

## message from the managing attorney

This issue focuses on employment and business issues right here and in the wider world.

First, Robert Ludolph advises that a company's policy governing the use of e-mail systems by its employees cannot selectively target messages related to union activity as violations of that policy—for now, that is.

Pepper recently started practice groups devoted to issues of importance to Canada and India, and in this issue we feature Len Schneidman's article "Are There Sovereign Wealth Funds in India's Future?" and offer details about Pepper's upcoming Canadian Webinar Series.

In upcoming events, several of our Detroit office attorneys will address successful fund-raising, and recently spoke on small business investment companies (Pepper's Detroit office is our national center for the firm's Small Business Investment Company Practice).

As always, we welcome your comments, questions and suggestions.

Barbara Rom  
313.393.7351  
romb@pepperlaw.com

## in this issue

- 1 **Company E-mail Policy Cannot be Selectively Applied to Union Messages**
- 2 **Peppercast: Assumption and Assignment of Executory Contracts: Lessons from Chrysler and GM**
- 3 **Are There Sovereign Wealth Funds in India's Future?**
- 4 **Canadian Webinar Series**
- 5 **Pizza for the House!**
- 6 **Recent and Upcoming Events**

## Company E-mail Policy Cannot Be Selectively Applied to Union Messages

The District of Columbia Circuit Court has reversed an effort by the National Labor Relations Board (NLRB) to provide a narrow protection for employers who seek to prohibit the use of company equipment and media for purposes not related to work. In *Guard Publishing Co.* 351 NLRB (2007), the NLRB found that Register-Guard did not commit an unfair labor practice when it disciplined its union president for sending union-related e-mails because solicitations on behalf of organizations were specifically prohibited by the company e-mail policy. The District of Columbia Circuit Court recently reversed the NLRB on this point and remanded the case to the NLRB.

Guard Publishing Company publishes *The Register-Guard*, a daily newspaper in the Eugene, Oregon area. In 1996, *The Register-Guard* installed a new computer system and adopted a Communications Systems Policy to govern use of communication systems, including e-mail. The policy provided that:

Company communication systems and the equipment used to operate the communication systems are owned and provided by the Company to assist in conducting the business of *The Register-Guard*. Communication systems are not to be used to solicit or proselytize for commercial ventures, religious, or other non-job related solicitations.

The NLRB concluded that *The Register-Guard* did not violate the National Labor Relations Act merely by maintaining a Communications Systems Policy that barred employees from using the company's e-mail system for all non-job related solicitations. The NLRB found that it was not discriminatory to discipline the union president for sending union-related e-mails because those were solicitations on behalf of an organization, in this case the union. The NLRB found no evidence that *The Register-*

*Guard* allowed other employees to use e-mail to solicit on behalf of any other group or organization.

In its appeal to the D.C. Circuit, the union did not challenge *The Register-Guard's* right to prohibit the use of company e-mail systems for personal or non-job related communications on a neutral basis; the issue was whether the policy was being selectively enforced. The court looked at the specific warning issued to the union president, which advised her to “refrain from using the Company’s systems for *union/personal* business.” The court noted that even if drawing such a line between personal vs. organizational solicitations was proper, the company had not raised that rationale before the general counsel had filed his complaint. The court went on to find that the Communications Systems Policy made no distinction between solicitations for groups and for individuals; solicitations for outside organizations was just one example of prohibited non-job related solicitations. The court reasoned that the reference to “personal” in the disciplinary notice made clear that the offense did not depend on what organization was involved. Since neither the company’s written policy nor the disciplinary records relied on any organizational justification, the court found that the evidence failed to support the NLRB’s determination that the union president was disciplined for a reason other than that she sent a union-related e-mail.

*Be aware that organized labor is looking for the right case to argue that employee use of the Internet should be equated to normal oral communications in the workplace and governed by those lesser restrictions.*

Employers may not implement a strict e-mail policy and then selectively enforce those policies. The NLRB is projected to be at full five-member strength in the near future. Chaired by Wilma Liebman, who dissented from the NLRB’s decision in *Guard Publishing*, the NLRB is likely to take opportunities to expand unions’ rights to communicate to employees through e-mail, Internet and other means. Be aware that organized labor is looking for the right case to argue that employee use of the Internet should be equated to normal oral communications in the workplace and governed by those lesser restrictions.

*Author:*

*Robert C. Ludolph*  
313.393.7368  
[ludolphr@pepperlaw.com](mailto:ludolphr@pepperlaw.com)



## **Peppercast: Assumption and Assignment of Executory Contracts: Lessons from Chrysler and GM**

In this podcast, I. William Cohen, a partner in Pepper Hamilton’s Detroit office and the immediate past chair of the firm’s Corporate Restructuring and Bankruptcy Practice Group, discusses executory contracts in bankruptcy and the lessons we can learn from the unique Chrysler and GM cases.

Listen today by visiting the Corporate Restructuring and Bankruptcy section of Pepper’s podcenter at [www.pepperpodcasts.com](http://www.pepperpodcasts.com).

## Are There Sovereign Wealth Funds in India's Future?

Forced by the global credit crunch out of the shadow of international finance and into the bright glare of the public spotlight, investments by foreign sovereigns and, in particular, sovereign wealth funds (SWFs), have captured worldwide attention. This is no less so in India, where for the past several years, SWFs have been accepted as investors through the FII (Financial Institutional Investor) route. In the last five years, approximately nine SWFs have invested in India this way. This article briefly explores the background of and policy concerns relating to SWFs, and describes the special United States tax regime applicable to SWFs, in order to inform the current discussion in India concerning the emergence of SWF investment in that country.

### SWF Defined

While there is no single, widely accepted definition of a SWF, broadly speaking they are actively managed, government-owned pools of capital originating in foreign exchange assets. The United States Treasury Department has described SWFs as government investment vehicles that are funded by foreign exchange assets and managed separately from official reserves, and divides them into two categories – commodity funds and non-commodity funds.

### The Current Climate

#### *Increased Visibility*

SWFs have been around for more than 70 years but have had a very low profile – probably because until recently they almost exclusively invested passively, for example, in United States Treasury obligations. However, two recent changes have increased their visibility in the investment world.

First, SWFs have accumulated huge sums of money, in large part because of the fall of the dollar and the surge (through mid-2008) in oil prices. According to various publicly available data sources, SWF assets under management at the end of 2007 ranged between \$3 trillion and \$3.7 trillion and some studies have predicted that by 2012 SWFs would potentially grow to between \$10 trillion and \$12 trillion.

*The scope of the application of Section 892 is related to a number of factors, including the type of income earned, the source of the qualifying income and the recipient of the income.*

Second, SWFs have adopted a more aggressive investment style. This includes major investments in U.S. financial institutions, as well as more acquisitions of operating companies. Finally, SWFs have more widely diversified their portfolio investments, including investments in private equity and hedge fund vehicles.

It should be noted, however, that even SWFs are not immune from global financial disarray, and there are signs that the amount and style of SWF investments may be changing.

#### *Policy Concerns*

The prominence of SWFs and their lack of transparency have led to several distinct policy concerns about the effects of SWF investment. The first concern is that SWFs may pursue political objectives or foreign policy goals that are not strictly financial when making their investments.

Also, because of SWFs' sheer size, there is a worry that they could invest in ways that cause volatility in markets and disruptions in economies. In addition, SWFs may be able to use their status as government instruments to compete unfairly with private investors.

Finally, there is a concern relating to a possible protectionist reaction by an investee country government. By virtue of SWFs' perceived or actual strategic behavior and their potential effects on markets, the local government might consider adopting broad protectionist financial market policies that could harm that country's economy and its foreign relations.

### *Policy Responses*

These policy concerns relating to SWF investment are evident worldwide. In the United States, the government review criteria relating to certain foreign investments that raise national security interests have been tightened. In addition, the United States Treasury Department has entered into an agreement with the governments of Singapore and Abu Dhabi relating to policy principles for SWFs and for countries receiving SWF investments.

Internationally, the Organization for Economic Cooperation and Development (OECD) Investment Committee has initiated an ongoing Freedom of Information Project and issued a report describing agreed principles for recipient countries' treatment of SWF investment. The principles include non-discrimination, transparency, predictability and regulatory proportionality. In addition to the work of the OECD, the International Monetary Fund has established an international working group tasked with establishing "best practices" guidelines for the management of SWFs.

### **U.S. Taxation of SWFs**

#### *History of Section 892*

The rules governing the taxation of U.S. investments by SWFs are contained in Section 892 of the Internal Revenue Code. The history and scope of Section 892 broadly followed the history and scope of the international law principle of sovereign immunity – that is, one country is immune from the jurisdiction of the courts of another country. The scope of the immunity evolved during the 20th century from one of absolute immunity (i.e., a country enjoys immunity in all cases) to one of restrictive immunity (i.e., a country is denied immunity in certain cases, such as those arising out of the commercial activities of that country). The adoption by the United States of a restrictive theory of immunity was announced by the State Department in 1952 and subsequently enacted into law in the Foreign Sovereign Immunities Act of 1976.

An exemption from U.S. tax for certain income received by foreign governments first appeared as early as 1917. Various changes to the exemption were enacted throughout the years with a significant narrowing of the exemption in 1980 to include only integral parts and controlled entities of a foreign government and to exclude income derived from commercial activities in the United States.

## Canadian Webinar Series

### *Foreign Corrupt Practices Act Effect on Canadian Companies*

September 30, 2009 | 12:00 – 1:00 P.M. EASTERN

Mr. Paw will discuss major enforcement efforts under the U.S. Foreign Corrupt Practices Act, with a particular focus on how these efforts affect Canadian companies given the broad jurisdictional view taken by U.S. authorities. He will look at some enforcement trends of particular note to Canadian companies looking to invest or raise capital in the United States. He also will provide guidance on avoiding avoid liability and best preparing for smooth international transactions and operations.

#### **Moderator**

Susan J. Krembs, Partner, Pepper Hamilton LLP

#### **Speaker**

Gregory A. Paw, Partner, Pepper Hamilton LLP

Register for this complimentary online webinar at <https://www.regonline.com/FCPA>.

### *U.S. Climate Change Legislation*

October 15, 2009 | 12:00 – 1:00 P.M. EASTERN

The clock is ticking, and the Obama administration and Democratic congressional leadership are committed to enacting U.S. climate change legislation in time for the December 7-18 climate change treaty negotiations in Copenhagen. Ms. Luxton and Mr. Walsh are following developments closely as Senate leaders work to get the 60 votes needed for passage, then work out differences with the House bill adopted June 26. Join us for an update and analysis of the prospects for climate change legislation this year and potential effects for Canadian and cross-border businesses.

#### **Moderator**

Susan J. Krembs, Partner, Pepper Hamilton LLP

#### **Speakers**

Jane C. Luxton, Partner, Pepper Hamilton LLP

William J. Walsh, Of Counsel, Pepper Hamilton LLP

Register for this complimentary online webinar at [https://www.regonline.com/US\\_Climate\\_Change](https://www.regonline.com/US_Climate_Change).

### *Operation of Section 892*

It should be noted initially that Section 892 does not impose a tax on any income. Rather, that section confers an exemption from tax for certain income derived from U.S. sources upon which a SWF could otherwise be subject to tax. Thus, in planning for a SWF investment in the United States, the initial analysis is the same as that which would apply to a private foreign corporate entity. Section 892 makes it clear that a foreign government is treated as a corporate resident of its country for both treaty and Code purposes. However, in the case of a treaty, such treatment is conditioned upon reciprocal treatment of the U.S. government by the treaty partner.

The scope of the application of Section 892 is related to a number of factors, including the type of income earned, the source of the qualifying income and the recipient of the income. Thus, Section 892, by its terms, applies only to an integral part or a controlled entity of a foreign government. Furthermore, it applies only to income from U.S. investments limited to stocks, bonds or other domestic securities, bank deposits, or financial instruments held in the execution of governmental financial or monetary policy.

It should be noted that there is a brewing tax policy debate in the United States over whether to repeal Section 892, with noted economists lining up on each side of the issue.

### **Conclusion**

There is growing discussion in India over the wisdom and means of attracting and strengthening India's claim to investment by SWFs. Hopefully, the experience of the United States and its policy determinations will provide a useful guide for India in its deliberations.

*Author:*

*Leonard Schneidman  
617.204.5104  
schneidmanl@pepperlaw.com*

## **Pizza for the House!**

More than 75 homeless women and children enjoyed fresh hot pizza, pop and salad at Genesis House III, an eastside Detroit Rescue Mission site. Pepper Hamilton attorneys and staff provided the service on the house and Genesis House III management provided the facility and hospitality. The old St. Bernard school has been transformed into a shelter for those women and young children who are most in need. The women in this program have a disability or are female veterans. They also work on substance abuse aftercare assistance, address legal issues, and attend school and training programs to help provide themselves with a future.

"It was touching to see how much the residents appreciated the dinner we served," said Ross Hoogerhyde, a Pepper attorney.

Chef Jerome Davis of Genesis House III said, "Pepper Hamilton went above and beyond in the care and service of our clients, treating them as if they were at a five-star restaurant and making them feel special. This brought much joy and many smiles to our women and children and we thank the Pepper staff for their exceptional service. The clients loved the treat of pizza and salad and would love to see you back again!"

Pepper Hamilton is sponsoring meals, donation campaigns and other community service projects at the Detroit Rescue Mission and the local Ronald McDonald House as part of celebrating its 30th anniversary in Detroit's Renaissance Center.

## Recent and Upcoming Events

### Michigan Venture Capital Association

The Detroit office hosted over 40 members and guests of the Michigan Venture Capital Association on September 11. The three member panel discussed, “Fundraising Strategies in the Current Environment,” followed by one-on-one venture capitalist/placement agent meetings.

### Capital Roundtable’s Workshop and MasterClass™ on SBICs

The Small Business Administration, parent of the SBIC program, received substantial funding and expanded authority via the economic stimulus package to help reinvigorate American small business. During this fact-filled MasterClass, you’ll hear first hand how both new and experienced GPs are benefiting from the SBIC provisions. You’ll learn how companies like yours have launched SBICs, and how they are managing their SBIC portfolio company investments. Plus you’ll discover the dos and don’ts of establishing and maintaining compliance with regulatory matters.

Workshop: September 14, 2009

Pepper attorneys **Michael B. Staebler**, **Todd W. Betke** and **Michael A. Temple** taught the half-day workshop, “Launching a New SBIC in 2009 - The Basics & the Nuances.”

MasterClass: September 15, 2009

Pepper attorneys **Michael B. Staebler** and **Hugh Douglas Camitta** spoke at The Capital Roundtable’s MasterClass on “The Exciting New World of SBICs - Best Practices for PE Firms to Launch & Manage Small Business Investment Companies.”

### Capital Roundtable’s MasterClass™ on Succeeding at Fundraising

MasterClass: October 7, 2009

Pepper partners **Julia D. Corelli** and **Michael B. Staebler** will be participating in the Tenth Semi-Annual MasterClass on “Succeeding at Fundraising - New Do’s & Don’ts of Fundraising: Bucking the Trend & Hitting Your Targets” for private equity, venture capital, and Mezz firms.

To take advantage of Pepper’s special registration rate, please contact Samantha Feldman at 212.832.7333 or [sfeldman@capitalroundtable.com](mailto:sfeldman@capitalroundtable.com).

## Pepper Hamilton LLP

Attorneys at Law

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