

Compliance Primer: Foreign Investment In US Real Property

By **Marisa Bocci, Kari Larson and Lysondra Ludwig** (October 27, 2023)

The rise in foreign investment in U.S. real property, especially in U.S. agricultural land, has led to rising concerns regarding national security.

The U.S. is able to track foreign investment in U.S. agricultural land through the reporting requirements under the Agricultural Foreign Investment Disclosure Act,[1] as implemented by corresponding U.S. Department of Agriculture regulations.[2]

AFIDA is an often-overlooked law that requires a foreign person or entity to disclose the acquisition or transfer of any interest in U.S. agricultural land to the U.S. Secretary of Agriculture.[3]

Due to the broad definition of "agricultural land" and the low threshold to be considered a "foreign person" for purposes of applying these rules, AFIDA captures a large swathe of transactions — often transactions without an obvious agricultural connection. In addition, many states have implemented similar reporting requirements for foreign ownership that need to be complied with.

Moreover, the regulatory landscape is evolving as public sentiment has led to growing pressure to regulate foreign investment. In addition to reporting, many states have proposed and implemented limitations and restrictions on foreign ownership. Between January and June, 15 states enacted legislation regulating foreign ownership of U.S. real estate.

The federal government has also proposed multiple variations of limitations and restrictions on foreign ownership.

In light of the broad scope and potential repercussions of AFIDA, the related state laws and the developing legal landscape, it is important to consider whether a transaction triggers any of these legislative requirements.

The following is a brief primer on the reporting requirements under AFIDA and the state-level statutes, as well as an overview of recent legislative proposals.

AFIDA

Concern over foreign investment in agricultural land has been a consistent theme in our legislative halls.

A 1978 U.S. House of Representatives report stated, "[t]he impact of foreign investment upon U.S. agriculture is difficult to gauge for a number of reasons, but primarily because of the lack of data on the nature magnitude, and scope of foreign investment activity." [4] Shortly thereafter, AFIDA was enacted to create a nationwide system for the collection of information about foreign ownership of U.S. agricultural land.[5]



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Under the AFIDA regulations, foreign persons who acquire, transfer or hold an interest in U.S. agricultural land are required to report such holdings and transactions to the U.S. secretary of agriculture.[6]

Although the AFIDA statute is relatively vague, the regulations promulgated by the U.S. secretary of agriculture pursuant to the statute are more helpful in ascertaining the statutory requirements and parameters.

When are filings required?

Any foreign person who acquires or transfers an interest in agricultural land is required to report such transaction within 90 days of the date of acquisition or transfer.[7]

Currently, this reporting obligation is satisfied by submitting a form FSA-153 to the applicable County Farm Service Agency office based on where the tract of land is located.[8]

However, the USDA is required to establish a process for reporting agricultural holdings by foreign persons electronically by Dec. 29, 2025.[9] Multiple filings will likely be required throughout the ownership life cycle of a parcel of property, as a filing is required upon acquisition, disposition or change in control.[10]

In addition, a report is required to be filed within 90 days of land subsequently becoming or ceasing to be agricultural land, or any person who holds agricultural land subsequently becoming or ceasing to be a foreign person.[11]

Who is a foreign person?

Under AFIDA, a "foreign person" includes a foreign government, an individual who is not a U.S. citizen or national, or an entity created or organized under the laws of a foreign government or that has its principal place of business outside of the U.S.[12]

These individuals and entities are clearly foreign and are aware of their foreign status.

However, the definition of a "foreign person" also includes a domestically organized entity if a significant interest or substantial control of such entity is directly or indirectly held by a government, person or entity described above.[13]

A "significant interest or substantial control" of a domestic entity under AFIDA occurs if a single foreign person owns an interest of 10% or more in the domestic entity, multiple foreign persons acting in concert with one another own an interest of 10% or more in the domestic entity, in the aggregate, or multiple foreign persons own collectively an interest of 50% or more in the aggregate, whether or not acting in concert.

A 10% ownership stake is a fairly low threshold to taint an entity with foreign person status, which may cause an entity to unwittingly become a foreign person.

Moreover, the acquisition of an interest by a foreign person of an upper-tiered entity, such as a corporate merger, may cause a lower-tiered entity to unknowingly become a foreign person.[14]

For example, if a foreign person acquires enough equity interest in an entity holding title to farmland to cross the "significant interest or substantial control" threshold, that existing nonforeign titleholder becomes foreign for the purpose of an AFIDA reportable interest.

To ensure compliance with AFIDA reporting, a domestic entity should track its upstream ownership to determine whether its direct or indirect foreign ownership meets the threshold requirements to be considered a foreign person.

What is an interest in agricultural land?

Once foreign person status is determined, one must determine whether they have acquired an interest in agricultural land. AFIDA broadly defines "any interest" as any interest acquired, transferred or held in agricultural land.[15]

This encompasses foreign persons directly acquiring a fee ownership or leasehold interest in U.S. agricultural land or indirectly obtaining an interest in or substantial control over an entity that may directly or indirectly hold a fee or leasehold interest in U.S. agricultural land.

However, there are exceptions for a security interest, a leasehold of less than 10 years in duration, contingent future interests, noncontingent future interests that do not become possessory upon termination of the present possessory estate, nonagricultural easements and rights-of-ways, and interests solely in mineral rights.[16]

Under AFIDA, agricultural land is land used for forestry production or land currently used for — or, if currently idle, land last used within the past five years for — farming, ranching or timber production if tracts are more than 10 acres in size in the aggregate.[17]

Importantly, farming, ranching and timber production includes, but is not limited to, activities set forth in the Standard Industrial Classification Manual.[18]

While the statute's applicability is obvious in the case of a transaction in which the land is currently used and will continue to be used for agricultural purposes, it is less so in the context of land acquired for unrelated uses or when the land is idle.

For example, an acquisition of a vacant parcel acquired for development that has been replatted and rezoned for an alternative use — residential, office, retail, etc. — but on which construction has not commenced at the time of sale, may require an AFIDA filing.

An acquirer who is a foreign person would need to perform due diligence on the property to see if it was used for agricultural purposes — such as grazing — in the last five years to determine if AFIDA reporting is required.

Similarly, land leased for the development of a wind or solar project, but for which construction has not commenced at the time of sale, may require a filing as well.

What are the consequences for a failure to comply?

Failure to comply with an AFIDA reporting obligation may subject one to a hefty penalty.

A penalty of up to 25% of the fair market value of the interest in agricultural land may be issued for a failure to submit a report or knowingly submitting a false report.[19]

Importantly, the fair market value of the land is calculated as of the date of the assessment of such penalty and not as of the date the reportable act occurred.[20]

The penalty for late-filed reports is 0.10% of the fair market value of the interest in the agricultural land times the number of weeks the report is late, with the amount capped at

25% of the fair market value.[21]

The USDA considers a number of external factors to determine the penalty amount, including potential mitigating circumstances such as how the violation was discovered — voluntary or request to report — involvement of legal counsel, and the nature of the information misstated or not reported.[22]

As part of the annual report that the USDA releases on foreign holdings of U.S. agricultural land, the USDA includes information about foreign persons who have been assessed a penalty.[23]

Developing Federal Law

Foreign individuals and entities reported holdings in all 50 states and Puerto Rico. However, with the exception of Maine, foreign investment currently represents a small percentage of privately held agricultural land in each state.[24]

About 40 million acres of U.S. agricultural land at the end of 2021 was held by foreign persons — an increase of over 2.4 million acres reported at the end of 2020 — which is 3.1% of all privately held agricultural land.[25]

However, the Midwest Center for Investigative Reporting "asserts that data collected under AFIDA are not complete, contain errors and omissions, do not track sales of foreign-held U.S. farmland, and may not accurately reflect changes over time." [26]

House members have raised similar concerns and requested the Government Accountability Office review foreign investment in U.S. farmland and "its impact on national security, trade, and food security as well as U.S. government efforts to monitor these acquisitions." [27]

The U.S. Congress continues to debate the role of foreign investment in the U.S. food and agriculture sector, and it has made numerous proposals during this session.

Legislative proposals from the 118th Congress have included a range of bills, which although focused on foreign investment in agricultural land, take varying tactics. Some of legislative proposals focus on understanding the scope and impact of foreign investment in agriculture.

These bills require additional research and reports be provided by the USDA and GAO, which, among other things, address:

- The impact of agricultural leasing activities in the U.S. of foreign persons;
- Trends relating to the purchase of agricultural land in the U.S. by foreign-owned shell corporations; and
- Foreign ownership of agricultural production capacity and foreign participation in agricultural economic activity in the U.S.[28]

In addition, these proposals attempt to increase compliance by setting minimum penalties for failure to comply with AFIDA reporting and requiring the USDA to conduct annual compliance audits of 10% of submitted filings.[29]

Other legislative proposals advocate for a review process of agricultural land transactions involving foreign investors. These bills would add food security and agricultural transactions to the purview of the Committee on Foreign Investment in the United States.

CFIUS is empowered to review certain foreign investments, acquisitions, and transactions in the U.S. for potential national security risk, and it may prohibit transactions or require parties to implement mitigation measures.

Among these proposals include adding the U.S. secretary of agriculture to CFIUS, adding agricultural systems and supply chains in the definitions of critical infrastructure and critical technologies for the purposes of reviewing such investments, and expanding the definition of a "covered transaction" for which CFIUS has oversight to include any purchase or lease by a foreign entity of concern of real estate valued over \$5 million or exceeding 320 acres, or if the real estate is primarily used for agriculture.[30]

There have also been more punitive proposals, which include a 60% excise tax to be imposed on the acquisition of any U.S. agricultural interest by certain foreign persons, a five-year ban on the sale of all real estate to all foreign persons, and prohibition on foreign investors from participating in USDA-administered farm programs.[31]

It seems that there is bipartisan consensus that additional regulation is needed. On Sept. 27, the Senate Committee on Agriculture, Nutrition and Forestry held a hearing on foreign ownership in U.S. agriculture.

This hearing highlighted the complexity of creating a workable solution to regulate foreign ownership of agricultural land and the various interested parties that will be impacted by any new law.

State-Level Considerations

States have also enacted their own reporting regime, as well as certain restrictions on foreign ownership of land, some predating the enactment of AFIDA.

Today, over half the states have some level of restriction — including reporting requirements — on foreign interest in agricultural land, which has created a patchwork of laws.

For example, Arkansas, Illinois and Maine, as well as 12 other states, have reporting requirements.[32] Many of these states model their disclosure and reporting requirements after AFIDA, but others vary in the amount of information required to be disclosed and timing.

Other states, such as Arizona and Pennsylvania, among others, have caps on the amount of acreage that a foreign person may own in the state — with mandatory divestment of acreage in excess of the cap. Other states have instituted bans on foreign ownership completely or only with respect to certain foreign countries, such as Florida did when it prohibited the sale of agricultural land to persons with ties to countries of concern.[33]

Although many exemptions apply to these restrictions, timely reporting and other compliance measures are often required to take advantage of such exemptions.

In addition, in 2023, over half of the state legislatures proposed laws related to foreign

investment in real estate. State laws and legislative proposals varied in their approach.

For example, some states focused on understanding the scope of foreign investment in their borders, enacting laws that mandate disclosure of, or require studies on, foreign ownership of agricultural land.[34] Other proposals directly prohibit certain types of investors, such as individuals or entities from a specific list of countries called out in the legislation or on a list maintained under federal law.[35]

Other proposals directly prohibit certain transactions, such as sales of agricultural land or land near military installations or critical infrastructure to foreign investors.

During their 2023 legislative sessions, Alabama, Arkansas, Florida, Idaho, Indiana, Louisiana, Mississippi, Montana, North Dakota, Oklahoma, South Dakota, Tennessee, Utah, Virginia and Wisconsin each enacted varying laws that include restrictions or reporting requirements on foreign ownership of real property, including reporting currently held property.[36]

Conclusion

In this atmosphere of heightened scrutiny of foreign beneficial ownership, parties should ensure that they are not overlooking any compliance requirements with respect to any transaction.

Parties should perform due diligence confirming the intended direct and indirect ownership interests in the acquisition and whether the involvement of any foreign person in the transaction exceeds the AFIDA reportable levels, as well as evaluating whether any of the applicable land is used for agricultural land within the scope of AFIDA, even if the business purpose of the transaction is not related to farming.

In addition, parties should also ensure that they are in compliance with all state laws and monitor legislative changes at the federal and state level.

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[1] 7 U.S.C. §§ 3501–3508.

[2] 7 C.F.R. §§ 781.1–.6 (1994). See 7 C.F.R. §§ 2.21(b)(29), .27(a)(12), .65(a)(30), .84(a)(7) (1994) for the delegation of authority.

[3] 7 U.S.C. §§ 3501–3508.

[4] H.R. Rep. No. 95-1570, 2d Sess. (1978).

[5] 7 U.S.C. §§ 3501–3508.

[6] Id. § 3501(2)(a).

[7] 7 C.F.R. § 781.3.

[8] Instructions for Completing Form FSA-153, https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/EPAS/PDF/instructions_for_completeing_form_fsa_153_8_06_2023.pdf; Gloria Montañó Greene, Deputy Under Secretary for Farm Production and Conservation, U.S. Dep't of Agric., Statement Before the Senate Committee on Agriculture, Nutrition, and Forestry (Sept. 27, 2023) ("USDA gathers information from the more than 3,000 counties and county equivalents in the United States. Each with their own county clerk and recorder's office—or none at all—feeding information into more than 50 different state systems.").

[9] Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, § 773 (2022).

[10] See generally U.S. Dep't of Agric., FSA Handbook: Foreign Investment Disclosure (2005), http://www.fsa.usda.gov/Internet/FSA_File/1-afida_r02_a02.pdf.

[11] 7 C.F.R. § 781.3.

[12] Id. § 3508(3).

[13] Id.

[14] 7 C.F.R. § 781.3(c); see supra note 10 at 4-4.

[15] 7 C.F.R. § 781.2(c).

[16] Id.

[17] Id. § 781.2(b). "Agricultural land" does not include land not exceeding 10 acres in the aggregate, if the annual gross receipts from the sale of the farm, ranch, or timber products produced thereon do not exceed US\$1,000.

[18] Id.

[19] 7 U.S.C. § 3502; 7 C.F.R. § 781.4.

[20] Id.

[21] Id.

[22] Id.

[23] The report includes a "Historical Penalty Table," which lists the date a penalty is assessed, name of applicable entity, penalty amount, paid date, reason for the penalty, primary foreign country, and penalty counties/states, as applicable. For 2021, the report can be found here: https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/EPAS/PDF/2021_afida_annual_report_through_12_31_2021.pdf.

[24] Farm Serv. Agency, U.S. Dep't of Agric., Foreign Holdings of U.S. Agricultural Land Through December 31, 2021 at 4 (revised July 12, 2023).

[25] Id. at 1.

[26] Cong. Rsch. Serv., In Focus: Foreign Ownership of U.S. Agriculture: Selected Policy Options (Jan.19, 2023).

[27] Letter to the Honorable Gene L. Dodaro, Comptroller General of the U.S. Government Accountability Office (Oct.1, 2022).

[28] Farmland Security Act of 2023, S. 2382, 118th Cong. (2023); SOIL Act of 2023, S. 1066, 118th Cong. (2023); FARM Act, S. 68 and H.R. 513, 118th Cong. (2023); PASS Act of 2023, S.168 and H.R. 683, 118th Cong. (2023).

[29] Id.

[30] Id.; Protecting U.S. Farmland and Sensitive Sites from Foreign Adversaries Act, H.R. 4577, 118th Cong. (2023); Food Security is National Security Act of 2023, S.2312, 118th Cong. (2023); Food Security is National Security Act of 2023, S.2312, 118th Cong. (2023); S. Amdt. 813 to FY2024 National Defense Authorization Act (NDAA), 118th Cong. (2023).

[31] Build It in America Act, H.R. 3938, 118th Cong. (2023); Saving American Farms from Adversaries Act, H.R. 840, 118th Cong. (2023).

[32] Ark. Code Ann. § 2-3-11; 765 Ill. Comp. Stat. Ann. 50/1, 50/2, 50/3, 50/4, 50/5, 50/6, 50/7, 50/8; Ind. Code Ann. § 32-22-3-6; Iowa Code Ann. §§ 9I.7, 9I.8, 9I.9, 9I.10, 9I.12, 10B.1, 10B.2, 10B.3, 10B.4, 10B.4A, 10B.5, 10B.6, 10B.7, § 558.44; Kan. Stat. Ann. § 17-7505; Me. Rev. Stat. tit. 7, §§ 31, 32, 33, 34, 35, 36; Minn. Stat. Ann. § 500.221; Mo. Rev. Stat. § 442.592; Neb. Rev. Stat. §§ 76-1520, 76-1521, 76-1523, 76-1524; N.D. Cent. Code Ann. §§ 10-06.1-15, 10-06.1-15.2, 10-06.1-17, 10-06.1-17.1, 10-06.1-18, 10-06.1-20, 10-06.1-21, 10-06.1-22, 47-10.1-05; Ohio Rev. Code Ann. §§ 5301.254; 5301.99; S.D. Codified Laws §§ 59-11-24; 59-11-24.1; Wis. Stat. § 710.02. Oklahoma requires any deed recorded with a county clerk to include an affidavit executed by the person or entity coming into title attesting that they are lawfully obtaining the land in compliance with Oklahoma law.

[33] Fla. Stat. § 692.202.

[34] NE LR106 (On September 15, 2023, Nebraska's Agriculture Committee held a hearing on the "interim study to examine interests in agricultural lands in Nebraska held by foreign individuals, business entities, and governments.").

[35] List maintained under federal law and referenced in state statutes include, among others: the International Traffic in Arms Regulations (Tables 1 and 2 of 22 C.F.R. § 126), the foreign adversaries list generated under Executive Order 13873 and its implementing regulations, sanctions lists maintained by the Office of Foreign Assets Control in the Department of the Treasury, and countries of particular concern designated by the U.S. Secretary of State.

[36] 2023 Ala. Laws 332; 2023 Ark. Acts 636; 2023 Fla. Sess. Law Serv. ch. 2023-33 (West); 2023 Idaho Sess. Laws ch. 251; 2023 Ind. Legis. Serv. P.L. 118-2023 (West); 2023 La. Acts 464; 2023 Miss. Laws HB 280; 2023 Mont. Laws ch. 434; 2023 N.D. Laws. H.B. 1135; 2023 N.D. Laws S.B. 2371; 2023 Okla. Sess. Law Serv. ch. 327 (West); 2023 S.D. Laws ch. 169; 2023 Tenn. Pub. Acts ch. 369; 2023 Utah Laws ch. 61; 2023 W. Va. Acts. ch. 310.