

February 10, 2004

United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500  
Washington, D.C. 20002-8002

Attn: Public Affairs

**Re: Response to request for public comment on effective compliance programs in Chapter Eight**

On behalf of United Technologies Corporation (UTC), I appreciate this opportunity to comment on proposed changes to Chapter Eight Guidelines. My comments will be brief. They follow and build upon the written testimony and letter I provided on August 27, 2002 in the early days of the Ad Hoc Advisory Group's work in behalf of the Commission's review of Chapter Eight and my oral testimony during Breakout Session III on November 14, 2002.

The Commission is to be commended for its foresight in creating an advisory body to review Chapter Eight Guidelines a decade after their inception, and the Ad Hoc Advisory Group is to be commended for the depth, breadth and speed of its work. The Guidelines have done much to contribute to the broadening of interest in and commitment to effective compliance programs. Several specific recommendations in the Ad Hoc Advisory Group's report will strengthen the Guidelines' effectiveness even further.

Of special note are the Advisory Group's recommendations at §B2.1 for strengthening the role and cognizance of the governing authority; the assignment of high-level personnel assigned to assure the implementation and effectiveness of a compliance program; and the provision regarding adequate resources.

We also applaud the inclusion of the proposed language in §8B2.1(b)(5)(C): "to have a system whereby the organization's employees and agents may report or seek guidance regarding potential or actual violations of law without fear of retaliation, *including mechanisms that allow for anonymous reporting.*" Research and experience teach us that a certain portion of a work force will not bring issues forward if they risk being identified because they fear retaliation.

**Inclusion of the word "anonymous" in the language is a positive step** because organizations would be required to think about mechanisms by which employees can raise issues without being identified. But aside from an office that accepts anonymous correspondence and assigns investigators, there are limits to how much information an organization can gain (including the

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probable need for follow-up questions to the source) (1) without some part of the organization's management structure somehow knowing the source's identity and (2) without risking the possibility the source could be identified by electronic tracking or retrieval of deleted email or toll free calls to a third party, etc.

**We strongly recommend another positive step: inclusion of the word "confidential," not to replace but to complement the word "anonymous."** The two are not interchangeable, and when used together as a requirement for an organization's reporting system they increase the likelihood that more employees will come forward. Thus we recommend that the proposed language in §8B2.1(b)(5)(C) be amended to read, in part, "...including mechanisms that allow for *confidential* and anonymous reporting."

As a reference point, the U.S. Sarbanes-Oxley Act of 2002 requires that "...each audit committee [of a board of directors] shall establish procedures for "the *confidential, anonymous* submission by employees...of concerns regarding questionable accounting or auditing matters."

Because of recent media attention to this far-reaching Act, the terms "confidential" and "anonymous" have been used frequently and, sometimes, carelessly. Sometimes they are even erroneously used interchangeably.

The Ad Hoc Advisory Group's October 7, 2003 report cited the independent, neutral ombudsman office at United Technologies as having been successful "in maintain[ing] the confidentiality of the information provided [by employee sources] against demand for external disclosures." (pp. 83-84)

Because a neutral, independent ombudsman office can offer a confidential as well as an anonymous outlet for employees, this model is available to organizations that strive to develop the most comprehensive and effective system for employee reporting. For this reason we strongly recommend that the word "confidential" be added to §8B2.1(b)(5)(C)'s language.

We established the confidential, neutral ombudsman program in 1986 as a means for employees to raise issues in confidence while remaining anonymous to the rest of the organization and even to the Ombudsman if the employee chooses. Within the context of the ombudsman program at UTC, this is why we believe the word "confidential" should be used with "anonymous" in the Guidelines.

Because the Program was created to be neutral, separate and independent of formal management structures, the Program promises that information employees raise through the program will kept confidential and that employees may remain anonymous to the rest of the organization and even to the Ombudsman.

When an employee contacts the Ombudsperson, the corporation promises that no one except the Ombudsperson who processes the inquiry will know that an employee is in the process of using the Program to communicate an issue. The fact of the communication will be kept confidential.

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The Ombudsperson who handles an employee's issue promises the employee that her or his name will not be given to management [or anyone else] without the employee's specific permission. That is, the Ombuds will keep the employee *anonymous* to the organization. (UTC has used the legal process a half dozen times to successfully defend this concept, which is generally known as *Ombudsman privilege*.)

The advantages to having this kind of structure are numerous. Because an organization can offer both confidentiality and anonymity, we believe more employees are likely to come forward. Note: if an employee chooses to raise an issue through the compliance office, which is part of the management structure, the compliance officer can advise the employee that while he or she will do everything possible to keep the employee's identity anonymous to the organization, should the issue end up in a third-party lawsuit, the compliance officer may be subpoenaed and have to reveal the employee's identity.

I would like to conclude with two points. As we mentioned in our 2002 comments, it would be very helpful if the Commission were to ask U.S. Attorneys to share data resulting from settlements negotiated under the Guidelines so others can learn the results of compliance with or avoidance of the Guidelines.

Finally, I understand there might be the opportunity to testify regarding the Ad Hoc Advisory Group's proposals. If that opportunity does arise, I would be grateful for the opportunity to provide oral comment.

Sincerely,

***Pat***

P.S. I have mailed a paper copy of this letter in addition to this email transmission.

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