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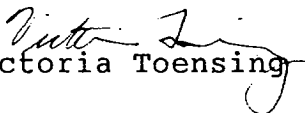
September 11, 1989

Hon. William W. Wilkins
Chairman
The United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, DC 20004

Dear Chairman Wilkins:

On behalf of General Electric, I submit to you Preliminary Comments of General Electric Company on The United States Sentencing Commission's Proposed Organizational Sanctions. Thank you for your invitation to participate in this important process.

Sincerely,


Victoria Toensing

cc: Hon. Stephen G. Breyer
Hon. Helen G. Corrothers
Hon. George E. MacKinnon
Hon. Ilene H. Nagel
Hon. Benjamin F. Baer (ex officio)
Hon. Stephen Saltzburg (ex officio)

PRELIMINARY COMMENTS
OF
GENERAL ELECTRIC COMPANY
ON
THE UNITED STATES SENTENCING COMMISSION'S
PROPOSED ORGANIZATIONAL SANCTIONS

September 11, 1989

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**IMPUTED CRIMINAL LIABILITY
REQUIRES ADJUSTMENTS TO ORGANIZATIONAL SANCTIONS**

Commentators have viewed corporate sanctions differently from individual sanctions, basing this distinction on the obvious fact that "corporations do not go to jail." The doctrine of imputed criminal liability, however, provides another more fundamental reason for this distinction.

As currently applied in the federal courts, this doctrine may impose virtually automatic criminal responsibility on the organization because of the conduct of one of its employees, even a low-level employee, and even for conduct in defiance of corporate policy. The doctrine imputes equal legal guilt whether it is the President and sole stockholder of a small corporation engaging in the criminal conduct or a field-level salesperson in a 50,000 employee multinational corporation doing so. Thus, despite the fact of conviction, the actual culpability of the corporation may be non-existent or minimal when contrasted with the level of personal culpability that accompanies the conviction of an individual. Yet, as the Supreme Court noted in United States v. United States Gypsum Co., 438 U.S. 422, 442 (1978), an element of moral culpability must be present if a sanction is to "square with the generally accepted functions of the criminal law."

The public policy goals of corporate sanctions are (1) to punish culpable corporate conduct and (2) to encourage

corporations not only to deter crime but also to detect and disclose possible criminal behavior. Accordingly, sentencing guidelines should look principally to the corporate behavior leading to the corporation's conviction and not solely to an agent's act imputed to the corporation. So long as this doctrine of imputed liability is used to convict corporations, organizational sanctions should be flexibly tailored to credit the corporation that does not have high-level management involved and that establishes programs to comply with the law and report crime.

For the Commission, the guiding principle that should flow from the existence of imputed guilt is the following: to the extent that a corporation automatically bears the responsibility, or liability, for an illegal act committed by its agent, organizational sanctions should be flexible enough to recognize that there may be little or no basis for a punitive fine (beyond any appropriate restitution); and it is especially appropriate to mitigate penalties when the individual wrongdoer was not vested with managerial authority or when the corporation has tried in good faith to prevent wrongdoing and/or was instrumental in discovering and reporting it.*

* An example of corporations pledging policy and funds to prevent and uncover possible criminal activity is the Defense Industry Initiatives (DII). Attached as an Appendix is information about the DII, the participating companies, and the outside auditing of each company's compliance with the DII standards.

THE FEDERAL DOCTRINE OF IMPUTED CRIMINAL LIABILITY MAY PERMIT
CONVICTION WITHOUT ACTUAL CORPORATE CULPABILITY

A corporation is an artificial legal person. It is composed of three distinct categories of other persons: first, the shareholders who own it and select the corporation's directors; second, the directors who are elected to oversee the corporation's affairs and the officers who are appointed to manage the business; and third, the employees who are to implement the policies and plans established by the directors and management.

Unlike most state courts, federal courts have adopted a broadly defined doctrine of imputed liability, which provides that corporations can "be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them." New York Central & Hudson River Railroad Co. v. United States, 212 U.S. 481, 494-95 (1909). The modern industrial, financial, or service corporation may have thousands of employees, or even hundreds of thousands of employees scattered around the world. Yet, under the doctrine of imputed liability, the criminal act of just one of these employees may provide the basis for the entire organization to be found guilty of a crime. This standard of automatic imputed guilt would be unconstitutional if applied to natural persons.

Moreover, many courts treat imputed corporate culpability under federal law as even broader than the New York Central test above might at first glance imply. Liability may flow not only for the criminal acts of officers, directors and managers, but also for acts of employees far removed from supervisory positions,

Standard Oil Co. v. United States, 307 F.2d 120, 127 (5th Cir. 1962), such as salespersons, clerical workers, truck drivers and manual laborers. Under some circumstances, criminal liability can even be imputed to the corporation through the evil deeds of an independent contractor, United States v. Parfait Powder Puff Co., 163 F.2d 1008 (7th Cir. 1947), cert. denied, 332 U.S. 851 (1948).

A corporation's exposure to federal criminal sanction is extended still further through broad judicial interpretation of the term "agent acting within the scope of authority." By not requiring the prosecution to show that the corporation's managers at least implicitly authorized the criminal acts, federal courts have imputed guilt for:

- acts an offending employee is not actually authorized to commit;
- acts committed despite the corporation's good faith efforts to prevent them; and
- acts specifically violating company policy and management directives.

Thus, as one commentator has explained:

Indeed, acts in disobedience of specific prohibitions against that very conduct have been held to constitute acts occurring within the scope of the agent's employment. In the context of corporate criminal prosecutions, then, 'within the scope of employment' is a term of art signifying little more than that the employee's crime must be committed in connection with his performance of some job-related activity. 1 K. Brickey, Corporate Criminal Liability, § 3:01 at 40 (1984).

While it is the general rule that one of the employee's purposes must be an intent to benefit the entity, a court may find that this standard is satisfied even though the employee's primary motive was personal profit and even though the corporation did not actually benefit from its employee's conduct, e.g., U.S. v. Beusch, 596 F.2d 871, 877 (9th Cir. 1979), or would not have desired to benefit if a responsible corporate official had known in advance of the conduct. Additionally, the intent to benefit the corporation may only be relevant if intent is a specific element of the crime. U.S. v. Automated Medical Laboratories, Inc., 770 F.2d 399, 407 (4th Cir. 1985); U.S. v. Cincotta, 689 F.2d 238, 241-242 (1st Cir.) cert. denied, 459 U.S. 991 (1982); U.S. v. Ridglea State Bank, 357 F.2d 495, 498-99 (5th Cir. 1966).

Furthermore, the so-called "collective knowledge" doctrine provides prosecutors with yet another tool to charge the corporation for the acts of its agents. Under the "collective knowledge" doctrine -- a doctrine that surely runs counter to fundamental notions of culpability traditionally associated with criminal conduct -- a corporation may be convicted for knowing violations of the law even though no single agent intended to commit the offense or even knew of the existence of the operative facts leading to the violation. See, e.g., U.S. v. Bank of New England, N.A., 821 F.2d 844, 856 (1st Cir.), cert. denied, ___ U.S. ___, 98 L.Ed. 2d 356, 108 S. Ct. 328 (1987); U.S. v. Shortt Accountancy Corp., 785 F.2d 1448 (9th Cir.), cert. denied, 478 U.S. 1007 (1986); U.S. v. T.I.M.E.-D.C., Inc., 381 F. Supp. 730, 738 (W.D. Va. 1974).

Thus, unlike a private individual who can be found guilty only if the jury finds beyond a reasonable doubt that he or she personally committed the crime or knowingly aided another person to do so, a corporation is exposed to prosecution, for example, when (A) the criminal act was committed by one low-level employee having no authority whatsoever in the organization, (B) the corporation's management tried actively and in good faith to prevent the criminal act, or (C) separate "elements" of the crime were committed by several low-level employees not one of whom intended to commit an offense, and no supervisor was aware of these collective acts.

This is not the forum to argue the merits, or lack thereof, of the doctrine of imputed guilt or the extremes to which it is sometimes pushed. There are substantial reasons of policy and constitutional principle why the standards for finding a corporate person guilty of a crime should be narrowed substantially. This is the place, however, to point out that the current contours of the doctrine of imputed corporate criminal liability may permit a finding of guilt in the absence of real culpability of the sort the criminal law normally addresses. The Commission should appreciate this fundamental distinction when deciding the underpinnings for the corporate sanction guidelines.

PUNITIVE FINES SHOULD REFLECT THE ACTUAL CORPORATE BEHAVIOR
AND NOT MERELY THE FACT OF CONVICTION

In addition to requiring the convicted corporation to make restitution when the criminal acts of an employee create gain or

PROBATION

We are aware the Commission is considering various proposals on probation for corporations. There does not appear to be a universally accepted definition of "probation." The term can be used to describe a situation where the court wants to retain jurisdiction solely to ensure a fine is paid or restitution is made, thus providing a ministerial function.

The term is also used to define more intrusive situations, where the court actually supervises activities of the corporation by forcing it to do or restricting it from doing certain inherently corporate acts. Our remarks are addressed to the imposition of supervisory rather than ministerial probation.

However doubtful the basis for concluding under proposed § 8D1.3(d) that it is feasible to impose by probation an internal compliance program, far more troublesome is proposed § 8D1.3(c). That latter kind of supervisory probation is triggered whenever the court requires restitution under proposed § 8D1.1(b) but the restitution is not paid at the time of sentencing. That will not be an uncommon event, since it may take time to identify victims and determine the appropriate amount of compensation. Nevertheless, even though actual payment may be assured, proposed § 8D1.3(c) seems to permit enormously restrictive regulation of ordinary business affairs, such as requiring court approval of dividend payments or the issuance of stock or commercial paper and also requiring court

approval of all employment compensation paid to directors, officers, or managers.

Another important observation is in order. As the commentary notes, Congress has expressed clear opposition to organizational probation except where the organization is essentially a corrupt entity organized or operated primarily to engage in illegal conduct.

We are concerned about the lack of empirical studies of successful supervisory corporate probations. We strongly urge that any further consideration of guidelines on organizational supervisory probation be postponed until there is an impact study to determine the percentages and types of offenders that would fall into this category. Imposing a court's oversight authority on the everyday decisions of a corporation could be a managerial disaster for both the court and the corporation. Until the Commission and interested commentators can identify and study a sufficient number of cases in which organizational probation has been successful, the Commission should heed Congressional opposition and not tread quickly into such unknown waters.

* * * *

We appreciate the opportunity to submit these preliminary comments.