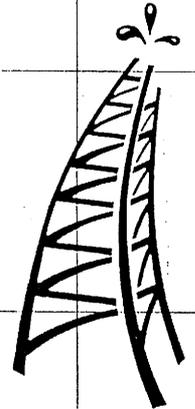


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## **Current Developments in Financial Accounting and Reporting . . . . . 1**

**Dennis Jennings**

An update on recent activities of the FASB and SEC including new EITFs: accounting for restructuring charges and employer liability for termination benefits.

## **COPAS : An Update . . . . . 7**

**Jon Gear**

A report on the activities of various committees and subcommittees of the Council of Petroleum Accountants Societies.

## **Current Developments in Environmental Issues . . . 21**

**Charlotte Wright**

This issue's topic focuses on the manner in which environmental concerns have affected the way U.S. petroleum companies do business in Latin America.

## **International Petroleum Fiscal Systems: Production Sharing Contracts . . . . . 24**

**Daniel Johnston**

Mr. Johnston examines the myriad variety of petroleum fiscal systems throughout the world, covering fiscal, concessionary, and royalty/tax systems; economic rent; negotiations; contracts; and joint ventures. Following the article are a glossary of terms and a list of abbreviations and acronyms our readers may find helpful.

**U.S. Taxation of Americans Working in Russia . . . 176**

**W. Richard Anderson**

This article reviews the U.S. tax law relative to Americans working in Russia, including the U.S./Russia tax treaty and the U.S. and Russian social security systems. Mr. Anderson has sixteen years of experience in all phases of financial accounting and tax compliance with an emphasis on complex corporate and partnership accounting and taxation matters. He has been the director of the tax department at Hein + Associates in Houston since 1987.

**Double Taxation . . . . . 189**

**Rich Anderson and Daniel Johnston**

Without relief from double taxation, very little foreign oil and gas exploration activities would take place. Mr. Anderson and Mr. Johnston discuss various ways that the U.S. and foreign governments address this issue.

**The Accounting Provisions  
of the Foreign Corrupt Practices Act . . . . . 199**

**J. Lanier Yeates, N. Stephan Kinsella, and Paul E. Comeaux**

The Foreign Corrupt Practices Act (FCPA) imposes unnecessary costs and disadvantages on American businesses competing in a global economy with other international businesses not restrained by this type of legislation. Mr. Yeates and Mr. Comeaux are Houston attorneys with the firm of Jackson & Walker. Mr. Kinsella is a Philadelphia attorney with Schrader, Harrison, Segal, & Lewis.

**Post-Project Audit of an Actual Oil and Gas  
Exploration and Development Project Account . . . 204**

**John Lohrenz and Clyde L. Posey**

In order to illustrate how post-project audits of individual project oil and gas accounts can be a potent management tool, the authors analyze an actual, typical successful oil and gas project from the investment to acquire exploration rights to abandonment. Mr. Lohrenz is an associate professor in the Department of Petroleum Engineering and Geosciences at Louisiana Tech University and a frequent consultant in the oil and gas industry. Mr. Posey is a professor in the School of Professional Accountancy at LTU.

**Announcements . . . . . 221**

# The Accounting Provisions of the Foreign Corrupt Practices Act

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## Introduction: Yet Another Bad Law from Congress

It seems obvious that, other than establishment of second-to-none means of providing national defense and providing for a fair and impartial judicial system, the most legitimate purpose of our federal government is the protection of American citizens from harm. Thus, it seems equally elementary that the Foreign Corrupt Practices Act ("FCPA"),<sup>1</sup> which protects no American citizen from any type of harm, is more than a useless law: it is a punitive one. Not only does the FCPA fail to protect the rights of Americans, it adds insult to injury by attempting to legislate morality and imposing unnecessary costs on American citizens who are competing in a global economy with other international business men and women who are not restrained by legislation of its type.

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<sup>1</sup> The FCPA is codified at 15 U.S.C.A. §§ 78m(b), (d)(1), (g)-(h), 78dd-2, and 78ff(a), (c) (West 1981 & Supp. 1993).

It injures Americans, first, by imposing regulatory and legal costs on businesses—coping with a complex web of regulations and paying attorneys' fees are not inexpensive.<sup>2</sup> Second, American businessmen are prevented under the FCPA from engaging in commercially useful activities with foreign officials that, evidently, only our Congress in its wisdom considers to be offensive,<sup>3</sup> putting our businessmen at a competitive disadvantage<sup>4</sup> with businessmen from other countries that do not impose such artificial restraints on activities. With uncharacteristic attention to morality and ethics, our Congress under the FCPA characterizes such activities as "bribery."

The FCPA attempts to deter the bribing of foreign officials in two ways: first, through the anti-bribery provisions discussed above by making bribes a criminal offense, and second, through a system of accounting provisions designed to serve as indirect internal deterrents.<sup>5</sup> Although the FCPA is a pernicious law, it is nevertheless the law, and its provisions are thus relevant to practitioners, businessmen, and, in general, anyone whose activities make them subject to its broad scope. Thus, the accounting provisions are important to those subjected to the constraints of the FCPA.

<sup>2</sup> Furthermore, the very existence of legislation such as the FCPA—more specifically, the federal government's power and willingness to enact legislation, i.e., to change the law from day to day—imposes costs on businesses by making the political climate uncertain. This is because, as noted by the late Italian theorist Bruno Leoni, under a system where a legislature has the ability to enact "centrally planned" laws, "we are *never certain* that tomorrow we shall have the rules we have today." Bruno Leoni, *Freedom and the Law* (3d ed., Liberty Fund 1991)(1961). As Leoni pointed out, "there is more than an analogy between the market economy and a judiciary or lawyers' law, just as there is much more than an analogy between a planned economy and legislation." *Id.* at 23 (emphasis in original). The knowledge of legislators about the society they will affect by their actions is, like that of central planners, severely limited. Because of this ignorance, all the effects of a given legislated law cannot be predicted, to say the least. In the same way that a centrally planned economy is inefficient, certain centrally planned laws, (i.e., legislation such as the FCPA) also impose inefficiencies on the market and, thereby, help to impoverish us all, to some extent. See also Ridgway K. Foley, Jr., "Invasive Government and the Destruction of Certainty," 38 *The Freeman* 11 (1988).

<sup>3</sup> FCPA §§ 78dd-1, 78dd-2.

<sup>4</sup> Katharine M. Albright and Grace Won, "Foreign Corrupt Practices Act," 30 *American Criminal Law Review* 773, at text accompanying n. 13 (1993).

<sup>5</sup> Albright and Won, *supra* note 4, at text accompanying n. 6.

### The FCPA's Accounting Provisions

The FCPA's accounting provisions are codified in the Securities Exchange Act of 1934 ("1934 Act"). If your company is required to register with the Securities Exchange Commission, then no matter where it conducts its business, it must comply with the accounting provisions of the FCPA. Thus, all companies that must register with the SEC under section 12<sup>6</sup> and file reports under section 15(d) of the 1934 Act<sup>7</sup> must comply with these accounting provisions, even if they do not engage in foreign activities.<sup>8</sup>

Section 78m(b)(2) of the FCPA requires such reporting companies to:

- (A) 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; and
- (B) 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

<sup>6</sup> 15 U.S.C.A. § 78(1).

<sup>7</sup> 15 U.S.C.A. § 78o(d).

<sup>8</sup> Albright and Won, *supra* note 4, at n. 21. Indeed, as stated by Philip B. Chenok, president of the American Institute of Certified Public Accountants, at a hearing while the Senate was considering amendments to the FCPA:

"The accounting provisions apply to a much broader universe than those who were or are today, engaged in foreign business activities. By reaching all companies subject to the continuous disclosure system of the Securities Exchange Act of 1934, the FCPA swept up approximately 10,000 firms. Many businesses, small and large, were understandably mystified that an act appearing to be concerned only with illegal payments to foreign officials had imposed new recordkeeping and internal control requirements that were equally applicable to domestic activities and even applied in circumstances where a firm had no foreign business."

Quoted in Albright and Won, at n. 21.

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.

"[T]he terms 'reasonable assurances' and 'reasonable detail' mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs."<sup>9</sup>

The purpose of part (A) above is to assure that the accounting records "reflect transactions in conformity with accepted methods of recording economic events and effectively prevent off-the-books slush fund and payments of bribes."<sup>10</sup> How very Kafka!<sup>11</sup> The purpose of the internal accounting controls in (B) is "to provide reasonable assurance that, among other things, transactions are recorded as necessary to maintain accountability of assets."<sup>12</sup>

#### Civil and Criminal Fines

Under section 78ff(a) of the FCPA, any person who willfully violates these accounting provisions may be fined not more than \$1,000,000 or imprisoned not more than 10 years, or both. However, moving away from the Kafkaesque, no criminal liability will be imposed for failing to comply with the accounting provisions (A) and (B) discussed above, unless an individual "knowingly circumvent[s] or knowingly fail[s] to implement a system of internal accounting controls or knowingly falsif[ies] any book,

<sup>9</sup> 15 U.S.C.A. § 78m(b)(7).

<sup>10</sup> Harold S. Bloomenthal, *International Capital Markets and Securities Regulation*, § 5.11[1] at nn. 3-4 (1992).

<sup>11</sup> The presumption here is that you are guilty without being charged of any crime; the accounting provisions of the FCPA are intended to deter the activities that Congress has decided are not only *contra bonos mores*, but criminal. See Franz Kafka, *The Trial*, at 6 and generally (Knopf 1982), 22nd. printing (originally published October 18, 1937).

<sup>12</sup> Bloomenthal, *supra*, note 10.

record, or account described in" these provisions.<sup>13</sup> Additionally, under Section 78m(b)(6), an issuer who owns less than 50 percent of a domestic or foreign firm is not liable for the violations of its subsidiary if the issuer used "good faith" in its attempts to encourage compliance with the above accounting controls. Of course, whether you have acted in "good faith" will be determined by the federal courts.

Since the consequences of willful violation of the FCPA's accounting provisions are potentially severe, companies and accountants should become well-versed and advised concerning the restrictions of the FCPA and should diligently comply with its accounting provisions. Regardless of whether you agree or disagree with the approach taken by Congress by attempting to legislate morality in establishing restrictions on useful commercial activity through mandates such as the FCPA, the FCPA should not and cannot be ignored. Until those in Congress who support "managed competition" and who are inclined to impede our competitiveness in this global economy are replaced with less parochial supporters of free enterprise, the accounting provisions of the FCPA and its other restrictions must be integrated into the business planning of all who are subject to its controls.

<sup>13</sup> 15 U.S.C.A. § 78m(b)(4),(5).