



As seen in...

BankNews

Reprinted with permission of BankNews Media. Contents of BankNews are, and remain, the property of BankNews, Inc.

Lying to Regulators ... What's the Risk?

In one of the most high-profile cases of its time, Martha Stewart was convicted of obstructing justice as a result of her intentional misrepresentation to Securities and Exchange Commission and FBI investigators regarding the circumstances of her sale of ImClone Systems stock.

While Stewart was not criminally charged with insider trading as a result of her actions, she was ultimately convicted for her participation in a scheme

to cover up her actions and the actions of her broker. Stewart's obstruction conviction resulted in five months of jail time and a five-month home confinement sentence plus a fine of \$30,000. Not unexpectedly, obstruction of justice charges are not limited to such high-profile cases.

Chapter 73 of Title 18 (18 USC §1501, *et seq.*) of the U.S. Code provides the statutory scheme for the federal crime of obstruction of justice. Importantly, as far as financial instructions are concerned, Section 1517 provides:

Whoever corruptly obstructs or attempts to obstruct any examination of a financial institution by an agency of the United States with jurisdiction to conduct an examination of such financial institution shall be fined under this title [maximum of \$250,00], imprisoned not more than five years, or both.

Section 1517 liability may attach at any time an individual obstructs or attempts to obstruct an examination of an institution by federal regulators. It is not necessary for an individual to be under oath in order for liability to attach.

There are relatively few reported cases concerning a conviction of individuals under Section 1517. The cases that are reported tend to reveal particularly egregious conduct by the individual alleged to have committed obstruction, and accordingly Section 1517 charges are often coupled with a litany of additional charges. Nevertheless, the following cases are illustrative of the consequences of violations of Section 1517 and the array of individuals that may be subject to Section 1517 liability.

United States v. McGinty. Criss L. McGinty, an executive vice president of a state bank, transferred \$500,000 from a customer's account to his own personal account. When the FDIC began an examination of the bank, McGinty provided falsified documents and bank statements to the regulators. McGinty was charged with one count of obstructing an examination of a financial institution under Section 1517. Eventually, McGinty pleaded guilty to other offenses in exchange for a sentence of 18 months, and the Section 1517 count was dropped.



Officers, directors, employees, accountants, attorneys and anyone else involved, even tangentially, in examinations of financial institutions by federal regulators should be aware of potential criminal liability that stems from a violation of Section 1517.

United States v. Church; United States v. Graham. In related cases, Terry L. Church, the chief operating officer and senior vice president of a national bank, and Michael Graham, a vice president of the same bank, directed bank employees to alter records sought by FDIC and OCC regulators during a routine examination. Subsequent to the alteration of the records, Church and Graham intentionally misrepresented to regulators their involvement in ordering the alterations. In addition to convictions for other offenses, Church was convicted of two counts of obstruction under Section 1517, and was sentenced to a 348-month term of imprisonment (subsequently reduced to 144 months). Graham was convicted of one count of obstruction under Section 1517, and was sentenced to a 51-month term of imprisonment.

In re Trauger. Thomas C. Trauger, an accountant who represented a financial institution, received notice that the FDIC and OCC required the financial institution to revise its accounting methods. On receipt of the notice, Trauger ordered the alteration and destruction of work papers and other audit documents in order to justify his prior audit conclusions. Trauger also submitted the altered work papers to the OCC as part of its examination of the financial institution. Trauger was charged with one count of obstruction under Section 1517, and was sentenced to a 12-month term of imprisonment.

The foregoing cases reveal that officers, directors, employees, accountants, attorneys and anyone else involved, even tangentially, in examinations of financial institutions by federal regulators should be aware of potential criminal liability that stems from a violation of Section 1517. Financial institutions must also be cognizant that regulators' examination manuals instruct regulators to be vigilant in detecting and reporting potential examination obstruction. Examples of potential examination obstruction include, but are not limited to:

Delaying Tactics

The financial institution's unreasonable delay in providing information requested by the regulators.

Screening Tactics

The financial institution's prescreening of documents requested by regulators, or the financial institution's request that access to documents or staff be requested in advance.

Alteration of Records

The financial institution's alteration or removal of key documents from files, destruction of records or spontaneous creation of required records.

Nonresponsive Answers

The financial institution's provision of incomplete responses to regulator's requests, or the provision of different information than requested by the regulators.

Removal of Records

The financial institution's removal of important documents from the institution's offices and corresponding concealment of the same.

Withholding Information Based on Unfounded Assertions of Privilege

The financial institution's failure to provide documents based on a blanket assertion of attorney/client privilege, accountant/client privilege or any other asserted privilege.

While not all of the aforementioned indicia of examination obstruction may be sufficient to impose criminal liability on an individual under Section 1517, the presence of such indicia may heighten the scrutiny of the regulators for any given examination, as well as provide an opportunity for regulators to report the potential obstruction to a prosecuting body. Accordingly, it is important for all persons involved in a federal regulatory examination of a financial institution (i) to be aware of and comply with all applicable laws and regulations associated with such examinations; and (ii) to be aware of the possible criminal liability associated with the obstruction of such examinations. Section 1517 provides a potentially powerful club for regulators to use to ensure compliance with their examination requests. **BN**