95th Congress 1st Session	} HOUSE OF REPRESENTATIVES {	Report No. 95-640

UNLAWFUL CORPORATE PAYMENTS ACT OF 1977

September 28, 1977 - Ordered to be printed

Mr. Staggers, from the committee of conference,

submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany H.R. 3815]

[Including cost estimate of the Congressional Budget Office]

The Committee on Interstate and Foreign Commerce to whom was referred the bill (H.R. 3815) to amend the Securities Exchange Act of 1934 to make it unlawful for an issuer of securities registered pursuant to section 12 of such Act or an issuer required to file reports pursuant to section 15(d) of such Act to make certain payments to foreign officials and other foreign persons, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment strikes out all after the enacting clause and inserts in lieu thereof the following:

[*language of bill omitted]*

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PURPOSE OF THE LEGISLATION

H.R. 3815 is designed to prohibit the corrupt use of the mails or other means and instrumentalities of interstate commerce by U.S. corporations, directly or indirectly, to bribe foreign officials, foreign political parties, or candidates for foreign political office. The bill's coverage does not extend to so-called grease or facilitating payments.

NEED FOR THE LEGISLATION

More than 400 corporations have admitted making questionable or illegal payments. The companies, most of them voluntarily, have reported paying out well in excess of $300 million in corporate funds to foreign government officials, politicians, and political parties. These corporations have included some of the largest and most widely held public companies in the United States; over 117 of them rank in the top Fortune 500 industries. The abuses disclosed run the

gamut from bribery of high foreign officials in order to secure some type of favorable action by a foreign government to so-called facilitating payments that allegedly were made to ensure that government functionaries discharge certain ministrial [sic] or clerical duties. Sectors of industry typically involved are: drugs and health care; oil and gas production and services; food products; aerospace, airlines and air services; and chemicals.
The payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for foreign political office is unethical. It is counter to the moral expectations and values of the American public. But not only is it unethical, it is bad business as well. It erodes public confidence in the integrity of the free market system. It short-circuits the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service, or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products. In short, it rewards corruption instead **{5}** of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business.

Bribery of foreign officials by some American companies casts a shadow on all U.S. companies. The exposure of such activity can damage a company's image, lead to costly lawsuits, cause the cancellation of contracts, and result in the appropriation of valuable assets overseas.

Corporate bribery is also unnecessary. The Secretary of Treasury testified before the Subcommittee on Consumer Protection and Finance:

Paying bribes. . . is simply not necessary to the successful conduct of business in the United States or overseas. My own experience as Chairman of the Bendix Corp. was that it was not necessary to pay bribes to have a successful export sales program.

Nor is Secretary Blumenthal's experience unique. Former SEC Chairman Hills testified:

Indeed, we find in every industry where bribes have been revealed that companies of equal size are proclaiming that they see no need to engage in such practices.

Despite the fact that the payments which this bill would prohibit are made to foreign officials, in many cases the resulting adverse competitive affects are entirely domestic. Former Secretary of Commerce Richardson pointed out that in a number of instances, "payments have been made not to "outcompete" foreign competitors, but rather to gain an edge over other U.S. manufacturers."

Corporate bribery also creates severe foreign policy problems for the United States. The revelation of improper payments invariably tends to embarrass friendly governments, lower the esteem for the United States among the citizens of foreign nations, and lend credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations. For example, in 1976, the Lockheed scandal shook the Government of Japan to its political foundation and gave opponents of close ties between the United States and Japan an effective weapon with which to drive a wedge between the two nations. In another instance, Prince Bernhardt of the Netherlands was forced to resign from his official position as a result of an inquiry into allegations that he received $1 million in pay-offs from Lockheed. In Italy, alleged payments by Lockheed, Exxon, Mobil Oil, and other corporations to officials of the Italian Government eroded public support for that Government and jeopardized U.S. foreign policy, not only with respect to Italy and the Mediterranean area, but with respect to the entire NATO alliance as well.

Finally, a strong antibribery statute would actually help U.S. corporations resist corrupt demands. According to former Gulf Oil Co., Chairman Bob Dorsey:

If we could cite our law which says we just may not do it, we would be in a better position to resist these pressures and refuse those requests.

{6} NATURE OF THE LEGISLATION

The committee considered two possible approaches for curbing the type of bribery payments defined in sections 2 and 3. One approach is to require that these payments be publicly disclosed and criminal penalties imposed for failure to disclose. The other approach, which the committee adopted in H.R. 3815, is to outlaw the payoffs with criminal sanctions.

The Subcommittee on Consumer Protection and Finance received extensive testimony on both approaches during the 94th and 95th Congresses. There emerged a clear consensus that foreign bribery is a reprehensible activity and that action must be taken to proscribe it. After carefully considering all the testimony adduced, the committee concluded that it should be outlawed rather than legalized through disclosure. The committee believes the criminalization approach to be the most effective deterrent, the least burdensome on business, and no more difficult to enforce than disclosure.

The committee determined that disclosure can never be an effective deterrent because the anticipated benefit of making a bribe, such as winning a multimillion dollar contract, generally exceeds the adverse effect, if any, of disclosing 1 year later a lump sum figure without names, amounts or even countries. Criminalization, on the other hand, has proven an effective deterrent. Although a vast number of questionable corporate payments have been disclosed, subsequent management changes have been attendant only to disclosures of domestic bribery. The reason is obvious: domestic bribes are clearly illegal whereas foreign bribes are not.

The committee also found that criminalization is no more difficult to enforce than disclosure. Both approaches involve proving beyond a reasonable doubt the same factual and legal elements. Most importantly, though, criminalization is far less burdensome on business. Most disclosure proposals would require U.S. corporations doing business abroad to report all foreign payments including perfectly legal payments such as for promotional purposes and for sales commissions. A disclosure scheme, unlike outright prohibition, would require U.S. corporations to contend not only with an additional bureaucratic overlay but also with massive paperwork requirements.

COMMITTEE CONSIDERATION

The committee's consideration of improper overseas payments and related abuses by some American corporations commenced during the 94th Congress. The legislative proposals considered during the 94th Congress were based, in part, on an extensive "Report on Questionable and Illegal Corporate Payments and Practices" that was issued by the SEC on May 12, 1976. The SEC Report summarized that agency's enforcement efforts with respect to such corporate payments under existing law and revealed the widespread nature of the practice of questionable corporate foreign payments. On September 21 and 22, 1976, the Subcommittee on Consumer Protection and Finance held hearings on several bill to prohibit such payments including H.R. 15481, H.R. 13870, H.R. 13953, and S. 3664. Testimony was presented by the Chairman of the Securities and Exchange Commission Roderick Hills, **{7}** representatives from the Departments of State, Treasury, and Commerce, Representative John E. Moss, Chairman of the Subcommittee on Oversight and Investigations, Representative Solarz, Representative Harrington, the American Institute of Certified Public Accountants, public interest groups and the Bar. As a result of end of session pressures, the Subcommittee was unable to report the bill out prior to the adjournment of the 94th Congress.

In the 95th Congress, the Subcommittee on Consumer Protection and Finance held hearings on April 20 and 21, 1977, which focused on the bills H.R. 1602 (Messrs. Murphy and Solarz) and H.R. 3815 (Mr. Eckhardt). The subcommittee heard from Secretary of the Treasury Blumenthal, Chairman of the Securities and Exchange Commission Williams, Representative Moss, Representative Harrington, public interest groups and the bar. The subcommittee reported out H.R. 3815 with amendments on May 12, 1977. The full committee reported the bill by voice vote on September 20, 1977, a quorum being present.

SECTION BY SECTION ANALYSIS

Section. 1. Short Title

This title may be cited as the "Unlawful Corporate Payments Act of 1977".

Section. 2. Prohibition Against Certain Payments to Officials by Registered Companies

This section of the bill, which enacts a new section 30A of the Securities Exchange Act of 1934, prohibits the corrupt use of the mails or other means and instrumentalities of interstate commerce to offer, pay or promise to pay any money, or to offer, or give, or promise to give anything of value to any foreign official, any foreign political party or any candidate for foreign political office. The new provision would also prohibit the authorization of such payments or gifts. The prohibition in section 2 applies to any issuer of securities registered with the Commission pursuant to section 12(b) of the Securities Exchange Act or required to file reports with the Commission pursuant to section 15(d) of the act. Section 2 also applies to any officer, director, employee, or agent of such an issuer, and to any natural person in control of such an issuer, who may authorize, order or carry out, any act or practice constituting a violation of this section. However, an agent of the issuer shall not be subject to the sanctions of section 2 unless the issuer is found to have violated the section.

The term "control" is defined as the power to exercise a controlling influence over the management or policies of a domestic concern. Any person who owns beneficially, either directly or through one or more controlled domestic concerns, more than 50 per centum of the voting securities of a domestic concern, shall be presumed to control such corporation and any person who does not so own more that 50 percent of the voting securities of such corporation shall be presumed not to have such control.

H.R. 3815 broadly prohibits transactions that are corruptly intended to induce the recipient to use his or her influence to affect any act or decision of a foreign official, foreign government or an instrumentality of a foreign government. The word "corruptly" is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position; for example, wrongfully to direct business to the payor or his client, to obtain preferential legislation or regulations, or to induce a foreign official to fail to perform an official function. The word "corruptly" connotes an evil motive or purpose such as that required under 18 U.S.C. 201(b) which prohibits domestic bribery. As in 18 U.S.C. 201(b), the word "corruptly" indicates an intent or desire wrongfully to influence the recipient. It does not require that the act he fully consummated or succeed in producing the desired outcome.

Facilitating payments

The language of the bill is deliberately cast in terms which differentiate between such payments and facilitating payments, sometimes called "grease payments". In using the word "corruptly", the committee intends to distinguish between payments which cause an official to exercise other than his free will in acting or deciding or influencing an act or decision and those payments which merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action. In defining "foreign official", the committee emphasizes this crucial distinction by excluding from the definition of "foreign official" government employees whose duties are essentially ministerial or clerical.

For example, a gratuity paid to a customs official to speed the processing of a customs document would not be reached by the bill. Nor would it reach payments made to secure permits, licenses, or the expeditious performance of similar duties of an essentially ministerial or clerical nature which must of necessity by performed in any event.

While payments made to assure or to speed the proper performance of a foreign official's duties may be reprehensible in the United States, the committee recognizes that they are not necessarily so viewed elsewhere in the world and that it is not feasible for the United States to attempt unilaterally to eradicate all such payments. As a result, the committee has not attempted to reach such payments. However, where the payment is made to influence the passage of law, regulations, the placement of government contracts, the formulation of policy or other discretionary governmental functions, such payments would be prohibited.

The committee fully recognizes that the proposed law will not reach all corrupt payments overseas. For example, Sections 2 and 3 would not permit prosecution of a foreign national who paid a bribe overseas acting entirely on his own initiative. The committee notes, however, that in the majority of bribery cases investigated by the SEC some responsible official or employee of the U.S. parent company had knowledge of the bribery and either explicitly or implicitly approved the practice. Under the bill as reported, such persons could be prosecuted. The concepts of aiding and abetting and joint participation would apply to a violation under this bill in the same manner in which those concepts have always applied in both SEC civil actions and in implied private actions brought under the securities laws generally.

{9}*SEC enforcement*

In the case of companies that currently file reports with the Securities and Exchange Commission, the Committee concluded that the Commission should retain investigative jurisdiction as to the prohibitions against corrupt payments in section 2 of the bill. This has been accomplished by providing that section 2 would amend the Securities Exchange Act of 1934. In the case of domestic concerns not otherwise subject to the Commission's jurisdiction, responsibility for the criminal prosecution of violations of the bill rests solely with the Justice Department.

Since its creation in 1934, the Commission, through its own attorneys, has been solely responsible for the conduct of all civil litigation, both trial and appellate, to which the Commission is a party. This arrangement has been effective and fruitful in insuring the proper discharge of the Commission's statutory mandate to protect the investing public. Accordingly, the committee intends that this arrangement shall not be altered.

The committee found that the SEC was in a far superior position to investigate reporting companies alleged to have bribed foreign officials because of its immediate access to those company's [sic] books and Commission filings. Further, retaining SEC jurisdiction in the case of reporting companies will avoid a costly duplication of effort which would result if enforcement of the antibribery statute were made the sole responsibility of the Justice Department.

Most importantly, the committee recognized the SEC's singular expertise at ferreting out foreign bribery. It was the Commission alone that followed up on the finding of the Watergate Special Prosecution Force in early 1975. On the other hand, it was not until late 1976 that the Justice Department formed a task force to investigate allegations of foreign corporate payments and to review all materials relating to such activities generated by the SEC and congressional committees.

A further reason for vesting investigative jurisdiction in the SEC with respect to section 2 arises from the Commission's well-deserved reputation for independence in its efforts. The committee would prefer to have investigations such as these, which may be politically sensitive, conducted by an independent agency responsive to Congress rather than the Executive branch.

Finally, the committee believes that, by assigning the SEC enforcement responsibilities with respect to Section 2, it will strengthen the Commission's ability to enforce compliance with existing requirements of the securities laws. Although there may be practical impediments to enforcement in individual cases, proof of bribery and other white collar crimes is often difficult to obtain in domestic cases. Moreover, the Commission's enforcement efforts under existing law demonstrate that it is possible to investigate successfully improper foreign payments made on behalf of American corporations.

The SEC's responsibilities would extend to conducting investigations, bringing civil actions, **{10}** commencing administrative proceedings if appropriate,[(1)] defending lawsuits against the Commission and its staff arising out o f the Commission's obligations under this Act, and referring cases to the Justice Department for criminal prosecution where warranted, just as the Commission currently does with respect to its existing responsibilities under the federal securities laws. The Commission, of course, will retain the power to seek all of the existing equitable remedies that have been recognized by the courts under the securities laws, and the Committee anticipates that the commission will continue to tailor remedies to fit the circumstances of specific cases.

Traditionally, there has been a close working relationship between the Justice Department and the SEC. The Committee fully expects that this cooperation between the two agencies will continue with respect to the enforcement of the provisions of this bill.

The Committee intends that the courts shall recognize a private cause of action based on this legislation, as they have in cases involving other provisions of the Securities Exchange Act, on behalf of persons who suffer injury as a result of prohibited corporate bribery. The recognition of such a private cause would enhance the deterrent effect of this legislation and provide a necessary supplement to the enforcement efforts of the Commission and the Department of Justice.

In addition, the Committee intends that no proof of *scienter* be required in a Commission enforcement action brought under the provisions of this bill, or of any other provision of the federal securities laws. Although the Supreme Court has held that private plaintiffs seeking to recover monetary damages for violations of Securities Exchange Act Rule 10b-5, 17 CFR 240.10b-5, must establish that the defendant acted with *scienter*, the appellate courts quite properly have never required proof of *scienter* in any of the Commission's own enforcement proceedings. *Compare Ernst & Ernst v. IIochfelder*, 425 U.S. 185 (1976) with *Securities and Exchange Commission v. World Radio Mission, Inc.,* 544 F.2d 535 (1st Cir. 1976); *Securities and Exchange Commission v. Management Dynamics, Inc.,* 515 F.2d 801 (2d Cir. 1975); *Securities and Exchange Commission v. Spectrum, Ltd.,* 489 F.2d 535 (2d Cir. 1973). In the context of an SEC action to enjoin future violations of the securities laws, a defendant's state of mind should make no difference. The harm to the public is the same regardless of whether or not the violative conduct involved *scienter*. Because an SEC enforcement action is designed to protect the public against the recurrence of violative conduct, and not to punish a state of mind, this Committee intends that *scienter* is not an element of any Commission enforcement proceeding. In so stating, we affirm the views expressed in 1975, when the Congress considered the Securities Acts Amendments of 1975. See S. Rep. 94-75, 94th Cong., 1st Sess. (1975) at 76.

The bill as reported provides that any officer, director or agent of an issuer or a domestic business concern, or any natural person in con- **{11} -**trol of such a corporation, must be found to have violated the law "knowingly and willfully." Consistent with the often-reiterated holdings of the courts that have interpreted a similar standard in the few places it is included in the federal securities laws, the knowledge required is merely that a defendant be aware that he is committing the act which constitutes the violation - not that he knows his conduct is illegal or has any specific intent to violate the law. *See, e.g., Tager v. Securities and Exchange Commission,* 344 F.2d 5, 8 (2d Cir. 1965); *Gearhardt & Otis, Inc. v. Securities and Exchange Commission,* 348 F. 2d 798, 802-803 (D.C. Cir. 1965); *Authur Lipper Corporation, et al., v. Securities and Exchange Commission,* 547 F.2d 171, 181 (2d Cir. 1976). Indeed, even in the criminal context, neither knowledge of the law violated nor the intention to act in violation of the law is generally necessary for conviction, and the Committee does not intend that either be required here in either civil or criminal proceedings. *See Ellis v. United States,* 206 U.S. 246, 257 (1907).

The penalties for each violation of section 2 would be a fine of up to $10,000 and/or imprisonment for up to 5 years; but in the case of a corporation a fine of up to $1 million could be imposed.

Liability of agents.

The bill specifically provides that an agent of an issuer, as distinguished from an officer, director or other person in a policymaking position, shall not be subject to the penalties of the bill until it is shown in a separate proceeding or in the proceeding against such agent that the issuer itself was in violation of the provisions of the bill. This provision reflects the Committee's concern that in some instances a low level employee or agent of the corporation - perhaps the person who is designated to make the payment - might otherwise be made the scapegoat for the corporation. The essential elements of these prosecutions will presumably take place on foreign soil. Such an agent or employee unlike the corporation possibly would not have the resources, legal or financial, to provide witnesses necessary to his defense. Accordingly, the practical effect of sections 2(c)(2) and 3(c)(2) is to require the corporation to bring in witnesses to rebut the contention of its involvement. These witnesses would then be available to the agent in his defense.

PROHIBITION AGAINST CERTAIN PAYMENTS TO OFFICIALS BY OTHER

DOMESTIC CONCERNS

Section 3. This section subjects any domestic business concern, other than one subject to the reporting requirements of the Securities Exchange Act, any officer, director or agent of such a domestic business concern or any natural person in control of such a domestic business concern to the same prohibitions and penalties that are set forth in section 2. However, an agent of the domestic concern shall not be subject to the sanctions of section 3 unless the domestic concern is found to have violated the section.

The term "domestic concern" is defined in the bill to mean any corporation, partnership, association, joint-stock company, business trust, unincorporated organization or sole proprietorship, which is owned or controlled by individuals who are citizens or nationals of the **{12}** United States, which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or any territory, possession, or commonwealth of the United States.

By so defining domestic concern, the committee intends to reach not only all U.S. companies other than those subject to SEC jurisdiction, but also foreign subsidiaries of any U.S. corporation. The committee found it appropriate to extend the coverage of the bill to non-U.S. based subsidiaries because of the extensive use of such entities as a conduit for questionable or improper foreign payments authorized by their domestic parent.[(2)]

The committee believes this extension of U.S. jurisdiction to so-called foreign subsidiaries is necessary if the legislation is to be an effective deterrent to foreign bribery. Failure to include such subsidiaries would only create a massive loophole in this legislative scheme through which millions of bribery dollars will continue to flow. The Committee believes that the qualified extraterritorial application of this bill clearly supported by the legislative principles of international law.[(3)]

The term "control" is defined as the power to exercise a controlling influence over the management or policies of a domestic concern. Any person who owns beneficially, either directly or through one or more controlled domestic concerns, more than 50 per cent of the voting securities of a domestic concern, shall be presumed to control such corporation and any person who does not so own more than 50 percent of the voting securities of such corporation shall be presumed not to have such control.

The term "interstate commerce" is defined to mean trade, commerce, transportation, or communication among the several States, or between any foreign country and any State, or between any State and any place or ship outside thereof. The term includes the intrastate use of a telephone or other interstate means of communication and the intrastate use of any other interstate instrumentality.

Violations of the prohibition in section 3 by domestic concerns would be investigated and prosecuted by the Justice Department. Since the Securities Exchange Act of 1934 provides the SEC with authority to enforce its provisions including those of section 2 by civil injunction, the committee provided similar authority for the Justice Department to enforce the provisions of this sections [sic].

The penalties for each violation of this provision would be a fine of up to $10,000 or imprisonment for up to 5 years, or both, but in the case of a corporation a fine of up to $1 million could be imposed.

[CBO estimate omitted]

DEPARTMENT OF STATE
Washington, D.C., April 20, 1977.

{16} Hon. Harley O. Staggers.
Chairman, Committee on Interstate and Foreign Commerce.

Dear Mr. Chairman: The Secretary has asked me to reply to your letter of March 7, requesting the Department of State's views on H.R. 3815, a bill to amend the Securities Exchange Act to make it unlawful for specified persons to make certain payments to foreign officials and other foreign persons.

The administration has carefully reviewed the problem of foreign bribery, and has made its views known through Secretary of the Treasury Michael Blumenthal's testimony on S. 305 before the Senate Banking Committee on March 16, 1977. The Administration agrees with the aims of both S. 305 and H.R. 3815 and is in the process of suggesting improvements to them. The Department of State is hopeful that a law can be passed which will aid the Government's efforts to deter bribery of public officials abroad.

The Office of Management and Budget advises that from the standpoint of the administration's program there is no objection to the submission of this report.

Sincerely,

Douglas J. Bennet, Jr.,
Assistant Secretary for
Congressional Relations.

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DEPARTMENT OF JUSTICE,
Washington, D.C., April 20, 1977

Hon. Harley O. Staggers,
Chairman, Interstate and Foreign Commerce Committee, House of Representatives, Washington D.C.

Dear Mr. Chairman: As previously indicated to the Senate Banking Committee, the Administration firmly supports legislation which would proscribe the bribery of foreign public officials by American businesses and their representatives. Accordingly, we are in complete accord with the aims and objectives of H.R. 3815 which would directly criminalize such illicit practices. Secretary Blumenthal will be testifying before the Committee on H.R. 3815 and will fully elaborate the Administration's position with respect to the issue of foreign payments. The purpose of this letter is to directly address our specific concerns regarding the enforcement provisions of H.R. 3815 and to point out certain apparent weaknesses of the Bill.

As the Department that will be ultimately responsible for criminally prosecuting any violations of H.R. 3815, we are acutely sensitive to the need for the Bill to provide an effective mechanism for detecting and investigating suspected violations of its provisions. Our experience in combatting domestic political corruption, coupled with our own recent efforts to develop prosecution [sic] involving the bribery of foreign officials amply demonstrates the difficulties of gathering sufficient credible and admissible evidence to support prosecution. By its very nature the bribery of public officials is covert and generally involves consensual parties who go to great lengths to conceal the transaction. When the official involved is a representative of a foreign government and most of the critical acts take place outside of the country, the problems of detection, investigation and prosecution are necessarily compounded.

Considering the anticipated enforcement problems associated with any statute which would proscribe bribery of foreign officials, we believe it imperative that we be in a position to rapidly mobilize maximum available investigative responsibility between the Securities and Exchange Commission and the Federal Bureau of Investigation. Rather than create such an anomaly, the Administration proposes instead to retain present Securities and Exchange Commission jurisdiction over illicit foreign payments by issuers subject to their registration requirements while simultaneously assigning criminal investigative jurisdiction to the Federal Bureau of Investigation for such cases regardless of the identity of the briber. This is in accord with current practices involving alleged domestic corruption by issuers and their representatives and experience has shown that it in no way restricts the Securities and Exchange Commission from continuing its own civil investigative efforts designed to protect the investing public.

The Department fully recognizes the expertise developed by the Securities and Exchange Commission over the past several years in the area of illicit foreign payments and believes they must play a vital role in any future attempt to deter and eradicate once and for all bribery of foreign officials by American issuers. Through their voluntary disclosure program they have performed a vital public service **{18}** in exposing the pervasive and apparently long-standing practice of some businesses to engage in such illicit practices. Their proposed Rules governing corporate record keeping, if promulgated, should further thwart attempts by issuers to conceal such payments and will presumably result in many fertile investigative leads. In order to be in a position to develop credible evidence in admissible form, this expertise, in our view, should be combined with that of the Federal Bureau of Investigation in investigating corruption and in gathering evidence abroad. By affording jurisdiction over such offenses to the Federal Bureau of Investigation, we would be able to utilize the expertise of both agencies to ensure vigorous and prompt criminal prosecutions of violations of the proposed statute.

Several additional features of H.R. 3815, in our view, pose potential enforcement problems. First, as currently worded the statute would require that the mails or instrumentality [sic] of interstate commerce be directly used to offer or make the prohibited payment. We believe this to be unduly restrictive and suggest instead that the provision be modified so as to provide that the mails or interstate facility need only be used in furtherance of the illicit payment, offer, et cetera.

Second, we believe "acquiesce" by employees or officials is too vague a concept upon which to predicate criminal liability. If by the term you wish to reach those who assist those engaging in the illicit practice, then we suggest that the term is not needed in light of the provisions of sections 2, 3 and 4 of title 18.

Lastly, we wish to comment briefly on the provision of H.R. 3815 which would enable the Department to seek in appropriate cases injunctive relief. While we welcome this authority, we anticipate that in the future relatively few cases will involve continuing criminal activities which would initially lend themselves to such action. While it is conceivable that instances will arise where bribe payments will be made over a period of time possibly linked to the volume of sales, thereby suggesting immediate injunctive action, we expect future cases to primarily involve single bribe instances which will not effectively lend themselves to this preliminary form of judicial action.

I would be more than happy for Department representatives to meet with members of your staff and discuss more fully the points raised in this letter.

Sincerely,

Patricia M. Wald,
Assistant Attorney General,
Office of Legislative Affairs.

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MINORITY VIEWS TO H.R. 3815, UNLAWFUL CORPORATE PAYMENTS ACT

This legislation would prohibit U.S. corporations from making payments or promises of payments to foreign political or governmental officials. Payments falling within the scope of the bill must be made or offered with the purpose of corruptly influencing an act or decision of the foreign official or inducing that official to use his influence to affect a decision of a foreign government.[(4)] We support, without reservation, the goal of H.R. 3815, which is the elimination of foreign bribery. Certainly, any legislation which will restore public confidence in American business and will prevent a continuation of the practices which recently have been disclosed is desirable and should be enacted. We are concerned, however, that the approach adopted by H.R. 3815 is not the most effective to eliminate questionable foreign payments.

In general terms the bill makes certain payments unlawful and imposes criminal sanctions on the making of payments described in the bill. The criminalization approach is contrasted with the approach recommended by Former Secretary of Commerce Elliot Richardson which would have required disclosure of improper payments. We believe that adoption of the disclosure approach would, in no way, imply that payoffs will be condoned as long as they are disclosed. Rather, we believe that this approach would prove ultimately to be a much more effective deterrent than would the provisions of H.R. 3815. This is because the legislation will be extremely difficult, if not impossible, to enforce. Payments falling within the scope of the legislation would include payments made on foreign soil to foreign officials and most of such payments certainly require the active cooperation of foreign individuals and governments. Without such cooperation, the difficulties of obtaining witnesses and evidence to successfully investigate and prosecute the case would be insurmountable.

The difficulties of the criminalization approach to dealing with the problems of questionable foreign payments were reiterated by Secretary of the Treasury Blumenthal when he testified before the Consumer Protection and Finance Subcommittee. At that time he stated:

I have always felt a criminal statute such as this one will not be easy to enforce, particularly because it does involve acts that take place in other countries, the whole ques- **{20}** -tion of extra territoriality and gets you into questions of availability of witnesses, gets you into the question of acts taken in other jurisdictions in which the laws are different...we must not underestimate the difficulties of enforcement that in any case will result from this kind of legislation.

Former Secretary of Commerce Elliot Richardson expressed similar fears which are highlighted in the report of the President's Task Force on Questionable Payments Abroad:

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. . . The Task Force has concluded that unless reasonably enforceable criminal sanctions were devised, the criminal approach would represent poor public policy.

We believe that legislation that cannot be effectively enforced will do little to deter payoffs. On the other hand, disclosure could be a very effective deterrent especially in combination with the other sanctions against such payments which exist in present securities, antitrust, tax and criminal law. We are concerned that the committee may have constructed a paper tiger which in the long run will do little to discourage conduct which we all believe has no place in the American business community.

We note that in this regard that the disclosure concept in the political area was finally utilized in the Federal Election Campaign Act of 1971. Its effect has been dramatic when compared to the nearly 50 years of benign neglect given unlawful political contributions prior to that time. Hopefully, H.R. 3815 will not be a law shielding corruption for 50 years before the effective deterrent to foreign bribery - full disclosure - is required.

The legislation also sets up a curious division in enforcement responsibilities between the Securities and Exchange Commission and the Department of Justice. This is because the bill amends the Securities and Exchange Act of 1934 as well as the criminal code, thereby giving the SEC authority to enforce the provisions of the bill as they apply to companies regulated by the Commission with the Department of Justice enforcing the bill with respect to all other domestic companies falling within the scope of the bill. We believe that this split in enforcement responsibility is unwise for several reasons.

The investigation of illegal payoffs to foreign officials is at best only indirectly related to the SEC's primary responsibility which is the protection of investors. We are reluctant to see the Commission redirect its already limited resources away from carrying out its primary mission of protecting investors to investigating foreign bribery. This is especially true when there is another body within the government more suited to that role - that is, the Department of Justice. The bill gives the Justice Department enforcement authority with respect to those companies not regulated by the SEC. We see no good reason for establishing two different programs to enforce the act in two different Federal entities - the SEC and the Department of Justice. Certainly this aspect of the Legislation does nothing to advance the cause of governmental efficiency.

{21} Further, we note that responsibility for investigating and prosecuting domestic bribery cases rests solely within the Department of Justice. It remains a mystery to us why the committee would choose to split enforcement responsibility with respect to foreign bribery when enforcement authority for a related crime - domestic bribery - resides in the Department of Justice.

During committee consideration of this bill it was argued that this split was necessary so that the committee could retain jurisdiction over the subject matter dealt with in the legislation. If protection of jurisdictional turf is the only thing at stake here, then only the Judiciary Committee need be concerned. However, we believe that the split in responsibility between the Justice Department and SEC which is now found in the bill could have an adverse impact on U.S. foreign policy. As pointed out above, H.R. 3815 does not affect domestic bribery - that is already unlawful under title 18. H.R. 3815 is a measure aimed exclusively at illegal foreign activity. Its enactment will invite employees of the SEC - a quasi-legislative agency - to be running all over the world either reincarnating the "ugly American" or creating SEC American foreign policy.

Those supporting this curious split of authority argue that the Department of Justice as a part of the Executive Branch might be more aware fo the political ramifications of vigorous enforcement of the bill and would, therefore, fail to prosecute violators vigorously. If our colleagues in the Majority, however, are distrustful of the Department of Justice, the answer is certainly not placing in other agencies authorities that more properly belong in the Department of Justice. Indeed, such an approach merely delays making the Department of Justice a more even-handed law enforcement agency.

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1. For example, Rule 2(e) of the Commission's Rule of Practice, 17 CFR 201.2(e), authorizes the Commission to censure, suspend, or bar professionals, such as accountants and lawyers, from practicing before the Commission. A public or private Rule 2(e) proceeding might, in the Commission's view, be preferable, or used in addition to a civil injunctive action or criminal referral, in particular cases.

2. A survey of public documents filed with the Securities and Exchange Commission which disclose questionable or improper payment activities show that at least 64 U.S. public corporations made such payments through foreign subsidiaries. Of those companies, 19 corporations have made payments aggregating $1 million or more over various periods of time.

3. As a general rule, the application of federal criminal law is limited to the territory of the United States. However, there are a number of Federal statutes with criminal sanctions which have extraterritorial applications: 18 U.S.C. § 1546 (fraud and misuse of visas, permits, and other entry documents), 18 U.S.C. § 2314 (transportation of stolen goods, securities, moneys, fraudulent state stamps, or articles used in counterfeiting), 18 U.S.C. § 2381 (treason committed "within the United States or elsewhere"), 50 App. 18 U.S.C. § 1 et seq. (Trading with the Enemy Act), 15 U.S.C. § 776 et seq. (Securities Exchange Act of 1934), 15 U.S.C. § 1-7 (Sherman Anti-Trust Act), 15 U.S.C. § 41 et seq. (Federal Trade Commission Act), et cetera.

The cases indicate that in the extraterritorial application of U.S. law by the Congress, "[sic]*United States v. Erdos,* 474 F.2d 157, 159 (4th Cir. 1973). "From the body of international law, Congress may pick and choose whatever recognized principle of national jurisdiction is necessary to accomplish the purpose sought by the legislation, *United States v. Rodriguez*, 182 F. Supp. 479, 491 (S.D. Cal. 1960).

There are a number of theories of legislative jurisdiction under international law, at least three of which are applicable here. See, "Jurisdiction with Respect to Crime-Draft Convention, with Comment, Prepared by the Research in International Law the Harvard Law School" 29 *American Journal of International Law* (Supp.) 439 (1935) and American Law Institute, *Restatement (Second) of the Law of Foreign Relations of the United States,* ch. 2 (1965).

The first of these is the familiar territorial principle *Restatement* § 17. Under this principle, a nation may prescribe rules of law regulating conduct occurring within its territory, regardless of where the effect of the conduct falls. This is the principle Congress in presumed to have relied upon unless its specifically indicates otherwise. *American Banana Co. v. United Fruit Co.,* 213 U.S. 347 (1907).

The second principle grants a nation jurisdiction to prescribe rules of law attaching legal consequences to conduct that occurs outside its territory if the conduct causes an effect within the prescribing nation's territory. *Restatement* § 18. Under this theory, the courts have upheld Congressional regulation of the conduct of noncitizens, even if the conduct took place outside the U.S., so long as the consequences of the conduct are felt within the U.S. See, *United States v. Pizzarusso,* 388 F.2d 8 (2d Cir.), cert. denied, 392 F.2d 912 (D.C. Cir. 1973) [sic]. *United States v. Braverman,* 376 F.2d 249 (2d Cir.), *cert. denied,* 389 U.S. 885 (1967); and *Record v. United States,* 375 F. 2d 882 (5th Cir.), *cert. denied sub nom. Groleau v. United States,* 389 U.S. 884 (1967).

A third pertinent theory of international jurisdiction is the nationality principle. *Restatement* § 30. Under this theory, a nation has jurisdiction to prescribe rules of law regulating the conduct of its nationals wherever located. This principle would extend jurisdiction to include any corporation chartered by a State of the United States. See, *Vermilya-Brown Co. v. Cornell,* 335 U.S. 377 (1948); *United States v. Cotten,* 471 F. 2d 744 (9th Cir.), *cert. denied,* 411 U.S. 936 (1973); and *Gillars v. United States,* 182 F. 2d 962 (D.C. Cir. 950 [sic]) as cases where the courts have upheld Congressional regulation of the actions of U.S. citizens outside the territorial jurisdiction of the U.S.

4. It is our understanding that the bill is not intended to reach "facilitating" or "grease" payments such as a gratuity paid to a customs official to speed the processing of documents, payments made to secure licenses or permits which would be issued in any event, or payments made under duress to protect a business investment. Although these kinds of payments would not be proper in the United States, we realize that they are a recognized part of doing business in certain foreign countries and agree that any legislation should not attempt to eliminate such payments. The bill is only aimed at payments or promises made to induce an official to misuse his position wrongfully to direct business to the person making the payment or to obtain preferential legislation or regulations.