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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

November 17, 1981

MEMORANDUM FOR: James A. Baker III

FROM: Glenn R. Schleede

SUBJECT: Justice Testimony on Foreign Corrupt Practices Act

In connection with your question at this morning's staff meeting, OMB staff tell me that the subcommittee has explicitly requested that Justice testimony be largely confined to an accounting of Justice's enforcement of the Act.

A copy of these testimony Jonathan Rose is scheduled to deliver tomorrow is attached.

The testimony does conclude (pages 13-15) by reiterating Administration policy: that the current law needs revision and that the Administration supports legislation along the lines of the Chafee-Rinaldo proposal (S. 708, H.R. 2530). Briefly, those bills would:

- Simplify the accounting standards of the Act and add a scienter requirement to make clear that only a knowing failure to comply with accounting standards will form a basis for liability;
- Replace the Act's vague "reason to know" standard, under which a U.S. concern may be held liable for an illegal payment, with standards specifying liability where a corrupt payment is made and the U.S. concern directs or authorizes, either expressly or by a course of conduct, that the payment be made;
- Clarify the extent of responsibility of a U.S. concern for the accounting standards of a partially-owned subsidiary;
- Consolidate enforcement of the Act's anti-bribery provisions in the Department of Justice; and
- Sanction the issuance of guidelines for compliance with the Act, to be issued by the Attorney General in consultation with other interested Federal agencies.

Attachment

cc: Dick Darman
Craig Fuller
Fred Fielding

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STATEMENT

OF

JONATHAN C. ROSE

ASSISTANT ATTORNEY GENERAL

OFFICE OF LEGAL POLICY

DEPARTMENT OF JUSTICE

CONCERNING DOJ ENFORCEMENT

OF THE

FOREIGN CORRUPT PRACTICES ACT

BEFORE

THE COMMITTEE ON ENERGY AND COMMERCE

SUBCOMMITTEE ON TELECOMMUNICATIONS, CONSUMER

PROTECTION AND FINANCE

OF THE

UNITED STATES HOUSE OF REPRESENTATIVES

Mr. Chairman, I am very pleased to have the opportunity to appear before the Subcommittee this morning to participate in its oversight hearings on the Foreign Corrupt Practices Act.

You have asked me to describe the past and current enforcement efforts of the Department of Justice relating to bribery of foreign government officials by American companies. These efforts began more than a year before the enactment of the Foreign Corrupt Practices Act (FCPA) and have continued since December 1977 when that Act was signed into law. With your permission, I will describe our pre-FCPA cases, as well as our enforcement actions under the Foreign Corrupt Practice Act itself.

I. THE DEPARTMENT OF JUSTICE'S INVESTIGATIONS WHICH PRE-DATED THE ENACTMENT OF THE FOREIGN CORRUPT PRACTICES ACT

As many of you may recall, it became public knowledge in the mid-1970's that a number of American corporations had engaged in possibly illegal practices involving domestic and foreign payments. I use the words "possibly illegal" advisedly because there was genuine uncertainty at the time over whether the foreign payments were in fact illegal. In response to those revelations, the Securities and Exchange Commission developed a program under which publicly held corporations voluntarily made generic disclosures, in public filings at the Securities and Exchange Commission, of their past practices involving such overseas and domestic payments. In connection with this voluntary disclosures program, a substantial number of American

corporations undertook internal investigations to determine the nature and extent of these practices.

In October 1976, the Department of Justice established its own Task Force to examine the facts underlying the voluntary corporate disclosures which had been made to the Securities and Exchange Commission, in order to determine whether any criminal statutes had been violated. At the time the Task Force was established, about 70 corporations had made voluntary disclosures to the SEC about various payments made at home and abroad. By summer 1977, the number of corporations which had made voluntary disclosures had risen to more than 400. It soon became apparent that if the facts underlying the corporate disclosures were to be reviewed by Justice Department prosecutors in a thorough and even-handed manner, the Task Force effort, as originally conceived, had to be expanded and intensified.

In the summer of 1977, 15 prosecutors were assigned full-time to the Task Force. Special Agents from the United States Customs Service -- first 25 part-time and later 7 full-time -- participated in the Task Force effort. In addition, the Federal Bureau of Investigation was asked to conduct a survey of the relevant public filings. Initially, the Department sought to identify those corporations whose activities warranted more thorough investigation. Eventually the prosecutors assigned to the Task Force in Washington conducted investigations into disclosures made by approximately 90 corporations. Various United States Attorney's Offices conducted investigations into

disclosures made by another 140 corporations. Since there have been substantial misconceptions about the nature of the voluntary disclosures that were made by American corporations in the mid-1970's, it might be useful for me to take a moment to outline generally the results of the Department's review of those disclosures.

We found that relatively few of these corporations had actually disclosed to the Securities and Exchange Commission that their employees and officials had bribed foreign government officials. Apparently, many corporations, acting upon the advice of counsel, disclosed any questionable practices they found, which practices, in themselves, might not have constituted either domestic or overseas bribery. For example, approximately 25 corporations disclosed that they had been engaged in illegal ocean freight rebating. Publicly held ocean carriers had been engaged in the practice, in violation of the rate schedules regulated by the Federal Maritime Commission, of rebating to shippers a portion of the fees that the carrier charged for transporting the shippers' goods. This type of rebating had absolutely nothing to do with bribery of foreign officials. However, it led to the successful criminal prosecution of a number of carriers on the grounds that they had engaged in a criminal conspiracy to defraud the Federal Maritime Commission. These prosecutions were conducted by the United States Attorney's offices in Cleveland, Ohio and Newark, New Jersey.

The Department's review also disclosed that many of the corporations which had made voluntary disclosures had engaged not in bribery of foreign government officials, but rather in a practice known as "accommodation overinvoicing". Corporations selling goods to foreign customers engaged in this practice in order to assist the customer in avoiding the tax and currency control laws of the customer's home country. For example, at the request of an overseas customer, a company would send an invoice for goods which indicated that the goods were worth $120,000 when in fact the actual sales price for the goods had been $100,000. The overseas customer would make a $120,000 payment to the American corporation which would, in turn, remit the excess $20,000 to the overseas customer's bank account either here in the United States or in some third country. In this way the overseas customer was able to maintain a U.S. dollar account which would be hidden from the authorities in his own country in violation of his country's currency control laws. The overseas customer would also thereby obtain documentation, in the form of falsely inflated invoices, to support a claim of increased costs which would reduce his tax liability in his own country. We found, in a number of instances, that the American companies which were supplying the inflated invoices would file Shipper's Export Declarations with the United States Customs Service and the Department of Commerce which reflected the higher invoice amount. Some of those cases were referred to the Department of Justice's Civil Division which brought civil actions against the

American companies enjoining them from the further filing of false Shipper's Export Declarations.

To illustrate how far afield certain of these disclosures were from the foreign bribery area, I would like to point to a few other examples. Some of the larger liquor companies disclosed to the Securities and Exchange Commission that they had been making illegal rebates in the United States to domestic liquor distributors. The Department also learned that a number of corporations had declared possible violations of the Federal Elections Campaign Act which prohibited corporate contributions in federal election campaigns.

The Department further discovered that a substantial number of companies disclosed, as "questionable" payments, commissions which had been paid to independent foreign sales agents. These commissions were often disclosed whenever the company had some indication that the commission appeared to be unusually large or was for some other reason possibly "questionable". In many such instances, there was no evidence that any portion of the commission had actually been passed on to a foreign government official.

The Department also discovered that certain companies had engaged in a practice of making payments to petty officials in connection with their performance of ministerial functions. The nature of these payments led the Department to conclude that investigations of this type of activity were not warranted.

Similarly, in a number of corporate disclosures, the amounts of payments were de minimis and, on that basis alone, did not warrant further investigation.

Finally, the Department identified a limited number of companies which had paid bribes to foreign government officials. In the vast majority of instances, it was discovered that the payments had been made by overseas corporate subsidiaries without any territorial connection to the United States. Since no violations of federal criminal law were found, the investigations were closed without prosecution. In ten instances, the Department was able to identify situations in which corporations had bribed foreign government officials and in the process violated an existing federal criminal law. In those cases, the appropriate federal criminal charges were filed.

Thus, the Department's review of the disclosure to the Securities and Exchange Commission made clear that far fewer than 400 companies had disclosed that they had engaged in bribery of foreign government officials. In several instances, the Department brought public prosecutions against companies which had paid bribes to foreign government officials and in connection therewith had made false filings with an agency of the United States Government in violation of 18 U.S.C. §1001. In other instances, the Department initiated prosecutions of corporations which, in the process of paying bribes to foreign government officials, had violated the Currency and Foreign

Transactions Reporting Act.*/ In several instances, an extension of the so-called Isaacs-Kerner theory of mail fraud was utilized to prosecute companies for the act of bribery itself. See United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974). Under that theory, a person paying a bribe to a government official can be prosecuted under the mail fraud statute on the ground that he engaged in a scheme to defraud the public, or the employing government, of the honest services of the recipient of the bribe, in violation of the recipient's fiduciary duty.

For the convenience of the Subcommittee, I have attached to this statement a list of the prosecutions resulting from the coordinated enforcement efforts of the Department of Justice in this area. The list indicates the office which brought the prosecution, the penalties paid by the defendants and the statutes under which the charges were brought. The pre-FCPA program has thus far resulted in the successful prosecution of six individuals and eighteen corporations which have paid a total of $7,662,000 in criminal fines, civil penalties and civil settlements.

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*/ The Currency and Foreign Transactions Reporting Act makes it an offense for anyone to transport into or out of the United States $5,000 or more in currency or bearer instruments without reporting certain information to the United States Customs Service.

II. THE DEPARTMENT OF JUSTICE'S ENFORCEMENT PROGRAM UNDER THE FOREIGN CORRUPT PRACTICES ACT

The pre-FCPA enforcement effort, which as I stated began in the summer of 1977, is only now being completed. With the enactment of the Foreign Corrupt Practices Act in December 1977, the same group of prosecutors responsible for investigating and prosecuting pre-FCPA violations were also charged with the responsibility for investigating and prosecuting violations of the new statute. Because of the highly sensitive nature of these cases arising from their potential foreign policy and national security implications, the United States Attorney's manual has been amended so that most of the Foreign Corrupt Practices Act investigations are being conducted by Justice Department prosecutors in the Fraud Section of the Criminal Division here in Washington rather than by the various United States Attorneys' offices. Investigations are conducted here in Washington to maintain close supervision of these cases and to minimize the adverse foreign policy consequences that any one of these cases can produce.

Thus far, the Department has completed 29 investigations into allegations of violation of the Foreign Corrupt Practices Act. These completed investigations have led to two public prosecutions by the Department of Justice. The first such prosecution was a civil injunctive action in United States v. Roy J. Carver, et al. In that case, Mr. Carver had disclosed to the United States Ambassador to Qatar that he and his associate had

obtained an oil concession in Qatar, prior to the effective date of the Foreign Corrupt Practices Act, by paying a $1.5 million bribe to Qatar's Director of Petroleum. After the Act became effective, Mr. Carver and his associate sought the assistance of the Ambassador in identifying an official of Qatar who could be paid to renew the concession. Our enforcement action resulted in the defendants being enjoined from future violation of the Act.

The second public prosecution by the Department of Justice under the Foreign Corrupt Practices Act was brought against the Kenny International Corp. and its owner Finbar B. Kenny. In that case, the defendants had paid $337,000 to the Prime Minister of the Cook Islands. The payment took the form of a contribution to the political party of the Prime Minister in return for an agreement from the Prime Minister that if re-elected he would renew an exclusive stamp distribution contract which Mr. Kenny had with the Cook Islands government. The corporation pled guilty to a criminal violation of the Foreign Corrupt Practices Act and paid criminal fines of $50,000. Both Mr. Kenny and the corporation consented to a civil injunction under the Act and made restitution of $337,000 to the Cook Islands Government.

The Department of Justice is currently conducting approximately 57 investigations of allegations of Foreign Corrupt Practices Act violations. Some of these investigations have continued for as long as three years. Many are difficult and complex. As is often the case in major white collar crime

investigations, the Department, in some instances, has had to review hundreds of thousands of documents, interview dozens of witnesses and adduce testimony before the Grand Jury from dozens more.

Added to the difficulties of ordinary complex investigations are some considerations unique to the Foreign Corrupt Practices Act which the Department has come to understand better as it has gained enforcement experience under the Act. It may be useful to share with you some of these considerations.

In an ordinary domestic bribery case, the offense is usually committed by two parties, i.e., the citizen who pays the bribe and the public official who receives the bribe. Since ordinarily neither of these two parties is willing to testify voluntarily about the transaction, a standard approach used by prosecutors to investigate domestic bribery is to offer one of the two consenting parties immunity or a favorable plea agreement in return for testimony against the other party. Generally, the government offers such a favorable disposition to the citizen who paid the bribe on the theory that there is a greater public interest in successfully prosecuting and removing from office the corrupt public official than there is in pursuing the person who paid the bribe.

The Foreign Corrupt Practices Act is, however, a bribery statute which is quite different from domestic bribery laws. The Congress clearly intended that prosecution of the corrupt foreign official be left to his or her own government.

Under the Foreign Corrupt Practices Act, therefore, only the conduct of the United States citizen or entity paying the bribe is criminalized. For obvious reasons, we cannot and have not attempted to obtain the testimony of the corrupt foreign official who has received the bribe for use against the Americans who may have made the payment. Thus, in order to prosecute American companies or citizens for violation of the Foreign Corrupt Practices Act we have been forced to develop evidence of the violation without the cooperation of either the offeror or the recipient of the bribe.

Another investigative limitation which results from the nature of the Foreign Corrupt Practices Act is that the Department has been unable to utilize some of the more traditional international evidence gathering tools, such as Interpol. Interpol, as you know, functions through local foreign law enforcement agencies. When our law enforcement authorities make a request for assistance through Interpol, local law enforcement agencies in the foreign country conduct the investigation. Because allegations of violation of the Foreign Corrupt Practices Act often involve allegations of corrupt payments to senior foreign government officials, we have been of the view that it would usually be inappropriate or worse to ask foreign law enforcement agencies to conduct investigations on our behalf into the activities of their own government officials.

Still another limitation on how we conduct investigations of Foreign Corrupt Practices Act violations is imposed by

a peculiar feature of bribery cases. Our experience has shown that all too often criminal confidence men operating as middlemen overseas, in order to induce their victims to part with their money in a transnational transaction, will suggest to the victim that extra money is essential in order to bribe a foreign government official. Although he may even identify the foreign government official, the confidence man may have no intention of bribing that government official and that government official may have no knowledge of the confidence man's representations to the victim. This situation can occur, not only when an independent operator attempts to defraud his victim, but also when a renegade employee attempts to defraud his own employer and embezzle the money.

Finally, soon after the enactment of the Foreign Corrupt Practices Act, the Department recognized that there was a growing and legitimate concern in the private sector and among many lawyers over what were perceived as ambiguities in language in the Foreign Corrupt Practices Act. In response, the Department established the Foreign Corrupt Practices Act Review Procedure, which is modeled after the Antitrust Division's Business Review Procedure, under which a company can submit for the Department's review a written description of a proposed transnational commercial transaction. After reviewing the transaction, the Department will inform the company whether or

not it will take any enforcement action under the FCPA if the transaction proceeds.

The Department had hoped that the establishment of the Review Procedure program would provide a mechanism which would eliminate doubts about the meaning and application of the Foreign Corrupt Practices Act and thereby prevent any unnecessary losses of exports due to perceived uncertainty about the Act. Unfortunately, relatively few companies have taken advantage of the Procedure. Thus far, the Department has published only four releases describing our actions under the Procedure. Three additional requests are pending. In part, we believe this underutilization of the review procedure results from a concern that confidential business information provided to the Department of Justice as part of the program would ultimately be publicly disclosed under the Freedom of Information Act.

The Department itself is very concerned that the Act be interpreted and enforced in a predictable and uniform manner. Our concern stems from what we believe are problems with the existing Act's clarity. We also believe that in some respects the Act is overly broad, sometimes confusing, and often necessarily uncertain in its application. These problems ought to be corrected. The Department believes that surely the Congress can draft a law that is carefully designed to proscribe the conduct at issue. When any new law is passed, a period of experience with the law often reveals problems which the Congress must and generally does correct. I recognize, however, that the Committee

has not invited comment on how the language of the existing law should be changed. We have been asked here today to report merely on how the existing law is being enforced. We will honor the limits of that invitation and not take up the Committee's time with a set of recommendations which we believe deserve full and separate consideration. We would hope to have a return invitation very soon to explore with the Committee ways in which the law should be improved. As you know the Senate has already recognized the need for change and has undertaken some very useful steps in this area.

I would be pleased to answer any questions the Subcommittee may have.