed differently than a statement by an executive officer that “we’re going to receive a subpoena any day now.” Companies and their counsel need to carefully consider the specificity of statements by those alleging misconduct and those responding to such allegations, and the employment positions of such persons, to apply a reasonable, good-faith analysis regarding whether the statements trigger a duty to preserve documents.

Whether the Conduct Typically or Historically Has Triggered an Investigation

A company and its counsel should consider whether conduct at issue is typically the type of conduct that triggers a government investigation. In some instances, repeat players who know, or should know, that certain conduct will trigger an investigation, may be held to more stringent standards in determining when the duty to preserve arose. *See, e.g., Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co.*, No. 06 Civ. 3972, 2011 U.S. Dist. LEXIS 4768, at *47 (S.D.N.Y. Jan. 14, 2011) (holding that the plaintiff was on notice of the duty to preserve as soon as a dispute arose because plaintiff was “a sophisticated commercial actor to whom the likelihood of a dispute over liability for” a damaged product “was so evident that they notified [the defendant] that they were holding them liable . . . within days of discovering” the alleged defect).

Thus, as soon as a company becomes aware of conduct that, based on the company’s prior experience, it knows or believes will be the subject of a government investigation, the company should consider issuing a litigation hold—even before it receives a request for information from the government. For example, a company that

does business overseas may be subject to repeated scrutiny for potential violations of the Foreign Corrupt Practices Act (FCPA). That company might also know that, in the current enforcement environment, the U.S. Department of Justice has been focusing heavily on FCPA violations. *E.g., Assistant Attorney General Lanny A. Breuer Speaks at the 24th National Conference on the Foreign Corrupt Practices Act*, Nov. 16, 2010, available at www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html (“I’m proud to say that our FCPA enforcement is stronger than it’s ever been—and getting stronger.”). That company might be expected to reasonably anticipate an investigation as soon as potential misconduct is identified because it is familiar with FCPA enforcement efforts by the government.

Pending Investigations of Companies in the Same Industry

Companies and their counsel should also consider whether the company is likely to be investigated as part of a broader industry-wide investigation. It is not uncommon for the government to launch an industry-wide investigation of certain conduct that occurs at many companies. For example, on August 4, 2010, former New York Attorney General—currently New York Governor—Andrew Cuomo, announced “an industry-wide investigation into predatory health care lending.” *See* Office of the Atty. Gen., Media Center, Aug. 4, 2010, available at www.ag.ny.gov/media_center/2010/aug/aug4a_10.html. The New York Attorney General’s Office announced that it issued 10 subpoenas to companies that allegedly pressured consumers into using a certain healthcare credit card with misleading sales pitches that pushed consumers into debt unwittingly. *Id.* If a company that also marketed the same credit card to consumers, but did not receive a subpoena, became aware of the investigation, it might consider whether a subpoena will be forthcoming and whether it therefore should reasonably anticipate an investigation. *See, e.g., Phillip M. Adams & Assocs.*, 621 F. Supp. 2d at 1191 (holding that the defendant had a duty to preserve electronic evidence years before the plaintiff threatened suit because of the defendant’s awareness that others in its

industry were being sued or settling cases based on the same alleged patent infringement that was at issue for the defendant).

This is not meant to suggest that a company should issue a litigation hold every time another company in the same line of business receives a subpoena. Indeed, a company is not required to issue a litigation hold based on speculation or a vague fear that it might receive a subpoena one day. But if there is an announced industry-wide investigation, all companies in that industry should take notice and consider how they should prepare. Likewise, a company that becomes aware of an industry-wide government investigation should consider whether it would be appropriate to proactively start an internal investigation to determine if that company has engaged in similar conduct that may be subject to a government investigation. Depending on the results of the internal investigation, the company may be able to determine if a litigation hold is necessary before the government comes knocking on its door.

The Commencement of an Internal Investigation

Companies and their counsel should also consider whether the commencement of an internal investigation triggers a duty to issue a litigation hold. Many internal investigations are undertaken because of, or in response to, a government investigation or request for information. In those circumstances, the duty to issue a litigation hold has been triggered. However, companies often commence an internal investigation before any government investigation is reasonably anticipated, even when the subject of the internal investigation could one day be the subject of a government investigation. This can raise difficult questions as to when to implement a litigation hold.

Instinctively, a company might feel compelled to implement a litigation hold as soon as it decides to conduct an internal investigation, even before any misconduct is identified. This has the advantage of preserving documents that would aid in the internal investigation, and assuring that documents are not inadvertently destroyed well in advance of any potential government investigation.

However, there can be disadvantages to implementing a litigation hold prematurely. First, a company may not want to reveal that it is commencing an internal investigation because it may not want to tip off employees who are suspected of wrongdoing. One way to address this concern may be to issue a limited litigation hold only to those employees who are not suspected of wrongdoing, and to try to obtain documents about potential misconduct in ways other than through the potentially culpable employees. But it may be difficult to identify those employees before the internal investigation has commenced.

A second disadvantage of issuing a litigation hold before determining that any misconduct occurred is that a litigation hold might result in business interruption, inconvenience, and significant costs for no reason. An internal investigation that triggers a litigation hold may ultimately find that nothing improper occurred. On balance, though, companies need to recognize that employees sometimes need to be inconvenienced, and business sometimes need to be disrupted, to protect the broader interests of the company in complying with its legal obligations.

In sum, when commencing an internal investigation, a company needs to balance the benefits of implementing a litigation hold early in the process against the risks of doing so. The overriding concern must be whether the company can determine at every stage of the internal investigation that a government investigation in the future is reasonably anticipated.

Claiming Protections of the Work-Product Doctrine

A tricky issue that companies and their counsel sometimes face is the impact on the duty to implement a litigation hold resulting from asserting the protections of the attorney-work-product doctrine. Parties may inadvertently “admit” that a litigation hold should have been put in place earlier than it was implemented by invoking the protections of the doctrine. Federal Rule of Civil Procedure 26(b)(3) protects from disclosure “things that are prepared in anticipation of litigation.” Fed. R. Civ. P. 26(b)(3). *See also* Fed. R. Evid.

502(g) (“work-product protection’ means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.”) The work-product doctrine also applies in criminal matters. *E.g., United States v. Nobles*, 422 U.S. 225, 238–39 (1975).

Companies need to know that, once they “anticipate” litigation or an investigation for work-product purposes, a court may find that they also “reasonably anticipated” litigation or an investigation for purposes of issuing a litigation hold. In *Siani v. State Univ. of N.Y. at Farmingdale*, 09-CV-407 (JFB) (WDW), 2010 U.S. Dist. LEXIS 82562 (E.D.N.Y. Aug. 10, 2010), the defendants issued a litigation hold on August 1, 2008, following the receipt of a complaint filed with the Equal Employment Opportunity Commission. The plaintiff contended that the defendants’ duty to preserve documents arose in early 2008 “when outside legal counsel was retained by the defendants for matters relating to [the plaintiff’s] allegations of ongoing discrimination.” *Id.* at *16. The plaintiff’s argument relied on the defendants’ withholding of documents created in February 2008 on the grounds that they were attorney work product prepared “in anticipation of litigation.” *Id.* In support of their work-product argument, the defendants contended that documents created in February 2008 were protected from disclosure because the plaintiff “had raised ‘concerns that he was a victim of ongoing age discrimination’ at a meeting in January 2008, and that [I]itigation was therefore reasonably foreseeable’ as of that date.” The court agreed with the plaintiff’s argument that, “[i]f [litigation] was reasonably foreseeable for work-product purposes . . . it was reasonably foreseeable for duty to preserve purposes.” It described the plaintiff’s argument as a “common sense conclusion that if the litigation was reasonably foreseeable for one purpose in January 2008, it was reasonably foreseeable for all purposes.”

Thus, if a company and its counsel invoke the work-product doctrine because documents are created “in anticipation of litigation” or an investigation, they should expect that government investigators will

credibly claim a litigation hold should have been implemented no later than the date on which the work-product doctrine was first invoked.

Consequences of Failure

When analyzing when to implement a hold, it is important for a company to recognize and consider the severe consequences that could flow from the failure to do so at the right time.

Loss of Beneficial Documents

One of the most often overlooked benefits of issuing a litigation hold early is the preservation of documents that actually benefit a company’s position. Usually, discussions around the failure to issue a litigation hold center on the “doomsday” scenario—all the severe sanctions and penalties that might flow from failure to issue a timely hold. But it is equally important to preserve helpful documents. There may be a perfectly legitimate explanation for a company’s conduct, and a company will want to preserve all of the documents that support that explanation. A company may lose the ability to defend itself adequately if it destroys beneficial documents.

Loss of Cooperation Credit

The failure to issue a litigation hold and the consequential destruction of relevant documents can thwart a company’s ability to obtain cooperation credit from the government. Although neither the Securities and Exchange Commission (SEC) nor the U.S. Department of Justice explicitly state that a company will receive credit for timely issuing a litigation hold, both government agencies will give credit to companies that provide all relevant information in response to an investigation. The loss of relevant documents due to the failure to implement a timely hold could prevent companies from receiving that credit.

The SEC’s cooperation standards set forth the criteria the commission considers in determining whether a party has cooperated in an investigation. *See* S.E.C., Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to

Agency Enforcement Decisions, Securities Exchange Act Release No. 44969 (Oct. 23, 2001) (Seaboard Report), *available at* www.sec.gov/litigation/investreport/34-44969.htm. In some circumstances, cooperation can cause the SEC to take no enforcement action, bring reduced charges, or seek lighter sanctions. Some of the factors the SEC will consider in determining whether a party cooperated include: what steps the company took upon learning of the misconduct; whether the company committed to learn the truth fully and expeditiously; whether the company made available to the SEC the results of its review of misconduct and provided sufficient documentation reflecting the company's response to the situation; and whether the company voluntarily disclosed information to the SEC that was not directly requested and that might not otherwise have been uncovered. *See id.* Any one of these factors would be difficult to satisfy if a company destroyed relevant documents because it failed to implement a timely litigation hold.

Similarly, in the "Filip Memorandum," the U.S. Department of Justice set forth the "Principles of Federal Prosecution of Business Organizations" and discussed how the Department measures and values a company's level of cooperation. *See* Dept of Justice, Title 9, Ch. 9-28.00, *available at* www.justice.gov/opa/documents/corp-charging-guidelines.pdf. Several factors relevant to cooperation can be impacted by the timeliness of a litigation hold. One factor the Department of Justice considers is whether a company disclosed all relevant, non-privileged, facts concerning misconduct. *See id.* § 9-28.720 at 9. Additionally, the Department of Justice will consider whether a company provided non-privileged documents and other evidence. *Id.* at 9 n.2. Each of these factors would be difficult for a company to satisfy if it lost relevant documents due to the failure to issue a timely litigation hold. The Department of Justice will also consider whether a company obstructed a government investigation by, for example, providing an "incomplete or delayed production of records." *Id.* § 9-28.730 at 12. The failure to implement a timely litigation hold may be deemed obstruction of justice in some circumstances.

Criminal Liability

In certain circumstances, and where the appropriate intent is proven, the failure to implement a litigation hold and the consequential destruction of documents can result in criminal liability. In response to the Enron/Arthur Andersen scandals, Congress enacted 18 U.S.C. § 1519, a part of the Sarbanes-Oxley Act aimed at criminalizing certain document-destruction conduct. The statute imposes criminal liability on a person who:

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 or case.

18 U.S.C. § 1519.

By its terms, section 1519 criminalizes conduct undertaken knowingly and with intent to impede or obstruct a government investigation. It also criminalizes conduct knowingly undertaken with the intent to impede or obstruct a contemplated investigation. The scienter requirements of the law preclude its application to an inadvertent destruction of documents. But the failure to implement a timely litigation hold may be circumstantial evidence of intent in some cases. In *U.S. v. Fumo*, 628 F. Supp. 2d 573 (E.D. Pa. 2007), the government charged that the defendant had destroyed email and other electronic evidence to keep it out of the hands of investigators while he was aware of an ongoing investigation relating to his conduct, all in violation of 18 U.S.C. § 1519. Notably, the defendant had not received a request for information or a criminal complaint before he destroyed documents. Rather, the government alleged the defendant knew about the investigation through press coverage. Even though the first subpoena in the investigation was not alleged to have been issued until April 2004, and even then, was not issued to the

defendant who allegedly destroyed documents, the court found that the indictment sufficiently alleged that the defendant was aware of the investigation at least as early as November 2003, when the *Philadelphia Inquirer* ran an article stating that the defendant was the subject of an investigation. Given that knowledge, the defendant had an obligation not to destroy documents.

The statute's prohibition on destroying documents in "contemplation" of an investigation means destroying documents may be a crime long before the government has actually begun its investigation. In *U.S. v. Russell*, 639 F. Supp. 2d 226 (D. Conn. 2007), the court stated that "in contemplation of" . . . is commonly understood as meaning something that is envisioned or anticipated." Because the indictment alleged that the defendant's destructive act "was done with the purpose of effecting, or with an expectation that, a federal investigation might ensue, his alleged conduct" was prohibited under the statute. The court rejected the defendant's motion to dismiss and ruled that a jury would determine whether "at the time [the defendant] destroyed [the] Computer, an official proceeding . . . or [an] FBI investigation . . . were foreseeable to or anticipated by" him.

Conclusion

Companies and their counsel who discover conduct that may lead to a government investigation need to apply a reasonable, good-faith analysis to decide when is the appropriate time to implement a litigation hold. They should consider all facts available at any given time to determine whether to reasonably anticipate a government investigation. Although implementation of a litigation hold can be disruptive and costly to an organization, the failure to implement a hold at the right time can lead to disastrous results. ■

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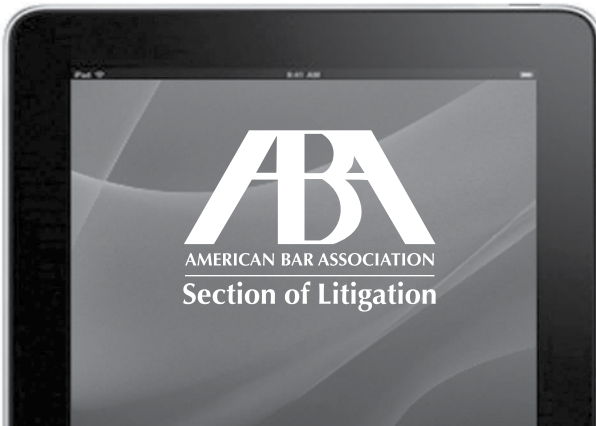
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