The original documents are located in Box C42, folder "Presidential Handwriting, 6/10/1976 (2)" of the Presidential Handwriting File at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE
WASHINGTON

June 9, 1976

MR PRESIDENT:

Last evening you received a package on the subject of "Questionable Corporate Payments Abroad".

Brent Scowcroft has prepared for your review some additional recommendations on this subject.

Jim Connor

cc: Bill Seidman

THE WHITE HOUSE

WASHINGTON

June 10, 1976

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR
THE HONORABLE ELLIOT L. RICHARDSON
Secretary of Commerce

Re: Questionable Corporate Payments Abroad

The President reviewed your memorandum of June 8 on the above subject and made the following decisions:

Issue 1: Should the Administration undertake a legislative initiative at this time?

Option A - "Undertake a legislative initiative at this time."

Option B - Modified as follows was also approved.
"Accelerate U.S. efforts to obtain an international agreement on questionable payments."

Issue 2: What form should a legislative initiative take?

Option A - Propose a form of "disclosure" legislation.

Issue 3: Should the Administration endorse the Hills bill?

Approved endorsing the Hills bill.

Please follow-up with appropriate action.

James E. Connor
James E. Connor
Secretary to the Cabinet

cc: Dick Cheney
Brent Scowcroft
Bill Seidman

MEMORANDUM THE PRESIDENT HAS SEEN....

3304

THE WHITE HOUSE

WASHINGTON

ACTION

June 9, 1976

MEMORANDUM FOR: THE PRESIDENT

FROM: BRENT SCOWCROFT

SUBJECT: Questionable Corporate Payments Abroad

Bill Seidman and I have forwarded to you a memorandum presenting three issues on legislative strategy which have resulted from the initial work of Secretary Richardson's Task Force.

This subject is complex, and although the memorandum is clear and balanced, it is rather lengthy. I would like to emphasize briefly my principal concerns:

--Revelations in this area have potentially disruptive implications for our foreign relations. While we have no wish to protect persons from the application of the laws of their countries, the potential for political use of damaging information outside the legal system is significant, and we should maintain some control over how information on questionable payments is made available to other countries. For this reason I strongly oppose "automatic" disclosure.

--The only equitable and workable long-term solution lies in multilateral action. The U.S. must not take upon itself the burden of relieving pressure on foreign governments and business entities. This will not solve the problem, and it could actually hinder ultimate resolutions by undermining our own international initiatives.

--We are not yet prepared for a legislative initiative, and we must not let a perceived tactical need for action in general push us toward a specific proposal. The Attorney General's "criminalization" option appeared late in the process and has not been discussed at any depth within agencies nor in an interagency meeting. This option avoids some of the problems of control of information inherent in disclosure legislation, and may be less likely to be significantly altered by Congress. If there is an urgent need for action, a Presidential initiative on multilateral efforts to deal with the questionable payments problem globally could have a very strong impact.

RECOMMENDATION

For these reasons I support the following positions:

ISSUE 1: Option B - Undertake no legislative initiative at this time, but rather accelerate efforts to obtain a multilateral agreement pending further study of legislative options.

ISSUE 2: Make No Decision Now - If you choose to undertake a legislative initiative, you should request additional consideration of Option B's "criminalization" vs. a modified Option A calling for increased reporting and limited disclosure. (There has been inadequate discussion of the criminalization option, which may have merit from the international perspective.)

ISSUE 3: Option A - Support the "Hills Bill"

Given the strongly held and disparate views among Task Force members and the fact that they have not collectively reviewed one of the major legislative options, I recommend that you meet with them on this matter before making your decision.

THE WHITE HOUSE

WASHINGTON

June 8, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: L. WILLIAM SEIDMAN
BRENT SCOWCROFT

SUBJECT: Questionable Corporate Payments Abroad

On March 31, you established a Cabinet-level Task Force on Questionable Corporate Payments Abroad and instructed the Task Force to provide you with interim reports and a final report by the end of the calendar year.

The first interim report of the Task Force is attached. It presents three issues for your decision:

1. Should the Administration undertake a legislative initiative at this time?

2. If you determine to undertake a legislative initiative at this time, what form should the initiative take?

3. Should the Administration endorse the "Hills bill?"

Secretary Richardson has promised to provide Senator Proxmire with specific views concerning pending "questionable payments" legislation by June 10. The June 10 date reflects an accommodation of two previous requests for delay. The Senate Banking and Urban Affairs Committee has scheduled a June 22 mark-up on "questionable payments" legislation.

There are sharp divisions among Task Force members and your advisors on the course of action you should follow at this time.

Treasury, State, Defense, Marsh, Friedersdorf and Morton argue against a legislative initiative at this time.

Commerce, OMB, STR, and the Counsel's Office support "disclosure" legislation.

Justice proposes "criminalization" legislation. Treasury and Marsh support this option if you should decide to undertake a legislative initiative at this time.

Given these differing views and the fact that the Attorney General's "criminalization" proposal was made after the last meeting of the Task Force and therefore has not been fully discussed at the Cabinet level, we suggest that you meet with the members of the Task Force and your advisors to discuss the issues outlined in the attached memorandum. Secretary Richardson concurs in this recommendation. This meeting will need to be held tomorrow or Secretary Richardson will have to request yet another delay of his testimony before Senator Proxmire.

THE WHITE HOUSE

WASHINGTON

June 8, 1976

MEMORANDUM FOR THE PRESIDENT

THROUGH: L. WILLIAM SEIDMAN
BRENT SCOWCROFT

FROM: ELLIOT L. RICHARDSON

SUBJECT: Questionable Corporate Payments Abroad

This memorandum seeks your guidance regarding whether or not to propose a legislative initiative, to supplement the unilateral and multilateral initiatives already taken by the Administration, in our attempt to address the "questionable payments" problem.

Current Analysis of the Problem

The Task Force on Questionable Corporate Payments Abroad has received briefings by the IRS, the Department of Justice, the Department of Defense and the SEC. The Task Force staff has held preliminary consultations with businessmen, congressional staff, legal experts, academicians, and other informed individuals and groups.

It is clear, on the basis of information already at hand, that there is a "questionable payments problem." 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. The problem is actually a set of problems, often interrelated, but distinguishable as follows:

- The problem of "petty corruption." "Grease" or "facilitating" payments are a business requirement in a number of countries where they are often accepted as a perquisite of an underpaid civil service.

- The problem of "competitive necessity." It is frequently argued that American firms are required to bribe in order to meet foreign competition, and in fact, foreign companies do sometimes make payments with the knowledge of their governments. The SEC has concluded, however, that little

if any business would be lost if U.S. firms were to stop these practices. In a number of cases, payments have been made to gain an advantage over other U.S. manufacturers.

- o 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.

- o The problem of adverse effect on foreign relations. Public disclosure of information and allegations regarding past practices has had adverse impact on the political and social fabric of countries friendly to the United States and has, thereby, adversely affected U.S. foreign relations.

- o The problem of adverse impact on multinational corporations (MNC's). Exposure of the questionable payments problem has increased concern that MNC's are unaccountable to national legal constraints and that they have the capacity to conduct independent foreign policy including the suborning of host country political and governmental processes. Such enterprises are an important part of the American economy and offer substantial opportunities for developing nations. The U.S. interest in a healthy international economic order is importantly dependent upon the international acceptability of MNC's.

- o The problem of eroding confidence in "free" institutions. Most fundamentally, the uncovering of these improper past practices, as a result of Watergate and subsequent executive and congressional investigations, has eroded confidence in corporate responsibility and in democratic and capitalist institutions generally.

Delineation of the precise dimensions of the questionable payments problem must await further investigation by the SEC, by the IRS, whose review of the problem is in its initial stages, and by the Department of Justice. Nevertheless, the nature of the problem in its presently visible dimensions is sufficient to justify not only the remedial measures already under way but also serious consideration of additional measures.

Issues and Options

Three issues are presented for your consideration. In considering these issues it is important to note that:

1. Existing Administration initiatives will continue to be pursued regardless of the resolution of these issues.

2. If any legislative initiative is proposed now, it would simply be outlined in an appropriate Presidential speech

or release. Specific drafting and resolution of related detailed issues would remain for further development by the Task Force.

3. Whether or not a new legislative initiative is proposed, the possibility of further initiatives in other areas, e.g., administrative guidelines with regard to the behavior of U.S. government employees, or a special foreign policy initiative to gain greater international cooperation would remain under review.

Issue 1: Should the Administration undertake a legislative initiative at this time?

The Task Force is divided on the question of whether there is a need for a legislative initiative or whether we should concentrate on accelerating efforts to obtain international agreement on questionable payments.

Option A: Undertake a legislative initiative at this time.

Alternative legislative initiatives are outlined in Issue 2.

Advantages:

- o There is a need for clarification of current law. Although SEC Chairman Hills testified that "we do have adequate tools to correct the problem once it is found," it is in fact not entirely clear that the SEC has adequate authority to compel public disclosure of those questionable payments which are not "material" as conventionally defined.

- o There is a substantive question as to the adequacy of current law. The Internal Revenue Code reaches only those transactions in which a questionable payment is improperly deducted as a business expense, and in no way constrains a corporation which does not seek the tax benefit of such deductions. SEC's authority applies only to issuers of securities, and does not reach certain significant U.S. firms doing international business. Since SEC authority as currently applied does not require disclosure of the names of recipients, it may not be a fully effective deterrent of extortion. A summary of the applicability of relevant current U.S. law is attached at Tab A.

- o Since there is skepticism regarding the seriousness of the Administration in its quest for remedies, there is a need to act in a way that is publicly perceived as posi-

tive. The Task Force has been criticized for its failure to have independent full-time staff, its mandate to report "before the end of the current calendar year," its alleged "stalling," etc. Continued disclosure will compound the problems of public skepticism and Congressional pressure. Secretary Richardson has promised Senator Proxmire a response with respect to his bill by June 10, and Senator Church will soon be holding hearings on his newly introduced bill.

- o A legislative initiative would provide an effective means to restore public confidence and to reduce cynicism with respect to business.

- o It is in the long-term interest of the United States to allay concerns regarding the accountability of multinational business enterprises. Unilateral legislative action could improve the standing of the U.S. and U.S.-based firms within the international community.

Disadvantages:

- o The U.S. Government has taken steps to curtail illicit payments by U.S. firms under current legal authorities. There is a broad consensus in the business community and enforcement agencies that the disclosure being required by SEC and IRS, as well as publicity resulting from Congressional inquiries, has modified the behavior of U.S. firms abroad. The steps that have been taken by DOD and State, and that will be taken pursuant to the new Security Assistance Act, will eliminate illicit payments from the sensitive sector of military sales.

- o Legislative proposals at this time may be premature. Additional time and analysis is required for a more complete definition of the true dimensions of the problem. Unilateral legislative action might undercut our bargaining position in international negotiations.

- o U.S. regulation of payments by U.S. firms abroad could potentially cause serious damage to U.S. foreign relations because it involves U.S. authorities in the examination of the conduct of foreign officials in their own countries. Disclosures in the United States of alleged corruption abroad could threaten leaders and institutions in friendly foreign countries. General disclosure legislation would tend to expand and institutionalize this process. When deterrence fails and disclosure results, U.S. interests abroad could be seriously damaged.

- o Unilateral legislative action by the United States might cause a substantial competitive handicap to American corporations leading to a loss of business, jobs, etc.

- o A legislative initiative is not the only means available to counter skepticism and to help restore confidence. An alternative course would be to defend more vigorously the adequacy of the current Administration approach -- and to supplement it with a visible effort to accelerate the progress of international negotiations. The current Administration approach is summarized at Tab B.

Option B. Accelerate U.S. efforts to obtain an international agreement on questionable payments. Do not propose any new legislation at this time.

In March the United States made a proposal in the United Nations for negotiation of an international agreement to curb illicit payments. In presenting this proposal, the United States outlined a number of principles on which we felt the agreement should be based, including the following: (1) the agreement would apply equally to those who offer or make improper payments and to those who request or accept them; (2) importing governments would agree to establish clear guidelines concerning the use of agents and to establish appropriate criminal penalties for defined corrupt practices by enterprises and officials in their territories; and (3) univorm provisions for disclosure by enterprises, agents, and government officials of political contributions, gifts, and payments made in connection with covered transactions. We expect that a group of experts will be formed this summer to undertake the negotiation of the agreement.

An intensification of our efforts to obtain such an agreement might include the following steps:

1. Major policy statements by you and members of the Task Force to convey the Administration's determination to reach a workable international agreement on bribery;

2. Renewal of approaches to foreign governments through our embassies abroad to generate additional support for our initiative; and

3. Preparation of an interim report -- which you would make available to Congress in a few weeks -- setting forth the accomplishments of the Task Force to date and outlining the Administration's proposed plan of action with respect to the international agreement.

Advantages:

- o This approach would provide time for more careful consideration of what kind of additional disclosure legislation, if any, is needed.

- o This approach does not foreclose the possibility of subsequently proposing additional legislation. Indeed, a result of the international negotiations may be that we would need to propose some sort of new disclosure requirements, but such a proposal would be made in accordince with the terms of the international agreement and parallel actions by other countries.

- o There is a risk that many countries might use unilateral U.S. action as an excuse for avoiding taking effective action on their own.

Disadvantages:

- o This approach may be perceived politically as a smoke screen for Administration unwillingness to take effective action on the questionable payments problem.

- o Negotiation of an international agreement may take up to 2 years to complete. There would likely be few immediate results from this approach.

- o There is a possibility that it may prove impossible to negotiate successfully such an agreement.

Decision

Option A _____ Undertake a legislative initiative at this time.

Supported by: Commerce, Justice, the Special Representative for Trade Negotiations, Counsel's Office, OMB

Option B _____ Accelerate U.S. efforts to obtain an international agreement on questionable payments. ~~Do not propose any new legislation at this time~~.

Supported by: State, Treasury, Defense, Marsh, Friedersdorf, Morton

If you approve undertaking a legislative initiative at this time, the Task Force is divided on what form the legislative initiative should take.

Issue 2: What form should a legislative initiative take?

The Senate Banking and Urban Affairs Committee has scheduled a June 22 markup session for "questionable payments" legislation. Three principal legislative proposals are currently pending in the Congress. A summary of their principal provisions is attached at Tab C.

The "Proxmire bill" requires disclosure to the SEC of all payments above $1,000 made in connection with business with foreign governments, and "criminalizes" payments made to influence actions of foreign officials.

The "Church bill" requires annual disclosure to the SEC of certain corporate payments abroad (including "commercial" as well as "official" payments) without imposing criminal sanctions for acts done abroad, and also contains a number of other provisions creating private rights of action for damages, and mandating certain internal, corporate reforms.

The "Hills bill" would force increased internal accountability within SEC-regulated corporations by making it a criminal offense to keep false books or to lie to auditors.

The Proxmire and Church bills have substantial defects. The Task Force does not recommend support of either. Consideration of whether the Administration should endorse the Hills bill is presented in Issue 3.

Option A. Propose a form of "disclosure" legislation.

A Presidential initiative for "disclosure" legislation might take the following form: It would require reporting of all payments in excess of some fixed amount made directly or indirectly to any person employed by or representing a foreign government and 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. These reports would be required to be made to some Executive Branch Department and not to the SEC. The State Department would have discretion to relay reports of these payments to the foreign government(s) affected and these reports would be publicly disclosed after an appropriate interval. Criminal and civil penalties would be set for willful or negligent failure to report. (Deliberate misrepresentation in such reports would be covered by current criminal law, 18 USC Section 1001.) The requirement of such reports would apply to all American business entities and their controlled foreign subsidiaries and agents. Penalties for failure to report would apply only to American parent corporations and their officers.

The State Department, which opposes a legislative initiative, has suggested that if you decide to propose a legislative initiative it should be narrower than the disclosure approach outlined above. The State Department approach would require U.S. firms doing business abroad to report to a single, designated agency of the Executive Branch all payments made to foreign officials, directly or indirectly, in connection with business dealings with foreign governments. The reports would be made available to other interested agencies of the United States government and would also be made available, upon request, to committees of Congress which need the information for legislative purposes as well as to foreign governments under the procedures developed in the Lockheed case. Public disclosure would only be made in those cases where agency or congressional processes required it.

If you decide to propose some form of disclosure legislation, a supplementary options paper will be prepared promptly to resolve the issues which distinguish the State Department approach from the broader disclosure approach and to resolve the remaining issues of detail, e.g., definitions of "controlled foreign subsidiaries and agents," minimum payment levels above which reporting would be required, etc.

Advantages

- Disclosure legislation should help build public confidence in the accountability and responsibility of MNCs without requiring the degree of extra-territorial enforcement implied by unilateral "criminalization."

- More systematic reporting and disclosure, including the name of "payees," would provide more effective protection for U.S. business from extortion or other improper pressures that would result from disclosure of a payment to their own government as well as public disclosure of their names in the United States. Virtually all foreign governments have statutes forbidding official corruption.

- An initiative limited to disclosure legislation avoids the difficult problems of defining bribery or determining whether certain transactions are bribery or distortion which would be entailed in any criminalization legislation.

Disadvantages:

- To the extent that deterrence fails and disclosure results, it could pose foreign policy problems by aggravating relations between the United States and certain countries.

- Disclosure could constitute a substantial additional paperwork burden on American corporations. Moreover, various ambiguities would be involved in the case of some payments and disclosure might unjustly implicate legitimate intermediaries.

- It may be argued that a disclosure approach is unwieldy and does not go far enough -- that criminalization of certain foreign payments should be required, that "bribery" is "wrong"; and that our law ought to reflect that moral judgment.

Option B. Propose legislation which would criminalize corrupt payments to certain foreign officials.

The Task Force has considered a wide range of possible criminalization initiatives. The Attorney General has proposed for your consideration legislation that would apply only to bribes of officials in foreign countries that (a) have appropriate laws prescribing domestic bribery (the State Department advises that virtually all nations already have such laws); and (b) have bilateral enforcement agreements with the United States similar to those being concluded with various nations in connection with the Lockheed matter. A draft statute is attached at Tab D.

Advantages:

- This proposal would facilitate cooperation by counterpart law enforcement agencies and would avoid involvement of United States law enforcement where there is not a foreign commitment to enforcement of its own laws.

- The bilateral agreement and foreign law requirement of the proposed statute would help minimize any possible adverse impact on the competitive position of American multinational corporations; entry into an agreement would evince the foreign nation's intention to enforce its corrupt practices laws, particularly against its own officials.

- Unlike a disclosure provision, this proposal would not create additional and burdensome reporting requirements for American multinational corporations, nor would a new bureaucracy have to be created within any Executive department or agency to implement the statute.

Disadvantages

- This proposal would have force only in relation to countries willing to enter into bilateral enforcement agreements. And it is conceivable that exactly those countries which are least inclined to enforce bribery statues--and most problematic in this respect--would fail to enter such bilateral agreements.

- For countries unwilling to enter enforcement agreements, this approach--as distinguished from the disclosure approach--would fail to deter extortion.

- Such an initiative would be inherently difficult to enforce because it would pose definitional problems--such as distinguishing between corrupt payments on the one hand and legitimate political contributions and fees on the other.

Decision

Option A MRG Propose a form of "disclosure" legislation.

Supported by: Commerce[1] State[2] Counsel's Office[3] STR[4] OMB

Option B _____ Propose legislation which would criminalize corrupt payments to certain foreign officials.

Supported by: Justice[5] Treasury, Marsh

[1] A memorandum outlining Secretary Richardson's views and specifications for a reporting and disclosure bill is attached at Tab E.

[2] A memorandum from Deputy Secretary of State Robinson is at Tab F.

[3] A memorandum from Ed Schmults is at Tab G.

[4] A memorandum from Ambassador Dent is at Tab H.

[5] A memorandum from the Attorney General is at Tab D.

Treasury opposes any legislative initiative at this time. However, if a decision is made to propose legislation, Treasury supports criminalization legislation, but only extending as far as the draft legislation in the Attorney General's memorandum.

Issue 3: Should the Administration endorse the Hills bill?

The Hills bill would require SEC-regulated firms to devise and maintain internal accounting controls intended to improve accountability while criminalizing falsification of associated books, records, accounts or documents and criminalizing the making of false or misleading statements to an accountant in connection with an issuer's audit. The bill does not criminalize bribery, and it does not reach non-SEC-regulated firms. Even with the proposed new authority, disclosure requirements would remain linked to a determination of "materiality" from the perspective of investors (as viewed by management, auditors and the SEC).

It is important to remember that the Hills bill is a limited legislative initiative. Since Senator Proxmire has indicated he will incorporate the Hills approach in his bill, it could not be claimed as a Presidential initiative, even though it would be viewed as a positive Administration action.

Recommendation: That you endorse the Hills bill.

Approve JRT Supported by: Commerce, State, Justice, Counsel's Office, Marsh, Morton

Disapprove _____ Supported by: Treasury*, Friedersdorf,

STR defers to other agencies.

* Treasury does not support the Hills bill, although we are not strongly opposed to it. While the bill is relatively harmless, (1) it does not purport to deal directly with the bribery issue and, therefore, does not meet the need, and (2) it adds further Government regulation on how SEC registered corporations are to keep books and deal with auditors, which is an ineffective and unnecessary intrusion in business procedures.

OMB feels that greater study of the implications of the Hills bill for the power and responsibility of the SEC is required before formal Administration support is given to the Hills bill.

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").

* 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.*

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* 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.

B

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.

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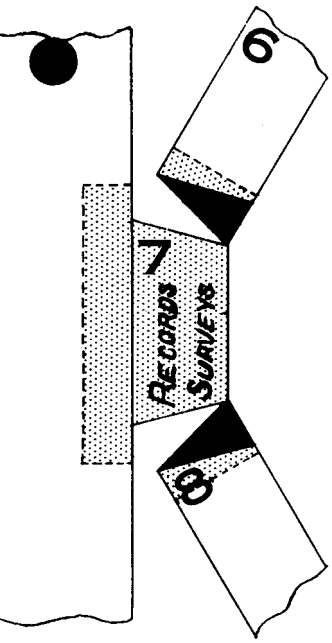

TABBED SEPARATOR SHEET
Form HEW-69A
(3-56)

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.

# # #

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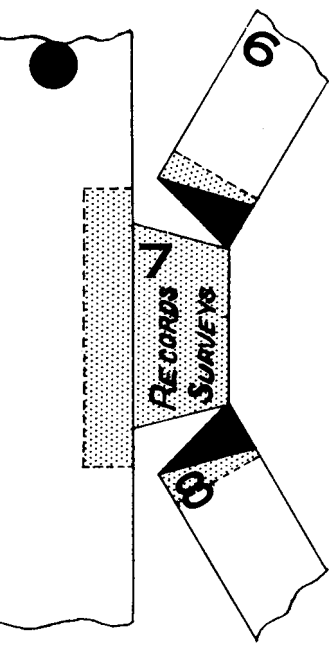

TABBED SEPARATOR SHEET
Form HEW-69A
(3-56)

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

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IRM 4000, 4200, 4700, 4(12)10, 8200, 8400, 8(24)G 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:GL:I, 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)

GPO 905-632

3

HOW TO USE
THESE SEPARATORS

Use one page for each separation.

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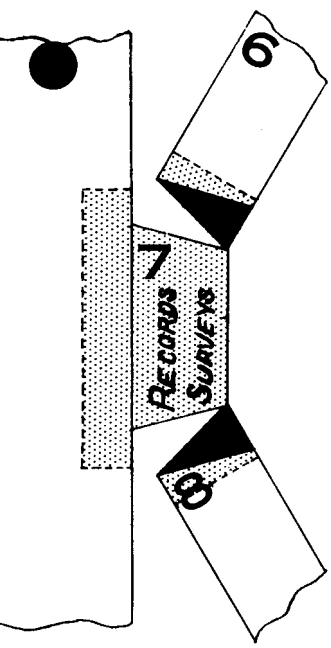

TABBED SEPARATOR SHEET
Form HEW-69A
(3-56)

LIMITED OFFICIAL USE

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.

nference room paper No. 4
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.

C

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."

D

Office of the Attorney General
Washington, D. C. 20530

May 24, 1976

MEMORANDUM FOR THE PRESIDENT

THROUGH: WILLIAM SEIDMAN
ASSISTANT TO THE PRESIDENT FOR
ECONOMIC AFFAIRS

SUBJECT: QUESTIONABLE CORPORATE PAYMENTS ABROAD

The Department of Justice believes that a legislative initiative in the area of questionable corporate payments abroad is needed in order to restore both domestic and foreign confidence in the free enterprise system. We recommend that the legislation take the form of direct criminalization of corrupt payments to foreign officials. A draft of such a statute is attached hereto as Tab A. The proposed statute would apply only to bribes of officials in foreign countries that a) have appropriate laws proscribing domestic bribery (the State Department advises that virtually all nations already have such laws); and b) have bilateral agreements with the United States setting forth a mechanism for enforcement--agreements similar in format to those being concluded with various nations in connection with the Lockheed matter (see Tab B).

The following factors support the Department's approach:

a) Enormous enforcement problems would be created by criminal or disclosure statutes that do not provide a mechanism for securing the cooperation of foreign law enforcement officials. The Department's proposal would facilitate cooperation by counterpart law enforcement agencies and would avoid involvement of United States law enforcement where there is not a foreign commitment to enforcement of its own laws.

b) The proposal would permit enforcement responsibility to be vested directly in the Department of Justice rather than an executive agency publicly identified with either the business community or the conduct of foreign relations.

c) The bilateral agreement and foreign law requirement of the proposed statute would help minimize any possible adverse impact on the competitive position of American multinational corporations; entry into an agreement would evince the foreign nation's intention to enforce its corrupt practices laws, particularly against its own officials.

d) Unlike a disclosure provision, a new bureaucracy will not have to be created within any Executive Department or Agency to implement the statute.

e) Unlike a disclosure requirement, the proposal would not create additional and burdensome reporting requirements for American multinational corporations.

f) The proposal would permit the Administration to endorse the legislation proposed by Chairman Hills while simultaneously advocating a more forceful and comprehensive Administration approach.

Respectfully,

Edward H. Levi
Attorney General

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.

TAB A

(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:

_____

For the United States Department of Justice:

_____

THE SECRETARY OF COMMERCE

WASHINGTON, D.C. 20230

June 3, 1976

MEMORANDUM FOR THE PRESIDENT

SUBJECT: RECOMMENDED INITIATIVE RE "QUESTIONABLE PAYMENTS ABROAD"

As you know, the Task Force is split in its recommendations to you. My personal recommendations are: (a) that you seek a legislative initiative as proposed; (b) that this initiative take the "disclosure" as opposed to the "criminalization" approach; and (c) that you endorse the "Hills bill." An outline of a reporting and disclosure bill which I favor is attached to this memorandum.

A summary of reasons which support my recommendations is as follows:

(1) It is imperative that the United States take the lead in restoring and maintaining confidence in the accountability and responsibility of multinational corporations--and, more fundamentally, in the integrity of the free-enterprise system. Measures taken to date have not proved--and do not seem likely to prove--adequate to restore and maintain the necessary degree of confidence. In my view, this point applies regardless of one's assessment of the technical adequacy of current law and regulation. The issue is one of symbols as well as substance.

(2) While I recognize that the best long-term solution must be an international one, I don't believe, as a practical matter, that such a solution will be forthcoming soon enough to restore confidence in a sufficiently timely fashion.

(3) It is my considered judgment that current law is not adequate. It is not clear that the SEC has adequate authority to compel public disclosure of those questionable payments which are not "material" as heretofore conventionally defined. The Internal Revenue Code reaches only those transactions in which a questionable payment is improperly deducted as a business expense. A corporation which does not seek the tax benefit of such deductions is in no way constrained from making questionable payments by the Code. SEC's authority applies only to issuers of securities--and does not reach certain significant U.S. firms doing international business. And, as currently applied, SEC authority does not require disclosure of the names of recipients--hence, is not a fully effective deterrent of extortion. (A staff memorandum detailing inadequacies of current law is attached.)

(4) There is a need to act in a way that is publicly perceived to be positive in response to Congressional legislative initiatives and to allay skepticism as to the seriousness of the Administration in its quest for remedies. Continued disclosures--absent any further Administration initiative--will compound the problems of Congressional pressure and public skepticism; and such further disclosures will inevitably be forthcoming, seriatim, as the product of the investigatory processes already engaged.

(5) It is my personal judgment that if the Administration comes forward with a positive approach to legislation, we will be in a position to work with the Congress to achieve a fully satisfactory legislative outcome.

(6) The recommended "disclosure" approach would help protect U.S. business from extortion. It would be effective as soon as enacted, in contrast to the Attorney General's criminal legislation, the effectiveness of which would depend upon other nations' willingness to enter enforcement agreements with the U.S. It would avoid the difficult definitional problems inherent in the criminal approach.

Elliot L. Richardson

Attachments

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.

F

THE DEPUTY SECRETARY OF STATE

WASHINGTON

June 1, 1976

MEMORANDUM FOR: Mr. L. William Seidman

From: Charles W. Robinson CR

Subject: Recommendation to the President Regarding Questionable Corporate Payments Abroad

We have reviewed the issues raised by the draft memorandum to the President on "Questionable Corporate Payments Abroad" and believe that, on balance, an initiative by the Administration calling for new disclosure legislation on corrupt practices should not be made at this time. While there may be strong arguments for such an initiative in political terms, in our judgment the substantive case is weak. The vigorous action already taken by U.S. agencies and congressional committees has had the effect of forcing substantial disclosure and of modifying corporate behavior. In addition, the disclosure provisions of the Security Assistance Act will, when that Act becomes law, require comprehensive disclosure of all payments made in connection with sales of defense items under the FMS program or under export license. These actions, together with our international initiatives, appear adequate to influence U.S. companies and to meet the expectations of the international community.

Not only is further disclosure legislation to curtail illicit payments by U.S. firms abroad unnecessary, it has the potential of causing serious damage to U.S. foreign relations. All U.S. regulation of payments by U.S. firms abroad inevitably involves U.S. authorities in the examination of the conduct of foreign officials in their own countries. As recent evidence has demonstrated, disclosures in the United States of alleged corruption abroad can threaten leaders and institutions in friendly foreign countries. Enactment of general disclosure legislation would tend to expand and to institutionalize this process. When deterrence fails and disclosure results, U.S. interests abroad can be seriously damaged.

We recognize the pressures that exist for further Presidential action to meet the expectations associated with the establishment of a task force and to blunt the criticisms of Congressional leaders such as Senators Church and Proxmire. However, in view of the likelihood that Congress will not complete action on legislation along the lines of the Church or Proxmire proposals this year, and the possibility that an Administration initiative might give impetus to such legislation, we recommend against proposing legislation at this time.

In the event the President should be disposed to propose further legislation at this time, we would favor legislation that would be aimed at simplifying the reporting requirements* imposed on U.S. business by the Government. U.S. firms doing business abroad could be required to report to a single, designated agency of the Executive Branch (possibly a commission operating within the Commerce Department) all payments made to foreign officials, directly or indirectly, in connection with business dealings with foreign governments. The designated agency would have authority to establish the form, timing and parameters of such reports by regulation. The reports would be made available to other interested agencies of the United States Government, including the IRS and SEC, and would also be made available, upon request, to committees of Congress which need the information for legislative purposes as well as to foreign governments under the procedures developed in the Lockheed case. The reporting firms would be invited to identify any information they believe to be proprietary data under Title 18 U.S.C. 1905 and that designation would be passed along to the agencies and the Congress which would make their own independent judgment as to the application of the statute. Under this approach, public disclosure would only be made in those cases where agency or congressional processes required it.

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* This objective is, of course, consistent with the President's program to simplify government regulation of business.

This procedure parallels that established by the new Security Assistance Act for both FMS and licensed commercial sales of defense articles and services. To avoid duplicating reports, the new legislation should supersede those provisions of the Security Assistance Act that are encompassed by it. We would not propose to repeal any existing authority of the IRS or SEC but would wish to leave open the possibility that those agencies might be satisfied with the reports furnished through the new procedure.

G

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.

H

THE SPECIAL REPRESENTATIVE FOR
TRADE NEGOTIATIONS
WASHINGTON

25 MAY 1976

MEMORANDUM FOR THE TASK FORCE ON QUESTIONABLE PAYMENTS ABROAD

FROM: Frederick B. Dent

SUBJECT: Recommendations to the President on Questionable Corporate Payments Abroad

The memorandum to the President setting forth the arguments on whether or not to propose a legislative initiative on the problem of questionable payments abroad clearly sets forth the issues involved. In my opinion, an Administration legislative initiative at this time would be advisable.

The approach outlined in the general specifications for a reporting and disclosure bill (Tab E) is reasonable. However, I do not believe it is possible to say at this time whether such legislation will be sufficient in the long run. Because of the likelihood of future developments in this area, I believe any actions taken at this time must be considered as an interim step and that the work of the Task Force should be continued. Further legislation or other initiatives may be necessary in the future and I, therefore, recommend that the Richardson Task Force continue to actively study and follow developments as they occur so that new initiatives can be developed and appropriate Administration responses can be quickly and thoughtfully prepared as necessary.

The Task Force memorandum comments on the development of "a foreign policy initiative" and the development of an international agreement on questionable corporate payments. The Office of the Special Representative for Trade Negotiations has been requested by Senate Resolution to negotiate such a code of conduct in the multilateral trade negotiations (MTN) now underway in Geneva. From the point of view of any possible conclusion of an agreement on this subject in the MTN,

in my opinion the legislation thus far proposed would not impair the negotiation of such an international code of conduct.

As to whether or not to endorse the "Hills Bill" proposed by the Chairman of the Security and Exchange Commission, it is my view that the concept of internal corporate disclosure should be favored. I would defer to other agencies more directly concerned as to the appropriateness of the enforcement mechanisms contained in that proposal.