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Politicians as the guardians of the status quo: A demonstration of rank and privilege without responsibility

INTRODUCTION

The focus of this paper is the contribution of politicians and government policy to the flawed structure, content and enforcement of legislation and other regulations governing corporate activities and management. Specifically, politicians and the governments they represent are responsible for the framework within which regulators attempt to oversee and enforce disclosure and the prudent and transparent operation of corporations. From this perspective, politicians, as lawmakers who are also responsible for providing adequate funding for efficient and effective enforcement of laws, are the gatekeepers protecting the public from the abuse of the corporate form. Unfortunately, the gatekeeper role is subject to “perverse incentives” of politicians (Zingales, 2011). Similarly, Moe (2003) argues the reform process is designed in such a way as to make politicians gatekeepers of the status quo even if this is not in the best interests of the public at large:

> American government is built around checks and balances that make new legislation difficult to pass and blocking it relatively easy. To be adopted, a reform must make it past subcommittees, full committees, and floor votes in two houses (not to mention filibusters, holds, and other obstacles), and the executive must sign it. This means that reformers must win political victories at each step to achieve their ends, while opponents need to succeed at only one step to block. By the design of our political system, then, the advantage always goes to interest groups that want to keep things the way they are.

To demonstrate the ability of interest groups to thwart regulatory reform, an analysis will be undertaken of the development of the United States Foreign Corrupt Practices Act from the early 1970s through to the passing of the act in 1977. This time frame has been chosen because the Foreign Corrupt Practices Act was originally conceived as the means of strengthening the corporate accounting and reporting provisions of the Securities Exchange Acts of 1933, 1934 in the wake of what has commonly been known as the Watergate scandal[1] and revelations of the use of corporate funds for illicit purposes including the payment of bribes and commissions to domestic and international governments and their representatives. Watergate has been chosen as the starting point of this paper as investigations revealed business-government corruption was endemic and occurred contemporaneously between domestic and international business and governments. As was noted in *Time* in 1975 Watergate investigations revealed ‘an interweaving of Big Government and big business that [created] a climate conducive to corruption … at the expense of the public interest’. The investigations also revealed the dichotomy between privilege and responsibility as indicated in the Letter of Transmittal of the Final Report of the Senate Select Committee on Presidential Campaign Activities (1974a, p.1227) that while “rank has its privileges because rank has its responsibilities”, privilege is often used “as a dodge of responsibility”.

[1] The bungled Republican Party burglary of the Democratic Party headquarters in the Watergate Building in 1972 and the subsequent investigation leading to the first ever resignation of an American president, Richard Nixon. Hereafter referred to as Watergate.

Initially the paper will outline the background to the discovery of the use of corporate funds for purposes of bribery and illegal campaign contributions. Evidence of and responses to the use of financial statements and records to disguise such payments will then be presented. Subsequent sections will detail attempts to develop one regulatory response, the Foreign Corrupt Practices Act, to the findings of Watergate-related investigations. The overall conclusion of the paper, based on an analysis of the events and hearings leading to the Foreign Corrupt Practices Act, is the ultimate solution does not match the originally intended outcome. In other words, accountability plays a secondary role to rank and privilege.

THE PATH TO THE FOREIGN CORRUPT PRACTICES ACT

The level of corruption at the highest levels of U.S. politics and the adage, "rank hath its privileges", was clearly demonstrated by the break-in the of Democratic Party headquarters in the Watergate building in 1972. The break-in was part of the activities of what was known as the "dirty tricks department" of President Richard Nixon's re-election committee[2] (see, for example, House of Representatives, Committee on the Judiciary, 1974a). The brief of the dirty tricks department was to develop a "political intelligence operation" including electronic surveillance of "political enemies" and opponents (House of Representatives, Committee on the Judiciary, 1974a, p.7-9). The purpose of the "dirty tricks" was to discredit political opponents especially leading candidates thereby weakening their campaigns and likelihood of electoral success (see, for example, Senate Select Committee on Presidential Campaign Activities[3], Book 10, 1973b, p. 3987-3988). Much of the public debate following media reports of the break-in focused on whether or not Richard Nixon had been aware of it and if so, when. This lead to moves to impeach the president (House of Representatives, Committee on the Judiciary, 1974b, p.1-3). The threats of impeachment lead to Nixon's resignation from office in 1974. Following Nixon's resignation, much of the focus turned to means of preventing or at least curtailing the use of corporate funds for illicit purposes.

The Senate Select Committee on Presidential Campaign Activities and investigations of the Watergate Special Prosecution Force exposed numerous and diverse examples of corruption, extortion and other wrong doing including financial statement manipulation on the part of executives of many large and prestigious corporations. These revelations gave rise to numerous congressional hearings and reports. The following sections will outline the findings of the Senate Select Committee on Presidential Campaign activities as they relate to financial statement manipulation and other evidence of white collar crime. Subsequent findings and recommendations of hearings relevant to the development of the Foreign Corrupt Practices Act will then be discussed.

SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES

The most extensive post-Watergate enquiry and report was that of the Senate Select Committee on Presidential Campaign Activities (the Ervin Committee) established on February 7 1973 to make a

> complete investigation and study of the extent ... to which illegal improper or unethical activities occurred in the 1972 Presidential campaign and election and to determine whether new legislation is needed to safeguard the electoral process by

> which the President of the United States is chosen (Final Report of the Senate Select Committee on Presidential Campaign Activities, Letter of Transmittal, June 27, 1974a)[4].

Evidence to the Committee revealed the extensive use of corporate funds for illicit purposes and the use of accounting processes to conceal it. For example, the Ervin Committee Final Report (Final Report of the Senate Select Committee on Presidential Campaign Activities, June 27, 1974a, p.447) revealed foreign subsidiaries represented the most common source of corporate contributions to political activities. Accounting for corporate funds in the books of subsidiaries was accomplished in a variety of ways including charges for services that were not performed or that were invoiced at an inflated rate. In other instances, contributions were disguised as loans or bonus payments to corporate officers. The result was that expenses and assets were misrepresented in the financial reports. Another common method of disguising the use of corporate funds for illegal political contributions was to record the payments as bonuses to corporate executives and employees. Accounting for the bonus payments was achieved via an administration account and carried as an account receivable even though payment was never pursued (Final Report of the Senate Select Committee on Presidential Campaign Activities, 1974a, p.451-459; Senate Select Committee on Presidential Campaign Activities, 1973c, Book 13, p.5404-5439). Consistent with its brief, the Committee made recommendations on electoral matters. Accounting, audit and other regulatory reforms were the subject of other Congressional hearings and SEC reports.

THEGENERAL RESPONSE TO SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES

As would be expected, the revelations of the Committee on Presidential Campaign Activities engendered considerable debate on appropriate solutions to activities uncovered in the Watergate and related investigations. Of considerable concern was the magnitude of some illicit payments and the high profile U.S. corporations involved. For example, in the hearings on *Senate Resolution 265 - Protecting the ability of the United States to Trade Abroad*[5] Senator Church stated

> We are not just talking about a little "baksheesh" to grease the palm of some petty clerk in order to speed needed documents on their way through the bureaucratic labyrinth (United States Senate, 1975b, October hearing, p.7).

Senator Church cite further evidence heard by the Subcommittee on Multinational Corporations suggesting

> a tale of kickbacks and shakedowns, of bribery and corruption in the very highest military and governmental circles abroad, and the condoning of secret slush funds, false bookkeeping, Swiss bank accounts and "fake" subsidiaries by the top

[4] The Committee's final report numbered 1250 pages. The report was drawn from some 25 books comprising hearing transcripts and documents presented to the Committee. The deliberations of the Committee were divided into phases: Phase I Watergate Investigation (books 1-9); Phase II Campaign Activities (books 10-12; Phase III Campaign Financing (book 13); investigations of specified individuals and entities (books 14-24); and Supplemental Material on Campaign Practices and Finances (book 25 dealing with the campaigns of political candidates other than Nixon).

[5] Senate Resolution 265 directed the President's Special Representative for Trade Negotiations and others to formulate and negotiate the development of a code of conduct to eliminate bribery and other improper payments at a global level (United States Senate, 1975b, October hearing).

> executives of some of America's leading firms (United States Senate, 1975b, October hearing, p.7).

In one example cited by Senator Church, one U.S. company had paid over $50million in contributions to government parties and members over a nine year period in return for favourable tax and energy legislation. Another example was a U.S. aircraft company paying in excess of $100million in agents' fees in order to sell a Middle East country an aircraft that had not competitor. Much of the $100million went to the Swiss bank account of military and civilian defence personnel of the purchasing country (United States Senate, 1975b, October hearing, p.7).

Furthermore, as noted by Senator Church, many of those admitting to paying bribes and other illicit contributions and fees justified it on the basis it was common practice. However, he expressed scepticism this was the case.

> the fact that corporations, by their own admission, go to such lengths to disguise these practices, through the use of double bookkeeping, numbered Swiss bank accounts, and a system of code names that would do credit to the CIA, puts the lie to the argument that it is accepted practice (United States Senate, 1975b, October hearing, p.8).

To be fair, bribery and illicit payments were not unique to U.S. corporations. Evidence showed bribery and illicit payments to foreign officials and entities were engaged in by companies from other countries. Accordingly, if the United States were to implement and enforce legislation outlawing bribes, payoffs, kickbacks and other unethical payments, American companies would be at a disadvantage compared to competitors in other countries that were not so constrained. Hence an international solution was also required because other countries were unlikely to follow the lead of the United States in prohibiting bribery and corruption even though such activities represented a threat to the integrity of global trade (Opening Statement by Abe Ribicoff, cited in United States Senate, 1975b, October hearing, p.2). It was considerations such as these that gave rise to Resolution 265. The purpose of Resolution 265 was the initiation of negotiations leading to a multilateral agreement to eliminate bribery and other illicit payments by corporations around the world to secure international trade[6].

In addition to the international solution set out in Resolution 265, a series of amendments to the Securities Exchange Act of 1934 were also proposed to strengthen accountability provisions as well as prohibiting illicit payments. These proposals were the subject of hearings before many Senate and House of Representatives committees. The culmination of these deliberations was the Foreign Corrupt Practices Act. The focus of the following discussion will be those hearings especially the sections dealing with proposed mechanisms to prevent manipulation and falsification of accounting records and reports to disguise or otherwise conceal the use of corporate funds for illicit purposes.

[6] Multilateral agreements were already in process. The OECD adopted Declaration and Decisions on International Investment and Multinational Enterprises on June 21, 1976. The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted by the Negotiating Conference on 21 November 1997.

SUBCOMMITTEE ON INTERNATIONAL ECONOMIC POLICY OF THE COMMITTEE ON INTERNATIONAL RELATIONS, HOUSE OF REPRESENTATIVE

In June, July and September 1975, the Subcommittee on International Economic Policy of the Committee on International Relations, House of Representatives held hearings on the Activities of American Multinational Corporations Abroad. Among the matters considered by the Committee was whether or not U.S. laws were effective. Issues discussed included the implied legality of payments to foreign officials given the absence of legislation prohibiting such payments. On the other hand, in some instances, corporations making such payments had violated foreign laws. Accordingly, the U.S. legal system was working but may needed improvement given the negative impact on the country's foreign policy in light of revelations of illicit payments by U.S. corporations to foreign entities and officials in return for favourable treatment (United States Senate, 1975a, p.1). In this regard, two bills, H.R. 7563 and H.R. 7539 were to be introduced to the House of Representatives to achieve these purposes. These bills proposed monitoring of the overseas business activities of American citizens and corporations in order to detect possible violation of Federal law and the reporting of violations to the responsible agency for enforcement (United States Senate, 1975a, p.4).

Written and oral statements from members of the Securities and Exchange Commission and surrounding discussions canvassed the possibility of a requirement under legislation such as the Securities and Exchange Act impelling corporations to disclose material information to protect not only American interests in foreign transactions but also the investment of shareholders of public companies (United States Senate, 1975a, p.24). SEC Commissioner Loomis argued for guidelines to be established to inform U.S. corporations on the conduct of their dealings with foreign entities. Such guidelines would not be mandatory but part of a self-regulation process. As Loomis argued "the most immediate and most effective resolution of the problem can best come from American companies themselves" (United States Senate, 1975a, p.62). In addition, the public accounting profession, in particular, the audit function was implicated in the perceived failure of the regulatory system. The SEC was contemplating working with leaders of the profession to develop guidelines to assist in the audit of published financial reports (United States Senate, 1975a, p.62).

SUBCOMMITTEE ON ABUSES OF CORPORATE POWER

In January and March 1976 four days of hearings on corporate abuse were held by the Subcommittee on Priorities and Economy in Government of the Joint Economic Committee of the Congress of the United States[7]. The Subcommittee sought a solution to corporate abuse in the form of "official corporate crimes and improper behaviour: bribes, kickbacks, illegal campaign contributions, and other improper uses of corporate funds" (United States Congress, 1976, p.5-6). Subcommittee chair, Senator William Proxmire, clarified the focus of the hearings as official corporate crimes rather than petty theft or embezzlement. Official corporate crimes amounted to "white collar crime" involving "the approval and active participation of top corporate management" in the wrongful use of corporate funds (United States Congress, 1976, p.5-6). This wrongful use extended beyond the payment of illicit campaign contributions to domestic politicians to bribery of foreign officials and kickbacks paid to domestic and foreign contractors. Representatives of the SEC, the General

[7] Hereafter referred to as the Subcommittee

Accounting office (GAO) and the Department of State were questioned by the Subcommittee on a number of issues linked to official corporate crime as follows.

The Subcommittee was not solely concerned with white collar crime but also the ability of the SEC and General Accounting Office (GAO) to investigate illicit activities and the commitment of the Departments of Justice and State to act on the findings of the SEC and the GAO to bring criminal charges based on the outcome of those investigations. A further issue addressed by the Subcommittee related to a perceived reluctance on the part of the Departments of Justice and State to compel disclosure of information regarding illicit payments and the extent to which US government officials were directly or indirectly complicit in corporate bribery of foreign entities. These issues were addressed throughout the four hearing days. The following highlights from the hearings focus on the appearances of representatives of the SEC, the GAO and the Department of State.

EVIDENCE FROM SEC REPRESENTATIVES

The then Chairman of the SEC acknowledged that many companies had engaged in illegal practices including the maintenance of secret funds with the involvement and participation of senior management. Accounts were created and maintained "outside the normal financial accountability system" to conceal illicit domestic and foreign political contributions often in return for favourable treatment. In some instances, the SEC had not been able to determine the destination of funds (United States Congress, 1976, p.6-7). Companies admitting to making and concealing illicit payments included construction, manufacturing and oil companies as well as defence contractors. In all cases, concealment of the use of funds was achieved by the falsification or inadequate maintenance of accounting records and books (United States Congress, 1976, p.8). Not one instance of falsification or inadequate maintenance of accounting records and books was reported by external auditors.

These last points lead to the conclusion on the part of the Subcommittee chair that the corporate disclosure system designed to protect shareholders and administered by the SEC had not worked (United States Congress, 1976, p.25). In view of this conclusion, the SEC representatives were asked to provide the Subcommittee with their views on the adequacy and effectiveness of existing laws and regulations and recommend ways to improve them (United States Congress, 1976, p.25). These views were subsequently provided in a detailed report dated May 19, 1976 (Special Supplement. Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices[8]).

The SEC Report confirmed concealment of the use of corporate funds to pay bribes, kickbacks and illegal campaign contributions. Concealment had been achieved through the use of non-functional subsidiaries, secret bank accounts and various tactics to disguise the source of funds or the creation of slush funds including laundering (1976a, p.7; Exhibit A, p.16-35). Details of methods used by a selection of specified companies were included in an appendix to the report (1976a, Exhibit B, p.36-45). The SEC found it "particularly disturbing" that corporate management not only had knowledge of questionable or illegal activities but participated in them (1976a, p.10). In some cases, members of the board of directors were also complicit in these activities (1976a, p.11).

Informal views of SEC staff were that

[8] Hereafter referred to as the SEC Report

> virtually all questionable payment matters have involved the deliberate falsification of corporate books or records, or the maintenance of inaccurate or inadequate books and records which, among other things, prevented these practices from coming to the attention of the company's auditors, outside directors and shareholders (1976a, p.5).

Surprisingly, following the instigation of the SEC's voluntary disclosure program, the same auditors and directors were often appointed by the board of directors to special committees to uncover the extent of illicit payments and the means by which they were concealed. The irony of this was not lost on members of the Subcommittee. Senator Proxmire asked whether it was realistic to expect corporations to effectively police themselves especially when directors and officers are usually friends and supporters of each other (United States Congress, 1976, p.23-24). Furthermore, Senator Proxmire questioned whether or not these voluntary committees had actually provided the SEC with complete reports (United States Congress, 1976, p.24).

EVIDENCE OF THE GENERAL ACCOUNTING OFFICE

Questions about the audit of the financial records of government contractors were raised on the second day of hearings when representatives of the General Accounting Office (GAO) appeared before the Subcommittee. The GAO had conducted investigations of questionable procurement practices on the part of primary government contractors and subcontractors. The questionable practices included subcontractors providing kickbacks (United States Congress, 1976, p.46), gratuities, gifts and entertainment (United States Congress,, 1976, p.47) to employees of the prime contractors who could influence purchasing and contract decisions. Conflicts of interest in procurement decisions were also identified (United States Congress, 1976, p.47).

In many cases, the cost of kickbacks and other rewards were included in the price paid by the prime contractor for the services or goods provided by the subcontractor. Ultimately, these expenditures were borne by the tax payer (United States Congress, 1976, p.50-51). One particular transaction discussed by the Subcommittee involved the sale of a part for $1900. Two employees of the selling company received more than $6000 each for facilitating the sale. On further investigation, the actual cost of the item to the selling company had been $190,000. Accounting for the loss on the sale could not be determined but the Subcommittee and GAO representatives concluded it had also been passed on to the tax payer (United States Congress, 1976, p.54).

As with the manipulation of financial reports uncovered by Watergate and SEC enquiries and investigations, it was determined that these were not isolated events. Rather, even though in many cases the amounts involved were relatively small, the practices identified were considered to be widespread. Furthermore, these activities were not uncovered during GAO audits (United States Congress, 1976, p.55). A particular focus of the Subcommittee's questions of the representatives of the GAO focused on revelations of the payment of bribes to foreign government officials by Lockheed (United States Congress, 1976, p.60).

Lockheed was the subject of questions by the Ervin Committee. Campaign contributions from Lockheed were not sourced from corporate funds but from employees (Senate Select Committee on Presidential Campaign Activities, 1974b). However, subsequent investigations revealed that Lockheed had paid kickbacks to secure favourable outcomes in negotiations in a number of countries including Japan, Italy and the Netherlands. In securing these contracts Lockheed was largely competing with other American companies rather than foreign companies. As argued by Senator Proxmire, the actions of Lockheed put "pressure on other American companies to become equally corrupt" (Proxmire, 1976, p.2). He further on pointed out that (Proxmire 1976, p.2), Lockheed's sales, more than half of which were to foreign governments, were "coordinated by the Pentagon". In addition, the Pentagon put pressure not only on Lockheed but other arms manufacturers to increase sale to foreign governments.

Lockheed was not a government entity but was the sole recipient of a government loan under the Loan Guarantee Act in the early 1970s. The GAO was required by the Loan Guarantee Act, "to audit the books, records and transactions of borrowers under the act" (United States Congress, 1976, p.60). In response to questions by the Subcommittee, GAO representatives responded that a detailed audit was not required by the Loan Guarantee Act. Subcommittee chairman, Senator Proxmire (United States Congress, 1976, p.60), however, rejected this claim citing the relevant provision of the act:

> The General Accounting Office shall make a detailed audit of all accounts, books, records and transactions of any borrower with respect to which an application for a loan guarantee is made under this act. The General Accounting Office shall report the results of such audit to the Board and to the Congress.

Consistent with the arguments of SEC Commissioner Loomis before the Subcommittee on International Economic Policy of the Committee on International Relations (1975, p.62), the GAO representatives, maintained "normal audit techniques" would not uncover evidence of bribes, kickbacks or money laundering. Uncovering such evidence would require a detailed audit, being "examining every document and tracing original documentation, checks that are written, invoices that are at issue" and the GAO could not undertake such a process in the space of one year. Furthermore, the GAO had never carried out the "investigative techniques" required to undertake a comprehensive audit. The GAO had neither the familiarity with such techniques nor the authority to implement them. Criminal or civil fraud was a matter for the Department of Justice (United States Congress, 1976, p.60).

EVIDENCE OF THE DEPARTMENT OF STATE

On the fourth hearing day on March 5 1976, the Subcommittee heard from representatives of the Department of State. The answer the Subcommittee sought from the Department of State was whether or not the US government not only knew but actively promoted bribery of foreign officials by some of the country's largest and most prestigious entities in order to win contracts (United States Congress, 1976, p.155). Specifically, Senator Proxmire contended some Pentagon officials, while publicly opposing bribery and payoffs, actively encouraged them and "lectured contractors on how to make payoffs" (Subcommittee on Priorities and Economy in Government, 1976, p.155). The Department of State denied covertly fostering illicit payments to foreign entities by United States organizations stating

> The Department of State has never condoned such payments. They are ethically wrong; their disclosure can unfairly tarnish the reputations of responsible American businessmen; they make it more difficult for the U.S. Government to assist U.S. firms in the lawful pursuit of their legitimate business interests abroad; they encumber our relations with friendly foreign governments; they are, in the long run, bad business, as firms involved in such practices risk loss of contracts, sales and even property; and they contribute to a deterioration of the general investment climate (United States Congress,1976, p.156).

In general, the questions raised by the Subcommittee and the allegations of complicity in illicit payments by U.S. corporations to foreign entities, could not be substantiated. A cautious approach was taken by the Department of State to dealing with illicit foreign payments to foreign corporations and officials due to the negative impact this might have on the competitiveness of US corporations dealing abroad. Accordingly, corporations were not compelled to provide information to investigators.

For example, as mentioned previously, Lockheed was investigated as part of the Watergate hearings. Even though campaign contributions to Richard Nixon were determined to have come from employees rather than corporate funds, Lockheed was found to have paid kickbacks to officials in Japan, Italy and the Netherlands in return for favourable consideration in the awarding of contracts. However, these allegations were difficult to substantiate because the SEC was denied access to Lockheed files. The Department of State was concerned those files might contain material having adverse foreign policy implications and therefore be detrimental to the national interest (United States Congress, 1976, p.33). In addition, Proxmire suggested disclosure of the names of those involved was not forthcoming because Lockheed wished to continue to use the sales agents involved in prior instances of bribery (Proxmire, 1976, p.2).

Further difficulties were encountered in the Lockheed investigation as well as implied involvement of the Pentagon in the company's illicit activities because the Secretary of the Treasury was also the Chairman of the Loan Guarantee Board. In his capacity as Secretary of the Treasury, he denounced Lockheed's bribery and similar illicit activities. On the other hand, as Chairman of the Loan Guarantee Board, he did not use his power to compel Lockheed to provide to the SEC and other authorities information concerning the nature and purpose of said activities (United States Congress, 1976, p.155).

SUMMARY OF HEARINGS

The Subcommittee (United States Congress, 1976, p.7) summarised practices used to disguise the misuse of corporate funds as follows:

(1) Bonuses to selected corporate employees which were rebated for use in making illegal domestic political contributions by such corporations;

(2) Use of an offshore corporate subsidiary as "cover" for a revolving cash fund for distributing diverted corporate funds for both domestic and foreign political activities, all of which were illegal in the place where paid;

(3) Anonymous foreign bearer stock corporations, used as depositories for secret illegal "kickbacks" on purchase `or sales contracts;

(4) Payments to foreign consultants which were diverted to management and used for illegal domestic political contributions and commercial bribery;

(5) Direct, corporate payments to foreign government officials in return for favourable business concessions; and

(6) Payments, aggregating tens of millions of dollars, to consultants or commission agents, made with accounting procedures, controls and records which, if existent at all, were insufficient to document whether any services were even rendered by such consultants or agents, or whether such services were commensurate with the amounts paid.

It was also noted by the Subcommittee (United States Congress, 1976, p.17), management of many corporations had filed reports with the Securities and Exchange Commission from which information had been omitted or materially misstated. Consequently, these reports violated the provisions of the 1934 Securities and Exchange Act. An aspect of concern to the Subcommittee, was that none of the instances of falsification of records or material misstatement of accounts uncovered by the Watergate Special Prosecutor or SEC investigations had been reported by the accountants or external auditors of the relevant companies (United States Congress, 1976, p.26). In other words, the reporting systems overseen by the SEC were not working (United States Congress, 1976, p.24). Specifically, "accounting procedures have been totally inadequate either to determine what has been going on or to assure us that they can prevent it in the future" (United States Congress, 1976, p.22).

In contrast to the implication of the Ervin Report that Watergate-related activities were "aberrational conduct", Proxmire argued private enterprise was undermining itself rather than monitoring activities. In particular, "at least an important part of the private sector is a house of marked cards, composed of kings of corruption, jacks of all illicit trades, and aces of political influence" (United States Congress, 1976, p.5-6). Proxmire further observed these activities had been engaged in by "some of the largest and most prestigious firms in America".

A further concern expressed by Senator Proxmire was the lack of response of the Federal Government and its agencies other than the SEC. In his opening statement on the second day of the hearings, Proxmire (United States Congress, 1976, p.39) stated

> The abuse of corporate power is a high priority issue and one that merits extensive public debate and discussion. ... Yet the response of the Federal Government has been disappointing. Except for the SEC, most other Government agencies[9] seem to be sitting on their hands or aiding and abetting the payment of bribes and kickbacks.

The Subcommittee did not express any decisions or make any formal recommendations on the basis of the hearings. However, a solution suggested by Proxmire was new legislation in order to deal with corporate abuse.

LEGISLATIVE INITIATIVES AND HEARINGS

From 1976 to 1977, different bills were presented to the Senate and the House of Representatives by different Senators, Congressmen and the SEC in relation to questionable payments. Ultimately the Senate and the House separately decided on a bill to be passed as the FCPA, however,

> [t]he House version of the bill did not contain the accounting provisions at all, and…were never debated on the House floor or in a House committee. In the Senate, the accounting provisions were overshadowed by the looming issue of overseas payments (Committee on Corporate Law and Accounting 1978, p.309).

For this reason, the following sections will focus on bills presented to the Senate rather than the House of Representatives.

[9] Those agencies identified by Senator Proxmire were the FBI, Justice Deparment, IRS and the Statement Department.

Committee on Banking, Housing and Urban Affairs: Prohibiting bribes to foreign officials

In April and May 1976, the United States Senate Committee on Banking, Housing and Urban Affairs conducted three days of hearings dealing with three proposed bills to address bribes to foreign officials. The two bills to be discussed in this section are

> S.3133 sponsored by Senator Proxmire to amend the Securities and Exchange Act of 1934 to require issuers of securities registered pursuant to section 12 of such act to maintain accurate records and to furnish reports relating to certain foreign payments, and for other purposes; and
>
> S.3418 sponsored by the Securities and Exchange Commission to amend the Securities Exchange Act of 1934 to prohibit certain issuers of securities from falsifying their books and records, and for related purposes.

During the course of the hearings, the Committee Chair, Senator Proxmire, referred to previous Committee hearings into the payment of bribes by Lockheed plus the voluntary program instituted by the SEC leading to disclosure that hundreds of millions of dollars had been paid in bribes by U.S. corporations to foreign officials and political parties. Proxmire described these activities as the "disgrace of our free enterprise system" that had "corrupted the free market system under which the most efficient producers with the best products are supposed to prevail" (United States Senate, 1976a, April hearings, p.1). It was further noted the SEC's voluntary disclosure program was premised on the view "foreign bribes are information material to investors" (United States Senate, 1976a, April hearings, p.3).

As Proxmire noted many high calibre corporate executives and politicians, including then President Ford, had denounced bribery and saw it as unnecessary for corporations to compete. In spite of such condemnation, Proxmire argued "many companies will continue paying bribes if they can get away with it, because the potential rewards are so great and the risks are minimal" (United States Senate, 1976a, April hearings, p.1). The absence of risk was exemplified by the failure of the Department of Justice to prosecute "prominent corporate criminals" (United States Senate, 1976a, April hearings, p.2). At worst, there had been some bad publicity but no one had gone to jail and only three chief executive officers had lost their jobs. The provisions of S.3133 were designed to address these issues. The general view of those appearing before the committee demonstrated resistance to any legislative response with potential to impringe on the manner in which management wished to conduct the activities of corporations caught by the legislation.

The first to give evidence before the committee was John McCloy. McCloy had been the chair of the Special Review Committee of the Gulf Oil Corporation's Board of Directors appointed to investigate the payment of political contributions from shareholders' funds. The investigation revealed the payment over a period of some twelve years of illegal campaign contributions of approximately $5 million from off-the-books accounts. Payments of unknown amounts had been made to foreign governments and officials in exchange for favourable treatment. Other payments of unknown amounts made for unidentified reasons had also been made. McCloy stated payments in many instances were customary and not considered illegal in the countries in which they were paid (United States Senate, 1976a, April hearings, p.4).

According to McCloy, a constructive and effective legislative response to political contributions and payments was not possible without further study of what was a very complex issue. For example, there was no accepted definition of bribery. Where did you draw the line between a tip or a gift and a bribe (United States Senate, 1976a, April hearings, p.5-6)? In other words, should all payments to foreign officials or governments be disclosed to investors (United States Senate, 1976a, April hearing, p.10). Legislation prohibiting bribery and political payments did not exist in the U.S. or anywhere else in the world. This was not to say nothing should be done but the initial focus should be the United States (United States Senate, 1976a, April hearing, p.5-6).

While McCloy supported the view that companies should be required to keep full and accurate accounts, he questioned whether new legislation was required (United States Senate, 1976a, April hearings, p.10). In response to Proxmire's concern the furore over disclosure of illicit payments would "like so many other things that happen in Washington … die down" and people would accept it, McCloy urged the Committee to do something but "take time to do it" (United States Senate, 1976a, April hearings, p.10). After all, now the payment of bribes and political contributions had been made public and actions had been taken by the SEC, "the barn door [was now] well fastened" (United States Senate, 1976a, April hearings, p.7).

Consistent with the emerging neoliberal approach, McCloy believed the key was reform by industry itself with a focus on the tone at the top (United States Senate, 1976a, April hearings, p.14). Multinational corporations played an important role in the U.S. economy. Their activities were not "synonymous with vicious behaviour". Restricting the activities of U.S. multinationals with gratuitous regulation would have a serious negative impact on the country's balance of payments (United States Senate, 1976a, April hearings, p.16).

Representatives of the Securities and Exchange Commission appeared before the Committee in May 1976. Proxmire's preliminary comments included concerns that penalties imposed on perpetrators of violent crime, whether premeditated or nor, were often substantial. On the other hand, there was a reluctance to impose penalties for instances of bribery and other illicit behaviour that were not only unethical and damaging to society but were premeditated and planned largely by "well educated people from whom we expect the highest kind of ethical conduct" (United States Senate, 1976c, May hearings, p.2). Of concern to the SEC representatives, was not the number of corporations involved in illicit payments, as this was comparatively small and only a few of those had made substantial payments but the fact some large companies had been able to evade the system of corporate accountability enshrined in existing regulations meant any company could do so. However, as detailed in the May 1976 report on Questionable and Illegal Corporate Payments and Practices, the SEC representatives supported the philosophy of S.3133, but considered S.3418 was a better solution to a "thorny and controversial problem" (1976a, Special Supplement. Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices, p.13).

Consistent with the views of McCloy, the SEC advocated self-regulation. The SEC acknowledged there had been a breakdown in corporate accountability on the part of a minority who "totally ignored the system"(United States, Senate, 1976c, May hearings, p.4).

Nonetheless, the SEC representatives believed self-regulation had "the potential significantly to enhance the reliability and accuracy of issuer financial reporting" (Securities and Exchange Commission 1977a, p.11). To this end, S.3418 requirements were designed to encourage the private sector to correct the problem, with SEC supervision, and without government involvement in business practices. In addition, the accounting profession was responding to perceived deficiencies in audit processes with proposals to issue a draft standard articulating the responsibilities of auditors to identify illegal payments and bring them to the attention of management. With these measures, the problem of illicit payments would be resolved and the integrity of the securities system restored (United States Senate, 1976c, May hearings).

S.3418 requirements consisted of corporations establishing and maintaining adequate accounting books and records, as well as a system of internal control. The SEC argued these requirements would "provide the teeth to assure that problems of this nature…[were] brought to appropriate levels of corporate management, and recorded in a manner that…[made] it far easier for…[the SEC] to discover them" (United States, Senate, 1976c, May hearings, p.19). There were three principles underlying the SEC's proposed remedy:

1. corporate accountability to investors required a proper accounting of the use of corporate funds;
2. to ensure a proper accounting of the use of corporate funds, legislation should prohibit false and misleading statements to external auditors on the part of corporate officials or agents; and
3. without internal controls, there was a lack of reasonable assurance that financial statements were based on duly authorised transactions and prepared in accordance with generally accepted accounting principles and applicable regulations (1976a, Special Supplement. Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices, p.13).

In Proxmire's view, S.3418 merely codified the implied requirement corporations keep honest records already incorporated in securities law. Proxmire reasoned the SEC was "…spending a great deal of effort to put a finer point on a requirement that already exist[ed] while ignoring the more obvious need for new authority" (United States Senate, 1976c, May hearings, p.19). Similarly, it was clear from the SEC's report the concept of internal accounting controls added nothing to professional requirements having been enshrined in auditing standards issued by the American Institute of Certified Public Accountants (AICPA), Statement of Auditing Standard (SAS) 1 section 320.28. In drafting S.3418, the SEC adopted the objectives of a system of accounting internals as set out in those standards (1976, Special Supplement. Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices, p.13). It raised concern that the "language that may provide guidance to accountants and auditors may not be sufficiently precise to define conduct that could result in civil or criminal sanctions" (AICPA cited in Bathen 1978, p.1262). On this point it was argued by Dundas and George (1979-1980, p.877) that "[t]he language of subsection (B) closely reflects the accounting profession's own objective", since this standard was "originally developed…to assist independent auditors in evaluating a firm's internal accounting controls to determine whether errors that could materially affect the reliability of the firm's financial statements could be prevented" (Bathen 1978, p.1262).

Given deficiencies in existing law already identified by the SEC itself and outlined in previous hearings plus the fact no instances of financial misstatement due to the illicit use of corporate funds had been uncovered by external auditors, Proxmire argued the system had not worked (United States Senate, 1976c, May hearings, p.1). Logically, S.3418 would be no more effective than existing legislation and professional standards. The failure of S.3418 to add anything to measures that had already failed was compounded by SEC guidelines based on the concept of materiality. The guidelines did not specify what made one bribe material and another not. This lack of specificity meant the guidelines were "very elastic" (United States Senate, 1976c, May hearings, p.1). Proxmire further argued the discussion of disclosure in SEC Report of May 1976 was very ambiguous containing numerous "hedge words" such as "off the book accounts … generally require disclosure" and the use of "may be required" as opposed to "is required".

Hence, Proxmire argued in support of his own S.3133 prohibiting foreign bribery and prescribing disclosure of payment of foreign sales commission on the basis the common denominator in all proposed legislative remedies to date was disclosure (United States Senate, 1976c, May hearings, p.2). In response, the SEC argued it already had sufficient authority under existing law to compel disclosure. After all, the system have had "worked remarkably well by any standard. It is the finest enforcement mechanism for business practice" (United States, Senate, 1976c, May hearings, p.15). Proxmire disagreed saying "I would submit that your report casts substantial doubt on whether existing law is sufficiently clear on just what needs to be disclosed" (United States Senate, 1976c, May hearings, p.2).

In September 1976, another round of hearings commenced on proposals to amend the Securities Exchange Act to *inter alia* prohibit the payment of bribes by corporations, require the keeping of accurate records and disclosure of certain foreign payments. As with previous hearing, introductory statements summarised and condemned the activities and events leading to the proposals. One issue highlighted at the commencement of these hearings was criticism of the Securities and Exchange Commission from some business factions arguing bribery was part of the normal course of business. Furthermore, shareholders had no right to information concerning such activities. As noted by the Committee Chairman, Mr Murphy, the SEC persisted in its efforts to effect legislative reform in the belief shareholders were entitled to know how a company's profits were derived. In turn, this permitted shareholders to assess management integrity and performance by being able to determine if profits were based on competitive excellence or as a result of financially acquired favourable treatment (United States Senate, September hearings, 1976b, p.1).

The argument bribery was a normal part of business activities was refuted by Dr Gordon Adams, Director of Military Research, Council on Economic Priorities. Dr Adams the lengths some companies had resorted to in order to conceal bribery and similar payments. Such efforts would not have been necessary if companies expected a positive public response to the use of corporate funds for purposes of bribery or similar payments (United States Senate, September hearings, 1976b, p.34). In addition, Dr Adams rejected notions of self-regulation noting one particular company "had an impressive anti-bribery policy in effect while … making $100,00 in questionable payments abroad from 1971 to 1975" (United States Senate, September hearings,, 1976b, p.33). For these reasons, Dr Adams saw the proposals incorporated in the House of Representative 15481 and its identical Senate counterpart 3664 and House of Representative 13870 and 13953 as appropriate remedial measures.

Once again, the SEC appeared before the Committee. SEC chairman, Rodrick Hills, summarised the findings of investigations of some 200 corporations

> … we have found literally hundreds of millions of dollars of corporate funds which were placed in hidden accounts and expended entirely at the discretion of corporate executives who caused or permitted the payments to be inaccurately recorded on corporate books. … this country's system of protection for investors, developed over the past 40 years, which includes corporate self-regulation through independent auditors and outside directors and counsel, and which is ultimately enforced by the Securities and Exchange Commission, has been seriously frustrated. It has … broken down (United States Senate, September hearings, 1976b, p.17).

For these reasons, the SEC supported H.R.15481 (and, thereby, S.3664 as accepted by the Senate) to amend the Securities Exchange Act to require corporations under the act to maintain accurate records and prohibit bribery. Specifically, the SEC supported tighter internal accounting controls as specified in Section 1 of H.R.15481 and S.3664. In addition, the SEC advocated new accountability measures including independence of the board of directors, recognition of the professional responsibilities of outside auditors[10] and legal counsel and establishment of independent audit committees. With these new approaches to accountability in place, stronger measures were not necessary because "in most cases … the failure can be traced to a failure of corporate accountability … to outside auditors, to outside directors, to outside counsel and … to outside shareholders" (United States Senate, September hearings, 1976b, p.18). A similar restricted approach was proposed by the AICPA.

The AICPA prepared statement to the Committee expressed concern at requirements for companies "to devise and maintain "adequate" systems of internal accounting controls sufficient to provide reasonable assurances with respect to certain management and accounting safeguards" (United States Senate, September hearings, 1976b, p.158). To begin, a review of companies known to have engaged in illicit payments demonstrated having a system of internal accounting controls was not a panacea. Most, if not all, of these companies had internal controls in place. The problem was, the controls were circumvented. Furthermore, in the absence of a definition, there was no way of determining whether an internal accounting control system was "adequate". AICPA argued that companies seeking guidance on the compliance requirements for an "adequate" internal control system may turn to the legal profession for advice and that they might consider a "checklist-type approach" (United States Senate, September hearings, 1976b, p.163). In this regards, companies may attempt "to attain a system that meets a minimal legal standard rather than to attain the best system suitable to the circumstances" (United States Senate, September hearings, 1976b, p.163). The Senate report accompanying S.3664 acknowledged no internal control system was perfect and encouraged open discussion between management and auditors to facilitate improvement when required. The SEC endorsed the language as being acceptably clear for businesses to follow by arguing that these objects were providing "a reasonable basis for the implementation of the required system of controls, and that such objectives are already familiar to the business community" (Committee on Corporate Law and Accounting 1978, p.337). Ascribing criminality to failure to implement an adequate system of internal

[10] including an audit standard being developed by the AICPA dealing with identifying and responding to illegal acts by clients.

accounting controls would not be conducive to such discussions (United States Senate, September hearings, 1976b, p.18-19).

A further concern raised in the AICPA statement was the potentially broad scope of provision prohibiting any person “from directly or indirectly causing any book, record, or document to be falsified and from making materially false or misleading statements or omitting to state material facts necessary to be stated to an accountant in connection with any audit or examination”. In the absence of any qualification such as “deceit” or “intent to deceive”, a negligent if honest mistake could result in a criminal conviction (United States Senate, September hearings, 1976b, p.159). To address the deficiencies in the proposed H.R.15418/S.3664, the AICPA suggested corporate accountability would be best served by “requiring the maintenance of accounting records that appropriately reflect transactions and dispositions of assets and by prohibiting circumvention of internal accounting, falsification of the records, and written representations” (United States Senate, September hearings,1976b, p.161).

The Chairman of the Special Committee on Foreign Payments of the Association of the Bar of the City of New York, William Kennedy, also appeared before the Committee. Kennedy reported the Special Committee acknowledge the need for reform: “the serious practices … exposed over the last several years are clearly contrary to the national interest … there have to be measures to prevent a recurrence of these practices” (United States Senate, September hearings, 1976b, p.176). However, the Special Committee agreed with the Senate’s rejection of previous criminalisation and disclosure proposals. Those proposals would have created two crimes from one act. The first crime was engaging in bribery or other illicit activities. The second was the failure to confess the commission of the first offence.

Kennedy made reference to existing legislation and the “array of sanction” embodied in legislation such as securities laws, the Internal Revenue Code and anti-trust laws. In a comment reminiscent of Proxmire’s conclusion the existing accountability system was not effective (United States Senate, 1976c, May hearings, p.6), Kennedy observed “[t]here was never a lack of law applicable to the situation. What there was, was a lack of law enforcement…This doesn’t mean that you shouldn’t have new laws, but your new law should be tailored to the genuine problem and not to the optical one” (United States, Congress, Senate, Committee on Banking Housing and Urban Affairs 1976b, p.178). The preferred option of the Special Committee was disclosure (United States Senate, 1976c, May hearings, p.181).

COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS. FOREIGN CORRUPT PRACTICES AND DOMESTIC AND FOREIGN INVESTMENT DISCLOSURE

Committee deliberations commenced in March 1977 and were, once again, chaired by Senator Proxmire. The subject of the hearings was S.305 to amend the Securities Exchange Act to require maintenance of accurate records and prohibit certain bribes and other purposes including making it a criminal offence for an American corporation to pay a bribe to foreign officials. Proxmire observed the SEC had now uncovered 300 U.S. engaged in the bribery of foreign officials to an amount in excess of $300 million. Proxmire argued the findings of the

SEC tarnished the reputation of the U.S government. Furthermore, bribery thwarted fair competition because the market was no longer controlled by price and quality. There was no disagreement that bribery was wrong. The question was how to stop it (United States Senate, 1977, March hearing, p.1).

S.305 had passed through the Senate in 1976 by a unanimous of 86 to zero. However, opposition to the provisions of the bill saw it stalled in the House of Representatives. Apart from addressing the detrimental impact of bribery on the reputation of the United States and its corporations, the bill, if passed, would provide leverage to the Administration in effecting an international solution (United States Senate, 1977, March hearing, p.2). Secretary of the Treasury, Blumenthal, told the committee the administration fully supported the aims of S.305 and, in general, criminalisation of illicit payments. However, Blumental also urged the Committee not to underestimate the difficulties that would be encountered in drafting the bill. Specifically, in the absence a multinational treaty and bilateral agreements, enforcement was not likely to be possible. The administration intended to pursue international treaties and agreements once the provisions of S.305 were enacted. Blumenthal stated the administration had no desire to weaken the bill rather enactment of a strong, effective and enforceable bill was preferred (United States Senate, 1977, March hearing, p.98). On the other hand, Blumenthal stated he found it difficult to comprehend the need for a criminal statute to make people behave in their business dealings in the same way they conducted interpersonal relationships (United States Senate, 1977, March hearing, p.99). On a more positive note, Blumenthal encouraged vigorous pursuit of disclosure requirements and strengthening of existing provisions (United States Senate, 1977, March hearing, p.94-95).

SUMMARY OF THE BILLS PRESENTED TO THE SENATE AND THE HOUSE OF REPRESENTATIVES

❖ The SEC proposed legislation as part of their report in 1976 was identical to the following bills;

- S.3418, HR.15481, S.3664, S.305 (the Senate version, before it was finalised by the House of Representatives).

The accounting section of the bills contained 4 amendments to the Securities Exchange Act of 1934. The main difference between these bills and the final version of S.305, after it was amended by the House of Representatives were as follows:

- The bills subsection in relation to Integrity of accounting records and reports did not include the wording "in reasonable detail".
- The Systems of accounting controls section of the bills included the wording "adequate" which was omitted in the Act.[11]
- The bills third and fourth provisions were taken out of the act as “the SEC had already published for comment rules designed to accomplish similar objectives under its existing authority”.

❖ S.3133. that was proposed by Proxmire was only identical to two of the House of Representatives bills namely, H.R 13870 and H.R. 13953. The content of the bills were mainly similar to the SEC proposal, however, the bills included a section relating to

[11] As explained previously

public disclosure of details of the amounts, in excess of $1,000, the people or organisations to whom the payments were made and the purpose of the payments (House of Representatives, 1977a). This section was mainly criticised by the SEC and the bill was withdrawn and never debated in the Senate.

THE FOREIGN CORRUPT PRACTICES ACT

Accordingly, by December 1977 the FCPA was passed by the Congress "with unusual speed and surprising unanimity" (Lacey and George 1997-1998, p.132). The Act was described as "in many ways the most important act affecting accounting since the Securities Act of 1933 and 1934" (Auerbach 1978 cited in Bathen 1978, p.1261). The purpose of the FCPA was to protect investors as well as to regulate the accuracy of financial information of the companies.

After 1977, the accounting provisions "were never debated in the House of Representatives. In the Senate…very little consideration was given to the accounting standards" (Dundas and George 1979-1980, p.870) and as a result the language of the accounting section was simplistic and vague (Baker & Bettner 1997). The vagueness of the accounting section was questioned since it was introduced as part of the S.3418. Senator Proxmire mentioned that "…a vagueness which I would think that the corporations wouldn't like. I think they would want the certainty. … to know what they have to report and what they don't have to report" (United States, Senate, 1976c, May hearings, p. 13).

The Act consisted of four sections: Section 101 containing the title of the Act, section 102 covering accounting standards, and sections 103 and 104 dealing with foreign corrupt practices. The accounting provisions were passed as a series of amendments to the Securities Exchange Act of 1934 which increased "the degree of federal involvement in the internal management of public corporations" (Lacey and George 1997-1998, p.133). These provisions of the Act "incorporated only [the first] two of the four rules proposed originally by the SEC" (Dundas and George 1979-1980, p.518), as indicated above, which required registered and reporting issuers under the Securities and Exchange Act to:

- maintain books and records accurately reflecting the transactions and dispositions of assets of the issuer;
- maintain an adequate system of internal accounting controls designed to provide reasonable assurance that specified objectives are satisfied;
- prohibit the falsification of an issuer's accounting records; and,
- prohibit the officers, directors, or stockholders of an issuer from making false, misleading or incomplete statements to an accountant engaged in an examination of the issuer (Securities and Exchange Commission 1977a, p.1).

The SEC subsequently adopted the other two recommendations as "SEC rules specifically related to the recordkeeping provisions of the FCPA" (Lacey & George 1997-1998, p.135).

The FCPA placed new and significant obligations on issuers to make and keep accurate records and to maintain a system of internal accounting controls (Deming 2010), as strengthening controls would putatively enhance corporate accountability and ultimately public confidence in the corporate sector (cited in Williams 1979). These sections were viewed by the Congress " as a measure to foster managerial accountability and corporate integrity by eliminating the weaknesses in corporate financial control and recordkeeping which permitted corrupt payments" (Goelzer 1979, p.4). The details of the section 102 of the act are presented below.

- Maintenance of accurate records: Subsection A of the accounting provision (section 102) of the FCPA required "Every issuer …shall… make and keep books, records, and accounts, which, in *reasonable detail*, *accurately and fairly* reflect the transactions and dispositions of the assets of the issuer" (emphasis added 1977). AICPA were concerned about the generality of the provision and the use of "accurately and fairly" as it relates to being exact that is not achievable by companies and "there is no standard against which achievement of that precision can be measured" (United States House of Representatives 1976, p.7).

- Maintenance of a system of internal accounting controls: Subsection B of the accounting standard provision of the Act obliged companies to employ a system of internal control by stating that

> Every issuer …shall… devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that
>
> (i) transactions are executed in accordance with management's general or specific authorization;
>
> (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;
>
> (iii) access to assets is permitted only in accordance with management's general or specific authorization; and
>
> (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences (1977).

This subsection of the accounting provision, represented "the most significant intrusion of government into corporate affairs since the original enactment of securities legislation in the 1930's" (Siedel 1981, p.444). In corporate history "[i]t was the first time the federal government imposed standards of corporate governance upon public companies" (Giudice 2011, p.351) as there was "a profound and pressing need to seek ways to raise the levels of conduct of corporate management" (Roderick Hills cited in Lacey & George 1997-1998, p.129). The FCPA gave the SEC the authority to regulate as well as oversee the internal management of domestic companies (Bathen 1978; Dundas & George 1979-1980). Previously, the SEC "never had the authority to regulate the internal operations of American corporations" (Dundas & George 1979-1980, p.880).

CONCLUSION

The FCPA was prompted by a series of scandals including Watergate involving bribery and illicit campaign contributions of domestic and foreign governments, politicians and corporations that had shaken public confidence in the integrity of the US business community (Gary 1990; Darrough 2010). The Watergate discoveries of patterns of concealed corporate political contributions for the purpose of obtaining foreign government sales and contracts as well as influencing the government's policies (Barovick 1976), demonstrated the "tremendous impact on corporations, independent auditors, and the role of the SEC" (Lacey & George 1997-1998, p.139). Senator Proxmire (United States, Senate, 1976c, May hearings, p. 3) argued "the fact that so many companies have been able to elude the system of corporate accountability strikes us as a matter requiring significant action". A series of hearings in response to these scandals, made it apparent that legislation was required to address corrupt activities.

The accounting provisions of the FCPA were arguably "one of the most significant expansions of the securities law since the 1933 and 1934 Acts" (Kneedler & Grant 1980, p.22). it had the ability to "affect the governance and accountability mechanisms of most major corporations, the work of their independent auditors and the role of the Securities and Exchange Commission" (Goelzer 1979, p.4). However as argued by Gary (1990, p.12) the Act was "the child of political scandal". The provisions of the act were self-regulatory measures to allow the companies "in conjunction with its outside accountants and counsel" to self-discipline their affairs without government involvement as the primary administrator (Williams 1979, p.3). Even before the accounting provision was accepted as part of the FCPA, there were debates on effectiveness of this act being based on the then existing practices and it was argued by one of the senators as follows:

> Mr. President, if this bill were really sufficient to provide a remedy for this immense amount of corruption…we could be sure that this place would be buzzing with lobbyists. They are not concerned about this bill…that is why these corridors are not filled with the lobbyists of any companies coming here to tell us that we must not pass this bill (Siedel 1981, p.450).

Some commentators regarded the Act's accounting provisions, particularly the internal control standards, as excessively vague (Securities and Exchange Commission 1981; Siedel 1981) and lacking in clarity (Roberts 1989).

This brief history of the path to the Foreign Corrupt Practices Act provides a clear example of the manner in which rank and privilege can be used to maintain the status quo in favour of a powerful minority. Many of the hearings heard that the prevailing system of corporate accountability had failed. Management had been able to circumvent internal controls and use corporate funds for illicit purposes. Internal controls were further thwarted by the manner in which management was able to record transactions and conceal improper use of corporate funds. The provisions of the Foreign Corrupt Practices Act were progressively eroded to the point the act did little more than maintain the status quo.

BIBLIOGRAPHY

1977, The Foreign Corrupt Practices Act

American Institute of Certified Public Accountants (1976), *Testimony before the Subcommittee on Consumer Protection and Finance of the Committee on Interstate and Foreign Commerce*, U.S. House of Representatives, New York, September 22, 1976

Baker, R C and Bettner, M S (1997), "Interpretive and Critical Research in Accounting: A Commentary on its Absence from Mainstream Accounting." *Critical Perspectives on Accounting*, Vol.8, pp.293-310.

Barovick, R L (1976), "The SEC Unleashes a foreign Payoffs Storm." *Business & Society Review* Vol.19, pp.48-53.

Bathen, T E (1978), "A Congressional Response to the Problem of Questionable Corporate Payments Abroad: The Foreign Corrupt Practices Act of 1977." *Law and Policy International Business*, Vol.10, pp.1253-1304.

Bernstein, C and Woodward, B (1974), *"All the President's Men"*, Simon and Schuster, New York

Bostick, L N. and Luehlfing, M S (2007), "Auditors' Responsibilities Formalized Under SAS 109 Understanding Risks Associated with the Legal and Regulatory Environment", *The CPA Journal*, February, 7, 2007 *http://www.nysscpa.org/printversions/cpaj/2007/207/p23.htm*

Committee on Corporate Law and Accounting (1978), *"A Guide to the New Section13(b)(2) Accounting Requirements of the Securities Exchange Act of 1934 (Section 102 of the FCPA of 1977)"*, Chicago American Bar Association 307-343

Council of Institutional Investors (2010), *"Statement on Financial Getekeepers"*, Council of Institutional Investors website, http://www.cii.org/UserFiles/file/Statement%20on%20Financial%20Gatekeepers.pdf accessed 22 August 2011

Cranston, R. (1982), "Regulation and Deregulation", *UNSW Law Journal*, pp.1-28

Darrough, M N (2010), "The FCPA and the OECD convention: Some lessons from the U.S. experience." *Journal of Business Ethics*, Vol.93, No.2, pp.255-276.

Deming, S H (2010), "FCPA prosecutions: The critical role of the accounting and recordkeeping provisions." *Business Law Today*, Vol.August pp.1-4.

Dundas, M and George, B (1979-1980), "Historical Analysis of the Accounting Standards of the Foreign Corrupt Practices Act." *Memphis State University Law Review*, Vol.10, No.3, pp.499-524.

Durr, K and Kinnane,A (2005), "431 Days: Joseph P. Kennedy and the Creation of the SEC" *Galleries*, SEC Historical Society, Virtual Museum and Archive of the History of Financial Regulation, http://www.sechistorical.org/museum/galleries/kennedy/

Gary, O (1990), "The Foreign Corrupt Practices Act: Revisited and Amended." *Business and Society*, Vol.29, No.Spring, pp.11-17.

Giudice, L (2011), "Regulating corruption: analyzing uncertainty in current Foreign Corruption Practices Act enforcement." *Boston University Law Review*, Vol.91, No.1, pp.347.

Goelzer, D L (1979), "The Accounting Provisions of the Foreign Corrupt Practices Act-The Federalization of Corporate Recordkeeping and Internal Control." *The Journal of Corporation Law*, Vol.5, No.1, pp.1-53.

Grabosky, P., and J. Braithwaite (986a), "*Of Manners Gentle*", Oxford Press, in association with the Australian Institute of Criminology

Grabosky, P., and J. Braithwaite (1986b), "Corporate Crime and Government Response In Australia", *The Australian Criminal Justice System: The Mid 1980's,* D. Chappell and P. Wilson, eds., Butterworths, Sydney, pp.84-96

Hart, G. (1980), "Some Aspects of Government Regulation of the Capital Markets", *Legislation and Society in Australia*, ed. by R. Tomasic, The Law Foundation of New South Wales & George Allen and Unwin, Sydney, pp.236-252

Hills, Roderick M (1976), "Corporate Morality – Whose Business Is It? An Address By Roderick M. Hills, Chairman Securities and Exchange Commission, Town Hall, Los Angeles, California, April 13, 1976", Securities and Exchange Commission

Hohenstein, K (2007), "The Bright Image: The SEC, 1961-1973", *Galleries,* SEC Historical Society, Virtual Museum and Archive of the History of Financial Regulation, http://www.sechistorical.org/museum/galleries/tbi/

Hohenstein, K (2009), "In the Midst of Revolution: The SEC, 1973-1981", *Galleries,* SEC Historical Society, Virtual Museum and Archive of the History of Financial Regulation, http://www.sechistorical.org/museum/galleries/rev/

House of Representatives, Committee on the Judiciary (1974a), Ninety-Third Congress, second session, Pursuant to H. Res. 803 A resolution authorizing and directing the Committee on the Judiciary to Investigate whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach Richard M. Nixon, President of the United States of America. Book 1. Events prior to the Watergate break-in, December 2, 1971 – June 17, 1972, May-June 1974, U.S. Government Printing Office, Washington.

House of Representatives, Committee on the Judiciary (1974b), Report. Impeachment of Richard M Nixon President of the United States, Ninety-Third Congress, second session,. House of Representatives Report No. 93.1305, 20 August, 1974

House of Representatives (1977a), "Foreign Corrupt Practices", Conference Report from the Committee of Conference [To accompany S.305], 95th Congress, 1st Session, Report No.94.831, December 6, 1977.

House of Representatives (1977b), "Unlawful Corporate Payments Act of 1977", Report from the Committee of Conference together with Minority Views [to accompany H.R. 3815] including cost estimate of the Congressional Budget Office, 95th Congress, 1st Session, Report No. 95-640, September 28, 1977.

Jickling, M (2009), "Causes of the Financial Crisis. CRS Report for Congress" *Congressional Research Service*, January 29, 2009

Joint Financial Stability Forum and Committee on the Global Financial System Working Group (2009), “The role of valuation and leverage in procyclicality”, CGFS Papers. No. 34, April 2009 http://www.bis.org/publ/cgfs34.pdf accessed 6 August, 2011

Kneedler, R and Grant, N W (1980), "The Foreign Corrupt Practices Act; Coping with Internal Accounting Control Provisions." *Los Angeles Business & Economics*, Vol.5, No.1, pp.22-27.

Koehler, M (2010), "The facade of FCPA enforcement." *Georgetown Journal of International Law* vol.41 no.4, 907-1009

Lacey, K and George, B C (1997-1998), "Expansion of SEC Authority into International Corporate Governace: The Accounting Provisions of the Foreign Corrupt Practices Act (A Twentieth Anniversary Review)." *Journal of Transnational Law and Policy*, Vol.7, pp.119-155.

Landauer, J (1974), “IRS Urges Minnesota Mining Ex-Officers Face Criminal Charge for Political Fund”, The Wall Street Journal, 31 December, 1974, p.2

Lewis, A E (1972), “5 Held in Plot to Bug Democrats’ Office Here”, Washington Post, Monday, June 18, 1972 http://www.washingtonpost.com accessed 7 March 2008

Lieberman, J. (2002), *Committee on Governmental Affairs, Hearings*, January 24, February 27, March 20, May 7, July 30 and November 12 http://hsgac.senate.gov/hearings02.htm accessed 13 February, 2011

Mattera, P (2007), Corporate Research E-Letter No.68, November-December 2007, “The “Business Watergate”, http://www.corp-research.org/archives/nov-dec07.htm accessed 7 March 2008

Mavrommati, S (2005), “The Dynamics of Gatekeepers, Corporate Culture and Whistle Blowers”, *The Corporate Governance Law Review*, vol. 1, no. 3, pp.385-401

McCloy, J J, Pearson, N W. and Matthews, B (1976), “The Great Oil Spill. The inside report. Gulf Oil’s Bribery and Political Chicanery”, New York, Chelsea House Publishers

Melnik, S (2003), “The CPA in Industry. Accountants’ Anti-Money-Laundering Responsibilities”, CPA Journal, December 2003 http://www.nysscpa.org/cpajournal/2003/1203/dept/d125003.htm accessed 19 July 2010

Mitchell, A. Sikka, P. and Wilmott, H (2001), “Policing Knowledge by Invoking the Law: Critical Accounting and the Politics of Dissemination”, *Critical Perspectives on Accounting*, vol.12, pp.527–555

Mitchell, A. Sikka, P. and Wilmott, H (1996), “Sweeping it Under the Carpet: The Role of Accountancy Firms in Moneylaundering”, presented at the Critical Perspectives on Accounting Symposium, Baruch College, New York, 26-28 April 1996

Mitchell, A. Sikka, P. and Wilmott, H (1998), The Accountants’ Laundromat, Association for Accountancy & Business Affairs, Essex

Mitnick, B. (1980), “*The Political Economy of Regulation*”, Columbia University Press.

Moe, T M (2003), “Reform blockers: the American political system advantages those who prefer the status quo, which is why so little has changed in American education” *Education Next*, March 22

Posadas, A. (2000), "Combating Corruption Under International Law, *Duke Journal of Comparative and International Law*, vol.10, pp.345-414

Posner, R. A. (1974), "Theories of Economic Regulation", *The Bell Journal of Economics and Management Science*, vol.15, no.2, pp.335-358

Proxmire, W. (1976), "U.S. Senator William Proxmire reports to you from Washington: Lockheed bribes must be disclosed now", Wisconsin Historical Society, March 1976.

Securities and Exchange Commission (1974), SEC News Digest, Issue 74-47 (SEC Docket, Vol.3, No. 18, Mar.19), March 8, 1974

Securities and Exchange Commission (1976a), Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices Number 363 Special Supplement, May 19, 1976, The Bureau of National Affairs Inc., Washington, DC

Securities and Exchange Commission (1976b), Letter to The Honorable John E. Moss, Chairman. Subcommittee on Oversight and Investigations Committee on Interstate and Foreign Commerce, House of Representatives, Washington DC.

Securities and Exchange Commission (1977a), Promotion of the Reliability of Financial Information, Prevention of the Concealment of Questionable or Illegal Corporate Payments and Practices, and Disclosure of the Involvement of Management in Specified Types of Transactions. Proposed Amendments to Rules and Schedules, Release No. 13185, 1977 SEC Lexis 2605, January 19, 1977

Securities and Exchange Commission (1977b), Report of the Advisory Committee on Corporate Disclosure to the Securities and Exchange Commission, November 3, 1977. Printed for the use of the House Committee on Interstate and Foreign Commerce, U.S. Government Printing Office, Washington, 1977

Senate Select Committee on Presidential Campaign Activities (1973a), *Hearings before the Select Committee on Presidential Campaign Activities of the United States Senate.* Book 2, Ninety-third Congress, First Session. U.S. Government Printing Office, Washington

Senate Select Committee on Presidential Campaign Activities (1973b), *Hearings before the Select Committee on Presidential Campaign Activities of the United States Senate.* Book 10, Ninety-third Congress, First Session. U.S. Government Printing Office, Washington

Senate Select Committee on Presidential Campaign Activities (1973c), *Hearings before the Select Committee on Presidential Campaign Activities of the United States Senate.* Book 13, Ninety-third Congress, First Session. U.S. Government Printing Office, Washington

Senate Select Committee on Presidential Campaign Activities (1974a), *The Final Report of the Select Committee on Presidential Campaign Activities*, United States Senate, Ninety-Third Congress, second session, Senate Report No.93-981 U.S. Government Printing Office, Washington

Senate Select Committee on Presidential Campaign Activities (1974b), *Book 25 of Presidential Campaign Activities of 1972, Watergate and Related Activities, Supplemental Material on Campaign Practices and Finances*, Ninety-Third Congress, First and Second Sessions, U.S. Government Printing Office, Washington

Siedel, G J (1981), "Internal Accounting Controls under the Foreign Corrupt Practices Act: A Federal Law of Corporations?" *American Business Law Journal*, Vol.18, pp.443-475.

Sikka, P (2002), "Time for a public inquiry into the major firms", The Times (London), July 4, 2002

Smith, H. (2002), "Interview with Senator Joe Lieberman", *Frontline*, March 15, 2002 http://www.pbs.org/wgbh/pages/frontline/shows/regulation/interviews/lieberman.html accessed 13 February, 2011

Stigler, G. (1971), "The Theory of Economic Regulation", *Bell Journal of Economic and Management Science*, vol.2, Spring, pp.3-21

The Guardian (1972), "Peter Jenkins" *The Guardian* Friday, September 15, 1972, page 11

The Wall Street Journal (1975a), "Phillips Petroleum Is Accused of Keeping a Political Slush Fund in Suit by Holder", *The Wall Street Journal*, 25 February, 1975, p.15

The Wall Street Journal (1975b), "Phillips Petroleum Charged by the SEC With Making Illegal Political Donations", *The Wall Street Journal*, 7 March, 1975, p.18

The Wall Street Journal (1975c), "Northrop is Accused by SEC of Failing to Disclose It Had Political Slush Fund", *The Wall Street Journal*, 17 April, 1975, p.6

Tomasic, R. (1980), "The Sociology of Legislation", *Legislation and Society in Australia*, ed. by R. Tomasic, Law in Society Series, The Law Foundation of New South Wales & George Allen & Unwin, Sydney, pp.19-49

Time (1975), "Business: Again, Political Slush Funds", *Time*, Monday, March 24, 1975. http://www.time.com/time/magazine/article/0,9171,946547-2,00.html#ixzz0nCykuqVY accessed 6 May 2010.

United States Congress (1976), Abuses of Corporate Power: hearings before the Subcommittee Priorities and Economy in Government of the Joint Economic Committee, Ninety-fourth Congress, First And Second_Sessions, January 14, 15,and March 2, 5 1956, U.S. Government Printing Office Washington.

United States House of Representatives (1976), Testimony of American Institute of Certified Public Accountants on HR.15481, 1-9

United States Senate (1975a), "The Activities of American Multinational Corporations Abroad", Hearings Before the Subcommittee On International Economic Policy of the Committee On International Relations, House of Representatives, Ninety-fourth Congress, First Session , June 5, July 17, 24, 29 and September 11, 18, 30 1975, U.S. Government Printing Office Washington.

United States Senate (1975b), "Protecting the Ability of the United States to Trade Abroad", *Hearing before the Subcommittee on International Trade of the Committee on Finance. Ninety-Fourth Congress, First Session on S.Res. 265 A Resolution to Protect the Ability of the United States to Trade Abroad*, October 6, 1975, U.S. Government Printing Office Washington.

United States Senate (1976a), "Foreign and Corporate Bribes", *Hearings before the Committee on Banking, Housing and Urban Affairs. . Ninety-Fourth Congress. Second Session on S. 3133*, April 5, 7 and 8, 1976, U.S. Government Printing Office Washington.

United States Senate (1976b), “Foreign payments disclosure”, Hearings before the Committee on Interstate and Foreign Commerce, Subcommittee on Consumer Protection and Finance., , Ninety-fourth Congress, second session on H.R. 15481 and S. 3664, H.R. 13870 and H.R. 1395, September 21 and 22 1976, U.S. Government Printing Office Washington..

United States Senate (1976c), “Prohibiting Bribes to Foreign Officials”, Hearings before the Committee on Banking Housing and Urban Affairs. *Ninety-Fourth Congress. Second Session on S. 3133, S. 3379, S. 3418, May 18 1976,* , , U.S. Government Printing Office Washington.

IUnited States Senate (1977), “Foreign Corrupt Practices and Domestic and Foreign Investment. Improved Disclosure Acts of 1977”, Hearings before the Committee on Banking, Housing, and Urban Affairs. Ninety-Fifth Congress. First Session on S.305, May 2 1977 U.S. Government Printing Office Washington.

United States Senate (2009), “Testimony before the Subcommittee on Financial Services and General Government before the Subcommittee on Financial Services and General Government by Chairman Mary Schapiro, U.S. Securities and Exchange Commission” U.S. Senate Committee on Appropriations, June 2, 2009

Vanasco, R R. (1999), “The Foreign Corrupt Practices Act: An International Perspective”, *Managerial Audit Journal*, Volume 14, Number 4/5, pp. 159-262, 1999

Warner, J (2009), “Financial crisis: Should we really be gunning for bankers” *The Telegraph*, December 2001 (http://www.telegraph.co.uk/finance/comment/jeremy-warner/6724501/Financial-crisis-Should-we-really-be-gunning-for-bankers.html accessed Friday 29 July, 2011)

Weinstein, H (1975), “Northrop: Fame in Aircraft, Shame in Politics”, *The New York Times*, 18 May, 1975, p.F-1

Whittington, R. (1991), “Illegal acts: what are the auditor’s responsibilities?”. *Journal of Accountancy*, January 1, 1991 http://www.allbusiness.com/accounting-reporting/auditing/152227-1.html accessed 25 July 2010

Williams, H M (1979), *Implementation of the foreign corrupt practices act: An intersection of law and management*, Dallas, Texas, Securities and Exchange Commission

Williams, H M (1980), *News* “The role of the SEC in overseeing the accounting profession”, Securities and Exchange Commission, March 13, 1980

Wong, L (2009), “The crisis: a return to political economy?”, *Critical Perspectives on International Business*, vol.5, issue ½, pp.56-77

Zeff, S. A. (1978), “The Rise of Economic Consequences”, *The Journal of Accountancy*, December 1978, pp.56-63

Zeff, S.A., (1982), “Truth in Accounting: the ordeal of Kenneth MacNeal”, *Accounting Review*, July, pp. 528-53

date		senate		House of Representatives	
		Bill Number	Sponsor	Bill Number	Sponsor
1975	3 June			H.R. 7539	Congressman Stephen Solarz
1976	11 March	S. 3133	Senator William Proxmire		
	5 May	S. 3379	Senators Frank Church		
	12 May	S. 3418	Senator Proxmire at the request of the SEC		
	18 May			H.R. 13870 (Identical to S.3133)	Congressman Moss
	21 May			H.R. 13953 (Version of S.3133)	Congressman Pickle
	11 June			H.R. 14340 (Identical to S.3379)	Congressman Stephen Solarz
	2 July	S. 3664 (combined S.3379 and S. 3418)	Committee on Banking, Housing and Urban	H.R. 14681	Congressman Stephen Solarz
	September	S. 3664 was passed		H.R 15481 (Version of S. 3664)	Mr Murphy
1977	January	S. 305	Senator Proxmire and Williams	H.R 1602	Mr Murphy
	February			H.R 3815	Congressman Eckhardt
	May	S. 305 was passed			
	November			H.R 3815 was passed	
	December	S. 305 (modified version based on H.R 3815)	Senator Proxmire	S. 305 was approved	
1981		S. 708	Senator John Chafee		
1983	February	S. 414	Senator John Heinz		
	March			H.R 2157	Dan Mica
1985	January	S. 430 (Identical to S. 414)			