

message from partner in charge

In this issue, Russ Adler advises employers that they'd be wise to note and heed the provisions of an increasingly sticky web of sometimes conflicting state and federal laws governing advance notice to employees about mass layoffs.

And looking to the wider world, Pepper recently started practice groups devoted to issues of importance to Canada and India; 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 and a webinar devoted to India.

In upcoming events, Pepper attorneys are part of several valuable events, workshops and seminars focusing on the new realities of business.

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

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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.

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.

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.

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.

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.

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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.

Treading Water in a Sea of Conflicting Federal and State Employment Laws

It may be an understatement to say that navigating the turbulent waters of the economy these days is difficult. Compounding the economic difficulty is the multilayered and often confusing interplay of legal issues created by federal, state, and, in some cases, local laws that apply to employment-related matters. Employers operating in multiple jurisdictions are familiar with this issue, but this problem is not limited to multistate employers; recent state legislation, although well-intended, also has complicated compliance for employers operating in only one state. The statutes governing reductions in force is one area of the law that illustrates this situation.

Most employers are familiar with the federal Worker Adjustment Retraining and Notification Act (WARN Act), enacted 20 years ago to govern plant closings and mass layoffs. As a general matter, the WARN Act requires employers with 100 or more employees to provide 60 days of advance notice to employees, their union, and state and local government officials, before a plant closing or mass layoff. Many employers do not know, however, that some states have enacted their own versions of the WARN Act, sometimes with noteworthy distinctions that can, for example, significantly affect the notice that must be given

to employees in the event of a large workforce reduction or increase the penalties for non-compliance. New York and New Jersey, which recently enacted their own versions of the WARN Act, are good examples of states with their own workforce reduction laws that can trip up even the most alert employers.

At the end of 2007, New Jersey enacted its version of the WARN Act, the Millville Dallas Airmotive Plant Job Loss Notification Act (the New Jersey Act). Two of the most significant distinctions between the New Jersey Act and the WARN Act concern the penalties imposed and the absence of the “faltering company” exception, one of the more significant exceptions from the WARN Act’s notice requirements. With regard to penalties, the federal WARN Act requires the employer to provide back pay and benefits for each day notice is not given, up to 60 days (in addition to a statutory fine of \$500 per day of violation). The New Jersey Act, however, imposes potentially far more significant penalties: an employer that provides fewer than 60 days of notice must pay each employee one week of severance pay for each full year of employment (subject to offset for payments provided under the federal WARN Act), so an employer with many longtime employees



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.

could face a significantly expensive penalty. Under the statute, partial compliance is not excused; an employer who gave 59 days of notice would be in violation of the New Jersey Act and subject to its enhanced penalty provision. In addition, the federal WARN Act, unlike the New Jersey Act, exempts from notice a company that can meet the “faltering company” exception (applicable only to plant closings, not mass layoffs). This exception covers a situation in which the employer was seeking new capital to stay in business and notice would have ruined the opportunity to obtain such capital.

New York’s plant closing and mass layoff law became effective February 1, 2009 and is aptly named the New York State Worker Adjustment and Retraining and Notification Act (NY WARN). NY WARN closely parallels the WARN Act but with several key differences, the most significant being its lower threshold for coverage and the increased notice period employers are obligated to provide. As noted above, the WARN Act applies to employers with 100 or more employees. NY WARN, however, applies to employers with only 50 or more employees. Consequently, employers that have fewer than 100 employees and may not have been affected by the WARN Act requirements are now subject to the obligations of NY WARN. Equally if not more significantly, NY WARN imposes a 90-day advance notice requirement, as opposed to the WARN Act’s 60-day notice requirement.

The above laws illustrate the need to carefully review with counsel all applicable laws and regulations governing not only plant closings and mass layoffs, but other employment-related matters as well. If recent trends continue, employers should expect additional employment-related legislation not only from the federal government, but also state and local governments. Having a clear understanding of legal obligations at the state, local and federal level will enable employers to plan ahead appropriately and avoid legal pitfalls.

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WEBINAR: FCPA Effect on Business in India

On October 20, Pepper partner Gregory A. Paw and Omar McNeill, general counsel from Freeh Group International will discuss enforcement efforts under the U.S. Foreign Corrupt Practices Act, with a focus on how these efforts affect companies doing business in India. They will look at enforcement trends significant to companies looking to invest or raise capital in India, and due diligence investigation in India. They also will provide guidance on avoiding liability and best preparing for smooth international transactions and operations.

Moderator:

Valérie Demont, Partner, Pepper Hamilton LLP

Speakers:

Gregory A. Paw, Partner, Pepper Hamilton LLP
Omar McNeill, General Counsel, Freeh Group International

Register for this complimentary online webinar at https://www.regonline.com/FCPA_India.

Upcoming Events

Capital Roundtable's MasterClass™ on Succeeding at Fundraising

University Club | New York, NY

MasterClass: October 7, 2009

Julia D. Corelli and Michael B. Staebler

To take advantage of Pepper's special registration rate, please contact Samantha Feldman at 212.832.7333 or sfeldman@capitalroundtable.com.

The European American Chamber of Commerce - New York Chapter

An Evening of Wine Tasting & Wine Pairing

September 24, 2009

The Alta Cucina Epicurean Center

Registration Fees: Member \$85 / NonMember \$105
(through 9/23/09, 5:00 p.m.)

On-site Registration Fees: Member \$125 / NonMember \$125

For more information, please feel free to contact EACC-NY's chapter administrator at either eaccny@eaccny.com or 646.932.2242.

Fund Manager Capital Raise and Compliance Workshop

October 6, 2009

Pepper Hamilton | New York, NY

Carol M. Degener and Gregory J. Nowak will be speaking at the workshop.

<http://ivyplus.biz/oct6announcement.html>

MIT Enterprise Forum of NYC

October 22, 2009

Holland & Knight | New York, NY

Valérie Demont will be speaking on a panel at the MIT Enterprise Forum, "How Your Company Can Capitalize on the Phenomenal Growth in Emerging Markets."

www.mitef-nyc.org

BKR International 2009 Annual Worldwide Meeting

October 24-27, 2009

Waldorf Astoria Hotel | New York, NY

James D. Rosener will participate on a panel during their 2009 annual meeting discussing the elements of doing business in the United States.

www.bkr.com.

The Deal Economy 2010

November 18-19, 2009

Union League Club

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www.thedeal.com

The Conference Board of Canada's M&A Strategy in 2010 Conference

November 30 - December 1, 2009

Toronto Board of Trade | Toronto, Canada

James D. Rosener will be speaking on November 30, on a panel discussing "Acquiring Companies in Distress."

<http://www.conferenceboard.ca/conf/09-0192/default.aspx>.

Pepper Hamilton LLP

Attorneys at Law

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