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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

August 2, 2002

The Honorable John Ashcroft
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Attorney General Ashcroft,

I am writing both to address Judiciary Committee oversight matters related to the Department of Justice enforcement of the Sarbanes-Oxley Act and in my capacity as the primary author of the Corporate and Criminal Fraud Accountability Act provisions contained in the Act. Yesterday, you publicly issued your first field guidance regarding the Department's enforcement of the Act. Upon review, this field guidance appears to fall short in several key respects in fulfilling the Congressional intent regarding this legislation, as supported by both the plain language of the statutes and the legislative history.

These provisions were intended to provide powerful new authority to investigate, prosecute and punish white collar criminals. Despite repeated invitations, the Department and the Administration played virtually no role in the drafting or debate of these provisions, which passed the Senate unanimously. Not even technical assistance was offered by the Department at the staff level. Indeed, only days before its passage and signing by the President, the Administration responded to a letter I sent jointly with Majority Leader Daschle seeking support by stating that the legislation was still under review internally and detailed views would be provided sometime "in the future." Given the Administration's absence in the crafting of the Act, this letter is intended to provide constructive assistance to you in the implementation of this important new law.

Congress has passed and the President has signed a strong law. However, any law is only as strong as its enforcement. While this letter is by no means an exhaustive list, certain potentially narrow interpretations set forth in your field guidance raise concerns over the Department's implementation of the new Act and are discussed below.

**Anti-Shredding Provisions**: In your field guidance, you discuss the two new evidence tampering statutes created in section 802 of the Act, which I authored. There are several aspects of your discussion of the new 18 U.S.C. § 1519, found in section 802, that require clarification. In discussing section 1519 you assert, without offering any support, that *"New Section 1519*

*should be read in conjunction with the amendment to 18 U.S.C. 1512 added by Section 1102 of this Act, discussed below, which similarly bars corrupt acts to destroy, alter, mutilate, or conceal evidence, in contemplation of an 'official proceeding.'"*

This statement is inaccurate and risks a significant narrowing of the new crime created in section 1519. Section 1519 originated in the Senate-passed bill and is plainly written to be a new, stand alone felony that imposes broad prohibitions on evidence tampering. New section 1519 is in no way linked to the amendment to existing 18 U.S.C. 1512 made in section 1102 of the Act, and the statutory and judicial limitations on the use of section 1512 simply have no bearing on the intended reach of new section 1519. Both the plain language of new section 1519 and the legislative history support the following key distinctions between the two provisions.

First, there is no "official proceeding" requirement in new section 1519. Rather, the statute covers all "matters within the jurisdiction of any department or agency of the United States." This language, which is similar to the broad language used in 18 U.S.C. Section 1001 and not the "official proceeding" language of section 1512 encompasses a broad array of both formal and informal investigative and regulatory functions of the federal government. The legislative history makes this clear, stating that the Act:

> [I]s 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. (Emphasis added). CONGRESSIONAL RECORD, July 26, 2002, at p. S 7419.

Second, new section 1519 pertains to any "matter within the jurisdiction of a federal agency." This is a factual, jurisdictional element and not part of the requisite criminal intent. In other words, unlike section 1512, the new section 1519 requires only proof of the defendant's intent to obstruct, impede, or influence and not any link to the defendant's knowledge about the nature of the government's jurisdiction. The legislative history supporting this point could hardly be any clearer.

Following are two passages from the Congressional Record discussing the "matter within the jurisdiction" element:

> [T]his section would create a new 20-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, *as a factual matter,* within the jurisdiction of any federal agency or any bankruptcy. It also covers acts either in contemplation of or in relation to such matters.
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> 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. *The fact that a matter is within the jurisdiction of a federal agency is intended to be a jurisdictional matter, and not in any way linked to the intent of the defendant. Rather, the intent required is the intent to obstruct, not some level of knowledge about the agency processes of the precise nature of the agency of court's jurisdiction. This statute is specifically meant not to include any technical requirement, which some courts have read into other obstruction of justice statutes, to tie the obstructive conduct to a pending or imminent proceeding or matter by intent or otherwise.* (Emphasis added). RECORD, supra, at p. S 7418 - 19.

Thus, it is clear both from the plain language of the statute and from the legislative history that the "matter within the jurisdiction" of the federal government requirement is not an element of intent, but rather a factual matter of jurisdiction. Incorporating any such requirement from existing obstruction of justice statutes such as section 1512 (to which you refer in your guidance) is simply incorrect. The reason for this is simple: establishing this level of intent has caused serious problems for prosecutors and confusion for juries in the past and does not make sense from a policy perspective when there is an act of evidence tampering. Similarly, there is no "corrupt" requirement in new section 1519, again distinguishing it from existing section 1512 with respect to intent.

Third, new Section 1519 not only criminalizes the destruction of documents and evidence but also the false creation and the making of any false entry into such a record, provided such acts are done with the intent to obstruct. Section 1512, on the other hand, only criminalizes destruction or alteration of existing documents, not the creation of new ones. In short, the two statutes are so different that it is puzzling why your field guidance strains to limit the new section 1519 to the constraints of the language in existing section 1512 - language that section 1519 was specifically crafted to avoid.

**New Securities Fraud Crime**: Your guidance also discusses Section 807 of the Act, which creates a new 25-year felony for securities fraud, codified at 18 U.S.C. § 1348. You state merely that: "This provision complements existing securities law. The statute requires a nexus to certain types of securities, no proof of the use of the mails or wires is required." You do not point out the many advantages of the new criminal provision.

For example, you do not note that the new statute makes significant changes by freeing prosecutors from dependence on the technical requirements of the Securities and Exchange Act of 1934 or SEC regulations and the often problematic intent requirements that can be associated with prosecuting willful violations of such laws and regulations. You do not point out that the new Section 1348 eliminates the "purchase and sale" requirement imposed under the 1934 Act on prosecutors in securities fraud cases. You do not mention that the new provision is more analogous to the existing statutes criminalizing bank fraud and health care fraud, even though it is being codified directly next to those provisions in the criminal code, and thus that it provides a far more flexible tool for prosecutors.

You also do not discuss the implications of this provision in simplifying the intent element in these complex cases -- implications made clear by the following legislative history:

> 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*. It is meant to cover any scheme or artifice to defraud any person in connection with a publicly traded company. The acts terms are not intended to encompass technical definition in the securities laws, but rather are intended to provide a flexible tool to allow prosecutors to address the wide array of potential fraud and misconduct which can occur in companies that are publicly traded.
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> 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*. RECORD, supra, at p. S 7418, 7421.

In short, your field guidance could do much more to point out the advantages to prosecutors of this new criminal provision.

The effectiveness of the new laws in the Sarbanes-Oxley Act in preventing financial fraud is dependent on the Department's vigor in enforcing its provisions. As prosecutors, investigators, judges, and juries first learn about and interpret these statutes, the leadership of the Department of Justice is vital. Providing overly narrow and technical readings of the new tools provided in the Act can become a self fulfilling prophecy.

Please provide the Judiciary Committee with all subsequent field guidance and training materials issued by the Department relating to the provisions of the Sarbanes-Oxley Act. In addition, please advise whether you plan to amend or supplement the field guidance you have already issued to clarify the points raised in this letter.

Finally, please advise me when you will respond to the letter I sent, with Senator Hatch, to you last week requesting that you provide us with information about the Corporate Fraud Task Force, and whether the Task Force was involved in any way with issuing the field guidance discussed in this letter.

Thank you for your prompt attention to this matter.

Sincerely,

PATRICK LEAHY
Chairman