



**COUNTRY
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United States

INVESTING IN

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This country-specific Q&A provides an overview of investing in laws and regulations applicable in United States.

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UNITED STATES INVESTING IN



1. Please briefly describe the current investment climate in the country and the average volume of foreign direct investments (by value in US dollars and by deal number) over the last three years.

The United States is considered one of the best place to invest worldwide due to its strong economic growth policies, innovation ecosystem, and highly developed market.

According to data compiled by the Bureau of Economic Analysis within the U.S. Department of Commerce, foreign direct investment in the United States increased \$216.8 billion to \$5.25 trillion at the end of 2022 from \$5.04 trillion at the end of 2021.

More than half of the total foreign direct investment in the United States at the end of 2022 came from five (5) countries: Japan (\$712.0 billion), the United Kingdom (\$663.4 billion), the Netherlands (\$617.1 billion), Canada (\$589.3 billion), and Germany (\$431.4 billion). If viewed from the standpoint of country of the ultimate beneficial owner (UBO), the entity at the top of the global ownership chain, Japan (\$775.2 billion) remained the top investing country, followed by Canada (\$683.8 billion), and the United Kingdom (\$660.6 billion). On the UBO basis, investment from the Netherlands and Luxembourg was much lower than by the country of foreign parent, indicating that much of the investment from foreign parents in these countries was ultimately owned by investors in other countries.

Foreign direct investment in the United States was concentrated in the U.S. manufacturing sector, which accounted for 42.4 percent of the position. There was also sizable investment in finance and insurance (10.6 percent) and wholesale trade (9.7 percent).

2. What are the typical forms of Foreign Direct Investments (FDI) in the country: a) greenfield or brownfield projects to build

new facilities by foreign companies, b) acquisition of businesses (in asset or stock transactions), c) acquisition of minority interests in existing companies, d) joint ventures, e) other?

Foreign Direct Investments (“FDI”) are investments made by foreign companies or individuals into the United States, usually to obtain a controlling interest in a firm. The typical forms of FDI in U.S. companies are mergers, acquisition of stock or assets, long-term loans, and joint ventures with existing companies, or development of facilities in the United States from the ground up.

The types of FDI are:

- Horizontal: one company invests in another company to produce the same products or services it produces in its home country;
- Vertical: a company invests in another company to acquire a supplier or distributor (complimentary);
- Conglomerate: a company invests in another company to produce products or services unrelated to its core business;
- Platform: company expands into a foreign company but the products are sent to another, third country.

3. Are foreign investors allowed to own 100% of a domestic company or business? If not, what is the maximum percentage that a foreign investor can own?

In general, there are few restrictions on foreign investment or ownership of domestic companies that are not imposed on domestic investors. Foreign investors may own a U.S. entity outright, however, federal law restricts and regulates permissible levels of foreign ownership and control when a transaction presents national security risk. For example, mergers, acquisitions or takeovers resulting in foreign control of investment in U.S. companies involved in critical technology, critical

infrastructure or other sensitive sectors must be reviewed and approved by the Committee on Foreign Investment in the United States (CFIUS) for potential national security risks.

In addition to CFIUS review, certain industries may impose other regulatory requirements on foreign investment and control. For example, public utilities: holding companies are subject to the oversight of the Federal Energy Regulatory Commission (FERC). Foreign entities seeking to acquire an interest in a U.S. utility may be able to avoid certain FERC requirements by qualifying as exempt. Another example relates to nuclear power. In July 2020, the U.S. International Development Finance Corporation modernized its nuclear energy policy and removed its legacy prohibition on financing nuclear power projects.

Federal law also requires that merchant marine vessels be owned and operated privately by U.S. citizens. The merchant marine fleet is a military auxiliary in times of war and national emergency. Any U.S. owner selling any interest in a vessel to a non-U.S. citizen must obtain the approval of the U.S. Department of Transportation (DOT) prior to executing such sale. The DOT is also responsible for overseeing U.S. airlines' compliance with foreign ownership and control laws, which limit foreign ownership to 25 percent of the voting stock of U.S. airlines, among other control requirements. Notification and licensing requirements are also imposed on the media and banking sectors, as are activities involving mineral leases, timber rights and outer continental shelf activities.

4. Are foreign investors allowed to invest and hold the same class of stock or other equity securities as domestic shareholders? Is it true for both public and private companies?

In general, yes. Neither U.S. citizenship, lawful permanent residence nor work authorization are required in order for foreign persons to be owners of a U.S. business entity. Likewise, none is required for a foreign national to serve on the board of directors of a corporation in the United States. Being a shareholder or director of a U.S. business entity does not equate to employment authorization in the United States.

5. Are domestic businesses organized and managed through domestic companies or primarily offshore companies?

The organization of these entities will typically vary

between foreign or domestic depending on several factors including apparent advantages of local law, regulatory issues and tax considerations.

6. What are the forms of domestic companies? Briefly describe the differences. Which form is preferred by domestic shareholders? Which form is preferred by foreign investors/shareholders? What are the reasons for foreign shareholders preferring one form over the other?

The most prevalent forms of domestic companies are sole partnerships, partnerships, limited liability companies and corporations.

A sole partnership is a non-organized business where a business owner simply begins business operations. A partnership is an entity comprised of two or more parties where the parties agree on how to allocate profits, responsibilities, management, and even liabilities in the case of limited partnerships and limited liability partnerships. Limited partnerships and limited liability partnerships are more organized forms of partnerships. A limited partnership is a partnership where at least one of the owners is a general partner responsible for the management of the business and is responsible for its debts. In a limited liability partnership all partners are limited partners and all parties have limited personal liability. Limited liability companies are similar to partnerships in that they allow protection of a member's personal assets while passing through profits and losses to the member's personal income without corporate taxation. Corporations have a separate legal existence from their owners called shareholders and, with the exception of S corporations, are taxed separately from its shareholders.

Which form is preferred by domestic shareholders?

Domestic investors (shareholders) typically prefer the corporate form since it is more widely accepted in lending and commercial transactions and it is typically easier to invest in a corporation and transfer and sell shares than the other forms of companies.

Which form is preferred by foreign investors/shareholders?

- **What are the reasons for foreign shareholders preferring one form over the other?**

Foreign investors prefer the form of a C corporation for a company. This form provides the investor with the limited liability of a corporation and less requirements to transfer the equity without having to file any tax information in the United States.

7. What are the requirements for forming a company? Which governmental entities have to give approvals? What is the process for forming/incorporating a domestic company? What is a required capitalization for forming/incorporating a company? How long does it take to form a domestic company? How many shareholders is the company required to have? Is the list of shareholders publicly available?

A sole partnership has no requirements to be established since its essentially an alter ego of the proprietor. However, the owner may wish to have a trade name or "DBA" which is typically filed with the County Clerk.

Partnerships do not require any state filings or even a written partnership agreement, although many partnerships prefer to have a written partnership agreement.

Limited partnerships and limited liability partnerships both require registration with the entities' state of formation, as do limited liability companies and corporations.

What is a required capitalization for forming/incorporating a company?

There is no minimum capital requirement to form a company.

How long does it take to form a domestic company?

The filing requirements vary from state to state, but an entity can typically be formed in 24 to 48 hours in states that have expedited filing. If the state does not have expedited filing available, formation documents can take a week or longer to be filed.

How many shareholders is the company required to have?

At least 1

Is the list of shareholders publicly available?

Not at this time.

8. What are the requirements and necessary governmental approvals for a foreign investor acquiring shares in a private company? What about for an acquisition of assets?

In general, there is an absence of exchange controls, government regulation, or licensing of foreign investment or foreign acquisitions in the United States. There are, however, some approval requirements on foreign investment.

CFIUS regulations require pre-closing filings for certain investments by any foreign person in United States businesses developing critical technology, and by foreign state-affiliated investors in United States critical technology, critical infrastructure and sensitive personal data businesses. Parties in other transactions may make voluntary filings to CFIUS to secure clearance and, in doing so, safeguard the transaction from post-closing unraveling by CFIUS.

In addition to CFIUS review, U.S. antitrust law prohibits any acquisition or merger that would have the tendency to lessen competition or create a monopoly. If a U.S. acquisition meets certain minimum size levels, a Hart-Scott-Rodino pre-merger notification must be filed with the U.S. Department of Justice and the Federal Trade Commission.

An acquisition or merger may trigger other regulatory or government approvals. The purchase and sale of securities, including the shares of a corporation and ownership interests in many other entities, are strictly regulated by both federal and state governments.

9. Does a foreign investor need approval to acquire shares in a public company on a domestic stock market? What about acquiring shares of a public company in a direct (private) transaction from another shareholder?

A non-U.S. company may issue shares or other securities in the United States to finance an acquisition, for example, by exchanging its shares for the shares or assets of the target company. However, the shares or other securities must be issued pursuant to a registration statement filed with the Securities and Exchange Commission (SEC), unless an exemption from registration is available.

10. Is there a requirement for a mandatory tender offer if an investor acquired a certain percentage of shares of a public company?

No. However, with public companies that file reports with the U.S. Securities and Exchange Commission, if an investor acquires more than 5% of that company's ownership, they will be required to report that ownership with the SEC and such reports will be publicly available.

11. What is the approval process for building a new facility in the country (in a greenfield or brownfield project)?

In general, no prior approval is required. CFIUS regulations provide an exception for "greenfield investments," i.e. start-up investments not involving existing U.S. business entities or assets comprising a US business.

12. Can an investor do a transaction in the country in any currency or only in domestic currency? a) Is there an approval requirement (e.g. through Central Bank or another governmental agency) to use foreign currency in the country to pay: i. in an acquisition, or, ii. to pay to contractors, or, iii. to pay salaries of employees? b) Is there a limit on the amount of foreign currency in any transaction or series of related transactions? i. Is there an approval requirement and a limit on how much foreign currency a foreign investor can transfer into the country? ii. Is there an approval requirement and a limit on how much domestic currency a foreign investor can buy in the country? iii. Can an investor buy domestic currency outside of the country and transfer it into the country to pay for an acquisition or to third parties for goods or services or to pay salaries of employees?

In general, transactions would be U.S. dollar denominated.

13. Are there approval requirements for a

foreign investor for transferring domestic currency or foreign currency out of the country? Whose approval is required? How long does it take to get the approval? Are there limitations on the amount of foreign or domestic currency that can be transferred out of the country? Is the approval required for each transfer or can it be granted for all future transfers?

U.S. Department of Treasury (Treasury) regulations require the filing of FinCEN Form 105 to comply with other Treasury regulations and U.S. Customs disclosure requirements involving physical transport, mailing or shipping of currency or monetary instruments greater than \$10,000 at one time out of or into the United States. Failure to declare currency in amounts over \$10,000 may be subject to forfeiture and could result in civil and criminal penalties.

14. Is there a tax or duty on foreign currency conversion?

No.

15. Is there a tax or duty on bringing foreign or domestic currency into the country?

Yes. Details are provided above in answer 13.

16. Is there a difference in tax treatment between acquisition of assets or shares (e.g. a stamp duty)?

In a typical stock acquisition, there is no transfer tax and no sales tax since the assets are not being sold to a new owner but the ownership of the entity holding the assets changes. If the consideration for the stock is stock of the buyer, the transaction is typically tax-free and no tax is due at transfer.

Asset transactions generally result in taxation gains at both the ordinary and capital gain rate. In addition, many states also have bulk sales clearance requirements from the seller of past tax liabilities before granting clearance for the transaction.

Moreover, depending on the types of assets transferred, such as real estate, recording fees and transfer taxes (called stamp duties in some foreign jurisdictions), are due at the time the document transferring title is

recorded. Depending on the jurisdiction, transfer taxes may also be due on such property in a stock transaction due to a change in ownership.

17. When is a stamp duty required to be paid?

To the extent that a municipality will collect taxes to record a deed or other title to property, the fee will be due at the time of filing or transfer.

18. Are shares in private domestic companies easily transferable? Can the shares be held outside of the home jurisdiction? What approval does a foreign investor need to transfer shares to another foreign or domestic shareholder? Are changes in shareholding publicly reported or publicly available?

Can the shares be held outside of the home jurisdiction?

Yes. There are no requirements that the stock/equity of an entity must be held within the jurisdiction of the entity.

What approval does a foreign investor need to transfer shares to another foreign or domestic shareholder?

As a legal matter, there are no approvals that must be obtained. However, the holders of an entity's stock or equity may have separate agreements that govern the transfer and disposition of the stock/equity. These agreements could require transfers to satisfy certain requirements or prohibit them altogether.

Are changes in shareholding publicly reported or publicly available?

The change will only be publicly reported if the entity is subject to the reporting requirements of the U.S. Securities and Exchange Commission and is a change in beneficial ownership of either a buyer or seller owning 5% or more of that company's outstanding equity.

19. Is there a mandatory FDI filing? With which agency is it required to be made? How long does it take to obtain an FDI approval? Under what circumstances is the

mandatory FDI filing required to be made? If a mandatory filing is not required, can a transaction be reviewed by a governmental authority and be blocked? If a transaction is outside of the home jurisdiction (e.g. a global transaction where shares of a foreign incorporated parent company are being bought by another foreign company, but the parent company that's been acquired has a subsidiary in your jurisdiction), could such a transaction trigger a mandatory FDI filing in your jurisdiction? Can a governmental authority in such a transaction prohibit the indirect transfer of control of the subsidiary?

CFIUS regulations require pre-closing filings for certain investments by any foreign person in United States businesses developing critical technology, and by foreign state-affiliated investors in United States critical technology, critical infrastructure and sensitive personal data businesses. Parties in other transactions may make voluntary filings to CFIUS to secure clearance and, in doing so, safeguard the transaction from post-closing unraveling by CFIUS.

With which agency is it required to be made?

CFIUS and BEA.

How long does it take to obtain an FDI approval?

For CFIUS submissions, the timeline will vary depending on whether it is a declaration or a notice. Reviews will take 30 days for the former and between 45 to 105 days for the latter.

Under what circumstances is the mandatory FDI filing required to be made?

As above.

If a mandatory filing is not required, can a transaction be reviewed by a governmental authority and be blocked?

Yes, if CFIUS determines that there is a national security risk.

If a transaction is outside of the home jurisdiction (e.g. a global transaction where shares of a foreign incorporated parent company are being bought by another foreign company, but the parent company that's been acquired has a subsidiary in your jurisdiction, could such a transaction trigger a mandatory FDI filing in your jurisdiction?

Yes, because there is a U.S. nexus.

Can a governmental authority in such a transaction prohibit the indirect transfer of control of the subsidiary?

Yes, CFIUS has on more than one occasion blocked such transactions.

20. What are typical exit transactions for foreign companies?

Where foreign investors do not completely own the enterprise, they are sometimes able to negotiate the right to trigger the sale of their interests or of the entire venture. Aside from such a provision, the exit strategies available to a foreign company are similar to those of a domestic company including, for a going concern, selling the assets or enterprise, selling the equity if there is an available buyer or market, a merger or strategic sale, or even an initial public offering ("IPO"). For a failing business, available exit strategies are liquidation, which involves selling the company's assets and paying off liabilities and distributing any remaining cash, or bankruptcy.

21. Do private companies prefer to pursue an IPO? i. on a domestic stock market, or ii. on a foreign stock market? iii. If foreign, which one?

i. on a domestic stock market, or

The country and exchange that a foreign company may consider in selecting where to pursue an IPO varies widely based upon a number of factors particular to the company. Over the years these factors have varied from the prestige of U.S. exchanges, the practicality of having multiple classes of equity, which many foreign exchanges do not allow, to avoiding additional regulation that U.S. IPOs are subject to, such as the Sarbanes-Oxley Act of 2002, or slumping markets.

ii. on a foreign stock market?

The selection of which foreign market to list on is also particular to the foreign company. A vibrant domestic exchange may be attractive to a native company as would an exchange with relative specialization in the company's industry. For example, while China overtook the United States in the amount of funds raised in IPOs the past two years, Indonesia became the fifth largest IPO market due to the importance of metals needed to make electric batteries, of which Indonesia has large deposits.

22. Do M&A/Investment/JV agreements typically provide for dispute resolution in domestic courts or through international arbitration?

It is difficult to quantify the percentage of M&A disputes being resolved through arbitration or litigation due to the lack of publicly available arbitration records. However, a survey of a large number of bilateral investment treaties found that most agreements now provide dispute resolution through both international resolution through international arbitration and domestic remedies. While the selection varies from country to country, the survey found that only a small percent of the agreements provide solely for resolution through domestic courts.

23. How long does a typical contract dispute case take in domestic courts for a final resolution?

The length of a contract dispute in a U.S. court depends on several factors including the complexity of the case, the actions of the parties and opportunities for settlement, but most cases in domestic court can be expected to take approximately two years to go to trial. Most cases in federal courts, on the other hand, are resolved within one year with over one-third being resolved in six months or fewer.

24. Are domestic courts reliable in enforcing foreign investors rights under agreements and under the law?

Yes.

25. Are there instances of abuse of foreign investors? How are cases of investor abuse handled?

No.

26. Are international arbitral awards recognized and enforced in your country?

Yes.

27. Are there foreign investment protection treaties in place between your country and major other countries?

Yes, the United States currently has 39 bilateral

investment treaties in force with other countries.

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