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美国翰宇国际律师事务所
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Looking Ahead to the Year of the Rabbit

With the Chinese New Year upon us, Squire Sanders would like to take this opportunity to wish you the very best in 2011, the Year of the Rabbit. In the Chinese zodiac, the rabbit is sensitive, thorough, cautious, attentive and flexible. How do these traits correspond to your expectations and plans for the coming year? We look forward to hearing what you experience in the Year of the Rabbit.

Flexibility and attentiveness are at the center of our vision for the New Year. In a move that will help ensure we can serve our clients' needs wherever their business takes them, we recently completed our combination with leading UK legal practice Hammonds LLP, launching a cost-effective global legal practice of approximately 1,275 lawyers working in 37 offices throughout the world. The combination means greater legal resources for China-based organizations pursuing opportunities in Europe and the Americas. In fact, Squire Sanders now ranks among the top 25 legal practices based on *The American Lawyer*'s "2010 Global 100" and among the 15 largest US-based legal practices based on *The National Law Journal*'s "NLJ 250."

To find out more about the combination, including our expanded expertise and geographic coverage, please contact your principal Squire Sanders lawyer or any of the lawyers listed in this edition of *China Outbound*.

UNITED STATES

FTC Proposes Changes to Its Green Guides for Environmental Marketing Claims

The Federal Trade Commission (FTC) recently published proposed revisions to its Guides for the Use of Environmental Marketing Claims (Green Guides) at 16 CFR Part 260. The Green Guides provide direction to marketers to avoid making environmental claims the FTC would consider to constitute unfair or deceptive advertising under Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Public comments on the proposed revisions and on specific questions raised by the FTC were due by 10 December 2010.[1]

The proposed revisions are the result of the FTC's efforts to keep pace with evolving claims and come after considerable public outreach about the effectiveness of the current Green Guides. The Green Guides originally were published in 1992, and revised in 1998, to provide marketers with guidance for making environmental claims in advertising, promotional materials and all other forms of marketing. Although the Green Guides are not themselves enforceable regulations, they are instructive on

[1] The proposed revisions to the Green Guides are available on the FTC website.

how the FTC views environmental claims in applying Section 5 of the Act, which requires marketing claims in general to be truthful and nondeceptive, and to be substantiated by competent and reliable evidence.

The current version of the Green Guides addresses general environmental benefit claims, such as that products are "green" or "eco-friendly," as well as the use of such specific terms as "biodegradable," "recyclable" and "compostable." The proposed revisions would update the guidance with respect to these terms and would add new guidance concerning the use of product certifications, seals of approval and claims relating to "renewable materials," "renewable energy" and "carbon offsets."

The proposed revisions strengthen or add specifically in the following areas:

- **General Environmental Benefit –** The current Green Guides state that marketers can make unqualified general environmental benefit claims (such as that a product is "green" or "eco-friendly") if all such express and implied claims can be substantiated. The proposed revisions to the Green Guides advise marketers not to make these claims without clear and prominent qualifications (e.g., "green – made from recycled materials") because unqualified claims imply very broad benefits that are difficult, if not impossible, to substantiate.
- **Certifications and Seals of Approval –** The current Green Guides address the use of certifications and seals of approval only briefly. The proposed revisions emphasize that these claims are covered by the FTC's separate guidance covering endorsements, which requires such measures as disclosure of any material connections to the certifier. The proposed revisions to the Green Guides also caution that the use of an unqualified certification or seal likely would constitute a general environmental benefit claim, which, as discussed above, would be very difficult to substantiate.
- **Degradable –** The current Green Guides state that a marketer should qualify a "degradable" claim unless it can substantiate that the entire product or package would degrade within a "reasonably short period of time." The proposed revisions specify that a "reasonably short period of time" means no more than one year. Also, because items destined for landfills, incinerators or recycling facilities normally will not decompose within a year, unqualified degradable claims for such items would be deemed deceptive.
- **Compostable –** The current Green Guides advise that a claim that a product is "compostable" must be substantiated by evidence it will be composted "in a

safe and timely manner." The proposed revisions to the Green Guides clarify that the time period must be approximately the same as for the materials with which the product is composted (e.g., natural plant matter).

- **Recyclable –** The Green Guides' proposed revisions would highlight and formalize the three-tiered analysis in the examples to the current guides describing what claims may be made regarding the availability of recycling programs: (1) if a "substantial majority" (proposed to be at least 60 percent) of consumers have access to recycling facilities, an unqualified recyclable claim can be made; (2) if a "significant percentage" (no specific percentage proposed) of consumers have access, a qualified claim can be made (e.g., "package may not be recyclable in your area"); and (3) if less than a "significant percentage" of consumers have access, a stronger qualification is required (e.g., "recycling programs for this product are available only in XX percent of communities").
- **Free of/Nontoxic –** The current guides do not specifically address these claims. The proposed revisions to the Green Guides state that claims that an item is "free of" a substance may be deceptive if (1) the item contains other substances posing a similar environmental risk, or (2) the substance has never been associated with the product category. The proposed revisions to the Green Guides also clarify that a "free of" claim may be made in some instances when a product contains a *de minimus* amount of a substance. Regarding "nontoxic" claims, the Green Guides' proposed revisions note that consumers are likely to interpret the claim as meaning a product is nontoxic to the environment as well as to consumers.
- **Made With Renewable Materials –** The current guides do not address this claim. The proposed revisions to the Green Guides caution that marketers should qualify claims with specific information about the renewable material and also should qualify claims if the item was not made entirely with renewable materials.
- **Made With Renewable Energy –** The proposed revisions to the Green Guides caution that marketers should not make unqualified claims with regard to renewable energy if the power used to manufacture any component of a product was derived from fossil fuel. The source of renewable energy also should be specified in any claim, and marketers that generate renewable energy but sell their renewable energy credits (RECs) for all of the energy they generate should not represent that they use renewable energy.

- **Carbon Offsets –** The Green Guides' proposed revisions require competent and reliable scientific evidence to support carbon offset claims, including the use of appropriate accounting methods. The proposed revisions to the guides also caution that marketers should disclose if the funded emissions reduction will not occur for two years or longer, and also should not advertise a carbon offset if the emissions reduction already is required by law.

The FTC has increased its enforcement activity based on the current Green Guides in recent years, with several prominent cases brought since 2009. This level of enforcement can be expected to continue. As a result, it is important that companies making environmental marketing claims carefully review the proposed revisions.

Please feel free to contact your regular Squire Sanders contact for further information about the FTC's Green Guides.

FTC Advises US EPA to Protect Sensitive Business Information

The FTC has submitted a comment to US EPA regarding the agency's proposed rule concerning the confidentiality of data submitted by businesses under US EPA's Greenhouse Gas Reporting Rule. The FTC advised US EPA that publication of certain competitively sensitive data could harm competition and raise antitrust concerns.

On 7 July 2010 US EPA published a proposed rule outlining the confidentiality status of data required to be reported under its Mandatory Greenhouse Gas Reporting Rule at 40 CFR Part 98. See Proposed Confidentiality Determinations for Data Required Under the Mandatory Greenhouse Gas Reporting Rule and Proposed Amendment to Special Rules Governing Certain Information Obtained Under the Clean Air Act, 75 Fed. Reg. 39094 (7 July 2010). The proposed rule describes the categories that US EPA has developed for the Mandatory Greenhouse Gas Reporting Rule for the collection of data from facilities that directly emit greenhouse gases from their processes or stationary fuel combustion sources. US EPA has also developed rules for upstream suppliers of fuels and industrial greenhouse gases and proposed confidentiality determinations for each category. US EPA accepted comments on the proposed rule through 7 September 2010.

The FTC commented that three categories including facility-specific data relating to production, throughput, raw material consumption, capacity and future operations should remain confidential because public disclosure of such firm-specific sensitive business information could make it easier for competitors to tacitly or explicitly coordinate their pricing decisions. This collusion, according to the FTC, would harm consumers through higher prices, decreased quality and decreased innovation. The FTC also recommended that US EPA delay publication of reported data until after reporting facilities have

the opportunity to apply for confidential treatment. US EPA intends to finalize its proposed rule on confidentiality before data is released in 2011.

Please feel free to contact your regular Squire Sanders contact for further information about US EPA's Mandatory Greenhouse Gas Reporting Rule or the FTC's comment.

– By Iain R. McPhie

Squire Sanders Partner Discusses US Acquisitions by China-Based Banks

Nicholas Unkovic, a partner in Squire Sanders' Northern California offices, was featured on the Forbes.com blog of Russell Flannery. In an entry titled "U.S. Acquisition By China's ICBC May Start 'Substantial Trend' In Banking Industry," Mr. Unkovic discusses the Industrial and Commercial Bank of China's (ICBC) plan to buy a majority share of the US subsidiary of the Bank of East Asia, based in Hong Kong.

If the deal is approved by the Federal Reserve, it will likely be the start of a significant trend, according to Mr. Unkovic. A key factor will be whether the Fed believes China provides adequate supervision and regulation over its banks. In the interview, Mr. Unkovic also comments on the risks for ICBC and strategies that have worked for other Asia-based banks.

UNITED STATES AND EUROPE

A Brave (but Scary) New World: Why Private Equity Is Not Exempt From US and UK Anti-Corruption Laws

It's a brave (but scary) new world out there. Private equity funds operating in the international arena should have by now switched to red alert with respect to the severity of the combined impact of the US Foreign Corrupt Practices Act of 1977 (FCPA) and the UK 2010 Bribery Act (the Bribery Act), due to come into force April 2011. As US and European authorities have intensified enforcement efforts, record fines and criminal convictions are becoming commonplace. For instance, Siemens has agreed to pay US$1.6 billion to US and German authorities in fines, penalties and disgorgement of profits. The ultimate question for private equity funds is how far does liability extend – the fund vehicle, the general partners, limited partners or the portfolio companies? The cumulative effect of both pieces of legislation poses a significant risk in part to all the aforementioned parties for the actions of agents, portfolio companies, third-party successor liability and the failure to institute adequate controls and mechanisms to prevent bribery. The ramifications for violators of the legislation include stepped up criminal and financial sanctions in addition to decreased portfolio company valuations, debarment from government contracts, director disqualification, Financial Services Authority restrictions, reputational risk, diminished

exit opportunities and stringent non-prosecution agreements.

The anti-bribery provisions of the FCPA prohibit an offer or payment of anything of value to a foreign official for the purpose of securing an improper advantage or obtaining or retaining business. The United States Department of Justice (DoJ) and the Securities and Exchange Commission (SEC) have been vigorous in their enforcement of the FCPA. And it appears this enforcement is likely to become even more thorough with the enactment of § 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act). This provision encourages whistleblowers to report suspected violations directly to the SEC. Whistleblowers providing information leading to a conviction or settlement will receive a bounty of at least 10 percent and up to 30 percent of the fines collected worldwide by the SEC in connection with that violation.

Funds looking at deals that are inherently more risky, but with a higher potential for returns, as in emerging markets, should be aware that a floodgate of opportunistic whistleblowers may appear from the shadows looking to capitalize on the Dodd-Frank Act. This may prevent companies from initiating their own internal investigations and self-reporting to the relevant authorities. Therefore, it is recommended that funds institute their own internal whistleblower procedures and policies in order to have control on self-investigation and decide whether to self-report.

The Bribery Act casts a wider net than the FCPA, covering improper payments to representatives of both public bodies and private companies, extending to senior officers of a company, if they are proven to have "consented or connived" in the commission of an offense, provided that they have a "close connection" to the UK. Furthermore, the statute imposes a strict liability corporate offense for commercial organizations that fail to prevent bribery, which applies to acts by all persons "associated" with the company who secure an improper business advantage for the organization.

It is the Bribery Act's corporate offense that raises the greatest reason for concern for all the players of private equity. The broad terminology of the law potentially covers all acts by persons "associated" with a company, including agents, joint venture partners, employees or those performing services on behalf of the fund. The category of associated persons to whom a fund may be linked to is so wide that the fund vehicle, its limited partners or the general partner may face liability if the agent has provided services and acted in a corrupt manner, even though there has not been direct knowledge of the bribery taking place. To be more specific, associated persons may include those persons who raise capital, advisers on the transaction or persons appointed to the board of a portfolio company. And the penalties are nothing to shrug off: individual liability is up to 10 years of

imprisonment, while commercial organizations face an unlimited fine.

If found to be liable, a fund's only defense is to prove that it had in place "adequate procedures" designed to prevent persons associated with the company from undertaking such conduct. While definitive guidelines defining "adequate procedures" will not be published until next year, the UK Ministry of Justice has provided some non-exhaustive considerations: risk assessment, top level commitment, due diligence, clear, practical and accessible policies and procedures, effective implementation, and monitoring and review. Thus, the Bribery Act effectively establishes strict liability for failure to implement adequate compliance mechanisms in order to prevent the commission of a bribe for a commercial organization. Therefore, private equity funds should promptly begin a review of their policies and procedures. This will allow time to revise and fully implement their policies and procedures before the Bribery Act comes into force in the Spring.

As a general matter, to protect against liability arising from the corrupt activities of a target, investors must conduct targeted preclosing due diligence. The due diligence investigation should examine key individuals associated with the target, as well as examine the target itself. Also, the investigation should be tailored to take into account the particular compliance risks presented by the target and its business. Obviously, key assets which have a governmental nexus, such as licenses or concessions, should receive particular attention. In all events, relationships with outside advisers and consultants should be carefully examined for signs that these relationships may have been a conduit for improper payments. And, of course, those conducting the due diligence should take care to make themselves familiar with any recent corruption problems in the public eye and any known patterns of corruption involving relevant government or political figures.

Once the acquisition has taken place, it is critical to establish for the target a rigorous compliance program which is vigorously implemented. The compliance program must be supported by senior management of the target and must be effective to establish a compliance culture within the target. Relationships with advisers and consultants should be reviewed and clear procedures for the retention and payment of such service providers should be clearly defined. Also, the program must include strong financial controls which are effective in identifying questionable payments.

It is critical to note that there is no one-size-fits-all compliance program and that programs that were in place to safeguard against the wrath of the FCPA will need to be revisited once final guidance is released for what is meant for "adequate procedures" under the Bribery Act in order to span both statutes. If a violation does occur for funds with both UK and US interests, dual prosecution may occur under each law. This

has significant impact for private equity funds that are based in either country and that have multi-jurisdictional portfolio companies.

– By Carol M. Welu

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EUROPE

Germany: Selected New Taxes and Rate Increases Ahead

As in many other countries, Germany's federal and state administrations are looking to increase their internal revenues to recover the shortfall resulting from the financial crisis. In the real world, this typically translates into an increase of tax rates and/or tax base.

Wisely, the federal and *Laender* administrations are shying away from increasing income taxes or value-added tax (VAT) in order to avoid smothering the present economic upswing, which was projected to reach up to 3.6 percent for 2010 – the highest since German unification more than 20 years ago.

With this background, the administrations have set their sights on transaction and excise taxes such as an aviation tax (up to €45 per ticket) and atomic energy tax – most notable, however, for the *Laender* level is the real estate transfer tax (RETT). RETT is triggered by the sale of real property and shares in companies holding real property – directly or indirectly – and is typically paid by the purchaser.

The general tax rate has been 3.5 percent since 1998. From 1 September 2006, the *Laender* have been free to determine the RETT tax rate individually. Berlin was the first to grasp the opportunity by raising its rate to 4.5 percent from 1 January 2007, with Hamburg following suit on 1 January 2009.

Recently, we have begun to see a wave of new RETT increases announced for the future in additional areas of Germany:

- Saxony-Anhalt, 4.5 percent from 1 March 2010
- Brandenburg, 5 percent from 2011
- Lower Saxony, 4.5 percent from 2011
- Bremen, 4.5 percent from 2011
- Saarland, 4 percent from 2011
- Schleswig-Holstein, 5 percent from 2013

The immediate strategy for responding is quite obvious:

Potential real estate investors in German property or property holding entities located in the above areas are advised to consider the upcoming rate increases in their investment budget or structure the investment to become effective before the rate increase. Likewise, property sellers are advised to consider the cost increase for the purchaser and act before the pie gets smaller.

– By Thomas Busching

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