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Possible Criminal Provisions Which May Be Implicated in the Events Surrounding the Collapse of the Enron Corporation

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Summary

On March 7, 2002, an indictment was filed in the United States District Court for the Southern District of Texas against Arthur Andersen, LLP, (Andersen) charging Andersen with an obstruction of justice violation under 18 U.S.C. § 1512 in connection with events surrounding the collapse of the Enron Corporation. This report will briefly summarize this statute and other federal laws carrying criminal penalties which may be implicated in the events surrounding Enron's collapse, depending upon the factual circumstances involved.

On December 2, 2001, Enron Corporation (Enron) filed the largest corporate bankruptcy in the history of the United States. The events surrounding the collapse of Enron have been the focus of investigations by the Congress and by the Executive Branch. Among the issues under examination in those investigations are questions as to whether Enron may have defrauded investors by deliberately concealing information about its finances and whether it may have violated various federal laws. Arthur Andersen, LLP (Andersen) performed both internal and external auditing for Enron. On March 7, 2002, an indictment was filed against Andersen in the United States District Court for the Southern District of Texas in connection with some of its activities regarding Enron.¹ The indictment alleges, among other things, that after the Andersen audit team had been advised by Enron that the SEC had opened an inquiry into Enron's "special purpose entities" and the involvement of Enron's Chief Financial Officer, Andersen partners and others instructed Andersen employees to destroy documents related to Enron.² The indictment alleges that such destruction continued until Andersen was served with an SEC subpoena. Based upon these allegations, paragraph 13 of the indictment states:

¹ The Andersen indictment may be found at the following website: [<http://news.findlaw.com/wp/docs/enron/usandersen030702ind.pdf>].

² Indictment filed on March 7, 2002, in *United States of America v. Arthur Andersen, LLP*, CR H-02-121, at pages 5-7 (hereinafter the Andersen indictment).

13. On or about and between October 10, 2001, and November 9, 2001, within the Southern District of Texas and elsewhere, including Chicago, Illinois, Portland, Oregon, and London, England, ANDERSEN, through its partners and others, did knowingly, intentionally and corruptly persuade and attempt to persuade other persons, to wit: ANDERSEN employees, with intent to cause and induce such persons to (a) withhold records, documents and other objects from official proceedings, namely: regulatory and criminal proceedings and investigations, and (b) alter, destroy, mutilate and conceal objects with intent to impair the objects' integrity and availability for use in such official proceedings.

(Title 18, United States Code, Sections 1512(b)(2) and 3551 *et seq.*)³

The factual allegations reflected in the Andersen indictment and in recent press accounts of the events surrounding Enron's precipitous decline suggest a number of provisions of federal law carrying possible criminal sanctions that may be implicated. Whether one or more of these provisions is deemed to be applicable to these events depends upon the factual circumstances involved. The factual record is still being developed through the ongoing congressional and criminal investigations. This report will briefly summarize some provisions of federal securities, criminal, tax, and pension laws carrying criminal penalties that may be of interest in this regard depending upon the facts as they become apparent. The statutes will be presented in order by title in the United States Code.

- 15 U.S.C. § 78u-1 (insider trading of securities based upon material nonpublic information)—One who is in possession of information not yet available to the public and who trades in securities about which this information is pertinent can be fined up to \$1,000,000 (up to \$2,500,000 if other than a natural person) and/or imprisoned up to ten years.⁴ These penalties are set out in 15 U.S.C. section 78ff(a).
- 15 U.S.C. § 78j(b) (securities fraud)—This provision is the general antifraud provision of the Securities Exchange Act. It prohibits the use of "any manipulative or deceptive device or contrivance" in connection with the purchase or sale of securities. Violations include filing false or misleading statements with the Securities and Exchange Commission. Penalties for violating the general antifraud provision are found at 15 U.S.C. section 78ff(a) and permit fines up to \$1,000,000 (up to \$2,500,000 if other than a natural person) and/or imprisonment up to ten years.
- 18 U.S.C. § 371 (conspiracy to commit a federal offense)—Among other things, this section applies to two or more persons conspiring to commit a federal offense, where one or more of those persons does any act in furtherance of the object of the conspiracy. Maximum criminal penalties include imprisonment of not more than 5 years, and a fine under Title 18, U.S.C. Under 18 U.S.C. § 3571, individuals convicted of a felony may be fined the greater of either the amount set forth in the offense statute or

³ The Andersen indictment at pages 7-8.

⁴ In addition, 15 U.S.C. section 78u-1 allows the Securities and Exchange Commission to bring an action which may result in civil penalties up to three times the profit gained or loss avoided.

an amount not more than \$250,000, while the maximum fine for an organization convicted of a felony would be the greater of the amount set forth in the offense statute or an amount of not more than \$500,000. This section also provides for an alternative fine based on pecuniary gain or loss. If anyone has derived pecuniary gain from the offense or if the offense results in pecuniary loss to any person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless the imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

- 18 U.S.C. § 1001 (false statements)—Among other things, this covers, in any matter within the jurisdiction of the federal Executive, Legislative or Judicial Branches, knowingly and willfully falsifying, concealing, or covering up by any trick, scheme, or device a material fact; making any materially false, fictitious, or fraudulent statement or representation; or making or using any false writing or document, knowing that it contains a materially false, fictitious, or fraudulent statement or entry. Maximum penalties include imprisonment of not more than 5 years, a fine under Title 18, U.S.C.,⁵ or both.
- 18 U.S.C. § 1341 (mail fraud)—Among other things, Section 1341 applies to use of the mail for the purpose of executing, or attempting to execute, a scheme or artifice to defraud or for obtaining money or property by false or fraudulent pretenses, representations, or promises. The maximum penalties include a fine under Title 18, U.S.C.,⁶ or imprisonment of not more than 5 years, or both.⁷
- 18 U.S.C. § 1343 (wire fraud)—Section 1343 covers use of wire, radio, or television communication in interstate or foreign commerce to transmit or to cause to be transmitted any writings, signs, signals, pictures, or sounds, for the purpose of executing a scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises. Maximum penalties include a fine under Title 18, U.S.C.,⁸ imprisonment of up to 5 years, or both.⁹

⁵ Under 18 U.S.C. § 3571, individuals convicted of a felony may be fined the greater of either the amount set forth in the offense statute or an amount not more than \$250,000, while the maximum fine for an organization convicted of a felony would be the greater of the amount set forth in the offense statute or an amount of not more than \$500,000. This section also provides for an alternative fine based on pecuniary gain or loss. If anyone has derived pecuniary gain from the offense or if the offense results in pecuniary loss to any person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless the imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

⁶ *Id.*

⁷ If the violation affects a financial institution, the defendant, if convicted, may be fined not more than \$1 million or imprisoned not more than 30 years, or both.

⁸ For the possible criminal fines provided under Title 18, U.S.C., for a felony conviction, see the discussion at fn. 5, *supra*.

⁹ If the offense affects a financial institution, conviction exposes a perpetrator to a fine of up to \$1 million, imprisonment of up to 30 years, or both.

- 18 U.S.C. § 1505 (obstruction of proceedings before departments, agencies or congressional committees)—Among other things, this covers corruptly impeding the due and proper administration of law under which any pending proceeding is being had before a federal department or agency, or due and proper exercise of the power of inquiry under which any inquiry or investigation is being had in either the House or Senate or any congressional committee or joint committee. Upon conviction, an offender faces imprisonment of up to 5 years, or a fine under Title 18, U.S.C.,¹⁰ or both.
- 18 U.S.C. § 1512(b) (corruptly persuading another to withhold a document from an official proceeding or to alter, destroy, mutilate, or conceal an object to impair its integrity or to make it unavailable in such proceeding)—Among other things, Section 1512(b) applies to corruptly persuading or attempting to corruptly persuade another person, or engaging in misleading conduct toward another person, with the intent to: influence, delay, or prevent the testimony of any person in an official proceeding; cause or induce any person to withhold testimony or withhold a record, document, or other object from an official proceeding; or cause or induce any person to alter, destroy, mutilate, or conceal an object with intent to impair the object’s integrity or availability for use in an official proceeding. This offense carries a maximum term of imprisonment of up to 10 years, a fine under 18 U.S.C.,¹¹ or both.
- 18 U.S.C. § 1956(a)(3)(A) (money laundering)—Among other things, this provision covers those who, with intent to promote the carrying on of specified unlawful activity (as defined in 18 U.S.C. § 1956(c)(7)), conduct or attempt to conduct a financial transaction involving property used to conduct or facilitate specified unlawful activity. It carries a maximum penalty of 20 years imprisonment and a fine under Title 18, U.S.C.¹² The term “specified unlawful activity” means, among other things, any act or activity constituting an offense listed in 18 U.S.C. § 1961(1) except an act indictable under 31 U.S.C., ch. 52, subchapter II.. Both mail fraud under Section 1341 and wire fraud under Section 1343 are among the offenses listed in Section 1961(1).
- 18 U.S.C. § 1962 (racketeering)—Among other things, this section makes it unlawful for any person who had received income derived, directly or indirectly, from a pattern of racketeering activity to use or invest, directly or indirectly, any part of that income, or the proceeds of such income, in acquisition of any interest in, or establishment or operation of, any enterprise engaged in interstate or foreign commerce or in activities affecting interstate or foreign commerce. “Racketeering activity” is

¹⁰ For a discussion of the maximum fines available under Title 18, U.S.C., for a felony conviction, see fn. 5, *supra*.

¹¹ *Id.*

¹² *Id.* In addition, 18 U.S.C. § 1956(b) provides for a civil penalty of the greater of the value of the property, funds, or monetary instruments involved in the transaction or \$10,000, for those who conduct or attempt to conduct such a transaction.

defined under 18 U.S.C. § 1961 to mean, among other things, any act indictable as mail fraud under 18 U.S.C. § 1341 or wire fraud under 18 U.S.C. § 1343. Section 1962 also prohibits any person, through a pattern of racketeering activity, to acquire or maintain, directly or indirectly, any interest or control of any enterprise engaged in interstate or foreign commerce, or whose activities affect interstate or foreign commerce. In addition, this section prohibits any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate in the conduct of that enterprise's affairs through a pattern of racketeering activity. Finally, Section 1962 makes it unlawful to conspire to engage in any of the activities prohibited in the section. Under 18 U.S.C. § 1963, a person convicted of an offense under Section 1962 faces maximum criminal penalties including imprisonment of not more than 20 years, a fine under Title 18, U.S.C.,¹³ or both, plus forfeiture to the United States of (1) any interest acquired or maintained in violation of Section 1962; (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over any enterprise which the person has established, operated, controlled, conducted, or participated in, in violation of 18 U.S.C. § 1962; or (3) any proceeds of or derived from racketeering activity in violation of Section 1962.¹⁴

- 26 U.S.C. § 7201 (attempted tax evasion)--Any person who willfully attempts to evade or defeat any tax or payment of any tax imposed by the Internal Revenue Code is guilty of a felony. Penalties include fines up to \$100,000 for individuals, \$500,000 for corporations, and/or imprisonment for not more than 5 years, plus the costs of prosecution. This is in addition to any other penalties imposed by law. See 18 U.S.C. § 3571, under which a larger fine may be imposed.
- 26 U.S.C. § 7206 (fraud and false statements/perjury)--Among other things, any person who willfully signs a return or other document under the penalties of perjury which he does not believe to be true and correct as to every material matter; who willfully counsels or advises the preparation of a return or other document which is fraudulent or is false as to any material matter; or who simulates, fraudulently executes or advises, aids in, or connives at such execution shall be guilty of a felony. Penalties include fines up to \$100,000 for individuals, \$500,000 for corporations, and/or imprisonment for no more than 3 years, plus the

¹³ Under 18 U.S.C. § 3571, individuals convicted of a felony may be fined the greater of either the amount set forth in the offense statute or an amount not more than \$250,000, while the maximum fine for an organization convicted of a felony would be the greater of the amount set forth in the offense statute or an amount of not more than \$500,000. This section also provides for an alternative fine based on pecuniary gain or loss. If anyone has derived pecuniary gain from the offense or if the offense results in pecuniary loss to any person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless the imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

¹⁴ 18 U.S.C. § 1964 also provides for civil remedies in specified circumstances.

costs of prosecution. See 18 U.S.C. § 3571, under which a larger fine may be imposed.¹⁵

- 26 U.S.C. § 7207 (fraudulent returns, statements, or other documents)--Any person who willfully delivers or discloses to the IRS any list, return, account, statement, or other document, known by him to be false as to any material matter can be fined up to \$10,000 (for individuals) or \$50,000 (for corporations), and/or imprisoned up to 1 year. See 18 U.S.C. § 3571, under which a larger fine may be imposed.¹⁶
- 29 U.S.C. § 1131 (ERISA § 501)--Any person who willfully violates any provision of part 1 of subtitle B of Title I of ERISA, or any regulation or order issued under any such provision can be fined up to \$5,000 and/or imprisoned up to one year. For corporations or other non-individuals, the fine can be up to \$100,000. The provisions referred to are the reporting, disclosure, and retention of records requirements in 29 U.S.C. §§ 1021-1031 (ERISA §§ 101-111). See 18 U.S.C. § 3571, under which a larger fine may be imposed.¹⁷

¹⁵ Under 18 U.S.C. § 3571, individuals convicted of a felony may be fined the greater of either the amount set forth in the offense statute or an amount not more than \$250,000, while the maximum fine for an organization convicted of a felony would be the greater of the amount set forth in the offense statute or an amount not more than \$500,000. This section also provides for an alternative fine based on pecuniary gain or loss. If anyone has derived pecuniary gain from the offense or if the offense results in pecuniary loss to any person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless the imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

¹⁶ 18 U.S.C. § 3571 provides, for a Class A misdemeanor not resulting in death, that a fine of the greater either of the amount set forth in the offense section or of not more than \$100,000 may be imposed upon an individual defendant, while a fine of the greater of the amount set forth in the offense section or of not more than \$200,000 may be imposed upon an organization. This section also provides for an alternative fine based on pecuniary gain or loss. If anyone has derived pecuniary gain from the offense or if the offense results in pecuniary loss to any person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless the imposition of a fine under this subsection would unduly complicate or prolong the sentencing process. A Class A misdemeanor is defined in 18 U.S.C. § 3559(a)(6) as an offense not specifically classified by a letter grade in the section defining it, for which the maximum authorized term of imprisonment is “one year or less but more than six months.”

¹⁷ *Id.*

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