The original documents are located in Box 25, folder “Questionable Corporate Payments Abroad” of the Ron Nessen Papers at the Gerald R. Ford Presidential Library.

THE SECRETARY OF COMMERCE
WASHINGTON, D.C. 20230

June 11, 1976

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

Dear Senator Proxmire:

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

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

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

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

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

(1) The Questionable Payments Problem

(2) Relevant Current Law

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

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

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

(6) Conclusion

(1) <u>The Questionable Payments Problem</u>

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

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

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

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

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

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

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

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

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

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

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

-- <u>The problem of adverse impact on multinational corporations</u>. Exposure of the questionable payments problem has exacerbated concerns about multinationals' accountability to the national legal constraints of both home and foreign "host" countries. It has raised the level of concern that such enterprises have the capacity to conduct independent foreign policy including the suborning of host country political and governmental processes. Increased anxiety regarding multinationals' legal and political accountability could lead to national and international "backlash" in the form of laws or regulations which could seriously handicap such enterprises with resulting detriment to the United States economy, to world commerce and to the pattern of world development.

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

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

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

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

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

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

(2) Relevant Current Law

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

(a) Securities Laws

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

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

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

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

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

The courts have not yet addressed the issue of whether and under what circumstances questionable payments made by a U.S. corporation to foreign officials would be material information which should be disclosed publicly.*/ Thus, the SEC, through its enforcement program and its voluntary disclosure program,**/ has been the sole arbiter as to the materiality of such payments.

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

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

---

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

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

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

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

(b) Tax Laws

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

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

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

(c) Antitrust Laws

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

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

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

(d) Criminal Statutes and Other Laws

Present federal law does not prohibit, per se, bribery or similar questionable practices by American companies or persons with respect to foreign officials, companies, or persons in furtherance of commercial gain. However, criminal or civil liability may attach from collateral false reporting practices. Most particularly, false statements filed with federal agencies may constitute a violation of 18 U.S.C. § 1001 (1970) or other specialized false statement statutes. Relevant provisions are summarized below:

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

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

(iii) State Department Export Licenses. Registered dealers may sell for export items on the U.S. Munitions List provided an export license is obtained from the State Department (22 C.F.R. § 121-27). The application forms for such licenses require that the cost be listed, but without a breakdown. The International Security Assistance and Arms Export Control Act of 1976 (which was vetoed on May 7, 1976, but then reintroduced in altered form as S. 3439 and H.R. 13680) would add a new provision to the Foreign Military Sales Act, 22 U.S.C. § 2751 et seq. (1970), to require reports to the Secretary of State, pursuant to regulations issued by him, concerning political contributions, gifts, commissions and fees paid by any person in order to secure sales under Section 22 of the Foreign Military Sales Act. No such payment could be reimbursed under any U.S. procurement contract unless it was reasonable, allocable to the contract, and not made to someone who secured the sale in question through improper influence. Similar reporting requirements would be required with respect to commercial sales of defense articles or defense services licensed or approved under Section 38 of the Foreign Military Sales Act. All information reported and records kept would be available to Congress upon request and to any authorized U.S. agency. It should be noted that even at the present time, the Defense Department requires disclosure of all fees and commissions paid in the sale of military equipment pursuant to the Foreign Military Sales (FMS) program. False statements made pursuant to these disclosure requirements would constitute possible violations of 18 U.S.C. § 1001 (1970).

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

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

(e) Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) <u>The Current Administration Approach to Treatment of the Problem</u>

The current Administration approach is comprised of the following:

(a) <u>Vigorous enforcement of current law (as summarized in (2) above)</u>.

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

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

(b) <u>Pursuit of international agreements</u>.

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

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

"Enterprises should:

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

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

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

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

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

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

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

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

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

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

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

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

(c) <u>Further policy development and coordination</u>.

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

In establishing the Task Force, the President said:

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

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

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

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

(4) <u>Alternative Approaches Which Might Supplement the Current Administration Approach</u>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(5) Recommendations for Additional Legislation

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

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

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

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

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

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

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

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

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

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

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

-- prohibit falsification of corporate accounting records;

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

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

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

(6) Conclusion

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

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

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

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

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

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

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

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

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

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

Sincerely,

Elliot L. Richardson

8/2/76

THE WHITE HOUSE

WASHINGTON

ACTION

August 2, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: L. WILLIAM SEIDMAN LWS

SUBJECT: Presidential Message on Questionable Payments Legislation

The Task Force on Questionable Corporate Payments Abroad has prepared disclosure legislation on questionable corporate payments in accordance with your decisions of June 10 and July 20. The proposed legislation has completed the OMB legislative clearance process and is scheduled to be transmitted to the Congress on Tuesday, August 3.

A Presidential message to the Congress on the legislation was prepared by the Department of Commerce and has been reviewed by OMB, NSC, Jack Marsh, Max Friedersdorf, Jim Cannon, the Counsel's Office (Ed Schmults), Mike Duval, and the Editorial Office (Doug Smith) and has been revised to incorporate their suggestions.

Recommendation: That you sign both originals of the message to the Congress on questionable payments legislation. (Tab A)

Attachment