



May 12, 2014

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Secretary Vietti-Cook

U.S. Nuclear Regulatory Commission

ATTN: Rulemakings and Adjudications Staff

Washington, DC 20555-0001

Rulemaking.Comments@nrc.gov

RE: Comments on Proposed Modification to Deliberate Misconduct Rule, 79 Fed. Reg. 8097

Dear Secretary Vietti-Cook,

The U.S. Nuclear Regulatory Commission (NRC) is proposing to amend its regulations concerning deliberate misconduct by licensees and other persons otherwise subject to the NRC's jurisdiction (known as the "Deliberate Misconduct Rule"). This proposed rule would incorporate the concept of "deliberate ignorance" as an additional basis on which to take enforcement action against persons who violate any of the NRC's Deliberate Misconduct Rule provisions. NACDL is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. For the following reasons, NACDL urges the NRC not to weaken the Rule's protections for persons within the NRC's jurisdiction by reducing the *mens rea* from actual knowledge to "deliberate ignorance."

The requirement of *mens rea* has long served as a critical protection for persons accused of wrongdoing.<sup>1</sup> By demanding proof that the accused has acted intentionally or knowingly (or both), the law reserves the harshest punishment for the most culpable persons, while imposing lesser sanctions on those who are

<sup>1</sup> See, e.g., *Staples v. United States*, 511 U.S. 600, 605 (1994) ("[T]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.") (quotation omitted); *Morissette v. United States*, 342 U.S. 246, 250 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.").

merely negligent or reckless. The current Deliberate Misconduct Rule preserves this time-honored distinction; it requires proof that the accused person acted intentionally or deliberately and that he or she had knowledge of the forbidden circumstance (*e.g.*, that the act would cause violation of a rule or regulation, that information submitted is incomplete or inaccurate, etc.). *E.g.*, 10 C.F.R. § 52.4(b), (c). It thus appropriately subjects to the harshest sanctions persons who engage in the most serious misconduct.

The proposed modification of the Deliberate Misconduct Rule to include deliberate ignorance would blur the distinction between acts committed with a clearly culpable *mens rea* and acts committed under more ambiguous—and less culpable—circumstances.<sup>2</sup> Even defined according to the requirements of *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011), as the notice proposes, deliberate ignorance is difficult to distinguish from recklessness and negligence.<sup>3</sup> There may be a theoretical distinction between a person who is deliberately ignorant and one who is reckless or negligent, as the Supreme Court concluded in *Global-Tech*, *see id.* at 2070-71, but in practice that distinction is almost impossible to maintain.

The NRC should be especially reluctant to weaken the *mens rea* component of the Deliberate Misconduct Rule because there is no compelling reason to do so. As Justice Kennedy points out in his *Global-Tech* dissent, “Facts that support willful blindness are often probative of actual knowledge.” *Global-Tech*, 131 S. Ct. at 2073 (Kennedy, J., dissenting). In the vast majority of cases, the same evidence that might establish the predicate for a finding of deliberate ignorance will provide circumstantial proof of actual knowledge. It will be the rare case where the evidence is insufficient on actual knowledge but sufficient on deliberate ignorance—and those are precisely the cases where the law's traditional distinction between persons who act with culpable *mens rea* and persons who do not is most critical.

The Notice itself shows that there is no reason to weaken the Deliberate Misconduct Rule. The current Rule took effect in 1991. 56 Fed. Reg. 40664, 40675 (Aug. 15, 1991). The Notice identifies just *one case* in the Rule's twenty-three year history—the *Geisen* case—where the absence of deliberate ignorance from the definition of Deliberate Misconduct produced an allegedly anomalous result. 79 Fed. Reg. at 8098-99. The existence of one “anomaly” (*Geisen* was convicted in the federal criminal case under a disputed willful blindness theory before the

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<sup>2</sup> *See, e.g.*, Robin Charlow, *Willful Ignorance and Criminal Culpability*, 70 Texas L. Rev. 1351, 1391-1400 (1992) (comparing culpability of knowing or intentional conduct with culpability of deliberately ignorant conduct); Douglas N. Husak & Craig A. Callender, *Willful Ignorance, Knowledge, and the “Equal Culpability” Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 Wis. L. Rev. 29, 53-56 (suggesting that many willfully ignorant persons are less culpable than persons with actual knowledge).

<sup>3</sup> *See, e.g.*, *United States v. Ojebode*, 957 F.2d 1218, 1229 (5th Cir. 1992) (“[Deliberate ignorance instruction] creates the risk that the jury might convict on a lesser negligence standard. The jury, for example, might find deliberate ignorance merely because it believed the defendant should have been aware of the illegal conduct.”); *United States v. Alvarado*, 838 F.2d 311, 314 (9th Cir. 1987) (same).

Supreme Court's decision in *Global-Tech* and likely would not have met those standards but was found not liable administratively under an actual knowledge standard) in twenty-three years does not justify blurring the Deliberate Misconduct Rule's clear delineation between those who act with culpable *mens rea* and those who do not. The NRC should require a far more compelling justification before abandoning such a fundamental principle.

For these reasons, the NRC should modify the proposed rule to remove deliberate ignorance as a basis for finding a violation of the Deliberate Misconduct Rule.

Sincerely,

A handwritten signature in black ink, appearing to read "Jerry J. Cox". The signature is written in a cursive style with a large, stylized initial "J".

Jerry J. Cox  
NACDL President