

U.S. Supreme Court Narrows Sarbanes-Oxley's Document Destruction Provision. . . But Not that Much

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The U.S. Supreme Court issued a decision today overturning the conviction of a commercial fisherman who was prosecuted under the Sarbanes-Oxley Act for throwing undersized red grouper overboard. The case, *Yates v. U.S.*, has been widely followed because the prosecution of the fisherman, John Yates, under Sarbanes-Oxley's so-called "document shredding" provision has been viewed by many as an overly aggressive use of federal criminal law, and of Sarbanes-Oxley in particular. The Supreme Court's decision will be hailed by many for rejecting the Department of Justice's aggressive interpretation of Sarbanes-Oxley, but the actual effect of the ruling will be fairly limited. The Supreme Court did not limit 18 U.S.C. § 1519 to financial fraud investigations. Instead, it limited the interpretation of "tangible objects" whose destruction the law forbids to objects that can be used to record or preserve information. Thus, although § 1519 fishermen might now be able to toss undersized fish back into the sea without violating § 1519, the statute still casts a wide net beyond the financial fraud context that was the driving force for the enactment of Sarbanes-Oxley.

Background

John Yates is a commercial fisherman. To the extent he was familiar with Sarbanes-Oxley on August 23, 2007, he surely never imagined that it would apply to his commercial fishing activities. But on that day, a Florida Fish and Wildlife Conservation officer boarded Mr. Yates' boat, the *Miss Katie*. The officer noticed three red grouper out of a larger catch that appeared to be undersized - shorter than 20 inches long

- under federal conservation regulations. The officer separated the undersized fish from the rest of the catch and instructed Mr. Yates to leave them in separate crates until *Miss Katie* returned to port. After the officer left the boat, Mr. Yates unwisely instructed his crew to throw overboard the undersized fish and replace them with fish from the rest of the catch.

Although violation of the federal conservation regulations at issue is a civil offense punishable only by a fine or fishing license suspension, Mr. Yates eventually found himself ensnared in the Sarbanes-Oxley law, which was enacted to enhance the punishment of financial fraud in the wake of the collapse of Enron and other corporations. Mr. Yates was charged with impeding a federal investigation under 18 U.S.C. § 1519. The enactment of that particular provision of Sarbanes-Oxley was prompted largely by the conduct of Enron's outside auditor, Arthur Andersen LLP, which destroyed potentially incriminating documents. Arthur Andersen's conduct exposed a loophole in a federal statute, 18 U.S.C. § 1512(b), which applied to a person who intimidated, threatened, or persuaded another person to shred documents, but did not apply to the person who actually shredded the documents. Congress responded by enacting § 1519, which makes it illegal to knowingly alter, destroy, mutilate, conceal, cover up, falsify, or make a false entry in any "record, document, or tangible object" with the intent to impede an

investigation under federal law.

Mr. Yates was convicted in federal district court and sentenced to 30 days in prison. The U.S. Court of Appeals for the Eleventh Circuit affirmed the conviction.

The Supreme Court today reversed the conviction. In a plurality opinion joined by three other Justices, Justice Ginsburg wrote that, although a fish is no doubt an object that is tangible, it is not the kind of "tangible object" covered by §1519. Her opinion interpreted "tangible object" as used in § 1519 as covering only objects that one can use to record or preserve information. The opinion explains that whether a statutory term is ambiguous turns not solely on the dictionary definitions of its words, but also on the context in which those words are used. Thus, the plurality opinion looked to the caption of § 1519, its location within the U.S. Code, the reach of other provisions of Sarbanes-Oxley, the words immediately surrounding "tangible object" in the statute, and the rule of lenity. Justice Alito provided the fifth vote for reversing the conviction, writing separately that applying several traditional canons of statutory construction allowed the case to be resolved on narrow grounds based upon the combined force of the statute's nouns, verbs, and title.

Justice Kagan wrote a dissent, joined by Justices Scalia, Kennedy, and Thomas. She explained that "tangible object" in § 1519 should be interpreted in accordance with its everyday meaning, i.e., an object that can be touched, which would include Mr. Yates' undersized fish.

Analysis

Although the Supreme Court's decision in *Yates* will surely be widely viewed as a significant rebuke of the Justice Department's aggressive interpretation of Sarbanes-Oxley, companies and individuals should find little comfort in the decision when they are responding to federal investigations. The case addresses only one specific provision of Sarbanes-Oxley. There are many other federal statutes that criminalize activities intended to thwart government investigations, and responding to government investigations remains fraught with peril. Indeed, in *Yates* the Supreme Court expressly noted that Mr. Yates had conceded that the federal Criminal Code contains several other sections that the government could have used to prosecute him for tampering with evidence.

In addition, while the case has garnered much attention because of the application of Sarbanes-Oxley to a set of facts very far afield from financial and accounting fraud, the Supreme Court did not limit § 1519 to that context. Justice Ginsburg's plurality opinion notes that the government's interpretation "would cut § 1519 loose from its financial-fraud mooring" and that the Court was mindful that in Sarbanes-Oxley Congress "trained its attention on corporate and accounting deception and cover-ups." But the Court did not end up limiting § 1519 to "financial fraud" or "corporate and accounting deception and cover-ups." Instead, the Court limited the definition of "tangible object" to objects that are used to record or preserve information. Indeed, the dissent in *Yates v. U.S.* highlights the fact that § 1519 will still apply well beyond the context of financial or accounting fraud. For example, as Justice Kagan pointed out, § 1519 could apply to a fisherman who shreds his vessel's catch log rather than dumping fish overboard.

Thus, while the Supreme Court's decision is a victory for Mr. Yates and ostensibly a defeat for the Department of Justice, the legal risks for corporations and individuals who respond to government investigations will remain as fierce as ever.

John F. Wood is a partner in Hughes Hubbard & Reed's Washington, DC, and Kansas City offices. He is a former United States Attorney and U.S. Supreme Court clerk, and he enjoys catching and eating red

grouper from the Gulf of Mexico, always in compliance with applicable conservation regulations.

For further information, please contact:

John F. Wood
(202) 721-4720
john.wood@hugheshubbard.com

White Collar & Corporate Compliance
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Hughes Hubbard & Reed LLP
One Battery Park Plaza | New York, New York 10004-1482 | 212-837-6000
1775 I Street, N.W. | Washington, D.C. 20006

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