

## Message from Attorneys in Charge

In this *Update*, we examine ongoing anti-corruption enforcement in India, as well as a clever grassroots campaign (begun in India but now spreading to many other countries) to call attention to the problem of soliciting bribes. On the employment front, we look at hidden employment-law risks for Indian companies doing business in the United States, and, in India, reasons why non-compete clauses often are unenforceable. We also spell out financial incentives for renewable energy development in the United States that are available to any company worldwide, so long as the development is within U.S. borders. And, we welcome Bipul Mainali to Pepper's India practice.

We're also happy to report that Pepper's India practice has been busy lately. Our representative matters in recent months include the sale of a subsidiary of an Indian media company to a U.S. media company, the acquisition by a U.S. company of an information provider in India, international arbitration in Delhi, our acting as global counsel for an Indian IPO, and our work toward establishing a technology platform in India. We expect to be able to report even more successes in the near future.

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## Current Issues in Anti-Corruption Enforcement in India

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We are happy to present this summary of some important Foreign Corrupt Practices Act (FCPA) enforcement actions involving India, as well as a discussion of some current trends in anti-corruption enforcement. Indeed, recent weeks have seen several developments in anti-corruption efforts in India. Following up on a report from the Indian ambassador to the United States on several FCPA cases involving Indian government officials (see Pepper Hamilton's November 19, 2009 *U.S.-India Update* article, "Enhancing Anti-Corruption Efforts in India: Lessons from Recent FCPA Enforcement Actions," for details), Minister of State Prithviraj Chavan in early December 2009 asked India's Central Bureau of Investigation to look into each of these instances of corruption. Chavan said he also has held meetings with each concerned department in the Indian government to urge expeditious action and reform. This issue thus appears to continue to have a political effect in India, and also has some interesting implications for the foreign policies of India and the United States.

Just more than a week after Chavan's statements, U.S. officials brought charges against a former vice president of Pride International, Inc., in what may be a first step to addressing bribes allegedly paid in several markets, including India. The charges against the former Pride official are consistent with a stated priority of American FCPA prosecutors to focus on personal culpability so as to most effectively deter future violations. In fact, the lead U.S. FCPA prosecutor has said the U.S. will direct enforcement resources not at low-level employees, but rather at senior corporate executives, finance directors, country heads and heads of international sales.

This publication may contain attorney advertising.

### in this issue...

- 1 Current Issues in Anti-Corruption Enforcement in India
- 3 Bipul K. Mainali Joins Pepper, Widens Scope of Firm's India Practice Group
- 4 Non-Compete Clauses Are Unenforceable in India
- 6 The Zero Rupee Note
- 6 Media Alert
- 7 Green for Green: Financial Incentives Available for Renewable Energy Development
- 12 Indian Webinar Series: Hidden Employment Law Risks in Doing Business in the United States

### ENFORCEMENT OFTEN FOCUSES ON INDIVIDUAL LIABILITY

This enforcement strategy has been seen before in India, where U.S. officials brought a civil suit in 2007 against the former president of A.T. Kearney India for FCPA violations. A.T. Kearney made more than \$700,000 in illicit payments to senior employees of Indian state-owned enterprises representing more than three-quarters of A.T. Kearney's revenue. These senior employees threatened to cancel contracts with A.T. Kearney, and the former president feared the company would close if it lost this business. A.T. Kearney employees fabricated invoices to cover the improper payments, thus causing misleading entries to be made on corporate books. After U.S. officials brought an FCPA enforcement action, the former president agreed to pay a fine and A.T. Kearney's American parent company paid \$490,900 in disgorgement for improperly reporting the A.T. Kearney bribes on the corporate books and records. In another example of personal liability, a former executive of Control Components, Inc., a California-based manufacturer of industrial valves, pled guilty in 2009 to criminal FCPA charges for his role in paying bribes to government officials, including in India at the Maharashtra State Electricity Board.

### RECORD KEEPING AND INTERNAL CONTROLS ARE CRITICAL ISSUES

The A.T. Kearney case raises another important FCPA enforcement point. While discussions and articles often focus on the FCPA's anti-bribery provisions, an equally powerful portion of the FCPA imposes recordkeeping and internal control obligations on companies and their foreign subsidiaries that file reports with the U.S. Securities and Exchange Commission. The FCPA requires the corporate books of such organizations to accurately reflect the true nature of all corporate transactions. The FCPA also directs such companies to devise and maintain an adequate system of internal controls to deter misconduct. An alleged lack of materiality of a transaction improperly reflected on the corporate books is no defense to liability – all transactions must reasonably identify the true nature of company expenses.

The effect of these recordkeeping provisions can be seen in a 2008 settlement with Westinghouse Air Brake Technologies for FCPA violations through its Indian subsidiary, Pioneer Friction Limited. Pioneer provided brake systems for rail operations through the Indian Railway Board. To ensure that product inspections would run smoothly, Pioneer made payments, sometimes as little as \$67, per inspection. Pioneer also paid \$31.50 per

INTERNATIONAL SUBSIDIARIES AND BUSINESS PARTNERS MUST UNDERSTAND THE IMPORTANCE OF ACCURATE CORPORATE BOOKKEEPING AS KEY TO AVOIDING FCPA LIABILITY. COMPANIES RISK SIGNIFICANT LIABILITY FOR TURNING A BLIND EYE TO POTENTIAL WRONGDOING IN THEIR OPERATIONS OR BY INTERNATIONAL BUSINESS PARTNERS.

month to Indian tax officials to avoid excise taxes. Pioneer generated false invoices to gather cash for these payments, and then reported the payments on records maintained separately from Pioneer's audited books. The false invoices further concealed the true nature of the payments by identifying the payments as for "consulting" and "supplies."

Westinghouse promptly investigated and reported its own misconduct, which U.S. regulators took into account in fashioning an appropriate remedy. Nonetheless, the U.S. Justice Department imposed a \$300,000 penalty, in addition to a \$367,000 penalty and disgorgement with the U.S. Securities and Exchange Commission.

Similarly, when DE-Nocil Crop Protection sought to register insecticides made with ingredients widely registered in other countries, it discovered a roadblock in the Indian Central Insecticides Board (CIB) and state regulatory boards. DE Nocil, a subsidiary of Dow Chemical Company, made more than \$32,000 in payments to an influential CIB official, and made petty cash payments – well under \$100 per payment – to state inspectors. Many of these payments were made through contractors who added fictitious "incidental charges" on bills or issued fake invoices to cover the expenses. While a laudable voluntary inspection by Dow revealed these payments, which Dow promptly reported, the company nonetheless reached a 2007 agreement with the U.S. Securities and Exchange Commission requiring payment of a \$325,000 fine.

## Bipul K. Mainali Joins Pepper, Widens Scope of Firm's India Practice Group

Associate **Bipul K. Mainali** brings to Pepper unique skills and perspectives to benefit the firm's India Practice, as a new member of Pepper's Corporate and Securities Group. In focusing his practice on mergers and acquisitions, capital markets, corporate finance and general corporate representations, Mainali advises clients on complex cross-border transactions involving India and the United States, and also has had extensive experience representing corporations, financial institutions, private equity funds and other principals and advisors in a range of corporate and securities matters.

Mr. Mainali received a B.A. LL.B. (Hons.) from National Law School of India University in 2003 and his LL.M. from Harvard Law School in 2006. Prior to attending Harvard Law School, Mr. Mainali worked with a preeminent law firm in India, where he advised multiple national and inter-

national clients on commercial transactions. During his time at Harvard, Mr. Mainali led a team on the aegis of Program on Negotiations, to prepare a blueprint for resolving the political crisis then in Nepal. He also served as the LL.M. commencement speaker. He is a member of the Board of Directors of SAB Media Software Services Private Ltd. Mr. Mainali is also fluent in Hindi and Nepalese, and is admitted to practice in New York and Delhi, India.

Mr. Mainali has served as a panelist for "Indo-U.S. Corridor Cross Border M&A" in New York, and for "Fundamentals of M&A Process and Deal Making" in Kathmandu, Nepal.

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The Pioneer and DE-Nocil cases indicate the importance of ensuring that international subsidiaries and business partners understand the importance of accurate corporate bookkeeping as key to avoiding FCPA liability.

### COMPLIANCE PROGRAMS AND VIGILANCE ARE KEY FACTORS

These enforcement actions demonstrate several important points for an effective FCPA compliance program. In this environment, companies risk significant liability for turning a blind eye to potential wrongdoing in their operations or by international business partners. To address these risks, Pepper Hamilton provides experienced guidance to ensure that clients' compliance and risk management programs are deterring and detecting potential anti-corruption issues. We evaluate and design effective programs to meet specific risks of a client's international operations. We conduct due diligence reviews of international business partners, and counsel steps to ensure maximum protection for our clients. We also conduct internal investigations of suspected corrupted payments, and design remedial strategies to best protect our clients.

Working with the experienced professionals at Pepper Hamilton to address FCPA risks and the wide range of other legal issues that may be encountered can help minimize the chances of liability for companies conducting international business. We look forward to working with you on these important issues.

## Non-Compete Clauses Are Unenforceable in India

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With the increase in cross-border trade and an enhanced competitive climate in India, confidentiality, non-compete and non-solicitation agreements are becoming increasingly popular there, especially in the IT and technology sectors. An increasing number of outsourcing and IT companies are including confidentiality, non-compete and non-solicitation covenants in agreements with their employees, with terms ranging from a few months to several years after the employment relationship is terminated. The companies claim that such restrictions are necessary to protect their proprietary rights and their confidential information.

Similarly, foreign companies doing business in India often seek to include confidentiality, non-compete and non-solicitation covenants in their agreements with senior management and employees, as is customarily done in certain foreign jurisdictions.

However, Indian courts have consistently refused to enforce post-termination non-compete clauses in employment contracts, viewing them as “restraint of trade” impermissible under Section 27 of the Indian Contract Act, 1872 (the Act), and as void and against public policy because of their potential to deprive an individual of his or her fundamental right to earn a livelihood.

The principles of Section 27 were aptly summarized by the Supreme Court of India in *Percept D’ Mark (India) Pvt. Ltd v. Zabeer Khan* (AIR 2006 SC 3426), in which the Supreme Court observed that under Section 27 of the Act a restrictive covenant extending beyond the term of the contract is void and not enforceable. The court also noted that the doctrine of “restraint of trade” is not confined to contracts of employment only, but is also applicable to all other contracts with respect to obligations after the contractual relationship is terminated.

This long-standing stance was clearly reaffirmed recently in a 2009 decision by the New Delhi High Court in *Desiccant Rotors International Pvt Ltd v. Bappaditya Sarkar & Anr* (I.A. No.5455/2008, I.A. No.5454/2008 & I.A. No.5453/2008 in CS(OS) No.337/2008), which involved a senior marketing manager at a manufacturer of evaporative cooling components, products and systems. As part of his employment agreement with Desiccant, the manager agreed that for two years follow-

INDIAN COURTS REMAIN SENSITIVE TO THE POSSIBILITY THAT EMPLOYERS MAY TRY TO USE RESTRICTIVE COVENANTS AS A BACK-DOOR MEANS OF RESTRAINING EMPLOYEES FROM EXERCISING THEIR TRADE AND WILL PLACE AN EXTREMELY HIGH BURDEN OF PROOF ON EMPLOYERS SEEKING TO ENFORCE THESE PROVISIONS.

ing the termination of his employment, he would be bound by a covenant with Desiccant that would require him to keep Desiccant’s matters confidential, and that would prevent him from competing with Desiccant and soliciting Desiccant’s customers, suppliers and employees. Expressly embodied in the employment agreement was an acknowledgement by the manager that he was dealing with confidential material of Desiccant, including know-how, technology trade secrets, methods and processes, market sales and lists of customers. After a few years of employment, the manager resigned and, notwithstanding the terms of his old employment agreement, within three months of his resignation joined a direct competitor of Desiccant as country manager in charge of marketing and started contacting customers and suppliers of Desiccant. In injunctive proceedings against the manager by Desiccant, the High Court reiterated the principles embodied in Section 27 of the Act and the individual’s fundamental right to earn a living by practicing any trade or profession of his or her choice. Brushing aside any argument by Desiccant that the restrictive covenants were primarily designed to protect its confidential and proprietary information, the High Court ruled that in the clash between the attempt of employers to protect themselves from competition and the right

of employees to seek employment wherever they choose, the right of livelihood of employees must prevail. Similarly, in a 2007 decision in *V.F.S. Global Services Ltd. v. Mr. Suprit Roy* (2008 (2) BomCR 446 ) the Bombay High Court held that a fully paid three-month “garden leave” agreement with a senior manager did not renew the employment contract and constituted a “restraint of trade” unenforceable by V.F.S.

Foreign investors in India need to be aware of Section 27 of the Act and the well-established line of court cases under it, as they structure their employment relationships and incentives with local management. As a general principle, confidentiality, non-competition and non-solicitation agreements will be enforceable during the term of the employment relationship. After termination of employment, however, many provisions of these agreements will be struck and deemed unenforceable by Indian courts in enforcement proceedings, even if the provisions are reasonable in scope and duration, subject to certain exceptions.

One of the few instances in which non-competition clauses will generally be enforceable is in the context of the sale of a business, where the owners of the business will agree to a non-compete in exchange for consideration for the goodwill associated with the business (for example, in a stock sale where the promoters will sell their stock in the business to a buyer in exchange for consideration). To be enforceable, the non-compete will need to be reasonably limited in time and scope, and consideration will need to be attributed to the goodwill in the transaction, as evidenced in the documentation. Similarly, a non-compete clause in a joint venture in which shareholders mutually agree not to compete with each other on certain terms and conditions, which include time and geographic restrictions, will generally be enforceable in India.

Non-solicitation obligations post-termination of employment may be enforced in limited circumstances, based upon the facts of each individual case. For example, they were upheld in the *Desiccant* case, in which the High Court did allow an injunction against the manager prohibiting him from soliciting Desiccant’s customers and suppliers to stand in effect. In the *V.F.S.* case, however, relief for breach of non-solicitation obligations was denied on the basis of vagueness of the relief claimed.

Confidentiality obligations post-termination of employment will similarly be enforced in limited circumstances so long as they remain reasonable and limited in time and scope and the employer can support that the information is confidential and proprietary to it. Indeed, while denying enforcement of the garden leave in

the *V.F.S.* case, the Bombay High Court established the principle that a restraint on the use of trade secrets during or after cessation of employment is not tantamount to a “restraint on trade” under Section 27 of the Act and therefore can be enforceable under certain circumstances. This case and others show that Indian courts will in certain circumstances enforce confidentiality agreements intended to protect an employer’s proprietary rights. But the courts remain sensitive to the possibility that employers may try to use these covenants as a back-door means of restraining employees from exercising their trade and will place an extremely high burden of proof on employers seeking to enforce these provisions. In the *Desiccant* case for example, the court held that a marketing manager could not be deemed to possess confidential information and that his written declaration to that effect in his employment agreement was meaningless; the court rejected Desiccant’s claim to enforce the confidentiality obligations of the manager.

Therefore, when dealing with local management and key employees in India, foreign investors need to remember that the position of Indian courts on the question of non-competes is unmistakably clear—any restriction with regard to freedom of employees to seek employment and earn a living after termination of their employment contract will generally be unenforceable as contrary to public policy as set forth under Section 27 of the Act.

## The Zero Rupee Note

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An Indian engineer has created the zero-rupee note, a unique tool in the battle against corruption. Bearing the likeness of Gandhi, the zero-rupee note appears similar to a real 50-rupee note except that the “5” has been removed, leaving the “0” behind. The note can be handed over to crooked bureaucrats seeking an improper payment, to both shame the official and protest the demand for a bribe.

The notes are the brainchild of Vijay Anand, who first distributed his protest currency at colleges in the southern Indian state of Tamil Nadu to encourage students to reject corrupt requests. Anand formed the 5th Pillar, a non-profit group committed to improving government integrity and spreading thousands of zero-rupee notes across India to foster a grassroots protest against low-level corruption. Anand recently told the international news agency Agence France-Presse (AFP) that he was confident the notes “will change the way people think and act in the coming years.” He targets school groups to drive home his message for future generations.

More than one million of the notes – each carrying the words “I promise to neither accept nor give a bribe” in one of five languages – have been handed out. And Anand’s program has spread to include the currencies of 200 countries from Abkhazia to Zimbabwe. But Anand also has a broader agenda of raising public awareness on corruption, and he has spearheaded programs and publications across India to raise awareness of the tools available to hold public officials accountable for corrupt acts. Anti-corruption experts credit awareness and transparency as major factors that help change a society’s attitude toward corruption. Anand’s innovative approach provides a great example of what a single person can do to advance this effort.

## Media Alert

Recently, Pepper partner **James D. Rosener** appeared on the television show “The Firm – Corporate Law in India” on CNBC-TV18 discussing “Foreign Law Firms vs. Indian Law Firms.” Listen today at [http://www.moneycontrol.com/video/management/no-foreigners-please\\_432690.html](http://www.moneycontrol.com/video/management/no-foreigners-please_432690.html).

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## Green for Green: Financial Incentives Available for Renewable Energy Development

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On January 8, 2010, President Obama announced the award of \$2.3 billion in tax credits for clean energy manufacturing operations in 43 states, from funds allocated under the 2009 stimulus package.<sup>1</sup> The previous month, the U.S. House of Representatives included a provision in the Jobs Bill it passed on December 16, 2009 that provides \$2 billion in funding to restore money to the Department of Energy's loan guarantee program for renewable energy that was diverted to pay for the "cash for clunkers" initiative last summer.<sup>2</sup> The Senate will take up the bill early in 2010, and some clean-energy advocates in Congress and elsewhere are urging that more funds be appropriated for renewable energy incentives.<sup>3</sup>

Make no mistake: the U.S. government is working hard to promote renewable energy development and doing so in the most meaningful way possible: with loan guarantee programs, grants, and tax breaks. Many states have adopted additional economic measures that incentivize in-state renewable energy projects. But the hodgepodge nature of these programs – authorized by different pieces of legislation, administered under an array of regulatory regimes, subject to varying requirements and deadlines – presents a serious challenge to interested parties seeking financial assistance for renewables projects.

Of particular interest to non-U.S. commercial interests, the programs do not discriminate against foreign-owned companies, so long as the facility is in the United States and the goods produced are sold as U.S. products, including as exports. While "Buy America" provisions apply under some programs to construction materials, waivers may be available. Of course, tax credits only make sense in the context of offsetting U.S. taxable income.

This article summarizes the main categories of economic incentives available for renewable energy development, along with key information about eligibility and availability.<sup>4</sup> The four types of programs are: (1) U.S. Department of Energy (DOE) loan guarantees, (2) federal tax incentives, (3) other federal government economic incentive programs, and (4) state programs.

### DOE LOAN GUARANTEES

DOE administers two large-scale loan guarantee programs for clean energy generation and manufacture, which fall under Sections 1703 and 1705 of the Energy Policy Act of 2005 (EPAAct), as amended by the American Recovery and Reinvestment Act of 2009 (ARRA).<sup>5</sup> Major aspects of these programs are presented in the following table:<sup>6</sup>

Program	Key Elements	Eligibility	Other
<b>1703</b> Loan guarantees for early commercial use of innovative clean energy technologies.  Aggregate funding for 1703 and 1705 of \$100 billion.	Permanent program under Energy Policy Act of 2005	Biomass, geothermal, hydropower, solar, wave/tidal, wind (also carbon capture and sequestration, coal gasification, nuclear, fuel, vehicles, and energy transmission systems).  Projects must avoid, reduce, or sequester air pollutants or greenhouse gases, using significantly improved technologies compared to commercially available methods.	Funding depends on annual congressional appropriations.  Priority given to loans of \$25 million or more.  Borrower must pay cost of loan guarantee.

<p><b>1705</b></p> <p>Loan guarantees for renewable energy systems and facilities that manufacture components for renewable energy.</p> <p>Aggregate funding for 1703 and 1705 of \$100 billion; target for 1705 program is \$4 billion to cover credit subsidy costs (\$6 billion if cash-for-clunkers funding is restored).</p>	<p>Temporary program added to EPAct by ARRA.</p> <p>Application must conform to Financial Institution Partnership Program (FIPP).</p>	<p>Biomass, geothermal, hydropower, solar, wave/tidal, wind (also energy transmission systems). Focus is on commercially available technologies.</p> <p>Applicants must be commercial, non-profit, or public financial institutions, partnering with project developers.</p> <p>First solicitation released Oct. 2009 for energy generation projects; manufacturing solicitation expected in early 2010.</p> <p>Applications considered on rolling basis, with a cutoff for Part I application of Aug. 24, 2010.</p> <p>Projects must comply with Davis-Bacon and NEPA. NEPA considerations disfavor more complex sites that would require an Environmental Impact Statement (EIS) as opposed to a simpler Environmental Assessment (EA), given the September 30, 2011 deadline for start of construction.</p>	<p>Authority for program expires Sept. 30, 2011. All approved projects must begin construction by Sept. 30, 2011.</p> <p>Minimum 20 percent equity requirement (may include funds from grants and tax credits, but caution is advised in relying on these in an application). Up to 80 percent of senior loan amount (64 percent of total project costs) may be guaranteed by DOE.</p> <p>Bank must retain 20 percent of the loan amount (“skin in the game”).</p> <p>Application fees are \$50,000 (\$12,500 for Part I) and nonrefundable.</p>
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**FEDERAL TAX INCENTIVES**

As with the DOE loan guarantee programs, the 2009 stimulus package expanded existing renewable energy tax incentives and added new ones. The three principal programs are Sections 45 and 48 of the Internal Revenue Code of 1986<sup>7</sup> and Section 1603 of ARRA.

Section 45 provides a production tax credit (PTC) for the production and sale of renewable energy to an unrelated taxpayer. With changes made under ARRA, the credit extends over a ten-year period and currently ranges from 1 cent to 2.1 cents per kilowatt (KW), depending on the type of power (these rates are adjusted annually for inflation). Facilities must be qualified (as defined in the statute). The modifications added under ARRA have expanded the range of structuring and tax allocation arrangements that are permissible.<sup>8</sup> For example, taxpayers with qualifying facilities under Section 45 may temporarily receive an investment tax credit under Section 48 in lieu of the Section 45 credit. In certain circumstances the immediacy of the investment tax credit may be more beneficial than receiving the variable credit over ten years under the Section 45 provisions.

Section 48 makes available an investment tax credit (ITC) for equipment that uses certain renewable energy sources to gener-

ate electricity or heating or cooling. Eligible sources include solar, small wind (less than 100 KW), fuel cells, geothermal, microturbines, and heat pumps, with tax credits ranging from 10 to 30 percent. The tax credit is designed with some flexibility permitted; for example, it may be allocated within sale-leaseback arrangements, but there are limitations and considerations that require careful planning to maximize tax savings. Most applications of the Section 48 credit expire at the end of 2016.

In addition to the regular provisions of Section 48, ARRA added a new section 48C, allowing an ITC of 30 percent for qualified tangible personal property placed in service at manufacturing facilities for “qualified advanced energy projects.” Qualifying projects are those that re-equip, expand, or establish a manufacturing facility for the production of renewable energy; fuel cells and related capabilities for electric or hybrid-electric vehicles; renewable energy electrical grids; carbon capture and sequestration; energy conservation, including renewable fuels and lighting technologies; and “other advanced energy property designed to reduce greenhouse gas as designated by the Secretary of Treasury.” In August, the Treasury Department released guidance for this program, including useful definitions, in Notice 2009-72.<sup>9</sup> Importantly, to qualify for the initial round of this tax credit, taxpayers must have submitted an application to DOE

and the Internal Revenue Service by Oct. 16, 2009. As noted at the beginning of this article, awards were announced on Jan. 8, 2010, totaling the entire \$2.3 billion originally allocated under the program. Future award rounds may be established if Congress appropriates additional funds.

Section 1603 of ARRA authorizes the Treasury Department to pay grants in lieu of tax credits for specified renewable energy property. The payments are available for solar, wind, geothermal, and other renewable energy investments placed in service in 2009 or 2010 that would qualify for a tax credit under Sections 45 or 48, discussed above. On July 9, 2009, Treasury and DOE announced guidance for the program, which sets forth application procedures and clarifies eligibility requirements.<sup>10</sup> To date, the Treasury has disbursed almost \$2 billion under this program.

#### OTHER FEDERAL GOVERNMENT PROGRAMS

Additional federal programs tend to be specialized, and often are focused on assistance to scientific researchers at universities and elsewhere. For example, DOE has a grant program administered by its Advanced Research and Projects Agency (ARPA) that has been active in the technologies of biofuels, wind and solar power, hybrid vehicles and the vehicles' power sources. One of these initiatives targeted transformational energy technologies ready for commercialization. Other ARRA-funded grants totaling \$32.7 billion have been awarded for state and private-sector projects across a spectrum of technologies and applications.<sup>11</sup> However, these programs are not currently in a position to accept applications unless new funding is made available or the application process is reopened, because money remains undistributed after the first round of announced grants.<sup>12</sup>

Other federal programs include the U.S. Department of Agriculture's Rural Energy for America Program (REAP), which provides grants to agricultural producers and rural small businesses for renewable energy systems and energy efficiency improvements. Eligible projects include those that produce energy from wind, solar, biomass, geothermal, hydropower, and hydrogen-based sources. Funding is available through 2012.<sup>13</sup>

#### STATE PROGRAMS

State incentives for renewable energy vary considerably. New Jersey and California have been in the vanguard of efforts to promote renewable energy, using grants, tax breaks, and credible measures that encourage utilities to buy renewable energy generated by others. Typically states motivate the utilities by specifying a percentage of their energy output that must come from renewable sources, either produced by the utility or purchased from others (a renewable energy portfolio standard).<sup>14</sup> Currently 29 states have mandatory programs, which can generate marketable credits. Up to 30 percent of the funding for some renewables projects, particularly in the area of solar cells, comes from the sale of these credits to utilities. As the number of states with renewables portfolio programs continues to change, this area warrants careful attention.<sup>15</sup>

While many states offer incentives for residences, schools, and public hospitals, and in the area of hybrid vehicles and alternative fuel, the table below gives a quick sample of the status of programs available to industry and commercial operations in a representative collection of states.<sup>16</sup> The richness of the programs available and the renewable technologies to which they apply differ significantly across states, making it important to look closely at individual state incentives programs.

State <sup>17</sup>	Tax Credit	Grant/Rebate	Loan	Utilities Portfolio Standard <i>(amounts and criteria vary widely)</i>
CA	Yes (solar only)	Yes	No	Yes, 20 percent by 2010, 33 percent by 2020, no credit trading (under discussion)
IL	Yes	Yes	No	Yes, 25 percent by 2025, credit trading allowed
MI	Yes	Some grants available, plus rebates	No	Yes, 10 percent by 2015, credit trading allowed
NV	Yes	Yes	No	Yes, 25 percent by 2025, credit trading allowed

NJ	Yes	Yes, including rebates in the form of tradeable solar renewable energy certificates	Yes	Yes, 22.5 percent by 2021, credit trading allowed
NY	Yes (green buildings only)	Yes	No, closed	Yes, 29 percent by 2015, no credit trading
PA	Yes (wind only)	Yes	Yes	Yes, 18 percent by 2021, credit trading allowed

### FINANCING STRATEGIES

As a practical matter, given the continued lethargy in capital markets, project developers may need to combine public and private financing, in increasingly creative ways. Thus, project designers should consider the following approaches.

First, interested parties should systematically evaluate available funding opportunities and how they may fit into project planning. Programs differ significantly in criteria, scope, and timing. If the project has site flexibility, there may be clear advantages in selecting one state over another, particularly in light of varying renewable energy portfolio requirements and differing incentives for particular types of renewable energy.

Second, applications for funding need to meld a clear, technically solid description of the technology with an explanation of how it satisfies the policy preferences embedded in the incentive program, as well as the requirements that apply to the specific grant or loan solicitation. For example, U.S. ownership is not a prerequisite, as long as the operation is in the United States. Funding opportunities under ARRA give priority to proposals that maximize job creation, and benefits to local communities should always be stressed.

Third, funding applicants need to identify key obstacles to acceptance of the proposal. For instance, DOE's 1705 loan guarantee program requires projects to be "shovel-ready" by September 30, 2011. As a practical matter, this may eliminate proposals that would require a full Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA), which normally takes at least a year to complete, in favor of those that can proceed more quickly with a simpler NEPA Environmental Assessment (EA), such as reusing a previously contaminated brownfield, mining site, or industrial facility rather than a pristine "greenfield" location. Funding for numerous federal grant

programs was provided by ARRA and has now been allocated. Parties interested in additional funding may want to consider the advisability of a legislative strategy.

Fourth, the support of local and federal political leaders can be critical. DOE has been in touch with states and communities to educate them about the bank-backed funding requirements in its loan guarantee program, with the thought that local assistance in facilitating partnerships between financial institutions and project developers can enhance the success of the application.

Fifth, close coordination among the developer, design and environmental engineers, private-sector financing sources, and lawyers is essential to avoid costly missteps and delays. Most deals involve a combination of private and public funding sources, and good planning results in cost-effective structuring of the project.

Sixth, continuing communications with the agency administering the grant, rebate, or loan guarantee, or approving the tax credit, are valuable, to make sure all submissions are complete and to address any issues that arise.

### CONCLUSION

There is no question that navigating the complex web of economic incentive programs for renewable energy development presents daunting challenges. The process may not be intuitively obvious, particularly to private-sector business interests that are more accustomed to direct deal making and decisions driven by economics. However, the government incentive regime has its rules, rhymes, and reasons, even if they are not immediately apparent. These sources of funding can mean the difference in whether a deal happens or not. With a clear understanding of how the programs work and a creative strategy that weaves together technical aspects, policy savvy, and practicality, obtaining some degree of government funding is a realistic goal and can help make the project a reality.

## ENDNOTES

- 1 American Recovery and Reinvestment Act of 2009, Pub.L. 111-5. See A. Bull, “Obama Awards \$2.3 Billion Clean Energy Tax Credits,” Reuters, Jan. 8, 2010, available at [http://news.yahoo.com/s/nm/20100108/ts\\_nm/us\\_obama\\_tax-credit](http://news.yahoo.com/s/nm/20100108/ts_nm/us_obama_tax-credit).
- 2 H.R. 2847.
- 3 For example, President Obama’s proposed fiscal year 2011 budget, released in early February 2010, made it clear that the administration’s strong support for these programs will continue. In just one indication, wind programs at the Department of Energy (DOE) would receive a 53 percent increase, and solar would see a 22 percent hike in funding. An additional \$5 billion would go towards tax credits for manufacturing facilities that create products used to produce renewable energy, fuel cells, electric grids, or other green technology.  
  
To be sure, the budget must make its way through a long review process in Congress, and political sentiments are running high to cut costs. However, even stronger pressures are mounting for job creation efforts, and the President has repeatedly tied renewable energy development to jobs, a sure sign he will push hard for funding for these programs.
- 4 Should Congress enact federal climate change legislation with cap and trade provisions, the funding picture for renewable energy projects would change radically. Such a program’s requirements for the purchase of greenhouse gas emission allowances and the sale of carbon offsets attributable to renewable energy would create major new funding sources. This issue is not within the scope of this article, but for more information, see Jane C. Luxton and William J. Walsh, “Climate Change Legislation: It’s Time for Businesses to Take It Seriously,” Pepper Hamilton *Sustainability, Clean Tech, and Climate Change Alert*, July 20, 2009, available at [www.pepperlaw.com/publications\\_update.aspx?ArticleKey=1549](http://www.pepperlaw.com/publications_update.aspx?ArticleKey=1549).
- 5 Energy Policy Act of 2005, Pub.L. 109-58.
- 6 These programs have numerous other conditions and fine print. Additional information is available at DOE’s Web site, see <http://www.energy.gov/recovery/renewablefunding.htm>.
- 7 Unless otherwise stated, all tax-related references to “Section” are to the Internal Revenue Code of 1986, as amended.
- 8 For more information, see Todd B. Reinstein, “American Recovery and Reinvestment Act of 2009 Enhances Renewable Energy Tax Provisions,” Pepper Hamilton *Energy Tax Alert*, Feb. 18, 2009, available at [www.pepperlaw.com/publications\\_update.aspx?ArticleKey=1397](http://www.pepperlaw.com/publications_update.aspx?ArticleKey=1397).
- 9 See Todd B. Reinstein, “Treasury Notice 2009-72 with Application Rules for Section 48C,” Pepper Hamilton *Energy Tax Alert*, Aug. 14, 2009, available at [http://www.pepperlaw.com/publications\\_update.aspx?ArticleKey=1575](http://www.pepperlaw.com/publications_update.aspx?ArticleKey=1575).
- 10 See <http://www.treas.gov/recovery/1603.shtml>.
- 11 See <http://www.energy.gov/recovery/breakdown.htm>.
- 12 See <http://www07.grants.gov/search/search.do?jsessionid=CIRGLTjMtgG9ymhPy7mKftHTTD7Kpy2GZRTbhZwQrNC52RTKlhJQ!-1179711943?mode=VIEWREVISIONS&revNum=8>.
- 13 More information is available at the U.S. Department of Agriculture’s Web site: <http://www.rurdev.usda.gov/ga/ten-ergy.htm>.
- 14 See <http://www.dsireusa.org/incentives/index.cfm?EE=1&RE=1&SPV=0&ST=0&searchtype=RPS&sh=1>. Passage of a comprehensive energy bill, either as part of climate change legislation or independently, may result in such standards becoming mandatory nationwide.
- 15 States that have not traditionally had robust programs are looking to adopt major incentive programs, such as Maryland. See “O’Malley Proposed New Energy Policies,” *Washington Business Journal* (Jan. 15, 2010) <http://washington.bizjournals.com/washington/stories/2010/01/11/daily84.html>.
- 16 See generally <http://www.dsireusa.org/>.
- 17 Many counties and municipalities offer additional programs.

## Indian Webinar Series: Hidden Employment Law Risks in Doing Business in the United States

Wednesday, March 24, 2010

11:00 a.m. - 12:00 p.m. EASTERN

Pepper partner Richard J. Reibstein will discuss the hidden employment law risks Indian companies can face when conducting business in the United States or buying companies in the United States.

Topics will include:

- protecting trade secrets from employee theft
- avoiding liability when hiring employees from competitors
- creating state-of-the-art non-compete and non-solicitation agreements
- understanding the new tax and employment law risks from using independent contractors
- looming liabilities related to employment in the context of M&A transactions.

### Moderator

Valérie Demont, partner, Pepper Hamilton LLP

### Speaker

Richard J. Reibstein, partner, Pepper Hamilton LLP

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