



O'MELVENY & MYERS LLP



Foreign Direct Investment into the United States

- Trends
- Drivers of Growth
- Legal Considerations
- Steps to Mitigate Risk

Presented by:

Steve Olson
Los Angeles
213-430-7855
solson@omm.com

September 2013



Trends in, and Drivers of, FDI into the United States

FDI and the U.S. Economy

#1 —→ The United States is the largest recipient of foreign direct investment in the world.

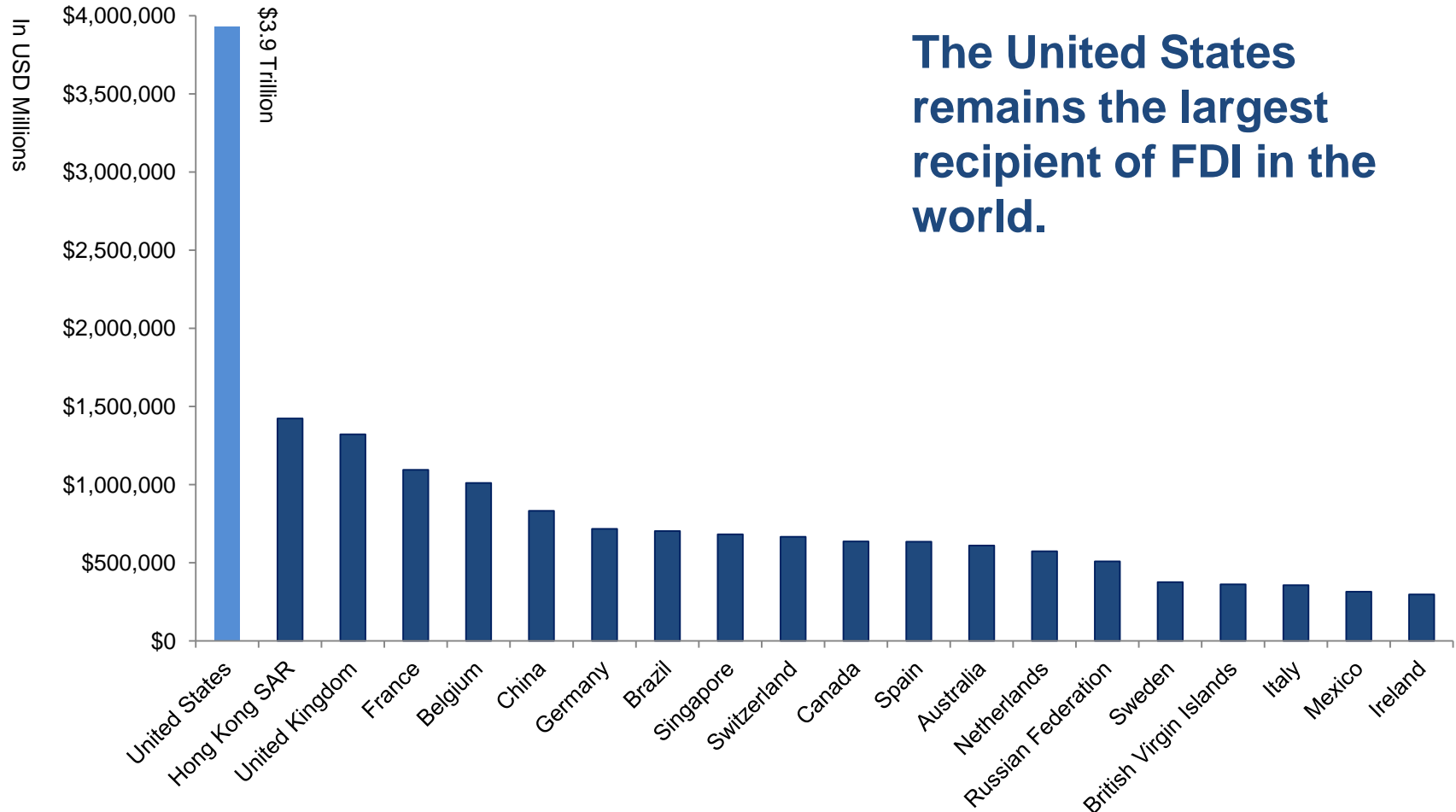
16% of U.S. Exports —→ In 2011, U.S. subsidiaries of foreign-owned firms accounted for 16 percent of all U.S. goods exports.

~6 million U.S. jobs —→ In 2011, subsidiaries employed 5.6 million U.S. workers.

R&D Investments —→ In 2011, subsidiaries invested \$45.2 billion in research and development in the United States

Investments in Fixed Assets —→ In 2011, subsidiaries owned \$1.6 trillion in gross property, plant, and equipment (PP&E). They invested more than \$177 billion in PP&E improvements in one year, alone.

Global FDI Trends



Global FDI Trends

#1 AT Kearney's 2013 FDI Confidence Index
 China: #2 Germany: #7 UK: #8

#1 IESE Business School's 2011 Venture Capital and Private Equity Index
 Canada: #2 UK: #3 Germany: #7

#4 World Bank's Ease of Doing Business 2012 Ranking
 Singapore: #1 Hong Kong SAR: #2 New Zealand: #3


#7 World Economic Forum's 2012-2013 Global Competitiveness rankings
 UK: #8 France: #21 Germany: #6


Ranking: FDI Confidence Index	
1	United States
2	China
3	Brazil
4	Canada
5	India
6	Australia
7	Germany
8	United Kingdom
9	Mexico
10	Singapore






Source: AT Kearney







U.S. FDI Trends


Top 15 FDI Stock Positions, 2012


 10% | \$261.1b

 1% | \$29.2b

 21% | \$564.7b
 10% | \$272.3b
 8% | \$221.7b
 2% | 41.4b
 1% | 30.8b

 5% | \$130.1b
 5% | \$127.7b
 5% | \$126b
 2% | \$47.7b
 2% | \$51.9b
 1% | \$33.2b

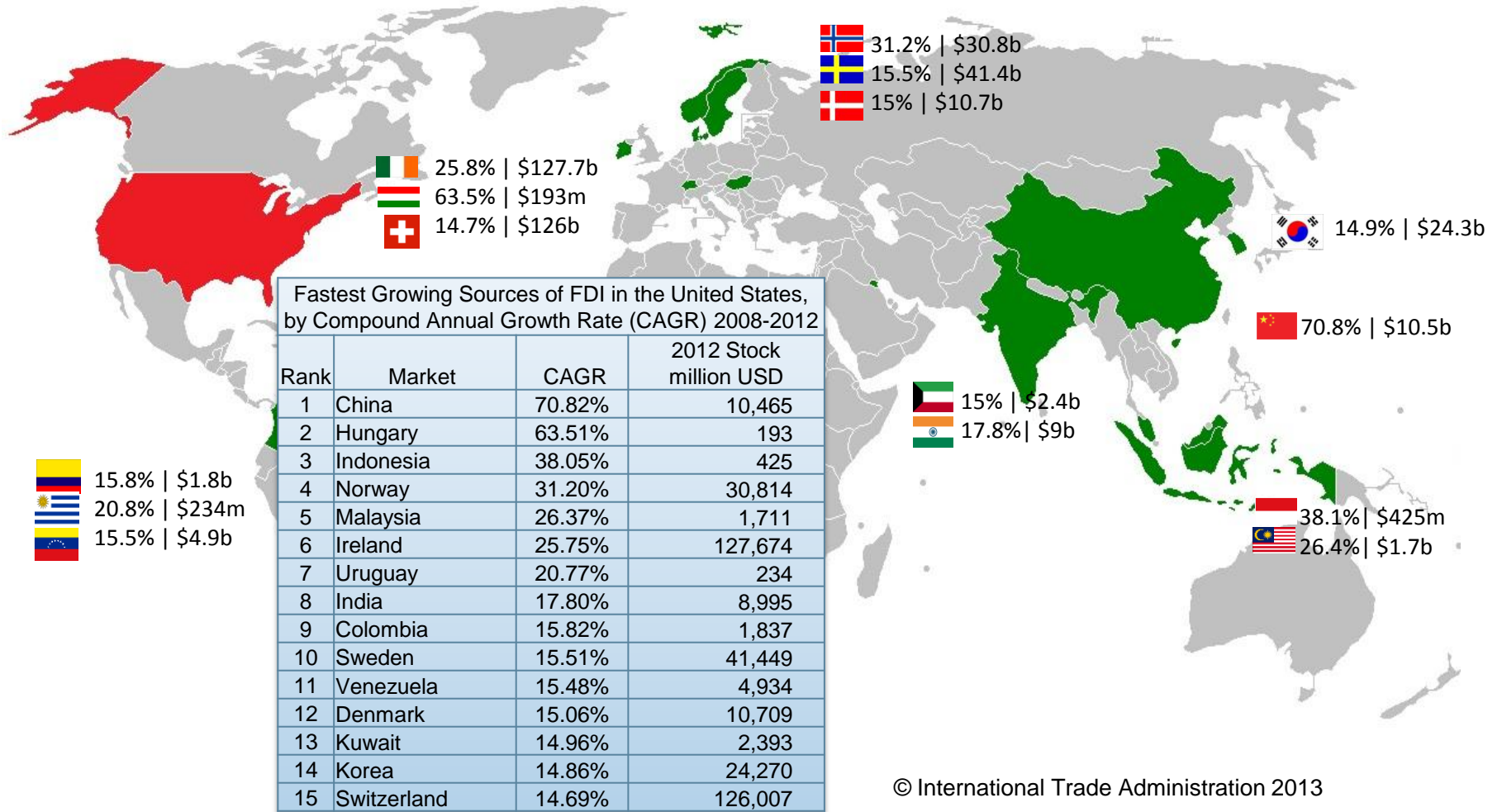
 12% | \$309.4b

 2% | \$51.1b

Largest Country Sources of FDI in the United States by 2012 Stock Position			
Rank	Market	% of Total Stock (\$2.7 trillion)	Million USD
1	United Kingdom	21.30%	564,714
2	Japan	11.67%	309,383
3	Germany	10.27%	272,262
4	Canada	9.85%	261,133
5	France	8.36%	221,724
6	Netherlands	4.91%	130,075
7	Ireland	4.82%	127,674
8	Switzerland	4.75%	126,007
9	Spain	1.96%	51,894
10	Australia	1.93%	51,051
11	Belgium	1.8%	47,728
12	Sweden	1.56%	41,449
13	Italy	1.25%	33,194
14	Norway	1.16%	30,814
15	Mexico	1.10%	29,175

U.S. FDI Trends

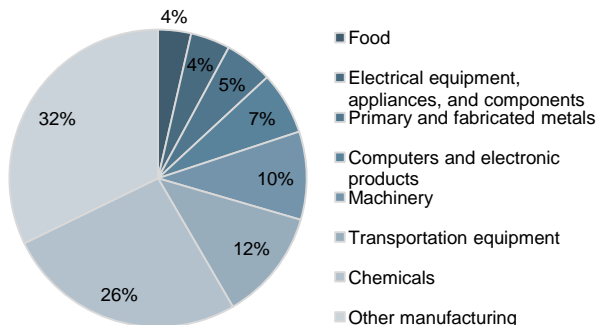
Top 15 FDI Growth Markets, 2012



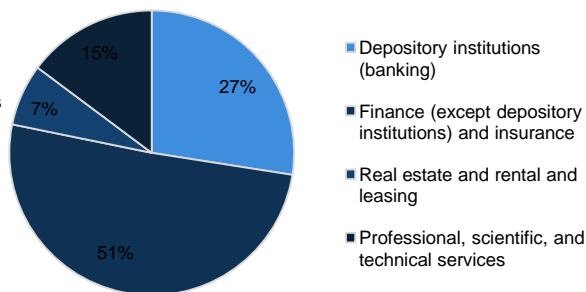
© International Trade Administration 2013

FDI in the United States by Industry, 2012

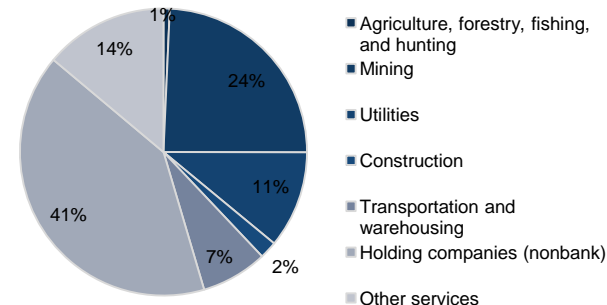
FDI Position in Manufacturing, 2012:
898.9 billion USD



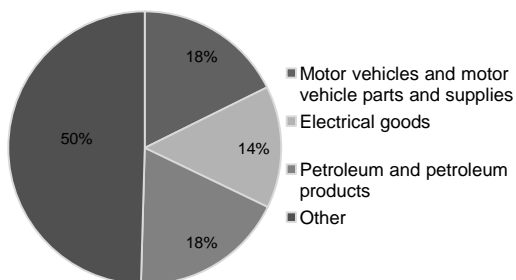
FDI Position in Services, 2012:
721.1 billion USD



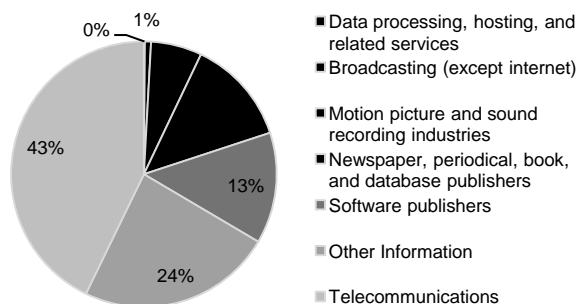
FDI Position in Other Industries, 2012:
562.8 billion USD



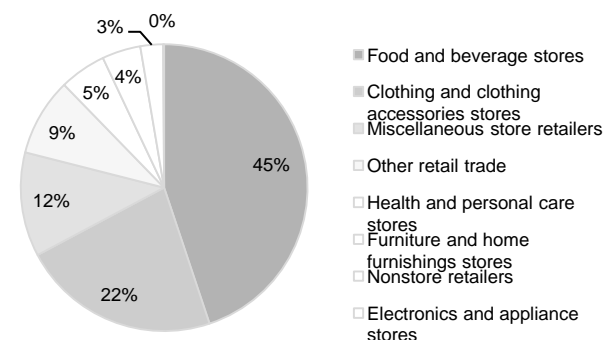
FDI Position in Wholesale Trade, 2012:
292.4 billion USD



FDI Position in Information, 2012:
123.8 billion USD



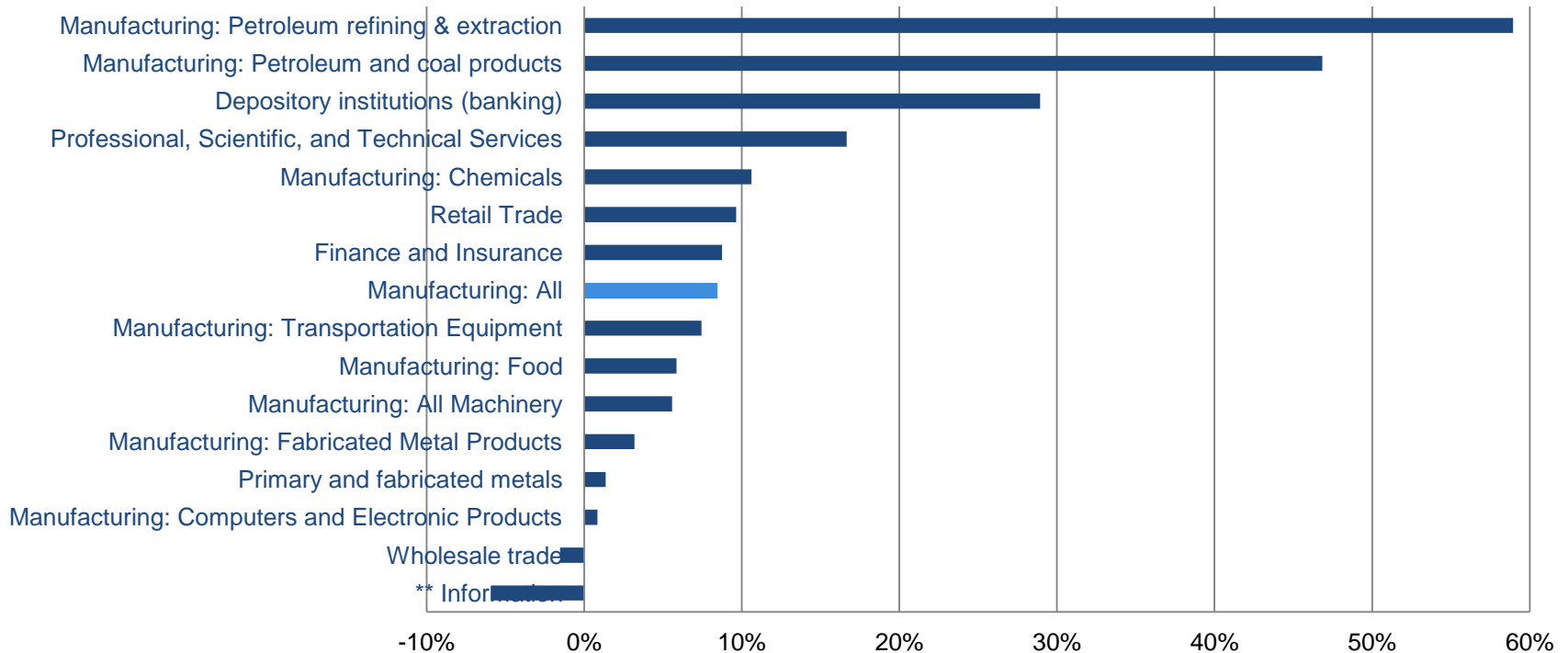
FDI Position in Retail Trade, 2012:
51.7 Billion USD



FDI Growth in the United States by Industry

FDI Growth in the United States by Major Industry Sectors

(Compound annual growth rate in FDI position between 2008 and 2012 on a historical cost basis)

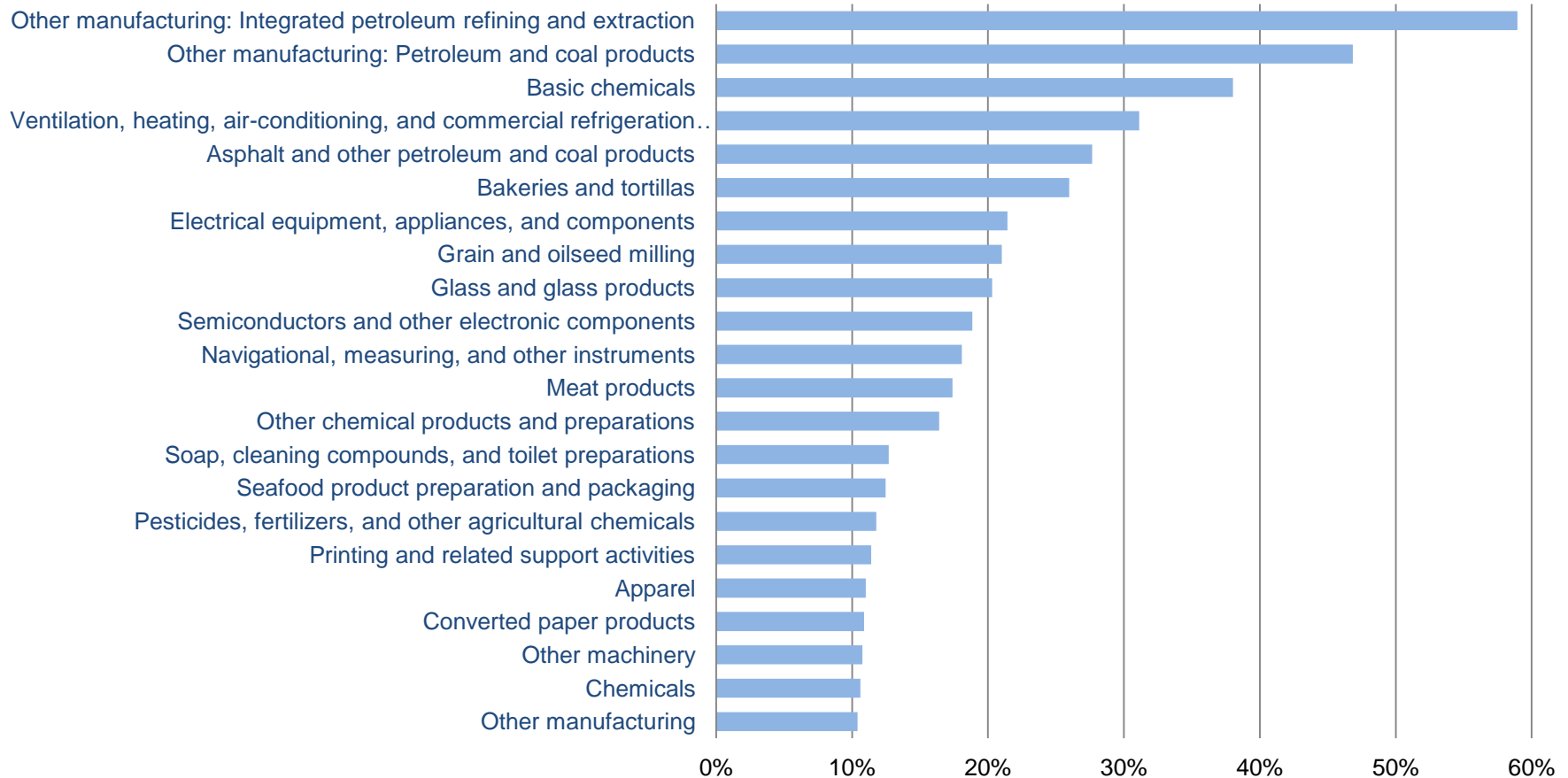


***"Information" includes "publishing industries, including newspaper, periodical, book, and database publishers." FDI in publishing industries experienced -11.6 percent CAGR during 2008-12.

FDI Growth by Industry:

Manufacturing FDI in the United States Continues to Grow

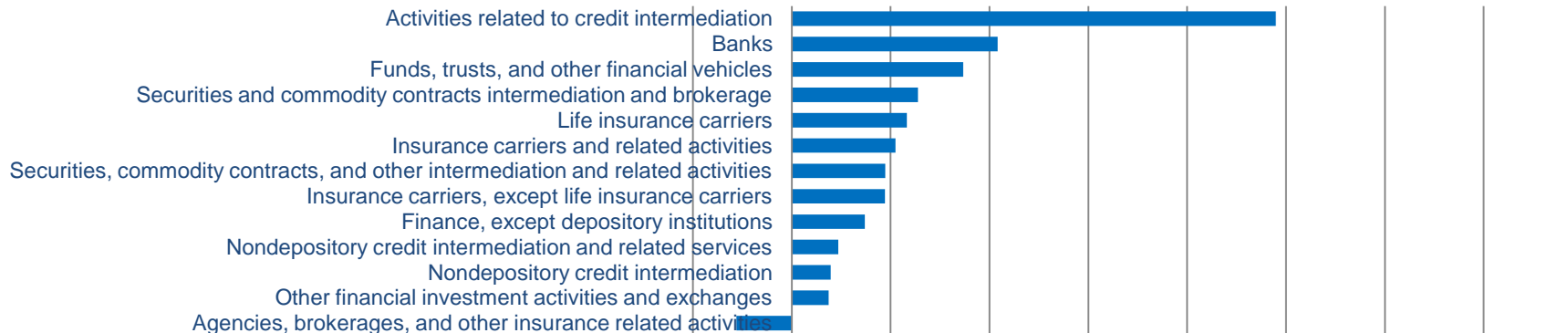
CAGR: Manufacturing FDI in the United States, 2008-12



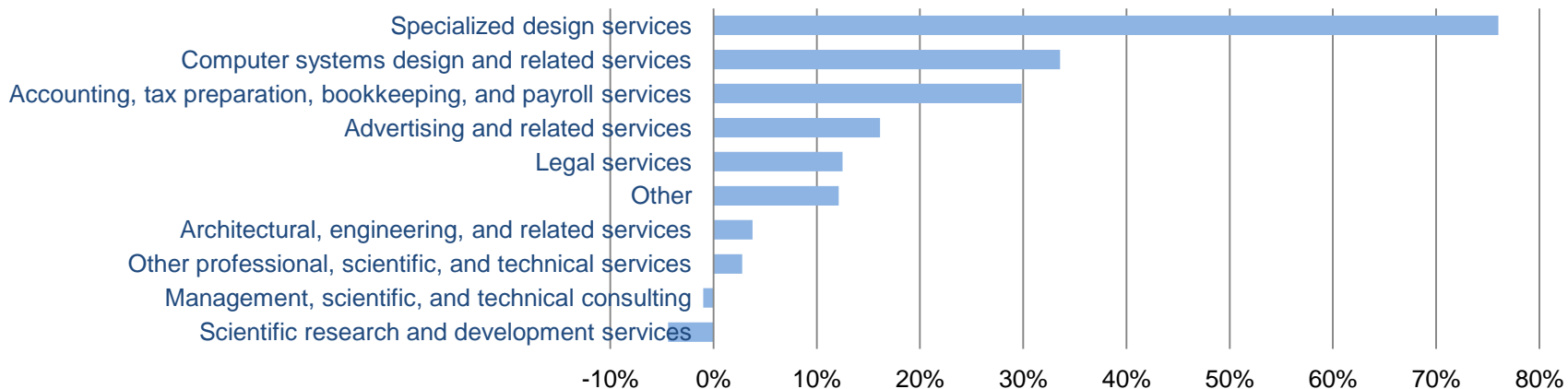
FDI Growth by Industry

Solid Growth in Banking, Finance, Professional, Technical Services

CAGR: Finance & Insurance FDI in the United States, 2008-12



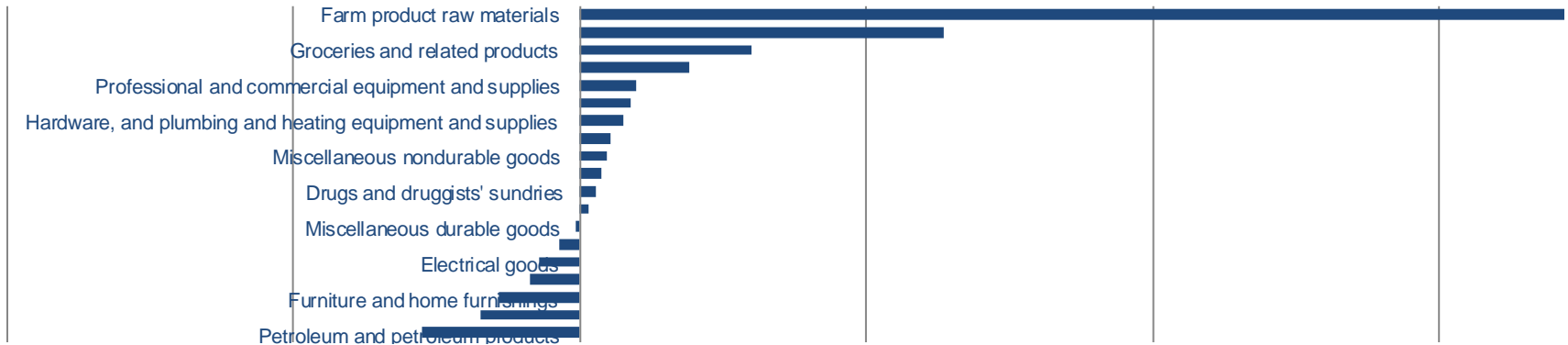
CAGR: Professional, Scientific, and Technical Services FDI in the United States, 2008-12



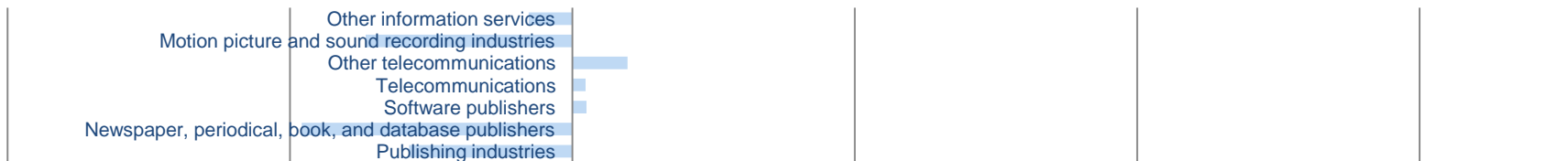
FDI Growth by Industry

Mixed Growth in Wholesale Trade, Retail Trade and Information

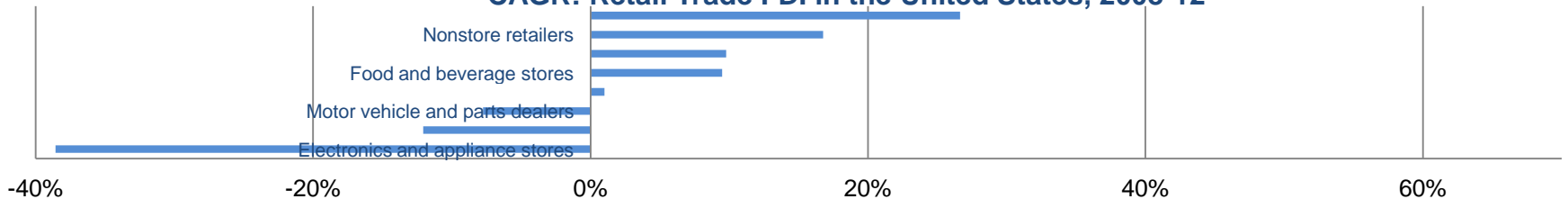
CAGR: Wholesale Trade FDI in the United States, 2008-12



CAGR: Information FDI in the United States, 2008-12

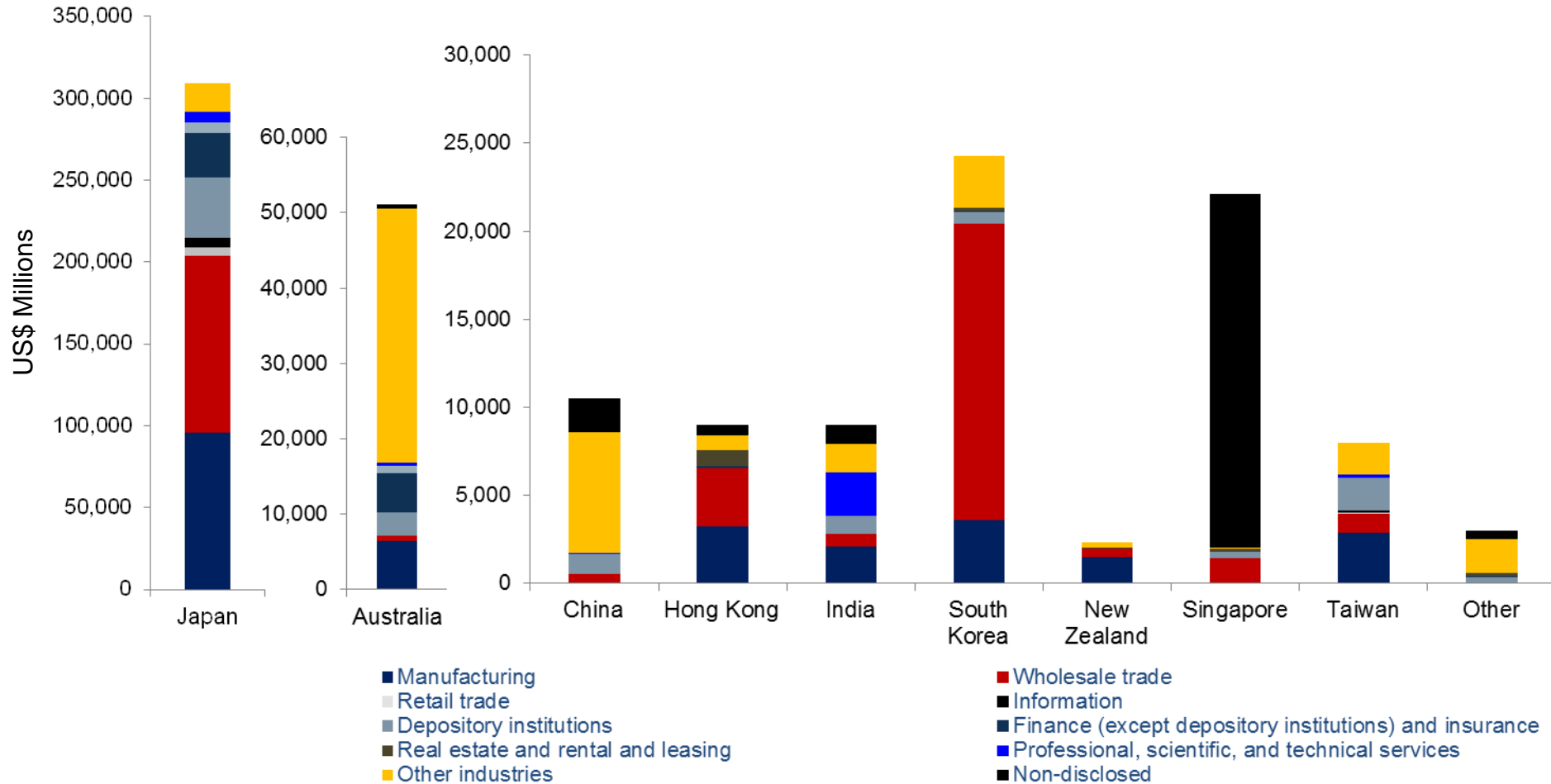


CAGR: Retail Trade FDI in the United States, 2008-12



U.S. FDI Trends – Asia Pacific

The Stock of FDI from Asia-Pacific to the United States was \$448.4 billion in 2012



U.S.-China FDI Relationship

#1 Fastest Growing Source

→ FDI from China to the United States has grown at 71 percent CAGR, 2008 – 2012

Ranked 28th Largest Source

→ Investor in the United States, by Stock FDI from ultimate beneficial owner, 2012

\$10.5 billion

→ Size of Chinese FDI stock in the U.S., 2012

12,000 U.S. Jobs

→ Number of U.S.-based employees of Chinese firms, 2011

\$366 million

→ R&D Expenditures by U.S. subsidiaries of Chinese-owned firms

Sources: U.S. Bureau of Economic Analysis

U.S.-China FDI Relationship

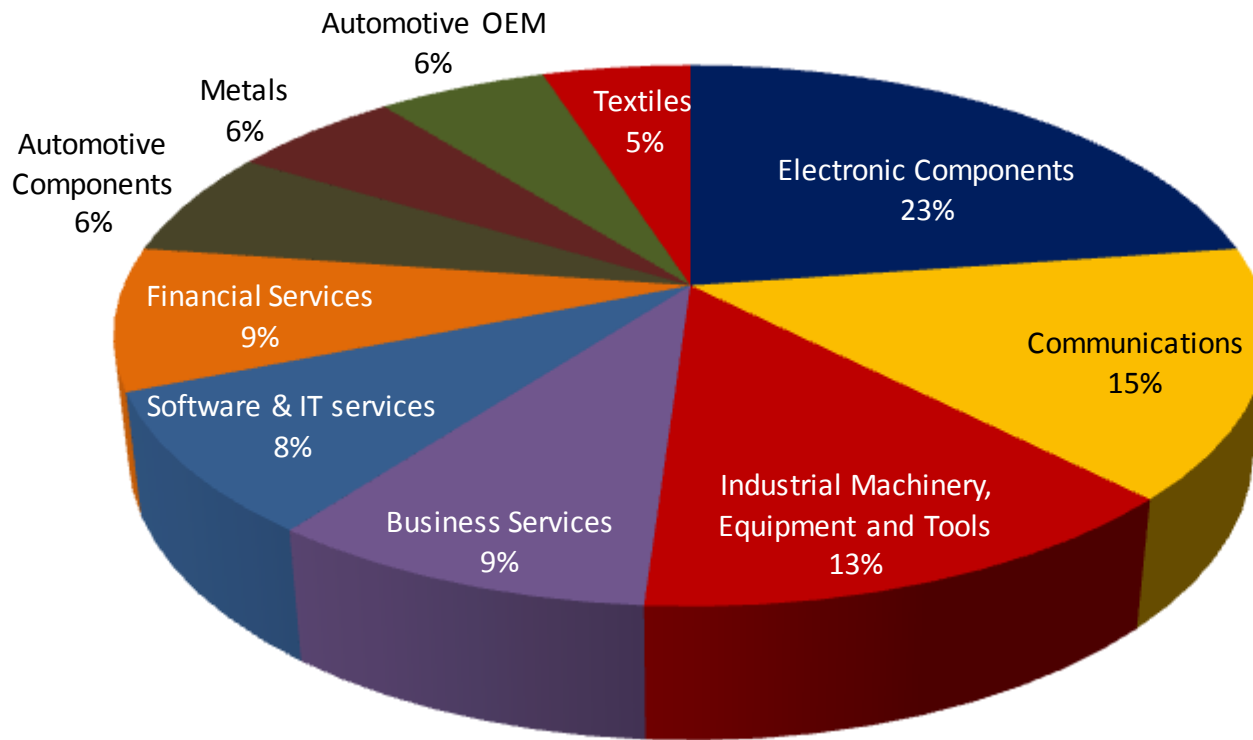
A Comparison with Global Trends

	2012 Stock	2012 Flow	Rank
China to U.S.	\$10.5 billion	\$1.37 billion	1
U.S. to China	51.3 billion	- 3.5 billion	(n/a)
China to World	\$832 billion	\$84 billion	15
World to China	509 billion	121 billion	2

Sources: UN Conference on Trade and Development (UNCTAD); U.S. Bureau of Economic Analysis (BEA)

U.S.-China FDI Relationship

**Announced Chinese FDI Projects in the United States by Industry
(2003-Present)**



Source: fDiMarkets.com



Drivers of Growth in Foreign Direct Investment into the United States

Drivers of Growth in FDI into the United States

- Aggressive Obama Administration Policies - to make the United States a global magnet for innovators
 - SelectUSA
 - Visa/Immigration Reform
 - Private/Public Partnerships
 - Ex. National Network for Manufacturing Innovation (NNMI)
 - Ex. Manufacturing Extension Partnership (MEP)
- Skilled, Productive Work Force and Developed Manufacturing Base
- Legal and Financial Incentives for Investment
- Free Trade Agreements and Free Trade Zones
- Advanced Legal System and Developed Alternative Dispute Resolution



Legal Considerations Relating to FDI into the United States

Primary Legal Considerations in FDI Transactions

1. Review and Approval of the Inbound Investment

- Industry Specific Restrictions on Foreign Ownership
- National Security Review (CFIUS)
- Antitrust Review

2. Ongoing Considerations

- FCPA/Bribery
- Labor
- Intellectual Property
- Consumer Protection
- Taxation
- US Securities Markets

Review and Approval of the Inbound Investment -

Industry specific restrictions on foreign ownership

Most industries have no limitations on, and welcome, FDI.

- Ex. clean energy, infrastructure development, retail, service and general manufacturing, etc.

Certain, limited, industries are subject to ceilings on foreign ownership.

- Ex. Defense, civil aviation, shipping, communications, energy/natural resources, banking, advanced electronics, and biotech.

Review and Approval of the Inbound Investment – **National Security Review (CFIUS)**

Committee on Foreign Investment in the United States (CFIUS)

2013 CFIUS Approvals

- BGI/Complete Genomics – first ever Chinese takeover of public American company
- Shuanghui/Smithfield Foods – largest ever Chinese takeover of American company

Recommendations

- Shape perceptions of the “character” of the foreign investor.
- Plan outreach early, build public support, and raise public profile.
- Conduct extensive regulatory and political due diligence.
- Consider foreign government ties (especially foreign government ownership or control), compliance record with respect to international non-proliferation regimes and other national security matters.

Takeaways

- Very few transactions have ever been blocked or modified on national security grounds.
- CFIUS gets a lot of media attention, but, in reality, risks are low (especially outside key industries).
- Risk is low and can be managed through proactive planning.

Review and Approval of the Inbound Investment - **Antitrust Review**

Antitrust Law in the United States

- Enforced by the Antitrust Division of the US Department of Justice and by the Federal Trade Commission.
- Agencies are authorized to challenge anticompetitive conduct and mergers, acquisitions and other business conduct.

Recommendations:

- Timing: Anti-trust review and approval can take significant time.
- Plan early: Understand antitrust implications and optimal transaction structure to anticipate future issues.
- Retain advisors with contacts and experience within the DoJ and FTC to facilitate the process and ensure efficient resolution.

Ongoing Considerations -

Foreign Corrupt Practices Act & Bribery

The Law

- FCPA applies to any act by US businesses, foreign corporations trading securities in the United States, American nationals, citizens and residents and any person who has a degree of connection to the US.
- Covers any payment (monetary or otherwise) to, or attributable to, foreign officials, candidates and parties.

Recent Developments – Increased enforcement

Recommendations

- Conduct internal audit to assess potential violations and liability and prepare for anti-corruption due diligence.
- Implement a robust compliance program including reporting, record keeping and internal controls.
- Address FCPA issues early and proactively.

Ongoing Considerations - Labor Laws

Complex Framework of Overlapping Laws and Regulations

- Pure Labor Laws
- Compensation and Wage Laws - Minimum Wages, Restrictions on Executive Compensation
- Workplace Safety - Occupational Safety and Health Administration
- Labor Relations and Unions
- Equal Opportunity and Anti-Discrimination - gender, race, color, sex, religion, age or national origin

Recommendations

- Reputational Risk: Labor issues are very political in the United States, often garnering outsized media attention.
- Class Actions: Treat labor issues as if they have the potential for a class action lawsuit.
- Consider Cultural Differences and Management Styles.
- Ongoing Compliance: Training and systems in place to manage labor relations and compliance.

Ongoing Considerations -

Intellectual Property – Patent, Copyright, Trademark

The United States has a robust and extensive system for the protection of IP.

Recent Developments – Increased, large stake litigation; patent trolls.

Recommendations:

- Assess acquirer’s current IP practices, including any potential infringement under US laws.
- Understand the role IP plays in the target business and the extent to which the target has protected such rights.

Ongoing Considerations - **Taxation**

US Tax Law

- The United States has a complex tax code, with regulations at the federal, state and local levels.
- Federal Corporate Income Tax - nominally a 35% tax rate, however a variety of exceptions, exemptions and credits substantially reduce the real tax paid.
- Federal Capital Gains Taxes - Recently increased from 15% to 20%.
- Currently, there are numerous proposals to simplify that tax code, but none has gained much traction, and any material change is, at minimum, years away.

Recent Developments

- Renewed focus on Bilateral Investment Treaties.

Recommendations

- Bring in tax professionals early in the process to structure the inbound transaction in the most tax efficient way.
- Utilize the variety of tax exceptions, exemptions and incentives available at the federal, state and local levels.

Ongoing Considerations -

Regulation of US Securities Markets

The United States securities laws are highly complex and regulate access to the public and private capital markets.

Recent Developments - Renewed focus after corporate governance scandals of early '00s (Enron, Worldcom) and recent financial crisis - led to SOX and Dodd Frank

Recommendations:

- Carefully consider:
 - type of deal (public v. private, etc.) and securities laws implications
 - type of financing will be required? Both to effectuate the transaction and to operate the business.
 - level of disclosure the acquiring company is comfortable with (reporting requirements may be triggered)
 - exit strategy at the outset - IPO? Financial/Strategic Sale?
- Importance of advisors with experience at the SEC

Ongoing Considerations -

Increased Shareholder Litigation Against US-Listed Chinese Companies

In 2011, there was a spate of shareholder lawsuits filed against US-listed Chinese companies that continues to this day.

Some of the lawsuits originated from short sellers publishing “analyst reports.” Others came from legitimate concerns surrounding reverse mergers.

Recommendations:

- Carefully consider:
 - ways of going public: through IPO or reverse merger
 - keeping shareholders informed when there is a drop in stock prices
 - importance of working with auditors long after going public
 - hiring a good team that knows US regulatory rules and Chinese standards
 - increased communication between Chinese and US regulatory bodies

Ongoing Considerations - **Consumer Protection**

Renewed focus on consumer protection in recent years.

Recent Developments.

- Growth in consumer litigation in recent years, particularly class action litigation over consumer products, foods and beverages (everything from shoes to tires to cellphones).
- Recent increase in government enforcement actions brought by federal government and state agencies/attorneys general.

Recommendations

- Have strict compliance programs in place to ensure compliance with U.S. manufacturing, safety, advertising, and labeling standards.
- Seek approval from legal department for all marketing and advertising materials (particularly those relating to health, nutritional, fitness benefits of the product).
- Retain experiences class action counsel.



Recommendations to Mitigate Political/Legal Risks

Recommendations to Mitigate Political/Legal Risks

- 1. Conduct a Comprehensive Risk Assessment early in the process.**
- 2. Develop a Holistic Plan for Navigating Process**
 - Carefully Select Advisors Who Will Work Together As A Team – Look for:
 - Expertise in a variety of areas and in similar transactions.
 - Active partners who will work efficiently and collectively towards end goal.
 - Government experience and contacts.
 - Plan Holistically
 - Begin Outreach Early - Public Relations and Politics are vital
- 3. Comprehensive Diligence of Acquirer and Target**
 - Most problems can be resolved if discovered (and disclosed, if necessary) early in the process.
- 4. Implement a Rigorous Compliance Program**

Case Study:

BGI-Shenzhen Acquisition of Complete Genomics

First-ever acquisition of US public company by a Chinese buyer

Issues:

- M&A
- Securities
- International M&A
- Merger Defense/Securities Litigation
- Antitrust review
- Chinese regulatory review
- National Security review (CFIUS)
- IP and privacy
- US and International Tax Structuring
- Executive Compensation
- SEC and Stock Exchange Regulations



OMM:

Practices Groups:

- M&A
- Securities Litigation
- Antitrust
- China Practice
- Government Relations
- Intellectual Property
- Tax
- Capital Markets
- Health Care
- Labor

Offices: Beijing, Shanghai, Los Angeles, Washington DC, New York, San Francisco, Silicon Valley

Conclusion

Business case for Chinese FDI into the United States is strong.

Legal risks can be managed and mitigated with proper planning.

史蒂芬·奥尔森



合伙人

白领辩护和公司调查业务组

洛杉矶代表处

电话: +1-213-430-7855

传真: +1-213-430-6407

solson@omm.com

密歇根大学, 法学博士,

1995: 《密歇根国际法律
期刊》特约编辑

斯坦福大学, 文学学士,

1990: 优秀生

史蒂芬·奥尔森(Steve Olson)是美迈斯洛杉矶代表处的合伙人。史蒂芬于2013年8月重新加盟美迈斯,在这之前他担任美国商务部高级顾问兼“选择美国”(SelectUSA)的执行董事,“选择美国”是奥巴马总统为促进国际企业向美国进行直接投资而推出的举措。在史蒂芬的领导下,“选择美国”帮助美国吸引到250多亿美元新的外商投资。史蒂芬还与白宫国家经济委员会主任共同担任“机构间投资工作组”联席主席,该工作组由22个联邦机构的高层领导和美国总统办事机构所组成,负责协调联邦投资政策和招商引资活动。在“选择美国”任职期间,史蒂芬办理了800余项在美国境内进行投资的案件,针对联邦与州投资项目和服务为投资者提供了宝贵的法律咨询意见,作为调查员协助投资者解决与各政府机构之间的美国监管环境问题,例如与国务院解决签证问题、与能源部解决贷款申请问题,与国家环境保护局解决环保规定问题等。

在担任商务部部长高级顾问期间,史蒂芬处理了许多重大的美国商业问题,包括商业秘密的保护、美国制造业政策以及美国移民政策。

在任职于奥巴马总统经济团队之后,史蒂芬目前领导美迈斯扩大代理全球企业向美国投资的业务。

作为在洛杉矶的前任联邦检察官,史蒂芬在陪审团审理方面有着丰富经验,经常在政府执法机构进行的刑事、民事调查和检控及大宗民事诉讼(例如窃取商业秘密和违约)中代表上市公司、董事会和高管。他还就复杂和敏感的内部调查为上市公司的审计委员会和独立董事提供咨询。