

**Written Testimony of Harrison M. Pittman
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Before the United States Senate Committee on Agriculture, Nutrition, & Forestry**

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for Entry Into Public Record

Chairwoman Stabenow, Ranking Member Boozman, and members of the United States Senate Committee on Agriculture, Nutrition, & Forestry, thank you, very much, for the invitation to provide testimony as part of the September 27, 2023 hearing on “Foreign Ownership in U.S. Agriculture”. In recent years, the issue of foreign ownership of agricultural land has re-emerged as a matter of significant national interest across a diverse range of citizens, businesses, and others directly and indirectly involved in all aspects of the agricultural and food industries.

I know of no other issue that engenders such deep interest from virtually every public and private sector component of the industry as well as many interests not often involved in agricultural issues at the state or federal levels. Additionally, the issue of foreign ownership of agricultural lands brings with it many competing viewpoints, often so among those who are commonly aligned on other agriculture-related issues. In 2023 alone, all but a few states have proposed legislation alongside approximately two dozen federal proposals or resolutions that seek to limit or restrict in some way foreign investment or ownership of agricultural land.

The National Agricultural Law Center has provided extensive research and outreach activities on the issue of foreign ownership of agricultural land to all manner of stakeholders. I hope that the NALC can be of value to you in the course of your deliberations in this hearing and in the days and weeks ahead. I look forward to answering your questions and providing any requested information that might be of assistance to you, your staff, or your constituents.

Chairwoman Stabenow, I also want to take a quick moment to thank you and your staff for holding the excellent Farm Bill field hearing along with Ranking Member Boozman in June of last year. The field hearing was well-received and informative. Senator Boozman, as always, it is an honor to have the opportunity to discuss with you issues important to the nation’s agricultural community.

As per the September 21, 2023 invitation to testify at this hearing, this written testimony embodies the following areas: (1) a brief introduction of the National Agricultural Law Center; (2) a concise summary of state and federal issues pertaining to the foreign ownership of agricultural land; and (3) brief mention of some additional issues that may be helpful in the course of ongoing deliberations.¹ I want to acknowledge NALC Staff Attorney Micah Brown for his assistance outstanding efforts over the past two year in researching, publishing, and engaging with stakeholders on the issue of foreign ownership of agricultural land but also his assistance in helping prepare for this testimony. Micah handles the Ag Finance & Credit portfolio

¹ For purposes of this written testimony, “agricultural land” refers only to privately held agricultural land. There are a small number of states that restrict foreign ownership of public lands.

for the NALC, specifically including issues involving foreign ownership of agricultural land, and has been of tremendous assistance in helping prepare for this hearing.

I. The National Agricultural Law Center

The National Agricultural Law Center (NALC) serves as the nation's leading source of agricultural and food law research and information. In 1987, Congress established the NALC against the backdrop of the Farm Crisis of the 1980s. As that crisis unfolded, the agricultural community – lenders, landowners, farmers, state and federal courts, land grant universities, federal and state agencies, attorneys, and more – abruptly found themselves confronted with a unique body of law that impacted their livelihoods. Some of those laws, just as is true today, had their roots as far back as the pre-Great Depression era. Unfortunately, there was a lack of timely, relevant, and neutral educational resources about those laws.

Recognizing this need, Congress established the NALC to serve as an independent, neutral, nonpartisan resource to the nation's vast agricultural community. As you all well know, the legal issues facing the agricultural and food industry have expanded greatly since that time and continue to do so.

The NALC operates as part of the Agricultural Law Information Partnership of the U.S. Department of Agriculture (USDA) Agricultural Research Service, National Agricultural Library and is a standalone unit of the University of Arkansas System Division of Agriculture, headquartered in Fayetteville, Arkansas. The NALC provides research and information to agricultural producers of all crops, timber, aquaculture, and other commodities; members of Congress and their respective staffs; state departments of agriculture; state and federal agencies, policymakers at all levels of government; farm and commodity groups; farmers' aid organizations; farm managers and rural appraisers; agricultural lenders; journalists; Cooperative Extension Service professionals; students; public and private sector attorneys; and others involved or interested in the agricultural industry.

The NALC and its staff do not engage in legal or policy advocacy of any kind, but rather serve to enhance understanding of the complex fabric of local, state, federal, and international laws, regulations, and policies that impact our diverse system of food, fiber, and energy production. We routinely deal with issues ranging from pesticide litigation and regulation, carbon and solar leases, the Endangered Species Act, the Lacey Act, Farm Bill issues, states' right-to-farm laws, statutory agricultural liens, impactful court decisions, Clean Water Act issues, conservation compliance, industrial hemp, federal and state research and promotion programs, heirs property, foreign ownership of agricultural land, and much more.

NALC Resources: Brief Overview

The NALC provides an array of agricultural and food law resources. A key part of the NALC's mission is providing a free-of-charge, comprehensive online clearinghouse of research and information in more than 50 specific areas of agricultural and food law research information. The NALC's clearinghouse of resources is available free of charge through its website,

www.nationalaglawcenter.org. Additionally, the NALC has a strategic national network of partners that help carry out its national research and information mission.

The NALC also engages in significant outreach and education through in-person workshops/meetings with producers and others in the ag industry, legal conferences, publications for non-attorneys and attorneys, one-on-one assistance with stakeholders, webinars on issues ranging from PFAS to federal crop insurance to Rail-to-Trail conversions, in-person presentations from states' farm bureau county committee meetings to the National Association of State Departments of Agriculture (NASDA) annual meeting, and through social media.

NALC Resources: The Feed

One resource that may be of particular value to you and your staff is the NALC's free-of-charge newsletter, The Feed. The Feed is issued every two weeks (except December). The Feed provides brief highlights of ag law and policy developments along with links to NALC and NALC partner resources for those interested in learning more about a particular issue. For example, each issue of The Feed contains updates on any notable federal or state legal developments regarding the foreign ownership of agricultural land. One can subscribe to The Feed by visiting the NALC website or accessing the adjacent QR Code.



NALC Resources: Foreign Ownership of Agricultural Land

The NALC has a comprehensive set of publications, webinars, and other materials focused on foreign ownership of agricultural land. The adjacent QR Code provides one-stop access to "NALC Resources At A Glance: Foreign Ownership of Agricultural Land".



NALC as a Resource: Post-Testimony

The NALC staff is available to be a resource to members of this Committee and their staff in the days and weeks ahead, including but not limited to the issue of foreign ownership of agricultural land. We can be contacted directly by phone or e-mail at any time. The NALC's main line is 479-575-7646 and the general email is nataglaw@uark.edu. My direct line is 479-575-7640 and my email is hmpittm@uark.edu.

II. Foreign Ownership of Agricultural Land: Concise Summary of State and Federal Issues

The following discussion is intended to provide a concise, foundational overview of key historical underpinnings and the current status at the state and federal levels regarding foreign ownership of agricultural land. The goal is for the information provided to help Committee members and their staff more efficiently understand the legal context in which this issue arises.

The key takeaway on the state level aspect is that there has been a dramatic increase in legislative activity over the past two years and especially since January 1, 2023. Additionally, state legislative proposals and enactments have trended towards a focus on specific countries – often the “Big Four” of China, Russia, North Korea, and Iran – and away from a focus on restrictions foreign ownership vis-a-vis all countries outside the U.S.

The key takeaway at the federal level is that the first and, for all practical purposes, the only instance in our nation’s history in which Congress has specifically addressed foreign ownership of agricultural land was enactment of the Agricultural Foreign Investment Disclosure Act of 1978 (AFIDA).² AFIDA has largely not been amended since its enactment nearly a half-century ago. As will be addressed below, USDA rulemaking in the nine-month period between December 6, 1978 and August 14, 1979 is by definition the most formative time period in our nation’s history relative to federal government involvement on the issue of foreign ownership of agricultural land. Thus, an examination of decisions made during that time period is critical to understanding the current implementation of AFIDA. Of course, AFIDA is not the only subject of federal level attention.

Foreign Ownership: Brief Data Overview

The latest AFIDA reporting data is through December 31, 2021.³ According to that data, foreign ownership in agricultural land is 40,031,308 million acres, equaling 3.1% of all privately held agricultural land in the United States. This is a 2.4 million-acre increase from the prior year. From 2011 to 2021, foreign ownership of agricultural land increased by 35.7% (total of slightly more than 14.3 million-acre increase between 2011 and 2021).⁴ As of 2021, 47% of this ownership was in forestland, 29% in cropland, and 22% for pasture and other agricultural purposes. The current percentages of forestland, cropland, and pastureland closely align with the percentages that have been reported since enactment of AFIDA.

Investors from three countries – Canada (31%), Netherlands (12%), and Italy (7%) – comprise one-half of all foreign ownership of agricultural land. The United Kingdom and Germany each represent 6% of foreign ownership. Thus, those five countries account for nearly two-thirds of all foreign ownership of agricultural land. The remaining one-third is spread across more than 100 countries. China reports a total of 0.9% (total of 383,935 acres) of all agricultural and non-agricultural land; 194,179 acres of agricultural land and 189,756 of non-agricultural land.

² 7 U.S.C. § 3501 - 3508. The AFIDA regulations are found at 7 C.F.R. Part 781. There are also AFIDA-relevant provisions contained in the USDA Handbook, available at https://www.fsa.usda.gov/Internet/FSA_File/1-afida_r02_a02.pdf. In 2018, the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) expanded CFIUS committee review over certain real estate assets in close proximity to US military installations, ports, or other sensitive facilities.

³ USDA, Farm Service Agency, “Foreign Holdings of U.S. Agricultural Land through December 31, 2021” (Revised July 27, 2023), available at <https://www.fsa.usda.gov/programs-and-services/economic-and-policy-analysis/afida/annual-reports/index>. Data used in this section derives from the AFIDA Reports contained in the preceding url.

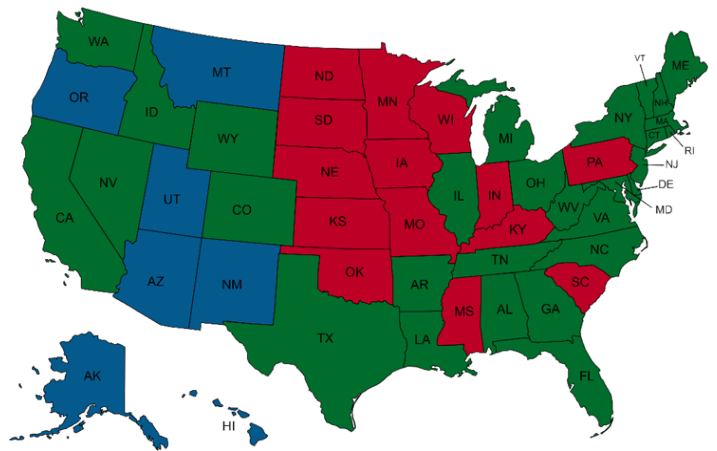
⁴ This is an NALC internal calculation based on AFIDA data from 2011-2021.

In terms of acreage, the highest levels of foreign ownership of agricultural land occur in Texas (4,719,144 acres), Maine (3,504,096 acres), Alabama (1,780,937 acres), Colorado (1,766,80), and Oklahoma (1,529,397 acres). In terms of percentages, the highest levels of foreign ownership of agricultural land occur in Maine (20.1%), Hawaii (9.2%), Alabama (6.3%), Florida (6.3%), and Louisiana (5.8%). This translates to Maine accounting for 10% of all foreign ownership of agricultural land in the U.S. and these five states accounting for more than 20% of all foreign ownership of agricultural land. The states with restrictions on foreign ownership as of December 31, 2022 (see discussion and map below), along with Maine, account for nearly one-fourth of all foreign ownership of agricultural land in the U.S.

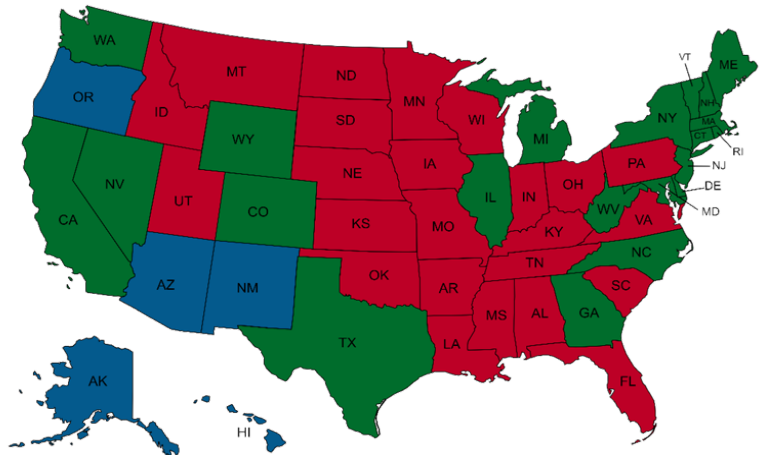
A. State Law Overview

State Laws: Current Status (2021-2022 through present)

As of December 31, 2022, there were approximately fourteen states that had enacted some type of restriction on foreign investment or ownership in agricultural land.⁵ The map to the immediate right depicts the status of states' laws on this issue as of 2022. The states in green affirmatively allowed for foreign ownership of agricultural land, the states in blue were silent on the issue, and the states in red had some type of foreign ownership restriction. Thus, at the end of 2022, a large majority of states affirmatively allowed for foreign ownership of agricultural land. As noted, there has been a significant increase in state level legislative activity since January 1, 2023.



As of September 2023, approximately one-half of states specifically forbid or limit certain foreign ownership within their state. The map to the immediate right depicts the status of states' laws as of September 2023. Since January 1, 2023, twelve states have enacted a law that restricts or limits certain foreign ownership of agricultural land within



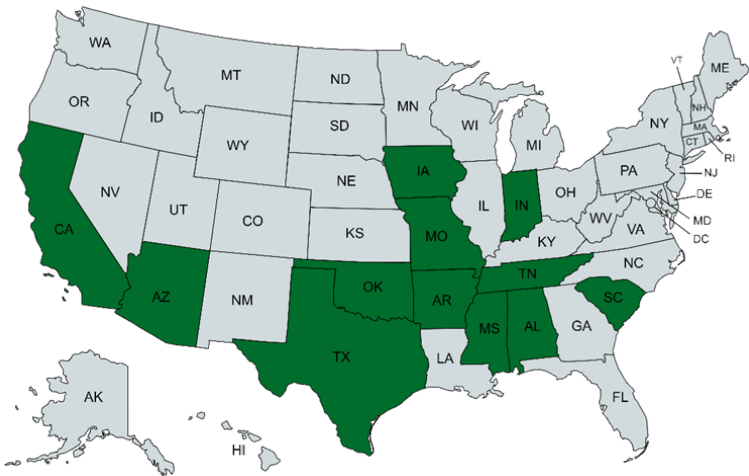
⁵ The term “approximately” is used as a result of reasonable competing interpretations that may exist. For example, states like Georgia technically have a law that could be read to restrict foreign ownership of agricultural land, but it is unenforceable. Additionally, there are states with state-level reporting requirements that are not included in this list of fourteen states.

that state.⁶ Those states are Idaho, Utah, Montana, North Dakota, Oklahoma, Arkansas, Louisiana, Tennessee, Ohio, Virginia, Alabama, and Florida.

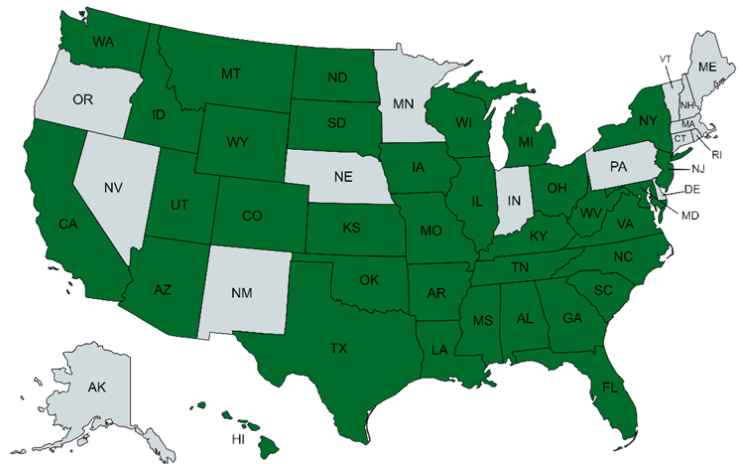
State Law: Legislative Proposals 2021-2022 & 2023

In 2021-2022, twelve states proposed laws that sought to restrict foreign investment or ownership of agricultural land. This represented a historically significant shift in state-level activity compared to prior decades. As can be seen immediately in the two maps below, in 2023, the number of state proposals increased even more dramatically.

2021-2022



Jan. 1, 2023 to Present



B. Federal Law Overview

Congress enacted AFIDA on October 14, 1978. At that time, AFIDA was the first instance in our nation’s history in which Congress specifically addressed the issue of foreign ownership of agricultural land. With the exception of the recent Consolidated Appropriations Act, 2023⁷ (discussed below), for all practical purposes AFIDA has not been significantly amended since its enactment nearly one-half century ago. Thus, AFIDA remains essentially the only action Congress has taken in our nation’s approximate 250-year history specifically addressing foreign ownership of agricultural land.

Pre-AFIDA

On February 28, 1978, Senator Herman E. Talmadge, then-Chairman of the Senate Committee on Agriculture, Nutrition, & Forestry, requested that the United States General Accounting Office (GAO) provide the Committee with “information on the various State laws that place constraints

⁶ A small number of states have enacted laws that impacted state-level reporting requirements, which are not included in the listing of states that have enacted some type of restriction.

⁷ Consolidated Appropriations Act, 2023, Pub. L. 117-328, 136 Stat. 4459 (2022).

or reporting requirements on non-resident alien ownership of U.S. farmland”; “a summary of data available from any reports on or analyses of the results of these laws”; and “any suggestions that might surface regarding possible approaches for obtaining nationwide data on purchases of U.S. farmland by foreigners.”⁸ Following a comprehensive state-by-state research process, GAO responded on June 12, 1978 via a landmark Report titled, “Foreign Ownership of U.S. Farmland: Much Concern, Little Data”.⁹

The detailed, 65-page Report might be best summarized by the following excerpt:

There is virtually unanimous agreement among persons at all levels of government and in the private sector that, currently, there is no reliable data on the amount of U.S. farmland owned by nonresident aliens or on recent trends of such ownership. Such information would be very helpful to the Congress if it wishes to formulate and implement a national policy on nonresident aliens owning farmland in the United States. Clearly, efforts need to be started now to produce useful and meaningful information.¹⁰

AFIDA

Congress enacted AFIDA four months later. AFIDA sets out a nationwide system for collecting certain information about foreign investments and ownership of U.S. agricultural land. Under AFIDA, a “foreign person who acquires or transfers any interest . . . in agricultural land” is required to disclose their interest in the land to USDA. Thus, a “foreign person” who acquires, holds, transfers, or disposes an interest in “agricultural land” within the U.S. is required to disclose to USDA certain information concerning such transactions and investments.¹¹ This data is compiled into an annual publication that reports the amount of cropland, pastureland, forestland, and other types of agricultural land that is foreign owned.¹²

AFIDA: USDA Rulemaking & Implementation

Importantly, Congress directed that “[n]ot later than 90 days after October 14, 1978, the Secretary shall prescribe regulations for purposes of carrying out the provisions of this

⁸ *Foreign Ownership of U.S. Farmland: Much Concern, Little Data*, CED-78-132; B-114824 (June 12, 1978)

⁹ *Id.* There have been several additional GAO Reports on foreign ownership of agricultural land since 1978. A list of these Reports along with a link to each is available on the NALC website and also available upon request.

¹⁰ *Id.*

¹¹ 7 U.S.C. § 3501. The information a foreign person must include in their disclosure is listed at 7 U.S.C. § 3501(a) – (b), (e), (f), 7 C.F.R. § 781.3, and form FSA-153. Depending on the type of foreign person involved in a transaction for agricultural land, USDA may require the party to provide further information.

¹² Additionally, USDA “shall transmit to each State department of agriculture, or such other appropriate State agency as the Secretary considers advisable, a copy of each report which was submitted to the Secretary under section 3501 . . . during such 6-month period and which involved agricultural land located in such State.” 7 U.S.C. § 3505.

chapter.”¹³ The USDA Agricultural Stabilization and Conservation Service ((ASCS), which today is known as the Farm Service Agency) set out to do so almost immediately. In understanding AFIDA today, it is vitally important to examine the regulatory foundation that began to be laid in those first 90 days.

The AFIDA Proposed Rule was issued a few weeks later on December 6, 1978.¹⁴ A 30-day comment period was opened, along with a December 14, 1978, public hearing held in Washington, D.C. A total of sixty-eight individuals submitted written comments as part of the 30-day comment period. A total of six individuals appeared and submitted comments at the public meeting.¹⁵ One month after the close of the comment period, on February 6, 1979, the initial AFIDA Final Rule was issued.

USDA allowed for additional comments on that Final Rule to be submitted through March 8, 1979.¹⁶ On May 18, 1979, an amended AFIDA Final Rule was issued based on comments received and “independent Departmental efforts”.¹⁷ Then, on August 14, 1979, USDA issued a “Corrections and Interpretations” of the May 1979 Final Rule. These three agency actions, all of which occurred within a nine-month timeframe nearly a half-century ago, are the basis of much of the modern-day implementation of AFIDA.

It appears that USDA has since amended the AFIDA regulations five times, with the last amendment occurring December 29, 1995. However, the predominant legal foundation of how AFIDA is currently implemented – i.e., standards for tracing of actual ownership through multiple tiers of ownership; what constitutes “any interest, other than a security interest”; civil penalties and the penalty process; substantial interest and substantial control standards vis-a-vis when a U.S. entity qualifies as a “foreign person”; the definition of “agricultural land” – was established in the nine-month period between December 6, 1978 and August 14, 1979.

AFIDA Proposed Rule: December 6, 1978

The AFIDA Proposed Rule set out six “Major Issues” for which it sought comments from the public.¹⁸ These were as follows:

- 1) Nature of the interest in United States agricultural land which a foreign entity holds, acquires, or transfers.
- 2) Nature of a security interest.
- 3) Tracing of actual ownership.
- 4) The nature of agricultural land.
- 5) The size of the agricultural land.
- 6) Significant or substantial control.

¹³ 7 U.S.C. § 3507.

¹⁴ 43 Fed. Reg. 57607 (Dec. 8, 1978) (proposed rule) (to be codified at 7 C.F.R. Part 781).

¹⁵ 44 Fed. Reg. 7115, 7115 (Feb. 6, 1979) (final rule) (to be codified at 7 C.F.R. Part 781).

¹⁶ *Id.*

¹⁷ 44 Fed. Reg. 29029 (May 18, 1979) (final rule) (to be codified at 7 C.F.R. Part 781).

¹⁸ 43 Fed. Reg. 57607, 57607-57608.

The proposed rule did not seek comments regarding penalties for violations of AFIDA. As noted, 68 individuals submitted comments and six individuals appeared and submitted written testimony at the December 14, 1978 public hearing in Washington, D.C.

AFIDA Initial Final Rule: February 6, 1979

The Final Rule addressed each of the Major Issues. It also included penalty provisions, which initially required that determinations of reporting violations “will be made on the basis of evidence submitted to a Board periodically appointed by the Secretary to make such determinations.”¹⁹ As part of the Final Rule, USDA allowed additional comments to be submitted through March 8, 1979.

AFIDA Final Rule, Revised: May 18, 1979

The May 18, 1979, Final Rule revisions were based on comments received regarding the initial Final Rule and “independent Departmental efforts”.²⁰ In issuing the May 18 Final Rule, USDA explained that “[s]uch revision is needed to obtain the reporting of information, but no more than is necessary, to effectuate the intent of Congress as expressed in . . . [AFIDA]. It is anticipated that, as a result of this action, entities which might have otherwise been required to file a report with the Department will be relieved of the obligation to do so.”²¹ The Final Rule made several other changes, much of which forms the basis of present-day AFIDA implementation, including:

- Clarified the definitions of “any interest” and “significant interest or substantial control” with a focus on specifying leaseholds of ten years or more;
- Provided “an interpretation . . . to make clear that interests solely in mineral interests are not considered an interest in agricultural land and, therefore, need not be reported.” (the basis of § 781.2(c)(6));
- Revised the rule to state that foreign persons are exempted from reporting requirements insofar as ownership relates to “surface or subsurface easements and rights of way used for some purpose unrelated to agricultural production.” (the basis of § 781.2(c)(5));
- Provided an interpretation “to clarify the fact that a report must be filed if the aggregate of the foreign individuals, foreign governments, and the actual or defined foreign legal entities holding an interest in a U.S. legal entity totals 5 percent or more.” (5% was later changed to 10%, in addition to other definitional changes);
- Restated the definition of “significant interest or substantial control” “in order to make clear that the reporting entity referred to in the definition is the entity in which the five percent foreign interest is held, rather than the foreign persons holding such interest.”;
- Rewrote the provision regarding what constitutes a reporting violation “in order to eliminate confusion as to what was a violation”;
- Removed the word “value” from the definition of “agricultural land” in order to tailor specific circumstance in which reporting is required;

¹⁹ 44 Fed. Reg. at 7118.

²⁰ 44 Fed. Reg. at 29029.

²¹ *Id.*

- Specified that, “[i]n an effort to eliminate any possible confusion . . . § 781.2(l) is amended to provide that indirect land holdings need not be reported”, changing the definition of “substantial interest and significant control” to: “Means five percent or more interest in a legal entity for the purpose of obligating such legal entity to report.”
- Required the name and the nature of the foreign business entity holding an interest in U.S. entity; and
- Provided that with respect to U.S. entities qualifying as a “foreign person”, “[a] close reading of the statute . . . reveals the Congress apparently did not intend to permit the Secretary to trace ownership beyond the third tier. Had this not been the case, section 2(f) of the Act would have included, after referring to reports submitted under paragraph (e), the expression, “or this subsection”. The absence of such language appears to limit tracing to the third tier.” The Final Rule further provided that “[i]n view of the fact that one of objectives of the Act is to uncover foreign ownership of U.S. agricultural land, tracing to the third tier is more than adequate. In fact, this objective can probably be accomplished in most cases without extensive tracing. Therefore, § 781.3(g) of the final rule is revised to exclude the terms ‘or this subsection’”.
- Revised the Final Rule to address circumstances in which a “foreign person” that has been reported by a U.S. entity will provide additional information about interests held in such foreign person.

AFIDA Final Rule “Corrections and Interpretations”: August 14, 1979

USDA issued a “Corrections and Interpretations” to the May 18, 1979 Final Rule in August 1979.²² This action set out two interpretations and is the basis of present-day § 781.3(h). Specifically, USDA stated that “[t]he first interpretation is added in order to indicate when a U.S. legal entity holding, acquiring, or transferring a U.S. agricultural land is considered to have 5 percent or more of its total ownership interest held, indirectly, by foreign individuals, foreign governments, or other foreign legal entities.”²³ The second interpretation was intended to provide “some indication as to what efforts a U.S. legal entity holding, acquiring, or transferring U.S. agricultural land must undertake in order to satisfy the Agricultural Stabilization and Conservation Service that it has attempted to determine whether a foreign persons hold, directly or indirectly, 5 percent or more of its total ownership interest.”²⁴ USDA concluded, “[t]hese interpretive rules should assist the public in attempting to decide whether a reporting obligation exists.”²⁵

Language used in this section may lack sufficient clarity to know with certainty precisely what is the standard communicated via the August 1979 agency action. For example, the second interpretation initially provides the following:

²² 44 Fed. Reg. 47256 (Aug. 14, 1979) (Corrections and Interpretations) (to be codified at 7 C.F.R. Part 781).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

Any legal entity which has issued 100,000 or more shares of common and preferred stock, and instruments convertible into equivalents thereof, shall be considered to have satisfactorily determined whether it has an obligation to file a report pursuant to § 781.3 if its business records fails to reveal that the percentage of shares held in such legal entity both by the entities with the foreign mailing addresses and investment institutions which manage shares does not equal or exceed five percent interest in such legal entity.

The interpretation continues, however, as follows:

If the legal entity . . . determines that the percentage of shares, held in it both by entities with foreign mailing addresses and investment institutions which manage shares, *equals or exceeds five percent interest*, then such legal entity shall be considered to have satisfactorily attempted to determine whether it has an obligation to file a report . . . if it sends questionnaires to each such investment institution holding an interest in it inquiring as to whether the entities for which they are investing are foreign persons and the percentage of shares reflected by the affirmative responses plus the percentage of shares held by entities listed on the business records with foreign mailing addresses does not reveal that foreign persons hold five percent or more interest in such legal entity.²⁶

This interpretation could potentially be read to provide that a U.S. legal entity with “100,000 or more shares of common and preferred stock, and instruments convertible into equivalents thereof” that determines “that the percentage of shares, held in it both by entities with foreign mailing addresses and investment institutions which manage shares, *equals or exceeds five percent interest*” might not be required to report under § 781.3 so long as the appropriate questionnaires were later sent out and it was not then revealed that foreign persons held five percent or more in the entity. It bears noting that the underlying procedural context for application of this provision would be that an entity did not report and was subsequently subject to a USDA inquiry or investigation as to whether it was required to report but failed to do so.

AFIDA: Other Issues to Consider

This list is not meant to be an exhaustive list of issues, but rather is intended to highlight some issues that might help someone further research the role of AFIDA in the current discussion over foreign ownership of agricultural land.

AFIDA broadly defines “person” as “any individual, corporation, company, association, firm, partnership, society, joint stock company, trust, estate, or any other legal entity.”²⁷ It bears noting that AFIDA as well as the regulations between December 6, 1978 and August 14, 1979 were written at a time in which Limited Liability Companies (LLC) were virtually non-existent.

²⁶ Id. (emphasis added).

²⁷ 7 U.S.C. § 3508. The AFIDA regulation (as well as the FSA Handbook) definition mirrors the statutory definition, except that it does not include “firm”.

The first LLC statute was enacted in 1977 (in Wyoming), with the overwhelming majority of states' creation of LLCs not occurring until the 1990s.

Today, LLCs are a very popular and often-used legal entity throughout the U.S. States' laws for LLCs vary widely and LLCs have unique features that may need to be considered as part of any discussion of AFIDA. For example, some states do not require LLCs to identify members of the LLC in the state business filing and LLCs allow a high degree of operational flexibility in the context of multi-tiered business structures.

AFIDA, the AFIDA statute to be specific, defines "agricultural land" as "any land located in one or more States and used for agricultural, forestry, or timber production purposes as determined by the Secretary under regulations to be prescribed by the Secretary."²⁸ The regulatory definition of "agricultural land" has evolved over the past several decades to its current definition at 7 C.F.R. § 781.2(b). And, it can be changed in the future. Thus, any proposal – i.e., S. 2060 and S. 926 – to define or redefine the definition of "agricultural lands" specifically as the term is defined at AFIDA § 3508(1) must keep in mind that doing so potentially means that the definition itself will not be found squarely in the statute but rather in combination with the regulatory definition, and that the regulatory definition is subject to being changed by agency-only action in a future year. The potential significance of this distinction is highlighted in the following paragraph.

On page 7, line 6, S. 2060 proposes that "agricultural land" has "the meaning given the term in section 9 of the Agricultural Foreign Investment Disclosure Act of 1978 (7 U.S.C. § 3508)." Thus, as described above, the definition will necessarily bridge with the regulatory definition found at § 781.2(b) and is subject to future amendment via agency action. However, on page 22, line 1, S. 2060 proposes that the term "agricultural land" "has the meaning given term in section 781.2 of title 7, Code of Federal Regulations (as in effect on the date of enactment of this Act)". If enacted as proposed, this could create a scenario with two different definitions of "agricultural land" applying under the same statute.

Similarly, the definition of "interest" or "any interest" is also subject to being defined via agency action. This should also be taken into account in any proposal to statutorily define "interest" or "any interest". AFIDA's first words are "[a]ny foreign person who acquires or transfers *any interest, other than a security interest*, in agricultural land shall submit a report"²⁹ However, the regulatory definition of "any interest" is more complex, has changed over time, and is subject to additional amendment through future agency action. This distinction could make a difference, for example, with S. 926 language found at page 6, line 22 in which it is proposed to define "interest" to include "a security interest" and "lease, without regard to duration of the lease." Congressional intent as to whether the statutory definition of "interest" or "any interest" be defined exclusively in the statute or additionally defined and subject to future change by USDA rulemaking is a factor that might be considered in the drafting process.

²⁸ 7 U.S.C. § 3508(1).

²⁹ *Id.* at § 3501(a). See also § 3501(b), (c), (d), (e), and (f).

Finally, the same is true for the definition of “foreign person” – i.e., the statutory definition is one that has been and remains subject to further definition via agency action, particularly through the definition of “significant interest and substantial control”. (See, e.g., S. 926 on page 9, line 14, S. 2060 on page 8, line 9, S. 2060 page 22, line 11, and S. 2060 page 24, line 8).

The term “tier” is an integral component of AFIDA reporting requirements, especially with respect to U.S. entities that qualify as “foreign persons” due to having satisfied the “significant interest or substantial control” definition. The term “tier” may have a broadly accepted common-sense definition that has been uniformly understood by all potential “foreign persons” since 1978. However, to the extent there is room for interpretation, the term is not defined in either the statute or regulations. While not entirely clear at this point, it is possible that the definition of “shell corporation” in S. 2382 (page 2, line 16) is written in light of issues presented by what constitutes a “tier.”

Another key term under AFIDA is “significant interest or substantial control.” Section 3508(3)(C) provides that the term “foreign person” includes “any person, other than an individual or government . . . which is created or organized under the laws of any State . . . and . . . in which, *as determined by the Secretary under regulations which the Secretary shall prescribe*, a significant interest or substantial control is directly or indirectly held”³⁰ The definition of “significant interest or substantial control” has evolved somewhat since February 6, 1979 to include the phrase “acting in concert” as a bright line test of when a U.S. entity with foreign ownership is required to report as a “foreign person” under AFIDA. However, the term “acting in concert” is not used (yet alone defined) in the statute and is not defined in the AFIDA regulations.

Consolidated Appropriations Act, 2023

On December 29, 2022, Congress amended AFIDA through the “Consolidated Appropriations Act, 2023” (“CAA”).³¹ Specifically, Section 773 of CAA contained amendments to AFIDA.

The CAA requires USDA to report to Congress on “foreign investments in agricultural land in the United States, including the impact foreign ownership has on family farms, rural communities, and the domestic food supply.” A similar type of report was initially required under § 3504 of AFIDA. That provision was repealed in 1998. CAA revives § 3504 such that USDA will again be required to report certain data and analysis concerning foreign ownership and investments in U.S. farmland to Congress.

CAA also requires USDA, within three years, to establish a process so that “foreign persons” required to report their agricultural landholdings under AFIDA can submit their disclosure electronically. Currently, foreign persons required to disclose their interests in U.S. farmland to USDA must generally complete and submit form FSA-153 to the FSA office in the county where

³⁰ Id. (emphasis added).

³¹ Consolidated Appropriations Act, 2023, Pub. L. 117-328, 136 Stat. 4459 (2022).

the land is located. Thus, under the direction of the CAA, USDA must make disclosures available for online submission.

Finally, CAA directs USDA to establish “an internet database that contains disaggregated data from each disclosure submitted.” The database will include data from every disclosure submitted to USDA since the implementation of AFIDA, and all future disclosures submitted to the agency. The law requires USDA to organize the database information into two separate categories of foreign persons: (1) foreign individuals and (2) foreign persons that are not individuals or a government (i.e., foreign business entities). For investments of a foreign individual, the database will indicate and be organized based on the citizenship of the individual. If the “foreign person” is a foreign business, the data will be organized based on (i) the nature of the business entity; (ii) the country where the foreign business entity is organized; and (iii) its principal place of business. Although the CAA requires USDA to establish a database that provides information concerning foreign ownership and investments in U.S. agricultural land, the law requires the agency to implement a “process to ensure the protection of personally identifiable information.”

Recent/Current Federal Proposals

As of July 27, 2023, there are approximately two dozen federal proposals, resolutions, or amendments that deal with one or more aspects of foreign ownership of agricultural land. The NALC has published articles specifically addressing many of these proposals, which can be accessed via the QR Code provided above for “NALC Resources At A Glance: Foreign Ownership of Agricultural Land”. NALC has internally categorized these items into ten categories, as follows:

Restrict Ownership/Investments: Ag Land, China Only

- Lower Energy Costs Act ([H.R. 1](#))
- Prohibition of Agricultural Land for the People’s Republic of China Act ([H.R. 809](#))
- This Land Is Our Land Act ([S. 684](#))

Restricting Ownership/Investments: Ag Land, Multiple Countries

- Promoting Agriculture Safeguards and Security Act of 2023 (“PASS Act”) ([S. 168/H.R. 683](#))
- Protecting America’s Agricultural Land from Foreign Harm Act of 2023 ([S. 926](#))
- Protecting America’s Agricultural Land from Foreign Harm Act ([H.R. 3357](#))
- FY24 ag appropriations bill ([H.R. 4368](#)) (Sec. 765)
- Farmland for Farmers Act ([S. 2583](#))

Restricting Ownership & Investments: All Real Estate

- Protecting our Land Act ([H.R. 212](#))
- Securing America’s Land from Foreign Interference Act ([H.R. 344](#))
- Saving American Farms from Adversaries Act ([H.R. 840](#))

- Protection of American Land Act of 2023 ([H.R. 4806](#))
- Not One More Inch or Acre Act ([S. 1136](#))

Restricting Ownership & Investments Through Other Methods

- Stop China’s Continuous Purchase of Land Act ([H.R. 4772](#))
- Protecting American Farmland Act ([H.R. 3996](#))

Amending AFIDA

- Protecting America’s Agricultural Land from Foreign Harm Act of 2023 ([S. 926](#))
- Security and Oversight for International Landholdings Act of 2023 (“SOIL Act”) ([S. 1066](#))
- Not One More Inch or Acre Act ([S. 1136](#))
- Foreign Agricultural Restrictions to Maintain Local Agriculture and National Defense Act of 2023 (“FARMLAND Act”) ([S. 2060](#))
- Farmland Security Act of 2023 ([S. 2382](#))
- [H.R. 1789](#)
- FY24 ag appropriations bill ([H.R. 4368](#)) (Sec. 747)

Restricting Foreign Participation in Farm Programs & Federal Funds

- Security and Oversight for International Landholdings Act of 2023 (“SOIL Act”) ([S. 1066](#))
- Protecting America’s Agricultural Land from Foreign Harm Act of 2023 ([S. 926](#))
- Protecting America’s Agricultural Land from Foreign Harm Act ([H.R. 3357](#))
- Foreign Agricultural Restrictions to Maintain Local Agriculture and National Defense Act of 2023 (“FARMLAND Act”) ([S. 2060](#))

Adding Agriculture to CFIUS

- Foreign Adversary Risk Management Act (“FARM Act”) ([S. 68/H.R. 513](#))
- Promoting Agriculture Safeguards and Security Act of 2023 (“PASS Act”) ([S. 168/H.R. 683](#))
- Protecting U.S. Farmland and Sensitive Sites from Foreign Adversaries Act ([H.R. 4577](#))
- Security and Oversight for International Landholdings Act of 2023 (“SOIL Act”) ([S. 1066](#))
- Foreign Agricultural Restrictions to Maintain Local Agriculture and National Defense Act of 2023 (“FARMLAND Act”) ([S. 2060](#))
- National Defense Authorization Act for Fiscal Year 2024 ([S. 2226](#))
- Food Security is National Security Act of 2023 ([S. 2312](#))

III. Additional Considerations

The following information is not exhaustive, but contains some potentially noteworthy areas that may warrant consideration.

“Agriculture” & FLSA

S. 168 proposes “agriculture” be defined as that term is defined under the Fair Labor Standards Act of 1938 (FLSA). FLSA a comprehensive federal statute that sets minimum wages, requires overtime wages, restricts child labor, and mandates some record-keeping by employers. The FLSA covers employees of employers engaged in interstate commerce directly or engaged in producing goods and services for interstate commerce. The term “agriculture” vis-a-vis “agricultural employer” has been interpreted by courts. In terms of exploring intended/unintended consequences it may warrant considering the different context in which the FLSA definition arises and that the term has been interpreted by courts.

S. 926 (page 3, line 12) proposes that “the President shall take such actions as may be necessary to prohibit the purchase or lease by covered persons of . . . public agricultural land that is owned by the United States and administered by the head of any Federal department or agency” There are instances, for example pursuant to the Bankhead-Jones Act, in which agricultural land is deeded to land grant universities and other public institutions for “public use” or “public purpose”. The entity is typically considered to own such property, but it is subject to having ownership revert to the federal government under certain circumstances. It is possible that these types of properties constitute “public agricultural land” but also could be an unusual circumstance that makes it difficult to determine whether the properties are “owned by the United States”.

Annual Compliance Audit

S. 2382 proposes that the USDA Secretary “shall conduct an annual compliance audit of not less than 10 percent of the reports submitted under section 2 for the year covered by the audit” It is unclear how the 10 percent might be calculated and who would make that determination. For example, the 10 percent could be of any group of ten reports for every one-hundred submitted or potentially a certain number of reports over a certain dollar amount or some other criteria.

CFIUS & Defense Production Act

Several proposals seek to amend the Defense Production Act, including statutorily prescribing that the USDA Secretary be a member of the Committee on Foreign Investment in the United States (CFIUS). In addition to these proposals, the Defense Production Act currently provides that the Committee shall be comprised of the several Executive Branch department heads (or their designees) as well as “[t]he heads of any other executive department, agency, or office, as the President determines appropriate, generally or on a case-by-case basis.”³² Thus, it appears

³² 50 U.S.C. § 4565(k)(2)(J).

that the potential exists for the USDA Secretary to be added to CFIUS by action of the President of the United States.

Implementing AFIDA: Full Picture

AFIDA implementation encompasses four main areas of activity: 1) the statute, 2) the regulations, which are subject to change via agency action, 3) the FSA Handbook, and 4) FSA-153. Thus, any changes to one of those four areas will require consideration of how that change is impacted by any of the other three areas. A lack of congruency could lead to a challenge in implementation. One potential current example is the difference between FSA-153 and the AFIDA regulations pertinent to U.S. entities who qualify as a “foreign person” pursuant to the significant interest or substantial control standard. Specifically, paragraph 3(D)(3)(d) states as follows: “List on separate sheet, the Name, Address and Country of all foreign persons who individually or in the aggregate hold significant interest or substantial control . . . in the person owning the land.” The AFIDA regulations indicate that such a U.S. entity would not list “all foreign persons”, but rather up to the first three “tiers” of ownership.

USDA Program Eligibility

In general, payments made to a “participant” of a USDA program are prorated to reflect those instances in which a “foreign person” has ownership in the participant. NALC experience has been that this is an area in which there is confusion in different sectors of the agricultural industry. One example of this confusion is whether a “participant” in the USDA Emergency Relief Program (ERP) is ineligible in the event there is *any* foreign ownership present versus the more general approach of prorating the USDA payment. For ERP, the statute and regulation seem to indicate that the general rule would apply but the FSA Handbook sets out the standard that any presence of foreign ownership triggers ineligibility.

Outreach & Awareness

S. 2060 (page 5, line 19) calls for the Secretary to use “existing resources and efforts to the maximum extent practicable . . . [to] carry out a nationwide outreach program . . . to increase public awareness and provide education regarding reporting requirements under this section.” Specifically, the provision states that the outreach program be directed “primarily towards landlords, owners, operators, persons, producers, and tenants . . . of agricultural land and county property appraiser offices, land appraisal companies, and real estate auction companies”. The NALC currently conducts this type of research and outreach, and would gladly help be a part of any effort to use existing resources to increase awareness of current laws to the nation’s agricultural community, specifically including those enumerated in S. 2060.

Similarly S. 926 (page 11, line 7) proposes that the Secretary submit a report to Congress that includes “the role of State and local government authorities in tracking foreign ownership of agricultural land in the United States.” The NALC currently maintains this type of information as

part of its national research and information mission and would gladly work with USDA and others in helping provide that information.

IV. Conclusion

Chairwoman Stabenow, Ranking Member Boozman, and members of the United States Senate Committee on Agriculture, Nutrition, & Forestry, thank you, again, for the invitation to provide testimony as part of the September 27 hearing on “Foreign Ownership in U.S. Agriculture”. If the NALC can be of any assistance to you, your staff, or constituents on this or any other issue, please feel free to contact us anytime.