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FOREIGN CORRUPT PRACTICES

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Mr. Staggers, from the committee of conference,

submitted the following

CONFERENCE REPORT

[To accompany S. 305]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 305) to amend the Securities Exchange Act of 1934 to require issuers of securities registered pursuant to section 12 of such Act to maintain accurate records, to prohibit certain bribes, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

[language of bill omitted]

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JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 305) to amend the Securities Exchange Act of 1934 to require issuers of securities registered pursuant to section 12 of such Act to maintain accurate records, to prohibit certain bribes, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the, action agreed upon

by the managers and recommended in the accompanying conference report:

The House amendment to the text of the bill struck out all of the Senate bill after the enacting clause and inserted a substitute text.

The Senate recedes from its disagreement to the amendment of the House with an amendment which is a substitute for the Senate bill and the House amendment. The differences between the Senate bill, the House amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

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A. Corporate Bribery of Foreign Officials

1. title of the act - foreign corrupt practice act

The Senate bill established the title of Title I of the Act as the "Foreign Corrupt Practices Act of 1977".

[page 10] The House amendment established the title of the Act as the "Unlawful Corporate Payments Act of 1977".

The House receded to the Senate.

2. accounting

a. Integrity of accounting records and reports

The Senate bill contained a provision which required issuers subject to the jurisdiction of the Securities and Exchange Commission (the "SEC") to make and keep books, records, and accounts which accurately and fairly reflect the transaction and disposition of the assets of the issuer.

The House amendment contained no provision.

The House receded to the Senate with an amendment requiring such books, records and accounts to be made and maintained accurately and fairly "in reasonable detail." The conference committee adopted the "in reasonable detail" qualification to the accurate and fair requirement in light of the concern that such a standard, if unqualified, might connote a degree of exactitude and precision which is unrealistic. The amendment makes clear that the issuer's records should reflect transactions in conformity with accepted methods of recording economic events and effectively prevent off-the-books slush funds and payments of bribes.

b. Systems of accounting controls

The Senate bill contained a provision requiring issuers to devise and maintain adequate systems of internal accounting controls sufficient to provide reasonable assurances that, among other things, transactions are recorded as necessary to maintain accountability for assets.

The House amendment contained no provision.

The House receded to the Senate with an amendment deleting the word "adequate." Since the precise requirements of the system of internal accounting controls to be maintained by the issuer are set forth in specific terms in the statute, the term adequate was deemed superfluous.

c. Prohibition, on falsification of books and records; false statements to accountants

The Senate bill contained provisions to make it unlawful for (1) any person knowingly to falsify any book, record, or account required to be made for any accounting purpose, and (2) any person knowingly to make a materially false or misleading statement, or to omit to state or cause another person to omit any material fact necessary in order to make statements to an accountant not misleading.

The House amendment contained no comparable provisions because the SEC had already published for comment rules designed to accomplish similar objectives under its existing authority.

The Senate receded to the House. Although these provisions were supportive of the basic accounting section, the use of the "knowingly" standard has become involved in an issue never intended to be raised or resolved by the Senate bill - namely, whether or not the inclusion or deletion of the word "knowingly" would or would not affirm, expand, or overrule the decision of the Supreme Court in *Ernst & Ernst v. Hochfelder* (425 U.S. 185). As stated clearly in the Com[page 11]mittee Report on S. 305, these provisions were to be, severable from the rest of the securities laws.

Under the circumstances, the conferees determined the best method of proceeding was to retain only new section 13(b)(2) of the Securities Exchange Act of 1934. The conferees further decided that this legislation should not be converted into a debate on the important issues raised by the *Hochfelder* decision.

In deleting the Senate provisions, the conferees intend that no inference should be drawn with respect to any rulemaking authority the SEC may or may not have under the securities laws.

• National Security

The Senate bill contained provisions which excluded from any duty or liability under paragraph (2) any person acting in cooperation with and at the specific written directive of any Federal agency or department responsible for matters concerning national security. Such directives were to be executed with specificity and to expire annually unless renewed in writing. The President of the United States was directed to review such directives annually and to certify that such directives involved classified information and were in conformity to applicable statutes and Executive orders.

The House amendment contained no provision.

The House receded to the Senate with an amendment. The amendment required that each directive be issued only pursuant to Presidential authority to issue such directives.

In addition, the amendment provides that a summary of all such directives shall be submitted annually to the appropriate intelligence oversight committees.

The conferees intend to make clear, as set forth in the Senate provision, that the only matters to be excluded from the requirements of paragraph (2) are those which would result, or would be likely to result, in the disclosure of information which has been classified by the appropriate department or agency for protection in the interests of the national security and then only to the extent that such information is specifically related to the person's lawful cooperation.

3. payment to officials

a. Prohibitions against certain payments to foreign officials by issuers subject to SEC jurisdiction.

The Senate bill amended the Securities Exchange Act of 1934 (the "Exchange Act") to prohibit the corrupt use of the mails or other means of interstate commerce by any issuer of securities registered with the SEC pursuant to section 12(b) or required to file reports pursuant to section 15(d) of the Exchange Act as well as any officer, director, employee or stockholder acting on behalf of the issuer, in furtherance of an offer, payment, promise to pay, or authorization of the payment of money or anything else of value to any official of a foreign government or institution thereof, any foreign political party, any candidate for foreign political office, or any other person which the issuer knows or has reason to know will make such offer, promise or gift. The scope of the prohibition was limited by the requirement that the offer, promise, authorization, payment, or gift must have as a purpose inducing the recipient to use his influence with [page 12] the foreign government or instrumentality, influencing the enactment or promulgation of legislation or regulations of that government or instrumentality or refraining from performing any official responsibilities, so as to direct business to any person, maintain an established business opportunity with any person or divert a business opportunity from any person.

The House amendment was similar to Senate bill; however, the scope of the House amendment was not limited by the "business purpose" test, nor did it contain the "in furtherance of" requirement.

The conference substitute includes provisions found in both the Senate bill and the House amendment. In section 30A(a), the conferees adopted the identical provisions of both bills with the addition of the Senate "in furtherance of" language. The conference substitute prohibits corporations subject to SEC jurisdiction from making corrupt use of the mails or other means of interstate commerce in furtherance of an offer, payment, promise to pay or authorization of payment of anything of value, to any foreign official, foreign political party, candidate for foreign political office or any other person which the issuer knows or has reason to know will make such offer, promise or payment. The adoption of the Senate "in furtherance of" language makes clear that the use of interstate commerce need only be in furtherance of making the corrupt payment.

By incorporating provisions from both bills, the conferees clarified the scope of the prohibition by requiring that the purpose of the payment must be to influence any act or decision of a foreign official (including a decision not to act) or to induce such official to use his influence to affect a government act or decision so as to assist an issuer in obtaining, retaining or directing business to

any person.

1. Definitions. - The Senate bill contained no definitional section. The House amendment defined the terms "control" and "foreign official." "Control" was defined as the power to exercise a controlling influence over the management or policies of an issuer. Any person who owned beneficially, either directly or through one or more controlled issuers, more than 50 percent of the voting securities of an issuer, was presumed to control such issuer and any person who did not own more than 50 percent of the voting securities of an issuer was presumed not to have such control.

"Foreign official" was defined to mean any officer or employee of a foreign government or any department, agency or instrumentality thereof, or any person acting in an official capacity for or on behalf of such government, department, agency or instrumentality. The term did not include employees whose duties were primarily ministerial or clerical.

The Senate receded to the House concerning the definition of "foreign official" and the House receded to the Senate concerning the definition of "control."

2. Penalties. - The Senate bill provided fines of not more than \$500,000 for willful violations by issuers and penalties of up to \$10,000 and/or 5 years imprisonment for willful violations by any officer, director, employee, or shareholder thereof.

The House amendment provided a fine of not more than \$1 million for knowing and willful violations by an issuer. Penalties for knowing and willful violations by officers, director, agents, or natural persons in control of any issuer were similar to those provided in the Senate bill. However, an agent's liability was predicated upon a finding that the issuer violated the section. Finally, the House amendment prohibited an issuer from paying either directly or indirectly any fine imposed under this section upon any officer, director, agent, or natural person in control of such issuer.

The conference substitute adopts the maximum corporate penalty in the House amendment and the penalties applicable to officers, directors, employees, and stockholders acting on behalf of the issuer as provided in the Senate bill. The conference substitute incorporates the "agent" provisions of the House amendment. To provide additional protection for agents and employees, the conference substitute predicates an employee's or agent's liability upon finding that the issuer has violated the section. As in the House amendment, the conference substitute prohibits an issuer from paying, either directly or indirectly, any fine imposed upon any individual under this section.

b. Prohibition against certain payments to foreign officials by domestic concern

Both the Senate bills and the House amendment applied their respective prohibitions and penalties from the previous sections to domestic concerns other than those subject to SEC jurisdiction.

The conference substitute parallels the agreement reached by the conferees with respect to the provision, governing issuers.

1. Definitions.- The Senate bill defined several terms used in this section. "Domestic concern" is defined as an individual who is a citizen or national of the United States as well as any corporation, partnership, association, joint-stock company, business trust, or unincorporated organization which is owned or controlled by individuals who are citizens or nationals of the United States and which has its principal place of business in the United States or which is organized under the laws of a State or any territory, possession or commonwealth of the United States.

The Senate bill restated the definition of interstate commerce in the Securities Exchange Act of 1934.

The House amendment defined the terms "control" and "foreign official" as previously discussed. In addition, the House amendment defined the term "domestic concern" as any corporation, partnership, association, joint-stock company, business trust, unincorporated organization or sole proprietorship (1) which is owned or controlled by individuals who are citizens or nationals of the United States, (2) which has its principal place of business in the United States, or (3) which is organized under the laws of a State of the United States or any territory, possession, or commonwealth of the United States. The House amendment extended the coverage of the section to U.S. controlled foreign subsidiaries.

The Senate receded to the House concerning the definition of "foreign official." The House receded to the Senate concerning the definition of control. The House receded to the Senate in the definition of "domestic concern" with an amendment to make clear that any company having a principal place of business in the United States would be subject to the bill.

[page 14] In receding to the Senate, the conferees recognized the inherent jurisdictional, enforcement, and diplomatic difficulties raised by the inclusion of foreign subsidiaries of U.S. companies in the direct prohibitions of the bill. However, the conferees intend to make clear that any issuer or domestic concern which engages in bribery of foreign officials indirectly through any person or entity would itself be liable under the bill. The conferees recognized that such jurisdictional, enforcement, and diplomatic difficulties may not be present in the case of individuals who are U.S. citizens, nationals, or residents. Therefore, individuals other than those specifically covered by the bill (e.g., officers, directors, employees, agents, or stockholders acting on behalf of an issuer or domestic concern) will be liable when they act in relation to the affairs of any foreign subsidiary of an issuer or domestic concern if they are citizens, nationals, or residents of the United States. In addition, the conferees determined that foreign nationals or residents otherwise under the jurisdiction of the United States would be covered by the bill in circumstances where an issuer or domestic concern engaged in conduct proscribed by the bill.

2. Department of Justice injunctive power. - The House amendment authorized the Department of Justice to enforce violations of the bill by domestic concerns through civil injunctions.

The Senate bill contained no provision. The Senate receded to the House.

b. disclosure

Title II of the Senate bill, entitled "The Domestic and Foreign Investment Improved Disclosure Act of 1977", amended the ownership disclosure and reporting requirements of the Securities Exchange Act of 1934. The House amendment contained no similar provisions.

The House receded to the Senate with an amendment to new section 13(g). The purpose of the amendment is twofold. First, the amendment deleted section 13(g)(1)(C) to make clear that the SEC may not require extensive historical ownership and transaction information. Second, the amendment deleted section 13(g)(1)(D) which the Conferees agreed was unnecessary in view of the Commission's general grant of rulemaking authority under section 13(g).

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