



Foreign Investment in the United States: Major Federal Statutory Restrictions

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Summary

Foreign investment in the United States is a matter of congressional concern. It is believed by some that the United States has an unusually liberal policy which allows foreigners to invest in virtually all American businesses and real estate and that these foreign investments undermine the American economy by making it vulnerable to foreign influence and domination. These critics argue that there is even foreign domination of some key defense-related industries and that the ability of the country to protect itself in a time of national emergency could greatly suffer. These critics further argue that extensive foreign investment in this country drives up prices which Americans have to pay for investments and, even more importantly, for houses and farmland in areas where there is a significant amount of foreign ownership.

However, others argue that the United States should welcome foreign investment because the influx of foreign money contributes to the creation of jobs in this country. Some also believe that the United States should be a kind of sanctuary for foreign money because of the political and economic instability which characterizes much of the rest of the world. It is also argued that, in this age of globalization of the world's economy, United States restrictions on foreign investment will only impair this nation's economy and cause us to appear isolationist.

This report takes a look at some of the major federal statutes which presently restrict investment by foreigners. The report first gives a brief history of foreign investment in the United States. It then reviews constitutional justifications and constitutional limitations which exist concerning federal statutory restrictions on foreign ownership of property. After that follows a discussion of some of the major federal statutes which limit foreign investment in the United States. Some of these statutes will be looked at in detail, but a detailed treatment of such other laws as the tax laws, the antitrust laws, and the immigration laws is beyond the scope of this report.

The report will be updated as needed.

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History of Foreign Investment in the United States

Traditionally accepted principles of international law state that the sovereign powers of a nation include the power to exclude alien persons and property.¹ However, in most cases, so as to be mutually beneficial to commerce, nations usually do not fully exercise this power of exclusion. Sometimes a nation writes the restraints into its domestic law. For example, Clause XXX of the Magna Carta has the following provision:

All merchants, if they were not openly prohibited before, shall have their safe and sure Conduct to depart out of England, to come into England, to tarry in, and go through England, as well by land as by water, to buy and sell without any manner of (evil tolts)² by the old and rightful Customers, except in time of war; and if they be of a Land making War against Us, and be found in our Realm at the beginning of the wars, they shall be attached without harm of body or goods, until it be known unto Us, or our Chief Justice, how our Merchants be entered therein the Land making War against Us; and if our merchants be well entreated there, theirs shall be likewise with Us.

Treaties and other forms of bilateral and multicultural agreements have also restricted foreign persons and property. For example, the Greek city-states formed agreements which allowed the reciprocal entry of and ownership of property of foreigners from other contracting states.³

The United States has through the years accepted both kinds of restraint.⁴ The American colonies were formed to realize profits for their English and Continental investors. After the War of Independence, the new government moved quickly to resolve the outstanding foreign claims so as to assure creditworthiness and to provide a favorable climate for foreign investment. The Jay Treaty, for example, stated that the new United States government would compensate the British for any property which had been seized or destroyed and for unpaid debts caused by the Revolution.

In his Report on Manufactures in 1791, Alexander Hamilton urged the new nation to keep investment open to foreigners.

It is not impossible that there may be persons disposed to look with a jealous eye on the introduction of foreign capital, as if it were an instrument to deprive our own citizens of the profits of our own industry; but, perhaps, there never could be a more unreasonable jealousy. Instead of being viewed as a rival, it ought to be considered as a most valuable auxiliary, conducing to put in motion a greater quantity of productive labor, and a greater portion of useful enterprise, than could exist without it.⁵

¹ See, e.g., *Bouve*, EXCLUSION AND EXPULSION OF ALIENS IN THE UNITED STATES 3 (1912); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); and *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).

² *tol*: In Old English law, a writ whereby a cause depending in a court baron was taken and removed into a county court. BLACK'S LAW DICTIONARY (6th ed. 1990).

³ Nussbaum, A CONCISE HISTORY OF THE LAW OF NATIONS 27 (1954).

⁴ Much of this historical discussion is based on chapter 1 of A GUIDE TO FOREIGN INVESTMENT UNDER UNITED STATES LAW by the Committee to Study Foreign Investment in the United States of the Section of Corporation, Banking and Business Law of the American Bar Association (New York 1979).

⁵ 3 Annals of Congress 994 (1791).

Hamilton's ideas prevailed. During the 18th and 19th centuries, foreign capital contributed enormously to the nation's development.

As the nation grew, its roads, bridges, canals, banks, and finally railroads were largely financed by state bonds sold overseas. The Erie Canal, the first American canal to achieve commercial success, was made possible by the first state bonds to be quoted on the London market, in 1817. Europe was eager for investments such as these, and a group of Anglo-American banking houses were established in London—led by Baring Brothers—which specialized in American finance. They bought up entire issues for resale in England. In their eagerness for foreign capital, American states and private enterprises sent their agents to Europe. Generals and congressmen turned to bond selling....⁶

By the middle of the 19th century, foreigners held half of the federal and state and one-quarter of the municipal debts. The 1849 California Gold Rush sparked even more foreign investment.

It is also interesting to note that American real estate was quite popular with foreign investors. Europeans acquired substantial holdings in such states as New York, Maine, Florida, West Virginia, and Iowa. The state of Texas granted an English company 3 million acres in payment for building the state capitol building in Austin. Some of the titled Europeans, including the German Baron von Richthofen and the British Earl of Dunraven, attempted to create baronial estates in the West.

At the turn of the century, with the invention of the automobile and the increasing importance of oil, foreign oil companies, such as Royal Dutch Shell, began buying American properties. However, World War I made a drastic change in the influx of foreign capital into the United States. The creditor countries of Europe sold many of their American holdings in order to supply their wartime needs. In just a few years, the United States shifted from a debtor to a creditor nation, a position which it retained for a number of years.⁷

Throughout the nation's history, there has been criticism of foreign investment in the United States. When the first and second banks of the United States were created in 1791 and 1816, their organic statutes barred the election of aliens as directors. The Know-Nothing Party advocated discriminatory taxation of foreign capital as early as the 1850s. The Alien Land Law of 1887 prohibited aliens from owning land in federal territories.⁸ During the 20th century Congress passed a number of statutes aimed at restricting foreign investment in certain industries such as shipping, aviation, and communications. Nevertheless, by the early 1970s foreign investment in the United States began to rise dramatically, and since then there has been frequent congressional debate as to whether there should be more restriction on investment by foreign citizens in American businesses.

⁶ Boorstin, *Foreign Investments in America*, 2 Editorial Research Reports 572-573 (1974).

⁷ A creditor nation may be defined as a country which exports more than it imports; a debtor nation imports more than it exports. A creditor nation may also be defined as a country whose domestic savings are greater than its domestic investment; a debtor nation is a country whose domestic savings are less than its domestic investment.

⁸ Act of March 3, 1887, ch. 340, § 1, 24 Stat. 476.

Constitutional Justifications and Limitations

Federal constitutional provisions may be interpreted as legal validation of federal statutes restricting investments by foreigners; other constitutional provisions have to be adhered to by the states in imposing additional restrictions on foreign investment.

The federal government is a government of limited powers. There is no express constitutional provision permitting the regulation of foreign investment in the United States. Thus, other federal powers mentioned in the Constitution must be looked at to justify such regulation. Three constitutional bases for such legislation are the federal powers over immigration and naturalization,⁹ the federal power to regulate interstate and foreign commerce,¹⁰ and the power to provide for the national defense.¹¹

Congress has the exclusive power to establish naturalization and citizenship requirements and to admit and expel aliens.

That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power.... The United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory.¹²

Congress has also been held to have the power to regulate the conduct of alien residents and to prescribe the conditions for their admission and residency.¹³ Thus, it is arguable that Congress can condition entry and residency of an alien upon his or her not acquiring investments in the United States. Although this might be an extreme condition to apply, no federal case appears to suggest limits to Congress's ability to place substantive conditions upon entry and residency of aliens.

Congress also has the exclusive power to "regulate Commerce with foreign Nations, and among the several States."¹⁴ The Commerce Clause would appear to give Congress the power to restrict the use of instrumentalities of interstate commerce to transact the sale or exchange of property to a foreign citizen or to the representative of a foreign citizen.¹⁵

Finally, Congress's power to "raise and support Armies" would also appear to be a constitutional basis for restricting foreign investment in the United States. If it is determined that foreign investments impair national preparedness in the event of an emergency, it appears that prohibition of foreign investments could on this basis be construed as constitutional.

⁹ Art. I, § 8, cl. 4.

¹⁰ Art. I, § 8, cl. 3.

¹¹ Art. I, § 8, cl. 12.

¹² *Chinese Exclusion Case (Chae Chan Ping) v. United States*, 130 U.S. 581, 603-604 (1889).

¹³ See *Fiallo v. Bell*, 430 U.S. 787 (1977).

¹⁴ Art. I, § 8, cl. 3.

¹⁵ See, e.g., *North American Company v. Securities and Exchange Commission*, 327 U.S. 686 (1946); and *Electric Bond Company v. Securities and Exchange Commission*, 303 U.S. 419 (1938).

Further, it should be noted that the federal government has exclusive authority over foreign relations. In the case *Zschemig v. Miller*,¹⁶ the Supreme Court held unconstitutional an Oregon statute which provided for the escheat to the state of property which would otherwise pass to a nonresident alien unless the laws of the foreign nation had reciprocal rights for United States citizens. The Oregon statute required the local probate courts to inquire into:

the type of governments that obtain in particular foreign nations—whether aliens under their law have enforceable rights, whether the so-called “rights” are merely dispensations turning upon the whim or caprice of government officials, whether the representation of consuls, ambassadors, and other representatives of foreign nations is credible or made in good faith, whether there is the actual administration in the particular foreign system of law any element of confiscation.¹⁷

The Court found the Oregon statute to be unconstitutional because it infringed upon the exclusively federal authority over foreign relations.

On the other hand, it has been stated that:

The imposition of any significant investment controls would likely violate both the spirit and the letter of more than forty bilateral treaties regulating trade and investment relations, many of which laws have been signed within the last ten years, as well as derogating our commitment to the OECD Code of Liberalization of Capital Movements.¹⁸

The treaties mentioned in the above quotation are Treaties of Friendship, Commerce, and Navigation which grant foreign countries the right to enter, trade, invest, or establish and operate businesses in the other signatory country. Thus, any foreign investment statute would need to take into account those Friendship, Commerce, and Navigation Treaties to which the United States is a signatory.

Further, treaties such as the North American Free Trade Agreement (NAFTA) among the United States, Canada, and Mexico provide for foreign investment opportunities. Chapter 11 of NAFTA requires each party to “accord to investors of another Party treatment no less favorable than it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”

Other constitutional provisions may be interpreted to protect foreigners from certain acts of state and local governments. Because the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution apply to *persons* instead of to *citizens*, these provisions guarantee that states cannot abridge the rights of foreign nationals within the United States.¹⁹ The Supreme Court has in the past voided state laws which establish classifications in government actions solely on the basis of citizenship. In doing so, the Court has stated that a classification based solely upon citizenship or nationality is inherently suspect and subject to strict scrutiny. For example, in *Graham v. Richardson*²⁰ the Court held that state laws which

¹⁶ 389 U.S. 429 (1967).

¹⁷ *Id.*, at 434.

¹⁸ Note, *United States Regulation of Foreign Direct Investment: Current Developments and the Congressional Response*, 15 VA. J. INT’L L. 611, 621 (1975).

¹⁹ See *Plyler v. Doe*, 457 U.S. 202 (1982).

²⁰ 403 U.S. 365 (1971).

denied welfare benefits to resident aliens who had not resided in the United States for a required number of years were unconstitutional because they deprived these persons of equal protection of the laws.

Under traditional equal protection principles, a State retains broad discretion to classify as long as its classification has a reasonable basis [citations omitted]. This is so in “the area of economics and social welfare” [citations omitted]. But the Court’s decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a “discrete and insular” minority [citations omitted] for whom such heightened judicial solicitude is appropriate. Accordingly, it was said in *Takahashi*, 334 U.S. at 420, that “the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits.”²¹

As mentioned in the *Takahashi* case²² in the above quotation, a state must be careful in applying state laws exclusively to aliens. This case challenged a California statute which barred the issuance of commercial fishing licenses to persons ineligible for citizenship. The Supreme Court held that this statute violated the Fourteenth Amendment’s Equal Protection Clause and the federal laws concerning citizenship.

Citizenship has also been rejected as a legitimate classification concerning membership in a state bar,²³ complete bans on employment of aliens in the state civil service system,²⁴ and the granting of educational benefits to aliens.²⁵ Yet, the Supreme Court has limited the application of these protections in other cases, one concerning a New York statute limiting appointment to the state police force to United States citizens,²⁶ and another concerning a New York statute forbidding certification of a non-citizen as a public school teacher unless the person had evidenced intent to become a citizen.²⁷ Therefore, there appears to be an exception to the general rule that a classification based on citizenship is subject to strict judicial scrutiny in situations where the classification relates to an essential governmental, political, or constitutional function. In such situations the less strict, rational basis test may be applied. From this discussion it may be concluded that state laws restricting investments by at least resident aliens may come under strict judicial scrutiny.²⁸

Yet, it must be remembered that, in contrast to the states, the federal government has broad authority over naturalization and immigration.

²¹ *Id.*, at 371.

²² *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948).

²³ *In Re Griffiths*, 413 U.S. 717 (1973).

²⁴ *Sugarman v. Dougall*, 413 U.S. 634 (1973).

²⁵ *Nyquist v. Mauclet*, 432 U.S. 1 (1977).

²⁶ *Foley v. Connelie*, 435 U.S. 291 (1978).

²⁷ *Ambash v. Norwich*, 441 U.S. 68 (1979).

²⁸ It is also possible that nonresident aliens, such as a Japanese bank doing business in the United States, are entitled to the same degree of equal protection under the Fourteenth Amendment as resident aliens, but this is an issue which appears not to have been settled by the courts. With respect, however, to actions by the federal government, it appears clear that Congress can discriminate against nonresident aliens so long as the restriction is reasonable and does not violate their procedural rights. *See, e.g.*, statutes discussed later in this report. No major cases challenging their constitutionality were found.

For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character appropriate to either the Legislature or the Executive than to the Judiciary.²⁹

The Supreme Court has held, for example, that aliens can be denied Medicare coverage³⁰ and that the federal government can deny a visa to a Marxist invited to speak on world communism.³¹ The power of Congress to exclude aliens from the United States and to prescribe the terms and conditions on which they enter is virtually absolute and is an attribute of the sovereignty of the United States.³²

Present Federal Restrictions on Foreign Investment

Four major federal statutes which have an impact upon foreign investment in the United States are information-gathering and disclosure statutes, instead of actual restriction statutes. One of these statutes is the International Investment and Trade in Services Survey Act of 1976.³³ Congress intended this act:

to provide clear and unambiguous authority for the President to collect information on international investment and United States foreign trade in services, whether directly or by affiliates, including related information necessary for assessing the impact of such investment and trade, to authorize the collection and use of information on direct investments owned or controlled directly or indirectly by foreign governments or persons, and to provide analyses of such information to the Congress, the executive agencies, and the general public.³⁴

The President by executive order delegated responsibility under this act for studying direct investment to the Commerce Department and portfolio investment to the Treasury Department.³⁵ The act directs the President to conduct a benchmark survey of foreign direct investment in the United States every five years.³⁶ Amendments to the act in 1990 direct the President to publish for the use of the general public and federal agencies periodic information concerning foreign investment, including information on ownership by foreign governments of United States affiliates of business enterprises the ownership or control of which by foreign persons is more than 50% of the voting securities or other evidence of ownership of these enterprises, as well as business enterprises the ownership or control of which by foreign persons is 50% or less of the voting securities or other evidence of ownership of these enterprises.³⁷ The 1990 Amendments

²⁹ *Mathews v. Diaz*, 426 U.S. 67, 81 (1975).

³⁰ *Id.*

³¹ *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

³² See *Chinese Exclusion Case (Chae Chan Ping) v. United States*, 130 U.S. 581, 603-604 (1889).

³³ 22 U.S.C. §§ 3101 *et seq.*

³⁴ 22 U.S.C. § 3101(b).

³⁵ E.O. 11961 (January 19, 1977), 42 Fed. Reg. 4321.

³⁶ 22 U.S.C. § 3103(b).

³⁷ 22 U.S.C. § 3103(a)(5).

also provide that the President may request a report from the Bureau of Economic Analysis (BEA) of the Department of Commerce of the best available information on the extent of foreign direct investment in a given industry.³⁸

Another federal statute having an impact upon foreign investment in the United States is the Foreign Direct Investment and International Financial Data Improvements Act of 1990.³⁹ The purpose of this act is:

to allow the Department of Commerce's Bureau of Economic Analysis (BEA) access to information collected by the Bureau of the Census (Census). This access will improve the accuracy and analysis of BEA's reports to the public and to Congress on foreign direct investment in the United States.⁴⁰

This act, among other requirements, adds chapter 10 to title 13 of the United States Code to provide that the Bureau of the Census shall exchange with the Bureau of Economic Analysis of the Department of Commerce any information that is collected under the census provisions and under the International Investment and Trade in Services Survey Act that pertains to a business enterprise operating in the United States if the Secretary of Commerce determines that the information is appropriate to augment and improve the quality of the data collected under the Survey Act. The Data Improvements Act of 1990 also requires that other reports be prepared by the Secretary of Commerce and the Comptroller General and submitted to congressional committees.⁴¹ The Bureau of the Census may provide business data to the Bureau of Economic Analysis and the Bureau of Labor Statistics (BLS) if the information is required for an authorized statistical purpose and the provision is the subject of a written agreement with that Designated Statistical Agency or its successors.⁴²

The third of these information-gathering and disclosure statutes is the Agricultural Foreign Investment Disclosure Act of 1978.⁴³ This act has the following two major requirements: (1) any foreign person who acquires or transfers any interest, other than a security interest, in agricultural land must submit a report to the Secretary of Agriculture not later than 90 days after the date of the acquisition or transfer;⁴⁴ (2) any foreign person who holds any interest, other than a security interest, in agricultural land on the day before the effective date of this act must submit a report to the Secretary of Agriculture not later than 180 days after the effective date of the act.⁴⁵

The fourth statute is also a disclosure statute. It is known as the Domestic and Foreign Investment Improved Disclosure Act of 1977 and is a requirement added to the Foreign Corrupt Practices Act of 1977.⁴⁶ This provision amended section 13(d) of the Securities Exchange Act of 1934⁴⁷ to require that anyone who acquires 5% or more of the equity securities of a company registered

³⁸ 22 U.S.C. § 3103(h).

³⁹ 22 U.S.C. §§ 3141 *et seq.*

⁴⁰ S.Rept. 101-443, 101st Cong., 2d Sess. 1 (August 30, 1990).

⁴¹ 22 U.S.C. §§ 3142 and 3143.

⁴² 13 U.S.C. § 402.

⁴³ 7 U.S.C. §§ 3501 *et seq.*

⁴⁴ 7 U.S.C. § 3501(a).

⁴⁵ 7 U.S.C. § 3501(b).

⁴⁶ P.L. 95-213.

⁴⁷ 15 U.S.C. § 78m(d).

with the Securities and Exchange Commission must disclose certain specified information, including citizenship and residence. Hearings indicate that this statute is directed at foreign investors in order to improve the ability of the federal government to monitor foreign investment in the United States.⁴⁸

All of the statutes discussed above are information-gathering and disclosure in nature. There are not across-the-board, blanket restrictions on foreign investment in the United States. Instead, over the years Congress has believed that certain industries which could affect national security should have limits on foreign investment. These industries include the maritime industry, the aircraft industry, banking, resources and power, and the various businesses which are parties to government contracts.

Shipping Industry

Laws that have provisions concerning barriers to foreign investment in the maritime industry are dispersed throughout Title 46 of the United States Code.

In the area of merchant shipping, there are restrictions on foreign ownership of ships which are eligible for documentation in the United States. Any vessel of at least five tons that is not registered under the laws of a foreign country is eligible for documentation if it is owned by: (1) a United States citizen; (2) an association, trust, joint venture, or other entity, all of whose members are United States citizens and that is capable of holding title to a vessel under the laws of the United States or of a state; (3) a partnership whose general partners are United States citizens and whose controlling interest is owned by United States citizens; (4) a corporation established under federal or state laws whose chief executive officer and chairman of its board of directors are United States citizens and no more of its directors are noncitizens than a minority of the number necessary to constitute a quorum; (5) the United States government; or (6) a state government.⁴⁹

Aircraft Industry

Statutory restrictions bar a considerable amount of foreign investment in the aircraft industry.

It is unlawful for any person to operate any aircraft unless it is registered.⁵⁰ An aircraft is eligible for registration only if it is: (1) not registered under the laws of a foreign country and is owned by a citizen of the United States, a citizen of a foreign country lawfully admitted for permanent residence in the United States, or a corporation not a citizen of the United States when the corporation is organized and doing business under the laws of the United States or a state and the aircraft is based and primarily used in the United States; or (2) an aircraft of the United States Government or a state, the District of Columbia, a territory or possession, or a political subdivision of a state, territory, or possession.⁵¹ A citizen of the United States is defined as: (a) an individual who is a citizen of the United States, (b) a partnership of which each member is a United States citizen, or (c) a corporation or association organized under the laws of the United

⁴⁸ Hearings on S. 245, the Foreign Investment Act of 1975 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs, 94th Cong., 1st Sess. (1975).

⁴⁹ 46 U.S.C. § 12102(a).

⁵⁰ 49 U.S.C. § 44101.

⁵¹ 49 U.S.C. § 44102.

States or of any state, the District of Columbia, territory, or possession of the United States, of which the president and two-thirds or more of the board of directors and other managing officers are United States citizens, which is under the actual control of United States citizens and in which at least 75 per cent of the voting interest is owned or controlled by persons who are citizens of the United States.⁵²

Foreign aircraft which are not a part of the armed forces of a foreign nation may be navigated in the United States by airmen holding certificates or licenses issued or rendered valid by the United States or by the nation in which the aircraft is registered if the foreign nation grants a similar privilege concerning United States aircraft.⁵³

Aircraft operators may be subject to restrictions based on citizenship. It is unlawful for a person to operate an aircraft without an airman certificate.⁵⁴ The Administrator of the Federal Aviation Administration may restrict or prohibit issuing an airman certificate to an alien or make issuing the certificate to an alien dependent upon a reciprocal agreement with the government of a foreign country.⁵⁵

The Secretary of Transportation is authorized to provide insurance and reinsurance against loss or damage arising from the risk of operation of aircraft.⁵⁶ Citizenship requirements may be important in obtaining this insurance. For example, some air cargoes may be insured only if they are owned by citizens or residents of the United States.⁵⁷

Mining

All valuable mineral deposits in lands belonging to the United States that are open to exploration and purchase may be purchased by United States citizens and by those who have declared their intention to become United States citizens.⁵⁸ Proof of citizenship may consist, in the case of an individual, of his affidavit; in the case of an association of unincorporated persons, of the affidavit of their authorized agent or upon information and belief; and in the case of a corporation organized under the laws of the United States, a state, or territory, by the filing of a certified copy of their charter or certificate of incorporation.⁵⁹

Deposits of coal, phosphate, sodium, potassium, oil, oil shale, gilsonite, or gas and lands containing these deposits owned by the United States, including within national forests and in incorporated cities, towns, villages, and national parks and monuments shall be subject to disposition in the approved manner to United States citizens, associations of United States citizens, or any corporation organized under United States, state, or territorial laws. Citizens of another country whose laws, customs, or regulations deny similar privileges to citizens or

⁵² 49 U.S.C. §40102(a)(15).

⁵³ 49 U.S.C. § 41703.

⁵⁴ 49 U.S.C. § 44711.

⁵⁵ 49 U.S.C. § 44703(e).

⁵⁶ 49 U.S.C. §§ 44301 *et seq.*

⁵⁷ 49 U.S.C. § 44303.

⁵⁸ 30 U.S.C. § 22.

⁵⁹ 30 U.S.C. § 24.

corporations of the United States shall not by stock ownership, stock holding, or stock control own any interest in any lease concerning these mineral lands.⁶⁰

The leasing of oil, natural gas, and other mineral deposits is allowed in the submerged lands of the Continental Shelf.⁶¹ Regulations require that only United States citizens, resident aliens, domestic corporations, or associations of one or more of these groups may obtain these leases.⁶²

Energy

Licenses for the construction, operation, or maintenance of facilities for the development, transmission, and utilization of power on land and water over which the federal government has control may be issued only to United States citizens and domestic corporations.⁶³

A license for nuclear facilities cannot be acquired by a foreign citizen or by a corporation believed to be controlled by a foreign citizen or government.⁶⁴

Lands

There appear to be few federal restrictions on the ownership of land by foreign individuals or by foreign corporations. However, such past acts as the Homestead Act⁶⁵ required American citizenship in order to make claims on these lands. Today, the Desert Land Act requires citizenship or a declared intention of citizenship in order to make claims.⁶⁶ Also, the Secretary of the Interior continues to require American citizenship or a declared intention of citizenship for authorizing permits for grazing on public lands,⁶⁷ and, as discussed above, the Agricultural Foreign Investment Disclosure Act requires the disclosure to the Secretary of Agriculture by foreigners of agricultural land purchases in the United States. Further, public lands improved at the expense of funds from a reclamation project can be sold only to United States citizens.⁶⁸

Communications

Federal statutes restrict foreign ownership and operation of mass communications media in the United States. Radio station licenses shall not be granted to or held by any foreign government or representative of a foreign government.⁶⁹ No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by any alien or the representative of any alien, any corporation organized under the laws of a foreign government, any corporation of which more than one-fifth of the capital stock is owned or voted by aliens or

⁶⁰ 30 U.S.C. § 181.

⁶¹ 43 U.S.C. §§ 1331 *et seq.*

⁶² 30 C.F.R. § 256.35.

⁶³ 16 U.S.C. § 797(e).

⁶⁴ 42 U.S.C. § 2133(d).

⁶⁵ Ch. LXXV, § 1, Stat. 392 (1862).

⁶⁶ 43 U.S.C. § 321.

⁶⁷ 43 U.S.C. § 315b.

⁶⁸ 43 U.S.C. § 375.

⁶⁹ 47 U.S.C. § 310(a).

their representatives or by a foreign government or representative or by any corporation organized under the laws of a foreign country, or by any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the capital stock is owned or voted by aliens, their representatives, or by a foreign government or representative, or by any corporation organized under the laws of a foreign country if the public interest will be served by the refusal or revocation of the license.⁷⁰

There does not appear to be a federal statute prohibiting the investment by foreign citizens in United States newspapers and magazines. However, the Foreign Agents Registration Act⁷¹ requires that agents of foreign principals must register with the Attorney General of the United States, that informational materials for or in the interests of a foreign principal must be labeled to show the relationship between the agent and the foreign principal, and that the agent must file two copies of the printed propaganda with the Justice Department.⁷² The statute defines foreign principal to include (1) foreign governments and foreign political parties; (2) persons outside the United States unless it is determined that the person is an individual and a citizen of and domiciled within the United States or that the person is not an individual and is organized under or created by the laws of the United States or a state and has its principal place of business within the United States; and (3) a business organized under the laws of or having its principal place of business in a foreign country.⁷³ However, agent of a foreign principal does not include any news or press service or association which is a corporation organized under United States or state law or any newspaper, magazine, periodical, or other publication having on file with the United States Postal Service required information so long as it is at least 80% beneficially owned by United States citizens, its officers and directors are all United States citizens, and the news or service or association, newspaper, magazine, periodical, or other publication is not owned, controlled, subsidized, or financed and none of its policies is determined by a foreign principal or its agent.⁷⁴

Banking

The Bank Holding Company Act (BHCA)⁷⁵ regulates as a bank holding company (BHC) any company that controls a United States bank; i.e., a bank chartered by a state or the federal government to do banking in the United States (as distinguished from a foreign bank—a bank chartered by a foreign government and doing business in the United States pursuant to the terms of the International Banking Act of 1978⁷⁶). “Control” of a bank or BHC is defined in terms of: (1) acquiring a 25% share or more of any class of voting securities of a bank or a BHC; (2) controlling the election of a majority of the directors or trustees of the bank or BHC; or (3) having been determined by the Board of Governors of the Federal Reserve System (FRB) to be exercising a controlling influence over the management or policies of the bank or BHC.⁷⁷

⁷⁰ 47 U.S.C. § 310(b).

⁷¹ 22 U.S.C. §§ 611 *et seq.*

⁷² 22 U.S.C. § 614.

⁷³ 22 U.S.C. § 611.

⁷⁴ 22 U.S.C. § 611(d).

⁷⁵ 12 U.S.C. §§ 1841-1849.

⁷⁶ 12 U.S.C. §§ 3101-3111.

⁷⁷ 12 U.S.C. § 1841(a)(2).

The BHCA is administered by the FRB, which must solicit the “views and recommendations” of the Comptroller of the Currency for national bank acquisitions and the appropriate state bank supervisor for state-chartered bank acquisitions.⁷⁸

The BHCA presumes that “any company which owns, controls, or has power to vote less than 5 per centum of any class of voting securities of a given bank or [bank holding] company does not have control over that bank or company.”⁷⁹ Before any company may take any action which would cause that company to become a BHC or before any BHC may acquire a 5% share or more of the voting stock of any U.S. bank or BHC, it must seek approval from the FRB.⁸⁰ FRB’s implementing regulation makes this requirement applicable to “foreign banking organizations.”⁸¹

The BHCA generally subjects BHCs to activity restrictions that essentially confine their portfolios to banking and financial services. Under the BHCA, subject to specified, limited exceptions, any company which controls a bank may engage only in banking or managing or controlling banks and subsidiaries; specified, limited non-banking activities; and activities that are financial in nature or incidental to such financial activity as determined by the FRB and the Secretary of the Treasury. Permissible banking activities are found in section 4(k) of the BHCA.⁸² A list of permissible non-banking activities for BHCs is found at 12 C.F.R. section 225.28. A further list of permissible non-banking activities for BHCs which have qualified as Financial Holding Companies under section 4(l)(1) of the BHCA is found at 12 C.F.R. section 225.86. In addition, the FRB has promulgated individual orders under the BHCA determining that particular activities are “so closely related to banking as to be a proper incident thereto.”⁸³

The BHCA’s section 2(h)(2) states that a foreign company that acquires stock of a U.S. bank or BHC is not subject to BHCA activities restrictions if: (1) it is organized as a bank holding company under foreign law and is principally engaged in the banking business outside of the United States.⁸⁴ A further provision states that nothing in the preceding provision authorizes such a foreign company to hold more than 5% of the outstanding shares of any class of voting securities of a company engaged in banking, securities, insurance, or other financial activities, as defined by the Federal Reserve Board, in the United States.⁸⁵ There is also authority for the Federal Reserve Board to provide a foreign company which acquires the stock of a U.S. bank or BHC an exemption from the activities restrictions if the Federal Reserve Board determines “by regulation or order ... under circumstances and subject to the conditions set forth in the regulation or order, [that] the exemption would not be substantially at variance with purposes of [the BHCA] ... and would be in the public interest.”⁸⁶

⁷⁸ 12 U.S.C. §1842(b)(1).

⁷⁹ 12 U.S.C. § 1841(a)(3).

⁸⁰ 12 U.S.C. § 1842; 12 C.F.R. § 225.11.

⁸¹ 12 C.F.R. § 225.11(f).

⁸² 12 U.S.C. § 1843(k).

⁸³ *See, e.g.*, Order Approving a Notice to Engage in Real Estate Title Abstracting, The First National Company, Storm Lake, Iowa, effective June 30, 1995, 81 FRB 805 (August 1993); Order Approving the Acquisition of a Title Insurance Agency, Norwest Corporation, Minneapolis, Minnesota, effective March 8, 1993, 79 FRB 517 (May 1993); and Order Approving the Acquisition of a Title Insurance Agency, Norwest Corporation, Minneapolis, Minnesota, effective October 15, 1990, 76 FRB 1058 (December 1990).

⁸⁴ 12 U.S.C. § 1841(h)(2).

⁸⁵ 12 U.S.C. § 1841(h)(3).

⁸⁶ 12 U.S.C. § 1843(c)(9).

Government Contracting

Corporations which are controlled or owned by foreign citizens can conduct business with the federal government on generally the same basis as domestic corporations which are owned completely by United States citizens. However, some federal statutes restrict purchases of products by federal agencies to those manufactured in the United States.

For example, the Buy American Act, enacted in the early 1930s,⁸⁷ requires that:

[n]otwithstanding any other provision of law, and unless the head of the department or independent establishment concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use....⁸⁸

Although there have over the years been a number of exceptions to the Buy American Act, amendments in 1988 and 1993 attempted to strengthen its provisions.⁸⁹ For example, every contract for the construction or repair of a public building or public work shall have a provision that the contractor or supplier shall use only unmanufactured articles or materials mined or produced in the United States unless the head of the department finds that this is impracticable or unreasonably increases the cost.⁹⁰ Further, if the Secretary of Defense, after consulting with the United States Trade Representative, determines that a foreign country, which is a party to a reciprocal defense procurement memorandum of understanding with the United States concerning waiver of the Buy American Act for certain products in that country, has discriminated against certain types of products produced in the United States that are covered by the agreement, the Secretary of Defense shall rescind the blanket waiver of the Buy American Act concerning those types of products produced in that foreign country.⁹¹

Some of the exceptions to the Buy American Act should be noted. For example, the Trade Agreements Act of 1979⁹² gives the President the authority to waive application of the Buy American restrictions on the products of our trading partners. However, this does not authorize the waiver of any small business or minority preference.⁹³

The National Industrial Security Program establishes a program to safeguard federal government classified information that is released to contractors, licensees, and grantees of the United States Government. This also covers foreign contractors.⁹⁴

⁸⁷ 41 U.S.C. §§ 10a-10d.

⁸⁸ 41 U.S.C. § 10a.

⁸⁹ P.L. 100-418, Title VII, and P.L. 103-139, Title VIII.

⁹⁰ 41 U.S.C. § 10b(a).

⁹¹ 41 U.S.C. § 10b-2(a).

⁹² 19 U.S.C. §§ 2501 *et seq.*

⁹³ 19 U.S.C. § 2511(f).

⁹⁴ 48 C.F.R. § 4.402.

No entity controlled by a foreign government is allowed to merge with, acquire, or take over a company engaged in interstate commerce in the United States which is performing a Department of Defense (DOD) contract or a Department of Energy (DOE) contract under a national security program that cannot be performed satisfactorily unless that company is given access to information in a proscribed category of information. Such a merger, acquisition or takeover is also not allowed to occur if the company engaged in interstate commerce in the United States was during the previous fiscal year awarded Department of Defense prime contracts in an aggregate amount exceeding \$500 million or Department of Energy prime contracts under national security programs exceeding \$500 million.⁹⁵ This limitation shall not apply if the merger, acquisition, or takeover is not suspended or prohibited under the statutes carried out by the Committee on Foreign Investment in the United States, as discussed below.⁹⁶

Investment Company Regulation

The Investment Company Act of 1940⁹⁷ requires registration with the Securities and Exchange Commission (SEC) of an investment company which does business in the United States. Only investment companies organized or created under the laws of the United States or a state are allowed to sell their own securities in interstate commerce in connection with a public offering unless the SEC finds that it is legally and practically feasible to enforce the federal securities laws against the investment company and that the exemption from registration is consistent with the public interest and the protection of investors.⁹⁸

The Trust Indenture Act of 1939⁹⁹ prohibits the sale in interstate commerce of certain securities which have not been registered under the Securities Act of 1933 unless the securities have been issued under an indenture.¹⁰⁰ There must be at least one or more trustees under the indenture, at least one of whom shall be a corporation organized and doing business under the laws of the United States, a state, territory, or the District of Columbia or a corporation or other person permitted to act as trustee by the SEC which is authorized to exercise corporate trust powers and is subject to supervision or examination by federal, state, territorial, or District of Columbia authority.¹⁰¹

Committee on Foreign Investment in the United States

The Committee on Foreign Investment in the United States (CFIUS) is a multi-member board headed by the Secretary of the Treasury.¹⁰² CFIUS may review any “covered transaction,” defined as any merger, acquisition, or takeover by or with a foreign person which could result in foreign

⁹⁵ 50 U.S.C. App. § 2170a(a).

⁹⁶ 50 U.S.C. App. § 2170a(b).

⁹⁷ 15 U.S.C. §§ 80a-1 *et seq.*

⁹⁸ 15 U.S.C. § 80a-7(d).

⁹⁹ 15 U.S.C. §§ 77aaa *et seq.*

¹⁰⁰ 15 U.S.C. § 77fff(a).

¹⁰¹ 15 U.S.C. § 77jjj(a)(1).

¹⁰² 50 U.S.C. App. §§ 2170 *et seq.*

control of any person engaged in interstate commerce in the United States,¹⁰³ for its possible impact upon national security. Factors to be considered in determining the impact upon national security include domestic production needed for projected national defense requirements, the capability and capacity of domestic industries to meet national defense requirements, the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security, and the potential effects of the proposed or pending transaction on United States international technological leadership in areas affecting United States national security.¹⁰⁴ A mandatory investigation is required in any instance in which an entity controlled by or acting on behalf of a foreign government seeks to engage in any merger, acquisition, or takeover which could result in control of a person engaged in interstate commerce in the United States that could affect the national security of the United States. Among indicia of control is a purchase of voting securities or comparable interests in a United States person greater than 10% of the outstanding voting securities of a United States person.¹⁰⁵

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¹⁰³ 50 U.S.C. App. § 2170(a).

¹⁰⁴ 50 U.S.C. App. § 2170(f).

¹⁰⁵ See 31 C.F.R. § 800.302(d)(1).