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corruption laws. For example, in 2011 similar laws in the U.K. and China went into effect. Therefore, U.S. companies with operations, subsidiaries or personnel in these countries must be aware not only of the FCPA, but also of the FCPA-type laws of other countries in which the operate. In addition, as is common in the antitrust world, coordinated FCPA-type investigations by enforcement authorities in different countries are becoming more prevalent.

Conclusion

FCPA enforcement by the DOJ and SEC is likely to continue to increase in the coming years. If your company sells products in foreign markets, applicable employees and management must be trained on the basics of the FCPA and other local anti-corruption laws in the countries in which they operate, and your company should have a clear written policy with respect to compliance. In addition, focus on understanding the practical application of the exceptions to the general anti- bribery prohibition, because judicial and DOJ interpretations of these provisions generally have been much narrower than the language would suggest.

This article has only scratched the surface of the FCPA and the challenges it presents for even the most diligent companies. For excellent overviews of the FCPA and an extensive discussion of current hot issues, cases and settlements, Shearman & Sterling publishes a semi-annual FCPA Digest, which can be obtained on its web site. Other firms, such as Gibson Dunn and Miller Chevalier, also have excellent summaries available on-line. In addition, *www.fcpaprofessor.com/* is an informative web site maintained by Professor Mike Koehler of Butler University. Finally, I would also note that *www.acc.com* has a wealth of FCPA-related information available to ACC members.

The Proposed Changes to GAAP Lease Accounting Standards: A Status Report

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On August 27, 2010, the International Accounting Standards Board (IASB) and the Financial Accounting Standards Board (FASB) proposed major changes to the treatment of operating leases under Generally Accepted Accounting Principles (GAAP). The proposed changes would apply to the majority of new and existing leases and, if adopted, would require most operating leases to be treated as capital leases under GAAP. In response to the large number of public comments to the draft proposal, the IASB and the FASB decided to revise the exposure draft and re-publish it in 2012. This article discusses some of the impacts of the proposed changes on financial reporting requirements and the current status of the draft proposal.

The proposed changes are designed to foster greater disclosure in GAAP financial statements by requiring landlords and tenants to list liabilities associated with operating leases on their balance sheets. Under existing rules, characterizing a lease as an operating lease permits landlords and tenants to keep the lease off of their financial statements. An operating lease is created when a landlord transfers only the right to use the property to a tenant and the tenant returns the property at the end of the lease term. This type of lease is treated as a true "rental" for accounting purposes: the tenant treats lease payments as an operating expense on its financial statement with no associated asset or liability (other than the accrued rent liability). By contrast, under a capital lease a tenant is deemed to receive the benefits and assume the risks of ownership and the lease is recognized as both a depreciable asset (the property) and a liability (the lease payments) on the tenant's balance sheet. Examples of capital leases include leases that transfer ownership to the tenant at the end of the term or leases that grant tenants the right to purchase the asset at less than market value.

When a lease is classified as a capital lease, the present value of lease expenses is treated similar to debt for accounting purposes: an imputed interest amount is allocated to the lease payments and shown as part of the tenant's income statement. Under the proposed GAAP lease accounting changes, a tenant's financial statement would show an increase in both the amount of debt and assets. Expenses realized by tenants would increase during the initial years of a lease term, resulting in a reduction in the tenant's net income and an increase in the tenant's earnings before interest, taxes, depreciation and amortization (EBIDTA). The opposite would apply to Landlords who must carry the right to receive lease payments as assets and their lease obligations as liabilities on their books: net income would increase during the lease's initial years and decrease over the final years of the lease term.

The proposed accounting changes could significantly impact existing loan and credit facilities containing financial covenants that require the borrower to meet net income, EBIDTA and debt-to-income tests or ratios. Changes in these ratios and tests resulting from the implementation of the new GAAP lease accounting standards could cause a borrower to fall out of compliance with key financial covenants in their credit agreements.

The new standards have been criticized for, among other things, requiring landlords and tenants to make difficult assumptions regarding the anticipated length of a lease term (will a tenant exercise

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an option to extend?) and the expected amount of percentage rent generated during the lease term (*i.e.,* rent based on sales performance). The standards impose a continuing obligation to update these assumptions for each new set of financial statements with adjustments required to be made in the current year. Consequently, a tenant's decision to decline an option to extend or a substantial escalation or reduction in percentage rent could have significant, unanticipated impacts on tenant and landlord balance sheets, resulting in unexpected volatility in balance sheet accounting.

There is hope on the horizon. When FASB and IASB issued the initial exposure draft they invited comments from the public. The two organizations received close to 800 comment letters, many of which focused on issues such as the difficulty in estimating the impact of unanticipated lease modifications and terminations, contingent lease terms and the impact of variable lease payments on lease accounting. On July 21, 2011 the FASB and IASP agreed to revise the proposed standards and re-expose them for public comment. As of this writing a final date for publication has not been set. However, the newly revised draft standard is scheduled for publication in mid-2012 and will be followed by a public comment period. Interested parties should monitor the ongoing FASB and IASB review process to assess the impact of the revised standards on their existing credit facilities, leases and accounting practices and consider whether the new exposure draft merits additional comment. Once greater clarity on the extent of the final changes exists, landlords and tenants should revisit their existing credit facilities and leases to determine whether changes are needed to ameliorate the impact of the new rules.

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Battle of the Board: The Political Rule of the NLRB

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Over the past two years, the National Labor Relations Board has implemented significant changes to the National Labor Relations Act. From the Employee Free Choice Act (EFCA) to shortened election periods and newly required postings, the recent Board majority has adopted an unapologetically pro-Union stance, unilaterally overruling decades of precedent and strategically skirting the requirements of the Administrative Procedures Act. While, to a certain degree, this is no surprise — the Board has historically been a political entity, changing agendas with each President — this particular Board has taken politics to a new extreme which employers need to understand.

Looking Back: EFCA Promises

Having expressed his support for EFCA — an Act which proposed sweeping amendments to the NLRA, including shortened election periods and "card check" provisions allowing union certification without a secret ballot election — Barack Obama's presidential victory was widely celebrated by labor organizations.

Such enthusiasm was well-earned. Union leaders estimated that their efforts on Obama's behalf cost nearly $400 million. And, although the election did not result in a "filibuster-proof" Congress, unions remained optimistic that President Obama would prioritize EFCA, and it was widely believed the legislation would pass within his first 100 days. But, it did not. Instead, EFCA lost the support of key politicians, and now, it appears that the Act has been indefinitely tabled. The unions, however, have not walked away empty-handed, and the NLRB has found alternative ways to give them the sought-after return on their investment.

An Alternate Route

Despite EFCA's ultimate stall in Congress, there was no question that the President would do something to fulfill his promises to organized labor.

Sure enough, on his first day in office, President Obama named controversial Board member and Clinton-appointee Wilma Liebman as Chairman of the NLRB. Liebman was known for her view that the Board should promote union organizing; she further believed labor law was significantly slanted in favor of management. Subsequently, on July 9, 2009, the President appointed Craig Becker, Mark Pearce, and Brian Hayes to the Board. Once more, both Becker and Pearce had strong pro-union backgrounds, while Hayes, the lone Republican, previously represented management. Although Pearce and Hayes were both confirmed by the Senate in 2010, Becker — by far the most controversial — failed to obtain Congressional approval. Nevertheless, on March 27, 2010, President Obama added him to the board through a recess appointment. On June 21, 2010, Obama appointed Lafe Solomon as Acting General Counsel to complement the now-liberal agency — since taking office, Solomon has instituted his own radical changes, including the increased use of injunctions, the infamous *Boeing* case, and his aggressive protection of employees who publicly complain about their employers via social media — actions that expand the definitions of protected activity, as well as unlawful acts.

An Unbalancing Act: The Board's Big Year

In September, 2010, with its three Democrats and sole Republican in place, the new Board majority took quick, comprehensive action. And it set its sights high.

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