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Chamber of Commerce of the United States of America

Washington

STATEMENT
on
THE FOREIGN CORRUPT PRACTICES ACT OF 1977
and
THE DOMESTIC AND FOREIGN INVESTMENT IMPROVED DISCLOSURE ACT OF 1977
(Titles I and II, respectively, of S. 305)
for submission to the
SENATE COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS
for the
CHAMBER OF COMMERCE OF THE UNITED STATES
by
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March 23, 1977

The Chamber of Commerce of the United States appreciates this opportunity to give its views in opposition to S. 305, as written, and to suggest alternative policy for the committee to consider in dealing with questionable overseas business payments.

The Chamber's membership comprises a broad cross section of this country's commercial sector. We represent over 62,000 firms -- from large corporations to single proprietorships -- in addition to 2,500 local, regional and state chambers of commerce, 1,100 trade associations and 41 American chambers of commerce abroad. These National Chamber members, engaged in domestic and international business, are concerned about the issue of questionable overseas payments both as a basic ethical problem and because well-publicized reports of instances of such payments have tended to undermine public confidence in the entire corporate community and in the market economy as a whole.

The Chamber condemns the payment, solicitation or extortion of bribes, payoffs or kickbacks, and supports the disclosure of such acts and the prosecution of violations of national laws. The Chamber has long endorsed the highest standards of professional conduct of American business people operating in the United States or overseas. The overwhelming majority of U.S. firms operating abroad conduct their activities in accordance with the legal requirements of host countries and refrain from unlawful intervention in the domestic affairs of host countries. The recent

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controversy surrounding questionable payments has resulted in much confusion concerning the commercial propriety of commissions and fees related to business transactions. Commissions or fees are paid on sales, or for services rendered, as a part of conducting business world-wide. They are generally determined by the market place and, in and of themselves, are entirely legitimate.

The Chamber believes that disclosure has proved to be an effective deterrent against the offering or solicitation of various forms of questionable payments. U.S. securities law already requires public disclosure of material payments. This reporting requirement, embodied in the Securities and Exchange Commission's "Voluntary Disclosure Program," has prompted voluntary disclosures by many corporations over the last two years. This voluntary disclosure approach, taken with existing SEC rule-making authority and the SEC's recommended stock exchange listing requirements, should adequately respond to public, corporate and investor-related concerns. It is important to note, as well, that misrepresentations to the Internal Revenue Service of certain payments may constitute violations of the Internal Revenue Code.

The Chamber, therefore, is not convinced that new legislation is needed to confront the problems caused by questionable overseas business payments.

Title I

Section 102 of S. 305 is legislation recommended to the Congress by the Securities and Exchange Commission. It would require accurate record-keeping through internal accounting controls and would outlaw falsification of records or misrepresentations to accountants. Section 102 is designed to augment the SEC's "Voluntary Disclosure Program," but the Chamber does not believe that this particular provision is crucial to the program's continued success. The SEC probably has sufficient authority under existing law to require corporations filing with that agency to meet the standards prescribed in Section 102. Indeed, in January, 1977, the Commission released rule-making proposals which are similar to the provisions of Section 102. Additionally, the precision and breadth of

the record-keeping and audit provisions, although well-intended, could actually make more difficult the job of performing a corporate financial examination. For this reason, the Committee should carefully consider the views of corporate auditors concerning Section 102.

The Chamber opposes Sections 103 and 104 of Title I of S. 305. These sections make it a criminal offense for a United States business to give anything of value to any foreign official, political party, candidate or intermediary for the purpose of influencing governmental actions. The National Chamber is particularly troubled by these sections for the following reasons:

(1) The criminalization of questionable overseas business payments would contribute little to deterring such payments beyond that which is already accomplished by existing securities, tax and criminal law. Aspects of the payments problem which cannot be directly remedied by existing domestic law, such as the conduct of foreign government officials, also cannot be directly met by S. 305. The inherent limits of domestic law in dealing with all facets of the payments problem can only be overcome through the negotiation and implementation of bilateral, or preferably multilateral, agreements.

(2) Legislation which would impose criminal penalties for making questionable business payments would be very difficult to administer and enforce. S. 305 attempts to compensate for poor or reluctant enforcement by some foreign governments of their own laws by, in effect, doing it for them. In order to prosecute successfully under these provisions, much evidence located outside of the United States would be required. U.S. prosecutors investigating the activities of foreign government officials will be totally dependent on the foreign government for sufficient information. Conversely, the accused could easily be prejudiced by an inability to obtain production of documentary evidence or attendance of witnesses located outside the jurisdiction of U.S. courts.

(3) S. 305 could lead to conflicts between the United States and foreign governments. Decisions taken at any point in the development and prosecution of a case could involve the United States in sensitive

diplomatic problems. The use by the Government or a defendant of certain evidence could cause embarrassment to a foreign government and create foreign policy problems for the United States stemming from our "meddling" in another country's internal affairs, even though such revelations should have come about through effective enforcement of domestic laws in the host country.

(4) With respect to the focus of the investigatory responsibility granted in Section 103, the Chamber believes that the SEC does not seek nor should it be granted criminal enforcement responsibilities which do not relate to the regulation of securities and securities markets.

Multilateral Efforts

It has become apparent that a substantial number of questionable payments on the part of multinational firms are the result of demands from officials of, and others purporting to represent, governments in some countries. Such demands are frequently made in a context in which the company's refusal to comply may result in extreme economic penalties. The Chamber is encouraged that the private sectors and governments of some countries have expressed interest in multilateral efforts to eliminate all such improper practices by businesses and by governments.

The conclusion of a multilateral agreement among the largest possible number of industrialized and developing countries could establish standards of ethical and equitable conduct of international business, provide that these same standards would apply to all businesses, create pressures or impose obligations on governments to vigorously enforce relevant domestic law, and establish a mechanism to resolve the diplomatic, commercial and legal problems associated with such practices. The Chamber endorses the efforts of the U.S. Government to bring about a treaty in this area under the auspices of the United Nations Economic and Social Council (ECOSOC).

Title II

Title II of S. 305 is generally an effort to obtain more information about domestic and foreign portfolio investors. The National Chamber welcomes foreign investment in the United States because of its net

positive impact on the U.S. economy. For this reason, as well as in the interest of protecting U.S. investment abroad, the Chamber opposes the denial of national treatment to foreign investors, except in instances in which there is a clearly established and overriding objection based on national interest.

Section 202 of S. 305 would require any purchaser of a security to provide additional information to the Securities and Exchange Commission if such purchase results in 5 percent or more beneficial ownership of a class of an equity security of a U.S. company registered with the SEC. It would, therefore, be applied without treating foreign investors in a discriminatory manner.

When, in the 94th Congress, Senator Harrison Williams first introduced proposals similar to Title II, the Administration and the business community had already recognized the importance of collecting better information on foreign direct and portfolio investment in the United States. At that time the Chamber supported the purpose of provisions similar to Section 202.* The Chamber continues to support the purpose of the monitoring provision in Section 202 of S. 305. However, what was in 1975 a serious inadequacy in our data base has been partially remedied by studies completed under the Foreign Investment Study Act of 1974 and should be further improved by studies to be conducted regularly under the International Investment Survey Act of 1976.

Section 203 would require periodic reporting by beneficial owners of blocks of stock down to 0.5 percent of a class, possibly being reduced 0.1 percent in the future. The Chamber questions the need for the reporting of information on a beneficial owner of less than 5 percent of a class of stock, the present required notification level. Section 203's extraordinarily low thresholds for reporting would substantially increase data collection and reporting expense. This expense would seem especially great when weighed against the debatable value to investors or policy-makers of information concerning an owner of 0.5 percent of a corporation's stock.

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*Statement of the Chamber of Commerce of the United States before the Subcommittee on Finance, Senate Committee on Banking, Housing and Urban Affairs on S. 425, March 6, 1975.

We would suggest that the Committee defer a decision on Title II until the proposed beneficial ownership disclosure requirements recently released by the SEC have been finalized. These proposed disclosure requirements are similar to the provisions of Title II of S. 305, and they could effectively respond to the legitimate informational needs of investors to which Title II is also addressed. The Chamber believes that the SEC proposals should be allowed a reasonable period of time, after promulgation, to be evaluated before any additional legislation is approved.

Conclusion

In light of the general success of existing governmental programs and enforcement measures, the most constructive additional federal response to the troubling problem of questionable overseas business payments is not in the form of new legislation; rather, it is through the negotiation of international agreements. The many elements of the problem which are outside United States jurisdiction can be addressed effectively only in this manner. The discussion of governmental action in response to the questionable payments problem should not, however, overshadow the duty of American business people to obey the law and to maintain the highest standards of professional conduct.