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Global Practice Guides

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Trends and Developments

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Overview

In 2023 and the first half of 2024, the USA was the leading destination for inbound foreign direct investment (FDI) as well as the largest investor in outbound FDI worldwide, according to the OECD. The USA also topped the list in Kearney's Foreign Direct Investment Confidence Index as the most attractive market for FDI for the twelfth year in a row.

Perhaps this is just concomitant with the USA being the largest economy in the world. Perhaps it reflects the flight of FDI flows to a more stable and predictable jurisdiction in times of uncertainty in recent years. Perhaps it can be attributed to the simple good fortune of having access to abundant energy sources, being geographically removed from geopolitical strife, and dynamic and durable consumer spending.

Amidst a complex and changing political, economic and social backdrop, a number of factors have influenced the USA's position as a top destination for FDI again in 2024, including legislative and executive action with direct implications for FDI.

The CFIUS and National Security

While the Committee on Foreign Investment in the United States (the "CFIUS") has been around for many years, the passage of the Foreign Investment Risk Review Modernisation Act in 2018 (the "FIRRMA") and its implementation since adoption expanded the scope of transactions subject to review, required certain mandatory filings for the first time and enhanced the focus on transactions involving critical technologies, critical infrastructure and sensitive personal data.

Using this broadened grant of authority, the CFIUS reviewed 342 total filings made by transaction parties in 2023, down from a total of 440 filings in 2022. This change may reflect lower global M&A volume in 2023 but also greater sophistication of parties in discerning which transactions may require a notice to be filed. Furthermore, in 2023, for the first time under the FIRRMA, the CFIUS imposed four civil monetary penalties for violations. These penalties were significant as, prior to 2023, the CFIUS had only issued two of these penalties in its 50-year history. The trend of penalties of increasing frequency and amount has continued in 2024, underscoring the CFIUS's renewed commitment to compliance monitoring.

In September 2022, President Biden signed the Ensuring Robust Consideration of Evolving National Security Risk by the Committee on Foreign Investment in the United States Executive Order, which for the first time provided specific presidential direction to the CFIUS on the risks that it should consider in its reviews of inbound investment transactions by non-US persons. The Executive Order highlighted a number of areas, including:

- US supply chain resilience;
- US technological leadership (including in sectors such as microelectronics, artificial intelligence, biotechnology and biomanufacturing, quantum computing, advanced clean energy and climate adaptation technologies);
- risks of aggregate industry investment trends;
- cybersecurity and cyber-enabled malicious activity; and
- US persons' sensitive personal data (including health, digital identity and biological data).

In November 2024, the US Department of Treasury issued a final rule broadening the CFIUS's jurisdiction over real estate transactions, granting the CFIUS the ability to review certain real estate transactions by foreign persons near more than 60 military bases and installations across 30 states. While the areas of focus identified in the 2022 Executive Order and the 2024 rule are not explicitly targeted at any individual foreign nation, they reflect a broader policy trend of repositioning the USA for a period of strategic competition with China and using the CFIUS in particular to ensure that advanced technologies developed in the USA are adequately protected from access that may enhance China's capabilities.

Overall, for deal practitioners, the CFIUS process is well established in the deal landscape for inbound M&A and other forms of investment. Although the vast majority of transactions notified to the CFIUS are still being approved, recent data suggests that the CFIUS has realigned towards a more vigilant position, with extended reviews, onerous inspections, and increased penalties likely to continue for the foreseeable future and into the new administration.

Federal Government Stimulus

In recent years, the Biden administration has succeeded in passing a number of significant pieces of legislation that have had a profound impact on the FDI landscape in the USA, drawing interest from companies around the world to invest and grow their US operations.

Between November 2021 and August 2022, the US Congress passed:

- the Infrastructure Investment and Jobs Act providing USD550 billion for transportation infrastructure, clean energy and water and broadband internet access;
- the Inflation Reduction Act, which allocated USD369 billion to energy security and climate change; and
- the CHIPS and Science Act, intended to boost innovation and national security with respect to semiconductors and other advanced technologies by allocating USD200 billion to scientific research and development, USD53 billion to semiconductor manufacturing and USD24 billion to tax credits for domestic chip production.

The combined effect of these Acts, as well as numerous other governmental policies, has been to supercharge investment in the USA in the areas that the Biden administration views as critical to national security and to winning a strategic competition with China over advanced technologies and supply chains. Due (in part) to these Acts, FDI into the US increased from USD227 billion in 2022 to USD5.3 trillion at the end of 2023. Since the enactment of the CHIPS and Science Act, dozens of companies have committed nearly USD400 billion in total semiconductor investments across the country, and by August 2024, the CHIPS Incentives programme had signed preliminary agreements with 15 companies across 15 states to provide over USD30 billion in direct funding and approximately USD25 billion in loans for semiconductor manufacturing projects, putting the US on track to produce nearly 30% of the global supply of leading-edge chips by 2032, up from 0% in 2020.

Two of the four largest semiconductor manufacturing investments since 2020 have been from foreign companies. Since the passage of these Acts, there has also been a sharp increase in US construction spending for manufacturing, with manufacturing attracting the largest volume of FDI on a sector basis in 2023, accounting for 41.2% of FDI at approximately USD2.2 trillion. Within manufacturing, the largest share of FDI was in chemicals, accounting for 34.5% of the total investment in the sector.

Whether through investments in background research that enables technological breakthroughs, the training of a talented workforce, the allocation of tax credits to support domestic manufacturing operations or the upgrading of infrastructure that is critical to transporting products within the USA and to export markets, these Acts have stimulated an increase in inbound FDI to the USA on top of existing economic and geopolitical tailwinds.

Focus on China

While one primary objective of the CHIPS and Science Act was to foster research and development and semiconductor manufacturing at home in the USA, another key factor in its adoption was the development of the Chinese semiconductor industry and its ability to develop its own advanced technologies. In fact, the White House announcement of the Act expressly stated that the "CHIPS and Science Act will lower costs, create jobs, strengthen supply chains, and counter China".

One requirement under the Act for receipt of the financial incentives and tax credits is that the recipient not invest in expanding semiconductor manufacturing in China during the course of the subsequent ten years (effectively facilitating the investment in the US semiconductor industry while simultaneously impeding the growth of China's semiconductor industry). This theme has continued in 2024, with a White House statement noting "President Biden takes action to protect American workers and businesses from China's unfair trade practices".

In September 2024, the chairman of the House Select Committee on the Chinese Communist Party, John Moolenaar championed China Week within the US House of Representatives, as the House of Representatives passed 25 pieces of legislation to combat economic threats from China, from biotechnology to drones to batteries. While it remains to be seen whether these bills will pass the Senate and be enacted as law, they illustrate a bipartisan commitment to supporting legislation that lessens American reliance on China.

In September 2024, the Biden administration also announced measures adding tariffs ranging from 7.5% to 100% on Chinese products (including tariffs of 100% on Chinese electric vehicles) in an effort to bolster American manufacturing. The US trade representative, Katherine Tai, said that the goal of the tariffs was to "target the harmful policies and practices of the People's Republic of China that continue to impact American workers and business".

Chinese FDI into the USA had already been significantly hampered by aggressive enforcement by the CFIUS and the trade war policies enacted under the Trump administration. However, the steps taken in Congress and by the Biden administration in the last few years have cemented a new chapter for FDI between the USA and China, and worldwide. Looking across new FDI into the USA, new Chinese FDI accounted for around 0.5% of total FDI in both 2022 and 2023, according to the Bureau of Economic Analysis. If the USA and China continue down a path of "decoupling" in the coming years, then countries around the world may be forced to choose sides and in essence participate in either a US-centric FDI ecosystem or a China-centric FDI ecosystem.

While the politics of "nearshoring" and "friendshoring" that arose from the supply chain disruptions during the worst of the COVID-19 pandemic began to nudge the world in this direction, further FDI and other restrictions from both the

USA and China would only accelerate the separation of supply chains and investment and technological spheres.

Outbound FDI Regulation

On the other side of the ledger, the USA was the leading source of outbound FDI to other countries in 2023. US outbound FDI increased by USD364 billion, or 5.8%, to USD6.7 trillion at the end of 2023 from USD6.3 trillion at the end of 2022. Large US multinational companies across industries from the technology sector to the automotive industry to the hospitality space have continued to invest heavily abroad, even during the last few challenging years.

However, on the regulatory front, there has been growing momentum in Washington, DC to focus on the potential national security risks of outbound FDI in addition to the more traditional scrutiny of inbound FDI through the CFIUS. In August 2023, President Biden issued an Executive Order declaring a national emergency relating to certain countries (namely, China) exploiting US outbound FDI to develop certain sensitive technologies and products critical for military, intelligence, surveillance and cyber-enabled capabilities, including semiconductors, quantum information technology and artificial intelligence.

Just over a year later, in October 2024, the US Treasury Department released its final regulations implementing an outbound investment control regime to restrict American investment in China. Effective 2 January 2025, the rule impacts US companies and citizens who invest in certain Chinese or China-linked businesses. It specifically targets transactions involving quantum information technologies, semiconductors and microelectronics, and artificial intelligence. Some of these transactions, such as those involving quantum information technologies, will be prohibited outright, while others require a mandatory notification to the Treasury Department within 30 days of closing. As a result, those individuals and entities that decide to invest in certain Chinese businesses may experience increased due diligence requirements and compliance risks.

Additionally, bills regulating outbound FDI, such as the National Critical Capabilities Defence Act and the Outbound Investment Transparency Act, have been brought to Congress several times in recent years and would create a new framework for national security screening of certain outbound FDI from the USA. Proponents of the bills argue that US companies investing in technology development overseas can increase the capabilities of US competitors and adversaries, thereby creating national security risks equivalent to those that may result from non-US companies acquiring US-based businesses.

The bills aim to provide the US government with stronger tools to monitor and influence the supply chains of US companies, including any links to Russia, China and certain other countries. On the other hand, critics of the bills argue that it would harm the competitiveness of US companies investing abroad or even result in a raft of new similar legislation in countries around the world in a response that could hamstring inbound FDI to the USA and the global economy at large. Just as the CFIUS served as an influential model for inbound FDI review regimes adopted around the world in recent years, a US-led push to screen outbound FDI may be the next wave of regulation to buffet FDI flows globally.

Conclusion

It is as challenging as ever to look into the crystal ball to predict whether the USA will retain its top spot for both inbound FDI flows and outbound

FDI flows in 2025 and beyond. The key variable will be the return of Donald Trump to the presidency in January 2025, which seems likely to usher in a new chapter in the American approach to FDI and its trading partners, whether from the application of tariffs to further industrial policy to geopolitical developments.

Despite the upcoming change in administration, it is the constants in the USA market that may provide the biggest boost to inbound FDI in the years to come: a skilled and innovative workforce; access to a large and affluent consumer market; historic stability; predictability of judicial outcomes; and favourable tax rates and regulatory regimes. Heading into a second Trump administration in 2025, it would be prudent to recognise that it is these constants that have made the USA the world's pre-eminent jurisdiction for FDI and any changes that jeopardise them need to be approached with due caution.

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