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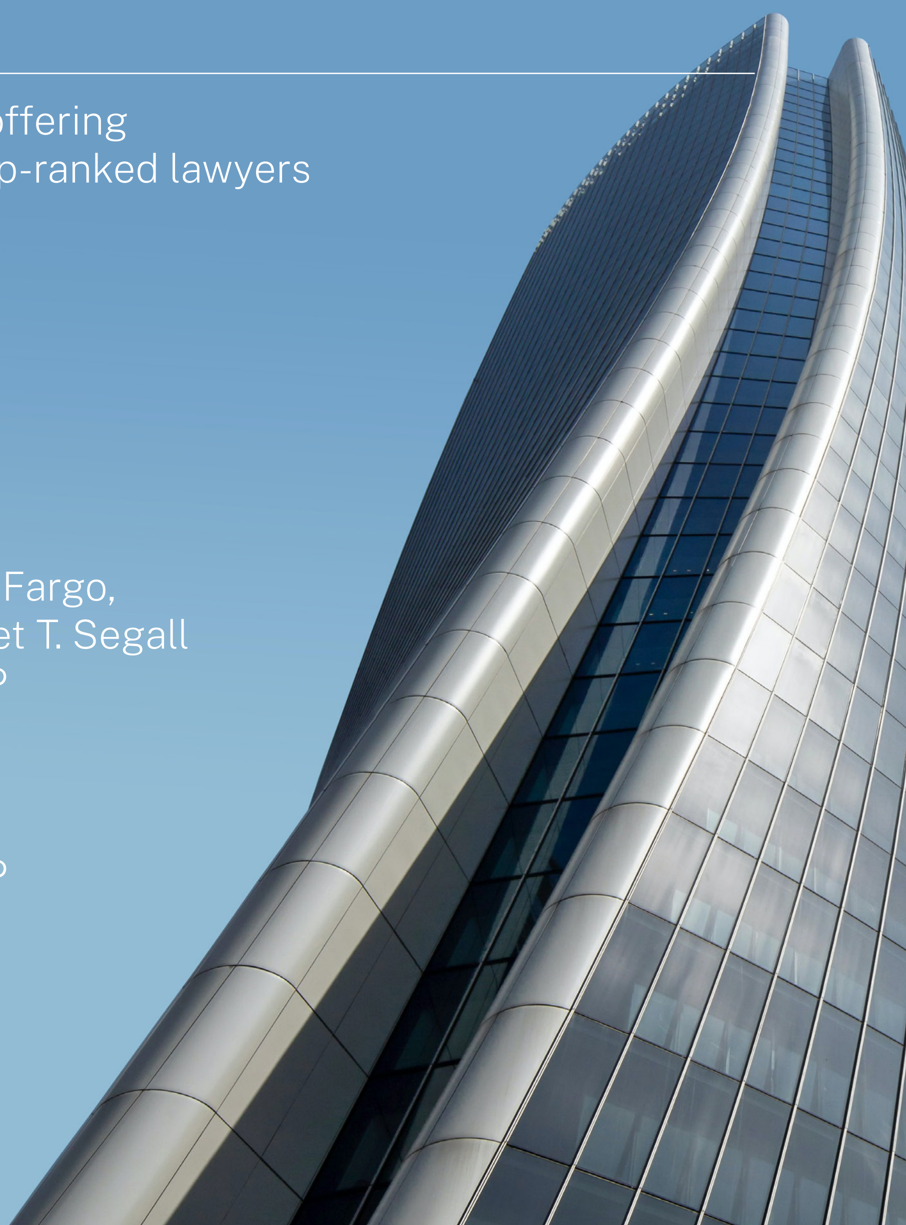

USA

Law & Practice
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Trends and Developments

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Cravath, Swaine & Moore LLP

Cravath, Swaine & Moore LLP has been known as one of the premier US law firms for two centuries. The firm advises companies on their most critical needs, including across the full spectrum of corporate transactions, encompassing mergers, acquisitions, divestitures, spin-offs and joint ventures, as well as securities offerings in the global debt and equity markets, bank financings, restructuring and bankruptcy matters, and shareholder activism defence. Both US and international clients rely on the firm's leadership and expertise in their most transformative corporate matters and high-stakes litigation, many of which involve multiple jurisdictions across diverse industries. The firm's hallmark is its ability to bring together expertise across disciplines, delivering an integrated and collaborative approach to clients on their most significant matters.

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Overview

In 2024 and the first half of 2025, 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 thirteenth 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 historically 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 2025, including legislative and executive action with direct implications for FDI.

America First Investment Policy

On 21 February 2025, the White House issued the National Security Presidential Memorandum 3: America First Investment Policy (the "AFI Policy"). The AFI Policy notes that the Trump administration remains committed to the USA's longstanding, bipartisan open investment environment, but also previews significant potential changes to foreign investment regulation. Those potential changes include:

- proposed expansion of jurisdiction of the Committee on Foreign Investment in the United States (CFIUS) to include "greenfield" investments (ie, investments in which a foreign person establishes a new business in the USA, rather than acquiring or investing in an existing US business);
- a focus on reforming CFIUS mitigation agreements so that such agreements consist of concrete actions that companies can complete within a specific time, rather than perpetual and expensive compliance obligations;
- expedited environmental reviews for investments in the USA over USD1 billion;
- further restrictions on investment by the People's Republic of China (the "PRC") or PRC-affiliated persons in US businesses in strategic sectors, including critical technology, critical infrastructure, healthcare, agriculture, energy and raw materials; and
- the AFI Policy "welcomes and encourages passive investments from all foreign persons", including non-controlling stakes and shares with no voting, board or other governance rights and that do not confer any managerial influence, substantive decision-making or non-public access to technologies/technical information, products or services.

The AFI Policy is significant because it highlights the Trump administration's key considerations relating to foreign direct investment and its attitude that economic security is national security. Specifically, it prioritises protecting US companies in critical sectors, revitalising US manufacturing capacity, building US capabilities in new technologies and ensuring supply chain resilience.

CFIUS and National Security

While CFIUS has been around for many years, the passage of the Foreign Investment Risk Review Modernization Act in 2018 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, CFIUS reviewed 325 total filings made by transaction parties in 2024, down from a total of 342 filings in 2023 and 440 filings in 2022. This change may reflect lower global M&A volume but also greater sophistication of parties in discerning which transactions may require a notice to be filed and greater comfort in not filing for transactions that involve little national security risk.

In 2024, CFIUS imposed five civil monetary penalties for violations – four with respect to breaches of material provisions of mitigation agreements or conditions, and one with respect to submission of a notice and supplemental information containing material misstatements. These penalties were significant as, prior to 2023, CFIUS had only issued two such penalties in its 50-year history. The trend of penalties of increasing frequency and amount underscores CFIUS's renewed commitment to compliance monitoring.

While CFIUS enforcement may be increasing, there is still an appetite for attracting foreign investment to the USA. On 31 March 2025, President Trump signed an executive order directing the establishment of the US Investment Accelerator, which aims to facilitate and accelerate both foreign and domestic investments over USD1 billion in the country, by assisting investors as they navigate government regulatory processes. In May 2025, the US Treasury Department issued a press release announcing its intent to launch a "Fast-Track" within the CFIUS review process to facilitate greater investment from ally and partner sources. This new programme will allow CFIUS to collect information from foreign investors in advance of a specific transaction and aims to streamline the CFIUS review process for certain trusted investors. The announcement of this new initiative evidences that CFIUS remains committed to facilitating and expediting foreign investment from allied and partner sources that do not raise national security concerns.

Furthermore, on 13 June 2025, President Trump issued an order approving Nippon Steel's acquisition of US Steel. While President Biden's administration had initially prohibited the transaction, President Trump found that the threat arising from the transaction could be adequately mitigated by the parties entering into a contract with the US government. In a first for CFIUS, it required US Steel to issue a "golden share" to the US government. This golden share, which does not include economic rights, gives the US government veto rights over a range of US Steel's business decisions, including relocating headquarters, changing the company's name, closing or idling plants before certain timeframes and reducing investments, among other matters. Perhaps most importantly, the US government will have the right to directly appoint one of US Steel's three independent directors, and will have an approval right with respect to the other two. While the issuance of a "golden share" may not become commonplace, it demonstrates the Trump administration's interest in CFIUS-related remedies.

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 CFIUS are still being approved, recent data suggests that CFIUS has realigned towards a more vigilant position, with potentially onerous inspections and increased penalties likely to continue for the foreseeable future.

Focus on China

In particular, the PRC remains at the forefront of CFIUS and national security policy in the USA. The PRC maintained the top spot as the foreign country from which the most notices were submitted to CFIUS in 2024, with 26 notices in total. In July 2025, President Trump issued an executive order prohibiting the acquisition of Jupiter Systems, LLC ("Jupiter"), an audiovisual equipment technology company that serves critical infrastructure and military customers in the USA, by a subsidiary of a Chinese entity, despite the transaction having closed in 2020. CFIUS found "credible evidence" that the transaction posed a national security threat relating to the potential compromise of Jupiter's products used in military and critical infrastructure environments. The executive order demonstrates that CFIUS under the Trump administration is willing to retroactively unwind transactions it deems a threat to national security and require mandatory divestitures.

Additionally, in April 2024, the American Congress signed into law the Protecting Americans from Foreign Adversary Controlled Applications Act, which banned social networking services defined as "foreign adversary controlled applications" if the president deemed them a threat to national security. The act explicitly applied to ByteDance Ltd. ("ByteDance"), a Chinese entity, and its subsidiaries, including TikTok. After President Trump signed multiple executive orders delaying enforcement of the ban, he signed an executive order in September 2025 that would allow a coalition of investors to run an American version of TikTok, separate from ByteDance. Specifically, the framework sets forth a "qualified divestiture" whereby a joint venture, majority owned and controlled by US persons, will operate TikTok's US application.

The AFI Policy stated the Trump administration's posture on PRC investment outright, categorising the PRC as a "foreign adversary" for the purposes of the memorandum, along with the Republic of Cuba, Iran, the Democratic People's Republic of Korea, the Russian Federation and the Venezuelan regime of Nicolás Maduro. The memorandum stated that "certain foreign adversaries, including the People's Republic of China (PRC), systematically direct and facilitate investment in United States companies and assets to obtain cutting-edge technologies, intellectual property, and leverage in strategic industries. The PRC pursues these strategies in diverse ways, both visible and concealed, and often through partner companies or investment funds in third countries."

Under the Trump administration, it has become clear that the PRC has become a disfavoured source of foreign investment and that foreign investors with ties to the PRC will receive strict scrutiny from CFIUS. The USA will use existing tools – and pursue new legal authorities – to restrict investment from the PRC, and PRC or PRC-affiliated investors will likely face even steeper hurdles than they have in the past.

Tariffs

A hallmark of the second Trump administration thus far has been its willingness to use tariffs and the threat of tariffs as leverage in both economic and noneconomic negotiations and with both traditional allies and adversaries alike.

In 2020, the North American Free Trade Agreement was replaced by the United States–Mexico–Canada Agreement (USMCA), and in July 2026, on the sixth anniversary of the USMCA's implementation, the three countries will hold a formal review to assess its record and future. Given the ongoing tariffs – and threat of tariffs – against Canada and Mexico, the talks will likely be anything other than routine. In 2024, goods and services trade within North America totalled an estimated USD1.93 trillion, and the USMCA governs co-operation across a range of sectors, from automotive manufacturing to energy and agriculture. The Trump administration has reiterated that both Canada's and Mexico's access to the US market will depend not only on addressing perceived trade imbalances, but also action on non-trade concerns, including immigration and drug enforcement.

The Trump administration's tariff policies have triggered a range of different responses from the USA's trading counterparties. On the one hand, they have indirectly bolstered certain alliances not involving the USA. For example, BRICS – an intergovernmental organisation comprised of Brazil, Russia, India, China, South Africa, Egypt, Ethiopia, Indonesia, Iran and the United Arab Emirates – has turned inward in response to American tariffs. At the annual BRICS summit in 2025, the countries issued a statement voicing "serious concerns about the rise of unilateral tariff and non-tariff measures which distort trade" and committing to increased economic and trade collaboration within BRICS. On the other hand, certain other countries have chosen a more conciliatory approach. In exchange for lower tariffs, Japan pledged to fund more than USD550 billion in American projects to bolster American infrastructure and manufacturing.

Tariffs have been front and centre of the Trump administration's policymaking so far in 2025, although it remains to be seen how they will affect foreign investment into the USA over the long term. Regardless, the widespread reintroduction of tariffs as a policy tool has ushered in a new chapter in American trade policy, with the effects to be seen in the years to come.

Outbound FDI Regulation

On the other side of the ledger, the USA was the leading source of outbound FDI to other countries in 2024. US outbound FDI increased by USD206.3 billion, or roughly 3%, to USD6.8 trillion at the end of 2024 from USD6.7 trillion at the end of 2023. Large US multinational companies across industries, from the technology sector to the automotive industry and 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 CFIUS. The AFI Policy noted a potential expansion of outbound investment by US persons in PRC-linked entities, both in terms of sector (eg, hypersonics, aerospace, advanced manufacturing, directed energy and more) and type of investment (eg, investments in publicly traded securities).

In October 2024, the US Treasury Department released its final regulations implementing an outbound investment control regime to restrict American investment in the PRC. Effective 2 January 2025, the rule impacts US companies and citizens who invest in certain PRC or PRC-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, are 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 and the export of certain technologies abroad continue to be brought to Congress. The China Technology Transfer Act of 2025 would restrict the export to the PRC of certain "national interest technology" and intellectual property, and the No Advanced Chips for the CCP Act of 2025 would prevent advanced artificial intelligence semiconductors from being sent to the PRC without both the President and Congress explicitly approving such transactions. In October 2025, the Senate passed a bipartisan amendment to the National Defense Authorization Act that would allow the US government to block investments into certain technology sectors of the Chinese economy.

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.

Conclusion

It remains as difficult as ever to gaze into the crystal ball and predict whether the USA will retain its top spot for both inbound and outbound FDI flows in 2026 and beyond. The key variable will be the extent of the impact of the Trump administration's ushering in of a new chapter in the United States' approach to FDI and its relationships with trading partners, encompassing the use of tariffs, the expansion of industrial policy, and wider geopolitical developments.

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