Calendar No. 872

94TH CONGRESS, 2d Session | SENATE | REPORT No. 94-917

EXPORT ADMINISTRATION AMENDMENTS, FOREIGN BOYCOTTS, AND DOMESTIC AND FOREIGN INVESTMENT IMPROVED DISCLOSURE ACTS OF 1976

REPORT

OF THE

COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

S. 3084

together with

ADDITIONAL VIEWS

MAY 25, 1976.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
57-010 WASHINGTON : 1976

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EXPORT ADMINISTRATION AMENDMENTS, FOREIGN BOYCOTTS, AND DOMESTIC AND FOREIGN INVESTMENT IMPROVED DISCLOSURE ACTS OF 1976

MAY 25, 1976.—Ordered to be printed

MR. STEVENSON, from the Committee on Banking, Housing and Urban Affairs, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 3084]

The Committee on Banking, Housing and Urban Affairs, to which was referred S. 3084, a bill to extend the Export Administration Act of 1969, as amended, having considered the same, reports favorably thereon with an amendment and an amendment to the Title and recommends its passage.

HISTORY OF THE BILL

S. 3084 was introduced in the Senate on March 4, 1976, and referred to the Committee. On March 22nd and 23rd, the International Finance Subcommittee held hearings on the bill, [1] and on April 22, 1976, it agreed to recommend the measure to the full Committee with amendments. Included as Titles II and III of the bill were the provisions

[1] Hearings Before the Subcommittee on International Finance of the Senate Committee on Banking, Housing and Urban Affairs on S. 3084, 94th Cong., 2d Sess. (1976).

of S. 953, a bill previously reported favorably by the Committee to strengthen the antiboycott provisions of the Export Administration Act and increase the investor disclosure requirements of the Securities Exchange Act of 1934.[2]

Hearings on S. 953 and other measures dealing with foreign boycotts and foreign investment in the United States were held by the International Finance Subcommittee on July 22–23, 1975.[3] The Securities Subcommittee held other hearings on proposals to regulate foreign investment in the United States, deal with foreign boycotts, and increase the disclosure requirements of the Securities Exchange Act of 1934 in March of 1975.[4] And the general subject of foreign investment in the United States was examined in hearings conducted by the International Finance Subcommittee in January and February of 1974.[5]

On May 6, 1976, the full Committee met in open executive session and agreed to report S. 3084 as recommended by the Subcommittee with amendments.

Purpose of the Bill

The purpose of Title I of the bill is to extend the Export Administration Act for a period of three years; provide for a more sophisticated and continuing analysis of the factors which justify limitations on exports on national security grounds so that a country's Communist or non-Communist status is not the sole determinant of U.S. policy; provide for a review of national security export controls to determine whether modifications are necessary in light of evolving technology, the availability of restricted items from sources outside the United States, and other relevant matters; improve the ability of the Executive Branch to monitor technology transfers to countries to which exports are restricted for national security or foreign policy purposes; improve the role of industry representatives in formulating and implementing national security export controls; permit agricultural commodities purchased for export to be stored in the United States free from future short-supply export limitations under specified conditions; increase the penalties applicable for violations of the Export Administration Act; and otherwise to improve the administration of United States export controls.

The purpose of Title II of the bill is to provide for public disclosure of requests to comply with a foreign boycott; require domestic concerns and persons receiving requests to comply with a foreign boycott to disclose publicly whether they are complying with such request; prohibit domestic concerns and persons from refusing to deal with other domestic concerns and persons pursuant to foreign boycott demands; prohibit domestic concerns and persons from furnishing information regarding an individual's race, religion, or national origin where such information is sought for purposes of enforcing a foreign

[2] *See* S. Rep. No. 946–32, 94th Cong., 2d Sess. (1976).

[3] Hearings Before the Subcommittee on International Finance of the Senate Committee on Banking, Housing and Urban Affairs on S. 425, Amendment No. 24 thereto, S. 953, S. 995, and S. 1303, 94th Cong., 1st Sess. (1975).

[4] Hearings Before the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs on the Foreign Investment Act of 1975, 94th Cong., 1st Sess. (1975).

[5] Hearings Before the Subcommittee on International Finance of the Senate Committee on Banking, Housing and Urban Affairs on Foreign Investment in the United States, 93d Cong., 2d Sess. Pt. 1 (1974).

boycott; insure that the antiboycott provisions of the Export Administration Act apply to all domestic concerns and persons including intermediaries in the export process, and otherwise to strengthen U.S. law against foreign boycotts and reduce their domestic impact.

The purpose of Title III of the bill is to identify foreign ownership in United States corporations and otherwise to provide for increased identification of the shareholders of U.S. Corporations.

A. EXPORT ADMINISTRATION

The Export Administration Act of 1969, as amended, is the basic statutory authority for regulating U.S. exports for national security, foreign policy, and short-supply purposes. The present law expires on September 30, 1976.

Title I of S. 3084, as reported by the Committee, would extend the Act for a three year period and in connection therewith make changes and improvements in its policy and implementation as follows:

(1) It would provide that in administering export controls for national security purposes, United States policy toward individual countries shall not be determined exclusively on the basis of a country's Communist or non-Communist status but shall take into account such factors as the country's present and potential relationship to the United States, its present and potential relationship to countries friendly or hostile to the United States, its ability and willingness to control retransfers of United States exports in accordance with United States policy, and such other factors as the President may deem appropriate.

It would also require periodic Presidential review of United States policy toward individual countries to determine whether such policy is appropriate in light of these factors. The results of such periodic reviews would be reported to Congress annually.

(2) It would change the present responsibility of the Secretary of Defense to review exports to "controlled countries" (defined as the Communist countries designated in the Foreign Assistance Act of 1961) so that he is required instead to review exports to countries designated by the President pursuant to the periodic review of the U.S. policy called for by the bill.

(3) It would require the Secretary of Commerce, in cooperation with the appropriate technical advisory committees established pursuant to statute, to review U.S. unilateral and multilateral export controls for purposes of determining whether such controls should be removed, modified. or added in order to protect the national security of the United States.

As part of such review, the Secretary of Commerce would also be required to explore ways of simplifying and clarifying export control lists.

The results of such review would be reported to Congress within eighteen months of enactment of the bill.

(4) The bill would require any person who enters into a contract or other arrangement which would transfer U.S. technology to nations to which exports are restricted for national security or foreign policy purposes to report the transaction to the Secretary of Commerce within 30 days of entering into such arrangement.

(5) It would require that an export license applicant be informed in writing of the specific statutory basis for any denial of his application.

(6) It would increase the terms of persons representing private industry on the technical advisory committees from two to four years.

(7) It would add multilateral export controls to the matters on which technical advisory committees are to be consulted. In addition, it would require that the Government inform such committees of the reasons for not accepting any advice or recommendations which they may make or render regarding export controls within their areas of responsibility.

(8) It would require that whenever an export license application is referred to a multilateral control process such as COCOM* for approval, the applicant, if he so requests, is to be given an opportunity to review the documentation to be submitted to such process for purposes of describing the proposed export in order to insure that its description of the proposed export is accurate.

(9) It would permit agricultural commodities purchased by or for use in a foreign country to be stored in the United States free from short supply export limits which may be imposed subsequently if the Secretary of Commerce, in consultation with the Secretary of Agriculture, receives assurance (i) that such commodities will eventually be exported, (ii) that neither the sale nor export thereof will result in an excessive drain of scarce materials and have a serious domestic inflationary impact, (iii) that storage of such commodities in the United States will not unduly limit the space available for storage of domestically owned commodities, and (iv) that the purpose of such storage is to establish a reserve of such commodities for later use by the buyer, not including resale to, or use by, another country.

(10) It would increase the maximum penalties for violations of the Export Administration Act as follows:

a. Judicially imposed penalties for a knowing violation of the Act or any rule or regulation thereunder: the first time $25,000 (now $10,000); the second and subsequent times, $50,000 (now $20,000);

b. Judicially imposed penalties for exporting anything contrary to the Act or any rule or regulation thereunder knowing that the export will be used for the benefit of any country designated by the President pursuant to the review of national security export control policy called for by the bill: $50,000 (now $20,000 where the violator knows that such export will be used "for the benefit of any Communist-dominated nation.");

c. Administratively imposed penalties for violating the Act or any rule or regulation thereunder: $10,000 (now $1,000).

In addition, authority would be given to the Government to defray or suspend the payment of any penalty during any "probation" period.

B. FOREIGN BOYCOTTS

Section 3(5) of the Export Administration Act sets forth United States policy against foreign boycotts as follows: "It is the policy of the United States (A) to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States [and] (B) to encourage and request domestic concerns engaged in . . . export . . . to refuse to take any action including the furnishing of information or the signing of agreements, which has the effect of furthering or supporting . . . [such] . . . restrictive trade practices or boycotts . . ."[6]

The Act provides for implementation of this policy by requiring all domestic concerns receiving requests for the furnishing of information or the signing of agreements which have the effect of furthering or supporting a foreign boycott to report this fact to the Secretary of Commerce for such action as he may deem appropriate.[7] This is the only measure specifically required under the present Act for carrying out U.S. anti-boycott policy. Implementation of that policy is otherwise left to the broad discretion of the President and the Secretary of Commerce.

Title II of S. 3084, as reported by the Committee, would expand and strengthen the implementation of U.S. anti-boycott policy as follows:[8]

(1) It would require domestic concerns and persons receiving a request to comply with a foreign boycott to disclose whether they intend to comply and have complied with such request.

(2) It would require that the boycott reports which are required to be filed with the Department of Commerce hereafter be made public; however, commercial information regarding the value, kind and quantity of goods involved in any reported transaction could be kept confidential if the Secretary of Commerce determines that disclosure of such information would put the domestic concern or person involved at a competitive disadvantage.

(3) It would prohibit domestic concerns and persons from furnishing to or for a foreign country any information regarding an individual's race, religion, or national origin where such information is sought for purposes of enforcing a foreign boycott.

(4) It would prohibit domestic concerns and persons from refusing to do business with other U.S. concerns or persons pursuant to a foreign boycott demand.

(5) It would increase the administrative penalties applicable under the Act for a violation of its anti-boycott provisions from $1,000 to $10,000 and make it clear that existing law authorizes the suspension of export privileges for violations of the anti-boycott provisions of the Act as well as any other provision of the Act.

(6) It would require public disclosure of Commerce Department charging letters or other documents initiating proceedings for the imposition of sanctions for failures to comply with the anti-boycott provisions of the Act.

(7) It would require the Commerce Department to provide the State Department with periodic reports on the information contained in the boycott reports filed by domestic concerns and persons.

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*International export control coordinating committee, consisting of Belgium, Canada, Denmark, France, the Federal Republic of Germany, Greece, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Turkey, the United Kingdom, and the United States.

[6] 50 U.S.C.A. App. § 2402(5) (Supp. 1976).

[7] 50 U.S.C.A. App. § 2403(b)(1) (Supp. 1976).

[8] Except for items 10 and 11 in the list which follows, and except for the express application of the antiboycott provisions of the Act to "persons" as well as "domestic concerns." these provisions are identical to those contained in Title I of S. 953. *See* S. Rep. 94–632, 94th Cong., 2d Sess. 2–3 (1976).

(8) It would require that the Commerce Department's semi-annual reports to Congress under the Act include an accounting of all action taken by the President and Secretary of Commerce to effect the anti-boycott policy of the Act.

(9) It would make it clear that the Act applies to banks, other financial institutions, insurers, freight forwarders, and shipping companies as well as all other domestic concerns and persons.

(10) It would provide that the refusal to deal provisions of the bill neither substitute for nor limit the operation of the antitrust laws.

(11) It would provide that the bill's refusal to deal provisions do not apply to conformance with requirements pertaining to the identity of the carrier on which exports are shipped so long as such requirements do not have as their purpose the enforcement or implementation of a foreign boycott. The purpose is to exempt from the reach of the refusal to deal provisions compliance with restrictions common in the export trade regarding the identity of the carrier on which goods may be shipped.

C. INVESTMENT DISCLOSURE

Under section 13(d) of the Securities Exchange Act of 1934, [15 U.S.C.A. § 78 m (1971)] generally any person who acquires the beneficial ownership of more than 5% of any equity security of a U.S. company subject to the Act must file with the Securities and Exchange Commission ("SEC") a statement disclosing, among other things, the background and identity of the persons on whose behalf the securities have been purchased, the source and amount of the funds used in making the purchase, any plans the purchaser may have to liquidate, merge, dispose of the assets of, or make major changes in the business of the company, the number of other shares the purchaser has a right to acquire, and any arrangements the purchaser may have with respect to the exercise of any rights relating to such securities.

Title III of S. 3084, as reported by the Committee, would amend Section 13(d) of the Exchange Act to expand the disclosure requirements thereunder to require disclosure of the following additional information:

a. the residence, nationality, and nature of the beneficial ownership of the person acquiring the securities; and

b. the background and nationality of each associate of the purchaser who has a right to acquire additional shares of the issuer.

In addition, Title III would impose new disclosure requirements as follows:

> Every holder of record of, and any other person having an interest in, 2% or more of any equity security of a U.S. company subject to the Exchange Act would be required to file reports as prescribed by the SEC at such time, with such persons, and containing such information as the SEC may require. The SEC would have authority to make exceptions not inconsistent with the public interest or the protection of investors.

The 2% threshold would be reduced to 1% on September 1, 1976 and ½ of 1% on September 1, 1977. However, the SEC could accelerate or defer such dates or grant exemptions from these disclosure requirements if, after public comment, it concluded that such change or exemption was not inconsistent with the public interest or the protection of investors.

The purpose of these provisions is to provide a means of identifying the extent of foreign ownership in U.S. corporations and, to a greater degree than in the past, the acquisition of potentially controlling interests in such corporations by foreign as well as domestic interests. Broad discretion is left to the SEC to permit it to tailor specific reporting requirements to the objectives sought to be achieved by the legislation.

In addition, in deciding whether to change the dates specified for the new reporting thresholds, the SEC is to consider and receive public comment on such matters as the extent to which beneficial owners avoid reporting requirements by using multiple holders of record; the cost of compliance to issuers and record holders; the effect on the securities markets; the benefits of such information to investors and the public; the interests of individuals in the privacy of their financial affairs; the extent to which the required disclosures would give someone an undue advantage in connection with the acquisition of securities through tender offers or otherwise; and the need for the required disclosures for purposes of administering and enforcing other provisions of the Exchange Act.

The SEC is to report to Congress on August 1, 1976 and again on August 1, 1977 on its implementation of the new reporting thresholds. No later than January 2, 1978, the SEC is to report to the Congress on the feasibility and desirability of reducing the reporting threshold further to one-tenth of one percent.

Need for the Legislation

Title I of this legislation is needed in order to extend the Export Administration Act and improve its administration so that its policies and procedures reflect the changing complexion of United States relations with other nations as well as the rapidly changing state of technological advance. Title I is also needed in order to permit foreign purchasers of agricultural commodities, under specified conditions, to establish a reserve of such commodities in the United States for export and use at a later date.

Title II of this legislation is needed in order to provide an effective means of enforcing U.S. policy against foreign boycotts and to mitigate their domestic impact.

Title III of the legislation is needed in order to provide a systematic mechanism for monitoring the acquisition of controlling or potentially controlling interests in U.S. companies by foreign as well as domestic investors.

A. Title I—Export Administration

United States export controls are a powerful instrument for protecting the Nation's security, advancing its foreign policy, and protecting the domestic economy against excessive drains of scarce materials. Export controls are a double-edged sword, however, for, in the short term at least, they reduce American economic opportunities abroad and deprive the American economy of the maximum possible benefits of international trade. It is, therefore, essential that export control policy reflect a clear perception of the national interest in light of changing conditions and changing relations among nations. It is also essential that export controls be administered in a manner which insures that national policy is fulfilled while inspiring the confidence and engendering the cooperation of those who are directly affected.

(1) Policy Toward Individual Countries

A major issue in export administration today is whether current national security export controls, which were erected in response to the Soviet threat following World War II, are appropriate to today's realities and whether they accurately reflect shifting alliances and changing military and strategic balances throughout the world. Current U.S. policy assumes that all Communist countries (with the exception of Yugoslavia) automatically pose a threat to the national security, and conversely that all non-Communist countries do not. Hence, identical polices apply to such diverse countries as the Soviet Union, Albania, Bulgaria, Czechoslovakia, Estonia, East Germany, Hungary, Lativa, Lithuania, Poland, Romania and The Peoples Republic of China.[9]

This monolithic approach is encouraged by section 4(h) of the Act which requires the Secretary of Defense to review applications for exports to "controlled countries" to determine whether such exports will significantly increase the military capability of the recipient country.[10] The term "controlled country" is defined to mean any "Communist country" as defined in section 620(f) of the Foreign Assistance Act of 1961.[11] The latter designates Yugoslavia, Tibet, Outer Mongolia, North Korea, North Vietnam, South Vietnam, and Cambodia, in addition to those countries named above, as Communist countries.[12] Hence, the Secretary of Defense must review applications for exports to Communist countries on the assumption that they all represent a threat to the national security, but he is under no obligation to review exports to other countries regardless of the potential threat they may pose. Moreover, he is required to treat Yugoslavia as a potential threat to the national security despite the fact that the United States applies to Yugoslavia the same export licensing criteria as are in effect for such countries as France, West Germany, and Italy.[13]

This straightjacketed and sometimes inconsistent approach does a disservice to the Nation's interest in maintaining flexibility in the scope and application of export controls. It does a disservice to the crucial need for export control policy to reflect the changing complexion of international relations. It forecloses or diminishes new market opportunities in Eastern Europe and Asia without regard to recent changes in Sino-Soviet relations as well as the changing character of relations between the Soviet Union and the nations of Eastern Europe. Meanwhile, it ignores the possibility, however remote, of potential threats to the Nation's security from entirely different parts of the world.

One of the major purposes of this legislation is to promote and encourage a continuing reexamination of export control policies and practices to insure that they reflect changing world conditions and the

[9] 15 CFR § 385.1 (1976).
[10] 50 U.S.C.A. App. § 2403(h) (Supp. 1976).
[11] 50 U.S.C.A. App. § 2403(h)(4)(C) (Supp. 1976).
[12] 22 U.S.C.A. § 2370(f) (Supp. 1976).
[13] 15 CFR § 385.4(c) (1976).

changing dimensions of national security. By expressly providing that U.S. policy toward individual countries shall not be determined exclusively on the basis of a country's Communist or non-Communist status, the bill is intended to diminish the tendency for rigid cold war perceptions of national security to dominate the export control process. By requiring instead that U.S. policy toward individual countries take into account such factors as the country's present and potential relationship to the United States, its present and potential relationship to countries friendly or hostile to the United States, its ability and willingness to control retransfers of United States exports in accordance with U.S. policy, and such other factors as the President deems appropriate, the bill is intended to bring all the factors which bear on the Nation's security into play in the development and implementation of national security export controls. By requiring that the President periodically review U.S. policy toward individual countries, and by requiring that the results of such review be included in annual reports to the Congress, the bill is intended to bring about that continuing reassessment of export control policy that is essential to insuring its conformity with the Nation's interests in a rapidly changing world. And finally, by refocusing the responsibility of the Secretary of Defense, so that instead of being required to review exports to an arbitrarily specified group of "controlled countries" regardless of whether they pose a national security threat, he would be required to review exports to countries designated by the President pursuant to his periodic review of U.S. policy, the bill would relieve the Secretary of Defense of irrelevant duties while insuring that his military judgment is brought to bear on exports to countries which truly do pose national security problems.

(2) Commodity Control Lists, Technolony Transfers, and Export Licensing Procedures

Two related issues have an important bearing on the efficacy of national security export controls: One is whether the items which are subject to controls are the ones which should be controlled in order to protect the national security or whether some items can be removed and others should be added in light of industrial and technological developments both at home and abroad; the other is whether export control procedures focus efforts where they are most needed and whether they provide clear, fair, and expeditious guidance to the exporting community, whose cooperation and confidence is essential to an effective export control program. On both scores, there is much apparent criticism.

In a recent report on the Government's role in East-West Trade, for example, the General Accounting Office observed:

> There is no basic interagency agreement on criteria for export controls and on whether foreign policy, commercial, or defense considerations should dominate trade policy with Communist states. Executive branch agencies have fundamental differences regarding licensing standards and procedures to be followed in administering controls. . . .[14]

[14] *Comptroller General of the United States, The Government's Role in East-West Trade; Problems and Issues; Summary Statement of Report to the Congress* 42 (February 1976).

Commerce, OEA [the Office of Export Administration], and ACEP [the Advisory Committee on Export Policy] procedures are slow and awkward and needlessly dependent on unaccountable practices, unanimity rules, limited OEA discretion, arbitrary agendas, and unlimited discussion of exception requests. . . .[15]

The United States has requested COCOM exceptions to export high-technology items to Communist states while opposing comparable but less sophisticated items proposed for export to the same countries by other COCOM members. . . .[16]

Foreign policy considerations dominate the entire structure of technology exchanges with Communist countries. Technical problems—degree of reciprocity, impact of transfer, monitoring and coordinating transfers in compliance with export controls, private technology exchange protocols, inadvertent or indirect transfers and marketing implications—are largely ignored . . . . The increased exposure of the Soviets to U.S. technology provided under the protocols makes the enforcement of controls totally dependent on industry cooperation.[17]

Similar concerns are echoed in a recent report by the Defense Science Board Task Force on the Export of U.S. Technology. Among its key findings are the following:

1. "The absence of established criteria for evaluating technology transfers reinforces the cumbersome case-by-case analysis of all export applications."

2. " 'Deterrents' meant to discourage diversion of products to military applications are not a meaningful control mechanism when applied to design and manufacturing know-how."

3. Turnkey factories, joint ventures, training in high technology areas, licenses with teaching, technical exchanges with on-going contact, and processing equipment with know-how are highly effective mechanisms for transferring technology, and they demand tight control which they are not presently getting.[18]

Equally strong but broader criticism of the present system has been levelled by Graham Allison of the Kennedy School of Government at Harvard University. Allison was responsible for the portion of the Murphy Commission report dealing with export controls. Among his conclusions are the following:

[1] The current system is not achieving the U.S. national security objectives for which it is designed: It fails to prevent shipment to the Soviet Union of technological products of potential concern to the U.S., while restricting American companies from selling products of no strategic importance.

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[15] *Id.* at 46.
[16] *Id.* at 47.
[17] *Id.* at 36.
[18] Office of the Director of Defense Research and Engineering, *An Analysis of Export Control of U.S. Technology; A Report of the Defense Science Board Task Force on Export of U.S. Technology XV Passim* (February 4, 1976).

[2] The current system forfeits opportunities for a more deliberate use of trade as a bargaining chip in the developing relationships with the Soviet Union, Eastern Europe, and the People's Republic of China . . . [R]egular procedures include no consideration of . . . [foreign policy] . . . objectives and no individual knowledgeable about Administration strategy for bargaining with the Soviet Union or China.

[3] The current system neglects important economic problems . . . [S]ome U.S. companies have been willing to sell technology at a price that is profitable to them . . . but which fails to reflect other costs borne by the US. economy as a whole. . . . The monolithic nature of the Soviet system is such as to provide the Soviet Union with significant bargaining leverage over U.S. firms.

[4] The present system is too narrowly focused on items of military significance narrowly defined. It does not consider the broader implications of transactions like supplying a truck factory or making grain sales.

[5] The present system fails to take into account the role that European and Japanese competitors play in providing goods and technology needed by the Soviet Union. The effectiveness of U.S. export controls has thus been significantly eroded.[19]

Industry is equally outspoken in its criticism of the administration of export controls, with complaints about delays in export licensing, bureaucratic overlap, uncertainty about the criteria governing licensing decisions, and over-breadth in the control lists with too much emphasis on items of little military or technological significance and corresponding insufficient attention to areas of rapidly evolving technology. Industry is critical, too, of what it perceives as a lack of adequate involvement in export licensing decisions despite the creation, pursuant to statute, of technical advisory committees to assist the Government on technical matters, licensing procedures, worldwide availability, and actual use of production technology.

These criticisms are cause for great concern, given the diversity of interests represented and the basic issues they raise about the efficacy of U.S. export controls. S. 3084 would help resolve some of these issues by its requirement that the President review existing unilateral and multilateral controls to determine whether they should be removed, modified, or added with respect to particular articles, materials, and supplies, including technical data and other information, in order to protect the national security. Such a review would provide an occasion for carefully examining the criticisms raised by the GAO, the Defense Science Task Force, Professor Allison, members of industry, and others with a view to adopting whatever changes in the control lists and procedures may be appropriate to insure that the national interest is served. Such a review would also provide an occasion for assessing the implications for U.S. export control policy of rapidly evolving technology and the increasing availability of controlled high technology items from outside the United States.

[19] Hearings Before the Subcommittee on International Trade and Commerce of the House Commitee on International Reelations on Export Licensing of Advanced Teechnology, 94th Cong., 2d Sess. (1976).

To the extent that sophisticated high technology generates new products of potential military significance, existing control lists may have to be expanded. On the other hand, where rapidly evolving technology has made presently controlled items obsolescent, it may be possible to pare down existing control lists. By the same token, where U.S.-controlled items are generally available from other countries, continued U.S. control may be a useless gesture, although in that regard, and in connection with the review of U.S. policy toward other countries called for by the bill, the United States should explore all possible ways of securing the cooperation of other countries with U.S. policy.

The bill's requirement that the Secretary of Commerce conduct his review of existing controls in cooperation with the appropriate technical advisory committees and that he report the results of such review to the Congress within eighteen months is intended to insure the widest possible participation in that review by all interested members of the public. The requirement that ways of simplifying and clarifying control lists be explored as part of such review is intended to insure that attention is given to the formidable obstacles which overly complex control lists may pose for potential exporters unfamiliar with the export control process. It is also intended to encourage concentration on items of true technological significance and to facilitate the elimination of technologically insignificant items from the control lists.

In the meantime, while this review is proceeding, the bill would accomplish a number of reforms which can and should be implemented immediately. Reporting of agreements which would transfer U.S. technology to nations to which exports are restricted for national security or foreign policy purposes would make it possible for the Government to monitor potential transfers of technology outside the export licensing process. It would also make it possible to determine whether additional steps are necessary to prevent uncontrolled leakage of militarily significant technology through technological cooperation agreements. If it is true, that technological cooperation agreements are a vehicle, whether intended or not, for circumventing export controls or transferring technology which should be controlled but is not, then the information developed from such monitoring will provide a basis for devising effective remedies.

The requirement that an applicant be informed in writing of the specific statutory basis for the denial of a license would end the Commerce Department's present unsatisfactory practice of informing applicants that a license has been denied on grounds of "national interest" since there is no legal basis for denying export license applications on such grounds. Application for export licenses may be denied under the Export Administration Act only for foreign policy, national security, or short-supply purposes. Interjection of a non-statutory "national interest" test merely serves to obscure the basis for the Government's action. This reform, assuming, as the Committee does, that the applicant is otherwise informed of why his application is denied, would increase the Government's accountability for its actions and thereby help sharpen its analysis of whether denial is justified.

In a similar vein, the requirement that the applicant be given an opportunity, if he so requests, to review the documentation to be submitted to any multilateral control process such as COCOM for purposes of describing his proposed export would insure greater accuracy in the control process, increase the Government's accountability for its actions, and help instill greater confidence in the export control program.

The bill would further enhance Government accountability by requiring that the technical advisory committees be informed of the reasons why any advice or recommendations which they may make or render are rejected, and it would give the exporting community an opportunity for involvement in a part of the export process which is as vital as unilateral U.S. licensing procedures by adding multilateral controls to the matters on which such technical advisory committees are to be consulted. In addition, by lengthening the term of private industry representatives on the technical advisory committees from two to four years, the bill would provide a better opportunity for committee members to become knowledgeable about matters within their areas of responsibility and thereby make it possible for them to render more effective service.

Finally, by raising the monetary penalties for violations of the Act, the bill would help restore the deterrent effect of penalties whose impact has been eroded by inflation.

One last point: the Committee has received numerous complaints from industry about delays in the processing of license applications. The issue is an important one. Delays which reflect bureaucratic inefficiency, administrative duplication, cumbersome procedures, or outmoded concepts and policies result in lost or discouraged export sales with no corresponding service to the national interest. Two years ago the Committee recommended and the Congress enacted legislation requiring that license applications be approved or disapproved not later than 90 days after submission. The legislation also required that if additional time were required, the applicant was to be informed of the circumstances requiring such additional time.[20]

In recommending the measure the Committee observed:

This provision was added because of the increasing delays experienced by exporters seeking final action on license applications for exports of high technology goods and services. Such delays cause uncertainty, and ultimately impede United States export potential. By requiring a decision within ninety days, with reasons to be given if additional time is required, the Committee expects the situation to be rectified.[21]

In defense of the present situation, the Commerce Department testified that according to a study done in the fall of 1975 approximately 85% of the export license applications it received during the study period were processed within ten days; 90% within twenty days.[22] On the other hand, high technology and machine tool industry representatives argue that the majority of the applications which they submit fall within the 10% not processed within those twenty days.[23] Indeed, by the Commerce Department's own admission, 77 percent of the

[20] Public Law 93-500, 93d Cong. 2d Sess. § 5(a) (1974).
[21] S. Rep. 93-1024, 93d Cong., 2d Sess. 6 (1974).
[22] Hearings Before the Subcommittee on International Finance of the Senate Committee on Banking, Housing, and Urban Affairs on S. 3084 at 118, 94th Cong., 2d Sess. (1976).
[23] *Id.* at 302, 341, and 359.

Communist country applications required up to 90 days for processing.[24]

Shortly before the hearings in March, the International Finance Subcommittee wrote to the Department of Commerce requesting detailed information to help it evaluate the possible sources of delay. Unfortunately, as of the date of this report, a reply has not been received. It is apparent, however, that the time it takes to secure a license application, whatever the reason, is a matter of concern to many and that continued efforts to reduce processing time, consistent with the fulfillment of the Government's export administration responsibilities, is essential. The issue is whether present procedures and policies truly reflect the Nation's interests in light of changing world conditions and technological developments or whether outmoded concepts, policies, and procedures merely result in unwarranted delay and thereby distort the national interest. In that connection, the Committee also expects the Administration to take appropriate steps to insure that license applications involving national security issues are denied only after the fullest possible review and the most careful assessment of whether the proposed expert potential military implications. Such review and assessment should also afford the applicant the fullest possible opportunity to participate in the discussion.

The Committee takes note of recent improvements in export administration. However, the fact that it has not received answers to questions it submitted more than two months ago for purposes of evaluating potential sources of delay, and the fact that industry complaints about delays continue, do nothing to bolster its confidence that such improvements are adequate or permanent. The Committee expects and urges the Administration to make continuous efforts to improve export administration and to examine and, as necessary, revise its practices to insure maximum efficiency and dispatch in the implementation of U.S. export control policy.

(3) Storage of Agriculture Exports in the United States

The imposition of export controls on agricultural commodities has been a continuing source of controversy in recent years, starting with the soybean embargo in 1973 and continuing through the restraints on grain sales to the Soviet Union and Poland in the late summer and fall of 1975. Under the Export Administration Act, it is express U.S. policy to use export controls, including controls on agricultural commodities, for both foreign policy and national security purposes, as well as for purposes of protecting the domestic economy from the excessive drain of scarce materials and reducing the serious inflationary impact of foreign demand.[25] On the other hand, except when controls are imposed for national security and foreign policy purposes, agricultural exports may not be restricted if the Secretary of Agriculture determines that the supply of such commodities is in excess of the requirements of the domestic economy.[26]

Delicate judgments and careful forecasting are obviously involved in this area of great importance to the Nation's economy and its conduct of foreign policy. As the 1973 soybean embargo made clear, export controls on agricultural commodities can be enormously dis-

[24] *Id.* at 118.
[25] 50 U.S.C.A. App. § 2402(2) (Supp. 1976).
[26] 50 U.S.C.A. App. § 2403(f) (Supp. 1976).

ruptive to American farmers, the Nation's allies, and other foreign customers. By the same token, grain agreements which limit potential future sales without extracting adequate purchase commitments, undermine the capacity of American agriculture to play a dominant role in meeting the world's food needs. For these reasons the Committee is concerned about recent restrictions on agricultural exports which portray the lack of a coherent long-term agricultural policy.

S. 3084 would remove a major cause of uncertainty in this area by permitting agricultural commodities purchased by or for use in a foreign country to be stored in the United States free from export limits which may be imposed subsequently for short supply purposes if the Secretary of Commerce, in cooperation with the Secretary of Agriculture, receives assurance (i) that such commodities will eventually be exported, (ii) that neither the sale nor export thereof will result in an excessive drain of scarce materials and have a serious domestic inflationary impact, (iii) that storage of such commodities in the United States will not unduly limit the space available for storage of domestically owned commodities and (iv) that the purpose of such storage is to establish a reserve of such commodities for later use in the purchaser's country and not for resale to or use by third countries.

This program would remove the uncertainty which foreign purchasers presently face because of the possibility that export controls will be imposed after purchase and frustrate their ability to ship the commodities they own from the United States. At the same time, by providing an incentive to create reserves of agricultural commodities, it would help smooth out fluctuations in worldwide demand and supply.

The protections and preconditions established under the bill would preserve existing authority to protect the domestic economy in times of short supply and would prevent foreign purchasers from using this device as a means of evading U.S. export policy or as a means of speculating with U.S. agricultural commodities in international markets to the detriment of the American consumer and farmer. Used wisely and with the caution intended by the Committee and in a manner consistent with the Nation's foreign policy objectives, this authority could make a significant contribution toward increasing America's role in world agriculture and reducing the uncertainty with which agriculture is plagued.

B. TITLE II—FOREIGN BOYCOTTS

(1) The Domestic Impact

The need for Title II of the bill is demonstrated by the growing domestic impact of the Arab boycott against Israel. While the boycott has been in effect since 1946, its impact on U.S. firms has recently begun to assume significantly greater proportions than in the past, and it could grow in the future unless action is taken.

For example, in 1974, 785 U.S. export transactions involved an Arab boycott demand, according to reports filed by U.S. firms with the Department of Commerce. However, for the first three quarters of 1975 alone, the number of such transactions jumped to 7,545, or almost ten times the number for all of 1974.[25] Twenty-three U.S. firms reported receipt of Arab boycott demands in 1974. During the first three quarters of 1975 alone the number jumped to 538, more than twenty-three times the number for all of 1974.[26]

Estimates by the Department of Commerce indicate that dollar value of goods involved in boycott-affected transactions in 1974 was $9.9 million. During the first half of 1975, the dollar value of such transactions climbed to over $203 million, more than twenty times the value for all of 1974.[27] According to a recent study by the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, which had access to the actual reports filed with the Commerce Department, the dollar value of goods involved in boycott-affected transactions for virtually all of 1975 (through 12/5/75) amounted to almost $630 million, almost seventy times the value for 1974.[28]

The increase in boycott demands by the Arab states reflects increased political tension in the Middle East and the dramatically enhanced economic power of the oil producing states since the oil embargo of 1973. Increased petroleum prices and the accumulation of oil earnings have significantly changed the dimensions of the boycott. Its power and reach promise to grow as trade and investment with the West expand. As they do, the pressure on U.S. firms to comply with the boycott if they wish to do business with the Arab states will undoubtedly grow as well.

Already there is substantial evidence of acquiescence to that pressure. In reports filed with the Department of Commerce for the third quarter of 1975, U.S. firms, according to the Commerce Department, indicated that they intended to comply with Arab boycott demands in over 63% of their export transactions.[29] The Commerce Department estimates that during 1974, the value of U.S. exports shipped in compliance with boycott demands stood at a little over $9.3 million. By the end of the first six months of 1975, according to Commerce, the value of exports shipped in compliance with boycott demands had already reached $9.2 million, or just about the same level as for all of 1974.[30] According to the study by the House Interstate and Foreign Commerce Subcommittee, the value of exports shipped in compliance with boycott demands for the first eleven months of 1975 (again through December 5th of the year) stood at $253 million, with U.S. firms indicating that they intended to comply with boycott demands in over 90% of the transactions in the last quarter of 1975 (through the 5th of December).[31]

Several cases brought to the attention of the Committee illustrate how the boycott affects business relations within the United States. One involved a U.S. company's contract to supply buses to an Arab state. As told to the Committee, after the bus manufacturer placed an

[25] Figures for 1974 and the first quarter of 1975 appear in U.S. Department of Commerce Export Administration Report 17 (1st Quarter 1975). Figures for the second and third quarters of 1975 are not yet published but were supplied to the Committee by the Department of Commerce.
[26] *Ibid.*
[27] Letter from Under Secretary of Commerce John K. Tabor to Senator Williams, June 25, 1975.
[28] Letter from Rep. John E. Moss to Senator William Proxmire, May 5, 1976.
[29] Unpublished data supplied to the Committee by the Department of Commerce.
[30] Letter to Senator Williams, *supra* note 28.
[31] Letter from Rep. John E. Moss, *supra* note 28.

order with one of its suppliers to supply seats for the buses, it was advised that the supplier was on the Arab blacklist and that, as a consequence, buses incorporating seats made by the supplier would not be acceptable. The manufacturer's order with its supplier was subsesequently terminated.

Another case brought to the Committee's attention illustrates the racial as well as political dimensions of the boycott. In that case Belvedere Products, Inc., a U.S. company and former subsidiary of the Revlon Company, discovered that it was on the Arab boycott list. It wrote to the League of Arab States asking what steps were necessary to secure its removal from the list. In response, the Arab League advised Belevedere that it would consider removing the company from the list if, among other things, it supplied a statement of the names and *nationalities* of its shareholders and directors. In addition, Belvedere was required to disclose whether it had any business dealings with its former parent, Revlon, a blacklisted company, the implication being that such dealings were prohibited.

In another case, Allied Van Lines International, according to testimony, distributed a brochure to potential customers regarding customs matters in various countries around the world. Under the heading "Arabian Countries," the brochure stated that "Shippers must check with the consulate for approval of items to be brought into this country. Items produced in Israel or *by Jewish firms or associates throughout the world are blacklisted.*" Emphasis supplied. The implication that Allied would not ship the products of *Jewish*, not necessarily Israeli, firms to Arab states was clear.

In all three cases, the boycott directly and adversely affected or potentially affected the ability of firms operating in the United States to do business with each other.

Over 1500 U.S. concerns are on the blacklist maintained by the League of Arab States. Firms on that list may not do business with the Arab states. More importantly for present purposes, other U.S. firms may not do business with blacklisted firms if they wish to do business with the Arab states. U.S. firms are thus put in the position of discriminating against other U.S. firms pursuant to the dictates of foreign governments.

(2) *Enforcement of U.S. Policy.* Despite the fact that it is explicit U.S. policy under existing law to oppose foreign boycotts, implementation of that policy has been largely weak and ineffective. With a few recent exceptions,[31a] the only measure taken has been the statutorily

[31a] On Nov. 20, 1975, after the International Finance Subcommitee recommended the subject legislation to the full Committee, the White House announced that it was taking a number of measures in response to discrimination against Americans on the basis of race, color, religion, national origin or sex that might arise from foreign boycott practices. Among other things, the Secretary of Commerce was directed to amend the Export Administration Act regulations (i) to prohibit U.S. exporters from answering or complying with boycott requests which would cause discrimination against U.S. citizens on the basis of race, color, religion, sex, or national origin and (ii) to require banks, insurers, freight forwarders, and shipping companies which become involved in any boycott request to report such involvement to the Department of Commerce. In addition, reporting on compliance intentions has now been made mandatory. Further, in April of 1976, the Commerce Department announced its intent to make public hereafter the charging letters which initiate administrative proceedings for violations of the Act. To the extent that there is overlap between the Administration's action and S. 3084, the latter would support such action by giving it an express statutory base even though present legal authority is adequate to support action taken by the Administration to date. Recently, the Justice Department announced legal action under the Sherman Act against a major U.S. company for certain actions in compliance with the Arab boycott. The infrequency of such legal action against firms complying with the Arab boycott demonstrates the need for additional legislation.

mandated one of requiring U.S. firms to file reports with the Department of Commerce upon receipt of a foreign boycott demand.

However, as late as the summer of 1975, Commerce Department report forms volunteered the advice that U.S. firms are "not legally prohibited from taking any action, including the furnishing of information or the signing of agreements, that has the effect of furthering or supporting such restrictive trade practices or boycotts." And while those report forms asked U.S. firms to indicate whether they intended to comply with the boycott, they also pointed out that "[c]ompletion of the information in this Item would be helpful to the U.S. government *but is not mandatory.*" (Emphasis supplied.) [31b] While neither statement was itself inaccurate, its appearance in an official U.S. government form did little to convey an impression of vigorous U.S. opposition to the boycott.

Moreover, enforcement activities were such that not until Congressional hearings in 1975 turned the spotlight on the Arab boycott and its growing domestic impact had any U.S. firms been penalized for failing to comply with even these limited reporting requirements. Even then, as of June 27, 1975, the Commerce Department sought to impose penalties against only five of the 105 firms found to be in violation of the Act. Four of the five were each penalized $1,000, and the remaining 100 were merely warned to comply with the law henceforth.[31c]

(3) *Inadequacy of Existing Law.* Existing U.S. law is inadequate to deal with the problem. According to testimony by the Justice Department, "[w]ith limited exceptions, none of which have significant application to the present problem, Federal civil rights laws do not prohibit private discrimination in the selection of contractors or the treatment of customers.[32]

According to the same testimony, the Sherman Act is the only Federal anti-trust statute having significant application to compliance with foreign boycotts, and there are serious impediments to its use.[33]

Among the impediments cited are (1) the "distinctive purpose" of the boycott, which exists for political reasons rather than for the purpose of securing commercial advantage; (2) the uncertainty of the economic impact and hence whether it is "so certain or severe as to justify application of the per se rule of illegality applied domestically;" (3) special legal considerations, such as the doctrine which precludes a sovereign state from being made a defendant in the courts of another; (4) the "act of state doctrine" which bars U.S. courts from examining the validity of acts performed by sovereign states within the own territory; and (5) the doctrine of "foreign governmental compulsion" which holds that a defendant "will not ordinarily be subject to sanctions in one jurisdiction for acts performed in another jurisdiction under pain of santion by the latter." [34]

[31b] U.S. Department of Commerce Form DIB–621 (Rev. 4–73).

[31c] As of June 1975, the case against the fifth had not yet been resolved. U.S. Department of Commerce, *Export Administration Report* 17 n. (1st Quarter 1975).

[32] *Hearings Before the Subcommittee on International Finance* on S. 425 et al., *supra* note 3 at 166.

[33] *Ibid.*

[34] *Id.* at 166–67.

As a consequence, according to the Justice Department, "it has never been held that a foreign, politically motivated boycott of this sort violates the [Sherman] Act." [35] Of significance, too, is the Department's conclusion that while an express agreement by a U.S. company to refrain from doing business with other U.S. companies might be "suspect," a unilateral refusal to deal "is not itself a violation." [35a]

(4) *Multidimensional Character of the Arab Boycott.* The Arab boycott takes a number of different forms. In its simplest form, Arab governments refuse to have, and prohibit their nationals from having, economic relations with the State of Israel. That is the classic case of a primary boycott.

In its secondary aspect, the boycott extends its reach by attempting to interfere with economic relations between third parties and the State of Israel as a means of implementing the primary boycott. Thus, U.S. companies might be required to refrain from doing business with Israel or with Israeli companies or nationals as a condition of doing business with Arab states.

In its tertiary aspect, the boycott extends its reach still further by attempting to interfere with economic relations among third parties themselves. Thus, a U.S. company might be required to refuse to do business with other companies which have economic relations with Israel, have Jewish ownership, management, or employees, or which for any other reason are blacklisted.

(5) *The Legislative Response.* The Committee recognizes that the Arab states regard their boycott efforts as part of their continuing struggle against Israel. The Committee also recognizes that the use of economic measures as a weapon in the Middle East struggle is likely to continue until there is a permanent political settlement. The Committee is aware that primary boycotts are a common, although regrettable, form of international conflict and that there are severe limitations on the ability of outside parties to bring such boycotts to an end. However, the Committee strongly believes that the United States should not acquiesce in attempts by foreign governments through secondary and tertiary boycotts to embroil American citizens in their battles against others by forcing them to participate in actions which are repugnant to American values and traditions. Accordingly, the bill reported by the Committee directly attacks attempts to interfere with American internal affairs while creating mechanisms for more subtle and flexible pressure against the other dimensions of foreign boycotts.

a. Reports on Compliance

By *requiring* that U.S. citizens disclose whether they intend to comply, and whether they have complied, with foreign boycott demands, the bill would give the Government a basis for accurately assessing the nature and extent of compliance with foreign boycotts and their economic impact on the United States. Accurate data is essential to sound policy. Experience has shown that where reports on compliance are optional, an overwhelming proportion choose not to supply the information.

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[35] *Id.* at 167.
[35a] *Ibid.*

For example, U.S. firms refused to disclose whether they intended to comply with Arab boycott demands in over twenty-two thousand of the reported twenty-three thousand 1972 export transactions involving an Arab boycott demand. Similarly, in 1973 U.S. firms refused to disclose their compliance intentions in over ten thousand of the reported eleven thousand export transactions involving a boycott demand. Through the third quarter of 1975, the most recent period for which data are available, in over three thousand of the reported seven thousand export transactions involving a boycott demand, U.S. firms refused to disclose whether they intended to comply.[36] As a result, valuable information about the extent and impact of the boycott was lost. Mandatory reporting of such information would fill an important gap in available data.

b. Public Disclosure

By requiring that future boycott reports filed by U.S. firms and persons be made public, the bill would give the public and the Congress an opportunity to monitor the behavior of U.S. business and the effectiveness of measures taken by the Government to implement U.S. anti-boycott policy. At the same time it would interject an element of public accountability in the responses of U.S. firms to boycott demands.

Presently, U.S. firms are free to comply with such demands without risking public scrutiny or the imposition of sanctions despite U.S. policy in opposition to such activity. Because their actions are cloaked in secrecy, the public and the Congress are deprived of an opportunity to know the degree to which U.S. business relations are being bent to the interests of foreign governments. Because they can comply with the boycott without telling the public, U.S. business need not give consideration to potential public disapproval of their actions. And because the Secretary of Commerce has repeatedly refused to make boycott reports available to the Congress, the opportunity to fashion appropriate legislative responses and to conduct effective oversight is seriously impaired.

The Committee is sensitive to the concern that public disclosure could subject U.S. citizens to harassment by private interests opposed to the Arab boycott. However, in weighing the alternatives for increasing the effectiveness of U.S. anti-boycott policy, including a flat prohibition on all forms of compliance, the Committee concluded that the potential adverse consequences were minimal and, in any event, were far outweighed by the potential public benefits.

For one thing, only persons complying with the boycott risk adverse public reaction. Those who refuse stand to enjoy the benefits of public approval. For another, it is unlikely that the reaction to compliance will be adverse in every case; instead it will depend on the nature of compliance. In some instances, such as a certification that goods to be shipped to an Arab state are not of Israeli origin, it will undoubtedly be recognized that no direct harm to domestic U.S. interests ensues and that such certification is an aspect of the primary boycott over which the U.S. has little control. In any event, the possibility of adverse reaction is not sufficient reason for withholding important information regarding corporate activities from the public.

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[36] U.S. Department of Commerce, *Export Administration Report* 19 (1st Quarter 1975). Figures for the second and third quarters of 1975 are not yet published but were supplied to the Committee by the Department of Commerce.

The whole thrust of U.S. securities laws since the 1930's has been public disclosure regardless of whether disclosure may reflect badly on corporate behavior. So there is ample precedent.

But whatever the reaction, public disclosure would cause U.S. businesses to weigh public policy carefully in their decision-making processes. American business would still be free to comply with certain boycott demands but not without regard to overall U.S. interests. The bill would thus provide an incentive for conforming private behavior to public policy without compelling it and would, in addition, create an environment which would help U.S. citizens stand-up to foreign pressure.

As noted, the Committee was urged by some to ban any and all forms of compliance with the boycott. It concluded, however, that such a ban would be unfair to many U.S. firms, would be of little benefit to the United States, and would deprive the President of desirable flexibility in the conduct of U.S. foreign policy.

As absolute prohibition against compliance with foreign boycotts would be tantamount to a counter-boycott. For example, if one country conditions U.S. business relations with it on a refusal to do business with another, U.S. firms could not lawfully comply with those terms. If a firm did do business with the boycotting country but not with the other, it would run the risk of apparent compliance with the boycott, regardless of the reasons why it had no business relations with the boycotted country.

A firm may simply have no business opportunities or interest in that country. Yet on its face, its behavior would be indistinguishable from compliance with the boycott. Rather than risk being charged with compliance, many would undoubtedly choose to terminate business relations with the boycotting country or refrain from developing them in the first place. The result would be a counter-boycott.

In the present context, such a policy would deprive U.S. businesses which have no opportunities or interest in Israel of legitimate business opportunities in the Arab states. Others might simply source their sales to the Arab states from foreign subsidiaries in order to circumvent U.S. law. In any event, U.S. trade relations would be severely impaired without any corresponding benefit to the United States. The termination of U.S. business relations with the Arab states is a weak reed for attempting to end the long-standing boycott against Israel. Other avenues, including progress toward an overall settlement of the Middle East question, offer more promise.

For these reasons, the Committee has focused its efforts on creating public accountability and an environment for resisting boycott demands while recommending specific prohibitions only on attempts to interfere with relations among U.S. citizens and other repugnant dimensions of foreign boycotts.

c. Refusing To Do Business and Supplying Information Regarding Race, Religion, or National Origin Pursuant to Boycott Demands

By prohibiting U.S. firms and persons from refusing to do business with other U.S. firms and persons pursuant to boycott demands, and by prohibiting U.S. firms and persons from furnishing information regarding an individual's race, religion, or national origin pursuant to a boycott request, S. 3084 would address the most repugnant dimensions of the boycott.

In the case of a primary boycott, where one country terminates its economic relations with another in order to achieve certain foreign policy objectives, the boycotting country bears the burden of disrupted economic relations. However, where the boycotting country extends the boycott to third parties, the matter has a direct and immediate impact on others not directly involved in the dispute. Their own policies and interests becomes directly engaged and their freedom of action, circumscribed. Where interference with third party relations has racial or religion overtones, the challenge strikes at fundamental U.S. social and legal principles.

Because of the growing domestic impact of the Arab boycott and the impediments to legal action against its secondary and tertiary dimensions, the Committee has concluded that changes in the law are essential. The prohibition on furnishing information regarding race, religion, or national origin would, if vigorously enforced, impair the ability of foreign countries and their nationals to discriminate against U.S. firms and persons and impede their ability to enlist other U.S. firms and persons in those efforts.

Similarly, the prohibition on refusals to do business pursuant to a boycott demand would seriously impair the ability of foreign governments to dictate business relationships among U.S. firms and persons. No longer would they be free legally to submit to foreign domination in the choice of persons with whom they deal, and foreign nations would be put on notice that the U.S. Government will not tolerate such interference with its sovereignty.

The Committee is sensitive to the difficulty of enforcing prohibitions on refusals to deal. The absence of business dealings without evidence of motive is obviously not proof of prohibited conduct. The danger of unwarranted allegations in this highly sensitive area has prompted the Committee to leave enforcement in the hands of the Executive Branch instead of creating a private right of action. In addition, any person accused of an illegal refusal to deal would be entitled to a full agency hearing on the record in accordance with provisions of the Administrative Procedure Act. The refusal to deal provisions of the bill, however, would neither substitute for nor limit the operation of the antitrust laws of the United States.

The Committee is aware that it is common in the export trade for the importer to specify the carrier on which goods are to be shipped for purposes of insuring safe and expeditious passage. Accordingly, the refusal to deal provisions of the bill would not apply to compliance with requirements pertaining to the carrier on which U.S. exports are to be shipped so long as such requirements do not have as their purpose the enforcement or implementation of a boycott, as they might, for example, if the importer refused to permit goods to be shipped on an American-owned blacklisted vessel regardless of its conformity with requirements of the importer regarding safe and expeditious passage. On the other hand, compliance with a requirement that goods be shipped only on a vessel which travels directly to a port designated by the importer, and conversely, a refusal to ship goods on a vessel which will not deliver the goods directly to such port, does not constitute a prohibited refusal to deal, since such restrictions reflect practices common in the export trade designed to insure unimpeded delivery of the goods.

d. Penalties

By increasing from $1,000 to $10,000 the penalties which may be imposed for violations of the anti-boycott provisions of the Act, and by making it clear that existing law permits suspension or revocation of export privileges for a violation of such provisions, the bill would give significantly greater meaning and potential effectiveness to the anti-boycotting provisions of the Act.

Present practice and existing limitations on penalties render them practically worthless in securing compliance. A $1,000 fine is of little significance to a multi-million dollar company. The problem is exacerbated by the practice of issuing warnings to first offenders. The failure to suspend or revoke a firm's export privileges for a violation of anti-boycott law, despite adequate authority to do so, undermines enforcement efforts further. Increased monetary penalties and vigorous enforcement efforts, would significantly enhance the incentives for compliance with U.S. anti-boycott law.

e. Disclosure of Charging Letters

By requiring public disclosure of charging letters or other documents initiating proceedings for enforcement of the anti-boycott provisions of the Act, the bill would give the public as well as aggrieved persons an opportunity to come forward with evidence bearing on allegations of illegal conduct. In addition, it would provide a means of scrutinizing the enforcement efforts of the Executive Branch. The present practice of keeping such proceedings secret impedes the gathering of all relevant evidence and deprives the public of an opportunity to assess the seriousness and vigor of enforcement action.

f. Reports to the State Department

By requiring the Commerce Department to report periodically to the State Department on the information disclosed in the boycott reports, the bill would establish a mechanism for focusing State Department attention on the nature and magnitude of boycott problems and generating intensified efforts to bring an end to foreign boycotts. Those engaged in U.S. diplomatic efforts relating to foreign boycott activities should be fully cognizant of how such boycotts operate and the impact they have on U.S. citizens. The Commerce Department is in a position to assist in generating such understanding by making information on the boycott available to the highest levels of government.

g. Reports to Congress

By requiring that the semi-annual reports to Congress under the Act include an accounting of actions taken by the President and the Secretary of Commerce to effect U.S. anti-boycott policy, the bill would provide the Congress with a better picture of the precise measures taken and the earnestness of the President's efforts to carry out U.S. anti-boycott policy.

h. Application of the Act to Export Intermediaries

Finally, by clarifying the Act to remove any doubt that it applies to banks, other financial institutions, insurers, freight forwarders, and shipping companies, the bill would bring within the Act parties which are often central to the implementation of a boycott. Since banks and other intermediaries often certify that the exporter has met all boycott requirements, they are in a unique position to enforce foreign boycott efforts.

Present law makes no exemption for banks and other export intermediaries. By its express terms it applies to all domestic concerns. Yet, with official blessing, U.S. banks, shipping companies, and other intermediaries have traditionally regarded themselves as exempt from the law. As a result, the public has been deprived of essential information regarding the workings of the boycott. The continued exemption of export intermediaries from the requirements of the Act would leave a significant section of the economy free from U.S. anti-boycott law. The bill would preserve the original intent that the law apply to *all* domestic concerns.

In proposing these changes in the law, the Committee wishes to emphasize that nothing in the bill which directs specific anti-boycott measures is intended to limit the President's authority to take other measures within his authority to effect the anti-boycott policy of the Act. Efforts which the Administration has recently taken in this area are welcome although overdue. Further efforts, including effective implementation of the provisions of this bill upon enactment, are encouraged.

C. TITLE III—INVESTMENT DISCLOSURE

Foreign investment in the United States has grown dramatically in recent years. Devaluation of the dollar, a depressed U.S. stock market inflation abroad, market opportunities in the United States, shortages of raw materials, and the growing accumulation of monetary surpluses among oil-producing states have combined to produce an increasing flow of investment funds to the United States.

Since 1960, foreign direct investment in the United States has grown at a rate of over $600 million per year. The Department of Commerce estimates that by year-end 1974 the value of foreign direct investment [37] in the United States stood at $26.5 billion compared to $6.9 billion in 1960, a gain of 230 percent in the fourteen year period. Foreign portfolio investment during the same period grew by over 500 percent. At the end of 1975, the total stood at $86 billion, compared to $13.8 billion in 1960.

Attitudes toward the growth of foreign investment in the United States are ambivalent. On the one hand it is recognized that foreign direct investment can strengthen the economy by enhancing competition, by improving the productivity and efficiency of industry through fresh infusions of management and technology, and by improving the balance of payments through new capital inflows, import substitution, and increased export sales. Foreign portfolio investment, too, benefits the economy because it tends to improve the balance of payments,

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[37] Defined as ownership of 25 percent or more of a corporation's equity securities. All other foreign investment is classified as portfolio investment.

strengthen the value of the dollar, increase capital availability, and lower domestic interest rates.

On the other hand, foreign investment, whether direct or portfolio, can be a vehicle for gaining control of essential industries, securing control of sources of materials in short supply, gaining access to high technology, and increasing industrial concentration through the consolidation of large foreign and domestic enterprises.

Of immediate concern in light of continuing tensions in the Middle East and the accumulation of vast sums in the hands of OPEC (a $60 billion surplus in 1974; $40 billion in 1975) is the possibility that foreign investment from Arab sources will be manipulated for political purposes. The Treasury Department estimates that during the first nine months of 1975, $3.5 billion, or 75 percent, of all the foreign portfolio investment in the United States came from OPEC sources. Such investment could constitute a powerful economic weapon should the Arab states attempt to employ it to achieve political ends.

At present, the formulation of sound national policy on foreign investment is seriously handicapped by shortcomings in data-gathering capability. There is currently no systematic and centralized mechanism for regularly gathering accurate information on the size and source of foreign investment flows. Instead we rely largely on periodic "benchmark" surveys every ten years or so based on sample surveys of selected U.S. firms.[38] As a result, available information provides little more than estimates of actual conditions. As the Federal Energy Administration said in its 1974 Report on Foreign Ownership, Control, and Influence in Domestic Energy Sources Supply:

> [F]or the most part, identification of foreign investment in U.S. energy sources and supplies must depend on incomplete and inconsistent data series. The requirements for corporate ownership disclosure under existing federal laws and regulations are ineffective. The identity of capital sources for portfolio investments appears to be particularly difficult to determine, and information concerning foreign direct investment (FDI) is acknowledged to be incomplete. This is so despite the fact that existing laws require FDI to be recorded for the purpose of keeping balance of payments accounts. The U.S. Department of Commerce, Bureau of Economic Analysis (BEA), which is responsible for the collection of FDI data, has acknowledged that companies in which foreign governments have a controlling interest hardly ever observe the requirements for filing appropriate forms pursuant to the prescribed laws and regulations.[39]

The consequences are strikingly illustrated by the Treasury Department's discovery, as reported in its Interim Report to the Congress on Foreign Portfolio Investment in the United States,[40] that such investment as of the end of 1974 was $32–37 billion, or as much as 80 percent, higher than the previous estimate of $48 billion. Similarly,

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[38] For a description of current procedures see U.S. Treasury Department. *Interim Report to the Congress on Foreign Portfolio Investment in the United States* 77–85 (October 1975) and U.S. Department of Commerce. *Interim Report to the Congress on Foreign Direct Investment in the United States* 17 (October 1975).

[39] Federal Energy Administration. Report to the Congress on Foreign Ownership. Control and Influence on Domestic Energy Sources and Supply 1–2 (December 1974).

[40] U.S. Treasury Department, *Interim Report to Congress, supra* note 38.

available data on direct investment significantly underestimates actual levels since it is based on sample surveys only and a definition of direct investment that is no longer regarded as appropriate.[41]

Compounding the problem is the inability to identify, to any meaningful degree, those who have the power, directly or indirectly, to influence the affairs of U.S. corporations. While many federal agencies collect data on individual investors,[42] a study commissioned by the Council on International Economic Policy and the Office of Management and Budget observed that "no single agency either coordinates, compiles, or discloses to the public a full picture of foreign investment in the U.S. . . .; there are only limited instances where investors are identified by nationality . . .; [and while] [i]dentification of the 'beneficial' owner is often regulated by the Federal agency . . . it is usually only provided when such information is known and available to the reporting entity".[43]

As a consequence, neither companies nor their shareholders have the information needed to protect their interests, and neither the reulatory agencies, the Executive Branch, nor the Congress has adequate information for the development of sound public policy. Debate over measures to regulate or control foreign investment or to prevent undue concentration of corporate control thus takes place under a cloud of serious informational deficiencies.

One of the principal problems in obtaining accurate information is the practice of recording stock ownership in other than the name of the beneficial owner through "nominee" or "street name" accounts. Nominee accounts are typically used by institutional investors (e.g., insurance and investment companies) and financial intermediaries (e.g., banks and trust companies) to register in the name of a third person securities held by them for their own accounts or the accounts of their customers. This is done to facilitate trading or other transactions in the stock. Street name accounts are used for the same purpose, typically by brokers, who register securities held for themselves or their customers in their own names or in the name of a nominee.

A report issued by the Senate Committee on Government Operations on the disclosure of corporate ownership shows how the widespread use of nominee or street name accounts poses serious obstacles to determining who owns and controls American corporations. According to the Report, for example, 26 of the 30 largest shareholders of Mobil Oil Corporation were nominees at the time of the Report. Similarly, 28 of the 30 largest shareholders of Ford Motor Company were nominees. In United Airlines Corporation, 28 nominees held 45.1% of that company's outstanding stock.[44] Identification of who actually owns and controls the corporation is virtually impossible under these circumstances.

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[41] To date, an investment has been considered a "direct" investment if it represented 25 percent or more of a company's equity security. In the new benchmark survey being prepared pursuant to the Foreign Investment Study Act of 1974 (Public Law 93-479) the 25 percent test is reduced to 10 percent or more.

[42] *See* U.S. Council on International Economic Policy and U.S. Office of Management and Budget. *Report on United States Data Collection Activities With Respect to Foreign Investment in the United States* 5-6 (February 1975).

[43] *Ibid.*

[44] Senate Committee on Government Operations, *Disclosure of Corporate Ownership,* 30, 35, 36, 55, and 56, 93d Cong., 1st sess. (1973). For an analysis of pertinent data on corporate ownership and control, *see also* Senate Committee Government Operations, *Corporate Ownership and Control,* 94th Cong., 1st sess. (1975).

While there are sound reasons for use of street and nominee names to facilitate securities transactions, their widespread use raises a number of problems both for investors and for the formulation of public policy. For one thing, street name and nominee accounts impose one or more layers between the issuer and the beneficial owner thereby making issuer-shareholder communications more difficult and expensive. The issuer is often precluded from contacting the beneficial owner directly, a matter of potentially significant import in tender-offer situations, and the beneficial owner often finds it difficult to exercise the prerogatives or receive the benefits of stock ownership directly. Both must act through one or more intermediaries. For another, street name and nominee accounts impede public access to information regarding the control of publicly held corporations and make it possible for power and influence to be exercised with relative anonymity.[45]

As the Government Operations Committee Disclosure of Corporate Ownership points out: "The existence of sizable blocks of stock held in the name of one or more nominees of a bank gives that bank considerable power in the way it exercises the voting rights it has itself and the influence it is in a position to exert on beneficial owners where it occupies an agency role." [46] Yet the public, and indeed, the corporation, have no effective means of identifying the existence of such potential influence.

Surveys of seventy-four major U.S. companies by the Senate Government Operations Committee concerning the identities of their top thirty shareholders revealed that Chase Manhattan held 2 percent or more of the stock in more than half the companies; Morgan Guaranty and First National City Bank held 2 percent or more of the stock in almost one-third of the companies; and Bankers Trust held 2 percent or more of the stock in almost one fourth of the companies.[46a] As a study by the House Banking and Currency Subcommittee on Domestic Finance observed: "Control of a small block of stock in a widely held company by a single or few like-minded financial institutions provides them with disproportionately large powers within the company" and "even 1 or 2 percent of stock in a publicly-held corporation can gain tremendous influence over a company's policies and operates.[47]

Faced with these problems and in light of measures being advanced in various quarters to reverse America's traditional open door policy toward foreign interest, the Committee has recommended in Title III of S. 3084 legislation which will make a significant contribution toward filling the information gaps which presently surround the question of who owns and controls American corporations. Rather than recommending new controls on foreign investment at this time, the Committee is recommending a mechanism for securing on a regular and systematic basis accurate and up-to-date information on the ownership of U.S. corporate securities, without regard to whether the

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[45] *See generally* Scurities and Exchange Commission. Preliminary Report to the Congress on the Congress on the Practice of Recording the Ownership of Securities in the Records of the Issuer in Other Than the Name of the Beneficial Owner of Such Securities (December 1975).

[46] Senate Committee on Government Operations. *Disclosure of Corporate Ownership, supra* note 44, at 136.

[46a] *Id.* at 24–26.

[47] Staff of Subcommittee on Domestic Finance, House Committee on Banking and Currency. *Commercial Banks and Their Trust Activities; Emerging Influence on the American Economy,* 90th Cong., 2d sess. (1968).

investment is from a foreign or domestic source. In that regard, no discrimination would be imposed against foreign investors.

The availability of timely and accurate information will make it possible in the future to assess U.S. policy toward foreign investment on a continuing basis with information that is essential to the intelligent formulation of sound policy. In the meantime, the U.S. open door policy toward investment from abroad will remain in effect unless and until events make it clear that revisions in such policy are warranted.

Title III of S. 3084 attacks the problem of inadequate investment information in two ways: First, it would amend section 13(d)(1) of the Exchange Act to require any person who acquires more than 5 percent of any class of registered equity securities to disclose the residence, nationality and nature of the beneficial ownership of the purchaser as well as the background and nationality of each associate of the purchaser who has a right to acquire additional shares of the issuer. (For these purposes, the term "nationality" refers to citizenship.) Those who beneficially own more than 5 percent of a corporation's equity securities or make a tender offer for corporate securities are already required to disclose such information as the identity and background of the purchaser, the source and amount of the consideration, and the purpose of the purchase.

Disclosure of the citizenship of the purchaser or person making a tender offer will make it possible to measure the extent to which foreign investors have acquired or seek to acquire controlling or potentially controlling interests in U.S. corporations without discriminating against them or imposing on them any additional burdens. Disclosure of the nature of the beneficial ownership will make it possible to determine the degree of control or potential control represented by persons owning more than 5 percent of a company's securities. An investor who merely has the right to receive dividends, for example, is far less significant from the standpoint of corporate control than one who has full voting rights with respect to his securities.

The second way in which Title III attacks the problem of disclosure is by enlisting the aid of recordholders in securing public disclosure of essential information regarding the ownership and control of U.S. corporate securities. This is accomplished by the new section 13(g) which would be added to the Exchange Act to require every recordholder of, and any other person having an interest in, two percent or more of any class of equity securities described in section 13(d)(1) to disclose such interest and such other ownership information as the SEC may by rule prescribe. The SEC would be given discretion to prescribe the form and content of the ownership reports and the manner and the frequency with which they are to be filed and disseminated, although reporting could not be required more often than quarterly.

In this connection, new section 13(g)(1) of the Exchange Act would also give the SEC power to determine the method for computing the reporting threshold. It is contemplated by the Committee that reports would be filed by recordholders and others on an aggregate basis where, for example, an institution uses more than one nominee of record. In this case, the Commission would require the reporting entity (bank or broker-dealer) to file based upon the cumulative holdings of these multiple accounts. Similarly, all securities owned by a person, regardless of the nature of that ownership, may be required by the SEC to be aggregated in computing how many securities the person owns for purposes of determining whether he would be required to report. In other contexts, aggregation may not be necessary and reporting may be required on an individual account basis. In each case the SEC must be governed by the statutory purpose and the regulatory need.

Although these new reporting requirements would be applicable initially to persons having an interest in 2 percent or more of a corporation's securities, the threshold would be reduced to one percent on September 1, 1976 and to one half of one percent on September 1, 1977. However, the SEC would have discretion to shorten or extend these periods if, after considering certain matters set forth in the bill, it finds that such action is not inconsistent with the protection of investors or the public interest.

Among the matters which the SEC would be required to consider are (1) the extent to which beneficial owners are avoiding reporting requirements through the use of street name or nominee accounts or multiple holders of record; (2) the cost of compliance to issuers and recordholders; (3) the effect on the securities markets, including the system for the clearance and settlement of securities transactions; (4) the benefits to investors and to the public; (5) the bona fide interests of individuals in the privacy of their financial affairs; (6) the extent to which such reported information gives or would give any person an undue advantage in connection with acquisitions or takeovers; (7) the need for such information in connection with the administration and enforcement of the Securities Exchange Act; and, (8) such other matters as the SEC may deem relevant, including the results of any study or investigation it may undertake such as the "street name" study currently being conducted pursuant to section 2(m) of the Exchange Act and the results of reports filed by institutional investment managers pursuant to section 13(f) of that Act.

New section 13(g) of the Act would make it unlawful for any person to make use of the mails or instrumentalities of interstate commerce to effect transactions in any security of a class described in section 13(d)(1) if such person knew or should have known that the person effecting the transaction, or any person on whose behalf such a transaction is intended to be effected, has not disclosed such information as the SEC may, by rule, require to be filed, published or disseminated pursuant to the bill. The SEC would be authorized, however, to grant exemptions, by rule or order, if it finds that such exemption is not inconsistent with the public interest or the protection of investors.

The SEC would be required to report to the Congress on August 1, 1976 and August 1, 1977 on the steps it has taken to implement, accelerate or defer reduction of the initial two percent threshold. In addition, the SEC would be required to report to the Congress no later than January 2, 1978, on the feasibility and desirability of reducing the reporting threshold to one-tenth of one percent. The SEC's comments on this procedure are set forth in the following letter:

SECURITIES AND EXCHANGE COMMISSION,
Washington, D.C., December 12, 1975.

Hon. HARRISON A. WILLIAMS, Jr.,
Chairman, Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: As you know, the Commission recently forwarded its comments regarding Title II of the Proposed Senate Draft Bill to amend the Export Administration Act of 1969 and the Securities Exchange Act of 1934. Essentially, we asked that you consider a procedure whereby the Commission initially would be required to secure disclosure of the interests of all stockholders owning 2% or more of the outstanding stock of all publicly held companies. Recognizing your Subcommittee's concern that a broader reporting requirement may better serve the public interest, we suggest that the 2% reporting threshold be reduced at regular intervals down to a mandatory disclosure threshold of ½ of 1% ownership. Each step would be required to be taken unless the Commission found, in accordance with prescribed statutory standards, that such lower reporting threshold would not be in the public interest.

In our earlier transmittal letter, we pointed out that we are studying the issue of beneficial ownership and that we presently have no basis for making a final determination as to the kinds of disclosure that may be necessary or appropriate, and the kinds of burdens that such disclosure may entail. Notwithstanding this point, however, we do recognize your Subcommittee's concern for immediate action. Accordingly, we believe that the suggestions we have made provide a satisfactory means of meeting the Subcommittee's concerns and still affording an opportunity for further Commission consideration of these issues.

Sincerely,

RODERICK M. HILLS,
Chairman.

In the course of its deliberations the Committee considered recommending enactment of new statutory penalties in order to insure effective enforcement of the new reporting requirements, particularly with respect to their application to foreign persons. Personal jurisdiction over foreign persons who fail to comply with the law is difficult, if not impossible, to obtain. However, the Committee concluded that the *in rem* jurisdiction of the courts, together with the equitable forms of relief which they are presently empowered to apply in such matters, is adequate to insure effective enforcement. These include such remedies as restrictions on transfers of securities, revocation or suspension of voting rights, impoundment of dividends, and divestiture. The Committee believes that these remedies, together with the general equitable power of the courts to fashion appropriate remedies, can and should be used against foreign persons as well as United States persons who fail to comply with the Act and that, therefore, the specification of statutory penalties is unnecessary.

The disclosure approach of Title III with its built-in flexibility will make possible a continuing assessment of foreign investment and corporate ownership issues. Such an approach will encourage international investment while insuring the availability of the facts necessary to protect vital national interests.

Public policy in support of enhanced disclosure in securities transactions follows a pattern which began with the Securities Acts of 1933 and 1934. This legislation will complement continuing efforts within the Executive Branch, the regulatory agencies, and the Williams Securities Subcommittee to increase the availability of information which is vital to the development of sound policy in this complex area where important national and international issues are at stake.

SECTION-BY-SECTION ANALYSIS OF THE BILL

A. TITLE I—EXPORT ADMINISTRATION

SHORT TITLE

Section 101 of the bill would provide that Title I of the bill may be cited as the Export Administration Amendments of 1976.

EXTENSION

Section 102 of the bill would extend the Export Administration Act for a period of three years from September 30, 1976 to September 30, 1979.

POLICY TOWARD INDIVIDUAL COUNTRIES

Section 103(a) of the bill would amplify existing law by providing that in administering export controls for national security purposes, United States policy toward individual countries shall not be determined exclusively on the basis of a country's Communist or non-Communist status but shall take into account such factors as the country's present and potential relationship to the United States, its present and potential relationship to countries friendly or hostile to the United States, its ability and willingness to control retransfers of United States exports in accordance with United States policy, and such other factors as the President may deem appropriate.

Section 103(a) would further require that the President periodically review United States policy toward individual countries to determine whether such policy is appropriate in light of the factors mentioned above. The results of such review, together with the justification for U.S. policy in light of such factors, would be required to be included in the semi-annual report of the Secretary of Commerce under the Export Administration Act for the first half of 1977 and in every second such report thereafter.

DEPARTMENT OF DEFENSE REVIEW

Section 103(b) of the bill would change the present responsibility of the Secretary of Defense to review exports to "controlled countries" (defined to mean any Communist country as defined under section 620(f) of the Foreign Assistance Act of 1961) so that he is required instead to review exports to those countries designated by the President pursuant to his report to Congress on the periodic review of U.S. policy toward individual countries as called for by section 103(a) of the bill. This change is consistent with the bill's intent that a country's Communist or non-Communist status not be the sole determinant of U.S. policy. The effective date of this change would be ninety days after the President completes the first of the policy reviews called for by the bill. As under present law, the Secretary of Defense could determine in advance which categories of exports to the designated countries he needs to review in order to fulfill his responsibilities under the Act and delegate authority to other agencies of the Government on license applications for all other categories of exports.

Review of Control Lists

Section 104 of the bill would require the Secretary of Commerce, in cooperation with the appropriate technical advisory committees, to undertake an investigation to determine whether U.S. controls or the multilateral controls in which the United States participates should be removed, modified, or added with respect to particular articles, materials, and supplies, including technical data and other information, in order to protect the national security. Such investigation is to take into account such factors as the availability of such articles, materials, and supplies from other nations and the degree to which the availability of the same from the United States or from any country with which the United States participates in multilateral controls would make a significant contribution to the military potential of any nation threatening or potentially threatening the national security of the United States.

As part of such investigation, the Secretary of Commerce would be required to explore ways of simplifying and clarifying the lists of materials subject to controls.

The results of such investigation would be required to be reported to the Congress not later than eighteen months after enactment.

Technological Cooperation Agreements

Section 105 of the bill would require any person who enters into a contract, protocol, agreement or other understanding for, or which may result in, the transfer of United States origin technical data or other information to any nation to which exports are restricted for national security or foreign policy purposes to report such transaction to the Secretary of Commerce and provide him with copies of all documents pertaining thereto within thirty days of entering into such understanding.

Reasons for Denial of License

Section 106 of the bill would require that in any denial of an export license application, the applicant be informed in writing of the specific statutory basis for such denial.

Review of Documents Submitted to Multilateral Review

Section 106 of the bill would further require that wherever an export license application is to be submitted to a multilateral review process such as COCOM for approval, the applicant, if he so requests, is to be given an opportunity to review the documentation to be submitted to such process for the purpose of describing the export in question in order to determine whether such documentation accurately describes the proposed export.

Technical Advisory Committees

Section 107(a) of the bill would lengthen the term of industry representatives on the technical advisory committees from two to four years.

Section 107(b) of the bill would add exports subject to multilateral controls to the matters on which technical advisory committees are to be consulted. Section 107(b) would also require that the technical advisory committees be informed of the reasons for any failure to accept any advice or recommendations which they may make or render to the Government.

Storage of Agricultural Exports in the United States

Section 108 of the bill would provide that upon approval of the Secretary of Commerce, in consultation with the Secretary of Agriculture, agricultural commodities purchased by or for use in a foreign country may remain in the United States for export at a later date without being subject to any quantitative limitations on export which may be imposed subsequently in order to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand. The Secretary of Commerce could not grant approval for such storage unless he receives adequate assurance (i) that such commodities will eventually be exported, (ii) that neither the sale nor export thereof will result in an excessive drain of scarce materials and have a serious domestic inflationary impact, (iii) that storage of such commodities in the United States will not unduly limit the space available for storage of domestically owned commodities, and (iv) that the purpose of such storage is to establish a reserve of such commodities for later use, not including resale to or use by another country. The Secretary of Commerce would be authorized to issue such rules and regulations as may be necessary to implement these provisions.

Agricultural commodities stored in the United States pursuant to this section are intended to be treated as exported for statistical purposes.

Penalties

Section 109 of the bill would increase the maximum penalties applicable for violations of the Act as follows:

a. Judicially imposed penalties for a knowing violation of the Act or any rule or regulation thereunder: the first time $25,000 (now $10,000); the second and subsequent times, $50,000 (now $20,000).

b. Judicially imposed penalties for exporting anything contrary to the Act or any rule or regulation thereunder knowing that the export will be used for the benefit of any country designated by the President pursuant to the report to Congress called for by section 4(b)(1) of the Act, as amended by section 103(a) of the bill: $50,000 (now $20,000 where violator knows that such export will be used "for the benefit of any Communist-dominated nation.").

c. Administratively imposed penalties for violating the Act or any rule or regulation thereunder: $10,000 (now $1,000).

In addition, authority would be given to the Government to defray or suspend the payment of any penalty during any "probation" period. However, such deferral or suspension would not operate as a bar to the collection of the penalty in the event that the conditions of the suspension, deferral, or probation are not fulfilled.

TITLE II—FOREIGN BOYCOTTS

Short Title

Section 201 of the bill would provide that Title II of the bill may be cited as the Foreign Boycotts Act of 1976.

Statement of Policy

Section 202(a) of the bill would amend section 3(5)(A) of the Export Administration Act of 1969 (the "Act") 50 USCA App. § 2402(5) (Supp. 1976) to make it clear that it is U.S. policy to oppose foreign boycotts when directed against domestic concerns as well as when directed at countries friendly to the United States. Section 3(5)(A) of the Act presently states that it is U.S. policy "to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States . . ." Since the Arab boycott includes a boycott of blacklisted U.S. firms as well as the State of Israel, amplification of the present statutory statement of policy will make it clear that the United States opposes attempts to extend foreign boycotts to its own internal affairs.

Implementation of U.S. Anti-Boycott Policy

Section 203 of the bill would reorganize subsection 4(b) of the Act to place all express boycott implementation provisions in a new paragraph 4(b)(2), transferring existing boycott provisions from paragraph 4(b)(1), and redesignating existing paragraphs (2) through (4) thereof as new paragraphs (3) through (5).

New subparagraph 4(b)(2)(A) would require that the Secretary of Commerce, through appropriate rules and regulations, implement the anti-boycott policy of the Act. This merely carries forward a similar provision in paragraph 4(b)(1), although the wording of this new provision is intended to make it clear that the Committee expects full implementation of the anti-boycott policy of the Act.

(*a*) *Disclosure of Foreign Boycott Demands.* New subparagraph 4(b)(2)(B) carries forward the requirement of existing law that firms which receive requests for the furnishing of information, the signing of agreements, or the taking of any other action which has the effect of furthering or supporting a foreign boycott report that fact to the Secretary of Commerce, together with such other information concerning such request as the Secretary may require for such action as he may deem appropriate for carrying out the purposes of U.S. anti-boycott policy. However, the bill would add individuals to those required to make such reports.

Subparagraph 4(b)(2)(B) would further require that domestic firms and persons receiving such requests also report to the Secretary of Commerce on whether they intend to comply and whether they have complied with such requests. In addition, any such reports made after enactment of the bill would be required to be made available promptly for public inspection and copying. However, information regarding the quantity, description, and value of any goods to which such reports relate may be kept confidential if the Secretary determines that disclosure thereof with respect to any particular domestic concern or person would place that concern or person at a competitive disadvantage.

Subparagraph 4(b)(2)(B) would also require that the Secretary of Commerce report the results of these boycott reports to the Secretary of State on a periodic basis for such action as he, in consultation with the Secretary of Commerce, may deem appropriate for carrying out the anti-boycott policy of the Act.

(*b*) *Prohibition on Supplying Certain Information Pursuant to Boycott Requests.* Subparagraph 4(b)(2)(C)(i) would require that rules and regulations implementing the anti-boycott policy of the Act also prohibit domestic concerns and persons from furnishing information regarding an individual's race, religion, or national origin ~~of their own or any other domestic concern's directors, officers, employees or shareholders~~ to, or for the use by, any foreign country, national, or agent thereof where such information is sought for purposes of enforcing a foreign boycott.

The Committee recognizes that there may be occasions where such information is sought for purposes other than enforcement of a foreign boycott. Enforcement of foreign civil rights or foreign investment disclosure laws, for example, might require disclosure of such information by a U.S. citizen. However, where such information is sought for purposes of determining whether a U.S. firm or person should be placed on or removed from a blacklist or for purposes of determining whether a U.S. firm or person is doing business with other U.S. firms or persons which are or might be blacklisted, or where such information is sought for any other purpose connected with enforcement of a boycott, the prohibition would apply.

(*c*) *Prohibition on Refusals to Deal.* Subparagraph 4(b)(2)(C)(ii) would require that rules and regulations implementing the anti-boycott policy of the Act also prohibit domestic concerns and persons from refusing to do business with any other domestic concern or person pursuant to an agreement with, requirement of, or a request from or on behalf of any foreign country, national. or agent thereof where such agreement, requirement, or request is made or imposed for the purpose of enforcing or implementing a foreign boycott. Any civil penalty (including any suspension or revocation of a firm's authority to export) for a violation of this prohibition could be imposed only after notice and an opportunity for an agency hearing on the record in accordance with sections 5 through 8 of the Administrative Procedure Act.

The prohibitions on refusals to deal imposed by this subparagraph would not apply to any conformity with requirements pertaining to the identity of any vessel or other carrier on which articles, materials, or supplies are to be shipped so long as such requirements do not have as their purpose the enforcement or implementation of restrictive trade practices or boycotts against a country friendly to the United States or against any domestic concern or person.

Section 203 of the bill also expressly provides that neither the prohibitions on refusals to deal nor the prohibitions on supplying certain information contained in the bill would substitute for or limit the operation of the antitrust laws of the United States.

Penalties

Section 204(a) of the bill would increase the civil penalty which may be imposed under the Act for violations of its anti-boycott provisions from $1,000 to $10,000. Such penalty may be imposed in addition to or lieu of any other liability or penalty which may be imposed under the Act.

Section 204(a) of the bill would also make it clear that export license privileges may be suspended or revoked for violations of the anti-boycott provisions of the Act. The authority to suspend or revoke export privileges for any violation of the Act already exists under present law and, thus, it extends to violations of the anti-boycott provisions of the Act. However, the Committee wishes to emphasize that its use in cases of violations of such provisions may make a significant contribution to effective enforcement of U.S. anti-boycott policy. Accordingly, the Committee encourages its application in circumstances which will help achieve that end.

Disclosure of Charging Letters

Section 204(a) of the bill would also require that any charging letter or other document initiating proceedings by the Secretary of Commerce after enactment of the bill for the imposition of sanctions for violations of the anti-boycott provisions of the Act be made available for public inspection and copying.

Technical Change

Section 204(b) of the bill would amend section 7(c) of the Act to conform it to the public disclosure requirements imposed by the bill. Section 7(c) currently provides that "[n]o department, agency, or official exercising any functions under this Act shall publish or disclose information obtained hereunder which is deemed confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless the head of such department or agency determines that the withholding thereof is contrary to the national interest." Since the bill would require that certain reports and documents be made public, section 104(b) of the bill would provide that section 7(c) of the Act applies "except as otherwise provided."

Reports to Congress

Section 205 of the bill would add a new paragraph (3) to subsection 10(b) of the Act to require that each report to the Congress by the Secretary of Commerce under the Act also contain a description of actions taken by the President and the Secretary to effect the anti-boycott policy of the Act.

Definitions

Section 206 of the bill would amend section 11 of the Act by adding a definition of the term "domestic concern" as used in the Act. As so defined, the term would include but not be limited to banks, other financial institutions, insurers, freight forwarders, and shipping companies organized under the laws of the United States.

The Committee does not intend to include the Export-Import Bank within this definition however. The Bank is excluded under the assumption, confirmed by the Bank to the Committee, that it does not participate in transactions which involve boycott demands.

TITLE III—INVESTMENT DISCLOSURE

Short Title

Section 301 of the bill would provide that Title III of the bill may be cited as the Domestic and Foreign Investment Improved Disclosure Act of 1976.

Disclosure of Residence, Nationality, and Nature of Beneficial Ownership

Section 302 of the bill would amend section 13(d)(1) of the Securities Exchange Act of 1934 (the "Exchange Act") to expand the disclosure requirements applicable thereunder to persons who acquire more than 5% of an equity security registered with the Securities and Exchange Commission ("SEC") or who propose to acquire such securities through a tender offer to include disclosure of (a) the residence, nationality, and nature of the beneficial ownership of the person acquiring the securities and all other persons by whom or on whose behalf the purchases have been or are to be effected and (b) the background and nationality of each associate of the purchaser who owns or has a right to acquire additional shares of the issuer.

For these purposes, the term "nationality" refers to citizenship. The term "nature of the beneficial ownership" could include such matters as whether the beneficial owner has the right to direct the voting of the securities, the receipt of dividends, the proceeds of sale or such other or different indicia of beneficial ownership as the SEC may prescribe.

Disclosure by Record and Other Holders

Section 303 of the bill would add a new subsection 13(g) to the Securities Exchange Act of 1934. Paragraph (1) thereof would require that every holder of record of, and any other person having an interest in, 2% or more of, any security of a class described in section

13(d)(1) of the Exchange Act, report such interest and such other information, in such form and at such intervals (but in no event more frequently than quarterly) as the SEC may by rule prescribe.

Paragraph (2) thereof would provide that any person required to make reports pursuant to paragraph (1) of this new subsection file, publish, or disseminate such reports in such manner and to such persons as the SEC may by rule specify. Paragraph (2) would also require that any issuer which receives reports pursuant to this paragraph include in any filing or registration statement it makes with the SEC such of the information contained in such reports as the SEC may by rule prescribe.

Paragraph (3) thereof would require that the 2% threshold of paragraph (1), be reduced to 1% on September 1, 1976 and to ½ of 1% on September 1, 1977. However, the SEC may shorten or extend such periods if it finds that such change is not inconsistent with the protection of investors or the public interest after giving appropriate consideration to, and receiving public comments, views, and data on the following:

(a) the incidence of avoidance of reporting by beneficial owners using multiple holders of record;

(b) the cost of compliance to issuers and to record holders;

(c) the effect on the securities markets of such action, including the system for the clearance and settlement of securities transactions;

(d) the benefits to investors and the public;

(e) the bona fide interests of an individual in the privacy of his financial affairs;

(f) the extent to which such reported information gives, or would give, any person an undue advantage in connection with tender offers or other acquisitions;

(g) the need for such information in connection with the administration and enforcement of the Exchange Act; and

(h) such other matters as the SEC may deem relevant, including the results of any study or investigation it may undertake pursuant to the Exchange Act and the information obtained pursuant to section 13(f) of that Act.

Paragraph (3) of new subsection 13(g) would also require the SEC to report to the Congress on August 1, 1976, and again on August 1, 1977, on the steps it has taken, or plans to take, to implement, accelerate, or defer the time periods set forth in this paragraph. In addition, the SEC would be required to report to the Congress no later than January 2, 1978 on the feasibility and desirability of reducing the specified thresholds to one-tenth of 1 per centum, after studying the impact of such reduction on a reasonable sample of issuers, record-holders, and other persons required to report under new subsection 13(g) and after full consideration of the matters to be considered in deciding whether to extend or shorten the periods specified in this paragraph for reduction of the specified thresholds.

Paragraph (4) of new subsection 13(g) would give the SEC the authority, by rule or order, to exempt from the requirements of this new subsection any security, issuer, or person, or any class of securities, issuers, or persons, if it finds that such exemption is not inconsistent with the public interest or the protection of investors.

Paragraph (5) of new subsection 13(g) would make it unlawful for any person, in contravention of such rules as the SEC may prescribe, to make use of the mails or any other means or instrumentality of interstate commerce to effect any transaction (for this own account or the account of another) in any security subject to this new subsection if such person knew, or should have known, that information required to be filed, published, or disseminated in accordance with this subsection, either by the person effecting the transaction or by the person on whose behalf, directly or indirectly, the transaction is intended to be effected, has not been filed, published, or disseminated.

Paragraph (6) of new subsection 13(g) would require that the SEC, in exercising its authority under this subsection, take such steps as are within its power, including consulting with the Comptroller General of the United States, the Director of the Office of Management and Budget, the regulatory agencies referred to in section 34(D) of the Exchange Act and other Federal authorities which, directly or indirectly, require reports substantially similar to that called for by this subsection to achieve uniform, centralized reporting of such information and avoid unnecessary duplicative reporting by, and minimize the compliance burden on, persons required to report.

Fiscal Impact Statement

In accordance with section 252(a) of the Legislative Reorganization Act of 1970, the Committee estimates that Titles I and II of the bill will result in no increase in the cost of administering the Export Administration Act inasmuch as the provisions of the bill can be carried out with existing staff. It is estimated that Title III would cost approximately $50,000 per year for additional staff to receive and process the reports required by the bill.

Changes in Existing Law

In the opinion of the Committee, it is necessary to dispense with the requirements of subsection 4 of rule XXIX of the Standing Rules of the Senate in order to expedite the business of the Senate.

ADDITIONAL VIEWS OF SENATORS HELMS AND GARN

We believe that it is necessary to protect U.S. firms and citizens from discriminatory actions which arise from foreign boycott practices, but we do not believe that this legislation will practically contribute to that worthwhile objective. On November 20, 1975, the President announced his antidiscriminatory policy with respect to foreign boycott practices. Departments and independent agencies subsequently took actions implementing his policy. We believe that the actions taken by the administration substantially meet the concerns raised by the committee and provide an acceptable means of coping with foreign boycotts aimed at U.S. firms or citizens. We therefore believe this legislation to be unnecessary and possibly counterproductive by further straining the already fragile trading relationship between the United States and the Arab countries.

Concerning the specific provisions of title II, we wish to present the following views:

(*1*) *Require firms to notify the Department of Commerce of action taken pursuant to a boycott related request*

Current Department of Commerce Export Administration regulations require U.S. firms to report their intentions or actions taken with respect to a boycott request. If a firm is undecided as to a course of action, it must report that fact but notify the Department of is final acion within 5 business days after making the decision.

The objective of required reporting has been met; we see no need for statutory language.

(*2*) *Public disclosure of boycott reports*

We believe that public disclosure of the boycott documents filed with the Department of Commerce is not in the national interest. The problem with public disclosure is that the act of complying with the request for information is interpreted by many as willfully complying with the Arab economic boycott. That is not necessarily the case. The vast majority of U.S. firms trading with the Arab countries have no trading relationship with the State of Israel or are engaged only in routine commercial trade and therefore are not subject to the specific restrictions delineated in most boycott documents.

Compliance, then, could be misinterpreted as an implication of wrongdoing, as is succinctly stated in the foregoing report on this legislation, and could result in economic injury to innocent U.S. firms through counterboycott activities. Larger firms could avoid the law by transferring sales to Arab countries through overseas branches or subsidiaries while small businessmen without overseas operations would be forced to face possible counterboycott actions simply because they engage in legitimate trade with the Arab world.

(3) Prohibition against the furnishing of discriminatory information pusuant to a boycott request

Existing Export Administration regulations prohibit U.S. firms from complying with boycott requests which have the effect of discriminating against U.S. citizens or firms on the basis of race, color, religion, sex, or national origin.

Existing regulatory language is stronger than the proposal; therefore, we see little practical consequence to codifying the provision.

(4) Prohibit U.S. firms from refusing to do business with other U.S. firms pursuant to a boycott request

It is our understanding that the Department of Justice is currently engaged in an intensive investigation of possible antitrust violations involving U.S. businesses cooperating with the Arab boycott. One such antitrust suit has already been filed against a U.S. firm.

We believe it extremely inappropriate at this time to modify the Export Administration Act so as to confer enforcement of antitrust violations on the Department of Commerce. They do not have the personnel or the time or the expertise to undertake such a venture.

(5) Increase maximum civil penalty from $1,000 to $10,000 and authorize the suspension of export privileges for violation of the boycott reporting requirement.

We have no objection to raising the civil penalty, but we do object to the suspension of export license privileges only for violation of the boycott reporting requirements. The Department of Commerce has exercised its authority to withhold or suspend export licensing privileges for violation of the act since the inception of the statute in 1949. Senate report No. 31, 1st session, 81st Congress, which accompanied the Export Control Act of 1949, stated with respect to enforcement of the act, "Authority for denial of licensing privileges has always been inherent in the power to prohibit or curtail exportations."

It is our concern that this provision could throw into question the authority of the Department of Commerce to exercise the withholding of export licensing privileges for other more serious violations of the act.

We believe this provision would be of no significant benefit to the Department of Commerce to enforce the antiboycott provisions to the act.

(6) Require public disclosure of documents initiating proceedings against U.S. firms for failing to comply with the antiboycott provisions of the act

We have no objections to this provision.

(7) Require the Department of Commerce to provide the State Department with summaries of boycott related information

We have no objection to this provision, though we see it of little value. The State Department and the Justice Department already have access to this information if it so desired and as a matter of policy copies of any boycott reports containing discriminatory references are automatically sent to the appropriate agencies for their evaluation.

(*8*) *Require that semiannual reports to Congress under the act include action taken by the executive branch to effect the boycott policy of the act*

We believe there is no need for this provision as the Department of Commerce presently reports on the administration of the antiboycott regulations in the semiannual Export Administration report.

(*9*) *Clarify that the act applies to banks, other financial institutions, insurers, freight forwarders, and shipping companies*

We believe this provision is unnecessary because the Export Administration regulations have been modified, pursuant to Presidential directive of November 20, 1975, to insure that related service organizations, which include banks, insurers, freight forwarders, and shipping companies, report any boycott request to the Department of Commerce.

The vast majority of the provisions contained in the antiboycott amendments to the Export Administration Act are presently being exercised through the regulatory process.

This legislation, therefore, is of little practical benefit, but its cost could be great. At a time of sensitive negotiations in the Mideast, where the United States is playing a major role as mediator, it is not in the national interest to willfully encourage confrontation. In addition, we believe that this legislation would damage trade developments in the Mideast by injecting a further element of uncertainty into existing and future business relationships.

JESSE HELMS.
JAKE GARN.

ADDITIONAL VIEWS OF SENATORS TOWER, HELMS, AND GARN

We are very concerned over the adoption of title III of this bill. In our opinion, the need for this legislation has not been demonstrated. Its obvious intent is to improve disclosure of both foreign and domestic corporate stock ownership, but at what cost? We believe the costs will be great, not only in terms of financial expenditures required, but also in the reduction of individuals' rights to privacy. We believe the primary question is, "At what level of corporate ownership disclosure is the public interest served?" This question simply has not been answered nor have benefits to be derived from broader disclosure been adequately presented. We believe the benefits to the public from such disclosure are illusive at best.

We support section 202 of the bill which amends section 13(d) of the Securities Exchange Act to basically require disclosure of the background and nationality of individuals who are beneficial owners of more than 5 percent of a class of any registered equity security. This modification will substantially improve our knowledge about the extent of foreign ownership in the United States.

Section 203 of the legislation, however, proposes to drop the required disclosure level immediately from 5 percent to 2 percent, and to one-half of 1 percent by September 1, 1977. We firmly believe that there has not been adequate evidence presented to warrant such a dramatic reduction. We are not convinced that 2 percent or one-half of 1 percent is of practical public significance to measuring the degree of substantial corporate control which either foreign or domestic investors can exercise. Can individuals owning one-half of 1 percent exercise substantial control over the policies or practices of domestic corporation such that their operations would be decidedly in opposition to the U.S. national interest? We think not.

One benefit alluded to during the hearings was that the legislation would better enable corporations to communicate with their shareholders. If there is a need for better communication, then the study presently being conducted by the Securities and Exchange Commission, to examine the adequacy of the communication system between the corporation and the stockholder, should provide a basis for reaching an acceptable solution to this problem. We do not believe that it is in the national interest for Congress to proceed pellmell to codify new sweeping disclosure requirements and regulations which will be expensive and will intrude on an individual investors' right to privacy. In addition, we believe that those groups or individuals who may derive benefits from increased disclosure should shoulder some of the costs. The taxpayer should not be asked to subsidize this activity.

Another benefit deriving from this legislation which was vaguely referred to during the hearings was that it would assist Federal regulatory agencies in detecting violations of Federal law. Again no affirmative testimony was given by our Federal regulatory agencies as to the need or the desirability of such new legislation.

Evidence indicates that the costs of collecting and processing this information will not be inconsequential to financial intermediaries or to Federal regulatory agencies. In our opinion it has not been demonstrated that the benefits of this legislation will outweigh those costs. In the end, it is the investor and the taxpayer who will pay the cost of broader disclosure.

Perhaps the most important and least discussed issue surrounding this legislation is the possible violation of the privacy rights of an individual as stated by the fourth amendment to the Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Former SEC Chairman Garrett expressed grave concern about the privacy issue raised in this legislative proposal when testifying before both the Securities Subcommittee and the International Finance Subcommittee:

> The idea of requiring fiduciaries to disclose their beneficiaries, or at least those beneficiaries with voting power, on a regular basis for public filings raises other considerations that must be carefully weighed. One is the longstanding tradition and policy in our law of protecting the privacy of private trusts. Compelling the public disclosure of the portfolios of private trusts—even if only to the extent that they hold equity securities of publicly owned U.S. companies for which the beneficiaries hold the voting power—is a fundamental departure from our settled norms. Of course, we have long since made this departure where the beneficiary is a reporting person under section 16 of the Securities Exchange Act or is otherwise a control person, or affiliate, of the portfolio company, or one who has acquired 5 percent and becomes subject to section 13(a). But we are now considering a more drastic and far-reaching departure.

The privacy rights of individual investors have also been contested and affirmed in recent court actions. The Supreme Court of California, for example, stated in the case of *City of Carmel-by-the-Sea* v. *Young*, 85 Cal. Rptr. 1,466 P.2d 225, 231–32 (1970):

> The protection of one's personal financial affairs * * * against compulsory public disclosure is an aspect of the zone of privacy which is protected by the Fourth Amendment and which also falls within the penumbra of constitutional rights into which the Government may not intrude absent a showing of compelling need and that the intrusion is not overly broad.

We believe that no compelling need has been shown for this legislation and that its coverage is overly broad and therefore is intrusion into an individual investor's right to privacy.

The case has been made that title III of this legislation could also violate the requirements of the due process clause of the fifth amendment because there is not a reasonable relationship between the end sought to be achieved and the means employed.

As former Chairman Garrett has stated, "We are now considering a more drastic and far-reaching departure." We strongly believe that additional disclosure should be weighed carefully and enacted only when overriding regulatory purpose warrants such disclosure.

A nation loses its basic freedoms slowly. Each step appears to be for a good reason. There always seems to be a compelling argument for the Government to know something more about the private concerns of the people. Soon it is denied that certain concerns are private at all. Finally, the basic protections of individual privacy are sufficiently eroded for the Government to exercise tyrannical control. It is not surprising that the majority of American people now believe their Government is an oppressor rather than a protector.

Another troubling aspect of this legislation which has not adequately been considered is the difficult problem of enforcement in the case of foreign nominees which are subject to their local privacy laws. It is doubltful whether this legislation could be equally enforced on both foreign and domestic concerns. Any laxity of enforcement, regardless of how meritorious the intent, could result in a competitive advantage to the noncomplying foreign institution. Former SEC Chairman Garrett briefly addressed this issue when testifying before the International Finance Subcommittee:

> Another consideration is one of competitive fairness among fiduciaries—broker-dealers and trust companies and United States and foreign banks. The foreign part of the problem is not just one of even application of the law as written, but also as enforced. We have been engaged in long, and so far, futile, efforts to compel disclosure of bank customers in some countries, even for purposes of criminal investigations.

In addition, the legislation would make it unlawful for any person to effect a security transaction if he "knew or should have known" that there had been a violation of the legislation's reporting requirements by the person on whose behalf the transaction is effected. While it is not clear, this provision would appear to impose on any person performing a brokerage service a duty to make a reasonable investigation to ascertain whether a reporting violation had occurred. If so, the provision would, in our view, place an undue burden on firms performing brokerage services that could raise the costs of securities transactions and adversely affect the functioning of the securities market.

John Tower.
Jesse Helms.
Jake Garn.

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