Prohibiting Foreign Bribes: Criminal Sanctions for Corporate Payments Abroad

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NOTES

PROHIBITING FOREIGN BRIBES: CRIMINAL SANCTIONS FOR CORPORATE PAYMENTS ABROAD

One of the results of the Special Prosecutor's investigation of the "Watergate Affair" was the uncovering of questionable corporate payments aboard. Initially the practice appeared to be limited to a handful of American multinational corporations, but in the past year admissions of corporate misconduct have escalated to the point where over three hundred firms have disclosed questionable domestic or foreign payments. The diverse nature of the recipients of foreign bribes and the variety of motives for making the payoffs are also indicative of the

3. The recipients of corporate payoffs fall into four general groups: foreign government officials, lower level government employees, foreign political parties, and foreign business enterprises. Of the 95 corporations examined by the Securities and Exchange Commission in their report to the Senate Committee on Banking, Housing and Urban Affairs, 54 admitted making payments to foreign officials, making this the most commonly reported transaction. Seventeen disclosed foreign political contributions. Some of the other reported payments are believed to have involved commercial bribery. SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, 94TH CONG., 2D SESS., REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 37-39 (Comm. Print 1976) [hereinafter cited as SEC REPORT]. "Grease" or "facilitating" payments to government employees to induce them to perform their routine functions may be the most common type of foreign bribe. See Letter from Elliot Richardson, Chairman of the President's Task Force on Questionable Corporate Payments Abroad, to Sen. William Proxmire, June 11, 1976, at 3 [hereinafter cited as Task Force Letter] (reprinted in Prohibiting Bribes to Foreign Officials: Hearing on S. 3133, S. 3379, and S. 3418 Before the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. 39-67 (1976) [hereinafter cited as Senate Hearing on Prohibiting Bribes]).
4. The often overlapping motives for making foreign payments may be classified as follows: (a) obtaining new business or maintaining existing business; (b) averting expropriation, nationalization, expulsion, or cancellation of existing rights (often termed "preventative maintenance"); (c) influencing administrative or legislative actions to establish or preserve a favorable business climate; and (d) expediting the performance of routine government services. To Require Certain Actions by the Overseas Private Investment Corporation: Hearings Before the Subcomm. on International Economic Policy of the House Comm. on International Relations, 94th Cong. 2d Sess. 40 (1976) [hereinafter cited as House Hearings on OPIC] (testimony of Joseph Griffin, Chairman, ABA Comm. Insuring Overseas Investments). See Herlihy & Levine, Corporate Payments: The Overseas Payment Problem, 8 LAW & POL'y INT'L Bus. 547, 548-53 (1976) [hereinafter cited as
pervasiveness of the practice. The gravity of the problem has been widely recognized by United States officials, who have condemned foreign bribery as distorting trade and investment flows, eroding the general reputation of the American business community, and damaging our foreign relations.\(^5\)

Particularly disturbing has been the discovery that in many instances a member of corporate management was directly involved in the transaction.\(^6\) Nevertheless, with the exception of several highly publicized resignations, very few of the corporate officials involved have been fired, demoted, or even transferred.\(^7\) Furthermore, there are indications that the recent disclosures and concomitant publicity are having only a limited impact on corporate conduct.\(^8\) Several firms have openly admitted that they will continue to make certain payments when "necessary."\(^9\)

This Note will focus on one possible remedy for the foreign payments problem: the prohibition of bribery through criminal sanctions. The scope of the analysis will be limited to the prohibition of payments to foreign government officials and contributions to foreign political par-

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\(^6\) Forty-six of the ninety-five companies reporting foreign and domestic payments to the SEC disclosed corporate management's knowledge of, approval of, or participation in the questioned transaction. SEC Report, supra note 3, at 41. See Corporate Payments, supra note 4, at 580 & n.188. A poll by the Opinion Research Corporation in July of 1975 revealed that almost one-half of the American executives surveyed saw nothing wrong with bribing foreign officials to obtain sales. SEC Report, supra note 3, at 41.


\(^8\) Wall St. J., July 9, 1976, at 1, col. 6 (Eastern ed.). Companies are clinging to foreign sales agents although many have been implicated in the bribery disclosures. Raytheon Co. continues to employ Adrion Khashoggi despite his alleged involvement in the Northrup Corp. bribes. During his testimony before the Senate Committee on Banking, Housing and Urban Affairs, Robert Hasch, Chairman of Lockheed Aircraft Corp., repeatedly declined to promise to fire consultants who have passed bribes for the company. Wall St. J., June 9, 1976, at 1, col. 1 (Eastern ed.).

\(^9\) Senate Hearing on Prohibiting Bribes, supra note 3, at 8 (testimony of Roderick Hills, Chairman, SEC); SEC Rptcorr, supra note 3, exhibit A at 2, 3, 7; Wall St. J., Mar. 3, 1976, at 3, col. 2 (Eastern ed.).
ties.10 After a brief review of the relevant domestic and foreign law, the 
Note will examine the criminal legislation which has been introduced 
in Congress. The effectiveness of these criminal sanctions, together with 
the problems inherent in such an approach, will then be assessed in light 
of the alternative remedies available. Finally, several modifications of 
the proposed criminal laws will be suggested.

I

EXISTING BRIBERY LAW

A. CURRENT UNITED STATES LAW

No current federal law directly prohibits American corporations from 
offering bribes to foreign officials or making contributions to foreign 
political campaigns.11 In some instances, however, civil or criminal pen-
alties may arise incidentally from such practices.

One area of potential liability involves the false reporting of question-
able payments. Firms conducting business under the Foreign Assistance 
Act12 are required to report all commissions connected with these sales 
to the Agency for International Development. Sales of all military goods 
abroad are governed by the recently enacted International Security As-
sistance and Arms Export Control Act.13 The Act empowers the Secre-
tary of State to issue regulations requiring that fees, political contribu-
tions, and gifts made in connection with governmental or commercial 
arms sales be disclosed to the Secretary and selected congressional com-
mittees and government agencies.14 In addition, companies dealing with 
buyers financing their purchases with loans from the Export-Import 
Bank of the United States must report all commissions included in the 
contract price to this federal agency. Deliberate falsification of these 
reports in order to hide any questionable payments may violate 18 

10. See note 3 supra. Commercial bribery and payments to lower level government 
employees will be mentioned only incidentally.

Force Letter, supra note 3, at 10; Wall St. J., June 15, 1976, at 3, col. 2 (Eastern ed.); 
Wall St. J., Sept. 16, 1976, at 7, col. 1. (Eastern ed.). Compare the federal sanctions for 
similar payments to United States government officials, 18 U.S.C. § 201 (1970), or for 


14. Id. at § 604(b).

15. Task Force Letter, supra note 3, at 11-12; Silk, To Bribe or Bribe Not, N.Y. Times, 
"whoever, in any matter within the jurisdiction of any department . . . of the United 
States knowingly and willfully . . . makes any false, fictitious or fraudulent statements
Firms with registered securities must meet additional reporting requirements. Although there is no specific requirement that payments to foreign officials or political parties be disclosed in registration statements or annual reports, the Securities and Exchange Commission requires the reporting of all information "material" to the purchasing decision of the prudent investor. The willful failure to report a questionable payment, if "material," arguably constitutes criminal fraud under 18 U.S.C. § 1001 (1966).

The Internal Revenue Code constitutes a further source of potential liability. Section 162(c)(1) of the code prohibits deductions "for any payment made, directly or indirectly, to an official or employee of any government . . . if . . . the payment would be unlawful under the laws of the United States if such laws were applicable to such payments and to such official or employee." Persons who knowingly take an improper deduction are subject to civil and criminal penalties.

Other possible collateral violations of the criminal code include conspiracy, mail fraud, fraud by wire, and conspiracy to defraud the

or representations, or [knowingly] makes or uses any false writing or document . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both." It was established in United States v. Olin Mathieson Chemical Corp., 388 F.2d 525 (2d Cir. 1966), that the concealment of improper payments in AID reports violated 18 U.S.C. § 1001 (1966). The Criminal Fraud Section of the Export-Import Bank is reportedly investigating several alleged cases of false reporting. Task Force Letter, supra note 3, at 11.

16. The SEC's use of the materiality doctrine is examined in note 62 infra.


18. In addition, § 162(c)(2) prohibits deductions for payments to any person "if the payment constitutes an illegal bribe, illegal kickback, or other illegal payment . . . under any law of a State (but only if such State law is generally enforced), which subjects the payer to criminal penalty or loss of license . . . ." In light of Treas. Reg. § 1.162-18(b) (5) this section appears not to be limited to payments within the United States but would apply with equal force to payments abroad.

Three provisions of the Tax Reform Act of 1976 should also aid in discouraging foreign bribery by making such payments more expensive for a corporation and its shareholders. Section 1065(a)(1) of the Act amends I.R.C. § 952(a) to include "the sum of the amounts of any illegal bribes, kickbacks, or other payments (within the meaning of section 162(c)) paid by or on behalf of the corporation . . . directly or indirectly to an official, employee, or agent in fact of a government" in the subpart (f) income of controlled foreign corporations. Similarly, section 1065(a)(2) amends I.R.C. § 995(b)(1)(D) to provide that such payments made by DISCs will be deemed a "distribution in taxable years" and thus taxable as a dividend to all shareholders on a pro-rata basis. The third provision, section 1065(b) of the Tax Reform Act, amends I.R.C. § 964(a) so as to exclude § 162(c) payments when calculating the earnings and profits of foreign corporations.


United States.\textsuperscript{23} It has also been suggested that such conduct might violate 18 U.S.C. § 953 (1966), which prohibits American citizens from attempting, directly or indirectly, to influence the conduct of a foreign government in relation to any disputes or controversies with the United States.\textsuperscript{24}

The ineffectiveness of present domestic law is evidenced by the current corporate payments problem. Moreover, because of the limited scope of existing regulations, it is unlikely that even the most vigorous enforcement of these laws would effectively deter future misconduct.\textsuperscript{25}

B. FOREIGN LAW

Bribery of government officials is expressly prohibited in virtually all countries.\textsuperscript{26} However, it is often difficult to determine exactly what con-

\begin{tabular}{|l|l|l|}
\hline
Barbados & Iran & St. Lucia \\
Burundi & Israel & Saudi Arabia \\
Chile & Jamaica & Senegal (3) \\
Dominican Republic & Jordan & Sierra Leone (5) \\
Ethiopia & Liberia & Sudan (5) \\
Greece & Morocco & Tanzania (3) \\
Guatemala & Nicaragua & Togo (5) \\
Guyana & Pakistan & Western Samoa (3) \\
Honduras & Paraguay & Zaire (3) \\
India & Philippines & Zambia (3) \\
\hline
\end{tabular}

[The numbers in parentheses indicate the maximum penalty in years.]

\textsuperscript{24} Metcalf Letter, supra note 7, at 5.
\textsuperscript{25} Task Force Letter, supra note 3, at 13.
\textsuperscript{26} See, e.g., Senate Hearings on Foreign and Corporate Bribes, supra note 5, at 65 (testimony of Leonard Meeker, Center for Law and Social Policy); id. at 103 (testimony of Elliot Richardson, Secretary of Commerce); Bar of the City of New York Report, supra note 4, at 25. See House Hearings on OPIC, supra note 4, at 5, which lists the bribery laws of OPIC countries as follows:
stitutes a "bribe" under the laws of a particular country. Several generalizations, nevertheless, can be made. Payments to obtain or maintain government business clearly constitute bribes. John J. McCloy, Chairman of the Gulf Oil Special Review Committee which investigated questionable payments made by this major multinational, testified before the Senate Committee on Banking, Housing and Urban Affairs that the Gulf Committee "could not identify a single country where a bribe of a government official to induce a government to enter into a contract with any company for the supply of its product to that government was not illegal in that country."2 In addition, payoffs made to influence the passage or retention of favorable legislation likely fall within the definition of an illegal bribe in a large number of countries.2 With respect to other types of questionable payments, there is no consensus on what conduct is prohibited under foreign law.3 In any event, the prosecution

| Argentina | Haiti | Singapore (7) |
| Bolivia | Indonesia | Sri Lanka (Ceylon) (7) |
| Brazil | Ivory Coast | Swaziland (7) |
| Cameroon | Kenya | Trinidad and Tobago (7) |
| China | Korea | Tunisia (10) |
| Colombia | Laos | Turkey (10) |
| Costa Rica | Malagasy Republic | Upper Volta (10) |
| Ecuador | Malaysia | Venezuela (8) |
| Egypt | Mali | Yemen Arab Republic (10) |
| El Salvador | Nigeria | Yugoslavia (10) |
| Grenada | Panama | |
| Guinea | Romania | |

**PENALTIES OF GREATER THAN 6 TO 10 YEARS**

**PENALTY OF 26 YEARS**

Thailand

27. See Senate Hearings on Prohibiting Bribes, supra note 3, at 14, 15, 17. Roderick Hills, Chairman of the SEC, testified:

   I do not think [that any government agency in the country has] the capacity to decide what is or is not legal under foreign laws. I hate to say how many file cabinets of my former law firm were filled with opinions expressing no opinion as to whether a given transaction was legal or illegal.

Id. at 14. See also Senate Hearings on Foreign and Corporate Bribes, supra note 5, at 6 (testimony of John McCloy).

28. Senate Hearings on Foreign and Corporate Bribes, supra note 5, at 6.


30. See note 27 supra.
of American nationals under foreign anti-bribery law has been very rare.\textsuperscript{31}

In contrast to the almost universal prohibition on bribery of government officials, corporate contributions to political campaigns are legal in many, if not most, countries.\textsuperscript{32} For example, Canada and the United Kingdom permit such contributions and even offer them confidential treatment.\textsuperscript{33} Corporate financing of political campaigns is also a regular practice in Japan\textsuperscript{34} and Italy.\textsuperscript{35} In addition to recognizing political contributions by corporations, German law provides that such donations are deductible as business expenses for tax purposes.\textsuperscript{36}

\section{PROPOSED LEGISLATION}

\subsection{CRIMINAL LEGISLATION}

During the 94th Congress, three bills were introduced which would prohibit corporate payments to foreign officials and restrict contributions to foreign political parties. Although none of the bills were enacted and all expired with the end of the 94th Congress,\textsuperscript{37} one of the


One of the reasons suggested for the lack of enforcement is that the countries in which the bribes are paid do not have access to the information needed to successfully prosecute. \textit{Senate Hearings on Foreign and Corporate Bribes, supra note 5, at 9 (comments of Sen. William Proxmire).} Similarly, lack of information might hamper criminal prosecution by United States law enforcement agencies. \textit{See notes 96-105 infra and accompanying text.}

\textsuperscript{32} \textit{N.Y. Times, Mar. 5, 1976, at 46, col. 2; Senate Hearings on Foreign and Corporate Bribes, supra note 5, at 5-6.} During the hearings John McCloy expressed his belief that it would "take comparatively little research to disclose that the absolute prohibition of corporate political contributions is a rather unique phenomenon of American political history." \textit{Id.} at 6.

\textsuperscript{33} \textit{Senate Hearings on Foreign and Corporate Bribes, supra note 5, at 103 (testimony of William Simon, Secretary of the Treasury).} \textit{See id.} at 12 (testimony of John McCloy); \textit{N.Y. Times, Mar. 5, 1976, at 46, col. 2 (city ed.); Wall St. J., Apr. 14, 1976, at 1, col. 6 (Eastern ed.).}

\textsuperscript{34} \textit{N.Y. Times, Mar. 1, 1976, at 8, col. 1 (city ed.).}

\textsuperscript{35} \textit{Wall St. J., May 14, 1975, at 1, col. 6 (Eastern ed.); id. at 2, col. 2.}

\textsuperscript{36} \textit{Wall St. J., Mar. 18, 1976, at 28, col. 2 (Eastern ed.).}

\textsuperscript{37} Neither H.R. 7539 nor S. 3133 were reported out of Committee. S. 3664 was voted on and passed by the Senate 86-0. \textit{122 Cong. Rec. S15862} (daily ed. Sept. 15, 1976). At the time of the vote it appeared that the House would not have time to act within the remaining two weeks before adjournment, and a proposal to attach the bill to a minor House-Senate conference group which would have increased the chances of enactment was rejected. \textit{Id.; Wall St. J., Sept. 16, 1976, at 7, col. 1 (Eastern ed.).}
proposals has been reintroduced in the 95th Congress.\textsuperscript{38}

The first anti-bribery proposal of the 94th Congress was H.R. 7539, which provided that anyone affiliated with an American company "who, with intent to influence any official act affecting such company, gives or attempts . . . to give any thing of value to any foreign government, any foreign official, or any foreign political organization, shall be fined not more than $10,000 or imprisoned not more than one year, or both."\textsuperscript{39}

Under this bill, the Secretary of State would be responsible for monitoring the foreign activities of American multinationals and reporting all questionable practices to the Department of Justice.\textsuperscript{40}

Sponsored by Senator Proxmire, the first Senate bill to be introduced, S. 3133, would prohibit bribes through an amendment to the Securities and Exchange Act of 1934,\textsuperscript{41} and therefore would apply only to firms with registered securities. This bill, like H.R. 7539, would prohibit the offering of money or anything of value to foreign officials and foreign political parties and, in addition, would impose criminal penalties for making payments to any person when the payor knows, or has reason to know, that a portion of the payment will be passed on to a government official.\textsuperscript{42} This latter provision was designed to restrict the apparently common use of sales agents as conduits for bribes,\textsuperscript{43} a problem which the House proposal failed to address.\textsuperscript{44} S. 3133 contains three other provisions which distinguish it from H.R. 7539. First, the Proxmire proposal would empower the Securities and Exchange Commission to issue new rules and regulations requiring firms with registered securities to maintain more accurate records.\textsuperscript{45} Second, it would incorporate for-

\textsuperscript{38} S. 3664 was reintroduced in the 95th Congress as S. 305. See note 49 infra.
\textsuperscript{39} H.R. 7539, 94th Cong., 2d Sess. § 2 (1976).
\textsuperscript{40} Id. at § 1.
\textsuperscript{41} 15 U.S.C. §§ 78a-78hh (1970). Only 9,000 of the approximately 30,000 American companies trading abroad regularly file with the SEC. Task Force Letter, supra note 3, at 15; Wall St. J., June 7, 1976, at 11, col. 1 (Eastern ed.).
\textsuperscript{42} S. 3133, 94th Cong., 2d Sess. § 3 (1976). The bill would not cover contributions to political parties made through intermediaries.
\textsuperscript{43} The ultimate recipient of the bribe in some cases may be known only to the foreign sales agent who includes these payments in his fee. Twenty-nine of the ninety-five corporations reporting to the SEC disclosed the use of foreign sales-type commissions. The SEC concluded that in many instances portions of these unusual sales commissions found their way into the hands of foreign officials. SEC REPORT, supra note 3, at 38-39.
\textsuperscript{44} During the Senate Hearings, Ralph Nader expressed his concern over multinationals circumventing anti-bribery law through the use of an elaborate system of intermediaries. Senate Hearings on Foreign and Corporate Bribes, supra note 5, at 21.
\textsuperscript{45} Section 1 provides that the Securities and Exchange Commission "shall . . . require issuers of securities . . . to maintain accurate books, records, or accounts of all transactions in such form and containing such information as the Commission deems necessary to carry out its enforcement responsibilities under this title."
eign bribery law, making a violation of foreign law punishable in the United States.\textsuperscript{46} Third, and most importantly, the bill would require that all issuers of registered securities report to the SEC any payment in excess of one thousand dollars made to any foreign official, political party, or sales agent, regardless of its legality. The reports would include the amount of the payment, the name of the recipient, and the purpose of the payment, and would be made public immediately.\textsuperscript{47} The SEC would be solely responsible for the investigation and prosecution of any violation of the proposed law.\textsuperscript{48}

After several hearings on S. 3133, Senator Proxmire introduced a second bill, S. 3664, which responded to much of the criticism directed at his first proposal. This bill has been reintroduced in the 95th Congress as S. 305.\textsuperscript{49} S. 305 drops the disclosure requirement of S. 3133\textsuperscript{50} and expands the application of the anti-bribery provisions to all American businesses and citizens. Specifically, the bill would make it unlawful for any individual or business concern to “corruptly” offer, pay, promise to pay, or authorize the payment of money or anything of value, directly or through an intermediary, to any foreign official, government agency, political party, or candidate for office.\textsuperscript{51} The prohibition would apply

\textsuperscript{46} Section 3 makes it “unlawful for any issuer of a [registered security to] . . . pay or agree to pay any money or give or agree to give any thing of value in a manner or for a purpose which is illegal under the laws of a foreign government having jurisdiction over the transaction.”

\textsuperscript{47} S. 3133, 94th Cong., 2d Sess. § 2 (1976).

\textsuperscript{48} Id. at § 4.

\textsuperscript{49} S. 3664 was combined with a previous bill dealing with disclosure of foreign investment in the United States. The combined legislation was entitled “Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure Act of 1977.” Title I of the proposal incorporated S. 3664. S. 305 was passed by the Senate by voice vote on May 5, 1977. 123 CONG. REC. S7195 (daily ed. May 5, 1977). At the time this Note went to press neither S. 305 nor H.R. 3815, its House counterpart, had been reported out of the House Committee on Interstate and Foreign Commerce.

\textsuperscript{50} The Senate Committee on Banking, Housing and Urban Affairs in their report on S. 3664 stated that the retention of the disclosure provision would be beneficial in “detering those payments which are dubious in purpose but which may not meet the bill’s definition of an illegal bribe.” SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, CORRUPT OVERSEAS PAYMENTS BY U.S. BUSINESS ENTERPRISES, 94th Cong., 2d Sess. 9 (1976) (Report No. 94-1031) [hereinafter cited as COMMITTEE REPORT ON S. 3664]. Unsure whether this benefit was outweighed by the administrative costs of the provision, the Committee postponed final decision on the disclosure requirement. Id. The President’s Task Force rejected a disclosure-plus-criminalization plan as being inherently incompatible. Task Force Letter, supra note 3, at 23.

\textsuperscript{51} S. 305, 95th Cong., 1st Sess. §§ 103, 104 (1977). The word “corruptly” was used in the bill to indicate an intent or desire to influence the recipient to misuse his official position. The Committee Report states that “corruptly” is to be interpreted in a manner consistent with the case law defining this word in 18 U.S.C. § 201(b) (1970), which deals with domestic bribery. COMMITTEE REPORT ON S. 3664, supra note 50, at 7.
only when the payment was made to induce the recipient to use his position to channel business to any person or influence the legislation or regulations of any foreign government.\(^{52}\)

The Securities and Exchange Commission would be responsible for investigating and bringing civil actions against corporations with registered securities. Cases would be referred to the Department of Justice for criminal prosecution.\(^{53}\) Firms not subject to the securities laws would come under the exclusive jurisdiction of the Department of Justice which would both investigate and prosecute alleged violations.\(^{44}\) In addition, S. 305 would impose more extensive corporate accounting requirements through an amendment to the Securities Exchange Act of 1934,\(^{55}\) while eliminating the provision incorporating foreign bribery law.\(^{56}\)

Of the three proposals, S. 305 is the most well-reasoned. To be effective, anti-bribery law should apply to all persons and businesses trading abroad and should restrict the use of sales agents as conduits for payoffs. Only S. 305 fulfills both requirements. This bill also imposes the most stringent accounting standards which should further deter bribery by

52. S. 305, 95th Cong., 1st Sess. §§ 103, 104 (1977). The language of the bill was narrowly drawn to exclude low level facilitating bribes made to expedite the performance of routine government services. The regulation of such payments by the United States was thought to be infeasible. Committee Report on S. 3664, supra note 50, at 6, 7. The bill would also not reach commercial bribery.

53. Committee Report on S. 3664, supra note 50, at 3. Rather than place full responsibility on the Department of Justice, the Committee believed that authorizing the SEC to investigate corporations already reporting to the agency would avoid costly duplication of effort. SEC investigation of bribes would continue regardless of the criminal penalties for such conduct since bribes would often be “material” to the investor. Id. at 10. Some commentators feel that all investigative and enforcement powers should be vested in a single agency. See Bar of the City of New York Report, supra note 4, at 31.


55. S. 305 incorporates verbatim the SEC’s proposed accounting standards which were introduced in the 94th Congress as a separate bill, S. 3418. The Proxmire legislation provides, in part, that all firms with registered securities 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 . . . transactions are executed in accordance with management’s general or specific authorization . . . .


56. “[T]o try to impose on any governmental agency in this country . . . the job of trying to interpret all foreign laws and ferret out all the law enforcement problems of the world would [be] a burden almost beyond [the] capacity of our Government to meet.” Senate Hearing on Prohibiting Bribes, supra note 3, at 17 (testimony of Roderick Hill, Chairman, SEC).
facilitating the enforcement of the anti-bribery sections of the bill.\textsuperscript{57} Furthermore, the proposal wisely places responsibility for all criminal prosecution on the Department of Justice, relieving the SEC of a task which may be beyond its proper scope of duty.\textsuperscript{58}

B. OTHER PROPOSALS

Of the various other alternatives for controlling foreign payments, disclosure and international agreements are the most viable.\textsuperscript{59} Disclosure has been the primary weapon employed by the Securities and Exchange Commission. Under the securities laws, corporations are required to provide registration statements and periodic reports to the SEC containing specified information.\textsuperscript{60} In addition to the specified

\textsuperscript{57} Foreign payoffs are often accompanied by questionable accounting procedures designed to conceal the generation of funds with which to make questionable payments or to hide the diversion of existing corporate assets. See Corporate Payments, supra note 4, at 553-58. During the floor debates, Senator Proxmire explained that the purpose of the accounting standards provision was “to make sure that the management of a company controls its assets, and that if people representing the company make a bribe payment [it will be] possible to hold the top officials of the company responsible.” 122 Cong. Rec. S15789 (daily ed. Sept. 14, 1976).

\textsuperscript{58} See, Senate Hearings on Foreign and Corporate Bribes, supra note 5, at 15 (testimony of John McCloy); Senate Hearing on Prohibiting Bribes, supra note 3, at 25 (testimony of Roderick Hills, Chairman, SEC); Task Force Letter, supra note 3, at 28; Lowenfels, Questionable Corporate Payments and the Federal Securities Laws, 51 N.Y.U. L. Rev. 1, 19 (1976).

\textsuperscript{59} Other possible means of controlling corporate payments include:

(a) Tax Laws. Section 162(c) of the Internal Revenue Code prohibits deductions for bribes and kickbacks. See note 18 supra and accompanying text. The IRS could require the reporting of all suspect payments, but because of the confidentiality of tax records, this information could not be disclosed to the public. Task Force Letter, supra note 3, at 14. Furthermore, the IRS would be powerless to regulate foreign bribes where the payments were properly reported and no improper tax benefits were taken. Id. But see Bar of the City of New York Report, supra note 4, at 23.

(b) Trade Laws. Antitrust laws are generally inapplicable to foreign bribes. Id. at 10. See House Hearings on MNCs, supra note 31, at 88-95 (testimony of Donald Baker, Deputy Assistant Attorney General, Department of Justice). Nevertheless, where bribery affects the sales of another American firm, the payment could be prohibited under 15 U.S.C. § 45 (1970), which empowers the Federal Trade Commission to declare certain practices unfair methods of competition. Metcalf Letter, supra note 7, at 7. Bribes which did not harm the sales of American competitors could not be reached.

(c) Corporate Codes of Conduct. Many firms have responded to disclosures of corporate misconduct by issuing ethical codes to be followed by their employees. SEC Report, supra note 3, at 45. Self policing, however desirable, is not a viable solution. See Senate Hearings on Foreign and Corporate Bribes, supra note 5, at 21 (testimony of Ralph Nader); N.Y. Times, Mar. 29, 1975, at 45, col. 6.

\textsuperscript{60} Schedule A of the Securities Act of 1933, 15 U.S.C. §§ 77a -77aa (1970), specifies
items, the rules promulgated by the Commission require the disclosure of all "material" information in order to prevent other items from being misleading. Because questionable payments are often deemed to be "material," over three hundred corporations have disclosed such payments through the SEC's voluntary disclosure program or as a result of Commission enforcement action.

A broader disclosure scheme which would apply to all persons and businesses, not only to corporations with registered securities, has been recommended by the President's Task Force on Questionable Corporate Payments Abroad. The proposal, which was introduced in the 94th Congress as S. 3741, states:

A person shall report to the Secretary [of Commerce] . . . payments hereafter made on behalf of the person or the person's foreign affiliate to any other individual or entity in connection with an official action, or sale to or contract with a foreign government, for the commercial benefit of the person or his foreign affiliate.

The report would include the name of the recipient and the amount of the payment and would be made public after one year unless the Secretary of State made a specific determination in writing that foreign policy considerations dictated against disclosure.

The Secretary of Commerce

the information required in a registration statement and empowers the Commission to modify these requirements. The continuous reporting system is based on the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78hh (1970).


62. In most instances the SEC has held questionable payments "material" on one of four grounds. First, such practices are often accompanied by inaccurate record keeping. Improper accounting practices provide an independent basis for holding the transaction "material." Second, a payment must be reported if it is significant in amount or related to a significant portion of revenue. The third basis involves matters of improper exercise of corporate authority and quality of management. Finally, a payment is "material" if it might cause repercussions of an unknown nature. SEC REPORT, supra note 3, at 6-13. See generally Note, Disclosure of Payments to Foreign Government Officials Under the Securities Acts, 89 HARV. L. REV. 1848 (1976); Note, Foreign Bribes and the Securities Acts' Disclosure Requirements, 74 MICH. L. REV. 1222 (1976); Mann, Watergate to Bananagate: What Lies Beyond?, 31 BUS. LAW. 1663 (1976).

63. See note 2 supra. The voluntary disclosure program is thoroughly examined in SEC REPORT, supra note 3, at 13-15.

64. S. 3741 was never reported out of committee.


66. Id. at § 9(a).

67. Id. at § 8. The Attorney General could also prevent disclosure if the payment were the subject of an ongoing investigation or prosecution. Id. Compare S. 3133 which contains no provision for delaying disclosure to the public. See note 7 supra and accompanying text.
would be empowered to exempt certain payments from the reporting requirements. 68

A second possible alternative to the unilateral criminal prohibition of bribery is the negotiation of an international agreement on the conduct of multinational corporations. Two of the most promising codes are the United States proposal to the United Nations Commission on Transnational Enterprises 69 and the guidelines developed by the Organization for Economic Co-operation and Development. The OECD code provides in part:

Enterprises should

7. not render—and they should not be solicited or expected to render—any bribe or other improper benefit, direct or indirect, to any public servant or holder of public office;
8. unless legally permissible, not make contributions to candidates for public office or to political parties or other political organizations;
9. abstain from any improper involvement in local political activities

Already the Senate has passed a resolution supporting an international solution to the bribery problem, and this alternative has also received support in the House. 71

III

POLICY ISSUES

During the congressional hearings on the proposed anti-bribery laws, three major issues were repeatedly raised: was bribery a competitive necessity in world trade; would the extraterritorial application of United States law have an adverse effect on foreign relations; and could an anti-bribery scheme be effectively enforced? The proposed criminal legislation will be examined along these three lines of inquiry and then the alternatives of disclosure and international codes will be explored.

71. S. Res. 265, 94th Cong., 1st Sess. (1976), states in part:
Resolved, That the Special Representative for Trade Negotiations, the United States Representative to the United Nations, and appropriate officials of the Department of State, Commerce, the Treasury, Defense, Agriculture, and Justice . . . initiate at once negotiations . . . with the intent of developing an appropriate code of conduct . . . which would result in elimination of [questionable corporate] practices on an international, multilateral basis . . .

A. COMPETITIVE NECESSITY

One of the major arguments against unilaterally prohibiting bribes to foreign officials or restricting corporate contributions to foreign political parties is that such legislation would place United States firms at a competitive disadvantage, resulting in lost foreign trade and fewer American jobs. Of course this problem is not unique to regulation through criminal sanctions; but would apply equally to the unilateral imposition of any method of regulation which effectively eliminated bribery. Some argue, therefore, that neither criminal sanctions nor an effective disclosure program should be enacted until an international agreement providing for regulation among all the major trading nations is negotiated.

While this argument at first appears persuasive, its premise of lost United States trade is a much debated issue. Although many businessmen claim that bribes are an accepted trade custom and that any restraint on bribery would shift American sales to foreign competitors who continued to make payoffs, these statements are often anecdotal and

72. An additional argument, closely related to competitive necessity, is that bribery is an accepted practice abroad. See, e.g., Note, Securities Regulation, 49 Temp. L.Q. 428, 434 (1976); Wall St. J., Mar. 18, 1976, at 1, col. 6 (Eastern ed.) ("[S]uch practices are so deeply engrained in political and business life in many countries . . . that only the few who get caught are likely to give them up altogether." Quoting an unnamed analyst); Wall St. J., Apr. 14, 1976, at 15, col. 1 (Eastern ed.) ("Payments are required [in the Mideast]. It is considered politically benevolent by the rulers of those countries for companies to distribute money." Quoting William Wearly, Chairman, Ingersoll-Rand Co.). Although so-called "grease" bribes to lower level employees may be an accepted custom in some parts of the world, payoffs to top officials are undoubtedly not. One writer has analyzed this argument as follows:

Some corporate executives contend that it is both unfair and unwise for the Government to crack down on bribery abroad by Americans. Their defense is essentially the "when in Rome, do as the Romans do" argument. This argument actually goes back to the ancient Greek Skeptics, disciples of Pyrrho, who asserted that there could never be any rational ground for preferring one course of action over another and that the task of man is simply to conform to the customs of the country where he lives or works. Some businessmen appear to follow the doctrines of the ancient Cynics, disciples of Diogenes, who held that man's life in society is inherently bad and that one can find satisfaction only in unresisting resignation to the world's evils.

Silk, To Bribe or Bribe Not, N.Y. Times, Oct. 26, 1976, at 39, col. 5 (city ed.).

73. See Senate Hearings on Foreign and Corporate Bribes, supra note 5, at 64 (testimony of Leonard Meeker, Center for Law and Social Policy).

74. See, e.g., id. at 53 (statement of Ian MacGregor, Chairman, United States Council of the International Chamber of Commerce); Solomon & Linville, Transnational Conduct of American Multinational Corporations: Questionable Payments Abroad, 17 B. C. INDUS. & COMM. L. Rev. 303, 338 (1976) [hereinafter cited as Questionable Payments Abroad].

75. See, e.g., Senate Hearings on Foreign and Corporate Bribes, supra note 5, at 59
The most reliable information on the impact of unilateral action on foreign trade is the SEC’s Report on Questionable and Illegal Corporate Payments and Practices. Of the seventy companies listed as involved in questionable foreign transactions, sixteen specifically noted in their reports to the Commission that cessation of these practices would have no material effect on total revenues, while only three indicated that payoffs might have to be made in the future to maintain sales. Roderick M. Hills, Chairman of the SEC, has stated that the Commission has found “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.” The investigation of the President’s Task Force on Questionable Corporate Payments Abroad similarly supports the view that bribes play an insignificant role in foreign trade.

Two major factors mitigate against any loss of trade due to unilateral regulation. First, in many product areas, only American firms compete for sales abroad. Therefore, if any trade distortion occurred, it would consist merely of a sales redistribution among American companies, having no overall effect on the United States balance of trade. Second, since bribes frequently do not reach the intended governmental recipient, their bearing on purchasing decisions is at best conjecture. Senator Proxmire has gone so far as to suggest that anti-bribery laws would create a United States trade advantage as American firms would de-

(testimony of Ian MacGregor, Chairman, United States Council of the International Chamber of Commerce); N.Y. Times, Mar. 4, 1976, at 48, col. 3 (city ed.) (statement of Robert Haack, Chairman, Lockheed Aircraft Corp.); Wall St. J., Mar. 18, 1976, at 18, col. 6 (Eastern ed.); Wall St. J., July 9, 1976, at 1, col. 6 (Eastern ed.).

76. See, e.g., Senate Hearings on Foreign and Corporate Bribes, supra note 5, at 59-61; N.Y. Times, Mar. 4, 1976, at 48, col. 3 (city ed.).

77. SEC REPORT, supra note 3.

78. Figures computed from Exhibit A of SEC REPORT, supra note 3. Many of the companies reporting that the cessation of bribery would not materially affect sales are not within high technology industries which have little foreign competition. Rather, they are within industries whose products may be readily duplicated by foreign competitors.


81. 122 CONG. Rec. S15790 (daily ed. Sept. 14, 1976); Senate Hearings on Foreign and Corporate Bribes, supra note 5, at 45 (testimony of George Ball, former Under Secretary of State); Task Force Letter, supra note 3, at 4.

82. Senate Hearings on Foreign and Corporate Bribes, supra note 5, at 39 (testimony of George Ball, former Under Secretary of State); Task Force Letter, supra note 3, at 4.

For example, Adnan Khashoggi, a well-known sales agent in the Middle East, retained the $450,000 given to him by Northrop Corp. to pass on to two Saudi air force generals. TIME, Feb. 23, 1976, at 33, col. 1.
velop the reputation of winning contracts solely on the basis of product quality and price.\textsuperscript{3}

Certainly, some foreign business opportunities would be lost by the unilateral enactment of criminal bribery laws. The more complete studies, however, indicate that potential trade losses would be small, if not insignificant.

B. FOREIGN RELATIONS

The extraterritorial application of United States law involves numerous foreign relations considerations.\textsuperscript{4} For example, such action might be viewed as an arrogant attempt by the United States to protect a foreign nation from its own corrupt officials. Mark B. Feldman, Deputy Legal Advisor for the Department of State, has argued that “[i]t would be not only presumptuous but counterproductive to seek to impose our specific standards in countries with differing histories and cultures.”\textsuperscript{5}

The State Department, Feldman indicated, “would be opposed to any legislation that would be directed to the conduct of U.S. citizens abroad in their relations with foreign officials which is based on the general proposition that U.S. citizens should behave well abroad.”\textsuperscript{6}

With regard to discouraging bribery of foreign government officials, it seems unlikely that the proposed anti-bribery laws would be viewed as an imposition of a conflicting moral code.\textsuperscript{7} Given that bribery is illegal in almost all countries, coupled with the concern voiced abroad over the corrupting influence of American multinationals, a substantial number of countries would undoubtedly favor American efforts to curb such conduct.\textsuperscript{8}

Measures to prevent such practices should engender

\textsuperscript{3} Senate Hearings on Foreign and Corporate Bribes, supra note 5, at 63.


\textsuperscript{5} House Hearings on MNCs, supra note 31, at 24. See Note, Securities Regulations, 49 TEMP. L.Q. 428, 434 (1976).

\textsuperscript{6} House Hearings on MNCs, supra note 31, at 26.


\textsuperscript{8} See 122 CONG. REC. S15780 (daily ed. Sept. 14, 1976). One of the reasons that an anti-bribery law would be welcomed abroad is that such payments rarely benefit the foreign nation. Payoffs to obtain sales result in the purchasing country either acquiring an inferior product or paying a higher price to cover the cost of the bribe. Id.; Gwirtzman, Is Bribery Defensible?, N.Y. Times, Oct. 5, 1975, § 6 (Magazine), at 110, col. 5. Any attempt to prohibit “grease” payments would be viewed with less favor.
good will among the leaders of reform movements in developing countries. The Attorney General of the African Republic of Botswana, M.D. Mokama, has stated:

Certainly, no self-respecting African nation would consider U.S. legislation aimed at curbing corrupt practices of American transnational enterprises in their foreign host state to be “presumptuous” or in any way “an interference.” On the contrary, most Third World nations would appreciate such legislation.

It has also been suggested that unilateral action restricting a multinational’s ability to contribute to foreign political parties would create serious foreign relations problems. However, in all three proposals illegality is contingent upon a nexus between the contribution and commercially favorable treatment by the government. Although some corrupt regimes may be offended by such a statutory formulation, it is reasonable to assume that many nations would welcome efforts to end payments that are political contributions in form and bribes in substance.

A further consideration is the effect the unilateral enactment of a criminal anti-bribery law would have on the development of international codes. William Simon, former Secretary of the Treasury, has expressed concern “that a unilateral effort like that involved in S. 3133 [or presumably H.R. 7539 or S. 305] would undercut the vital principle that co-operative action by the whole community of nations is needed in order to deal effectively with this problem.” Although the United States must carefully avoid the appearance of seeking to impose its specific legal standards on the rest of the world, compelling reasons exist for cautiously proceeding with the enactment of domestic laws. According to George Ball, former Under Secretary of State, only after “we have put our own house in order” will we be entitled to insist that other governments do likewise. Unilateral action by the United States, the domicile of most of the world’s powerful multinationals, would prove its commitment to solving the corporate payments problem, provide an example for other nations to follow, and permit America’s representa-

90. Committee Report on S. 3664, supra note 50, at 4-5. Corrupt regimes, of course, would favor American inaction.
91. See, e.g., Senate Hearings on Foreign and Corporate Bribes, supra note 5, at 12 (testimony of John McCloy).
93. Senate Hearings on Foreign and Corporate Bribes, supra note 5, at 88. See id. at 70 (testimony of Leonard Meeker, Center for Law and Social Policy).
94. Id. at 41.
tives to speak with authority in the development of an international agreement.85

C. Administration and Enforcement

The most difficult problem with any proposal to regulate corporate activities abroad is that of administration and enforcement.86 With regard to criminal anti-bribery laws, the main obstacle is gathering sufficient evidence to meet the criminal standard of proof beyond a reasonable doubt.87

It is generally recognized that no principle of international law compels a foreign country to provide judicial assistance in criminal matters.88 In some instances local law may actually prohibit the disclosure of certain information.89 However, even if local law provides for international cooperation in criminal prosecutions, this merely empowers and does not compel foreign authorities to offer assistance.90 Furthermore, a substantial number of the current international agreements providing for judicial assistance contain “ordre-public” clauses or interest clauses which permit noncooperation where judicial assistance might seriously harm the political, economic, or military stability of the requested nation.91 Any future agreement on judicial assistance would likely include a similar interest clause loophole,92 and furnishing information on questionable corporate payments would certainly fall within this exception.

Although information exchange is discretionary, there are indications that judicial assistance would be afforded in some instances. The SEC

85. Id. See also id. at 112 (comments of Sen. William Proxmire).
86. The enactment of an anti-bribery law governing transactions abroad would clearly be within the legislative jurisdiction of the United States. At least three jurisdictional theories support such action. First, under the territorial principle, a nation may regulate conduct within its territory whether or not the effect of the conduct falls within the territory. Second, a nation may regulate conduct outside its territory if the conduct is generally recognized as a crime and has foreseeable and substantial effects within the nation’s territorial limits. Third, a country may regulate the activities of its nationals regardless of where that activity takes place. COMMITTEE REPORT ON S. 3664, supra note 50, at 15. See Bar of the City of New York Report, supra note 4, at 6, 46 n.4. See generally RESTATEMENT (SECOND) OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES, ch. 2 (1965); Bassiouni, Theories of Jurisdiction and Their Application, 5 CALIF. W. INT’L L.J. 1 (1976).
87. Task Force Letter, supra note 3, at 22-23; COMMITTEE REPORT ON S. 3664, supra note 50, at 17.
88. 2 M. BASSIOUNI & V. NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW 234 (1973).
89. House Hearings on MNCs, supra note 31, at 69 (testimony of Philip Loomis, Jr., Commissioner, SEC).
90. BASSIOUNI & NANDA, supra note 98, at 234.
91. Id. at 237-38.
92. Cf. id. at 237.
has received remarkable international cooperation from a number of countries,\(^\text{103}\) and other nations have stated their willingness to cooperate to the fullest extent possible to ensure the prosecution of offending multinationals.\(^\text{104}\) In addition, the SEC has found information gathered from domestic records, ethically-minded employees, and competitors sufficient to bring numerous enforcement actions, and these sources would also be available for the enforcement of criminal sanctions.\(^\text{105}\)

\[\text{D. COMPARATIVE ANALYSIS OF CRIMINAL SANCTIONS, DISCLOSURE, AND INTERNATIONAL CODES}\]

To effectively appraise the merits and drawbacks of criminal sanctions, the alternative remedies must be evaluated. As with criminal anti-bribery law, the regulation of foreign payments through disclosure poses problems of administration, foreign relations, and lost trade. Reliance upon international agreements also presents serious difficulties.

One of the disadvantages of a general disclosure scheme, such as that found in S. 3133, is the administrative burden involved in receiving, filing, and examining reports on all fees and commissions paid in connection with sales abroad.\(^\text{106}\) Furthermore, if all payments were disclosed, the reports might be rendered largely meaningless due to their sheer volume. Concern over general disclosure also stems from the fact that the publication of all payments regardless of their legality would expose a company’s method of operation abroad, often a highly valued competitive tool.\(^\text{107}\) All of these problems, however, would be minimized by a disclosure plan, such as that found in S. 3741, which exempts many routine business payments\(^\text{108}\) and delays the release of all information to the public for one year.\(^\text{109}\)

Assuming that both criminal sanctions and disclosure could be effectively enforced, the criminal approach offers greater promise of long-

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103. *House Hearings on MNCs*, supra note 31, at 69 (testimony of Philip Loomis, Jr., Commissioner, SEC).
105. Id. at 5.
108. S. 3741 requires the Secretary of Commerce to issue regulations defining “certain types of payments which are not required to be reported because they are regular business payments not inconsistent with the purposes of this Act, or are bona fide payments to a foreign government, such as taxes or fees paid pursuant to duly promulgated laws, regulations, decrees, or other legal action.” S. 3741, 94th Cong., 2d Sess. § 9(a)(3) (1976).
109. Id. at § 8(a).
range deterrence. The deterrent effect of disclosure is "a highly depreciable commodity," as the adverse publicity surrounding a company's disclosure rapidly fades with time. Moreover, as the number of disclosing companies grows, the public focuses less on individual firms and more on all multinationals as a whole. This depreciation effect has already been demonstrated in the past year by the greatly decreasing press coverage given to each successive disclosure. If the trend continues, five years from now disclosure will be virtually worthless as a deterrent to corporate misconduct. On the other hand, criminal sanctions will probably retain their effectiveness. Corporate payoffs are crimes of planning, not of passion; insofar as the benefits and risks are balanced as in any business decision, criminal sanctions can succeed as a long-term deterrent.

The relative long-term values of criminal prohibition and disclosure must be considered in light of their likely impact on United States foreign relations. There is no question that the recent disclosures have been a tremendous setback to American foreign policy. Countries have expropriated the property of several multinationals; relations with our allies have been strained; and the heads of friendly governments have been forced out of office. To the extent that disclosure will not effectively deter future corporate payments, bribery and the attendant adverse publicity abroad will continue under this alternative along with the current foreign relations complications. Furthermore, this remedy,

110. *Senate Hearings on Foreign and Corporate Bribes, supra* note 5, at 21 (testimony of Ralph Nader). *But see* note 117 infra (coverage in the foreign press).
111. *Senate Hearings on Foreign and Corporate Bribes, supra* note 5, at 21; *Senate Hearing on Prohibiting Bribes, supra* note 3, at 6 (comments of Sen. William Proxmire). According to Jerry Levinson, Chief Counsel of the Senate Subcommittee on Multinationals, it "is completely illusionary to think that anything will change [as a result of the recent disclosures]." Mr. Levinson states that "once the publicity has faded many of these guys will go back to the same old philosophy of sell, sell, sell any way you can." Wall St. J., July 9, 1976, at 1, col. 6 (Eastern ed.).
112. *Senate Hearings on Foreign and Corporate Bribes, supra* note 5, at 21 (testimony of Ralph Nader).
114. *House Hearings on MNCs, supra* note 31, at 1.
115. *House Hearings on OPIC, supra* note 4, at 3-4.
117. Recent disclosures have not stopped foreign bribes. See note 8 supra. Although publicity in the United States will rapidly decrease over time, this may not be the case abroad. The depreciation effect of adverse publicity is a function of the volume of news coverage given to the disclosures. Major press coverage in a foreign nation is usually limited to disclosures involving the particular country's officials, and since such disclosures are relatively infrequent, the impact of such admissions would remain high. Of course this reasoning is inapplicable to countries with a government-controlled press.
Prohibiting Foreign Bribes

like criminal prohibition, might possibly be viewed by some countries as an unjustifiable interference with the internal affairs of a foreign state.118

Another drawback to a regulatory scheme predicated solely on disclosure of questionable payments is that the impropriety of bribery is left somewhat in doubt. Criminal sanctions, in contrast, would represent an unequivocal condemnation of bribery,119 and would provide American businessmen with a strong excuse for resisting extortion pressures.120

Furthermore, with regard to the United States balance of payments, disclosure may engender a more significant loss in trade than would the implementation of criminal legislation. If each regulatory scheme merely eliminated bribery, the two should result in equal trade distortion. However, if disclosure unveils legal payments, foreign firms may learn the fine points of American salesmanship abroad and thereby gain a competitive edge in world trade.121

The problems of regulating payments unilaterally would be considerably lessened if an international code were successfully negotiated. But as Ray Garret, former Chairman of the SEC, has indicated, "[S]uch an approach while intellectually appealing [is at best] a long range, and possibly ponderous, route to the resolution of the problems facing American companies today."122 It would take years to formulate a standard of conduct which would be acceptable to the major developed and developing nations of the world.123 In addition, reliance would have to

Under such circumstances, disclosure would not in any way reduce extortion pressures.


119. "Such legislation would represent the most forceful possible rhetorical assertion by the President and the Congress of our abhorrence of such conduct. It would place business executives on clear and unequivocal notice that such practices should stop." Task Force Letter, supra note 3, at 23.

120. Bob Dorsey, former Chairman of the Gulf Oil Corporation, testified before the Multinationals Subcommittee of the Senate Foreign Relations Committee that having "such a statute on our books would make it easier to resist the very intense pressures which are placed on us from time to time. If we could just cite our law which says that we just may not do it, we would be in a better position to resist these pressures and refuse the requests." 122 Cong. Rec. S15790 (daily ed. Sept. 14, 1976) (Sen. William Proxmire quoting Dorsey's testimony). See House Hearings on MNCs, supra note 31, at 75 (testimony of Philip Loomis, Jr., Commissioner, SEC).

121. A limited disclosure plan such as S. 3741 would lessen, but not eliminate, disclosure of trading methods.


123. The drafting of an acceptable code would be hampered by the conflicting interests
be placed on international enforcement machinery which is less depend-
able than that available domestically. 124

Because of these drawbacks, international codes could not be exclu-
sively relied upon to meet the pressing problem of foreign payments.
Nevertheless, efforts in this area should be encouraged. International
anti-bribery law could mesh nicely with strong domestic measures,
while reducing the foreign policy objections and enforcement problems
of unilateral criminal prohibition.

VI

RECOMMENDATIONS

As noted above, S. 305 seems to be the most comprehensive and well-
reasoned anti-bribery proposal. 125 However, several modifications that
might lessen the problems of regulating corporate payments through
criminal sanctions should be considered.

The sections of the bill dealing with political contributions 126 should
be restructured to more clearly indicate the intent of the Committee.
Only political contributions made to induce the recipient to misuse his
official position are meant to be prohibited. 127 The language of the bill
pertaining to political gifts, however, is almost identical to that in S.
3133 128 which apparently has been misinterpreted by some as prohibiting
all contributions, including those legal under local law. 129 The bill should
make clear that only corrupt political contributions are being attacked.
Alternatively, these subsections should be deleted entirely since the

of developed and developing countries and by the divergent views on the multinational
corporation's appropriate economic, political, and social roles. Questionable Payments
Abroad, supra note 74, at 341.

124. See Senate Hearings on Foreign and Corporate Bribes, supra note 5, at 46 (testi-
mony of George Ball, former Under Secretary of State); id. at 105 (comments of Sen.
William Proxmire). Agreement on an enforcement mechanism could also present prob-
lems. Developing nations might prefer an international body such as an agency of the
United Nations while developed countries might favor direct enforcement through signa-
tory nation-states. An additional problem would be determining what organizational func-
tions any agency should perform. Questionable Payments Abroad, supra note 74, at 342.

125. See notes 57-58 supra and accompanying text.


128. The only significant change is the addition of the word "corruptly" in S. 305. See
note 51 supra and accompanying text.

129. This misreading is indicated by the frequently voiced concern that S. 3133 would
raise foreign relations problems since corporate financing of political campaigns is legal
in many countries. Senate Hearings on Foreign and Corporate Bribes, supra note 5, at 21
(testimony of Ralph Nader). Cf. id. at 6, 12, 103.
subsections prohibiting bribes through intermediaries130 arguably cover bribes in the form of political contributions.

Adverse foreign reaction might also be diminished by prefacing the bill with a statement that one of its purposes is to protect domestic corporations from unfair methods of competition in foreign trade. If the prohibition against bribes is based on this or a similar specific United States interest, as opposed to general "American morality," there would be one less ground upon which foreign nations could object.131

The difficulty of enforcing criminal sanctions stems primarily from the degree of proof required. However, providing a civil private right of action for those competitors harmed by the payoffs would offer a means of enforcement in those instances where the criminal standard could not be met.132

Another modification which would ease enforcement would be the extension of the record-keeping requirements to all firms. Record-keeping plays an important role in deterrence and enforcement,133 but, as currently drafted, S. 305 imposes strict accounting standards only on those corporations with registered securities.134 A provision similar to that in S. 3741 empowering the Secretary of Commerce to promulgate record-keeping requirements for those firms beyond the reach of the SEC should be included in any future anti-bribery legislation.

CONCLUSION

Prohibition through criminal sanction is the best means of dealing

131. The objection that criminal anti-bribery law would impose "American morality" on foreign nations is frequently raised. See notes 85-90 supra and accompanying text.
132. A private right of action was included in section 10 of S. 3379, a bill which proposed to regulate bribery through disclosure and strict accounting standards. S. 3379, 94th Cong., 2d Sess. (1976). This provision was not included in S. 3664 or S. 305 because the Senate Committee on Banking, Housing and Urban Affairs considered the language of section 10 too ambiguous. COMMITTEE REPORT ON S. 3664, supra note 50, at 13. During the congressional debates on S. 3664, Senator Frank Church offered an amendment which would have provided, among other things, a private right of action. The amendment stated in part:

Sec. 5 (a) . . . any person who makes any payment prohibited by . . . this Act . . . and thereby causes a competitor to sustain actual damages is liable to such competitor in an amount equal to the sum of not more than three times the actual damages sustained by such competitor, plus the costs of the action and reasonable attorney's fees . . . .

133. See note 57 supra.
with the problem of corporate bribery in the international setting. Although such an approach might place a few American businesses at a competitive disadvantage, the overall impact on the United States balance of payments would be small, if not insignificant. The unilateral enactment of an anti-bribery law would raise various foreign relations problems, but those raised by criminal legislation would be no more substantial than those presented by a disclosure scheme, and certainly they would be less troublesome than those the United States is currently experiencing as a result of foreign payoffs. Similarly, the enforcement of criminal sanctions is achievable, and, although difficult, such enforcement is not prohibitively more difficult than the administration of other proposed remedies.

Criminal anti-bribery law promises to provide the most effective long-range deterrence to corporate misconduct. Furthermore, criminal sanctions would constitute an unmistakable American condemnation of foreign bribery, provide American businessmen with the best conceivable excuse for resisting extortion, and afford the United States a strong base from which to negotiate an international bribery agreement.

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