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ARTICLES

The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its Twentieth Birthday

*Stanley Sporkin**

During a discussion of corporate bribery, former Ambassador Michael Skol asked me whether I knew the name the Germans gave to the payment of a bribe.¹ When I said no, he told me the term is *Schmiergeld*.² In *The Joys of Yiddish*, Leo Rosten supplies definitions for both *Schmiere* and *Geld*. He defines *Geld* as the German word for money.³ He goes on to define *Schmiere* in one of its uses as follows:

* The Honorable Stanley Sporkin, U.S. District Judge for the District of Columbia; former Director of Enforcement, Securities and Exchange Commission; former General Counsel of the Central Intelligence Agency. The author's appreciation is extended to his interns for the summer of 1997, Sumeet Seam, Benjamin Means and Miguel Rodriguez, and to his law clerk, Daniel J. Solove.

¹ Ambassador Michael Skol was a career official with the Department of State. He is now affiliated with Diplomatic Resolutions, Inc.

² Ambassador Skol recently wrote: "Certain nations even make the practice [of bribery] openly — and unapologetically — *tax deductible*. 'Schmiergeld' ('grease money') the Germans call it, and the word even appears as such in their income tax instruction form." Ambassador Michael Skol, *An Ethical Bonanza: The Caldera Convention and the Internationalization of the FCPA*, FED. ETHICS REP. 1 (Aug. 1996).

³ See LEO ROSTEN, *THE JOYS OF YIDDISH* 129 (1968). The Yiddish word *gelt* is derived from the German word *geld*.

To bribe; a bribe. This is the most interesting usage, and has long been part of American slang. It is related to 'greasing the palm.' 'Do the officials expect to be Shmeered there?' There's a saying: 'Az men shmeert nit, fort men nit.' ('If you don't bribe, you don't ride'—or, less literally, 'Without bribery, you get nowhere.')

Somehow *Schmiergeld* has a better ring to it than the word "bribery." Whatever term is used to describe the conduct, the fact is that bribery has been with us since biblical times.

Twenty years ago, the United States unilaterally acted to prohibit the bribery of foreign officials by passing the Foreign Corrupt Practices Act of 1977 ("FCPA").⁵ The FCPA prohibits bribery both directly through its anti-bribery provisions⁶ and indirectly through its accounting requirements. Through its accounting requirements, the FCPA amended the Securities Exchange Act of 1934 by requiring in part that corporations "make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuers."⁷

Many cynics viewed the United States' attempt to ban all forms of corporate bribery as another example of the federal government's taking on the role of Don Quixote and tilting at windmills. While the law may not have been taken seriously when it was first enacted, it is clear that it has assumed a prominent place among our federal criminal laws.⁸ According to a recent article in the *Wall Street Journal*, the FCPA remains "the world's toughest law against foreign bribes."⁹ This article will provide background as to how the law was conceived and will discuss the law's present and future status.

⁴ *Id.* at 353. The Yiddish word *schmeer* is derived from the German word *schmiere*, meaning "grease" or "bribe."

⁵ Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494, as amended by Title V of the Omnibus Trade & Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 5001-03, 102 Stat. 1415, 1415-25 (codified as amended at 15 U.S.C. §§ 78m(b)(2), 78m(b)(3), 78dd-1, 78dd-2, 78ff (1994)). The response from the private sector was so loud that in 1988, Congress amended some of the FCPA's provisions. Among other things, the amendatory legislation made it clear that some ministerial "tips" used to procure administrative acts that the corporation was entitled to by law would not be banned. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b). Even though there had been a broad assault on the law, the supporters of the law were able to, in large part, withstand the attack.

⁶ 15 U.S.C. § 78dd-1.

⁷ 15 U.S.C. § 78m(b)(2)(A).

⁸ For additional background on the FCPA, see A.B. LEVENSON ET AL, CORPORATE COMPLIANCE AND THE FCPA (1997); Adam Fremantle & Sherman Katz, *The Foreign Corrupt Practices Act Amendments of 1988*, 23 INT'L LAW. 755 (1989); Gary Lynch, *Enforcement of the Accounting Provisions of the Foreign Corrupt Practices Act of 1977*, 2 FOREIGN CORRUPT PRAC. ACT REP. 273 (1983) (background material updated by the Securities and Exchange Commission).

⁹ Neil King, Jr., *Momentum Builds for Corporate-Bribery Ban*, WALL ST. J., Sept. 23, 1997, at A16.

I. HOW IT ALL BEGAN

In my forty years as a practicing attorney, there is no accomplishment of which I am more proud than the contribution I made by assisting in the creation of the FCPA. The FCPA was not the creation of some bureaucrat who, without provocation, thought that this was a law that should be on the books. Instead, it came about as a reaction to certain highly questionable activities of many of our international corporations that became public as a result of investigations conducted by the United States Securities and Exchange Commission ("SEC" or "Commission").

Both the SEC investigations and the idea for the FCPA arose out of Congressional testimony at the tail end of the famous Watergate hearings. At the time, I was Director of the SEC's Division of Enforcement. In those days, the Watergate hearings were great television fare. In the evening hours, I followed the daily replays of the hearings very closely. The testimony was absolutely fascinating. To a trial lawyer it was real theater. After all the dynamic revelations concerning the President's relationship to some third-rate burglary, a group of corporate officials testified to the making of political contributions to President Nixon's re-election campaign. The corporate officials offered no great revelations compared to those presented in the testimony of "All the President's Men."

Even though there was relatively little public interest in this phase of the hearings, the committee dutifully explored the issues raised. A number of corporate officials testified about impermissible contributions made by their corporations to President Nixon's re-election campaign. However, the committee made no searching inquiry into the methodology used by the corporations to make the payments.

I found the corporate officers' testimony particularly intriguing. My professional career includes training as an accountant, concluding in my being licensed as a Certified Public Accountant. After hearing the testimony, several accounting questions immediately sprang to my mind: How did a publicly traded corporation record such an illegal transaction? What, if any, information did the outside auditors have?

To satisfy my curiosity, I asked one of my staff members to commence an informal inquiry to determine how the transactions were booked. The answer came back shortly. The political contributions were disguised on the contributing corporations' books and records. At no time did the books and records disclose that an illegal political contribution had been made. This was not an oversight; it was the product of careful planning by top corporate officials who painstakingly designed the methodology used to record the transactions. In one case, the corporation obtained the money by setting up two foreign subsidiaries. When top officials were questioned as to why they used this method, they responded that by capitalizing the payment, they would not run afoul of the income tax laws because no deduction would be taken for the payment. In addition, they believed that by keeping the capitalization small, they would not meet the materiality stan-

standard for financial statement disclosure. By going this route, they also hoped to avoid the scrutiny of the corporation's outside auditors who normally would not sample too many small transactions as part of their routine audit procedures.

We discovered that the funds were masked in secret mislabeled accounts, and their use was not confined to illegal political contributions. Indeed, these secret funds were used to make many other forms of illicit payments, including payments of bribes to high officials of foreign governments. At this point, the inquiry was expanded and soon turned into a full-fledged formal SEC investigation.

The results of the investigation were staggering. As reported by the Department of Justice, "over 400 U.S. companies admitted making questionable or illegal payments in excess of \$300 million to foreign government officials, politicians and political parties."¹⁰ This included 117 of the top Fortune 500 corporations.¹¹

The caseload mounted. We uncovered enough evidence to initiate formal actions against some of the nation's most prestigious corporations.¹² The SEC was literally overrun with these cases, and its meager resources were tapped to the utmost. A creative solution became absolutely necessary.

The SEC's brilliant Chairman, Ray Garrett, and his superb colleagues (Commissioners Irving M. Pollack,¹³ John R. Evans, A. A. Sommer, Jr. and Philip A. Loomis, Jr.) tasked the Division of Corporation Finance's outstanding Director Alan Levenson and me to carefully review the findings of the probe in order to see if there were some way the SEC could bring appropriate closure to it.

The solution that we developed was inspired by the spirit of the federal securities laws. The securities laws have long been a model for appropriate government regulation. They are largely statutes that mandate transparency. Full and fair disclosure is the general concept underpinning these laws. As part of its administration of the federal securities laws, the SEC relies heavily on voluntary private sector compliance. Thus, instead of requiring government auditors to examine the financial reports of public corporations, that responsibility has been delegated to the nation's Certified Public Accountants.

With these concepts in mind, Mr. Levenson, with some input from me and then Commissioner Pollack, came up with the idea of a voluntary dis-

¹⁰ United States Department of Justice, *Foreign Corrupt Practices Act Antibribery Provisions*, in LEVENSON, *supra* note 8, at 131.

¹¹ See H.R. REP. 95-640, at 4 (1977); see also Fremantle & Katz, *supra* note 8, at 755.

¹² S. REP. NO. 95-114, at 1-2 (1977), reprinted in 1977 U.S.C.A.N. 4098, 4099.

¹³ For many years, Irving Pollack was the author's supervisor at the SEC. Mr. Pollack was without peer. If there were a hall of fame for career government workers, Mr. Pollack would be one of the initial inductees.

closure program.¹⁴ A corporation with an illicit payment problem could, in effect, go to a corporate “confessional.” It would be required to publicly disclose the questionable payments it had made. In addition, it would have to agree to commission an independent internal investigation to determine the full nature and extent of its worldwide bribery and other similar questionable activities. It was contemplated that the results would be turned over to the SEC and made public.

As the last part of the program, the corporation would have to assure the Commission that appropriate steps had been taken to insure that such activities did not recur. Because we did not know whether the so-called private investigation would have the requisite integrity and objectivity, the Commission reserved the right to bring formal action. The corporate community was informally assured, but not promised, that if all went well, no Commission action would be brought against a voluntarily complying corporation.¹⁵

To put it mildly, the program was a huge success. According to the Department of Justice, over 400 corporations took part in the program.¹⁶ Because the SEC’s overall enforcement program had been so successful in this and in certain other programs, we were occasionally called upon by other government agencies to explain our success.

A visit to one agency was quite interesting. I learned that before taking action against the deleterious activities of those it regulated, this other agency would make a broad public announcement about its planned undertaking, usually based on only the most limited amount of anecdotal information. As soon as the announcement was made, those in the targeted areas, the complying as well as the non-complying constituencies, would mount a vigorous campaign to thwart the agency’s action. With skilled public relations firms and the able Washington bar, an all-out assault would be made against the agency from Pennsylvania Avenue to the Capitol.

In contrast, the SEC generally followed a strategy of determining the facts before it announced a broad ranging program. As the SEC brought case after case, it was difficult for the corporate community to mount a successful counter-attack. Our political leaders could not afford to take up the cudgels for a would-be law violator.

Indeed, in the case of the SEC’s questionable payments program, Congress specifically came to the Commission’s assistance. One of this country’s great national treasures is former Senator William Proxmire of

¹⁴ The Program was well received by the Commission, and its members provided helpful suggestions.

¹⁵ See SECURITIES AND EXCHANGE COMMISSION, REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 13-17 (1976).

¹⁶ *Foreign Corrupt Practices Act Antibribery Provisions*, *supra* note 10, at 131. It is my recollection that the number of “volunteers” might have exceeded 600, with the number of formal actions being over 60.

Wisconsin. He was so shocked by what the SEC was uncovering that he had his administrative assistant Ken McLain phone me to determine what, if any, legislation could help the SEC to continue to ferret out illicit corporate activities.

When the call came, I was prepared. Bringing to bear both my legal and accounting training, I analyzed the various cases the SEC had brought and came to the conclusion that in no instance was an illicit payment recorded in the corporation's books for what it was. The payments were carefully disguised. For example, a bribe to a government official was often made through an agent. The books and records would merely reflect an "agent's fee." The system of private sector enforcement was thus being subverted. In many instances, the corporation's public accountants were outright lied to or otherwise misled.

Most of all, I was amazed that there was no requirement that publicly traded corporations maintain honest books and records. My research of the various laws did reveal that such a "books and records" requirement was included in the laws governing this nation's financial institutions. It occurred to me that if such a requirement was good enough for this nation's brokerage and banking institutions, why not for its industrial concerns?

I became convinced that what was necessary was a simple law that would require corporations to keep accurate books and records. In my view, a corporation would think twice before it recorded a bribe for what it was. Since bribery is generally considered a crime, it would be virtually untenable for someone to admit in writing that the corporation is engaging in such activities on an ongoing basis. Bribery needs secrecy in order to flourish.¹⁷ Thus, I theorized that requiring the disclosure of all bribes paid would, in effect, foreclose that activity.

When I originally advised the Commission of my view, the members of the Commission decided that there was no need for any new authority because the Commission had been successful under its existing disclosure statutes. However, the Commission's theory had never received a court test. All of its actions were resolved by the entry of consent decrees and appropriate undertakings. While corporations that paid bribes might well have a serious public relations problem, a court test of the issue would bring different considerations into play. The key issue was the application of the materiality standard. Not all corporate information requires disclosure. Apart from information that is specifically required to be disclosed, all other required disclosures must meet the materiality standard. As stated by the Supreme Court in *TSC Industries, Inc. v. Northway, Inc.*, "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."¹⁸

¹⁷ It would be quite difficult for a corporation paying a bribe to justify it as not meeting the disclosure standard.

¹⁸ *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

The SEC largely predicated its lawsuits on the theory that the illicit activities of publicly traded corporations are material and must be disclosed to their shareholders. There was no question that the theory was a good one, especially inside the Commission. Outside the Commission, certain members of the private bar held other views. They contended that if a corporation with a billion dollars in assets paid bribes in the low millions, that conduct would not be material. The SEC theory on materiality squarely stood up to their contentions. The Commission's position on materiality was several-fold. In its view, an activity that subjects a corporation to possible substantial criminal penalties would be important to shareholders and thus would meet the *Northway* materiality standard. Moreover, to properly test materiality, one must look beyond the amount of the bribe. According to the Commission, one must look to the amount of business that the corporation would lose if it could no longer use bribery to obtain that business. In effect, it was the amount of business that was derived from the *Schmiergeld* that was particularly crucial to the materiality issue.

Because the Commission had decided not to recommend any new or additional legislation, I put my idea aside until I received that personal call from Senator Proxmire. I then advised the Senator that in my view a very simple one-line statute would be helpful in stopping this activity. When I told him all that was necessary was a law requiring a corporation to keep fair and accurate books and records, he was skeptical. However, he had enough confidence in me to enact my suggestion into law. But that was not all that Congress did. It also accepted a proposal from the Commission's brilliant Chief Accountant, Professor Sandy Burton,¹⁹ to add a provision requiring corporations to put in place an effective system of internal controls. The books and records and the internal controls provisions became the first part of the statute.²⁰ Senator Proxmire, still not satisfied that such a seemingly benign-sounding provision would be effective, added a specific anti-bribery provision to the law. This provision explicitly made it unlawful for a U.S. corporation to bribe foreign officials.²¹ Congress extended the law beyond U.S. public corporations and made it apply equally to U.S. private corporations.²² The statute contained no materiality standard.

The statute has had a real impact on corporate behavior and governance. Unlike many other laws enacted by Congress, it is being actively enforced. While the events I have described occurred rather gradually and largely caught the corporate community by surprise, corporate America subsequently mounted a drive to have the statute repealed or at least drasti-

¹⁹ Professor John Burton is presently a professor at the Columbia University Business School. He was formerly Dean of Columbia University Business School.

²⁰ This provision of the statute amended the Securities Exchange Act, 15 U.S.C. §§ 78a-78ll.

²¹ See 15 U.S.C. § 78dd-1.

²² See 15 U.S.C. § 78dd-2.

cally modified. A good many of our corporations whined that they were losing business to foreign corporations that not only were not precluded from paying bribes to foreign officials but were encouraged to do so. Other governments permitted *Schmiergeld* to be a deductible expense for income tax purposes. While Congress dutifully listened to the corporate community, it did not make the suggested changes. Instead, with some minor adjustments, the law remained in effect and is still fully operative at this time.²³

An analysis of the cases brought under the FCPA clearly demonstrates that the statute has been vibrant. Since its enactment, the U.S. Government (the Department of Justice and the SEC) has brought about fifty cases under the anti-bribery section and a large number under the books and records section of the law.²⁴ The cases are far-reaching. They include an action against Triton Energy Corporation for the alleged payment of a bribe to obtain business in Indonesia.²⁵ As anticipated, the books and records provision with its clear standards has been used more often than the bribery provision that presents a more difficult case to prove.²⁶

It is clear that the program has been extremely successful. Prior to the FCPA's enactment, industrial concerns were not required to maintain accurate books and records. As a result, their accountants were easily misled. This is substantiated by the fact that in at least forty cases, the corporations' outside auditors were unable to detect that illicit activity was afoot. In a recent *Wall Street Journal* article reporting on the honesty of the world's great corporations, the author stated that "U.S. exporters are listed as among the least corrupt. One reason American companies may be 'cleaner' than Europeans is the presence of U.S. laws that punish companies that pay bribes, notably the twenty-year old Foreign Corrupt Practices Act."²⁷

²³ Congress amended the FCPA when it passed the Omnibus Trade and Competitiveness Act of 1988. One of the most important changes was the altering of the requisite state of intent from "knowing or having a reason to know" to knowledge with a "firm belief." For a detailed analysis of the changes that the 1988 amendments made to the FCPA, see Fremantle & Katz, *supra* note 8, at 755.

²⁴ As of 1995, the DOJ has brought actions against 17 corporations and 33 individuals. The SEC has brought seven actions enforcing the books and records provision of the FCPA against foreign bribery. Additionally, the SEC has used the books and records provision to combat illicit activity other than foreign bribery in a large number of cases. See Danforth Newcomb & Judith Reed, *Summary of Cases Relating to Bribes to Foreign Officials Under the Foreign Corrupt Practices Act of 1977*, at B-19, B-20 (unpublished article submitted at the ABA National Institute on the FCPA, Feb. 24, 1997) (on file with author). The author would like to thank William McLucas, Director of the SEC's Office of Enforcement, and Peter Clark, Deputy Chief of the Fraud Section, Criminal Division, Department of Justice, for their help in obtaining these statistics.

²⁵ SEC v. Triton Energy Corp., et al., Civ. 97-401 (D.D.C. 1997).

²⁶ See *infra* note 28.

²⁷ Greg Steinmetz, *U.S. Firms Appear Among Least Likely To Bribe Overseas*, WALL ST. J., Aug. 25, 1997, at A9.

The efficacy of this phase of the law has been enhanced by the recently enacted Private Securities Litigation Reform Act.²⁸ This Act requires auditors "to develop systems reasonably designed to detect illegal acts and to make appropriate disclosure to management and, under certain circumstances, to the board of directors when illegal acts are detected."²⁹

II. WHERE ARE WE NOW?

In some respects, this is not the end of the story but only its beginning. There are a number of exciting developments taking place on a worldwide basis.³⁰ To their credit, the present Administration and certain members of Congress have embarked on a mission to persuade the rest of the nations in the world to follow the United States' lead and outlaw corporate bribery.

The major initiative launched by the United States to attack bribery worldwide has been through the Organization for Economic Cooperation and Development ("OECD"). The OECD consists of a group of twenty-nine developed countries. In 1994, the OECD approved a recommendation that its members take meaningful steps to deter, prevent, and combat bribery of foreign officials.³¹ In 1996, the OECD Ministers adopted the Recommendation on Tax Deductibility of Bribes to Foreign Public Officials, requiring members to consider no longer treating international bribery as a deductible business expense for tax purposes.³² In June 1996, at the Lyon Summit, the G-7 committed themselves to combat international corruption.³³ Spurred by the success at the Lyon Summit, the United States again pushed for a ban of foreign corruption at the annual OECD meeting. On May 26, 1997, the OECD finally pledged to crack down on bribery in international business transactions. The agreement commits members to introduce anti-bribery legislation by April 1, 1998 and requires that members' legislatures approve the anti-bribery legislation by the end of 1998.³⁴

²⁸ Pub. L. No. 104-67, 109 Stat. 737 (codified as 15 U.S.C. §§ 77z-1, 78u-4).

²⁹ Harvey L. Pitt et al., *Director Duties to Uncover and Respond to Management Misconduct*, INSIGHTS, June 1997, at 5, 8.

³⁰ For a brief but insightful survey of many recent developments, see Guy de Jonquieres & John Mason, *Goodbye to Mr. 10%*, FIN. TIMES (London), July 22, 1997. See also King, *supra* note 9 ("Twenty years after the Lockheed bribery scandals launched a new corporate era in the U.S., countries around the world are about to adopt tough laws of their own to crack down on companies that bribe to win foreign contracts.").

³¹ See Skol, *supra* note 2, at 2.

³² Currently, about half of OECD member countries not only fail to criminalize foreign bribery, but actually permit companies to deduct it from their taxes. See *Competitive Bribing*, WALL ST. J., Apr. 19, 1996, at A12.

³³ See Michael Kantor, Trade Promotion Coordinating Committee, *The National Export Strategy: Toward the Next American Century: A U.S. Strategic Response to Foreign Competitive Practices* 115 (4th Ann. Rep. to U.S. Congress) (1996).

³⁴ See King, *supra* note 9.

On another front, the Administration has strongly backed an Organization of American States ("OAS") proposal for an international treaty to criminalize bribes of foreign officials. In 1996, twenty-three of the thirty-five OAS member countries signed the Inter-American Convention Against Corruption, the "world's first anti-corruption treaty."³⁵ This required the twenty-three signatories to criminalize bribery of foreign officials and to update their domestic legislation to criminalize specific corrupt acts related to bribery and illicitly obtained benefits.³⁶ The treaty also included a books and records component somewhat similar to the United States' law.

Similarly, in 1995, the World Bank revised its procurement rules to be more transparent and to guard against corruption. The World Bank supplemented these revisions with ongoing aid and training for governments' contracting officials and auditors.³⁷ In 1996, the World Bank took an even bolder step when it explicitly announced its policy not to tolerate fraud or corruption on World Bank-financed contracts.³⁸ Anti-bribery amendments were also approved, requiring severe sanctions against those determined to have engaged in corrupt or fraudulent practices.³⁹

In addition, the Export-Import Bank ("Ex-Im Bank"), the Overseas Private Investment Corporation ("OPIC"), and the United States Agency for International Development ("USAID") have introduced anti-corruption measures.⁴⁰ The Ex-Im Bank requires disclosure of "commissions."⁴¹ False representation can result in sanctions and reporting to the U.S. Department of Justice.⁴² OPIC requires OPIC-financed companies to pledge to comply with the FCPA.⁴³ Failure to comply can lead to sanctions.⁴⁴ In 1996, USAID began requiring an anti-corruption statement on assisted procurement contracts.⁴⁵ This statement prohibits bribery and subjects violators to possible sanctions.⁴⁶

In December 1996, the United Nations adopted a declaration against bribery and corruption in international commercial transactions.⁴⁷ Moreo-

³⁵ Kantor, *supra* note 33.

³⁶ See Lucinda A. Low & Kathryn Cameron Atkinson, *Led by the U.S., the World Wages War on Corruption*, NAT'L L.J., Mar. 3, 1997, at B14.

³⁷ See Kantor, *supra* note 33, at 118.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 120-21.

⁴¹ *Id.* at 120.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 121.

⁴⁶ *Id.*

⁴⁷ See *United Nations Declaration Against Corruption and Bribery in International Commercial Transactions*, G.A. Res. 51/191, U.N. GAOR, 51st Sess., Annex 1, U.N. Doc. A/RES/51/191 (1996), reprinted in 36 I.L.M. 1043, 1046-47 (1997); see also Low & Atkinson, *supra* note 36, at B15.

ver, U.S. Senator Arlen Specter proposed legislation that would virtually mandate that the U.S. Government sanction organizations that engage in "corrupt practices" that disadvantage U.S. corporations.⁴⁸ This worldwide effort is truly an unusual phenomenon. In areas such as this, conduct usually is governed by the lowest common denominator. In effect, the bad drives out the good. Indeed, when U.S. corporations first attempted to get the FCPA repealed, their ostensible aim was to allow our corporations to compete more effectively with foreign entities. They argued that bribes to government officials were required to obtain business. This nation's corporations wanted the opportunity to compete on that basis. Simply put, the ends justified the means.

The position of the current Administration has been an extremely admirable one. Instead of the lowest common denominator, it is the Administration's position that we want our corporations, along with other corporations throughout the world, to comport themselves on the basis of the highest standards. It is readily conceded that the United States alone cannot succeed in this grand experiment without the full cooperation of the other nations of the world. To obtain a worldwide ban on bribery, it must be in the interest of each of the nations of the world. In a paper I recently delivered at the First International Ethics Seminar, I said:

A new worldwide strategy to deal with the anti-competitive global aspects of corporate bribery is the one this great conference has under consideration. The proposed solution is to endorse the United States stance and outlaw bribery worldwide. I applaud these efforts.

We know that seldom does ethical conduct rise to a highest common denominator unless there is strong reason for it, and the influential group behind it can demonstrate a real advantage to enhancing the standard. I believe there are many self-interested reasons for following the United States lead.

A law outlawing corporate bribery is an important and necessary step in achieving an honest and fair global securities market. Right now, corporations seeking additional capital realize they need access to the United States market place. If they choose this route, they will have to comply with United States standards, including its anti-bribery laws.

A continuing countenance of bribery is de-stabilizing to the government that permits it. As the cases brought by the SEC disclose, many of the companies bribing overseas were also engaged in deleterious conduct at home. The many companies that made illicit political contributions show that this is true. As one executive told me, it is very hard to deprogram your officials in foreign lands when they return to the United States. I need not list to you the many governments around the world that have been overturned when their top government officials were revealed as taking *Schmiergeld*.

⁴⁸ Senator Arlen Specter introduced the "Unfair Trade Practices Act" in the final days of the 104th Congress. See Matt T. Morley and Yan Liu, *De-Greasing the Wheels of Commerce: U.S. Anti-Bribery Initiatives Signal Stiffening FCPA Enforcement*, in LEVENSON, *supra* note 8, at 26.

Simply put, a good and effective government requires that its officials be honest and loyal to the government. When officials are for sale, the government is vulnerable to being de-stabilized and it is highly likely that, at some point, the government will be overthrown. The United States government stand against bribery worldwide is clearly the correct one. While there have been some aberrations by U.S. companies, by and large, the law has worked quite well.

The collapse of the Soviet Union taught us that Communism is a flawed economic system. As much as anything, the collapse was a tribute to the vitality and superiority of this nation's free market system. Such a system to reach its heights depends on open and fair competition. When impediments are placed in the path of an honest competitive system, the system cannot function as it must. While some try to discredit the U.S. system and want to continue a race to the bottom, this is not the way to proceed. What society would want to construct a major bridge, tunnel or public building where the best company for the job was excluded because it would not bribe a government official to procure the contract? When that bridge collapses because of faulty work, who is going to answer that a bribe paying shoddy contractor was hired because he gave *Schmiergeld*? The point is the case has been squarely made to outlaw international corporate bribery.⁴⁹

III. WHAT THE FUTURE HAS IN STORE

As we look to the future, it is clear that there is going to be further globalization of worldwide financial markets. I envision the time when the United States will be just one of many players in the system. Possibly under such a regime, a worldwide SEC will be created.⁵⁰ To start, it would have standard setting authority to be followed by enforcement jurisdiction. At this point, the United States' role would be similar to that played by the State of New York prior to the passage of the Federal securities laws in 1933 and 1934. For a worldwide system to be credible, there must be uniform standards. A uniform standard on corporate bribery would be a good place to start. It is in each nation's self-interest to do so.

Little did I realize when the SEC embarked on its so-called illicit payments program that it would have such an impact on corporate conduct. The impact of the FCPA on corporate behavior and governance has been substantial. To meet the law's standards, U.S. corporations have put in place procedures that assure, as much as possible, the honesty and integrity of the corporate community. Where there have been missteps, generally they have been uncovered and redressed by prompt and appropriate external and internal corrective actions.

⁴⁹ Judge Stanley Sporkin, Paper delivered at The First International Ethics Seminar (Aug. 6-7, 1997) (on file with author).

⁵⁰ This new body might be named SECI (Securities and Exchange Commission International).

Self-regulatory and internal compliance programs have become commonplace. The government's costs of policing have been modest. The results achieved from one minor phase of the Watergate hearings may, at some point, become the hearings' most significant legacy. This will come about if one day all the nations of the world take steps to outlaw all forms of corporate bribery. My hat is off to the Congress (especially to the heroic efforts of Senator Proxmire) and the SEC for having the fortitude to put into place such an important and meaningful regulatory program. Only time will tell whether all this considerable effort will be able to obtain its ultimate dual objectives of providing an even playing field for all corporations in the world and, more importantly, ridding the world of *Schmiergeld*.