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# USA

## Law and Practice

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# 1. Legal System and Regulatory Framework

## 1.1 Legal System

### Legal System

The laws of the USA derive from several different sources and exist in various forms. The US Constitution is the supreme law of the land, under which the legal landscape is composed of common law, statutory law and regulatory rules. In addition, matters may be governed by US federal law, the law of one of the 50 US states or be subject to both federal and state jurisdiction at the same time. Each jurisdiction has its own common law, statutory law and regulatory rules, as well as its own court system and procedural rules.

State courts have jurisdiction over questions of state law and most questions of federal law. Federal courts have jurisdiction over questions of federal law and only limited jurisdiction over questions of state law. The court system usually follows the same structure in the various states as well as on the federal level, with a Supreme Court as the highest court, the Court of Appeals as an intermediary court (not all state court systems provide for an intermediate court) and the trial courts (also referred to as circuit or district courts) on the lowest level.

### Sources of US Law

In addition to statutory laws and regulatory rules at the US federal and state level, a significant portion of applicable law derives from common law. Common law, also referred to as case law, is established through judicial decisions, which create precedents and have authority for future court proceedings and decisions. Precedents may be established by state or federal courts and precedents of appellate courts are binding on lower courts within the same jurisdiction. In contrast, precedents from other jurisdictions only have persuasive (informative or influential) effect.

International treaties, federal and state statutes as well as the rules enacted by regulatory agencies, such as the US Securities and Exchange Commission (SEC) and the Federal Trade Commission (FTC), present further sources of US law and regulatory frameworks. The US Congress, as the legislative branch of the federal government, is responsible for passing federal statutes. Congress may also delegate rule-making power to executive or independent agencies to enact and enforce regulatory rules; the SEC and FTC are examples of such agencies with rule-making power. The responsibility of these regulatory agencies is not limited to implementing and enforcing new rules but also extends to the interpretation of existing laws, thereby shaping the legal landscape further.

## 1.2 Regulatory Framework for FDI

The USA does not provide a strict framework for foreign direct investment (FDI) and has historically been relatively open to FDI. The Committee on Foreign Investment in the United States (CFIUS) is the committee authorised to review certain foreign investment transactions in order to determine the effect of such transactions on the country's national security.

However, notwithstanding the implementation in 2018 of a mandatory filing regime (which was significantly revised in 2020), review by CFIUS remains largely a voluntary process and CFIUS approval is not required for most FDI transactions. Mandatory filing is limited to certain transactions involving US businesses that deal with critical technologies or critical infrastructure, or that collect or maintain sensitive personal data. Investors from certain foreign states are exempted from some aspects of the CFIUS regime. More detail is provided in **7. Foreign Investment/National Security**.

## 2. Recent Developments and Market Trends

### 2.1 Recent Developments and Market Trends

#### Current Environment

US M&A transactions hit a record high in 2021 by total deal value, which totalled approximately USD2.6 trillion. US M&A activity in 2022 slowed in comparison to 2021, but remained in line with pre-pandemic levels, despite facing headwinds such as rising inflation and interest rates. The total deal value of US M&A transactions through the first three financial quarters of 2022 totalled approximately USD1.3 trillion, accounting for a decrease by value of approximately 40% in comparison to the same period in 2021. The US market's share of the global M&A by value in the first three financial quarters of 2022 accounted for approximately 42%, which is down from 46% compared to the same period in 2021.

#### CFIUS

CFIUS continues to play a significant role in transactions involving foreign investment in a US business, as the US government increasingly views investment screening as an essential national security tool. In September 2022, President Biden signed the first executive order providing formal presidential direction to CFIUS on the risks it should consider when reviewing transactions, and in October 2022, CFIUS released its first enforcement and penalty guidelines. Although neither the executive order nor the guidelines changed CFIUS processes or legal jurisdiction, they are nevertheless noteworthy as indicia of the continuing evolution and maturation of the US approach to investment screening. Overall, enhanced review of FDI transactions and the diminished predictability of outcomes at CFIUS continue to generate uncertainty surrounding the risks governing foreign investment in the USA.

#### Antitrust Under the Biden Administration

The Biden administration has brought heightened scrutiny of transactions with an increased scepticism of consolidation in general. President Biden's picks for antitrust leadership roles at both the Antitrust Division of the Department of Justice (DOJ) and FTC are vocal proponents of a more aggressive antitrust enforcement agenda. Under the leadership of Chair Lina Khan, the FTC already has voted through a series of changes along party lines that enhance the FTC's enforcement capabilities, such as reviving the FTC's practice of including "prior approval" provisions in consent decrees which impose significant obligations on merging parties with respect to future deals and expanding the scope of enforcement action under Section 5 of the FTC Act with respect to conduct that does not violate the other antitrust laws.

Both agencies are expected to increase their scrutiny of remedy packages and buyers. Areas of particular antitrust interest are technology, healthcare, agriculture and private equity. Parties should expect more expansive reviews, longer review timelines, increased engagement on broader theories of harm, and increased chance of litigation.

# 3. Mergers and Acquisitions

## 3.1 Transaction Structures

### Investment in Private Companies

In the USA, acquisitions of private companies are typically effected through share purchases, asset purchases or mergers. Share purchase agreements are agreements between current and future shareholders of a respective target company under which the future shareholders purchase the equity of the target from current shareholders. In the absence of an agreement otherwise in the share purchase agreement, all assets and liabilities of the target company will remain with the target company and will therefore be for the account of the future shareholders. Share purchase agreements are also most common for minority investment and venture capital investment rounds.

In contrast to an acquisition of a business via a share purchase, an asset purchase does not affect the shareholder structure of the target company. The acquirer will purchase from the target company only the assets and liabilities that are identified (whether specifically or categorically) in the asset purchase agreement.

Finally, private companies with more disparate shareholder bases can be acquired using a state-law governed merger, in which the target company is merged with a company (typically a shell acquisition vehicle) owned by the acquirer and the current shareholders receive the consideration for the sale in exchange for their shares in the target company. Unlike a share purchase where each selling shareholder would need to be party to the share purchase agreement, mergers can be approved by the percentage of shareholders required under state law (eg, a majority of the outstanding shares) and are binding on all shareholders of the target company.

### Investment in Public Companies

Due to the disparate shareholder base of any public company, acquisitions of public companies use the state-law governed merger structure described above, structured either as a one-step merger or a two-step transaction. Except for unsolicited/hostile takeovers, the target company board and the acquirer will negotiate the terms of a merger agreement that will govern the transaction, including representations and warranties, restrictions on the target company between signing and closing, risk allocation related to regulatory approvals, conditions to closing, and ability of the target company to accept superior proposals.

In a one-step merger, the merger of the target company with the acquirer's acquisition vehicle must be approved by the target's board of directors and then put to a vote of the target company's shareholders. Once the target company's shareholders have approved the merger (and any other conditions to closing have been satisfied), the merger will occur and will be binding on all shareholders of the target company.

In a two-step transaction, the acquirer will first make a public tender offer to the target company's shareholders to acquire their shares for the merger consideration. Once sufficient shares have been tendered for the acquirer to itself complete a state-law governed merger to squeeze out the non-tendering shareholders, the acquirer closes on the tender offer and completes the second-step merger to acquire 100% of the target company.

## 3.2 Regulation of Domestic M&A Transactions

All domestic M&A transactions, including those involving FDI, are subject to US antitrust and competition laws as set forth in **6. Antitrust/**

**Competition**. Foreign investors should bear in mind that any issuance of securities in the USA is subject to the regulatory framework enacted and enforced by the SEC. As a result, a foreign entity intending to offer its shares as consideration in the course of a US M&A transaction is likely to be required to register the securities with the SEC.

## 4. Corporate Governance and Disclosure/Reporting

### 4.1 Corporate Governance Framework

#### Legal Entities

The most common legal entity forms in the USA are corporations, partnerships and limited liability companies (LLCs). The most relevant items to consider when choosing a legal entity form include the respective tax treatment, limitations on liability and whether the entity will be privately or publicly held. The most common legal entity form in the USA for publicly traded companies is the corporation, but publicly traded LLCs and partnerships also exist. US investment funds are frequently structured as partnerships.

#### Corporate Governance

Corporate governance laws derive from both federal and state law, as well as requirements of securities exchanges. Many US corporations are incorporated in the state of Delaware and, as a result, the corporate case law crafted in Delaware plays a prominent role in US corporate governance. Delaware state law imposes fiduciary duties on the officers and directors of a Delaware corporation, as well as on controlling shareholders. These fiduciary duties include a duty of loyalty and a duty of care and are owed to the Delaware corporation and its shareholders.

As a general matter, Delaware corporations follow the shareholder primacy framework in which the officers and directors of the corporation are charged with acting in the best interests of its shareholders. Certain other US states expressly incorporate the interests of other stakeholders into the fiduciary duties owed by officers and directors of corporations incorporated in those states. However, there has been increasing debate in the USA in recent years on the merits and long-term viability of a pure shareholder primacy framework, particularly driven by large institutional investors and the corporate governance community. ESG issues have been brought to the forefront of this dialogue, and most US corporations recognise the need to address the interests of other stakeholders in order to preserve long-term value for shareholders.

In addition to state law, the Securities and Exchange Act of 1934, the Sarbanes-Oxley Act of 2002 and the Dodd-Frank Act of 2010 provide a framework of rules and disclosure requirements applicable to public corporations; for more detail refer to **5. Capital Markets**. In addition to the applicable legal requirements, proxy advisory firms like ISS and Glass Lewis set forth corporate governance requirements, including matters such as board diversity and director accountability, which directly impact shareholder voting and are therefore highly relevant for public companies.

### 4.2 Relationship Between Companies and Minority Investors

#### Controlling Shareholders

As set forth in **4.1 Corporate Governance Framework**, directors and officers of corporations owe fiduciary duties to the corporation and its shareholders. Under Delaware state law, a controlling shareholder may also owe certain fiduciary duties to minority shareholders. Such fiduciary duties become relevant in the context of conflicted interest transactions between the controlling shareholder and the corporation. It is also important to note that shareholders of private LLCs and partnerships may eliminate such fiduciary duties, which can be protective of officers, directors, general partners and controlling shareholders.

### Shareholder Litigation
One important distinguishing feature of the US corporate landscape is the prevalence of shareholder litigation. Litigation by shareholders of public companies, whether on a "derivative" basis on behalf of the corporation or on a "class action" basis on behalf of a large class of shareholders, is quite common – both in the context of significant corporate transactions (eg, M&A, IPOs) and in the ordinary course (eg, disclosure-based "stock drop" cases). The plaintiff bar in the USA is continuously searching for potential claims, and both litigating and settling these claims can become very costly for the corporation.

## 4.3 Disclosure and Reporting Obligations
### Schedule 13D and 13G Under the SEA
Pursuant to the Securities Exchange Act of 1934, any individual or institutional investor must publicly disclose its ownership of stock in a US public company if the investor directly or indirectly becomes the beneficial owner of more than 5% of the public company's shares. To comply with this reporting obligation, the investor must file a statement on Schedule 13D with the SEC within ten days after the acquisition. However, if certain requirements are met, a shorter form Schedule 13G may be filed instead of a Schedule 13D.

### Insiders Under the SEA
Pursuant to the Securities Exchange Act of 1934, any director or officer of a US public company or person who directly or indirectly becomes the beneficial owner of more than 10% of the public company's shares (each, an insider) must file a statement on Form 3 with the SEC within ten days after becoming an insider. Additionally, an insider under Section 16 may be required to report certain changes in beneficial ownership on Form 4 as well as an annual statement of beneficial ownership on Form 5. An insider is also prohibited from realising short-swing profits, resulting from the sale of equity in the public company within six months of purchasing any such equity at a lower price or from the purchase of equity in the public company within six months of selling any such equity at a higher price. An insider is strictly liable to disgorge any short-swing profits realised to the issuer.

### Filing Thresholds
Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), investors in US companies must comply with notification requirements at certain notification thresholds, as provided by the size of transaction and size of person tests. For more detail refer to **6. Antitrust/Competition**.

### Bureau of Economic Analysis
For survey purposes, US companies are required to report inbound FDI transactions to the Bureau of Economic Analysis (BEA) for the BE-13 survey on new FDI in the USA within 45 days after an acquisition of a company is completed, a legal entity is established or has expanded, in each case, if the transaction was consummated either (i) by a foreign person or entity or (ii) by an existing US entity with a foreign entity holding a controlling stock interest (defined as 10% or more of voting securities) in the respective US affiliate.

# 5. Capital Markets

## 5.1 Capital Markets

### Structure

The US equity markets accounted for 46.2% of the global equity markets, as of the third fiscal quarter of 2022, and 39.2% of the global fixed income market, as of the first fiscal quarter of 2022. The main equity markets and exchanges in the USA are the New York Stock Exchange Euronext (NYSE) and the Nasdaq Stock Market. In 2022, equity issuances on US capital markets, as of the third fiscal quarter of 2022, represented a total of USD77.2 billion, a decrease of 77.7% from USD345.7 billion in the same period of 2021, and the value of initial public offerings (IPOs), as of the third fiscal quarter of 2022, represented a total of USD7.1 billion, a decrease of 75.4% from USD117.8 billion in the same period of 2021. As of the first three fiscal quarters of 2022, the issuance of corporate debt, asset-backed securities and non-agency mortgage-backed securities amounted to an approximate total of USD1,337.5 billion, a decrease of 28.2% from USD1,861.7 billion in the same period of 2021. Bank debt and capital markets debt are generally highly accessible in the USA and are common sources of financing. Given the volatility in 2022, for highly leveraged transactions, accessing those markets has been more challenging for borrowers recently, and direct lending has become another important source of funding for such deals.

US private markets are highly active and venture capital is widely available to nurture the growth of private companies. In recent years, the strength of the private market has allowed companies to hold off on IPOs as US private companies can often meet their financing needs without relying on public capital.

### Regulation

The SEC regulates the US public capital markets. The SEC is an independent US government agency that sets forth the requirements for public companies to disclose financial and other information to the public and has civil enforcement authority for violations of the securities laws. The SEC is also responsible for overseeing the security exchanges, brokers and dealers, investment advisers and mutual funds. To trade securities on the US exchanges, an issuer must be registered with the SEC and accepted for listing on an exchange.

In addition, the NYSE and Nasdaq require listed companies to adhere to certain corporate governance standards, including with respect to directors' independence and the implementation of an audit committee.

## 5.2 Securities Regulation

### Securities Act of 1933

The Securities Act of 1933 and the rules and regulations promulgated thereunder (collectively, the Securities Act) regulate the issuance of securities in the USA and set forth the registration requirements for issuances of securities and the exemptions therefrom. The Securities Act is designed to protect investors in issuances of new securities and to ensure full and fair disclosure before making an investment decision. Issuers may be exempted from the registration requirements, as is the case for most private investments if certain requirements are met.

### Securities Exchange Act of 1934

The Securities Exchange Act of 1934 and the rules and regulations promulgated thereunder (collectively, the Exchange Act) regulates the trading of securities once such securities have been registered. Under the Exchange Act, public companies must comply with ongoing reporting requirements (eg, annual reports on Form 10-K, quarterly reports on Form 10-Q), produce financial statements in accordance with the GAAP or IFRS and provide proxy statements in advance of votes at shareholder meetings.

In addition to the regular cadence of periodic reporting, US public companies must also disclose information relating to specific transactions or other actions within four days for certain reportable events on Form 8-K. A more lenient regime applies to "foreign private issuers" that are organised outside the USA and meet certain share ownership or business contacts criteria.

### 5.3 Investment Funds

See **7. Foreign Investment/National Security** for additional detail on FDI by foreign investors structured as investment funds.

## 6. Antitrust/Competition

### 6.1 Applicable Regulator and Process Overview

The merger control regime of the USA is governed by the HSR Act – codified in Section 7(a) of the Clayton Act. There are two government agencies that review transactions – the DOJ and the FTC. Which agency has jurisdiction over a particular transaction is determined by agency experience and expertise with the relevant industry.

The HSR Act requires that the transacting parties each file a pre-merger notification form (ie, HSR filing) for transactions above a certain size. The parties must file if the following jurisdictional tests are met: size-of-transaction, size-of-person, and commerce. For 2022, the size-of-transaction test is met if the value of the assets, voting securities and non-corporate interests to be acquired are worth more than USD101 million. If the value is less than USD101 million, then the transaction is not reportable.

The size-of-person test only applies to transactions that result in the acquirer holding interests of the target company valued at more than USD101 million but less than USD403.9 million. This test is satisfied when one of the parties has annual net sales and total assets of at least USD202 million and the other has annual net sales and total assets of at least USD20.2 million. The thresholds for the size-of-transaction and size-of-person tests are adjusted each year. The commerce test is satisfied when the acquirer or the target company engages in commerce in the USA or in activities that impact US commerce.

The HSR Act exempts the acquisition of voting securities of a foreign issuer by a foreign acquirer unless certain separate thresholds are met. The HSR Act also has other exemptions, including voting securities acquisitions that are made only for the purpose of investment. These acquisitions must be less than 10% of the voting securities and the investor must have "*no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer*".

After the parties make their HSR filings with the agencies, the parties enter an initial 30-day waiting period (15 days in the event of a cash tender offer or bankruptcy sale). Either party may request early termination of this waiting period, although the agencies have suspended the granting of early terminations since early 2021. If the agencies do not take any further action, the parties are free to close the transaction upon expiration of the waiting period.

If the reviewing agency believes a more in-depth review is necessary, it may issue a request for additional information and documentary material (second request) to each party. If the parties receive second requests, the waiting period is extended to 30 days from the date on which both parties certify that they have "substantially complied" with the second requests.

Following the parties' certification of "substantial compliance" with their respective second requests, the reviewing agency can:

- allow the new waiting period to expire or grant early termination of the new waiting period, in which case the parties are free to close the transaction;
- seek a remedy through a consent agreement; or
- bring a lawsuit to block the transaction.

For FDI transactions that do not meet the relevant requirements to trigger a HSR filing, these investments nonetheless are still potentially subject to a substantive competition review, as all investments are subject to the Clayton Act Section 7's prohibition of acquisitions of stock or assets if "*the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly*", whether or not such investment is notifiable under the HSR Act. In practice, this typically will only happen if the agencies receive complaints about the investment from customers, competitors or other industry participants.

## 6.2 Criteria for Review

The DOJ or FTC will assess whether there is any competitive impact of the investment as part of the HSR Act review process.

If the reviewing agency determines that there is potential competitive overlap, it will assess the relevant market in which each party operates to determine the competitive impact of the proposed investment. The reviewing agency will consider the relevant product and geographic markets, level of concentration, and increase in concentration as a result of the investment, in order to assess whether there could be any potential unilateral effects, co-ordinated effects, and/or any other potential anti-competitive harm. The reviewing agency also will consider any potential synergies or efficiencies from the investment. The reviewing agency often will collect information from third parties within the industry, such as customers, competitors, suppliers or industry experts, regarding the effect of the transaction. The agencies are expected to announce new guidelines for the review of transactions in the coming months which may broaden the agencies' traditional approach to reviewing transactions.

## 6.3 Remedies and Commitments

If the reviewing agency determines that it does have competitive concerns with the investment, the parties may propose remedies to address those concerns.

Where the agencies' concerns are about a "horizontal" concentration (ie, a combination of competitors in a relevant market), then the agencies will require structural relief such as divestiture of assets to mitigate any potential anti-competitive harm. Where the agencies' concerns are "vertical" in nature (ie, a transaction between entities at different levels of a production chain), then the agencies may accept behavioural, or conduct, commitments.

The agencies will require the relevant remedy to be negotiated and agreed upon in a formal consent decree, which the reviewing agency must approve prior to allowing the parties to close the transaction. The agencies under the Biden Administration have generally been more sceptical of remedies than past agencies and have shown increased willingness to challenge transactions outright in court.

### 6.4 Enforcement

Transactions that require a HSR filing may not be consummated until the expiration or termination of the waiting period. If the parties consummate the transaction prior to the end of the waiting period, they will be subject to civil penalties of up to USD46,517 per day and are mandated to complete corrective filings. However, whether or not an investment is subject to or went through the HSR Act review process, the agencies have the ability to challenge the investment, either before or after the investment is made, if they believe the investment will result in anti-competitive harm.

If the DOJ or FTC seeks to block an investment before it is made, then such agency must bring suit in federal district court for a preliminary injunction prohibiting the investment from being made pending a court's decision on the merits. If the DOJ or FTC seeks to challenge an investment after it is made, they must also challenge the investment in court (DOJ in federal district court and FTC in either federal district court or through administrative proceedings). The judge's decision may be appealed to an appeals court by either the parties to the transaction or the relevant agency.

## 7. Foreign Investment/National Security

### 7.1 Applicable Regulator and Process Overview

**Overview**

CFIUS is a US government committee authorised to review certain foreign investment transactions in order to determine the effect of such transactions on the national security of the USA. CFIUS is comprised of the heads of nine US government departments and offices, and is chaired by the Secretary of the Treasury.

CFIUS operates pursuant to Section 721 of the Defense Production Act of 1950, as amended (50 USC 4565) (Section 721), regulations promulgated by the Treasury Department (31 CFR Part 800, et seq), Executive Order 11858, as amended, and Executive Order 14083. CFIUS has played an increasingly prominent role in cross-border investments in the last several years, particularly following the enactment of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), which significantly expanded CFIUS's authorities and resources.

**Investments Subject to Review**

CFIUS may review any investment in the USA that involves a foreign person and satisfies certain other criteria summarised below, regardless of industry, sector or transaction value. Generally, a "foreign person" is a foreign national, a foreign entity or a foreign government, or any entity over which control is exercised or exercisable by one of the foregoing. In addition, CFIUS may review any transaction designed or intended to evade the CFIUS process. Transactions subject to CFIUS review are referred to as "covered transactions".

*Covered transactions*

First, CFIUS has the authority to review any transaction that could result in a foreign person controlling a US business, including through a joint venture. CFIUS defines "control" as the power to determine, direct or decide important matters affecting an entity. There is no bright-line ownership threshold for control, and CFIUS may find control at relatively small ownership percentages if the foreign investor holds certain rights (eg, veto rights over certain actions by the US business). CFIUS will not find control, however, in any transaction resulting in the foreign investor holding 10% or less of the outstanding voting interests of the US business, but only if the transaction is solely for the purpose of passive investment.

Second, CFIUS has the authority to review certain non-controlling investments by foreign persons in US businesses that deal with critical technologies, critical infrastructure or sensitive personal data (TID US businesses). Specifically, CFIUS may review an investment by a foreign person in a TID US business if the investment would afford the foreign investor:

- access to material non-public technical information in possession of the TID US business;
- membership or observer rights on the board of directors of the TID US business; or
- any involvement (other than through the voting of shares) in substantive decision-making of the TID US business regarding certain specified matters.

Third, CFIUS has the authority to review the purchase or lease by, or concession to, a foreign person of certain real estate located within a specified distance – in some cases, up to 100 miles – of ports and sensitive US government facilities.

*Exempt investors*

Currently, investors from Australia, Canada, New Zealand and the UK that satisfy certain criteria are exempt from CFIUS's jurisdiction over non-controlling investments and real estate transactions, but remain subject to CFIUS's authority with respect to control transactions. CFIUS maintains the authority to change the list of exempt countries.

### Mandatory Filings

Two categories of transactions – both involving TID US businesses – must be filed with CFIUS at least 30 days prior to closing. First, certain covered transactions must be filed if the target is a TID US business and a foreign government has a substantial interest in the foreign investor. Second, certain covered transactions must be filed if the target is a TID US business that deals with one or more critical technologies, and a licence or other US regulatory authorisation would be required to export such critical technology to the foreign investor or certain persons that own or control the foreign investor. Failure to submit a mandatory filing when required could result in civil monetary penalties of up to USD250,000 or the value of the transaction, whichever is greater.

### Process and Timeline

Parties may submit a transaction to CFIUS by making either a short-form filing (called a "declaration") or a long-form filing (called a "notice"). There is no filing fee associated with submitting a declaration, and CFIUS must assess the transaction within 30 days of accepting the declaration. CFIUS is not obligated, however, to provide the parties with a definitive answer regarding the transaction on the basis of a declaration. Conversely, filing a notice ensures that the CFIUS process will result in a definitive answer as to whether the transaction raises national security concerns. See 'Non-notified Transactions' below for a discussion of the value of receiving CFIUS clearance.

Generally, a notice is filed jointly by the foreign investor and the US target. The filing fee ranges from USD0 to USD300,000 based on the value of the transaction. CFIUS encourages parties to consult with CFIUS in advance of filing a notice, and parties typically file a draft notice prior to submitting their formal filing.

Upon acceptance of a notice, CFIUS begins a 45-day "review" period during which it considers all aspects of the transaction. If necessary, the review period can be followed by an additional 45-day "investigation" period, which can be extended to 60 days in extraordinary circumstances. Upon completion of the investigation period, CFIUS must either determine that it has no unresolved national security concerns and conclude all action under Section 721 with respect to the transaction (referred to informally as "approving" or "clearing" the transaction) or refer the matter to the President of the United States. See **7.4 Enforcement** for a discussion of the authorities of the President.

### Non-notified Transactions

CFIUS has the authority to unilaterally initiate a review of any covered transaction that was not submitted to CFIUS and with respect to which CFIUS did not conclude all action under Section 721 (such transactions are referred to as "non-notified transactions"). CFIUS identifies non-notified transactions that may be of interest through referrals from other executive branch agencies, tips from the public, media reports, commercial databases and notifications from the US Congress. In 2021, CFIUS considered 135 non-notified transactions. Of these, CFIUS requested a formal filing from the parties in eight cases.

CFIUS may initiate a review of a non-notified transaction many years after it was consummated, and this review could result in a forced divestiture if CFIUS identifies national security concerns. For this reason, even if no mandatory filing is required, parties may choose to file with CFIUS voluntarily to obtain increased certainty that CFIUS will not raise concerns in the future.

## 7.2 Criteria for Review

Please see **7.1 Applicable Regulator and Process Overview** for a general overview of the criteria, considerations and analyses associated with the CFIUS process.

## 7.3 Remedies and Commitments

If CFIUS identifies a risk that arises as a result of a covered transaction, CFIUS has the authority to negotiate or impose conditions on the parties to resolve its concerns. These conditions (referred to as "mitigation measures") are generally memorialised in a contract (referred to as a "mitigation agreement") between the parties to the covered transaction and one or more CFIUS member agencies.

Recent mitigation measures have included the following:

- prohibiting or limiting the transfer or sharing of certain intellectual property, trade secrets or technical knowledge to the foreign investor;
- ensuring that the foreign investor does not have access to systems that hold sensitive information;
- ensuring that only US citizens handle certain products and services;
- ensuring that certain facilities, equipment, data and operations are located only in the USA;

- notifying (and requiring for approval of) relevant US government parties in advance of visits by non-US nationals to the US business;
- excluding certain sensitive assets from the transaction;
- notifying customers of the US business of the change of ownership; and
- establishing corporate governance mechanisms (including board committees) to ensure compliance with mitigation measures.

Violation of a material provision of a mitigation agreement may result in a civil monetary penalty of up to USD250,000 or the value of the transaction, whichever is greater. In addition, in certain circumstances CFIUS may re-open its review of the transaction and exercise its other authorities, including recommending that the President force a divestiture.

### 7.4 Enforcement

If CFIUS determines that a covered transaction under review or investigation may pose a national security risk, CFIUS may impose interim mitigation measures or prohibit the parties from consummating the transaction while CFIUS completes its work. If CFIUS ultimately determines that the risk cannot be mitigated, CFIUS may refer the transaction to the President for action.

Following a referral from CFIUS, the President may suspend or prohibit a covered transaction that threatens to impair US national security, including by forcing a divestiture if the transaction has already been consummated. The President must announce a decision on whether to suspend or prohibit a transaction no later than 15 days after the earlier of the date on which CFIUS completed the investigation of the transaction or the date on which CFIUS referred the transaction to the President.

Generally, there is no appeal mechanism within the CFIUS process, and the actions of the President described above are not subject to judicial review. Legal challenges to US government actions under the CFIUS process are rare and may be brought only in the United States Court of Appeals for the District of Columbia Circuit.

Please see **7.1 Applicable Regulator and Process Overview** for a discussion of the consequences of making an investment subject to the jurisdiction of CFIUS without prior CFIUS approval.

## 8. Other Review/Approvals

### 8.1 Other Regimes

Depending on the industry in which an FDI transaction is made, there may also be industry-specific regulatory review or requirements arising at the US federal or state level. Two such examples are described below for illustrative purposes:

Foreign investment in a US business in the telecommunications services sector may require a licence or other authorisation of the Federal Communications Commission (FCC). The FCC may refer an application for such licence or authorisation to the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector (commonly referred to as “Team Telecom”), a multi-agency committee of the US government that assists the FCC in connection with national security and law enforcement concerns that may be raised by foreign participation in the US telecommunications services sector.

The Defense Counterintelligence and Security Agency (DCSA), a component of the US Defense Department, administers the National Industrial Security Program and ensures the security of classified or sensitive information shared by the US government with its contractors. If a US business performs government contracts that require access to classified information, the DCSA may require that the parties take specific measures to mitigate or negate concerns relating to foreign ownership, control or influence in connection with a foreign investment.

## 9. Tax

### 9.1 Taxation of Business Activities

US domestic corporations are subject to tax – currently at a 21% federal rate – on income earned worldwide, subject to a complex scheme of foreign tax credits, deductions and other special rules governing income earned from sources outside the USA. Non-US corporations are subject to tax at the same rate, but only to the extent of any income attributable to business activities carried on in the USA plus an additional branch profits tax of 30%. Under most treaties, these taxes apply only if the business is conducted through a permanent establishment in the USA. Non-US corporations are also subject to tax at a 30% rate on non-business income derived from sources within the USA, including dividends, subject to potential reduction under an applicable treaty. Non-US corporations are generally not subject to US tax on income earned from sources outside the USA.

Many non-US investors prefer to earn income or conduct business in the USA through an entity taxable as a partnership rather than a corporation. Under US tax rules, partnerships are not generally subject to income tax. Instead, the activities and income of the partnership are subject to tax at the partner level. Notably, most non-US and US domestic entities (other than a US corporation under state law) with more than a single owner, including limited liability companies, may elect to be classified as partnership for US tax purposes.

There are numerous taxes imposed on business activity and income earned in the USA in addition to federal income tax. In particular, many US states and some local jurisdictions impose income taxes in addition to federal income taxes on income earned in that jurisdiction. State and local tax rates vary across jurisdictions, with an average rate of between 4% and 5%. State income tax laws generally conform to the US federal income tax laws but there are deviations particular to each state.

Additionally, although the USA has no national value-added tax regime, most states and many local jurisdictions impose sales taxes on products and some services sold within the state. There are also federal, state and local withholding taxes imposed on payroll payments to employees. Excise taxes are also imposed on certain types of businesses and products, including a new 1% excise tax on stock repurchases by publicly traded companies. Finally, state and local jurisdictions may impose other taxes such as property taxes, franchise fees or transfer taxes.

### 9.2 Withholding Taxes on Dividends, Interest, Etc

There is a 30% withholding tax imposed on dividends and interest (other than exempt "portfolio interest") paid by US corporations to non-US investors. US tax treaties generally eliminate withholding on interest and reduce the dividend rate to 15%. A 5% rate for dividends is often available for significant non-US investors, generally those owning at least 10% of a US corporation. A very limited number of treaties also provide for a 0% withholding rate for dividends paid to non-US parent corporations holding at least 80% of a US corporation. A 12-month holding period is frequently required to obtain eligibility for the 5% or 0% rates for dividends.

Most US tax treaties contain comprehensive limitation on benefit provisions to address treaty shopping. Eligibility for the 0% dividend rate is generally further limited to certain categories of non-US corporations, such as publicly traded corporations.

### 9.3 Tax Mitigation Strategies

Historically, tax mitigation strategies in the USA focused primarily on shifting valuable intellectual property offshore through transfer pricing arrangements, increasing leverage on the US business through intercompany debt and redomiciling US companies to non-US jurisdictions to avoid incurring US tax on income from non-US operations.

Developments in US tax law have significantly constrained the availability and effectiveness of many of these strategies. Statutory developments include limitations on the deductibility of interest, a minimum tax rate on certain payments to affiliated non-US persons and current taxation of most income earned by US corporations through non-US subsidiaries. Statutory and regulatory changes have also severely limited the tax benefits of redomiciling US corporations. Finally, the Internal Revenue Service (IRS) has won significant victories in court attacking various transfer pricing arrangements intended to shift income offshore.

### 9.4 Tax on Sale or Other Dispositions of FDI

Disposition of shares of a US corporation by a non-US person is generally not subject to US tax, unless the corporation holds substantial amounts of US real estate and one of several exceptions is not available. Gain from the disposition by a non-US person of a partnership interest is subject to US tax to the extent the gain is attributable to the conduct of a US trade or business by the partnership or the partnership holds a substantial amount of US real estate. These taxes are typically enforced in the first instance through withholding on payments by the acquirer.

As discussed above, because the USA imposes tax on operations conducted by non-US persons in the USA, it is typical for non-US investors to invest in pass-through US businesses through a “blocker” corporation that pays taxes and files US tax returns. Note that the blocker corporation is still subject to US tax on any income it derives from the business and on dividends paid to its non-US shareholders. As a consequence, investing through a blocker does not generally reduce US taxes on ongoing operations. However, a blocker may produce a US tax benefit upon exit because the disposition of the stock of the blocker corporation is generally exempt from US tax, whereas a disposition of the assets of the US business (or a disposition of the interests in the partnership conducting the business) would not be exempt.

### 9.5 Anti-evasion Regimes

US tax law includes several provisions intended to preserve the US tax base. There are specific and complex rules on transfer pricing arrangements intended to ensure transactions between US and non-US affiliates are undertaken on an arm’s-length basis, as well as rules limiting the ability of a US corporation to claim deductions on interest and other liabilities to non-US affiliates prior to payment.

In addition to the limitation on benefits provisions found in many US tax treaties, US tax law contains several provisions limiting the availability of treaty benefits and deductions for payments made to hybrid entities or with respect to hybrid instruments. These restrictions generally apply where applicable non-US law treats the payments differently from US law.

US tax law also includes several judicially created doctrines intended to prevent taxpayers from applying statutory or regulatory provisions to obtain unintended benefits. These include the economic substance doctrine and substance-over-form principles, which may be applied to disregard the form of a transaction in determining its appropriate tax treatment.

Finally, Congress recently enacted a book minimum tax intended to close the gap between US taxable income and financial profits reported to shareholders. Starting in 2023, applicable corporations in a group with over USD1 billion of average annual adjusted financial statement income will be subject to a minimum tax of 15% on that income in each taxable year. Many aspects of the tax and its administration are expected to be developed in future regulatory guidance.

## 10. Employment and Labour

### 10.1 Employment and Labour Framework

Generally, US employment relationships are voluntarily created, without requirement of a written contract.

The employment term can continue for an indefinite period and is generally freely terminable by either party, for any or no reason (other than certain statutory prohibitions, including anti-discrimination rules), unless the relationship is established and governed by an employment contract. Absent a written agreement, employers are not required to provide severance or termination pay. There is no mandatory notice period required by either party to terminate individual employment other than federal law requiring advance notice in connection with certain large-scale lay-offs.

A majority of states in the US recognise restrictive covenant agreements including those relating to non-competition, customer and employee non-solicitation, and confidentiality following employment. Other than in certain US states such as California, non-competition agreements are generally enforceable subject to various limitations on their duration and scope (based on a reasonableness standard), and public policy considerations. However, this is evolving based on state and federal proposals.

While US federal law establishes labour organising rights in the private sector, organised labour is relatively uncommon in the private sector, and tends to be found mainly in certain industries, such as railroads and airlines.

### 10.2 Employee Compensation

There are no material statutorily required benefits in the USA for active employees, other than the Affordable Care Act, which mandates that employers with more than 50 full-time employees offer certain health insurance benefits. Federal and state minimum wage laws may impact compensation.

Compensation for full-time US employees typically consists of cash salary or wages, participation in a defined contribution retirement plan (which may or may not include an employer contribution) and basic welfare benefits, including health insurance, which is often partially subsidised by the employer. Defined benefit pension plans are now fairly uncommon in the US private sector. Management-level employees commonly receive annual cash-based incentive compensation, while equity-based incentive compensation is often reserved for officers and executive employees.

Corporate transactions typically implicate US compensation arrangements only as a matter of contract. Employment agreements, incentive plans and other arrangements frequently contain provisions addressing the impact (if any) of a transaction. Currently, it is uncommon for the mere occurrence of a transaction, including an acquisition, change-of-control, or investment transaction, to cause an amount to vest or become payable, commonly referred to as "single-trigger". Instead, a transaction may cause severance protections to apply for a specified period of time following the corporate transaction if an employee is terminated without cause or resigns for good reason (ie, a constructive termination), commonly referred to as "double-trigger".

### 10.3 Employment Protection

Corporate transactions may generally be entered into and completed without the approval of, or consultation with, US employees. Typically, US employees are not consulted on transactions prior to their public announcement.

Employment in the USA is generally "at will", and the great majority of US private sector employees are not represented by labour unions or works councils. US employees do not have a statutory right to transfer employment (or right to reject transfer) or mandatory severance benefits upon a corporate transaction.

US employees, however, may have contractual rights impacted by the structure of a transaction. Upon a sale of a legal entity, employees of the acquired entity will automatically transfer to the acquirer as their employment relationship will continue with the transferred legal entity. In the case of a sale of the assets of a business, employees of such business will not automatically transfer to the acquirer, and the acquirer instead must offer employment to each employee.

## 11. Intellectual Property and Data Protection

### 11.1 Intellectual Property Considerations for Approval of FDI

Technology – and intellectual property (IP) underlying it – form a key component of CFIUS review. In the last several years, CFIUS has gained significant authority in reviewing national security implications of foreign investments in US companies in possession of sensitive personal data of US citizens or involved in certain critical technologies. For a general overview of the CFIUS process, refer to **7. Foreign Investment/National Security**.

Foundational technologies are often particularly attractive investments for FDI, with diverse applications across multiple sectors. Consequently, CFIUS scrutiny especially focuses on these technologies. Such technologies include robotics, artificial intelligence (AI) and machine learning, big data, quantum computing, IT processing and storage, and mobile computing and communications (including 5G).

### 11.2 Intellectual Property Protections

The USA has traditionally been considered a strong IP regime, with high standards of protection for IP owners. Unlike other jurisdictions, it has no general compulsory licensing statute; involuntary licensing is limited to particular patented subject matter under narrow circumstances.

Instead, the most significant limitation on IP protection stems from evolving judicial and administrative interpretation of subject-matter ineligibility as set forth in 35 USC Section 101. Constant refinement and evolution of eligibility under Section 101 has challenged the availability of IP protection for several key technologies, including electrical and computer technologies and life sciences.

### 11.3 Data Protection and Privacy Considerations

The USA lacks a comprehensive federal data privacy law. Instead, the landscape is a complicated framework of discrete federal data privacy regulations complemented by state/local regulations.

#### Federal

Even without a single federal privacy law, the USA safeguards data privacy through several vertically integrated regulations targeting particular industries and media.

Broadly, the FTC has broad oversight of “unfair or deceptive acts or practices”, under which the FTC issues regulations, enforces privacy laws, and takes enforcement actions to protect consumer data.

In addition to FTC enforcement, federal laws govern the collection of information online, including:

- Children’s Online Privacy Protection Act (information about minors);
- Fair Credit Reporting Act (credit information);
- Health Insurance Portability and Accounting Act (health information); and
- Gramm Leach Bliley Act (personal information collected by financial institutions).

#### State

Currently, just under half of all US state Attorneys General oversee data privacy laws; these may apply to government entities, private businesses or both. California’s Consumer Privacy Act (CCPA) and New York’s Stop Hacks and Improve Electronic Data Security (SHIELD) Act are currently the most significant state data privacy laws. In 2023, the California Privacy Rights Act will come into effect, which extends CCPA rights to all California employees. Additionally, the Colorado Privacy Act, the Connecticut Data Privacy Act, the Utah Consumer Privacy Act and the Virginia Consumer Data Protection Act will become effective and increase the number of US states with comprehensive data privacy laws. Because of the broad nature of these data privacy laws, they can have significant extraterritorial scope – even non-resident businesses fall within their scope.

Penalties under state regulations vary, but include civil penalties levied on a per-violation basis. However, because these state regulations are still relatively novel, enforcement is still evolving.

## 12. Miscellaneous

### 12.1 Other Significant Issues

There are no significant developments not covered elsewhere in this chapter.

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