

WELCOME TO FABULOUS LAS VEGAS: THE NEVADA GAMING REGULATORY RESPONSE TO SOVEREIGN WEALTH FUND INVESTMENT

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I. INTRODUCTION

It should come as no shock to hear that the United States economy is experiencing a downward spiral. The Nevada gaming industry, to which Nevada's economic health is so closely tied, has not been insulated from this downward spiral.¹ In troubled times like these, desperation invites opportunism. As a result, an old market player has stepped into a new and prominent role in the global economy. Cue the hero music; enter Sovereign Wealth Funds ("SWF"), stage right. But just as with any well-known hero, SWFs are not without flaws. In fact, SWFs' sizable investments in crucial sectors of the national economy have sparked concern and debate among both scholars and policy makers. The regulatory mechanisms designed to deal with SWFs must provide the proper amount of oversight necessary to ensure an open and stable international economic system while also protecting our nation's national security concerns.²

The bulk of recent scholarly work surrounding SWFs is dedicated to assessing the federal regulatory systems' adequacy—or likely, inadequacy—in dealing with issues unique to SWF investment. However, the federal regulatory system has not been the only regulatory body to deal with SWF investment in the United States. In 2008, one of the United Arab Emirates' ("UAE")

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¹ Gaming is Nevada's largest industry and gaming revenues account for 23.3% of the state's budget. See RESEARCH DIV., LEGIS. COUNS. BUREAU, POLICY AND PROGRAM REPORT ON REVENUE AND BUDGET 3 (Nev. 2010), available at <http://www.leg.state.nv.us/Division/Research/Publications/PandPReports/20-RB.pdf>.

² Clay Lowery, Treas. Assistant Sec'y for Int'l Affairs, Remarks to Barclays Capital's 12th Annual Global Inflation-Linked Conference (Feb. 25, 2008) [hereinafter Lowery], <http://www.treasury.gov/press-center/press-releases/Pages/hp836.aspx>.

SWFs, Dubai World, made a large investment into the Nevada gaming industry and was found suitable to purchase up to twenty percent of MGM Mirage's stock.³ This article will address how the Nevada gaming regulatory system has found an effective way to deal with SWF investment in a manner that maintains an open market welcoming to foreign direct investment yet avoids compromising Nevada's stringent gaming investment standards.

A. *A Primer on Sovereign Wealth Funds*

What is a SWF? "Broadly speaking, . . . SWFs are actively managed, government-owned capital pools originating from foreign exchange assets[]" and are created to invest surplus funds into private markets abroad.⁴ However, it is important to note that currently there is no widely accepted definition of a SWF.⁵

Although SWFs escape an agreed-upon definition, the U.S. Treasury Department has conceptually classified SWFs as generally falling into one of two distinct categories. These two categories are based on the source from which the foreign exchange assets are created.⁶ The first category is "commodity SWFs," which derives its name from the exportation of natural resources.⁷ Countries with commodity SWFs are simply replacing a physical asset in the ground with a financial asset that they will use to invest in foreign markets in an attempt to transform short-term natural resource wealth into long-term economic diversification.⁸ Commodity SWFs are designed to guard against boom and bust economic cycles prevalent to economies that rely heavily on natural resource exportation.⁹ The second category is "non-Commodity SWFs," which are usually established through transfers of assets from official foreign exchange reserves into a standalone investment fund that can be invested into

³ *Hearing on the Application of Dubai World for a Finding of Suitability as Beneficial Owners or Shareholders of the Voting Securities of MGM Mirage, Before the Nev. Gaming Comm'n* (Nov. 20, 2008) [hereinafter *NGC Dubai World Suitability Hearing*].

⁴ See STAFF OF JOINT COMM. ON TAXATION, ECON. AND U.S. INCOME TAX, ISSUES RAISED BY SOVEREIGN WEALTH FUND INVESTMENT IN THE UNITED STATES, at 21-22 (JCX-49-08 June 17, 2008), [hereinafter, ISSUES RAISED BY SOVEREIGN WEALTH FUNDS], available at <http://www.jct.gov/x-49-08.pdf>.

⁵ See *id.* at 21. Both the Treasury and the IMF define SWFs differently and base their definitions on the sources and objectives of SWF investment. However, specific categorization of SWFs is not pertinent for the purposes of this article.

⁶ Robert M. Kimmitt, *Public Footprints in Private Markets: Sovereign Wealth Funds and the World Economy*, FOREIGN AFF., Jan./Feb. 2008, at 119, 120.

⁷ *Id.*

⁸ See Mark E. Plotkin, *Foreign Direct Investment by Sovereign Wealth Funds: Using the Market and the Committee on Foreign Investment in the United States Together To Make the United States More Secure*, 118 YALE L.J. POCKET PART 88, 88-89 (2008), <http://thepocketpart.org/ylj-online/scholarship/718-foreign-direct-investment-by-sovereign-wealth-funds>.

⁹ See Lowery, *supra* note 2; see also Patrick J. Keenan, *Sovereign Wealth Funds and Social Arrears: Should Debts to Citizens be Treated Differently than Debts to Other Creditors?*, 49 VA. J. INT'L L. 431, 432 (2009) (citations omitted) (discussing how commodity based SWFs are used to invest reserves or earnings from commodity trades).

foreign markets with the hope of garnering higher returns.¹⁰ Assets of this type of SWF resemble “borrowed money” rather than traditional wealth.¹¹

Although SWFs have recently begun to cause a stir, they are not a new type of foreign direct investment (“FDI”). In fact, SWFs have been a global market player since 1953¹² and, until recently, have operated in relative obscurity. However, what is new about SWFs is their rapid growth in both number and size.¹³ Twenty years ago, only a few funds managed total assets in the billion-dollar range.¹⁴ In 2008, there were approximately forty SWFs managing assets over one billion dollars,¹⁵ with twelve established since 2005.¹⁶ As of February 2008, the International Monetary Fund (“IMF”) approximated that total assets under SWF management ranged from two to three trillion dollars.¹⁷ The IMF has also postulated that SWFs are likely to become even more important in the future because growth predictions indicate that foreign assets under the management of SWFs could reach up to the six to ten trillion-dollar range by the year 2013.¹⁸

II. WHY SOVEREIGN WEALTH FUNDS HAVE BECOME SUCH A PROMINENT TOPIC

SWFs have become an increasingly prominent topic because the size of their investment activity has changed. This alteration can be attributed to consistent changes in the U.S. economy. For the last quarter century, the U.S. has been a net importer and consumer of goods and services.¹⁹ Add this trade deficit to an investment banking business model that heavily relied on leverage, the sub-prime mortgage collapse,²⁰ and a paltry domestic savings rate,²¹ and voila; the “great recession”²² is now upon us. Simply put, “Americans have been spending other people’s money or [their] own future money for far too

¹⁰ Kimmitt, *supra* note 6, at 121.

¹¹ *Id.*

¹² *Id.* at 119. The Kuwait Investment Board was created in 1953 to invest its surplus oil revenue and is perhaps the first ever SWF.

¹³ Lowery, *supra* note 2.

¹⁴ *Id.*

¹⁵ Kimmitt, *supra* note 6, at 121. The exact number of SWFs is hard to estimate due to the fact that they are often not transparent. *Id.*

¹⁶ *Id.* at 119.

¹⁷ Int’l Monetary Fund, *Sovereign Wealth Funds-A Work Agenda*, at 6 (Feb. 29, 2008), available at <http://www.imf.org/external/np/pp/eng/2008/022908.pdf>.

¹⁸ *Id.*

¹⁹ ISSUES RAISED BY SOVEREIGN WEALTH FUNDS, *supra* note 4, at 1.

²⁰ See Forrest Norman, *Private Equity, Sovereign Funds and the Global Credit Crunch*, DUKE L. MAG., Winter 2009, at 3 (Stephen Schwarzman, chairman and co-founder of the Blackstone Group and former head of Lehman Brothers’ global mergers and acquisitions team, citing bad mortgages as a link in the chain of events that led to the U.S. economic collapse).

²¹ See Kurt Andersen, *That was Then. . .and This is Now. Our 30-year winning streak couldn’t last forever. Now we’re sobering up. How a reset can make America a saner, better place*, TIME, Apr. 6, 2009, at 34. By 2007, the average household saved less than 1% of its disposable income. *Id.*

²² *Id.*

long[.]”²³ Therefore, the current economic situation has essentially pushed increased amounts of SWF investment in the U.S.²⁴

A. *The Jekyll and Hyde Nature of Sovereign Wealth Fund Investment*

Many questions still surround SWF investment, with the bulk of the questions centering on whether SWFs are investing large amounts of money into U.S. companies and around the world for economic or political reasons. However, the benefits that accompany SWF investment into the U.S. economy cannot be denied; but then again, neither can the risks. Thus, the question becomes: are SWFs a part of the solution or are they a part of the problem? Well, “that depends.”²⁵

SWFs create both theoretical and regulatory challenges because of their dichotomous nature.²⁶ Although SWFs bolster the national economy by infusing much needed capital to some of its largest financial institutions,²⁷ these bailouts come at a price. Part of that price is the introduction of state-capitalism into the United States’ traditionally market-capitalism system.²⁸ The

²³ Norman, *supra* note 20, at 3 (Gao Xiqing, Vice Chairman, President, and Chief Investment Officer of The China Investment Group, China’s sovereign-investment fund, discussing the effect of America’s overspending on its status as a world leader.) According to Duke Professor, James Cox, moderator of the financial panel, “a year ago, we would have been having a debate and discussion here about the role of sovereign wealth funds. . . Little did we know that in a few months time, sovereign wealth funds in various parts of the world were going to be bailing out our banks [and] financial institutions.” *Id.* at 2.

²⁴ *Id.* at 2-3.

²⁵ David H. McCormick, Treas. Under-Sec’y for Int’l Affairs, Remarks at the Tuck Global Capital Markets Conference (Feb. 15, 2008), <http://www.treasury.gov/press-center/press-releases/Pages/hp832.aspx> (stating that SWFs might be the answer to our country’s financial woes if they foster openness and make market based decisions without political undertones).

²⁶ Keenan, *supra* note 9, at 432.

²⁷ Peter Heyward, *Sovereign Wealth Fund Investments in U.S. Financial Institutions: Too Much or Not Enough?*, 27 BANKING & FIN. SERVICES POL’Y REP., MAY 2008, at 19, 20. Heyward discusses the major SWF investments into the U.S. marketplace that have occurred in the last two years. For example, China’s SWF made a \$3 billion purchase of a 10% non-voting stake in the Blackstone Group and a \$5 billion dollar purchase of a stake in Morgan Stanley. *Id.* Abu Dhabi’s SWF purchased \$7.9 billion worth of Citigroup shares, making it the largest shareholder of Citigroup. *Id.* Singapore’s SWF purchased \$4.4 billion dollars of Merrill Lynch stock. *Id.* Finally, Korea, Kuwait and Japan’s SWFs purchased \$6.6 billion dollars of mandatory preferred stock in Merrill Lynch. *Id.*; see also *Turmoil in U.S. Credit Markets: Examining the U.S. Regulatory Framework for Assessing Sovereign Investments: Hearing Before the S. Comm. on Banking, Housing and Urban Affairs*, 110th Cong. (2008) (statement of Scott G. Alvarez, Gen. Couns., Bd. of Governors of the Fed. Reserve Sys.) (stating that in all, SWF’s direct investment into U.S. financial firms between August 2007 and April 2008 amounted to more than \$30 billion, of which \$17 billion was invested in commercial banking organizations, accounting for a substantial portion of the new capital raised by U.S. banks during that period).

²⁸ Ronald J. Gilson & Curtis J. Milhaupt, *Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism*, 60 STAN. L. REV. 1345, 1346 (2008) (citing Peter S. Goodman & Louise Story, *Overseas Investors Buying U.S. Holdings at record Pace*, N.Y. TIMES, Jan. 20, 2008). The authors dub this situation as “new mercantilism,” wherein a government actor becomes a direct participant in the market in order to further profit maximization goals for the state, as opposed to the American concept of a capitalist economy based on free-markets and reduced government participation in the market-place. *Id.*

dichotomy arises from this relationship because SWFs are expected to behave like a private actor in the financial market being motivated solely by profit,²⁹ yet many scholars and policy makers fear that SWFs may be motivated by a political agenda, wherein they would seek the advancement of their government's strategic interests through ownership of controlling interests in vital industries and institutions of finance.³⁰ This fear cannot be ignored, particularly because SWFs "represent large, concentrated, and often non-transparent positions in financial markets,"³¹ and because they invest heavily in companies and industries that even astute U.S. investors will not touch.³²

Therefore, SWFs are seen as having a "Dr. Jekyll and Mr. Hyde"³³ nature, simultaneously observed as the hero in shining armor coming to rescue the country from its economic woes, while also being viewed as a potential villain with a clandestine motive to take positions of control in American corporations or vital industries in order to advance strategic foreign government interests. Given this dichotomy, SWF investment becomes a double-edged sword. However, because the economies of the nation, as well as Nevada, are in such dire straits, a time-honored adage passed on by many grandmothers may apply: "Beggars can't be choosers."³⁴

B. *The Benefits Associated With Sovereign Wealth Fund Investment*

One facet of SWFs exudes all the positive benefits that their investments bring to our economy. The U.S. Treasury stated that "sovereign wealth funds have the potential to promote financial stability[]" because they have shown themselves to be stable long-term investors that contribute significant amounts of capital to the financial system.³⁵ This claim of long-term stability is bolstered by the fact that SWFs "typically do not use leverage or have capital requirements that could force them to liquidate positions rapidly."³⁶ Because large amounts of leverage are part of the reason the U.S. economy is in dire straits, a SWF's unique position could allow it to invest in the U.S. long-term and not be affected by the whims of short-term volatility.³⁷ One can only postulate what would have happened if SWFs had not stepped in and shouldered some of the burden of stabilizing the U.S.'s ailing financial system.

²⁹ Keenan, *supra* note 9, at 432-33 (citing Roland Beck & Michael Fidora, *The Impact of Sovereign Wealth Funds on Global Financial Markets* 5 (Eur. Cent. Bank, Occasional Paper No. 91, 2008)).

³⁰ *Id.* at 433 (citing Stephanie Kirchgaessner, "Congressional Angst" Scuppers Chinese Bid, *FIN. TIMES*, Aug. 3, 2005, at 22).

³¹ Lowery, *supra* note 2.

³² Heyward, *supra* note 27, at 20.

³³ Reference to Robert Louis Stevenson's classic novel *STRANGE CASE OF DR. JEKYLL AND MR. HYDE*, a fictional novel that explores the duality of human nature, which is split in the sense that within the same person there is both an apparently good and an evil personality, each being quite distinct from the other.

³⁴ I would like to thank my grandmother, Florence Lavecchia, for her help in raising me and teaching me so much about life.

³⁵ Lowery, *supra* note 2.

³⁶ *Id.*

³⁷ *Id.*

A concrete example of foreign-owned firms' positive involvement in the U.S. economy, and a reason why SWF investment may be beneficial to the U.S. economy, can be observed by the contributions foreign-owned firms are already giving back to the U.S. economy. Foreign-owned firms' business activities are responsible for the employment of nearly one in ten of the U.S. private sector jobs that usually pay higher wages.³⁸

A second benefit of being open to international investment is the possibility of reciprocity. SWF investment may have the potential to lead investor nations to open their markets up to the U.S. enterprises in which SWFs invest.³⁹ This would allow U.S. businesses greater access to developing markets and could open up business opportunities previously closed to U.S. firms.⁴⁰

Third, international investment in the U.S. has the potential to bring new technology into the economy, to introduce new business methods to American industries, and to foster healthy business competition that, in turn, could result in a business environment that promotes innovation, productivity, lower prices, and new variety for consumers.⁴¹

C. *The Risks Associated With Sovereign Wealth Fund Investment*

Although the potential benefits of SWF investment in the U.S. cannot be overlooked, some observers and policy makers fear the substantial risks involved with achieving such benefits.⁴² Most of the concerns SWFs generate stem from the fact that SWFs are indeed government-controlled entities. This tends to make many Americans uncomfortable because the U.S. economy does not have a tradition of government ownership.⁴³ In fact, in many advanced economies based on a market capitalism model like the U.S., it is the individual company whose value is to be maximized, not the state's.⁴⁴ Consequently, government ownership in market capitalism economies is traditionally viewed with suspicion.⁴⁵ Two reasons underlie this suspicion. First, wide-ranging

³⁸ McCormick, *supra* note 25.

³⁹ Paul Rose, *Sovereigns as Shareholders*, 87 N.C. L. REV. 83, 92-93 (2008) (citation omitted) (giving the example of a recent Chinese SWF investment into the U.S., which may encourage China to open its developing markets to U.S. firms).

⁴⁰ *Id.*

⁴¹ McCormick, *supra* note 25.

⁴² *Sovereign Wealth Funds: Foreign Policy Consequences in an Era of New Money: Hearing Before the S. Comm. on Foreign Relations*, 110th Cong. (2008). Ranking member Richard Lugar stressed the balance that needs to be maintained between maintaining an open market but still safeguarding national security interests, considering that SWFs governmental ties imply that they could be "used to apply political pressure, manipulate markets, gain access to sensitive technologies, or undermine economic rivals." *Id.*

⁴³ Mark E. Plotkin, *Foreign Direct Investment by Sovereign Wealth Funds: Using the Market and the Committee on Foreign Investment in the United States Together To Make the United States More Secure*, 118 YALE L.J. POCKET PART 88, 91 (2008), <http://thepocketpart.org/ylj-online/scholarship/718-foreign-direct-investment-by-sovereign-wealth-funds>.

⁴⁴ Gilson & Milhaupt, *supra* note 28, at 1346.

⁴⁵ Plotkin, *supra* note 43, at 91; *see also* Gilson & Milhaupt, *supra* note 28, at 1346 (stating that most European Union and World Trade Organization rules "are designed to prevent governments from shifting the level of profit maximization from the company to the state").

government ownership in the private market is an unaccustomed concept.⁴⁶ Second, governments do not have a successful history as private market participants, which may be attributable to misaligned incentive structures and a perceived lack of sensitivity to market stimuli.⁴⁷ This cultural sensitivity to government control is not assuaged by the fact that “[SWFs] represent large, concentrated, and non-transparent positions in financial markets[.]”⁴⁸

Lack of transparency is one of the principal reasons policy makers, pundits, and observers alike ring the alarm bells concerning national security. Some argue that it is not a far stretch to imagine that if a foreign government is seeking some sort of political gain through its investment then the government “may be willing to accept lower financial returns . . . because [it] judge[s] the success of an investment not just by measuring its financial return, but also by whether it achieves [its] political objectives.”⁴⁹ Additionally, national security concerns also arise about SWFs amassing large amounts of U.S. investments and the possibility of using their financial power as a bargaining chip with the federal government through threats of divestment-terror.⁵⁰

Aside from the national security risks SWF investment engenders, there are also non-national security concerns that surround SWF investment. Due to their sheer size, SWFs have the capability to move markets and cause volatility just by shifting asset allocations.⁵¹ Again, a lack of transparency drives these fears. Because there are no uniform rules of disclosure, it becomes very difficult for other market participants to make informed decisions without having some idea of how a SWF is going to act.⁵² Even a rumor of a possible shift “may cause market participants to react to what they perceive sovereign wealth funds to be doing.”⁵³

Equally worrisome is the possibility that SWFs may be able to achieve an unfair advantage over private investors because they may be able to marshal their government intelligence or security services to gather exclusive non-public information not normally available to the average commercial investor.⁵⁴ The Securities and Exchange Commission has already expressed its concerns about regulating SWFs in these types of situations, noting that it can anticipate the conflict of interest challenges when asking a foreign government for

⁴⁶ Plotkin, *supra* note 43, at 91.

⁴⁷ *Id.*; see also Kimmitt, *supra* note 6, at 124 (“[T]he U.S. economy is built on the belief that private firms allocate capital more efficiently than governments.”).

⁴⁸ Lowery, *supra* note 2 (expounding on some of the risks that SWFs may present).

⁴⁹ Victor Fleischer, *Should We Tax Sovereign Wealth Funds?*, 118 YALE L. J. POCKET PART 93, 96 (2008), <http://thepocketpart.org/ylj-online/scholarships/719-should-we-tax-sovereign-wealth-funds>.

⁵⁰ See Rose, *supra* note 39, at 94-95 (citation omitted) (discussing the possibility of a SWF threatening to withdraw its billions from the U.S. economy if the federal government doesn’t adopt a policy favorable to its country’s political position); see also Heyward, *supra* note 27, at 21 (stating that the risk of SWFs pulling their money out of the U.S. institutions that they have invested in may be more devastating to the U.S. economy than the small amount of control they have achieved over the company from their investment).

⁵¹ Lowery, *supra* note 2.

⁵² Int’l Monetary Fund, *supra* note 17, at 16-17 (citing Gai and Shin, “Transparency and Financial Stability,” Bank of England *Financial Stability Report* (Dec. 2003)).

⁵³ Lowery, *supra* note 2.

⁵⁴ Kimmitt, *supra* note 6, at 124.

enforcement assistance in investigating a SWF for market abuses such as insider trading.⁵⁵ These types of non-national security risks could be as devastating to the U.S. economy as the national security risks because public confidence in the market is an important factor in the success of free-market systems. A lack of public confidence could lead to fewer people investing in the market and could cripple market performance.

Both the national security risks and non-national security risks of SWF investment have the potential to affect the global economy in significant ways. However, numerous authorities that have been following SWF investment point out that the biggest danger to the global economy at this time is over-protective policy responses to SWF investment.⁵⁶

III. THE REGULATORY FRAMEWORK GOVERNING SOVEREIGN WEALTH FUNDS

The U.S. Treasury Department has acknowledged that SWFs are here to stay and will likely be a pivotal player in the emerging global economy.⁵⁷ Thus far, the U.S. response to SWF investment has been three-fold. First, the Committee on Foreign Investment in the United States (“CFIUS”) evaluates investments that may result in foreign control of U.S. businesses and may raise national security concerns.⁵⁸ Second, the U.S. worked with several other countries to help the IMF develop a set of voluntary best practices to which SWFs should adhere.⁵⁹ Lastly, the U.S. is also working with the Organization for Economic Co-operation and Development, which has developed best practices guidelines for countries that receive SWF investments.⁶⁰

A. *The U.S. Government’s Regulatory Framework for Sovereign Wealth Fund Investment*

“With great power comes great responsibility.”⁶¹ CFIUS plays a dominant role in regulating SWF investment. Established in 1975 pursuant to Executive Order 11858,⁶² CFIUS is tasked with monitoring foreign investment in the U.S. and developing and implementing related policies.⁶³ However, these tasks carry an onerous burden. CFIUS must balance free-market principles by

⁵⁵ Christopher Cox, Chairman, U.S. Sec. & Exch. Comm’n, Gauer Distinguished Lecture in Law and Policy at the American Enterprise Institute Legal Center for the Public Interest: The Rise of Sovereign Business (Dec. 5, 2007), <http://www.sec.gov/news/speech/2007/spch120507cc.htm>.

⁵⁶ See e.g. Kimmitt, *supra* note 6, at 126.

⁵⁷ See Lowery, *supra* note 2.

⁵⁸ *Id.* The U.S. Treasury Department actually chairs this committee.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Famous last words of Uncle Ben to his nephew Peter Parker. SPIDER-MAN (Columbia Pictures & Sony Pictures Entertainment 2002).

⁶² Exec. Order No. 11,858, 40 FED. REG. 20,263 (May 7, 1975), *reprinted as amended* in 50 U.S.C. app. § 2170 (2006 & Supp. I 2007).

⁶³ *Id.*, *amended by* Exec. Order No. 13,456, 73 FED. REG. 4,677 (Jan. 23, 2008). See Stephen K. Pudner, Commentary, *Moving Forward from Dubai Ports World—The Foreign Investment and National Security Act of 2007*, 59 ALA. L. REV. 1277, 1278 (2008).

allowing SWFs fair and non-discriminatory access to U.S. markets while at the same time ensuring the nation's security.⁶⁴

Since its inception, CFIUS has undergone some major overhauls. These alterations have usually followed uproars over CFIUS's inability to prevent foreign investments that could potentially threaten the U.S.'s national security interests.⁶⁵ The latest of these alterations came with the 2007 Foreign Investment and National Security Act ("FINSA").⁶⁶ Because CFIUS was originally a presidential creation, FINSA marked "the first time that Congress brought CFIUS explicitly under a statutory framework[.]"⁶⁷

CFIUS consists of: the Treasury Secretary; the heads of the Departments of State, Homeland Security, Justice, Commerce, Defense, and Energy; and representatives of the Office of U.S. Trade, and the Office of Science and Technology Policy. The following offices also observe and, as appropriate, participate in CFIUS's activities: the Office of Management & Budget, the Council of Economic Advisors, the National Security Council, the National Economic Council and the Homeland Security Council. Additionally, the Director of National Intelligence and the Secretary of Labor are non-voting, ex-officio members of CFIUS.⁶⁸

1. *How the CFIUS Process Begins*

The CFIUS review process can begin with either a voluntary notice to the committee by a party to a potential transaction or upon the recommendation from a CFIUS member agency that believes a given transaction may affect U.S. national security interests.⁶⁹ Covered transactions that CFIUS may review include "any merger, acquisition, or takeover . . . by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States."⁷⁰

Once CFIUS receives notification that an investment may fall under its authority, it has thirty days to make a preliminary review of the transaction.⁷¹ CFIUS, or the President of the United States acting through CFIUS, must take a

⁶⁴ See Rose, *supra* note 39, at 105.

⁶⁵ A full history of CFIUS is beyond the scope of this article. For a comprehensive overview of CFIUS's history and changes in the wake of multiple controversies, see Pudner, *supra* note 63.

⁶⁶ Foreign Investment and National Security Act of 2007, H.R. 556, 110th Cong., Pub. L. No. 110-49, 121 Stat. 246 (2007) (codified at 50 U.S.C. app. § 2061 (2006)). FINSA may have been prompted by Dubai Ports World's failed acquisition of U.S. port assets and Congress' ensuing fuss and politicizing over this transaction, which was a very sensitive issue in the wake of Sept. 11, 2001. For a full discussion on this issue, see Thomas E. Crocker, *What Banks Need to Know About the Coming Debate Over CFIUS, Foreign Direct Investment, and Sovereign Wealth Funds*, 125 *BANKING L.J.* 457 (2008); see also George Stephanov Georgiev, Comment, *The Reformed CFIUS Regulatory Framework: Mediating Between Continued Openness to Foreign Investment and National Security*, 25 *YALE J. ON REG.* 125 (2008) (recounting failed and successful foreign attempts at acquiring U.S. firms and the political backlash that ensued from these transactions).

⁶⁷ Pudner, *supra* note 63, at 1282.

⁶⁸ H.R. 556 § 3(k)(2); see also Pudner, *supra* note 63, at 1283.

⁶⁹ H.R. 556 § 2(b)(1).

⁷⁰ *Id.* § 2(a)(3); see also 50 U.S.C. app. § 2170(a)(3) (2006 & Supp. I 2007).

⁷¹ H.R. 556 § 2(b)(1)(E).

number of things into consideration when deciding whether or not a proposed transaction involves issues that may affect the national security of the U.S.⁷² If CFIUS determines that no further investigation is required, it must promptly notify the parties and allow them to proceed with the acquisition.⁷³ However, if further national security investigation is warranted, then CFIUS must complete its investigation and report its findings to the President within forty-five days of the investigation's commencement.⁷⁴ The President must then announce his decision of whether to take action to suspend or prohibit the transaction due to national security interests within fifteen days following the completion of CFIUS' investigation.⁷⁵ If the President feels that the transaction may threaten national security interests, then he has the power to unravel the transaction.⁷⁶ Moreover, the President's power to unravel the transaction is *not subject to* judicial review.⁷⁷

2. Transactions CFIUS Must Review

In deciding whether to review a transaction, FINSA requires CFIUS to consider whether the transaction is a foreign government controlled transaction as opposed to just a private foreign investor.⁷⁸ Transactions that could result in a U.S. entity being controlled by a foreign government or entity acting on behalf of a foreign government (SWFs) are subject to full CFIUS investigations.⁷⁹ Additionally, CFIUS *must* immediately review "transaction[s] that threaten[] to impair the national security of the [U.S. if the] threat has not been mitigated during or prior to [its initial] review of [the] transaction[.]"⁸⁰ Under FINSA, "national security" has a broad definition that encompasses the term "critical infrastructure."⁸¹ Thus, CFIUS *must* review any system or assets, "whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security[.]"⁸² CFIUS also has the broad power to review a transaction

⁷² See 50 U.S.C. app. § 2170 (b)(1)(B) (2006 & Supp. I 2007) (stating that "if the Committee determines that the covered transaction is a foreign government controlled transaction, the Committee *shall* conduct an investigation of the transaction" (emphasis added)).

This investigation is immediate and is directed at determining the effects of the foreign government controlled transaction on the national security of the United States. See 50 U.S.C. app. § 2170 (b)(2)(A) (2006 & Supp. I 2007). Section 2170(f) lists the eleven different national security factors that the president or his designee may take into account when conducting an investigation involving a foreign government controlled transaction.

⁷³ H.R. 556 § 2(b)(6).

⁷⁴ *Id.* § 2(b)(2)(C).

⁷⁵ *Id.* at § 6(d)(1)-(3).

⁷⁶ *Id.*

⁷⁷ *Id.* § 6(e) (emphasis added). The presidential power to unravel a transaction has actually only been exercised once.

⁷⁸ *Id.* § 2(a)(4) ("The term foreign government-controlled transaction means any covered transaction that could result in the control of any person engaged in interstate commerce in the United States by a foreign government or an entity controlled by or acting on behalf of a foreign government.") (emphasis added).

⁷⁹ *Id.* § 2(b)(2)(B)(i)(II); see also 31 C.F.R. § 800.204 (2008) (delineating the numerous ways in which control can be defined by CFIUS).

⁸⁰ H.R. 556 § 2 (b)(2)(B)(i)(I) (emphasis added).

⁸¹ *Id.* § 2(a)(5).

⁸² *Id.* § 2(a)(6).

based solely upon the lead agency's recommendation and the committee's concurrence.⁸³ In the alternative, CFIUS may decide against reviewing the transaction if the Treasury Secretary and the head of the lead agency jointly determine that the transaction will not threaten U.S. national security.⁸⁴

In practice, CFIUS has been reluctant to initiate investigations due to its fear of perceptions that CFIUS may discourage foreign investment and create a conflict with the U.S.'s open investment policy.⁸⁵ Nevertheless, many companies whose transactions may warrant CFIUS review voluntarily submit notice of their transactions for review because of the possible consequence of having a transaction "un-wound"—even after consummation—if CFIUS independently decides to investigate the transaction.⁸⁶

3. Criticisms of the CFIUS Process

One of the criticisms of CFIUS is that it is chaired by the Treasury Department, which may put economic concerns above national security concerns.⁸⁷ However, FINSA was enacted to silence this criticism by adding the Director of National Security to the committee, thus alleviating concerns that national security interests would be overlooked during the review process.

Additionally, some SWF investors may view the CFIUS process as unnecessarily cumbersome and may start moving money away from the U.S. economy and into emerging markets with less arduous review processes.⁸⁸ In fact, this phenomenon has already begun. "Many foreign investors have withdrawn from proposed acquisitions or even divested themselves of completed acquisitions in the face of pressure from CFIUS, the public, or Congress."⁸⁹ This scenario may carry the most potential harm for the U.S. economy.

The U.S. economy could face severe unintended consequences if SWFs invest elsewhere because CFIUS's process is too difficult and costly.⁹⁰ First, the U.S. could lose much-needed foreign capital, upon which the U.S. economy is very dependent.⁹¹ Second, if SWFs choose to invest in markets with less-rigid constraints, the U.S. may lose an opportunity to strengthen a political tie with a country through its investment and subsequent interest in the U.S. economy's well-being.⁹² Third, and perhaps worse than simply losing the SWF investment, if a SWF moves its money to a country the U.S. considers an

⁸³ *Id.* § 2(b)(2)(B)(i)(III)(ii).

⁸⁴ *Id.* § 2(b)(2)(D)(i).

⁸⁵ See also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-686, DEFENSE TRADE: ENHANCEMENTS TO THE IMPLEMENTATION OF EXON-FLORIO COULD STRENGTHEN THE LAW'S EFFECTIVENESS 3 (2005), <http://www.gao.gov/new.items/d05686.pdf>.

⁸⁶ Pudner, *supra* note 63, at 1285 (citations omitted).

⁸⁷ Georgiev, *supra* note 66, at 129.

⁸⁸ *Id.* at 131.

⁸⁹ Pudner, *supra* note 63, at 1288-89 (citing CONGRESSIONAL RESEARCH SERVICE, CHINA AND THE CNOOC BID FOR UNOCAL: ISSUES FOR CONGRESS 13 (2005), available at http://www.opencrs.com/rpts/RL33093_20050915.pdf).

⁹⁰ Georgiev, *supra* note 66, at 131 (citations omitted).

⁹¹ See ISSUES RAISED BY SOVEREIGN WEALTH FUNDS, *supra* note 4, at 19 (discussing America's dependence on foreign investment because of America's large trade deficit).

⁹² Richard A. Epstein & Amanda M. Rose, *The Regulation of Sovereign Wealth Funds: The Virtues of Going Slow*, 76 U. CHI. L. REV. 111, 131 (2009) (citing Solomon W. Polachek and Carlos Seiglie, *Trade, Peace and Democracy: An Analysis of Dyadic Dispute* 52-55

unfriendly nation, the SWF may align its interests against the U.S. and with the unfriendly nation.⁹³ Fourth, if a SWF invests in a nation lacking strict regulation, CFIUS is unable to address any potential threat the investment could pose to U.S. national security. Although it would be able to stop potentially harmful investments within U.S. borders, when SWFs invest abroad, CFIUS cannot address the prospective problems with the investments outside U.S. borders. For example, if a SWF invests in an emerging market without the same type of stringent checks that CFIUS provides, the SWF may be able to make strategic purchases and investments in vital commodity producers or reserves that would not pass CFIUS muster if the SWF were to make them within the U.S.⁹⁴ This could indirectly put U.S. national security interests at risk and “affect them more drastically than SWF activity within the” U.S.⁹⁵

Aside from the difficulty of the CFIUS process discouraging SWF investment in the U.S. and the related risks, there is also a risk that SWFs forego U.S. investment because they perceive the CFIUS process as too politicized. Before the FINSA amendment that statutorily changed the CFIUS process, a series of high-profile, politicized acquisitions eventually resulted in some SWFs being turned away from their investment.⁹⁶ Nevertheless, FINSA’s passage did little to rid the CFIUS process of political involvement and actually provided for increased Congressional involvement in the CFIUS process.⁹⁷ Removing politics from the CFIUS process will depend heavily on how narrowly or broadly the CFIUS committee decides to construe the term “national security,” as it relates to “critical infrastructure.”⁹⁸ Although increased Congressional involvement may seem like a proper oversight mechanism, it may actually work to increase politicization of the process because SWFs are now starting to understand the American way of getting things done—lobbying. SWFs are now employing professional lobbying firms to convince Congress not to oppose their proposed acquisitions in U.S. companies.⁹⁹ Not only are SWFs lobbying, but so, too, are private domestic companies who may have protec-

(Institute for the Study of Labor Discussion Paper No. 2170, June 2006), available at <http://papers.ssrn.com/abstract=915360> (last visited Jan. 11, 2009)).

⁹³ *Id.* at 132-33.

⁹⁴ Rose, *supra* note 39, at 147.

⁹⁵ *Id.*

⁹⁶ See Rose, *supra* note 39, at 113, for an in-depth discussion about the politics that surrounded British Tire and Rubber’s attempted takeover of Massachusetts-based Norton company, XO Communications’ blocking of ST Telemedia’s purchase of majority stake in Global Crossing, a Chinese state-controlled company’s failed bid to take over Unocal Oil Company, and the Dubai Ports world attempted acquisition of the Peninsular and Oriental Steam Navigation Company.

⁹⁷ Foreign Investment and National Security Act of 2007, H.R. 556 § 7, 110th Cong., 121 Stat. 246, 256-59 (2007) (CFIUS must now report to Congress upon the conclusion of transactions that they review as well as provide Annual and detailed reports to Congress concerning the committee’s activities and transactions).

⁹⁸ See Rose, *supra* note 39, at 118-19 (Stating that to truly rid the process of politics, “national security” must be read to cover concerns that are truly national and in fact involve situations that are related to security, not just politically unfavorable transactions related to a particular congressional district or particular firm).

⁹⁹ Pudner, *supra* note 63, at 1302 (citing Eamon Javers & Dawn Kopecki, *Why No Outrage from Washington: To Fend Off Fiascos Like Last Year’s Failed Dubai Ports World Deal, the Emirate Called in the Big Guns: The Lobbyists*, Bus. Wk., Oct. 8, 2007, at 35).

tionist agendas.¹⁰⁰ This type of lobbying activity could potentially denigrate confidence in the CFIUS regulatory system and may drive SWFs elsewhere.¹⁰¹

Lastly, CFIUS may not be able to vet-out non-national security risks, which have the potential to affect market volatility. There are a great number of transactions that are not evaluated by CFIUS because they do not constitute “control.”¹⁰² Acquisitions are only “covered transactions” if they constitute “control,” and because many SWFs are currently seeking to acquire minority interests rather than controlling interests in firms, these transactions are flying under the CFIUS radar, but could still present a potential threat to the U.S. economy.¹⁰³ SWFs may still be able to attain some measure of control even though their ownership stake would be considered less than the law’s definition of “control.”¹⁰⁴ Therefore, because CFIUS may not be able to vet-out all of the non-national security risks that accompany a SWF’s investment, the U.S. financial market may still be subject to risks such as government inefficiency in the market place, lack of transparency, and SWFs asserting control through their minority interests—all of which could contribute to market volatility.

In sum, CFIUS has a very difficult job. It must balance America’s national security interests while making sure that the U.S. remains open to foreign investment and attempting to insulate the process from politicization so that the U.S. will continue to see a positive influx of foreign investment on which it is heavily reliant at this time. How this snake-charmer’s balance plays out in the future will have a lot to do with how the future of both the U.S. and the global economies are shaped.

B. *International Regulatory Responses to Sovereign Wealth Funds*¹⁰⁵

CFIUS may be able to effectively protect the U.S. interests when SWFs invest domestically; however, the U.S. Treasury Department has recognized

¹⁰⁰ See Rose, *supra* note 39, at 113-16 (describing four transactions affected for political reasons that may not have had national security implications).

¹⁰¹ *But see id.* at 117 (explaining how the CFIUS “Evergreen” provision may provide some certainty and political insulation to SWF investments because the only two ways a previously approved CFIUS transaction may be unwound is if a party to the transaction provided false or misleading information during the review or if the mitigation agreement is breached intentionally).

¹⁰² 31 C.F.R. § 800.204(c) (2008).

¹⁰³ Evan Bayh, Op-Ed., *Time for Sovereign Wealth Rules*, WALL ST. J., Feb. 13, 2008, A26 (speaking about how CFIUS review is only triggered if the investment exceeds 10% of controlling interest).

¹⁰⁴ *Id.*

¹⁰⁵ The full breadth of the international regulatory response to SWFs is beyond the scope of this article. However, it is important to touch upon it briefly because the U.S. is advocating heavily for the acceptance of these international solutions in order to help control the effects of how SWFs shape the global economy outside of America’s borders. For a fuller exploration of the international response and the official document that lays out the purpose of the Santiago Principles, see Int’l Working Group of Sovereign Wealth Funds [IWG] Establishing Meeting, Apr. 30-May 1, 2008, *Sovereign Wealth Funds Generally Accepted Principles and Practices: “Santiago Principles,”* (Oct. 2008), [hereinafter Int’l Working Group of Sovereign Wealth Funds], <http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf>; see also Rose, *supra* note 39, at 147 (stating that a holistic approach in regulating SWFs may be enhanced by voluntary adoption of the Santiago Principles); see also Angel Gurria, OECD Sec’y-Gen., *OECD Declaration on Sovereign Wealth Funds and Recipient Country*

that controlling SWFs domestically may not be enough. For this reason, the U.S. helped play a role in developing the international response to SWFs.¹⁰⁶

In October of 2008, twenty-six countries with SWFs collaborated under the supervision of the IMF and came to a resolution on a set of Generally Accepted Principles and Practices (“GAPP”) to which SWFs should abide.¹⁰⁷ These principles and practices were dubbed the “Santiago Principles.”¹⁰⁸ The fact that twenty-six countries participated in making the Santiago Principles may be indicative of how widely adopted these principles will become in the international community.¹⁰⁹ Furthermore, wide-ranging international adherence to these principles would help the U.S. control macro-economic and national security risks that SWFs may cause by making politically strategic investments in less-regulated markets across the world.¹¹⁰ If a majority of countries adopted these principles and received international support to back them up through the IMF, then SWFs would not likely have a variety of financially viable markets wherein they could assert interests other than purely economic interests. Thus, not every country that accepts SWFs into their markets would need to adopt overly onerous regulations to control them. Furthermore, the countries adhering to GAPP may also have the assurance that SWFs will behave like the good institutional investors that they are touted to be and will not withdraw their money for less-regulated markets because the choices of markets that do not adhere to the Santiago Principles will be small and perhaps more politically risky.

Additionally, the Organization for Economic Co-operation and Development (“OECD”) has laid out a framework of voluntary best practices and principles; however, the OECD’s principles are aimed at the countries in which SWFs invest.¹¹¹ Recognizing that investment is a two-way street, the OECD has laid out principles to which investee countries should adhere so that the global economy will continue to remain open to SWF investment. The OECD principles ask investee nations to live up to the same types of standards applied to SWFs.¹¹² Thus, countries that adopt the voluntary Santiago Principles are likely to adopt the best practices and principles laid out by the OECD. Since wide-ranging adoption of the Santiago Principles would make it difficult for SWFs to invest in countries where they could carry out ulterior motives, wide-

Policies, (Oct. 11, 2008), [hereinafter OECD Declaration], <http://www.oecd.org/dataoecd/0/23/41456730.pdf>.

¹⁰⁶ See Lowery, *supra* note 2 (stating that multi-lateral agreed upon principals of best practices is the most appropriate international response to the rise of SWFs).

¹⁰⁷ Int’l Working Group of Sovereign Wealth Funds, *supra* note 105, at 4 (the Santiago Principles are noted for working to alleviate one of the major problems with SWFs: transparency).

¹⁰⁸ GAPP was dubbed the Santiago Principles because the final meeting of all twenty-six countries occurred in Santiago, Chile.

¹⁰⁹ Robert M. Kimmitt, Deputy Sec’y, U.S. Treas., Statement on Int’l Working Group Agreement on Generally Accepted Principles and Practices for Sovereign Wealth Funds (Oct. 11, 2008), [hereinafter Kimmit Statement on IGW Agreement], *available at* <http://www.treas.gov/press-center/press-releases/Pages/hp1197.aspx> (stating that he was confident that these principles will support a stable global financial system and reduce protectionism).

¹¹⁰ See Rose, *supra* note 39, at 147.

¹¹¹ OECD Declaration, *supra* note 105, at 2.

¹¹² See *id.*

ranging adherence to OECD principles will also make it difficult for investee nations to use national security excuses as a means of protectionism. This is because SWFs will simply take their investment capital to a nation that abides by OECD principles, thereby assuring a greater chance of fair treatment.

However, there is a drawback here as well. The Santiago and OECD principles are only voluntary sets of best practices.¹¹³ The *hope* is that the Santiago Principles will create “a natural incentive among funds to hold themselves to high[er] standards[]” and relieve countries of the need to take “draconian” measures to regulate SWFs.¹¹⁴ Another *hope* is that OECD principles will be “guideposts against which countries that receive sovereign wealth investments can measure their inward investment policies”¹¹⁵ and maintain an open and non-discriminatory investment climate that welcomes SWFs and assures them of the same types of protections that investee nations seek.

Whether wide-ranging adoption of these principles occurs, remains to be seen. If the international backing of these principles is not strong enough to encourage a substantial number of countries to adopt and enforce these principles, then it is likely that their effect on how SWFs are regulated will be negligible and, in some cases, even harmful to promoting a market open to international investment.¹¹⁶

With the preceding background on the current issues affecting SWF investment and the corresponding regulations both in the U.S. and abroad, we can now discuss Nevada’s gaming regulatory response to SWFs investment.¹¹⁷

IV. THE NEVADA GAMING REGULATORY RESPONSE TO SOVEREIGN WEALTH FUND INVESTMENT

Much like the customers who patronize state casinos, the gaming industry has always been a place where visionary risk-takers may find reward.¹¹⁸ Thus, it should come as no surprise that when SWFs started investing in riskier,

¹¹³ See Int’l Working Group of Sovereign Wealth Funds, *supra* note 105, at 5.

¹¹⁴ Lowery, *supra* note 2 (emphasis added) (stating that SWFs will be aware of their reputations and thus may adhere to the best practices in order to protect their reputations).

¹¹⁵ Kimmitt Statement on IGW Agreement, *supra* note 109.

¹¹⁶ See Epstein & Rose, *supra* note 92, at 134 (claiming that erecting any more barriers to SWF investment other than the current U.S. regulations may push SWF investment away, “even if they are just a self-policing but diplomatically coerced code of ‘best practices’”).

¹¹⁷ In 2008, the Nevada Gaming Commission found Infinity World, one of Dubai World’s SWFs, suitable to become a voting shareholder in MGM. *NGC Dubai World Suitability Hearing*, *supra* note 3. In late 2009, the Nevada Gaming Commission found Infinity World suitable to become 50-50 partners with MGM Mirage on its City Center project. *Special Hearing on the Application for a Finding of Suitability as a 50% Member of City Center Holdings, LLC, Before the Nev. Gaming Comm’n* (Nov. 19, 2009) [hereinafter *Special Hearing on City Center Holdings*].

¹¹⁸ Interview with Dr. R. Keith Schwer, Dir. of Ctr. for Bus. and Econ. Research, Faculty Member, Univ. of Nev., Las Vegas Econ. Dep’t, in Las Vegas, Nev. (Apr. 17, 2009) [hereinafter Schwer Interview]. Dr. Schwer is recognized as an authority on the business and economic environment of Las Vegas and the state of Nevada. He stated that many doubted casino entrepreneur Steve Wynn when he opened the Mirage because it needed to make \$1 million a day to break even. “Well it did very well thank you, it made \$2 million a day. . .people that have been risk takers here have generally done well in the past.” *Id.*

higher-yield investments,¹¹⁹ they would eventually take their money to the Silver State's gaming industry.

Since 1861 and the advent of legalized gaming in Nevada, the gaming regulatory system has been forced to evolve with the changing times in order to ensure that the industry, with which the state's economy is tied, remains viable.¹²⁰ Luckily, two previous evolutions equipped the gaming regulatory system with the experience necessary to deal with the entrance of SWF investment into the industry.

The first of these evolutions was the Corporate Gaming Act of 1967, and its subsequent revision in 1969, which created a licensing and regulatory framework for publicly-traded corporations and enabled them to invest in casino resorts.¹²¹ The second evolution was the introduction of foreign public company investment and foreign individual investment into the gaming industry, which created a licensing and regulatory framework that paved the way for other foreign investors to access the gaming market.¹²² After Nevada lawmakers and gaming regulators adeptly handled these two evolutions, the Nevada gaming control system was well-equipped to respond to and thrive in a modern investment climate wherein SWFs have now taken a prominent role in the global economy.

As it currently stands, Nevada gaming is a highly regulated industry, and just like CFIUS, Nevada's gaming control system is tasked with balancing the need to control the industry and protect Nevada's economy while also maintaining an open investment environment that promotes the freedom necessary to let it flourish.¹²³ However, "[i]f you want to play in our sand-box, then you have to play by our rules."¹²⁴

A. *Composition and Structure of the Nevada Gaming Control System*

Nevada has a two-tiered regulatory control system.¹²⁵ The first tier is the State Gaming Control Board ("GCB"), and the second tier is the Gaming Com-

¹¹⁹ Edward F. Greene & Brian A. Yeager, *Sovereign Wealth Funds—A Measured Assessment*, 3 CAP. MKT. L. J. 247, 257 (2008).

¹²⁰ LIONEL SAWYER & COLLINS, *NEVADA GAMING LAW* 3 (3d ed. 2000) (explaining that it has taken over 60 years to achieve balance between control and freedom within the system).

¹²¹ See *id.* at 25-27. This evolution started with Howard Hughes' move into Nevada and it ushered in the era of corporate ownership in the gaming industry; it also helped legitimize the gaming industry. *Id.* at 25.

¹²² See *id.* at 219-26. The approval of the first foreign public company, Carma Limited, happened contemporaneously with Assembly Bill 655, which formally recognized the power the Gaming Commission had to approve foreign licensure. *Id.* at 219-24. The second foreign licensure that occurred in 1985 was for Genji Yasuda to purchase the Aladdin hotel. *Id.* at 224-26.

¹²³ *Id.* at 219-20 (citing "the flexibility of Nevada's gaming laws and the innovative spirit of the state's gaming regulators [that] made approval [of foreign ownership of and investment in Nevada casinos] possible.") *Id.* at 119.

¹²⁴ Interview with Pat Wynn, Deputy Chief of Investigations, Nev. Gaming Control Bd., in Las Vegas, Nev. (May 12, 2009) [hereinafter Wynn Interview] (explaining that if you want to conduct gaming activity in Nevada then you are going to have to abide by the strict suitability standards of transparency and accountability set out by the State of Nevada).

¹²⁵ LIONEL SAWYER & COLLINS, *supra* note 120, at 29.

mission (“Commission”).¹²⁶ Both tiers are public policy driven.¹²⁷ The policy mandates guiding the two regulatory bodies are contained in a number of different statutes and are broken down according to which area of regulation the statutes affect.¹²⁸ Nevada Revised Statute section 463.0129(1) provides a summary of the overall public policy that should guide all regulatory decisions.¹²⁹ Among other things, section 463.0129(1) indicates the vital importance of the gaming industry to the economy of the state and its inhabitants, reflects how the future growth of the gaming industry is dependent on the public’s trust and confidence in the gaming industry, and calls for strict regulation “[t]o ensure that gaming is conducted honestly, competitively, and free of [any] criminal or corruptive elements[.]”¹³⁰ Therefore, any decision concerning gaming made by either regulatory body must reflect the public policy mandates.¹³¹ The legislature granted both regulatory bodies broad powers to ensure that these policy mandates are carried out.¹³²

1. Tier 1 – The Nevada Gaming Control Board

The GCB is a full-time agency that serves the gaming industry as both a police officer¹³³ and tax collector.¹³⁴ The GCB is a three-member decision-making panel appointed to four-year terms by the governor.¹³⁵ All three members must have different skill sets.¹³⁶ The chairman is required to “have five years of administrative experience in public or business administration.”¹³⁷ “Another member must be a certified public accountant with five years’ experience[,] or be an expert in the fields of corporate finance and auditing, general finance, gaming, or economics.”¹³⁸ The last member must have experience in gaming, investigations, law enforcement, or law.¹³⁹ This complementary skill set helps the GCB work together in interpreting the investigative reports given

¹²⁶ *Id.*

¹²⁷ STATE GAMING CONTROL BD. AND NEV. GAMING COMM’N, GAMING REGULATION IN NEVADA: AN UPDATE 12 (2006) [hereinafter GAMING REGULATION IN NEVADA] available at http://gaming.nv.gov/documents/pdf/gaming_regulation_nevada.pdf.

¹²⁸ *E.g.*, NEV. REV. STAT. § 463.489 (1975) (contains the public policies that should guide gaming regulators when dealing with corporations). *See also*, NEV. REV. STAT. §§ 463.563 (2009) (limited partnerships), 463.573 (1993) (limited liability companies), 462.622 (1987) (corporate acquisitions).

¹²⁹ GAMING REGULATION IN NEVADA, *supra* note 127, at 1 (citations omitted).

¹³⁰ NEV. REV. STAT. § 463.0129(1) (1999).

¹³¹ GAMING REGULATION IN NEVADA, *supra* note 127, at 1.

¹³² Telephone interview with Dennis Neilander, Chairman, Nev. Gaming Control Bd., in Reno, Nev. (April 27, 2009) [hereinafter Neilander Interview].

¹³³ Nev. Gaming Comm’n Reg. 5.040 (2010) (In pertinent part, “[t]he [GCB] is charged by law with the duty of observing the conduct of all licensees to [ensure] that licenses shall not be held by unqualified or disqualified persons or unsuitable persons or persons whose operations are conducted in an unsuitable manner.”); *see also*, LIONEL SAWYER & COLLINS, *supra* note 120, at 29.

¹³⁴ LIONEL SAWYER & COLLINS, *supra* note 120, at 29.

¹³⁵ GAMING REGULATION IN NEVADA, *supra* note 127, at 7.

¹³⁶ LIONEL SAWYER & COLLINS, *supra* note 120, at 30-31.

¹³⁷ *Id.* at 30 (citing NEV. REV. STAT. § 463.040(4) (1981)).

¹³⁸ *Id.* at 30-31 (citing NEV. REV. STAT. § 463.040(5) (1981)).

¹³⁹ NEV. REV. STAT. § 463.040(6) (1981); *see also* LIONEL SAWYER & COLLINS, *supra* note 120, at 31.

to them by the various agencies housed within the GCB. In addition, the GCB is tasked with making informed recommendations to the Commission based on the GCB's investigation into the qualifications of each applicant.¹⁴⁰

There are some key checks on the GCB that aim to make sure that applicants are treated fairly in the licensure process. The first check is intended to make the GCB an apolitical office. GCB members are to be appointed based on their qualifications and not upon partisan politics.¹⁴¹ Therefore, "no [GCB] member may be a political party official[,] . . . a member of a political convention or party committee."¹⁴² Furthermore, "[n]o state legislator or elected state official may serve on the [GCB]."¹⁴³ The second check is intended to ensure impartiality.¹⁴⁴ Therefore, "[GCB] members may not have [any pecuniary] interest in any business holding a gaming license or do [any] business with [any] person holding a gaming license."¹⁴⁵ An additional check designed to control impartiality is that the governor cannot remove a GCB member during his or her term except due to misfeasance, malfeasance, or nonfeasance in office.¹⁴⁶ To date, Nevada has never had a member of the GCB or Commission accused of illegal conduct.¹⁴⁷ Other jurisdictions that regulate gaming cannot say the same.¹⁴⁸

Lastly, the GCB has a staff of about 450 individuals.¹⁴⁹ Sixty-four of them are investigators with various skill sets.¹⁵⁰ The staff is split into six divisions: Administration, Audit, Enforcement, Investigations, Tax and License, and Technology.¹⁵¹ All six divisions assist the GCB and Commission in their regulatory and law enforcement duties.

2. Tier 2 – The Nevada Gaming Commission

The Commission is a part-time, five-member lay body appointed to staggered four-year terms by the governor.¹⁵² The Commission is primarily responsible for acting upon the recommendations of the GCB in matters relat-

¹⁴⁰ NEV. REV. STAT. § 463.1405(1), (3) (2003).

¹⁴¹ NEV. REV. STAT. § 463.040(3) (1981); *see also* LIONEL SAWYER & COLLINS, *supra* note 120, at 31 (citing NEV. REV. STAT. § 463.040(3) (1981)).

¹⁴² NEV. REV. STAT. § 463.060(2) (1997); *see also* LIONEL SAWYER & COLLINS, *supra* note 120, at 31 (citing NEV. REV. STAT. § 463.060(2) (1997)).

¹⁴³ NEV. REV. STAT. § 463.040(2) (1981); *see also* LIONEL SAWYER & COLLINS, *supra* note 120, at 31 (citing NEV. REV. STAT. § 463.040(2) (1981)).

¹⁴⁴ LIONEL SAWYER & COLLINS, *supra* note 120, at 31.

¹⁴⁵ NEV. REV. STAT. § 463.060(3) (1997); *see also* LIONEL SAWYER & COLLINS, *supra* note 120, at 31 (citing NEV. REV. STAT. § 463.060(3) (1997)).

¹⁴⁶ NEV. REV. STAT. § 463.050(3) (2007); *see* LIONEL SAWYER & COLLINS, *supra* note 120, at 31-32 (citing NEV. REV. STAT. § 463.050(3) (2007)).

¹⁴⁷ GAMING REGULATION AND GAMING LAW IN NEVADA AS REMEMBERED BY ROBERT D. FAISS 6 (R.T. King ed., 2006).

¹⁴⁸ *Id.*

¹⁴⁹ GAMING REGULATION IN NEVADA, *supra* note 127, at 7.

¹⁵⁰ Wynn Interview, *supra* note 124.

¹⁵¹ NEVADA GAMING CONTROL BD, NOTICE #2011-07, MERGING OF THE BOARD'S INVESTIGATIONS AND CORPORATE SECURITIES DIVISIONS (Feb. 8, 2011) *available at* http://gaming.nv.gov/industry_ltrs/industry_ltr_258.pdf.

¹⁵² *Id.* at 35; GAMING REGULATION IN NEVADA, *supra* note 127, at 6.

ing to licensing.¹⁵³ However, the Commission is the state's *final* administrative authority and may accept, deny, or modify the recommendations of the GCB on licensing matters, as well as revoke or suspend any gaming license.¹⁵⁴ Additionally, the Commission is charged with enacting, adopting, or repealing gaming regulations to help it and the GCB carry out their tasks in accordance with Nevada's policies, objectives, and statutory purposes.¹⁵⁵

In order to ensure that applicants are treated fairly throughout the process, the Commission is subject to the same checks as the GCB. Members of the Commission cannot be members of any committee or political convention, cannot be members of the legislature or hold an elected office, and may not be actively engaged in or hold a direct pecuniary interest in gaming activities.¹⁵⁶ There is also an additional check; to ensure that no single political party dominates the Commission, there can be no more than three members with the same political affiliation at any one time.¹⁵⁷

B. *The Licensure Process: Nevada's Gatekeeper to the Gaming Industry*

Unlike the CFIUS process where transactions are only examined if certain criteria of "control" are met and national security interests are involved,¹⁵⁸ the licensing process in Nevada serves as the gatekeeper to transacting any form of gaming business in the state and sometimes even any form of business that is closely related to the Nevada gaming industry. The GCB and Commission may exercise broad statutory authority to require the licensure of any individual or entity that:¹⁵⁹ (1) has an influence (ownership/control) over any gaming operations within the state;¹⁶⁰ (2) shares in gaming revenues with a licensee;¹⁶¹ (3) is a lender to a gaming licensee;¹⁶² or (4) is the owner of the land upon which gaming is conducted.¹⁶³

¹⁵³ GAMING REGULATION IN NEVADA, *supra* note 127, at 6.

¹⁵⁴ See NEV. REV. STAT. § 463.1405(4) (2003); *see also* NEV. REV. STAT. § 463.220 (1985) (emphasis added).

¹⁵⁵ GAMING REGULATION IN NEVADA, *supra* note 127, at 6.

¹⁵⁶ NEV. REV. STAT. § 463.023(2)-(3) (1961).

¹⁵⁷ *Id.* § 463.023(4).

¹⁵⁸ See 50 U.S.C. app. § 2170(b)(1)(B), (b)(2)(a) (2006 & Supp. I 2007).

¹⁵⁹ GAMING REGULATION IN NEVADA, *supra* note 127, at 10.

¹⁶⁰ *Id.* There are a myriad of laws under Title 41, Chapter 463, which covers gaming regulation in the state of Nevada. The statutes contained therein define the Commission and GCB's broad authority to require an individual or entity to obtain a license if they are exercising any type of ownership/control or any similar influence. However, the statutes are situation specific and will be referenced individually as they apply.

¹⁶¹ GAMING REGULATION IN NEVADA, *supra* note 127, at 10; *see* NEV. REV. STAT. § 463.167(1) (2007).

¹⁶² GAMING REGULATION IN NEVADA, *supra* note 127, at 10; *see* NEV. REV. STAT. § 463.300 (1959). A casino cannot borrow money for a gaming operation without complying with Nevada Gaming Regulations.

¹⁶³ GAMING REGULATION IN NEVADA, *supra* note 127, at 10; NEV. REV. STAT. §§ 463.162(1)(c) (2009), 463.167(1) (2007). "An unlicensed landlord may not receive rental payments based upon a percentage of the earnings or profits from the lessee's gaming revenues." LIONEL SAWYER & COLLINS, *supra* note 120, at 47 (citations omitted). Fixed rental payments are acceptable. However, if the rental payments are fixed, the gaming authorities reserve the discretion to require the landlord to obtain a license; *see*, NEV. REV. STAT.

1. *The Standard that Must be Met*

The standard for attaining a gaming license and conducting business within the gaming industry can be boiled down to two over-arching concepts: (1) suitability of the individual or individuals in charge of the corporation; and (2) suitability of the source of funds with which the gaming establishment is going to be operated.¹⁶⁴

Gaming license applicants bear the burden of proving their qualification to receive a license.¹⁶⁵ Therefore, “[y]ou are guilty until proven innocent.”¹⁶⁶ Both regulatory bodies assess the applicants’ qualifications based on the broad discretionary powers granted to them by state law, regulations, and precedent.¹⁶⁷

The criteria that both the GCB and Commission evaluate are wide-ranging and very discretionary. Regulators will first look at the character of the individual applicant.¹⁶⁸ There are a whole host of factors that, if unsatisfied, will likely affect an applicant’s suitability evaluation and may result in application denial.¹⁶⁹ The test evaluates seven criteria under which the Commission might find an applicant unsuitable:

- (1) conviction of a felony or misdemeanor involving violence, gambling or moral turpitude;
- (2) an unexplained pattern of arrests exists showing a lack of due regard for the law;
- (3) a failure to prove he is a person with integrity and good character;
- (4) association or membership in organized crime;
- (5) associations with individuals who are deemed unsuitable;¹⁷⁰
- (6) prior unsuitable operation of a casino
- (7) any conduct constituting a threat to the public health, safety, morals, good order and general welfare of the state of Nevada and its gaming industry, or any conduct that would reflect discredit upon the State of Nevada or its gaming industry.¹⁷¹

Although this is a rather extensive list of things that could potentially disqualify an applicant, there are even more factors that the GCB and Commission look at when determining an applicant’s suitability. Regulators will also evaluate the applicant’s financing sources and the suitability of those funds in order

§ 463.162(6) (2009) (providing if the landlord is ever found unsuitable the lease must be terminated without liability to the casino).

¹⁶⁴ Interview with Gregg P. Schatzman, former Senior Investigative Agent, Nev. State Gaming Control Bd., in Las Vegas, Nev. (Apr. 16, 2009) [hereinafter Schatzman Interview] (explaining that the “standard is the same now as it was then”); *see also*, Nev. Gaming Comm’n. Reg. 3.090 (1975).

¹⁶⁵ Nev. Gaming Comm’n. Reg. 4.010(2) (1973), 5.040 (2010). The standard is embedded in both regulations.

¹⁶⁶ Schatzman Interview, *supra* note 164.

¹⁶⁷ LIONEL SAWYER & COLLINS, *supra* note 120, at 56.

¹⁶⁸ *Id.* at 57.

¹⁶⁹ The character suitability standards are codified at NEV. REV. STAT. § 463.170(2) (2009) and Nev. Gaming Comm’n. Reg. 3.090(1) (1975).

¹⁷⁰ The Fifth and Sixth criteria for suitability derive from a period when Nevada gaming regulators sought to rid the industry of organized crime’s influence. For an interesting article on the topic, *see* Leslie Niño Fidance, *The Mob Never Ran Vegas*, 13 GAMING. L. REV. & ECON. 27 (2009).

¹⁷¹ NEV. REV. STAT. § 463.170(2) (2009); Nev. Gaming Comm’n. Reg. 3.090(1) (1975); *see also* LIONEL SAWYER & COLLINS, *supra* note 120, at 57.

to make sure that the funds are not derived from criminal or hidden sources and that the funding for the entire operation is adequate.¹⁷² Moreover, an applicant's business competence will be evaluated.¹⁷³ Additional evaluation factors include: the suitability of the location; the ownership of the location; multiple licensing criteria, if applicable; and lastly, the applicant's conduct during the investigatory process.¹⁷⁴ It is important to note that the applicant's conduct during the investigation weighs very heavily in the regulatory bodies' evaluation of the applicant because the Nevada gaming industry mandates 100% transparency during the investigatory process.¹⁷⁵

2. *The Investigatory Process*

The investigatory process is where the bulk of the initial work is done to determine an applicant's suitability based on the factors listed above. Background investigators have very broad powers and can inspect premises, as well as demand access to personal and business records for the purposes of auditing or examination.¹⁷⁶ For businesses,

the [GCB] will look at patterns of litigation to see if the applicant company uses litigation to get out of paying vendors and things of that nature. Furthermore, the [GCB] will examine all of the company's business records, its sources of capital, and whether or not it has operated in a regulatory environment before. If so, how did they perform in that environment?¹⁷⁷

There are no limits on how far back investigators may search, and investigators will likely uncover any discrepancies in the information the applicant provides.¹⁷⁸ One gaming expert—having experienced what a top-level federal governmental security clearance process was like while working as a White House presidential assistant—remarked that a typical gaming license investiga-

¹⁷² See NEV. REV. STAT. § 463.170(3)(b) (2009); Nev. Gaming Comm'n. Reg. 3.090(2) (1975).

¹⁷³ See NEV. REV. STAT. § 463.170(3)(a) (2009); Nev. Gaming Comm'n. Reg. 3.090(1)(c) (1975).

¹⁷⁴ NEV. REV. STAT. § 463.339 (2003) (mandating full and true disclosure of all information requested from the applicant by gaming regulatory authorities consistent with the state's public policy and the duties of the regulatory system).

¹⁷⁵ Wynn Interview, *supra* note 124 ("our system operates in the sunlight, whatever we ask for, we want it provided because we have certain disclosure standards that need to be met before an evaluation of suitability can occur.").

¹⁷⁶ See NEV. REV. STAT. §§ 463.140(2)-(4) (1995), 463.1405(2) (2003); *see also* Nev. Gaming Comm'n Reg. 4.010 (1973). The statutes and regulations grant investigators very broad authority to look into almost any aspect of a person's life or business no matter how intrusive it may seem.

¹⁷⁷ Interview with Mark A. Clayton, Esq., former member, Nev. Gaming Control Bd., in Las Vegas, Nev. (Apr. 20, 2009) [hereinafter Clayton Interview] (discussing the types of factors that the regulators will look at when investigating businesses for suitability). Mark Clayton served on the GCB when it approved the Dubai World SWF's stock purchase of MGM Mirage.

¹⁷⁸ LIONEL SAWYER & COLLINS, *supra* note 120, at 76. The investigators are looking at what the applicant provides, but also what the applicant is trying to hide. Unlike criminal actions, license applications are not subject to the same constitutional rules of exclusion. *Id.* at 78.

tion “is far more extensive and intrusive than the highest U.S. security clearance investigation.”¹⁷⁹

Knowing all the factors Nevada gaming regulators take into account when determining whether an applicant is suitable to conduct business within the industry, it is now time to analyze how the system actually responded to SWF investment.

V. NEVADA’S ABILITY TO NAVIGATE THE UNIQUE REGULATORY PROBLEMS
PRESENTED BY SOVEREIGN WEALTH FUND INVESTMENT –
AN EXAMINATION OF DUBAI WORLD’S PURCHASE
OF MGM MIRAGE STOCK

On November 20, 2008, the Commission, acting on the recommendation of the GCB, found Dubai World suitable to purchase up to 20% of MGM Mirage’s (“MGM”) stock.¹⁸⁰ By examining this transaction, it will be seen that the Nevada gaming industry’s comprehensive and time-tested regulatory system has allowed Nevada to receive the benefits of SWF investment, while effectively mitigating the accompanying risks. Additionally, Nevada’s example may also be a useful guide for other state industries across the U.S. looking to open their economies to SWFs.

A. *Welcoming the Knight in Shining Armor*

As previously mentioned, the gaming regulatory system has the duty to control the gaming industry while simultaneously ensuring the industry is allowed the freedom to become an openly competitive market that welcomes both domestic and foreign investment.¹⁸¹ Its job is just as important to Nevada’s economy as CFIUS’ job is to national security because gaming is the state’s primary industry.¹⁸² Should the regulatory system fail to block unsuitable investors from the Nevada economy, the consequences could be dire to the 300,000 people who are directly employed by the industry and the thousands more whose jobs depend on supplying the industry.¹⁸³

The Dubai World SWF (“DW”) has the potential to provide many benefits that both the Nevada economy and MGM are in need of at this unprecedented time of economic stress. One of the extolled benefits of SWF investment is that they are long-term stable investors that have the potential to promote financial stability.¹⁸⁴ The GCB specifically looked into this factor.¹⁸⁵ After con-

¹⁷⁹ *Id.* at 75 (quoting Robert D. Faiss, one of the world’s foremost authorities on gaming law).

¹⁸⁰ See *NGC Dubai World Suitability Hearing*, *supra* note 3; see also *Hearing on the Application of Dubai World for a Finding of Suitability as Beneficial Owners or Shareholders of the Voting Securities of MGM Mirage, Before the State Gaming Control Bd.* (Nov. 5, 2008) [hereinafter *GCB Dubai World Suitability Hearing*].

¹⁸¹ LIONEL SAWYER & COLLINS, *supra* note 120, at 3.

¹⁸² See *GAMING REGULATION IN NEVADA*, *supra* note 127, at 10.

¹⁸³ See *NEV. RESORT ASS’N, THE FACTS ABOUT GAMING IN NEVADA 1* (Feb. 2011) available at <http://nevadaresorts.org/docs/factbook/NRA-2011-Factbook.pdf>.

¹⁸⁴ McCormick, *supra* note 25.

¹⁸⁵ Clayton Interview, *supra* note 177. Because Dubai World’s SWF investment was the first foreign SWF to ever go through the licensure process, Clayton personally participated in

ducting thorough investigations of DW's business records and other investment holdings around the world, the GCB found "[DW] to be a long-term stable investor investing in a long-time player within the gaming industry."¹⁸⁶ As of November 2008, DW had purchased 9.4% of MGM's stock and became a 50% partner in MGM's City Center project, which was the largest private investment in U.S. history.¹⁸⁷ DW's contributions totaled in excess of six billion dollars.¹⁸⁸ This amount of capital investment is indicative of DW's long-term investment interest in MGM.¹⁸⁹ Furthermore, DW's investment is also a much-needed lifeline for the local economy; City Center created 12,000 gaming and hospitality jobs¹⁹⁰—not to mention the thousands of construction jobs it fueled.¹⁹¹

Another possible benefit of SWF investment is the concept of reciprocity, i.e., an opportunity for U.S. firms to generate new businesses in the investor country.¹⁹² This benefit does not occur with all SWF investment, nor does U.S. policy mandate reciprocity.¹⁹³ However, the investment relationship between DW and MGM does include reciprocal investment.¹⁹⁴ Plans were announced at the November 2008 GCB hearing for MGM to develop and manage two nongaming, destination resorts in Abu Dhabi and Dubai that will carry the MGM Grand and Bellagio brands respectively.¹⁹⁵

Lastly, SWF investment brings along with it the opportunity to introduce new business methods into economies, promote healthy business competition, create innovation, lower prices, and enhance customer variety.¹⁹⁶ The partnership between DW and MGM seeks to do just this. Both companies want to leverage each other's knowledge of the hospitality industry because both entities are well-recognized in the international economy for hospitality.

Did this investment have a strategic backdrop? Yes, but not the kind you would think. Dubai World wasn't seeking to gain control of MGM or sabotage the gaming industry; it is a mutually beneficial strategy. MGM wants to diver-

the front-end of the investigation. *Id.* GCB members do not normally participate in the investigative process and his participation in the early stages of the investigation is indicative of the emphasis the GCB placed in making sure the process was thorough and complete. *Id.*¹⁸⁶ *Id.*

¹⁸⁷ *GCB Dubai World Suitability Hearing*, *supra* note 180, at 7 (statement to the GCB from former MGM Mirage CEO, J. Terrance Lanni).

¹⁸⁸ *Id.* In late 2009, the Commission found DW suitable for licensure as a 50-50 partner in City Center thereby ratifying the parties' agreement and solidifying DW's stake in the Nevada gaming industry. *See Special Hearing on City Center Holdings*, *supra* note 117.

¹⁸⁹ *Id.* at 26-27.

¹⁹⁰ Amanda Finnegan, *City Center Employees Receive Uniforms, Gear up for Opening*, LAS VEGAS SUN (Oct. 29, 2009 2:05 AM), <http://www.lasvegassun.com/news/2009/oct/29/citycenter-employees-receive-uniforms-gear-opening>.

¹⁹¹ Arnold M. Knightly, *Safety Issues Raised*, LAS VEGAS REV. J. (Sept. 26, 2008 5:22 PM), <http://www.lvrj.com/news/26371359.html> (stating that the City Center project employed over 7,700 construction workers).

¹⁹² Rose, *supra* note 39, at 92-93 (citation omitted).

¹⁹³ Kimmitt, *supra* note 6, at 128.

¹⁹⁴ *GCB Dubai World Suitability Hearing*, *supra* note 180, at 7-9 (statement to the GCB from former MGM Mirage CEO, J. Terrance Lanni).

¹⁹⁵ *Id.* at 8.

¹⁹⁶ McCormick, *supra* note 25.

sify itself by creating resorts all around the world and Dubai World wanted to invest in the gaming industry.¹⁹⁷

Thus, DW's investment into the Nevada gaming industry has the potential to introduce new hospitality standards and business methods into both Nevada and the United Arab Emirates. Furthermore, now that City Center is open for business, it has created jobs, added variety for the consumer, and contributes to healthy business competition in Nevada's gaming industry.

B. *Fending Off Mr. Hyde*

Nevada gaming regulators were well apprised of the current issues surrounding SWF investment before DW sought entrance into the gaming industry.¹⁹⁸ In order to harness the benefits that accompany SWF investment and to mitigate the perceived risks of SWF investment, DW would have to pass Nevada's stringent standards of suitability.¹⁹⁹ However, some aspects of the investigation into DW were different because the GCB had to add a third tier to the investigation.²⁰⁰ Not only did the character of the individuals that control the SWF and the suitability of their funds have to be investigated, but the Dubai government also needed to be investigated because of its potential to control the investment.²⁰¹ It is important to note that DW was not discriminated against because it was a SWF; they were put through the exact same investigation and asked to meet the exact same standards of suitability that all potential investors, whether foreign or domestic, are asked to meet.²⁰² Nevada's actions of non-discrimination, progressive liberalization, and unilateral liberalization are similar to OECD's general investment policy principles regarding the treatment of foreign investors, which include SWFs.²⁰³

1. *The Risk of Government Control*

In order to mitigate the state capitalism that accompanies SWF investment, the GCB investigated all of the individuals with decision-making power in Infinity World, DW's SWF investment arm. The GCB needed to be sure there was separation of direct government control from the fund and that it would be able to acquire jurisdiction over any individuals with the ability to control the fund.²⁰⁴ Additionally, the GCB made sure to address an added wrinkle of government control. DW is a decreed company, which means it was created by Sheikh Mohammed, the ruler of Dubai, who retains authority to

¹⁹⁷ Neilander Interview, *supra* note 132. Neilander recommended approval for DW's suitability as an investor in the Nevada gaming industry. *Id.*

¹⁹⁸ Clayton Interview, *supra* note 177 ("[T]here are the common perceptions about SWFs and then there are the realities. The realities are what need to be investigated.").

¹⁹⁹ See GAMING REGULATION IN NEVADA, *supra* note 127, at 10 ("Nevada requires approvals and licenses for transactions which affect ownership and/or control of any gaming operation in the State and for any individual who could exert any similar influence.").

²⁰⁰ Neilander Interview, *supra* note 132.

²⁰¹ *Id.* In SWF investigations, one must add the third tier and investigate the government and the corporate entity that the government has formed to hold the investment, as well as the individuals that will control the entity. *Id.*

²⁰² Wynn Interview, *supra* note 124.

²⁰³ See OECD Declaration *supra* note 105, at 3.

²⁰⁴ Wynn Interview, *supra* note 124.

change the individuals in power and control over DW at any time.²⁰⁵ Because of a decreed company's nature and its potential to be amended by Sheikh Mohammed, the GCB exercised its broad discretion and requested that DW's Chairman and Chief Financial Officer file suitability applications in order to retain jurisdiction over any possible decision-makers in the company.²⁰⁶ Jurisdiction over a SWF's decision-making body is key because it ensures that the Commission has the power to regulate the SWF as necessary to protect the best interests of the state.²⁰⁷

Furthermore, DW submitted itself to the jurisdiction of the Gaming Control Act and Commission regulations and waived any claims to sovereign immunity in the event that a regulatory inquiry or disciplinary action should occur. This ensures that the Commission will be able to carry out its regulatory duty upon the SWF without having to fight the issue of sovereign immunity first.²⁰⁸

An additional check against governments pursuing geo-political goals via SWF investment is one that all applicants must face: the GCB's intrusive²⁰⁹ and costly suitability investigation.²¹⁰ The costs of suitability investigation are particularly high for foreign applicants, not because of discriminatory reasons but because the logistics of a foreign investigation increase the costs.²¹¹ Therefore, it is unlikely that a SWF will undergo this cumbersome procedure for reasons besides seeking return on its investment.²¹²

The last factor scrutinized by Nevada gaming regulators was the percentage of shares in MGM that DW was seeking. At the time the GCB found DW suitable to purchase MGM stock, Kirk Kerkorian owned about 50% of MGM's shares, which made him MGM's largest shareholder.²¹³ Therefore, any concerns about DW imposing its political or strategic will through shareholder influence could be effectively mitigated by Kerkorian's large amount of shares.²¹⁴ As long as DW's total share of MGM stock remains considerably below other large investors, concerns about the SWF's potential strategic control will likely remain mitigated in the future.

By taking all these steps to ensure the separation of government-meddling in the fund, the Nevada gaming control system may have potentially wrought a way to stave off any political or strategic goals that SWFs may seek when investing in U.S. companies. However, there are still other risks that come

²⁰⁵ *GCB Dubai World Suitability Hearing*, *supra* note 180, at 41-43 (Dubai World was created by Decree No. 3 in 2006 and is not subject to Dubai's commercial federal laws).

²⁰⁶ *Id.*

²⁰⁷ Neilander Interview, *supra* note 132.

²⁰⁸ *Id.*

²⁰⁹ LIONEL SAWYER & COLLINS, *supra* note 120, at 75.

²¹⁰ *See id.* at 225.

²¹¹ *Id.* at 74.

²¹² Clayton Interview, *supra* note 177.

²¹³ Howard Stutz, *Kerkorian to Step Down From MGM Resorts Board*, *LAS VEGAS REV. J.*, Apr. 15, 2011, at 1D. Kerkorian "controlled more than 50 percent of MGM Resorts in 2009, until a stock offering reduced his stake." *Id.* at 2D. As of April 2011, Kerkorian still holds a 27% share of MGM stock. *Id.* at 1D.

²¹⁴ Clayton Interview, *supra* note 177.

along with SWF investment, and the gaming regulatory system had to deal with those as well.

2. *Lack of Transparency*

One of the major problems with SWF investment is the lack of transparency and uniform rules of disclosure.²¹⁵ In Nevada, participation in the gaming industry is a privilege and not a right.²¹⁶ Therefore, if applicants—not just SWFs—do not comply with Nevada gaming regulators' requests during the investigation and throughout the tenure of the investment, then it is likely that they will not receive a license to conduct gaming business in the state or that the Commission will revoke their license.²¹⁷ Nevada's gaming industry requires total transparency so that an evaluation of the applicant's suitability can be determined.²¹⁸ Some commentators have postulated that more regulation on top of the already onerous CFIUS federal regulation will push SWFs away.²¹⁹ Nevertheless, Nevada gaming regulators remain true to their policy of protecting the industry and the inhabitants of the state.²²⁰ So, even if this regulatory stance pushes other SWF investors away "then that is just the way it is. We are not going to lessen our standards."²²¹ This stringent policy has served the state well in ensuring that gaming is conducted in an open and honest environment and has even helped rid Nevada of corruptive elements that had seeped their way into the gaming industry in the past.²²²

A good mitigating factor to the regulatory bodies' tough stance on transparency is their commitment to conduct business in an apolitical²²³ and non-discriminatory fashion.²²⁴ Thus, SWFs seeking to conduct business in the gaming industry can be assured that they will only be held to the same stringent standards to which everyone else is held.²²⁵

C. *Other Concerns About Sovereign Wealth Fund Investment*

Lack of transparency and fear of government investment motives that are not economically based are some of the major concerns that SWF investment presents. Nevada's gaming control system has acted cogently to contain those risks. However, there are also some other risks that SWFs present, and the regulatory response to those bears mentioning as well.

The Nevada gaming control system has broad power to investigate *any* investor at *any* time if there is even the slightest hint of impropriety.²²⁶ Fur-

²¹⁵ *Id.*

²¹⁶ *State v. Rosenthal*, 559 P.2d 830, 833 (Nev. 1977).

²¹⁷ Wynn Interview, *supra* note 124.

²¹⁸ *Id.*

²¹⁹ *See, e.g., Epstein & Rose*, *supra* note 92, at 118, 134.

²²⁰ GAMING REGULATION IN NEVADA, *supra* note 127, at 10 (noting "[t]he economic success [of Nevada's gaming industry] is dependent on the effective and thorough licensing of individuals and entities involved in gaming in the State.").

²²¹ Neilander Interview, *supra* note 132.

²²² *See generally Niño Fidance*, *supra* note 170.

²²³ LIONEL SAWYER & COLLINS, *supra* note 120, at 31 (citations omitted).

²²⁴ Wynn Interview, *supra* note 124.

²²⁵ *Id.*

²²⁶ *Id.* (emphasis added).

thermore, investors are continuously monitored by the GCB; therefore, DW is continuously monitored.²²⁷ This type of intensive monitoring allows gaming regulators to swiftly make an inquiry into any activity that would bring disrepute on the State of Nevada.²²⁸ However, in order to forestall any problems of this nature, the Commission ordered DW to create an internal compliance committee, so that someone within Infinity World could ensure that DW maintains compliance with Nevada's gaming laws.²²⁹ Ordering companies to create internal compliance committees is a check often used by the regulatory bodies, so DW was treated no differently in this respect either.²³⁰

In addition to the numerous checks previously discussed, Nevada gaming regulators have another powerful check on a SWF's investment, one that CFIUS may not even have. Not only are gaming authorities able to control a SWF's activity within Nevada, but they also have the ability to control a SWF even when they are operating outside Nevada's jurisdiction. This power is set forth in The Foreign Gaming Act.²³¹ The act requires licensees to operate foreign gaming operations in accordance with Nevada's standards of honesty and integrity.²³² Licensees are required to operate within the laws of any gaming jurisdiction in which they are located and to protect the integrity of Nevada gaming by prohibiting unscrupulous conduct outside Nevada.²³³ Accordingly, it is not enough for licensees to follow the laws of a jurisdiction outside of Nevada; they also cannot engage in any conduct that would reflect discredit or disrepute on Nevada, or act in a fashion contrary to Nevada's public policy.²³⁴

When evaluating the many factors the GCB and Commission review during a typical investigation, and then examining their investigation of DW and the regulatory checks they placed upon the SWF, it appears as if Nevada's comprehensive and time-tested regulatory system may have wrought a rational method for vetting SWF investment. This allows the Nevada economy to receive the benefits of SWF investment while at the same time effectively mitigating the risks that accompany it.

VI. CONCLUSION

In these times of financial turmoil, many people are pointing at Las Vegas, gambling, and casinos as illustrations of "what is *wrong* in America right now."²³⁵ However, it is time to start looking at what the Nevada gaming industry is doing right. The Nevada gaming control agencies have likely fashioned a way to harness the knight in shining armor qualities of SWFs while managing

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ NEV. REV. STAT. §§ 463.680 - 463.720 (2007).

²³² *Id.* §463.720(2) (1997).

²³³ LIONEL SAWYER & COLLINS, *supra* note 120, at 226-27 (citations omitted).

²³⁴ NEV. REV. STAT. § 463.720(3) (1997).

²³⁵ Bo J. Bernhard, Industry Comment, *The Battered Gaming Industry: A Case Study for Our Times?*, UNLV GAMING RESEARCH & REV. J. 55, 56 (2009) (stating that perhaps the gaming industry can provide a how-to map rather than a how-not-to map).

to avoid protectionism and run an honest, apolitical, non-discriminatory regulatory system.

Consequently, what *is* certain and has been certain for years, is that Nevada's gaming regulatory system will not compromise its standards for any investors, even if they could be a knight in shining armor here to rescue the economy. This stance of requiring more rather than less regulation, while contrary to free-market economic theories, has not only proven effective in protecting Nevada's citizens but has also allowed the state's free market economy to achieve unprecedented levels of economic growth time and time again.²³⁶ Perhaps it may be time to stop pointing fingers at the gaming industry as a symbol for what is wrong with the economy and start looking at Nevada's regulatory framework as a good starting point for lessons on how other regulatory bodies across the nation can use Nevada's framework to deal with SWF investment.

²³⁶ See *id.* at 57.