

E-ALERT | International Trade

September 30, 2013

US REGULATORY AND INSTITUTIONAL ENVIRONMENT FOR CHINESE FOREIGN DIRECT INVESTMENT

On Wednesday, September 25, Covington & Burling LLP had the privilege of co-hosting with the China General Chamber of Commerce - USA a timely event on the US regulatory and institutional environment for Chinese foreign direct investment (FDI). The program featured keynote remarks by Marisa Lago, Assistant Secretary of Treasury for International Markets and Development, and two panel discussions drawing on the deep experiences of current and former US government officials, other experts on Chinese FDI, and transactional, government affairs, and CFIUS experts from Covington & Burling LLP. The audience included representatives from a wide range of Chinese companies in the United States, banks, organizations promoting trade and investment, and government officials. In keeping with our continuing efforts to apprise you of matters relating to foreign investment, the following is a short summary of the key points that arose during the event.

ASSISTANT SECRETARY LAGO'S KEYNOTE ADDRESS

Assistant Secretary Lago emphasized in her [remarks](#) the importance of the US-China economic relationship and the role of investment between the two countries. She reiterated that the United States has a longstanding open investment policy and noted the benefits of foreign investment, including investment from China. Assistant Secretary Lago spoke in detail about the Committee on Foreign Investment in the United States (CFIUS) and made clear that the framework for CFIUS reviews is complementary to the United States' commitment to an open investment policy and is in accordance with the guidelines of the Organisation for Economic Co-operation and Development.

In particular, Assistant Secretary Lago noted the following four characteristics of CFIUS: (1) CFIUS has a limited scope and is exclusively focused on national security; (2) CFIUS is committed to being as efficient as possible and imposing as little burden as possible on prospective investors; (3) CFIUS does not discriminate among countries and applies the same rules to each transaction it reviews; and (4) CFIUS maintains the confidentiality of the information about transactions it reviews but its rules are fully transparent and its determinations are subject to high-level accountability. She added that investors are encouraged to consult with CFIUS. Finally, after noting the significance of China's recent announcement with respect to negotiating a bilateral investment treaty with the United States, Assistant Secretary Lago pointed out that the United States continues to urge the reduction of investment barriers in China. Assistant Secretary Lago responded to questions from the audience.

PANEL I: TRENDS IN BILATERAL INVESTMENT BETWEEN THE US AND CHINA AND OPPORTUNITIES FOR CHINESE INVESTORS

Following Assistant Secretary Lago's remarks, the first panel focused on trends in bilateral investment between the US and China and opportunities for Chinese investors. The panel comprised:

- Aaron Brickman, Deputy Executive Director, SelectUSA, US Department of Commerce;
- Alex Hao, Partner, Jun He;

- Andrew Jack, Partner, Covington & Burling LLP;
- Dan Rosen, Principal, Rhodium Group;
- Tim Stratford, Partner, Covington & Burling LLP (moderator); and
- Jeremie Waterman, Senior Director, Greater China, US Chamber of Commerce.

The panelists noted that Chinese investments are being made in a range of industries across the United States. Several industries were mentioned as having received significant investments or presenting opportunities for increased investments, including energy, natural resources, real estate, and infrastructure. In terms of confronting challenges or perceived challenges, the panelists offered specific advice to Chinese companies, including the following: (1) engage in direct dialogue on these issues and learn from the collective successes of Chinese companies in the United States; (2) effectively work with a range of counsel and advisors; (3) localize business plans to take into account the US environment; and (4) proactively develop relationships with local communities. The panelists also discussed the US-China bilateral investment treaty as promising for US investment into China.

PANEL II: PLANNING FOR CFIUS AND US REGULATORY AND INSTITUTIONAL CONSIDERATIONS FOR CHINESE INVESTMENT

The second panel discussed strategies to plan for CFIUS reviews and current issues at play. The panel comprised:

- Jeffrey Bader, Fellow, Brookings Institution, former Director of Asian Affairs, National Security Council;
- Daniel Bryant, Partner, Covington & Burling LLP;
- David Fagan, Partner, Covington & Burling LLP (moderator);
- Tony Fratto, Partner, Hamilton Place Strategies;
- Phillip Gesue, Senior Vice President, China Construction America, Inc.;
- Ambassador Alan Larson, Senior Advisor, Covington & Burling LLP; and
- Mark Plotkin, Partner, Covington & Burling LLP.

There was a general consensus among the panelists that the environment for Chinese investment in the US has improved, that CFIUS is interested in successful outcomes, and that while Chinese transactions can attract public and political attention, the political and regulatory dynamics can be managed with careful planning.

In particular, the panelists spoke about the importance of developing relationships at the local level and anticipating issues through advance planning and outreach to key stakeholders. There also was consensus that there are certain broader policy issues that can complicate the environment for Chinese investment, including in particular, cybersecurity. Additionally, the discussion included the challenging issue of proximity — or what the US government has called “persistent co-location” — to US military bases and other sensitive facilities. The panel noted that proximity issues are not new; they have arisen in cases dating back nearly a decade, and they also are not limited to wide open spaces. Proximity issues can arise in office parks or office buildings, depending on who the other tenants are and the activities taking place. The important lesson for all investors is the need to carefully consider and identify these issues while in the early stages of transaction planning, because they can prove extremely complex if a transaction is closed without fully accounting for the security challenges.

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Many other topics were addressed by the panels including in the questions and answers with the attendees. We have covered the highlights in this summary and would be pleased to discuss any of these issues and answer any questions on the current environment for Chinese FDI.

As always, we will continue to keep you apprised of legal and policy developments and key issues related to CFIUS and foreign investment.

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