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# Treasury's New Reporting System for Information on Foreign Exchange Transactions†

On December 21, 1971, the United States devalued the dollar by approximately 10 percent. Since congressional approval of this change[1] was required by the Bretton Woods Agreement Act[2] (approving United States participation in the international monetary stabilization program instituted after World War II), Congress passed the Par Value Modification Act.[3] When on February 12, 1973, the President declared a second devaluation of the dollar, it became necessary for Congress to sanction the second devaluation by amending the Par Value Modification Act, and S. 929[4] and H.R. 6912[5] were introduced to do so. In the course of the Hearings on S. 929,[6] Senator Proxmire raised with Paul Volcker, the then Under Secretary of the Treasury for Monetary Affairs, the question of the effect of the devaluation upon multinational corporations. Their colloquy apparently led the Senator to ask "What role did these corporations play in the speculative inflows of funds to Germany and Japan?" Mr. Volcker replied, to Senator Proxmire's consternation, that "I can't answer that question. We don't have the data."[7]

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†Editor's Note: Since the present paper was completed, the proposed regulations discussed herein have been issued in final form. The banking regulations remain largely unchanged (*Cf.* 39 Fed. Reg. 36962 (Oct. 16, 1974) with reporting forms in 39 Fed. Reg. 37362 ff. (Oct. 21, 1974)). A major change was, however, incorporated in the multinational non-banking regulations (40 Fed. Reg. 8020 [Feb. 24, 1975]). The original version limited reports to liquid items. Because it was felt that this limitation would seriously misrepresent the company's true position in the specified foreign currencies, forms were issued to provide for reporting both liquid and other assets held in these currencies. *See infra* text page 504 at 3 and following.

[1] 22 U.S.C. § 286 et seq. (1970).

[2] 22 U.S.C. § 286c (1970).

[3] 31 U.S.C.A. § 449 (1973).

[4] 119 CONG. REC. S.2802 (daily ed. Feb. 20, 1973).

[5] 119 CONG. REC. H.2724 (daily ed. April 12, 1973).

[6] Hearings on S.929 before the Senate Committee on Banking, Housing, and Urban Affairs, 93rd Cong., 1st Sess. (1973).

[7] *Id.* at 47.

Convinced that the United States ought to have adequate data on the participation by corporations under its jurisdiction in international capital flows Senator Proxmire moved on the floor of the Senate, during debate on S. 929, to amend the bill to add Title II, Foreign Currency Reports, to the Par Value Modification Act.[8] In brief, Title II, after setting out a Statement of Findings, including the observation that "movements of mobile capital can have a significant impact on the proper functioning of the international monetary system,"[9] directs the Secretary of the Treasury, by rule, to require multinational corporations to submit reports of foreign currency transactions.[10]

During the rather extensive debate which ensued between Senator Proxmire, Senator Taft and Senator Tower, fear was voiced that the competitive position of the United States multinationals might be weakened if they were to be required to make public information that other multinationals could continue to keep secret. Senator Tower read into the Report a letter from Mr. Volcker, who, despite the desire he expressed in the Hearings[11] for a better statistical reporting network, opposed the amendment on the grounds that (a) the Treasury already had adequate existing authority in this field and (b) such a provision in the bill at that time might lead to additional speculative flows in apprehension of controls.[12] Nevertheless, Senator Proxmire's amendment passed, 46 to 40, and the bill as a whole, after a Senate-House Conference, was enacted into law on September 21, 1973.[13]

Nine months later, on June 27, 1974, the Treasury published for comment its proposed reporting requirements[14] to comply with the directive of the statute. Senator Taft need not have worried; as presently drafted, the reports should not cause the firms required to report to reveal much that would be of use either to the competition, or indeed, to the Treasury. In judging the effectiveness of the reporting requirements in their proposed form, it is helpful to summarize what the proponent of the legislation, Senator Proxmire, suggested as three main advantages of imposing such a reporting system of foreign currency transactions

[8]119 CONG. REC. S6230 (daily ed. March 29, 1973).

[9]31 U.S.C.A. 1141 (1973). This observation, as noted by Senator Tower in the debate on the amendment, is given force by the proposal of the International Monetary Fund to make a study of disequilibrating flows: "An intensive study should be made of effective means to deal with the problem of disequilibrating capital flows by a variety of measures, including controls, to influence them and by arrangements to finance and offset them." See 119 CONG. REC. S.6236 (daily ed. March 29, 1973).

[10]Conf. Rep. No. 93-424, 93rd Cong., 1st Sess. (1973).

[11]Hearings on S.929, *supra* note 6 at 47.

[12]119 CONG. REC. S.6233 and S.6236 (daily ed. March 29, 1973). This fear, in view of the total lack of public notice of the amendment (neither the N.Y. Times nor the Wall St. Journal, nor indeed other business publications, made any reference to the amendment in their articles on the bill), would seem to have been unfounded.

[13]Pub. L. No. 93-110.

[14]Proposed Supplemental Reporting Requirements, § 128.2-4, .30-.37, 39 FED. REG. 23830-23844 (1974).

upon persons and corporations subject to United States jurisdiction.[15] First, he suggested that the mere requirement of disclosure would help eliminate unwarranted currency speculation. Secondly, he believed that the requirement would give United States financial officials the information they need to understand the process of a currency crisis and so, if necessary, to intervene. "A reporting system will serve as an early warning system for detecting possibly disruptive currency movements."[16] Thirdly, he hoped that the requirement would contribute to international monetary stability by providing our major trading partners with some assurance that "our multinational corporations are subject to some governmental scrutiny."[17] In accomplishing these aims, Senator Proxmire envisioned that the reports would be required of only the largest corporations and then only to the extent their foreign exchange operations had a significant effect upon the market. I would envision that daily reports would be required for large and unusual currency transactions which depart from the firm's customary trading pattern."[18] He also suggested that in making up the forms for the reports," . . . the balance measured should be defined as carefully as possible as those short-term, liquid items that could and would move across international boundaries in times of crisis."[19] How well have the proposed forms conformed to these aims?

Procedurally, the new reporting system is proposed as an amendment to 31 CFR Part 128, the Treasury's present requirements governing the reporting of transactions in foreign exchange, transfer of credit, and export of coin and currency.[20] The Treasury in its introduction to the amendment notes that the reporting requirements are in addition to the present ones and that the aim of the supplemental requirements is "to provide additional data on the nature and source of flows of mobile capital."[21] (The present requirements seem to be directed at obtaining the information necessary for balance of payments statistics, *i.e.*, they do not cover domestic holdings of foreign currency.) The proposed amendment to 31 CFR Part 128[22] provides for six new reporting forms, Foreign Currency Forms FC-1, 1a, 2, 2a, 3 and 4.

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[15]119 CONG. REC. S.6233 (daily ed. March 29, 1973).

[16]*Loc. cit.*

[17]*Loc. cit.*

[18]*Loc. cit.*

[19]*Ibid.*, at S.6235.

[20]At present, pursuant to 31 C.F.R. Part 128, banks subject to the requirements report monthly to their Federal Reserve Banks on "short-term" liabilities to "foreigners" (Treasury Foreign Exchange Form B-1), "short-term" claims on "foreigners" (Foreign Exchange Form B-2) and "long-term" liabilities to and claims on, "foreigners" (Foreign Exchange Form B-3); other types of firms report claims on, and liabilities to, foreigners on Treasury Foreign Exchange Form C-1/2 and C-3. The distinctions between these forms and the proposed new reporting system are explained in the proposal, see 39 Fed. Reg. 23836 and 23842 (1973), and need not be gone into here.

[21]Proposed Supplemental Reporting Requirements, 39 Fed. Reg. 23830 (1974).

[22]*Ibid.* at 23830-23831.

The six forms represent different categories of respondents: Forms FC-1 and FC-1a are the forms to be used by domestic branches and banking subsidiaries of banks; FC-2 and FC-2a refer to the foreign branches and banking subsidiaries of United States banks; FC-3 covers domestic branches and subsidiaries of nonbanking companies and includes domestic nonbanking subsidiaries of banks; and FC-4 is for the foreign branches and nonbanking subsidiaries of such entities. FC-1 and 1a and FC-2 and 2a are differentiated by time periods covered: FC-1 and FC-2 are weekly reports (amounts outstanding as of the close of business on Wednesdays); FC-1a and FC-2a, FC-3 and FC-4 are end of the month reports. It may be noted initially that *all* of the reports are position, and not transaction reports, that is, they reflect only the foreign exchange position in the covered currencies[23] either at the close of business on Wednesdays or at month's end. To the extent that pressure on currencies is caused by movements to and away from a currency in transactions that are opened and closed in time spans of less than a week, these reports will not provide any data with respect to such movements in capital. With these forms, which, of course, may be deliberately designed only to obtain a data base determining the norm, all Treasury will be getting is, for banks, a weekly report as to their shorts and longs in specified currencies on Wednesdays, and for other types of institutions, the amounts held on the last day of the month. One may seriously question if this is the data concerning currency transactions that Senator Proxmire was hoping to obtain. Obviously, with respect to banks, at least, the reports could be greatly in the public interest if they are used by the bank regulators. Such weekly reports on Franklin National Banks's foreign currency positions might have permitted far earlier regulatory intervention in that bank's difficulties.[24] Traditional conduct of bank foreign exchange desks, as I understand it, is to attempt to have no open positions overnight;[25] thus if Franklin National Bank were reporting for two weeks in a row an open position in francs, the Comptroller of Currency—the regulatory authority for national banks—would be alerted to take a close look at the foreign exchange department of the bank and its conduct. The question whether position rather than transaction reports will disclose data concerning speculative movements in currencies affects all of the forms. There follows an analysis of the individual forms and some additional problems which could be ironed out in them before the regulation is finally issued.

[23]Each form is presently drafted to provide for reporting of positions in eight major currencies (Belgian francs, Canadian dollars, Dutch guilders, French and Swiss francs, marks, yen and pounds); others can be added if the Treasury so decides.

[24]N.Y. Times, May 14, 1974, at 47, col. 3.

[25]Lippert, *Psychology of the Exchange Market*, in THE INTERNATIONAL MARKET FOR FOREIGN EXCHANGE 125 (R. Aliber ed. 1969).

1. Form FC-1, as is true of the drafting of the other forms, does not seem to require all of the information that would be necessary to give a true portrait of the actual position in a currency on the particular date (in the case of Form FC-1, Wednesdays at the close of business). As this writer understands it, trading in foreign exchange may take place, not only in outright sales and purchases of a currency (whether "spots" or "forward") but in the form of "swaps,"[26] which resemble in effect so-called "Repos" under which inventories of government bonds are financed by sale of the securities with an agreement to repurchase them on a fixed day. Such "sales" and repurchase agreements are in actual effect loans by the purchaser to the seller secured by the bonds. Thus a position in francs may include the right to receive repayment of a specified number of francs which were lent (sold) on Tuesday to be returned (repurchased forward) on Friday. Equally the position includes the obligation to return any amounts of francs which were borrowed (sold forward). FC-1 does not make clear that these contract rights should be included in reporting the positions. For example, "Net spot position" is defined in terms of, not only outstanding purchases of foreign exchange, but also "amounts due from correspondent banks, from foreign branches, from head offices abroad and from their branches outside the home country, . . . to be credited to the account of the reporting unit within the number of business days regarded by the reporting unit as representing spot purchases."[27] Assuming that the latter phrase does not modify "amounts due . . ." so that that category would include swaps regardless of the due date, the drafting does not make clear that all swaps should be counted, not merely those with other banks. One suspects that the limitation of the category of obligations due from and to banks was deliberate in order to avoid counting of debts and receivables denominated in foreign currencies, but it should be made clear that the "net position" in foreign exchange holdings includes the results of transactions made in the form of loans (swaps) as well as outright purchases and sales. The specific instructions for Form FC-1[28] speak in terms of "forward purchases" and "forward sales" although the language of definition of "forward exchange bought" and "forward exchange sold" is sufficiently broad to cover swaps on which the due dates are considered forward; this also should be clarified.

2. Paragraph C of the General Instructions for Form FC-1 provides an exemption to reporting on a specified currency "if the dollar equivalent value of the net position in that currency is less than $1 million long or short," but goes on to permit the exemption to be applied "separately to each domestic branch

[26]Altman, *Eurodollars and Foreign Exchange Markets,* in *op. cit.* n. 23 at 28.
[27]Proposed Foreign Currency Form FC-1, 39 FED. REG. 23833 (1974).
[28]*Ibid.*, at 23834.

or banking subsidiary of the reporting bank."[29] Form FC-2 (the weekly report form for foreign branches and foreign subsidiaries of United States banks) equally provides an exemption for "any foreign branch or banking subsidiary" if the net position for the currency in question is less than $1 million long or short. In the case of Form FC-1, since it seems that foreign currency transactions taking place within the United States are almost always handled through the head office, and the smaller banks of holding company groups generally do not participate in the market, the branch by branch and subsidiary by subsidiary exemption should not give rise to much distortion. However, for the multinational banks with Edge Act Corporation[30] subsidiaries, the exemption should prove useful; ideally the Form should require that these subsidiaries' positions be counted in those of the reporting banks or be separately reported without the exemption. In the case of Form FC-2, however, the branch by branch exemption not only offers possibility for evasion of reporting but eviscerates the regulatory use of the form. The *risk* to an institution with ten foreign branches each of which is long pounds to $900,000 is the same as the risk to an institution whose London branch is long $9,000,000 in pounds, but only the latter would be reported under the Form FC-2 as presently drafted. Moreover, the exemption in this form distorts comparison of the weekly reports; since the reports are on a consolidated (total for all foreign branches and subsidiaries) basis, it is not possible to tell week by week which branches with what positions are *not* reporting. This problem is ameliorated somewhat by the requirement of Form FC-2a (the monthly report) that any currency reported on (at any branch) in the weekly reports must be reported on in FC-2a; and FC-2a must be accompanied by a list of the names of the branches or subsidiaries "whose reportable items are included." It must be made clear, however, that the reporting in FC-2a should include the *entire* position in the currency and not merely the position at the particular branch that was included in the FC-2 weekly report. Best of all would be to eliminate the branch by branch exemption and merely permit exemption on a consolidated basis.

3. Forms FC-1a and FC-2a, the end of the month reports for banks and their foreign operations, cover not only foreign currency positions but what the forms denominate as "Liquid Assets" and "Other Assets" and "Liquid Liabilities" and "Other Liabilities" held in foreign currencies. Again there is a problem in where swaps will be covered in these categories. "Liquid assets" is here defined as "amounts due from correspondent banks, from foreign branches, from head offices abroad and from their branches outside the home country, and negotiable and readily transferable commercial and financial instruments

[29] *Id.*, at 23833.

[30] Edge Act Corporations are international banking companies federally chartered under the provisions of the Edge Act, 12 U.S.C. §§ 6 et seq. (1970).

maturing within one year of the date of the report."[31] The definition is clearly aimed at attempting to pick up Senator Proxmire's category of short-term, liquid items that could move across international boundaries in times of crisis. Again it is unclear if "amounts due" include obligations of nonbanks; and the specific instructions of the form which list the obligations covered do not list (other than "loans payable on demand") obligations due from nonbanks not embodied in instruments. The category of "other assets," however, would seem to include such swap obligations although the obligations are very short term and the category "other assets" seems aimed at long term items. Another problem with these categories is that they do not in any way separate out what might be called "portfolio" investments denominated in foreign currencies and direct investment. The category "other assets" will include both the bank's foreign currency loans and, for example, the amount invested in its banking houses abroad. If it is desired to obtain reports on nonliquid items held in foreign currency, the division between the two types should be made since the effects of currency movements on the two types of assets may be very different.[32]

4. Paragraph (4) of Part II of the Instructions for Form FC-1a[33] indicates that liabilities on acceptances made by correspondent banks for the account of the reporting banks are to be listed under "other liabilities" while, for example, overdrafts extended by correspondent banks are to be included in "liquid liabilities." Since acceptances almost always have a maturity date of six months or less, it is hard to see why a bank's liability to a correspondent with respect to letters of credit confirmed for its account (including the responsibility to put the accepting bank into funds to meet the acceptance) should be treated differently from the other types of liabilities required to be included in column 3. Such obligations on acceptances are no more or less "saleable," if that is what is meant by liquidity, than overdrafts.

5. Form FC-2, the weekly report of foreign currency positions of United States banks' foreign branches has the same problems detailed above concerning whether the language covers swap contracts and the branch by branch exemption. In addition, it contains a definition of "majority-owned foreign banking subsidiaries" which may cause difficulty; not only are subsidiaries included where the reporting bank owns (directly or indirectly) more than 50 percent of the voting power of all classes of stock entitled to vote, but also where the reporting bank "owns" more than 50 percent of "the total

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[31]Proposed Foreign Currency Forms FC-1a and FC-2a, 39 Fed. Reg. 23836 and 23840 (1974).

[32]The draftsmen of these forms would find the call report form utilized by the Comptroller of the Currency in connection with the examination of foreign branches of national banks a useful tool in discovering the types of foreign currency assets held by foreign branches.

[33]*Id.*, at 23836, Form FC-1a.

value of all classes of stock."[34] If the latter "ownership" (which could be achieved through nonvoting preferred) does not accompany actual control in fact, it is hard to see how the United States bank will be able to require the figures from its "subsidiary."

6. Form FC-2a traces Form FC-1a and the comments, therefore, are the same except that it may be noted, in addition, that the definitions of "assets" and "liabilities" appear to require some double counting since they require inclusion of amounts due from and due to "other foreign branches and banking subsidiaries of the parent bank."

7. Form FC-3 is the form that many United States businesses may be surprised to learn they must file. It, like FC-4, is a monthly form and it must be filed by all nonbanking business concerns and nonprofit institutions located in the United States that at the end of the month have a balance in one of the categories of liquid assets, liquid liabilities or net position, in a covered currency,[35] in a dollar equivalent amount of over $1 million. If any one of the three categories is over $1 million, "the entire line for that currency must be reported."[36] There is no branch by branch exemption for Form 3 (although inexplicably, the Form 4 exemption is branch by branch).[37]

Once again, it should be stressed that what these forms will report is not a firm's trading in foreign currencies, but its position at the end of each month. Of course, where significant changes from month to month show up, Treasury can always require disclosure of transactions *within* one month, but the opportunities for "window dressing" are obvious. If the multinationals are "speculating," the disclosure required by these forms will not discourage it.[38] Firms reporting on Form 3 and 4 are not required to report "other" assets and liabilities in the foreign currencies covered, so the amounts reported depend totally upon what is included within the category of "liquid" assets and liabilities. Here again, it is not clear whether the contract right or obligation in relationship to a swap is included; and, if not, the reports may not represent the real foreign exchange position at all. The specific instructions concerning the

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[34]*Id.*, at 23838, Form FC-2. This problem, however, is caused not by the Treasury's drafting, but by the statute. The statute, 31 U.S.C.A. 1142(b) (1973), provides that the reports are to cover transactions conducted by any foreign person controlled by a United States person as that term is defined in section 7(f)(2)(c) of the Securities Exchange Act of 1934. The draftsman of the forms has simply taken over the statutory definition; but it is one thing to forbid conduct by persons owned but not controlled by a United States person (as does section 7(f) of the Securities Exchange which is concerned with violations of margin regulations), and another to mandate the affirmative action of reporting.

[35]See note 22 *supra*.

[36]Proposed Foreign Currency Form FC-3, 39 FED. REG. 23841 (1974).

[37]*Ibid.*, at 23844, Proposed Foreign Currency Form FC-4.

[38]A large increase from one month to another in, say, the pound account, can always be explained in terms of contemplated British investment. Thus Professor Briloff's suggestion that I.T.T. must have been speculating in foreign currencies is backed up not so much by his observation that a recent I.T.T. prospectus shows an increase of $450 million in an account to cover foreign

categories contain an anomaly: liquid assets are to include "negotiable and other readily transferable commercial and financial instruments," but are not to include "drafts drawn upon others accepted by banks or other firms." Since "other types of loans, trade payables or other accounts payable" are to be excluded from "liquid liabilities," presumably the draftsmen were trying to exclude from the reportables trade-related positions in foreign currencies and pick up what might be called "speculative positions." However, if this was the aim, the dividing line would have to be worked out much more carefully. Both trade and bank acceptances trade in the London money market and can be utilized as "readily transferable financial instruments;" exclusion of "other types of accounts receivable" may well exclude swaps. Hopefully the comments received by the Treasury on the proposed forms will point out the difficulties with the attempt to separate the types of transactions and consequent positions.

8. Form FC-4 picks up the positions of foreign branches and subsidiaries of United States firms: it traces FC-3 (and the same comments apply) except that the exemption is branch by branch. A major problem with FC-4 is that, as was true with FC-3, claims on and liabilities to "allied organizations" are to be excluded from the report. An "allied organization" is defined for Form FC-4 as the United States parent firm and its domestic branches and subsidiaries; and for Form FC-3 as including a company in which the reporting company owns directly or indirectly 10 percent.[39] Inasmuch as FC-4 only calls for reporting of the foreign currency positions of majority owned subsidiaries (with the same definition as in Forms FC-1a and 2a and the same problem),[40] to the extent that a multinational company takes a position through a foreign subsidiary in which it owns a controlling but less than 51 percent interest, the position will not be reported on Form FC-4. However, the position could be financed by a loan of the currency from the parent. Since the subsidiary is an "allied organization" for the purposes of Form FC-3, the loan of the currency, although carried on the parent's books as, for example, an open D-mark position, would not appear in the parent's FC-3 report.

There can be little doubt that Senator Proxmire is correct that the appropriate officials must have adequate information concerning the international currency transactions of global businesses under our jurisdiction if our Treasury Department and central bank are to be able to cooperate with other nations in achieving international monetary stability. His amendment has directed the Treasury to obtain the data; the final form of the reporting requirements will be eagerly awaited to see if convenience for the respondents, or the need of the international community for adequate information, prevails.

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currency hedging as by the fact that the prospectus also discloses a $29.8 million loss absorbed to cover costs related to foreign currency contracts. See *New York Magazine*, August 12, 1974, at 9.

[39] 39 FED. REG. 23841, Form FC-3.

[40] See text at note 33 *supra*.