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Mariana del Rio Kostenwein
Associate

Simon Gluck & Kane LLP
One Penn Plaza
250 West 34th Street, Suite 4615
New York, NY 10119
C +1 (914) 565 9492
T +1 (212) 775 0055 Ext. 205
F +1 (212) 839 9103
mdelrio@customs-law.com
www.customs-law.com

S|G|K SIMON GLUCK KANE Customs & International Trade Law

Under FSMA Food Importers Must Play Larger Role in Ensuring Food Safety

On January 4, 2011 President Obama signed the Food Safety Modernization Act (FSMA) into law. This law broadens the existing powers that Congress granted to the U.S. Food and Drug Administration (FDA) to regulate domestically produced foods as well as those of foreign origin. The FSMA also provides the FDA with new ways of ensuring that food products are not adulterated or misbranded. In September 2014, the FDA proposed supplemental rules for public comment covering various key areas of FSMA. This article will focus on the new proposed Foreign Supplier Verification Program (FSVP) regulations, which will create new requirements for food importers.

The FSMA will require food importers to develop a FSVP that will ensure that food imported into the United States is produced using processes and procedures that mirror the standards which domestic food manufacturers are required to meet. The FSVP must be developed by a "qualified individual." This individual must perform a "hazard analysis" for each food imported and that analysis must be kept in writing. A hazard analysis involves the identification of known or reasonably foreseeable hazards in each food imported based on information gathered from experience, illness data, scientific reports, and other sources and the determination of whether or not there are any significant hazards for that particular food. The importer must analyze potential hazards including biological hazards (*e.g.,* parasites), chemical hazards (*e.g.,* pesticides), and physical hazards.

If the importer concludes that there are significant hazards with respect to the food to be imported, it must determine who is in the position to control that hazard. If it is the importer's customer, then the importer must obtain a written assurance from its customer every year that this customer is taking steps that will significantly minimize or prevent the hazard. If it is the foreign supplier, the importer must evaluate the risk in using a particular foreign supplier keeping in mind the hazard analysis conducted. The importer must consider, *e.g.,* who will be applying the controls to minimize the hazards (will it be the foreign supplier or the foreign supplier's raw material/ingredient supplier?), the procedures the foreign supplier has in place with respect to food safety, the foreign supplier's compliance with FDA regulations (including whether or not that foreign supplier has been issued a FDA warning letter or is on import alert), the supplier's food safety performance history as well as any other relevant factors. The importer's evaluation of the risks must be written and a reevaluation of the risks should be conducted, if information regarding the risks changes.

The importer must develop written procedures that will ensure that it will source products only from foreign suppliers it has approved. Based on its hazard analysis and risk evaluation, the importer will need to perform and document the activities it engages

Mariana del Rio Kostenwein
Associate

Simon Gluck & Kane LLP
One Penn Plaza
250 West 34th Street, Suite 4615
New York, NY 10119
C +1 (914) 565 9492
T +1 (212) 775 0055 Ext. 205
F +1 (212) 839 9103
mdelrio@customs-law.com
www.customs-law.com

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in to verify that its foreign supplier is producing safe foods, *e.g.,* through an on-site audit, sample or testing of the food, a review of the foreign supplier's food safety records, or any other verification activity that is appropriate based on the food and foreign supplier risk. If there is a hazard associated with the imported food that is controlled by the foreign supplier and there is a reasonable probability that the hazard could result in "serious adverse health consequences or death in humans or animals" (SAHCODHA), an on-site audit of the foreign supplier MUST be conducted or the importer must obtain documentation of an on-site audit BEFORE it initially imports the food. The importer must also conduct this activity EVERY year thereafter if such serious risk is involved.

Importers must generally reassess their FSVP for EACH food that they import within three years of creating the FSVP and within three years of the importer's last reassessment. Of course, if the importer learns of new information about risks concerning the food or supplier, the importer must reassess its FSVP. All reassessments should be documented.

If an importer does not comply with the FSVP regulations, its products will be refused admission into the United States.

Importers should be prepared to meet the new requirements created under FSMA. The Final Rule concerning FSVP is expected later this year. Importers will be required to be in full compliance with the new rule 18 months after its promulgation.

Rechtliche Fragen im Zusammenhang mit der Rekrutierung von Mitarbeitern von Wettbewerbern in den Vereinigten Staaten

Myriam Rastaetter
Associate, Corporate Department
D +1 (212) 613 2073
F +1 (212) 554 9672
mrastaetter@gibbonslaw.com

Peter Flägel
Director in the Corporate Department
D +1 (212) 613 2091
F +1 (212) 554 9685
pflagel@gibbonslaw.com

Gibbons P.C.
One Pennsylvania Plaza,
37th Floor
New York, NY 10119
www.gibbonslaw.com

Um die Geschäfte in den Vereinigten Staaten zu erweitern, entschließen sich deutsche Unternehmen bisweilen, erfolgreiches Verkaufs-, Management- und Marketing-Personal von Wettbewerbern abzuwerben. Diese aber unterliegen häufig nach-vertraglichen Einschränkungen. Eine Verletzung kann nicht nur den Arbeitnehmer sondern auch den neuen Arbeitgeber erheblichen Risiken aussetzen. Die folgenden Aspekte sind zu bedenken bevor entsprechende Personalentscheidungen gefällt werden, die später bedauert werden könnten.

Umfang nach-vertraglicher Einschränkungen

Drei Arten von nach-vertraglichen Einschränkungen sind üblich: (1) Wettbewerbsverbote, (2) Anwerbungsverbote hinsichtlich Kunden und Arbeitnehmern und (3) Geheimhaltungs-vereinbarungen. Während letztere regelmäßig wirksam sind, hängt die Durchsetzbarkeit von Wettbewerbs- und Anwerbungssverboten vom anwendbaren Staatenrecht sowie von anderen Faktoren ab. Während in bestimmten Bundesstaaten (wie z.B. New York) solche Vereinbarungen regelmäßig (unter gewissen Voraussetzugen) durchsetzbar sind, gebietet das Recht anderer Bundesstaaten eine enge Auslegung dieser Vereinbarungen und limitiert ihre Durchsetzbarkeit. Nach kalifornischem Recht zum Beispiel entfalten nach-vertragliche Wettbewerbs- und Anwerbeverbote grundsätzlich keine Wirkung[1]. In letzter Zeit scheint aber auch eine Reihe von Gerichtsentscheidungen in verschiedenen anderen Staaten darauf hinzudeuten, dass an die Durchsetzbarkeit von erst nach Eingehung des Arbeitsverhältnisses vereinbarten nach-vertraglichen Wettbewerbsverboten immer strengere Voraussetzungen gestellt werden.

Selbst wenn keine besonderen entsprechenden Geheimhaltungsvereinbarung im Anstellungsschreiben oder Arbeitsvertrag getroffen wurden, darf ein Arbeitnehmer grundsätzlich Betriebsgeheimnisse seines alten Arbeitgebers nicht dem neuen Arbeitgeber mitteilen. Der *Uniform Trade Secrets Act* und gegebenenfalls anwendbares Common Law verbieten dies grundsätzlich.

Schutzmaßnahmen

Unterliegt ein potenzieller Arbeitnehmer solchen Einschränkungen, sollte der

[1] Die hiesigen Ausführungen beziehen sich ausschließlich auf entsprechende Vereinbarungen in Arbeitsverträgen. Wettbewerbs- und Anwerbungsverbote im Zusammenhang mit einem Unternehmensverkauf sind grundsätzlich durchsetzbar, auch in Kalifornien.

Myriam Rastaetter
Associate, Corporate Department
D +1 (212) 613 2073
F +1 (212) 554 9672
mrastaetter@gibbonslaw.com

Peter Flägel
Director in the Corporate Department
D +1 (212) 613 2091
F +1 (212) 554 9685
pflagel@gibbonslaw.com

Gibbons P.C.
One Pennsylvania Plaza,
37th Floor
New York, NY 10119
www.gibbonslaw.com

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Rechtliche Fragen im Zusammenhang mit der Rekrutierung von Mitarbeitern von Wettbewerbern in den Vereinigten Staaten

neue Arbeitgeber klären, ob die erwogene Neuanstellung eine Verletzung dieser Einschränkungen darstellen könnte. Selbst wenn der alte und der neue Arbeitgeber ähnliche Produkte herstellen oder vertreiben, könnte ein Verstoss z.B. nicht vorliegen, wenn die Arbeitgeber verschiedene Kundengruppen ansprechen. Die zentrale Frage in diesem Zusammenhang ist regelmäßig, ob die Geschäftsfelder des alten und des neuen Arbeitgebers sich überschneiden.

Der neue Arbeitgeber sollte immer ausdrücklich im Anstellungsschreiben oder Arbeitsvertrag klarstellen, dass er vom Arbeitnehmer keine Verletzung seiner nach-vertraglichen Pflichten verlangt. Auch sollte klargestellt werden, dass der neue Arbeitgeber nicht wünscht, Information des alten Arbeitgebers zu erhalten. Eine solche schriftliche Vereinbarung kann gegebenenfalls in einem Prozess von entscheidender Bedeutung sein.

Risiken des neuen Arbeitgebers

Wenn die Anstellung des neuen Arbeitnehmers seine nach-vertraglichen Verpflichtungen verletzt, entstehen für den neuen Arbeitgeber Risiken:

Der alte Arbeitgeber kann über eine einstweilige Verfügung versuchen, es dem Arbeitnehmer zu verbieten, das vertragsbrüchige Verhalten fortzusetzen. Wird dem Antrag stattgegeben, kann der Arbeitnehmer (zumindest vorübergehend) vom neuen Arbeitgeber nicht mehr eingesetzt werden.

Zweitens könnte der alte Arbeitgeber unmittelbar gegen den neuen Arbeitgeber gerichtlich vorgehen, indem er vorbringt, dass der neue Arbeitgeber durch den Arbeitnehmer auf unlautere Weise Betriebsgeheimnisse des alten Arbeitgebers erlangt und dass der neue Arbeitgeber den Arbeitnehmer zum Bruch seiner nach-vertraglichen Verpflichtungen verleitet habe. Dazu muss der alte Arbeitgeber allerdings beweisen, dass der neue Arbeitgeber von der Existenz und der Verletzung der nach-vertraglichen Vereinbarungen wusste. Um eine direkte Inanspruchnahme des neuen Arbeitgebers zu vermeiden, sollte dieser daher die oben beschriebenen Schutzmaßnahmen ergreifen.

Schlussfolgerung

Deutsche Arbeitgeber, die an der Einstellung profilierter Verkaufs-, Management- oder Marketing-Leute von U.S.-Konkurrenten interessiert sind, sollten vor einer solchen Entscheidung klären, ob diese Mitarbeiter durchsetzbaren nach-vertraglichen Verpflichtungen unterliegen. Sodann sollten die oben genannten Schutzmaßnahmen ergriffen werden, um eine Klage zu vermeiden.

AHK German American Chambers of Commerce Deutsch-Amerikanische Handelskammern

DE INTERNATIONAL The German Chamber Network

Dr. Thomas Rinne
Partner

Rechtsanwälte Abogados
Goethestraße 7
60313 Frankfurt am Main
T +49 (69) 92 03 47 90
F +49 (69) 92 03 47 91 5
rinne@fra.einem.de
www.einem.de

v. Einem & Partner
Rechtsanwälte

Higher Protection of Trade Secrets in the European Union Coming Soon

If the lawmaking process continues as scheduled, the protection of trade secrets within the European Union will be significantly improved within the next couple of months. However, businesses will only be able to take advantage of the new rules if they prepare themselves properly for the new legal environment.

As part of its Europe 2020 strategy, the European Commission has identified the need for harmonizing national legislation in the field of trade secrets. Today, the protection level of trade secrets varies widely within the European Union. There is even no common understanding of the definition of a "trade secret". This situation has led to an ever increasing skepticism of businesses when it comes to sharing their secret information, knowledge and ideas with other businesses in the European Union in joint research and development (R&D) projects.

Thus, the European Commission is about to enact a Directive that aims at harmonizing the legal framework for the protection of trade secrets. In the Directive, trade secrets are defined as information which (a) is secret in the sense that it is not generally known among or readily accessible to persons within the circles that normally deal with this kind of information; (b) has commercial value because it is secret, and (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

The draft Directive also contains measures, procedures and remedies that the national lawmaker shall make available to the holder of a trade secret that has been unlawfully used, disclosed or been acquired. The judicial authorities shall be entitled to order the cessation or the prohibition of the use or disclosure of the trade secret on an interim basis and the prohibition to produce, offer, place on the market or use infringing goods and the seizure or the delivery of the suspected infringing goods. "Infringing goods" are considered to be goods whose design, quality, manufacturing process or marketing significantly benefits from trade secrets which have been unlawfully acquired, used or disclosed. The enforcement of the holder's rights shall be warranted by injunctive (e.g. cessation or prohibition of the use or disclosure) and corrective measures (e.g. recall of infringing goods from the market, where appropriate its destruction).

The most important novelty of the Directive possibly is the requirement that information can only be considered as being "secret" if the holder has taken appropriate measures within its own organization to avoid the proliferation of a secret. Businesses which have not yet done so should start as soon as possible to adopt measures aiming at the protection of their secret and confidential information as part of their compliance strategy.

Dipl.-Phys. Dr. rer. nat.
Thomas Kloiber
Deutscher Patentanwalt und
European Patent Attorney
Partner

Patentanwälte
EUROPEAN PATENT ATTORNEYS,
Vonnemann Kloiber & Kollegen
An der Alster 84
20099 Hamburg
T +49 (0)40 28 08 13 0
F +49 (0)40 28 08 13 31
info@vonnemann.de
www.vonnemann.de

The meaning of English terms in European Community trade marks can not be considered descriptive and devoid of distinctive character if the terms do not form part of basic English vocabulary and the relevant public does not have sufficient knowledge of English language

The applicant, Junited Autoglas Deutschland GmbH & Co. KG, Germany, filed an application for registration of a Community trade mark **"United Autoglas"** at OHIM (Office for Harmonisation in the Internal Market), inter alia, for the Nizza Class 12 goods 'parts for land vehicles, namely windscreens, glass for car windows' and the Nizza Class 37 services 'automobile glazing services; glazing'.

The opponent, Belron Hungary Kft – Zug Branch, Switzerland, filed a notice of opposition against registration of the mark applied for, in respect of the goods and services referred to above, based on the national figurative mark, registered in Poland ('the earlier mark'), reproduced below:

for corresponding Class 12 goods and Class 37 services.

OHIM's Opposition Division upheld the opposition. The applicant filed an appeal against the decision of the Opposition Division. The OHIM´s Board of Appeal dismissed the appeal and concluded that there was a likelihood of confusion with regard to the goods and services in Classes 12 and 37. The applicant now claimed that the General Court of Justice of the European Union (the Court) should annul the contested decision and reject the opposition. The Court, however, upheld the contested decision of OHIM`s Board of Appeal, confirming the likelihood of confusion between the marks at issue.

The applicant asserted that the word 'autoglas' for the relevant public in Poland designates glass for automobiles. Since it is a descriptive term and therefore devoid of distinctive character, it will be disregarded by the relevant consumer. Consequently, the term 'united' will hold a dominant position in the trade mark sought.

The Court, however, argued that the term 'autoglas' exists in German and English (spelled 'auto glass' in English) and in both languages it designates glass for automobiles. As regards the second part of the term 'autoglas', the German word 'glas' (meaning 'glass'), it must be noted that the corresponding term in Polish is 'szkło'. Thus, there is

Dipl.-Phys. Dr. rer. nat.
Thomas Kloiber
Deutscher Patentanwalt und
European Patent Attorney
Partner

Patentanwälte
EUROPEAN PATENT ATTORNEYS,
Vonnemann Kloiber & Kollegen
An der Alster 84
20099 Hamburg
T +49 (0)40 28 08 13 0
F +49 (0)40 28 08 13 31
info@vonnemann.de
www.vonnemann.de

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clearly no similarity between the two words. Although many consumers in the European Union know basic English vocabulary the term 'glass' cannot be considered to form part of such basic vocabulary.

Even if, as the applicant submits, the relevant public associates the term 'auto', when it is used in relation with the goods and services at issue, solely with automobiles, the fact remains that the term 'autoglas' cannot be considered to be descriptive for the part of the Polish consumers who do not have a certain level of English or German. In the light of the lack of meaning of the word 'glas' for that part of the relevant public, the term 'autoglas' as a whole has no meaning either.

Moreover, the English word 'united', like the term 'glass', is not elementary English vocabulary. Like the word 'glass', it is therefore meaningless for the part of the relevant public which does not have a certain level of knowledge of English.

In the light of the similarity between the signs and of the fact that the goods and services covered by the marks at issue are partly similar and partly identical, the Board of Appeal was correct to find that there was a risk that the relevant public might consider the goods and services to come from the same undertaking where they are offered under the marks at issue and that there was therefore a likelihood of confusion within the meaning of applicable law.

Contrary to what the applicant maintains, the presence of the element 'united' in the trade mark sought is not sufficient to prevent a likelihood of confusion. The presence of that element does not rule out the possibility that the consumer might consider the trade mark sought to constitute a mere variant of the earlier mark on account of the presence of the element 'autoglas', which is almost identical to the sole word element present in the earlier mark.

Since the plea put forward by the applicant in support of its claims is unfounded, the action was dismissed in its entirety.
(Judgment of the General Court of Justice of the European Union In Case T 297/13)

AHK German American Chambers of Commerce Deutsch-Amerikanische Handelskammern
DE INTERNATIONAL The German Chamber Network

Dr. Wolf zur Nieden
Rechtsanwalt/Assoziierter Partner
T +49 (221) 33 66 07 44
F +49 (221) 33 66 09 5
wzurnieden@goerg.de

Dr. Damian Tigges
Rechtsanwalt/Assoziierter Partner
T +49 (221) 33 66 07 88
F +49 (221) 33 66 09 5
dtigges@goerg.de

GÖRG Partnerschaft
von Rechtsanwälten mbB
Kennedyplatz 2
50679 Köln
www.goerg.de

Acquisition of real estate from a German insolvency administrator: a riddle wrapped up in an enigma?

Many domestic as well as foreign investors are highly interested to purchase real estate in Germany these days. Be it for capital investment purposes or as part of the assets of a Germany based business that is about to be acquired. Is the owner or the owning entity of the target asset undergoing insolvency proceedings commercial and legal upsides can be realized while at the same time certain specifics must be obeyed.

Characteristics of a sale in an insolvency scenario

In many insolvencies poor organization, unprofessional or maybe even unsound business conduct in the past have been part of the problem. Mistakes have been made, critical situation have been dealt with poorly and most of the communication and documentation has been neglected – partly due to lack of interest or professionalism or even partly to cover up mistakes. Along with the disappointment and demoralization of possible remaining employees this is the situation that a German insolvency administrator faces at the beginning of his task. In addition, he – as a person from the outside – is by virtue of German insolvency law from one day to the other in charge to save and enhance the insolvent estate. He is even personally liable for possible damages if he is in breach of his duties.

This is the main reason why German insolvency administrators in their capacity as vendors will hardly ever guarantee or warrant certain qualities or confirm assumptions in the context of a sale of assets especially real estate from an insolvent estate. Some investors have trouble to accept this concept but it is only the logical consequence of the described circumstances of an insolvency scenario. However, this in itself should rarely be a reason to abstain from acquiring real estate from an insolvency administrator. For one, there are undeniable commercial advantages that tend to go along with such sales. While the exposure to legal risks indicated above may not be avoidable altogether, those risks can still be controlled to a reasonable extent most of the time. Secondly, knowing which contractual conditions and concessions can and should be insisted upon and what information should be collected during due diligence is key to become comfortable with such a “no guarantee”-scenario.

Upsides of acquiring real estate assets from an insolvent estate

There also some legal upsides than can be realized with the acquisition of real estate from an insolvent estate, if one knows, how to apply the available legal instruments.

Dr. Wolf zur Nieden
Rechtsanwalt/Assoziierter Partner
T +49 (221) 33 66 07 44
F +49 (221) 33 66 09 5
wzurnieden@goerg.de

Dr. Damian Tigges
Rechtsanwalt/Assoziierter Partner
T +49 (221) 33 66 07 88
F +49 (221) 33 66 09 5
dtigges@goerg.de

GÖRG Partnerschaft
von Rechtsanwälten mbB
Kennedyplatz 2
50679 Köln
www.goerg.de

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Contrary to purchases from regular vendors of real estate the ongoing insolvency imposes a kind of freeze on the asset's land register folio. Not only does this prohibit the entry and thus the coming into force of further rights in rem but German insolvency law also provides the opportunity to delete certain prior rights aimed at the securing of debts, which were entered into the land register by compulsory execution up to one month before the application for insolvency.

Furthermore the purchaser of real estate from an insolvency administrator is entitled to terminate the original lettings that were concluded by the debtor and not altered by the insolvency administrator with a statutory deadline at the first opportunity, even if the duration of the lettings is limited by contract and therefore actually non-callable. This is a fundamental difference to regular real estate acquisitions. From this perspective an acquisition of real estate under insolvency rules can provide the opportunity to develop the real estate regardless of existing lettings or to conclude new ones on better terms. A similar termination right applies in the less frequent scenario that the real estate is auctioned off on the initiative of the owners of land charges or of the insolvency administrator himself.

However tenants are not necessarily without rights. They may have provided for the risk of such a termination by agreeing upon the registration of a restricted personal easement in their favor. The legal consequence is that despite the ending of the contractual lease agreement by termination the tenant is legally authorized to continue the usage of the real estate by virtue of his right *in rem.* However, in practice the registration of such a restricted personal easement in favor of the tenant is not too common.

Be assured navigating the intricacies of acquiring real estate under insolvency does not require reckless faith, but merely good preparation and experienced legal advice.

AHK German American Chambers of Commerce Deutsch-Amerikanische Handelskammern

DE INTERNATIONAL The German Chamber Network

Timothy Ho
Senior Associate

Hodgson Russ LLP
150 King Street West, Suite 2309
P.O. Box 30
Toronto, ON M5H 1J9 Canada
D +1 (416) 595 2673
T +1 (416) 595 5100
tho@hodgsonruss.com
www.hodgsonruss.com

Structuring a Cross-Border Securities Offering: Common U.S. Exemptions From Registration

Due to the size and scope of the U.S. capital markets, U.S. investors can form a meaningful add-on tranche to both public and private European securities offerings. However, the legal mechanics of structuring a cross-border offering may seem daunting to overseas issuers and their advisors. A European issuer seeking access to the U.S. capital markets faces a largely binary choice between 1) conducting an SEC-registered offering and immediately becoming subject to ongoing and costly reporting requirements under the U.S. Securities Exchange Act of 1934, or 2) using a targeted financing under an established legal exemption from registration.

If option two is the desired outcome, this article provides an outline of basic terminology from the U.S. Securities Act of 1933 (Securities Act) applicable to cross-border offerings.

Regulation S – U.S. securities regulations do not apply to offshore transactions with no nexus to the United States (for example, a transaction that is executed on a foreign securities exchange located outside the United States to a non-U.S. buyer). Where U.S. investors form part of the offering, however, it is helpful to conceptualize a global securities offering as comprising two separate offerings proceeding on parallel tracks on either side of the border. The tranche of securities being placed domestically in Europe (whether on a public or private basis pursuant to local law) or another non-U.S. destination is exempt from U.S. registration provided that the requirements of Regulation S under the Securities Act are met. While there are several components to the analysis, in general, 1) the offer or sale must be made in an offshore transaction, and 2) there must be no directed selling efforts in the United States.

If the conditions of Regulation S are met, the European portion of the offering is deemed to take place outside the United States, and such transaction will not be integrated with a concurrent U.S. offering. Such U.S. offering will commonly be structured under one of the below exemptions.

Private Placement – A private placement under Section 4(a)(2) of the Securities Act generally requires that an offering be made to a limited number of sophisticated investors who are buying for investment and without the use of general solicitation or advertising. All privately placed securities are restricted from further transfer under U.S. securities law, absent registration or another exemption therefrom.

Regulation D – As it is not possible to map the borders of Section 4(a)(2) of the Securities Act with absolute precision, a "safe harbor" is provided by Rule 506 of Regulation D,

Timothy Ho
Senior Associate

Hodgson Russ LLP
150 King Street West, Suite 2309
P.O. Box 30
Toronto, ON M5H 1J9 Canada
D +1 (416) 595 2673
T +1 (416) 595 5100
tho@hodgsonruss.com
www.hodgsonruss.com

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which requires sales be made to investors that fall into certain recognized categories of "accredited investors" (AIs) deemed by statute to possess the requisite resources and sophistication to enter into a Regulation D placement. AI categories include both institutions and certain high-income/high-net-worth individuals. If the offering is to be made with general solicitation or advertising, the issuer faces additional obligations to verify the AI status of its investors. Securities sold pursuant to Regulation D continue to be legended and restricted from further transfer.

Rule 144A – Rule 144A of the Securities Act provides an exemption for the resale of privately-placed restricted securities only to certain Qualified Institutional Buyers (QIBs) that are deemed to be sophisticated investors. QIBs include U.S.-regulated insurance companies, investment companies, certain employee benefit plans, trusts, broker-dealers, and banks that in the aggregate own and invest on a discretionary basis at least US$100 million in securities of issuers that are not affiliated with the QIB. Rule 144A is often used in connection with fully underwritten offerings by an issuer that first privately places its securities to an initial syndicate of investment banks or "initial purchasers," who in turn resell these restricted securities to QIB investors.

Additional Considerations

In addition to the exemptions from federal registration discussed herein, issuers must also abide by state securities laws, known colloquially as "blue sky laws." Additionally, issuers selling securities in the United States must always bear in mind the general anti-fraud provisions of both federal and state securities laws.

Christopher Knipp
Director

McGladrey LLP
1185 Avenue of the Americas
New York, NY 10036
D +1 (212) 372 1852
T +1 (212) 839 9103
chris.knipp@mcgladrey.com

David S. Luzi
International Tax Partner

McGladrey LLP
20 N. Martingale Rd., Suite 500
Schaumburg, IL 60173
T +1 (847) 413 6250
F +1 (847) 517 7067

www.mcgladrey.com

US penalty imposition on international tax compliance – Bleak outlook for sympathy and forgiveness

Lately, the IRS has devoted more attention and resources to international-related tax compliance. There are reasons for this significant attention, e.g. the illicit evasion of those with unreported income and hidden foreign bank accounts, the government's significant revenue gap and the need to gain information about the techniques used by corporate America to reduce its U.S. tax burden Consequently, professionals need to ensure that they are aware of the company's international activities and can obtain the data necessary to comply with the complex tax reporting.

There are many situations that may trigger international tax compliance obligations, e.g.:

- The proper documentation to support payments made to foreign parties without required withholding taxes;
- The conduction of business in a country that participates in a boycott of Israel;
- U.S. employees with signatory authority over foreign bank accounts used in the business;
- Investments into foreign funds that have entered into transactions that require U.S. reporting.

Penalties associated with international tax compliance can be severe. The penalty for failing to file Form 5471, Information Return by U.S. Persons With Respect to Certain Foreign Corporations, is $10,000 per failure (i.e., if a taxpayer misses two Forms 5471, the penalty is $20,000). Historically, the IRS had been reasonable in the assessment of tax penalties in this area. However, beginning in 2008, the IRS instituted a critical shift in policy leading to the initiation of computer-generated penalty notices to corporations that failed to file Form 5471.

In December 2013, a Treasury Inspector General for Tax Administration report (the Report) was issued, which in this respect concluded that the penalties for late-filed forms were properly being assessed, but the controls over the abatement of penalties were insufficient, leading to incorrect abatement in a significant number of cases. Recently, we have seen an increased level of scrutiny and even denials of abatement resulting in additional administrative costs from pursuing appeals and additional penalty costs.

The Report provides comments and suggestions with respect to IRS policy and suggests that the prospect of negotiating penalty abatements in future cases is quite

Christopher Knipp
Director

McGladrey LLP
1185 Avenue of the Americas
New York, NY 10036
D +1 (212) 372 1852
T +1 (212) 839 9103
chris.knipp@mcgladrey.com

David S. Luzi
International Tax Partner

McGladrey LLP
20 N. Martingale Rd., Suite 500
Schaumburg, IL 60173
T +1 (847) 413 6250
F +1 (847) 517 7067

www.mcgladrey.com

US penalty imposition on international tax compliance – Bleak outlook for sympathy and forgiveness

bleak. Although the Report relates only to Form 5471, it likely sheds light on how the IRS will handle failures to comply with other international tax filing obligations.
Some key points include:

Abatement rates declining

- According to the Report, the rate of penalty abatement for the years preceding 2012 ranged from 76 to 78%.
- For the 2012 year, the penalty abatement percentage shrank to 39%.

Scrutiny of IRS abatement procedures

- Penalties were considered incorrectly abated in 40 out of 93 cases. This will clearly put pressure on penalty reviewers to follow abatement procedures.
- The IRS has a formal penalty abatement decision tree model that its personnel must follow to determine whether a reasonable cause exists to abate the penalties. The reasonable cause standard evaluates whether the taxpayer has "exercised ordinary business care and prudence in determining their tax obligations." Some previously acceptable justifications are not supported when the decision tree is utilized (e.g., reliance upon a professional, first-time filing, taxpayer ignorance of the law, unobtainable records and unintentional failure to file an extension).
- A June 26, 2013, procedural update to the Internal Revenue Manual requires managers to review and approve all late-filed Form 5471 penalty abatements.

Future penalty assessment for other international tax compliance

- In 2013, the IRS also implemented systematic penalty assessments for late filings of Forms 5472, Information Return of a 25% Foreign-owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business, for certain forms in the 1120 series.
- With respect to Form 1065, U.S. Partnership Tax Return, the IRS has added a question within the return identifying the number of Forms 5471 attached to the return and will begin the systematic assessment of penalties for late filing of Forms 5471 in 2014.
- With respect to Form 1040, the IRS is pursuing changes to Form 1040, Schedule B that would require identification of the number of Forms 5471 attached to the return.

Christopher Knipp
Director

McGladrey LLP
1185 Avenue of the Americas
New York, NY 10036
D +1 (212) 372 1852
T +1 (212) 839 9103
chris.knipp@mcgladrey.com

David S. Luzi
International Tax Partner

McGladrey LLP
20 N. Martingale Rd., Suite 500
Schaumburg, IL 60173
T +1 (847) 413 6250
F +1 (847) 517 7067

www.mcgladrey.com

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With the increased penalty assessments and the percentage of taxpayers granted abatements trending downward, taxpayers will need to increase their awareness of the potential for international tax penalties and exercise more vigilance in this important reporting area.

FATCA Compliance for Payees

Elisa Fay, CPA
National Partner in Charge of Tax

Rödl Langford de Kock LLP
Certified Public Accountants
Wirtschaftsprüfer, Steuerberater
1100 South Tower
225 Peachtree St., N.E.
Atlanta, GA 30303
T Direct: +1 (404) 586 3594
elisa.fay@roedlUSA.com
www.roedl.com/us

Dr. Will Dendorfer, CPA, StB
Partner

Rödl Langford de Kock LLP
Certified Public Accountants
Wirtschaftsprüfer, Steuerberater
747 Third Avenue, 4th Floor
New York, NY 10017
T Direct: +1 (212) 380 9220
will.dendorfer@roedlUSA.com
www.roedl.com/us

Rödl & Partner

The Foreign Account Tax Compliance Act ("FATCA"), enacted in March 2010, FATCA was designed to detect, deter, and discourage offshore tax evasion. The provisions of FATCA are generally effective July 1, 2014, but with various phased in effective dates. FATCA requires U.S. persons to disclose foreign financial assets with their U.S. tax return while foreign financial institutions ("FFIs") must disclose the identities of U.S. persons holding accounts with the institutions. An FFI includes banks and custodial institution, specified insurance companies, and investment entities. An FFI may also include a holding company or treasury center if it is part of an expanded affiliated group that also includes a bank, custodial institution, specified insurance company or investment entity.

A holding company is defined as an entity whose primary activity consists of holding (directly or indirectly) all or part of the outstanding stock of one or more members of its expanded affiliated group. A partnership or any other non-corporate entity shall be treated as a holding company if substantially all the activities of such partnership (or other entity) consist of holding more than 50% of the voting power and value of the stock of one or more common parent corporation(s) of one or more expanded affiliated group(s). FATCA also requires certain non-financial foreign entities must disclose the identities of their substantial U.S. owners. FATCA imposes 30% withholding on any withholdable payment made to an undocumented account holder/payee or a non-compliant foreign entity even though a treaty may provide a lower rate under the normal U.S. withholding regime.

Many nonfinancial companies mistakenly believe that FATCA only applies to financial institutions. Although much of the registration and reporting burden of FATCA will be felt by FFIs, many nonfinancial companies will also be affected by FATCA depending on whether the entity is a payor, payee or both.

Key Issues for Payees

The key issues payees must consider are as follows:

1) Does my entity need to register with the IRS?

2) How do I avoid withholding?

3) What do I need to report to the IRS?

To comply with FATCA, all foreign entities must perform some due diligence and certify their FATCA status and compliance with FATCA. FFIs must register with the IRS while non-financial foreign entities ("NFFEs") are not required to register. FFIs must also identify their substantial U.S. account holders, obtain and track U.S. account holders'

Elisa Fay, CPA
National Partner in Charge of Tax

Rödl Langford de Kock LLP
Certified Public Accountants
Wirtschaftsprüfer, Steuerberater
1100 South Tower
225 Peachtree St., N.E.
Atlanta, GA 30303
T Direct: +1 (404) 586 3594
elisa.fay@roedlUSA.com
www.roedl.com/us

Dr. Will Dendorfer, CPA, StB
Partner

Rödl Langford de Kock LLP
Certified Public Accountants
Wirtschaftsprüfer, Steuerberater
747 Third Avenue, 4th Floor
New York, NY 10017
T Direct: +1 (212) 380 9220
will.dendorfer@roedlUSA.com
www.roedl.com/us

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FATCA Compliance for Payees

tax information, and report the information to the IRS every year through one of several means. Certain non-financial foreign entities ("NFFEs") must identify and disclose their substantial U.S. owners. Finally, avoiding withholding requires certifying an entity's status as an FFI or NFFE on a withholding form provided to the payor. Therefore, the determination as to whether an entity is an FFI or NFFE is critical to addressing the issues identified above.

What Do You Need To Do Now?

The following is a high level assessment workplan payees should consider undertaking now if they have not already begun:

Payees:

1) Identify all foreign entities (e.g., any entity that receives U.S. payments or that holds an account with a foreign financial institution) and test each expanded affiliated group
2) Classify all entities as FFIs (in-house banks, investment centers, treasury and hedging groups) or NFFEs (excepted, passive, entities foregoing exceptions that will disclose ownership)
3) Document classification rationale
4) Determine registration requirements for each entity
5) Identify and understand documentation to be provided to avoid withholding (i.e. W-8BEN-E)

The New W-8BEN-E

One issue that is pervasive for all payees receiving U.S. source payments is the requirement to provide Form W-8BEN-E to certify their status as beneficial owners or payees of a payment for withholding tax purposes, and to also certify their status under FATCA. As a practical matter, most non-financial companies simply want to know which box they should check on Form W-8BEN-E to indicate their FATCA status. While in a simple legal structure this may a relatively straightforward analysis, some version of the assessment identified above will be required nevertheless.

The new W-8BEN-E is required for payments arising from obligations incurred after December 31, 2014. The W-8BEN-E is valid for 3 years unless changes occur. Any W-8BEN on file as of December 31, 2014 for obligations existing as of that date should be until December 31, 2016.

It should be noted that the provision of a W-8BEN-E will generally require the

Elisa Fay, CPA
National Partner in Charge of Tax

Rödl Langford de Kock LLP
Certified Public Accountants
Wirtschaftsprüfer, Steuerberater
1100 South Tower
225 Peachtree St., N.E.
Atlanta, GA 30303
T Direct: +1 (404) 586 3594
elisa.fay@roedlUSA.com
www.roedl.com/us

Dr. Will Dendorfer, CPA, StB
Partner

Rödl Langford de Kock LLP
Certified Public Accountants
Wirtschaftsprüfer, Steuerberater
747 Third Avenue, 4th Floor
New York, NY 10017
T Direct: +1 (212) 380 9220
will.dendorfer@roedlUSA.com
www.roedl.com/us

Rödl & Partner

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company to obtain a U.S. identification number. In addition, depending on the activities of the company in the U.S, a U.S. income tax return is often required. At a minimum, a protective return should be filed in the U.S. when there is no permanent establishment in order to avoid penalties and preserve deductions.

Maureen R. Monaghan
Senior Counsel

Wuersch & Gering LLP
100 Wall Street, 10th Floor
New York, NY 10005
D +1 (212) 509 6312
T +1 (212) 509 5050
F +1 (212) 509 9559
maureen.monaghan@wg-law.com
www.wg-law.com

WUERSCH & GERING LLP

International Social Security Agreements: Protecting Benefits of Employees on International Assignment

Individuals who have careers in two or more countries are often concerned about paying social security taxes into two different systems and potentially losing benefits. Although many foreign countries provide coverage exemptions for nonresident aliens or for employees who have seen sent to work within their borders for short periods, the United States does not. Federal law provides compulsory Social Security coverage for services performed in the United States as an employee, regardless of the citizenship or country of residence of the employee or employer, and irrespective of the length of time the employee stays in the United States. Thus, most foreign workers in the United States are covered under the U.S. program.

To eliminate the need to pay social security taxes in two countries and protect the worker's eligibility for benefits in both systems, the United States has entered into international social security agreements, called "totalization agreements," with 24 countries, including Germany. All U.S. totalization agreements apply a basic "territoriality" rule pursuant to which an employee who would otherwise be covered by both the U.S. and a foreign system remains subject exclusively to the coverage laws of the country in which he or she is working.

However, the agreement with each country (except Italy) includes an exception to the territoriality rule for workers on temporary assignment. Under this "detached-worker" exception, a person who is temporarily transferred to work for the same employer in another country remains covered only by the country from which he or she has been sent. The detached-worker rule in U.S. totalization agreements generally applies to employees whose assignments in the host country are expected to last five years or less. Thus, a German citizen or resident who is temporarily transferred by a German employer to work in the United States continues to be covered by the German social security system and is exempt from U.S. Social Security.

Workers who are exempt from U.S. or foreign social security taxes under an agreement must document their exemption by obtaining a certificate of coverage from the country that will continue to cover them. For example, a German worker sent on temporary assignment to the U.S. would need a certificate of coverage issued by the German authorities to provide his or her exemption from U.S. Social Security tax. Employers generally are required to request such certificates on behalf of employees they have transferred abroad. If a home country agency will not issue a certificate of coverage, then a statement must be obtained from the U.S. social security administration

Maureen R. Monaghan
Senior Counsel

Wuersch & Gering LLP
100 Wall Street, 10th Floor
New York, NY 10005
D +1 (212) 509 6312
T +1 (212) 509 5050
F +1 (212) 509 9559
maureen.monaghan@wg-law.com
www.wg-law.com

WUERSCH & GERING LLP

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indicating the individual is not subject to U.S. social security taxes under the particular totalization agreement (pursuant to IRS Rev. Proc. 84-54). The certificate, once received, is given to the host country employer so social taxes are not withheld in the host location. In the United States, the certificate remains on file with the employer. It is not sent to the IRS.

Each U.S. totalization agreement includes a provision that permits the authorities in both countries to grant exceptions to the normal rules if both sides agree. An exception might be granted, for example, if the overseas assignment of a German citizen were unexpectedly extended for a few months beyond the five-year limit under the detached-worker rule. In this case, the worker could be granted continued German coverage for the additional period. However, the exception provision is invoked fairly infrequently and should not be relied on to regularly deviate from the rules.

Totalization agreements also assure adequate continuity of social security protection for individuals who have acquired credits under the system of the United States and of another country, but have not met the basic requirements to obtain regular benefits under either system. A totalization agreement may allow those workers to qualify for partial U.S. or foreign benefits based on combined, or “totalized,” coverage credits from both countries. For example, under the U.S. totalization agreement with Germany, social security credits from both countries can be counted to meet the eligibility requirements for German benefits if the individual has at least 18 months of coverage credited under the German system. In order to have German credits counted under the U.S. system, an individual must have earned at least six credits (generally 18 months of work) under the U.S. system. If the combined credits in the two countries enable the worker to meet the eligibility requirements, a partial benefit can then be paid, which is based on the proportion of the worker’s total career completed in the paying country.

Andreas Maywald
Client Service Executive

Deloitte Tax LLP
1633 Broadway
New York, NY 10019
T +1 (212) 436 7487
F +1 (212) 655 6989
C +1 (347) 819 3278
anmaywald@deloitte.com
www.deloitte.com

Deloitte.

"Tax Haven" Proposals in Kentucky, Maine, Massachusetts and New Hampshire

Legislatures in Kentucky, Maine, Massachusetts, and New Hampshire are currently considering "tax haven" proposals. In an effort to combat the state impact of perceived international income shifting, these proposed laws would generally require an otherwise water's-edge filing group to include the income and apportionment factors of certain related corporations incorporated or doing business in a purported "tax haven" foreign jurisdiction. Alaska, Montana, Oregon, Rhode Island, West Virginia, and the District of Columbia have already enacted versions of these laws.

The states have generally adopted two different approaches for defining "tax haven" jurisdictions: (1) identifying by name specific nations considered to be "tax havens" ("'Blacklist Approach"); or (2) designating a nation as a "tax haven" based on certain criteria ("Subjective Approach"). Regardless of approach, these provisions have provided state tax agencies with discretion to determine which jurisdictions are "tax havens."

Blacklist approach: Montana and Oregon have incorporated into their tax haven laws a "blacklist" of nations. Montana, for example, requires that a return under a water's-edge election must include the income and apportionment factors of a unitary member that is incorporated in a listed "tax haven." Each state following this approach also requires that its Department of Revenue reevaluate the "blacklist" every two years and report to the respective legislature any recommended additions or subtractions to the list.

Subjective approach: Tax haven laws in Alaska, Rhode Island, West Virginia, and the District of Columbia designate nations as "tax havens" based on certain criteria. These states generally require the inclusion of income and apportionment factors of any member that is doing business or incorporated in a "tax haven." Rhode Island, West Virginia, and the District of Columbia consider a member to be doing business or incorporated in a "tax haven" if the jurisdiction meets certain statutory criteria, based on the Multistate Tax Commission model combined reporting statute ("MTC model"). Under the MTC model, a "tax haven" is defined as a jurisdiction that has no or a nominal effective tax rate on the relevant income and:

- has laws or practices that prevent effective exchange of information for tax purposes with other governments on taxpayers benefiting from the tax regime;
- has a tax regime that lacks transparency;
- facilitates the establishment of foreign-owned entities without the need for a local substantive presence or prohibits these entities from having any commercial impact on the local economy;

Andreas Maywald
Client Service Executive

Deloitte Tax LLP
1633 Broadway
New York, NY 10019
T +1 (212) 436 7487
F +1 (212) 655 6989
C +1 (347) 819 3278
anmaywald@deloitte.com
www.deloitte.com

Deloitte.

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- explicitly or implicitly excludes the jurisdiction's resident taxpayers from taking advantage of the tax regime's benefits or prohibits enterprises that benefit from the regime from operating in the jurisdiction's domestic market; or
- has created a tax regime that is favorable for tax avoidance, based upon an overall assessment of relevant factors, including whether the jurisdiction has a significant untaxed offshore financial/other-services sector relative to its overall economy

In addition to these criteria, West Virginia includes nations identified by the Organization for Economic Cooperation and Development (OECD) as "tax havens" or as having a harmful preferential tax regime. Alaska applies its own definition.

Recently, tax haven legislation has been proposed in Kentucky, Maine, Massachusetts, and New Hampshire. Similar to current laws in Montana and Oregon, the proposals would incorporate a "blacklist" approach. However, the state proposals differ in regard to the list of nations identified as "tax havens." Montana's and Oregon's legislatures are also considering proposed legislation that would amend their current statutory list of "tax haven" nations.

Montana's and Oregon's legislatures are also considering proposed legislation that would amend their current statutory list of "tax haven" nations. The proposals in both states would add Guatemala, Hong Kong, the Netherlands, Switzerland, and Trinidad and Tobago and would remove Monaco and the Netherland Antilles. Montana's proposed legislation would also add Ireland to the statutory list of identified "tax havens."

Taxpayers with current international operations and those considering international expansion should monitor the status of the above-referenced legislative proposals and others that may arise, as these proposals could potentially impact the tax base and apportionment factors of a water's-edge filing group.

Sidney N. Weiss
Attorney at Law

Sidney N. Weiss
675 Third Avenue
New York, NY 10017
C +1 (914) 262 2346
T +1 (212) 986 5309
F +1 (212) 986 5629
snw@weisslaw.net
www.weisslaw.net

SIDNEY N. WEISS
ATTORNEY AT LAW

Dispute Resolution Considerations in International Agreements.

Business people are interested in doing business and getting the deal done. In negotiating agreements, they and their attorneys, pay special attention to price, risk of loss, transfer of ownership, scheduling, defaults, breaches, and specifications. Often, these terms are so important that they are relegated to schedules or appendices attached to the written agreements, leaving the body of the agreement to definitions and boilerplate.

But boilerplate should never be ignored, and this is especially true for clauses in the agreement which concern dispute resolution, and the location and applicable law to be applied in such a resolution. These concerns are especially important in international transactions where the parties are dealing not only with different states, but with different legal systems. Here are some of the factors every business person should consider.

1. Litigation vs. Arbitration.

Every party should weigh the benefits and advantages of arbitration and litigation and decide what it considers the best choice in its circumstances. Corporate lawyers tend to prefer arbitration, believing that the process is cheaper, and less complicated. But that is no longer necessarily true. The arbitration and litigation processes have tended to merge, with heavy document discovery an important part of each process.

In addition, cost which formerly gave arbitration an advantage, now benefits litigation, primarily because parties must pay enormous fees to the arbitrators and forums, often in the tens of thousands of dollars; while litigating a case in court is usually free or at very little cost (judges are not paid by the parties). Arbitration awards are secret while litigation decisions are public. Arbitrations are essentially non-appealable, but litigations are appealable to one higher level by right, and perhaps to higher levels by court discretion.

Paradoxically, arbitration awards are easier to enforce in foreign courts than are court judgments. Finally, court judgments, especially when juries are involved, tend to punish the bad guys and award large verdicts. If you tend to be a good guy and feel that the other side is more likely to cause a breach than you, litigation in a common law jurisdiction with a jury is the choice for you. But each party in each negotiation must weigh the costs and benefits for itself.

2. Choice of Forum and Choice of Governing Law.

The stronger party usually dictates the content of these clauses, and no modifications may be obtainable. Here again, each decision must be weighed based on the considerations involved in each transaction. For example, preferably, you want to have

Sidney N. Weiss
Attorney at Law

Sidney N. Weiss
675 Third Avenue
New York, NY 10017
C +1 (914) 262 2346
T +1 (212) 986 5309
F +1 (212) 986 5629
snw@weisslaw.net
www.weisslaw.net

SIDNEY N. WEISS
ATTORNEY AT LAW

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the forum in your jurisdiction. If you are German, you don't want to go to Peru to sue your Peruvian customer. But on the other hand, if you win a judgment in German courts think about how difficult it will be to get the money if the judgment must be enforced elsewhere. Placing jurisdiction in one party's forum always makes it more difficult for the foreign party. Think of the enormous expense involved in having to try a case in a foreign jurisdiction where you are reliant upon foreign lawyers, whose laws you are not familiar with. And, agreeing to try a case in Delaware is disastrous for everyone. The travel costs and time needed to get to a remote location are a burden for everyone.

The location of the dispute resolution does not determine the law to be applied. Always try to designate your local law. Based on your business experience, this will give you the advantage of having a good idea of how the law applies to your situation. Failing the application of your own law, apply New York law, which has the advantage of being well-known, predictable, and business-friendly.

Sidney N. Weiss is an international trade lawyer and commercial litigator in New York, and a long-time member of the GACC. He represents domestic and foreign companies before federal agencies, and the courts on international trade, corporate, and commercial matters.

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German American Chamber of Commerce, Inc.

Susanne Gellert, LL.M.
Rechtsanwältin | Attorney at Law
Director Legal Department & Business Development Consulting

80 Pine Street, Floor 24 | New York, NY 10005
T +1 (212) 974-8846 | **F** +1 (212) 974-8867
E legalservices@gaccny.com

www.gaccny.com