

SUMMARY OF PENDING SIGNIFICANT LEGISLATIVE INITIATIVES

While numerous bills and resolutions dealing with the questionable payments problem have been introduced in both Houses of Congress, far and away the most significant of these are Senator Proxmire's bill, S. 3133, and a bill introduced on May 5, 1976 by Senator Church, S. 3379. In addition, on May 12, 1976 Chairman Hills of the SEC forwarded a draft legislative proposal to Senator Proxmire. Each of these legislative proposals and its current status is discussed below.

1. The Proxmire Bill, S. 3133

Members of the Task Force are generally familiar with this bill; since it has been a topic of discussion in Task Force meetings and because Secretaries Richardson, Simon and Robinson have testified before Senator Proxmire.

S. 3133 is an amendment to the Securities Exchange Act of 1934 and requires issuers of securities registered with the SEC to file periodic reports with the Commission regarding the payment of money or furnishing of anything of value in an amount in excess of \$1,000 during the reporting period:

- (i) to any person or entity employed by, affiliated with, or representing directly or indirectly, a foreign government or instrumentality thereof;
- (ii) to any foreign political party or candidate for foreign political office;
- (iii) to any person retained to advise or represent the issuer in connection with obtaining or maintaining business with a foreign government or instrumentality thereof or with influencing the legislation or regulations of a foreign government.

The reports mandated by this section are to be made publicly available and are to include the precise amount of the payment and the name of the person or entity to which the payment is made. In addition, the reports are required to state the purpose for which the payment was made.

S. 3133, in addition to its disclosure requirement, makes it a criminal offense for any issuer of a security registered with the SEC to make use of the mails or any means or instrumentality of interstate commerce to:

- (i) make, or to offer or agree to make, any payment or to give anything of value to an official of a foreign government for the purpose of inducing the individual "to use his influence within such foreign government . . . to obtain or maintain business for or with the issuer or to influence legislation or regulations of that government;"
- (ii) make or agree to make any payment or give anything of value to any person while knowing of having reason to know that a portion of the payment "will be offered, given or promised directly or indirectly to any individual who is an

official of a foreign government . . . for the purpose of inducing that individual to use his influence . . . to obtain or maintain business for or with the issuer or to influence legislation or regulations of that government;”

- (iii) make or agree to make any payment or give anything of value “to any foreign political party or official thereof or any candidate for foreign political office” for the purpose of inducing use of influence in the obtaining or maintaining of business for or with the issuer or influencing legislation or regulations of that government.

In addition, Senator Proxmire’s bill would make it unlawful for any issuer to make or agree to make any payment or to give anything of value “in a manner or for a purpose which is illegal under the laws of a foreign government having jurisdiction over the transaction.” S. 3133 would vest the SEC with the authority to prosecute and appeal criminal actions arising under its provisions.

Secretaries Richardson, Simon and Robinson testified before Senator Proxmire on April 8, 1976, and while expressing misgivings about the Proxmire approach, reserved a final judgment and detailed critique until a date by which the Task Force would have had a chance to begin its work and systematically scrutinize the policy questions posed by the Proxmire bill. Pressed by Senator Proxmire for an early report, Secretary Richardson agreed to report back to Senator Proxmire by early June.

In hearings and in public statements, Senator Proxmire has evidenced a willingness to alter or amend S. 3133 to accommodate various legitimate criticisms and concerns such as the inappropriateness of vesting the SEC with criminal enforcement authority and the problem involved in possible prohibition of corporate political contributions by U.S. firms in countries where such are legal. Senator Proxmire has also evidenced a willingness to accommodate certain amendments to the securities laws proposed by Chairman Hills on May 12, 1976. These changes are discussed below.

It should be noted that the Proxmire approach involving criminal penalties is rejected by Senators Church and Percy of the Senate Foreign Relations Subcommittee on Multinational Appropriations. These senators and their staffs believe that the criminal approach is unenforceable and inappropriate and prefer emphasis on disclosure.

2. The Church Bill, S. 3379

S. 3379 is the joint work product of Senators Church and Percy. Senator Church, however, introduced it without Senator Percy’s co-sponsorship since Percy has reservations about certain of its provisions. In broad outline, however, S. 3379 represents an approach supported by Percy as well as by Church.

S. 3379, the International Contributions, Payments and Gifts Disclosure Act, contains the following provisions. It would amend the Securities Exchange Act of 1934 to require issuers of securities registered with the SEC to file annually a sworn disclosure statement containing a complete accounting of all payments or gifts (including offers and agreements to make such payments or gifts) of “significant value” made:

- (i) as direct or indirect political contributions to foreign governments;
- (ii) to employees of foreign governments and intended to influence the decisions of such employees and which are made without the consent of their sovereign; and
- (iii) made to employees of foreign nongovernmental purchasers and sellers and intended to influence normal commercial decisions of their employer and are made without the employer's knowledge or consent.

This annual disclosure statement must set forth the name and address of the person who made such a contribution, payment or gift; the date and amount of the payment; the name and address of each recipient or beneficiary, direct and indirect, of such payment; a description of the purpose for which the payment was furnished; and a statement whether the payment was legal in the jurisdiction where made. Further, this section of the Church bill provides criminal penalties for knowing failure to file or knowingly filing a false or insufficient statement. All information contained in such annual reports would be made public unless the President makes a determination that public disclosure would "severely impair the conduct of United States foreign policy." In this case, the President would then nonetheless have to place the information in a report and submit it to the Senate Committee on Foreign Relations and the House Committee on International Relations.

The Secretary of State is charged with preparing a comprehensive review and foreign policy analysis on a country-by-country basis concerning the implications of the types and amounts of payments disclosed in the annual reports filed with the SEC.

Further the Church bill:

- (i) requires each company to include in its annual report to shareholders the aggregate value of all such payments and a statement as to whether or not they were legal or illegal in the countries where made and advise their shareholders that information on specific transactions is publicly available at the SEC.
- (ii) amends the Internal Revenue Code to clarify standards of nondeductibility for illegal foreign payments.
- (iii) requires that each issuing corporation have a board of directors composed of at least one-third outside directors and that these directors compose an audit committee responsible for initiating and pursuing internal investigations of company operations including supervision of hiring and conduct of independent auditors. Independent auditors are given civil recourse for damage against persons or companies who withhold or misrepresent information necessary for the auditor to carry out his responsibilities.

- (iv) grants a shareholder right of action for actual damages in connection with the purchase or sale of any security or waste of assets resulting from any of the contributions, payments or gifts in question.
- (v) grants a right of action to persons to seek actual damages from illegal payments made by a competitor providing the plaintiff has not himself made such illegal payments in a relevant time period. Such damages can be trebled.

No hearings have yet been scheduled on the Church bill. Senator Percy plans to seek some amendments. It is not unreasonable to expect that the Task Force or members of the Task Force on behalf of their departments will be called to testify on this legislation. As yet, no counterpart legislation has been introduced in the House. Speculation exists that Senator Church will try to persuade Congressman Reuss to introduce a similar bill in the House. Such House initiative would significantly increase the prospects for this legislation in this session of Congress. Because it amends both the Securities Exchange Act and the Internal Revenue Code, S. 3379 has been referred to both the Committees on Banking, Housing and Urban Affairs and Foreign Relations and if reported will have to be referred to the Committee on Finance.

It should be noted that S. 3379 requires reporting of “commercial” as well as governmental or official bribery. A chief thrust of the bill is toward corporate responsibility as a general proposition. In Senator Percy’s mind, the bill is to serve a broader purpose than simply addressing the questionable foreign payments problem.

3. SEC Draft Legislation

In his report submitted to Senator Proxmire on May 12, 1976, Chairman Hills of the SEC has proposed legislation amending the Securities Exchange Act of 1934:

- to prohibit falsification of corporate accounting records;
- to prohibit the making of false and misleading statements by corporate officials or agents to persons conducting audits of the company’s books and records and financial operations;
- to require corporate management to establish and maintain its own system of internal accounting controls designed to provide reasonable assurances that corporate transactions are executed in accordance with management’s general or specific authorization, and that such transactions are properly reflected on the corporation’s books.

Since the SEC legislative proposal is relatively short, it is attached in its entirety to this appendix.

Senator Proxmire has applauded the Hills’ initiative and has agreed to introduce his proposed legislation, characterizing it as “the Commission’s redraft of my own bill.” He has further said, however, that he will consider it “along with other proposals.” Apparently, therefore, Proxmire considers the SEC’s initiative to be additive to, and not a substitute for, S. 3133.

B. Draft Legislation Proposed by the Commission

The Commission proposes the following for Congressional consideration:

A BILL

To amend the Securities Exchange Act of 1934 to prohibit certain issuers of securities from falsifying their books and records, and for related purposes.

Be it enacted by the Senate and House of Representatives of the United States of

America in Congress assembled,

That Section 13(b) of the Securities Exchange Act, 15 U.S.C. 78m(b), is amended by renumbering existing Section 13(b) as “Section 13(b)(1)”, and by adding at the end of new Section 13(b)(1), the following subparagraphs:

“(b)(2) Every issuer which has a class of securities registered pursuant to section 12 of this title and every issuer which is required to file reports pursuant to Section 15(d) of this title shall

“(A) make and keep books, records and accounts, which accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and

“(B) devise and maintain an adequate system of internal accounting controls sufficient to provide reasonable assurances that

“(i) transactions are executed in accordance with management’s general or specific authorization;

“(ii) transactions are recorded as necessary (1) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements and (2) to maintain accountability for assets;

“(iii) access to assets is permitted only in accordance with management’s authorization; and

“(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

“(b)(3) It shall be unlawful for any person, directly or indirectly, to falsify, or cause to be falsified,

any book, record, account or document, made or required to be made for any accounting purpose, of any issuer which has a class of securities registered pursuant to section 12 of this title or which is required to file reports pursuant to Section 15(d) of this title.

“(b)(4) It shall be unlawful for any person, directly or indirectly,

“(A) to make, or cause to be made, a materially false or misleading statement, or

“(B) to omit to state, or cause another person to omit to state, any material fact necessary in order to make statements made, in the light of the circumstances under which they were made, not misleading

to an accountant in connection with any examination or audit of an issuer which has a class of securities registered pursuant to section 12 of this title or which is required to file reports pursuant to Section 15(d) of this title, or in connection with any examination or audit of an issuer with respect to an offering registered or to be registered under the Securities Act of 1933.”