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S+C NEWSLETTER Volume 1, Issue 20, December 17, 2009



GREETINGS...

Seasons greetings to our clients, associates and friends in the US, China and Asia. We hope everyone is enjoying the holiday season. We also want to wish everyone a happy new year. We hope the new year 2010 brings peace, joy and lots of new opportunities in cross-border business between the US and Asia!

Sincerely,
Aaron Schechter and Frances Chou

HOT TOPICS...

And About the Chinese Yuan...

US President Barak Obama, Dominique Strauss-Kahn, the managing director of the International Monetary Fund and Jean-Claude Trichet, the president of the European Central Bank, in recent weeks have all urged China to allow its currency, the yuan, to rise. China's President Hu Jintao politely chose to ignore Obama's and other's requests, and other Chinese officials and economists continue to defend China's policy of keeping the yuan steady against the dollar.



In the last three years up to July 2008, China's yuan has risen 21% against the dollar, although since that time the rate has more or less remained fixed. Since the dollar has dropped this year, the yuan's trade-weighted value has fallen, while many other currencies have soared against the yuan. While some say this had led to a competitive advantage for China, the response from Beijing is that the data ignores the full picture; last year China held its currency steady against the dollar during the global financial crisis, while others tumbled. Since the start of 2008, the yuan has actually risen against every currency except the yen. China's position is that it has done a lot to help global rebalancing through its monetary and fiscal stimulus. Additionally, China's current-account surplus has dropped by almost half, to 6% of GDP from 11% in 2007. Chinese policymakers understand that the yuan needs to rise over the longer term but say now is the wrong time, given that Chinese exports are still falling, by 14% over the last year. Another challenge for China is their experience since 2005, whereby a gradual rise in its currency encouraged investors to bet on further appreciation which led to hot-money inflows that swell domestic liquidity. The most recent data on China's foreign currency reserve composition suggests that hot-money inflows could have accounted for almost half of the US\$62 billion increase in China's foreign exchange reserves in September. Alternatively, a large one-off increase in the yuan of perhaps 25% might work, and stem expectations of a further rise but would be politically unacceptable as many exporters would be put out of business overnight. Some Chinese economists claim that the benefits to the US from yuan revaluation are exaggerated; that a stronger yuan would not significantly reduce the US trade deficit, since there is little overlap between US and Chinese production.

In the long run, a stronger yuan would benefit China's economy, and the world's economy, by helping shift growth from investment and exports and into consumption. It would boost the purchasing power of Chinese consumers and reduce corporate profits, which have accounted for most of the increase in China's domestic savings in recent years. Early next year, China's exports should be growing again, its year-on-year GDP growth could be close to 10% and its inflation rate will have turned positive. At that point, some experts believe that China may start to allow the yuan to start rising again. (For a previous discussion of China's currency policy see S+C Newsletter <http://www.splusc.com/Newsletter121808.pdf> and for a previous discussion on hot-money inflows into China see S+C Newsletter <http://www.splusc.com/Newsletter080508.pdf>).

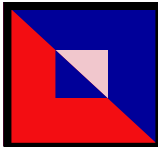
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Schechter + Chou, Inc. 嘉质策略 · 10960 Wilshire Boulevard, Suite 1225, Los Angeles, CA 90024, USA
tel: 310-479-8600 · fax: 310-479-0699 · email: info@splusc.com · website: www.splusc.com

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LEARN THE ROPES...

Sixth Annual In-House Counsel Conference, January 20, 2010

Millennium Biltmore Hotel in Downtown Los Angeles.

Frances Chou will be a panelist for the 2010 In-House Counsel Conference hosted by the Association of Corporate Counsel, Southern California Chapter. Association of Corporate Counsel is a nationwide organization, and its members are in-house counsel for all major corporations. The panel topic is "Interactive Strategies for Doing Business in China". The panel will cover the key questions that every practitioner wants to ask for doing business in what will be the largest marketplace in the world. From setting up your business, to outsourcing, to IP, to the Foreign Corrupt Practices Act---panelists will approach topics from the legal, corporate, administrative, and regulatory sides of the main issues. For more information or to register, please visit: <http://www.acc.com/chapters/socal/index.cfm?eventID=4359>.

LEGALLY SPEAKING...

What Are the Exceptions and Defenses to FCPA's Anti-Bribery Provision...

A lot of companies doing business overseas have heard that paying "grease money" is not prohibited by the Foreign Corrupt and Practices Act (the "FCPA"). So, what is "grease money"?

The FCPA does not prohibit "grease payments", which are paid to secure the performance of "routine governmental action" by a foreign official. The "routine governmental action" are limited to actions ordinarily and commonly performed, including obtaining permits or license that qualify a person to do business in a foreign country, processing government paperwork, providing police protection, mail pick-up and delivery or scheduling inspections or customs inspections, and providing utility service, loading and unloading cargo or protecting perishable products from deterioration. Such payments do not cover any acts involving the exercise of discretion. This exception never covers paying money in order to get awarded or to maintain business. This exception is very narrowly defined and strictly interpreted. In practice, this exception likely excludes anything more than small payments to low-level employees for non-discretionary, ministerial activities. Also, such facilitating payments might be legal under FCPA, however, might be illegal under local laws. Furthermore, this exception does not relieve a company of documenting the nature of the payment correctly, which means that if a company makes such a payment, it has to document the nature of the payment in its records, even if it is in violation of the local laws. Other defenses available under FCPA include the lawfulness under local written laws and regulations. This defense is usually not that useful, since most countries have laws that prohibit kickbacks or other corrupt payments. Citing local business customs and practices is not an acceptable defense. This exception is most useful where local laws require a company to make certain payments or contributions in order to be qualified to do business in that country. Another defense concerns government contract performance or promotional expenses, which covers payments of "reasonable and bona fide" expenditures directly related to the execution or performance of a government contract or expenses of a foreign official related to travel or lodging "directly related" to the promotion, demonstration or explanation of products or services. In addition, absence of one of the elements of an FCPA violation, such as payment made without a "corrupt intent," also precludes liability.

These exceptions and defenses offer only limited protection, as they are narrowly construed, and the burden of proof of such exception or defenses is on the defendant. Therefore, US companies doing business overseas have to be extremely careful in making various "payments" in foreign countries in order to avoid any liabilities under the FCPA. .

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