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PROPOSED

MODEL CODE

FOR

CORPORATE REHABILITATION

SECTION 1: ORDER FOR REHABILITATION AGENDA

1.1 When any [company]^{1/} [doing business]^{2/} in this state has been convicted of [an offense or major violation]^{3/}, or has been subjected to a [civil judgment]^{4/} in an amount greater than [\$250,000]^{5/}, the court, on its own motion, or on the motion or suggestion^{6/} of the plaintiff, the prosecutor, an authorized representative of any state or federal agency, or, with permission of the court, any person as amicus curiae, may order a hearing on the ordering of a Rehabilitation Agenda, as hereinafter defined.^{7/}

1/ Company will have to be elsewhere defined. There is no reason why "corporation" should be used, if partnerships or sole proprietorships would thereby be excluded. An assets proviso might be appropriate.

2/ A cross-reference to "doing business" as elsewhere defined in state law might be appropriate.

3/ The desired terminology will vary from state to state; should regulatory infractions be included, etc.?

4/ This can be defined so as to exclude contract judgments.

5/ Obviously this is a variable.

6/ Because technically a non-party would not be a movant.

7/ These sections leave open whether the hearing would be prior to entry of final judgment or at the foot of the judgment.

1.2 At such hearing, the court will hear evidence on the relationship between the wrongful conduct and the practices, policies, and procedures of the company. If the court finds [reasonable grounds to believe]^{8/} (a) that the wrongful conduct arose from or was part of an uncorrected pattern of company policies, practices or procedures and (b) that changes in such practices or procedures that the company might reasonably be demanded to make, costs and benefits considered, would protect the public from further [such wrongful conduct],^{9/} it may order the company to file with it a Proposed Rehabilitation Agenda.

1.3 If it appears to the court that a public agency with jurisdiction over the company and subject matter is prepared to exercise its authority in a manner likely to realize the same benefits as the Agenda procedures described herein, the court may, in its discretion, stay the filing of the Proposed Rehabilitation Agenda. In all such cases, however, the court shall continue to exercise jurisdiction over the cause. It shall request^{10/} or order the agency and the company to file progress reports every sixth months until the court shall be satisfied that adequate and reasonable means of assuring compliance have been instituted. As an aid to evaluating such progress, and

^{8/} Quære whether this is the best terminology; for a finding of this sort perhaps "preliminary reason to believe" would be appropriate.

^{9/} The sense intended is conduct of the same sort as gave rise to the action; there is an obvious vagueness, but one not easy to obliterate.

^{10/} This anticipates the problem of a state court dealing with a federal agency.

advising the court thereon, the court may appoint an Outside Review Committee as defined in Section 5, infra.

SECTION 2: REHABILITATION AGENDA DEFINED

If an order to file a Proposed Rehabilitation Agenda is issued the company shall file it within 60 days of the order, unless otherwise allowed. The document shall contain the following information:

2.1 The company's findings as to why the wrongful conduct arose, identifying, in particular, all connected defects in company policies, practices and procedures.^{11/}

2.2 The measures the company proposes to promote nonrecurrence of the wrongful conduct. Such measures may include:

- (a) Alterations in the company's patterns of operation, including new standards and procedures for the monitoring of sales^{12/} and work forces, new methods of production, etc.;
- (b) Changes in personnel, including the firing, suspension, or hiring of corporate employees;

^{11/} Under SEC pressure, Gulf Oil made such an undertaking in the wake of recent bribery scandals, and has circulated its report to shareholders. In settling a shareholder suit against Northrop Center for Law in the Public Interest, as plaintiff's attorneys achieved comparable relief; in both situations the company had to bring in special counsel.

^{12/} The FTC has ordered monitoring of sales forces in a series of cases; See Hearst Corp., 82 F.T.C. 218(1973), Atlantic Industries, 83 F.T.C. _____ (1973).

- (c) The establishment of new positions with specified tasks and responsibilities designed to reduce the wrongful conduct;^{13/}
- (d) The implementation of company information gathering procedures to assure that data bearing upon the possibility of repeated wrongful conduct is being adequately gathered and transmitted to corporate officers of appropriate authority;^{14/}
- (e) A representation by the company to prepare studies for the court or other agency assessing the impact of company activities on designated groups (including workers, consumers, and neighbors of the company's plants);^{15/}
- (f) A representation by the company to monitor and periodically report on the intensity of a particular problem, and on the steps being taken by the company to ameliorate it;
- (g) The maintenance of specified financial, technical, scientific, employment, sales, complaint or other records, to be available for review by any person authorized by the court or by other provisions of law; and

13/ A current example is in the consent decree entered into between AT & T, the Secretary of Labor, and the E.E.O.C. (The At & T Anti-Bias Decree), CCH Employment Practices Guide, p.1533-3 ff.

14/ Also a part of the AT & T Anti-Bias Decree, above.

15/ I can find no settlement order that does this; the pending Toxic Substances Legislation now on the floor of Congress would empower the FDA to make companies perform technological and environmental impact studies regarding toxic substances prior to marketing. See S _____, 94th Cong., 2nd Sess.

(h) The notification of appropriate interested groups, including the company's shareholders, suppliers, customers, etc., of the Agenda and its contents.

2.3 If the company believes that no special rehabilitative measures are called for or feasible in the circumstances, it shall so state and explain.

2.4 It shall set forth the names of the company officer or officers responsible for the preparation of the Proposed Rehabilitation Agenda, and designate those officers who will be primarily responsible for supervising its implementation if approved.^{16/} It shall describe the investigation and other procedures employed, and estimate the employee man-hours invested in its production.

2.5 It shall be signed by the president, the chief legal officer, and the appropriate vice-president of the company, who shall verify it to the best of their information and belief.^{17/}

2.6 The board of directors of the company shall be informed of the Proposed Rehabilitation Agenda and of its contents; and a certified copy of the minutes of the board meeting, so indicating, shall be filed along with it.

^{16/} Section 9.1 (b), infra, attaches personal liability for non-performance.

^{17/} This wording does not impose true high jeopardy; but especially in large companies, to make the, e.g., President verify all matters contained "of his own knowledge" would seem undue. Even the loose wording is some assurance that the higher officers will be keenly aware of the undertaking.

SECTION 3: PRIMARY JURISDICTION IN AGENCY:

AGENCY STATEMENT

When it shall appear that the wrongful conduct was within the apparent authority of ^a public agency to have kept under review, the court may, in its discretion, request or order the agency to prepare an Agency Agenda of the scope authorized by Section 2 of this Act, explaining why the course of conduct was not forestalled by agency action, and setting forth the measures the agency intends to prevent recurrence. If the agency believes that no special rehabilitative measures are called for or feasible in the circumstances, it shall so state and explain. ^{18/}

18/ The idea arises from my own impression that when something goes wrong in a regulated situation, there is a tendency of the regulator and the regulatee suddenly to close ranks against the curiosity of the outside world. Extracting such an Agency Agenda may combat this tendency somewhat. On the other hand, one of my colleagues predicts that the Agency, forced to demonstrate muscle, will move along the path of least resistance: laying overly protective burdens on the company mindless of cost.

SECTION 4: NOTICE AND NEGOTIATION ON SUFFICIENCY OF
PROPOSED AGENDA

4.1 Any person wanting to review the Proposed Rehabilitation Agenda, and participate in further proceedings, shall record with the court his interest and mailing address, and shall be known herein, together with all the parties to the original action who do not disclaim further interest, as an Agenda Participant.

4.2 When the Proposed Rehabilitation Agenda is filed, the company shall mail copies to all Agenda Participants. If an Agency Agenda is filed, the Agency shall distribute it similarly.

4.3 The court shall set a date, not beyond 90 days from the filing of the Proposed Rehabilitation Agenda, for a hearing on its sufficiency, and so notify all Agenda Participants.

4.4 Any Agenda Participant who wishes to put forth objections and/or alternatives to the Proposed Rehabilitation Agenda, or Agency Agenda, shall mail them to the court and to all other Agenda Participants no less than 14 days prior to the date of the Hearing.

4.5 If it appears to the court that there are significant objections or alternatives to the company's Proposed Rehabilitation Agenda, the court may adjourn the hearing for a period not to exceed 30 days, during which time representatives of the company and Agenda Participants taking exception to the Proposed Agenda will meet together to attempt to agree on an Agreed Agenda.

4.6 At the hearing, the court shall consider the Proposed Rehabilitation Agenda, or the Agreed Agenda, in light of the representations of any Agency Agenda, and any objections and alternatives not accounted for in the Agreed Agenda. If the

court finds by [a preponderance of the evidence]^{19/} that the Proposed Agenda or Agreed Agenda is a reasonable and adequate means of preventing recurrence of the wrongful conduct, it shall enter an order adopting the Agenda as part of its final judgment. Otherwise the court shall appoint an Outside Review Committee, as hereinafter defined.

SECTION 5: OUTSIDE REVIEW COMMITTEE

5.1 An Outside Review Committee (hereinafter Committee) shall consist of three or more individuals with no financial or familial connection to the company, who, by reason of their expertise in connection with the problems, the court shall deem qualified to review the Agenda.

5.2 The Committee shall be appointed by the court on its own motion or on the recommendation of any Agenda Participant appearing at the hearing, or of any professional society or association whose advice may be requested by the court. Reasonable expenses and consulting fees shall be assessed as court costs.

5.3 The Committee shall interview corporate personnel, agency staff, and other appropriate persons, make reasonable inspection of corporate records and facilities, and report to the court its judgment as to the adequacy and reasonableness of the Proposed or Agreed Agenda and of any alternatives.^{20/}

19/ Is this an appropriate burden in comparable circumstances?

20/ The SEC has ordered peer group review in settling actions against a number of CPA firms, e.g., Touche, Ross & Co., Peat, Marwick, and Laventhol, Krekstein.

5.4 If the Committee is refused access to company records it deems necessary, it may apply to the court for a discovery order under [the relevant provision of the jurisdiction's code of civil procedure].

5.5 The Committee shall file its own Agenda, together with a Report on its investigations, to the court, copies of which shall be mailed by the clerk of court forthwith to all Agenda Participants.

5.6 Within 45 days of the filing of the Committee's Agenda and Report, the court shall set a date for hearing, with notice to all Agenda Participants.

SECTION 6: FINAL ORDER UPON RECOMMENDATION OF OUTSIDE
REVIEW COMMITTEE

At the hearing on the recommendations of the Committee, the court shall have power to adopt or amend the Committee's Agenda as the public interest in nonrecurrence of the wrongful conduct, and the burdens upon the company, shall reasonably and appropriately require.

SECTION 7: VERIFICATION OF COMPLIANCE

Upon adopting the Agenda as part of its final order, the court shall order the company to prepare and file with the court, semi-annually or annually, as the court may order, a statement confirming its compliance with the obligations of the Agenda. Such statement shall be in the form of an affidavit signed by officers of the company designated in the Agenda under Section 2.4. When

it appears to the court that further verification is advisable, the court is authorized to empower the original Committee, or a successor, with powers of inspection as required.

SECTION 8: VIOLATION OR OBSTRUCTION OF AGENDA PROGRAM
CONTEMPT

8.1 If any person exercising powers established by the Agenda shall consider himself wrongfully obstructed by company policy or personnel, or if the company considers anyone in the purported exercise of such powers to be exceeding them, or if any person believes that any Agenda provision is being neglected or violated, an application for enforcement shall be filed with the court. The court may, in the first instance refer the matter to the Committee, in its discretion, for report and recommendation.

8.2 The court shall hold in contempt on its own motion or on the motion of any Agenda Participant any individual who is proven to be wrongfully and wilfully violating or neglecting provisions of the Agenda.

SECTION 9: VIOLATION OF AGENDA PROGRAM RESULTING
IN FURTHER MISCONDUCT

When any company subject to an Agenda program is charged with a crime or violation, or sued for civil damages, if the court finds probable cause to believe that the wrongful conduct or injury was causally related to a failure to abide an obligation of the Agenda, the Agenda shall be admissible in evidence and,

9.1 In a criminal proceeding,

- (a) violation of the Agenda by the company shall create a rebuttable presumption of criminal intent and [recklessness], ^{21/} when those are elements of the offense charged;
- (b) any agent of the company having primary responsibility for performing or supervising the Agenda and any agent of the company responsible for certifying compliance under §2.4, supra, may also be charged and tried for the same offense and subject to the same penalties as the company, whether or not the statute or regulation violated expressly provides for individual liability, if they can be shown to have been negligent in the performance of their respective duties, and that negligence caused or contributed to the violation;
- (c) any other provision of state law notwithstanding, no fines or penalties imposed on an individual under subsection (c), above, shall be indemnified by the company directly or indirectly; and

21/ The terms will vary with state law, e.g., "gross negligence."

- (d) the court may impose such other relief as it sees fit, including the suspension of culpable employees, and the appointment of a receiver to manage the portion of company operations involved;

9.2 In a civil proceeding for damages,

- (a) failure of the company to perform an Agenda obligation shall constitute negligence per se; and
- (b) the plaintiff shall be awarded triple his actual damages.

SECTION 10: LIFE OF ORDER; APPLICATION TO TERMINATE

10.1 The court when entering the final order shall place a life upon the conditions imposed; but in no case shall any condition be in force for a period beyond five years, except upon a subsequent showing of a need for extensions, not to exceed five years each, to be ordered on the same showing as required for the original order.

10.2 At any time prior to the original termination date, the company may move for an order terminating any or all of the Agenda obligations, and the court may order such termination, upon notice to all Agenda participants, if there is substantial evidence that the need for the condition no longer exists, or that under the circumstances then existing, the costs of implementing the condition are exceeding the benefits.

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