FOREIGN BRIBERY BY AMERICAN MULTINATIONAL CORPORATIONS: A STATUS REPORT*

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INTRODUCTION

THE UNITED STATES has been an important forum for the development of multinational corporations. Approximately ninety percent of the world's multinationals are headquartered in the U.S.[1] As a result, the United States is viewed as having a heavy responsibility to control multinationals' global activities.[2] Abuses in the area of corporate bribery, surfacing initially as a by-product of the Watergate investigations, prompted Congress to conduct numerous investigations into multinational corporate conduct[3] and to reappraise existing legal remedies and federal agencies' enforcement responsibilities.

The search for ways to eliminate corrupt corporate practices was conducted by the Multinational Corporation Subcommittee of the Senate Foreign Relations Committee; the Senate Banking, Housing and Urban Affairs Committee; the Subcommittee on International Economic Policy of the House Committee on International Relations; and the President's Task Force on Questionable Corporate Payments Abroad. A flurry of legislative proposals resulted. Although it was generally agreed that some new legislation was needed,[4] a wide disparity of opinion prevailed as to the desired nature and scope of the new laws. The sentiments expressed by Federal agencies were

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1. Borton & Gross, *Control of Multinational Corporations' Foreign Activities*, 35 WASHBURN L.J. 435, 436 (1976).

2. *Id.*

3. *See, e.g., Multinational Corporations and United States Foreign Policy: Hearings Before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations*, 94th Cong., 1st & 2d Sess. (1975).

4. SENATE COMM. ON BANKING AND URBAN AFFAIRS, CORRUPT OVERSEAS PAYMENTS BY U.S. BUSINESS ENTERPRISES, REPORT TO ACCOMPANY S. 3664, S. REP. NO. 94-1031, 94th Cong., 2d Sess. (1976) [hereinafter cited as CORRUPT OVERSEAS PAYMENTS].

largely negative and, at the close of the Ninety-fourth Congress, no new major legislation had been enacted.

The investigations did, however, produce a heightened stockholder awareness of corporate misconduct by the multinationals. Armed with data disclosed by the government's probing, shareholder derivative suits followed federal agency actions, and many officers and directors have been called to task for participating or acquiescing in improper payments. Examination of the reasoning which influenced developing legislation, as expressed by legislators and federal agencies, and a brief review of a few recent stockholder actions lends some insight into the nature of probable future multinational controls.

I. PROPOSED LEGISLATION

A sampling of legislators' views reveals a varying perception of the corporate bribery problem, ranging from national defense, to ethics, to economics. Senator Frank Church suggested that, unless Congress regulates multinational corporations, United States foreign policy will become a corporate, rather than a government policy.[5] He sponsored an amendment to the Arms Export Control Act of 1975, requiring public disclosure of agents fees and arms sales to halt bribery in the sale of armaments.[6] His proposals required disclosure, not prohibition, presuming that publicity would automatically abate the undesirable practices.[7]

Senator Charles Percy advocated a multinational code of ethics established by business associations, such as the American Management Association, as well as business advisors — lawyers, accountants, and bankers. He suggested the code of professional ethical standards be drawn up by a committee of businessmen to be voluntarily enforced by the corporations themselves, with censure by business associations as the penalty for noncompliance.[8] The Senator alluded to the weakness of the proposal: "We all know, though, that passing an international code will not eliminate corrupt business practice. It will only set an international norm." He expressed "faith in the business community that it can be done."[9]

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5. *Multinational Corporations and United States Foreign Policy: Hearings Before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations, on Lockheed Aircraft Corp.*, pt. 14, 94th Cong., 2d Sess. 1–2 (1976) (opening statement of Sen. Frank Church).

6. *Id.*

7. *Id.*

8. *Id.* at 315–25 (comments by Sen. Charles Percy).

9. *Id.* at 324.

Efforts of the United Nations Organization for Economic Cooperation and Development in drafting an international code of ethics were applauded by the Secretary of the Treasury and the State Department as well as by Senator Percy.[10] But the Senate Committee on Banking, Housing and Urban Affairs characterized such multinational remedies as "largely hortatory in nature [because they] do not include reliable enforcement machinery or sanctions for violators."[11] Referring specifically to the OECD code, Senator William Proxmire noted, "While this code might prove marginally useful . . . bribery of public officials is already illegal under the laws of most countries . . . [W]here countries do not vigorously enforce their domestic bribery laws, there is little likelihood that a redundant voluntary code will have significant impact."[12] SEC chairman Garrett expressed a similar view of guidelines for voluntary conduct, which Mr. Feldman of the State Department suggested might be developed by various nations: "Such an approach, while intellectually appealing, strikes me, at best, as a long range, and possibly ponderous, route to the resolution of the problems facing American companies today."[13]

Senator Proxmire favored a hard line approach to corporate bribery. He said, in no uncertain terms, "U.S. corporations should be prohibited from paying bribes anywhere in the world. They are already prohibited from paying bribes at home".[14] He was referring to the SEC voluntary disclosure program.[15] The Senator suggested foreign bribery should be a criminal offense and should be prosecuted by the SEC because the Justice Department is too "timid."[16] The consensus in the Senate was that the problem was international and could not best be solved by unilateral action.[17] But Senator Proxmire contended that restricting U.S. corporations, even while not restricting their foreign competitors, will not hurt the U.S.

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10. *Id.* at 324-25.

11. CORRUPT OVERSEAS PAYMENTS, *supra* note 4, at 6.

12. *Id.*

13. Address by SEC Chairman Raymond Garrett before the American Society of Corporate Secretaries (June 27, 1975) (portions inserted in the record of *The Activities of American Multinational Corporations Abroad: Hearings Before the Subcomm. on International Economic Policy of the House Comm. on International Relations,* 94th Cong., 1st Sess. 58, 62 (1975)).

14. *Foreign and Corporate Bribes: Hearings on S. 3233 Before the Senate Comm. on Banking, Housing and Urban Affairs,* 94th Cong., 2d Sess. 1-2 (1976) (comments by Sen. William Proxmire) [hereinafter cited as *Senate Hearings on Foreign and Corporate Bribes*].

15. *Id.* at 3.

16. *Id.* at 2.

17. *See* 121 CONG. REC. S19,798-811 (daily ed. Nov. 12, 1975).

competitive position. He noted the experience of non-bribing companies such as DuPont, General Dynamics, and Pitney Bowes.[18]

Representative Stephen Solarz also supported a unilateral approach on the assumption that other nations would follow the U.S. lead:

> Current statutes have failed to provide sufficient protection and more positive action is clearly needed.
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> . . . .
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> I think what is at stake here is really, in a number of significant respects, the reputation of our country, and I think that we have an obligation to set a standard of honesty and integrity in our business dealings not only at home but also abroad which will be a beacon for the light of integrity for the rest of the world.[19]

A number of bills were proposed in Congress to deal with improper corporate payments. In the Senate, on March 11, 1976, Senator Proxmire introduced a bill to regulate bookkeeping procedures and to prohibit questionable payments. The bill would require reporting to the SEC of all payments in excess of $1,000 to foreign officials, political parties, or sales agents retained to influence legislation or obtain business from foreign governments.[20]

On May 5, 1976 Senators Church, Clark, and Pearson introduced a similar bill. It would require reporting to the SEC of foreign political contributions, payments to foreign officials to influence their decisions, and payments to commercial interests to influence normal business decisions; provide for record keeping for five years and for annual foreign policy analysis by the State Department of effects of questionable payments; amend the Internal Revenue Code to prohibit deductions of illegal payments; require companies to establish auditing committees of outside directors; and create new private rights of action by stockholders and competitors injured by bribery.[21]

On May 12, 1976 Senator Proxmire introduced another similar, though less stringent bill, drafted by the SEC, to regulate accounting

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18. *Senate Hearings on Foreign and Corporate Bribes, supra* note 14, at 1 (comments by Sen. William Proxmire).

19. *The Activities of American Multinational Corporations Abroad: Hearings Before the Subcomm. on International Economic Policy of the House Comm. on International Relations,* 94th Cong., 1st Sess. 5 (1975) (statement of Rep. Stephen J. Solarz) [hereinafter cited as *House Hearings on the Activities of American Multinational Corporations Abroad*].

20. S. 3133, 94th Cong., 2d Sess. (1976).

21. S. 3379, 94th Cong., 2d Sess. (1976).

procedures and make it unlawful to falsify records or to deceive an accountant in an audit.[22]

On June 18, 1976 a compromise bill, revising and consolidating all three earlier proposals was offered by Senator Proxmire. It would require accurate accounting procedures; make it a crime to deceive an auditor; create criminal penalties of up to two years imprisonment and a fine of up to $10,000 for authorizing payment to foreign officials for corrupt purposes; define "corrupt purposes" as inducing the recipient to use his influence to direct business to any person, to influence legislation or regulations, or to fail to perform an official function in order to influence business decisions, legislation, or regulations of a government; and would empower the Justice Department to investigate and prosecute criminal violations by those not subject to SEC jurisdiction.[23]

This compromise bill was an outgrowth of hearings by the Senate Committee on Banking, Housing, and Urban Affairs. The Committee rejected the argument that bribery may be necessary in order to compete in certain markets. They pointed to the many U.S. corporations which do compete successfully without engaging in corrupt practices, and noted that in cases involving aircraft sales abroad, the questionable payments were "not to outcompete foreign competitors, but rather to gain a competitive edge over other U.S. manufacturers."[24]

The Committee was persuaded by comments from Bob Dorsey, former chairman of Gulf Oil Corp., that strong legislation prohibiting corporate bribery would help U.S. multinationals resist corrupt demands[25] and rejected State Department fears that such legislation would cause resentment by foreign countries at imposition of American standards on transactions taking place within their borders: "[T]he Committee believes that most countries would welcome a greater effort by the United States to discourage offensive conduct by U.S. companies, wherever their activities may take place."[26]

In dismissing objections based on jurisdictional arguments,[27] the Committee relied on the American Law Institute Restatement of the Law of Foreign Relations of the United States:

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22. S. 3418, 94th Cong., 2d Sess. (1976).
23. S. 3664, 94th Cong., 2d Sess. (1976).
24. CORRUPT OVERSEAS PAYMENTS, *supra* note 4, at 4.
25. *Id.*
26. *Id.*
27. Analogous issues of jurisdiction involving U.S. antitrust laws are discussed at text accompanying notes 87-104 *infra*.

1. A nation may prescribe rules of law attaching legal consequences to conduct occurring within its territory, whether or not the effect of that conduct falls within the territory.[28]

2. [A nation has] jurisdiction to prescribe rules of law relating to conduct occurring beyond its territorial limits if that conduct has its effect within the territory of the prescribing nation.[29]

3. A nation has jurisdiction to prescribe rules of law relating to the conduct of its nationals, wherever that conduct occurs . . . [A] corporation has the nationality of the nation which creates it.[30]

Despite arguments propounded by Secretary Elliot Richardson, the Committee concluded that disclosure requirements are not as effective as, nor more easily enforcible than prohibition of improper corporate payments. They reasoned that requiring only disclosure would "leave ambiguous whether such payments might be acceptable . . . [implying] that bribery can be condoned as long as it is disclosed."[31] Direct criminal prohibition is the most forceful assertion against improper conduct, and enforcement entails no greater evidentiary burden for conviction than under a disclosure requirement. In either case, an undisclosed payment made with an improper purpose must be proven for a successful prosecution.[32]

In the House of Representatives, several bills were introduced by Representative Solarz. One would amend the Criminal Code to specifically prohibit the bribery of any foreign government, foreign official, or foreign political organization by any American company or official, with criminal penalties of $10,000 fine or one year imprisonment or both.[33] Another would direct the State Department to monitor overseas activities of American citizens and corporations and report any possible violation of Federal Law to the appropriate U.S. Government agency for enforcement.[34] A third would provide

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28. CORRUPT OVERSEAS PAYMENTS, *supra* note 4, at 15, (citing generally RESTATEMENT (SECOND) OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES ch. 2 (1976), and American Banana v. United Fruit Co., 213 U.S. 347 (1909)).

29. *Id.* at 16 (citing RESTATEMENT (SECOND) OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES § 18 (1965)).

30. *Id.* (citing RESTATEMENT (SECOND) OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES § 27, and Steele v. Bulova Watch Co., 344 U.S. 280 (1952)).

31. *Id.* at 8.

32. *Id.*

33. H.R. 7539, 94th Cong., 2d Sess. (1976) (amending 18 U.S.C. § 201 (1970)).

34. H.R. 7563, 94th Cong., 2d Sess. (1976).

for cancellation of Overseas Private Investment Corporation (OPIC) insurance contracts with corporations engaging in foreign payments for corrupt purposes.[35]

President Ford proposed the Foreign Payments Disclosure Act to require reporting to the Secretary of Commerce payments made by U.S. businesses and their foreign subsidiaries and affiliates in relation to business with foreign government. Reports would be made available to the IRS, SEC, State Department, Justice Department, Congress and, one year after filing, to the public.[36]

None of the above measures was enacted into law. Recently another Senate Bill was introduced by Senator Proxmire. It would impose criminal penalties for offering or paying money to a foreign government, official, politician, or agent to obtain or hold business in that country or to influence its laws; or for falsifying records to conceal such payments. The bill provides maximum penalties of $500,000 fine for corporations, and $10,000 fine or five years imprisonment for individual executives or directors.[37] The bill is supported by President Carter, who, in contrast to the Ford Administration, favors criminal penalties for corporate bribery.[38]

II. FEDERAL AGENCY RESPONSE

A. *Securities and Exchange Commission*

The Securities and Exchange Commission has been the most aggressive government agency in discouraging corporate bribery abroad. It became involved, not because of the illegality of corporate payments, but because secret slush funds tend to make financial statements false or misleading.[39] The SEC's power is derived from the Securities Act of 1933[40] and the Securities Exchange Act of 1934,[41] requiring detailed disclosures to investors by corporations issuing registered securities.[42] Any economic factor which an

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35. H.R. 14,681, 94th Cong., 2d Sess. (1976); H.R. REP. No. 94-1416, 94th Cong., 2d Sess. (1976); see text accompanying notes 113-18 *infra*.

36. FOREIGN PAYMENTS DISCLOSURE, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. DOC. No. 94-572, 94th Cong., 2d Sess. *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2957.

37. Wall St. J., Apr. 7, 1977, at 3, col. 2.

38. *Id.*, Mar. 17, 1977, at 2, col. 3.

39. *House Hearings on the Activities of American Multinational Corporations Abroad, supra* note 19, at 67 (testimony of SEC Commissioner Philip A. Loomis, Jr.).

40. 15 U.S.C. §§ 77a-77aa (1970).

41. 15 U.S.C. §§ 78a-78jj (1970).

42. Corporations with assets exceeding $1,000,000 and shareholders numbering 500 or more, and corporations with securities listed and registered for public trading on national securities exchanges, must be registered for public trading with the SEC.

investor would consider "material" in determining whether or not to make an investment must be disclosed,[43] and disclosures may not be false or misleading.[44] A major concern is how to determine which illegal payments are material. The basic test of materiality is "whether a reasonable man would attach importance [to the fact misrepresented] in determining his choice of action in the transaction in question."[45] As noted by Solomon and Linville, corporate bribes, in themselves, may not be considered material,[46] and nondisclosure, "in the honest and reasonable belief that a valid corporate justification exists, or that sufficient facts are not available to the corporation to permit release of a non-misleading statement . . .," might not expose a corporation to liability.[47] A charge of withholding information may be defended as a valid "exercise of discretionary business judgment."[48]

The SEC prefers a case by case determination of materiality, taking into consideration all relevant facts and circumstances, rather than a Congressional mandate that all bribes or political contributions are material *per se*.[49] There are "instances where the requiring of disclosure causes loss to present shareholders for the benefit, so to speak, of prospective shareholders,"[50] and the "mere fact that a foreign payment has been made, particularly in a relatively small amount, is not necessarily a material fact to investors."[51] The SEC's objective is not to find out whether a

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Securities Exchange Act of 1934 § 12, 15 U.S.C. § 78*l* (1970). This would include almost all American multinationals. Antifraud provisions apply to unregistered securities as well. *See, e.g.,* Securities Act of 1933 § 17, 15 U.S.C. § 77q (1970) *and* Securities Exchange Act of 1934 § 10, 15 U.S.C. § 78j (1970).

43. Mills v. Electric Auto Lite Co., 396 U.S. 375 (1970); SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied,* 394 U.S. 976 (1969) (construing Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (1964) and rule 10b-5, 17 C.F.R. 240.10b-5).

44. Securities Act of 1933 §§ 11(a), 12(2), 17, 24, 15 U.S.C. §§ 77k(a), 77*l*(2), 77q, 77x; Securities Exchange Act of 1934 §§ 10(b), 13(a), 14(a), 15 U.S.C. §§ 78j(b), 78m(a), 78n(a).

45. List v. Fashion Park, Inc., 340 F.2d 457, 462 (1965) (quoting *Restatement of Torts* § 538(2)(a)), *cert. denied,* 382 U.S. 811 (1965).

46. Solomon & Linville, *Transnational Conduct of American Multinational Corporations: Questionable Payments Abroad,* 17 B.C. INDUS. & COM. L. REV. 303, 316 (1976).

47. *Id.* at 314.

48. *Id.* at 315.

49. Address by SEC Chairman Raymond Garrett, *supra* note 13, at 59–60; *see also* SEC REPORT ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES, [1976] FED. SEC. L. REP. (CCH), No. 642, pt. II, at 17, 21, 26, 27.

50. Address by SEC Chairman Raymond Garrett, *supra* note 13, at 61.

51. *House Hearings on the Activities of Multinational Corporations Abroad, supra* note 19, at 64 (statement of Philip A. Loomis, Jr.).

payment was a bribe, but to find out whether it was reported accurately. It's burden is to prove that a payment was "misclassified," not that it was illegal. If the SEC shows evidence of misclassification, then the corporation has the burden of rebuttal, *i.e.,* of defending its classification.[52]

Where a payment might be extortion by a government official, rather than bribery, disclosure may cause the adverse consequences (possible expropriation, excessive taxation, etc.) threatened by the extortionist. The corporation may actually be protecting its stockholders' interests by paying "defensive bribery."[53] Investigation of "defensive bribery" is difficult because many countries have laws protecting the secrecy of financial activities.[54] Chairman Garrett has questioned the propriety of involving the SEC too deeply in foreign affairs. While acknowledging the need for "development of sound policy guidance for American business abroad," he noted that "it does not seem properly the sole, maybe not even the primary, province of the SEC."[55]

The SEC's position is weakened by the necessity of protecting American foreign investments. It has been argued that foreign conduct which is considered legal abroad should not be held illegal under United States law.[56] Many corporate executives believe such conduct is necessary if American business is to compete in world markets.[57] Payments to political parties and foreign officials are accepted as proper in some foreign nations;[58] failure of American businessmen to conform could result in the loss of vital contracts. As a result, the SEC may be less inclined to investigate, for fear of comprising American corporate positions in foreign nations. "[T]he SEC must be sensitive to the potential harm which may result from full disclosure of all overseas activities."[59]

The emphasis on disclosure rather than prohibition of improper corporate payments limits the SEC's effectiveness in restraining

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52. *Id.* at 73 (testimony of Philip A. Loomis, Jr.).

53. *Id.* at 74–75.

54. *Id.* at 68.

55. Address by SEC Chairman Raymond Garrett, *supra* note 13, at 62.

56. Wall St. J., Sept. 9, 1975, at 1, col. 6; *id.*, Aug. 4, 1975, at 2, col. 2.

57. *Multinational Corporations and United States Foreign Policy: Hearings Before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations, on Political Contributions to Foreign Governments,* pt. 12, 94th Cong., 1st Sess. 37, 72–73 *passim* (1975) (testimony of Bob R. Dorsey; comments by Sen. Stuart Symington), [hereinafter cited as *Senate Hearings on Political Contributions*]. See text accompanying note 24 regarding the Senate Banking Committee's rejection of this argument.

58. N.Y. Times, Oct. 23, 1975, at 59.

59. Solomon & Linville, *supra* note 46, at 325.

corporate bribery. Congressional proposals to strengthen the SEC's power[60] have been resisted by the Commission, which recommended only "limited-purpose legislation . . . to demonstrate clear congressional policy."[61] It supported proposed new legislation to prohibit falsification of corporate accounting records, to prohibit false and misleading statements by corporate officials or agents to persons conducting audits, and to require management to establish and maintain its own system of internal accounting controls.[62] But the SEC was opposed to any legislation which would expand its duties beyond investor protection. In House Subcommittee testimony, Commissioner Loomis said, "[O]ur purpose and mission is not to eliminate sin, but to enforce the statutes entrusted to us, which, in general, require disclosure of facts material to investors."[63] His remarks echoed those of Chairman Garrett, that the SEC is "not concerned with corporate morality as such — just disclosure of material facts." The Chairman opposed broadening the SEC's mandate to "enforce even indirectly, through compulsory disclosure, all of the world's laws and all of its perceptions of morality and right conduct."[64]

> [The SEC is reluctant to open] the door to further intrusions, conceivably even by the Congress, that our ruling and disclosure procedures and requirements be used to help enforce policies increasingly remote from investor protection in the classical, or financial and economic sense[.] If our processes should become so encumbered, we very much fear that they will become less effective for this primary purpose. We also fear that if we are given or undertake too many tasks, we will not do any of them very well.[65]

Under existing law the most common remedies applied in SEC prosecutions are mandatory injunctions requiring full disclosure and prohibitory injunctions requiring disclosure in future statements.[66]

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60. *Senate Hearings on Foreign and Corporate Bribes, supra* note 14, at 2.

61. SEC REPORT ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES, [1976] FED. SEC. L. REP. (CCH), No. 642, pt. II, at 57.

62. *Id.* at 58.

63. *House Hearings on the Activities of American Multinational Corporations Abroad, supra* note 19, at 58 (statement of Philip A. Loomis, Jr.).

64. Address by SEC Chairman Raymond Garrett, *supra* note 13, at 59.

65. *Id.* at 60.

66. *House Hearings on the Activities of American Multinational Corporations Abroad, supra* note 19, at 76 (testimony of SEC Associate Director Wallace L. Timmeny).

The decision in *SEC v. Kalvex, Inc.*[67] suggests that actions brought by the Commission, attacking questionable corporate payments, under the guise of the disclosure requirements of the securities laws, may be successful. Those corporations which have been investigated by the SEC have all consented to an entry of final judgment and permanent injunction.[68] Representative Solarz has questioned the effectiveness of such measures: What incentive is there for disclosure by an executive faced with an embarrassing payment which, in his opinion, is in the best interest of his company? If his failure to disclose it is discovered, his only penalty is to then disclose it.[69] Mr. Timmeny, of the SEC's Division of Enforcement, responded that injunction is not taken lightly by the majority of American businessmen.[70] He went on to say,

> In addition, I think there is another very substantial prohibition, and that is simply that violations of the Federal securities laws may well result in suits by shareholders who have been injured or by investors who bought on the basis of misinformation . . . and these lawsuits have been known to result in some very substantial financial penalties . . . .[71]

Representative Nix, at his Subcommittee's hearings, lamented that the SEC's jurisdiction, limited to insisting on adequate accounting procedures, "stops at the water's edge," making reference to foreign payments by Gulf Oil Corp., Northrop Corp., United Brands Co., and Ashland Oil Co.[72] But perhaps the "water's edge" was far enough, for in each of these cases, SEC action was followed by shareholders' derivative suits, resulting in changes in personnel, accounting procedures, operating policies and controls, and, generally, substantial monetary settlements.[73]

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67. [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶95,226, at 98,184 (S.D.N.Y. July 7, 1975); *see also* Solomon & Linville, *supra* note 46, at 321.

68. Solomon & Linville, *supra* note 46, at 324.

69. *House Hearings on the Activities of American Multinational Corporations Abroad, supra* note 19, at 77 (comments by Rep. Stephen Solarz).

70. *Id.* (testimony of Wallace L. Timmeny).

71. *Id.* Shareholders class action and derivative suits may prove to be the most effective deterrent to multinational misconduct. See text accompanying notes 124-65 *infra.*

72. *House Hearings on the Activities of American Multinational Corporations Abroad, supra* note 19, at 2 (comments by Rep. Robert Nix).

73. *See* cases cited *infra* in notes 126 (Ashland), 128 (Gulf), 158 (United Brands); Springer v. Jones, Civ. No. 74-1455 (C.D. Cal., filed May 24, 1974) (Northrop). For a general discussion of shareholder derivative suits, see text accompanying notes 124-65 *infra.*

B. *Internal Revenue Service*

In early investigations of questionable corporate payments,[74] following the Lockheed scandal, the Internal Revenue Service was thought to provide an "effective sanction against offending companies."[75] Its power to investigate extraterritorial activities of American multinationals is derived from the power to tax income generated abroad.[76] Under United States tax regulations, illegal payments are not deductible business expenses for income tax purposes.[77] A foreign payment is treated as illegal if it would be illegal in the United States,[78] without regard to whether it was illegal in the country where it was made.[79] Any payment which benefits a foreign official or employee,[80] even though indirectly through an agent, may be disallowed as a bribe or kickback.[81]

But as the SEC confines its function to investor protection, so the IRS prefers to confine its function to revenue raising, and avoid policing the propriety of foreign payments. In promulgating its regulations, the Treasury Department's intent was to see that American corporations did not deduct illegal payments as "ordinary and necessary" business expenses.[82] The IRS has been concerned with the deductibility, not the morality, of corporate expenditures and would have no reason to question, or even to recognize, an expense not deducted in a corporation's tax return. Donald C. Alexander, Commissioner of the IRS, made the Service's position clear in his testimony before the House Subcommittee on International Economic Policy:

> [O]ur responsibility is not to try to eliminate all sin wherever we find it but instead to administer and enforce the tax law.
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> . . . Although a business may have engaged in a number of dubious financial machinations to create a slush fund, it may have chosen not to adopt the same course on its tax returns and it may not have claimed illegitimate deductions.

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74. Wall St. J., Feb. 11, 1976, at 3, col. 2.

75. N.Y. Times, Feb. 11, 1976, at 1, col. 8.

76. Kewanee Oil Co. v. Commissioner, 62 T.C. 728, 735 (1974) ("It is a fundamental policy of our tax system . . . that a domestic corporation is taxed on its global income, irrespective of its source.")

77. Int. Rev. Code of 1954 § 162(c)(1).

78. *Id.*

79. Treas. Reg. § 1.162–18(a)(1) (1975).

80. Foreign officials and employees include anyone officially connected with, or purporting to be officially connected with the government of a foreign country, in whatever capacity. *Id.* § 1.162–18(a)(3) (1975).

81. *Id.* § 1.162–18(a)(2) (1975).

82. N.Y. Times, Feb. 11, 1976, at 1, col. 8.

> . . . If the transfer is without tax consequences, the Internal Revenue Service is not the agency to cope with the problem.[83]

The Commissioner opposed Tax Code revisions to compel disclosure of payments not claimed as deductions, because of the already burdensome complexity of tax returns. He indicated that the tax laws are simply not the appropriate vehicle for dealing with corrupt corporate payments, and suggested that the problem ought to be solved "outside the framework of the tax system."[84]

Because of the complexity inherent in multinational corporate entities and their activities, information necessary for detection of improper financial dealings is difficult to obtain. The IRS has only a limited ability to demand and examine books and records of foreign entities. "It has long been a rule of law that one country will not enforce the tax laws of another country."[85]

The Tax Reform Act of 1976 includes a provision treating foreign bribery by a Domestic International Sales Corporation (DISC) or a foreign subsidiary of a U.S. company as a currently taxable "deemed dividend."[86] But the provision, while closing a loop hole in the prior law's nondeductibility of bribes and kickbacks, is limited in scope and falls far short of a major deterrent to corrupt corporate payments abroad.

C. *Antitrust Division of the Justice Department*

When corporate bribery abroad threatens to restrain U.S. domestic or foreign trade, it becomes a matter of concern to the Antitrust Division. Under the Sherman[87] and Clayton[88] Acts, any conduct which tends to create a monopoly in restraint of trade is illegal. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of commerce among the several States or with foreign nations . . . [is prohibited]."[89] The present laws are not expressly directed against corrupt corporate payments, but can deal with the issue collaterally to the protection of fair

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83. *House Hearings on the Activities of American Multinational Corporations Abroad, supra* note 19, at 42 (statement of IRS Commissioner Donald C. Alexander).

84. *Id.* at 55–56 (testimony of Donald C. Alexander).

85. *Id.* at 51.

86. Tax Reform Act of 1976, Pub. L. No. 94–455, § 1065, 90 Stat. 1653 (codified at Int. Rev. Code of 1954, § 995(b)(1)(F)(iii); *see also,* Note, *The Effect of the Tax Reform Act of 1976 on Domestic International Sales Corporations,* 2 DEL. J. CORP. L. 94, 109–10 (1977).

87. 15 U.S.C. §§ 1–7 (1970).

88. *Id.* §§ 12–27.

89. *Id.* § 1.

competition. According to Donald Baker, Deputy Assistant Attorney General of the Justice Department's Antitrust Division, the Sherman and Clayton Acts need no revision to deal with corrupt corporate payments abroad. A great many private civil treble damage actions have been brought in the foreign area.[90]

> While bribery has not been explicitly at issue up to now in cases involving international trade, some private inducements to foreign governments to engage in anti-competitive activity have been the subject of litigation. There is no logical reason why bribery of foreign officials may not be involved in future international activities which are the subject of antitrust litigation.[91]

United States courts have not hesitated to exercise jurisdiction where corporate practices abroad adversely affect domestic markets. Antitrust regulations have been successfully invoked to dismantle cartels involving foreign and U.S. companies controlling international markets;[92] to control mergers of foreign corporations with subsidiaries in the United States;[93] and to prevent use of political leverage outside the U.S. by a foreign subsidiary of an American company to stiffle competition from other American firms.[94]

In 1909 the U.S. Supreme Court held that, with respect to antitrust laws, acts done abroad were subject only to the laws of the place where they were committed.[95] But subsequent antitrust cases have retreated from this broad statement of territoriality, and by 1945 it was "settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends . . ."[96]

As Mr. Baker has pointed out, no jurisdictional issue remains:

> [W]hen the act or agreement can be shown to have a direct effect on markets within the United States, our law should reach it . . .

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90. *House Hearings on the Activities of American Multinational Corporations Abroad, supra* note 19, at 87 (statement of Donald I. Baker, Deputy Assistant Attorney General, Antitrust Division, Department of Justice).

91. *Id.* at 88.

92. United States v. N.V. Nederlandshe Combinatie Voor Chemische Industrie, 1970 Trade Cas. ¶ 73,181 (S.N.Y.D. 1970) (consent decree).

93. United States v. Ciba Corp., 1970 Trade Cas. ¶ 73,269 (S.D.N.Y. 1970) (consent decree).

94. Continental Ore v. Union Carbide, 370 U.S. 690 (1962).

95. American Banana v. United Fruit Co., 213 U.S. 347 (1909).

96. United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945).

> Of course, under our traditional jurisprudence, it is necessary to have personal jurisdiction over the party committing the act. This normally presents no problem with respect to the subsidiary of an American corporation, let alone the corporation itself. It may, of course, pose a problem where the potential defendants are foreign corporations which do no business in the United States.
>
> Thus, in the end we are not dealing with a legal issue of jurisdiction, but of substance.[97]

The effectiveness of antitrust actions to help curb illegal foreign payments is limited. Governmental policy of most nations, including the United States, encourages exports even where it involves encouraging anticompetitive practices, so long as those practices do not harm *domestic* consumers.[98] Antitrust policy is violated only when a U.S. company's questionable activities abroad unfairly restrict another U.S. company's opportunity to compete.[99] If questionable practices are necessary to compete with foreign firms,[100] which U.S. antitrust laws cannot reach, sanctions against American corporations would be counterproductive in terms of encouraging exports.

Under the doctrine of "foreign governmental compulsion," an American corporation may not be held liable for a violation of U.S. law if the violation were compelled by a foreign government.[101] In countries where payments to government officials are necessary to carry on business,[102] the doctrine provides a strong defense to an antitrust suit. Considerations of comity further restrict enforcement of antitrust laws. "Issues of comity involve situations where two

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97. Baker, *Antitrust and World Trade: Tempest in an International Teapot?*, 8 CORNELL INT'L L.J. 16, 37 (1974) (footnote omitted), *reprinted in House Hearings on the Activities of American Multinational Corporations Abroad, supra* note 19, app. 10 at 260.

98. *Id.* at 34, *House Hearings on the Activities of American Multinational Corporations Abroad,* at 257.

99. *House Hearings on the Activities of American Multinational Corporations Abroad, supra* note 19, at 90 (statement of Donald Baker). The Senate Committee on Banking, Housing & Urban Affairs observed that in cases involving foreign sales of aircraft this condition was satisfied; see text accompanying note 24 *supra.*

100. *Senate Hearings on Political Contributions, supra* note 57, at 367–68 *passim* (testimony of Lockeed Board chairman D. J. Haughton). See text accompanying notes 53–59 *supra* (discussion of SEC views on "necessary" corrupt practices) and text accompanying note 24 *supra* (views of the Senate Committee on Banking, Housing & Urban Affairs).

101. *House Hearings on the Activities of American Multinational Corporations Abroad, supra* note 19, at 89. (statement of Donald Baker); Interamerican Ref. Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970).

102. See note 100 *supra.*

states have concurrent jurisdiction and are likely to prescribe and enforce rules of law requiring inconsistent conduct upon the same person."[103] United States courts will consider not only American interests, but also the interests of foreign nations, and the hardships that application of United States law may impose on American corporations abroad.[104]

D. *Civil Aeronautics Board*

In contrast to views expressed by other regulatory agencies, the Civil Aeronautics Board would welcome new legislation to strengthen its ability to police corporate bribery. The CAB is charged with regulating U.S. airlines,[105] a prominent industry in international operations, giving the Board a potentially substantial influence on U.S. corporate payments abroad.

In House Subcommittee testimony, James Weldon, Jr., Acting Director of the CAB's Bureau of Enforcement, favored legislation prohibiting bribes outright to help corporations resist demands for such payments. He noted, however, that when top corporate management deliberately circumvents internal control procedures to conceal wrongful expenditures it is practically impossible for governmental agencies to detect it without the aid of a "tipster."[106] The tipster in recent cases has been the Watergate Special Prosecutor.[107] In view of the already stringent reporting requirements for airlines, it is difficult to conceive of additional legislation that would alleviate the problem. Weldon suggested that penalties are generally insignificant: "Corporate fines, absent a successful shareholder derivation action, are merely passed along to the consumer as a cost of doing business."[108] However, the CAB may also terminate licenses for improper conduct.[109]

Suggested legislation enabling the CAB to prosecute criminal actions directly, rather than by referral to the Justice Department, was supported by Weldon of the CAB,[110] but ardently opposed by

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103. *House Hearings on the Activities of American Multinational Corporations Abroad, supra* note 19, at 89 (statement of Donald Baker).

104. *Id.*

105. 49 U.S.C. §§ 1302, 1303, 1324 (1970).

106. *House Hearings on the Activities of American Multinational Corporations Abroad, supra* note 19, at 83–84 (statement of James J. Weldon, Jr., Acting Director, CAB Bureau of Enforcement).

107. *Id.* at 85 (testimony of James Weldon, Jr.).

108. *Id.* at 84 (statement of James Weldon, Jr.).

109. 49 U.S.C. § 1371(g) (1970).

110. *House Hearings on the Activities of American Multinational Corporations Abroad, supra* note 19, at 84 (statement of James Weldon, Jr.).

Baker of the Justice Department.[111] Baker contended it was contrary to Congressional policy and did not represent the Administration's opinion.[112]

E. *Overseas Private Investment Corporation*

The United States Government provides insurance for American investments abroad through the Overseas Private Investment Corporation. OPIC insurance contracts protect Americans against expropriation of their foreign assets by governments of the host nations. Before issuing an insurance policy to any American firm with an overseas subsidiary, OPIC must be satisfied that the corporation has not violated the laws of the foreign nation. A false representation in the corporation's application for insurance, if later discovered, is grounds for recission of the insurance contract. But there is no provision for termination of the insurance for violations subsequent to its issuance.[113]

OPIC contracts contain terms providing for the cancellation of insurance where companies, through their own fault, provoke expropriations.[114] OPIC could thus refuse a claim if expropriation was the result of corporate bribery, unlawful political contribution, or other improper activity.[115] However, if the improper activity were merely used as a pretext for an expropriation, then, even though an improper payment was made, OPIC would still be bound to indemnify the loss.[116] Legislation was introduced by Representative Solarz which would require OPIC contracts to provide for cancellation of the insurance contract, not merely denial of a specific claim, if the insured corporation engaged in bribery of foreign officials.[117] The bill passed the House but expired in the Senate Foreign Relations Committee.

Michael Butler, vice president and general counsel of OPIC, expressed a reluctance to involve OPIC in questions of international business ethics:

> I have my doubts whether we, in this country can police the morality of the world. I would be a little skeptical about that.

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111. *Id.* at 95 (statement of Donald Baker).

112. *Id.*

113. *Id.* at 174 (comments by Rep. Solarz).

114. Some expropriations were prompted by disclosure of unlawful corporate payments, *e.g.*, Gulf Oil property in Peru, and legislation under consideration in Costa Rica, and other Latin American countries. *Id.* at 1 (comments by Rep. Robert Nix). *See also id.* at 22 (statement of Mark B. Feldman).

115. *Id.* at 9 (statement of OPIC Vice Pres. & Gen'l Counsel Michael F. Butler).

116. *Id.* at 16 (testimony of Michael F. Butler).

117. H.R. 14,681, *supra* note 35.

> Also, I would be very reluctant to get into that sort of situation because how would one determine whether or not a bribe had been extorted from a U.S. investor? You probably would have to talk to the foreign government official, and that really interjects the U.S. Government into matters that I think rather clearly are not its business. Such a mechanism could create very serious foreign relations problems by forcing the U.S. Government to take actions which could be easily regarded as outrageous interference in the government affairs of a foreign country.[118]

F. *State Department*

Mr. Butler's statement for OPIC reflects the view of the Department of State. A corporate payment to a foreign official may involve extortion by the payee, a foreign government. United States agencies can enforce U.S. law only against the corporate payor. The State Department opposed explicit prohibition against bribery of foreign officials by American corporations as unenforcible and provocative of resentment by foreign governments.[119]

Mark Feldman, Deputy Legal Advisor for the State Department, expressed the Department's view to the House Subcommittee on International Economic Policy:

> It would be not only presumptuous but counterproductive to seek to impose our specific standards in countries with different histories and cultures. Moreover, enforcement of such legislation — and I think this is the most important point — would involve surveillance of the activities of foreign businessmen and would be widely resented abroad.
>
> Extraterritorial application of U.S. law — which is what such legislation would entail — has often been viewed by other governments as a sign of U.S. arrogance or even as interference in their internal affairs.[120]

Representative Beister added that aside from foreign sensibilities an insurmountable problem exists in proving the criminal offense in the United States district court. "[T]he foreign public official would have to be subpenoed to testify in the United States."[121]

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118. *House Hearings on the Activities of American Multinational Corporations Abroad, supra* note 19, at 17 (testimony of Michael Butler).

119. *Id.* at 30–31 (testimony of State Dep't Deputy Legal Advisor Mark B. Feldman).

120. *Id.* at 24 (statement of Mark B. Feldman).

121. *Id.* at 27 (comments by Rep. Edward G. Beister).

In the area of armament sales, however, the State Department published proposed changes in the International Traffic in Arms Regulations,[122] requiring munitions exporters to certify that they have informed the *buyer* government of the identity and amount paid to an agent on a contingent basis as a fee, if the amount paid exceeds $10,000. If no contingent fee is paid, a statement to that effect must be filed with the Department. Failure to disclose an excessive fee would expose the seller to Criminal Code penalties of a $10,000 fine and five years imprisonment for making false or fraudulent statements to an agency of the U.S. Government.[123]

The measure is weak in that disclosure is made only to the buying country, and any resulting action is left to the discretion of that country. The disclosure required is not a "public" disclosure; it deals only with commissions, not bribes; and the buying country must decide whether a commission is excessive. The State Department has acknowledged that it would be premature to assume the controls would be effective. As of this writing, the proposed change has not been promulgated in the regulations.

III. STOCKHOLDER SUITS

Government inspired publicity from the congressional investigations and federal agency litigation against multinational corporations accused of corrupt practices was followed by shareholder derivative suits and class actions. Shareholders sought to hold corporate officers and directors — and in some cases, outside auditing firms — accountable for losses allegedly sustained by the corporations. Those losses included indirect injury to good will and public esteem, as well as actual monetary loss of the amounts improperly paid. Plaintiffs demanded resignation of responsible corporate directors and executives, injunctions prohibiting future improprieties, accounting and auditing procedures to assure compliance, restitution of monetary losses, and occasionally punitive damages. Few such cases were decided in court on their legal merits. Generally, the offending corporate managements were anxious for a court sanctioned settlement with minimum publicity. Plaintiffs, too, interested in avoiding further bad publicity for their corporations, and often overwhelmed by the complexity of the litigation, were usually willing to settle.[124]

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122. 40 Fed. Reg. 37,043 (1975).

123. 18 U.S.C. § 1001.

124. Telephone interview with Avrom S. Fischer (Feb. 16, 1977), council of record for plaintiffs in Meer v. United Brands Co., Civ. No. 75–1738 (S.D.N.Y. Feb. 16, 1977).

These cases were frequently brought in federal court under securities disclosure laws, which give private rights of action to persons injured by corporate management violations.[125] State law claims for mismanagement and corporate waste were included under pendent jurisdiction. Liberal discovery procedures and pleading amendment rules enable plaintiffs to uncover previously undisclosed corporate misconduct once the government has made public sufficient data for a stockholder to frame his initial complaint.

Three *Oil Company Cases,* Ashland Oil,[126] Phillips Petroleum,[127] and Gulf Oil,[128] are typical of the structure and settlements in corporate bribery derivative suits. All three were products of post-Watergate investigations into corporate political contributions.

An SEC investigation[129] suggested that Ashland made improper foreign payments from 1967 to 1972: $125,000 to foreign political organizations, $202,000 to foreign officials for petroleum rights, and $162,000 to foreign individuals with no documentation as to why the payments were made.[130] Then, Ashland stockholder Levin filed a derivative suit in a Kentucky federal district court to set aside the 1974 election of directors, recover stock options issued to directors, and obtain restitution for illegal corporate political contributions and bribes.[131] The case was settled within a year. Board Chairman Orin Atkins paid Ashland $91,000 and agreed to pay an additional $28,000 annually for three years; Vice Chairman William Seaton paid $37,000 plus $17,000 annually for four years; Director Clyde Webb paid $17,000 plus $7,000 annually for four years. The Democratic National Committee agreed to refund $50,000 in campaign contributions, and the Republican party, $2,000. As a result of the stockholder action, Ashland will recover $377,000 of the $489,000 alleged by the SEC to have been improperly spent. The defendants waived all rights to indemnification by the corporation, making restitution from personal funds.[132]

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125. J.I. Case v. Borak, 377 U.S. 426 (1974); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Securities Act of 1933 §§ 11, 12, 15 U.S.C. §§ 77k, 77*l* (1970); Securities Exchange Act of 1934 §§ 9(e), 10(b), 13(a), 14(a), 27, 15 U.S.C. §§ 78i(e), 78j(b), 78m(a), 78n(a), 78aa (1970).

126. Levin v. Atkins, Civ. No. C-75-0095L(B) (W.D. Ky. Feb. 27, 1976).

127. Gilbar v. Keller, Civ. No. 75-611 (C.D. Cal. Apr. 22, 1976).

128. Shlensky v. Wild, Civ. No. 75-377 (W.D. Pa. 1976), *appeal docketed,* No. 77-1156 (3rd Cir. Dec. 17, 1976).

129. SEC REPORT ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES, [1976] FED. SEC. L. REP. (CCH), No. 642, pt. II, exhibit B, at 3-4.

130. *Id.*

131. Levin v. Atkins, Civ. No. C-75-0095L(B) (W.D. Ky. Feb. 27, 1976).

132. *Id.*

In The Phillips Petroleum case,[133] plaintiffs alleged false and misleading proxy statements, in violation of federal securities law,[134] for failure to disclose political campaign contributions. Stockholders instituted the suit in reaction to Board Chairman Keller's guilty plea to government prosecution[135] for violating political election campaign laws.[136] They sought to invalidate board of directors elections at the 1974 and 1975 shareholder's meetings.[137] But the suit also disclosed secret foreign construction and shipping rebates in 1963 and 1964, funnelling over two and a half million dollars through Swiss bank accounts of Phillips subsidiaries.[138] A court-approved settlement provided for restitution of $150,000 from Phillips directors, in addition to $82,000 reimbursement from Mr. Keeler for fines and legal expenses for the election law violations.[139] An audit committee of three independent outside directors was established to recommend public accountants annually; accountants proposed by management, if disapproved by stockholders, could not be proposed again in the next fiscal year; and the 1976 board of directors was to be gradually replaced, through attrition, with a board composed of sixty percent outside independent directors.[140]

The Gulf Oil case[141] followed public SEC reports[142] and Congressional investigating committee hearings[143] revealing corporate expenditures of more than ten million dollars in foreign and domestic political contributions and bribes. A plethora of stockholder suits filed in federal district courts were consolidated into a single derivative action involving more than ten plaintiffs and twenty defendants.[144] Complaints, cross complaints, and counter-

133. Gilbar v. Keller, Civ. No. 75-611 (C.D. Cal. Apr. 22, 1976).

134. Securities Exchange Act of 1934 § 14(a), 15 U.S.C. § 78n(a) (1970).

135. Brief for Plaintiff at 1, Gilbar v. Keller, Civ. No. 75-611 (C.D. Cal. Feb. 17, 1976).

136. Federal Election Campaign Act, 18 U.S.C. § 610 (Supp. V 1975) (repealed by Act of May 11, 1976, Pub. L. No. 94-283, Title II, § 201(a), 90 Stat. 476) (now codified in scattered sections of 2, 18, 26 U.S.C.).

137. Brief for Plaintiff at 9, Gilbar v. Keller, Civ. No. 75-611 (C.D. Cal. Feb. 17, 1976).

138. *Id.* at 6.

139. Plaintiff's Memorandum in Support of Proposed Settlement at 4-5, Gilbar v. Keller, Civ. No. 75-611 (C.D. Cal. Feb. 17, 1976).

140. Record at 7, 10, 21, Gilbar v. Keller, Civ. No. 75-611 (C.D. Cal. Feb. 17, 1976).

141. Shlensky v. Wild, Civ. No. 75-377 (W.D. Pa. 1976), *appeal docketed*, No. 77-1156 (3rd Cir. Dec. 17, 1976.)

142. SEC REPORT ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES, [1976] FED. SEC. L. REP. (CCH), No. 642, pt. II, exhibit B, at 7.

143. *Senate Hearings on Political Contributions, supra* note 57, at 4-58 (testimony of Bob R. Dorsey, Chairman of the Board of Directors, Gulf Oil Corp.).

144. Shlensky v. Wild, Civ. No. 75-377 (W.D. Pa. 1976), *appeal docketed*, No. 77-1156-58 (3rd Cir. Dec. 17, 1976). This is the lead case for eight actions consolidated in

claims prayed for reimbursement for fines paid, restitution of funds misapplied, accrued interest, legal expenses incurred by the corporation, damages for loss of goodwill and increased public relations costs to repair the corporate name, refund of certain salaries, plaintiffs' attorneys' fees, and return of stock options allegedly issued as hush money.[145]

One plaintiff candidly expressed his motivation for filing the derivative suit:

> I was outraged by the bland assertion of Bob Dorsey, the Chairman of the Board, before the Senate Committee, that in answer to a request from the Arab groups in Beruit or wherever that was, for $50,000, because they felt, in spite of all the oil income that these countries have, that their position had not been adequately presented in the United States, that they [Gulf] handed out the $50,000.[146]

A court approved settlement provided for restitution by Gulf directors of more than 1.5 million dollars in addition to two million dollars to be paid by Gulf's executive liability insurer.[147] Plaintiffs indicated a willingness to settle because they were interested in protecting the corporation's rights by the suit, and further litigation could cause more harm than good to the corporation. One shareholder noted that Gulf's cost for attorneys' fees had reached about 1.7 million dollars.[148] There were fears, too, that Gulf's insurer might contest claims for indemnity, contending misrepresentation in the insurance applications.[149] If the insurer could successfully avoid

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the Federal District Court for the Western District of Pennsylvania. The other seven are Levin v. Dorsey, Civ. No. 75-607 (W.D. Pa. filed May 19, 1975); Shlensky v. Dorsey, Civ. No. 75-758 (W.D. Pa. filed June 19, 1975); Koeningsberg v. Dorsey, Civ. No. 75-875 (W.D. Pa. filed July 17, 1975); Weschler v. Brockett, Civ. No. 75-1219 (W.D. Pa. filed Sept. 24, 1975), *transf'd from* Civ. No. 75-4188 (S.D.N.Y. filed Aug. 22, 1975); Milberg v. Dorsey, Civ. No. 76-22 (W.D. Pa. Jan. 8, 1975), *transf'd from* Civ. No. 75c-1523 (E.D.N.Y. filed Sep. 16, 1975); Benckenstein v. Wild, Civ. No. 76-63 (W.D. Pa. Jan. 14, 1975), *transf'd from* Civ. No. 75-H-1925 (S.D. Tex., Nov. 10, 1975); Horenstein v. Gulf Oil Corp., Civ. No. 76-78 (W.D. Pa. Jan. 16, 1975) *transf'd from* Civ. No. 75-1287-M (D. Mass. Apr. 3, 1975).

145. *Id.*

146. Transcript of Proceedings at Hearings on Motion to Stay at 14-15, Levin v. Dorsey, Civ. No. 75-607 (W.D. Pa., filed May 19, 1975), *consolidated sub nom.* Shlensky v. Wild, Civ. No. 75-377 (W.D. Pa. 1976), *appeal docketed,* No. 77-1156 (3rd Cir. Dec. 17, 1976).

147. Shlensky v. Wild, Civ. No. 75-377 (W.D. Pa. 1976), *appeal docketed,* Civ. No. 77-1156 (3rd Cir. Dec. 17, 1976).

148. Transcript of Preliminary Settlement Hearing, Record at 210.

149. *Id.*

liability, multimillion dollar judgments against individual directors would be largely uncollectible.

But the settlement is being appealed in the Third Circuit[150] by the Project on Corporate Responsibility, which owns two shares of Gulf common stock. To the consternation of District Court Judge Willson the appellant, acting in what it believed to be the public interest, felt that any settlement would prejudice other stockholder actions pending against Gulf Oil[151] for other alleged corrupt practices. A similar rationale was applied in *Herbst v. International Telephone and Telegraph Company,*[152] where the court withheld approval of a class action settlement because several clauses provided for the release of the company's claims against present and former directors. Shareholders who brought a separate action objected to the release. The court noted that fairness is not the only criteria for approval of settlements; the overall impact on other pending actions must also be considered.[153]

Plaintiffs in the *Oil Company Cases* obtained access to the federal courts by means of the Securities Exchange Act of 1934, §§ 13(a) and 14(a), requiring disclosure of facts relevant to proxy solicitations[154] and sales of registered securities,[155] and § 27 providing for private rights of action in U.S. District Courts.[156] Failure to disclose questionable corporate payments in a proxy statement for election of directors has generally been considered sufficient grounds for federal subject matter jurisdiction.[157] In *Meer v. United Brands*

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150. Shlensky v. Wild, Civ. No. 77–1156 (3rd Cir., filed Dec. 17, 1976).

151. Transcript of Hearing on Order Approving Proposed Settlement, Shlensky v. Wild, Civ. No. 75–377 (W.D. Pa. 1976), *appeal docketed,* Civ. No. 77–1156 (3rd Cir. Dec. 17, 1976).

152. 72 F.R.D. 85 (D. Conn. 1976).

153. *Id.*

154. 15 U.S.C. § 78m(a) (1970).

155. *Id.* § 78n(a) (1970).

156. *Id.* § 78aa, *construed in* J.I. Case Co. v. Borak, 377 U.S. 426, 430–31 (1964).

157. *But see* the Sterling Drug Case, where the action was dismissed for failure to establish a federal claim:

> Section 14(a) was designed "to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitations." *J.I. Case Co. v. Borak,* 377 U.S. 426, 431 (1964). In the instant case the only corporate action sought to be authorized by proxy solicitation in question was the directorial elections of 1970-1975. The alleged improper payments were not the subject of the proxy solicitation. If at all, they represent a breach of defendant directors fiduciary duty to their corporation. Lacking, therefore, is the "transaction causation" component of section 14(a) claim that is required by the Second Circuit.

Levy v. Johnson, Civ. No. 76–1178, slip op. at 4 (S.D.N.Y. Feb. 15, 1977).

Co.,[158] two counts alleging violations of § 13(a) were dismissed because the company's non-disclosure of $1,250,000 in payments to an official of the government of Honduras was not related to a purchase or sale of its stock.[159] However, the court granted leave to amend the complaint to allege § 14(a) violations, reasoning that the payments might well have influenced stockholders' choice of directors, had they been informed.[160] In *Rafal v. Gineen*,[161] the court said,

> The election of these persons to the Board of Directors is clearly a transaction for which stockholder approval is sought within the context of § 14(a). The election of a board of directors may be the most important and, in some cases, the only transaction in which the stockholder has any significant voice in determining the company's destiny.[162]

Even where federal jurisdiction is obtained, it is not unusual for a parallel derivative suit to be pursued in the state court.[163] But personal jurisdiction over dispersed directors is not often obtainable in the state courts,[164] while worldwide service of process and liberal choice of venue are available for suits involving Securities Exchange Act violations in the federal courts.[165]

CONCLUSION

Legislators concerned with corporate bribery abroad considered a number of approaches to curb the undesirable practices. Reliance upon voluntary restraints, such as an international code of conduct,

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158. [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH). ¶ 95,648 (S.D.N.Y. June 30, 1976) (order dismissing fourth and seventh counts of consolidated amended complaint).

159. The private remedy for violation of reporting requirements of § 13(a) is provided by § 18(a), which relates to a purchase or sale of securities. Since the action is derivative, the corporation would have had to rely on its own false and misleading statement in a purchase or sale of its own securities to constitute an actionable violation. *Id.*

160. *Id.* ¶ 95,894 (order granting motion to amend consolidated amended complaint).

161. [1972-1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,505 (E.D. Pa. 1972).

162. *Id.*

163. *See, e.g.*, the state court counterpart to the Gulf Oil case: Shlensky v. Wild, Civ. No. 75-14,106 (Pa. C.P. Allegheny Co. June 19, 1975).

164. *E.g.*, Ashland Oil's main office is in Ashland, Kentucky, yet its Board members reside in New York, Texas, Minnesota, Oklahoma, Connecticut, North Carolina, and Massachusetts. Only seven of its sixteen directors live in Kentucky.

165. Securities Exchange Act of 1934, § 27, 15 U.S.C. § 78aa (1970); *see also* W. CARY, *Note on Some Procedural Advantages of Action Under Rule 10b-5; Pendent Jurisdiction*, in CASES AND MATERIALS ON CORPORATIONS 794 (4th ed. unabr. 1964).

was preferred by many because of its multilateral nature, but was generally considered ineffectual for lack of adequate enforcement provisions. The Ninety-fourth Congress was unable to enact prohibitory unilateral legislation, making foreign bribery by U.S. multinationals a crime in the United States. Some thought it might weaken the competitive position of U.S. firms in overseas markets, since the restrictions would not apply equally to foreign competitors. But the proposals have not been abandoned, and with support from the Carter Administration, such legislation will probably be enacted in the near future.

Existing law discourages improper corporate conduct abroad largely through collateral measures, such as disclosure requirements for investor protection and disallowance of tax deductions. The Ford Administration favored strengthening the disclosure requirements, confident that it would result in abatement of undesirable practices:

> The requirement that persons subject to SEC jurisdiction maintain adequate books and records is now implicit in existing law; the legislation recommended . . . would make that requirement explicit.
>
> . . . .
>
> . . . Public disclosure of matters of this kind generally leads to their cessation. In virtually all of the cases reported to the Commission, companies discovering payments of this kind have taken effective steps to stop them and to assure that similar payments do not recur in the future.[166]

Regulatory agencies were, with few exceptions, reluctant to get deeply involved in matters of foreign policy. They opposed expansion of their powers, and concurrently their duties and responsibilities, to include policing corporate improprieties throughout the world.

Many in government feared that any really forceful unilateral legislation would overstep U.S. jurisdictional limitations, and incur resentment by foreign countries at attempts to export American moral values. Others thought foreign countries would welcome U.S. leadership in curbing corrupt corporate practices. Experience of the Justice Department in antitrust law enforcement involving extraterritorial transactions indicates that the jurisdictional problems are

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166. FOREIGN PAYMENTS DISCLOSURE, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. DOC. No. 94-572, 94th Cong., 2d Sess. 2, *reprinted in* [1976] U.S. Code Cong. & Ad. News 2957, 2958.

not insurmountable. If the United States can export its free enterprise philosophy by means of unilateral legislation, perhaps it can export its business ethics philosophy as well.

Private stockholder actions have played an important role in curtailing corporate bribery in recent years. In a sense, this is a voluntary restraint, for a corporation disciplined by its own stockholders is self-disciplined. Disclosure is necessary to its existence. Without the revelations publicized by governmental investigations, stockholders would not have had the information to act.

Remedies and standards of the derivative suit, though subject to complex compromises, are well settled in law: recovery of damages from management for breach of duty to the corporation. The impact is probably as severe as criminal sanctions, without the attendant foreign relations difficulties of legislated prohibition.