FDI Restrictions

Limitations on Foreign Investment into the United States

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I. Introduction

The United States has consistently ranked as a top destination for foreign direct investment (FDI). The United States boasts a high Ease of Doing Business ranking, a population of over 325 million people, the world's largest economy, and one of the best educated, most productive, and most innovative workforces in the world. The benefits of an open investment regime, based, to the extent possible, on the principle of national treatment, have been noted for decades. National treatment strives to ensure that foreign-owned companies in the United States are treated the same as domestically owned firms. This principle and its benefits were eloquently expressed in a policy statement issued by President Ronald Reagan in 1983.[7] That policy statement emphasized further liberalization of trade, protection of intellectual property rights around the world, and the importance of national treatment as a principle. Subsequent U.S. Presidents have also emphasized the importance and benefits of the United States' liberal and open investment regime.

Given the openness of the United States investment regime and the vast amount of FDI that the country continues to attract, it may seem unnecessary to consider the limitations foreign investors may face. Indeed, these limitations are few and far between, but foreign investors and their legal counsel need to be aware of them. This chapter describes the most important limitations by sector and does not cover, nor is it meant to cover, authorities and activities of the Committee on Foreign Investment in the United States (CFIUS). This chapter reflects the views of the author and is intended as a starting point to understanding the limitations on investing into the United States.

Topics Covered:
- Energy Sector
- Transportation Sector
- Financial Services Sector
- Miscellaneous (Including Radiocommunications and Tech)
- State and Local Restrictions

II. Energy

A. Atomic Energy

Commercial nuclear power and atomic energy are governed by the Atomic Energy Act of 1954.[8] Under the Atomic Energy Act, a license issued by the United States Nuclear Regulatory Commission (NRC) is required for any person in the United States to transfer or receive in interstate commerce, manufacture, produce, transfer, use, import, or export any

[7] Statement on International Investment Policy, National Archives, reaganlibrary.gov/research/speeches/90983b.

[8] 42 U.S.C. §§ 2011 et seq.

nuclear "utilization or production facilities" for commercial or industrial purposes.[9] These licenses cannot be issued to "an alien or any alien corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government."[10]

An NRC-issued license is also required for nuclear use in medical therapy, industrial and commercial purposes, and research and development (R&D) activities.[11] This second category of licenses has a restriction nearly identical to the commercial licenses previously discussed.[12] The legal limits on issuing licenses to foreign entities are implemented by 10 CFR 50.38, which provides that "Any person who is a citizen, national, or agent of a foreign country, or any corporation, or other entity which the Commission knows or has reason to believe is owned, controlled or dominated by an alien, a foreign corporation, or a foreign government, shall be ineligible to apply for and obtain a license."

The NRC has therefore established a "foreign owned, controlled, or dominated" test (FOCD) for the purpose of determining if an investment into the United States civil nuclear sector may fall under this prohibition.[13] The NRC has issued a Final Standard Review Plan (SRP) on Foreign Ownership, Control, or Domination, which details some of the complexities that go into making an FOCD determination.[14] For example, in some situations a license can be granted where there is 100 percent indirect ownership by a foreign parent company if that foreign parent company's stock in turn is "largely" owned by U.S. citizens.[15] On the other hand, the analysis under the "domination" principle may render an applicant ineligible for the license if its corporate structure makes a foreign company or foreign citizen appear to be dominant.[16]

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[9] 42 U.S.C. § 2133.

[10] 42 U.S.C. § 2133(d).

[11] 42 U.S.C. § 2134.

[12] *Compare* 42 U.S.C. § 2134(d) *with* 42 U.S.C. § 2133(d) (using nearly identical language in describing limitations on granting licenses to foreign persons or foreign companies).

[13] The NRC also has FOCD information on its website regarding nuclear reactors, which can be found at: nrc.gov/reactors/focd.html

[14] 64 Fed. Reg. 52355-01, 52358 (Sep. 28, 1999).

[15] Id. (This treatment may reflect a view that in such case the firm is not really foreign owned since it is ultimately, albeit very indirectly, owned by U.S. citizens).

[16] Id.

B. Oil, Gas, and Certain Mineral Rights

The limits on investment in the oil and gas sector by citizens of other countries and foreign corporations are found in the Mineral Lands Leasing Act of 1920.[17] Under that law, there are limitations on the acquisition of rights-of-way for oil or gas pipelines, or pipelines carrying products refined from oil and gas, across onshore federal lands. These restrictions also apply to acquiring leases or interests in certain minerals (including coal and oil) on onshore federal lands. Citizens of other countries and foreign corporations may have up to a 100 percent stock ownership in a domestic company that owns such rights, interests, or leases, provided that the foreign investor's home country reciprocates with rights to U.S. companies.[18]

III. Transportation

A. Land Transport

There are two primary restrictions on investment in land transportation in the United States. The first is for transportation within the United States (cabotage), which is limited to persons of the United States using U.S.-registered and either U.S.-built, or duty-paid trucks or buses.[19] The second restriction is cross-border bus or truck services, which require operating authority from the Department of Transportation (DOT).[20]

B. Maritime Transport

The occasional complexity of the limitations on foreign investment into the United States is perhaps best illustrated by U.S. cargo preference laws and obligations stemming from the Military Cargo Preference Act of 1904 and the Cargo Preference Act of 1954. Military cargoes must be carried exclusively on U.S.-flag vessels.[21] At least 50 percent of all government-generated (procured, furnished, or financed by) cargo tonnage must be carried by privately- owned U.S.-flag commercial vessels (provided those are available at

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[17] 30 U.S.C. §§ 181, et seq.

[18] 30 U.S.C. §§ 181, 185(a) (This requirement of reciprocity applies to deposits of coal, phosphate, sodium, potassium, oil, oil shale, gilsonite, gas, and federal lands containing such deposits).

[19] *See,* "Guidelines For Compliance of Commercial Motor Vehicles (CMV) and CMV Drivers Engaged in Cross-Border Traffic," Homeland Security, May 2012 at: https://www.dhs.gov/xlibrary/assets/policy/dhs-cross-border-trucking-guidelines.pdf; *see also*, "How do I enter the United States as a commercial trucker," U.S. Customs and Border Protection, at: https://www.cbp.gov/border-security/ports-entry/cargo-security/carriers/land-carriers/how.

[20] These regulatory requirements can be found in 49 C.F.R. Subtitle B, Chapter III.

[21] 10 U.S.C. § 2631.

fair and reasonable rates).[22] This requirement includes agricultural cargo,[23] but cargo generated under Export-Import Bank loan guarantees must be exclusively carried on U.S.-flag vessels (provided that the guarantee amount is over $20 million or the term of the loan is over seven years).[24] In turn, a U.S.-flagged vessel must be owned and crewed by U.S. citizens (with certain limited exception),[25] but the entity that owns the vessel may have a foreign parent company. Finally, it is worth noting that the cargo preference laws and regulations do not apply to non-military and non-government agency commercial goods.

There are several limitations on the transportation of goods and people within the United States (cabotage) by vessel. Cabotage of passengers is generally not allowed by foreign-flagged vessels.[26] In order for a vessel to engage in cabotage services of goods or passengers, it must meet at least one of three essential requirements qualifying it as eligible to engage in "coastwise trade."[27] The coastwise trade requirements for a vessel are (1) ownership by a U.S. citizen and documentation as coastwise under U.S. law (which requires the vessel to have been built in the United States); (2) ownership by a U.S. citizen, exempt from documentation, and otherwise entitled to documentation with a coastwise endorsement but for tonnage (because vessels measuring less than five net tons are excluded from documentation altogether); or (3) ownership by a partnership or association in which at least 75 percent interest is owned by a U.S. citizen, exempt from documentation, and otherwise entitled to documentation with a coastwise endorsement but for tonnage (because vessels measuring less than five net tons are excluded from documentation altogether), citizenship of owner, or both.[28]

The catching and transport of fish in U.S. waters is similarly limited to vessels built in the United States and either owned by a U.S. citizen or owned by an entity in which there is at

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[22] 46 U.S.C. § 55305; 46 CFR 381.

[23] Id.

[24] Id.

[25] *See* 46 U.S.C. § 8103.

[26] 46 U.S.C. § 289.

[27] 19 CFR § 4.80.

[28] 46 U.S.C. § 289.

least 75 percent ownership and control by U.S. citizens. Control, for the purpose of this provision, means either having the right to direct the business of the entity; possessing the ability to limit actions of or to replace CEOs; holding a majority of the board of directors, general partners, persons serving in management capacities; or being able to direct the transfer, operation, or manning of the vessel. Control does not include certain financial rights or simply the ability to participate in the previously listed actions.

The limitations in the maritime transportation sector listed above are by no means exhaustive. The United States maintains an extensive list of reservations in its international trade agreements regarding this sector.[29]

C. Air Transportation

Air carriers must be U.S. citizens in order to engage in domestic air service (cabotage) and to provide international air service as U.S. air carriers.[30] Foreign Civil Aircraft, as defined by U.S. law, require authority from the Department of Transportation (DOT) in order to operate in the United States.[31] Non-U.S. citizens also require authority to engage in indirect air transportation activities such as air freight forwarding and passenger charter activities.[32] The grant of such authority is determined by the DOT, which takes into consideration, among other things, the reciprocity granted to U.S. investors by the foreign investor's home country. Under the Aviation Programs statutes, 49 U.S.C. Subtitle VII, a U.S. citizen is defined as an individual who is a U.S. citizen; a partnership in which each member is a U.S. citizen; or a U.S. corporation where at least two thirds of the board of directors are U.S. citizens, the president and other managing officers are U.S. citizens, and at least 75 percent of voting interests are owned or controlled by U.S. citizens. A foreign company may therefore own up to a 25 percent voting interest in a U.S. air carrier or a company engaged in indirect air transportation activities without a DOT grant of authority.

IV. Financial Services

The United States has a number of restrictions on foreign investment in the financial services sector, via both mergers and acquisitions (M&A) and greenfield investment. This

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[29] *See* United States-Korea Free Trade Agreement (KORUS), signed June 30, 2007, Annex II, pp 4-7 (listing maritime transport sector non-conforming measures); Agreement Between the United States, Canada, and Mexico (USMCA), December 12, 2019 text, Annex II, pp 5-7 (listing maritime transport sector non-conforming measures). The text of the KORUS agreement can be found at: https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta; The text of the USMCA can be found at: https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between

[30] 49 U.S.C. Subtitle VII.

[31] Id.

[32] Id.

section provides a brief overview of some of these restrictions. At both the national level and state level, there may be citizenship requirements for banking. For example, all directors of a national bank are required to have U.S. citizenship, a requirement that the Comptroller of the Currency can waive only for a minority of the total number of directors of a given national bank.[33] The varying requirements imposed by different states operating with different banking regulations add an additional level of complexity at the sub-federal level. Some U.S. states do not account for foreign banks in their licensing process and requirements. This may limit a foreign bank's ability to enter into that state's financial sector or create additional steps and requirements for that foreign bank to enter that state's financial sector, which are not applicable to U.S. banks. Some states also impose citizenship requirements on members of the boards of directors of state-chartered depository institutions. There are also similar requirements for insurance companies, which are generally regulated at the state level. Various states also regulate insurance at a more local level of government, and such regulations may include citizenship requirements for their board of directors, citizenship requirements for incorporators, and residency requirements for various organizational structures.

There are also limitations on what foreign banking corporations and branches of foreign banks can do in the United States. Corporations organized under a foreign country's laws cannot establish thrift institutions (credit unions, savings banks, or savings associations).[34] Foreign non-bank firms cannot own Edge Act corporations, which are corporations that either take deposits from and make loans to companies doing business internationally or invest in foreign companies. This limitation does not apply to foreign banks and their U.S. subsidiaries.[35] Foreign banks cannot engage in securities advisory and investment services without first registering as an investment adviser under the *Investment Advisers Act of 1940*.[36] Foreign banks cannot be members of the Federal Reserve System (and relatedly cannot vote for directors of the Federal Reserve Bank).[37]

Finally, there are a number of financial services activities that are limited by reciprocity conditions, and likely require an analysis of the foreign investor's home country's laws. These limitations include acting as a sole trustee of an indenture for a bond offering in the

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[33] 12 U.S.C. § 72.

[34] 12 U.S.C §§ 1463 *et seq.*, 12 U.S.C §§ 1751 *et seq.*

[35] 12 U.S.C. § 619.

[36] 15 U.S.C. §§ 80b-2, 80b-3.

[37] 12 U.S.C. §§ 221, 302, 321 (this restriction does not apply to U.S. bank subsidiaries of a foreign bank).

United States and being designated as a primary dealer in U.S. government debt securities.[38] Similar reciprocity requirements may also exist at the state and local level.

V. Additional Limitation – Highlights (Including Technology Transfers and Radiocommunications)

There are various other limitations on investing in the United States that do not fit neatly in any of the other categories in this chapter. Many of these are not so much restrictions on investment, but rather conditions on doing business in the United States that are not applicable to U.S. investors. The largest group of such limitations is on business and export promotion services provided by the U.S. government. Foreign persons and foreign corporations cannot apply for a certificate of review under the Export Trade Company Act (ETCA) of 1982, which limits liability under federal and state antitrust laws when engaging in the certified export conduct.[39] Foreign nationals and foreign companies can still receive the benefits of such a certificate by becoming members of a qualified applicant.[40] U.S. International Development Finance Corporation (DFC) programs are administered preferentially for U.S. citizens or entities controlled by U.S. citizens, and their availability to foreign-owned or -controlled U.S. enterprises may depend on the extent of U.S. ownership or participation.[41]

A key restriction for foreign investors that falls into the miscellaneous section are the regulations surrounding controlled technologies, such as lasers and sensors, nuclear materials, and chemicals. Release of a controlled technology to a foreign national in the United States, which may be a foreign investor or part of a foreign investor, is deemed to be an export to the home country of the foreign national, and as such requires written authorization from the Bureau of Industry and Security (BIS) at the U.S. Department of Commerce (DOC).[42]

There are also requirements surrounding practicing before the U.S. Patent and Trademark Office. U.S. patent attorneys must be U.S. citizens or lawful residents, and U.S. patent agents must be U.S. citizens or lawful residents or registered to practice in a country that

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[38] 15 U.S.C. § 77jjj(a)(1); 22 U.S.C. §§ 5341, 5342.

[39] 15 U.S.C. §§ 4011-4021; 15 CFR Part 325.

[40] Id.

[41] 22 U.S.C §§ 2191. The DFC maintains a useful website which can be found at: dfc.gov on what programs and resources it offers as well as some of the eligibility requirements for projects.

[42] 15 CFR Parts 730-774. BIS maintains guidelines for foreign national license applications, which can be found here: bis.doc.gov/index.php/licensing/14-policy-guidance/deemed-export/109-guidelines-for-foreign-national-licenses

allows for U.S. patent agents to practice there (for the limited purpose of patent prosecuting applications of applicants located in another country).

Lastly, there are limitations on foreign investment in the radiocommunications sector. The United States prohibits the granting of a station license to a foreign government or representative thereof.[43] The United States also prohibits the granting of broadcast, common carrier, aeronautical en route, or aeronautical fixed station licenses to foreign citizens or their representatives, corporations organized under foreign laws, and corporations with more than one fifth of their capital stock being foreign owned.[44] There are also additional limitations on the ownership of the stock of companies that own radiocommunication company stock that are too detailed to address in this chapter.[45]

VI. State-Level Restrictions (Primarily Real Estate)

This section addresses sub-federal restrictions on investment, which are primarily found in insurance and real estate sectors at the state level. Since the restrictions on insurance are highlighted briefly in Section IV above covering financial services, this section will focus on real estate. Some states have established restrictions on the purchase of agricultural land and may require that foreign entities comply with reporting requirements and /or establish residency in the United States. In addition, some states have limited the purchase of agricultural land by any entity (foreign or domestic) or placed restrictions on how many acres of agricultural land may be acquired by non-U.S. residents. Similarly, a few states have residency requirements for owning real estate. For example, Oklahoma allows non-U.S. citizens to own real estate only if they fall within certain exceptions (which include residency).[46] Several states also have various preference systems for either U.S. citizens or residents to own land, placing limits on how long non-resident non-U.S. citizens can own real estate without changing their status to

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[43] 47 U.S.C § 310(a).

[44] 47 U.S.C § 310(b); Foreign Participation Order 12 FCC Rcd 23891, paras 97-118 (1997).

[45] 47 U.S.C. § 310(c). The Federal Communications Commission, which regulates this sector, maintains guidelines on foreign ownership, which can be found here: fcc.gov/document/foreign-ownership-guidelines-fcc-common-carrier-and-aeronautical-radio

[46] Okla. Const. art. XII §§ 1,2 (restricting the purchase of real estate by non-U.S. citizens); Okla. Stat. tit. 60, § 121 (creating an exception if the right is guaranteed by a U.S. treaty or if the person's country of origin affords such rights to U.S. citizens); Okla. Stat. tit. 60, § 122 (creating an exception for resident aliens or aliens who intend to become residents).

become a U.S. resident or U.S. citizen. Ultimately, there are not outright restrictions on foreign investors owning real estate, but instead conditions and limitations at the state level.

VII. Conclusion

The previous sections have covered the sectors and subsectors where the United States has the most extensive limitations on foreign investment. While a few of these limitations are stringent in nature, many allow for high levels of indirect ownership, for investment based on corporate structure, and for investment where the home country of the foreign investor reciprocates. The volume of FDI into the United States remains the highest in the world and stands as a testament to the nation's friendly investment environment. The United States ultimately welcomes foreign investment even in the sectors where there are limitations and has made a variety of resources available to foreign investors seeking to invest into the United States, including the SelectUSA program. In that same light, this chapter will hopefully prove a useful addition to foreign investors looking to navigate the U.S. investment regime.

Disclaimer

This chapter was prepared by Edward S. Rivera with the Office of the Chief Counsel for International Commerce (OCCIC). Views expressed in this chapter are the author's own, not that of the International Trade Administration. This chapter does not constitute legal advice. Readers interested in investing in the United States should consult legal counsel.