



SECURITIES AND EXCHANGE COMMISSION

Washington, D. C. 20549

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FOR RELEASE: 9:30 a.m. Tuesday, June 16

81-25

COMMISSION SUPPORTS CHANGES TO EASE UNINTENDED BURDENS CREATED BY FOREIGN CORRUPT PRACTICES ACT

The SEC supports Congressional efforts to amend the Foreign Corrupt Practices Act (FCPA) so as to ease unintended burdens and clarify uncertainties, Commission Chairman John S.R. Shad said in testimony before two Senate subcommittees today.

Chairman Shad presented the Commission's position at a joint hearing of the Subcommittee on Securities and the Subcommittee on International Finance and Monetary Policy of the Senate Committee on Banking, Housing and Urban Affairs, beginning at 9:30 a.m. Tuesday morning. The subcommittees are considering a bill sponsored by Senator John H. Chafee (R-R.I.), S.708, that would amend the law passed in 1977.

"The Commission recognizes that the Foreign Corrupt Practices Act has spawned unintended difficulties for American commerce abroad and uncertainties concerning compliance with the accounting provisions," Mr. Shad said. "Senator Chafee's bill effectively addresses these problems. The Commission does not object to the bill's proposed consolidation in the Department of Justice of authority to enforce the foreign bribery prohibitions (and) will offer limited amendments to other S. 708 provisions."

In his prepared testimony, Chairman Shad pointed out that the Commission has previously responded to concerns expressed by the

business community regarding the FCPA on a number of occasions. For example, he noted that the SEC was cooperating with the Department of Justice in the latter's program to afford advice to companies as to whether proposed transactions would violate the FCPA. And last January the Commission issued a policy statement aimed at removing what many persons regarded as ambiguities in certain sections of the statute.

With regard to the prohibition against publicly owned corporations paying bribes overseas in order to gain or retain business, currently Section 30A of the Securities Exchange Act, Chairman Shad noted that the SEC had not advocated such a provision and does not now object to the effect of S. 708. The bill would repeal Section 30A and reenact it, with some changes, as part of the statutes administered by the Department of Justice, which already has similar authority with regard to privately-owned companies and all criminal violations.

"The Commission's primary mission is disclosure, not substantive regulation of day-to-day commercial transactions," he pointed out. "Despite repeal of Section 30A, in instances where foreign bribery involves a failure to disclose information which is material to investors, the Commission would retain its authority to take appropriate action under the federal securities laws. So long as the Commission has that authority, its principal role under the securities laws can be fulfilled. For these reasons the Commission would not oppose this provision of S. 708."

Turning to the accounting provisions of the FCPA, which generally require companies to keep accurate books and records and to have

adequate internal control systems, Chairman Shad pointed out that they were intended partly to facilitate corporate disclosure and partly to provide for increased accountability.

"They were not intended exclusively to curb foreign bribery," he said. "Rather, the large number of serious questionable payments which led to enactment of the FCPA were viewed as symptomatic of a threat to the disclosure system which the Commission administers. For that reason, the Commission believes that the substance of the accounting provisions should be retained, but appropriately refined to remove ambiguities and unnecessary burdens.

"S. 708 would make it clear that intentional falsifications of corporate records and significant failures in control remain a matter of Congressional concern, but that corporations would not be required to adopt controls which are not cost-effective or to guaranty absolute accuracy in recordkeeping. The Commission concurs in these objectives."

The Commission offered a number of amendments to the accounting provisions aimed at:

- affording corporate management greater latitude in determining whether internal controls are cost-effective;
- providing corporations greater protection against liability for violations without senior management's knowledge or involvement;
- revising certain terms used in the bill in order to reduce ambiguities and conform them more closely to accounting and securities law terminology; and

-- protecting the confidentiality of certain business records.

With regard to the section of S. 708 that would change the FCPA so as to require that books and records be accurate "in all material respects," Mr. Shad said that difficulty could be encountered in deciding what the term "material" meant in this context.

"S. 708 is susceptible to the interpretation that Congress intends only to require record-keeping accuracy and controls which affect numbers appearing in published financial statements," he explained. "In the case of publicly-owned companies, such numbers are commonly rounded off in millions of dollars..."

"The Commission's rules implementing the Securities Exchange Act of 1934 have always required publicly-held corporations to file accurate financial statements with the Commission. If the S. 708 accounting provisions are to have substance, they must reach records and controls which are relevant to disclosures beyond the financial statements and to the objective of attaining a reasonable level of accountability for assets, even though not necessarily material to the financial statements. If that is not the intent of Congress, the Commission would not oppose repeal of the accounting provisions, since the Commission already has adequate statutory authority to sanction issuers which file inaccurate financial statements."

He said the Commission recommended that for purposes of the books and records provisions, a matter be considered to be "material" if... "a prudent man would be likely to consider the matter important in the management of his own property."

"The accounting provisions of the FCPA are concerned with the conduct expected of management in making basic determinations concerning corporate records and controls and, accordingly, the term material should establish the standard expected in that context," Chairman Shad said. "The Commission believes most businessmen are scrupulously honest. They want to see those who lie, cheat and steal exposed and prosecuted. They want to compete in a fair environment in which the rewards go to those who deserve them. They do not want the standards set so low that 'it pays' to engage in self-dealing and intentional abuse of companies and their shareholders."

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