



Letter from America  
March 2009

## WELCOME

Letter from America takes an in-depth look at legal issues in the United States that may have an impact on your business here in Europe.

In this issue we focus on:

- The financial crisis may trigger increased FCPA scrutiny; and
- Ensuring Collection Rule B - maritime attachment

## The Financial Crisis May Trigger Increased FCPA Scrutiny

by [Palmina M. Fava](#), [Carlos Ortiz](#), [Keren Tenenbaum](#), and [Timothy Birnbaum](#)

In response to the current global financial crisis, large corporations and businesses, particularly financial services organisations, are seeking new investment opportunities. Some have sought investment from sovereign wealth funds ("SWF"), state-owned investment vehicles pooled from a foreign nation's economic reserves. Yet in undertaking these new business initiatives, many may have unknowingly exposed themselves to possible scrutiny under the Foreign Corrupt Practices Act ("FCPA").

In the case of SWF investment, businesses must be mindful that the definition of "foreign officials" under the FCPA has expanded beyond the traditional classification of foreign dignitaries or elected officials. It may **include any business, as well as its representatives, that is managed by the investment arm of a foreign country or receives funding from a foreign country's investment fund**, if the foreign government exercises certain levels of control. Accordingly, a company may unwittingly be doing business with those to whom it is forbidden from offering gifts or making certain payments, and may lack the necessary internal controls to perform the heightened diligence required by the FCPA. Businesses actively seeking SWF investment, or those businesses that transact with clients who have received SWF investment, may find themselves caught up in FCPA liability.

This potential exposure comes at a time when both the Securities and Exchange Commission ("SEC") and the Department of Justice ("DOJ") have made it a top priority to investigate and enforce FCPA violations.

### Businesses Receiving SWF Investment May be Liable Under the FCPA

The basis for increased liability among businesses that have received funding from SWFs is what the SEC and DOJ define as "quid pro quo" arrangements. A transaction may be vulnerable to FCPA enforcement if a business accepts SWF funding with the sole intent of achieving new business opportunities in the SWF's home nation in violation of the FCPA's anti-bribery provisions<sup>1</sup>.

The US government increasingly has been scrutinizing businesses for violations of the FCPA. Financial services providers traditionally have been unaffected by FCPA enforcement activities, which primarily focused on the manufacturing, energy, telecommunications and pharmaceutical sectors. However, it appears likely that increased FCPA scrutiny may soon focus on financial services providers<sup>2</sup>. Since 2007, SWFs have invested an estimated \$30 billion to \$40 billion in US financial services firms, making them the most significant and transparent recipient of SWF investment.

### Increased Vulnerability of Businesses Transacting with SWF-Infused Clients

Additional FCPA scrutiny may apply not only to the businesses that actively seek SWF investment, but also to those businesses that transact with companies receiving SWF funding, because the entities receiving the funding may be treated as agents of foreign countries for purposes of FCPA enforcement. An issuer and its employees, therefore, may be exposed to FCPA liability for business dealings associated with the SWF-infused client, whether or not it was aware that the client was connected to a SWF.

This too marks an important expansion of potential FCPA liability. Traditionally, FCPA prosecutions and enforcement actions had been limited only to those issuers who unlawfully conducted business in foreign nations. But this new trend would include domestic issuers that conduct business with other domestic businesses exclusively on US soil.

Neither the SEC nor the DOJ has set forth specific guidelines regarding the percentage of foreign funding that a business must receive in order for its employees to be treated as "foreign officials." However, both agencies have indicated that the employees of such businesses may be deemed "foreign officials" when the foreign government exercises "effective control" over the business. The effective control standard typically examines governmental membership in various executive committees, governmental involvement in decision making or governmental veto power.

### Issuers Must Take Extra Precautions to Prevent FCPA Exposure

All issuers should **evaluate their clients** and determine the extent to which a SWF "exercises control" over the business in which it has invested. Ultimately, this may affect the way that the issuer can transact with this client. In addition, issuers that have received SWF funding must **undertake FCPA compliance initiatives** prior to initiating any new business in the SWF's home country.

To ensure compliance with the FCPA, it is crucial for companies to **maintain up-to-date corporate policies** on the FCPA, implement a strong compliance program, monitor activities of its agents and employees involving government officials, and conduct intensive training.

In the event that a company learns of a potential FCPA violation, it must **act promptly** and efficiently to minimize the impact on its business. The company should obtain legal assistance on a range of issues including how to conduct an internal investigation, whether to voluntarily disclose the violations to the authorities and what remedial actions to take.

<sup>1</sup> Nicholas Rummell, "Cash Crunch Could Result in More Corruption Cases," Financial Week, October 7, 2008.

<sup>2</sup> Nicholas Rummell, "Foreign Stakes in Big US Banks May Spark Bribery Investigations," Financial Week, May 12, 2008.

## Ensuring Collection Rule B - maritime attachment

by [David Wenger](#)

**An earlier version of this article appeared in Maritime Risk International in November 2007.**

In the US, an extraordinary remedy is available in maritime cases. Supplemental Admiralty Rule B permits pre-trial attachment of a non-resident defendant's property without prior notice to the defendant.

A court may restrain any assets of the defendant located within the jurisdiction and thereby provide a fund from which a judgment may be paid. There are four requirements to obtain a Rule B maritime attachment:

- the cause of action must arise within the court's admiralty and maritime jurisdiction;
- the defendant 'cannot be found' within the district;
- the defendant's property may be found within the district; and
- there is no statutory or maritime law bar to the attachment.

The 'cannot be found' element is met if either the defendant is not subject to personal jurisdiction or cannot be served with process in the district. If either of these factors of non-presence exist, any property of the defendant may be attached, even property unrelated to the claim.

While Rule B attachments occur without notice, the defendant is entitled to a prompt post-attachment hearing. At the hearing, the defendant may contest the validity of the attachment, the amount of security demanded, or any other alleged deficiency in the proceedings. The plaintiff is required to show why the attachment should not be vacated, but the plaintiff's burden is low. The merits of the case are not at issue. The plaintiff must only demonstrate compliance with filing and service requirements, and that the attachment has met the four Rule B criteria.

The plaintiff must also show that the damages claimed are reasonably calculated, which may include interest, as well as legal and arbitral costs recoverable in a parallel arbitration. If the plaintiff's burden at the hearing is met, a district court may still vacate the attachment if:

- the defendant is present in a convenient adjacent jurisdiction;
- the defendant is present in the district where the plaintiff is located; or
- the plaintiff has already obtained sufficient security for a judgment.

The courts will not engage in a fact-intensive inquiry into the substantiality and nature of the defendant's presence.

While several courts have imposed an additional requirement of balancing the need for the attachment against the burden imposed on a defendant by the attachment, courts no longer engage in any need versus hardship inquiry in considering whether to vacate an attachment.

### Attachment of electronic funds transfer wired through New York banks

The decision of the Second Circuit Court of Appeals in *Winter Storm Shipping v. Thai Petrochemical* expanded the nature of property that may be attached pursuant to Rule B, and set off significant controversy. In *Winter Storm*, a party against whom a maritime claim was asserted attempted to electronically transfer funds through a New York intermediary bank.

The Appeals Court held that the jurisdictional reach of US courts under Rule B extends to electronic funds transfers. Funds transfers may be attached, even if the funds are unrelated to the claim asserted. Because any electronic funds transfer in US dollars must pass through a US bank, and must pass through New York City, this decision has wide implications.

The *Winter Storm* decision was followed by *Aqua Stoli v. Gardner Smith*. There, the Second Circuit Court of Appeals overruled vacatur of an attachment of an electronic funds transfer through a New York intermediary bank.

The district court had held that because the party against whom the attachment was obtained was an on-going business with sufficient assets to satisfy any judgment against it, the burden on the defendant of not being able to conduct its business in US dollars outweighed the claimant's need for security.

Overruling the district court, the Second Circuit held that the rules on maritime attachment should be strictly construed and disposed of the need versus hardship analysis. The court limited the district court's *vacatur* power to circumstances where the defendant is present in a convenient adjacent jurisdiction or the district where plaintiff is located, or where the plaintiff has already obtained sufficient security for a judgment.

*Aqua Stoli*, however, raised some questions. The Appeals Court stated that under the law of the Second Circuit, electronic funds transfers 'to or from a party are attachable by a court as they pass through banks located in that court's jurisdiction.' This remains the law in New York. Yet the court in a footnote also questioned the validity of *Winter Storm's* holding that an electronic funds transfer is attachable property of either the beneficiary or the sender. The Court noted, without further explanation, that under New York state law, which the court would look to in the absence of a federal rule, an electronic fund transfer is neither the property of the sender nor the beneficiary while present in an intermediary bank.

Attempting to interpret *Aqua Stoli's* footnote questioning the validity of *Winter Storm*, New York courts have not been uniform in decisions about electronic funds transfers. One case vacated an attachment, holding that a defendant had not acquired a property interest in an electronic funds transfer directed to it, which had been attached at a bank in New York. Another case vacated an attachment beyond the *vacatur* guidelines articulated in *Aqua Stoli*. A plaintiff already involved in one action with a defendant instituted a new action arising from same facts and obtained an attachment. The court vacated the attachment as an 'improper practice' showing a 'want of equity' on the part of the plaintiff. In a third case, a court vacated an attachment, finding that the plaintiff had already obtained adequate security and that the plaintiff and defendant were present in another location where they were subject to jurisdiction.

The majority of recent cases, however, have upheld attachments of electronic funds transfers directed to, as well as originated by, the defendant, (although two recent decisions reduced the amount of the attachment sought, finding that the plaintiffs failed to accurately calculate the amount of the claim).

## Practical tips on rule B attachment of an electronic funds transfer

For Rule B to be used effectively, timing of an attempted attachment of an electronic funds transfer is critical. Where a plaintiff seeks to attach funds of the originating party, attachments are only permitted so long as the funds are captured at the intermediary bank.

Once an electronic funds transfer has reached the beneficiary's bank, it is no longer attachable as an asset of the originator. Additionally, while most orders of attachment are valid for a 24-hour period after served upon a bank, certain judges may limit the validity period of attachment orders.

Proper notice of attachment is also important. Once an electronic funds transfer is attached, prompt notice must be given to the defendant. Rule B allows notice by fax and 'other verifiable electronic means', which has been held to include notice by email.

Some companies have attempted to avoid having their electronic funds transfers attached by taking measures to be considered 'found' in New York, and thereby defeating a threshold requirement of attachment. These include registering to do business, appointing agents for service of process and even leasing office space in New York. Obviously, a company must consider the tax and regulatory issues involved in maintaining a New York presence and whether the advantages of possibly avoiding a Rule B attachment outweigh disadvantages caused by a New York presence.

Parties may consider contractually precluding the availability of a Rule B attachment, but such a decision should be evaluated carefully as it limits availability of a remedy that in some instances may be the only way to guarantee collection of an eventual judgment.

## Conclusion

The availability of Rule B attachments may be somewhat curtailed in the coming months. In a recent case, *Gala Rosa -v- Sures et Derees Group*, decided 4 February 2009, the court noted that Rule B cases have clogged the New York court system. A third of civil cases in the Southern District of New York are now Rule B cases. The court refused to add two customary enabling provisions to an order of attachment effectively rendering the order moot.

New York maritime lawyers will attend a meeting with judges of the Southern District Court in March this year to discuss implementing steps to make Rule B cases more efficient and less burdensome on the court. The procedures that emerge may modify the availability of Rule B attachment. But for now, and likely even once new procedures are implemented, a Rule B attachment of an electronic funds transfer remains a powerful tool for a claimant to obtain jurisdiction over a defendant not otherwise subject to jurisdiction and to ensure collection of any eventual judgment.

**If you have any comments on this newsletter or would like to see articles written on a particular topic, please email your comments to [catherine.collett@dlapiper.com](mailto:catherine.collett@dlapiper.com)**

**IMPORTANT NOTE TO RECIPIENTS:** We may supply your personal data to other members of the DLA Piper global organisation (which may be situated outside the European Economic Area ("EEA")) so that we or they may contact you with information about legal services and events offered by us or them subject to your consent.

It is our policy not to pass any of your personal data outside of the DLA Piper global organisation or use your personal data for any purposes other than those indicated above.

Regulated by (1)The Solicitors Regulation Authority, (2)The Law Society of Scotland

DLA Piper UK LLP(1) and DLA Piper Scotland LLP(2) are part of DLA Piper, a global legal services organisation, the members of which are separate and distinct legal entities.

For further information please refer to [www.dlapiper.com/structure](http://www.dlapiper.com/structure)

A list of offices can be found at [www.dlapiper.com](http://www.dlapiper.com)

DLA Piper UK LLP is a limited liability partnership registered in England and Wales (registered number OC307847)

A list of members is open for inspection at its registered office and principal place of business 3 Noble Street, London EC2V 7EE

If you no longer wish to receive information from DLA Piper UK LLP and/or any of the DLA Piper members, please click here:

<http://info.dlapiper.com/vtu/ABC123>