TESTIMONY OF
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BEFORE A JOINT HEARING OF THE
SUBCOMMITTEE ON INTERNATIONAL FINANCE AND
THE SUBCOMMITTEE ON SECURITIES
SENATE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS

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Mr. Chairman, thank you for this opportunity to present the Administration's position on the issue of illicit payments by U.S. corporations to foreign officials in general, and on Senator Chafee's proposed amending legislation to the Foreign Corrupt Practices Act, S. 708, in particular.

I have asked Commerce Secretary Baldrige to join me today because of the Commerce Department's active involvement in this issue during the past two years and because of the Department's special responsibility for export promotion and business advocacy.

In addition, I am accompanied by two distinguished representatives from two other federal agencies with direct involvement in the Foreign Corrupt Practices Act. Mr. Edward C. Schmults, Deputy Attorney General, is representing the Justice Department, and Mr. Ernest B. Johnston, Deputy Assistant Secretary for Economic and Business Affairs, is representing the State Department. They are available to address specific questions about the legal interpretations and enforcement practices of the Foreign Corrupt Practices Act, as well as any inquiries regarding the foreign relations implications of the Act, and current efforts toward an international agreement prohibiting illicit payments.

Mr. Chairman, the Administration strongly supports the proposed changes to the bribery portion of the Foreign Corrupt Practices Act encompassed in S. 708, and will suggest only minor changes be considered by the Committee, which are consistent with the objectives of S. 708.

As for the accounting and recordkeeping provisions of the Chafee bill, the Administration, while not actively opposing the changes proposed in S. 708, believes that there is a more effective and equitable solution to the problems encountered under this section of the law. We recommend that the prohibition against falsifying company books and records for the purpose of concealing illegal payments to foreign officials be transferred to the antibribery provisions of the Act. Such a change would simplify the Act and demonstrate that the current general, overly-broad recordkeeping standards in the law are unnecessary and excessive.

As Chairman of the Trade Policy Committee, the interagency trade policymaking body created by Congress in the Reorganization Act, I want to emphasize that our support for S. 708 is based on interagency consensus. The Departments of Justice, State, Treasury, Commerce and other agencies have studied this legislation carefully through the Trade Policy Committee process and are unanimous in their support for the Chafee bill.

The Administration believes that the provisions of S. 708 are faithful to the objectives sought by Congress in 1977 in attempting to prohibit illicit payments overseas. We feel that this legislation, by clarifying ambiguities in the current law and by limiting excessive recordkeeping requirements which presently go far beyond international transactions, would do more to accomplish the original intent of the law. Because there has been so much confusion about the Foreign Corrupt Practice Act, not only has Congress' goal of prohibiting overseas bribes been obscured, but another important goal of the Congress -- namely, export promotion - - has been undermined.

To be sure, the Foreign Corrupt Practices Act, when proposed by this Committee in 1976 and 1977, as a statutory solution to the problem of overseas bribery, was a commendable undertaking.

The FCPA, to no one's surprise, was passed unanimously by Congress in December 1977 following widespread reports of questionable payments in connection with U.S. business activities both at home and abroad. Corporate bribes to foreign officials were perceived by both the Executive and Legislative Branches of Government as unethical, unnecessary to the conduct

of business, and harmful to our relations with foreign governments. The FCPA was intended to make certain payments, offers of payments, and gifts to foreign officials, political parties or political candidates illegal. It also established recordkeeping requirements for all publicly held corporations, regardless of whether a corporation is engaged in international business.

Behind the FCPA's prohibition of bribery was the important objective of enhancing U.S. national security, foreign policy and economic interests. It was believed that: (a) political controversy due to corruption involving American bribes would endanger the stability of friendly foreign governments or complicate U.S. international relations; (b) successor foreign governments would expropriate the assets of or cancel contracts with U.S. businesses believed to have used corrupt practices, and (c) U.S. economic resources would be misallocated because bribery distorts comparative advantage.

This administration shares these objectives, and commends Senator Proxmire and the Senate Banking Committee for their efforts to deal with a multi-faceted problem four years ago.

I state unequivocally that the Administration supports the principle that illicit payments, whether foreign or domestic, are unethical and undesirable. We do not endorse or condone bribery for any reason.

However, while well-intended, the law has given rise to interpretative and practical problems for firms engaged in overseas business.

Certainly, we are all against bribery and condemn the misuse of an official position for personal or monetary gain. In fact, there are few countries in the world that do not have an antibribery statute incorporated in their domestic laws.

The problem is one of uncertainty surrounding the application and enforcement of the Foreign Corrupt Practices Act in different countries and cultures. This was the finding of a General Accounting Office study released earlier this year.

Many problems arise from confusion over what makes a payment a bribe. Grease payments, such as fees to get low-level bureaucrats to perform their duties of processing forms, approving licenses, or unloading a shipment of perishable goods from a boat in dock, are

specifically permitted on the grounds that petty corruption is often unavoidable. This Committee acknowledged that fact when it wrote the FCPA in 1977.

But, there is a large gray area between that sort of bureaucratic paper shuffling and the potentially destructive authority of local officials.

There is also the problem of a firm's liability for the actions of foreign agents overseas. It is particularly difficult for a U.S. company, large or small, to protect itself against the behavior of an agent in a foreign nation. Large corporations use hundreds, sometimes thousands, of sales agents throughout the world. Small companies, often attempting to export for the first time, must rely upon individuals about whom limited information, at best, is available. In both cases the U.S. businessperson is left hopelessly confused as to what sort of circumstances may someday be sufficient evidence to show he had reason to know of possible wrongdoing before the fact. This is an unreasonable burden on U.S. forms which makes certainty of compliance nearly impossible.

It should be noted that we have no similar "reason to know" standard of responsibility in our domestic bribery laws. If we deem this standard of responsibility inappropriate in our domestic law, it is far more inappropriate when extended internationally, to many different cultural and social structures.

These questions of uncertainty are so complex as to have earned the FCPA the reputation of being one of our nation's most serious export disincentives. Treatment under the FCPA of company contributions to local charities or political parties, Christmas gifts, tokens of hospitality or in accordance with custom, inflated rates of commission or "finders fees" which are viewed by some foreign governments as a part of their employees' salaries, are all unclear. This creates a chilling effect for U.S. firms attempting to sell overseas.

When faced with uncertainty and questions of whether or not to make a particular payment, many of which are a social and business custom and legal in many countries, U.S. firms now play it safe and do not even bother to compete.

In addition, the cost of complying with the accounting and recordkeeping requirements of the Act has placed an excessive burden on all publicly held companies regardless of whether or not they make any foreign sales. The GAO study found that over 55 percent of the firms polled said they believe their efforts to comply with the act's accounting provisions have cost more than the benefits received.

Here again, the FCPA demands that the businessperson determine his own "reasonable degree" or "accurate and fair" recordkeeping and internal controls.

But to violate the statute, one need only to err in keeping company books in the detail to which the Securities and Exchange Commission deems necessary. One need not be engaged in corruption or foreign sales to violate the so-called Foreign Corrupt Practices Act.

Most alarming is the fact that there is considerable disagreement among the American Bar Association (ABA), the American Institute of Certified Public Accountants (AICPA) and the Securities and Exchange Commission (SEC) as to a firm's responsibility under the accounting provisions of the law.

Costly accounting procedures and ambiguities about what is a bribe not only cause U.S. companies to lose foreign orders, but retard competing in the first place. The problems created by the act are especially onerous on smaller publicly held companies, and new exporters, who are unable to obtain specialized counsel familiar with the act's intricacies.

S. 708 seeks to solve these problems, to reassure businesses conducting legitimate overseas transactions, while retaining the strict prohibitions against bribery of foreign government officials. The bill clarifies key ambiguities in the law, thereby eliminating "gray areas" where what is and what is not permissible is currently, at best, extremely difficult to determine.

Most importantly, the bill alleviates the major uncertainty that businessmen have faced under the FCPA liability based on having "reason to know" that a foreign agent was planning to engage in a questionable payment. S. 708 removes this term thereby making the Act more

compatible with domestic bribery law, and substitutes the more appropriate requirement of "direction or authorization" of an illicit payment as a basis for liability.

Also very important is that the bill makes enforcement of antibribery consistent and predictable by: (1) placing all antibribery enforcement responsibilities under the Department of Justice, (2) authorizing the Department of Justice to issue clear and comprehensive guidelines as to what is permissible conduct and what is not permissible conduct, and (3) providing that the FCPA constitutes the exclusive substantive prohibition under the U.S. Code for overseas bribery.

S. 708 excludes from coverage certain payments that are customary in the country where made whose purpose is to facilitate or expedite the performance of official duties. This approach represents a more logical and comprehensible solution to the question of "grease" payments, which are legal under current law, but which have been difficult to apply to real life situations.

The bill also clearly states that legitimate business marketing expenses, and conventional courtesy gifts or tokens of regard do not constitute a violation of the Foreign Corrupt Practices Act. In addition, the Chafee bill demonstrates common sense and respect for the laws of other nations by excluding the prohibition payments which are legal in the country where they take place.

The Administration wishes to suggest several amendments to S. 708 which are minor. In addition, there appears to be a discrepancy between the definition of bribery proposal in S. 708 and the accepted definition under domestic bribery statues. In keeping with the objective in S.708 of making the scope of the FCPA more consistent with that of similar domestic laws, we suggest that the language on bribery in this legislation be brought into closer conformity with that found in the U.S. criminal code.

I am prepared to submit a description of these proposals for the record. However, rather than detail formal language changes, it is hoped that the authors of the bill will resolve these concerns through consultations with the Administration and this committee. I am confident that agreement can be reached on the suggested language changes quickly and with limited debate.

Finally, there is one major substantive proposal offered by the Administration regarding the accounting and recordkeeping provisions of the Act which represents an addition to S. 708.

As you know, the Administration strongly opposes unnecessary and unjustifiable government imposed regulatory and statutory burdens on U.S. commerce. While we support the continuation of an effective antibribery law and further attempts to obtain an international antibribery agreement, we oppose the continuation of the accounting and recordkeeping provisions of the FCPA.

Section 102 of the FCPA represented a significant extension of the jurisdiction of the Securities and Exchange Commission (SEC) over business practices unrelated to the protection of investors and unnecessary for the effective operation of the prohibitions against illicit payments overseas. Pervasive federal rules on accounting practices have not been deemed necessary for the enforcement of domestic bribery laws or other criminal laws prohibiting misuse of corporate assets.

The accounting and recordkeeping requirements of the FCPA, which require all companies that issue securities regardless of whether they are involved in international business, to keep books "in reasonable detail," are highly inflationary, having caused U.S. companies to develop expensive new accounting systems and to utilize costly accountants and auditors with no assurance from the SEC that such systems meet SEC requirements. Because of their vagueness as to what constitutes compliance, the accounting and recordkeeping provisions have imposed significant cost burdens on all U.S. corporations in order to resolve the limited problem of illegal foreign payments. The GAO found that the majority of companies it surveyed stated that compliance with the accounting provisions of the FCPA had increased their accounting and auditing costs by 11 to 35 percent; an additional 22 percent of the companies surveyed believe the increase to be more than 35 percent.

In conjunction with this change, the Administration suggests that language be added to the bill to provide that any attempts to conceal misappropriation of assets to make prohibited payments be made a criminal offense. Such a provision would apply to all assets, whether

material or immaterial, and should be outside the securities laws. The presence of criminal sanctions for both bribery of foreign officials and misappropriation of assets for that purpose is a sufficient incentive to U.S. business engaged in international commerce to maintain proper records and internal controls. In this manner, the law will be made more accurate in its approach to the problem of overseas bribery of foreign government officials, and more simplified in its enforcement and purpose.

If U.S. corporations engage in illegal acts, they should be punished for such violations. Broad preventative mandates are not necessary to prohibit acts already defined as illegal. Should Congress wish to extend such authority to the SEC for purposes other than to prevent overseas bribery, the SEC should be prepared to defend such an extension of power under a new provision of securities law.

While it is important to delineate the important changes proposed by S. 708, and the suggestions offered by this Administration, it is perhaps more important to mention what is not changed by Senator Chafee's legislation or by the Administration's recommendations.

As amended by S. 708 and the Administration's suggestions, the Foreign Corrupt Practices Act will continue to make it unlawful for any U.S. company or any official, employee, director or shareholder of such company corruptly to pay, give, offer, promise, anything of value to any foreign official for the purpose of influencing any act or decision of that foreign official or inducing the official to misuse his legal duty in order to obtain, retain, direct or maintain business.

When a U.S. corporation has been found to have violated the law, the penalty is a $1 million fine. For individuals who directed or authorized such bribes to take place the penalty is $10,000 and/or 5 years in prison. The United States remains the only country with a strong, pervasive, extraterritorial law specifically designed to outlaw corrupt payments to foreign officials.

Let us remember that there is an important international aspect to this issue. It is in the interest of the United States to pursue an agreement on the problem of illicit payments abroad for

two reasons. First, a successful agreement with our trading partners has the potential of eliminating the very real competitive disadvantage that now exists between the U.S. and other nations. While this is desirable, we, as a nation, have made a conscious and deliberate decision to prohibit U.S. firms from making questionable payments to foreign officials, no matter what other nations choose to do.

Second, and more important, the problem of illicit payments to win sales is an international problem. Bribery, regardless of whether it is made by a U.S. firm or by any other Western country, has the same national security and foreign relations implications for the United States. The problem of illicit payments is clearly a multilateral one: There is little difference in terms of U.S. national security interests whether a friendly foreign government falls at the hands of a bribe by an American firm or a foreign firm. The FCPA has done little to encourage other nations to subscribe to the U.S. approach toward this problem. In fact, to date, American efforts to achieve an international agreement have failed. Developed countries have consistently been unwilling to follow the example of the U.S. as embodied in the Foreign Corrupt Practices Act. Nonetheless, we maintain that it is an important goal for broader national policies for the U.S. to seek a sensible international solution to this problem.

The State Department is prepared to address the current status of our international efforts, and to explain what tact may be pursued under provisions of S. 708. Let us understand that the United States will continue to support and enforce a strong international antibribery law for its own citizens. My office will strongly support the State Department in efforts to reinvigorate work for an international approach.

Our statement as a nation is clear on the issue of illicit payments, and our leadership toward an international effort in this area will be strengthened because we will have demonstrated to our trading partners that it is possible to create a reasonable and fair, yet comprehensive and stringent prohibition against the bribing of foreign government officials. Once the U.S. business community and the U.S. government stand together in support of a

practicable law of this type that respects the laws and customs of other nations, our credibility and influence as a world leader against bribery will be greatly enhanced.

Let me conclude my remarks with a reference to my capacity before this Committee.

Congress made the job of U.S. Trade Representative a permanent Cabinet-level position with direct responsibility to the President because of the importance of promoting and fostering international trade.

In accepting this position, it is my duty to encourage greater U.S. involvement in foreign markets, to pursue greater openness in markets throughout the world, and to identify barriers to trade - - no matter where they exist - - and to seek elimination of such impediments.

I have come before you today to report on one very serious trade barrier to our exports. I view this problem as no less important than reporting to Congress on foreign subsidies, nontariff barriers that take the form of local content laws, or hidden taxes or standards used by our competitors to exclude U.S. products from their borders.

Mr. Chairman, clarifying the Foreign Corrupt Practices Act may be the most important trade issue before us because it represents a self-imposed constraint to exports that comes not from the fact that we have chosen to take a strong stance against international bribery, but because we have done so in a self-defeating manner.

Elimination of the export disincentive aspects of the Foreign Corrupt Practices Act is a priority of this Administration and the Office of the USTR. We urge this committee to approve S. 708 in a timely way.