

SPECIFICATIONS FOR A REPORTING AND DISCLOSURE BILL

All payments 1/ in excess of \$1,000 2/ made, directly or indirectly 3/ to any person employed by or representing a foreign government or to any foreign political party or candidate for foreign political office 4/ in connection with obtaining or maintaining business with, or influencing the conduct of, a foreign government, 5/ would have to be reported 6/ to the Department of Commerce. 7/

Reports of such payments would be due within thirty days of a payment. 8/ Criminal penalties for corporations and responsible officers or directors would attach to willful failure to file such a report and to deliberate misrepresentations in such reports. Negligent failure to report would be subject to civil penalties. 9/

Reports of payments would be transferred to the Department of State which in turn would relay the reports to the affected governments. 10/

Such reports would be made available for public inspection, one year from date of original filing. 11/

The reporting requirement would apply to all American business entities 12/ and their controlled foreign subsidiaries 13/ and agents. 14/

1/ Definition of the Term "Payment."

Payment would be defined to mean the payment of money or furnishing of anything of value or the offer or agreement to pay money or furnish anything of value above some floor amount or value.

2/ \$1,000 Floor.

Setting a floor at this level would help limit, but not obviate, the need to report miscellaneous small payments which might be made to facilitate customs treatment, etc. The setting of any floor is admittedly difficult and some will argue that setting the floor at any level will imply approval of smaller improper or illegal payments. Another option would be to set the floor at \$10,000. This would obviate the need for reporting of most "grease" or "facilitating" payments while capturing major payments of the sort to give rise to concerns about accountability of multinational corporate behavior. On the other hand, it can be argued that a \$10,000 floor is too high and implies too broad a sanction of substantial smaller payments--or a series of such smaller payments to the same payee.

3/ Direct or Indirect Payments.

While the bill would not require payments of “regular” agents’ fees or commissions paid in the conduct of business abroad, it would require reporting of fees or commissions the proximate purpose of which is to transfer something of value to a government official in connection with obtaining or maintaining business with such government, or which are intended to influence governmental conduct.

4/ Political Contributions Covered.

An argument can be made that it is improper to include in any reporting and disclosure bill political contributions on the grounds that such reporting represents unwarranted intervention into the political processes of other countries; or stated another way, other nations should be allowed to set their own requirements for legality and reporting of political contributions. A countervailing consideration is, as has often been noted in prosecutions of corrupt practices within the United States, that the line between a corrupt payment intended to influence official action on the one hand and a bona fide political contribution on the other is very difficult to draw. Exclusion of political contributions could substantially undercut the force and effect of a disclosure bill.

5/ “Obtaining or Maintaining Business with or Influencing Conduct of a Foreign Government.”

As outlined in note 3 above, the reporting requirement would be designed to capture payments made directly or indirectly to influence governmental decision-making. Regular agents’ fees or commissions are not necessarily covered. The reporting company must make a judgment as to the purpose and likely effect of a given payment, in deciding whether or not it must be reported.

6/ Scope of Reports.

At a minimum, a report would include the amount of value of payment; the name of the recipient; and the purpose of the payment.

7/ Reports made to the Department of Commerce.

The reports should be made to some appropriate department of the Executive Branch of Government. The Department of Commerce has administered reporting requirements under the Export Administration Act and generally has a legitimate concern with the foreign payments practices of American corporations. The Department of State or the Department of Treasury might also be appropriate agencies to receive such reporting. The SEC is not an appropriate collector of these reports. In many instances the proposed disclosure legislation would require reporting of information not “material” under the securities laws. Requirement of reporting to the SEC might imply a definition of materiality along the lines of the disclosure statute. Such definition would go well beyond any definition that has ever yet evolved through SEC and court

interpretation. This disclosure statute is not an appropriate vehicle for substantial redefinition of “materiality.”

8/ Thirty-Day Reporting Period.

The thirty-day delay would allow orderly reporting by foreign subsidiaries or agents to American parent corporations. See notes 13 and 14 below.

9/ Civil and Criminal Penalties.

The strongest possible consequence should attach to a willful failure to comply with the bill’s reporting requirements, and it is thought that mere civil penalties will not be an adequate incentive to compliance. Criminal penalties should not attach negligent failure to file. Difficult cases may arise where officers of a foreign subsidiary fail to report to their American parent corporation. Criminal penalties can probably only reach the American parent corporation and its officers. Criminal penalties will nevertheless provide a strong incentive for American parent corporations to assure full reporting and accountability on the part of their foreign subsidiaries. No new penalties need be prescribed for filing of false information which is already a criminal offense under 18 U.S.C. Section 1001.

10/ Reports to Foreign Governments.

This transfer of reported information should act as a spur to foreign governments to enforce their own laws.

11/ Delay before Public Disclosure.

A one-year delay before reports of foreign payments are disclosed will protect against anti-competitive disclosure of business and market plans which could result if reports were made available sooner. These same considerations are recognized in the Church bill, S. 3379.

12/ All Business Entities Covered.

In contrast to an SEC approach, the proposed bill would cover all entities, whether or not they have securities registered with the SEC.

13/ Controlled Foreign Subsidiaries.

This term would be defined as it is in the administration of the tax laws, as greater than 50 percent equity ownership. A more stringent or fluid test of control could be adopted, but such could lead to substantial difficulty of administration and stimulate objections with regard to the bill’s extraterritorial effect.

14/ Inclusion of Agents.

This term will be given the same definition it receives under the securities laws.