

January 20, 2016

Dear Members of the Senate Judiciary Committee,

We, the 40 undersigned organizations, are writing to oppose inclusion in any criminal justice reform package of “mens rea” (state of mind) provisions that would make it harder for prosecutors to criminally prosecute companies and corporate executives that engage in criminal wrongdoing.

While most of our organizations do not work on issues of criminal justice reform, we are broadly supportive of the efforts to address issues of mass incarceration which are major drivers of poverty and inequality and are devastating many families and communities, especially communities of color.

Provisions that would make it harder to prosecute corporate crime or white-collar crime, however, are not aimed at addressing these aspects of the criminal justice system and should not be part of the current discussion of criminal justice reform.

Specifically, there are various mens rea proposals, including mens rea legislation proposed in the Senate, that are premised on the belief that our criminal laws are in need of a new, overarching set of standards relating to mens rea. These proposals would likely make it far harder to prosecute corporate crime by overturning the basic precept that “ignorance of the law is no defense” and may offer corporations and company executives an “ignorance of the law” defense. At minimum, they will create legal uncertainty – promoting litigation and chilling enforcement actions. Prosecutors and judges will struggle to figure out whether new mens rea standards apply to every element of a crime and what new standards of proof must be met, among many other intricate questions. Corporate criminal defendants and their counsel will use the new standards to innovate new ways to escape even the modest criminal liability that now attaches to corporate wrongdoing. In practical terms, these new problems, against the backdrop of the challenges that already burden corporate criminal prosecution, mean that in many instances prosecutors will simply give up and not seek to prosecute corporate wrongdoers in the first place given limited resources.

There is little evidence of any problem that needs to be solved with these new mens rea proposals. In fact, regulatory crime contributes only a tiny fraction, less than one percent,¹ to the federal prison population and we have too little, not too much, prosecution of corporate crime. In 2014, regulatory offenses comprised only two percent of all federal criminal prosecutions.² The reasons for this lack of prosecution are clear: In contrast to low-level street offenses, corporate criminal sanctions are typically far too lenient, not too tough. Corporate defendants, whether institutional or individual, are typically very well resourced, able to mount very effective defenses, and are not overwhelmed by prosecutors. In short, corporate crime is under-criminalized, not over-criminalized.

¹ See Inmate Statistics at https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp

² See Federal Judicial Caseload Statistics at <http://www.uscourts.gov/statistics/table/d-2/federal-judicial-caseload-statistics/2014/03/31>

Corporate criminals are rational actors. Weak enforcement and lax standards, as we have seen over and over, will invite more corporate crime and wrongdoing. Given incentives to escape criminal prosecution through strategic ignorance, corporations and executives will respond with more criminal conduct.

These are not esoteric matters. Corporate wrongdoing inflicts a horrific toll on our society— injuries and deaths from dangerous cars and other products, workers maimed, killed and afflicted with disease due to occupational hazards, lives lost through polluted air and water, consumers ripped off of life savings and family assets, and more.

There is absolutely no reason for the otherwise laudable criminal justice reform bill to contain any measure to weaken what are already ineffective standards for corporate criminal prosecution.

While we oppose the current proposals to establish a default mens rea standard, we support provisions in the bi-partisan Senate Sentencing Reform and Corrections Act of 2015 that will require the government to document the federal statutes that do not currently contain mens rea or state of mind requirements as well as the frequency of prosecutions (or lack thereof) under those statutes. Such information is a crucial precondition to adequately assessing the need for default mens rea legislation and will help inform policy makers and the public of the full scope and impact of the various mens rea proposals.

We therefore ask members to reject attempts to add mens rea provisions to criminal justice reform legislation that would make it more difficult to enforce bedrock regulatory safeguards and permit corporations to avoid complying with these fundamental protections.

AFL-CIO

American Friends Service Committee

Asbestos Disease Awareness Organization

Center for American Progress

Center for Biological Diversity

Center for Effective Government

Center for Food Safety

Center for Justice and Democracy

Center for Progressive Reform

Center for Responsible Lending

Center for Science in the Public Interest

Coalition for Sensible Safeguards

Connecticut Council on Occupational Safety and Health (ConnectiCOSH)

Consumer Action

Consumer Federation of America

CounterCorp

Earthjustice

Environmental Action Center

Environmental Working Group

Economic Policy Institute

Food & Water Watch
Government Accountability Project
Institute for Agriculture and Trade Policy
Labor & Employment Committee of the National Lawyers Guild
Leadership Conference on Civil and Human Rights
National Association of Consumer Advocates
National Association of Social Workers
National Center for Law and Economic Justice
National Consumer Law Center
National Consumers League
National Employment Law Project
Natural Resources Defense Council
Occupational Health Clinical Center
Public Citizen
SAFER (Stable, Accountable, Fair and Efficient Financial Reform)
SafeWork Washington
Sciencecorps
Sierra Club
U.S. PIRG
Wisconsin Committee on Occupational Safety and Health (WisCOSH)