

**Testimony of Patrick Gnazzo,
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prepared for delivery to the
Advisory Group on Organizational Guidelines,
United States Sentencing Commission,
relating to
Chapter Eight of the Sentencing Guidelines
November 14, 2002**

I am Pat Gnazzo, Vice President of Business Practices, and on behalf of United Technologies Corporation, I want to thank you for this opportunity to present our views and recommendations regarding Chapter Eight of the Sentencing Guidelines. United Technologies Corporation provides high-technology products and services to the aerospace and building systems industries throughout the world. UTC's industry-leading companies are Pratt & Whitney, Carrier, Otis, Hamilton Sundstrand, Sikorsky, and UTC Fuel Cells.

Before I outline our recommendations, I first would like to give you some background on the confidential Ombudsman/DIALOG Program that UTC has made available to employees since 1986. I intend to reference several aspects of that program in the comments that will follow.

The Ombudsman/*DIALOG* Program

This UTC program is a two-way confidential communication channel designed to provide every UTC employee a means of addressing the company, with a commitment that management will provide a candid and confidential response. Thoughtful,

authoritative answers are provided for questions or concerns on any company-related topic, with the exception of those covered in union (collective bargaining) agreements. Complete confidentiality and anonymity are guaranteed. This guarantee of anonymity fosters a level of candor that otherwise might not be possible, and it encourages communication from employees who otherwise might not be heard.

The Program's Value

The *DIALOG* Program complements UTC's formal ethics program, it enhances internal communication, and it is a convenient vehicle for employees to use to question or report sensitive or legal issues. The program also provides a way for employees to make suggestions for improvement and register concerns or complaints. The program also demonstrates that, by offering each employee the opportunity to ask any question on any business-related topic, UTC is interested in corporate values as well as ethics and business practices. Finally, the program's existence indicates UTC is a company interested in what its employees have to say, so much so that it provides the safest possible way for that input to be heard.

Summary of Testimony

As you suggested in your letter of invitation, I will limit comment to two questions:

Question 1.f: Should §8A1.2, comment 3(k)(5), concerning implementing and publicizing a reporting system that fosters reporting without fear of retribution, be made more specific to encourage:

- i. whistleblowing protections;

- ii. a privilege or policy for good faith self-assessment and corrective action (e.g., 15 U.S.C. §1691 (c) (1) (1998));
- iii. the creation of a neutral or ombudsman office for confidential reporting; or,
- iv. some other means of encouraging reporting without fear of retribution?

And

Question 3: How can the Chapter Eight Guidelines encourage auditing, monitoring, and self-reporting to discover and report suspected misconduct and potential illegalities, keeping in mind that the risk of third-party litigation or use by government enforcement personnel realistically diminishes the likelihood of such auditing, monitoring and reporting?

A Reporting System Without Fear of Retribution

I would like to address Question 1 f. first. The language of Point 5 of the Guidelines is clear and well-intentioned: "...a reporting system that fosters reporting without fear of retribution." Better organizations result from better reporting systems. In the workplace, however, the objective of the language of the Guidelines can be impossible to achieve absent the organization's ability to provide an absolute guarantee of confidentiality for the reporting source.

Workplace surveys reveal that a certain portion of any employee group will not report suspected or observed wrongdoing for fear of retribution or shunning by superiors or colleagues. A 1994 Ethics Resource Center (ERC) workplace survey is a benchmark. Thirty-one percent of respondents reported observing workplace misconduct, and 52 percent of them said they failed to report. When asked "why?" [did you fail to report], 41 percent said they feared retaliation or retribution from supervisor or management; 38 percent did not trust the organization to keep the report confidential; 24 percent feared retaliation or retribution from co-workers; and 25 percent did not want to be known as a

whistleblower. [Note: Respondents could give more than one reason, so the percentages need not total 100.]

A similar survey by the ERC and the Society for Human Resources Management in 1997 and a Year 2000 ERC survey reveal similar results.

A goal of ethics and compliance programs, and the Sentencing Guidelines as well, is to have better organizations filled with employees willing to come forward. But the organization can be a punishing place, and retribution can be hard to prove – whether it surfaces in increasingly poor performance appraisals of the reporting employee by the vengeful manager or tires slashed in the parking lot by disgruntled co-workers.

A spate of articles post-Enron illustrates the potential plight of the whistleblower (see *Blowing the Whistle: Not for the Fainthearted*, N.Y. Times, February 10, 2002; *A Corporate Fear Of Too Much Truth*; N.Y. Times op-ed, February 17, 2002; and *Whistle-Blowers Being Punished, A Survey Shows*, N.Y. Times, September 3, 2002).

We see this in our own work place. Recently, an employee reported to her/his supervisor that a co-worker had made threatening comments about what she/he would do if laid off or fired. The employee did the right thing: went openly to supervision. An investigation was begun, and the alleged offender was removed from the work place pending the outcome of the investigation.

How did the work place react? Employees in the source's work group chastised (and even swore at) the reporting source for being a "snitch."

We can easily see the parallel between this situation from my own company and the case of Jennifer Long, of the Internal Revenue Service. Author C. Fred Alford, in his book *Whistleblowers*, writes of IRS agent Jennifer Long's testimony about alleged IRS abuses. On the Monday following her testimony, according to Alford, "every single manager was in her face with the same refrain: 'You're not a team player.'"

Employees who need and want to report but fear retaliation need some protection. At United Technologies, we have a Corporate Ombudsman to oversee the *DIALOG* Program I described above. The Ombudsman is an alternate, neutral, and confidential source for employees to use to raise issues. The office of the Corporate Ombudsman at UTC has existed since mid-1986. We have a written and an oral component to our reporting mechanisms through this office, and in the last 16 years employees have used the Program to raise more than 65,000 issues in confidence.

Recently, a secretary called the UTC Ombudsman to report that her boss was cheating the company. She said that only she and her boss knew of his wrongdoing, and if she reported it openly “He would fire me – or worse.”

She genuinely feared for her job security and personal safety.

Because our Ombudsman offers the promise of confidentiality (which we have successfully protected using the legal process on a half dozen occasions), the Ombudsman was able to assure the caller that the organization could investigate the issue without anyone knowing that she was the source.

She agreed, the investigation occurred, she was right, the boss is gone, and she’s still with us – without anyone (except the Ombudsman) knowing her name.

No law assures us “ombuds privilege”, but because of the way our Ombudsman operates (e.g., does not investigate, does not accept notice on behalf of the corporation, does not keep records for the corporation, is truly neutral and independent from management decisions) we feel comfortable in promising absolute confidentiality for employees – even in the potential face of third-party lawsuits.

We promise employees a confidential reporting system, and over the last 16 years more than 65,000 employees have taken us up on the offer.

So in direct response to your Question 1.f., we encourage the Commission to find a way to strengthen the possibility for having “a reporting system that fosters reporting without fear of retribution.” We recommend that a promise of confidentiality be somehow incorporated into the system.

One solution would be to encourage organizations to create truly independent and neutral organizational ombudsman offices. Our experience at UTC shows that this model does offer the assurance and comfort of a confidential outlet.

But that costs money, and many organizations might not be willing (or able) to “staff up” for such an office. As an aside, we are asked frequently whether the ethics officer and the ombudsman can be the same person. Our response is a definite “No.” The person who accepts notice (the ethics or compliance officer) cannot be the person who does not accept notice (the ombudsman). The person who investigates (the ethics or compliance officer) cannot be the person who does not investigate (the ombudsman).

With respect to the above, if §8A1.2, comment 3(k)(5), that section could be strengthened in its impact by being made more specific to require organizations to implement and publicize a *confidential* reporting system. That could prompt organizations themselves to determine how to meet the objectives.

This (the inclusion of the word *confidential*) might also help accomplish what will benefit organizations the most: a national law that protects the identity of a reporting source even in cases of third-party intervention. Workplace fear is detriment to reporting. The guaranteed assurance of confidentiality can eliminate that fear, with better organizations as a result.

Encouraging Auditing, Monitoring and Self-Reporting

I would now like to comment briefly on your Question 3: “How can Chapter Eight Guidelines encourage auditing, monitoring and self-reporting to discover and report suspected misconduct and potential illegalities...?”

The short answer is that they cannot, except in their ability to provide for strong mitigation of damages incurred by those organizations that have genuinely and sincerely attempted to foster and implement an effective compliance program.

Organization that audit, monitor and self-report might not be as forthcoming as they could (should) be knowing that the reporting might end up being part of a discovery process.

Organizations should want the benefit of a complete, effective compliance program and auditing and monitoring process. Two things would help in this process:

1. Organizations should be protected from third-party lawsuits and civil suits solely on an attorney-client basis, and
2. Companies should have the guarantee of reduced penalties when they do report.

Stronger, responsible organizations help build stronger, responsible societies. That presents an opportunity for the Commission and industry to work together as partners in good governance that is clearly for the larger good.

Summary

Once again, on behalf of United Technologies, I appreciate your invitation to comment here today. I hope our experiences in the workplace will be helpful to you as you work to revise the Sentencing Guidelines to encourage appropriate actions.