

Investing in the United States

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1. How does your jurisdiction compare internationally as a destination for inward investment?

The US is the world's largest recipient of foreign direct investment (FDI). FDI is generally defined as a new or expanded business that is owned (directly or indirectly) by a non-US company, and generally serves as an adequate marker for foreign investment.

In 2012, FDI in the US reached US\$175.2 billion. In 2013, FDI increased by 35%, amounting to a total of US\$236.3 billion. The majority of US FDI is concentrated in equity, followed by reinvestment of earning and debt instruments, respectively. The increased activity in the business sectors has led to legal opportunities in commercial litigation, mergers and acquisitions, tax planning, intellectual property and real estate.

Texas is the third recipient of FDI among US states. Although Texas is ranked behind California and New York for total FDI, it ranks first for FDI in the energy and chemical industries. Over the past five years, Houston has attracted 44% of the total Texas FDI, followed by Dallas-Fort Worth and Austin, respectively.

This Q&A deals with investing in the US generally, with a particular focus on Texas.

2. What types of companies are attracting foreign investment into your jurisdiction and what are the most active sectors?

The most active sectors for foreign direct investment (FDI) in the US are (the figures below represent the cumulative FDI in 2013):

- Manufacturing (US\$936 billion).
- Finance and insurance (US\$365 billion).
- Wholesale trade (US\$329 billion).
- Banking (US\$181 billion).
- Information technology (US\$149 billion).
- Professional services (US\$104 billion).
- Retail trade (US\$60 billion).
- Real estate (US\$51 billion).

Sectors that are starting to attract more foreign funds include:

- Alternative energy.
- Climate change mitigation.
- Telecommunications.
- Transport.
- Healthcare.

Chemical companies and petroleum products continue to dominate the manufacturing sector, receiving about 40% of the cumulative FDI, collectively. Transportation equipment and electrical appliance manufacturing has dropped significantly since 2012.

Texas has experienced a significant growth of FDI in the IT and electronics, energy, industrial manufacturing and chemical industries, largely due to:

- International companies reinvesting in their communities in Texas.
- Increased investment and contracting opportunities for foreign subsidiaries.
- Lower standards of living in major Texas cities compared to other major US cities.

For example, Toyota has invested US\$3 billion in the Texas economy.

Currently, most of US FDI is concentrated in Texas, California and New York. Texas leads the country for FDI-funded energy products, whereas New York is the lead destination for financial services and California for information technology.

3. What will be the main factors affecting the market and how do you expect the market to develop?

The US economy is projected to see increased FDI in the next several years, which will likely correspond to increased development in the growing sectors mentioned in *Question 2*. As the US economy efficiency increases, the cost of doing business could increase, resulting in higher levels of commitment from foreign investors.

One of the biggest factors that will affect the US market is the declining price of crude oil. The US is currently experiencing a supply phenomenon in which the supply of oil is exceeding demand, causing commodity prices to fall. Falling commodity prices will undoubtedly have an effect on the US economy. However, at the end of 2014, the US economy had an unemployment rate of 5.6% (representing a 1.4% decline since 2013), strong GDP growth and a falling inflation rate. This trend of falling inflation and increased expansion is likely to widen as commodity prices fall, leading to an even greater supply shock.

If the price of crude oil maintains at its current level, foreign investors should invest in companies specialising in the technology of oilfield development. Several of the large oil producers have hired highly specialised petroleum engineer firms to develop practices that make the extraction of oil more efficient, therefore reducing the price per barrel and making extraction profitable.

Factors and concerns that foreign investors should be aware of are national indebtedness, policy making, availability of financing, private sector indebtedness and international relations.

The presidential election of 2016 will mark the end of President Barack Obama's term as US President. Depending on the outcome of the election, various industries in the US economy are likely to be affected, either through policy changes or funding.

LEGAL SYSTEM

4. Please briefly outline the government and legal system.

Federal government

The US is a federal republic that is divided into three branches of government: executive, legislative and judicial, and two levels of government: federal and state. The US Constitution establishes a federal system of government and gives specific powers to the federal (national) government. All powers not delegated to the federal government remain with the states. Each of the 50 states has its own state constitution, governmental structure, legal codes and judiciary.

The executive branch is headed by the president. The legislative branch (Congress) is bicameral and consists of the House of Representatives, whose members are elected for constituencies based on population, and the Senate, whose members are elected from each of the 50 states (two for each state). The judicial branch is comprised of the Supreme Court, which is made up of nine appointed judges.

The US is a multi-party democracy, although there are consistently two primary political parties: the Democratic Party and the Republican Party.

Texas government

The Texas state government is divided into three branches of government: executive, legislative and judicial. Texas' executive branch is headed by the governor and is a plural system, which limits the power of the governor. The executive branch also includes several boards and commissions. The legislative branch is bicameral and consists of the Texas House of Representatives and Texas Senate. The Texas Legislature meets every two years. The judicial branch includes many levels of courts, including the Texas Supreme Court, the Texas Court of Criminal Appeals and many municipal courts, county and district courts.

5. What are the key laws and regulatory authorities governing foreign investment in your jurisdiction?

There are four federal statutes affecting foreign investment in the United States (*Foreign Investment in the United States: Major Federal Statutory Restrictions, Congressional Research Service, 17 June 2013*):

- **International Investment and Trade in Services Survey Act of 1976.** This act gives the President authority to collect information on international investment and US foreign trade services, and to provide its analysis of this information to Congress, executive agencies and the general public.
- **Foreign Direct Investment and International Financial Data Improvements Act of 1990.** This act allows the Department of Commerce's Bureau of Economic Analysis to access information collected by the Bureau of the Census.
- **Agricultural Foreign Investment Disclosure Act of 1978.** This act requires that:
 - any foreign person who acquires or transfers any interest other than a security interest in agricultural land to submit a report to the Secretary of Agriculture not later than 90 days after the date of the acquisition or transfer; and

- any foreign person who holds any interest other than a security interest in agricultural land on the day before the effective date of the Act to submit a report to the Secretary of Agriculture not later than 180 days after this date.

- **Domestic and Foreign Investment Improved Disclosure Act of 1977.** This act requires anyone who acquires 5% or more of the equity securities of a company registered with the Securities and Exchange Commission (SEC) to disclose certain information, including citizenship and residence.

6. What international treaty organisations and/or economic, customs or monetary unions or free-trade areas is your jurisdiction a member of?

The US is a member of both the World Trade Organization (WTO) and the North American Free Trade Agreement (NAFTA).

The US is also part of numerous international organisations, including (but not limited to) the:

- Asia-Pacific Economic Cooperation (APEC).
- Euro-Atlantic Partnership Council (EAPC).
- Group of Five (G5).
- Group of Seven (G7).
- Group of Eight (G8).
- Group of Ten (G10).
- Group of Twenty Finance Ministers and Central Bank Governors (G20).
- International Chamber of Commerce (ICC).
- International Monetary Fund (IMF).
- International Trade Union Confederation (ITUC).
- North Atlantic Treaty Organization (NATO).
- Organisation for Economic Co-operation and Development (OECD).

7. What other international agreements apply to foreign investment?

The US enters into many bilateral investment treaties (BITs) and free-trade agreements (FTAs), which are collectively referred to as "international investment agreements". According to figures provided by the Congressional Research Service, the US was a party to over 500 international investment agreements as of 2011.

INVESTOR INDIVIDUALS

8. Are there any visas, permits or other requirements for foreign individuals entering your jurisdiction for business purposes?

A person who is not a US citizen or permanent resident must obtain one of several types of visas that allow the visa holder to seek employment or do business in the US. A foreign person who is in the US for business purposes but is not seeking employment can apply for a temporary business visa (B-1). The common types of visa held by foreign workers and investors coming to the US and which allow employment in the US include:

- **Temporary Worker visas (H-1B and H-1B1).** These are visas to work in a speciality occupation in the US. They require an individual to meet certain educational thresholds.

- **Inter-company Transferee visas (L).** These are similar to temporary work visas (*see above*) and apply to companies with US and foreign branches. Workers who have worked for the company for over a year may be eligible to work in the US under such a visa.
- **Treaty Trader and Investor visas (E-1 and E-2).** These visas are granted based on a business investment operating in the US. Additional visas may be granted to employees based on the foreign investment (*see Question 9*).

There are no additional immigration requirements at the state level in the US.

9. Are there any visa waivers or fast-track procedures available for foreign individuals entering your jurisdiction as investors?

Investor visas, commonly known as Treaty Trader (E-1) and Treaty Investor (E-2), are available to citizens of foreign countries that have signed a treaty of commerce and navigation, or a bilateral investment treaty (BIT) providing for non-immigrant entries, with the US.

The E-1 visa is specifically designed for foreign business owners, business managers and employees who are required to stay in the US for prolonged periods of time to oversee or work for an enterprise that is engaged in trade between the US and the relevant foreign treaty country. The E-2 visa is available to a foreign person who is a citizen or national of a treaty country and who wishes to enter the US solely to develop and direct the operation of an enterprise in which he has invested, or is in the process of investing, a substantial amount of capital. Specific criteria must be met to qualify for both visas.

Both E-1 and E-2 visa holders are initially allowed a maximum stay of two years. Requests for extension of stay may be allowed for periods of up to two years for each request. There is no maximum limit to the number of extensions of an E-1, provided that the visa holder maintains the intention to leave the US when his status expires or is terminated.

The three main requirements to qualify for both E-1 and E-2 visas are as follows:

- There must be a treaty between the US and the foreign country (*see above*).
- A majority (more than 50%) ownership or control of the foreign company must be held by nationals of the foreign country applying for the visa.
- The foreign nationals applying for the visas, either as owners or employees, must be citizens of the foreign country.

E-1 treaty countries include:

- Africa: Ethiopia, Liberia and Togo.
- Asia: Republic of China (Taiwan), Japan, South Korea, the Philippines, Singapore and Thailand.
- Australia.
- Central America: Costa Rica and Honduras
- Europe: Austria, Belgium, Bosnia and Herzegovina, Croatia, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Luxembourg, Macedonia, Netherlands, Norway, Poland, Slovenia, Spain, Sweden, Switzerland and the United Kingdom.
- Middle East: Brunei Darussalam, Iran, Israel, Jordan, Oman, Pakistan and Turkey.
- North America: Canada and Mexico.

- South America: Argentina, Bolivia, Chile, Colombia, Paraguay and Suriname.

E-2 treaty countries include:

- Africa: Cameroon, Democratic Republic of Congo (DRC), Liberia, Morocco, Egypt, Ethiopia, Republic of the Congo, Senegal, Togo and Tunisia.
- Asia: Bangladesh, Republic of China (Taiwan), Japan, South Korea, Kyrgyzstan, Mongolia, The Philippines, Singapore, Sri Lanka and Thailand.
- Australia.
- Central America: Honduras, Costa Rica and Panama.
- Europe: Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Denmark, and Estonia.
- Middle East: Bahrain, Iran, Jordan, Oman, Pakistan and Turkey.
- North America: Canada and Mexico.
- South America: Argentina, Bolivia, Chile, Colombia, Paraguay and Suriname.
- The Caribbean: Grenada, Jamaica and Trinidad and Tobago.

10. What are the circumstances under which an individual becomes liable to pay tax in your jurisdiction? Can individuals be liable for tax on foreign-source income?

Individuals can be subject to tax at the federal, state and local (that is, county or city) levels. Each of these jurisdictions has different rules for determining tax liability.

Federal taxation

The US has two different taxation systems for US persons and non-US persons. US persons are subject to taxation on their worldwide income (including all foreign-source income), although they are allowed to credit some or all of foreign taxes paid in many circumstances. Non-US persons are only subject to US income tax on income deemed to be sourced in the US.

A US person is defined as a US citizen, green card holder or US resident alien. A person is generally considered a US resident alien if he stays in the US for a certain number of days in the current and two prior years (substantial presence test). A person meets the substantial presence test if he is physically present in the US on at least both:

- 31 days during the current year.
- 183 days during the three-year period that includes the current year and the two years immediately before the current year, counting:
 - all the days he was present in the current year;
 - one third of the days he was present in the first year before the current year; and
 - one sixth of the days he was present in the second year before the current year.

The taxation of non-resident aliens is limited to US source income. There are two main taxation schemes based on the following two categories of income:

- **Fixed, determinable annual, periodical (FDAP) income (investment income).** This commonly includes passive income or income not effectively connected with a US trade or business. Common examples of FDAP income are US source interest and dividends. FDAP income is taxed at 30%, unless a reduced rate applies under a tax treaty.

- **Effectively connected income (ECI) (trade or business income).** Income that is effectively connected with a US trade or business is taxed on a net basis (that is, income less allowable deductions) at the same federal income tax rates that apply to US citizens or residents. State and local taxes may increase the effective tax rate on income from a US trade or business. Non-resident individuals engaged in a trade or business within the US during the taxable year must file a return and pay tax at regular US progressive tax rates (up to 39.6%) on income deemed to be effectively connected with such trade or business. Income effectively connected with a US trade or business may not be subject to US tax if there is an income tax treaty in effect with the non-resident's country of residence. Under most treaties entered into by the US, business profits of a non-resident are not subject to US tax unless these are attributable to a permanent establishment in the US. Generally, a permanent establishment is a fixed place of business (for example, an office, factory, mine or place of management) through which a non-resident wholly or partly carries on its activities.

Texas state taxation

Income tax. Texas does not have an individual income tax on residents or non-residents, regardless of status or number of days stayed in Texas.

Business taxation. A foreign person's business may be subject to certain business taxes in Texas, such as the Texas franchise tax and the Texas sales and use tax (*see Question 20, Texas taxation*).

Texas local taxation

Income tax. No county or municipality in Texas imposes an individual income tax on residents or non-residents, regardless of status or number of days stayed in Texas.

Property tax. Real property (that is, land, buildings and so on) and certain income producing tangible personal property (that is, business machinery) is subject to the Texas property tax. The Texas property tax is administered at the local level and is based on the value of the property. A foreign person holding real property in Texas is subject to this tax at the same rate as a Texas resident.

Property tax rates vary across the state as the tax is collected at the local rather than the state level. For homeowners in 2014, the median property tax in Texas was US\$2,275 per year for a home worth the median value of US\$125,800. Each year, counties in Texas collect an average of 1.81% of a property's assessed fair market value as property tax.

INVESTMENT RESTRICTIONS

11. Are there any restrictions on foreign ownership and investment in specific industry sectors? Do any formalities, permit or notification requirements apply?

Restrictions on foreign investment are largely a matter of federal law, as the US Constitution prevents states from discriminating against foreign commerce. There are limits on foreign investment in certain industries believed to affect national security, including:

- **Shipping.** A vessel of at least five tonnes that is not registered under the laws of a foreign country is eligible for documentation in the US if:
 - it is owned by a corporation established under the federal or state laws;
 - its chief executive officer and chairman of its board of directors are US citizens; and
 - no more than a minority of the number of directors sufficient to constitute a quorum are non-citizens.

- **Aircraft.** An aircraft is eligible for registration if it is not registered under the laws of a foreign country and it is:
 - owned by a citizen of a foreign country lawfully admitted for permanent residence in the US, or a non-US corporation doing business under the laws of the US or a state; and
 - based and primarily used in the US.

Aircraft operators may also be subject to restrictions based on citizenship.

- **Banking.** The Bank Holding Company Act regulates any company that controls a US bank. Control means:
 - acquiring a 25% share or more of any class of voting securities;
 - controlling the election of a majority of the bank's directors or trustees; or
 - having been determined by the Federal Reserve System as exercising a controlling influence over the bank's management or policies.
- **Energy.** Mineral deposits in US land are open to exploration and purchase by a corporation organised under the US federal, state or territory laws through the filing of a certified copy of their charter or certificate of incorporation. Citizens of a country whose laws, customs or regulations deny similar privileges to US citizens or corporations cannot own any interest in any lease over these mineral lands through stock ownership, holding or control. Licences for the development, transmission and utilisation of power on land and water controlled by the federal government can only be issued to US citizens and domestic corporations.
- **Communications and media.** Federal statutes restrict foreign ownership and operation of mass communications media in the US, including radio station licences. While there is no federal statute prohibiting foreign investment in US newspapers and magazines, the Foreign Agents Registration Act requires agents of foreign principals to register with the US Attorney General.
- **Government contracting.** Federal statutes restrict the purchase of products by federal agencies to those manufactured in the US.

In addition, federal law prohibits or limits foreign ownership or investment in hydroelectric power companies, various nuclear products and air transit companies.

12. Does the government retain and exercise control over certain industry sectors? If so how?

The US and Texas governments do not exercise control over certain industry sectors.

13. Are there restrictions on foreign ownership or occupation of real estate? Do any formalities, permit or notification requirements apply?

There are generally no restrictions on foreign ownership or occupation of real estate. However, there are certain tax withholding requirements for dispositions of US real property by a foreign person. The Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) authorises the US to tax foreign persons on dispositions of US real property interests, including, but not limited to, exchange, liquidation, redemption, gift, transfer, and so on. Foreign investors are initially subject to a 10% withholding tax on the gross amount realised on the sale of a US real property interest. A foreign corporation that distributes a US real property

interest must withhold a 35% tax on the gain it realises on distribution to its shareholders.

14. Are there any minimum capital requirements for foreign investment?

There are no minimum capital requirements for foreign investment in the US and Texas. However, bilateral investment treaties usually require a "significant" investment in order to apply.

15. Are there any exchange control or currency regulations? Are there any restrictions on the remittance of profits abroad?

There are no exchange controls in the US or Texas.

The US currency is regulated by the Office of the Comptroller of the Currency within the US Department of the Treasury. Some economic policies, such as stimulation of the economy through quantitative easing, may have some effects on US currency.

There are no restrictions on the remittance of profits abroad.

IMPORTS

16. Are there any restrictions on the importation of commercial goods and services?

Like most other countries, the US governs the importation of goods through tariffs, quotas, duties and other similar taxes. Generally, the importation of commercial goods and imports into the US is governed by a complex network of treaties, laws and regulations that exceed the scope of this article. However, several key features of this network are outlined below.

The US Customs and Border Protection (CBP) enforces the regulation, control and facilitation on the importation of carriers, people and commodities. The scope of the CBP includes:

- Protecting US consumers from toxic or hazardous products.
- Monitoring foreign competition within certain industries and labour associated with such industries.
- Investigating the introduction of drugs and other illegal substances.

While most of US import law focuses on the importation of goods, the Tariff Act addresses imported services, and specifically unfair competition (*section 337*). The most common issues arising under section 337 are patent violations, although the regulation covers any circumstance in which the president finds that unfair methods are used in the importation of a commercial good. If a foreign operator is found to have used unfair competition, an investigation by the International Trade Commission is likely to follow.

17. What import duties apply to commercial goods and services?

The US uses the Harmonized Tariff System (HTS) to determine the duty rate for nearly all imports. The HTS contains several thousand pages and is beyond the scope of this article. Persons seeking more details can the US International Trade Commission-Tariff Database to obtain an estimation of the duty rate for a particular imported product (<http://dataweb.usitc.gov/scripts/tariff.asp>).

The HTS includes a tariff schedule for:

- Live animals and animal products.

- Vegetable products.
- Animal or vegetable fats and oils and their cleavage products, prepared edible fats, and animal or vegetable waxes.
- Prepared foodstuffs, beverages, spirits and vinegar, tobacco and manufactured tobacco substitutes.
- Mineral products.
- Products of the chemical or allied industries.
- Plastics and articles of plastics, and rubber and rubber articles.
- Raw hides and skins, leather, furskins and articles of furskins, saddlery and harness.
- Travel goods, handbags and similar containers and articles of animal gut (other than silkworm gut).
- Wood and articles of wood, wood charcoal, cork and articles of cork, manufacturers of straw, of esparto or of other plaiting materials, basket ware and wickerwork.
- Pulp of wood or of other fibrous cellulosic material, waste and scrap paper or paperboard, paper and paperboard and articles of these.
- Textile and textile articles.
- Footwear, headgear, umbrellas, sun umbrellas, walking sticks, seat-sticks, whips, riding-crops and parts of those, prepared feathers and articles made with feathers, artificial flowers and articles of human hair.
- Articles of stone, plaster, cement, asbestos, mica or similar materials, ceramic products, and glass and glassware.
- Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal, articles made of such pearls and metals, imitation jewelry and coin.
- Base metals and base metal articles.
- Machinery and mechanical appliances, electrical equipment, parts of such appliances and equipment, sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles.
- Vehicles, aircraft, vessels and associated transport equipment.
- Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus, clocks and watches, musical instruments and parts and accessories of such instruments.
- Arms and ammunition and parts and accessories of such arms and ammunition.
- Miscellaneous manufactured articles.
- Works of art, collectors' pieces and antiques.

18. Are the safety regulations and standards applicable to commercial goods and services in your jurisdiction compatible with other standards that are recognised internationally?

Generally, the US has high safety standards for the importation of commercial goods and services when compared to other countries. To comply with such standards, commercial importers must be aware of the relevant regulations governing the following steps of the importation process:

- Entry of commercial goods.
- Right to import commercial goods into the US.
- Examination of the goods and required entry documents.

- Packing the goods and avoiding commingling goods.
- Classification and value of goods.
- Transaction value.
- Country of origin marking and special marking requirements.
- Prohibited goods.

More information is available at: www.exim.gov.

STRUCTURING AND TAX

19. How is foreign investment into your jurisdiction typically structured? What forms of legal vehicle are attractive to foreign investors?

There are several different ways to structure foreign investment in the US. Investment structures vary greatly depending on the type of investment (for example, real property, publicly traded stock, oil and gas, and so on), desired returns and tax concerns.

Common types of foreign investment include:

- Direct investment personally in a US partnership or corporation ("naked" investment).
- Investment in a US partnership or corporation through a foreign corporation (foreign blocker).
- Investment in a US entity through a wholly-owned US corporation (domestic blocker).

The tax efficiencies of these structures vary greatly depending on the type of investor (individual, trust or business entity) and the country of residence of the foreign investor.

Tax treaty planning is an essential element for structuring any foreign investment. The US is party to tax treaties with a number of countries which provide for reduced rates in certain circumstances. Planning for the tax consequences under the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) is another essential element of tax planning and structuring for foreign investors looking to invest in US real property (*see Questions 5 and 20, Federal taxation*). Any foreign person seeking to invest in the US should always consult a tax advisor with international tax expertise to determine the most tax efficient structure based on the particular facts and circumstances.

20. What are the circumstances under which a business becomes liable to pay tax in your jurisdiction?

Federal taxation

All US entities are subject to US tax on their worldwide income. A foreign corporation is subject to US tax if it is engaged in a trade or business in the US, whether or not it receives US source income from that trade or business, and whether or not income from such trade or business is exempt from US tax under a tax treaty.

Whether a foreign corporation is engaged in a US trade or business depends on the facts and circumstances of each particular case. The determination is based on the nature and extent of the corporation's economic activities in the US (either directly or through an agent, partnership, trust or estate). Generally, a person is engaged in a US trade or business if those activities are "considerable, continuous, and regular". The mere solicitation of sales by independent contractors, absent any other US activity, is generally not considered to meet the definition of active trade or business.

If the foreign business is from a country that signed a tax treaty with the US, there are more favourable rules that apply to the

determination of whether income is sourced in the US. The key test for foreign entities doing business in the US is whether or not the foreign entity's activities and presence amounts to a permanent establishment, as defined in the relevant tax treaty. Entities that have a permanent establishment in the US must pay US tax on all business profits attributed to the permanent establishment. Most US tax treaties have very similar definitions of permanent establishment (PE) and typically define PE using the following two general tests:

- Whether the corporation has a fixed place of business within the target country, as defined under the language of the specific treaty.
- Whether the corporation operates in the target country through a dependent agent that habitually exercises the authority to conclude contracts on behalf of the corporation in the target country.

Although many US tax treaties use a similar definition, each treaty should always be examined for exceptions or differences.

There are a number of activities that are considered as engaging in a US trade or business under the Federal Tax Code but would not be attributable to a permanent establishment under a tax treaty.

In addition, the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) imposes a withholding tax on the disposition of US real property interests (USRPI) by a foreign person. A USRPI is any interest in real property located in the US (that is, land, real estate or oil and gas interests) and includes an interest in a US corporation that owns USRPIs. As a general rule, a person who purchases a USRPI from a foreign person must withhold 10% of the gross proceeds of sale, unless an exception applies.

Texas taxation

Texas franchise tax. A foreign business may be subject to the Texas franchise tax if it is doing business in Texas. The franchise tax applies to taxable entities that conduct specific activities, including:

- Advertising.
- Consignments.
- Performance of a contract in Texas, regardless of whether the taxable entity brings its own employees into the state, hires local labour or sub-contracts.
- Delivering items an entity has sold into Texas.
- Having employees or representatives in Texas carrying on the business of the taxable entity.
- Federal enclaves (that is, doing business in any area within Texas that is leased or owned, ceded to, or under the control of the federal government).
- Maintaining franchisees.
- Maintaining a holding company.
- Keeping inventory in Texas.
- Leasing tangible personal property.
- Granting loans to production partners.
- Acting as a general partner in a partnership.
- Maintaining a place of business in Texas.
- Assembling, processing, manufacturing or storing goods in Texas.
- Holding, acquiring, leasing or disposing of any property located in Texas.
- Providing personal services.

- Sending materials to Texas to be stored awaiting orders for their shipment.
- Shows and performances.
- Solicitation: having employees, independent contractors, agents or other representatives in Texas, regardless of whether they reside in Texas, to promote or induce sales of the foreign taxable entity's goods or services.
- Having a Texas telephone number.
- Transportation.

Texas sales and use tax. A business may also be required to collect sales and use tax on sales made to Texas residents. Texas Comptroller Rule §3.286 requires any entity that "engages in business" in Texas to obtain a sales tax permit, and collect the sales and use tax on all sales to Texas customers. Under the Rule, an entity is engaged in business in Texas if it satisfies any of the conditions included in the following non-exhaustive list:

- Maintains, occupies, or uses, permanently or temporarily, directly or indirectly, or through an agent, by whatever name called, a kiosk, office, place of distribution, sales or sample room, warehouse or storage place, or other place where business is conducted.
- Has any representative, agent, salesperson, canvasser or solicitor who operates in Texas under the authority of the seller to conduct business, including selling, delivering or taking orders for taxable items.
- Promotes a flea market, arts and crafts show, trade day, festival or other event that involves the sale of taxable items.
- Uses independent salespersons in direct sales of taxable items.
- Derives receipts from a rental or lease of tangible personal property that is located in Texas, or owns or uses tangible personal property that is located in Texas, including a computer server or software.
- Allows a franchisee or licensee to operate under its trade name, provided that the franchisee or licensee is required to collect Texas sales and use tax.
- Conducts business in Texas through employees, agents or independent contractors.

The state has issued guidance interpreting the factors taken into account to determine whether an entity conducts business in Texas. The threshold is low, only requiring that the non-state company has any one or a combination of the following in Texas (*Texas Policy News 07/01/1992*):

- Property.
- Employees.
- Agents.
- Independent solicitors.

The ability of a state to impose a requirement to collect sales tax on a non-state entity is limited by the US Constitution. The US Supreme Court has established that a seller that has no physical presence in a state is not required to collect sales and use tax on sales to in-state customers (*Quill v North Dakota (1992) 504 US 298*). However, a state can require a non-state seller to collect use tax on the sale of property intended for use within the state if the seller acts through local representatives to establish and maintain a market in the taxing state. It is immaterial whether these representatives are the seller's employees or are acting as independent contractors (*Scripto, Inc v Carson, 362 US 207 (1960)*).

21. What are the main business tax rates?

Federal taxation

US C corporations are taxed on their profits at two levels:

- **The corporate level.** A tax on corporate profits is paid annually by the corporation when profits arise.
- **The owner level.** A tax on dividends is paid by shareholders when a dividend distribution is made.

The maximum US corporate tax rate is 35%.

A branch of a foreign corporation can also be subject to tax through the branch profits tax. The US branch will be subject to the same tax on corporate profits as a US C corporation on its net income that is effectively connected with the US. The branch will also be subject to an annual branch profits tax on any net income that is repatriated to the foreign country or is not invested in qualifying US assets. The branch profits tax is generally 30%, although this rate can be reduced under a tax treaty.

State taxation

The Texas franchise tax (*see Question 20, Texas taxation: Texas franchise tax*) applies on the total revenue apportioned to the state, as determined by the entity's federal income tax return, less the greater of the following:

- Cost of goods sold.
- Compensation.
- 30% of total revenue.

The tax rate of 1% applies to the amount above, less an exemption that is indexed to inflation.

22. What is the tax treatment in your jurisdiction of profits from an investee company remitted outside your jurisdiction by an investor?

The remittance of profits from a US entity to a foreign source are subject to dividend withholding tax at the standard rate of 30%, which is the same as the fixed, determinable annual, periodical (FDAP) income withholding rate (*see Question 10, Federal taxation*). However, this rate may be reduced under a tax treaty.

23. What transfer pricing and/or thin capitalisation restrictions may apply to investments into your jurisdiction from elsewhere?

Transfer pricing

The Internal Revenue Service (IRS) can make transfer pricing adjustments in transactions between commonly controlled entities if the price set by the parties is not at arm's-length. The rules apply to organisations that are owned or controlled, either directly or indirectly, by the same interests. For example, the IRS can make transfer pricing adjustments between a foreign investor and its wholly owned domestic corporation.

The IRS is authorised to allocate income, deductions and other tax items between commonly owned or commonly controlled organisations as necessary to prevent tax evasion or to clearly reflect the parties' income. In the case of a transfer or licence of intangible property, the income from the transfer must be "commensurate with the income attributable to the intangible property". Transfer pricing rules therefore generally attempt to identify the respective amounts of taxable income of the related

parties that would have resulted if the parties had been unrelated parties dealing at arm's-length.

Thin capitalisation (earnings stripping rules)

The US applies earnings stripping rules to certain taxpayers, including US corporations owned by foreign corporations. If certain other conditions are met, a corporation's interest deduction is limited when the corporation makes a substantial interest payment (in proportion to its income) to a foreign related person who is not subject to US tax in whole or in part on that interest payment. A corporation's interest deduction is also limited when the corporation makes a substantial interest payment to an unrelated US or foreign person who is not subject to US gross basis taxation (in whole or in part) on that interest payment, provided that a foreign related person has guaranteed the corporation's underlying debt. A foreign person is not subject to US gross basis taxation in whole or in part if, for example, the foreign person is eligible to claim a reduced or zero rate of withholding tax under a US tax treaty.

A corporation will be subject to the earnings stripping rule if it has both:

- Excess interest for the tax year (that is, a net interest expense exceeding 50% of the corporation's adjusted taxable income).
- A debt-to-equity ratio at the end of the taxable year exceeding 1.5:1.

If a corporation meets these requirements, any interest paid to a related person will be treated as a disqualified interest, and disallowed as a deduction to the extent of the excess interest expense for the year. Disallowed interest can be carried forward to future years.

INCENTIVES

24. What tax incentive or other schemes exist to encourage foreign investment?

The federal government does not offer any formal tax incentive schemes for foreign investors. However, states and local municipalities often offer tax incentives for businesses to locate in their jurisdiction on a case-by-case basis. Texas has a reputation for working with international businesses to help them relocate or start a new branch in the US. Additional information about investing in Texas is available at: <https://texaswideopenforbusiness.com/international/foreign-direct-investment>.

INVESTMENT GUARANTEES

25. What legal guarantees exist against expropriation and/or provide for appropriate compensation? What is your government's track record in this regard?

Foreign investors seeking to invest in the US must comply with extensive and complex international laws to be protected by US laws. Before investing in the US, it is imperative that foreign investors consult competent legal counsel. Foreign investors should be familiar with the key following areas:

- Anti-money laundering and bribery laws.
- Foreign investment restrictions.
- Anti-trust regulations.
- Intellectual property law.
- Consumer protection.
- Immigration law.
- Exchange controls.

In certain circumstances, the US government has rights to expropriate the private property of individuals, regardless of citizenship. Generally, expropriation by the government must comply with international law standards, that is, the expropriation must be:

- For a public purpose.
- Conducted in a non-discriminatory manner.
- Conducted under due process of law.
- Subject to the payment of prompt, adequate and effective compensation.

Expropriation is not limited to the taking of physical property. There is a large number of circumstances in which an investor can be deprived of the economic value of its investment.

The US legal system has a strong record for protecting and enforcing the rights of foreign investors, provided that they comply with all relevant laws. Regardless of where they choose to invest, foreign investors should be aware of bilateral investment treaties (BITs) and the legal protections afforded by them. BITs usually grant the following benefits to foreign investors:

- Favourable treatment comparable to that of local competitors and other foreign companies (most favoured nation treatment).
- Limits on the expropriation of investments.
- Right to seek just compensation.
- Guarantee of market rates of exchange for the transfer of funds.
- Rights associated with fair dispute settlement.

26. Are there any issues in relation to the enforcement of intellectual property rights?

US patent law applies to all inventors, regardless of citizenship. One difference concerns the enforcement of patent violations. Under the Tariff Act of 1930, the International Trade Commission is responsible for the investigation of patent infringement claims involving imported products, whereas the federal government is responsible for domestic patent litigation.

US copyright law protects original works of authorship, and gives the producer of such work the exclusive right to sell, license or reproduce the work.

Unlike in most other countries, it is not necessary to register trade marks as US trade mark law protects trade marks that are created through use and at common law. However, developers are encouraged to register their trade mark, as certain protections are only available for registered trade marks.

27. Are there any issues in relation to the gaining and enforcement of judgments and/or arbitral awards?

Unless the foreign investor has committed any acts that would draw the suspicion of any US governmental body, the investor can be confident that the US will enforce all laws relating to anti-money laundering and bribery, anti-trust and other relevant laws in a non-discriminatory manner. Foreign investors are also protected by many bilateral investment treaties (BITs) (*see Question 25*) and many issues will be dealt with fairly and equitably (for example, the delay of a judgement in favour of a foreign investor, compliance and payment of any costs associated with such judgement).

RECENT DEVELOPMENTS AND PROPOSALS FOR REFORM

28. Have there been any significant recent or proposed legal developments affecting investors?

The implementation of the Foreign Account Taxpayer Compliance Act (FATCA) over the last few years has complicated payments to foreign persons, entities, and financial institutions. In addition to taxation and withholding schemes, certain payments to foreign persons are subject to an additional 30% withholding tax if certain compliance and verification requirements are not met. An in-depth discussion of FATCA is beyond the scope of this article. However, foreign investors should be aware of potential withholding issues and seek US counsel when structuring investments and determining how to remit payments out of the US.

29. Are there any planned or on-going treaty negotiations or political developments that could have an impact on your jurisdiction's bilateral relationships with other nations and/or other economic, customs or monetary unions, free-trade areas or markets?

The Foreign Account Taxpayer Compliance Act (FATCA) provides for bilateral information sharing agreements, which the US has been in a process of entering with over 100 countries to date. These information sharing treaties require foreign banks to give US taxing authority information on US persons that have accounts with those banks (among other provisions). This has complicated the ability of US persons to do businesses abroad with foreign banks.

MAIN INVESTMENT ORGANISATIONS

Organization for International Investment

Main activities. Non-profit organisation working to increase foreign investment in the US.

W www.ofii.org

Overseas Private Investment Corporation

Main activities. Mobilises private capital to solve development challenges.

W www.opic.gov

ONLINE RESOURCES

Department of Commerce

W www.commerce.gov

Description. The Department of Commerce is a department of the US government charged with promoting the economic growth of the US (official website).

Export-Import Bank of the United States

W www.exim.gov

Description. This official website provides information on the regulations of US export and imports.

Securities and Exchange Commission (SEC)

W www.sec.gov

Description. The SEC enforces federal securities laws, and the nation's stock and option exchanges.

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Professional qualifications. US, Attorney

Areas of practice. Commercial litigation; general civil litigation; franchising and distribution.

Non-professional qualifications. BA, Baylor University, 1979; BAcc, Baylor University, 1980; JD, Baylor University School of Law, 1983

Recent transactions

- Obtained a significant judgment on behalf of Jani-King International, Inc in a breach of contract and fraud suit against its Singapore master franchisee.
- Won a jury verdict in a breach of contract and promissory estoppel case, including actual and exemplary damages, then successfully collected the judgment in favour of the Firm's client, against Energy Service Co, Inc (ENSCO).
- Won a binding arbitration award for a company that operated as a licensee of a delicatessen operation after the licensor sought to have the contract terminated on a variety of grounds. The award upheld the contract, including the client's right to the exclusive use of the trademarks and trade dress, and the right to sub-license the use of the company's intellectual property.

Professional associations/memberships. State Bar of Texas; Houston Bar Association; American Bar Association.



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Professional qualifications. Texas, US, Attorney

Areas of practice. General corporate and transactional matters; corporate mergers and acquisitions; commercial contracts for companies engaged in oil field services, including master services agreements; business formations; business governance issues and formalities; private equity offerings; contracts; negotiation of asset and stock sales.

Non-professional qualifications. Graduate of Baylor University and the University of Houston Law Center, received the American Jurisprudence (AmJur) Award for highest grade in the class

Recent transactions

- Represented a privately held civil engineering firm in the stock purchase by a publicly-traded UK company.
- Represented a purchaser in acquisition of a bookstore.
- Represented a trucking carrier in the negotiation and drafting of independent contractor agreements.
- Represented an app-developer in the offering of convertible notes.
- Represented a landowner in negotiating just compensation with a publicly-trading pipe company.
- Represented an engineering firm in the negotiation of AIA contracts.
- Represented borrowers in industries including oil and gas exploration, manufacturing and chemicals in negotiating term loans, revolving credit facilities, second lien financings, working capital facilities and other financing arrangements, both in the US and internationally.
- Represented numerous privately held companies in acquisitions by private equity funds and strategic buyers.
- Represented a management team in the recapitalisation of company by multiple private equity funds.



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Professional qualifications. Texas, US, Licensed attorney; Certified Public Accountant

Areas of practice. Corporate transactions; tax planning and controversy; trust and estate planning; works with multinational corporations, small businesses, and individuals to achieve their planning goals and successfully resolve their tax controversies with the IRS and State taxing authorities.

Non-professional qualifications. BBA in Accounting and MS in Taxation, Texas A&M University; JD, with honors; University of Texas School of Law

Recent transactions

International tax planning and controversy

- Offshore voluntary disclosure program submissions, including streamlined procedures submissions.
- International reorganisations to optimise tax structure.
- Tax treaty residency analysis for dual citizens, resident aliens, and non-resident aliens.
- Tax treaty permanent establishment analysis.
- Transfer pricing.

Domestic tax planning and controversy

- Federal, state, income and employment tax planning for businesses and their owners.
- Internal revenue service audits.
- Domestic voluntary disclosures.
- Texas sales tax audits

Corporate formation and transactional work

- Formation of corporations, LLCs, partnerships, and non-profit entities.
- Limited liability company agreements.
- 1031 exchanges.
- IRS non-profit exemption applications.

Trust and estate planning and probate

- Drafting wills and ancillary documents.
- Drafting trusts for estate planning and tax planning.
- Probate of wills with independent administration and muniments of title.

Professional associations/memberships

- Texas Society of CPAs (2012-present).
- Federal Tax Policy Committee (2015-present).
- Relations with the IRS Committee (2013-present).
- Houston Society of CPAs:
 - Membership Committee (2012-present): Vice Chair (2013-2014); Chair (2014-present);
 - Outstanding Committee Member of the Year, 2013-2014.
- State Bar of Texas:
 - Tax Section (2012-present);
 - International Tax Committee (2012-present): Vice Chair (2013); Chair (2013-present).
- Houston International Tax Forum (2012-present).
- Houston Young Lawyers Association (2012-present).
- Scouting Committee (2012-present).



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Professional qualifications. Texas, US, Licensed attorney; Montana, Licensed attorney

Areas of practice. General corporate and transactional matters; corporate mergers and acquisitions; commercial contracts for companies; business formations; business governance issues and formalities; contracts; negotiation of asset and stock sales; energy matters.

Non-professional qualifications. BA, University of Oklahoma; JD, UCLA. Worked at the White House in the Office of Cabinet Affairs where she was responsible for co-ordinating communications, policies and logistics between the Executive Office of the President and the Cabinet.

Professional associations/memberships

- State Bar of Texas.
- State Bar of Montana.
- Houston Young Lawyers Association.
- Women's Energy Network.
- Young Professionals in Energy.
- Rocky Mountain Mineral Law Foundation.
- Gray Reed & McGraw Pro Bono Committee.
- Council for Young Professionals for Children, a branch of Child Advocates.
- Pi Beta Phi Houston Alumnae Club.

Publications. Editor of articles for the *UCLA Journal of Law & Technology*.