THE SECRETARY OF COMMERCE

WASHINGTON, D.C. 20230

January 19, 1977

MEMORANDUM FOR THE PRESIDENT

SUBJECT: QUESTIONABLE CORPORATE PAYMENTS ABROAD

On March 31, 1976 you established the Cabinet-level Task Force on Questionable Corporate Payments Abroad, and designated me to serve as its chairman. You directed the Task Force to conduct a coordinated policy review, "to explore additional avenues which should be undertaken," and to report finally to you prior to December 31, 1976.

As you know, we determined that the character of the problem was sufficiently serious to merit an accelerated effort by the Task Force. Accordingly, on June 8, the Task Force provided you with a report which resulted in your public announcement, on June 14, of a three-part policy approach for remediation of the questionable payments problem:

(1) enforcing vigorously existing U.S. law through the Department of Justice, the Internal Revenue Service and the Securities and Exchange Commission;

(2) strengthening current U.S. law through:

  (a) new disclosure legislation to improve deterrence; and

  (b) new corporate accountability legislation to assure the integrity of corporate reporting systems and corporate officials; and

(3) accelerating progress toward an international agreement capable of equitable enforcement.

Reproduced from the Collections of the Manuscript Division, Library of Congress

The purpose of this memorandum is to provide you with a few summary observations on the approach which you initiated--as we turn over to the new Administration responsibility for continued action. I should note that technically the life of the Task Force has expired, and the observations here are personal ones which have not been reviewed by other members of the Task Force.

The ongoing investigations--particularly those of the IRS and the Department of Justice, in addition now to those of the SEC--continue to support the view that the problem is serious. And, they suggest, the problem is somewhat more pervasive than early evidence may have indicated. There is, however, no evidence or argument which has been brought to my attention or the attention of the Task Force which would argue against the basic soundness of the conceptual approach you adopted in June.

The most controversial element of that approach, as you know, has been the "disclosure" approach to unilateral U.S. legislation--as distinguished from the "criminalization" approach associated with Senator Proxmire. As you will recall, on August 4 we transmitted to the Congress your proposed Foreign Payments Disclosure Act. The Senate did not hold any hearings on the Administration bill; rather, it passed the Proxmire bill by the overwhelming margin of 86-0. The House, somewhat belatedly, held hearings on the Proxmire bill--and took no further action before adjourning.

It is, of course, difficult to forecast what action the new Congress will take. The "criminalization" approach has a great deal of superficial appeal. There is a kind of common sense logic which says, in effect, that if a society abhors certain behavior it ought to make it a crime, pure and simple--regardless of whether or not the law proscribing the abhorred behavior can be enforced. In an election year, with partisan opposition between the Executive and Legislative branches, it should not have been surprising that the arguments against the simplistic criminalization approach would prove difficult to advance. But now perhaps a more reasoned approach may have improved prospects.

Reproduced from the Collections of the Manuscript Division, Library of Congress

I have no doubt that the merits of the argument continue to lie with our general position in favor of the disclosure approach. The unilateral criminalization alternative would present very serious problems of access to witnesses and evidence beyond the reach of U.S. law enforcement; and, perhaps more importantly, its unenforceability could ultimately corrode further the general respect for both the private enterprise system and law itself. While the disclosure approach is less ambitious in its pretense, it is at least honest, relatively enforceable, and somewhat more promising as a deterrent--not only of questionable U.S. corporate behavior, but of questionable foreign behavior.

While general opinion has not yet come to an appreciation of the disclosure approach, there may be reason for some sense of encouragement. Most serious scholars and practitioners of international law--notably including the Special Committee on Foreign Payments of the New York City Bar Association--share our view. And although editorial opinion has been mixed at best, it is noteworthy that the Washington Post has editorially endorsed our approach.

Nonetheless, I would guess that there will have to be some modification of our proposal if it is to displace the Proxmire criminalization approach. The directions for acceptable compromise, it seems to me, are two: In order to remove the (misguided) charge of "cover-up" associated with the provision of our bill which limited direct public disclosure for at least one year, I would think it desirable to relax this limit considerably. And in order to address the simplistic logic which demands criminalization--but in order to do so in a way which is enforceable--I would find it acceptable to link our disclosure approach with a criminalization approach applied only to transactions involving foreign countries which are party to mutual enforcement agreements with the United States.

Reproduced from the Collections of the Manuscript Division, Library of Congress

Ultimately, as we have consistently argued, the only fully fair and enforceable approach to the questionable payments problem is a multilateral one--i.e., one which rests on international agreement. Here the United States has clearly assumed the lead in the world community, and results have been considerably more promising than many expected.

At the March 1976 meeting of the UN Commission on Transnational Enterprises in Lima, Peru, U.S. representatives outlined the following principles for an international agreement:

--It would apply to international trade and investment transactions with governments, i.e., government procurement and other governmental actions affecting international trade and investment as may be agreed;

--It would apply equally to those who offer to make improper payments and to those who request or accept them;

--Importing governments would agree to establish clear guidelines concerning the use of agents in connection with government procurement and other covered transactions, and establish appropriate criminal penalties for defined corrupt practices by enterprises and officials in their territory;

--All governments would cooperate and exchange information to help eradicate corrupt practices;

--Uniform provisions would be agreed upon for disclosure by enterprises, agents and officials of political contributions, gifts and payments made in connection with covered transactions.

Reproduced from the Collections of the Manuscript Division, Library of Congress

The U.S. proposal was forwarded to the Economic and Social Council (ECOSOC) with a recommendation that ECOSOC give the issue priority consideration. In August 1976, in response to vigorous efforts by U.S. negotiators, ECOSOC established an intergovernmental working group to examine the problem and to elaborate in detail "the scope and contents of an international agreement to prevent and eliminate illicit payments . . . in connection with international commercial transactions." The intergovernmental working group held its first session in New York, November 15-19, 1976. While some consideration of substantive issues was begun, the meeting was primarily organizational. More substantive sessions are now scheduled for January 31 - February 11 and March 28 - April 8, 1977.

Obstacles to the successful negotiation of an international agreement remain. Among some developed countries, there is traditional resistance to the concept of disclosure. Among less developed countries, there is general support in principle for an agreement--but some tactical concern that the United States may be advancing a questionable payments agreement in lieu of a broader code of conduct for multinational corporations. Nonetheless, there is now--for the first time--serious international discussion of the questionable payments problem. And with persistent effort, the ultimate result of your Administration's initiative should be an important international agreement, helping better to shape the emerging world legal and economic system.

Given the context of transition, I have not formally addressed the question of how best to organize within the Executive branch for continued pursuit of solutions to the questionable payments problem. There will be some continuing need for interdepartmental coordination. And while I believe your decision was correct to separate policy development functions from investigative and enforcement functions, it may be appropriate now for the new Administration to give lead responsibility to the Attorney General; in part,

Reproduced from the Collections of the Manuscript Division, Library of Congress

because many of the remaining issues involve changes in certain administrative practices--perception of the need for which has grown directly out of detailed investigations--and in part because there is, in my view, a special need for sensitivity to the problems of enforcement in the development of sound general policies.

Be that as it may, it has been a special privilege for me to have served as Chairman of the Task Force and to have been associated with policy development in this area under your leadership.

E.L.R.

Elliot L. Richardson

Reproduced from the Collections of the Manuscript Division, Library of Congress