

APPENDIX II

BUSINESS ACCOUNTING AND FOREIGN TRADE SIMPLIFICATION ACT*

S. 708

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Business Accounting and Foreign Trade Simplification Act".

FINDINGS AND CONCLUSIONS

SEC. 2. (a) The Congress finds that—

(1) the enactment of the Foreign Corrupt Practices Act of 1977 was a positive and significant step toward the important objective of prohibiting bribery of foreign government officials by United States companies in order to obtain, retain, or direct business;

(2) the Foreign Corrupt Practices Act of 1977 has caused unnecessary concern among existing and potential exporters as to the scope of legitimate overseas business activities;

(3) the accounting standards requirements of the Foreign Corrupt Practices Act of 1977, which apply to all issuers of securities irrespective of whether they have foreign operations, are unclear and excessive and have caused costly and unnecessary paperwork burdens;

(4) United States agencies responsible for enforcement of the Foreign Corrupt Practices Act of 1977 have not sufficiently coordinated interpretation and enforcement practices with other agencies responsible for international trade policy, export promotion, foreign policy, international monetary policy,

and other related civil and criminal statutes; and

(5) it is in the best interest of all countries to maintain responsible standards of corporate conduct in foreign markets to preserve free and equitable trading practices.

(b) The Congress concludes that—

(1) the principal objectives of the Foreign Corrupt Practices Act of 1977 are desirable, beneficial, and important to our Nation as well as to our relationships with our trading partners, and these objectives should remain the central intent of the Act;

(2) exporters should not be subject to unclear, conflicting, and potentially damaging demands by diverse United States agencies responsible for enforcement of the Foreign Corrupt Practices Act of 1977;

(3) general compliance and enforcement practices associated with the Foreign Corrupt Practices Act of 1977 should be developed in accordance with considerations underlying foreign relations, international trade, export promotion, international monetary policy, and other related civil and criminal statutes; and

(4) a solution to the problem of corrupt payments by firms to obtain or retain business demands an international approach; accordingly, appropriate international agreements should be initiated and sought by the United States agencies responsible for trade agreements and by the President.

* S. 708, 97th Cong., 1st Sess., 127 CONG. REC. 13,983-85 (1981).

AMENDMENT OF SHORT TITLE

SEC. 3. Section 101 of the Foreign Corrupt Practices Act of 1977 is amended to read as follows:

"SHORT TITLE

"SEC. 101. This title may be cited as the 'Business Practices and Records Act'."

ACCOUNTING STANDARDS

SEC. 4. (a) Section 13(b)(2) of the Securities Exchange Act of 1934 is amended to read as follows:

"(2) Every issuer which has a class of securities registered pursuant to section 12 of this title and every issuer which is required to file reports pursuant to section 15(d) of this title shall devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that —

"(A) transactions are executed in accordance with management's general or specific authorization;

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

"(C) access to assets is permitted only in accordance with management's general or specific authorization;

"(D) the recorded accountability for assets as compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences; and

"(E) for the purposes of subparagraphs (A) through (D) of this paragraph, the issuer makes and keeps books, accounting records, and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."

(b) Section 13(b) of the Securities Exchange Act of 1934 is amended by adding at the end thereof the following:

"(4) No criminal liability shall be imposed for failing to comply with the requirements of paragraph (2) of this subsection.

"(5) No civil injunctive relief shall be imposed with respect to —

"(A) any issuer for failing to comply with the requirements of paragraph (2) of this subsection if such issuer shall show that it acted in good faith in attempting to comply with such requirements; or

"(B) any person other than an issuer, in connection with an issuer's failure to comply with paragraph (2), unless such person knowingly caused the issuer to fail to devise or maintain a system of internal accounting controls that complies with paragraph (2).

"(6) No person shall knowingly circumvent a system of internal accounting controls established pursuant to paragraph (2) for a purpose inconsistent with paragraph (2).

"(5) Where an issuer which has a class of securities registered pursuant to section 12 of this title or an issuer which is required to file reports pursuant to section 15(d) of this title holds 50 per centum or less of the voting power with respect to a domestic or foreign firm, the provisions of paragraph (2) require only that the issuer proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, including the relative degree of its ownership over the domestic or foreign firm and under the laws and practices governing the business operations of the country in which such firm is located, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with paragraph (2). Such an issuer shall be con-

clusively presumed to have complied with the provisions of paragraph (2) by demonstrating good faith efforts to use such influence.”.

REPEALER: NEW BRIBERY PROVISION

SEC. 5. (a)(1) Section 30A of the Securities Exchange Act of 1934 is repealed.

(2) Section 32 of such Act is amended—

(A) by striking out “(other than section 30A)” in subsection (a); and

(B) by striking out subsection (c).

(b) Section 104 of the Business Practices and Records Act is amended to read as follows:

“FOREIGN PAYMENTS

SEC. 104. (a) It shall be unlawful for any domestic concern, or any officer, director, employee, or shareholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of a payment, gift, offer, or promise, directly or indirectly, of anything of value of any foreign official for the purpose of—

“(1) influencing any act or decision of such foreign official in his official capacity, or inducing such foreign official to do or omit to do any act in violation of his legal duty as a foreign official; or

“(2) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality; in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.

“(b) It shall be unlawful for any domestic concern, or any officer, director or employee, or shareholder thereof acting on behalf of such domestic concern

to make use of the mails or any means or instrumentality of interstate commerce corruptly to direct or authorize, expressly or by a course of conduct, a third party in furtherance of a payment, gift, offer, or promise of anything of value to a foreign official for any of the purposes set forth in subsection (a).

“(c) Subsections (a) and (b) shall not apply to—

“(1) any facilitating or expediting payment to a foreign official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official;

“(2) any payment, gift, offer, or promise of anything of value to a foreign official which is lawful under the law and regulations of the foreign official's country;

“(3) any payment, gift, offer, or promise of anything of value which constitutes a courtesy, a token of regard or esteem, or in return for hospitality;

“(4) any expenditures, including travel and lodging expenses, associated with the selling or purchasing of goods or services or with the demonstration or explanation of products; or

“(5) any ordinary expenditures, including travel and lodging expenses, associated with the performance of a contract with a foreign government or agency thereof.

“(d)(1)(A) Except as provided in subparagraph (B), any domestic concern which violates subsection (a) or (b) shall, upon conviction, be fined not more than \$1,000,000.

“(B) Any individual who is a domestic concern and who willfully violates subsection (a) or (b) shall, upon conviction, be fined not more than \$10,000, or imprisoned not more than five years, or both.

“(2) Any officer or director of a do-

mestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) or (b) shall, upon conviction, be fined not more than \$10,000, or imprisoned not more than five years, or both.

"(3) Whenever a domestic concern is found to have violated subsection (a) or (b) of this section, any employee of such domestic concern who is a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States (other than an officer, director, or stockholder acting on behalf of such domestic concern), and who willfully carried out the act or practice constituting such violation shall, upon conviction, be fined not more than \$10,000, or imprisoned not more than five years, or both.

"(4) Whenever a fine is imposed under paragraph (2) or (3) of this subsection upon any officer, director, employee, or stockholder of a domestic concern, such fine shall not be paid, directly or indirectly, by such domestic concern.

"(e)(1) When it appears to the Attorney General that any domestic concern, or officer, director, employee, or stockholder thereof, is engaged, or is about to engage, in any act or practice constituting a violation of subsection (a) or (b) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent or temporary injunction or a temporary restraining order shall be granted without bond.

"(2) For the purpose of all civil investigations which, in the opinion of the Attorney General, are necessary and proper for the enforcement of this Act, the Attorney General or any attorney or attorneys of the Department of Justice designated by him are empowered to administer oaths and affir-

mations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or materials to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

"(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General, or attorney designated by the Attorney General, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. The Attorney General shall have the power to make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

"(f) As used in this section—

"(1) The term 'domestic concern' means (A) any individual who is a citizen, national, or resident of the United States; or (B) any corporation, partnership, association, jointstock company, business trust, unincorporated organization, or sole proprietor-

ship which has its principal place of business in the United States, which is organized under the law of a State of the United States or a territory, possession, or commonwealth of the United States, which has a class of securities registered pursuant to section 12 of the Securities Exchange Act of 1934, or which is required to file reports under section 15(d) of the Securities Exchange Act of 1934.

"(2) The term 'foreign official' means (A) any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any instrumentality; or (B) any foreign political party or official thereof or any candidate for foreign political office."

DEFINITIONS

SEC. 6. Section 13(b) of the Securities Exchange Act of 1934 is amended by adding at the end thereof the following:

"(6) For the purpose of this section, the terms 'reasonable assurances' and 'reasonable detail' mean such level of detail and degree of assurance as would satisfy prudent individuals in the conduct of their own affairs, having in mind a comparison between benefits to be obtained and costs to be incurred in obtaining such benefits."

EXCLUSIVELY PROVISION FOR OVERSEAS BRIBERY

SEC. 7. No criminal action pursuant to section 1341 or 1343 of title 18, United States Code, may be brought against a domestic concern, its officers, directors, employees, or any shareholders thereof acting on behalf of such domestic concern for a payment, gift, offer, or promise to a foreign official based upon the theory that the foreign official or the domestic concern violated a duty to or defrauded the

foreign government or the citizens of a foreign country.

AUTHORITY TO ISSUE GUIDELINES

SEC. 8. Title I of the Business Practices and Records Act is amended by adding at the end thereof the following:

"GUIDELINES AND GENERAL PROCEDURES FOR COMPLIANCE

SEC. 105. (a) Not later than six months after the date of enactment of this section, the Attorney General, after consultation with the United States Trade Representative, the Secretary of State, the Secretary of Commerce, and the Secretary of the Treasury, and after consultation with representatives of the business community and the interested public through public notice and comment and in public hearings, shall determine to what extent the business community would be assisted by further clarification of section 104 of this Act and shall, based on such determination and to the extent necessary and appropriate, have the authority to issue—

"(1) guidelines describing specific types of conduct associated with common types of export sales arrangements and business contracts which the Attorney General determines constitute compliance with the provisions of section 104 of this Act; and

"(2) general precautionary procedures which issuers or domestic concerns may use on a voluntary basis to ensure compliance with this Act, and to create a rebuttable presumption of compliance with this Act.

The guidelines and procedures referred to in the preceding sentence shall be issued in accordance with sections 551 through 557 of title 5, United States Code.

"(b) The Attorney General, after consultation with other Federal agencies

and representatives from the business community, shall establish a Business Practices and Records Act Review Procedure for the purpose of providing responses to specific inquiries concerning enforcement intentions under this Act. The Attorney General shall issue opinions, within thirty days, in response to requests from domestic concerns, regarding compliance with the requirements of the provisions of section 104 of this Act. An opinion that certain prospective conduct does not involve a violation shall be final and binding on all parties, subject to the discovery of new evidence. When appropriate, and at reasonable intervals, the responses derived from the review procedure will be reviewed by the Attorney General to determine whether such compliance of responses should be included in a new guideline pursuant to subsection (a).

"(c) Any document or other material provided to, received by, or prepared in the Department of Justice, or any other department or agency of the United States Government, in connection with a request by a domestic concern for a statement of present enforcement intentions under the Business Practices and Records Act Review Procedure pursuant to subsection (b) of this section, or in connection with any investigations conducted to enforce this Act, shall be exempt from disclosure under section 552 of title 5, United States Code, regardless of whether the Department responds to such a request or the applicant withdraws such request prior to receiving a response. The Attorney General shall protect the privacy of each applicant, and shall adopt rules assuring that materials, documents, and information submitted in connection with a review procedure request will be kept confidential and will not be used for any

purpose that would unnecessarily discourage use of the review procedure. The review procedure shall be developed and instituted in accordance with sections 551 through 557 and 701 through 706 of the title 5 United States Code.

"(d) The Attorney General shall make a special effort to provide timely compliance guidance to potential exporters, and smaller businesses, who as a practical matter are unable to obtain specialized counsel on issues pertaining to this Act. Such assistance shall be limited to requests for enforcement intention disclosures provided for under this Act, and general explanation of compliance responsibilities and of potential liabilities under the Act.

"(e)(1) On September 1 of each year the Attorney General Shall transmit to the Congress and make public a detailed report on all actions which the Department of Justice has taken pursuant to this Act, along with its views on problems associated with implementation, its plan for the next fiscal year to further implement the Act, and recommendations for amendments.

"(2) On September 1 of each year the Chairman of the Securities and Exchange Commission shall file with the Congress a detailed report on all actions which the Commission has taken pursuant to section 13(b) of the Securities Exchange Act, its views on problems associated with implementation, its plans for the next fiscal year to further implement such section, and its recommendations for amendment."

INTERNATIONAL AGREEMENTS

SEC. 9. (a) It is the sense of the Congress that the President should pursue the negotiation of an international agreement among the largest possible number of nations on illicit payments, including, a process by which problems

and conflicts associated with such practices could be resolved.

(b) Within one year after the date of enactment of this Act, the President shall report to Congress on—

(1) the progress of the negotiations referred to in subsection (a);

(2) those steps which the administration and Congress should consider taking in the event that these negotiations do not successfully eliminate the competitive disadvantage of United States business; and

(3) possible actions that could be taken to promote cooperation by other nations in international efforts to prevent bribery of foreign officials, candidates, or parties in third countries.

This report shall also include recom-

mendations for any new legislation required to give the President authority to take appropriate action to achieve such objectives. The report shall contain an analysis of the potential effect on the interests of the United States including United States national security of the corruption of foreign officials and political leaders in connection with international business transactions involving persons and business enterprises of other nations. In addition, the report shall assess the current and future role in curtailing such corruption of private initiatives such as the Recommendations to Governments and Rules of Conduct to Combat Extortion and Bribery developed by the International Chamber of Commerce.