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THE CORPORATE AND CRIMINAL FRAUD ACCOUNTABILITY ACT OF 2002

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Mr. LEAHY, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[Including the cost estimate of the Congressional Budget Office]

[To accompany S. 2010]

The Committee on the Judiciary, to which was referred the bill (S. 2010) to provide for criminal prosecution of persons who alter or destroy evidence in certain Federal investigations or defraud investors of publicly traded securities, to disallow debts incurred in violation of securities fraud laws from being discharged in bankruptcy, to protect whistleblowers against retaliation by their employers, and for other purposes, having considered the same, reports favorably thereon, with an amendment in the nature of a substitute, and recommends that the bill, as amended, do pass.

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I. Purpose

The purpose of S. 2010, the "Corporate and Criminal Fraud Accountability Act of 2002," is to provide for criminal prosecution and enhanced penalties of persons who defraud investors in publicly traded securities or alter or destroy evidence in certain Federal investigations, to disallow debts incurred in violation of securities fraud laws from being discharged in bankruptcy, to protect whistleblowers who report fraud against retaliation by their employers, and for other purposes.

II. Background and Need for the Legislation

A. Introduction

The "Corporate and Criminal Fraud Accountability Act of 2002," S. 2010, was introduced by Senator Patrick Leahy, with Senators Daschle, Durbin, and Harkin as original cosponsors, on March 12, 2002. This legislation aims to prevent and punish corporate and criminal fraud, protect the victims of such fraud, preserve evidence of such fraud, and hold wrongdoers accountable for their actions.

In the wake of the continuing Enron Corporation ("Enron") debacle, the trust of the United States' investors and pensioners in the nation's stock market has been seriously eroded. This is bad for our markets, bad for our economy, and bad for the future growth of investment in American companies. This bill would play a crucial role in restoring trust in the financial markets by ensuring that the corporate fraud and greed may be better detected, prevented and prosecuted. While greed cannot be legislated against, the federal government must do its utmost to ensure that such greed does not succeed. This bill contains a number of provisions intended to increase the criminal penalties for serious fraud, ensure that evidence—both physical and testimonial—is preserved and available in fraud cases, provide prosecutors with the tools they need to prosecute those who commit securities fraud, and make sure that victims of securities fraud have a fair chance to pursue their claims and recoup their losses.

B. Enron's collapse

Enron began in 1985 as a pipeline company in Houston, Texas. It garnered profits by promising to deliver agreed-upon numbers of cubic feet of gas to a particular utility or business on a specific day at market price. That changed with the deregulation of electrical power markets, a change due in part to lobbying from senior Enron officials. Under the direction of former Chairman Kenneth L. Lay, Enron expanded into an energy broker, trading electricity and other commodities.

According to a Report of Investigation commissioned by a Special Investigative Committee of Enron's Board of Directors ("the Powers Report"), Enron apparently, with the approval or advice of its accountants, auditors and lawyers, used thousands of off-the-book entities to overstate corporate profits, understate corporate debts and inflate Enron's stock price.

The alleged activity Enron used to mislead investors was not the work of novices. It was the work of highly educated professionals, spinning an intricate spider's web of deceit. The partnerships—with names like Jedi, Chewco, Rawhide, Ponderosa and

Sundance—were used essentially to cook the books and trick both the public and federal regulators about how well Enron was doing financially. The actions of Enron's executives, accountants, and lawyers exhibit a "Wild West" attitude which valued profit over honesty.

Some Enron executives, with the knowledge and approval of its Board of Directors, managed these entities, reaped millions of dollars in salary and stock options, and received conflict-of-interest waivers from Enron's Board. As the Powers Report states, "[m]any of the most significant transactions apparently were designed to accomplish favorable financial statement results, not to achieve bona fide economic objectives or to transfer risk" (Powers Report at 4). Much of this conduct occurred with "extensive participation and structuring advice from [Arthur] Andersen," ("Andersen") which was simultaneously serving as both consultant and "independent" auditor for Enron.[1]

With the assistance of Andersen and its other auditors, Enron apparently successfully deceived the investing public and reaped millions for some select few insiders.[2] To the outside world, Enron and its auditors were either not reporting their massive debt at all, or were making "disclosures [that] were obtuse, did not communicate the essence of [Enron] transactions completely or clearly, and failed to convey the substance of what was going on between Enron and its partnerships" (Powers Report at 17). In short, through the use of sophisticated professional advice and complex financial structures, Enron and Andersen were able to paint for the investing public a very different picture of the company's financial health than the true picture revealed. By the fall of 2001, the painting bore little or no resemblance to the reality.

According to a federal indictment, on October 16, 2001, Enron announced a $618 million net loss for the third quarter of 2001 and that it would reduce shareholder equity by $1.2 billion.[3] Six days later, the Securities and Exchange Commission ("SEC") began investigating the financial practices of Enron and Andersen. On November 8, 2001, Enron announced that it had overstated earnings during the prior four years by $586 million and was responsible for $3 billion in obligations that were never publicly reported. Upon these disclosures, Enron stock fell to $8.41 a share and has since fallen to less than $1 (the stock had been trading at near $90 per share). Less than a month later Enron filed for bankruptcy—the largest corporate bankruptcy in the history of the United States.

On February 6, 2001, at a Senate Judiciary Committee hearing on "Accountability Issues: Lessons Learned from Enron's Fall" ("Committee hearing"), witnesses testified that Enron's sudden collapse left thousands of investors holding virtually worthless stock, and most Enron employees with a worthless retirement account.

[1] Powers Report at 5. For example, Enron's records show that Andersen billed Enron $5.7 million for advice in connection with the now infamous "LJM" and "Chewco" transactions, beyond its regular audit fees. Id.

[2] For example, in one insider transaction, known as "Southhampton Place," insider Andrew Fastow, a senior Enron official, invested $25,000 and received $4.5 million in return in a period of two months. Powers Report at 16. On an annual basis, this represents a profit margin of over 100,000%.

[3] See Indictment, *United States* v. *Arthur Andersen LLP*, Cr. No. CRH–02–121, United States District Court for the Southern District of Texas at 2–3. ("Andersen Indictment"). The indictment, filed on March 7, 2002, charges Andersen with persuading others to destroy documents in violation of 18 U.S.C. § 1512(b)(2).

Pension funds nationwide, including state and union-owned pension funds, literally lost billions on Enron-related investments. Bruce Raynor, President of the Union of Needletrades, Industrial and Textile Employees ("UNITE") and Vice President of the American Federation of Labor-Congress of Industrial Organizations ("AFL–CIO"), and Co-Chair of the Council of Institutional Investors, testified that UNITE members lost millions in the Enron collapse and that institutional investments, such as pension funds, are "particularly vulnerable" to such fraud because of their reliance on index funds, which "rely on the market to accurately price securities." Firefighters, teachers, garment workers, and police officers who had no way of knowing or finding out about Enron's apparently deceitful conduct ahead of time lost millions in pension fund investments.

Mr. Raynor, Washington State Attorney General Christine O. Gregoire, and securities and legal ethics expert Professor Susan P. Koniak, of the Boston University School of Law, also testified that Enron was merely one extreme example of numerous other cases of fraud on investors. Like those cases, the few at Enron who profited appear to be senior officers and directors who cashed out while they and professionals from accounting firms, law firms and business consulting firms, who were paid millions to advise Enron on these practices, assured others that Enron was a solid investment.

C. The aftermath of Enron's collapse and the cover up

As investors and regulators attempted to ascertain both the extent and cause of their losses, employees from Andersen were allegedly shredding "tons" of documents, according to the Andersen Indictment. Instead of preserving records relevant and material to the later investigation of Enron or any private action against Enron, "Andersen partners assigned to the Enron engagement team launched on October 23, 2001, a wholesale destruction of documents at Andersen's offices in Houston, Texas." Moreover, "instead of being advised to preserve documentation so as to assist Enron and the SEC, Andersen employees on the Enron engagement team were instructed by Andersen partners and others to destroy immediately documentation relating to Enron, and told to work overtime if necessary to accomplish the destruction" (Andersen Indictment at 5–6).

The systematic destruction of records apparently extended beyond paper records and included efforts to "purge the computer hard drives and E-mail system of Enron related files" not only in Houston but in Andersen's offices in Portland, Chicago, Illinois, and London, England (Id. at 6). Indeed, the current rules on audit record retention are so vague that Andersen's lawyers issued ambiguous advice encouraging such document destruction—advice that they linked to highly questionable interpretations of current law. In addition to the indictment of Andersen, Andersen partner David Duncan, who did significant work for Enron, has pleaded guilty to the same obstruction charge. Allegedly, these actions were undertaken in anticipation of a SEC subpoena to Andersen for its auditing and consulting work related to Enron.

The apparent efforts to cover up any alleged misconduct by Enron or Andersen were not limited to Andersen and the destruction of physical evidence and documents. In a variety of instances when corporate employees at both Enron and Andersen attempted to report or "blow the whistle" on fraud, but they were discouraged at nearly every turn. For instance, a shocking e-mail from Enron's outside lawyers to an Enron official was uncovered. This e-mail responds to a request for legal advice after a senior Enron employee, Sherron Watkins, tried to report accounting irregularities at the highest levels of the company in late August 2001. The outside lawyer's counseled Enron, in pertinent part, as follows:

> You asked that I include in this communication a summary of the possible risks associated with discharging (or constructively discharging) employees who report allegations of improper accounting practices: 1. Texas law does not currently protect corporate whistleblowers. The supreme court has twice declined to create a cause of action for whistleblowers who are discharged * * *

In other words, after this high level employee at Enron reported improper accounting practices, Enron did not consider firing Andersen; rather, the company sought advice on the legality of discharging the whistleblower. Of course, Enron's lawyers would claim that they merely provided their client with accurate legal advice—there is no protection for corporate whistleblowers under current Texas law. In the end, Ms. Watkins did not report the matter to the authorities until after she had been subpoenaed, and after "tons" of documents had been destroyed.[4]

According to media accounts, this was not an isolated example of whistleblowing associated with the Enron case. In addition, a financial adviser at UBS Paine Webber's Houston office claims that he was fired for e-mailing his clients to advise them to sell Enron stock.[5] A top Enron risk management official alleges he was cut off from financial information and later resigned from Enron after repeatedly warning both orally and in writing as early as 1999 of improprieties in some of the company's off-balance sheet partnerships.[6] An Andersen partner was apparently removed from the Enron account when he expressed reservations about the firm's financial practices in 2000.[7] These examples further expose a culture, supported by law, that discourage employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally. This "corporate code of silence" not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity. The consequences of this corporate code of silence for investors in publicly traded companies, in particular, and for the stock market, in general, are serious and adverse, and they must be remedied.

D. The legal and ethical landscape and the need for reform

The Committee hearing of February 6, 2002, revealed that while Enron and Andersen were taking advantage of a system that allowed them to behave in an apparently fraudulent manner, as well as engage in both the destruction of valuable evidence and retalia-

[4] "Enron Changes Climate for Whistle-blowers," The Christian Science Monitor, March 1, 2002.
[5] "Man Says Advice to Sell Enron Led to Firing," New York Times, March 5, 2002.
[6] "Economist Raised Doubts About Partnerships; Enron Researcher Raised Issue in '99," Houston Chronicle, March 19, 2002.
[7] "Andersen Whistleblower was Removed," New York Times, April 3, 2002.

tion against potential witnesses, the regulators, the victims of fraud, and the corporate whistleblowers were faced with daunting challenges to punish the wrongdoers and protect the victims' rights. The legal regime that, on one hand, allowed this conduct to take place, and, on the other, may serve as an impediment to punishing all the wrongdoers and protecting all the victims has led to widespread calls for reform and support for S. 2010, in particular.

The following groups and individuals have written in support of S. 2010: a bipartisan group of State Attorneys General from Kansas, Oklahoma, Oregon, Georgia, Washington, Ohio, and Vermont, including both the current and incoming heads of the National Association of Attorneys General; the North American Securities Administrators Association, whose membership consists of the securities administrators in all fifty states, the District of Columbia, Canada, Mexico, and Puerto Rico; the AFL–CIO; numerous whistleblower protection groups, including the Government Accountability Project, Taxpayers Against Fraud, and the National Whistleblower Center; consumer protection groups, including the Consumers Union and the Consumer Federation of America; the Vermont Department of Banking, Insurance, Securities and Health Care Administration; and the California State Teachers' Retirement System.

Outlined below are some of the shortcomings in current law that the Enron matter has publicly exposed.

First, unlike bank fraud, health care fraud, and bankruptcy fraud, there is no specific "securities fraud" provision in the criminal code to outlaw the breadth of schemes and artifices to defraud investors in publicly traded companies.[8] Currently, in securities fraud cases, prosecutors must rely on generic mail and wire charges that carry maximum penalties of up to only five years imprisonment and require prosecutors to carry the sometimes awkward burden of proving the use of the mail or the interstate wires to carry out the fraud. Alternatively, prosecutors may charge a willful violation of certain specific securities laws or regulations, but such regulations often contain technical legal requirements, and proving willful violations of these complex regulations allows defendants to argue that they did not possess the requisite criminal intent.[9] There is no logical reason for imposing such awkward and heightened burdens on the prosecution of criminal securities fraud cases. The investing public is entitled to no less protection than those who keep money in federally insured financial institutions enjoy under the bank fraud statute.

Second, current federal obstruction of justice statutes relating to document destruction is riddled with loopholes and burdensome proof requirements. Those provisions are a patchwork of various prohibitions that have been interpreted very narrowly by federal courts. For instance, certain current provisions in Title 18, such as section 1512(b), make it a crime to persuade another person to destroy documents, but not a crime for a person to destroy the same documents personally. Other provisions, such section 1503, have

[8] See 18 U.S.C. 1344 (bank fraud), 1347 (health care fraud), and 157 (bankruptcy fraud).

[9] See e.g., *SEC* v. *Zandford,* 238 F.3d 559 (4th Cir. 559) (holding that straight out stealing of investors' money did not violate SEC rule 10b–5 because stealing was not sufficiently related to technical "purchase or sale" requirement), cert. granted, 122 S. Ct. 510 (2001). This case is one, although not the only example, of why federal prosecutors are justifiably hesitant to include technical SEC regulations as part of a criminal indictment.

been narrowly interpreted by courts, including the Supreme Court in *United States* v. *Aguillar,* 115 S. Ct. 593 (1995), and the First Circuit in *United States* v. *Frankhauser,* 80 F.3d 641 (1st Cir. 1996), to apply only to situations when the obstruction of justice may be closely tied to a judicial proceeding. Still other provisions, such as sections 152(8), 1517 and 1518, apply to obstruction in certain limited types of cases, such as bankruptcy fraud, examinations of financial institutions, and healthcare fraud. In short, the current laws regarding destruction of evidence are full of ambiguities and limitations that must be corrected.

Indeed, even in the current Andersen case, prosecutors have been forced to use the "witness tampering" statute, 18 U.S.C. 1512, and to proceed under the legal fiction that the defendants are being prosecuted for telling other people to shred documents, not simply for destroying evidence themselves. Although prosecutors have been able to bring charges thus far in the case, in a case with a single person doing the shredding, this legal hurdle might present an insurmountable bar to a successful prosecution. When a person destroys evidence with the intent of obstructing any type of investigation and the matter is within the jurisdiction of a federal agency, overly technical legal distinctions should neither hinder nor prevent prosecution and punishment.

Even more surprising, in the context of audits and reviews conducted under the Securities and Exchange Act of 1934, there is currently no clear statutory requirement that accountants retain the most basic work papers to support the conclusions reached and opinions expressed in their audits, much less more detailed records, to facilitate determinations by federal regulators and law enforcement officials of whether a corporation or its accountants tried to mislead the public, as in the Enron matter.

Third, federal sentences sufficiently neither punish serious frauds and obstruction of justice nor take into account all aggravating factors that should be considered in order to enhance sentences for the most serious fraud and obstruction of justice cases. Currently, United States Sentencing Guidelines (U.S.S.G.) § 2J1.2 recognizes that a wide variety of conduct falls under the offense of "obstruction of justice." For obstruction cases involving the murder of a witness or another crime, the Guidelines allow, by cross reference, significant enhancements based on the underlying crimes, such as murder or attempted murder. For cases when obstruction is the only offense, however, the guidelines provide little assistance in differentiating between different types of obstruction—including the organized, large scale shredding that apparently occurred in the Enron/Andersen matter.

The current fraud sentencing guidelines also fail to provide for sufficient additional punishment based upon certain important aggravating factors. For instance, the fraud guidelines in U.S.S.G. § 2B1.1, require the sentencing judge to take the number of victims into account, but only to very limited degrees in small and medium-sized cases. Specifically, once there are more than fifty victims, the guidelines do not require any further enhancement of the sentence, so that a case with fifty-one victims may be treated the same as a case with five thousand victims. As the Enron matter demonstrates, serious frauds, especially for cases in which publicly traded securities are involved, can leave thousands of victims robbed of their life savings. In addition, while the 2B1.1 guidelines provide a specific offense characteristic to enhance sentences where a financial institution's solvency is jeopardized, there is no similar enhancement for the risk of devastating a substantial number of private fraud victims, which is instead treated only as a ground for departure. That distinction is unsound and should be reconsidered. Finally, the Chapter 8 Guidelines relating to Sentencing Organizations for criminal conduct are outdated and do not sufficiently deter organizational or corporate misconduct.

Fourth, innocent, defrauded investors attempting to recoup their losses face unfair time limitations under current law. The current statute of limitations for most securities fraud cases is three years from the date of the fraud or one year after the fraud was discovered. This can unfairly limit recovery for defrauded investors in some cases. As Washington State Attorney General Gregoire testified at the Committee hearing, in the Enron state pension fund litigation, the current short statute of limitations has forced some states to forgo claims against Enron based on alleged securities fraud in1997 and 1998. In Washington state alone, the short statute of limitations may cost hard-working state employees, firefighters and police officers nearly $50 million in lost Enron investments, which they will never recover.

Especially in complex securities fraud cases, the current short statute of limitations may insulate the worst offenders from accountability and rewards those who can successfully cover up their misconduct for at least a year. As Justices O'Connor and Kennedy said in their dissent in *Lampf, Pleva. Lipkind, Prupis, & Petigrow* v. *Gilbertson,* 111 S. Ct. 2773 (1991), the 5–4 Supreme Court decision that changed decades of presumably settled law, and imposed a uniform, short statute of limitations in most securities fraud cases, the current "one and three" limitations period makes securities fraud actions "all but a dead letter for injured investors who by no conceivable standard of fairness or practicality can be expected to file suit within three years after the violation occurred."[10]

Other experts agree with Justices Kennedy and O'Connor. In fact, the last two SEC Chairmen supported extending the statute of limitations in securities fraud cases. Then Chairman Arthur Levitt testified before a Senate subcommittee in 1995 that "extending the statute of limitations is warranted because many securities frauds are inherently complex, and the law should not reward the perpetrator of a fraud, who successfully conceals its existence for more than three years." Before Chairman Levitt, in the first Bush administration, then SEC Chairman Richard Breeden also testified before Congress in favor of extending the statute of limitations in securities fraud cases. Reacting to the *Lampf* opinion, Breeden stated in 1991 that "[e]vents only come to light years after the original distribution of securities, and the *Lampf* cases could well

[10] *Lampf, Pleva. Lipkind, Prupis, & Petigrow* v. *Gilbertson,* 111 S. Ct. 2773, 2790 (1991). In *Lampf*, the 5–4 majority changed the decades old practice of deferring to state limitations period in securities fraud cases, and it adopted a national statute of limitations instead. In addition, as opposed to adopting the longer federal limitations period that the SEC and then Solicitor General Kenneth Starr supported from a 1988 securities law, *id.* at 2781, the Court held not only that the shorter "1 and 3" period imported from § 9(e) of the 1934 Act (15 U.S.C. § 78i(e)) governed, but that fraud victims did not even have the right to raise the customary doctrine of "equitable tolling," which can protect them in cases where they can demonstrate that the defendant took affirmative steps to conceal the fraud. Id. at 2782. In short, current law encourages fraud artists to game the system.

mean that by the time investors discover they have a case, they are already barred from the courthouse." Both the FDIC and the State securities regulators joined the SEC in calling for a legislative reversal of the *Lampf* decisions at that time.

The one year statute of limitations from the date the fraud is discovered is also particularly harsh on innocent defrauded investors. This short limitations period has the effect of placing true fraud victims on a "stop watch," from the moment they know that they have been cheated. As most prosecutors and victims will confirm, however, the best cons are designed so that even after victims are cheated, they will not know who cheated them, or how. Especially in securities fraud cases, the complexities of how the fraud was executed often take well over a year to unravel, even after the fraud is discovered. Even with use of the full resources of the FBI, a Special Task Force of Justice Department Attorneys, and the power of a federal grand jury, complex fraud cases such as Enron are difficult to unravel and rarely can be charged within a year.

This one year "stop watch" is even more unfair when considered in light of the significant obstacles that current law places between a victim and the courthouse in securities fraud cases. A lead plaintiff must be selected by the court, a process that can take months. Discovery is automatically stayed during the pendency of any motion to dismiss, consideration of which can take over a year in itself. During that period the stop watch continues to run on the claim, even though the victim has little or no ability to find out more about exactly who participated in the fraudulent activity and how the fraud was accomplished. With the higher pleading standards that also govern securities fraud victims, it is unfair to expect victims to be able to negotiate such obstacles in the span of 12 months (See 15 U.S.C. § 78u–4).

In short, by the time a victim learns enough facts to file a complaint under a heightened pleading standard, survives a motion to dismiss, begins discovery, and learns that an additional wrongdoer or theory should be added to the case, that claim is likely to be time barred, then the wrongdoer is able to avoid liability and the victim is left holding the proverbial bag. Moreover, current law sets up a perverse incentive for victims to race into court, so as not to be barred by time, and immediately sue. Plaintiffs who wish to spend more time investigating the matter or trying to resolve the matter without litigation are punished under the current law.

Furthermore, the short statute of limitations does nothing to discourage frivolous cases, as a plaintiff operating in bad faith would have little trouble meeting the one year deadline and simply throwing in every possible defendant and every claim. After all, by definition of the so-called "strike suit," filing occurs almost immediately upon a change in the stock price. Instead of stopping bad faith suits, the short statute merely blocks the meritorious claims of fraud victims. Statutes of limitations are simply not proper means of deciding legitimate cases which should be decided on the merits—that is the role of the underlying substantive law.

In many securities fraud cases the short limitations period under current law is an invitation to take sophisticated steps to conceal the deceit. The experts have long agreed on that point, and unfortunately they have been proven right. Based on the Enron and Andersen cases, it only takes a few seconds to warm up the shredder, but it will take years for victims to put this complex case back together again. It is time that the law is changed to provide victims the time they need to prove their cases to recoup their losses.

Fifth, victims of securities fraud can be thwarted from fair recovery when a debtor, such as Enron, declares bankruptcy. Current bankruptcy law permits wrongdoers to discharge their obligations under court judgments or settlements based on securities fraud and other securities violations. This loophole in the law should be closed to help defrauded investors recoup their losses and to hold accountable those who incur debts by violating our securities laws.

State regulators are also unfairly disadvantaged under the current system. Under current laws, state regulators are often forced to "re-prove" their fraud cases in bankruptcy court to prevent discharge because remedial statutes often have different technical elements than the analogous common law causes of action. Moreover, settlements may not have the same collateral estoppel effect as judgments obtained through fully litigated legal proceedings. In short, with limited resources already stretched to protect fraud victims, state regulators must plow the same ground twice in securities fraud cases.[11]

Sixth, corporate whistleblowers are left unprotected under current law. This is a significant deficiency because often, in complex fraud prosecutions, these insiders are the only firsthand witnesses to the fraud. They are the only people who can testify as to "who knew what, and when," crucial questions not only in the Enron matter but in all complex securities fraud investigations. Although current law protects many government employees who act in the public interest by reporting wrongdoing, there is no similar protection for employees of publicly traded companies who blow the whistle on fraud and protect investors. With one in every two Americans investing in public companies, this distinction fails to serve the public good.

Corporate employees who report fraud are subject to the patchwork and vagaries of current state laws, although most publicly traded companies do business nationwide. Thus, a whistleblowing employee in one state may be far more vulnerable to retaliation than a fellow employee in another state who takes the same actions. Unfortunately, as demonstrated in the tobacco industry litigation and the Enron case, efforts to quiet whistleblowers and retaliate against them for being "disloyal" or "litigation risks" transcend state lines. This corporate culture must change, and the law can lead the way. That is why S. 2010 is supported by public interest advocates, such as the National Whistleblower Center, the Government Accountability Project, and Taxpayers Against Fraud, who have called this bill "the single most effective measure possible to prevent recurrences of the Enron debacle and similar threats to the nation's financial markets."

E. The future

Many people and institutions contributed to the Enron debacle, including the corporate officers and directors whose actions led to

[11] The North American Securities Administrators Association (NASAA) has endorsed S. 2010, stating that it would "enhance the ability of state and federal regulators to help defrauded investors recoup their losses and to hold accountable those who perpetrate securities fraud." See letter from Joseph P. Borg, NASAA President and Director of Alabama Securities Commission.

Enron's failure, the well-paid professionals who helped create, carry out, and cover up the complicated corporate ruse when they should have been raising concerns, the regulators who did not protect the public and our public markets, and the Congress and the courts, which have thrown obstacles in the way of securities fraud victims. Now Congress must contribute to making the Enron situation right and ensuring that this never happens again. Without discipline, professionalism, an effective legal structure, and accountability, greed can run rampant, with devastating results. Unfortunately, business failures during a permissive era rarely happen in isolation.

Accountability is important and must be restored because Enron is not alone. It is only a case study exposing the shortcomings in our current laws. At the Committee hearing, experts gave investors the grave warnings that it is likely that there are more "Enrons" lurking out there, simply eluding discovery. Future debacles wait to be discovered not only by investigators or the media, but by the more than one in two Americans who depend on the transparency and integrity of our public markets.

The majority of Americans depend on capital markets to invest in the future needs of their families—from their children's college fund to their retirement nest eggs. American investors deserve action. Congress must act now to restore confidence in the integrity of the public markets and deter fraud artists who believe their crimes will go unpunished. Restoring such accountability is the aim of the Corporate and Criminal Fraud Accountability Act of 2002.

Accountability and transparency help our markets work as they should, in ways that benefit investors, employees, consumers and our national economy. The Enron debacle has arrived on our doorstep, and our job is to make sure that there are adequate doses of accountability in our legal system to prevent such occurrences in the future, and to offer a constructive remedy and decisive punishment should they occur. The time has come for Congress to rethink and reform our laws in order to prevent corporate deceit, to protect investors and to restore full confidence in the capital markets.

III. Section-by-Section Analysis and Discussion

S. 2010 has three major components that will enhance accountability. First, it provides prosecutors with new and better tools to effectively prosecute and punish those who defraud investors, which means ensuring criminal laws are flexible enough to keep pace with the most sophisticated and clever con artists. It also means providing for criminal penalties tough enough to make them think twice before defrauding the public.

Second, this bill establishes tools to improve the ability of investigators and regulators to collect and preserve evidence which proves fraud. This ensures that corporate whistleblowers are protected and that those who destroy evidence of fraud are punished.

Third, the bill protects victims' rights to recover from those who have cheated them. In short, S. 2010 will not only save documents from the shredder, but also send wrongdoers to jail once they are caught.

SECTION-BY-SECTION ANALYSIS

Section 1.—Title. "Corporate and Criminal Fraud Accountability Act."

Section 2. Criminal penalties for altering documents

This section provides two new criminal statutes which would clarify and plug holes in the current criminal laws relating to the destruction or fabrication of evidence and the preservation of financial and audit records.

First, this section would create a new 10-year felony which could be effectively used in a wide array of cases where a person destroys or creates evidence with the intent to obstruct an investigation or matter that is within the jurisdiction of any federal agency or any bankruptcy.

Second, the section creates a new 5-year felony which applies specifically to the willful failure to preserve audit papers of companies that issue securities. Section (a) of the statute has two sections which apply to accountants who conduct audits under the provisions of the Securities and Exchange Act of 1934. Subsection (a)(1) is an independent criminal prohibition on the destruction of audit or review work papers for five years, as that term is widely understood by regulators and in the accounting industry. Subsection (a)(2) requires the SEC to promulgate reasonable and necessary regulations within 180 days, after the opportunity for public comment, regarding the retention of categories of electronic and non electronic audit records which contain opinions, conclusions, analysis or financial data, in addition to the actual work papers. Willful violation of such regulations would be a crime. Neither the statute nor any regulations promulgated under it would relieve any person of any independent legal obligation under state or federal law to maintain or refrain from destroying such records.

Section 3.—Debts nondischargeable if incurred in violation of securities fraud laws

This provision would amend the federal bankruptcy code to make judgments and settlements arising from state and federal securities law violations brought by state or federal regulators and private individuals non-dischargeable. Current bankruptcy law may permit wrongdoers to discharge their obligations under court judgments or settlements based on securities fraud and securities law violations.

Section 4.—Statute of limitations

This section would set the statute of limitations in private securities fraud cases to the earlier of five years after the date of the fraud or two years after the fraud was discovered. The current statute of limitations for most private securities fraud cases is the earlier of three years from the date of the fraud or one year from the date of discovery. This provision states that it is not meant to create any new private cause of action, but only to govern already existing private causes of action under federal securities laws.

Section 5.—Review and enhancement of criminal sentences in cases of fraud and evidence destruction

This section would require the United States Sentencing Commission ("Commission") to review and consider enhancing, as appropriate, criminal penalties in cases involving obstruction of justice and in serious fraud cases. The Commission is also directed to generally review the U.S.S.G. Chapter 8 guidelines relating to sentencing organizations for criminal misconduct, to ensure that such guidelines are sufficient to punish and deter criminal misconduct by corporations.

Subsection 1 requires that the Commission generally review all the base offense level and sentencing enhancements under U.S.S.G. § 2J1.2. Subsection 2 specifically directs the Commission to consider including enhancements or specific offense characteristics for cases based on various factors including the destruction, alteration, or fabrication of physical evidence, the amount of evidence destroyed, the number of participants, or otherwise extensive nature of the destruction, the selection of evidence that is particularly probative or essential to the investigation, and whether the offense involved more than minimal planning or the abuse of a special skill or position of trust. Subsection 3 requires the Commission to establish appropriate punishments for the new obstruction of justice offenses created in this Act.

Subsections 4 and 5 require the Commission to review guideline offense levels and enhancements under U.S.S.G. § 2B1.1, relating to fraud. Specifically, the Commission is requested to review the fraud guidelines and consider enhancements for cases involving significantly greater than 50 victims and cases in which the solvency or financial security of a substantial number of victims is endangered. Subsection 6 requires a comprehensive review of Chapter 8 guidelines relating to sentencing organizations.

Section 6.—Whistleblower protection for employees of publicly traded companies

This section would provide whistleblower protection to employees of publicly traded companies. It specifically protects them when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting and stopping fraud. If the employer does take illegal action in retaliation for lawful and protected conduct, subsection (b) allows the employee to file a complaint with the Department of Labor, to be governed by the same procedures and burdens of proof now applicable in the whistleblower law in the aviation industry.[12] The employee can bring the matter to federal court only if the Department of Labor does not resolve the matter in 180 days (and there is no showing that such delay is due to the bad faith of the claimant) as a normal case in law or equity, with no amount in controversy requirement. Subsection (c) governs remedies and provides for the reinstatement of the whistleblower, backpay, and compensatory damages to make a victim whole, in-

[12] See 49 U.S.C. § 42121 *et seq.*

cluding reasonable attorney fees and costs, as remedies if the claimant prevails.

Section 7.—Criminal penalties for securities fraud

This provision would create a new 10-year felony for defrauding shareholders of publicly traded companies. The provision would supplement the patchwork of existing technical securities law violations with a more general and less technical provision, with elements and intent requirements comparable to current bank fraud and health care fraud statutes.

DISCUSSION

S. 2010 is one part of the response needed to solve the problems exposed by Enron's fall. Securities law experts, consumer protection groups, and others in Congress, both in the Senate and the House of Representatives, have made various proposals and introduced legislation that deserve careful consideration. Certainly, in light of recent events, careful reexamination is required of both the decisions of the Supreme Court and current laws. Despite the best of intentions, federal laws may have helped create an environment in which greed was inflated and integrity devalued. S. 2010 is an important starting point in that process. Following is a discussion and analysis of the bill's provisions.

Section 2 of the bill would create two new felonies to clarify and close loopholes in the existing criminal laws relating to the destruction or fabrication of evidence and the preservation of financial and audit records. First, it creates a new general anti shredding provision, 18 U.S.C. § 1519, with a 10-year maximum prison sentence. Currently, provisions governing the destruction or fabrication of evidence are a patchwork that have been interpreted, often very narrowly, by federal courts. For instance, certain current provisions make it a crime to persuade another person to destroy documents, but not a crime to actually destroy the same documents yourself.[13] Other provisions, such as 18 U.S.C. § 1503, have been narrowly interpreted by courts, including the Supreme Court in *United States* v. *Aguillar,* 115 S. Ct. 593 (1995), to apply only to situations where the obstruction of justice can be closely tied to a pending judicial proceeding. Still other statutes have been interpreted to draw distinctions between what type of government function is obstructed.[14] Still other provisions, such as sections 152(8), 1517 and 1518 apply to obstruction in certain limited types of cases, such as bankruptcy fraud, examinations of financial institutions, and healthcare fraud. In short, the current laws regarding destruction of evidence are full of ambiguities and technical limitations that should be corrected. This provision is meant to accomplish those ends.

Section 1519 is meant to apply broadly to any acts to destroy or fabricate physical evidence so long as they are done with the intent to obstruct, impede or influence the investigation or proper administration of any matter, and such matter is within the jurisdiction of an agency of the United States, or such acts done either in relation to or in contemplation of such a matter or investigation. This statute is specifically meant not to include any technical require-

[13] See 18 U.S.C. § 1512(b).

[14] See *United States* v. *Frankhauser,* 80 F.3d 641 (1st Cir. 1996) (1503 prohibits destroying evidence to thwart grand jury investigation, but not FBI investigation).

ment, which some courts have read into other obstruction of justice statutes, to tie the obstructive conduct to a pending or imminent proceeding or matter. It is also sufficient that the act is done "in contemplation" of or in relation to a matter or investigation. It is also meant to do away with the distinctions, which some courts have read into obstruction statutes, between court proceedings, investigations, regulatory or administrative proceedings (whether formal or not), and less formal government inquiries, regardless of their title. Destroying or falsifying documents to obstruct any of these types of matters or investigations, which in fact are proved to be within the jurisdiction of any federal agency are covered by this statute.[15] Questions of criminal intent are, as in all cases, appropriately decided by a jury on a case-by-cases basis. It also extends to acts done in contemplation of such federal matters, so that the timing of the act in relation to the beginning of the matter or investigation is also not a bar to prosecution. The intent of the provision is simple; people should not be destroying, altering, or falsifying documents to obstruct any government function. Finally, this section could also be used to prosecute a person who actually destroys the records himself in addition to one who persuades another to do so, ending yet another technical distinction which burdens successful prosecution of wrongdoers.[16]

Second, Section 2 creates a five-year felony, 18 U.S.C. § 1520, to punish the willful failure to preserve financial audit papers of companies that issue securities as defined in the Securities Exchange Act of 1934. The new statute, in subsection (a)(1), would independently require that accountants preserve audit work papers for five years from the conclusion of the audit. Subsection (b) would make it a felony to knowingly and willfully violate the five-year audit retention period in (1)(a). The materials covered in subsection (1)(b), which requires the SEC to issues reasonable rules and regulations, are intended to include additional records which contain conclusions, opinions, analysis, and financial data relevant to an audit or review. The regulations are intended to cover the retention of such substantive material, whether or not the conclusions, opinions, analyses or data in such records support the final conclusions reached by the auditor or expressed in the final audit or review so that state and federal law enforcement officials and regulators can conduct more effective inquiries into the decisions and determinations made by accountants in auditing public corporations. Nonsubstantive materials, however, such as administrative records, which are not relevant to the conclusions or opinions expressed (or not expressed), need not be included in such retention regulations. The language of the provision is clear. The SEC "shall" promulgate regulations relating to the retention of the categories of items which are specifically enumerated in the statutory provision. Willful violation of these regulations will also be a crime under this section.

In light of the apparent massive document destruction by Andersen, and the company's apparently misleading document retention policy, even in light of its prior SEC violations, it is intended that the SEC promulgate rules and regulations that require the reten-

[15] See 18 U.S.C. § 1001.
[16] See 18 U.S.C. § 1512(b).

tion of such substantive material, including material which casts doubt on the views expressed in the audit of review, for such a period as is reasonable and necessary for effective enforcement of the securities laws and the criminal laws, most of which have a five-year statute of limitations. It should also be noted that criminal tax violations, which many of these documents relate to, have a six-year statute of limitations. By granting the SEC the power to issue such regulations, it is not intended that the SEC be prohibited from consulting with other government agencies, such as the Department of Justice, which has primary authority regarding enforcement of federal criminal law or pertinent state regulatory agencies. Nor is it the intention of this provision that the general public, private or institutional investors, or other investor or consumer protection groups be excluded from the SEC rulemaking process. These views of these groups, who often represent the victims of fraud, should be considered at least on an equal footing with "industry experts" and others who participate in the rulemaking process at the SEC.

This section not only penalizes the willful failure to maintain specified audit records, but also will result in clear and reasonable rules that will require accountants to put strong safeguards in place to ensure that such corporate audit records are retained. Had such clear requirements and policies been established at the time Andersen was considering what to do with its audit documents, countless documents might have been saved from the shredder. The idea behind the statute is not only to provide for prosecution of those who obstruct justice, but to ensure that important financial evidence is retained so that law enforcement officials, regulators, and victims can assess whether the law was broken to begin with and, if so, whether or not such was done intentionally, or with or without the knowledge or assistance of an auditor.

Section 3 of this bill would amend the Bankruptcy Code to make judgments and settlements based upon securities law violations non-dischargeable, protecting victims' ability to recover their losses. Current bankruptcy law may permit such wrongdoers to discharge their obligations under court judgments or settlements based on securities fraud and other securities violations. This loophole in the law should be closed to help defrauded investors recoup their losses and to hold accountable those who violate securities laws after a government unit or private suit results in a judgement or settlement against the wrongdoer.

State securities regulators have indicated their strong support for this change in the bankruptcy law. Under current laws, state regulators are often forced to "reprove" their fraud cases in bankruptcy court to prevent discharge because remedial statutes often have different technical elements than the analogous common law causes of action. Moreover, settlements may not have the same collateral estoppel effect as judgments obtained through fully litigated legal proceedings. In short, with their resources already stretched to the breaking point, state regulators must plow the same ground twice in securities fraud cases. By ensuring securities law judgments and settlements in state cases are non-dischargeable, precious state enforcement resources will be preserved and directed at preventing fraud in the first place.

Section 4 of S. 2010 would protect victims by extending the statute of limitations in private securities fraud cases. It would set the statute of limitations in private securities fraud cases to the earlier of five years after the date of the fraud or two years after the fraud was discovered. The current statute of limitations for most such fraud cases is three years from the date of the fraud or one year after discovery, which can unfairly limit recovery for defrauded investors in some cases. As Attorney General Gregoire testified at the Committee hearing, in the Enron state pension fund litigation the current short statute of limitations has forced some states to forgo claims against Enron based on alleged securities fraud in 1997 and 1998. In Washington state alone, the short statute of limitations may cost hard-working state employees, firefighters and police officers nearly $50 million in lost Enron investments which they can never recover.

Especially in complex securities fraud cases, the current short statute of limitations may insulate the worst offenders from accountability. As Justices O'Connor and Kennedy said in their dissent in *Lampf, Pleva. Lipkind, Prupis, & Petigrow* v. *Gilbertson,* 111 S. Ct. 2773 (1991), the 5–4 decision upholding this short statute of limitations in most securities fraud cases, the current "one and three" limitations period makes securities fraud actions "all but a dead letter for injured investors who by no conceivable standard of fairness or practicality can be expected to file suit within three years after the violation occurred." The Consumers Union and Consumer Federation of America, along with the AFL-CIO and other institutional investors, strongly support the bill, and view this section in particular as a needed measure to protect investors.

The experts agree with that view. In fact, the last two SEC Chairmen supported extending the statute of limitations in securities fraud cases. Former Chairman Arthur Levitt testified before a Senate Subcommittee in 1995 that "extending the statute of limitations is warranted because many securities frauds are inherently complex, and the law should not reward the perpetrator of a fraud, who successfully conceals its existence for more than three years." Before Chairman Levitt, in the last Bush administration, then SEC Chairman Richard Breeden also testified before Congress in favor of extending the statute of limitations in securities fraud cases. Reacting to the *Lampf* opinion, Breeden stated in 1991 that "[e]vents only come to light years after the original distribution of securities, and the *Lampf* cases could well mean that by the time investors discover they have a case, they are already barred from the courthouse." Both the FDIC and the State securities regulators joined the SEC in calling for a legislative reversal of the *Lampf* decisions at that time.

In fraud cases the short limitations period under current law is an invitation to take sophisticated steps to conceal the deceit. The experts have long agreed on that point, but unfortunately they have been proven right again. As recent experience shows, it only takes a few seconds to warm up the shredder, but unfortunately it will take years for victims to put this complex case back together again.[17] It is time that the law is changed to give victims the time they need to prove their fraud cases.

Section 5 of S. 2010 ensures that those who destroy evidence or perpetrate fraud are appropriately punished. It would require the Commission to consider enhancing criminal penalties in cases involving obstruction of justice and serious fraud cases where a large number of victims are injured or when the victims face financial ruin.

Currently, the U.S.S.G. recognize that a wide variety of conduct falls under the offense of "obstruction of justice." For obstruction cases involving the murder of a witness or another crime, the U.S.S.G. allow, by cross reference, significant enhancements based on the underlying crimes, such as murder or attempted murder. For cases when obstruction is the only offense, however, they provide little guidance on differentiating between different types of obstruction. This provision requests that the Commission consider raising the penalties for obstruction where no cross reference is available and defining meaningful specific enhancements and adjustments for cases where evidence and records are actually destroyed or fabricated (and for more serious cases even within that category of case) so as to thwart investigators, a serious form of obstruction.

This provision, in subsections (4) and (5), also requires that the Commission consider enhancing the penalties in fraud cases which are particularly extensive or serious, even in addition to the recent amendments to the Chapter 2 guidelines for fraud cases. The current fraud guidelines require that the sentencing judge take the number of victims into account, but only to a very limited degree in small and medium-sized cases. Specifically, once there are more than 50 victims, the guidelines do not require any further enhancement of the sentence. A case with 51 victims, therefore, may be treated the same as a case with 5,000 victims. As the Enron matter demonstrates, serious frauds, especially in cases where publicly traded securities are involved, can affect thousands of victims.

In addition, current guidelines allow only very limited consideration of the extent of devastation that a fraud offense causes its victims. Judges may only consider whether a fraud endangers the "solvency or financial security" of a victim to impose an upward departure from the recommended sentencing range. This is not a factor in establishing the range itself unless the victim is a financial institution. Subsection (5) requires the Commission to consider requiring judges to consider the extent of such devastation in setting the actual recommended sentencing range in cases such as the Enron matter, when many private victims, including individual investors, have lost their life savings. Finally this provision requires a complete review of the Chapter 8 corporate misconduct guidelines, which are outdated and need to be toughened to deter corporate crime.

Section 6 of the bill would provide whistleblower protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to

[17] Of course, the allegations in the Enron case as set forth in this report are still being investigated, and 8 months after the public disclosures of Enron's conduct, not one Enron executive has been charged, even with the resources of the FBI available. That is another example of why a one year statute of limitations for such complex fraud cases is simply unreasonable.

supervisors or appropriate individuals within their company. Although current law protects many government employees who act in the public interest by reporting wrongdoing, there is no similar protection for employees of publicly traded companies who blow the whistle on fraud and protect investors. With an unprecedented portion of the American public investing in these companies and depending upon their honesty, this distinction does not serve the public good.

In addition, corporate employees who report fraud are subject to the patchwork and vagaries of current state laws, even though most publicly traded companies do business nationwide. Thus, a whistleblowing employee in one state (e.g., Texas, see supra) may be far more vulnerable to retaliation than a fellow employee in another state who takes the same actions. Unfortunately, companies with a corporate culture that punishes whistleblowers for being "disloyal" and "litigation risks" often transcend state lines, and most corporate employers, with help from their lawyers, know exactly what they can do to a whistleblowing employee under the law. U.S. laws need to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies. S. 2010 is supported by groups such as the National Whistleblower Center, the Government Accountability Project, and Taxpayers Against Fraud, all of whom have written a letter placed in the Committee record calling this bill "the single most effective measure possible to prevent recurrences of the Enron debacle and similar threats to the nation's financial markets."

This bill would create a new provision protecting employees when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, their supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting and stopping actions which they reasonably believe to be fraudulent. Since the only acts protected are "lawful" ones, the provision would not protect illegal actions, such as the improper public disclosure of trade secret information. In addition, a reasonableness test is also provided under the subsection (a)(1), which is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts (See generally *Passaic Valley Sewerage Commissioners* v. *Department of Labor,* 992 F. 2d 474, 478). Certainly, although not exclusively, any type of corporate or agency action taken based on the information, or the information constituting admissible evidence at any later proceeding would be strong indicia that it could support such a reasonable belief.

Under new protections provided by S. 2010, if the employer does take illegal action in retaliation for such lawful and protected conduct, subsection (b) allows the employee to elect to file an administrative complaint at the Department of Labor, as is the case for employees who provide assistance in aviation safety. Only if there is no final agency decision within 180 days of the complaint (and such delay is not shown to be due to the bad faith of the claimant) may he or she may bring a de novo case in federal court with a jury trial available (See United States Constitution, Amendment VII; Title 42 United States Code, Section 1983). Should such a case be brought in federal court, it is intended that the same burdens of proof which would have governed in the Department of Labor will continue to govern the action. Subsection (c) of this section requires both reinstatement of the whistleblower, backpay, and compensatory damages to make a victim whole should the claimant prevail. The bill does not supplant or replace state law, but sets a national floor for employee protections in the context of publicly traded companies.

Section 7 of the bill would create a new ten-year felony under Title 18 for defrauding shareholders of publicly traded companies. Currently, unlike bank fraud or health care fraud, there is no generally accessible statute that deals with the specific problem of securities fraud. In these cases, federal investigators and prosecutors are forced either to resort to a patchwork of technical Title 15 offenses and regulations, which may criminalize particular violations of securities law, or to treat the cases as generic mail or wire fraud cases and to meet the technical elements of those statutes, with their five year maximum penalties.

This bill, then, would create a new ten-year felony for securities fraud—a more general and less technical provision comparable to the bank fraud and health care fraud statutes in Title 18. It adds a provision to Chapter 63 of Title 18 at section 1348 which would criminalize the execution or attempted execution of any scheme or artifice to defraud persons in connection with securities of publicly traded companies or obtain their money or property. The provision should not be read to require proof of technical elements from the securities laws, and is intended to provide needed enforcement flexibility in the context of publicly traded companies to protect shareholders and prospective shareholders against all the types schemes and frauds which inventive criminals may devise in the future. The intent requirements are to be applied consistently with those found in 18 U.S.C. §§ 1341, 1343, 1344, 1347.

By covering all "schemes and artifices to defraud" (see 18 U.S.C. §§ 1344, 1341, 1343, 1347), new § 1348 will be more accessible to investigators and prosecutors and will provide needed enforcement flexibility and, in the context of publicly traded companies, protection against all the types schemes and frauds which inventive criminals may devise in the future.

This bill is only part of the needed response to the problems exposed by the Enron debacle. For instance, a provision granting State Attorneys General and the SEC the authority to use the civil RICO statute would have been another important tool in battling fraud and protecting investors. The SEC has tremendous expertise in protecting investors, and the States, whose officials are more directly accountable to the public than federal officials, have traditionally played a major positive role in responsibly exercising their authority to protect our nation's investors and consumers. The tobacco industry litigation is but one recent example of this important role played by the States. Although the provision had received bipartisan support from State Attorneys General around the nation, it was removed from S. 2010 as a compromise, after objections were raised that such elected state officials could not be entrusted with the same enforcement powers as the federal government.

Changes are clearly needed to restore accountability in U.S. markets, which have already been adversely affected by recent events. Instead of acting as gatekeepers who detect and deter fraud, it appears that Enron's accountants and lawyers brought all their skills and knowledge to bear in assisting the fraud to succeed and then in covering it up. Congress must reconsider the incentive system that has been set up that encourages accountants and lawyers who come across fraud in their work to remain silent.

IV. Committee Consideration

On Thursday, April 25, 2002, the full Committee met in open session and ordered favorably reported the bill, S. 2010, by unanimous consent, with an amendment in the nature of a substitute sponsored by Senator Leahy and, after adopting an amendment sponsored by Senator Hatch and cosponsored by Senator Leahy and Senator Schumer, an amendment sponsored by Senator Feinstein and cosponsored by Senator Cantwell, and an amendment sponsored by Senator Grassley and cosponsored by Senator Leahy, a quorum being present.

V. Votes of the Committee

First, Senator Leahy offered an amendment in the nature of a substitute, clarifying that the statute of limitations provision in Section 5 of S. 2010 was not intended to establish any new private right of action, amending Section 7 of S. 2010 dealing with whistleblowers, removing Section 3 from S. 2010, which would have authorized State Attorneys General and the Securities and Exchange Commission to bring suits under 18 U.S.C. § 1964 [civil provision of the Racketeering Influenced Corrupt Organizations Act ("RICO")], and renumbering the remaining provisions accordingly. This substitute was accepted by unanimous consent.

Second, Senator Hatch offered an amendment to the substitute, cosponsored by Senator Leahy and Senator Schumer, to make technical corrections to the criminal provisions, defining a publicly traded company in Section 7 of the substitute, narrowing the scope of the new audit records destruction crime created in Section 2 of the substitute, raising the maximum penalty for the general anti-shredding provision created in Section 2 of the substitute (new 18 U.S.C. § 1519) from 5 to 10 years, and modifying and adding additional provisions to Section 5 of the substitute relating to review of the sentencing guidelines in fraud and obstruction of justice cases a well as for organizational misconduct. The amendment was adopted by vote of 18 yeas to 0 nays.

Yeas	Nays
Leahy	
Kennedy (proxy)	
Biden (proxy)	
Kohl	
Feinstein	
Feingold	
Schumer	
Durbin	
Cantwell	
Edwards (proxy)	
Hatch	
Thurmond (proxy)	
Grassley	
Kyl (proxy)	
DeWine	
Sessions (proxy)	
Brownback	
McConnell (proxy)	

Third, Senator Feinstein offered an amendment, cosponsored by Senator Cantwell, to Section 4 of the substitute to lower the statute of limitations created in that provision from the earlier of 3 years from the date of discovery of the fraud or five years from the fraud to the earlier of 2 years from the date of discovery of the fraud or 5 years from the fraud. Senator Hatch offered a second degree amendment to the Feinstein-Cantwell amendment to strike the statute of limitations provision in Section 4 of the substitute. Senator Hatch's second degree amendment was rejected by vote of 7 yeas to 11 nays.

Yeas	Nays
Hatch	Leahy
Thurmond (proxy)	Kennedy (proxy)
Grassley	Biden (proxy)
Kyl (proxy)	Kohl
DeWine	Feinstein
Sessions (proxy)	Feingold
McConnell (proxy)	Schumer
	Durbin
	Cantwell
	Edwards (proxy)
	Brownback

The Feinstein-Cantwell amendment was then adopted by voice vote.

Fourth, Senator Grassley offered an amendment, cosponsored by Senator Leahy, to Section 5 of the substitute dealing with whistleblower rights. This amendment replaced the option for immediate suit in federal court with an administrative remedy and resort to federal court if the administrative decision is not made within six months, removed enhanced penalties in whistleblower matters, removed the provision dealing with arbitration agreements, and lowered the statute of limitations in whistleblower cases from 180 to 90 days. The amendment was adopted by unanimous consent.

The Committee agreed to favorably report S. 2010, as amended, by unanimous consent.

VI. Congressional Budget Office Cost Estimate

In compliance with paragraph 11(a) of rule XXVI of the standing rules of the Senate, the Committee sets forth, with respect to the bill, S. 2010, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

VII. Regulatory Impact Statement

U.S. Congress,
Congressional Budget Office,
Washington, DC, May 2, 2002.

Hon. Patrick J. Leahy,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2010, the Corporate and Criminal Fraud Accountability Act of 2002.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Ken Johnson (for federal costs), Susan Sieg Tompkins (for the state and local costs), and Paige Piper/Bach (for the private-sector impact).

Sincerely,

Barry B. Anderson
(For Dan L. Crippen, Director).

Encloures:

S. 2010—Corporate and Criminal Fraud Accountability Act of 2002

Summary: S. 2010 would create new crimes for persons who destroy records that could aid a federal investigation, people who commit securities fraud, or auditors who intentionally fail to retain certain audit records five years. In addition, the bill would prohibit certain fines assessed for violations of securities laws from being discharged in bankruptcy proceedings. Under S. 2010, employees who aid the SEC with investigations of publicly traded companies and who are subsequently discriminated against by their employer would have access to the Occupational Safety and Health Administration's (OSHA's) program for investigating illegal discrimination and termination of whistleblowers.

CBO estimates that implementing S. 2010 would cost about $2 million over the 2003–2007 period, subject to the availability of appropriated funds. The bill also would increase direct spending and receipts by less than $500,000 a year; therefore, pay-as-you-go procedures would apply.

S. 2010 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments. This legislation would impose private-sector mandates, as defined by UMRA, but CBO estimates that the direct cost of the mandates would fall well below the annual threshold established by UMRA ($115 million in 2002, adjusted annually for inflation).

Estimated cost to the Federal Government: CBO estimates that implementing S. 2010 would cost about $2 million over the 2003–2007 period, subject to the availability of appropriated funds. This bill also would increase direct spending and receipts by less than $500,000 a year. The costs of this legislation fall within budget functions 370 (mortgage and housing credit) and 550 (health).

Basis of estimate: For this estimate, CBO assumes that S. 2010 will be enacted before the start of fiscal year 2003, and that the necessary amounts will be appropriate each fiscal year. Components of the estimated costs are described below.

Spending subject to appropriation

Under S. 2010, employees who provide information or otherwise assist investigations could file claims with OSHA in the event of discrimination or termination by their employer as a result of their whistleblowing activities. OSHA currently investigates whistleblower claims of discrimination against employers who violate occupational or environmental laws and regulations. To handle the additional claims that would arise if S. 2010 were enacted. CBO assumes OSHA would have to hire three additional employees. Subject to the availability of appropriated funds, CBO estimates that implementing the bill would cost less than $500,000 in 2003 and about $2 million over the 2003–2007 period.

Under S. 2010, the federal government would be able to pursue cases that it otherwise would not be able to prosecute. CBO expects that any increase in federal costs for law enforcement, court proceedings, or prison operations would not be significant, however, because of the small number of cases likely to be involved. Any such additional costs would be subject to the availability of appropriated funds.

Direct Spending and Revenues

Because those prosecuted and convicted under S. 2010 could be subject to criminal fines, the federal government might collect additional fines if the bill is enacted. Collections of such fines are recorded in the budget as governmental receipts (revenues), which are deposited in the Crime Victims Fund and spent in subsequent years. CBO expects that any additional receipts and direct spending would be less than $500,000 each year.

S. 2010 also would affect revenues by preventing certain fines the SEC assesses for violations for securities laws from being discharged in bankruptcy proceedings. This provision would apply to disgorgement funds, under which the SEC collects payments from violators and distributes them directly to the victims of the violation. Typically, these disgorgement funds are deposited in the Treasury only if the administrative costs of distributing the funds to the victims are prohibitive. Under current law, a violator could escape paying disgorgement funds under bankruptcy proceedings. S. 2010 would no longer allow such payments to be discharged in bankruptcy, and therefore, in certain cases could result in an increase of receipts to the Treasury. CBO estimates that any such increase would not be significant.

Pay-as-you-go-considerations: The Balanced Budget and Emergency Deficit Control Act sets up pay-as-you-go procedures for legislation affecting direct spending or receipts through 2006. CBO estimates that any such effects would be less than $500,000 a year.

Estimated impact on state, local, and tribal governments: S. 2010 contains no intergovernmental mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Estimated impact on the private sector: S. 2010 would impose private-sector mandates, as defined by UMRA, but CBO estimates that the direct cost of the mandates would fall well below the annual threshold established by UMRA ($115 million in 2002, adjusted annually for inflation).

The bill would impose a private-sector mandate by requiring that any accountant who conducts certain corporate audits to maintain all audit or review work papers for a five-year time period. According to the American Institute of Certified Public Accountants and industry representatives, the accounting industry currently retains financial statement working papers and records for seven years. Therefore, CBO estiamtes that the direct cost, if any, to comply with this mandate would be small.

The bill also would protect employees of certain publicly traded companies who provide information to the U.S. government (whistleblowers). Those companies would not be able to discharge, demote, suspend, threaten, harass, or discriminate against such employees in the terms and conditions of their employment. Based on information from the Occupational Safety and Health Administration, the agency that would enforce this provision, CBO estimates that those publicly traded companies would incur minimal, if any, direct cost to comply with the whistleblower protection requirements.

Estimate prepared by: Federal Costs: Ken Johnson and Alexis Ahlstrom; Impact on State, Local, and Tribal Government: Susan Sieg Tompkins; and Impact on the Private Sector: Paige Piper/Bach.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

VIII. ADDITIONAL VIEWS OF SENATORS HATCH, THURMOND, GRASSLEY, KYL, DEWINE, SESSIONS, BROWNBACK, AND MCCONNELL

A. GENERAL

The Chairman's Report contains a lengthy dissertation of facts and circumstances that allegedly gave rise to Enron's bankruptcy. We do not ascribe to the particulars outlined in the Report because at this point, a determination of the facts is the subject of ongoing investigations and court proceedings. We also do not necessarily agree that the Enron situation can be attributed to loopholes in current law; rather, it appears to be the result of bad actors violating existing laws.

In its amended form, S. 2010 is a marked improvement from the original version as introduced, and thus, the bill passed out of this committee unanimously by voice vote. We note that the amended version incorporates some of the provisions Senator Hatch included in his original amendment to S. 2010. Specifically, it further strengthens and refines prosecutorial tools and penalties for criminal conduct. In addition, as amended, S. 2010 removes a particularly troubling and unnecessary provision that would have extended the Department of Justice's (DOJ) automatic standing to bring suit under the civil provision of the Racketeer Influenced and Corrupt Organizations Act (RICO) to the 50 State Attorneys General and the Securities and Exchange Commission (SEC). To date, the Enron situation has left no doubt that the DOJ and SEC are aggressively investigating and bringing charges against offending parties. Moreover, to allow all 50 State Attorneys General and the SEC to bring multiple and duplicative civil RICO actions would result in inconsistent applications of the statute and undermine DOJ's proper role in this area. We know that other members of this committee, on both sides, shared these concerns, and we are pleased that we were able to remove this section from the bill.

Another improvement to S. 2010 resulted from a revision to the proposed new protections for corporate whistleblowers. As originally drafted, the proposal would have provided for overly expansive damage awards which could have encouraged frivolous claims that abuse the protections we seek to bestow. We believe that protections for corporate whistleblowers should track those already existing for airline employees. Those protections, contained in the Aviation Safety Protection Act of 2000, do not include a private cause of action, excessive damages or voluntary arbitration. To reach a compromise, we agreed to allow whistleblowers access to federal district court in cases where the Secretary of Labor has failed to issue a final decision on a whistleblower claim within 6 months.

Despite these improvements, we believe that S. 2010 still contains language that is problematic and even unnecessary to address the concerns that have arisen in light of the Enron bankruptcy, the consequences of which have indeed been devastating to a great many people. We are hopeful that improvements to S. 2010 will continue.

Below we clarify our intent and understanding with regard to specific provisions of S. 2010, as amended.

B. Specific Provisions

SECTION 2.—CRIMINAL PENALTIES FOR ALTERING DOCUMENTS

Section 2 of S. 2010 creates two new Title 18 offenses: an obstruction statute specifically directed to the destruction of documents, 18 U.S.C. 1519, and a document retention provision that applies to auditors of publicly traded securities, 18 U.S.C. 1520. Although it certainly appears, to date, that existing criminal obstruction of justice statutes are adequate to prosecute those who may be culpable in the Enron matter, we support providing prosecutors with all the tools they need to ensure that individuals who destroy evidence with the intent to impede a pending or future criminal investigation are punished. We also support the view that there is a need for a baseline retention standard that will apply to audit or review workpapers, which are the most critical documents relating to audits of publicly traded companies.

Section 1519

We recognize that section 1519 overlaps with a number of existing obstruction of justice statutes, but we also believe it captures a small category of criminal acts which are not currently covered under existing laws—for example, acts of destruction committed by an individual acting alone and with the intent to obstruct a future criminal investigation.

We have voiced our concern that section 1519, and in particular, the phrase “or proper administration of any matter within the jurisdiction of any department or agency of the United States” could be interpreted more broadly than we intend. 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.

Section 1520

Although the scope of section 1520, the document retention provision, has been significantly narrowed since S. 2010 was introduced, we are concerned that the Chairman’s Report does not reflect the full extent to which this provision was narrowed.

As we made clear before S. 2010 was amended, we strongly believe that a broad federal mandate requiring accountants of publicly traded companies to retain all documents sent, received or created in connection with any audit, review or other similar engagement, would create an unworkable standard—one that would require auditors to retain warehouses of documents, including those immaterial to an audit's conclusions. We believe that any such mandate would have a substantial and adverse effect on this nation's economy.

In its current form, section 1520 requires accountants of publicly traded companies to maintain audit and review workpapers for a period of 5 years. It does not impose any such requirement with respect to other documents, such as memoranda, correspondence, communications, and electronic records. Instead, with respect to other such documents, section 1520(a)(2) directs the SEC to promulgate, after adequate notice and opportunity for comment from industry experts, regulators and government agencies, such rules and regulations "as are reasonably necessary".

It is our intention that the SEC will exercise its discretion prudently in determining the necessity for and the scope of document retention regulations. In so doing, we anticipate that the SEC may well determine that the retention of many documents that fall within the list of categories of documents enumerated in section 1520(a)(2) is unecessary. Similarly, the SEC may also determine that it is unreasonable to apply a 5-year retention period, to all regulated documents.

We understand that the accounting profession has implemented standards relating to the retention of workpapers. We encourage the profession to review their existing standards, and we urge the SEC to consider such standards when implementing regulations pursuant to section 1520(a)(2).

In supporting section 1520, it is our intention to strike a fair balance between the legitimate needs of investigators and the accounting profession. In our view, it is not the role of Congress to impose unnecessary and draconian retention requirements on a profession, particularly where broad criminal obstruction statutes serve to deter and punish severely those who destroy documents with the intent to impede a pending or future investigation.

SECTION 4.—STATUTE OF LIMITATIONS

1. General views

We believe current law likely provides an adequate length of time in which people who have been defrauded can file suit—one year after an individual knows he or she has been defrauded or three years after the date of the fraud. This period mirrors legislatively enacted limitations that apply to statutory claims that are most analogous to those contemplated here. Such statutes of limitations provide for certainty in the markets and adequately protect genuinely aggrieved consumers. There has been no evidence to indicate that the time period after a claimant has discovered a fraud needs to be doubled, let alone tripled, as was proposed originally in S. 2010. It is worthy to note that even though they dissented from the majority holding in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson,* 501 U.S. 350, 369, 374 (1991) Justices O'Connor and Kennedy were clear in their support for the current one-year limitation after discovery of the fraud. Regrettably, the sponsors of S. 2010 prevailed in their effort to extend the current statute of limitations, and we would like to clarify our understanding of the intended parameters of that extension.

Section 4(a) of this bill amends section 1658 of Title 28, United States Code to address the *Lampf* holding. Specifically, it sets a five-year outer limit on implied private rights of action involving a claim of fraud, deceit, manipulation, or contrivance, which are in contravention of a regulatory requirement concerning the federal securities laws. Consequently, section 4(a) is not intended to conflict with existing limitations periods for any express private rights of action under the federal securities laws.

2. Five-year maximum limit

In addition, because of the two-year limitation provided in section 1658(b)(2) of Title 28, United States Code, as amended by this bill, the five-year outer limit is not subject to equitable tolling. This is consistent with existing law applying statutes of limitation to securities fraud actions. Where there is a bifurcated limitations period, with an inner limit running from the time when the fraud was or should have been discovered, the inner limit "by its terms, begins after discovery of the facts constituting the violation, making tolling unnecessary. The [outer limit] is a period of repose inconsistent with tolling." *Lampf,* 501 U.S. at 363.

3. Two-year discovery limit

Section 4 of this bill is not intended to change existing case law holding that an objective standard should be used to measure the starting point as to when a securities fraud should have been discovered for purposes of a limitations period. In other words, this provision is intended to be consistent with established case law in that the "discovery" limitations period for private antifraud actions under section 10(b) of the Exchange Act begins to run when the plaintiff is on "inquiry notice" of a fraud. Rather than requiring actual knowledge to begin the running of the statute of limitations, the limitations period begins to run after discovery should have been made by exercise of reasonable diligence. This requirement, which has "long applied in fraud cases outside as well as in the securities field," *Tregenza* v. *Great American Communications Co.,* 12 F.3d 717, 722 (7th Cir. 1993) and cases cited therein, is necessary to limit "the opportunistic use of federal securities law to protect investors against market risk." Id. When "the circumstances would suggest to an investor of ordinary intelligence that she has been defrauded, a duty of inquiry arises, and knowledge will be imputed to the investor who does not make such an inquiry." *Dodds* v. *Cigna Sec., Inc.,* 12 F.3d 346, 350 (2d Cir. 1993), *cert. denied,* 511 U.S. 1019 (1994). *See also, inter alia, Menowitz* v. *Brown,* 991 F.2d 36, 41 (2d Cir. 1993); *Kahn* v. *Kohlberg, Kravis, Roberts & Co.,* 970 F.2d 1030, 1042 (2d Cir.), *cert. denied,* 506 U.S. 986 (1992).

4. No expansion of existing private rights of action

We agree that Section 4 of this bill is not intended to create a new private right of action or to broaden any existing private right of action.

SECTION 5.—REVIEW AND ENHANCEMENT OF CRIMINAL SENTENCES IN CASES OF FRAUD AND EVIDENCE DESTRUCTION

We support the provisions of section 5 which have incorporated many of our suggestions. We strongly endorse the view that the Sentencing Commission should revisit the guidelines that apply to corporate misconduct, as well as to those that apply to obstruction of justice and fraud offenses. We believe that tougher penalties, coupled with new criminal offenses, will enhance the ability of prosecutors to respond to egregious acts of obstruction and fraud.

SECTION 6.—WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES

This bill provides federal protection for corporate whistleblowers, who should be shielded from illegal retaliatory action. The amendment offered by Senators Grassley and Leahy revises the original bill to make these protections consistent with the Aviation Safety Protection Act of 2000 in which we provided whistleblower protections to another class of non-government employees. Because we had already extended whistleblower protections to non civil service employees, we thought it best to track those protections as closely as possible.

To make the corporate whistleblower protections consistent with those provided to airline employees, the amendment struck the excessive damages included in the original bill and subsequent compromises. It also removed a provision that allowed immediate access to federal district courts. However, this compromise does provide whistleblowers with access to federal court in the event the Secretary of Labor fails to issue a final decision within 6 months.

SECTION 7.—CRIMINAL PENALTIES FOR SECURITIES FRAUD

Although we believe that existing criminal statutes are adequate to prosecute criminal acts involving securities fraud, we support the creation of a new securities fraud offense. In our view, this provision will make it easier, in a limited class of cases, for prosecutors to prove securities fraud by eliminating, for example, the element that the mails or wires were used to further the scheme to defraud.

This new securities fraud offense does not lower the standard of criminal intent prosecutors must meet to convict securities fraud offenders. Like the bank and health care fraud statutes on which this provision is modeled, prosecutors must prove that a defendant knowingly engaged in a scheme or artifice to defraud, or knowingly made false statements or representations to obtain money in a securities transaction. This standard, which includes knowledge and intent elements, is consistent with existing securities fraud statutes.

3. CONCLUSION

As we consider legislative reforms to address concerns highlighted by the Enron debacle, it should be noted that there are a host of issues, many of which are outside of the jurisdiction of this Committee. While S. 2010 tightens and strengthening criminal penalties, among other things, it does not address issues relating to corporate and professional responsibility and disclosure. Complementary legislation is necessary to address these issues which are the focus of the President's "10 Point Plan" and debate in other Senate and House committees.

Not only does legislation need to address corporate and professional responsibility and disclosure, it also must be deliberate and measured so that our economy is not adversely affected. We look forward to working with the full Senate, the other legislative chamber and the President to find the appropriate balanced solution to these complex issues.

ORRIN G. HATCH.
STROM THURMOND.
CHUCK E. GRASSLEY.
JON KYL.
MIKE DEWINE.
JEFF SESSIONS.
SAM BROWNBACK.
MITCH MCCONNELL.

IX. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 2010, as reported, are shown as follows (existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

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TITLE 11—BANKRUPTCY

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CHAPTER 5—CREDITORS, THE DEBTOR, AND THE ESTATE

Subchapter I—Creditors and Claims

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SUBCHAPTER II—DEBTOR'S DUTIES AND BENEFITS

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§ 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

(1) for a tax or a customs duty—

* * * * * * *

(17) for a fee imposed by a court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under section 1915(b) or (f) of title 28, or the debtor's status as a prisoner, as defined in section 1915(h) of this title 28; [or]

(18) owed under State law to a State or municipality that is—

(B) enforceable under part D of title IV of the Social Security Act (42 U.S.C. 601 et seq.)**[**.**]***; or*

(19) that—

(A) arises under a claim relating to—

(i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), any State securities laws, or any regulations or orders issued under such Federal or State securities laws; or

(ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and

(B) results, in relation to any claim described in subparagraph (A), from—

(i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;

(ii) any settlement agreement entered into by the debtor; or

(iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.

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TITLE 18—CRIMES AND CRIMINAL PROCEDURE

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PART I—CRIMES

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CHAPTER 63—MAIL FRAUD

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§ 1341. Frauds and swindles

Whoever, having devised * * *

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§ 1347. Health care fraud

Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice—

(1) to defraud any health care benefit program; or

(2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program.

in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 10 years, or both. If the violation results in serious bodily injury (as defined in section 1365 of this title), such person shall be fined under this title or imprisoned not more than 20 years, or both; and if the violation results in death, such person shall be fined under this title, or imprisoned for any term of years or for life, or both.

§ 1348. Securities fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice—

(1) to defraud any person in connection with any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)); or

(2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d));

shall be fined under this title, or imprisoned not more than 10 years, or both.

* * * * * * *

CHAPTER 73—OBSTRUCTION OF JUSTICE

§ 1501. Assault on process server

Whoever knowingly * * *

* * * * * * *

§ 1514. Civil action to restrain harassment of a victim or witness

(a)(1) A United States * * *

* * * * * * *

(c) As used in this section—

(1) the term "harassment" means a course of conduct directed at a specific person that—

(A) causes substantial emotional distress in such person; and

(B) serves no legitimate purpose; and

(2) the term "course of conduct" means a series of acts over a period of time, however short, indicating a continuity of purpose.

§ 1514A. Civil action to protect against retaliation in fraud cases

(a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES.—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of sections 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of sections 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

(b) ENFORCEMENT ACTION.—

(1) IN GENERAL.—A person who alleges discharge or other discrimination by any person in violoation of subsection (a) may seek relief under subsection (c), by—

(A) filing a complaint with the Secretary of Labor; or

(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

(2) PROCEDURE.—

(A) IN GENERAL.—An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

(B) EXCEPTION.—Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

(C) BURDENS OF PROOF.—An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.

(D) STATUTE OF LIMITATIONS.—An action under paragraph (1) shall be commenced not later than 90 days after the date on which the violation occurs.

(c) REMEDIES.—

(1) IN GENERAL.—An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

(2) COMPENSATORY DAMAGES.—Relief for any action under paragraph (1) shall include—

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) the amount of back pay, with interest; and

(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

(d) RIGHTS RETAINED BY EMPLOYEE.—Nothing in this section shall be deemed to diminish the rights, privilege, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.

§ 1518. Obstruction of criminal investigation of health care offenses.

(a) Whoever willfully prevents, obstructs, misleads, delays or attempts to prevent, obstruct, mislead, or delay the communication of information or records relating to a violation of a Federal health care offense to a criminal investigator shall be fined under this title or imprisoned not more than 5 years, or both.

(b) As used in this section the term "criminal investigator" means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations for prosecutions for violations of health care offenses.

§ 1519. Destruction, alteration, or falsification of records in Federal investigations and bankruptcy

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 10 years, or both.

§ 1529. Destruction of corporate audit records

(a)(1) Any accountant who conducts an audit of an issuer of securities to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1(a)) applies, shall maintain all audit or review workpapers for a period of 5 years from the end of the fiscal period in which the audit or review was concluded.

(2) The Securities and Exchange Commission shall promulgate, within 180 days, after adequate notice and an opportunity for comment, such rules and regulations, as are reasonably necessary, relating to the retention of relevant records such as workpapers, documents that form the basis of an audit or review, memoranda, correspondence, communications, other documents, and records (including electronic records) which are created, sent, or received in connection with an audit or review and contain conclusions, opinions, analyses, or financial data relating to such an audit or review, which is conducted by any accountant who conducts an audit of an issuer of securities to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1(a)) applies.

(b) Whoever knowingly and willfully violates subsection (a)(1), or any rule or regulation promulgated by the Securities and Exchange Commission under subsection (a)(2), shall be fined under this title, imprisoned not more than 5 years, or both.

(c) Nothing in this section shall be deemed to diminish or relieve any person of any other duty or obligation, imposed by Federal or State law or regulation, to maintain, or refrain from destroying, any document.

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TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

PART V—PROCEDURE

CHAPTER 111—GENERAL PROVISIONS

§ 1658. Time limitations on the commencement of civil actions arising under Acts of Congress

(a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment

of this section may not be commenced later than 4 years after the cause of action accrues.

(b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of—

(1) 5 years after the date on which the alleged violation occurred; or

(2) 2 years after the date on which the alleged violation was discovered.

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