STATEMENT OF SHERMAN E. UNGER, GENERAL COUNSEL, U.S. DEPARTMENT OF COMMERCE BEFORE THE SUBCOMMITTEE ON INTERNTAIONAL FINANCE AND MONETARY POLICY AND THE SUBCOMMITTEE ON SECURITIES OF THE SENATE BANKING, HOUSING AND URBAN AFFAIRS COMMITTEE

MAY 20, 1981

Introduction

MR. CHAIRMAN and members of the committee, as Ambassador Brock testified, we agree with and support the intent underlying S. 708 and we appreciate the Committee's consideration of the need for amending the Foreign Corrupt Practices Act (FCPA). While we would suggest several changes for exporters and would-be exporters, we believe S. 708 is a constructive effort to address and resolve difficulties in interpreting and complying with the present Act.

First - - so there can be no doubt - - I want to emphasize this Administration's agreement with the purpose of the FCPA: Bribery and corruption in international business transactions are inherently wrong and bad business.

At the same time, it is apparent that the Act is not perfect - - it has caused a number of problems for well-meaning U.S. companies and has had an adverse impact on efforts to expand our Nation's exports.

One of the mandates of the Department of Commerce is to foster and promote the foreign commerce of the United States; that means exports. The expansion of this Nation's exports improves our balance of payments and is essential to the health and vitality of our economy. The FCPA has become a significant export disincentive. Costly accounting procedures and

ambiguities cause all public U.S. companies additional expense whether they export or not, while the same burdens are not imposed on private companies. The Act retards many companies from attempting to compete in foreign Commerce and adds an unnecessary expense to all public companies.

American exporters believe that bribery is an undesirable means of transacting business abroad and desire to comply with the Act. Businessmen and lawyers alike are in agreement that the provisions of the Act are vague and subjective. It is difficult to ascertain, with any degree of certainty, what is prohibited and what is not. The Act's provisions are ambiguous.

The uncertainty that hangs over the present Act, together with the threat of adverse publicity that can result from even suggestions of non-compliance, have resulted in excessive caution which inhibits otherwise legitimate business transactions. Some corporate managers have chosen to stay out of major markets to avoid even the slightest risk of allegations of wrongdoing.

While it is not possible to assess, with precision, the dollar amount of exports lost, I share the consensus of the business community and the Government that the figure is significant in terms of our overall export expansion goals.

I believe we can reduce problems for exporters in complying with the Act, while at the same time reducing its disincentives.

The Problem with the Accounting Provisions

I would like to develop in detail an area mentioned by Ambassador Brock.

Section 102 of the FCPA requires all public companies to maintain an accurate accounting of the transactions and dispositions of their assets. It also requires these companies to maintain a system of internal accounting controls to ensure management awareness of, and hence accountability for, illegal payments.

The result of a GAO investigation of the impact of the FCPA on American business was published in March, 1981. This report indicates how expensive it is for a company to comply with the Act's accounting provisions. Almost a quarter of the corporate respondents indicated accounting and auditing cost increases exceeding 35 percent, while over one-half estimated that compliance had increased cost by 11 to 35 percent.

Significantly, the accounting provisions affect public companies regardless of whether they engage in international business. Compliance with these provisions is particularly difficult since their interpretation is unclear. This Administration is dedicated to eliminating unnecessary regulation of business. The removal of the accounting requirements is a positive step toward this goal.

If the SEC believes that accounting provisions similar to those contained in Section 102 of the FCPA are necessary to enable it to enforce the mandate given it by Congress, it should come to Congress and seek a grant of such general legislative authority. The SEC should not rely on specialized legislation such as the FCPA to broaden its general authority.

S. 708

S. 708, attempts to lessen difficulties by adding a "materiality" standard to the accounting requirements and by defining "materiality" in terms of financial statements prepared in

accordance with generally accepted accounting principles. There are several problems with this approach.

First, this standard of "materiality" is not well-suited to prevent illicit payments since illegal payments of significant sums may, for large commissions, be below the threshhold requiring disclosure.

Second, since "materiality" depends upon a business' size, smaller companies would be subject to tighter constraints than larger companies. In other words, the same payment made by both a large and small business may be non-material with respect to the former, but material with respect to the latter.

Further, these requirements are enforced by the SEC and represent a departure from the purpose of federal securities laws and the mission of the SEC.

The securities laws were enacted to protect the financial interest of investors by requiring companies to make public disclosure of information that could be expected to influence an investment decision or a shareholder's vote. The disclosure approach was chosen as the best means of achieving required regulation without undue governmental intervention.

Enactment of the FCPA gave the SEC an enforcement mandate having no relationship to investment protection. It allows Federal regulation to affect corporate management by prescribing stringent rules for maintaining books and managing assets. S. 708 does not change this result.

The Administration Approach

The Administration urges repeal of all accounting provisions contained in section 102 because they are unnecessary to prevent illicit payments.

In place of section 102, we propose criminalizing the falsification or concealment of payments prohibited by the FCPA in all business records. This new provision would be enforced by the Department of Justice, and would be outside the securities laws and the jurisdiction of the SEC. Unlike the accounting provisions of the present FCPA, this provision would not be limited to companies subject to SEC jurisdiction (i.e., public companies).

The presence of criminal sanctions for bribery of foreign officials gives business management sufficient incentives to maintain proper recordkeeping and control even without section 102. Pervasive federal rules on accounting practices have not been necessary for the enforcement of domestic bribery laws or other criminal laws prohibiting misuse of corporate assets. There appears no justification for such rules with regard to foreign bribery.

Repeal of the accounting provisions is consistent with eliminating unnecessary regulatory burdens. The Administration supports continuation of an effective anti-bribery law and an attempt to obtain an international agreement on this issue.

Conclusion

Mr. Chairman, the Administration will fully support S. 708 with the changes that Ambassador Brock and I have suggested. These amendments to the FCPA will help to remove the disincentives to exports of that law, while at the same time reaffirming through criminal sanctions our strong opposition to bribery in international commerce.