

---

1981

## Is the SEC the Appropriate Federal Agency for Policing Bribery of Foreign Nationals by Multinational Public Corporations

Ilsa M. Klein

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>

 Part of the [International Law Commons](#)

---

### Recommended Citation

Ilsa M. Klein, *Is the SEC the Appropriate Federal Agency for Policing Bribery of Foreign Nationals by Multinational Public Corporations*, 13 Case W. Res. J. Int'l L. 517 (1981)  
Available at: <https://scholarlycommons.law.case.edu/jil/vol13/iss3/6>

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

## NOTE

### Is the SEC the Appropriate Federal Agency for Policing Bribery of Foreign Nationals by Multinational Public Corporations?

by *Ilsa M. Klein\**

#### I. INTRODUCTION

OVER THE PAST few years, especially since the Watergate episode, media attention has focused on a facet of criminal activity which had been previously relegated to a position of lesser importance. Corporate bribery of foreign nationals has become the subject of increased scrutiny. An evaluation of corporate bribery requires the identification of numerous competing interests—the actor, the recipient, corporate role models, federal regulatory agencies, foreign laws, extraterritoriality of jurisdiction, and the fluid workings of the free market economy.

The focus of this note is on: a clarification of types of corporate bribery; the activities undertaken by the Securities and Exchange Commission in response to corporate bribery; and the question of whether the Securities and Exchange Commission is the appropriate federal agency to deal with corporate bribery.

At the outset, it is necessary to define the operational terms. Although in everyday parlance an act of bribery and the concept of a multinational corporation each conote a certain image, they must be described to better understand the nebulous character of existing legislation.

#### II. BRIBERY

##### A. *Definitions*

A standard definition of a “multinational company,” and one which has been used in U.N. studies dealing with the impact of multinationals,<sup>1</sup>

---

\* Case Western Reserve University School of Law, J.D. candidate (1982).

<sup>1</sup> DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, U.N., MULTINATIONAL CORPORATIONS IN WORLD DEVELOPMENT, II Annexes 118, U.N. Doc. ST/ECA/190 (1973). See generally DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, U.N., THE IMPACT OF MULTINATIONAL CORPORA-

is "any firm which performs its main operations, either manufacture or the provision of service, in at least two countries."<sup>2</sup> The "host country" is generally defined as "any country which receives foreign direct investment, especially a country in which a particular subsidiary is operating."<sup>3</sup> A definition of the "home country" is "any country whose residents make foreign direct investment, especially the country of origin of the company described."<sup>4</sup>

A working definition of "bribery," however, is not as easily derived. At common law, a bribe required that the recipient hold government office and that the objective of the bribe be to influence government decisions.<sup>5</sup> Kugel and Cohen have interpreted the Foreign Corrupt Practices Act of 1977<sup>6</sup> as defining bribery as "the payment of anything of value to a foreign official, political party or candidate for office in order to affect, directly or indirectly, the relationship of the bribing individual and the host government. It does not forbid commercial bribery."<sup>7</sup>

### B. Categories & History of Bribes

Three general categories of bribes exist: the transaction bribe, the variance bribe, and the outright purchase.<sup>8</sup> The transaction bribe,<sup>9</sup> which is sometimes referred to as a "grease" or "facilitating" payment,<sup>10</sup> is made to a public official to encourage the expeditious completion of a prescribed duty.<sup>11</sup> Such a payment is not undertaken to obtain a competitive advantage. Instead, the transaction bribe is used to ensure the fulfillment of a responsibility, to which the payer is already entitled, within a shorter period of time.<sup>12</sup>

The variance bribe<sup>13</sup> is paid "to secure the suspension or nonapplication of a norm to a case where the application would otherwise be appro-

TIONS ON DEVELOPMENT AND ON INTERNATIONAL RELATIONS, U.N. Doc. E/5500/ Rev. 1 ST/ESA/6 (1974).

<sup>2</sup> M. BROOKE & H. REMMERS, *THE STRATEGY OF MULTINATIONAL ENTERPRISE* 5 (1970).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> I. Y. KUGEL & N. COHEN, *GOVERNMENT REGULATION OF BUSINESS ETHICS: U.S. LEGISLATION OF INTERNATIONAL PAYOFFS* booklet 1, at 8 (1978).

<sup>6</sup> Pub. L. No. 95-213, 91 Stat. 1494 (amending Securities Exchange Act of 1934).

<sup>7</sup> I. Y. KUGEL & N. COHEN, *supra* note 5, at 10.

<sup>8</sup> W. REISMAN, *FOLDED LIES—BRIBERY, CRUSADES AND REFORMS* 69 (1979).

<sup>9</sup> *Id.* at 69-75.

<sup>10</sup> AD HOC COMMITTEE ON FOREIGN PAYMENTS, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *REPORT ON QUESTIONABLE FOREIGN PAYMENTS BY CORPORATIONS: THE PROBLEM AND APPROACHES TO A SOLUTION* 3 (1977) [hereinafter cited as *REPORT ON QUESTIONABLE FOREIGN PAYMENTS*].

<sup>11</sup> W. REISMAN, *supra* note 8, at 69-75.

<sup>12</sup> *Id.*

<sup>13</sup> W. REISMAN, *supra* note 8, at 75-88.

priate."<sup>14</sup> There are two types of variance bribes. The first kind is a bribe given to preclude the application of an already established standard of conduct, such as paying a product inspector to refrain from inspecting the product. The second type of variance bribe is given to alter illegally an effective norm, rather than only to seek its nonapplication to a particular set of circumstances. An example of this category of bribery may be found when a corporation pays a foreign official to affect a change in overall foreign legislative trends or host government elections.<sup>15</sup>

The third category of bribes is the outright purchase.<sup>16</sup> The objective of the outright purchase is "to acquire an employee who remains in place in an organization to which he appears to pay full loyalty while actually favoring the briber's conflicting interests."<sup>17</sup>

Although both Watergate<sup>18</sup> and Abscam<sup>19</sup> have brought the concept of bribery to the forefront of the national news, bribery in fact dates back several hundred years. The practice of bribing a government official threads its way through history. Just one example dates back to the 1600's when Mogul rulers were given precious items made of copper, brass and stone along with paintings and carvings as an enticement to grant the British East India Company duty-free treatment for its exports.<sup>20</sup>

The Securities and Exchange Commission (SEC) became directly involved in investigating corporate bribery activities in 1973. At that time, the Office of the Special Prosecutor charged several corporations and their executive management with the misappropriation of corporate funds used for illegal domestic political contributions.<sup>21</sup> The SEC's interest in this activity centered on the materiality of such information and the effect of its nondisclosure on public investors.<sup>22</sup> Additional investigation of the corporations by the SEC uncovered actions taken in blatant abrogation of the securities laws. Corporate financial records had been falsified and slush funds had been earmarked for questionable or illegal foreign

<sup>14</sup> W. REISMAN, *supra* note 8, at 75.

<sup>15</sup> W. REISMAN, *supra* note 8, at 78-79.

<sup>16</sup> W. REISMAN, *supra* note 8, at 88-92.

<sup>17</sup> W. REISMAN, *supra* note 8, at 88-89.

<sup>18</sup> Sierck & Watson, *Post-Watergate Business Conduct: What Role for the SEC?*, 31 BUS. LAW. 721 (1976).

<sup>19</sup> N.Y. Times, Oct. 31, 1980, § 1, at 1.

<sup>20</sup> Gwartzman, *Is Bribery Defensible?*, N.Y. Times, Oct. 5, 1975, § 6 (Magazine), at 19.

<sup>21</sup> SECURITIES AND EXCHANGE COMMISSION, REPORT ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES SUBMITTED TO THE SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, 94th Cong., 2d Sess. 2 (Comm. Print 1976) [hereinafter cited as SEC REPORT]. See, e.g., N. JACOBY, P. NEHEMKIS & R. EELLS, *BRIBERY AND EXTORTION IN WORLD BUSINESS* (1977).

<sup>22</sup> *Id.*

payments.<sup>23</sup> Subsequent to this initial exposure of securities violations, the SEC expanded its investigation and sought injunctions against several corporations.<sup>24</sup>

### III. REGULATION OF BRIBERY ACTIVITY

#### A. *Is Regulation Necessary?*

Prior to developing a regulatory scheme to control effectively questionable and illegal foreign payments, it must be determined whether such control is necessary. This may be ascertained by evaluating the purpose to be served by questionable and illegal foreign payments and the potential ramifications of establishing such parameters for the legality of these transactions.

Questionable and illegal foreign payments impact directly upon both multinational politics and economics. Focusing on the relationship between the host government and the multinational corporation, David Blake arrived at four potential objectives of multinational corporations which would justify their attempts to exert influence: (1) generating favorable government policies directly pertaining to the particular corporation, (2) improving societal attitudes to benefit the entire industry of which the particular corporation is a member, (3) allying with other multinational corporations to affect government policies in a general way and thereby facilitating operations for multinationals in host countries, and (4) joining with local businesses to direct their efforts towards a better socioeconomic environment as well as a stronger free enterprise system.<sup>25</sup> Based on these objectives, one might assume that the involvement of the multinational corporation in the host country's politics and society necessarily has a positive effect. Using the bribe as a tool, however, the foreign corporation has the means of determining its host government's foreign relations by compelling indirect dealings with the corporation's home country.

The multinational corporation, through the use of illegal foreign political contributions, may also support a political party or candidate which it perceives might provide the most beneficial environment for corporate activities. In addition, because a significant number of multina-

---

<sup>23</sup> *Id.* at 3.

<sup>24</sup> In response to the SEC injunctions, each corporation consented to a permanent injunction which prohibited any further violation of the federal securities laws. None of the corporate defendants either admitted or denied the charges. See SEC REPORT, *supra* note 20, at Exhibit B, reprinted in 1 MANAGING CORPORATE DISCLOSURE 317 (A. Cohen & S. Friedman Co-chairmen 1978).

<sup>25</sup> Blake, *Government, Politics, and the Multinational Enterprise*, in INTERNATIONAL BUSINESS-GOVERNMENT & AFFAIRS, TOWARD AN ERA OF ACCOMMODATION 68-69 (J. Fayerweather ed. 1973).

tional corporations market products which are necessary for conventional warfare and which are often determinative of a host country's foreign policies, the national security impact of the products has affected their host country's political relations.<sup>26</sup> Thus, it certainly becomes questionable from the host country's perspective whether any such scenario is beneficial.

The multinational corporation, however, generates its greatest political influence through its economic impact. On an annual basis, it is estimated that multinational corporations located in many European host countries contribute to overall capital formation at a rate of two to ten percent, and to the growth of industrial capital at a rate of five to fifteen percent.<sup>27</sup> It has also been estimated that between 1950 and 1975 more than \$120 billion had been invested by U.S. multinationals in their host countries.<sup>28</sup>

Multinational corporations are often found to be both larger in their size of operation and more technically advanced than the national enterprises found in the host countries.<sup>29</sup> In addition, unlike a national enterprise, it is conceivable that a multinational corporation will function in an oligopolistic market.<sup>30</sup> In instances where multinationals have settled in less developed countries, increased productivity for the region and political and social upheaval from the established traditions have often resulted. This form of advancement then exacerbates the disparity between the technological and financial advances, as well as the social environment in which they operate.<sup>31</sup> In a host country in which the societal standards and the economy are in transition, as an outgrowth of significant amounts of direct foreign investment, a questionable or illegal payment will represent sufficient strength to affect a favorable response to the multinational corporation. Consequently, a multinational corporation could wield extensive, and potentially unchecked, abusive power.

## B. Problems

The regulation of questionable and illegal foreign payments by multinational corporations is rendered a difficult, as well as a frustrating,

---

<sup>26</sup> Vernon, *Multinational Enterprise and National Security*, in *THE ECONOMIC AND POLITICAL CONSEQUENCES OF MULTINATIONAL ENTERPRISE: AN ANTHOLOGY* 95 (1972).

<sup>27</sup> I BUREAU OF INTERNATIONAL COMMERCE, U.S. DEP'T OF COMMERCE, *THE MULTINATIONAL CORPORATION-STUDIES ON U.S. FOREIGN INVESTMENT* 81 (1972).

<sup>28</sup> N. JACOBY, P. NEHEMKIS & R. EELLS, *supra* note 20, at xix.

<sup>29</sup> COMMITTEE OF EXPERTS ON RESTRICTIVE BUSINESS PRACTICES, ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *RESTRICTIVE BUSINESS PRACTICES OF MULTINATIONAL ENTERPRISES* 57 (1977).

<sup>30</sup> *Id.*

<sup>31</sup> I BUREAU OF INTERNATIONAL COMMERCE, *supra* note 24, at 82.

task. The first problem is one of definition. When is the commonplace gratuity transformed into an illegal payment?

The second problem focuses on a determination of a working standard. In every multinational transaction there are two sets of laws to be applied and followed—those of the home country and those of the host country. In many countries, the transaction bribe is not illegal, rather, it is thought to be quite necessary for a smoothly functioning economy.<sup>32</sup> Conversely, in the United States such a payment was regarded as a form of bribery prior to the Foreign Corrupt Practices Act of 1977.<sup>33</sup> Subsequently, the use of the transaction bribe has been strictly monitored.<sup>34</sup> To serve as a successful deterrent for such activity, the regulations of foreign bribery must reconcile the often divergent standards of the home and host countries so that the multinational corporation does not find itself at a competitive disadvantage internationally.

The third problem is jurisdictional in nature. The United States can certainly regulate the domestic activities and methodology used by corporations.<sup>35</sup> However, in an era of increased foreign trade and global interdependence, other countries may regard the United States as presumptuous and self-righteous in its attempts to influence all international transactions to which U.S. nationals are but one of the parties involved.

A fourth problem to be resolved is the extent to which the executive tier of corporate management should be held accountable for the illegal foreign payments made by its employees both with and without its knowledge. Arguably, applying agency principles, management should continue to have ultimate responsibility for all corporate activities even though it may not be literally aware of each detail. Certainly this would be an ideal approach. However, because of the dramatic growth of the multinational public corporation, the assumption of total liability by management may be unjust. Such an approach, in a few isolated instances, would also discourage some highly competent individuals from accepting management roles and responsibilities.

Although there are innumerable issues to be dealt with when trying to regulate such a complex activity, the four cited should serve to indicate the broad expanse of problems to be resolved for the successful administration of such a regulatory policy.

---

<sup>32</sup> See generally, *McCloy on Corporate Payoffs*, 54 HARV. BUS. REV. 14 (July-Aug. 1976).

<sup>33</sup> Pub. L. No. 95-213, 91 Stat. 1494 (amending Securities Exchange Act of 1934).

<sup>34</sup> To further curtail improper foreign payments, the Justice Department has also made use of 18 U.S.C. §§ 1341, 1343 which preclude the use of any communications medium for fraudulent purposes, and 31 U.S.C. §§ 1051-1143 which stipulate that money and other negotiable instruments be reported upon transport outside of the United States.

<sup>35</sup> U.S. CONST. art. I, § 8, cl. 3.

### C. Legislation

The initial attempt to regulate the purchase of securities on a national basis, rather than on a strictly state basis, may be considered a by-product of the Crash of 1929.<sup>36</sup> Between 1923 and 1933 investors lost approximately \$25 billion by the sale of worthless securities to the public through false or incomplete representations.<sup>37</sup> This crisis prompted congressional action. In response to a recommendation by President Franklin Roosevelt,<sup>38</sup> the Senate Committee on Banking and Currency supported bill S.875<sup>39</sup> by enunciating the motivating policy as "informing the investor of the facts concerning securities to be offered for sale in interstate and foreign commerce and providing protection against fraud and misrepresentation."<sup>40</sup> Initially, it was felt that the Federal Trade Commission would be responsible for overseeing the administration and enforcement of this national legislation. Within a year after S.875 was considered in committee, however, the same Senate committee considered S.3420,<sup>41</sup> the purpose of which was "to provide for the regulation of securities exchanges and of over-the-counter markets operating in interstate and foreign commerce and through the mails."<sup>42</sup> Once again, the events surrounding the Crash of 1929 were a motivating force. As President Roosevelt stated, "The people of this country are, in overwhelming majority, aware of the fact that unregulated speculation in securities and in commodities was one of the most important contributing factors in the artificial and unwarranted 'boom' which had so much to do with the terrible conditions of the years following 1929."<sup>43</sup>

President Roosevelt perceived the necessary objectives of any substantive legislation in this regulatory area as being: first, the establishment of such high margin requirements that the necessary result would be greatly reduced market speculation, and second, the allocation of explicit authority to the national government to supervise the exchanges

---

<sup>36</sup> This conclusion may be inferred from the severity and timing of investor losses. *Id.* at 2. S. REP. NO. 47, 73d Cong., 1st Sess. (1933).

<sup>37</sup> *Id.*

<sup>38</sup> In his message, President Roosevelt described the proposed legislation as adding "to the ancient rule of *caveat emptor*, the further doctrine of 'Let the seller also beware.' It puts the burden of telling the whole truth on the seller." Message from Franklin D. Roosevelt to the Congress (March 29, 1933), 77 CONG. REC. 954, reprinted in 1 Y. KUGEL & N. COHEN, *supra* note 5, at 6-7.

<sup>39</sup> See S. REP. NO. 47, 73d Cong., 1st Sess. (1933).

<sup>40</sup> *Id.* at 1.

<sup>41</sup> See S. REP. NO. 792, 73 Cong., 2d Sess. (1934).

<sup>42</sup> *Id.* at 1.

<sup>43</sup> Letter from Franklin D. Roosevelt to Duncan U. Fletcher (March 26, 1934), reprinted in 1 Y. KUGEL & N. COHEN, *supra* note 5, at 9.



and to correct any ensuing abuses.<sup>44</sup> The Senate committee embraced the President's desire to curtail strictly the abusive practice of using credit for speculation. In addition, the Senate emphasized the need to eliminate "the secrecy surrounding the financial condition of corporations which invite the public to purchase their securities."<sup>45</sup> Also, the Senate vested a special commission administered by presidential appointees "with power to eliminate undue hardship and to prevent and punish evasion."<sup>46</sup>

Based upon these concerns for well-informed public investors, the Securities Act of 1933<sup>47</sup> and the Securities Exchange Act of 1934 were promulgated.<sup>48</sup> The Securities Act of 1933 requires registration with the government of all nonexempt securities, and an accompanying registration statement which should disclose all information pertinent to the company and the stock.<sup>49</sup> The registration statement must be accompanied by a prospectus which is to be furnished to all prospective purchasers of the security.<sup>50</sup> The Securities Exchange Act of 1934 broadens the application of the Securities Act of 1933 by requiring that information previously disclosed in compliance with the 1933 Act be updated,<sup>51</sup> and by augmenting the statutory applicability to include stock transactions subsequent to the initial issue.<sup>52</sup> The SEC was created by mandate of the 1934 Act for the purpose of administering federal securities regulations and overseeing all securities exchanges registered with it.<sup>53</sup> In addition, the Act requires: registration statements of the securities be properly filed, brokers and dealers practices controlled and the manner of sales of a security be regulated (e.g. short-selling).<sup>54</sup> The Act also grants the SEC broad, flexible rule-making powers.<sup>55</sup>

Within the parameters of illegal foreign payments, congressional intent to regulate has been manifested through the interpretation and application of Sections 10, 12 and 13 of the Securities Exchange Act of 1934.<sup>56</sup> Section 10b deals with the employment of manipulative and deceptive devices. It is illegal under that section to make use of, either directly or indirectly, interstate commerce, the mail, or the facilities of any

<sup>44</sup> 1 Y. KUGEL & N. COHEN, *supra* note 5, at 9.

<sup>45</sup> 1 Y. KUGEL & N. COHEN, *supra* note 5, at 12.

<sup>46</sup> 1 Y. KUGEL & N. COHEN, *supra* note 5, at 12.

<sup>47</sup> 15 U.S.C. § 77a (1976).

<sup>48</sup> 15 U.S.C. § 78a (1976).

<sup>49</sup> *See* 15 U.S.C. §§ 77c, 77e, 77g (1976).

<sup>50</sup> 15 U.S.C. § 77j (1976).

<sup>51</sup> 15 U.S.C. §§ 78l, 78m (1976).

<sup>52</sup> 15 U.S.C. § 78l (1976).

<sup>53</sup> 15 U.S.C. § 78d (1976).

<sup>54</sup> 15 U.S.C. §§ 78l, 78o (1976).

<sup>55</sup> 15 U.S.C. §§ 78s, 78m, 78x, 78d-1 (1976).

<sup>56</sup> 15 U.S.C. §§ 78j, 78l, 78m (1976).

national securities exchange to defraud, to make a false statement or an omission as to a material fact, or to act in a fraudulent manner.<sup>57</sup> Under Section 12, which deals with registration requirements for securities, every security registered with the SEC must include all information "necessary or appropriate for the proper protection of investors and to insure fair dealing in the security."<sup>58</sup> Section 13, which pertains to the filing of periodical reports, also emphasizes protection and fairness when dealing with investors. This section requires that updates be submitted to the SEC to "keep reasonably current the information and documents required."<sup>59</sup>

Implicitly, the language of those sections of the Securities Act of 1934 indicates that the SEC can employ the tool of disclosure to uncover illegal foreign payments. With disclosure as the frame of reference, the corollary issue becomes materiality, or, what information is sufficiently important to investors that registrants with the SEC be required to include it when they file.

There is no definition of materiality provided within the body of either the 1933 or the 1934 Act. Under the general rules and regulations of the Securities Act of 1933, however, rule 405(1) defines material as covering all "those matters as to which an average prudent investor ought reasonably to be informed before purchasing the security registered."<sup>60</sup> In trying to apply the definition of materiality, it becomes apparent that materiality is a broad, nebulous concept. As determined in the *SEC Report*, "[T]here is no litmus paper test. Each case normally presents unique combinations of facts, and the consideration whether particular information should be disclosed necessarily depends on the context in which the question arises."<sup>61</sup>

The courts, aware that a single standard does not prevail, have had to determine appropriate tests of materiality in nondisclosure cases. Until 1976, circuit courts vacillated as to the degree of probability necessary to determine that disclosure of a fact would impact on an investor's decision.<sup>62</sup> In 1976, the Supreme Court narrowed the criteria for determining materiality by assessing "the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him."<sup>63</sup> The type of information which is generally felt to be material, and

---

<sup>57</sup> 15 U.S.C. § 78j (1976).

<sup>58</sup> 15 U.S.C. § 78l(b)(2) (1976).

<sup>59</sup> 15 U.S.C. § 78m(a)(1) (1976).

<sup>60</sup> 17 C.F.R. § 230.405(1) (1981).

<sup>61</sup> SEC REPORT, *supra* note 20, at 22.

<sup>62</sup> Compare *Kohler v. Kohler Co.*, 319 F.2d 634, 642 (7th Cir. 1963); *List v. Fashion Park*, 340 F.2d 457, 462 (2d Cir., 1965); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 384 (1970); *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 154-55 (1972).

<sup>63</sup> *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976).

therefore should be disclosed to investors, falls into seven broad categories: financial and economic data; quality and style of management; any information requested by a significant number of shareholders; material indicative of corporate standards of ethics; risk involvement and the impact of disclosure on business; correct and fully documented company books; and disclosure necessitated by the public interest.<sup>64</sup>

#### D. The SEC

The SEC's interest in questionable and illegal foreign payments was predicated on the Commission's belief that such activity, often resulting in falsification of corporate financial records and the creation of secret "slush funds," was indeed material to investors' evaluations and therefore should be disclosed. As the Commission concluded, "These practices cast doubt on the integrity and reliability of the corporate books and records which are the very foundation of the disclosure system established by the federal securities laws."<sup>65</sup> Clearly, the SEC has undertaken to become the watchdog over such illegal activity by invoking its disclosure provisions.

Directed toward its enforcement efforts, the SEC relied on two types of disclosure programs: active investigations on the Commission's part, and a voluntary disclosure program. In 1975, following the SEC's inquiry into illegal domestic campaign contributions, the Commission brought injunctions against nine corporations.<sup>66</sup> Within the following year, the nine corporations, along with five additional corporate defendants, all consented to permanent injunction judgments which preclude subsequent federal securities laws violations.<sup>67</sup> In addition, 13 of the corporations were required to form special review committees panelled by outside members of their boards of directors to investigate the charges.<sup>68</sup> The committees were then required to report in detail to their corporate boards of directors. Following this review procedure, each corporation's management was then to submit a form 8-K to the SEC bringing to the Commission's attention interim revisions in the corporate position.<sup>69</sup>

Realizing that its resources were limited, the SEC instituted a voluntary program of disclosure of illegal foreign payments to encourage greater corporate self-policing and responsiveness.<sup>70</sup> The SEC sought to have corporations conduct internal investigations by individuals not involved with foreign bribery activity. If the investigation revealed any ille-

---

<sup>64</sup> 1 Y. KUGEL & N. COHEN, *supra* note 5, at 22-26.

<sup>65</sup> SEC REPORT, *supra* note 20, at 3.

<sup>66</sup> SEC REPORT, *supra* note 20, at 3.

<sup>67</sup> SEC REPORT, *supra* note 20, at 4.

<sup>68</sup> SEC REPORT, *supra* note 20, at 4.

<sup>69</sup> SEC REPORT, *supra* note 20, at 4-5.

<sup>70</sup> SEC REPORT, *supra* note 20, at 6-7.

gality, the corporation was then "encouraged" to meet with Commission staff members to arrive at an appropriate method of disclosure prior to filing a form 8-K as an information update.<sup>71</sup> The SEC has contended that playing an advisory role is well within its ambit under rules 1(d) and 2 of its guide of *Informal and Other Procedures*.<sup>72</sup>

In its advisory capacity, the SEC has taken several factors into consideration prior to determining in what manner an illegal foreign payment should be disclosed. These considerations include: the accounting treatment already given to the questionable payment; the amount of the questionable payment and its legality under host country law; the reason for the payment and the recipient's position as a government employee or a private businessman; whether the payment was an isolated occurrence or if it was part of a habitual practice; corporate knowledge and support of the practice; and what actions the company had undertaken to curb such illegal activities.<sup>73</sup> In general, the SEC has held that questionable or illegal foreign payments are material and should be disclosed if the amount paid is substantial or if the amount paid is insignificant, disclosure is required if the payment relates to a substantial amount of business.<sup>74</sup>

The Commission also gave significant weight to the relation between home and host country laws, and to whether the payment's recipient had been employed in the public or private sector and in what position.<sup>75</sup> If a foreign payment was illegal under home country laws it must be disclosed; and, if a payment was illegal under host country laws it must usually be disclosed. Disclosure was not usually required if the payment was not illegal under both home and host country laws.<sup>76</sup> In such an instance, the payment was perceived as a "routine expenditure made in the ordinary course of business."<sup>77</sup>

The *SEC Report* segregated foreign payment recipients into government officials, and commercial agents and consultants.<sup>78</sup> The Report indicated that "in the ordinary course of business" a corporation would not normally be making a payment to a foreign government official.<sup>79</sup> Therefore, all variance bribes were regarded as being subject to disclosure.<sup>80</sup> Transaction bribes, or facilitating payments, which have been legal in

---

<sup>71</sup> SEC REPORT, *supra* note 20, at 8-10.

<sup>72</sup> 17 C.F.R. §§ 202.1(d), 202.2 (1981); see SEC REPORT, *supra* note 20, at 7 n.5.

<sup>73</sup> SEC REPORT, *supra* note 20, at 17.

<sup>74</sup> SEC REPORT, *supra* note 20, at 15.

<sup>75</sup> SEC REPORT, *supra* note 20, at 17.

<sup>76</sup> SEC REPORT, *supra* note 20, at 24-25.

<sup>77</sup> SEC REPORT, *supra* note 20, at 29.

<sup>78</sup> SEC REPORT, *supra* note 20, at 25-28.

<sup>79</sup> SEC REPORT, *supra* note 20, at 25.

<sup>80</sup> SEC REPORT, *supra* note 20, at 25.

many countries, were material and therefore disclosable if: (1) a particular individual had been receiving substantial amounts; (2) the aggregate amount was substantial, or (3) corporate management had falsified corporate books and records to conceal such payments.<sup>81</sup> As a blanket ruling, the Commission did not find payments to nonofficial nationals to be disclosable events.<sup>82</sup> The Report, however, did present a number of factors to be taken into account before arriving at a decision of nondisclosure.<sup>83</sup>

By the time the Commission had submitted its report to the Senate in 1976, 95 companies had disclosed questionable or illegal foreign payments, either voluntarily or as a result of the SEC's efforts.<sup>84</sup> An overview of the corporate respondents indicates that the majority represented manufacturing concerns; primarily drug manufacturers and corporations which dealt in petroleum refining and ancillary industries.<sup>85</sup> The transactions most often cited were payments to foreign officials.<sup>86</sup> The majority of those corporations which voluntarily disclosed payments of foreign political contributions contended that such contributions were legal in the host country. More companies reported questionable and illegal foreign payments than questionable domestic payments.<sup>87</sup> It is possible that corporations were more amenable to reporting foreign rather than domestic payments because of the ambiguity of the law and subsequent exposure to legal action. Although some foreign payments were made under conditions that were knowingly illegal, many payments were legal in the host country. Combining the misapplication of host country law with the lack of clear definition in certain facets of U.S. law, conceivably corporate management did not become aware of their illegalities until after the payments had been disclosed to federal authorities.

The Commission's Report optimistically concluded that the SEC did not feel that American business should receive a blanket condemnation.<sup>88</sup> As a result of the juncture between the enforcement and voluntary disclosure policies, the Commission maintained that the ultimate effect will be stronger corporate management and an augmentation of the public's con-

---

<sup>81</sup> SEC REPORT, *supra* note 20, at 27.

<sup>82</sup> "There is nothing inherent in this practice that gives rise to a disclosure obligation under the federal securities laws." SEC REPORT, *supra* note 20, at 27.

<sup>83</sup> "Among the key factors to be considered in determining whether disclosure may be required is the relationship of the agent to the governmental entity or contracting party, the size and nature of the payment, the services to be performed by the agent, and the method and manner of payment." SEC REPORT, *supra* note 20, at 28.

<sup>84</sup> SEC REPORT, *supra* note 20, at 37.

<sup>85</sup> SEC REPORT, *supra* note 20, at 37.

<sup>86</sup> SEC REPORT, *supra* note 20, at 37.

<sup>87</sup> SEC REPORT, *supra* note 20, at 37-39.

<sup>88</sup> SEC REPORT, *supra* note 20, at 54.

fidence in the business sector.<sup>89</sup> The Commission did, however, support what it termed "limited-purpose legislation . . . to demonstrate clear congressional policy with respect to a thorny and controversial problem."<sup>90</sup> Although it acknowledged Congress' legislative function, the Commission requested that any legislation directed at restricting questionable or illegal foreign payments include three components: a prohibition against corporations falsifying accounting records, a prohibition against misrepresentations made by corporate management to auditors, and a requirement that internal accounting controls be established and maintained by corporate management.<sup>91</sup>

### *E. Foreign Corrupt Practices Act*

Based on the *SEC Report*, Congress concluded that there was "a serious breach in the operation of the Commission's system of corporate disclosure."<sup>92</sup> As a result, Congress passed the Foreign Corrupt Practices Act of 1977.<sup>93</sup> The Act is divided into two areas; Section 102 which deals with accounting standards, and Sections 103 and 104 which pertain to the foreign corrupt practices of issuers and domestic concerns. Section 102 requires that the registrants with the SEC maintain stringent internal accounting controls carefully overseen by management.<sup>94</sup> Ostensibly, this provision was designed to eradicate the existence of slush funds which were not indicated on the corporate books.<sup>95</sup> Section 102, however, has a potentially broader impact than would be apparent at first blush. This provision of the Foreign Corrupt Practices Act does not establish a floor below which questionable transactions might otherwise be regarded as immaterial to the company's overall financial position, and there is no direct mention of foreign payments. Consequently, disclosure is required of all payments, both domestic and foreign, by utilizing the appropriate accounting controls.

Sections 103 and 104 make illegal the bribery of foreign officials by domestic concerns, and allow for the imposition of criminal sanctions against appropriate corporate management.<sup>96</sup> A few points in these provisions are notable.<sup>97</sup> First, culpability is not based on actually making a

---

<sup>89</sup> SEC REPORT, *supra* note 20, at 55.

<sup>90</sup> SEC REPORT, *supra* note 20, at 57.

<sup>91</sup> SEC REPORT, *supra* note 20, at 57-59.

<sup>92</sup> S. REP. No. 95-114, 95TH CONG., 1ST SESS., reprinted in U.S. CODE CONG. & AD. NEWS 4098.

<sup>93</sup> Pub. L. No. 95-213, 91 Stat. 1494 (codified in various sections of 15 U.S.C.).

<sup>94</sup> *Id.* at § 102.

<sup>95</sup> See S. REP. No. 95-114, *supra* note 76, at 7, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 4098, 4105.

<sup>96</sup> 15 U.S.C. §§ 67dd-1, 78dd-2 (Supp. III 1979).

<sup>97</sup> See Atkeson, *The Foreign Corrupt Practices Act of 1977: An International Applica-*

foreign payment; promise of payment is sufficient.<sup>98</sup> Second, although a foreign subsidiary might in fact execute the payment, the parent company remains liable.<sup>99</sup> Third, acknowledging a longstanding practice throughout many parts of the world, Congress determined that the transaction bribe, or facilitating payment, was not illegal.<sup>100</sup> To achieve this end, the Foreign Corrupt Practices Act omits from its definition of "foreign official" any mention of a foreign employee with primarily ministerial or clerical functions.<sup>101</sup> Finally, before the Justice Department may prosecute the employee who actually engaged in the transaction, it must first obtain the corporate defendant's conviction.<sup>102</sup>

As indicated by Estey and Marston despite the congressional intent to focus prosecutorial efforts on corporations rather than on their agents, practically, such a provision becomes an almost insurmountable impediment to establishing further corporate liability.<sup>103</sup> Without first seeking and obtaining the conviction of the employee who handled the payment, it is unlikely that sufficient evidence could be obtained to support a corporate conviction. Therefore, in order to obtain the employee's testimony it would probably be necessary to grant him immunity from prosecution.

Although the Foreign Corrupt Practices Act has aided in forming a definition of the legal bounds of corporate activity, a few other issues have impacted significantly on the SEC's scope of operation.<sup>104</sup> In policing foreign bribery activity, the SEC has been granted jurisdiction over the regulation of all activities of public companies, not only those activities associated with the issuance or trading of securities.<sup>105</sup> Also, the Commission's authority over the internal accounting controls and activities of registered corporations has been expanded.<sup>106</sup> Initially, this broader authority was demonstrated by the prohibition against the falsification of books and misrepresentation to auditors, along with the power to require review and guidance by audit committees.<sup>107</sup> The potential for extensive private right of action litigation by shareholders or competitors as a result

---

*tion of SEC's Corporate Governance Reforms*, 12 INT'L LAW. 703 (1978); Estey & Marston, *Pitfalls (and Loopholes) in the Foreign Bribery Law*, FORTUNE, Oct. 9, 1978, at 182.

<sup>98</sup> 15 U.S.C. §§ 78dd-1(a) (Supp. III 1979).

<sup>99</sup> *Id.*

<sup>100</sup> See S. REP. NO. 95-114, *supra* note 76, at 10, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 4098, 4108.

<sup>101</sup> 15 U.S.C. §§ 78dd-1(b), 78dd-2(d)(2) (Supp. III 1979).

<sup>102</sup> 15 U.S.C. §§ 78ff(c)(3), 78dd-2(b)(3) (Supp. III 1979).

<sup>103</sup> Estey & Marston, *supra* note 78, at 188.

<sup>104</sup> Ferrara & Goelzer, *Saints and Sinners Concluded: The Foreign Corrupt Practices Act*, in TRANSNATIONAL CORPORATE CONDUCT—THE IMPACT OF UNITED STATES LAWS ON EUROPEAN AND UNITED STATES OPERATIONS 143, 161-62 (1979).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

of injury sustained through false accounting records has also been provided.<sup>108</sup>

Taken in its entirety, the Foreign Corrupt Practices Act has empowered the SEC to assert its authority over the internal corporate structure even prior to the point at which illegal corporate activity occurs. Should such illegalities nevertheless take place, it is now possible for shareholders and other interested parties to bring a cause of action for violation of the established internal corporate controls.

#### IV. ALTERNATIVES TO SEC REGULATION

##### A. SEC: Problems & Criticism

The legislative reforms, along with the Commission's opinion, presuppose that the SEC should be policing the foreign bribery activity of multinationals. There is a question, however, as to whether the SEC should have been granted jurisdiction over such corporate activity. If the SEC were not responsible for the policing function, a multiplicity of replacements would be available, if not vying, for the position.

The possible administrative alternatives to SEC regulation might be more profitably explored after a discussion of the problems and criticism which the SEC has encountered in its present fulfillment of its legislated function. The Foreign Corrupt Practices Act emphasizes criminalization; penalties for violation include heavy fines of up to \$1 million for issuers, a maximum \$10,000 fine for individual officers or directors of such an issuer, and jail sentences ranging up to five years.<sup>109</sup> Criminalization, however, creates enforcement problems. As Congress has delegated the responsibilities, the SEC handles the investigation and may bring suits for injunction, while the Justice Department handles the criminal prosecutions.<sup>110</sup> Some critics contend that this division of labor actually subjects the SEC to a disparate portion of the work.<sup>111</sup> Should Commission staff elect to file criminal charges, the staff must then work with the Justice Department to aid in the preparation of its case. Once the case reaches the Justice Department the delegation of duties remains somewhat unclear.

In addition, under the Foreign Corrupt Practices Act the Justice De-

---

<sup>108</sup> *Id.*

<sup>109</sup> 15 U.S.C. § 78ff(c) (Supp. III 1979). See Mathews, *Enforcement of the Foreign Corrupt Practices Act*, in *THE NEW REVIEW PROCEDURE UNDER THE FOREIGN CORRUPT PRACTICES ACT* 433-34 (R. Beckler, A. Levenson & R. Shine Co-chairmen, 1980).

<sup>110</sup> S. REP. No. 95-114, *supra* note 76, at 11-12, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 4098, 4108-10.

<sup>111</sup> Lashbrooke, *The Foreign Corrupt Practices Act of 1977: A Unilateral Solution to an International Problem*, 12 CORNELL INT'L L.J. 227, 236 n.54 (1979); Estey & Marston, *supra* note 78, at 719.



partment has the authority to investigate and prosecute all domestic concerns except for the relatively small number of SEC registrants.<sup>112</sup> In the latter instance, the SEC maintains jurisdiction.<sup>113</sup> It is generally felt that this division is a further indication of the seemingly inequitable degree of responsibility that has been meted out to the SEC.<sup>114</sup> The Senate, however, felt that to burden the Justice Department with additional investigative responsibilities would have been duplicative of the SEC's efforts and would have been more costly to the Government.<sup>115</sup> Furthermore, the ambiguous distinction between the SEC's and the Justice Department's stipulated roles has created an inconsistency of interpretation. Until recently, no advice or working guidelines had been provided, by the Commission or the Justice Department, to explain the intricacies of the Foreign Corrupt Practices Act. The Justice Department established a review procedure several months ago so that corporate management could consult about the likelihood of litigation resulting from a questionable transaction, prior to the transaction's occurrence.<sup>116</sup> Although this seems quite equitable from the perspective of the Justice Department, a major problem does exist. The SEC has not agreed to support the Justice Department in its determination of the standards of legality of a particular transaction under the Foreign Corrupt Practices Act.<sup>117</sup> Consequently, the SEC cannot bring suit for an injunction against a corporation for engaging in an activity which the Justice Department upheld as legal and therefore not subject to further litigation.<sup>118</sup> Corporate management would probably be skeptical of participating in this type of advance disclosure practice and thus subjecting itself to suspicion in the face of such a substantial, and as yet unresolved, administrative inconsistency.

Any corrective effort to facilitate the implementation of this program should be aimed at using the standards employed by the SEC and the Justice Department. In addition, corporate management would probably be more cooperative if it could be assured that any disclosure would be kept confidential. Although the Justice Department has guaranteed secrecy, the concern still permeates management that trade secrets and marketing information could be obtained by competitors through the Freedom of Information Act<sup>119</sup> or through more informal channels of in-

---

<sup>112</sup> 15 U.S.C. §§ 78ff(c)(3), 78dd-2(b)(3) (Supp. III 1979).

<sup>113</sup> S. REP. NO. 95-114, *supra* note 76, at 3, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 4098, 4101.

<sup>114</sup> Lashbrooke, *supra* note 83.

<sup>115</sup> S. REP. NO. 95-114, *supra* note 76, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 408, 4109.

<sup>116</sup> *A Federal Clinic on Keeping It Legal*, NEWSWEEK, Apr. 7, 1980, at 64.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*; *Foreign Bribes*, TIME, Nov. 26, 1979, at 61.

<sup>119</sup> 5 U.S.C. § 552 (1976).

formation release.<sup>120</sup> Perhaps by example and positive experiences, the Government will be able to gain the corporate confidence necessary to make this review procedure a viable enterprise. Management might be encouraged to participate by implementing a reduced penalty scale for activities found to be illegal after corporate management had, in good faith, sought the guidance of the Justice Department, as compared to those corporations which do not avail themselves of this service. These efforts, when taken in combination, could provide a basis for a successful remedy to the regulatory stumbling blocks.

The SEC has also been criticized as being "morally imperialistic" in its legislative attempt.<sup>121</sup> Most countries have laws making bribery illegal.<sup>122</sup> The perceived heavy-handedness of the United States, however, is thought to be potentially antagonistic to other nations by intimidating them into prosecuting their own officials, when they might not otherwise do so.<sup>123</sup> While this extraterritorial approach could conceivably affect world ethics over an extended period of time, nevertheless, foreign countries could balk at the unwarranted and unsolicited pressure exerted by U.S. law. The expansiveness of the Commission's approach was summarized by former SEC Commissioner A. A. Sommer, Jr. He felt that the SEC ignored the distinction between "disclosure as a means for informing investors and disclosure as a means of altering conduct."<sup>124</sup> As an outgrowth of the Foreign Corrupt Practices Act, businessmen have complained of feeling the derisiveness of foreign purchasers and have indicated that U.S. corporations are at a competitive disadvantage in the world market.<sup>125</sup>

If corporations and foreign countries are unhappy with the Foreign Corrupt Practices Act, the SEC will have difficulty maintaining its credibility and effectiveness. The alternatives to the SEC's jurisdictional authority, derived from the Foreign Corrupt Practices Act, are numerous and varied in approach ranging from the national to the international. At present, in addition to the SEC and the Justice Department, several U.S. agencies have competing and overlapping interests in overseeing the limitation of questionable and illegal foreign payments.

---

<sup>120</sup> *Foreign Bribes*, *supra* note 88.

<sup>121</sup> N. JACOBY, P. NEHEMKIS & R. EELLS, *supra* note 20, at 219.

<sup>122</sup> Note, *Prohibiting Foreign Bribes: Criminal Sanctions for Corporate Payments Abroad*, 10 CORNELL INT'L L.J. 231, 235 (1977).

<sup>123</sup> Lashbrooke, *supra* note 83, at 241; *The Big Payoff*, TIME, Feb. 23, 1976, at 28.

<sup>124</sup> Guzzardi, *An Unscandalized View of Those "Bribes" Abroad*, FORTUNE, July 1976, at 118, 121.

<sup>125</sup> See, e.g., *Misinterpreting the Antibribery Law*, BUS. WEEK, Sept. 3, 1979, at 150; *Business Without Bribes*, NEWSWEEK, FEB. 19, 1979, AT 63.

### B. *The Internal Revenue Service*

The Internal Revenue Service (IRS) has exhibited an interest in the disclosure of bribes, but only as far as the payment of the appropriate taxes is concerned.<sup>126</sup> According to Section 162(c)(1) of the Internal Revenue Code (Code), no deductions are allowable for payments made to government officials or agents in any country, so long as the payments violate the laws of the United States.<sup>127</sup> If such a payment has been deducted, the IRS requires payment of the tax on the impermissible deduction. The IRS may also assess a negligence penalty equaling five percent of the underpayment,<sup>128</sup> or a penalty for fraud totaling fifty percent of the underpayment.<sup>129</sup>

Under the Tax Reform Act of 1976, the Code sanctions were broadened.<sup>130</sup> Income derived as a direct result of the payment of a foreign bribe becomes taxable to the parent company in the United States. The IRS also prepared an 11-item questionnaire directed to all major U.S. corporations. The survey sought to ferret out details of tax accounting practices which might have indicated Code violations.<sup>131</sup>

Two criticisms<sup>132</sup> have been directed against the IRS approach. First, the threat of IRS sanctions is not an effective deterrent to illegal activity.<sup>133</sup> A company could conceivably pay a bribe and not take it as a deduction. Second, the effectiveness of the IRS approach is determined by administrative discretion on an ad hoc basis.<sup>134</sup> This lack of uniformity, caused by a shortage of resources, makes it impossible to subject each corporation to a complete audit. To ensure thoroughness, however, the audits that do occur would necessarily need to be more extensive than the traditional audit. Consequently, the corporation would face the possibility of a harsh penalty for fraud.<sup>135</sup>

The criticisms leveled against this approach accurately reflect the simplistic attitude assumed by the IRS itself. The underlying assumption of the Code is that the information supplied to the IRS represents an accurate assessment of the company's financial position. However, this focus ignores the possibility of omissions from or falsifications of corporate records and reflects no interest in international business practices or the

---

<sup>126</sup> I.R.C. §§ 162(c)(1), 7201, 7203.

<sup>127</sup> *Id.* § 162(c)(1).

<sup>128</sup> *Id.* § 6653(a).

<sup>129</sup> *Id.* § 6653(b).

<sup>130</sup> Pub. L. No. 94-455, 90 Stat. 1520 (codified at I.R.C. § 952).

<sup>131</sup> REPORT ON QUESTIONABLE FOREIGN PAYMENTS, *supra* note 10, at 23.

<sup>132</sup> REPORT ON QUESTIONABLE FOREIGN PAYMENTS, *supra* note 10, at 23.

<sup>133</sup> REPORT ON QUESTIONABLE FOREIGN PAYMENTS, *supra* note 10, at 23.

<sup>134</sup> REPORT ON QUESTIONABLE FOREIGN PAYMENTS, *supra* note 10, at 23.

<sup>135</sup> REPORT ON QUESTIONABLE FOREIGN PAYMENTS, *supra* note 10, at 23.

motivating causes for such illegal payments. The IRS, therefore, has isolated an area of interest and has disregarded the vast scope of the problem. The result is a piecemeal, and ineffective, solution.

### C. *The Federal Trade Commission*

The Federal Trade Commission (FTC) also maintains a degree of jurisdiction over the control of questionable and illegal foreign payments through its ability to investigate foreign trade conditions.<sup>136</sup> One essential purpose of the Commission's activities is to prevent corporations from using "unfair or deceptive acts or practices" which affect commerce.<sup>137</sup> The FTC's concern with foreign bribery is premised on the view that once a corporation offers a bribe, that corporation assumes an unfair competitive advantage in the international market.

The FTC bases its authority upon: the Sherman Act,<sup>138</sup> the Clayton Act,<sup>139</sup> and the Federal Trade Commission Act.<sup>140</sup> Under the Sherman Act, bribery may be construed as a restraint on trade which impairs free competition through unlawful market control.<sup>141</sup> The Clayton Act prohibits the receipt of payments by the seller in a sales transaction unless services have been rendered.<sup>142</sup> Several lower courts have applied this provision directly to the areas of export sales and foreign bribery.<sup>143</sup> Unfair methods of competition and disparate pricing structures are also prohibited by the Federal Trade Commission Act.<sup>144</sup> An unfair method of competition refers to the utilization of an illegal payment to generate sales contracts. It is then likely that the resulting pricing structure would reflect unduly favorable conditions for the foreign purchaser, and ultimately higher prices for American consumers. When these two prohibited practices occur in concert, the FTC takes the position that the antitrust provisions are applicable to cases of foreign bribery engaged in for the purpose of obtaining a foreign government contract such that the U.S. competitors are denied their rights of exportation.<sup>145</sup>

---

<sup>136</sup> 15 U.S.C. § 46(h) (1976).

<sup>137</sup> 15 U.S.C. § 45(a)(2) (Supp. III 1979).

<sup>138</sup> 15 U.S.C. § 1 (1976).

<sup>139</sup> 15 U.S.C. § 18 (1976).

<sup>140</sup> 15 U.S.C. § 41 (1976).

<sup>141</sup> 15 U.S.C. § 1 (1976).

<sup>142</sup> 15 U.S.C. § 13(c) (1976).

<sup>143</sup> *Canadian Ingersoll-Rand Co. v. D. Loveman & Sons, Inc.*, 227 F. Supp. 829 (N.D. Ohio 1964); *Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966).

<sup>144</sup> 15 U.S.C. § 45(a) (1976).

<sup>145</sup> REPORT ON QUESTIONABLE FOREIGN PAYMENTS, *supra* note 10, at 26.

#### D. *The Overseas Private Investment Corporations*

The Overseas Private Investment Corporation (OPIC) insures U.S. investors against losses due to expropriation, the inconvertibility of local currency, and war, as well as losses incurred on long term investments to friendly, less developed countries.<sup>146</sup> A year before the Foreign Corrupt Practices Act was passed, a bill was introduced in Congress requiring that OPIC insurance be used to protect investors from the consequences of illegal foreign bribes to government officials.<sup>147</sup> The Department of State did not support that bill because officials sensed that a possible misunderstanding might ensue.<sup>148</sup> If OPIC insurance were cancelled as a response to a corporate act of bribery, the Department of State hypothesized that a foreign government might interpret that gesture as an endorsement of extreme retaliatory action, such as expropriation.<sup>149</sup> The Department of State also foresaw that OPIC investigations into bribery charges might be perceived as an undesirable extraterritorial application of U.S. law. This intrusion could later seriously impinge on dispute resolution efforts.<sup>150</sup>

#### E. *International Organizations*

International organizations have assumed a role in formulating multinational codes of conduct which render bribery illegal. Such codes, however, have not yet been effective as the direct basis for litigation. The United Nations (U.N.), the organization with the most expansive influence based on size of membership and subject matter jurisdiction, has been actively preparing a code of multinational conduct.<sup>151</sup> However, its Working Group<sup>152</sup> has dealt with the issue of corrupt practices in only very general terms.<sup>153</sup>

The Organization for Economic Co-operation and Development (OECD) is an independent organization whose membership is restricted to those developed Western countries in which most multinationals are

<sup>146</sup> 22 U.S.C. § 2191 *et seq.* (1976 & Supp. III 1979).

<sup>147</sup> S. 3463, 94th Cong., 2d Sess. (1976).

<sup>148</sup> Boeker, *Developing Codes of Conduct for Multinational Enterprises*, 77 DEP'T STATE BULL. 475, 479 (1977).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Note, *Transnational Corporations—The United Nations Code of Conduct*, 5 BROOKLYN J. INT'L L. 129, 130 (1979).

<sup>152</sup> In 1976, at the second meeting of the United Nations Commission of Transnational Corporations (which evolved from the Economic and Social Council), the Commission created an Intergovernmental Working Group of the Whole (Working Group) to which was delegated the responsibility of preparing and drafting a multinational code of conduct. *Id.* at 131-33, 132 n.22.

<sup>153</sup> *Id.* at 142-43.

headquartered.<sup>154</sup> Approximately 80 percent of the total world investment is generated in those OECD member countries.<sup>155</sup> As compared with actions taken by other international organizations, the OECD has taken the most advanced steps to determine guidelines on the issue of improper payments.<sup>156</sup> OECD proposals usually attain an ideological consensus because of the somewhat common heritage of its members. Although more likely to receive worldwide acclamation than the U.N. proposals, the OECD guidelines, similar to the plan offered by the U.N., lack the power of enforcement. The OECD guidelines have no binding effect and function merely as an advisory opinion.<sup>157</sup>

Both the General Agreement on Tariffs and Trade (GATT)<sup>158</sup> and the International Chamber of Commerce (ICC) have been considered as potential arenas for constructing a multinational response to the issue of questionable foreign payments.<sup>159</sup> GATT has a large membership, but its focus is trade, not investments. Although GATT provides a favorable forum because it has an established dispute resolution procedure,<sup>160</sup> combining the issues of trade and questionable foreign payments could place the United States in a precarious bargaining position.<sup>161</sup> The ICC also has an existing procedure for dispute resolution, which is directed towards corporate commercial activities.<sup>162</sup> This highly respected group has devoted some effort to the issue of questionable foreign payments by forming a Commission of Unethical Practices which was charged with developing a "code of good business behavior."<sup>163</sup> The ICC has concluded that the business sector itself should deal with the problem of foreign bribery and that self-regulation would be the most effective approach.<sup>164</sup>

#### F. An Overview

The Securities and Exchange Commission along with numerous other federal agencies and international organizations, has been discussed with the question in mind as to whether it is the appropriate agency to police multinational bribery activity. By its own admission, the SEC has an administrative problem. As it revealed, "Projects for future improvements

---

<sup>154</sup> See REPORT ON QUESTIONABLE FOREIGN PAYMENTS, *supra* note 10, at 39.

<sup>155</sup> Boeker, *supra* note 112, at 477.

<sup>156</sup> REPORT ON QUESTIONABLE FOREIGN PAYMENTS, *supra* note 10, at 39.

<sup>157</sup> See REPORT ON QUESTIONABLE FOREIGN PAYMENTS, *supra* note 10, at 40.

<sup>158</sup> *Opened for signature* Oct. 30, 1947, 61 Stat. (pts. 5, 6), T.I.A.S. No. 1700, 55 U.N.T.S. 188.

<sup>159</sup> See REPORT ON QUESTIONABLE FOREIGN PAYMENTS, *supra* note 10, at 41.

<sup>160</sup> REPORT ON QUESTIONABLE FOREIGN PAYMENTS, *supra* note 10, at 41.

<sup>161</sup> REPORT ON QUESTIONABLE FOREIGN PAYMENTS, *supra* note 10, at 42.

<sup>162</sup> REPORT ON QUESTIONABLE FOREIGN PAYMENTS, *supra* note 10, at 42.

<sup>163</sup> REPORT ON QUESTIONABLE FOREIGN PAYMENTS, *supra* note 10, at 43.

<sup>164</sup> REPORT ON QUESTIONABLE FOREIGN PAYMENTS, *supra* note 10, at 43.

in operations depend to a large extent on our ability to cope with our own paperwork problems."<sup>165</sup> The initial concern over questionable or illegal foreign payments has been obfuscated. Originally, legislation in this area was intended to protect the rights and interests of the public investors.<sup>166</sup> The breadth of corporate activity and the distance created between the corporation and the public investors has increased significantly. Consequently, it is arguable that most investors do not know or care if the corporation in which they have an interest pays a bribe. The synergistic effect of repeated bribery disclosures, however, has become significant. Investors, and the American public as a whole, are concerned with the appearance of U.S. corporations to the rest of the world.<sup>167</sup> If the American public overtly condones or at least implicitly accepts foreign bribery, the Nation risks being perceived as unethical or immoral. Therefore, the collective American self-respect demands public outrage at the thought of bribery.

The issue of questionable foreign payments has received attention on two levels, the domestic and the international. Domestically, in a sincere attempt to address this problem, several federal agencies have been granted authority to take action. The SEC has been working with the Justice Department to ensure that public investors have a complete awareness as to a registered corporation's operations and manner of achieving its business purpose. The FTC has sought to promote fair methods of business competition which are necessary for maintaining a free market economy. The IRS has focused its attention on the accurate reporting and tax assessment of corporate income, once again, to stimulate foreign investments and protect the interest of U.S. investors in extraordinary circumstances. Unfortunately, the result of this division of domestic authority has been piecemeal legislation which deals separately with tax evasion, the formation of monopolies, or nondisclosure. Each agency seems to be wearing blinders to the other important issues in which the agency does not have subject matter jurisdiction.

Internationally, the efforts are just beginning. Several groups have addressed the problem of questionable foreign payments, including: the U.N., the OECD, GATT and the ICC. Two major problems confront these groups. First, not all countries which act in a home or host capacity are members of any of these organizations. Second, once a code of conduct is developed, it functions merely as a set of voluntary guidelines; no country is bound to follow its mandate. The issue is beginning to receive more attention internationally, but any attempts to eradicate the inconsistent approaches or to standardize legislative efforts are still in the ges-

---

<sup>165</sup> [1976] SEC ANN. REP. 167.

<sup>166</sup> See notes 57 & 78-79B *supra* and accompanying text.

<sup>167</sup> See *How Clean Is Business?*, NEWSWEEK, Sept. 1, 1975, at 50.

tation period, lacking any unanimity of action or policy.

## V. A NEW APPROACH

At this point, when the primary issue seems to have shifted from concern for the individual investor to a justification of each agency's own existence, the fundamental problem must be approached anew. The problem of illegal foreign payments has become such a pervasive practice that a fragmented, albeit sincere, effort will no longer suffice.

International commissions or guidelines are helpful in representing a valuable multinational effort to reach a point of increased understanding and communication on a common problem. It is imperative, however, that the initial effort be directed toward arriving at a unified national approach.

Attention should be focused on the creation of a new commission, of limited duration, which would address the problem and its impact from a fresh perspective. In order to preclude the possibility of narrow-mindedness, the temporary commission might be composed of representatives from the SEC, FTC, Justice Department, and the IRS, along with corporate representatives from both the United States and a number of host countries.

Once there is a consensus amongst the commission members that foreign bribery should remain illegal, based on ethical, economic, and foreign policy justifications, along with other frames of reference, a specialized multidisciplinary division of an existing department should be established. This body would provide and promote a cohesive application of those U.S. laws which impact on the extraterritorial operations of the U.S. multinational public corporation. Initially, it is expected that certain definitional boundaries will be unclear. However, this department, charged with a singular responsibility, will facilitate the creation of an easily adaptable working standard. Absent such a single function institution, virtually any one agency faces the same plight of too many duties and too few resources. After such a unified approach has been undertaken, probably the most effective policy would be a strategy to encourage support and disseminate information throughout the internal corporate ranks to ensure the understanding and the ordering of priorities. Perhaps a more positive result could be obtained if corporate codes of conduct were standardized throughout the country. The most important feature of any corporate code of conduct is that all of the employees understand it and integrate it into their professional behavior.

Concurrent with this program should be a demand for greater individual accountability. A system of exorbitant financial penalties should be imposed with the burden of payment to be borne exclusively by those employees who directly handle questionable foreign payments. Subse-



quent to an initial grace period, the penalties for infractions should be stiffened.

By implementing such a plan, the corporate veil is removed as a shield for employee misfeasance. Any offense that occurs will be that much more serious because the provisions will have been so clearly delineated within the corporate sector. Hopefully, the employee will then become more discriminating in selecting the activities in which to participate and endorse. Only through this pragmatic approach, recognizing the frailties of human nature, will other options for generating multinational business and for streamlining its subsequent regulation be thoughtfully developed.