The Origins of the FCPA: Lessons for Effective Compliance and Enforcement

*By Thomas O. Gorman**

"They trusted us"—Judge Stanley Sporkin explaining why 450 corporations self-reported in the 1970s Volunteer Program without a promise of immunity.

I. Introduction

Can one man make a difference? Stanley Sporkin is proof that the answer is "yes." In the early 1970s he sat fixated by the Watergate Congressional hearings. As the testimony droned on about the burglary and cover-up, the Director of the Securities and Exchange Commission's ("SEC" or "Commission") Enforcement Division sat mystified. Witnesses spoke of corporate political contributions and payments. "How does a public company book an illegal contribution" the Director wondered. "Public companies are stewards of the shareholder's money—they have an obligation to tell them how it is used" he thought. He decided to find out.

The question spawned a series of "illicit" or foreign payments cases by the Commission resulting in the Volunteer Program. Under the Program, crafted by Director Sporkin and Corporation Finance Director Alan Levinson, about 450 U.S. corporations self-reported illicit payments which had been concealed with false accounting entries. There was no promise of immunity but the Director had a reputation for doing the right thing, being fair. Ultimately the cases and Program culminated with the passage of the Foreign Corrupt Practices Act ("FCPA"), signed into law by President Jimmy Carter in 1977.

Today a statute born of scandal and years of debate continues to be debated. Business groups and others express concern about the expansive application of the FCPA by enforcement officials and the spiraling costs to resolve investigations. Enforcement officials continue to call for self-reporting, cooperation and more effective compliance.

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While the debate continues, both sides might do well to revisit the roots of the FCPA. The success of the early investigations and the Volunteer Program is not attributable to overlapping enforcement actions, endless investigations, draconian fines and monitors. Rather, it was a focus on effective corporate governance—ensuring that executives acted as the stewards of shareholder funds. Director Sporkin calls this "doing the right thing." A return to that focus may well end the debate and yield more effective compliance and enforcement.

II. The Beginning

The Watergate Congressional hearings transfixed the country. A scandal was born from a burglary at the Watergate Hotel in Washington, D.C. by the Committee to Reelect the President, known as CREP. The hearings were punctuated by a series of articles in The Washington Post based on conversations with a source known only as "deep throat." Later the two reporters would become famous. President Richard Nixon would resign in disgrace. His senior aides would be sentenced to prison.[1]

A little-noticed segment of the hearings involved corporate contributions to politicians and political campaigns. Most observers probably missed the slivers of testimony about illegal corporate conduct since they were all but drowned in the seemingly endless testimony about the burglary, cover-up and speculation regarding the involvement of the White House. One man did not. Then SEC Enforcement Director and later Federal Judge Stanley Sporkin was fixated. He listened carefully to the comments about corporate political contributions. The Director wondered how the firms could make such payments without telling their shareholders:

> You know, I sometimes use the expression, "only in America could something like this happen." There I was sitting at my desk . . . and at night while these Watergate hearings were going on I would go home and they'd be replayed and I would hear these heads of these companies testify. This fellow Dorsey from Gulf Oil . . . and it was interesting that somebody would call Gulf Oil and they would say we need $50,000 for the campaign. Now everybody, I knew that corporations couldn't give money to political campaigns . . . what occurred to me was, how do you book a bribe . . . .[2]

What, if any information did the outside auditors have was another key question, according to the Director.[3] Not only was he fascinated by the testimony but "something bothered him [Director Sporkin]. It was the thought of all that money moving around in businessmen's briefcases. That money belonged to corporations. Corporations belong to investors. The SEC protects investors. So Sporkin investigated."[4]

An informal inquiry was initiated. As Judge Sporkin recounts: "To satisfy my curiosity [about how the payments were recorded in the books and records] I asked one of my staff members to commence an

informal inquiry to determine how the transactions were booked."[5] This "was not one of these elaborate investigations where you have 5 people. I called in a guy named Bob Ryan and I said, Bob, go to Gulf Oil."[6] A day later the answer came back: "[W]hat happened was that Gulf Oil had set up two corporations; one called the ANEX, one called the ANEY, capitalized . . . with the $5 million each; took the money back to New York, put it into [Gulf Chairman] Dorsey's safe at the head of Gulf Oil and there he [Dorsey] had a slush fund, a corporate fund of $10 million."[7] The payments were not reflected in the books and records of the company—the shareholders were not told how their money was being used.

It was apparent that corporate officials "knew they were doing something that was wrong because the reason they set [it] up this was . . . is because they didn't want to expense the money so they capitalized it. And why did they want to expense the money . . . [Director Sporkin explained is] Because they were afraid, not of the SEC, but of the IRS. So it . . . right from the beginning . . . it showed me that there was something afoul here," Director Sporkin later recounted.[8] Indeed, it was clear that senior corporate officials had painstakingly designed a methodology to secrete what they knew were wrongful transactions.[9]

III. The Illicit or Foreign Payments Cases

The preliminary inquiry was followed by formal SEC investigations early in 1974. The resulting cases would become known as the "illicit or foreign payments" cases. The focus of the investigations was on corporate accountability and governance, not the propriety of making the payments.[10] If shareholder funds entrusted to corporate officials were being used to make political contributions, pay bribes and take other, similar actions, there should be disclosure. Shareholders are entitled to know how their money is being used, the manner in which their company is operating and the type of stewards who work for them. As Director Sporkin stated: "Our concept was to get the information to the shareholders and let the shareholders make decisions on what they wanted to do."[11] That theme was echoed in the SEC Report to Congress on its enforcement efforts in 1976: "Disclosure of these matters reflects the deeply held belief that the managers of corporations are stewards acting on behalf of the shareholders, who are entitled to honest use of, and accounting for, the funds entrusted to the corporation and to procedures necessary to assure accountability and disclosure of the manner in which management performs its stewardship."[12]

The investigations focused on several prominent corporations. A variety of conduct was uncovered.

- In a number of instances facilitation payments were found, that is, those made to obtain the performance by foreign officials of their duties;
- In others, excess sales commissions and kickbacks were uncovered;
- Off the book transactions were discovered;
- Falsified corporate records were discovered along with secret slush funds used for a variety of purposes;
- The corporate records did not reflect accurately how shareholder funds were used—they concealed the transactions, the source of the funds and the fact that their application was for illegal purposes.[13]

Collectively, 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."[14]

In January 1974 the SEC considered the issuance of what would become Securities Act Release No. 5466 (March 8, 1974) and a recommendation from Director Sporkin and the Division of Enforcement to file the first enforcement action stemming from the illicit payment investigations. The Commission carefully deliberated a series of issues before authorizing the Release and the enforcement action. SEC Commissioner John Evans recounted those deliberations:

> Before making the decision to file the complaint [in *SEC v. American Shipbuilding]*, and before voting to accept the settlement, various members of the Commission expressed concern, and there was considerable discussion that this application of the securities laws and enforcement approach would lead to undesirable results. Although there was some speculation at the time, we could not have known, of course, that our program would result in the disclosure of illegal or questionable payments by many corporations to recipients throughout the world. We could not have known that investigations by independent company committees would bring about the replacement of top management officials of some major corporations. We could not have known that some corporations had made payments which, if disclosed, would result in political crises in foreign countries.[15]

Director Sporkin and the Commission did not think that additional legislative authority was necessary to support the proposed enforcement action. The securities laws provided a firm foundation in their view.[16]

Materiality was a key question carefully evaluated by the five Commissioners and the Enforcement Division. That concept was generally defined at the time in objective terms, considering, information which a reasonable investor might find useful.[17] A key point in the materiality discussions, as Commissioner Evans recounted, was the fact that

most of the illegal or questionable payment cases involved false and fictitious entries on the corporate books and records and the filing of false and misleading reports with the Commission. These two points "were weighed heavily in our decisions [to bring the actions] . . . Any diversion of funds outside the corporate system, or any deception with respect to corporate books and records, cannot be permitted without undermining the purposes of the securities laws," the Commissioner noted.[18]

Later in its Report to Congress the Commission reiterated its view on materiality:

> [Q]uestionable or illegal payments that are significant in amount or that, although not significant in amount, relate to a significant amount of business, are material and required to be disclosed . . . [if the payments are] unknown to the board of directors, [it] could be grounds for disclosure regardless of the size of the payment itself or its impact on dependent business because the fact that corporate officials have been willing to make repeated illegal payments without board knowledge and without proper accounting raises questions regarding improper exercise of corporate authority and may also be a circumstance relevant to the 'quality of management' that should be disclosed to the shareholders . . . [in addition] a questionable or illegal payment could cause repercussions of an unknown nature which might extend far beyond the question of the significance either of the payment itself or the business directly dependent upon it. For example, public knowledge that a company is making such illegal payments, even of a minor nature, in one foreign country could cause not only expropriation of assets in that country but also similar a similar reaction or a discontinuation of material amounts of business in other counties as well.[19]

One major oil company that made such payments, for example, had that fact asserted as the basis for an expropriation by a Latin American Republic.[20] Another point considered was the fact that substantial criminal penalties could be imposed on the organization—something shareholders should be told, according to Director Sporkin.[21] Likewise, concealing the fact that the company is securing business through the payment of bribes could also shroud underlying difficulties with the business. If, without the payment of the bribes, the company cannot compete effectively, there may be difficulties with the business model, its products or the manner in which it is competing in the international market place. Shareholders would have a right to such information.[22] And, all of these factors reflected on the stewards of the corporation, the management entrusted with the funds of the shareholders: "This factor is important because investors have a right to be informed regarding the integrity of management in connection with the administration of corporate affairs and assets," Commissioner Evans noted in recounting the SEC's discussions on the point.[23]

The SEC authorized the issuance of the Release and the filing of its first enforcement action from the illicit payment investigations at the

January meeting.[24] The enforcement action was against American Ship Building Company and its CEO. The complaint centered on the payment of about $120,000 in political contributions and other payments falsely booked as payments to employees in the corporate records.[25] It alleged violations of the proxy and periodic reporting requirements by failing to disclose that corporate funds had been used to make political contributions. The complaint also alleged that the books and records of the company had been falsified to conceal these facts from the shareholders. This would become the first of the illicit or questionable payments cases.[26] In the Commission's view the filing of this enforcement action should have indicated that "the standard for disclosure in such a case was not traditional economic materiality, but that such payments reflected on the integrity of management."[27]

The Release focused on disclosure obligations when there was a conviction, a guilty plea, or pending indictment alleging that the federal election laws had been violated. It also noted that in other instances management was in the best position to assess the issuer's disclosure obligations.[28]

The *American Shipbuilding* enforcement action was settled at the time of filing with a consent decree. It would become a predicate for other similar cases. The focus of the settlement was an injunction effectuated by Court-ordered undertakings which included:

- A requirement to establish a review committee which included a chairman not affiliated with the company;
- A directive that the committee examine all the books and records of the company beginning with September 1970;
- A directive that the examination focus on expenses or payments entered on the books and records of the company for purposes other than those indicated;
- The Committee was required under the order to prepare a report and submit its findings to the court, the Commission and the board of directors; and
- A requirement that the board reviews the report and takes the appropriate action to implement its recommendations.

The point was to hold the organization and the individuals involved accountable while improving corporate governance for the benefit of the shareholders in the future. A series of similar cases followed. Examples include:

- *SEC v. Gulf Oil Corporation,* Civil Action No. 75-00563 (Filed March 11, 1975) in which the complaint alleged that the company disbursed over $10 million to various subsidiaries, including the Bahamas Exploration Company, through false book entries in the records of the company. About $5.4 million was converted to

cash and returned to the United States to make domestic political contributions or to disburse overseas.

- *SEC v. Lockheed Aircraft Corporation,* Civil Action No. 76-0611 (D.D.C. Filed April 13, 1976) in which the complaint alleged that the company paid at least $25 million in corporate funds to foreign government officials, including officials in Japan and Italy. In addition, over $200 million was paid to various consultants and agents without adequate records or controls to ensure that the payments were used for the purpose indicated in the records and that the services were received. The complaint also alleged that the company maintained a secret cash fund of at least $750,000 which was used in part to make payments to foreign government officials.
- *SEC v. Foremost-McKesson, Inc.,* Civil Action No. 76-1257 (D.D.C. Filed July 7, 1976) in which the complaint alleged that the firm made payments of $6 million in cash and merchandise to retailers and wholesalers to induce the purchase of wine and spirits distributed by the company. It also alleged that at least $213,000 was paid to various government officials to impact government policy and that the books and records were falsified.
- *SEC v. General Tire & Rubber Co.,* Civil Action No. 76-0799 (D.D.C. Filed May 10, 1976) in which the Commission alleged that under the direction of the president of the company funds were diverted for political purposes by purporting to increase bonuses and salaries. Slush funds were created, including one with the knowledge and approval of senior management of the international division, which totaled $3.9 million. It was used to pay foreign government officials. Another fund maintained by a foreign subsidiary was used in conjunction with five major tire companies to finance efforts to secure a price increase from a foreign government.[29]

The Commission's illicit payment actions were brought against some of the most prominent corporations in the U.S. They included: Minnesota Mining & Manufacturing Co. (1975); Phillips Petroleum Co. (1975); Northrop Corporation (1975); Gulf Oil Corporation (1975); United Brands Company (1975); Ashland Oil, Inc. (1975); General Refractories Co. (1975); Braniff Airways, Inc. (1976); Waste Management, Inc. (1976); Lockheed Aircraft Corporation (1976); General Tire & Rubber Company (1976); Firestone Tire & Rubber Company (1976); and Foremost-McKesson (1976).[30]

Many of the cases brought named senior corporate officials as defendants in addition to the company. The following are examples of actions brought against the firm where one or more senior executives were named as defendants:

- American Shipbuilding Company—George M. Steinbrenner, III, CEO;
- Minnesota Mining & Manufacturing—Harry Heltzer, CEO; Irwin Hansen, Director and former vice president; Bert Cross, former Chairman of the board;
- Phillips Petroleum—William Keeler, former Chairman of the Board of Directors and CEO; John Houchin, former president and chairman of the board; William Martin, Chairman of the Board and CEO; Carstens Slack, vice president;
- Gulf Oil Corporation—Claude Wilde, Jr. former vice president; and
- Northrop Corporation—Thomas Jones, President and CEO; James Allen Director and former vice president.

The naming of the executives was consistent with the overall approach of these cases. Each action centered on the notion that corporate officials were the stewards of shareholder funds. In that capacity they had an obligation to account to the shareholders whose money they utilized, and tell them how their funds were used.[31]

The remedies in these cases were driven by Director Sporkin's vision of what the cases were about: I "always tried to look at how to create something for the overall good; to create something with a purpose. The purpose was if we could get all companies to have honest books and records and what not that would be a good purpose," the Director later noted.[32] Thus the consent decrees typically included an injunction based on the Sections of the securities laws cited in the complaint. The injunction was implemented and given meaning through a series of court ordered undertakings which were carefully crafted to ensure that shareholders were informed how their funds were being utilized to strengthen corporate governance. Typically a special board committee would be created, chaired by independent director since many firms did not have an audit committee. A report would be prepared under the direction of the committee with the assistance of outside counsel and the auditors. That report would be filed with the SEC and distributed to the board of directors. It would contain recommendations for improving corporate governance systems. Those recommendations would be implemented by the company as ordered by the court.[33]

The reports generated in these actions served as models for other companies and the future. One of the most comprehensive was that of Gulf Oil.

- The report was prepared by a special committee headed by John J. McCoy, Esq;
- The nearly 300 page report was supported by six appendices;

- It analyzed more than $12 million of corporate funds for payments to government officials in the U.S. and overseas;
- The report detailed the responsibility of corporate management for years of misusing funds;
- It contained recommendations to avoid the reoccurrence of the improper conduct; and
- Following the completion of the report the independent directors on the Gulf board replaced senior management.

The reports prepared in other cases were similar. The specific recommendations were tailored in those reports to the facts and circumstances at the company. They included revisions to corporate policies and procedures, requirements that restitution be made by those involved and directives that employees be discharged.[34] In each instance the focus was on using the equitable powers of the court—the SEC did not have the authority to impose fines and did not seek disgorgement—to "make sure things went well" according to Director Sporkin.[35]

The approach to remedies centered on halting violations and preventing a reoccurrence of wrongful conduct. A central point was the impact on long-term corporate practice and governance. In this regard what two SEC officials stated at the time regarding the Gulf report applies equally to the significance of the program: "Long after the present furor in reaction to overseas corporate payments has passed, the Gulf report will survive as an invaluable resource tool providing a revealing portrayal of the operations of a major company, the evolution of ethical practices in business, and as a model for remedial action in the future."[36]

IV. The Volunteer Program

The corporate payments and the SEC investigations and actions garnered significant publicity, spurring controversy that continues today. Congress initiated hearings that went on for the next two years. In corporate and business circles in the U.S. and abroad there were discussions on topics which ranged from the propriety of the payments to the authority of the SEC to bring the actions.[37]

As the contours of the problem emerged, it became apparent that a new approach was required. SEC Commissioner Philip Loomis, testifying before the Subcommittee on International Economic Policy, the House of Representative Committee on International Relations, suggested that corporations potentially facing a difficulty could have discussions with the SEC staff about the issue.[38] Commissioner Loomis' suggestion grew into a program crafted by the Directors of the SEC's Divisions of Enforcement, Stanley Sporkin, and Corporation Finance, Alan Levenson. It was called the Volunteer Program.

The program called for corporations that had made questionable payments to self-report to the SEC. Modeled on the early enforcement cases and settlements, it required that the company take a series of steps to resolve the situation voluntarily rather than be subjected to an SEC investigation. Those included:

- *Investigation:* A careful, in-depth investigation into the facts surrounding the questionable or illegal payments had to be conducted. A committee of the board of directors would supervise the investigation. Members of the committee could not be officers or involved in the activity. The committee should seek the assistance of the outside auditors and retain outside counsel.
- *Scope of the inquiry:* The investigation should cover the prior five years since that is the period reflected in the financial statements. Periods prior to that time should also be reviewed if the activities appear to be part of continuing actions or related to those within the period.
- *Report:* A report should be prepared by the committee at the conclusion of the inquiry and submitted to the full board of directors. That report should contain detailed information about each payment, its purpose and amount, the recipient and the country where it was made along with the surrounding circumstances.
- *SEC Staff access:* The SEC staff was required to have access to the report and its underlying documentation. The materials would be subject to the Freedom of Information Act.[39]
- *Adoption of policies:* The board of directors should issue an appropriate policy statement regarding questionable or illegal payments. It should typically include a statement that the activities have ceased. The adoption of such a policy should be communicated to appropriate corporate personnel and implemented by adequate internal controls and safe guards.
- *Filing:* At the conclusion of the investigation a final report of material facts had to be filed with the Commission, generally on Form 8-K. That filing should include a discussion of the inquiry and a commitment to complete it if necessary; an undertaking by the company regarding the termination of the payments; and a detailed discussion of the transactions.[40]

The program did not offer issuers or those involved immunity from prosecution, or even promise "cooperation credit." It did not require the company to consult with the SEC staff. It was an effort to spur corporate self-governance since the illicit or questionable payment cases graphically illuminated serious corporate self-governance issues. As then Chairman Roderick Hills stated at the time:

It is apparent that our system of corporate self-regulation policed by in-

dependent auditors, directors and counsel and ultimately enforced by the SEC has broken down. Hundreds of millions of dollars have been siphoned out of corporate cash flow and spent out of slush funds with the knowledge of some members of top corporate management but without the knowledge of the outside directors, outside auditors and stockholders. No matter that it is only a score or so out of thousands, some are among the biggest and the most audited corporations in the world. If they can do it, who can't?"[41]

The Volunteer Program was a step toward repairing and strengthening corporate self-governance under the supervision of the board of directors and its independent directors and outside auditors and counsel. It also had certain pragmatic aspects: "The voluntary program offers advantages to both the company and the Commission. It enables the company to conduct its own investigation without the involvement of the staff of the Commission, which would tend to tie up the company's personnel and disrupt its business. From the Commission's point of view, the program permits a substantial number of companies to be examined without cutting into the availability of the Commission's limited staff for other enforcement work.[42]

The program was a huge success. Overall about 450 corporations stepped forward, conducted comprehensive internal investigations, remediated the issues and provided their findings to the SEC staff and shareholders.[43] Within months of its announcement, nearly 100 companies joined the program. A wide variety of corporate conduct was uncovered. As SEC Chairman Hills stated in analyzing the early returns for the program in May 1976: "The revelations are of a wide variety. Some corporations have disclosed annual payments of millions of dollars. Others indicate that they made far smaller payments. Some payments were clearly designed to cause illegal actions by government or business officials, but some were to persuade persons to do jobs they were supposed to do without 'tips.' Some were authorized, or at least known of, by top corporate officials who deliberately permitted corporate books to be distorted in order to deceive outside directors, lawyers, and accountants and shareholders; others were carried out by low-level officials, either in violation of general corporate policy or under corporate procedures that carelessly permitted the practices to continue to grow."[44]

The SEC report to Congress shed additional light on the kinds of conduct uncovered as the program unfolded:

- The two largest identifiable groups of companies that self-reported were drug manufacturers and those in the petroleum refining and related services business;
- The most common transactions were payments to foreign officials;
- A significant number of companies reported that at least some

member of corporate management had knowledge of the transactions;

- Most reported the falsification of corporate records or the maintenance of records that appear to be inadequate; and
- Many of the defects in the financial systems represented intentional efforts to conceal the activity.[45]

V. The Congressional Debates

The revelations from the Watergate hearings and the Commission's investigations and enforcement actions sparked two years of Congressional hearings. Those revelations also spawned a widespread debate in the United States and abroad regarding the corporate conduct, the Commission's actions and what, if anything, should be done.

In some quarters the revelations engendered reform efforts. "In the business community many companies initiated reform efforts, separate and apart from those organizations involved in the volunteer program. In a number of instances the disclosures "prompted outside directors to increase their involvement in and knowledge of corporate affairs. In many cases, these outside directors reportedly have been instrumental in initiating internal investigations and requiring more stringent auditing controls."[46] The boards of directors at many companies issued orders directing that the kind of conduct identified in the Commission's cases be halted.[47] Many companies adopted or reformed their corporate code of conduct. Many of those policies prohibit the use of corporate funds or assets for unlawful or improper purposes. A number of firms also included provisions regarding the documentation of payments. The new or revised policies were typically distributed to employees.[48]

The accounting profession also instituted reforms keyed to the type of conduct identified in the SEC's actions. Many firms digested the Commission's cases and related news articles, distributing the material throughout the firm. The major accounting firms instituted a series of specific steps which included: 1) Establishing procedures to ensure that information relating to questionable payments is brought to the attention of senior personnel; 2) Establishing policies to assure that questionable or sensitive transactions are brought to the attention of the board of directors, preferably the audit committee; 3) Preparing educational materials for clients which encourage the adoption of policies relating to ethics in business transactions; 4) Adopting policies that encouraged clients to voluntarily disclose information regarding questionable payments to the Commission; 5) Extending audit procedures in appropriate circumstances; and 6) Modifying representation letters to include statements about questionable or illegal payments.[49]

The Auditing Standards Executive Committee of the American

Institute of Certified Public Accountants also considered reform and the SEC urged the Exchanges to consider new listing requirements. The former prepared an exposure draft on "Illegal Acts by Clients."[50] As to the latter, SEC Chairman Roderick Hills wrote a letter to the Chairman of the New York Stock Exchange suggesting that the Exchange consider adopting a requirement that firms have an audit committee composed of independent directors as part of its listing standards. The Commission had been seeking to have boards establish an audit committee composed of independent directors since 1940.[51]

Many were highly critical of the actions taken by the Commission. Some thought the cases should not have been brought. Others claimed that the sums involved were not material. Still others argued that since many of the transactions took place in foreign countries the issue was one of local law in the particular country. Then SEC Chairman Roderick Hills summarized many of these points in a speech delivered at Yale Law School in 1976:

- One commentator stated that the questionable payments cases were just another experiment doomed to fail, comparing the cases to prohibition: " 'America's unlamented noble experiment with prohibition in the 1920s made more sense than this new crackdown. Back then, the do-good arguments for banning booze worked out as a bonanza for crime, corruption, and conspiracy. Now the SEC's new experiment in righteousness is about to backfire too. It will register more laughter abroad than sales. Washington's cleanup code for corporations under pressure to pay off abroad is reducing America to a role of 'a pitiful, helpless giant' . . .' "
- Another comment from a distinguished Washington lawyer and former SEC staff member noted: " 'What function remains for the SEC here? I submit; none. The Commission is plainly out of its ballpark . . .' "
- A state court judge wrote: " 'I read your bureaucratic blurb in the *Wall Street Journal* today (about foreign payment cases). You are out of your mind. Stockholders don't give a good damn.' "[52]

Throughout the Congressional hearings there was a significant debate regarding how to address the question. Opinions ranged from doing nothing to drafting additional disclosure requirements or to criminalizing foreign bribery. The SEC considered its existing authority adequate. At the same time the Commission favored adding additional provisions focused on disclosure and internal controls. The agency did not advocate anti-bribery legislation as the topic was out of its traditional disclosure role and such a provision could be difficult

to enforce. As Director Sporkin later noted: "we were a disclosure agency . . . Our concept was to get the information to the shareholders and let the shareholders make decisions on what they wanted to do."[53] It also sidestepped suggestions that the agency be given authority to bring criminal prosecutions as an unnecessary consideration at the time.

The Commission advanced proposed legislation to strengthen reporting requirements and internal controls. It had three key components: A prohibition against the falsification of corporate accounting records; a prohibition against making false statements to auditors; and a requirement that the company maintain a system of internal accounting controls. A draft bill reflected these points: 1) A proposed new Section 13(b) had two primary subcomponents: a) proposed 13(b)(2)(A) would require that every issuer "make and keep books, records and accounts, which accurately and fairly reflect the transactions and dispositions of the assets of the issuer . . ."; b) A new proposed Section 13(b)(2)(B) would require every issuer to "devise and maintain an adequate system of internal accounting controls sufficient to provide reasonable assurances that . . ." transactions were executed as authorized and in accord with GAAP; 2) A proposed Section 13(b)(3) would make it unlawful to falsify records required to be maintained, for an accounting purpose; and 3) A proposed new Section 13(b)(4) would prohibit the making of false statements to the auditors.[54]

The Business Roundtable stated that it was opposed to the kind of conduct uncovered in the Commission's investigations. At the same time it argued that existing authority was sufficient to deal with the questions. Accordingly, no additional legislation was required.[55] Other commentators thought that the passage of anti-bribery laws would strengthen the position of U.S. corporations doing business abroad who could then resist requests for the payment of bribes and gratuities as illegal.[56]

Departments within the Government took divergent views. The Department of State strongly opposed U.S. corporations making such payments. Such acts could interfere with and weaken U.S. foreign policy.[57] For example, some thought that payments made by Lockheed Corporation in Italy and Japan may well have damaged U.S. relationships. Indeed, in August 1976 the former Prime Minister of Japan was indicted for accepting $1.7 million from Lockheed. The Netherlands was rocked by the Lockheed scandal.[58]

The State Department, however, opposed legislation that would directly prohibit and criminalize such actions when undertaken in foreign countries.[59] The Department also expressed concern that the disclosure of such transactions might make it more difficult for the