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Under normal circumstances, a law enforcement agency that finds some 90 large companies making hundreds of millions of dollars of illegal or questionable payments, that successfully prosecutes actions against nearly a dozen companies for violations of federal law, that causes restitution of millions of dollars to the shareholders, and that causes scores of other major companies to institute codes of good conduct would expect a certain amount of praise.

But let me read a bit of our fan mail.

Eliot Janeway says:

> "America's unlamented noble experiment with prohibition in the 1920's 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' -- not in world affairs, as Nixon threatened, but in world markets. There's no way to compete for foreign business without being prepared to pay off to get it."

And from a distinguished Washington lawyer and former SEC staff member:

> "What function remains for the SEC here? I submit; none. The Commission is plainly out of its ballpark. It is operating in an area where others have great competence, and where it does <u>not</u> have great competence (emphasis added)."

And finally, a more graphic comment that came to me in a recent letter from a State Circuit Judge:

> "I read your bureaucratic blurb in the <u>Wall Street Journal</u> today (about foreign payments). You are out of your mind. Stockholders don't give a good damn."

And, of course, he could have cited some footnote in support. One large multinational corporation that had disclosed some questionable payments conducted a

stockholder vote to determine whether it should disclose all foreign and political contributions. 99% of the stockholders voted no -- they didn't want to see it.

It keeps us in balance; however, it is clear that many others make it quite clear that we are not doing anywhere near enough.

Congressional leaders and public commentators have proposed brand new laws:

> A Senate bill would make it a federal crime for any publicly-held corporation to violate the laws of any foreign county;
>
> Other proposals would provide federal rather than state charters for our large corporations;
>
> or
>
> Others would require appointment of public directors on private company boards to protect the public interests rather than those of the stockholders.

The SEC has in a sense been a unifying force for these conflicting views. Whether they think we have done too much or too little, they all agree that we have caused too much confusion. Everyone now wants guidelines.

But it has always been hard to be on the right side of the bribery issue.

Some 20 years ago, I was detailed from the law firm for which I then worked to serve as Acting Counsel for a new public transit authority created after the city's purchase of two private bus lines. My job was to approve each check until a new set of guidelines could be written.

Within two weeks I had a call from a state legislator who demanded his "regular" check (he had learned that I had disapproved a check made out to him). I said that a public authority could not make the same political contributions that the private companies had made before.

He snapped back incredulously:

> "You read your books again, sonny. The law may say you don't have to pay taxes anymore. But you still have to pay us."

Such marvelous training this was for my experience at the SEC, where disclosures of improper and illegal payments have poured forth almost daily.

Probably no single topic has consumed more of my attention or energy since coming to the Securities and Exchange Commission than the question of our treatment of questionable, improper, or illegal corporate payments. One would think that, with all this energy and attention devoted to the subject. I would by now be in a position to set forth to you with lawyer-like precision and clarity my position and the Commission's position in this area. Unfortunately, that is not the case. As the debate continues, the issues and solutions tend to become ever more clouded. And as we proceed down our murky trail, several basic questions rise repeatedly:

> Have we uncovered a growing cancer at the core of American business that must be removed with extensive government action, no matter what the cost;
>
> or are we naively depriving American corporations of the capacity to do business abroad?

And just to complicate things a bit more:

> Is it really any of the SEC's business anyway?

WHAT HAVE WE FOUND?

The facts to date can be expressed in simple terms. Nearly 100 publicly-owned companies have voluntarily or involuntarily made disclosures relating to foreign or domestic corporate payments and practices of a questionable nature. The total sales of these companies easily exceed $200 billion.

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. Some are questionable only because the company is not sure how a foreign business representative has been spending his otherwise legitimate sales commissions. Some were understandable reactions to low or high level extortion, and others intentional and vulgar examples of corporate arrogance. Some result from a careless disregard for elementary standards of responsibility and others were the result of boyish intrigue with the lure of mysterious and supposedly potent foreign agents.

Our staff currently is preparing a report detailing the practices that have been publicly-disclosed in filings made to the Commission for submission to Congress to assist in its consideration of the issue. This survey which will cover filings made with us until about mid-April, probably will show something along the following lines:

-- about 90 corporations will have made disclosures concerning questionable foreign and domestic payments and practices.

-- substantially all of that number will have declared their intention to stop past practices and will have adopted codes of conduct to that end, or will have instructed their officials and independent auditors to adopt practices that effectively stop them.

To date five companies have indicated a continuing problem.

-- one large dollar company which made small payments totalling about $80,000 annually to military personnel to guard remote plants and personnel, indicates that it plans to continue them. It plans to encourage the foreign government to establish formal procedures for these payments, however.

-- another small company made payments of about $125,000 over a five-year period in order to obtain permission to install and continue to operate equipment. The estimated revenues from the operation of this equipment is estimated to be approximately $2,000,000 -- slightly more than 1% of its annual revenues for the last year. The company thinks these kinds of payments are customary in that country, and it plans to continue them when no reasonable alternative exists.

-- a third declared its policy to be against such payments but acknowledged that it might make them if they saw no alternative and if each payment is approved by the chief executive officer. In any such case, the company promised generic disclosure to its shareholders.

-- a fourth similarly declared its opposition to such practices but said it would settle tax and custom claims of an unreasonable nature by such payments if there was no alternative and if the payment is approved by the President.

HAVE WE FOUND IT ALL?

Since over 7,500 companies file with the Commission, it is safe to say there will be more to come as the year continues, but is is also safe to say that we probably have uncovered a good measure of the problem. Obviously, some companies have revealed their problems in greater depth than others. Some have made no disclosures and probably will continue to chance it. They may stop future payments but we may never find out about their past. And, of course, we expect that some corporations will attempt to continue their practices and conceal them from some members of top management and the board of directors, and from their independent auditors and us as well.

WHAT GOOD HAVE WE DONE?

There has, of course, been a remarkable change. We can assert with some assurance and only minor exceptions to date, that the companies reporting questionable and illegal payments have taken effective action to stop them. Most have completed investigation of their past actions and have installed workable guidelines to prevent repetition.

The major accounting firms now make greater efforts to verify the accuracy of books and records and to call questionable practices to the attention of top management and the board of directors.

Independent directors now recognize far better their obligations. They surely know that they have, in effect, an affirmative obligation to question both management and outside auditors on the matter of questionable payments.

I think that we also have engendered an increasing recognition in the business community that the actions of some have tainted them all, and that American business now must take effective steps to put its house in order and persuade the world it has done so.

And the business community surely must know by now that the Commission's Enforcement Division has the capacity and the will to test the accuracy and adequacy of corporate disclosures from time to time and from company to company in a manner that will give us assurance that they are sufficient.

WHAT DOES IT TELL US ABOUT AMERICAN BUSINESS?

Here it is important to stress the differences. To lump all payments, big and small, into a universal condemnation of American business is a facile deception and to attempt to deal with them all under a single law or procedure would indeed be naive.

Of the thousands of publicly traded companies, fewer than 100 have admitted questionable payments, and fewer than 20 of that number revealed very large lump sum payments in the nature of bribes to get new business.

As uncomfortable as it is to talk of degrees of impropriety, who does not see the distinction between the bribery of a government official to secure a large government contract that would otherwise have gone to a competitor and a payment to an official to make him do what he is supposed to do without it. Compare, for example, an airplane manufacturer that pays millions to get a contract away from a competing American manufacturer, with an importer who pays thousands of dollars to persuade the local police to guard warehouses, and to get port officials to permit its goods to be shipped out. Compare the bribe of a chief of state to change the country's tax laws with systematic political contributions that are entirely legal in the country where made.

Taken as a whole, these incidents have not revealed some new low of corporate morality. Kickbacks, embezzlement and large gratuities have been some part of the commercial scene for centuries. Indeed a thoughtful analysis may well indicate that there has been, since the turn of the century the quality and morality of corporate management.

There is a passage in Gore Vidal's new book, "1876" where Charlie Schyler, who returned to America in 1875 from a 38-year European exile to write about the scandals of the Grant Administration, talks to his daughter, a French Princess, about small bribes taken by a government official. The Princess asks:

> "Why is it so wrong to take money in this way? Who is hurt?"

Charlie replied:

> "It's not the gifts. It's what (the official) does in exchange. Like trying to obstruct the Courts of Justice."
>
> "But in Europe everyone steals", says Emma.
>
> "But we are not Europeans. We are protestants and believe in God and in the absolute necessity of being good", responds Charlie.

"I shall never be an American" is Emma's victorious rejoinder.

WHAT IS THE PROBLEM?

But we are Americans, and, moreover, lawyers who have an insatiable need to define problems in a way that they can be solved. And there is in fact a problem presented us of awesome potential.

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

This, then, must be our primary focus. To restore the efficacy and integrity of the existing system. Until this is accomplished, we cannot ignore proposals for drastic change in the system.

ANALYSIS OF THE PROBLEM

Many distinctions are important in constructing solutions to some of the problems I have identified:

-- there is a huge body of foreign laws and practices that intentionally or unintentionally are violated each year. Currency regulations, tax laws, and local practices of all kinds are puzzled over each year by lawyers and accountants. Surely we have witnessed enough confusion over 40 years about such foreign problems as to leave them out of this one.

-- then there are the so-called grease payments, a form of low-level extortion, to get officials to do what they are supposed to do anyway.

Such payments were involved in the four companies I mentioned earlier that have

indicated that they may have to continue to make payments in the future. Such cases present problems as to what kind of disclosure is proper and as to whether the accounting is proper. They may also provide some split votes in the SEC, but dealing with them offers no problem of national moment. Given our practices to date, it is obvious we are not bringing our foreign commerce to a halt.

-- and we frequently are presented cases of the ambiguous commission payment. The problem is how to tell whether what looks like a legitimate commission might in fact be a disguised bribe for a foreign official. No doubt these will provide questions that lawyers can debate. We can adopt the famous Justice Stewart standard for pornography: "You'll know it when you see it." If corporate books and records are adequately maintained, and if companies properly monitor their practices, corporate presidents "will know them when they give them."

-- there will also be a few cases of genuine extortion for personal threats or major property damage. These present tragic but not unique problems. I doubt whether they are susceptible to legislative solution.

So we are presented with the help of a little conceptual categorization, with the problem of the real bribe to get major business contracts.

The issue, so stated, is not whether the SEC is competent to deal with it, but rather and simply, will we as a nation permit such conduct. Is that Circuit Judge correct? Are we, as Mr. Janeway says, "sermonizing our way ot of the export markets"? Are we engaged in a foolish self-flagellation when the world needs a strong American industry? Is Pat Buchanan right when he claimed in a recent column that Lockheed had to give bribes to get business. He said Lockheed was being shaken down. He explains all this bribery very simply with the quaint phrase "no tickee, no laundry."

But the complaint we filed against Lockheed alleges a far different case:

-- $75,000 established in a secret off-book fund;

-- $200 million spent without adequate records to assure that the purported recipient was the actual recipient. We charge that $25 million of that sum was given in secret payments to government officials to get business rather than for the purposes stated on Lockheed's books.

Lockheed has settled the case without admitting these allegations, but the report that they have agreed to provide the Commission and the Court will, within a reasonable time, provide us an answer to the accuracy of these charges and other matters. Until that time, they remain only allegations, but they certainly present a far different picture than that portrayed by Mr. Buchanan.

The point is that in this and some other cases

1) The outside directors say they didn't know about it.

2) The auditors say they were unaware of these practices as they were going on.

3) The shareholders were not informed of the matter.

4) Top management says they had to do it under the rules of the game.

Surely it is not naive to say that neither shareholder relations or international relations should be left to such undisciplined behavior.

Returning to Mr. Janeway's concern for the strength of American business in the export markets, I submit that those who claim bribery is an essential component to effective competition in foreign markets have not made their case.

Read the remarkable report of the Special Committee of the Gulf Oil Corporation, chaired by John McCloy. After an exhaustive review of Gulf's foreign and domestic payments, it concluded that it could find no good reason for having made them.

Look at the documents of the many companies that have reported their intention to cease improper or illegal foreign payments and further stated that this cessation will have no material impact on their business activities.

Look, too, at the companies that say that they didn't bribe. In the major industries where major bribes are revealed, competitors of equal status say that they have not used major bribes to obtain business abroad.

David Lewis, Chairman of General Dynamics states with some vigor that his company has sold the F-16 aircraft all over the world without resorting to bribery of foreign officials.

> "There were (he says) zero payoffs, there were zero bribes, there were zero offers."

No doubt a major contract will be lost from time to time, but there is no evidence that we are crippling American business. And if those who contend that bribery is essential to compete abroad ever do make their case, I think that a country as powerful as this one will have the resources to deal with the problem.

WHAT MORE CAN BE DONE?

What more can be done effectively to stop the practices and to help the business that may be hurt by a bribing competitor?

I begin my response with the fervent hope that we will not rush for new laws to require our Courts to enforce all the laws of the world, or change the very nature of our corporate structure without first trying to restore the integrity of the system that has served so well.

We too often yield to the concept that we can change the behavioral pattern of centuries with a new law or two.

Before we rush to that judgment, let's examine our present capabilities. We have the tools to finish the job:

The consent judgments secured in most of our litigated cases have required the creation of independent committees to study the details of possible corporate abuse and to report these matters to the shareholders, all under pressure of a Court injunction. The reports have been superb, and this approach provides great assistance to our overworked enforcement staff. Equally important, it establishes a vehicle for providing new and responsible governance to corporations that have engaged in substantial patterns of corporate abuse. Confronted with the facts, responsible management is taking control.

Renewed efforts by the IRS, the Justice Department, the FTC, as well as the selective intensive efforts by our Division of Enforcement will find most of the problems. We are not dealing with millions of taxpayers, rather with a few hundred

corporations, all of which have elaborate accounting procedures that are reviewed by independent auditors.

We are working with the accounting profession to tighten their standards and approaches to this problem. Last week the Accounting Standards Board issued an exposure draft to which, if adopted, would require auditors to report illegal payments to an appropriate level of management -- a clearly expressed responsibility.

I also believe the Commission may suggest legislation that will further assure discovery of these practices. Rules that would:

-- impose a requirement on management to establish a system of internal accounting controls that would reasonably assure that transactions are properly identified and executed only in accordance with management's authorization.

-- require that auditors include in their reports an opinion as to the adequacy of the company's system of internal controls.

-- specifically impose liability on management for making false or misleading statements or for omitting material facts necessary to make the statements made not misleading to an independent accountant conducting an audit of any company registered with the Commission.

But the information will be largely useless if it is not received by a board with sufficient independence from corporate management that may have authorized or permitted questionable payments to fully explore and deal with the problem.

Rather than rush to require public directors, we should first take the final steps to give a truly independent character to the boards of our large corporations. I have suggested informally to the New York Stock Exchange that they change their listing requirements to cause:

-- all of the large listed companies to have an independent audit committee that has full access to all financial information and that meets regularly and privately with the outside auditors.

-- an increase in the number of outside directors on boards generally, perhaps a requirement that a majority of outside and independent directors serve for companies of a certain size.

-- consideration of the advisability of allowing lawyers who provide the independent securities advice to the corporations to sit on the board of directors. Such lawyers are simply not independent of management when they serve the dual function of lawyers and directors. Their presence has a dampening effect on other outside directors who might probe areas where the lawyers give assurances that no problems exist. Other professionals or those that serve on many boards may similarly have lost a truly independent status.

Such action can, and I think will, re-establish the integrity of the system and assure its vitality.

Nor are we helpless in dealing with foreign companies who scorn these morals and bribe to secure contracts from American concerns in foreign countries:

-- over 100 of the largest foreign companies list their stock in this country and must abide by our audit standards. Our rules and our own surveillance will treat them equally.

-- more important, we have the largest, strongest and most competitive business organizations in the world. If they have the will, and are supported by our Government and our capital markets, they can shape responsible business practices elsewhere to a far greater degree than they have.

There is too much evidence already of how the world is in fact reacting to accept the simplistic notion that we are treated with laughter abroad.

Finally, while international codes of conduct can be useful, the better response lies with the dedicated and forceful use of the economic power of this nation to retaliate directly and immediately against any foreign company that takes business away from American business with bribes.

Our State, Treasury, Defense, Commerce and Agriculture Departments have enough collective economic authority to reduce such practices if they do occur. How many large international companies will bribe business away from an American company if they know that the American market is to be cut off from them?

My point is that our Government can do much more to help, and I trust that the White House Task Force chaired by Secretary Richardson will point in that direction.

CONCLUSION

I conclude with a note of cautious optimism. Admittedly, we have discovered a major problem of American business. Admittedly, we have discovered that our system of internal corporate controls have broken down. Repeatedly, facts have come to light that place the reputation of American business in a bad light. But I am hopeful that we are turning the corner.

American corporations are aware that their reputation is at stake. Those that have not engaged in these practices are beginning to speak out. All seem to recognize that effective responses are essential if their ways of business are to be preserved. As the President of the Bank of America, the largest bank in the world, responds:

> "Integrity is not some impractical notion dreamed up by naive do-gooders. Our integrity is the foundation for, the very basis of our ability to do business. If the market economy ever goes under, our favorite villains -- socialist economies and government regulators -- won't be to blame. We will."

And companies that have engaged in some of the practices that have case a shadow on themselves and the entire corporate community are taking steps to see that they do not do so again. The Gulf Oil report concludes with elegant simplicity:

> "The reality is that the long history of illegal corporate practices is effectively at an end."

I therefore am hopeful that this brief but passionate era of corporate history is now in the process of winding to a conclusion. We continue to have the most efficient and innovative business community in the entire world. We continue to benefit from federal regulators whose dedication to the integrity of the business community is unparalleled. Together, we can find the solution.