



California Corporate & Securities Law

This Time, Record Destruction Claims Are Aimed At The SEC

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Most have heard the saying “do as I say, not as I do” but I expect that fewer know the full quotation. Its author was the remarkable English polyhistor, John Selden (1584–1654). Here’s the full quotation from [The Table Talk of John Selden](#):

Preachers say, Do as I say, not as I do. But if the physician had the same disease upon him that I have, and he should bid me do one thing, and himself do quite another, could I believe him?

The government can be pretty tough when it comes to the destruction of documents. For example, Section 802 of the Sarbanes–Oxley Act made it a crime to knowingly alter, destroy, mutilate et cetera any record with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of the SEC or any other department or agency of the United States. 18 U.S.C. § 1519. California followed suit by adding a substantially similar provision, Section 25404(a), to the Corporations Code. Cal. Stats. 2003, c. 473 (AB 1031).

The SEC can be quite demanding of others when it comes to retention requirements for email records. For example, the SEC tells investment advisers that “you should keep the email, including all attachments that are required records, as examiners may request a copy of the complete record. In dealing with electronic records, you must also take precautions to ensure that they are secure from unauthorized access and theft or unintended destruction.” See [Information for Newly-Registered Investment Advisers](#).

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Thus, I read with interest Broc Romanek's [post](#) yesterday about accusations that the SEC was itself destroying documents. My interest was further piqued by this statement attributed to an SEC spokesman in this *Wall Street Journal* [story](#):

The SEC spokesman said a record of every matter-under-inquiry process is maintained in the agency's computer system, and that documents such as brokerage trading records, agency emails and newspaper clippings can be obtained again if necessary.

It so happens that in June I had submitted a Freedom of Information Act request to the SEC seeking copies of the SEC's internal email retention policies and procedures. In response I received a copy of these [Administrative Regulations](#). As I read these regulations, the SEC has a 60-day retention policy. All messages in users' in-boxes and folders dated over 60 days are subject to automatic deletion. If an email is deemed an "official record", the user is required to print the message. The paper copy is then maintained in the official file. These procedures seem to involve an extremely short retention period and to place significant reliance on email users. These procedures also seem to be far less demanding than what the SEC expects of the private sector. (I've never worked at the SEC, and welcome comments from anyone who has first-hand experience with the SEC's retention policies regarding emails.)

The accusations reported in the press center on the destruction of "matters under inquiry" or "MUIs". Having read the SEC's [Enforcement Manual](#), I'm not at all surprised to read that the staff disposed of investigative records. In fact, Section 2.6.1 of the Enforcement Manual expressly contemplates the disposition of files when an investigation is closed:

Once a decision has been made to close an investigation, there are several steps that the staff must take. These steps create the official record and ensure that documents obtained during the investigation are handled properly:

*• Check with the Freedom of Information Act ("FOIA") Office. Records that are subject to a request from a member of the public under FOIA cannot be destroyed. **If no FOIA issues exist, the staff may prepare the files for disposition.** If a FOIA issue exists, the FOIA office will advise the staff on the proper disposition of the case*

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files. For example, the staff may be asked to include records subject to a pending FOIA request in the files going to storage even though the records would otherwise not be retained after the case is closed.

- Prepare a closing recommendation. The closing recommendation is a short memorandum and serves as the basic historical record summarizing what the staff did in the investigation and action.

- Prepare the files for disposition. *Remember that electronic records obtained or generated during the investigation will also require proper disposition.*

- Prepare and send appropriate termination notices.

A Special Note For Those Who Read Yesterday's Blog: I've updated the posting to include information subsequently sent to me regarding my inadvertent discovery of a vampire California Correctional Health Care Services website.

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