The original documents are located in Box 29, folder "Questionable Corporate Payments Abroad" of the Edward Schmults Papers at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE

WASHINGTON

June 4, 1976

MEMORANDUM FOR: BILL SEIDMAN

FROM: ED SCHMULTS

SUBJECT: The Decision Memorandum to the President on Questionable Corporate Payments Abroad

My recommendations on the options presented in the decision memorandum are as follows:

Issue 1 -- Support Option A (Undertake a legislative initiative at this time);

Issue 2 -- Support Option A (Propose a form of disclosure legislation); and

Issue 3 -- Approve endorsement of the Hills bill.

Based on my prior fifteen years of practice as a corporation and securities lawyer, my responsibilities at the Treasury Department as Executive Director of the Lockheed Loan Guarantee Agency, and my work in helping to organize the Questionable Corporate Payments, Task Force, I have the following additional thoughts on the need for a legislative initiative.

We really know all that we need to know about the questionable payments problem. In my view, the Administration should take a clearly perceived positive approach soon. The matter should not be left to an independent agency like the SEC, with the responsibility to assure only material disclosure to investors, or a quasi-independent agency like the IRS, concerned only with deductability or non-deductability of a payment.

The crux of the matter is that we have the spectacle of large American companies paying bribes abroad. In my view, the

incalculable harm being done domestically to American business and our free enterprise system far outweighs the disadvantages involved in any legislative initiative. By "harm", I mean substantial political erosion in Congress, leading to Nader federal incorporation bills and oil divestiture proposals, and a vision of hypocrisy and institutional decay in the eyes of the American people.

From the Administration's standpoint, it seems to me that, given our economic and regulatory philosophy of "getting government off the backs of business," we cannot sit back and fail to deal vigorously with a corporate "misconduct" issue like business bribery.

I am troubled by one aspect of a disclosure statute and that is the possible paperwork burden. However, by selecting an appropriate threshold dollar amount and reducing the frequency of reporting, we should be able to mitigate this objection responsibly. To deal with this problem and others in a way that would be consistent with the President's direction to seek the widest possible consultation, I urge that the President sketch out the disclosure proposal in broad terms and say that he is directing his task force to hold hearings and consultations on the details and possible problems that would arise. If an initiative is to be made, I recommend that it be announced <u>first</u> by the President -- his leadership should be evident.

With respect to the recommendation to endorse the Hills bill, I would be relatively low key on this since we will be getting ourselves mixed up in Proxmire's proposal. Also, if the Administration proposes a disclosure statute, strong endorsement of the Hills proposal might be confusing.

SPECIFICATIONS FOR A REPORTING AND DISCLOSURE BILL

All payments 1/ in excess of $1,000 2/ made, directly or indirectly 3/ to any person employed by or representing a foreign government or to any foreign political party or candidate for foreign political office 4/ in connection with obtaining or maintaining business with, or influencing the conduct of, a foreign government, 5/ would have to be reported 6/ to the Department of Commerce. 7/

Reports of such payments would be due within thirty days of a payment. 8/ Criminal penalties for corporations and responsible officers or directors would attach to willful failure to file such a report and to deliberate misrepresentations in such reports. Negligent failure to report would be subject to civil penalties. 9/

Reports of payments would be transferred to the Department of State which in turn would relay the reports to the affected governments. 10/

Such reports would be made available for public inspection, one year from date of original filing. 11/

The reporting requirement would apply to all American business entities 12/ and their controlled foreign subsidiaries 13/ and agents. 14/

1/ Definition of the Term "Payment."

Payment would be defined to mean the payment of money or furnishing of anything of value or the offer or agreement to pay money or furnish anything of value above some floor amount or value.

2/ $1,000 Floor.

Setting a floor at this level would help limit, but not obviate, the need to report miscellaneous small payments which might be made to facilitate customs treatment, etc. The setting of any floor is admittedly difficult and some will argue that setting the floor at any level will imply

approval of smaller improper or illegal payments. Another option would be to set the floor at $10,000. This would obviate the need for reporting of most "grease" or "facilitating" payments while capturing major payments of the sort to give rise to concerns about accountability of multinational corporate behavior. On the other hand, it can be argued that a $10,000 floor is too high and implies too broad a sanction of substantial smaller payments--or a series of such smaller payments to the same payee.

3/ Direct or Indirect Payments.

While the bill would not require payments of "regular" agents' fees or commissions paid in the conduct of business abroad, it would require reporting of fees or commissions the proximate purpose of which is to transfer something of value to a government official in connection with obtaining or maintaining business with such government, or which are intended to influence governmental conduct.

4/ Political Contributions Covered.

An argument can be made that it is improper to include in any reporting and disclosure bill political contributions on the grounds that such reporting represents unwarranted intervention into the political processes of other countries; or stated another way, other nations should be allowed to set their own requirements for legality and reporting of political contributions. A countervailing consideration is, as has often been noted in prosecutions of corrupt practices within the United States, that the line between a corrupt payment intended to influence official action on the one hand and a bona fide political contribution on the other is very difficult to draw. Exclusion of political contributions could substantially undercut the force and effect of a disclosure bill.

5/ "Obtaining or Maintaining Business with or Influencing Conduct of a Foreign Government."

As outlined in note 3 above, the reporting requirement would be designed to capture payments made directly or indirectly to influence governmental decision-making. Regular agents' fees or commissions are not necessarily covered. The reporting company must make a judgment as to the purpose and likely effect of a given payment, in deciding whether or not it must be reported.

6/ Scope of Reports.

At a minimum, a report would include the amount of value of payment; the name of the recipient; and the purpose of the payment.

7/ Reports made to the Department of Commerce.

The reports should be made to some appropriate department of the Executive Branch of Government. The Department of Commerce has administered reporting requirements under the Export Administration Act and generally has a legitimate concern with the foreign payments practices of American corporations. The Department of State or the Department of Treasury might also be appropriate agencies to receive such reporting. The SEC is not an appropriate collector of these reports. In many instances the proposed disclosure legislation would require reporting of information not "material" under the securities laws. Requirement of reporting to the SEC might imply a definition of materiality along the lines of the disclosure statute. Such definition would go well beyond any definition that has ever yet evolved through SEC and court interpretation. This disclosure statute is not an appropriate vehicle for substantial redefinition of "materiality."

8/ Thirty-Day Reporting Period.

The thirty-day delay would allow orderly reporting by foreign subsidiaries or agents to American parent corporations. See notes 13 and 14 below.

9/ Civil and Criminal Penalties.

The strongest possible consequence should attach to a willful failure to comply with the bill's reporting requirements, and it is thought that mere civil penalties will not be an adequate incentive to compliance. Criminal penalties should not attach negligent failure to file. Difficult cases may arise where officers of a foreign subsidiary fail to report to their American parent corporation. Criminal penalties can probably only reach the American parent corporation and its officers. Criminal penalties will nevertheless provide a strong incentive for American parent corporations to assure full reporting and accountability on the part of their foreign subsidiaries. No new penalties

need be prescribed for filing of false information which is already a criminal offense under 18 U.S.C. Section 1001.

10/ Reports to Foreign Governments.

This transfer of reported information should act as a spur to foreign governments to enforce their own laws.

11/ Delay before Public Disclosure.

A one-year delay before reports of foreign payments are disclosed will protect against anti-competitive disclosure of business and market plans which could result if reports were made available sooner. These same considerations are recognized in the Church bill, S. 3379.

12/ All Business Entities Covered.

In contrast to an SEC approach, the proposed bill would cover all entities, whether or not they have securities registered with the SEC.

13/ Controlled Foreign Subsidiaries.

This term would be defined as it is in the administration of the tax laws, as greater than 50 percent equity ownership. A more stringent or fluid test of control could be adopted, but such could lead to substantial difficulty of administration and stimulate objections with regard to the bill's extraterritorial effect.

14/ Inclusion of Agents.

This term will be given the same definition it receives under the securities laws.

Section 225, Bribery of Foreign Public Officials

(a) For the purpose of this section:

(1) "affiliate" means any business entity organized under the laws of the United States, a State, a foreign government, or any political subdivision thereof, that is subject, directly or indirectly, to the control of a business entity organized under the laws of the United States, a State, or any political subdivision thereof;

(2) "foreign government" means any government that has been recognized by the United States and that has entered into a mutual assistance agreement;

(3) "foreign public official" means:

(A) any officer or employee of; or

(B) any person:

(i) acting for or in behalf of; or

(ii) exercising a duty or trust imposed by virtue of the Constitution, statutes, laws, directives, decrees, or practices of;

a foreign government or any department, agency, or branch thereof; and includes a person who has been nominated or appointed to be a foreign public official or who has been officially informed that he will be so nominated or appointed;

(4) "mutual assistance agreement" means a bilateral agreement between the United States Department of Justice and a comparable law enforcement agency of a foreign government that provides in substance for the mutual exchange of information and other assistance for the purpose of enforcing the provisions of this section and the laws of such foreign country;

(5) "official act" means any decision or action on any question, matter, cause, suit, proceeding, or controversy, that is pending before, or that may by law be brought before, any foreign public official in his official capacity or the department, agency, or branch to which his official capacity relates, and

(6) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

(b) Whoever, being a citizen of the United States or of a State, or being a person admitted for permanent residence as described in Section 101(a) (20) of the Immigration and Nationality Act [8 U.S.C. 1101(a)(20)], or being a business entity organized under the laws of the United States, a State or of any political subdivision thereof or being an affiliate of such an entity, or being an employee of such a business entity or of an affiliate, directly or indirectly, whether inside or outside the territorial jurisdiction of the United States, in connection with a matter affecting interstate or foreign commerce or influencing the conduct of foreign relations, corruptly gives, offers, or promises anything of value to any foreign public official, or offers or promises any foreign public official to give anything of value to any other person or entity, with intent --

(1) to influence any official act;

(2) to influence such foreign public official to commit, to aid in committing, to collude in, or to allow, or to make opportunity for the commission of, any fraud on the United States; or

(3) to induce such foreign public official to do or omit to do any act in violation of his lawful duty;

shall be imprisoned for not more than five years, or fined not more than $10,000, or both.

(c) Any person responsible for supervising employees of a business entity organized under the laws of the United States, a State, or any political subdivision thereof, or of any affiliate of such an entity, who, by his reckless failure adequately to supervise the activities of such employees, permits or contributes to the commission of a violation of subsection (B) of this section, shall be imprisoned for not more than one year, or fined not more than $10,000, or both.

Supervision shall not be deemed reckless within the meaning of this subsection if the firm has had an independent audit conducted at least annually, among the purposes of which is to determine whether officers or employees of the firm have engaged in activities prohibited by this section, and if the firm has maintained its books, records and accounts with sufficient accuracy to allow such determinations to be made.

(d) This section shall apply only to gifts, offers, and promises that at the time they are effected, constitute violations of domestic penal statutes, laws, directives, or decrees concerning domestic bribery or conflicts of interests promulgated by the foreign government in question.

PROCEDURES FOR MUTUAL ASSISTANCE IN THE ADMINISTRATION OF JUSTICE IN CONNECTION WITH THE LOCKHEED AIRCRAFT CORPORATION MATTER

The United States Department of Justice and the Ministry of Justice of Greece, hereinafter referred to as "the parties", confirm the following procedures in regard to mutual assistance to be rendered to agencies with law enforcement responsibilities in their respective countries with respect to alleged illicit acts pertaining to the sales activities in Greece of the Lockheed Aircraft Corporation and its subsidiaries or affiliates:

1. All requests for assistance shall be communicated between the parties through the diplomatic channel.

2. Upon request, the parties shall use their best efforts to make available to each other relevant and material information, such as statements, depositions, documents, business records, correspondence or other materials, available to them concerning alleged illicit acts pertaining to the sales activities in Greece of the Lockheed Aircraft Corporation and its subsidiaries or affiliates.

3. Such information shall be used exclusively for purposes of investigation conducted by agencies with law enforcement responsibilities, including the Ministry of Defense, and in ensuing criminal, civil and administrative proceedings, hereinafter referred to as "legal proceedings".

4. Except as provided in paragraph 5, all such information made available by the parties pursuant to these procedures, and all correspondence between the parties relating to such information and to the implementation of these procedures, shall be kept confidential and shall not be disclosed to third parties or to government agencies having no law enforcement responsibilities. Disclosure to other agencies having law enforcement responsibilities, including the Ministry of Defense, shall be conditioned on the recipient agency's acceptance of the terms set forth herein. Should a subsequent development in accordance with existing domestic law impair the ability of the requesting state, or an agency thereof, to carry out the terms set forth herein, the requesting state shall promptly return all materials made available hereunder to the requested state, unless otherwise agreed.

In the event of breach of confidentiality, the other party may discontinue cooperation under these procedures.

5. Information made available pursuant to these procedures may be used freely in ensuing legal proceedings in the requesting state in which an agency of the requesting state having law enforcement responsibilities is a party, and the parties shall use their best efforts to furnish the information for purposes of such legal proceedings in such form as to render it admissible pursuant to the rules

of evidence in existence in the requesting state, including, but not limited to, certifications, authentications, and such other assistance as may be necessary to provide the foundation for the admissibility of evidence.

6. The parties shall give advance notice and afford an opportunity for consultation prior to the use, within the meaning of paragraph 5, of any information made available pursuant to these procedures.

7. Upon request, the parties agree to permit the interviewing of persons in their respective countries by law enforcement officials of the other party, provided advance notice is given of the identity of the persons to be interviewed and of the place of the interview. Representatives of the other party may be present at such interviews. The parties will assist each other in arranging for such interviews and will permit the taking of testimony or statements or the production of documents and other materials in accordance with the practice or procedure of the requesting state. The requesting party shall not pursue its request for an interview or for the production of documents and other materials if the requested party considers that it would interfere with an ongoing investigation or proceeding being conducted by the authorities of the requested party.

8. The parties shall use their best efforts to assist in the expeditious execution of letters rogatory issued by the judicial authorities of their respective countries in connection with any legal proceedings which may ensue in their respective countries.

9. The assistance to be rendered to a requesting state shall not be required to extend to such acts by the authorities of the requested state as might result in the immunization of any person from prosecution in the requested state.

10. All actions to be taken by a requested state will be performed subject to all limitations imposed by its domestic law. Execution of a request for assistance may be postponed or denied if execution would interfere with an ongoing investigation or legal proceeding in the requested state.

11. Nothing contained herein shall limit the rights of the parties to utilize for any purpose information which is obtained by the parties independent of these procedures.

12. The mutual assistance to be rendered by the parties pursuant to these procedures is designed solely for the benefit of their respective agencies having law enforcement responsibilities and is not intended or designed to benefit

third parties or to affect the admissibility of evidence under the laws of either the United States or Greece.

Done at Washington, D.C., this _____ day of May, 1976.

For the Ministry of Justice of Greece:

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For the United States Department of Justice:

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SUMMARY OF PENDING SIGNIFICANT LEGISLATIVE INITIATIVES

While numerous bills and resolutions dealing with the questionable payments problem have been introduced in both Houses of Congress, far and away the most significant of these are Senator Proxmire's bill, S. 3133, and a bill introduced on May 5, 1976 by Senator Church, S. 3379. In addition, on May 12, 1976 Chairman Hills of the SEC forwarded a draft legislative proposal to Senator Proxmire. Each of these legislative proposals and its current status is discussed below.

1. The Proxmire Bill, S. 3133

Members of the Task Force are generally familiar with this bill, since it has been a topic of discussion in Task Force meetings and because Secretaries Richardson, Simon and Robinson have testified before Senator Proxmire.

S. 3133 is an amendment to the Securities Exchange Act of 1934 and requires issuers of securities registered with the SEC to file periodic reports with the Commission regarding the payment of money or furnishing of anything of value in an amount in excess of $1,000 during the reporting period:

(i) to any person or entity employed by, affiliated with, or representing directly or indirectly, a foreign government or instrumentality thereof;

(ii) to any foreign political party or candidate for foreign political office;

(iii) to any person retained to advise or represent the issuer in connection with obtaining or maintaining business with a foreign government or instrumentality thereof or with influencing the legislation or regulations of a foreign government.

The reports mandated by this section are to be made publicly available and are to include the precise amount of the payment and the name of the person or entity to which the payment is made. In addition, the reports are required to state the purpose for which the payment was made.

S. 3133, in addition to its disclosure requirement, makes it a criminal offense for any issuer of a security registered with the SEC to make use of the mails or any means or instrumentality of interstate commerce to:

(i) make, or to offer or agree to make, any payment or to give anything of value to an official of a foreign government for the purpose of inducing the individual "to use his influence within such foreign government . . . to obtain or maintain business for or with the issuer or to influence legislation or regulations of that government;"

(ii) make or agree to make any payment or give anything of value to any person while knowing of having reason to know that a portion of the payment "will be offered, given or promised directly or indirectly to any individual who is an official of a foreign government . . . for the purpose of inducing that individual to use his influence . . . to obtain or maintain business for or with the issuer or to influence legislation or regulations of that government;"

(iii) make or agree to make any payment or give anything of value "to any foreign political party or official thereof or any candidate for foreign political office" for the purpose of inducing use of influence in the obtaining or maintaining of business for or with the issuer or influencing legislation or regulations of that government.

In addition, Senator Proxmire's bill would make it unlawful for any issuer to make or agree to make any payment or to give anything of value "in a manner or for a purpose which is illegal under the laws of a foreign government having jurisdiction over the transaction." S. 3133 would vest the SEC with the authority to prosecute and appeal criminal actions arising under its provisions.

Secretaries Richardson, Simon and Robinson testified before Senator Proxmire on April 8, 1976, and while expressing misgivings about the Proxmire approach, reserved a final judgment and detailed critique until a date by which the Task Force

would have had a chance to begin its work and systematically scrutinize the policy questions posed by the Proxmire bill. Pressed by Senator Proxmire for an early report, Secretary Richardson agreed to report back to Senator Proxmire by early June.

In hearings and in public statements, Senator Proxmire has evidenced a willingness to alter or amend S. 3133 to accommodate various legitimate criticisms and concerns such as the inappropriateness of vesting the SEC with criminal enforcement authority and the problem involved in possible prohibition of corporate political contributions by U.S. firms in countries where such are legal. Senator Proxmire has also evidenced a willingness to accommodate certain amendments to the securities laws proposed by Chairman Hills on May 12, 1976. These changes are discussed below.

It should be noted that the Proxmire approach involving criminal penalties is rejected by Senators Church and Percy of the Seante Foreign Relations Subcommittee on Multinational Appropriations. These senators and their staffs believe that the criminal approach is unenforceable and inappropriate and prefer emphasis on disclosure.

2. The Church Bill, S. 3379

S. 3379 is the joint work product of Senators Church and Percy. Senator Church, however, introduced it without Senator Percy's co-sponsorship since Percy has reservations about certain of its provisions. In broad outline, however, S. 3379 represents an approach supported by Percy as well as by Church.

S. 3379, the International Contributions, Payments and Gifts Disclosure Act, contains the following provisions. It would amend the Securities Exchange Act of 1934 to require issuers of securities registered with the SEC to file annually a sworn disclosure statement containing a complete accounting of all payments or gifts (including offers and agreements to make such payments or gifts) of "significant value" made:

(i) as direct or indirect political contributions to foreign governments;

(ii) to employees of foreign governments and intended to influence the decisions of such employees and which are made without the consent of their sovereign; and

(iii) made to employees of foreign nongovernmental purchasers and sellers and intended to influence normal commercial decisions of their employer and are made without the employer's knowledge or consent.

This annual disclosure statement must set forth the name and address of the person who made such a contribution, payment or gift; the date and amount of the payment; the name and address of each recipient or beneficiary, direct and indirect, of such payment; a description of the purpose for which the payment was furnished; and a statement whether the payment was legal in the jurisdiction where made. Further, this section of the Church bill provides criminal penalties for knowing failure to file or knowingly filing a false or insufficient statement. All information contained in such annual reports would be made public unless the President makes a determination that public disclosure would "severely impair the conduct of United States foreign policy." In this case, the President would then nonetheless have to place the information in a report and submit it to the Senate Committee on Foreign Relations and the House Committee on International Relations.

The Secretary of State is charged with preparing a comprehensive review and foreign policy analysis on a country-by-country basis concerning the implications of the types and amounts of payments disclosed in the annual reports filed with the SEC.

Further the Church bill:

(i) requires each company to include in its annual report to shareholders the aggregate value of all such payments and a statement as to whether or not they were legal or illegal in the countries where made and advise their shareholders that information on specific transactions is publicly available at the SEC.

(ii) amends the Internal Revenue Code to clarify standards of nondeductibility for illegal foreign payments.

(iii) requires that each issuing corporation have a board of directors composed of at least one-third outside directors and that these

directors compose an audit committee responsible for initiating and pursuing internal investigations of company operations including supervision of hiring and conduct of independent auditors. Independent auditors are given civil recourse for damage against persons or companies who withhold or misrepresent information necessary for the auditor to carry out his responsibilities.

(iv) grants a shareholder right of action for actual damages in connection with the purchase or sale of any security or waste of assets resulting from any of the contributions, payments or gifts in question.

(v) grants a right of action to persons to seek actual damages from illegal payments made by a competitor providing the plaintiff has not himself made such illegal payments in a relevant time period. Such damages can be trebled.

No hearings have yet been scheduled on the Church bill. Senator Percy plans to seek some amendments. It is not unreasonable to expect that the Task Force or members of the Task Force on behalf of their departments will be called to testify on this legislation. As yet, no counterpart legislation has been introduced in the House. Speculation exists that Senator Church will try to persuade Congressman Reuss to introduce a similar bill in the House. Such House initiative would significantly increase the prospects for this legislation in this session of Congress. Because it amends both the Securities Exchange Act and the Internal Revenue Code, S. 3379 has been referred to both the Committees on Banking, Housing and Urban Affairs and Foreign Relations and if reported will have to be referred to the Committee on Finance.

It should be noted that S. 3379 requires reporting of "commercial" as well as governmental or official bribery. A chief thrust of the bill is toward corporate responsibility as a general proposition. In Senator Percy's mind, the bill is to serve a broader purpose than simply addressing the questionable foreign payments problem.

3. SEC Draft Legislation

In his report submitted to Senator Proxmire on May 12, 1976, Chairman Hills of the SEC has proposed legislation amending the Securities Exchange Act of 1934:

--to prohibit falsification of corporate accounting records;

--to prohibit the making of false and misleading statements by corporate officials or agents to persons conducting audits of the company's books and records and financial operations;

--to require corporate management to establish and maintain its own system of internal accounting controls designed to provide reasonable assurances that corporate transactions are executed in accordance with management's general or specific authorization, and that such transactions are properly reflected on the corporation's books.

Since the SEC legislative proposal is relatively short, it is attached in its entirety to this appendix.

Senator Proxmire has applauded the Hills' initiative and has agreed to introduce his proposed legislation, characterizing it as "the Commission's redraft of my own bill." He has further said, however, that he will consider it "along with other proposals." Apparently, therefore, Proxmire considers the SEC's initiative to be additive to, and not a substitute for, S. 3133.

B. Draft Legislation Proposed by the Commission

The Commission proposes the following for Congressional consideration:

A BILL

To amend the Securities Exchange Act of 1934 to prohibit certain issuers of securities from falsifying their books and records, and for related purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That Section 13(b) of the Securities Exchange Act, 15 U.S.C. 78m(b), is amended by renumbering existing Section 13(b) as "Section 13(b)(1)", and by adding at the end of new Section 13(b)(1), the following subparagraphs:

"(b)(2) Every issuer which has a class of securities registered pursuant to section 12 of this title and every issuer which is required to file reports pursuant to Section 15(d) of this title shall

"(A) make and keep books, records and accounts, which accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and

"(B) devise and maintain an adequate system of internal accounting controls sufficient to provide reasonable assurances that

"(i) transactions are executed in accordance with management's general or specific authorization;

"(ii) transactions are recorded as necessary (1) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements and (2) to maintain accountability for assets;

"(iii) access to assets is permitted only in accordance with management's authorization; and

"(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

"(b)(3) It shall be unlawful for any person, directly or indirectly, to falsify, or cause to be falsified, any book, record, account or document, made or required to be made for any accounting purpose, of any issuer which has a class of securities registered pursuant to section 12 of this title or which is required to file reports pursuant to Section 15(d) of this title.

"(b)(4) It shall be unlawful for any person, directly or indirectly,

"(A) to make, or cause to be made, a materially false or misleading statement, or

"(B) to omit to state, or cause another person to omit to state, any material fact necessary in order to make statements made, in the light of the circumstances under which they were made, not misleading

to an accountant in connection with any examination or audit of an issuer which has a class of securities registered pursuant to section 12 of this title or which is required to file reports pursuant to Section 15(d) of this title, or in connection with any examination or audit of an issuer with respect to an offering registered or to be registered under the Securities Act of 1933."

GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

MEMORANDUM FOR THE GENERAL COUNSEL

From: John R. Garson
Assistant General Counsel
for Domestic & International Business

Subject: Questionable Corporate Payments Abroad--
Adequacy of Existing Law

To aid the efforts of the Steering Committee on questionable payments abroad, you have asked me to review current law and regulations which address the problem, in one form or another, and to give you my assessment of the adequacy of these laws to deter improper payments in the future.

The first part of this memorandum summarizes existing law and practice bearing on questionable payments, chiefly federal securities, tax, and antitrust laws. The second part discusses the inadequacies of these laws as deterrents to the making of questionable payments.

Summary of Existing Legislation

1. Securities Laws

The securities laws are designed to protect investors from misrepresentation, deceit, and other fraudulent practices by requiring public disclosure of certain information pertaining to the issuers of securities. Such disclosure is accomplished, first, through the mechanism of a registration statement which is required to be filed with the Securities and Exchange Commission (the "SEC") as a precondition to a public offering of securities pursuant to the Securities Act of 1933, 15 U.S.C. §77a et seq. (1970), the "1933 Act;" and, second, through the annual and other periodic reports and proxy materials required to be filed by registered companies with the SEC pursuant to the Securities Exchange Act of 1934, 15 U.S.C. §78a et seq. (1970), the "1934 Act."

There is no specific requirement that questionable payments to foreign officials be disclosed in registration statements filed pursuant to the 1933 Act or in the annual or

periodic reports or proxy materials filed pursuant to the 1934 Act. However, in addition to the specific instructions and requirements incident to each of these filings, the SEC requires the disclosure of all material information concerning registered companies and of all information necessary to prevent other disclosures made from being misleading, e.g., 17 C.F.R. §§230.408, 240.12b-20, 240.14(a)-9(a)(1975). Thus, facts concerning questionable payments are required to be disclosed insofar as they are material.

Materiality has been defined by the SEC as limiting the information required "to those matters as to which an average prudent investor ought reasonably to be informed before purchasing the security registered." Rule 405(1), 17 C.F.R. §230.405(1)(1975). The materiality of any fact is to be assessed, according to the courts, by determining:

> ". . . whether a reasonable man would attach importance [to it] . . . in determining his choice of action in the transaction in question. [Citation omitted]." (Emphasis supplied.) This, of course, encompasses any fact ". . . which in reasonable and objective contemplation might affect the value of the corporation's stock or securities . . . [Citation omitted]." (Emphasis supplied.) Thus, material facts include not only information disclosing the earnings and distributions of a company but also those facts which affect the probable future of the company and those which may affect the desire of investors to buy, sell, or hold the company's securities." SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968).

Alternatively stated, the test is whether ". . . a reasonable man might have considered . . . [the information] important in the making of [his] decision." Affiliated Ute Citizens v. United States, 406 U.S. 128, 153-54 (1972).

The courts have not yet addressed the issue of whether and under what circumstances questionable payments made by a U.S. corporation to foreign officials would be material information which should be disclosed publicly.* Thus, the SEC,

*The conviction of a director and chief executive officer of a company for bribing U.S. public officials has been held to be a material fact which should have been disclosed. Cooke v. Teleprompter Corp., 334 F. Supp. 467 (S.D.N.Y. 1971).

through its enforcement program and its voluntary disclosure program,* has been the sole arbiter as to the materiality of such payments.

The extent of the Commission's activities with respect to both foreign and domestic payments and practices has created a great deal of uncertainty as to how the materiality standard applies to improper foreign payments. The SEC has not issued a release containing disclosure guidelines on this subject to date. However, in a report submitted to the Senate Banking, Housing and Urban Affairs Committee on May 12, 1976, the SEC has given some guidance as to its current position ("Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices"--hereinafter referred to as the "SEC Report").

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* In addition to its regular enforcement program, the SEC has established special procedures for registrants seeking guidance as to the proper disclosure of questionable foreign payments. These procedures, frequently referred to as the "voluntary disclosure program," provide a means whereby companies can seek the informal views of the Commission concerning the appropriate disclosure of certain matters. The program is intended to encourage publicly-owned corporations to discover, disclose, and terminate, on a voluntary basis, the making of questionable payments and related improper activities.

A staff study by the Subcommittee on Oversight and Investigations of the House Interstate and Foreign Commerce Committee on the SEC Voluntary Compliance Program (May 20, 1976) has concluded that there are significant deficiencies in the operation of the program. In particular, the staff believes that more detailed public disclosure is necessary as to all companies which have made any illegal payments (under the laws of the United States or any other nation), any substantial questionable payments, or any form of domestic or foreign political contribution, or which have maintained false or inaccurate books or records.

In this Report, the SEC takes the position that questionable or illegal payments that are significant in amount or that, although not significant in amount, relate to a significant amount of business, are material and required to be disclosed. Other questionable payments may also be material, according to the Report, regardless of their size or the significance of the business to which they relate. Thus, the Report indicates (at page 15) that: " . . . the fact that corporate officials have been willing to make repeated illegal payments without board knowledge and without proper accounting raises questions regarding improper exercise of corporate authority and may also be a circumstance relevant to the 'quality of management' that should be disclosed to the shareholders."

Moreover, even if expressly approved by the board of directors, the Report states (at page 15) that " . . . a questionable or illegal payment could cause repercussions of an unknown nature which might extend far beyond the question of the significance either of the payment itself or the business directly dependent upon it" -- and for that reason might have to be disclosed.

It should be noted that the SEC believes that the current securities laws are adequate to require sufficient disclosure of questionable or illegal payments in order to protect the investor. The problem perceived by the SEC is the weakness of the corporate financial reporting system. The legislation proposed by Chairman Hills seeks to strengthen that system by imposing internal accounting controls on corporations regulated by the SEC designed to ensure that corporate transactions are executed in accordance with management's authorization, and that such transactions are reflected on company books and records so as to permit the preparation of financial statements in conformity with generally accepted accounting principles. The legislation proposed would make it a criminal offense to falsify corporate accounting records or to make false or misleading statements to company auditors.

2. Tax Laws

Section 162(c) of the Internal Revenue Code provides that bribes and kickbacks, including payments to government officials, cannot be deducted in computing taxable income if the payment (wherever made) would be unlawful under U.S. law if made in the United States. Thus, the tax law only reaches those transactions in which a questionable foreign payment is deducted as a business expense.

The principal mechanism for the detection of improper deductions is the corporate income tax return and, in the case of foreign subsidiaries and affiliates, certain information returns. Criminal and civil sanctions may be applicable if an improper payment is deducted from earnings. There are no cases currently pending in the Department of Justice.

The Internal Revenue Service (the "IRS") does not routinely require taxpayers to furnish information as to the payment of bribes or kickbacks. However, in August 1975, the IRS issued guidelines to its field examiners providing techniques and compliance checks to aid in the identification of schemes used by corporations to establish "slush funds" and other methods to circumvent federal tax laws. In April 1976, additional instructions were issued focusing on illegal deductions of questionable payments to foreign officials abroad. The IRS is now engaged in investigating hundreds of the nation's largest companies regarding possible improper deductions of such payments and related tax improprieties.

3. Antitrust Laws

The antitrust laws may impact on improper payments in a variety of ways. Depending on the factual circumstances, an improper payment could violate Sections 1 or 2 of the Sherman Act, 15 U.S.C. §§1, 2 (1970); Section 5 of the Federal Trade Commisison Act, 15 U.S.C. §45 (1970); the "FTC Act;" or Section 2(c) of the Clayton Act, the so-called brokerage provision of the Robinson-Patman Act, 15 U.S.C. §13(c)(1970).

As a general rule, an American corporation which pays a bribe to gain favorable legislation abroad, or to facilitate a sale at the expense of a foreign competitor, will not be in violation of the U. S. antitrust laws. On the other hand, payment of a bribe by one U. S. company to assist its sales at the expense of another U. S. company may well be an unfair method of competition within the meaning of section 5 of the FTC Act.* A conspiracy among two or three U. S. companies to bribe a foreign official to keep another U. S. company out of an overseas market would probably violate section 1 of the Sherman Act; however, it is not clear that an improper payment involving one firm and one government official can constitute a conspiracy for purposes of this section. Bribes paid by one company for the purpose of monopolizing a foreign market might violate section 2 of the Sherman Act.

Section 2(c) of the Clayton Act prohibits the payment of commissions or other allowances, except for services actually rendered, in connection with the sale of goods in which either the buyer or seller is engaged in commerce (including commerce with foreign nations). Section 2(c) encompasses commercial bribery and bribes of state government officials to secure business at the expense of U. S. competitors. Although there do not appear to be any section (2)(c) cases involving dealings with foreign governments, the statute might be applicable to the payment of a bribe by a U. S. corporation to a foreign official to assist its business at the expense of its U. S. competitor.

4. Other Legislation

There are a number of provisions of limited application which come into play when a company takes advantage of particular programs sponsored by specific U. S. Government agencies. Thus, for example, where a sale of goods is financed in whole or in part by a credit established by the Export-Import Bank of Washington ("Eximbank"), the supplier must certify that it has not paid any commissions or fees except those regularly

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* Thus, for example, the Federal Trade Commission is examining allegations that General Tire & Rubber Company made payments in Morocco for the purposes of getting a permit to expand its plant there and preventing Goodyear Tire & Rubber Company from obtaining a permit to do business in Morocco.

paid in the ordinary course of business to its sales agents or representatives. Several cases of possible fraud have been referred recently to the Criminal Fraud Section of the Justice Department.

The Agency for International Development ("AID") makes hard currency loans to foreign countries for procurement of goods produced in the United States. Companies making sales under this program must certify that they have not paid any commissions or fees except as regular compensation for bona fide professional, technical or comparable services. AID officials compare contract prices with current market prices and occasionally discover discrepancies requiring legal action, including referrals to the Department of Justice for possible fraud prosecutions. It has been held that a concealment of improper payments in AID forms constitutes a violation of the federal statute making it unlawful to conceal any matter within the jurisdiction of any United States department or agency, 18 U.S.C. §1001 (1970). U. S. v. Olin Mathieson Chemical Corporation, 368 F.2d 525 (2d Cir. 1966).

The International Security Assistance and Arms Export Control Act of 1976 (which was vetoed on May 7, 1976, but then reintroduced in altered form as S. 3439 and H.R. 13680) would add a new provision to the Foreign Military Sales Act, 22 U.S.C. §2751 et seq. (1970), to require reports to the Secretary of State, pursuant to regulations issued by him, concerning political contributions, gifts, commissions and fees paid by any person in order to secure sales under section 22 of the Foreign Military Sales Act. No such payment could be reimbursed under any U. S. procurement contract unless it was reasonable, allocable to the contract, and not made to someone who secured the sale in question through improper influence. Similar reporting requirements would be required with respect to commercial sales of defense articles or defense services licensed or approved under section 38 of the Foreign Military Sales Act. All information reported and records kept would be available to Congress upon request and to any authorized U. S. agency. It should be noted that even at the present time, the Defense Department requires disclosure of all fees and commissions paid in the sale of military equipment pursuant to the Foreign Military Sales ("FMS") program.

ANALYSIS

The issue presented is whether new legislation is required to deal with improper corporate payments or whether the existing legislative scheme-- the sum of all the laws and regulations described above-- obviates the need for new legislation. Another way to state the question is whether the company that would consider the making of an improper payment-- or the foreign official that would demand one-- will be deterred from doing so by the existing laws and regulations.

The dimensions of the improper payments problem may suggest the singular ineffectiveness of existing laws and regulations. Still, it may be asked whether the failure is more a function of enforcement policy on the part of the administrators. In other words, assuming that the SEC, the IRS, and the other agencies sharing jurisdiction in the area were to adopt a militant enforcement policy-- to exercise to the maximum possible extent their authority to deal with the problem-- is it reasonable to believe that this would put an end to it? And if that is a reasonable possibility, we would still have to ask whether it is desirable to entrust the solution of the problem to a zealous enforcement of laws and regulations which were not designed to deal with it and which only accidentally impact on it. As a matter of effective law enforcement, is there not some virtue in a legislative scheme which does not depend for its viability on the continued zeal or militancy of its administrators?

My personal assessment is that even the most vigorous enforcement of existing law would not be an adequate solution to the problem, and that the shortcoming of existing law is a function of statutory and jurisdictional limitations rather than one of enforcement policy.

Other papers prepared under the aegis of the Steering Committee as well as existing legislative initiatives (e.g., the bills introduced by Senators Church and Proxmire) suggest that there are essentially two kinds of meaningful deterrents, namely, criminal sanctions and public disclosure. The criminalization approach has been found wanting in several respects

and for the purposes of this paper it is assumed that the disclosure approach is the preferred system.

Although some of the details are still being formulated, it is assumed that any disclosure system would satisfy certain minimum objectives. First, it would apply to all U. S. corporations. Second, it would also apply to foreign government officials; that is, it would require disclosure of the names of those who demand improper payments. Third, it would require disclosure of information regarding the payments to the public (as opposed to the mere reporting of information to a government agency).

In reviewing existing law, it is clear that none of the "systems" described in the first part of this memorandum satisfy these criteria. Indeed, the system of disclosure administered by the SEC is the only one which, as a practical matter, requires detailed consideration. For ease of presentation, it may be useful to discuss first the laws and regulations of lesser significance.

With respect to taxation and antitrust, both systems are theoretically applicable to all U. S. corporations doing business abroad but only to the extent that the making of a questionable payment also results in a violation of certain statutory prohibitions.

In the case of the tax laws, they only reach those transactions in which a questionable payment is deducted as a business expense. If a company making an improper payment does not take a deduction, the only source of potential liability arises from the maintenance of "slush funds" to circumvent federal tax laws generally.

Although the IRS could require reporting of questionable payments, the information obtained could not be disclosed to the public because of the confidentiality of tax administration. Moreover, the mission of the IRS in the area of questionable payments abroad is to administer and enforce the tax law. All of the procedures and programs which the IRS has adopted, or might adopt in the future, are designed to accomplish that central objective-- the enforcement of the tax statutes.*

* Letter dated May 13, 1976, from Donald C. Alexander, Commissioner, IRS, to John D. Lange, Jr., Deputy Director, Office of International Investment, Department of the Treasury.

As for the antitrust laws, they are generally inapplicable to an improper payment unless it can be shown that there is an anticompetitive effect on U.S. foreign commerce, for example, where a bribe is paid to exclude the product of a U.S. competitor or to monopolize a foreign market. Also, the doctrine of sovereign immunity and the act of state doctrine create serious problems in cases involving payments to foreign government officials, and the actual initiation of a case would be seriously hampered by legal and policy inhibitions on the exercise of extraterritorial enforcement.

Moreover, the utility of the Sherman Act and the FTC Act in deterring improper payments abroad is further diminished by the fact that there are no disclosure requirements by which improper payments are systematically brought to the attention of the Justice Department or the FTC. The principal source of information (apart from reports filed with the SEC) would be aggrieved American competitors.

With respect to the Eximbank, AID, and FMS programs, each of them has a very limited application, that is, they only apply to companies taking advantage of these particular programs. Moreover, none of them at the present time require public disclosure. They are designed merely to ensure that the Government does not aid in the financing of questionable payments. In the case of the FMS program, pending legislation (as noted above) would provide for disclosure to the Congress but, in any case, it would still be limited to companies making sales of military equipment. Thus, as a practical matter, all of these programs taken together only impact on a limited number of companies doing business abroad and the FMS program, through its disclosure requirement (assuming passage of the new legislation) is the only one which contains a deterrent element.

Turning now to the securities laws, there are several reasons why the SEC disclosure requirements are inadequate to deter improper payments. First, they only apply to public companies, i.e., to companies with securities registered under the 1934 Act or to companies making public offerings. Second, they only apply to the extent that the questionable payment is "material" within the meaning of the law. Third, as a general rule, they do not (and could not) require disclosure of the names of recipients of questionable payments. Fourth,

they are not designed to protect the same interests that would be served by new disclosure legislation.

Nonetheless, the utility of the SEC disclosure requirements must be examined in some detail. For, as mentioned previously, the Commission itself believes that current securities laws are adequate to require sufficient disclosure of questionable payments and that the problem is to be solved by strengthening the corporate financial reporting system.

First, with respect to the coverage of the SEC program, there are at present approximately 9,000 corporations which regularly file documents with the Commission, not all of which do business abroad. On the other hand, there are some 30,000 U.S. exporters and an additional number of U.S. firms doing business abroad which do not export from the United States. Indeed, some of the most important U.S. firms doing business abroad are private companies which are not subject to the SEC disclosure requirements.

Second, the Commission's authority to require disclosure is limited in that an improper payment must be reported only if it is "material information." There are serious problems with the view (set forth at page 15 of the SEC Report) that any payment, regardless of amount, may be "material" because it can lead to "repercussions of an unknown nature" or reflect on the quality or integrity of management.

It would seem that the concept of materiality advanced by the SEC in its Report is at substantial variance with discussions of materiality only recently espoused by the Commission. For instance, in facing the issue whether a company is required to report unlawful discrimination in employment, the SEC stated -- in a release issued less than one year ago -- that:

> "The Commission's experience over the years in proposing and framing disclosure requirements has not led it to question the basic decision of the Congress that insofar as investing is concerned the primary interest of investors is economic. After all, the

> principal, if not the only reason, why people invest their money in securities is to obtain a return. A variety of other motives are probably present in the investment decisions of numerous investors; but the only common thread is the hope for a satisfactory return, and it is to this that a disclosure scheme intended to be useful to all must be primarily addressed."*

In the same release the Commission stated that "there is no distinguishing feature which would justify the singling out of equal employment from among the myriad of other social matters in which investors may be interested." The release then listed 100 so-called social matters in which investors may be interested (including "activities which would be illegal in the U. S. but which are conducted abroad") but which, presumably, are not material per se. As stated not long ago by then Chairman Ray Garrett:

> " . . . as you can see, if you require disclosure of all violations of law against bribery or political contributions on the ground that illegal payments are material per se, we may be hard pressed to explain that other illegal corporate acts are not equally material for the same reason."**

The Commission's current position with respect to questionable payments, however, seems to suggest the emergence of a new theory, namely, that with respect to illegal conduct the illegality itself is of consequence-- regardless of the nature of the offense and of its effect upon the value of the stockholder's investment. Indeed, with respect to questionable payments, it does not even appear to matter to the SEC whether they are actually illegal, that is, whether subject to indictment by prosecuting authorities in the United States or abroad. It is submitted that the Commission's enforcement policy in this area-- as represented in the SEC Report-- may be based on tenuous legal grounds. At the very least, given the extent of the Commission's enforcement activity, there is a good possibility that the matter will be presented to the courts.

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* Securities Act Release No. 5627, October 14, 1975, p. 37.

** Freeman, "The Legality of the SEC's Management Fraud Program," 31 Bus. Law. 1295, 1301 (March 1976).

The remarks of Chairman Garrett underscore the fact that the Commission's policy is a function of its composition at any particular time. It is presently reported that there is a split on the Commission, with two Commissioners urging a more moderate posture on the question of improper payments, but that Chairman Hills has been willing to act forcefully on the problem. New Commissioners may be disposed to take different interpretations. Thus, even assuming the legality or propriety of the views espoused by the present Commission, it is uncertain whether this will continue to be SEC policy. There may be virtue in a legislative scheme which does not depend for its viability on the continued zeal or militancy of its administrators. Indeed, the Congressional report of May 20, 1976, on the SEC voluntary compliance program (described above) has already revealed serious questions as to the evenhandedness of the Commission's enforcement policy.

Third, the SEC does not require disclosure of the names of the recipients of questionable payments, and it is hard to see how it could do so, at least in most cases, even under the most expansive interpretation of the materiality doctrine. In addressing S. 3133 (the "Proxmire bill")--which requires disclosure of the names of recipients-- the SEC Report states that while, in some cases, disclosure of the identity of the recipient might be important to an investor's understanding of the transaction, more frequently his identity may have little or no significance to the investor. Since any disclosure system should have as a principal purpose the deterrence of extortion by government officials, the SEC system is deficient in that respect as well.

More generally, the SEC system of disclosure is simply not designed to protect the same interests that would be served by new disclosure legislation. The questionable payments problem is an area of national policy with sensitive foreign relations implications. Whatever definition of materiality is given by the Commission or the courts, the SEC disclosure requirements are designed to protect the interests of the prudent investor. It is not an appropriate mechanism to deal with the full array of national concerns caused by the problem of questionable payments.

Moreover, it may be asked whether the Commission, in its zeal to test the outer limits of the materiality doctrine, has not raised serious questions as to the purpose and scope of the securities laws and the statutory role of the Commission. In remarks delivered in December 1975, then Commissioner Sommer urged the Commission to go slowly in expanding the area in which disclosure becomes a substitute for the enforcement of other substantive laws. In particular, he pointed out that:

> ". . . Materiality is a concept that will bear virtually any burden; it can justify almost any disclosure; it can be expanded all but limitlessly. But we must constantly bear in mind that overloading it, unduly burdening it, excessively expanding it may result in significant changes in the role of the Commission, the role of other enforcement agencies, and our ability to carry out our statutory duties." SEC News Digest, December 12, 1975.

* * *

In reviewing existing law, the largest single defect appears to be the absense of a comprehensive disclosure system. Disclosure is not required by the tax or the anti-trust laws, and the Eximbank, AID, and FMS programs have a very limited application. Thus, as a practical matter, the SEC program is the only significant disclosure system. However, because of the limitations described above, it is not a viable alternative to new legislation. What is required is a system which will extend to all American firms doing business abroad, regardless of whether they are registered with the SEC and irrespective of whether the payments are "material" from the perspective of a prudent investor.

SUMMARY OF DOMESTIC AND INTERNATIONAL ACTIONS AND INITIATIVES

A useful summary of international and domestic initiatives to deal with the questionable payments problem appears in the White House Fact Sheet distributed at the time of the announcement of the creation of the Task Force. A copy of this Fact Sheet is attached as Tab 1 hereto.

Given the information currently at hand, the Fact Sheet can be amplified or supplemented as follows:

(a) Securities and Exchange Commission (SEC)--The SEC released on May 12, 1976 an extensive report on their activities in the questionable payments area. The report at pp. 1-13, sets forth the particulars of the enforcement and disclosure programs which the SEC has pursued to date. Further, in its report at pp. 13-14, the Commission outlines the criteria and considerations which should guide issuers of securities in determining whether or not certain questionable payments are or are not material for SEC reporting purposes. A copy of the SEC report is appended as Tab A to the main memorandum. The SEC has recommended certain limited-purpose legislative actions: to prohibit falsification of corporate accounting records and the making of false and misleading statements by corporate officials to auditors; and to require the institution and maintenance by corporations of appropriate systems of internal accounting controls. The SEC's legislative proposal is outlined more fully at Tab D which summarizes certain significant legislative proposals which are currently pending.

(b) Internal Revenue Service (IRS)--Attached as Tab 2 to this appendix is a memorandum prepared by the Commissioner of Internal Revenue setting forth the enforcement approach currently being undertaken by the IRS. The Commissioner's memorandum attaches certain sections of the IRS manual which contain a series of questions being asked of a large number of corporations regarding questionable business practices.

(c) Eximbank--Suppliers of goods in Eximbank-assisted transactions are required to certify that there have been paid "regular commissions to regular sales agents." Corporations have made such certifications while nonetheless engaging in improper payment practices, since the certifying officer usually did not know of the improper practices carried out by other representatives of the corporation. This Eximbank requirement, at least as pertains to transactions aided by the Eximbank, should become a much more real deterrent to improper payments. A corporate official who, knowing of such payments, nonetheless makes an Eximbank certification could be subject to criminal liability. One practical result of the disclosures of the past year, and of current SEC and IRS initiatives, will be the adoption by American corporations of a higher degree of internal control over questionable payment practices. It may, in the future, be quite difficult for a corporation to make such a certification to the Eximbank and later to plead ignorance of improper payments which would contradict certification given the Eximbank.

(d) International Initiatives--A summary of the international initiatives currently being pursued by the United States is attached as Tab 3 to this appendix.

FOR YOUR USE AND INFORMATION MARCH 31, 1976

Office of the White House Press Secretary

THE WHITE HOUSE
FACT SHEET

TASK FORCE
ON QUESTIONABLE CORPORATE PAYMENTS ABROAD

The President today announced the creation of a Cabinet-level Task Force, to be chaired by Elliot L. Richardson, Secretary of Commerce. It will examine the matter of questionable payments by U. S. corporations to foreign officials, political organizations and business agents. The Task Force will report to the President through the Economic Policy Board and National Security Council. A final report is due from the group prior to the close of the current calendar year.

I. Scope of the Problem. While the full dimensions of the situation are not known, recent disclosures and allegations indicate that a substantial number of U. S. corporations have been involved in questionable payments to foreign officials, political organizations, or business agents. The Securities and Exchange Commission recently indicated that the number of U. S. corporations previously examined or currently under examination by the Commission is "more than eighty-five".

II. International Initiatives. Proposals for an international code of conduct for multinational corporations have been under consideration for some time. Recently, efforts have been made to deal with the specific question of illegal or unethical payments. In international discussions, the U. S. has expressed strong objections to any unlawful activity but only in the past year or so have events led to the development of a series of multilateral initiatives on the payments problem.

A. Senate Resolution 265, passed on November 12, 1975, calls for the U. S. government to seek an international code of conduct covering ". . . bribery, indirect payments, kickbacks, unethical political contributions and other such similar disreputable activities," as part of the current GATT multilateral trade negotiations under the Trade Act of 1974.

B. OECD Guidelines, now under negotiation in the Organization for Economic Cooperation and Development, include a provision, suggested by the U. S., which condemns the giving or receiving of bribes.

C. UN Resolution, adopted December 15, 1975, condemns corrupt corporate practices and calls on member governments to cooperate in eliminating them. Additionally, on March 5, 1976, the U. S. proposed negotiation of an effective international agreement on corrupt practices. This proposal is now under consideration.

D. OAS Resolution, adopted July 1975, by the Permanent Council of the Organization of American States, condemns bribery and urges member states, insofar as necessary, to clarify their national laws with regard to such activities.

III. Domestic Initiatives. Three aspects of U. S. domestic efforts should be noted:

A. Policy Review. A number of Executive Branch departments as well as the SEC have been reviewing existing authorities to stem illegal payments by U. S. companies to foreign agents or officials.

B. Enforcement. As noted above, investigations by federal agencies already involve many corporations. Several law enforcement agencies, e.g., IRS and SEC, have recently announced that they will further intensify their investigative efforts.

C. Legislation. Various legislative proposals have been made to address the issue, such as requiring public disclosure of fees paid to agents or officials abroad. To date, no new legislation has been requested by the Administration.

IV. Current U. S. Interests. Beyond moral concerns, there are at least five areas in which the subject of payments by U. S. companies to foreign agents or officials is of interest under current law.

A. International Implications. Foreign payments by U. S. companies have international implications which raise foreign policy issues of concern to the State Department, e.g., they encumber relations with foreign governments and contribute to the deterioration of the international investment climate.

B. Antitrust. Overseas payments by U. S. companies could become an antitrust issue if questions of anti-competitive behavior arise. The Department of Justice is the lead agency in this area.

C. Corporate Disclosure. The Securities and Exchange Commission monitors and regulates the disclosure practices of U. S. companies. A major concern of the SEC is to assure that corporate information which is important to the potential investor, including costs of doing business abroad, be disclosed in a corporation's financial reports.

D. Military Sales and Assistance. The Department of Defense has principal operating responsibility for implementing the Military Assistance Program and the Foreign Military Sales Program, both of which involve justification for the inclusion of substantial agent's fees.

E. Tax Reporting. The Internal Revenue Service is responsible for investigating the propriety of all business deductions. Our Federal tax law provides that illegal expenditures are not deductible as business expenses.

V. Current Federal Law. Present Federal law does not directly prohibit payments by U. S. companies or individuals to foreign individuals or companies, although such payments may violate foreign laws. However --

A. Criminal liability in the U. S. can result from the filing of false statements with the U. S. government, i.e., false certifications filed with the Export-Import Bank, the Department of Defense, or the Agency for International Development may constitute criminal fraud under 18 U.S.C. §1001.

B. Payments made abroad which would be illegal if made in this country may not be deducted from business taxes, and claiming such deductions may constitute a criminal tax violation.

C. False statements made to the Securities and Exchange Commission concerning or concealing such bribes, provided the amounts involved are "material", may constitute criminal fraud.

VI. Complexities of the Issue. Competing considerations in this area must be carefully weighed before remedial steps are taken. For example:

A. Proposals which would make it a criminal act for U. S. companies to engage abroad in what are regarded as improper activities at home pose serious difficulties since the enforcement of such laws could involve the U. S. in the investigation of the conduct of foreign government officials.

B. Unilateral disclosure legislation could raise foreign affairs difficulties to the extent that such legislation presumably would require making the names of the payee as well as the payor public.

C. The prohibition of certain payments by U. S. firms without commensurate restraints on similar payments by foreign competitors could place U. S. firms in a disadvantageous position.

D. An important dimension of any analysis in this area must be the consideration of the possible effect of any actions on trade, on the location of private corporations and on the international flow of capital.

VIII. The President's Task Force. The Task Force on Questionable Corporate Payments Abroad was established by Presidential directive (copy attached).

A. Membership.

The Secretary of State	Henry A. Kissinger
The Secretary of the Treasury	William E. Simon
The Secretary of Defense	Donald H. Rumsfeld
The Attorney General	Edward H. Levi
The Secretary of Commerce	Elliot Richardson
The Special Representative for Trade Negotiations	Frederick B. Dent
The Director, Office of Management and Budget	James T. Lynn
Assistant to the President for Economic Affairs	L. William Seidman
Assistant to the President for National Security Affairs	Brent Scowcroft
Executive Director, Council on International Economic Policy	J. M. Dunn

B. Chairman. The Task Force will be chaired by Commerce Secretary Elliot Richardson.

C. Scope of Review. The President has encouraged the Task Force to consider all policy dimensions of questionable foreign payments by U. S. corporations and to obtain the views of the broadest base of interested groups and individuals. The President has specifically directed that the SEC be invited to participate in the efforts of the Task Force.

D. Organization. The Task Force will report to the President through the Economic Policy Board and National Security Council.

E. Duration. Status reports from the Task Force will be submitted to the President from time to time. The final report is due prior to the close of the current calendar year.

# # #

Commissioner

MAY 13 1976

Mr. John D. Lange, Jr.
Deputy Director
Office of International
Investment
Department of the Treasury
Washington, D. C. 20220

Dear Mr. Lange:

This refers to your April 20, 1976 request for Service input to the Cabinet Task Force on Questionable Payments Abroad.

In August, 1975, the Service issued guidelines to its field examiners providing techniques and compliance checks to aid in the identification of schemes used by corporations to establish "slush funds" and other methods to circumvent Federal tax laws. Subsequently, on April 6, 1976, additional instructions were issued which focused on questionable payments to foreign officials or governments for favorable consideration related to corporate activities abroad. These telegraphic instructions included requirement that the responses to the 11 questions be obtained in affidavit form from selected corporate officials, key employees and the partner of the corporate accounting firm in charge of the engagement. Enclosed are two copies of the recently updated guidelines dated May 10, 1976, consolidating all previous instructions.

With respect to expanded disclosure of information, we have and plan to continue to utilize the exchange of information provisions of tax treaties with foreign countries. As you are probably aware, the United States has a tax treaty with most of the major industrial nations. However, any information received under these treaties, which reflects illegal payments, must remain secret except to the extent it is utilized by the United States strictly for tax purposes. Any disclosure for other purposes would contravene the treaty convention.

On the domestic side, the Service has been quite active, within statutory limitations, in pursuing expanded disclosure of information. During the inquiries relating to illegal political contributions, the Service obtained specific tax related information from congressional committees, as well as the Special Prosecutor's Office. This information was correlated and transmitted to our field offices for appropriate action. In the disclosure of questionable payments abroad, we established liaison with the Securities and Exchange Commission to review its files for possible violations of the Federal tax statutes. Presently, we have two agents reviewing SEC's records on a full-time basis. Recently, we completed arrangements with the Department of Defense to secure its audit reports on contracts, another potential source of violations of Title 26, U.S.C.

Mr. John D. Lange, Jr.

Under 26 U.S.C. 6103 and 7213, the Service is prohibited from disclosing information contained in a specific tax return. However, when Service employees, in the course of their work, discover evidence of a possible violation of a Federal statute, not administered by the Treasury Department, current procedures allow the Service to notify only the Department of Justice of the existence of such evidence. The Justice Department can then submit a written request for access to Service records under 26 CFR 301.6103(a)-1(g). The Justice Department may, at its discretion, notify another Federal agency of a possible violation of law administered by that agency. Such agency may then make a written request for access to Service information.

A Federal agency can have access to confidential information in Service files, but only if the head of the agency makes a written request under 26 CFR 301.6103(a)-1(f) specifying the details and, in particular, the reasons why inspection of Service records is desired. Obviously, these regulations do provide many avenues to detect illegal payments, either domestically or abroad. We believe that greater deterrence could be effected in the questionable payments abroad area, if there were similar exchanges of information by other Federal agencies when possible tax violations of Title 26, U.S.C. are uncovered in the course of an agency's business.

The Service's mission in the area of questionable payments abroad is to administer and enforce the tax law. All of the procedures and programs which the IRS has adopted, or might adopt in the future, are designed to accomplish that central objective -- the enforcement of the tax statutes.

If we can be of further assistance, please let us know.

With kind regards,

Sincerely,

Donald C. Alexander

Enclosures

manual supplement

Department of the Treasury Internal Revenue Service

42G-348
40G-119 84G-12
47G-111 8(24)G-123
4(12)G-9 93G-168
82G-81

May 10, 1976

Corporate Slush Funds

Section 1. Purpose

This Supplement provides guidelines for the use of additional techniques and compliance checks to help identify schemes used by corporations to establish "slush funds" and other schemes which may be used to circumvent the tax laws. The procedures in Section 3 of this Supplement were issued by TWX on April 6, 1976, from Director, Audit Division, to all Regional Commissioners, District Directors and Director of International Operations. Two additional TWX's were issued, one on April 16 and the other on April 27, 1976, amplifying the procedural instructions set forth in the April 6 TWX.

Section 2. Background

Recent investigations of some major corporations by the Service and other enforcement agencies have disclosed intricate corporate schemes, outside normal internal audit controls, designed to generate large amounts of cash for illegal or improper use and to reduce taxable income unlawfully. These schemes to create secret slush funds and to consciously misrepresent corporate taxable income by claiming unallowable deductions or exclusions from income, or otherwise, are of great concern to the Service. The diversity of techniques used is almost unlimited. Slush funds have been used for such illegal purposes as corporate political contributions, bribery, lobbying, kickbacks and diversions to personal use. The very difficult task of discovering slush funds in corporate examinations requires effective planning of in-depth probes and the use of imaginative audit techniques. Frequent characteristics of these schemes are the involvement of top level corporate officers and the creation of slush funds through the use of foreign subsidiaries, foreign bank accounts, foreign affiliates, foreign intermediaries, or unrelated foreign entities. While major use has been made of foreign sources, schemes have been detected that are not connected with the foreign area. All such schemes which circumvent or evade the tax laws must be dealt with effectively by the Service.

Section 3. Affidavits Required in Corporate Examinations

.01 In every coordinated examination, as defined in IRM 42(11)3, selected corporate officials, key employees and the managing partner (i.e., the partner who determines the scope of their audit and the type of opinion to be rendered) of the corporation's accounting firm will be asked, as a minimum, questions 1 thru (11) below. Additional questions should be asked when warranted by the facts and circumstances in a particular case; however, consideration should be given to obtaining the assistance of Regional Counsel in developing such questions. This procedure may be used in noncoordinated examinations where the facts and circumstances warrant and after approval by the group manager/case manager. The individuals selected for questioning should be those present or former employees or directors who would be likely to have or have had sufficient authority, control or knowledge of corporate activities to be aware of the possible misuse of corporate funds. This would include, for example, chief executive officer, chief financial officer, officer in charge of international operations, officer in charge of governmental activities, directors who are not corporate officers but who serve on audit committees or have

Distribution:

IRM 4000, 4200, 4700, 4(12)10, 8200, 8400, 8(24)10 and 9300

Section 3. cont.

similar responsibilities, and others as appropriate. It should be clearly understood by the individual selected for questioning that the term "corporation" includes the taxpayer under examination, all affiliates and related entities as defined in IRC 482, domestic and foreign. The individuals being questioned should be advised as to the years to which the questions relate. As a minimum the questions will cover all tax years assigned to Audit whether under examination, in Review or in Conference and will include all subsequent years for which returns have been filed. If warranted by facts and circumstances the questions will also cover any year open under the statute of limitations, including any nondocketed year in Appellate. However, in consultation with Regional Counsel, the District Director and Chief, Appellate Branch Office, should mutually decide upon and agree to the extension of this procedure to nondocketed years in Appellate. The decision of District Director and Chief, Appellate Branch Office, should be confirmed in a memorandum of understanding. (See Section 9 for Appellate Division Responsibilities.) If the taxpayer objects to the extension of the questions to open years not yet under examination, the District Director will determine whether he/she will immediately place such years under examination or wait to obtain answers when those returns would normally be examined. The approval of Regional Counsel is required if these questions are to be asked with respect to years under the jurisdiction of any court.

1 During the period from _____ to _____, did the corporation, any corporate officer or employee or any third party acting on behalf of the corporation, make, directly or indirectly, any bribes, kickbacks or other payments, regardless of form, whether in money, property, or services, to any employee, person, company or organization, or any representative of any person, company or organization, to obtain favorable treatment in securing business or to otherwise obtain special concessions, or to pay for favorable treatment for business secured or for special concessions already obtained?

2 During the period from _____ to _____, did the corporation, any corporate officer or employee or any third party acting on behalf of the corporation, make any bribes, kickbacks, or other payments, regardless of form, whether in money, property or services, directly or indirectly, to or for the benefit of any government official or employee, domestic or foreign, whether on the national level or a lower level such as state, county or local (in the case of a foreign government also including any level inferior to the national level) and including regulatory agencies or governmentally-controlled businesses, corporations, companies or societies, for the purpose of affecting his/her action or the action of the government he/she represents to obtain favorable treatment in securing business or to obtain special concessions, or to pay for business secured or special concessions obtained in the past?

3 During the period from _____ to _____, were corporate funds donated, loaned or made available, directly or indirectly, to or for the use or benefit of, or for the purpose of opposing, any government or subdivision thereof, political party, candidate or committee, either domestic or foreign?

Section 3. cont.

4 During the period from _____ to _____, was corporate property of any kind donated, loaned, or made available, directly or indirectly, to or for the use or benefit of, or for the purpose of opposing, any government or subdivision thereof, political party, candidate or committee, either domestic or foreign?

5 During the period from _____ to _____, was any corporate officer or employee compensated, directly or indirectly, by the corporation, for time spent or expenses incurred in performing services for the benefit of, or for the purpose of opposing, any government or subdivision thereof, political party, candidate or committee, either domestic or foreign?

6 During the period from _____ to _____, did the corporation make any loans, donations or other disbursements, directly or indirectly, to corporate officers or employees or others for the purpose of making contributions, directly or indirectly, for the use or benefit of, or for the purpose of opposing, any government or subdivision thereof, political party, candidate or committee, either domestic or foreign?

7 During the period from _____ to _____, did the corporation make any loans, donations or other disbursements, directly or indirectly, to corporate officers or employees or others for the purpose of reimbursing such corporate officers, employees or others for contributions made, directly or indirectly, for the use or benefit of, or for the purpose of opposing, any government or subdivision thereof, political party, candidate or committee, either domestic or foreign?

8 During the period from _____ to _____, did any corporate officer or employee or any third party acting on behalf of the domestic corporation have signatory or other authority or control over disbursements from foreign bank accounts?

9 During the period from _____ to _____, did the corporation maintain a bank account or any other account of any kind, either domestic or foreign, which account was not reflected on the corporate books, records, balance sheets, or financial statements?

(10) During the period from _____ to _____, did the corporation or any other person or entity acting on behalf of the corporation maintain a domestic or foreign numbered account or an account in a name other than the name of the corporation?

(11) Which other present or former corporate officers, directors, employees, or other persons acting on behalf of the corporation may have knowledge concerning any of the above areas?

Section 3. cont.

.02 The case manager or group manager will determine whether these questions are presented during an interview or mailed in letter form. If not personally delivered, then certified mail will be used for all communications under this section between the Internal Revenue Service and taxpayer or third parties. A reasonable amount of time should be allowed to the respondent to reply. Where a reply is not received after delivery or mailing by the Internal Revenue Service within 20 workdays, prompt followup by personal contact will be made.

.03 The responses to these questions will be reduced to writing and signed by the respondent in either affidavit form or under the written declaration that it is made under the penalties of perjury, the contents of which the respondent believes to be true and correct as to every material matter. If the individual refuses to sign the affidavit or written declaration but confirms the statement by oath or affirmation in the presence of two Internal Revenue employees, a legend will be inserted at the end of the statement as follows:

"This statement was read by _____ (the Subject) on _____ 19__, who stated under oath that it was true and correct but refused to sign it.

"

_____ Witness

_____ Witness

If any individual refuses to answer any of the examiner's questions or refuses to confirm a written statement by oath or affirmation, a summons should be issued to that individual in accordance with IRM 4022 and testimony obtained under oath pursuant to IRC 7602.

.04 When any of these questions is answered in the affirmative, all details surrounding the transaction should be secured. Responses to all questions will be reviewed along with all other available information. If further clarification is required, follow-up interviews will be conducted.

.05 False statements provided to the Internal Revenue Service concerning any matter arising under the Internal Revenue Laws can subject the individual, or others, to criminal penalties under Titles 18 and 26 of the United States Code. Therefore, whenever there is any indication that the answers contained in an affidavit or statement are false, the matter will be immediately referred to the Intelligence Division for appropriate criminal action.

.06 The individuals questioned will be expected to answer fully and truthfully, to the best of their knowledge and belief, and to the best of their recollection. However, individuals obviously cannot be required to state details of matters as to which they had no knowledge.

Section 4. Audit Plan and Compliance Checks

.01 During the preplanning and the examination of all returns, case mangers and examiners will be alert to situations which lend themselves to the creation of slush funds and illegal payments. When deemed appropriate and necessary, the audit plans will include some or all of the following compliance checks. For any compliance check not included in the audit plan, the reason will be explained in the examiners' workpapers.

Section 4. cont.

1 Interview other corporate officers and key employees not included in Section 3.01 (i.e., those who have been dismissed or changed jobs, corporate airplane pilots, security officers, etc.). Where appropriate, the use of summonses and affidavits will be considered.

2 Examine internal audit reports and related workpapers to determine if any reference is made to the creation of any secret or hidden corporate fund.

3 Review taxpayer's copy of reports filed with other governmental regulatory agencies.

4 Determine the number and nature of foreign trips by top executives in the company. Examiners should be especially alert for itinerary stops in countries with protective banking and secrecy laws.

5 Trace significant corporate contractual arrangements with foreign individuals and entities.

6 Extend the examination to controlled foreign subsidiaries where the operations and activities of those corporations lend themselves to the creation and use of slush funds. (Be especially alert for shell corporations established in tax havens or countries with protective banking and secrecy laws.) For assistance in resolving legal and practical problems that will arise regarding the accessibility of records, refer to Sections 6 and 7 below.

7 Determine the manner in which funds are repatriated from subsidiaries, affiliates and/or associates.

8 Examine foreign cables to identify diversion of funds transactions.

9 Trace the use of foreign establishments to furnish services or products which are competitively available here.

(10) Trace foreign pricing arrangements and excessive charges by foreign entities.

(11) Scrutinize unusual transactions with foreign individuals or entities.

.02 Items 4 through (11) are generally covered in Chapter 600 of IRM 4(12)10, Tax Audit Guidelines - Individuals, Partnerships, Estates and Trusts, and Corporations. They are repeated here to extend their use within the context of this Supplement.

.03 In the preplanning stages where it is deemed advisable to make an on-site examination in a foreign country, assistance from the Office of International Operations (OIO) should be secured at the very earliest stage. In these instances, OIO should be contacted during preparation of the Audit Work Plan. The provisions of Section 6, Request for Office of International Operations Assistance, will be followed.

.04 Where individuals' returns are associated with the examination of a corporation pursuant to Manual Supplement 48G-208 (Rev. 3), CR 81G-17(Rev. 3), and 91G-29 (Rev. 3), dated August 8, 1975, or for any other reason, the audit plan will include procedures necessary to determine if the individual acted either as a conduit for corporate transactions or held secret corporate funds.

Section 4. cont.

.05 Case managers and group managers will be responsible for planning sufficient time to carry out the aforementioned compliance checks. Case managers will indicate in Item 29 of Form 4451 (Large Case Status Report, Report Symbol No-CP:A-164) staff-days spent during the quarter and cumulative figures in complying with the provisions of this Manual Supplement. Significant information such as date of fraud referrals, issue involved, and date of acceptance or rejection by Intelligence Division should also be included.

.06 All Audit Division managers should ensure that employees under their supervision are familiar with Chapter (12)00, In-Depth Probes, of IRM 42(11)8, Handbook for Field Audit Case Mangers, and IRM 4235, Techniques Handbook for In-Depth Audit Investigations, where appropriate. Also, audit managers will ensure that their employees are familiar with various evasion and slush fund schemes found in Intelligence Digests (Document No. 5590), and Manual Supplement 42G-319, CR 43G-14, dated December 31, 1974.

.07 Case Managers and examiners should check with the Intelligence Division for any information they might have about the corporation, its affiliates or related entities and the individuals selected for questioning.

.08 Upon finding indication of fraud during the examination, the examiner will refer the matter to the Intelligence Division in accordance with IRM 4565 or 42(11)9, as appropriate.

Section 5. Information From Other Government Agencies

.01 During the preplanning and examination of corporate cases, case managers, group managers, and examiners should consider IRM 4083, Information Requested From Government Agencies, and IRM 4084, Information Furnished by Government Agencies.

.02 The National Office has established special liaison with the Securities and Exchange Commission to obtain information relating to slush funds, bribes, political contributions, and other tax-related information.

Section 6. Request for Office of International Operations Assistance

.01 To properly examine taxpayers with foreign slush fund issues and other schemes in the foreign area, it is necessary to obtain first-hand knowledge and independently verify information concerning related foreign entities or foreign branches of domestic entities. In most instances, information may be obtained from United States sources more quickly than from foreign sources. However, if it is determined that an on-site examination should be made in a foreign country, a request for support should be made to OIO. This request should be made following the coordinated examination support request provisions of IRM 42(11)5:(4)(f). Collateral request provisions of IRM 4597 will be followed in noncoordinated examination cases. OIO will work with the requesting district in developing the audit plan for an on-site examination and assist in planning other details of the on-site audit.

Section 6. cont.

.02 Once the details of the on-site examination have been finalized, formal request for approval of the on-site examination and foreign travel authorization will be made in accordance with IRM 42(10)(10) and Section 420 of IRM 1763, Travel Handbook.

Section 7. Use of Summons

.01 Every effort should be made to secure taxpayer's records, responses to questions and other pertinent financial data without the issuance of a summons. However, in certain instances it may be necessary to issue a summons. Under such circumstances, IRM 4022 will be followed in considering the need to issue such a summons.

.02 Before issuing a summons where the records are outside the United States, a copy of the proposed summons will be submitted to the appropriate Regional Counsel for review. Regional Counsel will coordinate their review with Chief Counsel, CC:GLI, which in turn will coordinate the matter with the appropriate National Office Division. The proposed summons will be accompanied by a statement describing the circumstances and efforts that have been made to secure the records and data from the taxpayer and why the taxpayer will not make the requested records available. In no event will the examiner issue the summons until advice has been received from the Regional Counsel.

Section 8. Information Concerning Possible Nontax Violations of Federal, State, or Local Laws

The purpose of these procedures is to obtain information that may relate to violations of Federal tax laws. However, if the Service receives information indicating violations of Federal laws which are not administered by the Service, or of violations of State or local laws, the case manager will set forth in a memorandum the pertinent facts concerning the suspected violation. Such memorandum, together with any documentation, will be promptly forwarded through the Chief, Audit Division, to the Chief, Intelligence Division for appropriate referral. (See IRM 4097.) However, see MS 12G-134, dated January 15, 1976, for exceptions.

Section 9. Appellate Division Responsibilities

.01 The Chief of each Appellate Branch Office will contact the District Director, in consultation with Regional Counsel, to decide on a case-by-case basis for every coordinated examination case in Appellate inventory whether the 11 questions in Section 3 above will be asked. The decision of the District Director and Chief, Appellate Branch Office, should be confirmed in a memorandum of understanding.

.02 In a nondocketed case, where the taxpayer or his representative offers to make payment of additional tax liability for slush funds deductions or reveals their existence to Appellate officials for the first time, Appellate consideration of the case will be discontinued. The case will be returned to the Audit Division for verification of appropriate facts and possible referral to Intelligence. Under similar circumstances in a docketed case, Regional Counsel should be immediately consulted.

Section 10. Intelligence Division Responsibilities

.01 All Referral Reports will be handled in accordance with IRM 9322.2 or 9322.3, as appropriate.

.02 Intelligence Division personnel will be made available, as needed, to advise and assist Audit in training their personnel in interviewing procedures and techniques.

.03 Information concerning possible violations of any local, state or Federal statute will be processed in accordance with IRM 9382.4 or Manual Supplement 12G-134, dated January 15, 1976, as appropriate.

Section 11. Application

.01 The compliance checks listed in Section 4 will be applied to all cases not processed to Review as of March 4, 1976. The applicability of these compliance checks to cases pending in Review as of March 4, 1976 is as follows:

1 If the compliance checks listed in Section 4 were not applied to the examined returns of a corporation with foreign subsidiaries or other foreign interests, the case should be returned to the examiner for such application.

2 If the compliance checks listed in Section 4 were not applied to the examined returns of a corporation without foreign subsidiaries or other foreign interests, the Chief, Review Staff, or Chief, Technical Branch, in some districts, will make a judgment as to the slush fund potential and either return the case to the examiner or release the case. In either instance, a statement of his/her decision and the basis for it will be included in the case file.

Section 12. Effect on Other Documents

.01 Manual Supplement 42G-329, CR 40G-111, 47G-107 and 4(12)G-8, dated August 29, 1975, and Amend. 1, dated April 6, 1976, are superseded. Annotations referring to that Supplement at IRM 4022, 4083, 4084, 4241.1, 4241.4, 42(11)6, 4724.1 and Chapters 500 and 600 of IRM 4(12)10, Tax Audit Guidelines--Individuals, Partnerships, Estates and Trusts, and Corporations, should be removed.

.02 This supplements IRM 4022, 4083, 4084, 4241.1, 4241.4, 42(11)6, 4724.1, 8223, 8430, 9360 and 9382.4: This also supplements Chapters 500 and 600 of IRM 4(12)10, Tax Audit Guidelines--Individuals, Partnerships, Estates and Trusts, and Corporations; and 681 and 682 of IRM 8(24)40, Appellate Division Supervisors' Guide. This "effect" should be annotated by pen-and-ink beside the basic text and Handbook text cited, with a reference to this Supplement.

S. B. Wolfe
Assistant Commissioner
(Compliance)

Current Status Report on International Initiatives Relating to Corrupt Practices April 16, 1976

OECD

The bribery issue has been discussed in general terms in the OECD's Committee on International Investment and Multinational Enterprises, and the Committee has agreed to include the following language on corrupt practices in its voluntary guidelines relating to multinational enterprises:

"Enterprises should

(1) not render--and they should not be solicited or expected to render--any bribe or other improper benefit, direct or indirect, to any public servant or holder of public office;

(2) unless legally permissible, not make contributions to candidates for public office or to political organizations;

(3) abstain from any improper involvement in local political activities."

We hope that work on these guidelines will be completed in time for promulgation at the OECD Ministerial in June.

The initial reaction to U.S. efforts to include such a provision was not favorable, with the French in particular arguing that language prohibiting bribery was gratuitious. However, the U.S. was able to persuade other delegations that such language was, on balance, useful.

The U.S. has also informed OECD members that it may raise the issue again in the OECD and propose more concrete action. However, the UN exercise appears to provide a better opportunity for developing support for effective action at this time.

United Nations

The U.S. proposal for negotiation of a treaty on corrupt practices in the UN was made on March 5 at the second session of the UN Commission on TNE's in Lima. The proposal was for an agreement to be based on the following principles:

(a) It would apply to international trade and investment transactions with Governments, i.e., government procurement and other governmental actions affecting international trade and investment as may be agreed;

(b) It would apply equally to those who offer or make improper payments and to those who request or accept them;

(c) Importing Governments would agree to (i) establish clear guidelines concerning the use of agents in connection with government procurement and other covered transactions and (ii) establish appropriate criminal penalties for defined corrupt practices by enterprises and officials in their territory;

(d) All Governments would cooperate and exchange information to help eradicate corrupt practices;

(e) Uniform provisions would be agreed for disclosure by enterprises, agents and officials of political contributions, gifts and payments made in connection with covered transactions.

The proposal was forwarded to ECOSOC with a recommendation that ECOSOC give the issue priority consideration.

The U.S. objective is to have ECOSOC, at its July 12-August 6 meeting in Geneva, pass a resolution on corrupt practices which will create a group of experts charged with (1) writing the text of a proposed international treaty on corrupt practices and (2) reporting that text back to ECOSOC in the summer of 1977. The U.S. goal would then be to forward an agreed text to the UN General Assembly for action in the fall of 1977. It is not certain that this timetable will be acceptable to other ECOSOC members, and consultations will be needed to seek their support.

Preliminary reactions to the U.S. proposal, while not strong, have been encouraging. The Canadians and Japanese have been instructed to support the basic outlines of the proposal, and the UK and Nordic governments have indicated interest. The Germans are not in favor of action along the lines of the U.S. initiative. The French are not expected to provide early support. The reaction from developing countries in Lima was somewhat more positive, although it is not clear at this stage how far they would be willing to go with this exercise.

On December 4, 1975 the UN General Assembly adopted by consensus a resolution condemning bribery and calling on home and host governments to cooperate to eliminate corrupt practices. The U.S. made a statement of interpretation, in accepting the resolution, indicating the U.S. understanding that the resolution condemned both the giving and taking of bribes and did not call upon home countries to enact legislation which would be applied extra-territorially. The resolution was cited as part of the U.S. proposal in Lima.

MTN

Ambassador Dent has asked the GATT to take up the issue, as called for in Senate Resolution 265 (passed by a vote of 93-0 on November 12, 1975). The resolution proposes negotiation in the MTN of an international agreement to curb "bribery, indirect payments, kickbacks, unethical political contributions and other such similar disreputable activities." The U.S. has indicated that negotiation of such an agreement is a matter of top priority.

OAS

The OAS passed a resolution last July condemning bribery but does not plan any further action on the issue. The U.S. does not view the OAS as a promising forum in which to undertake an initiative on corrupt practices at this time. It does not include the key countries whose cooperation we need.

Coordination

While each of these initiatives is proceeding independently, both timing and substance are being coordinated by the CIEP

Interagency Committee on TNEs. The Committee is chaired by State and includes representatives from Commerce, Justice, STR, Treasury, Labor, NSC, USIA, and CIEP. The Committee has been meeting regularly (generally at least once a month) to review U.S. positions on these issues as they are raised in international fora.

10 March 1976

ORIGINAL: ENGLISH

COMMISSION ON TRANSNATIONAL CORPORATIONS
Second session
1-12 March 1976, Lima, Peru

Paper submitted by the delegation of the United States of America

1. Resolution 3514 (XXX), approved unanimously by the General Assembly, condemns all corrupt practices, including bribery, by transnational and other corporations, their intermediaries and others involved in violation of the laws and regulations of the host countries. The resolution calls upon Governments to take necessary and appropriate measures within their respective national jurisdictions and to co-operate to prevent such corrupt practices. Finally, the resolution requests the Economic and Social Council to direct the Commission on Transnational Corporations to include in its programme of work the question of corrupt practices of transnational corporations and to make recommendations on ways and means whereby such corrupt practices can be effectively prevented.

2. The problem of corrupt practices is both a trade and investment problem and, in fact, extends beyond the activities of transnational enterprises. It is primarily the responsibility of each State to set forth clear rules relevant to such activities within their territories - to establish and enforce legislation dealing with the problem, including clear rules as to the use of agents in transactions with the Government. However, the dimensions of the problem are such that unilateral action needs to be supplemented by multilateral co-operation. Co-ordinated action by exporting and importing, host and home countries is the only effective way to prevent improper activities of this kind. The most effective method of achieving such international co-operation is through an international agreement dealing with corrupt practices.

3. An international agreement dealing with corrupt practices should be based on the following principles:

(a) It would apply to international trade and investment transactions with Governments, i.e., government procurement and other governmental actions affecting international trade and investment as may be agreed;

(b) It would apply equally to those who offer or make improper payments and to those who request or accept them;

(c) Importing Governments would agree to (i) establish clear guidelines concerning the use of agents in connexion with government procurement and other covered transactions and (ii) establish appropriate criminal penalties for defined corrupt practices by enterprises and officials in their territory;

(d) All Governments would co-operate and exchange information to help eradicate corrupt practices;

(e) Uniform provisions would be agreed for disclosure by enterprises, agents and officials of political contributions, gifts and payments made in connexion with covered transactions.

4. The Commission believes that urgent and serious consideration should be given to the preparation of an international agreement which would establish certain standards and procedures relative to international trade and investment transactions with governments with the aim of eliminating corrupt practices in these areas. Accordingly, the Commission requests that the Economic and Social Council at its sixty-first session give priority consideration to this question and establish a group to which states shall appoint a high level expert, taking into account his knowledge of the issues involved, to study and prepare, based on the principles set forth in paragraph 3 hereof, recommendations for such an agreement. The report of the group would be submitted to the Economic and Social Council at its sixty-third session. The Center on Transnational Corporations, along with such organs of the United Nations as the Economic and Social Council deems appropriate, would give full support and assistance to the expert group in its work.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF
THE CHAIRMAN

June 16, 1976

The Honorable Elliot L. Richardson
The Secretary of Commerce
Washington, D.C. 20230

Dear Mr. Secretary:

I was pleased to learn that the President and the Task Force support the Commission's proposed legislation submitted to the Senate Committee on Banking, Housing and Urban Affairs on May 12, 1976. Our proposal seems to have attracted considerable support in Congress as well, and presently appears to be the only one over which no substantial disagreement exists. I therefore am hopeful that the Congress will move swiftly to enact it while consideration is being given to the Administration's proposal and others. We will be prepared to offer our comments on the Administration's proposal when called upon.

Your letter of June 11, 1976, to Senator Proxmire seems to contain a curious criticism of the manner in which the Securities and Exchange Commission has dealt with matters involving questionable or illegal corporate payments. We consider your comments to be particularly unfortunate since neither you nor anyone on your staff previously discussed them with us.

You suggest that the Commission's enforcement policies in this area "may be based on tenuous legal grounds." This may reflect a failure to distinguish between some disclosures made voluntarily by certain corporations and the disclosures we have required under the federal securities laws. The Commission has to date brought seventeen actions in the United States District Court alleging that the named defendants have violated applicable provisions of the federal securities laws by failing to disclose material domestic or foreign payments. In none of the cases that arose during their respective tenures did Mr. Garrett or Mr. Sommer, whose statements you quote, express opposition to the institution of the actions. All of the actions have been concluded by the

entry of final judgments of permanent injunction against the corporate defendants, consented to by them.

The Department of Justice and Department of State expressed an interest in certain of these actions, and neither those departments nor any other branch of government previously has criticized the Commission's handling of these cases or the legal theories on which they were based. The Commission is concerned that your comments may cast an ambiguous cloud over our activities and that they may be erroneously cited by those who may be the subject of current or future enforcement actions.

You also characterize the present SEC policy as one of "continued zeal or militancy," apparently suggesting an antagonism to prior Commission action that could have been more responsibily raised in discussion directly with me or our staff.

You go on to indicate that "it may be asked whether the SEC, in its expansive definition of materiality, has not raised serious questions as to the purpose and scope of the securities laws and the statutory role of the Commission."

That your letter was delivered on the same day that the Supreme Court of the United States expressly endorsed the Commission's standard of materiality in TSC Industries, Inc. v. Northway, Inc. (No. 74-1471 June 14, 1976), slip op. at 11, n.10, is perhaps of slight significance. Again, however, the more important point is that you seem to have challenged the Commission's action on a broad front without either identifying the instances to which you refer or offering the Commission an opportunity to respond.

Your decision to use the Task Force report to broadly criticize the Commission and ambiguously challenge the authority under which we have acted is unfounded, inappropriate and ill-timed. It is our firm belief that the Commission's report to the Senate Committee on Banking, Housing

and Urban Affairs on "Questionable and Illegal Corporate Payments and Practices" presents a responsible analysis of how the Commission is proceeding in this area and that our actions, so described, are entirely within our statutory authority.

If you believe we are incorrect, we would appreciate a more useful articulation of the problems you perceive.

Sincerely,

Roderick M. Hills

Roderick M. Hills
Chairman

cc: Members of the White
House Task Force on
Questionable Corporate
Payments Abroad

THE SECRETARY OF COMMERCE

WASHINGTON, D.C. 20230

June 11, 1976

Honorable William Proxmire
Chairman, Committee on Banking,
Housing and Urban Affairs
United States Senate
Washington, D.C. 20510

Dear Senator Proxmire:

In testifying before your Committee on April 8, 1976 I promised to provide you with comments on your proposed legislation concerning questionable corporate payments abroad. At that time, the Task Force on Questionable Corporate Payments Abroad had just been created (on March 31). In order to allow the Task Force time to perform relevant preliminary analysis of the issues involved -- and with the schedule of the Congress also in view -- we agreed that these comments should be provided by June 1. On May 19, you graciously agreed to my request that the June 1 date be changed to June 10. This letter provides comments in accord with our agreement.

Your bill, S. 3133, amends the Securities Exchange Act of 1934 and the Securities Act of 1933 to require disclosure of certain foreign payments and to provide for criminal prosecution of payments made to influence actions of foreign governments.

S. 3133 would require each issuer of a security registered with the Securities and Exchange Commission (SEC) to report to the SEC all payments in excess of $1,000 made to: (i) representatives or employees of foreign governments; (ii) any foreign political party or candidate for foreign office; or (iii) any person retained to assist with obtaining or maintaining business with, or influencing legislation or regulations of, a foreign government. S. 3133 requires that such reports be made publicly available and that they contain a statement of amount, purpose and the name of the recipient of each payment.

In addition, S. 3133 would amend the Securities Act of 1933 to allow the SEC to initiate, prosecute or appeal criminal actions against issuers who use the mails or any instrumentality of interstate commerce to pay or agree to pay or give anything of value to a foreign government official, agent or representative of such official or to any foreign political party or candidate, for the purpose of inducing such individual or party to use his or its influence with a foreign government "to obtain or maintain business for or with the issuer or to influence legislation or regulations of that government." Further, S. 3133 would make unlawful any payment made in a manner or for a purpose which is illegal under the laws of the foreign government having jurisdiction over the transaction.

In commenting upon your bill, this letter discusses the following:

(1) The Questionable Payments Problem

(2) Relevant Current Law

(3) The Current Administration Approach to Treatment of the Problem

(4) Alternative Approaches Which Might Supplement the Current Administration Approach

(5) Recommendations with Respect to the Need for Additional Legislation at this Time

(6) Conclusion

(1) The Questionable Payments Problem

As you know, the Task Force is charged with responsibility for policy development and not with responsibility for investigation. Ongoing investigative responsibilities rest with auditing agencies (e.g., the Defense Contract Auditing Agency), the Internal Revenue Service, the SEC, and the Department of Justice -- upon whose work the Task Force has drawn in its attempt better to understand the character and scope of the problem.

It is clear on the basis of information already at hand that the "questionable payments problem" is, in fact, real -- i.e., that:

-- A significant number of America's major corporations, in their dealings with foreign governments, have engaged in practices which violated ethical and in some cases legal standards of both the United States and foreign countries.

-- To carry out these practices, certain American corporations have falsified records, lied to auditors, and used off-the-books "slush" funds.

-- In some cases, improper foreign payments have been unlawfully deducted as ordinary and necessary business expenses for U.S. income tax purposes.

-- In the case of a number of major corporations, employment of improper business practices abroad has coincided with past illegal political contributions in the United States. (Some allege that a major area of abuse involves the possible direct connection between questionable payments abroad and illicit domestic payments.)

"The problem" is, of course, a set of problems -- often interrelated, but distinguishable, as follows:

-- The problem of "petty corruption." So-called "grease" or "facilitating" payments are a business requirement in a number of less developed countries -- where they are often culturally, if not legally, accepted as a means of remuneration for an underpaid civil service. Further, petty corruption is a "fact of life" -- although presumably to a lesser extent -- in many developed countries.

-- The problem of "competitive necessity." It is frequently argued that American firms are required to bribe in order to "out-compete" foreign competition. (While this hypothesis may be valid, no substantial evidence to support this hypothesis has, as yet, been presented to the Task Force. In several cases, payments have been made to intermediaries, but have not been transmitted to the intended governmental decision makers. In a number of questionable payments cases -- especially those involving sales of military and commercial aircraft -- payments have been made not to "out-compete" foreign competitors, but rather to gain an edge over other U.S. manufacturers.)

-- The problem of extortion. In some instances, improper payments have been extorted from U.S. companies by corrupt officials or agents purporting to speak for such officials.

-- The problem of adverse effect on foreign relations. The manner of disclosure of allegations regarding past practices, the substance of the allegations revealed, and in some cases the practices themselves, have had adverse impact on the political and social fabric of countries friendly to the United States -- and have, thereby, adversely affected U.S. foreign relations.

-- The problem of adverse impact on multinational corporations. Exposure of the questionable payments problem has exacerbated concerns about multinationals' accountability to the national legal constraints of both home and foreign "host" countries. It has raised the level of concern that such enterprises have the capacity to conduct independent foreign policy including the suborning of host country political and governmental processes. Increased anxiety regarding multinationals' legal and political accountability could lead to national and international "backlash" in the form of laws

or regulations which could seriously handicap such enterprises with resulting detriment to the United States economy, to world commerce and to the pattern of world development.

-- The problem of eroding confidence in "free" institutions. Revelations of questionable payments -- with off-book accounting -- may have undermined, to some degree, investor confidence in the adequacy of regulatory mechanisms intended to assure the provision of information necessary for the honest and efficient functioning of capital markets. The payments themselves may have distorted the allocation of resources within a would-be competitive system -- or, in some cases, may have distorted representation within a political system. But most fundamentally, the uncovering of these improper past practices has eroded confidence in corporate responsibility and in democratic and capitalist institutions generally.

At this stage, some would argue that the pattern of illegal and questionable behavior already exposed is highly atypical -- that most international corporations have conducted themselves as "good citizens." The SEC analysis indicates that at least 95 corporations have disclosed possible questionable or illegal payments. And the SEC would suggest that the actual scope of the problem is not likely to be significantly greater than that which has already been voluntarily revealed -- because criminal sanctions attach to the willful filing of a false or incomplete report, i.e., the incentive fully to disclose "voluntarily" has arguably been high.

Others argue that the pattern of voluntary disclosure to the SEC has shown corporations to have been less than wholly forthcoming -- that in many instances additional investigation has shown initial disclosures to have been inadequate. Some note further that SEC reporting requirements have not reached those companies whose counsel have, on one ground or another, advised against disclosure.

In short, the extent to which disclosures to date do or do not fully represent the scope of the problem remains in dispute. It is the current view of the Task Force and the President that the overwhelming majority of U.S. corporations do conduct themselves as good citizens -- and that they are to some extent now the victims of a public mood which alleges guilt-by-association.

More definitive delineation of the precise dimensions of the questionable payments problem must await further investigation by corporations investigating themselves with the approval of the SEC and the courts (the "Gulf model"), by the IRS whose intensified review of the problem is in its initial stages, by the Federal Trade Commission, and by the Department of Justice.

It is clear, however, that the nature of the problem -- and the extent of the problem as revealed to date -- are sufficient to justify the remedial measures already under way and serious consideration of possible additional measures.

(2) Relevant Current Law

The discussion which follows in sections (a) - (d) outlines current law and in section (e) analyzes its sufficiency for the task of deterring future improper payments by American firms abroad.

(a) Securities Laws

The securities laws are designed to protect investors from misrepresentation, deceit, and other fraudulent practices by requiring public disclosure of certain information pertaining to the issuers of securities. Such disclosure is accomplished, first, through the mechanism of a registration statement which is required to be filed with the SEC as a precondition to a public offering of securities pursuant to the Securities Act of 1933, 15 U.S.C. § 77a et seq. (1970), the "1933 Act;" and, second, through the annual and other periodic reports and proxy materials required to be filed by registered companies with the SEC pursuant to the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq. (1970), the "1934 Act."

There is no specific requirement that questionable payments to foreign officials be disclosed in registration statements filed pursuant to the 1933 Act or in the annual or periodic reports or proxy materials filed pursuant to the 1934 Act. However, in addition to the specific instructions and requirements incident to each of these filings, the SEC requires the disclosure of all material information concerning registered companies and of all information necessary to prevent other disclosures made from being misleading, e.g., 17 C.F.R. §§ 230.408, 240.12b-20, 240.14(a)-9(a)(1975). Thus, facts concerning questionable payments are required to be disclosed insofar as they are material.

Materiality has been defined by the SEC as limiting the information required "to those matters as to which an average prudent investor ought reasonably to be informed before purchasing the security registered." Rule 405(1), 17 C.F.R. § 230.405(1)(1975). The materiality of any fact is to be assessed, according to the courts, by determining:

> ". . . whether a reasonable man would attach importance [to it] . . . in determining his choice of action in the transaction in question. [Citation omitted.]" (Emphasis supplied.) This, of course, encompasses any fact ". . . which in reasonable and objective contemplation might affect the value of the corporation's stock or securities . . . [Citation omitted.]" (Emphasis supplied.) Thus, material facts include not only information disclosing the earnings and distributions of a company but also those facts which affect the probable future of the company and those which may affect the desire of investors to buy, sell, or hold the company's securities." SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968).

Alternatively stated, the test is whether ". . . a reasonable man might have considered . . . [the information] important in the making of [his] decision." Affiliated Ute Citizens v. United States, 406 U.S. 128, 153-54 (1972).

The courts have not yet addressed the issue of whether and under what circumstances questionable payments made by a U.S. corporation to foreign officials would be material

information which should be disclosed publicly.*/ Thus, the SEC, through its enforcement program and its voluntary disclosure program,**/ has been the sole arbiter as to the materiality of such payments.

The extent of the Commission's activities with respect to both foreign and domestic payments and practices has created a great deal of uncertainty as to how the materiality standard applies to improper foreign payments. The SEC has not issued a release containing disclosure guidelines on this subject to date. However, in a report submitted to your Committee on May 12, 1976, the SEC has given some guidance as to its current position ("Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices).

In this Report, the SEC takes the position that questionable or illegal payments that are significant in amount or that, although not significant in amount, relate to a significant amount of business, are material and required to be disclosed. Other questionable payments may also be material, according to the Report, regardless of their size or the significance of the business to which they relate. Thus, the Report indicates (at page 15) that: ". . . the fact that corporate officials have been willing to make repeated illegal payments without board knowledge

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*/ The conviction of a director and chief executive officer of a company for bribing U.S. public officials has been held to be a material fact which should have been disclosed. Cooke v. Teleprompter Corp., 334 F. Supp. 467 (S.D.N.Y. 1971).

**/ In addition to its regular enforcement program, the SEC has established special procedures for registrants seeking guidance as to the proper disclosure of questionable foreign payments. These procedures, frequently referred to as the "voluntary disclosure program," provide a means whereby companies can seek the informal views of the Commission concerning the appropriate disclosure of certain matters. The program is intended to encourage publicly-owned corporations to discover, disclose, and terminate, on a voluntary basis, the making of questionable payments and related improper activities.

and without proper accounting raises questions regarding improper exercise of corporate authority and may also be a circumstance relevant to the 'quality of management' that should be disclosed to the shareholders."

Moreover, even if expressly approved by the board of directors, the Report states (at page 15) that ". . . a questionable or illegal payment could cause repercussions of an unknown nature which might extend far beyond the question of the significance either of the payment itself or the business directly dependent upon it" -- and for that reason might have to be disclosed.

(b) Tax Laws

Section 162(c) of the Internal Revenue Code provides that bribes and kickbacks, including payments to government officials, cannot be deducted in computing taxable income if the payment (wherever made) would be unlawful under U.S. law if made in the United States.

The principal mechanism for the detection of improper deductions is the corporate income tax return and, in the case of foreign subsidiaries and affiliates, certain information returns. Criminal and civil sanctions may be applicable if an improper payment is deducted from earnings.

The Internal Revenue Service (IRS) does not routinely require taxpayers to furnish information as to the payment of bribes or kickbacks. However, in August 1975, the IRS issued guidelines to its field examiners providing techniques and compliance checks to aid in the identification of schemes used by corporations to establish "slush funds" and other methods to circumvent federal tax laws. In April and May of 1976, additional instructions were issued focusing on illegal deductions of questionable payments to foreign officials abroad. The IRS is now engaged in investigating hundreds of the nation's largest companies regarding possible improper deductions of such payments and related tax improprieties.

(c) Antitrust Laws

The antitrust laws may have an impact on improper payments in a variety of ways. Depending on the factual circumstances, an improper payment could violate Sections 1 or 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1970); Section 5

of the Federal Trade Commission Act, 15 U.S.C. § 45 (1970) the "FTC Act;" or Section 2(c) of the Clayton Act, the so-called brokerage provision of the Robinson-Patman Act, 15 U.S.C. § 13(c) (1970).

As a general rule, an American corporation which pays a bribe to gain favorable legislation abroad, or to facilitate a sale at the expense of a foreign competitor, will not be in violation of the U.S. antitrust laws. On the other hand, payment of a bribe by one U.S. company to assist its sales at the expense of another U.S. company may well be an unfair method of competition within the meaning of Section 5 of the FTC Act. A conspiracy among two or three U.S. companies to bribe a foreign official to keep another U.S. company out of an overseas market would probably violate Section 1 of the Sherman Act; however, it is not clear that an improper payment involving one firm and one government official can constitute a conspiracy for the purposes of this section. Bribes paid by one company for the purpose of monopolizing a foreign market might violate Section 2 of the Sherman Act.

Section 2(c) of the Clayton Act prohibits the payment of commissions or other allowances, except for services actually rendered, in connection with the sale of goods in which either the buyer or seller is engaged in commerce (including commerce with foreign nations). Section 2(c) encompasses commercial bribery and bribes of state government officials to secure business at the expense of U.S. competitors. Although there do not appear to be any Section 2(c) cases involving dealings with foreign governments, the statute might be applicable to the payment of a bribe by a U.S. corporation to a foreign official to assist its business at the expense of its U.S. competitor.

(d) Criminal Statutes and Other Laws

Present federal law does not prohibit, per se, bribery or similar questionable practices by American companies or persons with respect to foreign officials, companies, or persons in furtherance of commercial gain. However, criminal or civil liability may attach from collateral false reporting

practices. Most particularly, false statements filed with federal agencies may constitute a violation of 18 U.S.C. § 1001 (1970) or other specialized false statement statutes. Relevant provisions are summarized below:

(i) The Export-Import Bank of the United States (Eximbank). Certificates prepared by American firms whose goods are purchased with Export-Import Bank loans must declare any commissions, fees, or other costs above and beyond the actual value of the goods sold which constitute any part of the contract price. Several cases of possible fraud have recently been referred to the Criminal Fraud Section of the Department.

(ii) The Agency for International Development (AID). Under the Foreign Assistance Act, 22 U.S.C. § 2399 (1970), AID makes loans of hard currency available to foreign countries for purchase of American commodities for importation. An American exporter who makes a sale under this program must file a supplier's certificate with AID certifying that no kickbacks or commissions were paid. AID officials compare contract prices with current market prices and occasionally discover discrepancies requiring legal action, including referrals to the Department of Justice for possible fraud prosecutions. It has been held that a concealment of improper payments in AID forms constitutes a violation of the federal statute making it unlawful to conceal any matter within the jurisdiction of any United States department or agency, 18 U.S.C. § 1001 (1970). U.S. v. Olin Mathieson Chemical Corporation, 368 F.2d 525 (2d Cir. 1966).

(iii) State Department Export Licenses. Registered dealers may sell for export items on the U.S. Munitions List provided an export license is obtained from the State Department (22 C.F.R. § 121-27). The

application forms for such licenses require that the cost be listed, but without a breakdown. The International Security Assistance and Arms Export Control Act of 1976 (which was vetoed on May 7, 1976, but then reintroduced in altered form as S. 3439 and H.R. 13680) would add a new provision to the Foreign Military Sales Act, 22 U.S.C. § 2751 et seq. (1970), to require reports to the Secretary of State, pursuant to regulations issued by him, concerning political contributions, gifts, commissions and fees paid by any person in order to secure sales under Section 22 of the Foreign Military Sales Act. No such payment could be reimbursed under any U.S. procurement contract unless it was reasonable, allocable to the contract, and not made to someone who secured the sale in question through improper influence. Similar reporting requirements would be required with respect to commercial sales of defense articles or defense services licensed or approved under Section 38 of the Foreign Military Sales Act. All information reported and records kept would be available to Congress upon request and to any authorized U.S. agency. It should be noted that even at the present time, the Defense Department requires disclosure of all fees and commissions paid in the sale of military equipment pursuant to the Foreign Military Sales (FMS) program. False statements made pursuant to these disclosure requirements would constitute possible violations of 18 U.S.C. § 1001 (1970).

(iv) Securities and Exchange Commission. The failure to report in corporate financial statements filed with the SEC bribes and kick-backs to foreign officials or governments may constitute criminal fraud. However, to fall in that category under present law, the errors or omissions must have a material effect on the financial picture of the company as a whole as presented by the report.

In conjunction with violations in all of the foregoing areas, depending on the facts of a particular case, additional charges may be appropriate for conspiracy, 18 U.S.C. § 371 (1970), mail fraud, 18 U.S.C. § 1341 (1970), or fraud by wire, 18 U.S.C. § 1343 (1970). Furthermore, attempts to circumvent or defeat a regulatory system designed to ensure the integrity of a government program may constitute a conspiracy to defraud the United States.

(e) Analysis

The following analysis addresses the issue of whether new legislation is required to deal with improper corporate payments or whether the laws and regulations described above are, taken together, sufficient to deter such practices. Another way to state the question is whether the company that would consider the making of an improper payment -- or the foreign official that would demand one -- will be deterred from doing so by the existing laws and regulations.

The dimensions of the improper payments problem suggest, to some, the singular ineffectiveness of existing laws and regulations. On the other hand, some argue that the past failure of deterrence may be a function of insufficiently vigorous enforcement of existing authorities. My personal assessment is that even the most vigorous enforcement of existing law would not be an adequate solution to the problem, and that the shortcomings of existing law are the result of statutory and jurisdictional limitations rather than of enforcement policy.

It is clear that the provisions outlined above are insufficient to deal adequately with the questionable payment problem. Indeed, the requirements of the SEC are the only ones which, as a practical matter, deserve detailed consideration. For ease of presentation, it may be useful to discuss first the laws and regulations of lesser significance.

With respect to taxation and antitrust, both systems are theoretically applicable to all U.S. corporations doing business abroad but only to the extent that the making of a questionable payment also results in a violation of certain statutory prohibitions.

The tax laws only reach those transactions in which a questionable payment is deducted as a business expense. If a company making an improper payment does not take a deduction, the only source of potential liability arises from the maintenance of "slush funds" to circumvent federal tax laws generally. Although the IRS could require reporting of questionable payments, the information obtained could not be disclosed to the public because of the confidentiality of tax administration. Moreover, the mission of the IRS in the area of questionable payments abroad is to administer and enforce the tax law. All of the procedures and programs which the IRS has adopted, or might adopt in the future, are designed to accomplish that central objective -- the enforcement of the tax statutes.

The antitrust laws are generally inapplicable to an improper payment unless it can be shown that there is an anticompetitive effect on U.S. foreign commerce, for example, where a bribe is paid to exclude the product of a U.S. competitor or to monopolize a foreign market. There also exist substantial constraints to the justiciability and enforceability of applications of antitrust laws to foreign transactions. These include traditional legal doctrines regarding sovereign immunity of foreign governments and compulsion by foreign governments and consideration of comity between nations.

The Eximbank, AID, and FMS programs only apply to companies taking advantage of these particular programs. Moreover, none of them at the present time requires public disclosure. They are designed merely to ensure that the Government does not aid in the financing of questionable payments. In the case of the FMS program, pending legislation (as noted above) would provide for disclosure to the Congress but, in any case, it would still be limited to companies making sales of military equipment. Thus, as a practical matter, these programs taken together affect the actions of a limited number of companies doing business abroad and the FMS program, through its disclosure requirement (assuming passage of the new legislation), is the only one which contains a deterrent element.

There are several reasons why the SEC disclosure requirements may be inadequate to deter improper payments. First, they only apply to public companies, i.e., to companies with

securities registered under the 1934 Act or to companies making public offerings. Second, they only apply to the extent that the questionable payment is "material." Third, as a general rule, they do not require disclosure of the names of recipients of questionable payments. Fourth, they are not designed to protect adequately the interests that would be served by new legislation. Nonetheless, the utility of the SEC disclosure requirements must be examined in some detail, since the Commission itself believes that current securities laws are adequate to require sufficient disclosure of questionable payments and that any remaining problem can be solved by strengthening the corporate financial reporting system.

First, with respect to the coverage of the SEC program, there are at present approximately 9,000 corporations, not all of which do business abroad, which regularly file documents with the Commission. On the other hand, there are some 30,000 U.S. exporters and an additional number of U.S. firms doing business abroad which do not export from the United States. Indeed, some of the more important U.S. firms doing business abroad are private companies which are not subject to the SEC disclosure requirements.

Second, the Commission's authority to require disclosure is limited in that a questionable payment must be reported only if it is "material." On page 15 of its Report, the SEC sets forth the view that any payment, regardless of amount, may be "material" because it can lead to "repercussions of an unknown nature" or reflect on the quality or integrity of management. This very broad concept of materiality is at substantial variance with other recent discussions of materiality by the SEC. For instance, in facing the issue whether a company is required to report unlawful discrimination in employment, the SEC stated -- in a release issued less than one year ago -- that:

> "The Commission's experience over the years in proposing and framing disclosure requirements has not led it to question the basic decision of the Congress that insofar as investing is concerned the primary interest of investors is economic. After all, the

> principal, if not the only reason, why people invest their money in securities is to obtain a return. A variety of other motives are probably present in the investment decisions of numerous investors; but the only common thread is the hope for a satisfactory return, and it is to this that a disclosure scheme intended to be useful to all must be primarily addressed." Freeman, "The Legality of the SEC's Management Fraud Program," 31 Bus. Law. 1295, 1301 (March 1976).

In the same release the Commission stated that "there is no distinguishing feature which would justify the singling out of equal employment from among the myriad of other social matters in which investors may be interested." The release then listed 100 so-called social matters in which investors may be interested (including "activities which would be illegal in the U.S. but which are conducted abroad") but which, presumably, are not material per se. As stated not long ago by then Chairman Ray Garrett:

> ". . . as you can see, if you require disclosure of all violations of law against bribery or political contributions on the ground that illegal payments are material per se, we may be hard pressed to explain that other illegal corporate acts are not equally material for the same reason." Securities Act Release No. 5627, October 14, 1975, p. 37.

The Commission's current position with respect to questionable payments, however, seems to suggest the emergence of a new theory, namely, that with respect to illegal conduct the illegality itself is of consequence -- regardless of the nature of the offense and of its effect upon the value of the stockholder's investment. Indeed, with respect to questionable payments, it does not even appear to matter to the SEC whether they are actually illegal, that is, whether subject to indictment by prosecuting authorities in the United States or abroad. The Commission's enforcement policy in this area, however laudable, may be based on tenuous legal grounds. At the very least, given the extent of the Commission's enforcement activity, there is a good possibility that the matter will be presented to the courts.

The remarks of former SEC Chairman Garrett underscore the fact that the Commission's policy is a function of its composition at any particular time. New Commissioners may be disposed to take different interpretations. Thus, even assuming the legality or propriety of the views espoused by the present Commission, it is uncertain whether this will continue to be SEC policy. There may be virtue in a legislative scheme which does not depend for its viability on the continued zeal or militancy of its administrators.

Third, the SEC does not require disclosure of the names of the recipients of questionable payments, and it is hard to see how it could do so, at least in most cases, even under the most expansive interpretation of the materiality doctrine. The SEC Report states that while, in some cases, disclosure of the identity of the recipient might be important to an investor's understanding of the transaction, more frequently his identity may have little or no significance to the investor (at page 60).

More generally, the SEC system of disclosure is simply not adequate to the task at hand.

The questionable payments problem has sensitive and broad-ranging public policy and foreign relations implications. Moreover, it may be asked whether the SEC, in its expansive definition of materiality, has not raised serious questions as to the purpose and scope of the securities laws and the statutory role of the Commission. In remarks delivered in December 1975, then Commissioner Sommer urged the Commission to go slowly in expanding the area in which SEC disclosure becomes a substitute for the enforcement of other substantive laws. In particular, he pointed out that:

> ". . . Materiality is a concept that will bear virtually any burden; it can justify almost any disclosure; it can be expanded all but limitlessly. But we must constantly bear in mind that overloading it, unduly burdening it, excessively expanding it may result in signficant changes in the role of the Commission, the role of other enforcement agencies, and our ability to carry out our statutory duties." SEC News Digest, December 12, 1975.

Whatever definition is given "materiality" by the SEC or the courts, SEC disclosure is designed to protect the interests of the prudent investor. It is, arguably, not an appropriate mechanism to deal with the full array of national concerns caused by the problem of questionable payments.

(3) The Current Administration Approach to Treatment of the Problem

The current Administration approach is comprised of the following:

(a) Vigorous enforcement of current law (as summarized in (2) above).

Investigative enforcement activities are being conducted by audit agencies, the IRS, the Federal Trade Commission, the Department of Justice, and the SEC. The SEC has provided you with a Report based on the findings of its "voluntary program." As noted, the investigative activities of all these agencies are ongoing -- and the product of their investigations will continue to emerge in accord with fair and orderly legal process.

It is reasonable to conclude that the exposures to date have increased the attentiveness of responsible enforcement agencies in general -- and that they have increased the deterrent effect of current law thereby. A particularly noteworthy example is provided by the IRS's guidelines of May 10, 1976 -- requiring affidavits concerning "slush funds" and concerning bribes, kickbacks or other payments, regardless of form, made directly or indirectly to obtain favorable treatment in securing business or special concessions; or made for the use or benefit of, or for the purpose of opposing, any government, political party, candidate or committee.

(b) Pursuit of international agreements.

We anticipate endorsement of a code of conduct for multinational corporations at the coming Organization for Economic Cooperation and Development (OECD) Ministerial

Conference later this month. The code will include as agreed declaratory policy the following language:

"Enterprises should:

(i) not render -- and they should not be solicited or expected to render -- any bribe or other improper benefit, direct or indirect, to any public servant or holder of public office;

(ii) unless legally permissible, not make contributions to candidates for public office or to political organizations;

(iii) abstain from any improper involvement in local political activities."

Ambassador Dent has asked the General Agreement on Tariffs and Trade to take up the questionable payments issue, as called for in Senate Resolution 265. The resolution proposes negotiation in the Multilateral Trade Negotiations of an international agreement to curb "bribery, indirect payments, kickbacks, unethical political contributions and other such similar disreputable activities." The U.S. has indicated that negotiation of such an agreement is a matter of top priority.

Most significantly, the U.S. proposal for negotiation in the United Nations of a treaty on corrupt practices was made on March 5 at the second session of the UN Commission on Transnational Enterprises in Lima. The proposal is for an agreement to be based on the following principles:

(i) It would apply to international trade and investment transactions with governments, i.e., government procurement and other governmental actions affecting international trade and investment as may be agreed;

(ii) It would apply equally to those who offer to make improper payments and to those who request or accept them;

(iii) Importing governments would agree to establish clear guidelines concerning the use of agents in connection with government procurement and other covered transactions, and establish appropriate criminal penalties for defined corrupt practices by enterprises and officials in their territory;

(iv) All governments would cooperate and exchange information to help eradicate corrupt practices;

(v) Uniform provisions would be agreed upon for disclosure by enterprises, agents and officials of political contributions, gifts and payments made in connection with covered transactions.

The proposal was forwarded to the UN Economic and Social Council (ECOSOC) with a recommendation that ECOSOC give the issue priority consideration.

The U.S. objective is to have ECOSOC, at its July 12-August 6 meeting in Geneva, pass a resolution on corrupt practices which will create a group of experts charged with writing the text of a proposed international treaty on corrupt practices and reporting that text back to ECOSOC in the summer of 1977. The U.S. goal would then be to forward an agreed text to the UN General Assembly for action in the fall of 1977.

(c) Further policy development and coordination.

On March 31, 1976 the President established the Cabinet Task Force on Questionable Corporate Payments Abroad -- which, as you know, I chair. Members of the Task Force include: The Secretary of State; The Secretary of the Treasury; The Secretary of Defense; The Attorney General; The Special Representative for Trade Negotiations; The Director, Office of Management and Budget; The Assistant to the President for Economic Affairs; The Assistant to the President for National Security Affairs; and The Executive Director, Council on International Economic Policy.

In establishing the Task Force, the President said:

"Although the Federal Government is currently taking a number of international and domestic steps in an attempt to deal with this problem, I believe that a coordinated program to review these efforts and to explore additional avenues should be undertaken in the interest of ethical conduct in the international marketplace and the continued vitality of our free enterprise system."

The President directed the Task Force to coordinate further policy development concerning the questionable payments problem and to provide the President with interim status reports and a final report before the end of the calendar year.

The full Cabinet Task Force has met four times -- most recently, yesterday, with the President. Staff groups have prepared interim analyses of: current knowledge as to the character of the problem; pending legislative initiatives; possible alternative legislative initiatives; pending international initiatives; and possible supplementary international initiatives. We have consulted with a wide range of business representatives, legal experts, concerned U.S. citizens and foreign officials -- and, I should note, it is clear that there is a wide range of differing opinions within and among these groups.

The comments which follow reflect the thinking of the Task Force as developed to date -- except in those instances where I note my personal views or the specific decisions of the President.

(4) Alternative Approaches Which Might Supplement the Current Administration Approach

There are three broad categories in relation to which possible supplementary initiatives may be conceived: (a) further administrative initiatives within current law; (b) further international initiatives; and (c) further U.S. legislative initiatives. These categories, of course, are not mutually exclusive -- although alternative approaches within each category may be.

Within the first category, I include the stepped-up enforcement activities to which I have referred. In addition, the Task Force is now examining the need for changes in Executive Branch administrative operating procedures and guidelines.

But the basic premise from which I know you start is that current law is not sufficient -- a premise with which, as noted and qualified in (2) above, we would concur.

In our view, the ultimate legal basis for adequately addressing the questionable payments problem must be an international treaty along the lines proposed by the United States at the second session of the UN Commission on Transnational Enterprises in Lima. A treaty is required to make the "criminalization" of foreign bribery fully enforceable -- for, in the absence of foreign cooperation, it would be extremely difficult, and in many cases impossible, for U.S. law enforcement officials and potential defendants to be assured of access to relevant evidence. A treaty is also required to treat the actions of foreign as well as domestic parties to a questionable transaction. And a treaty is required to assure that all nations, and the competing firms of differing nations, are treated on the same basis.

However, a realistic assessment of prospects for international action would have to suggest that it is probable the desired international agreement may -- in spite of our best efforts -- take a considerable amount of time to achieve. International prospects are, in any case, highly uncertain.

In order to advance the prospects of favorable international action with respect to the U.S. proposal, the State Department has coordinated a special series of direct representations to foreign governments.

I am pleased to report that, in addition, the President has decided to accelerate progress toward an international agreement by direct efforts with our major trading partners. The U.S. Government -- the President in particular -- is serious about taking every reasonable step to achieve a responsible international agreement as quickly as possible.

It is with respect to U.S. legislation, then, that the question remains as to what else can and should be done.

The President and the Task Force have, as I have already noted, decided that current law is not sufficient to deal fully with the questionable payments problem. However, before outlining the legislative approach that we have decided upon, it is useful to review the considerations which underpin our choice of measures.

There are two principal competing general legislative approaches -- a disclosure approach or a criminal approach. While it is possible to design legislation -- as indeed is the case with S. 3133 -- which requires disclosure of foreign payments and makes certain payments criminal under U.S. law, the Task Force has unanimously rejected this approach. The disclosure-plus-criminalization scheme would, by its very ambition, be ineffective. The existence of criminal penalties for certain questionable payments would deter their disclosure and thus the positive value of the disclosure provisions would be reduced. In our opinion the two approaches cannot be compatibly joined.

The Task Force has given considerable scrutiny to the option of "criminalizing" under U.S. law improper payments made to foreign officials by U.S. corporations. Such legislation would represent the most forceful possible rhetorical assertion by the President and the Congress of our abhorrence of such conduct. It would place business executives on clear and unequivocal notice that such practices should stop. It would make it easier for some corporations to resist pressures to make questionable payments.

The Task Force has concluded, however, that the criminalization approach would represent little more than a policy assertion, for the enforcement of such a law would be very difficult if not impossible. Successful prosecution of offenses would typically depend upon witnesses and information beyond the reach of U.S. judicial process. Other nations, rather than assisting in such prosecutions, might resist cooperation because of considerations of national preference or sovereignty. Other nations might be especially offended if we sought to apply criminal sanctions to foreign-incorporated and/or foreign-managed subsidiaries of American corporations. The Task Force has concluded that unless reasonably enforceable criminal sanctions were devised, the criminal approach would represent poor public policy.

The Task Force did give serious consideration to one criminalization scheme, whereby the standards of U.S. law against official bribery would be applied to improper payments made abroad, provided the country in which such payments were made had entered a mutual enforcement assistance agreement with the United States and had enacted its own criminal prohibitions against official bribery. (A review by the Task Force reveals that practically every country in the world has a law against official bribery.) While such an approach to criminalization could be enforceable and would eliminate potential affronts to other nations' sovereignty, it would, however, apply only to payments made in countries willing to enter enforcement agreements with the U.S. -- whose number might not be large. In addition, as is the case with domestic bribery standards, it would entail the drawing of very difficult distinctions between criminal payments on the one hand and proper fees or political contributions on the other.

The Task Force has similarly analyzed the desirability of new legislation to require more systematic and informative reporting and disclosure than is provided by current law. The Task Force recognized that additional disclosure requirements could expand the paperwork burden of American businesses (depending upon the specific drafting) and that they might, in some cases, result in foreign relations problems -- to the extent the systematic reporting and disclosure failed to deter questionable payments and their publication proved embarrassing to friendly governments.

At the same time the Task Force perceived several very positive attributes of systematic disclosure. First, it deemed such disclosure necessary to supplement current SEC disclosure, which as noted already covers only issuers of securities making "material" payments, and does not normally include the name of the payee. Such disclosure would provide protection for U.S. businessmen from extortion and other improper pressures, since would-be extorters would have to be willing to risk the pressures which would result from disclosure of their actions to the U.S. public and to their own governments. It would avoid the difficult problems of defining and proving "bribery." It would offer a means to give public reassurance of the essential accountability of multinational corporations.

(5) Recommendations for Additional Legislation

Based upon analyses of the sufficiency of current law and of optional legislative approaches summarized above, the President has decided to recommend that the Congress enact legislation providing for full and systematic reporting and disclosure of payments made by American businesses with the intent of influencing, directly or indirectly, the conduct of foreign governmental officials. At the same time, the President has decided to oppose, as essentially unenforceable, legislation which would seek broad criminal proscription of improper payments made in foreign jurisdictions.

The President has directed the Task Force to draft this disclosure legislation for submission to Congress as soon as possible -- in order to allow Congressional action on the proposal in this session of Congress. The Task Force has not yet had an opportunity to develop, nor has the President had an opportunity to review, detailed specifications for such legislation. However, it is possible at this time to state in conceptual terms the basic outlines of the disclosure legislation which I would recommend:

-- All American business entities, whether or not they have securities registered with the SEC, would be required to report all payments in excess of some floor amount, made directly or indirectly to any person employed by or representing a foreign government or to any foreign political party or candidate for foreign political office in connection with obtaining or maintaining business with, or influencing the conduct of, a foreign government.

-- Such reports would include, at a minimum, the amount or value of the payment; its purpose; and the name of the recipient.

-- These reports would be required to be made to some Executive Branch department, such as the Department of Commerce or State and not the SEC.

-- The State Department, at its discretion would convey the contents of such reports to the affected foreign government. The reports would become available for public inspection after an appropriate interval, such as one year, to protect proprietary concerns and to allow opportunity for constructive diplomatic intervention prior to public controversy regarding a given payment.

-- Civil and/or criminal penalties would be set for negligent or willful failure to report. (Deliberate misrepresentation on such reports would be covered by current criminal law, 18 U.S.C. § 1001) (1970.)

-- The requirement for such reports would apply to all American business entities and through them to controlled foreign subsidiaries. Penalties for failure to report would apply only to U.S. parent corporations and their officers.

It is readily apparent that the approach outlined above in conceptual terms is, in a number of respects, similar to the disclosure portion of S. 3133. Our approach does differ, however, in at least one important respect. As already noted, reporting would not be made to the SEC. The SEC's jurisdiction, limited to "issuers" of registered securities, is inadequate to the problem. Further, the Task Force believes that the SEC would be an inappropriate agency for this reporting, which is directed at important national and foreign policy concerns and not simply to investor confidence.

The further extent to which the Administration's disclosure approach may differ from that embodied in S. 3133 remains to be determined through detailed drafting and the process of resolving points which remain at issue within the Task Force.

In addition to deciding to recommend the proposed new disclosure legislation, the President has decided to endorse the legislative approach to improved private sector internal reporting and accountability first proposed to your Committee by Chairman Hills in his Report of May 12 and recommended by the Task Force. That approach would:

-- prohibit falsification of corporate accounting records;

-- prohibit the making of false and misleading statements by corporate officials or agents to persons conducting audits of the company's books and records and financial operations;

-- require corporate management to establish and maintain its own system of internal accounting controls designed to provide reasonable assurances that corporate transactions are executed in accordance with management's general or specific authorization, and that such transactions are properly reflected on the corporation's books.

For reasons suggested above, I firmly believe that enactment of the disclosure and accountability legislative proposals, as recommended by the President, will provide the best approach to remedying the inadequacies of current law -- and to restoring confidence thereby. Should you or your colleagues wish, I would be happy to provide further elaboration of reasons for this belief --by whatever means may be most convenient to the Committee.

(6) Conclusion

Let me conclude with several summary points drawn from the above discussion:

(a) The questionable payments problem is serious -- as is the need for additional initiatives to address it. The improper actions of a few have not only disturbed foreign relations, but have caused a further erosion of confidence in American business and American institutions. Remedial actions taken to date have been insufficient to restore confidence.

(b) Although current investigative and enforcement activities are considerable, current law is not fully adequate to deter improper payments.

(c) The "disclosure" approach and the "criminalization" approach to additional legislation are not compatible with each other. For reasons stated, the Administration believes the disclosure approach to be a more effective and manageable means to deterrence.

(d) Although the preferred long-term approach to solution must be an enforceable international treaty (as proposed by the U.S. in Lima), the prospects for prompt adoption of such a treaty would, in the ordinary course, have to be viewed realistically as unlikely. There is a need for the U.S. to accelerate efforts to achieve its proposed international agreement.

(e) Accordingly, the President has reached the following decisions which are fully consistent with my own views:

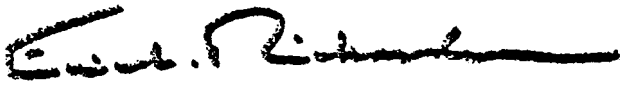
(i) The President has decided to initiate special efforts to accelerate progress toward achievement of an international agreement -- along the lines proposed by the United Stated in Lima.

(ii) The President has decided to endorse legislation to assure the integrity of corporate reporting systems and the accountability of corporate officials -- legislation first proposed to your Committee by Chairman Hills in his Report of May 12.

(iii) The President has decided to propose additional legislation requiring reporting and disclosure of certain payments by U.S.-controlled corporations made with the intent of influencing, directly or indirectly, the conduct of foreign government officials.

We know you share with us a conviction that what is fundamentally at stake is not merely the impropriety of certain financial transactions. What is at stake ultimately is confidence in, and respect for, American business, American institutions, American principles -- indeed, the very democratic political values and free competitive economic system which we view as the essence of our most proud heritage and our most promising future. With this in view, we look forward to working with you and your colleagues toward enactment of legislation which will best serve the fundamental public interests which require a responsible solution to the questionable payments problem.

Sincerely,



Elliot L. Richardson

On April 19 the Department transmitted to all diplomatic posts a message (State 94647) reporting the establishment of the Cabinet Task Force on Questionable Payments. The message requested all posts to provide responses to several questions regarding foreign laws applicable to questionable payments. These questions were:

"A. Does host country have specific or general penal legislation punishing the offer, solicitation, giving or receipt of monies or other things of value to influence or attempt to influence official actions? (This question is stated in general terms to avoid the necessity of distinguishing between bribery, extortion and other possible defined offenses.)

B. Does host country have any laws or regulations requiring disclosure of payments made to or for the benefit of government officials?

C. Does host country have any laws or regulations governing the involvement of agents in sales or investment transactions with host government?

D. Does host country have legislation prohibiting or restricting political contributions by individuals or corporations?

E. Does host country have any laws or regulations requiring disclosure of political contributions by individuals or corporations?

F. Does host country have any laws or regulations prohibiting the offer, solicitation, payment or receipt of kick-backs or other undisclosed payments or commissions to influence the corporate decision-making process in connection with commercial transactions not involving government officials or agencies?"

Responses were requested by May 1. "Yes" or "no" answers were requested, amplified by such comment as the post considered appropriate. Summaries of pertinent laws were requested to be included in the cable response, with full texts of such laws to be pouched to the Department.

As of May 17, the Department has received cable responses from over 100 posts, and texts of pertinent laws have been pouched from such posts. A tabulation of these responses is attached at Tab A.

In broad summary:

(1) Question A. The vast majority of States has legislation prohibiting the giving or receiving of bribes involving public officials;

(2) Question B. Most States do not have laws requiring disclosure of payments made to government officials, and several posts have explained this as a normal consequence of the illegality of such payments;

(3) Question C. Many States have no laws or regulations governing the activities of agents, and these laws or regulations that do exist range widely in scope;

(4) Question D. Most States do not have laws restricting political contributions. For one-party or communist States the question is generally not applicable;

(5) Question E. Most States do not require disclosure of political contributions. (This question is also generally inapplicable to one-party or communist societies);

(6) Question F. A good number of States do have as part of their commercial law, laws or regulations prohibiting payments made or offered to influence corporate officials. It should be noted that for societies where business is conducted by the government the question has been marked as not applicable, though in such cases bribery of public officials is generally prohibited.

Country	A	B	C	D	E	F
Afghanistan (Kabul 3189)	Y	N	Y	N	N	N
Albania						
Algeria (Algiers 1052)	Y	N	Y	N/A	N/A	N/A
Argentina						
Australia (Canberra 3184)	Y	Y	Y	N	N	Y
Austria (Vienna 3530)	Y	N	N	N	N	Y
Bahamas (Nassau 699)	Y	N	N	N	N	N
Bahrain (Manama 3807)	Y	N	Y	N/A	N/A	N
Bangladesh (Dacca 2168)	Y	N	N	N/A	N/A	N
Barbados (Bridgetown 839)	Y	N	N	N	N	N
Belgium (Brussels 4373)	Y	Y	N	N	N	N
Benin (Cotonou 711)	N	N	N	N/A	N/A	N
Bhutan						
Bolivia (La Paz 3396)	Y	N	Y	N	N	N
Botswana (Gaborone 906)	Y	Y	Y	N	N	N
Brazil (Brasilia 4219)	Y	N	N	Y	Y	N
Bulgaria (Sofia 984)	Y	N	Y	N/A	N/A	N/A
Burma (Rangoon 1362)	Y	N	Y	N/A	N/A	N/A
Burundi (Bujumbura 357)	Y	N	N	N/A	N/A	N

Note:

Columns A, B, C, D, E and F correspond to questions posed in State 94647, and "Y" or "N" correspond to answers received from posts. Note: A simple yes or no answer is not always a fully accurate characterization of the response from post.

Country	A	B	C	D	E	F
Cameroon (Yaounde 1566)	Y	N	N	N	N	N
Canada (Ottawa 1718)	Y	Y	Y	N	Y	No. Ans. Rec.
Central African Rep. (Bangui 706)	Y	N	N	N	N	N
Chad (N'Djamena 1136)	Y	N	N	N/A	N/A	Y
Chile (Santiago 3867)	Y	N	N	N	N	N
China-PRC (Peking 729)	Y	Y	Y	N/A	N/A	N/A
China-ROC (Taipei 2917)	Y	Y	Y	N/A	N/A	Unknown
Colombia (Bogota 4295)	Y	Y	Y	Y	Y	N
Congo						
Costa Rica (San Jose 2145)	Y	N	N	N	N	Y
Cyprus (Nicosia 1173)	Y	N	N	N	N	N
Czechoslovakia (Prague 1105)	Y	Y	Y	N/A	N/A	N/A
Denmark (Copenhagen 1484)	Y	Y	N	N	N	Y
Dominican Rep. (Santo Dom. 2046)	Y	N	Y	N	N	N
Ecuador (Quito 3149)	Y	Y	No Answer Received			
Egypt (Cairo 5505)	Y	N	Y	N	N	N
El Salvador (San Salvador 2046)	Y	Y	Y	N	N	N
Equitorial Guinea						
Ethiopia (Addis Ababa 213)	Y	N	N	N	N	N
Fiji						
Finland (Helsinki 901)	Y	N	N	N	N	Y
France (Paris 12738)	Y	N	N	N	N	Y
Gabon (Libreville 801)	Y	N	N	N/A	N/A	N
Gambia (Bangui 446)	Y	N	Y	N	N	Y

Country	A	B	C	D	E	F
Germany, D.R.						
Germany, F.R. (Bonn 7285)	Y	N	N	N	N	N
Ghana (Accra 3603)	Y	N	Y	N/A	N/A	N
Greece (Athens 4119)	Y	N	Y	N	N	Y
Grenada						
Guatemala	Y	N	Y	N	N	N
Guinea						
Guinea-Bissau						
Guyana						
Haiti (Port-Au-Prince 1112)	Y	N	N	N	N	Y
Honduras (Tegucigalpa 2062)	Y	N	Y	N	N	Y
Hong Kong (Hong Kong 4895)	Y	N	N	N/A	N/A	Y
Hungary (Budapest 1355)	Y	N	Y	N/A	N/A	N/A
Iceland (Reykjavik 616)	Y	N	N	N	N	Y
India (New Delhi 6348)	Y	Y	N	Y	Y	Y
Indonesia (Jakarta 5730)	Y	Y	Y	Y	N	N
Iran						
Iraq						
Ireland (Dublin 857)	Y	N	N	N	N	N
Israel (Tel Aviv 3044)	Y	Y	Y	Y	Y	N
Italy (Rome 7345)	Y	N	N	Y	Y	N
Ivory Coast (Abidgan 4109)	N	N	N	N/A	N/A	N
Jamaica (Kingston 1631)	Y	Y	N	N	N	N
Japan (Tokyo 6412)	Y	N	Y	Y	Y	N
Jordan (Amman 2331)	Y	N	N	N	N	N

Country	A	B	C	D	E	F
Kenya (Nairobi 4187)	Y	N	N	N	N	Y
Kuwait (Kuwait 2096)	Y	Y	Y	N	N	N
Laos (Vientiane 964)	N	N	N	N	N	N
Lebanon						
Lesotho						
Liberia (Monrovia 3017)	Y	N	N	N	N	N
Libya	Answers not yet received.					
Luxembourg (Luxembourg 455)	Y	N	Y	N	N	N
Malawi (Lilongwe 137)	Y	N	N	N/A	N/A	N
Malaysia (Kuala Lumpur 2459)	Y	N	Y	N	N	Y
Maldives						
Mali (Bamako 1474)	Y	N	Y	N	N	N
Malta (Valletta 526)	Y	N	N	N	N	Y
Mauritania (Nouakchott 1072)	Y	N	N	N/A	N/A	Y
Mauritius (Port Louis 368)	Y	N	N	Y	Y	N
Mexico (Mexico 5568)	Y	N	Y	N	N	N
Mongolia						
Morocco (Rabat 2306)	Y	N	Y	N	N	Y
Mozambique (Maputo 499)	Y	N	N	N	N	Unknown
Nepal (Kathmandu 1735)	Y	N	N	N	N	N
Netherlands (Hague 2313)	Y	N	N	N	N	Y
New Zealand (Wellington 1642)	Y	Y	N	N	Y	Y
Nicaragua (Managua 2030)	Y	N	N	N	N	N
Niger (Niamey 1768)	Y	N	N	N	N	N
Nigeria (Lagos 4775)	Y	Y	Y	N/A	N/A	Y

Country	A	B	C	D	E	F
Norway (Oslo 2198)	Y	N	Y	N	N	Y
Oman (Muscat 517)	Y	N	Y	N	N	N
Pakistan (Islamabad 4316)	Y	Y	Y	N	N	Unkno
Panama (Panama 3321)	Panama has no specific laws on subject.					
Papua New Guinea (Port Moresby 377)	Y	Y	N	Y	Y	N
Paraguay (Asuncion 1869)	Y	N	N	N	N	Y
Peru (Lima 3903)	Y	N	Y	N	N	N
Philippines (Manila 6063)	Y	N	N	N	N	N
Poland (Warsaw 3043)	Y	Y	Y	N/A	N/A	N/A
Portugal (Lisbon 2886)	Y	Y	N	Y	Y	Y
Qatar						
Romania						
Rwanda (Kiguli 337)	Y	N	Y	N/A	N/A	Y
Saudi Arabia (Jidda 3074)	N	N	Y	N/A	N/A	N
Senegal (Dakar 2675)	Y	Y	Y	N	Y	N
Sierra Leone (Freetown 1251)	Y	N	N	N	N	Y
Singapore (Singapore 2159)	Y	Y	Y	N	N	Y
Somalia (Mogadiscio 672)	Y	N	Y	N	N	N/A
South Africa (Pretoria 1930-1968)	Y	N	N	N	N	Y
South Korea (Seoul 3232)	Y	N	Y	Y	Y	Y
Spain (Madrid 3218)	Y	Y	Y	Y	Y	Y
Sri Lanka (Colombo 1566)	Y	N	Y	N	N	N
Sudan (Khartoum 1268)	Y	Y	N	N	N	Y
Surinam (Paramaribo 327)	Y	N	N	N	N	N
Swaziland (Mbabane 689)	N	N	N	N	N	N

Country	A	B	C	D	E	F
Sweden (Stockholm 2410)	Y	N	N	N	N	Y
Switzerland (Bern 1822)	Y	N	N	N	N	Y
Syria (Damascus 2692)	Y	Y	Y	Y	N	N
Tanzania (Dar es Salaam 1556)	Y	Y	Y	Y	N/A	Y
Thailand (Bangkok 12467)	Y	N	N	Y	Y	Y
Togo (Lome 947)	Y	N	N	N	N	Y
Trinidad & Tobago (Port-of-Spain 1075)	Y	N	N	N	N	N
Tunisia (Tunis 3106)	Y	N	N	N	N	
Turkey (Ankara 3475)	Y	N	Y	Y	Y	N
United Kingdom (London 6689)	Y	Y	Y	N	Y	Y
USSR (Moscow 6772)	Y	N/A	Y	N/A	N/A	N/A
Upper Volta (Ouagadougou 1206)	Y	N	N	N/A	N/A	Y
Uruguay						
Venezuela (Caracas 4916)	Y	Y	N	Y	N	Y
Yemen (Sana 1381)	N	N	N	N	N	N
Yugoslavia (Belgrade 2821)	Y	N	Y	N/A	N/A	Y
Zaire						
Zambia (Lusaka 1163)	Y	N	Y	N/A	N/A	Y

FOR IMMEDIATE RELEASE June 14, 1976

Office of the White House Press Secretary

THE WHITE HOUSE

STATEMENT BY THE PRESIDENT

On March 31, I established the Task Force on Questionable Corporate Payments Abroad. I directed the Task Force to conduct a sweeping policy review and to recommend such additional policy steps as might be warranted.

From the initial findings of the Task Force it is clear that the questionable payments problem must be taken seriously. The number of U.S. firms implicated has been relatively small, but the pattern of improper behavior involved cannot be tolerated. It is totally inconsistent with American values. It threatens to harm our foreign relations. If allowed to continue, it could badly erode public and international confidence in American business and American institutions.

The United States is the foremost advocate of principles of fair, open and democratic political behavior and of free, honest and competitive economic behavior. We have an affirmative responsibility for leadership in efforts to advance the application of these principles.

My statement creating the Task Force noted that we have already initiated a wide range of enforcement actions and international initiatives to address the questionable payments problem. I have decided, however, that we can and must do more:

(1) We must take additional legislative steps to improve the deterrent effect of United States law. I have therefore directed the Task Force to develop a specific legislative initiative which would require reporting and disclosure of payments by U.S.-controlled corporations made with the intent of influencing, directly or indirectly, the conduct of foreign government officials. In order that the Congress will have time to enact this legislation in this session, I have instructed the Task Force to proceed with the drafting of detailed specifications as quickly as possible.

(2) We must assure the integrity of corporate reporting systems and the accountability of corporate officials. The Administration will therefore support legislation proposed by the Securities and Exchange Commission to make it unlawful (a) for any person to falsify any book, record or account made, or required to be made, for any accounting purpose; and (b) for any person to make a materially false or misleading statement to an accountant in connection with any examination or audit.

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(3) We must accelerate progress toward an international agreement consistent with the principles put forward by the United States at the Second Session of the United Nations Commission on Transnational Enterprises. I will ask our major trading partners to give our proposed questionable payments agreement priority consideration.

In taking these necessary steps, I wish to emphasize that I do not mean to imply any condemnation of American business in general. To the contrary, I am confident that the overwhelming majority of American businessmen have conducted themselves as good citizens both at home and abroad. Unfortunately, American business, and Americans generally, have become the victims of the improper actions by a few -- and of guilt-by-association.

I have decided upon the additional actions announced today as an important way to curb spreading cynicism and to help restore confidence in basic American institutions and principles.

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FOR IMMEDIATE RELEASE JUNE 14, 1976

Office of the White House Press Secretary

THE WHITE HOUSE

FACT SHEET

DECISIONS ON QUESTIONABLE CORPORATE PAYMENTS ABROAD

The President today announced three decisions based on his review of an interim report by the Cabinet Task Force on Questionable Corporate Payments Abroad. The decisions are: (1) to propose new corporate "disclosure" legislation with regard to questionable payments abroad; (2) to endorse legislation proposed by the SEC intended to assure the integrity of corporate reporting procedures and the accountability of corporate executives; and (3) to seek priority treatment at forthcoming international meetings for the United States' proposed international agreement on questionable payments.

I. Background. The President created the Cabinet Task Force on Questionable Corporate Payments Abroad on March 31, 1976. The Task Force is chaired by Commerce Secretary Elliot Richardson. Its members include: Secretary of State; Secretary of Treasury; Secretary of Defense; Attorney General; Special Representative for Trade Negotiations; Director, Office of Management and Budget; Assistant to the President for Economic Affairs; Assistant to the President for National Security Affairs; and Executive Director, Council on International Economic Policy.

In creating the Task Force the President directed it to conduct a comprehensive policy review and to explore whether "additional avenues should be undertaken in the interest of ethical conduct in the international marketplace and the continued vitality of our free enterprise system." He instructed the Task Force to provide him with interim reports and a final report by the end of the current calendar year.

The President's decisions followed his receipt of the first interim report of the Task Force.

II. The Decisions

A. "Disclosure" Legislative Initiative. The President announced that he had decided to submit legislation to the Congress requiring reporting and disclosure of certain payments by U.S.-controlled corporations made with the intent of influencing, directly or indirectly, the conduct of foreign government officials. The President instructed the Task Force to develop detailed specifications for such legislation as quickly as possible -- in order to allow Congressional action on the proposal in this session of Congress.

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In announcing these decisions, the President expressed confidence that the overwhelming majority of American businessmen have conducted themselves as good citizens both at home and abroad. The President's decisions derived in part, he said, from a need to halt the growing trend of spreading cynicism and to help restore confidence in basic American institutions and principles.

B. Corporate Accountability Decision. The President endorsed legislation proposed by SEC Chairman Roderick Hills in his Report of May 12. The legislation would amend the Securities Exchange Act of 1934:

-- to prohibit falsification of corporate accounting records;

-- to prohibit the making of false and misleading statements by corporate officials or agents to persons conducting audits of the company's books and records and financial operations;

-- to require corporate management to establish and maintain its own system of internal accounting controls designed to provide reasonable assurances that corporate transactions are executed in accordance with management's general or specific authorization, and that such transactions are properly reflected on the corporation's books.

C. Acceleration of International Efforts. The President announced his intention to seek priority treatment for the United States' proposed international agreement on questionable corporate payments abroad.

The proposed agreement was first put forward by the United States in a United Nations forum on March 5, 1976. If successful, it would result in an international treaty based on the following principles:

-- It would apply to international trade and investment transactions with Governments, i.e., government procurement and other governmental actions affecting international trade and investment as may be agreed;

-- It would apply equally to those who offer or make improper payments and to those who request or accept them;

-- Importing Governments would agree to establish clear guidelines concerning the use of agents in connection with government procurement and other covered transactions, and establish appropriate criminal penalties for defined corrupt practices by enterprises and officials in their territory;

-- All Governments would cooperate and exchange information to help eradicate corrupt practices;

-- Uniform provisions would be agreed for disclosure by enterprises, agents and officials of political contributions, gifts and payments made in connection with covered transactions.

The President's initiative will supplement related U.S. international initiatives taken in the OAS, OECD, GATT and UN.

III. Ongoing Activities.

A. Policy Development and Coordination. The Task Force will continue to have responsibility for policy development and coordination within the Executive Branch in accordance with the President's directive of March 31.

B. Investigations. Responsibility for investigative activities will remain with the appropriate investigative agencies and not the Task Force. Investigative and enforcement actions of the audit agencies, the IRS, the FTC, the SEC and the Department of Justice are ongoing in accordance with the dictates of current law.

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FOR IMMEDIATE RELEASE JUNE 14, 1976

Office of the White House Press Secretary

THE WHITE HOUSE

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In creating the Task Force the President directed it to conduct a comprehensive policy review and to explore whether "additional avenues should be undertaken in the interest of ethical conduct in the international marketplace and the continued vitality of our free enterprise system." He instructed the Task Force to provide him with interim reports and a final report by the end of the current calendar year.

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(OVER)

In announcing these decisions, the President expressed confidence that the overwhelming majority of American businessmen have conducted themselves as good citizens both at home and abroad. The President's decisions derived in part, he said, from a need to halt the growing trend of spreading cynicism and to help restore confidence in basic American institutions and principles.

B. Corporate Accountability Decision. The President endorsed legislation proposed by SEC Chairman Roderick Hills in his Report of May 12. The legislation would amend the Securities Exchange Act of 1934:

-- to prohibit falsification of corporate accounting records;

-- to prohibit the ~~making of false~~ and misleading statements by corporate officials or agents to persons conducting audits of the company's books and records and financial operations;

-- to require corporate management to establish and maintain its own system of internal accounting controls designed to provide reasonable assurances that corporate transactions are executed in accordance with management's general or specific authorization, and that such transactions are properly reflected on the corporation's books.

C. Acceleration of International Efforts. The President announced his intention to seek priority treatment for the United States' proposed international agreement on questionable corporate payments abroad.

The proposed agreement was first put forward by the United States in a United Nations forum on March 5, 1976. If successful, it would result in an international treaty based on the following principles:

-- It would apply to international trade and investment transactions with Governments, i.e., government procurement and other governmental actions affecting international trade and investment as may be agreed;

-- It would apply equally to those who offer or make improper payments and to those who request or accept them;

-- Importing Governments would agree to establish clear guidelines concerning the use of agents in connection with government procurement and other covered transactions, and establish appropriate criminal penalties for defined corrupt practices by enterprises and officials in their territory;

-- All Governments would cooperate and exchange information to help eradicate corrupt practices;

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-- Uniform provisions would be agreed for disclosure by enterprises, agents and officials of political contributions, gifts and payments made in connection with covered transactions.

The President's initiative will supplement related U.S. international initiatives taken in the OAS, OECD, GATT and UN.

III. Ongoing Activities.

A. Policy Development and Coordination. The Task Force will continue to have responsibility for policy development and coordination within the Executive Branch in accordance with the President's directive of March 31.

B. Investigations. Responsibility for investigative activities will remain with the appropriate investigative agencies and not the Task Force. Investigative and enforcement actions of the audit agencies, the IRS, the FTC, the SEC and the Department of Justice are ongoing in accordance with the dictates of current law.

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EMBARGOED FOR RELEASE
UNTIL 2:30 P.M., E.D.T.

AUGUST 3, 1976

Office of the White House Press Secretary

THE WHITE HOUSE

TO THE CONGRESS OF THE UNITED STATES:

Certain improper activities abroad undertaken by some American corporations have resulted in an erosion of confidence in the responsibility of many of our important business enterprises. In a more general way, these disclosures tend to destroy confidence in our free enterprise institutions.

With this in view, I established the Task Force on Questionable Corporate Payments Abroad on March 31, 1976, and directed it to undertake a sweeping policy review of approaches to deal with the questionable payments problem. On June 14, after reviewing an interim report of the Task Force, I directed the Task Force to develop, as quickly as possible, a specific legislative initiative calling for a system of reporting and disclosure to deter improper payments.

Today, I am transmitting to the Congress my specific proposal for a Foreign Payments Disclosure Act. This proposal will contribute significantly to the deterrence of future improper practices and to the restoration of confidence in American business standards.

This legislation represents a measured but effective approach to the problem of questionable corporate payments abroad:

-- It will help deter improper payments in international commerce by American corporations and their officers.

-- It will help reverse the trend toward allegations or assumptions of guilt-by-association impugning the integrity of American business generally.

-- It will help deter would-be foreign extorters from seeking improper payments from American businessmen.

-- It will allow the United States to set a forceful example to our trading partners and competitors regarding the imperative need to end improper business practices.

-- It does not attempt to apply directly United States criminal statutes in foreign states and thus does not promise more than can be enforced.

-- Finally, it will help restore the confidence of the American people and our trading partners in the ethical standards of the American business community.

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The legislation will require reporting to the Secretary of Commerce of certain classes of payments made by U.S. businesses and their foreign subsidiaries and affiliates in relation to business with foreign governments. The reporting requirement covers a broad range of payments relative to government transactions as well as political contributions and payments made directly to foreign public officials. By requiring reporting of all significant payments, whether proper or improper, made in connection with business with foreign governments, the legislation will avoid the difficult problems of definition and proof that arise in the context of enforcement of legislation that seeks to deal specifically with bribery or extortion abroad.

The Secretary of Commerce will, by regulation, further define the scope of reporting required. Small or routine payments will be excluded, as will certain clearly bona fide payments such as taxes. Reports will include the names of recipients.

Reports will be made available to the Departments of State and Justice as well as to the Internal Revenue Service and the Securities and Exchange Commission. The Department of Justice and the State Department will, in appropriate instances, relay reported information to authorities in foreign jurisdictions to assist them in the enforcement of their own laws.

Reports also will be made available to appropriate congressional committees. All reports would be made available to the public one year from the date of their filing, except in cases where a specific written determination is made by the Secretary of State or the Attorney General that considerations of foreign policy or judicial process dictate against disclosure.

This proposed legislation is intended to complement and supplement existing laws and regulations which can affect questionable corporate payments abroad.

In this regard, I wish to recognize and build upon the fine record of the Securities and Exchange Commission. The Commission already has taken prompt and vigorous action to discover questionable or illegal corporate payments and to require public disclosure of material facts relating to them. Moreover, as the Commission has noted, public disclosure of matters of this kind generally leads to their cessation. In virtually all the cases reported to the Commission, companies discovering payments of this kind have taken effective steps to stop them and to assure that similar payments do not recur in the future.

A principal emphasis of the Commission's activities in this area has been to prompt the private sector to take actions that would restore the integrity of the existing system of corporate governance and accountability. I applaud this approach and expect the Secretary of Commerce to follow the same spirit in administering this new legislation.

However, not all firms engaged in international commerce are regulated under the securities laws and are subject to the disclosure requirements of the Commission. The Commission requires disclosure of payments only when necessary or appropriate for the protection of investors. Further, it has not

generally required reporting of the name of a recipient, a requirement which I believe can be an important deterrent to extorters. In addition, the Commission's system of disclosure -- focusing as it does primarily on the interests of the investing public -- is not designed to respond to some of the broader public policy and foreign policy interests related to the questionable payments problem.

Accordingly, the legislation which I am proposing deals with all U.S. participants in foreign commerce -- not just firms subject to Commission regulatory requirements -- and it calls for the active involvement of the Secretaries of State and Commerce and the Attorney General in administering a system which addresses the full range of public policy interests inherently involved in the questionable payments problem.

The Secretary of Commerce will take every feasible step to minimize the reporting burdens under this new legislation. The legislation directs the Secretary to consult with other federal agencies to eliminate duplicative reporting. Where appropriate, agencies are authorized to combine reporting and record-keeping in single forms.

In this regard, I also wish to recognize and build upon the Securities and Exchange Commission's acknowledged expertise in financial reporting. Persons subject to the Commission's jurisdiction must maintain books and records that are sufficient to provide data the Commission believes should be disclosed. The requirement that persons subject to SEC jurisdiction maintain adequate books and records is now implicit in existing law; the legislation recommended by the Commission, which the Task Force and I support, would make that requirement explicit. It is contemplated that the Commission will take further steps to assure that companies it regulates maintain adequate systems of internal accounting controls. Thus, it may well be unnecessary for the Secretary of Commerce to impose additional record-keeping requirements on companies regulated by the Commission to enable compliance with the proposed legislation.

We remain mindful that the questionable payments problem is an international problem which cannot be corrected by the United States acting alone. Consequently, we are continuing our efforts to secure an international agreement which will establish a mutually acceptable framework for international cooperation in eliminating improper business practices.

The legislation I am proposing today can contribute in an important way to the restoration of confidence in America's vital business institutions. I urge its prompt consideration and enactment by the Congress.

GERALD R. FORD

THE WHITE HOUSE,

August 3, 1976.

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