NEWS

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C. 20549
(202) 755-4648

HOLD FOR RELEASE: FRIDAY, JUNE 27, 1975, NOON EDT

HOMILY ON THE GLORIES OF RIGHT CONDUCT AND THE WAGES OF SIN

An Address By

Ray Garrett, Jr., Chairman

Securities and Exchange Commission

June 27, 1975

AMERICAN SOCIETY OF CORPORATE SECRETARIES, INC.

The Greenbrier
White Sulphur Springs
West Virginia

There are so many topics of mutual interest today that one is hard put to choose among them. Virtually everything in which the Securities and Exchange Commission is involved has some degree of interest to the members of this Society, so in preparing a talk such as this, the problem is not so much finding a subject as it is settling upon what to exclude.

Our own minds at the Commission naturally tend to be directed to whatever sector is making the most noise from time-to-time, but that does not necessarily result in our concentrating on the matters of greatest significance for the future. For example, we have not been spending much time and talk on the recent revisions in the Form 10-K and our limited intrusion into the annual report to shareholders. That was last year's battle -- except, of course, for the proposals relating to interim reporting, where controversy is still warm and final resolution is still before us.

I was reminded of this two weeks ago when Barron's published an address by its editor, Alan Abelson, describing these changes in annual reporting as the most radical in 40 years. To my delight, if not surprise, Mr. Abelson, after reviewing all the changes and their effects, concluded that they were good. At least I think he did. He said:

> "Quarrel as we may with individual aspects, I think the developing and accelerating reformation in corporate disclosure is a plus.

> * * * Will it make for more equitable or efficient markets? I'm not sure. No, let me be more frank at the risk of being more cynical. I don't believe the bulk of investment decisions will be made any differently in the future than they have been in the past. Does that mean that more disclosure and more accurate accounting are worthless? No, I don't think so. If most investors won't be benefited, more will.
>
> Will it prevent another Equity Funding? I really don't think so. Never underestimate the ingenuity of a scoundrel."

By the time Mr. Abelson is finished, one is never quite certain whether he has been complimented or taken in. So it is with some hesitancy that I state publicly that I think Mr. Abelson was saying something nice about the Commission. Inasmuch as this is not a daily, or weekly, occurrence, I treasure the thought and hope not to be disabused.

On the other hand, we are not hearing many nice things about our release proposing new rules governing forecasts of earnings. Events have been moving so fast, and memories have become so short, that we are being widely accused of seeking to halt all forecasts while masking this sinister goal behind elaborate verbiage which pretends to have something permissive about it. This dark suspicion is troublesome for at least two reasons. First, it suggests either that we do not know how to say what we mean or that we are exceedingly sneaky. Second, it ignores the history of our adventures in this field.

As all of you surely know, generally speaking, earnings forecasts have not been accepted in formal material filed with the Commission. While recognizing that most investors value most securities, especially equity securities, in terms of future earnings -- or at least give substantial weight thereto -- the classical SEC position has been that management forecasts in prospectuses and 10-K's would be given undue credence by investors and would present irresistible temptations to management. In the course of time, however, the idea grew that our classical position was perhaps too strict, that in protecting investors from possibly being misled by the written material, we were depriving them of what should obviously be the most responsible forecast to set against the many informal and often irresponsible forecasts that they frequently hear from others. And, of course, we have observed the British experience with mandatory forecasts reviewed by auditors.

The whole exercise, from the extensive hearings of late 1971, to the Commission's release stating general policy conclusions in April 1972, to the present rule proposals, has been an effort to produce conditions and safeguards that would permit management forecasts in prospectuses and 10-K's. If the rules are successful, they should result in more forecasts of a higher quality rather than less. Now it may be, as I have heard asserted, that our proposed conditions and safeguards are too strict and tricky and that, rather than inviting their use, they will scare management out of any forecasting and maybe out of any conversations with any analysts or financial reporters. If this is the case, then we have missed our target.

We will study the comments with care. If it looks like we are just making everybody mad without making any real progress in giving investors more helpful information, we may just junk the whole project, as some in our own ranks would prefer to do anyway, or, more likely, make substantial revisions to our proposals. But I hope you ladies and gentlemen, who customarily follow these matters with more care and composure than do some other people, will at least remember what we are trying to do and not harbor any suspicions of secret purposes on our part.

One area of abiding interest to you as well as ourselves is that of disclosure of share ownership. This subject has attracted widespread attention from various quarters for various reasons. There are now proposals on this subject in pending bills in the Congress which are inspired by fear of foreign control of domestic companies and combine measures seeking more disclosure of foreign ownership with measures to screen or simply forbid foreign control, either of any publicly-owned company or of companies in specified industries that seem especially sensitive.

The Administration has consistently opposed any screening or further prohibitions at this time on the ground that no danger has been demonstrated that would justify the disruptive

internationsl consequences of the United States adopting such a protectionist policy. We have thought it none of our proper business to have a position on this aspect. Disclosure of ownership, on the other hand, is clearly in our neighborhood, and we have taken positions on such proposals.

The bill that has made the most progress thus far is S. 425, submitted by Senator Williams, of New Jersey, which has now been submitted in revised form after hearings last winter. In its ownership disclosure provisions, S. 425 goes all the way. Every record owner who holds for the benefit of another must report to the company the name, nationality and address of the beneficial owner or owners at least annually. The company, in turn, must file with the Commission such of this information as we prescribe by rule.

In one sense, such a provision is a corporate secretary's dream, permitting for the first time direct mailing to all persons holding power to vote or dispose of securities. But it also has some qualities -- with respect to the sheer volume and scope of persons encompassed within its broad and sweeping terms -- that led us, in our testimony on the bill, to highlight some significant problems we think it would create. The burden it would impose on all persons to report all shares held beneficially

seems far to exceed any public benefits, and could constitute a formidable attack on personal privacy. Properly computerized and programmed it would make possible the reconstruction of every individual portfolio, at least that portion held in publicly-traded stocks.

Nevertheless, we think there is some legitimate demand for something more in the disclosure of stock ownership, including, but not limited to, the identification of foreign ownership, which is S. 425's major concern. We held our own hearings on this and related matters earlier, last winter, and developed some concepts toward increasing available information, without too much trouble and expense, that seem promising.

Defining beneficial ownership for this purpose as the power to direct the voting or disposition of shares, it would seem quite enough if beneficial ownership had to be reported only when it exceeded some small percentage of the outstanding shares, smaller than 5 percent -- possibly one percent. The theory would be that any persons who wished to preserve the privacy of his holdings could do so by staying below that percentage. Otherwise public interest overrides private interest.

To test this out, we called on your Securities Committee for some statistical assistance. After an informal conference, they produced a random sampling of twenty-two of your members, ranging from the very large to the more modest. The results were interesting. In no case was the company aware

of more than eighteen persons with beneficial interests exceeding one percent. Because the Joint report of the Subcommittees on Intergovernmental Relations and on Budgeting, Management and Expenditures, of the Senate Committee on Government Operations, at the urging of Senators Metcalf and Muskie, recommended that all agencies requiring the reporting of stock ownership specify the largest 30 record holdings, your Committee took a look at those figures too, and found that, from its sampling, the 30th record holder was frequently down to a small fraction of one percent, which leads us to conclude that the reporting of the top 30 should be tempered by a de minimis percentage exclusion.

As we reflected on this sampling, I observed that it did not seem unreasonably burdensome to report such small numbers. To which one of your committee members replied that, while it might not be too burdensome, it also would not be very informative. To which I rejoined that the negative information might be more important than the affirmative. Today, it might be worth some effort merely to demonstrate the absence of hidden concentrations and interlocks in corporate share ownership, if that is the fact.

We have also struggled with the questions of where the burden should lie and what to do about foreign fiduciaries, especially those with local secrecy laws. On the former question, we rather think the duty should be on the beneficial owner to report, as it is now, but also on the company to inquire, and upon the fiduciary to respond. As to the latter,

Senator Williams's bill provides for the suspension of the right to vote shares, by court order, for noncompliance by a fiduciary. Some persons have advised us that foreign investors generally care so little about voting that disenfranchisement would be inadequate inducement. The forced sale of securities as a remedy, also provided by S. 425 should prove more effective as would the impounding of dividends not expressly provided in S. 425, but permissible under its broad terms. These latter remedies would doubtless attract the desired attention but might prove too severe.

If you judged the relative importance of current issues by the intensity of staff concern and the volume of discourse, you would have to conclude that the most burning issue facing the free world in these times is the threatened removal of our Washington headquarters to Buzzards Point, a lonely spot along the north bank of the Anacostia River just west of the new -- and already defunct -- South Capitol Street bridge. Fortunately, everyone in Washington that cares, except the General Services Administration, feels strongly that the proposed site should be preserved for a riverside park. We share that view and welcome all the friendly support we can get to remain in a location convenient, not just to us, but to the tens of thousands of citizens that visit our office every year.

Next in importance, however, is surely the matter of corporate expenditures for illegal or improper purposes. Here, it sometimes seems as though we have punched a tar baby which we cannot get free from. Editorially, we have been priased for courageous action that displays the corrupting power of multi-national corporations and offers a means of improving the moral climate of all the world. We have also been accused of blundering into something clearly beyond our responsibilities and threatening the very existence of foreign trade by American companies. As usual, we find that the people who know the least about the subject have the strongest opinions.

Recently, Commissioner Loomis related the story of how we got into this business, the problems we have encountered and foresee, and some of the things we or others might do about them. The statement was prepared as testimony before the House Committee on International Relations, and has been released to the public even though the hearing at which it was to be delivered was postponed. Since I could not improve upon Commissioner Loomis' statement, I will repeat some of his narrative of the background of our involvement in this area:

As a general prosposition, our current involvement may be said to have grown out of the investigations made by the Watergate Special Prosecutor's Office of illegal, and therefore undisclosed, corporate campaign contributions in the 1972 elections. Our staff, observing these proceedings, recognized that the activities disclosed for the first time involved

questions of possible significance to public investors, and that this might have a bearing upon our responsibilities. Accordingly, the Special Prosecutor's Office referred to us information obtained in various of its investigations.

Starting with the leads thus provided, our staff looked into these matters, using a somewhat broader focus. Inquiry into illegal campaign contributions disclosed the falsification of corporate financial statements to disguise or conceal the source and application of corporate funds misused for this purpose. More specifically, they disclosed, in some instances, the existence of secret "slush funds", derived from the creation of expenses for fictitious purposes and disbursed without accountability by corporate executives. In our view, this type of activity necessarily rendered inaccurate the financial statements filed with the Commission.

Such secret funds might be, and were, used for a number of purposes, including, in certain instances, payments abroad. Thus, although some of the Commission's actions did not involve foreign payments, the Commission, in its injunctive actions against Gulf Oil Corporation, Phillips Petroleum Company, Northrop Corporation and Ashland Oil, Inc., has alleged violations in connection with funds distributed in cash overseas.

These latter four cases have alleged only that undisclosed funds were distributed abroad; no specific allegations were contained in the complaints that the funds in question were paid to foreign government officials. I should note, however, as a result of testimony before the Senate Subcommittee on Multinational Corporations, that it is known that funds went to foreign officials in some of these cases; further details should be forthcoming in reports to the courts and to the Commission as required by the consent decrees and the lawsuits we have brought.

The only case to date in which we have made a specific allegation of payments to a foreign government official is our lawsuit against United Brands Company, a case which, by the way, did not result from files sent to this Commission by the Special Prosecutor, but rather, from a routine Commission investigation of the circumstances following the suicide of that company's chief executive officer.

* * *

As I mentioned earlier, in each of these cases, we have proceeded by filing an action in a United States District Court to enjoin violations of the Securities Exchange Act of 1934. In almost all the cases, the defendants have consented to the entry of an injunction, prohibiting future violations of the periodic reporting or other provisions of the Act, and the defendants have

also agreed to the entry of what we call "ancillary" relief. Since some questions have been raised as to why we have proceeded in this way, some further discussion of our enforcement alternatives might be in order.

The remedy of an injunction, which is expressly authorized by Section 21(e) of the Securities Exchange Act, is not only our most effective remedy, but is probably the only suitable one in this type of situation. Upon the entry of an injunction, those encompassed within its terms are barred from future violations of the laws they were charged with violating, and a future occurrence of such unlawful conduct is punishable as a criminal contempt.

While it is true that we could, instead, commence administrative proceedings against the same persons we have sued in court, such an approach would not only likely involve delays, it presumably would produce no more than a Commission order directing the companies to comply with the Act. We do have other remedies in administrative proceedings against publicly held companies, largely centering around our ability to terminate their right to issue or trade securities in interstate commerce, but such a remedy is far more damaging to the shareholders of the company who, after all, are innocent victims of the failure to make full disclosure. As a result, any administrative proceeding we might bring would accomplish no more, and probably

less, than a court order to the effect that the company comply with the law.

We can also recommend the institution of criminal prosecutions against such companies, but that can only be undertaken by the Department of Justice. Certainly, criminal prosecutions could only be viewed as a supplement to, and not as an alternative for, our own civil injunctive actions, since criminal proceedings do not always provide an effective remedy against the corporations involved and might appear to some merely to duplicate the prior work of the Special Prosecutor.

Once we institute a civil enforcement proceeding in a federal district court, if the defendant is willing to consent to the entry of an injunction, and, if appropriate, to additional, or ancillary, relief, there would be no point in trying to insist on litigating the case to a conclusion, nor would the courts view favorably any effort on our part to waste their time in that way. A defendant is entitled to consent to the entry of appropriate relief which satisfies our complaint, without admitting or denying guilt.

More significantly, as I have already indicated, in an injunctive action we can also seek broad ancillary relief.

In the Phillips, Northorp, Ashland and Gulf Oil cases, the Commission sought the appointment of a special master to

-- inquire into and examine the books and records of the subject corporation;

-- render a proper accounting; and

-- submit a report to the court and the shareholders concerning the matters included in the complaint, including the expenditure of corporate funds for unlawful political contributions or other unlawful purposes.

An order was also sought in those cases, as part of the ancillary relief requested, requiring individual defendants to reimburse the corporate defendants for unlawful political contributions and other unlawful purposes. In accepting consent decrees in these actions, which include injunctions against future violations, the Commission has settled for undertakings by the defendants, punishable by contempt, which require corporate actions beyond what the Commission is explicitly authorized, by statute, to seek. The corporate defendants in our lawsuits have, generally, undertaken to establish Special Committees of their Boards of Directors to conduct investigations into the matters alleged in the Commission's complaint and to have these Committees submit a written report of their investigative findings and recommendations to the company's Board of Directors, which must review and implement the report.

It should be noted that the Commission retains the right to seek further relief in these cases if the terms of the injunction or the undertaking have not been

fully complied with or implemented. To date, none of the reports have been submitted by the corporations alleged to have made undisclosed foreign payments. Therefore, the extent of payments to foreign government officials, in these cases, has not yet been definitely established.

These questionable payments by American corporations in foreign countries present a number of difficult problems for us.

For one thing, the exact purpose of such payments is often difficult to determine. It is normal and understandable that American corporations seeking to do business abroad will employ or retain sales agents, business consultants and others who are on the scene and familiar with local ways of doing business. Payments made to such intermediaries are often entirely proper, but may not always be so. Once the money is in the hands of a foreign agent, it may be difficult to determine exactly what he does with it. Of course, suspicions are always raised where large sums are paid for unexplained services and it is hard to determine exactly what the company is receiving for its money.

Thus spoke Commissioner Loomis to the House Committee.

One of the frustrations in this development has been our inability to retain sufficient control over the swift pace of events to enable us to make reasoned judgments regarding precisely what should be disclosed and why. Through consent decrees in several cases we had worked out careful programs for the assembly of data by examining committees to be followed by review and deliberation on the disclosure policies to be applied. Other persons have not been interested in waiting, however, and much detail has been spread on the public record whether or not mandated by the disclosure requirements of the federal securities laws. This makes it somewhat difficult for us to foresee where it will all end in terms of our laws. It may very well end in legislation expressly directed at improper expenditures abroad -- whether in terms of disclosure requirements or flat prohibitions, I cannot say.

Nor can I say whether the expenditures that may be made disclosable or forbidden by legislation will be in terms of illegality under our laws if made in this country -- the present approach as to deductability under the Internal Revenue Code -- or illegality under the laws of the country where made. The State Department has expressed the view that either approach would be resented by many foreign countries. Some countries, at least, regard it as arrogant on our part, rather than helpful, for the United States to presume to protect them from the venality of their own officials. Indeed we have learned that in Central America serious credence is given to the suspicion that our Commission's celebrated concern for

corporate disclosure is a cover story. What we are really doing is substituting for the CIA in trying to topple local governments while that agency's attentions are otherwise occupied -- a misapprehension that would be amusing were it not pitiful.

Let me discuss some features of the disclosure problems that seem clear and some that do not.

First, it is clear that there are a great variety of practices among countries and among companies. It is far too simplistic to say that corruption is a way of life in most foreign countries and that everybody knows that no one can do business abroad without regular bribes, etc. The truth is much more complicated. The game, if one wants to indulge in it, is played differently in different countries and at different times. It evidently also is played differently by different players -- some seeming curiously ready, almost eager, to find reasons to conclude that foreigners are naturally corrupt and that some kind of monkey business is required in order to get anything done; others, willing to do business only on the merits.

Second, the significance of this illegality and immorality is far from clear in all instances. Are we saying that every improper expenditure must be disclosed as such, giving details,

because it is improper regardless of other considerations? We are not saying that. At least we have not said it so far, and I, at least, do not propose that we should ever say it. But one must acknowledge the momentum of logic, the often irresistible trend of collective thinking in this sort of process -- stimulated in the courts by the ingenuity of counsel seeking new grounds of recovery. Stimulated, also, among publicists and others by that institution so strong, if not virulent, today that Bayless Manning, in another context, once dubbed the "purity potlatch." So I would not presume to predict just where this all will end.

Commissioner Sommer, as well as Commissioner Loomis, in a recent talk on this subject, asserted that we are not concerned with corporate morality as such -- just disclosure of material facts. It offends some within our own ranks to make this assertion. How can a government agency with such widespread responsibility for working toward the public interest and the interest of investors disclaim any concern for corporate morality? How, indeed! We have showed an abiding and increasing concern for corporate morality in the treatment of investors, present and potential. We have not shown the same concern for external morality, so to speak -- how the corporation

treats the rest of the world -- unless it is breaking the law in a manner and to a degree that might be expensive for investors, in terms of cost or otherwise. Then, but only then, we have said, investors should know.

Is this enough? One reason for saying it is enough -- and declining to embark on a program to smoke out, and thereby discourage all forms of improper external behavior -- is the enormity of the task. Despite strident accusations to the contrary, we do not regard ourselves as having a mandate to enforce, even indirectly, through compulsory disclosure, all of the world's laws and all of its perceptions of morality and right conduct. Some forbearance not only seems implicit in our governing statutes, but also may be essential to enable us to continue to do a competent job of investor protection.

But the question is asked whether investors should not be protected against, unknowingly, investing in a company whose external behavior is illegal, or at least breaks a law that they happen to feel strongly about, or deviates from their moral code. This is by no means a frivolous question. It is at the heart of the recent proposals of the Natural Resources Defense Council that we require disclosure in 10-K's and registration statements of all deviations from the National Environmental Protection Act and the Equal Employment Opportunity Act. There is no impropriety in my revealing that the

Commission, in the past, has been reluctant to adopt these proposals. It was our declining to do so and the manner in which we declined that led the District Court to hold that we had denied the Council due process, which led to our hearings last spring on those and similar proposals. We have not completed our review of the results of those hearings, nor have we yet received the staff's recommendations, so there remains open at least the possibility that we may in some degree change our position.

If we do, will we have opened the door to further intrusions, conceivably even by the Congress, that our filing 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.

As you can see, if we require disclosure of all violations of laws against bribery or political contributions on the ground that illegal payments are material per se, we may be hard pressed to explain that other illegal corporate acts are not equally material for the same reason. We do not doubt that there are some investors who really care about how

lawfully a company's business is conducted. There undoubtedly are such persons, although they seem to be selective about which violations of which laws they are concerned about, and it sometimes appears that the loudest importunings come not from investors who care about a company's conduct but by persons who care about a company's conduct and become, or assert that they might become, at least nominal investors to achieve standing.

Now, if improper foreign expenditures are not to be regarded as material simply because they are improper, without more, what principles govern the separation of those that are material and those that are not? Is it the method by which payments are made, the size of the payments, the purpose for which they are made, or the hazards to the business for exposure of the payments? It is, I believe, all of these, in different proportions in different situations.

The method may be material in itself, where it takes the form of a well-contrived program by top management to generate substantial funds through false book entries that are converted into cash and thereafter unaccounted for -- so-called laundered money. When hundreds of thousands of dollars are put through this process and thereafter disbursed in cash for shady, if not always clearly illegal, purposes, that seems to us to be

a material deviation from sound accounting practice and therefore should be disclosed, even though the aggregate sums might be small related to revenues, so that if the discrepancy had arisen in some other manner, no particular attention to it would be called for. Phoney book entires and unaccounted for funds are wholly inconsistent with financial integrity. When they are deliberately produced by the conscious policy of top management, or its benign neglect, the problem is serious and investors ought to know about it. This would be true even if the laundered money was in fact disbursed for perfectly proper purposes although we are not likely to see that case. Why have officers carrying around hundreds of thousands of dollars in hundred dollar bills in brief cases, flying the cash back and forth to foreign countries, only to spend it for proper purposes? One might as well mail a check, and book it properly.

Suppose, however, nothing so dramatic is involved. Instead we have the fully-accounted for fix -- fully-accounted for but not separately reported and probably booked in some euphemistically titled account. But the company knows exactly where the money went and why. Or, instead, the substantial sums are paid to some misty figure abroad who charges exorbitant fees and good things happen, but how much of the

money he retains and how much is passed on to whom is the consultant's secret. The company does not know, in part because it does not want to know, thus enjoying the appearance of purity along with the pleasures of sin -- an arrangement not unknown in other contexts.

Should such transactions be separately identified and reported? If so why, unless impropriety alone is sufficient ground? One argument for disclosure is the riskiness of it all, what Robert Burns called the hazard of concealing. Burns was talking about sex -- extramarital sex -- and must have been composing in an uncharacteristic moment of morning-after fear and remorse. The whole verse goes:

> I weigh the quantum of the sin,
> The hazard of concealing.
> But, ach, it hardens all within
> And petrifies the feeling.

On reflection, the verse may have more to say about the circumstance we are considering than first appears, except that the argument I am pursuing does not "weigh the quantum of the sin, the hazard of concealing." That hazard, coupled with the damaging consequences of exposure, may be quite material in evaluating the quality of earnings from the segment of business thus procured or affected.

Is it not material to an investor that a company's profitable business of selling a product in or to another country is obtainable and retainable only by making substantial

clandestine payments to the husband of the niece of the chief of state, which payments, if exposed, would cause the business to cease and massive retaliation to be inflicted?

It seems to me that I would want to know that if I were considering investing in the company, although I might speculate on the specific hazards in the specific country. Graft is evidently more hazardous in some countries than in others. It is also true that present, as against prospective, investors in the company might have a different attitude. They might reasonably say, "Perhaps I would have appreciated this bit of intelligence before I bought any stock, but now that I have it, don't tell me, since you can't tell me without telling all the world and blowing the whole deal."

Is this a point of view that is entitled to respect? Is it reasonable for us to say that you must disclose transactions that would be damaging if disclosed because of the hazard that they might be -- thus guaranteeing the damage the risk of which compels the disclosure in the first phase?

There are thus instances where the requiring of disclosure causes loss to present shareholders for the benefit, so to speak, of prospective shareholders. They open us to the charge that we are precipitating immediate and certain loss to an identifiable group of innocent investors for the sake of conferring uncertain protection to the amorphous universe of potential investors. Certainly, present shareholders who

suffer the loss do not regard us as their friend. It might seem more reasonable for shareholders' displeasure to be directed toward the authors of the hanky-panky, meaning management, but we suffer some of the fate of the messenger of bad news. Unhappily, the consequences of taking a position for protection of present investors, from the public point of view, generally seems worse, because the protection amounts to condonation of concealment which may not work for long anyhow. If we are to preserve faith in the integrity of a continuous disclosure system for our capital markets, the balance must generally, if not in every case, be drawn in favor of prompt disclosure.

This bias in favor of prompt disclosure is reinforced by the lessons of experience leading to the conclusion that the secret will not long be kept inviolate in any event, and as the news begins to get around, the opportunities and temptations for bail-out multiply. Certainly that seems to be the case in the area of improper foreign payments. How long the old situation could have endured had not Watergate and its aftermath caused us to start peeking under the sheets we will never know. I have the strong conviction that something would have attracted public attention to these practices in any event, but whether or not that is so, public attention is there now, and it is not going to go away.

All improper foreign payments, of course, are not big bribes. Many of them are small and in the foreign community where made possibly not really regarded as improper at all.

If the local plant manager in a foreign country has to slip a weekly mordita of modest amount to the postman in order to get regular mail deliveries, or to the customs inspector, the fire inspector or the tax collector, is that something for us to get excited about? In our public statements, individual members of the Commission have said no, at least where these payments conform to custom and usage. Similar payments, at the local level, anyway, are not unknown in the United States. That is certainly my current view, even though there is some difficulty in formulating the rationale for the distinctions implied. Arguably these payments have none of the attributes of the big bribe -- they do not appear to be at all hazardous in some countries -- at least so long as discretion is preserved. As I stated earlier, however, it is difficult to predict what the final position of our law will be.

We are fully aware of the widespread confusion and dismay created by these exposures to which we have contributed. They have, in some instances, shattered individual careers and fortunes, placed heretofore profitable lines of business in jeopardy, disrupted foreign governments, and led to bitter recriminations in many quarters. It has all been a sad thing to watch, and it is not yet over.

We hear the ex post facto complaint of corporate executives -- that they are being singled out for pillorying and worse for doing what seemed in their shareholder's interests according to the rules of the game as actually played. This can be, and is being, overstated. In many cases it seems clear that the participants have not thought that what they were doing was right, however necessary they had persuaded themselves these practices were. When sound policy dictates effective and decisive action, we must proceed even against the executive who succumbs to extortion under severe pressure.

We have been deeply concerned with the affect these revelations have had and may have on our relations with foreign governments, political as well as economic. In an effort to understand this aspect, we have gone to some trouble to consult with other departments of the government. Some businessmen have, no doubt, hoped that State or Defense or Treasury or someone would tell us to sit down and stop rocking the boat. Some others have suspected them of doing so, or trying to, but such is not the case. Instead, we get the strong impression that, while regretting the necessity, as do we, they recognize it and agree that we should proceed.

But we are not happy at the thought of simply more investigations, more consent decrees and more painful exposure without the development of sound policy guidance for American business abroad. We are not certain how this policy will or should be developed. It does not seem properly the sole,

maybe not even the primary province of the SEC.

A number of policy apporaches have been suggested in different quarters. Representatives of the State Department, testifying before the House Committee on International Relations, have suggested the possibility that various nations sit down to develop guidelines to the appropriate conduct of multinational corporations. Mr. Mark Feldman, Deputy Legislative Advisor of the State Department, who did the testifying, suggested that such a code might include a special provision to the effect that foreign investors neither make, nor be solicited to make, payments to government officials or contributions to political parties or candidates. 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.

We could, no doubt, promulgate disclosure guidelines which would require the detailing of these matters for investors. Commissioner Sommer, on the other hand, has suggested that multinational corporations making payments abroad be required to disclose, generically, the existence of such a corporate practice, and perhaps, the extent to which it's engaged in, without specifically identifying who got what. Whether the underlying details could be kept confidential, once their existence is disclosed, is another matter. In the present

atmosphere one must confess to doubts. Alternatively, we could try to distinguish between types of payments -- for example, not requiring disclosure of payments made merely to expedite action government officials otherwise would be required to take, but requiring disclosure of all or most payments designed to get foreign officials to take action improper, or that they otherwise would not take. Even this approach has some inherent and rather obvious analytical deficiencies.

On balance, I do not think we can escape from the fact that American businesses desparately need guidance in the conduct of their business overseas. Those companies that might not otherwise want to make improper payments abroad feel compelled to do so by virtue of competitive pressures that I think Commissioner Evans would describe as the pressure to succumb to the lowest common denominator of corporate behavior.

The alarm and despondency spread by these developments is not, of course, limited to company management. The public accounting profession feels caught in the middle and peculiarly exposed. After discussions with some leaders in that profession, we are seriously considering engaging in a joint effort, probably through an accounting series release, to provide auditors with some guidance in rendering opinions on published financial reports. The auditor's responsibility cannot be considered wholly apart from that of the company itself, but it does have some separate aspects, and they are certainly entitled to some understanding of what is expected of them.

While this whole business ultimately may be something for the Congress to decide, as some have suggested, I am inclined to believe that the most immediate and most effective resolution of the problem can best come from American companies themselves. For only if American companies communicate with each other, and attempt to articulate a commonly agreeable standard, in full recognition and understanding of the competitive pressures they commonly face, can a workable solution evolve without the hazard of placing those firms who seek to conduct themselves in an upright manner at a competitive disadvantage.

The establishment of some collective understanding, in my view, is desirable, whether or not legislation is ever enacted in this area, since such an understanding could appropriately form the basis for any legislative resolution of the problems we have been discussing this morning. If that seems as if the Commission is passing the buck, I think that is a misimpression. We can attempt to set guidelines, but in the end I suspect we will all be less than satisfied with the product of our efforts, unless they are predicated upon actual business experience after consultation with those who have that experience. We can make our offices available to sit down and talk over matters concerning, doing business abroad. In the long run that is where the solution must come from, since that is where the problem originated. I expect, shortly, to see whether such conversations can be

begun. We welcome suggestions in that direction. In the meantime, however, lest there be any doubt as to the official American policy:

> "Illicit contributions and their disclosure can adversely affect governments, unfairly tarnish the reputation of responsible American businessmen, and make it more difficult for the United States Government to assist U.S. firms in the lawful pursuit of their legitimate business interests abroad."

So said Mr. Feldman on behalf of the Department of State, and we heartily concur.