

MEMORANDUM

DATE: December 15, 2010

TO: Discovery Subcommittee

FROM: Kate David

CC: Judge Mark Kravitz
Judge Lee H. Rosenthal
Professor Edward Cooper
John Rabiej

SUBJECT: Laws Imposing Preservation Obligations

This memorandum summarizes statutes, regulations, ordinances, and rules imposing preservation obligations. During the May 2010 Conference on Civil Litigation, the E-Discovery Panel suggested that the Civil Rules Advisory Committee examine the possibility of adopting a rule on preservation. Following the 2010 Conference, the Discovery Subcommittee began examining the possibility of adopting a rule on preservation and determined that it would be useful to identify laws that impose a duty to preserve. The Discovery Subcommittee asked me to research existing laws imposing preservation obligations to give them a broad sense for the kinds of laws that already work in this area. This memo summarizes a representative sampling of those laws.

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I. Sampling of Laws Imposing Preservation Obligation

There are thousands of federal, state, and municipal statutes, regulations and ordinances that impose a duty to preserve.¹ The Code of Federal Regulations alone contains over 5000 references to record keeping and maintenance. And all 50 states have statutes that establish record keeping requirements. Municipalities also have record retention requirements, such as requirements that local businesses maintain records relating to permit applications. *See, e.g.*, BERKELEY, CAL., CODE §§ 9.72.130 (2010) (taxicab drivers), 9.72.080 (firearms dealers).

Some statutes and regulations apply generally to all types of businesses (e.g., employment laws) and others apply only to those doing business in a certain area (e.g., food manufacturers, bingo operators) or engaged in a certain activity (e.g., contracting with the government, exporting goods).

These laws impose the duty to preserve on a broad spectrum of entities and individuals, including: employers,² firearms dealers,³ storers of nuclear fuel and radioactive waste,⁴ kosher meat

¹I did a search of federal statutes and regulations and state statutes for a representative sample of the laws that impose a duty to preserve. I also reviewed ordinances from several large cities and included some of Berkeley's more unique ordinances imposing preservation requirements. In short, this memo covers a representative sampling of the laws imposing a duty to preserve rather than an exhaustive summary of all of the federal, state, and municipal laws imposing a duty to preserve. If the Subcommittee desires more examples, I can continue to collect statutes and regulations.

²29 U.S.C. § 211; *Id.* § 1027; 29 C.F.R. § 516.1-516.9; *Id.* § 825.500; *Id.* § 1627.3; CAL. GOV'T CODE § 12946 (West 2005).

³BERKELEY, CAL., CODE § 9.72.080.

⁴10 C.F.R. § 72.72.

providers,⁵ butchers,⁶ restaurants,⁷ transporters of inedible kitchen grease,⁸ motor vehicle fuel distributors,⁹ taxicab drivers,¹⁰ resorts,¹¹ contact lens sellers,¹² licensed professionals,¹³ auctioneers,¹⁴ alligator parts dealers,¹⁵ cigarette and tobacco distributors,¹⁶ schools,¹⁷ childcare centers,¹⁸ pest control dealers,¹⁹ commercial fundraisers,²⁰ stores providing recycling programs,²¹ salvage pools,²²

⁵N.Y. AGRIC. AND MKTS. LAW § 201-b(3) (McKinney 2010).

⁶ALA. CODE § 2-15-3 (2010).

⁷BERKELEY, CAL., CODE § 11.60.040

⁸CAL. FOOD & AGRIC. CODE § 19313.1 (West 2010).

⁹CAL. HEALTH & SAFETY CODE § 43026(d) (West 2006).

¹⁰BERKELEY, CAL., CODE § 9.52.130.

¹¹*Id.* § 11.20.130.

¹²CAL. BUS. & PROF. CODE § 2546.5(c) (West 2010).

¹³*Id.* § 2532.6(c)(3)(speech-language pathologists and audiologists); *Id.* § 4846.5(e) (veterinarians); *Id.* § 4980.54(d) (family and marriage therapists); *Id.* § 4996.22(b) (social workers); FLA. STAT. § 494.00295 (2010) (mortgage brokers); TEX. OCC. CODE ANN. § 559.055 (West 2004) (pharmacists).

¹⁴CAL. CIV. CODE § 1812.607(g) (West 2009).

¹⁵ALA. CODE § 9-12-207(d) (2010).

¹⁶CAL. BUS. & PROF. CODE § 22978.5(a) (West 2010).

¹⁷CAL. EDUC. CODE § 17611 (West 2002).

¹⁸ALA. CODE § 38-7-13 (2010); S.C. CODE ANN. § 63-13-70 (2009).

¹⁹CAL. FOOD & AGRIC. CODE § 12114 (West 2010).

²⁰CAL. GOV'T CODE ANN. § 12599.7 (West 2005).

²¹CAL. PUB. RES. CODE § 42252(d) (West 2007).

²²CAL. VEH. CODE § 11540(b) (West 2010).

bingo operators,²³ slot machine licensees,²⁴ collection agencies,²⁵ wine shippers,²⁶ dentists,²⁷ pharmacies,²⁸ hospital districts,²⁹ operators of medical waste treatment facilities,³⁰ telephone medical advice services,³¹ cremationists,³² reinsurers,³³ mold remediators,³⁴ sexually oriented businesses,³⁵ foundries,³⁶ utilities,³⁷ body-piercing salons,³⁸ tattoo facilities,³⁹ employee leasing companies,⁴⁰ mail-

²³ALA. CODE § 45-8-150.09 (2010).

²⁴FLA. STAT. § 551.104(6) (2010).

²⁵ALASKA STAT. ANN. § 08.24.280(a) (West 2010).

²⁶TEX. ALCO. BEV. CODE ANN. § 54.06(b) (West 2010).

²⁷ARIZ. REV. STAT. ANN. § 32-1264 (2010).

²⁸CAL. BUS. & PROF. CODE § 4169(a)(5) (West 2010).

²⁹TEX. HEALTH & SAFETY CODE ANN. § 61.053(j) (West 2010).

³⁰CAL. HEALTH & SAFETY CODE § 118165 (West 2006).

³¹CAL. INS. CODE § 10279(a)(5) (West 2010).

³²ALA. CODE § 34-13-121(h) (2010).

³³TEX. INS. CODE ANN. § 4152.205(a) (West 2009).

³⁴TEX. OCC. CODE ANN. § 1958.156 (West 2004).

³⁵TEX. LAB. CODE ANN. § 51.016 (West 2010).

³⁶N.Y. ARTS & CULT. AFF. LAW § 14.06 (McKinney 2010).

³⁷N.Y. ENERGY LAW § 17.103(2)(a) (McKinney 2004).

³⁸FLA. STAT. § 381.0075(11)(a)(7) (2010).

³⁹ALA. CODE § 22-17A-6(3) (2010).

⁴⁰FLA. STAT. § 468.525(3)(g) (2010).

in secondhand precious metals dealers,⁴¹ bail bond agents,⁴² government contractors,⁴³ accountants,⁴⁴ lawyers,⁴⁵ chemical manufacturers,⁴⁶ and railroads.⁴⁷

Some of these laws are brief and others are extremely comprehensive. A sampling, from least to most comprehensive:

Example A:

Restaurants:

1. At least fifty percent by volume of each restaurant's food packaging, in which prepared food is provided to customers, or which is kept, purchased, or obtained for this purpose, shall be degradable or recyclable.
2. Each restaurant shall maintain written records evidencing its compliance with this section.

BERKELEY, CAL., CODE § 11.60.040(A).

Example B:

Each license holder shall maintain records for three years showing the continuing education programs completed by the license holder.

TEX. OCC. CODE ANN. § 559.055 (West 2004).

⁴¹*Id.* § 538.32.

⁴²*Id.* § 648.36.

⁴³41 C.F.R. § 60-741.80.

⁴⁴18 U.S.C. § 1520.

⁴⁵MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (lawyers); ME RULES OF PROF'L CONDUCT R. 1.15(2)(iii).

⁴⁶15 U.S.C. § 2607.

⁴⁷49 C.F.R. § 234.273.

Example C:

In addition to any other records required to be kept pursuant to this chapter, every transporter of inedible kitchen grease shall record and maintain for two years all of the following:

- (a) The name and address of each location from which the transporter obtained the inedible kitchen grease.
- (b) The quantity of material received from each location.
- (c) The date on which the inedible kitchen grease was obtained from each location.

CAL. FOOD & AGRIC. CODE § 19313.1 (West 2010).

Example D:

(a) Every butcher shall keep a record of every cow or animal of the cow kind killed, showing the color, earmarks and brand of each cow or animal of the cow kind killed or butchered and the date when killed or butchered and, if purchased, from whom purchased, the residence of the person from whom the same was purchased and when and also the approximate gross weight at the time purchased and at the time killed or butchered.

(b) Any butcher who fails to keep such record or who fails to make the required entries above specified within 24 hours after butchering any cow or animal of the cow kind shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than \$500.00 and may be sentenced to hard labor for the county for a period of not exceeding 12 months.

(c) All persons shall have a right to inspect at any time the book required to be kept by this section.

ALA. CODE § 2-15-3 (2010).

Example E:

Every officer of election shall retain and preserve, for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice

President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for, all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election, except that, when required by law, such records and papers may be delivered to another officer of election and except that, if a State or the Commonwealth of Puerto Rico designates a custodian to retain and preserve these records and papers at a specified place, then such records and papers may be deposited with such custodian, and the duty to retain and preserve any record or paper so deposited shall devolve upon such custodian. Any officer of election or custodian who willfully fails to comply with this section shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

42 U.S.C. § 1974.

Example F:

(a) General requirements. Any personnel or employment record made or kept by the contractor shall be preserved by the contractor for a period of two years from the date of the making of the record or the personnel action involved, whichever occurs later. However, if the contractor has fewer than 150 employees or does not have a Government contract of at least \$150,000, the minimum record retention period shall be one year from the date of the making of the record or the personnel action involved, whichever occurs later. Such records include, but are not necessarily limited to, records relating to requests for reasonable accommodation; the results of any physical examination; job advertisements and postings; applications and resumes; tests and test results; interview notes; and other records having to do with hiring, assignment, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship. In the case of involuntary termination of an employee, the personnel records of the individual terminated shall be kept for a period of two years from the date of the termination, except that contractors that have fewer than 150 employees or that do not have a Government contract of at least \$150,000 shall keep such records for a period of one year from the date of the termination. Where the contractor has received notice that a complaint of discrimination has been filed, that a compliance evaluation has been initiated, or that an enforcement action has been commenced, the contractor shall preserve all personnel records

relevant to the complaint, compliance evaluation or action until final disposition of the complaint, compliance evaluation or action. The term personnel records relevant to the complaint, compliance evaluation or action would include, for example, personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person, and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the aggrieved person applied and was rejected.

(b) Failure to preserve records. Failure to preserve complete and accurate records as required by paragraph (a) of this section constitutes noncompliance with the contractor's obligations under the Act and this part. Where the contractor has destroyed or failed to preserve records as required by this section, there may be a presumption that the information destroyed or not preserved would have been unfavorable to the contractor: Provided, that this presumption shall not apply where the contractor shows that the destruction or failure to preserve records results from circumstances that are outside of the contractor's control.

(c) The requirements of this section shall apply only to records made or kept on or after the date that the Office of Management and Budget has cleared the requirements.

41 C.F.R. § 60-300.80.

Example G:

(a) Each licensee shall keep records showing the receipt, inventory (including location), disposal, acquisition, and transfer of all special nuclear material with quantities as specified in § 74.13(a) of this chapter and for source material as specified in § 40.64 of this chapter. The records must include as a minimum the name of shipper of the material to the ISFSI or MRS, the estimated quantity of radioactive material per item (including special nuclear material in spent fuel and reactor-related GTCC waste), item identification and seal number, storage location, onsite movements of each fuel assembly or storage canister, and ultimate disposal. These records for spent fuel and reactor-related GTCC waste at an ISFSI or for spent fuel, high-level radioactive waste, and reactor-related GTCC waste at an MRS must be retained for as long as the material is stored and for a period of 5 years after the material is disposed of or transferred out of the ISFSI

or MRS.

(b) Each licensee shall conduct a physical inventory of all spent fuel, high-level radioactive waste, and reactor-related GTCC waste containing special nuclear material meeting the requirements in paragraph (a) of this section at intervals not to exceed 12 months unless otherwise directed by the Commission. The licensee shall retain a copy of the current inventory as a record until the Commission terminates the license.

(c) Each licensee shall establish, maintain, and follow written material control and accounting procedures that are sufficient to enable the licensee to account for material in storage. The licensee shall retain a copy of the current material control and accounting procedures until the Commission terminates the license.

(d) Records of spent fuel, high-level radioactive waste, and reactor-related GTCC waste containing special nuclear material meeting the requirements in paragraph (a) of this section must be kept in duplicate. The duplicate set of records must be kept at a separate location sufficiently remote from the original records that a single event would not destroy both sets of records. Records of spent fuel or reactor-related GTCC waste containing special nuclear material transferred out of an ISFSI or of spent fuel, high-level radioactive waste, or reactor-related GTCC waste containing special nuclear material transferred out of an MRS must be preserved for a period of five years after the date of transfer.

10 C.F.R. § 72.72.

Example H (29 C.F.R Part 516 (containing several sections)):

§ 516.2 Employees subject to minimum wage or minimum wage and overtime provisions pursuant to section 6 or sections 6 and 7(a) of the Act.

(a) Items required. Every employer shall maintain and preserve payroll or other records containing the following information and data with respect to each employee to whom section 6 or both sections 6 and 7(a) of the Act apply:

(1) Name in full, as used for Social Security recordkeeping purposes, and on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records,

(2) Home address, including zip code,

(3) Date of birth, if under 19,

(4) Sex and occupation in which employed (sex may be indicated by use of the prefixes Mr., Mrs., Miss., or Ms.) (Employee's sex identification is related to the equal pay provisions of the Act which are administered by the Equal Employment Opportunity Commission. Other equal pay recordkeeping requirements are contained in 29 CFR Part 1620.)

(5) Time of day and day of week on which the employee's workweek begins (or for employees employed under section 7(k) of the Act, the starting time and length of each employee's work period). If the employee is part of a workforce or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of the day and beginning day of the workweek for the whole workforce or establishment will suffice,

(6)(i) Regular hourly rate of pay for any workweek in which overtime compensation is due under section 7(a) of the Act, (ii) explain basis of pay by indicating the monetary amount paid on a per hour, per day, per week, per piece, commission on sales, or other basis, and (iii) the amount and nature of each payment which, pursuant to section 7(e) of the Act, is excluded from the "regular rate" (these records may be in the form of vouchers or other payment data),

(7) Hours worked each workday and total hours worked each workweek (for purposes of this section, a "workday" is any fixed period of 24 consecutive hours and a "workweek" is any fixed and regularly recurring period of 7 consecutive workdays),

(8) Total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation,

(9) Total premium pay for overtime hours. This amount excludes the straight-time earnings for overtime hours recorded under paragraph (a)(8) of this section,

(10) Total additions to or deductions from wages paid each pay period including employee purchase orders or wage assignments.

Also, in individual employee records, the dates, amounts, and nature of the items which make up the total additions and deductions,

(11) Total wages paid each pay period,

(12) Date of payment and the pay period covered by payment.

(b) Records of retroactive payment of wages. Every employer who makes retroactive payment of wages or compensation under the supervision of the Administrator of the Wage and Hour Division pursuant to section 16(c) and/or section 17 of the Act, shall:

(1) Record and preserve, as an entry on the pay records, the amount of such payment to each employee, the period covered by such payment, and the date of payment.

(2) Prepare a report of each such payment on a receipt form provided by or authorized by the Wage and Hour Division, and (i) preserve a copy as part of the records, (ii) deliver a copy to the employee, and (iii) file the original, as evidence of payment by the employer and receipt by the employee, with the Administrator or an authorized representative within 10 days after payment is made.

(c) Employees working on fixed schedules. With respect to employees working on fixed schedules, an employer may maintain records showing instead of the hours worked each day and each workweek as required by paragraph (a)(7) of this section, the schedule of daily and weekly hours the employee normally works. Also,

(1) In weeks in which an employee adheres to this schedule, indicates by check mark, statement or other method that such hours were in fact actually worked by him, and

(2) In weeks in which more or less than the scheduled hours are worked, shows that exact number of hours worked each day and each week.

§ 516.5 Records to be preserved 3 years.

Each employer shall preserve for at least 3 years:

(a) Payroll records. From the last date of entry, all payroll or other records containing the employee information and data required under any of the applicable sections of this part, and

(b) Certificates, agreements, plans, notices, etc. From their last effective date, all written:

(1) Collective bargaining agreements relied upon for the exclusion of certain costs under section 3(m) of the Act,

(2) Collective bargaining agreements, under section 7(b)(1) or 7(b)(2) of the Act, and any amendments or additions thereto,

(3) Plans, trusts, employment contracts, and collective bargaining agreements under section 7(e) of the Act,

(4) Individual contracts or collective bargaining agreements under section 7(f) of the Act. Where such contracts or agreements are not in writing, a written memorandum summarizing the terms of each such contract or agreement,

(5) Written agreements or memoranda summarizing the terms of oral agreements or understandings under section 7(g) or 7(j) of the Act, and

(6) Certificates and notices listed or named in any applicable section of this part.

(c) Sales and purchase records. A record of (1) total dollar volume of sales or business, and (2) total volume of goods purchased or received during such periods (weekly, monthly, quarterly, etc.), in such form as the employer maintains records in the ordinary course of business.

516.1 Form of records; scope of regulations.

(a) Form of records. No particular order or form of records is prescribed by the regulations in this part. However, every employer subject to any provisions of the Fair Labor Standards Act of 1938, as amended (hereinafter referred to as the "Act"), is required to maintain records containing the information and data required by the specific sections of this part. The records may be maintained and preserved on microfilm or other basic source document of an automatic word or data processing memory provided that adequate projection or viewing equipment is available, that the reproductions are clear and identifiable by date or pay period and that extensions or transcriptions of the information required by this part are made available upon request.

(b) Scope of regulations. The regulations in this part are divided into two subparts.

(1) Subpart A of this part contains the requirements generally applicable to all employers employing covered employees, including the requirements relating to the posting of notices, the preservation and location of records, and the recordkeeping requirements for employers of employees to whom both the minimum wage provisions of section 6 or the minimum wage provisions of section 6 and the overtime pay provisions of section 7(a) of the Act apply. In addition, § 516.3 contains the requirements relating to executive, administrative, and professional employees (including academic administrative personnel or teachers in elementary or secondary schools), and outside sales employees.

(2) Subpart B of this part deals with the information and data which must be kept for employees (other than executive, administrative, etc., employees) who are subject to any of the exemptions provided in the Act. This section also specifies the records needed for deductions from and additions to wages for “board, lodging, or other facilities,” industrial homeworkers and employees whose tips are credited toward wages. The sections in subpart B of this part require the recording of more, less, or different items of information or data than required under the generally applicable recordkeeping requirements of subpart A.

(c) Relationship to other recordkeeping and reporting requirements. Nothing in 29 CFR part 516 shall excuse any party from complying with any recordkeeping or reporting requirement imposed by any other Federal, State or local law, ordinance, regulation or rule.

§ 516.6 Records to be preserved 2 years.

(a) Supplementary basic records: Each employer required to maintain records under this part shall preserve for a period of at least 2 years.

(1) Basic employment and earnings records. From the date of last entry, all basic time and earning cards or sheets on which are entered the daily starting and stopping time of individual employees, or of separate work forces, or the amounts of work accomplished by individual employees on a daily, weekly, or pay period basis (for example, units produced) when those amounts determine in whole or in part the pay period earnings or wages of those employees.

(2) Wage rate tables. From their last effective date, all tables or

schedules of the employer which provide the piece rates or other rates used in computing straight-time earnings, wages, or salary, or overtime pay computation.

(b) Order, shipping, and billing records: From the last date of entry, the originals or true copies of all customer orders or invoices received, incoming or outgoing shipping or delivery records, as well as all bills of lading and all billings to customers (not including individual sales slips, cash register tapes or the like) which the employer retains or makes in the usual course of business operations.

(c) Records of additions to or deductions from wages paid:

(1) Those records relating to individual employees referred to in § 516.2(a)(10) and

(2) All records used by the employer in determining the original cost, operating and maintenance cost, and depreciation and interest charges, if such costs and charges are involved in the additions to or deductions from wages paid.

§ 516.7 Place for keeping records and their availability for inspection.

(a) Place of records. Each employer shall keep the records required by this part safe and accessible at the place or places of employment, or at one or more established central recordkeeping offices where such records are customarily maintained. Where the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records shall be made available within 72 hours following notice from the Administrator or a duly authorized and designated representative.

(b) Inspection of records. All records shall be available for inspection and transcription by the Administrator or a duly authorized and designated representative.

§ 516.8 Computations and reports.

Each employer required to maintain records under this part shall make such extension, recomputation, or transcription of the records and shall submit to the Wage and Hour Division such reports concerning persons employed and the wages, hours, and other conditions and practices of employment set forth in the records as the Administrator or a duly authorized and designated representative may request in writing.

§ 516.9 Petitions for exceptions.

(a) Submission of petitions for relief. Any employer or group of employers who, due to peculiar conditions under which they must operate, desire authority to maintain records in a manner other than required in this part, or to be relieved of preserving certain records for the period specified in this part, may submit a written petition to the Administrator requesting such authority, setting forth the reasons therefor.

(b) Action on petitions. If, after review of the petition, the Administrator finds that the authority requested will not hinder enforcement of the Act, the Administrator may grant such authority limited by any conditions determined necessary and subject to subsequent revocation. Prior to revocation of such authority because of noncompliance with any of the prescribed conditions, the employer will be notified of the reasons and given an opportunity to come into compliance.

(c) Compliance after submission of petitions. The submission of a petition or the delay of the Administrator in acting upon such petition will not relieve any employer or group of employers from any obligations to comply with all the applicable requirements of the regulations in this part. However, the Administrator will provide a response to all petitions as soon as possible.

II. Treatment of E-Discovery Panel Elements

The E-Discovery Panel recommended that the preservation rule take into account the following elements: (1) trigger, (2) scope, (3) duration, (4) ongoing duty, (5) litigation hold, (6) work product, (7) consequences/procedures, and (8) judicial determination. As shown above, the laws imposing preservation obligations vary widely. A survey of these laws revealed no single law that included all of the E-Discovery Panel's recommended elements.

Some of the elements, including the effect of a litigation hold, the application of privilege, and access to a judicial officer, were not addressed in any of the laws I reviewed. Other elements, such as scope, duration, and consequences were included in many laws. These elements received

a wide range of treatment.

A. Trigger

Most of the laws imposing a preservation obligation do not have a “trigger,” as they require ongoing maintenance of certain types of records.

Some laws that set forth general recordkeeping requirements also include a more comprehensive duty to preserve after a “trigger event.” For example, after a contractor has “received notice that a complaint of discrimination has been filed, that a compliance evaluation has been initiated, or that an enforcement action has been commenced,” it becomes obligated to preserve “all personnel records relevant to the complaint, compliance evaluation or action.” 41 C.F.R. § 60-300.80. And “[u]pon notice that a verified complaint against it has been filed” employers, labor organizations, and employment agencies “shall maintain and preserve any and all records and files until the complaint is fully and finally disposed of and all appeals or related proceedings terminated.” CAL. GOV’T CODE ANN. § 12946 (West 2005). Other statutes extend the duration of the duty to preserve when regulatory proceedings are instituted, a lawsuit is filed, or an audit or investigation is underway. *See infra* Section II.C.

B. Scope

As explained above, laws imposing preservation obligations vary widely. Some are very precise about the scope of the obligation, while others are less so. The Consumer Product Safety Act uses very broad language to describe the records that must be maintained:

Every person who is a manufacturer, private labeler, or distributor of a consumer product shall establish and maintain such records, make such reports, and provide such information as the Commission may, by rule, reasonably require for the purposes of implementing this chapter, or to determine compliance with rules or orders prescribed under this chapter.

15 U.S.C. § 2065(b).⁴⁸ Similarly, Florida motor carriers are required to keep “pertinent records and papers as may be required by the department for the reasonable administration of this chapter.” FLA. STAT. § 320.0715(4) (2010). Another statute that provides little guidance: “[e]very childcare center or group childcare home shall maintain a register setting forth essential facts concerning each child enrolled under the age of eighteen years.” S.C. CODE ANN. § 63-13-70 (2009).

Other laws provide more guidance. For example, the state statutes that require those applying for or holding a professional license to retain records of professional training and education tend to be straightforward. One example:

Applicants shall maintain records of completion of required continuing education coursework for a minimum of two years and shall make these records available to the board for auditing purposes upon request.

CAL. BUS. & PROF. CODE § 4980.54(d) (West 2003).

Other regulations list the specific documents to be retained. For example, 29 C.F.R. § 516.2 imposes a duty on employers to keep all records that contain any of the “items required” listed in the regulation (including name, home address, date of birth, hours worked, and rate of pay). The City of Berkeley requires taxicab drivers to keep waybills that include “information on where and when the passengers entered vehicle, where the passengers were discharged, and the amount of fare collected.” BERKELEY, CAL., CODE § 9.52.130(1). The State of California requires auctioneers to maintain all records that “include the name and address of the owner or consignor and of any buyer of goods at any auction sale engaged in or conducted by the auctioneer or auction company, a

⁴⁸The CPSA’s implementing regulations (which do not cover all consumer products) are more specific and provide guidance as to which records must be maintained and, in some cases a time period that the records should be retained. *See* 16 C.F.R. Parts 1115, 1117-18, 1130, 1203-05, 1209-12, 1605. But for the products that are not covered by the regulations, the general recordkeeping requirement provides little guidance.

description of the goods, the terms and conditions of the acceptance and sale of the goods, all written contracts with owners and consignors, and accounts of all moneys received and paid out, whether on the auctioneer's or auction company's own behalf as agent, as a result of those activities.” CAL. CIV. CODE § 1812.607(g) (West 2009). The State of Alabama requires butchers to “keep a record of every cow or animal of the cow kind killed, showing the color, earmarks and brand of each cow or animal of the cow kind killed or butchered and the date when killed or butchered and, if purchased, from whom purchased, the residence of the person from whom the same was purchased and also the approximate gross weight at the time purchased and at the time killed or butchered.” ALA.CODE § 2-15-3(a) (2010).

Some federal regulations also provide a list of records that must be kept. The Equal Employment Opportunity Commission requires employers to keep personnel or employment records related to:

- (i) Job applications, resumes, or any other form of employment inquiry whenever submitted to the employer in response to his advertisement or other notice of existing or anticipated job openings, including records pertaining to the failure or refusal to hire any individual,
- (ii) Promotion, demotion, transfer, selection for training, layoff, recall, or discharge of any employee,
- (iii) Job orders submitted by the employer to an employment agency or labor organization for recruitment of personnel for job openings,
- (iv) Test papers completed by applicants or candidates for any position which disclose the results of any employer-administered aptitude or other employment test considered by the employer in connection with any personnel action,
- (v) The results of any physical examination where such examination is considered by the employer in connection with any personnel action,

(vi) Any advertisements or notices to the public or to employees relating to job openings, promotions, training programs, or opportunities for overtime work.

29 C.F.R. § 1627.3(b)(1).

Other laws include examples of records that must be kept, but do not limit the duty to those records. For example, under 41 C.F.R. § 60-300.80, contractor employers are required to keep records which:

include, but are not necessarily limited to, records relating to requests for reasonable accommodation; the results of any physical examination; job advertisements and postings; applications and resumes; tests and test results; interview notes; and other records having to do with hiring, assignment, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship.

Section 60-300.80 also gives examples of the personnel records a contractor should preserve if a complaint of discrimination has been filed, a compliance action has been initiated, or an enforcement action has been commenced. But it does not limit the duty to preserve to the items listed:

The term personnel records relevant to the complaint, compliance evaluation or action would include, for example, personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person, and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the aggrieved person applied and was rejected.

Id.

Another approach is to provide a “safe harbor” and deem records sufficient if certain conditions are met. For example:

Each schoolsite shall maintain records of all pesticide use at the schoolsite for a period of four years, and shall make this information available to the public, upon request, pursuant to the California Public Records Act. A schoolsite may meet the requirements of this

section by retaining a copy of the warning sign posted for each application required by Section 17612, and recording on that copy the amount of the pesticide used.

CAL. EDUC. CODE § 17611 (internal citations omitted). And Proposed 29 C.F.R. § 2530.209-2(c)

would provide that:

Records required to be maintained by a single employer plan under § 2530.209-2(a) will be deemed sufficient if:

(1) With respect to service from the later of the date the employer adopts the plan or [effective date of regulation], they contain all information with respect to service with that employer that is relevant to a determination of each employee's benefit entitlements under the plan, and

(2) With respect to service before [effective date of regulation], if any, they include all records maintained by the employer on and after February 9, 1979, for the purpose of determining employee's benefit entitlements under the provisions of the plan.

C. Duration

Some documents are required to be retained for a short period of time, while others must be retained for many years or indefinitely. On the short end, retailers or restaurants purchasing alligator parts “shall maintain a bill of sale for each purchase for a period of six months after such purchase.” ALA. CODE § 9-12-207(c) (2010). On the long end, public utility holding companies are required to maintain some records for fifty years. *See* 17 C.F.R. § 257.2.

Some provisions imposing preservation requirements specify precisely how long the information must be preserved:

- Any accountant who conducts an audit of a regulated issuer of securities “shall maintain all audit or review workpapers for a period of 5 years from the end of the fiscal period in which the audit or review was concluded.” 18 U.S.C. § 1520(a)(1).

- Officers of elections shall retain election records “for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for....” 42 U.S.C. § 1974.
- “Every employer shall make and keep for 3 years payroll or other records for each of his employees....” 29 C.F.R. § 1627.3.
- Mortgage brokers must maintain copies of all mortgage loan origination disclosure statements for four years. OHIO REV. CODE ANN. § 1322.06(B) (West 2010).

Other laws contain indefinite retention periods. For example, Proposed 29 C.F.R. § 2530.209-2(d) provides that records must be retained “as long as any possibility exists that they might be relevant to a determination of benefit entitlements.” Some provisions imposing a duty to preserve require simply that certain records be “kept,” but do not specify how long. *See, e.g.*, COLO. REV. STAT. § 11-41-112(1)(l) (West 2003); BERKELEY, CAL., CODE § 11.60.040(A).

There are also provisions that provide only a minimum duration of the duty to preserve. For example, the SEC requires brokers and dealers to preserve records “for a period of not less than six years.” 17 C.F.R. § 240.17a-4. Similarly, the State of California requires auctioneers to preserve certain records “for a period of not less than two years” (CAL. CIV. CODE § 1812.607(g) (West 2009)) and commercial fundraisers to maintain records “for not less than 10 years following the completion of each solicitation campaign.” CAL. GOV’T CODE § 12599.7(a) (West 2005).

Some laws contain more complex schemes for determining how long records must be retained. For example, 49 C.F.R. § 382.401, which obligates employers to maintain records related to alcohol and drug testing, sets forth different lengths of time that records must be preserved, depending on the type of record:

(b) Period of retention. Each employer shall maintain the records in accordance with the following schedule:

(1) Five years. The following records shall be maintained for a minimum of five years:

(i) Records of driver alcohol test results indicating an alcohol concentration of 0.02 or greater,

(ii) Records of driver verified positive controlled substances test results,

(iii) Documentation of refusals to take required alcohol and/or controlled substances tests,

(iv) Driver evaluation and referrals,

(v) Calibration documentation,

(vi) Records related to the administration of the alcohol and controlled substances testing programs, and

(vii) A copy of each annual calendar year summary required by § 382.403.

(2) Two years. Records related to the alcohol and controlled substances collection process (except calibration of evidential breath testing devices).

(3) One year. Records of negative and canceled controlled substances test results (as defined in part 40 of this title) and alcohol test results with a concentration of less than 0.02 shall be maintained for a minimum of one year.

(4) Indefinite period. Records related to the education and training of breath alcohol technicians, screening test technicians, supervisors,

and drivers shall be maintained by the employer while the individual performs the functions which require the training and for two years after ceasing to perform those functions.

Other laws extend the amount of time documents must be preserved when an investigation is underway, an administrative proceeding is instituted, or a lawsuit is filed. For example, Section 19141.6 of California's Revenue and Taxation Code extends the obligation to preserve indefinitely when a protest or lawsuit is pending:

Information for any year shall be retained for that period of time in which the taxpayers' income or franchise tax liability to this state may be subject to adjustment, including all periods in which additional income or franchise taxes may be assessed, not to exceed eight years from the due date or extended due date of the return, or during which a protest is pending before the Franchise Tax Board, or an appeal is pending before the State Board of Equalization, or a lawsuit is pending in the court of this state or the United States with respect to California franchise or income tax.

Section 5097(d)-(e) of California's Business and Professions Code likewise extends the preservation obligation indefinitely during the pendency of "any board investigation, disciplinary action, or legal action involving the licensee or the licensee's firm":

(d) Audit documentation shall be maintained by a licensee for the longer of the following:

- (1) The minimum period of retention provided in subdivision (e).
- (2) A period sufficient to satisfy professional standards and to comply with applicable laws and regulations.

(e) Audit documentation shall be maintained for a minimum of seven years which shall be extended during the pendency of any board investigation, disciplinary action, or legal action involving the licensee or the licensee's firm. The board may adopt regulations to establish a different retention period for specific categories of audit documentation where the board finds that the nature of the documentation warrants it.

Another example, which extends the duration of the duty to preserve when an audit or investigation is underway, provides that the obligation endures until the recordholder is released, in writing:

All records pertaining to offshore and onshore Federal and Indian oil and gas leases shall be maintained by a lessee, operator, revenue payor, or other person for 6 years after the records are generated unless the recordholder is notified, in writing, that records must be maintained for a longer period. When an audit or investigation is underway, records shall be maintained until the recordholder is released by written notice of the obligation to maintain records.

30 C.F.R. § 1212.50.

In the following example, the obligation to preserve records is extended to two years after a USDA audit of those records, with the caveat that “any destruction of records” will be at the risk of the producer when “there is reason to know, believe or suspect that matters may or could be in dispute or remain in dispute”:

Such records and accounts must be retained for two years after the date of payment to the producer under the program, or for two years after the date of any audit of records by USDA, whichever is later. Any destruction of records by the producer at any time will be at the risk of the producer when there is reason to know, believe, or suspect that matters may be or could be in dispute or remain in dispute.

7 C.F.R. § 81.13.

Several laws imposing a duty to preserve provide that they do not supersede preservation requirements set forth in other laws. For example, Section 1520(c) provides: “[n]othing in this section shall be deemed to diminish or relieve any person of any other duty or obligation imposed by Federal or State law or regulation to maintain, or refrain from destroying, any document.” 18 U.S.C. § 1520(c). Similarly, “[n]othing in 29 CFR part 516 shall excuse any party from complying with any recordkeeping or reporting requirement imposed by any other Federal, State or local law,

ordinance, regulation or rule.” 29 C.F.R. § 516.1(c).

Other statutes, like Section 5079(d)(2) of California Business and Professions Code, require that the duty to preserve extend for “[a] period sufficient to satisfy professional obligations and to comply with applicable laws and regulations.”

D. Ongoing Duty

Most of the preservation laws impose an ongoing duty to preserve “all” or “any” records of a certain kind. I did not come across any laws providing an end point to the duty to preserve, such that there would be no duty to preserve information generated after the date of the trigger event.

E. Litigation Hold and Work Product

I found no preservation laws addressing the effect of a litigation hold or whether actions taken in furtherance of the preservation duty are protected by work product or other privilege.

F. Consequences

Sanctions imposed for failure to preserve range from small monetary fines to large monetary fines, adverse inference instructions, hard labor, and prison.

Under the Employee Retirement Income Security Program, an employer who fails to maintain records in accordance with the statute must pay “a civil penalty of \$10 for each employee with respect to whom such failure occurs, unless it is shown that such failure is due to reasonable cause.” 29 U.S.C. § 1059(b). The Customs Regulations Guidelines for the Imposition and Mitigation of Penalties for Violations of 19 U.S.C. 1641 penalizes brokers \$10,000 for failure to maintain satisfactory accounting records or records of other documents filed with Customs. 19 C.F.R. Pt. 171, App. C. at XI.B.5. However, the penalty may be subject to mitigation:

\$10,000 penalty for failure to maintain satisfactory accounting records will only be subject to mitigation in full if the broker can

prove that satisfactory accounting records and documents records are being kept. Mitigation in a lesser degree may be afforded upon a showing by the broker that a bona fide attempt was made to establish a satisfactory accounting and/or recordkeeping system, or upgrade a deficient system, but such efforts proved unsuccessful or only partially effective.

Id. at XI.D.5.

Other statutes punish violators with adverse inference instructions. Where government contractors violate recordkeeping provisions, “there may be a presumption that the information destroyed or not preserved would have been unfavorable to the contractor.” 41 C.F.R. § 60-300.80(b). That presumption is rebuttable and “shall not apply where the contractor shows that the destruction or failure to preserve records results from circumstances that are outside of the contractor’s control.” *Id.* Likewise, inadequate audit documentation “shall raise a presumption that the procedures were not applied, tests were not performed, information was not obtained, and relevant conclusions were not reached.” CAL. BUS. & PROF. CODE § 5097(c) (West 2003). Again, this presumption “shall be a rebuttable presumption affecting the burden of proof relative to those portions of the audit that are not documented as required.... The burden may be met by a preponderance of the evidence.” *Id.*

At least one statute, which imposes a duty on butchers to keep records of cows that are butchered, provides that a butcher who fails to keep such records “may be sentenced to hard labor for the county.” ALA.CODE § 2-15-3(b) (2010).

Some sanctions provisions include a state of mind component. Most of these provisions require willful or malicious behavior, but at least one requires only negligence. The Chemical Weapons Convention Regulations imposes penalties for willful violations:

Civil penalty for failure to establish or maintain records. Any person

that is determined to have willfully failed or refused to establish or maintain any record or submit any report, notice, or other information required by the Act or the CWCR, or to have willfully failed or refused to permit access to or copying of any record, including any record exempt from disclosure under the Act or the CWCR as set forth in paragraph (a)(2) of this section, shall pay a civil penalty in an amount not to exceed \$5,000 for each violation.

Criminal penalty. Any person that knowingly violates the Act by willfully failing or refusing to permit entry or inspection authorized by the Act; or by willfully disrupting, delaying or otherwise impeding an inspection authorized by the Act; or by willfully failing or refusing to establish or maintain any required record, or to submit any required report, notice, or other information; or by willfully failing or refusing to permit access to or copying of any record, including records exempt from disclosure under the Act or the CWCR, shall, in addition to or in lieu of any civil penalty that may be imposed, be fined under Title 18 of the United States Code, be imprisoned for not more than one year, or both.

15 C.F.R. § 719.2(b)(2)-(c).

An accountant who knowingly or willfully violates his duty to preserve corporate audit records “shall be fined ..., imprisoned not more than 10 years, or both.” 18 U.S.C. § 1520(b). The statute concerning private securities litigation, 15 U.S.C. § 77z-1, provides that “[a] party aggrieved by the willful failure of an opposing party to comply with [the duty to preserve] may apply to the court for an order awarding appropriate sanctions.” The California statute that imposes preservation obligations on taxpayers limits penalties for violating the statute to \$50,000 “if the failure to maintain or the failure to cause another to maintain is not willful.” CAL. REV. & TAX. CODE § 19141.6(c)(2) (West 2004). A custodian of health care records appointed by the Kansas state board of healing arts is not subject to civil liability for destroying health care records “except upon clear and convincing evidence that the custodian of records maliciously altered or destroyed health care records.” KAN. STAT. ANN. 65-28,128(e)(6) (2010). Appraisers are subject to criminal penalties

if they willfully violate the duty to preserve records of appraisal activities. N.H. REV. STAT. ANN. § 21-J:14-e (2010). Under an Indiana statute that imposes a duty to preserve health care records: “[a] provider is immune from civil liability for destroying or failing to maintain a health record in violation of this section if the destruction or failure to maintain the health record occurred in connection with a disaster emergency ..., unless the destruction or failure to maintain the health record was due to negligence by the provider.” IND. CODE § 16-39-7-1 (2006).

Some sanction schemes are more complex. Take, for example, this I.R.S. regulation:

(a) Imposition of monetary penalty – (1) In general. If a reporting corporation fails to furnish the information described in § 1.6038A-2 within the time and manner prescribed in § 1.6038A-2(d) and (e), fails to maintain or cause another to maintain records as required by § 1.6038A-3, or (in the case of records maintained outside the United States) fails to meet the non-U.S. record maintenance requirements within the applicable time prescribed in § 1.6038A-3(f), a penalty of \$10,000 shall be assessed for each taxable year with respect to which such failure occurs. Such a penalty may be imposed by the District Director or the Director of the Internal Revenue Service Center where the Form 5472 is filed. The filing of a substantially incomplete Form 5472 constitutes a failure to file Form 5472. Where, however, the information described in § 1.6038A-2(b)(3) through (5) is not required to be reported, a Form 5472 filed without such information is not a substantially incomplete Form 5472.

(2) Liability for certain partnership transactions. A reporting corporation to which transactions engaged in by a partnership are attributed under § 1.6038A-1(e)(2) is subject to the rules of this section to the extent failures occur with respect to the partnership transactions so attributed.

(3) Calculation of monetary penalty. If a reporting corporation fails to maintain records as required by § 1.6038A-3 of transactions with multiple related parties, the monetary penalty may be assessed for each failure to maintain records with respect to each related party. The monetary penalty, however, shall be imposed on a reporting corporation only once for a taxable year with respect to each related party for a failure to furnish the information required on Form 5472, for a failure to maintain or cause another to maintain records, or for

a failure to comply with the non-U.S. maintenance requirements described in § 1.6038A-3(f). An additional penalty for another failure may be imposed, however, under the rules of paragraph (d)(2) of this section. Thus, unless such failures continue after notification as described in paragraph (d) of this section, the maximum penalty under this paragraph with respect to each related party for all such failures in a taxable year is \$10,000. The members of a group of corporations filing a consolidated return are jointly and severally liable for any monetary penalty that may be imposed under this section.

(b) Reasonable cause – (1) In general. Certain failures may be excused for reasonable cause, including not timely filing Form 5472, not maintaining or causing another to maintain records as required by § 1.6038A-3, and not complying with the non-U.S. maintenance requirements described in § 1.6038A-3(f). If an affirmative showing is made that the taxpayer acted in good faith and there is reasonable cause for a failure that results in the assessment of the monetary penalty, the period during which reasonable cause exists shall be treated as beginning on the day reasonable cause is established and ending not earlier than the last day on which reasonable cause existed for any such failure. Additionally, the beginning of the 90-day period after mailing of a notice by the District Director or the Director of an Internal Revenue Service Center of a failure described in paragraph (d) of this section shall be treated as not earlier than the last day on which reasonable cause existed.

(2) Affirmative showing required – (i) In general. To show that reasonable cause exists for purposes of paragraph (b)(1) of this section, the reporting corporation must make an affirmative showing of all the facts alleged as reasonable cause for the failure in a written statement containing a declaration that it is made under penalties of perjury. The statement must be filed with the District Director (in the case of failure to maintain or furnish requested information permitted to be maintained outside the United States within the time required under § 1.6038A-3(f) or a failure to file Form 5472) or the Director of the Internal Revenue Service Center where the Form 5472 is required to be filed (in the case of failure to file Form 5472). The District Director or the Director of the Internal Revenue Service Center where the Form 5472 is required to be filed, as appropriate, shall determine whether the failure was due to reasonable cause, and if so, the period of time for which reasonable cause existed. If a return has been filed as required by § 1.6038A-2 or records have been maintained as required by § 1.6038A-3, except for an omission of, or

error with respect to, some of the information required or a record to be maintained, the omission or error shall not constitute a failure for purposes of section 6038A(d) if the reporting corporation that filed the return establishes to the satisfaction of the District Director or the Director of the Internal Revenue Service Center that it has substantially complied with the filing of Form 5472 or the requirement to maintain records.

(ii) Small corporations. The District Director shall apply the reasonable cause exception liberally in the case of a small corporation that had no knowledge of the requirements imposed by section 6038A; has limited presence in and contact with the United States; and promptly and fully complies with all requests by the District Director to file Form 5472, and to furnish books, records, or other materials relevant to the reportable transaction. A small corporation is a corporation whose gross receipts for a taxable year are \$20,000,000 or less.

(iii) Facts and circumstances taken into account. The determination of whether a taxpayer acted with reasonable cause and in good faith is made on a case-by-case basis, taking into account all pertinent facts and circumstances. Circumstances that may indicate reasonable cause and good faith include an honest misunderstanding of fact or law that is reasonable in light of the experience and knowledge of the taxpayer. Isolated computational or transcriptional errors generally are not inconsistent with reasonable cause and good faith. Reliance upon an information return or on the advice of a professional (such as an attorney or accountant) does not necessarily demonstrate reasonable cause and good faith. Similarly, reasonable cause and good faith is not necessarily indicated by reliance on facts that, unknown to the taxpayer, are incorrect. Reliance on an information return, professional advice or other facts, however, constitutes reasonable cause and good faith if, under all the circumstances, the reliance was reasonable. A taxpayer, for example, may have reasonable cause for not filing a Form 5472 or for not maintaining records under section 6038A if the taxpayer has a reasonable belief that it is not owned by a 25-percent foreign shareholder. A reasonable belief means that the taxpayer does not know or has no reason to know that it is owned by a 25-percent foreign shareholder. For example, a reporting corporation would not know or have reason to know that it is owned by a 25-percent foreign shareholder if its belief that it is not so owned is consistent with other information reported or otherwise furnished to or known by the reporting corporation. A taxpayer may have reasonable cause for not treating

a foreign corporation as a related party for purposes of section 6038A where the foreign corporation is a related party solely by reason of § 1.6038A-1(d)(3) (under the principles of section 482), and the taxpayer had a reasonable belief that its relationship with the foreign corporation did not meet the standards for related parties under section 482.

(c) Failure to maintain records or to cause another to maintain records. A failure to maintain records or to cause another to maintain records is determined by the District Director upon the basis of the reporting corporation's overall compliance (including compliance with the non-U.S. maintenance requirements under § 1.6038A-3(f)(2)) with the record maintenance requirements. It is not an item-by-item determination. Thus, for example, a failure to maintain a single or small number of items may not constitute a failure for purposes of section 6038A(d), unless the item or items are essential to the correct determination of transactions between the reporting corporation and any foreign related parties. The District Director shall notify the reporting corporation in writing of any determination that it has failed to comply with the record maintenance requirement.

(d) Increase in penalty where failure continues after notification – (1) In general. If any failure described in this section continues for more than 90 days after the day on which the District Director or the Director of the Internal Revenue Service Center where the Form 5472 is required to be filed mails notice of the failure to the reporting corporation, the reporting corporation shall pay a penalty (in addition to the penalty described in paragraph (a) of this section) of \$10,000 with respect to each related party for which a failure occurs for each 30-day period during which the failure continues after the expiration of the 90-day period. Any uncompleted fraction of a 30-day period shall count as a 30-day period for purposes of this paragraph (d).

(2) Additional penalty for another failure. An additional penalty for a taxable year may be imposed, however, if at a time subsequent to the time of the imposition of the monetary penalty described in paragraph (a) of this section, a second failure is determined and the second failure continues after notification under paragraph (d)(1) of this section. Thus, if a taxpayer fails to file Form 5472 and is assessed a monetary penalty and later, upon audit, is determined to have failed to maintain records, an additional penalty for the failure to maintain records may be assessed under the rules of this paragraph if the failure to maintain records continues after notification under

this paragraph.

(3) Cessation of accrual. The monetary penalty will cease to accrue if the reporting corporation either files Form 5472 (in the case of a failure to file Form 5472), furnishes information to substantially complete Form 5472, or demonstrates compliance with respect to the maintenance of records (in the case of a failure to maintain records) for the taxable year in which the examination occurs and subsequent years to the satisfaction of the District Director. The monetary penalty also will cease to accrue if requested information, documents, or records, kept outside the United States under the requirements of § 1.6038A-3(f) and not produced within the time specified are produced or moved to the United States under the rules of paragraph (f)(2)(ii) of this section.

(4) Continued failures. If a failure under this section relating to a taxable year beginning before July 11, 1989 occurs, and if the failure continues following 90 days after the notice of failure under this paragraph is sent, the amount of the additional penalty to be assessed under this paragraph is \$10,000 for each 30-day period beginning after November 5, 1990, during which the failure continues. There is no limitation on the amount of the monetary penalty that may be assessed after November 5, 1990.

(e) Other penalties. For criminal penalties for failure to file a return and filing a false or fraudulent return, see sections 7203 and 7206 of the Code. For the penalty relating to an underpayment of tax, see section 6662.

(f) Examples. The following examples illustrate the rules of this section.

Example 1 Failure to file Form 5472. Corp X, a U.S. reporting corporation, engages in related party transactions with FC. Corp X does not timely file a Form 5472 or maintain records relating to the transactions with FC for Year 1 or subsequent years. The Service Center with which Corp X files its income tax return imposes a \$10,000 penalty for each of Years 1, 2, and 3 under section 6038A (d) and this section for failure to provide information as required on Form 5472 and mails a notice of failure to provide information. Corp X does not file Form 5472. Ninety days following the mailing of the notice of failure to Corp X an additional penalty of \$10,000 is imposed. On the 135th day following the mailing of the notice of failure, Corp X files Form 5472 for Years 1, 2, and 3. The total

penalty owed by Corp X for Year 1 is \$30,000. (\$10,000 for not timely filing Form 5472, \$10,000 for the first 30-day period following the expiration of the 90-day period, and \$10,000 for the fraction of the second 30-day period). The penalty for Years 2 and 3 for the failure to file Form 5472 is also \$30,000 for each year, calculated in the same manner as for Year 1. The total penalty for failure to file Form 5472 for Years 1, 2, and 3 is \$90,000.

Example 2 Failure to maintain records. Assume the same facts as in Example 1. In Year 5, Corp X is audited for Years 1 through 3. Corp X has not been maintaining records relating to the transactions with FC. The District Director issues a notice of failure to maintain records. Corp X has already been subject to the monetary penalty of \$10,000 for each of Years 1, 2, and 3 for failure to file Form 5472 and, therefore, a monetary penalty under paragraph (a) of this section for failure to maintain records is not assessed. However, an additional penalty is assessed after the 90th day following the mailing of the notice of failure to maintain records. Corp X develops a record maintenance system as required by section 6038A and § 1.6038A-3. On the 180th day following the mailing of the notice of failure to maintain records, Corp X demonstrates to the satisfaction of the District Director that the newly developed record maintenance system will comply with the requirements of § 1.6038A-3 and the increase in the monetary penalty after notification ceases to accrue. The additional penalty for failure to maintain records is \$30,000. An additional penalty of \$30,000 per year is assessed for each of years 2 and 3 for the failure to maintain records for a total of \$90,000.

26 C.F.R. § 1.6038A-4(a)-(g).

G. Judicial Determination

I found no preservation laws that provide access to a judicial officer.

III. Conclusion

There are thousands of federal, state, and municipal statutes, regulations, and ordinances that impose a duty to preserve. These laws impose preservation obligations in a myriad of ways. While none of these laws include all of the elements suggested by the E-Discovery Panel, they do include some of the elements and shed light on different ways the duty to preserve has been imposed.