ABA NATIONAL INSTITUTE ON THE FOREIGN CORRUPT PRACTICES ACT

"ORIGINS OF THE FCPA"

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The FCPA is now in its 29th year and going strong. While there were some rocky times when I thought it would be dismembered, the fact is it has weathered through those rough days and remains vibrant as it now enters its fourth decade.

What I envisioned when the law was enacted was a new corporate regime where bribery of foreign officials would be almost completely extinguished at least as it pertained to major U.S. corporations.

As all of us here have observed, the wild-eyed do-gooders predictions never occurred. Instead statistics indicate that bribery of foreign officials has maintained a steady pace over the years. What has been particularly disturbing to me is that the provision of the act requiring public issuers to devise and maintain a system of internal accounting controls that assures:

- Execution of transactions only in accordance with management's authorization which need to be recorded in conformity with GAAP.;

- Access to assets only in accordance with management's authorization;
- The maintenance of the accountability for assets; and
- Appropriate action when a comparison between existing assets and recorded assets demonstrates differences; has been virtually ignored.

For how else can one explain the current furor over Section 404 of Sarbanes-Oxley that once again mandated a company have a system of effective internal controls.

I ask the question: are the many companies that are complaining about section 404 totally ignorant of the FCPA accounting internal control requirements? If no that would be an unfortunate commentary and would indicate an almost unparalleled degree of hubris .

I am sure many of you know the SEC's program of self-evaluation with a follow-up report to the SEC has its origins in the FCPA program.

Back in the mid-1970's foreign bribery by U.S. corporations was rampant. It was quite reminiscent of the options practices of this day, although I think the incidence of foreign bribery exceeded the current flood of options cases. At one time there were approximately 650 sensitive payment cases in active status.

The Commission became very concerned about where the program was going and I must say with me for leading them into this morass with seemingly no end in sight. We had a wonderful chairman at the time, Rae Garrett. Although he was quite conservative, he did not like dishonesty. And so he was supportive of the program.

However, even with his support he wanted to see an exit strategy. Alan Levenson, my dear departed friend, who was then Director of the Division of Corporate Finance and myself were attending the Annual North American Securities Commissioners conference in the wonderful city of San Antonio.

In attendance were the various state securities commissioners. For those who have attended one of those conventions, you know they are a blast. In the middle of the proceedings, Alan Levenson and I were summarily summoned back to DC by Chairman Garrett.

When we arrived at the Commission, you could see the Chairman was under some pressure from the business community and his own Commission. He told us he was not going to exercise his draconian powers and declare the program at an end. Instead, he wanted Alan and me to come up with a strategy to cap the program.

Alan and I very much appreciated the way the Chairman handled it. He did it in a way that avoided a public spanking. It is with this background that

the Volunteer program came into being. We had already been relying on private counsel to internally investigate in a comprehensive manner instances of sensitive payments after a staff investigation indicated there was a prima facie case of their existence. As part of the court action taken against these corporations we required that a self assessment be performed by outside counsel and that the corporation disclose the results to the SEC and the corporation's shareholders.

The volunteer program we devised contained the self-assessment aspect. It merely eliminated the need for the SEC to bring an enforcement action to get to that point. So what the corporate community was told was that if they would engage outside counsel to perform a comprehensive review of the corporation's contracting practices in foreign lands and made a credible report to the SEC there was the strong possibility that the SEC would take no formal action against the corporation. There were no absolute promises and the SEC reserved the right to proceed against the corporation on the basis of the corporation's own findings.

To the credit of the Corporate community it took us at face value. This is largely because the staff had built a far ranging reputation for fairness and to everybody's satisfaction the system worked.

It is interesting that the voluntary program had fallen into disuse after I left the commission in 1981. I tried to revive it in a speech I made to the Federal

Securities Law Committee of the ABA in 1999. This was in reference to the corporate managed earnings cases that were emerging at the time and which represented the beginning of the wave of accounting scandals that plagued this nation in the early 2000's. At this early stage, I urged the following:

"Perhaps what is needed is for the SEC to dust off its volunteer program of the 1970's that was used to deal with the corporate bribery scandals of that day."

While my plea at that time was ignored, in 2001 along came the SEC's 21(a) investigation report that became known as the "Seaboard Report." When I read it I though that it looked awfully familiar. And recently I have received a number of calls and indeed some newspaper commentary about resurrecting the program with respect to the Stock Option Craze. For example, a June 17, 2006 article by David Vise in the Wall Street Journal advocated the following for dealing with the emerging stock option revelations:

"The SEC needs to act more quickly. Indeed, it should take a leaf from its own past: In the 1970s, after scores of companies secretly paid bribes overseas, then-SEC enforcement Chief Stanley Sporkin warned that unless companies voluntarily made immediate and full disclosure of their activities, they would face harsher legal consequences later. This amnesty-like approach swiftly brought many bribes into public view, as scores of companies rushed to confess.

Mr. Sporkin's example might serve as a blueprint for flushing out miscreant companies and their all-too-willingly compliant directors in the current scandal. Having failed to detect the backdating of stock options when this practice took place, now is the time for Wall Street's top cop to take the initiative."

But more about this in two weeks when I will be addressing that subject.

I do have clients in this area. I can basically say I feel their pain. As a key participant in devising the FCPA, I am not prepared to seek its termination. But I do think the Department of Justice and the SEC can do something forward-looking which would be win-win for both the government and the private sector. Because I believe this idea has merit, I would very much like the SEC and DOJ to give it due consideration. I have dubbed the proposal the FCPA Immunization-Inoculation Program. This is the customer take-away component of my talk.

Here is the way the program would work:

The FCPA immunization proposal represents an attempt similar to the voluntary disclosure system that proved to be such a success, and which I have described above but one that would be more proactive. The program would exclude all pending cases which would be dealt with in due course along traditional guidelines.

The quasi-amnesty program would consist of:

- Agreement by participating firms to conduct a full and complete review of the company's compliance with the FCPA for the previous 3 years.
- The study would be conducted jointly by a major accounting firm or specialized forensic accounting firm and a law firm. A joint accounting-law firm effort makes the most sense because the audit would include both a financial as well as a legal component. At the conclusion of the process, both the law firm and the accounting firm would provide the company with an exception list along with an appropriate certification.
- The firm would further agree to disclose the results of the legal-accounting audit to the SEC, its investors and the public.
- If any violations turned up in the process of the audit, the participating firm would agree to take all steps to eliminate the problems and implement the appropriate controls to prevent further violations.

- Further, participating firms would agree to subject themselves to a similar audit on an annual basis for at least 5 years to ensure that compliance was being maintained.
- Participating firms would be required to create the position of FCPA compliance officer, whose sole responsibility would be to ensure the company's compliance with the FCPA. He/she would make an annual certification.
- In exchange for these actions by the firms, the SEC and DOJ would give qualified assurances that no actions would be brought for violations exposed by the review. The limited amnesty would not apply if the violations rose to a flagrant or egregious level.

Such an immunization-inoculation program would serve the dual purpose of: (1) creating suitable incentives to compliance-minded companies to adopt and maintain high ethical standards in the conduct of their business; and (2) reducing the case load and investigative burden of governmental agencies that enforce the FCPA while reassuring regulators that companies are taking active steps to limit corruption in their foreign contracting and other activities.

If anyone in the audience believes this has merit let me hear from you. While some adjustments may be necessary, I think it would provide the right-thinking corporate community with the necessary assurances that it needs to

develop a vibrant overseas business without having to defend itself against very costly and time consuming investigations.

In a way, seeing so many of you here is bittersweet for me. I am awed by the attention that has been given to something that I helped give birth to some 30 years ago. I am also disappointed that this issue after all these years has not had a better resolution for the good of this nation and the global economy. Thank you.