



## June 2009 German–American Business Council Newsletter

Dear GABC Members and Friends,

It has been a busy season for us and we are fortunate to be welcoming many new members. We appreciate your input and interest in many of the programs and events we offered. We are also glad that many of you are now connected to our IntraNet utilizing the many opportunities it offers such as getting detailed information about programs, careers and being able to communicate directly with fellow members.

This edition of the Newsletter will be addressing a variety of legal issues including taxes and visas as we move into the summer. We hope that the information will be useful to you.

Speaking of summer, I hope to see you at our next social event, the annual Sommerfest in June where we look forward to meeting your spouses and family members. Please check your e–mail or the GABC website for detailed information.

If I don't have the chance to tell you personally, have a great summer and we'll see you in the fall!



Sincerely,

Brigitte Carangelo

President

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### Upcoming Events

June 21, 2009  
3PM – 6PM  
Sommerfest – Annual summer picnic outing for members, their guests, and families with German food and beer. Kids welcome. This will be the last GABC event until after the summer hiatus. For more details, go to: [www.gabc-boston.org/events](http://www.gabc-boston.org/events)

July-August 2009  
Summer Vacation – The GABC will be on summer hiatus for the months of July and August, since most of our members go on vacation during this time. There will be no monthly GABC event for those months, although you can still contact us for information and assistance any time. We will resume our regularly monthly event schedule in September 2009 with our annual Member/Sponsor Open House (date TBA). See you then!

As usual, the GABC will

## Effects Of U.S. National Security Regulations on Minority Investments by Non-U.S. Investors



[David Cifrino, P.C.](#)  
[Partner](#)  
[McDermott, Will & Emery LLP](#)

McDermott  
Will & Emery

Recently enacted regulations issued by the U.S. Department of Treasury on behalf of the Committee on Foreign Investment in the United States (CFIUS) affect a wide variety of minority investments by non-U.S. investors, including joint ventures.

In addition to these new rules, which became effective in December 2008, the Treasury Department also released guidance on the various transactions that CFIUS has reviewed, and identified factors used in determining whether such transactions presented national security concerns. Taken together, the new rules and guidance provide a practical roadmap on addressing the requirements of the Exon-Florio amendment to the Defense Production Act of 1950, as amended by the Foreign Investment and National Security Act of 2007 (FINSIA), most importantly in non-takeover minority investments where an unsuspecting investor may unintentionally enter into a transaction subject to review and potential suspension by CFIUS. Under Exon-Florio, only transactions that could result in the control of a U.S. business by a non-U.S. person are deemed "covered transactions" and subject to CFIUS review.

The rules clarify that a non-U.S. person may be deemed to control a joint venture which includes a U.S. business by virtue of the contractual rights of the non-U.S. person in the joint venture, and that CFIUS will analyze the factors that determine control as they would in connection with a takeover or merger. The new regulations further clarify that control means "the power, direct or indirect, whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal or informal arrangements to act in concert, or other means, to determine, direct, or decide important matters affecting an entity..."

Emphasizing that all relevant facts and circumstances are taken into account and that no single factor is determinative of control, the rules provide an expanded list of examples of "important matters" that affect an entity. Negative controls or "veto rights" over these matters, many common rights granted an investor or joint venture partner, are deemed to indicate a level of control. These include the right to control the following:

- The sale, lease, mortgage, pledge or other transfer of any of the principal assets of the entity, whether or not in the ordinary course of business
- The reorganization, merger or dissolution of the entity  
The closing, relocation or substantial alteration of the production, operational, or research and development facilities of the entity

send invitations to each event via e-mail. Should you ever have any questions, please contact our Executive Director, Marian LeMay at [info@gabc-boston.org](mailto:info@gabc-boston.org).

Registration for all events is available on-line at [www.gabc-boston.org](http://www.gabc-boston.org)

For a complete listing, go to: [our calendar](#)

### Member Profile



[Detlef](#)  
[Gericke-Schoenhagen](#)  
[Director](#)  
[Goethe-Institut](#)

What's your connection with German-American business?

*The Goethe-Institut has a long-standing cooperation with the GABC; we are often hosting GABC-programs in our building on 170 Beacon Street.*

*A GABC event about the European view on the American election campaign in October 08 was the very first discussion program which I have visited in Boston, and it was excellent!*

What keeps you busy when you're not working?

*My family, my children, my friends.*

What are you looking forward to seeing the GABC do in the future?

*I would like to have programs about different forms of leadership. I am interested in how people in leading positions manage, behave and interact in different cultural frames and backgrounds, and also how interaction in companies and institutions changes when people in leading positions*

- Major expenditures or investments, issuances of equity or debt, or dividend payments by the entity, or approval of its operating budget
- The selection of new business lines or ventures  
The entry into, termination or non-fulfillment of significant contracts
- The policies or procedures governing the treatment of non-public technical, financial or other proprietary information
- The appointment or dismissal of officers or senior managers or employees with access to sensitive technology or classified U.S. government information
- The amendment of charter documents of the entity with respect to the foregoing items

However, not all minority investor protections or veto rights rise to the level of control under the new rules. Certain rights that do not affect the strategic direction of the U.S. business or its day-to-day management are not deemed to provide the recipient of these rights with control over the U.S. business. These non-control protections include the power to:

- Prevent the sale or pledge of all or substantially all of the assets of an entity or a voluntary filing for bankruptcy or liquidation
- Power to prevent an entity from entering into contracts with majority investors or their affiliates
- Prevent an entity from guaranteeing the obligations of majority investors or their affiliates
- Purchase an additional interest in an entity to prevent the dilution of an investor's pro rata interest in that entity in the event that the entity issues additional instruments conveying interests in the entity
- Prevent the change of existing legal rights or preferences of the particular class of stock held by minority investors, as provided in the relevant corporate documents governing such shares
- Prevent the amendment of the charter documents of an entity with respect to the foregoing matters

Even a transaction in which the non-U.S. person acquires less than 10 percent of the voting interests of a U.S. business may be a covered transaction subject to CFIUS review. A "safe harbor" exists only for transactions in which the non-U.S. person acquires 10 percent or less of the outstanding voting interest in a U.S. business and the transaction is solely for the purpose of passive investment. The rules expand the meaning of "solely for the purpose of passive investment" by providing that "[o]wnership interests are held or acquired *solely for the purpose of passive investment* if the person holding or acquiring such interests does not plan or intend to exercise control, does not possess or develop any purpose other than passive investment, and does not take any action inconsistent with holding or acquiring such interests solely for the purpose of passive investment."

Finally, the rules clarify that although representation on the board of directors of a U.S. business is a factor that may indicate control, absent the non-U.S. investor obtaining other veto rights over important matters affecting the U.S. business, such board representation alone will not constitute control, even if such investor acquires more than 10 percent of the voting interests of the U.S. business.

Non-U.S. persons or entities seeking to make investments or acquisitions in the United States, and companies in the United States seeking non-U.S. capital or non-U.S. buyers must consider the implications of the structure and the nature of the party opposite them

*bring their international and global experiences into the business.*

**What do you like about the GABC?**

*I like that its members who are in leading positions in their companies and institutions have found a place in common. Experiences can be exchanged and different approaches not only add to each other, but they can multiply each other. This is what is called networking!*

## Board Profile



**Christa Bleyleben**  
**MassGlobalPartners**

**What's your connection with German-American business?**

*Throughout my career I have worked with companies and organizations around the world, including of course Germany. I am currently in discussions with several Universities and regional organizations in Germany about collaborations with New England in the science and technology field.*

**What keeps you busy when you're not working?**

*My family, entertaining friends, traveling, cultural activities, skiing in the winter and hopefully tennis and beach this summer.*

**What are you looking forward to seeing the GABC do in the future?**

*Continue to offer networking events, interesting and relevant programs and expand the cooperation with other international business and industry councils.*

**What do you like about the GABC?**

*A great forum to network with*

early on in the proposed transaction in order to make a determination as to whether a voluntary notice filing should be made. The new rules encourage parties to engage in pre-filing consultations in advance of filing the formal notice. Under the rules, CFIUS review of covered transactions must be completed within 30 days, except that CFIUS must conduct an additional investigation, which must be completed within 45 days, where the transaction threatens to impair U.S. national security, where the transaction involves a non-U.S. government controlled entity or non-U.S. control over critical infrastructure, or where CFIUS recommends further investigations.

\* \* \* \* \*

For more information on this topic, contact any of the following partners at McDermott Will & Emery LLP:

David Cifrino at [dcifrino@mwe.com](mailto:dcifrino@mwe.com) or 617-535-4034 ;  
Meir Lewittes at [mlewittes@mwe.com](mailto:mlewittes@mwe.com) or 212-547-5351 ; or  
Tom Sauermilch at [tsauermilch@mwe.com](mailto:tsauermilch@mwe.com) or 212- 547-5532 .

## Tips for Protecting Yourself from the Financial Distress of Your Customers



Kevin J. Walsh  
Member, Bankruptcy and Restructuring

Mintz Levin



Given the current financial and economic crisis, it is important now, more than ever, for companies to safe-guard against potential problems in their revenue streams. On April 16, 2009, Kevin Walsh of Mintz Levin discussed several tips that any company can take advantage of when doing business with customers that may be experiencing financial distress.

Often a company's most frequent contact with a customer is through invoices. Make this document work for you. Include in your invoice the grant of a security interest by the customer in any goods you deliver (make sure to perfect this interest and provide any applicable notice to existing lenders). Specifically require the customer to pay late fees and costs of collection. Make sure your business form sets the terms of the agreement between you and your customer by requiring both parties to sign a single sales confirmation.

Once you have your contract in place, be sure to take advantage of your right of stoppage for good shipped but not yet received by an insolvent buyer and your right of reclamation for goods shipped and already received by an insolvent buyer. These protections are time sensitive and require very specific steps; be sure to contact experienced counsel for assistance.

If your customer becomes a debtor in bankruptcy and you received payments from the customer during the ninety-day period prior to the bankruptcy filing, you may face a preference claim from the debtor. This law suit seeks repayment to the debtor of these monies. Experienced counsel can assist you with assembling your defenses; however, there are some things you can do now to put

*other internationally interested professionals, especially those linked to Germany, Austria and Europe in general. I also greatly value the multitude of informative programs and the close cooperation with other international business councils.*

## Recent GABC Events

May 20, 2009  
European Food Festival:  
Our members and colleagues from our sister French and British groups enjoyed a sampling of food, wine and beer from Germany, France and Great Britain. International colleagues and friends mixed, mingled and had fun and lively conversations at the French Library and Cultural Center in the Back Bay on a breezy evening.

##

April 16, 2009  
Business Challenges and Legal Issues in a Down Economy-A Discussion of Legal Issues that come to the forefront when an economy is in crisis. Held at the law firm of Mintz Levin, One Financial Center, Boston.

Don Schroeder of the Employment, Labor and Benefits Section of Mintz Levin spoke on "How to Avoid Liability When Laying Off Personnel".

Kevin Walsh, an attorney in Mintz Levin's Bankruptcy, Restructuring and Commercial Law Section addressed the ways to "Protect Yourself from the Financial Distress of Your Customers".

##

March 10, 2009  
Biotech Update: US-European Trends in Biotechnology – We had a

yourself in the best position for dealing with a preference claim. If you suspect your customer is in financial extremis, require cash on delivery or cash in advance for new orders. If practicable, obtain a guaranty from an owner so that you have another source of payment. Avoid taking post-dated checks for payment. Such checks are not considered payment at the time received and could jeopardize a very common preference defense. Finally, try to be consistent with credit and collection policies and apply payments to invoices in a manner that is consistent with the historically pattern between you and your customer.

The Presentation also explored issues surrounding intellectual property licenses when your licensor or licensee files for bankruptcy. Section 365 of the Bankruptcy Code provides enhanced rights for intellectual property licenses under certain circumstances.

If your licensor files for bankruptcy, you should demand in writing that it continue to perform under the license until such time as the agreement is assumed or rejected. Once you make this demand, the debtor must either continue to perform or turn over the intellectual property (in the form in existence as of the bankruptcy filing) to you. If the debtor decides to assume the license (i.e., honor the agreement), it must cure past defaults and provide assurances that it can perform in the future. If the debtor rejects the license agreement, you have options. You may permit the rejection and receive an unsecured claim in the bankruptcy case. Alternatively, you may retain the rights to the intellectual property, including any exclusivity rights, for the initial term of the agreement and any extensions thereof. If you choose to retain rights, the debtor will have no ongoing support obligations, and you must continue to make all royalty payments and are deemed to have waived certain claims against the debtor.

To best protect yourself as licensee, broadly define the "intellectual property" in the license agreement and specify that the license is intended to be covered by section 365(n) of the Bankruptcy Code. Clearly and narrowly define "royalty" payments and separately define other fees to minimize the payments required if you decide to retain license rights in the face of a rejection of the agreement. Include automatic rights to improvements made to the intellectual property so that you have the state of the art version at the time of the bankruptcy filing.

If your licensee files for bankruptcy, you cannot unilaterally terminate the license on account of the bankruptcy filing, notwithstanding that the agreement, on its face, may permit such termination. Bankruptcy law will not permit it.

To retain maximum control over your intellectual property, characterize the license as non-exclusive to prevent assignment without your consent. In fact, it is a good idea to require your written consent to any assignment of the license. Limit the possibility of assignment to competitor or unrelated third party by clearly describing the scope of the license, including benchmarks regarding skill and resource requirements of any assignor and defining acceptable conditions for a new licensee. These standards will be considered in bankruptcy and be persuasive to the judge who will determine the appropriateness of any assignment.

For further information or questions, please feel free to contact:

full house the night Bob Coughlin, President of the Mass Biotech Council held a talk on Trends in US-European Biotechnology at the Goethe-Institut. Guests had a chance to mingle and network, and learn which resources are available in the state of Massachusetts for Biotech efforts.



Pictured: Bob Coughlin, GABC Executive Director Marian LeMay, and GABC Vice President, Warwick Davies

###

Kevin J. Walsh  
617-348-1622  
[kwash@mintz.com](mailto:kwash@mintz.com)

## Meet Our New Members

Mr. Philip Legan — HR Manager —  
TÜV Süd America  
Mr. Paul J. Wierl — Product Manager —  
TÜV Süd America  
Mr. Matthias Hesse — Scientific Consultant —  
Vertex Pharmaceuticals Inc.  
Mr. Ian Wilcken —  
Interfreight Corporation  
Mr. Jamieson Brookes — Owner —  
J. Brookes Wood Products  
Ms. Anne Ehringhaus — Owner —  
Ehringhaus ConsultingCoachingTraining  
Ms. Coleby Mantz — Founder —  
Jetty Marketing  
Mr. Robert Gokey — Co-owner —  
Karls Sausage Kitchen & European Market  
Mrs. Anita Gokey — Co-owner —  
Karls Sausage Kitchen & European Market

For Membership information, go to: [GABC Membership](#)

## Special Thanks to our Sponsors



## Sponsor Spotlight-Bruker Corporation



Bruker was founded in Karlsruhe, Germany in 1960 and since then it has been driven by a single idea; to provide the best-in-class scientific instrumentation. Today, Bruker Corporation (Nasdaq: BRKR), headquartered in Billerica, Massachusetts, employs over 4,000 people around the globe, generates over \$1.1 Billion in annual revenues. Bruker is a leading provider for high-end laboratory research and process analytical instruments that covers a broad spectrum of applications, based on Molecular and X-ray Spectroscopy, and Mass Spectrometry. Visit [www.bruker.com](http://www.bruker.com) to discover our technology portfolio and our solutions.

## Sponsor Spotlight-Dräger Technology for Life®



Founded in 1889 and headquartered in Lübeck, Germany Drägerwerk AG & Co. KGaA is an international leader in the fields of medical and safety technology. Dräger products protect, support and save lives. In 2007 Dräger generated revenues of around EUR 1.8 billion. The Dräger Group is currently present in more than 190 countries and has about 10,000 employees worldwide. Please visit [www.draeger.com](http://www.draeger.com) for more information.

### About the GABC



German-American Business Council of Boston, Inc. (GABC), [www.gabc-boston.org](http://www.gabc-boston.org), is a non-profit organization of companies, business people, and other professionals dedicated to encouraging and cultivating German-American business and trade. Through its speaker series, seminars, and special events the GABC provides a forum for the exchange of knowledge and ideas, and for business and professional contacts between its members.

Interested professional are invited apply for membership via our website. Our members represent all facets of the international business community including import an export managers, manufacturers, trade specialists, bankers, financiers, insurance agents, government officials, attorneys, consultants, educators and entrepreneurs.

The German-American Business Council is a member of GBANE, the Global Business Alliance of New England.

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