

Questions for the Record
Senator Charles E. Grassley
Senate Judiciary Committee
Hearing: “The Adequacy of Criminal Intent Standards in Federal Prosecutions”
January 20, 2016

Questions for Mr. Weissman

Mr. Weissman, your prepared testimony outlines eight problems with a default mens rea standard of “willfulness.” Given time limitations, you weren’t able to address all of these in your oral testimony.

Would you please elaborate on the various legal and policy problems that you believe would be generated by a bill that would adopt a default “willfulness” standard?

Response:

A number of key statutes used to prosecute corporate criminals do not include mens rea provisions *in their text*, the trigger issue in the legislation proposed by Senator Hatch. These include mail and wire fraud, adulteration of drugs and food, conspiracy, Racketeering Influenced and Corruption Organization (RICO) Act violations and restraint of trade. Moreover, it is unlikely that many statutes include a mens rea statute for *each element* of a crime; under the Hatch language, a default willfulness standard would apply to any element for which a mens rea standard was not specified.

The broad application of a willfulness standard to key corporate crime statutes poses a series of interconnected problems, as I discussed in my written testimony.

First, a willful standard goes far beyond the knowing requirement that is the effective default for corporate crime. Willfulness generally requires not just intent to commit a wrongful act, but an intent to violate the law.

Second, the nature of the corporation and corporate crime may pose special problems of proof in establishing willfulness. Diffuse responsibility and decentralized decision-making may make it difficult to establish who, exactly, made a decision to break the law, causing problems both for prosecution of individual executives and the corporation itself.

Third, while it is a basic principle of the criminal law that “ignorance is no excuse,” a default mens rea standard threatens to create an “ignorance of the law” defense, and to encourage corporation and corporate officials to cultivate strategic ignorance of criminal law standards.

Fourth, a willfulness standard will call into question the viability of “willful blindness” as satisfying intent standards. The diffuse responsibility inherent in large corporations enables executives to be adept at willful blindness as to wrongful acts committed by the corporation, as well as to the potential criminal illegality of corporate wrongdoing.

Fifth, a default willfulness mens rea standard, if applied to every element of a crime, will at minimum create far-reaching legal uncertainty, as prosecutors, defense counsel and courts grapple with complicated statutory interpretation and conceptual confusion about what it means to apply willfulness to each element of a crime.

Sixth, a willfulness standard will call into question the ability of prosecutors to bring cases based on reckless activity. That’s a particularly serious issue as regards corporate crime, because recklessness characterizes the criminal intent in many industrial disasters and product defect cases, where corporations did not intend to injure or expose anyone to danger but in fact did so through reckless behavior.

Seventh, a willfulness standard will undermine viability of the “responsible corporate officer” doctrine, which defines senior managers as a category of defendant worth of punishment when they have the responsibility for preventing a crime, but fail to take action. Prosecutors may be able to prove willfulness in certain cases, but the whole purpose of the responsible corporate officer doctrine is to punish managers and executives for actions *not* taken – an entirely different approach than that contemplated by willfulness requirements.

Finally, regulatory and corporate criminal law aims to place a duty on the corporation to ensure compliance – or, in other words, to ensure it is not endangering consumers or the environment, ripping off people or the government. A blanket willfulness rule would undercut this incentive structure and assignment of affirmative duties.

Our fear is that the combined effect of these impacts would be a crushing blow against the ability of prosecutors to hold criminally liable the most powerful forces in society.