

Cross-Border Update on Investing and Doing Business in the United States



Valérie Demont, Nishith Desai, Amy Hariani, James D. Rosener | April 16, 2014



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July 16, 2014 | 9:00 AM - 10:00 AM EDT

Focus: Joint ventures with U.S. partners

Contact dolanb@pepperlaw.com for more information and to register.

Speaker: Valérie Demont



+1.212.808.2745
demontv@pepperlaw.com

- Partner in the Corporate and Securities Practice Group of Pepper Hamilton LLP, resident in the New York office
- Chair of Pepper's U.S.-India Practice
- Focuses her practice primarily on U.S. and cross-border mergers and acquisitions, capital markets, corporate finance and securities matters
- Involved in numerous mergers, acquisitions, joint ventures and dispositions for corporations and private equity funds in the U.S., Europe (France), Canada and Asia.

Speaker: Nishith M. Desai



+91.22.6669.5000
nishith@nishithdesai.com

- Founder of the multi-skilled, research-based international law firm, Nishith Desai Associates
- an international tax and corporate law expert, researcher, published author and lecturer in leading academic institutions around the world
- a specialist in providing strategic legal and business solutions coupled with industry expertise
- Legal Era, a prestigious Legal Media Group has recognized Nishith Desai as the Best Tax Lawyer of the Year (2013).
- Has been ranked No. 28 in a global Top 50 "Gold List" by Tax Business, a UK-based journal for the international tax community
- Listed in the Lex Witness 'Hall of fame: Top 50' individuals who have helped shape the legal landscape of modern India

Speaker: Amy Hariani



+1.202.463.5657
ahariani@usibc.com

- Serves as the Director and Legal Counsel for the U.S.-India Business Council (USIBC)
- Manages the Life Sciences and Legal and Professional Services portfolios. On behalf of these companies, Ms. Hariani advises and advocates to the U.S. government and the Government of India on various issues relating to competition, intellectual property, market access, merger & competition, antitrust, and other issues relating to international trade between the U.S. and India.

Speaker: James D. Rosener



+1.212.808.2717
rosenerj@pepperlaw.com

- Partner in the Commercial Department of Pepper Hamilton LLP
- Heads the firm's International Practice Group, is managing partner of the New York office and has served as a member of the firm's Executive Committee
- Practice is devoted primarily to international transactions, private equity, mergers and acquisitions and corporate financing.

Firm Facts

- Established in 1890
- More than 500 lawyers
- Thirteen offices in seven states (PA, NJ, DE, NY, MA, MI and CA) and the District of Columbia
- National and international practice (including active client matters in Europe, the UAE, the Near East, the Far East, South America, Canada and other parts of the world)

Practice Breakdown



Pepper U.S. – India Practice

- Pepper is devoted to serving U.S. clients investing and operating in India, and Indian clients investing or doing business in the United States
- Practice consists of a multidisciplinary team of attorneys with experience in a variety of practice areas, (including corporate, securities, M&A, financing, tax, intellectual property, funds, construction, enforcement and litigation)
- In 2012, Pepper acquired the investigative group run by Louis Freeh, former director of the U.S. Federal Bureau of Investigation, allowing the combined firm to offer clients the outstanding capabilities of top consultants, forensic analysts, and former FBI and comparable resources worldwide
- Recognized as in both 2011 and 2012 as a significant player for U.S.-India business by India Business Law Journal.

Pepper U.S. - India Practice Materials

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Valérie Demont
Partner

The Pepper Five: On U.S. – India Issues

This is a podcast series where we ask Pepper attorneys five key questions on topics that are top of mind for our clients. In this session, we sit down with [Valérie Demont](#), chair of Pepper's [U.S.-India practice](#). Ms. Demont and [James D. Rosener](#), chair of Pepper's [International Practice](#), are preparing for a trip to India in February 2014 that will take them to New Delhi, Bangalore and Mumbai.

We discuss what she hopes to accomplish on this trip, including an event series with the [Indo-American Chamber of Commerce](#) which will focus on key issues for Indian companies looking to conduct business in the U.S. We also discuss what are some of the key Indian legal and regulatory trends to be mindful of in 2014 and whether India is still a top global destination for foreign investment.

(Running Time: 8:05)



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Our Locations



Pepper has expanded from its Philadelphia origins to 13 locations.



U.S.-India Business Council (USIBC)



- The USIBC is the premier business advocacy organization representing America's top companies investing in India, joined by global Indian companies, with an aim to deepen trade and strengthen commercial ties
- USIBC formulates an annual work plan that targets specific issues important to its member-companies, compiled from input derived from the 12 Executive Committees and Working Groups that meet regularly to assess progress on-the-ground and to devise strategies and prepare representations to advance sector-specific reforms in India.
- USIBC is partnered with the premier industry & trade associations in India, including the Confederation of Indian Industry (CII), the Federation of Indian Chambers of Commerce and Industry (FICCI), the American Chamber of Commerce in India (AmCham India), National Association of Software and Service Companies (NASSCOM), The Indus Entrepreneurs (TiE), and the Indo-American Chamber of Commerce (IACC). These relationships provide USIBC-member companies with invaluable expertise and contacts throughout the U.S. and India.

Nishith Desai Associates

- Nishith Desai Associates is a research-based Indian law firm with offices in Mumbai, Silicon Valley, Bangalore, Singapore, Mumbai BKC, Delhi and Munich that aims at providing strategic, legal and tax services across various sectors; some of which are IP, pharma and life-sciences, corporate, technology and media
- The firm has had many accomplishments and won several accolades internationally as well as domestically for being an industry leader; and continues to be ranked consistently as one of the top 5 in India
- Their expertise and opinion is regarded as an authority amongst the upper echelons of international law. In addition, their client list includes many of the Fortune 500 and other successful Indian businesses
- Has been ranked as the best performing Indian law firm of the year by the RSG India Consulting in its client satisfaction report (2011). The Tax Directors Handbook, 2009 lauded his firm for its constant and innovative out-of-the-box ideas.

Indian FDI into the United States

- India FDI in the United States (stock) was \$5.2 billion in 2012 (latest data available), up 6.7% from 2011.
- India direct investment in the U.S. is primarily concentrated in the professional, scientific, and technical services, and banking sectors.
- Sales of services in the United States by majority India-owned firms were \$9.3 billion.

Source: United States Trade Representative

Indian Imports into the United States

- India was the United States' 10th largest supplier of goods imports in 2013.
- U.S. goods imports from India totaled \$41.8 billion in 2013, up 3.2% (\$1.3 billion) from 2012, and up 220% from 2003. U.S. imports from India account for 1.8% of overall U.S. imports in 2013.
- The five largest import categories in 2013 were: Precious Stones (diamonds) (\$9.2 billion), Pharmaceutical Products (\$4.5 billion), Mineral Fuel (oil) (\$3.9 billion), Organic Chemicals (\$2.2 billion), and Miscellaneous Textile Articles (\$2.1 billion).
- U.S. imports of agricultural products from India totaled \$3.5 billion in 2013, the 5th largest supplier of Ag imports. Leading categories include: tree nuts (\$286 million), spices (\$231 million), essential oils (\$177 million), rice (\$167 million), and vegetable oils (\$93 million).
- U.S. imports of private commercial services* (i.e., excluding military and government) were \$18.5 billion in 2012 (latest data available), up 6.1% (\$1.1 billion) from 2011, and up 930% from 2002. The other private services (business, professional and technical services), and the travel categories accounted for nearly all of U.S. services imports from India.

Source: United States Trade Representative

Formation of US Subsidiaries



Types of US Entities - Overview

- Foreign investors generally operate utilizing one or more entities when conducting business in the United States
- The following entities are the most commonly used for a US subsidiary:
 - Corporation
 - Limited liability company (LLC)
- Delaware is the primary jurisdiction used for the incorporation of US entities - 63% of Fortune 500 and 50% of public companies are incorporated in Delaware
- the entity also needs to qualify to do business in the jurisdiction of its principal place of business and any other state where it actively conducts business. For example, if the entity is incorporated in Delaware but has a principal place of business in New York, it must also qualify to do business in New York

Ownership



Corporation

- Minimum of 1 stockholder; no maximum number of stockholders
- No citizenship or residency requirements of stockholders
- Limited power over day-to-day management
- Powers generally limited to:
 - electing the Board of Directors
 - amending charter documents
 - approving mergers and sales of substantially all assets
 - dissolution
- At least one meeting annually
- Stockholders can act by written consent

LLC

- Minimum of 1 member; no maximum number of members
- No citizenship or residency requirements of members
- LLCs can be managed directly by one or several members or can adopt a Board of Managers/Directors structure
- Members and managers' powers are determined by the contractual provisions of the operating agreement of the LLC

Liability of Equity Holders



Corporation

- Limited liability of stockholders:
 - limited liability for the debts of the corporation – except “piercing corporate veil”
 - liability for wrongful distributions and redemptions
- No duties owed to creditors except in insolvency or dissolution

LLC

- Limited liabilities of members:
 - limited liability for the debts of the corporation – except “piercing corporate veil”
 - liability for wrongful distributions and redemptions
- No duties owed to creditors except in insolvency or dissolution
- Members may actively manage the LLC without losing their immunity from personal liability



Corporation

- Board of Directors responsible for affairs of the corporation
 - appointment of officers
 - approval of major decisions regarding corporation
- At least 1 director; no maximum number of directors
- No citizenship or residency requirements (but “controlled company issue in India)
- At least one meeting annually
- Directors can act by unanimous written consent

LLC

- LLCs may be managed by Members (acting as Managing Members) or by Managers appointed by the Members (similar to a Board of Directors in a corporation)
- No citizenship or residency requirements (but controlled company issue in India)
- LLC operating agreement to determine the number of Managers, meetings and voting requirements
- LLC operating agreement may create classes of Managers with different powers, duties and rights



Corporation

- Directors owe fiduciary duties to the stockholders
 - duty of care
 - duty of loyalty
 - additional duties derived from duty of care and loyalty
 - confidentiality, good faith, fair dealing
- Duties owed to creditors when corporation is in the zone of insolvency
- No fiduciary duties owed to employees
- Civil liability only; not criminal

LLC

- Managing Members or Managers owe fiduciary duties to the Members (same as corporation)
- Certain fiduciary duties may be modified or eliminated by the LLC operating agreement
 - except duty of good faith and fair dealing
- Duties owed to creditors when LLC is in the zone of insolvency
- No fiduciary duties owed to employees
- Civil liability only; not criminal



Corporation

- Officers are appointed by the Board of Directors and serve at the pleasure of the Board
- Officers can be terminated at any time with or without cause
 - employment agreements
- Powers and duties of officers are determined by the Board and charter documents
- Officers include: President, Secretary, Treasurer and any other officers as Board may desire
- One person may hold multiple officer titles
- No citizenship or residency requirements

LLC

- LLCs may (but are not required to) appoint officers
- Officers serve at the pleasure of the Managing Members/Managers
- Officers may be terminated at any time with or without cause
 - employment agreements
- Powers of officers are determined by the Managing Member/Managers and LLC operating agreement
- One person may hold multiple officer titles
- No citizenship or residency requirements

Capitalization



Corporation

- Corporations issue stock to stockholders
 - common stock, preferred stock
- Minimal par value (e.g.-\$.01 per share)
- Minimal capitalization requirements in Delaware – par value multiplied by number of shares of stock issued
- Stock freely transferable except:
 - securities law compliance
 - stockholder agreement restrictions
- Stock in physical certificated form except publicly traded companies
- Stock may be issued against cash, assets or services contributed to corporation
- Tax liability concerns if equity issued at less than fair market value

LLC

- LLCs issue membership interests to the Members
- No par value
- No minimal capitalization requirements
- Interests can be issued with various economic or voting rights set forth in LLC operating agreement
- Interests freely transferable except:
 - securities law compliance
 - stockholder agreement restrictions
- Interests usually not certificated
- No contribution requirements. Interests may be issued against cash, assets or services contributed to LLC
- Tax liability concerns if equity issued at less than fair market value

Corporation

- Corporations are taxable as separate entities and subject to income tax filing requirements – Federal (35%), State and local taxes
- Income is blocked and does not automatically flow to stockholders
- Stockholders also taxed on dividends
- Withholdings on dividend and interest payments to foreign stockholders or lenders (30% standard rate; can be reduced under Treaty or eliminated for portfolio interests)
- Corporations also subject to:
 - payroll/social security tax (FICA) (12.4% (split 50% employer-employee) up to \$117,000 of wages)
 - unemployment tax (FUTA) - 6.0% of the first \$7,000 of wages (with credit, can reduce to 0.6%)
 - Medicare tax (2.9% (split 50% employer-employee) on total wages)
 - additional state taxes (nexus) (franchise, sales and use tax, etc.)

LLC

- LLCs are pass-through for income tax purposes unless they elect to be treated as corporations (C-corp)
- Profits and losses passed through Members if not C-corp – no double tax
- Members become subject to US tax regime
- LLCs are also subject to:
 - payroll/social security tax (FICA) (12.4% on up to \$117,000 of wages)
 - unemployment tax (FUTA)- 6.0% of the first \$7,000 of wages (with credit, can reduce to 0.6%)
 - Medicare tax (2.9% on 100% of wages)
 - Branch profits tax if not C-corp
 - additional state taxes (nexus) (franchise, sales and use tax, etc.)
 - employee pays both employer-employee share of FICA and Medicare, if employee is a member of pass-through LLC

Other Tax Matters

- Permanent establishment issues for parent company
 - US federal income tax on any US business profits attributable to the permanent establishment (35% tax rate)
 - Mitigating strategies: creation of a US subsidiary, independence of US subsidiary, employment agreements, contracting parties
- Officers of US subsidiary who are not US citizens may be subject to personal income tax in the US and the obligation to file income tax returns in the US
 - Green card holders – deemed US tax resident subject to tax on their worldwide income (39.6% highest federal income tax rate)
 - Residency for more than 183 days in the US
 - Compensation for services provided to the US subsidiary in the US

Incorporation/Formation



Corporation

- Public filing of a Certificate of Incorporation
- Bylaws – internal governance of corporation
- Appointment of registered agent for service of process in Delaware
- Obligation to file Annual Reports
- Payment of franchise tax with Annual Reports – based on authorized share capital
- Qualification to do business in States where operate actively

LLC

- Public filing of a short form Certificate of Formation
- LLC operating agreement – all terms related to interests, members rights and duties, allocation of economics and internal governance
- Appointment of registered agent for service of process in Delaware
- No obligation to file Annual Reports
- Payment of franchise tax
- Qualification to do business in States where operate actively

Qualification to Do Business

- Since the US subsidiary incorporated in Delaware may not be doing business in Delaware, it may become necessary to qualify it in all the States where it actively conducts business:
 - location of employees
 - location of contracts
 - location of offices
- An application for authority facilitates legal and administrative proceedings by specifying where and in what manner the US subsidiary may be served with process
- Qualification to do business does not subject the US subsidiary to any substantive regulation that does not also apply to a foreign organization doing business without authority
- The consequence of doing business without authority is that the organization may not affirmatively enforce its contracts before the courts of the jurisdiction where it failed to qualify until it obtains authority and pays all arrears in fees, penalties, and taxes

Employment Matters - Employees



- US subsidiary can hire US and foreign employees
 - Visas or other work permit required for any non-US employees
- Employees can be hired “at will” without written employment agreement – but recommended for more senior employees
- “At will” employees can be terminated at US subsidiary’s election with or without cause
 - Need to comply with federal or state discrimination statutes
 - Customary (but not required) to provide severance to more senior employees
 - Generally need to payout any accrued but unused vacation
 - Releases of claims

Non-Competition/Non-Solicitation



- Enforceability of non-competition covenants in employment agreements – often difficult to enforce
 - Reasonableness – limitation in geographic scope, duration, and scope of activities restricted
 - Need for consideration to support enforceability
- Non-solicitation covenants – employees, customers
- Trade secrets – highest level of protection; difficult to prove
- Confidentiality obligations – generally enforceable if information truly “confidential”

Independent Contractors

- Independent contractor misclassification problem
- State specific laws on independent contractors – need to do a state-by-state analysis; beware of standard forms of contracts used across all States
- Examples of items to review include
 - titles used; business cards
 - scope of supervision of independent contractor’s work and inspection rights
 - termination “at will” provisions
 - exclusivity, broad non-compete and non-solicit provisions
- risk of suits by independent contractor/employee for unpaid employee benefits (medical, pension etc.), work-related expenses and to recover overtime pay
- risk of regulatory liability to governmental authorities for failure to withhold taxes, unpaid Social Security and Medicare contributions, unpaid workers’ compensation and unpaid unemployment insurance premiums



- Obtain insurance coverage that complies with requirements under contracts with customers
 - minimum commercial general liability, personal injury and other coverage requirements etc.
- Obtain director and officer insurance coverage
 - coverage and availability issue with smaller or foreign companies

Q&A



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visit www.pepperlaw.com**



Valérie Demont | Pepper Hamilton LLP | +1.212.808.2745 | demontv@pepperlaw.com

Nishith M. Desai | Nishith Desai Associates | +91.22.6669.5000 | nishith@nishithdesai.com

Amy Hariani | U.S.-India Business Council | +1.202.463.5657 | ahariani@usibc.com

James D. Rosener | Pepper Hamilton LLP | +1.212.808.2717 | rosenerj@pepperlaw.com