

# **Navigating Foreign Ownership Laws in the Wild, Wild West: Latest Trends and Developments**

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# Foreign Ownership of Agricultural Land: FAQs & Resource Library

Over the past decade, foreign ownership of agricultural land have grown. As a result, an interest in restricting and monitoring foreign ownership of U.S. agricultural land is growing significantly among federal and state lawmakers. <sup>(1)</sup> This page is intended to provide resources and answers to some frequently asked questions concerning foreign ownership and investments in private agricultural land.

This information is provided for educational purposes only. If you have concerns that go beyond the scope of what has been discussed in any of the questions below, we encourage you to seek legal advice from a licensed attorney in your area. The questions are meant to provide general information only, and do not constitute any legal advice offered by the National Agricultural Law Center, nor act as a substitute for legal advice and counsel. *This resource was last updated April 25, 2023.*

## IN GENERAL

*Q: What is a “foreign ownership law”?*

In general, a “foreign ownership law” is a law that restricts certain foreign individuals, foreign entities, or foreign governments from acquiring, transferring, holding, or investing in U.S. real estate, specifically including private agricultural land located within the U.S. For purposes of this resource, the following questions and accompanying answers focus on privately held agricultural land.

## STATE LAWS

*Q: Are there any states that ban foreign ownership of agricultural land?*

There are no states with an absolute prohibition on foreign ownership, however, approximately eighteen states specifically forbid or limit nonresident aliens, foreign business entities, or foreign governments from acquiring or owning an interest in private agricultural land within the boundaries of their state.

Some states, such as Arizona, Hawaii, Idaho and Oregon have laws that prohibit foreign ownership of public real estate and farmland; however, only Oregon specifically restricts foreign individuals from purchasing public lands within the state. *See* Or. Rev. Stat. Ann. § 273.255 which permits “[a]ny individual who...is a citizen of the United States, or has declared an intention to become a citizen, may apply to purchase state lands.” Mississippi has a law (Miss. Code Ann. § 29-1-75) restricting nonresident aliens and corporations from purchasing or owning public lands within the state, which is set to expire on July 1, 2026.

*Q: How many states have foreign ownership laws?*

Approximately eighteen states have laws that seek to restrict to some degree foreign ownership or investments in private agricultural land within the boundaries of their state.

*Q: What states have a foreign ownership law?*

Currently, states that have a law prohibiting or restricting foreign ownership and investments in private farmland include: Arkansas, Idaho, Indiana, Iowa, Kansas, Kentucky, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Utah, Virginia, and Wisconsin.

Other states, such as Georgia, Maryland, and New Jersey have enacted statutes that permit foreign persons to purchase or hold real estate within their state to some degree. However, these states' laws condition land ownership rights on certain factors. For example, New Jersey's law expressly provide land ownership rights to "alien friends" who are domiciled and have a residency within the U.S. *See* N.J. Stat. Ann. § 46:3-18. Maryland provides real property rights to an "alien who is not an enemy." *See* Md. Code Ann., Real Prop. § 14-101. Although these laws do not contain language that strictly prohibits foreign ownership of real property within their state, these statutes could be construed as a restriction on foreign investments that are not expressly permitted under these states' laws.

*Q: Do states have similar foreign ownership laws?*

Even though approximately eighteen states have foreign ownership laws, each state has taken its own approach to restricting foreign ownership of farmland within its borders. For example, some states define "agricultural land" and "farming" differently from other states, restrict only certain types of foreign investors, or allow foreign purchasers to acquire a certain acreage amount of farmland.

*Q: Why do states' foreign ownership laws vary?*

State laws restricting foreign ownership vary widely and without a generalized or uniform approach likely because many of these states' laws developed at different "political flashpoints" in our nation's history. These flashpoints include:

1. Colonial Period/Signing of the Declaration of Independence
2. Late 1880's through the turn of the century, including the enactment of the Territorial Land Act of 1887 (*e.*, westward expansion of the U.S.)
3. Early 20<sup>th</sup> century through post-WWII
4. 1970s, which resulted in the enactment of the federal reporting statute known as the Agricultural Foreign Investment Disclosure Act ("AFIDA") of 1978
5. 2021 – Present

*Q: What type of foreign investors are restricted under these state laws?*

Because each state has taken its own approach to its foreign ownership law, many states restrict different types of foreign investors, such as foreign individuals or nonresident aliens, foreign businesses and corporations, or foreign governments. Additionally, some states restrict certain parties associated with a restricted foreign investor, such as an agent or trustee. For example, Indiana's foreign ownership law restricts only foreign business entities from purchasing agricultural land while Oklahoma's law restricts nonresident individuals and foreign businesses and corporations.

*Q: How are states' foreign ownership laws enforced? What are the penalties for noncompliance?*

Some states' foreign ownership laws contain provisions that assign enforcement authority to the state's attorney general or "a district attorney of the county where the foreign-owned land is located." Other states provide private enforcement of its foreign ownership law, meaning a resident of the state in which the farmland is located can file a lawsuit to enforce the restriction against a foreign party. These enforcement provisions generally direct the enforcing parties to file an escheat or forfeiture action against a foreign party suspected of violating a state's foreign ownership law. If the land escheats or forfeits to the state, meaning the state takes title of the land, the foreign party is penalized by losing their legal interest in the agricultural land. Other states prescribe civil (monetary) penalties for noncompliance of its foreign ownership law.

*Q: What states have recently proposed laws?*

From 2021 through 2022, the following states have proposed legislation that seeks to restrict certain foreign investments in real property and agricultural land located within the boundaries of their state:

- Alabama (SB 14)
- Arizona (SB 1342)
- Arkansas (SB 312) (original version)
- California (SB 1084)
- Indiana (SB 388)
- Iowa (HF 2311; HF 2467)
- Missouri (HB 506; HB 1136; HB 1296; HB 1947; SB 243; SB 791)
- Oklahoma (HB 1497; SB 1469; SB 1534; SJR 45)
- South Carolina (H 4845)
- Tennessee (SB 1070; HB 1451)
- Texas (HB 58; HB 69; HB 303; HB 305)

In 2023, the majority of states have proposed, or have plans to propose, at least one piece of legislation that seeks to prohibit or restrict foreign investments and landholdings in land—specifically private farmland—located within their state to some degree. Some states that are considering legislation do not have a law that restricts foreign ownership of land in their state while other states are considering proposals that would amend their current foreign ownership

law. These proposed measures are available on your state legislature's website by searching pending legislation. Generally, you can retrieve these proposals by searching "foreign ownership".

*Q: Were any of these proposals enacted into law?*

In 2021, Arkansas' SB 312 (enrolled version) was enacted into law, but the original version of the bill sought to restrict foreign investments in the state's agricultural land. The original version of the bill included identical language and provisions contained in Missouri's foreign ownership law, but this version is entirely different from the bill that was enacted. The version of SB 312 that was enacted is a reporting requirement law. Accordingly, this law simply requires certain foreign investors to submit to the Arkansas Department of Agriculture a copy of their federal Agricultural Foreign Investment Disclosure Act ("AFIDA") report they submit to the U.S. Department of Agriculture ("USDA"). AFIDA, as discussed in detail below, is a federal reporting statute that requires certain foreign investors to disclose their U.S. agricultural landholdings.

In 2022, Indiana was the only state to enact a law restricting certain foreign investments in the state's agricultural land. In the same year, both chambers of California's state legislature unanimously passed a bill (SB 1084) that would restrict foreign governments from owning agricultural land within the state, but Governor Newsom vetoed the bill.

As of April 2023, Arkansas, Idaho, Utah, and Virginia have enacted a foreign ownership law during their legislative session. North Dakota (HB 1135) amended its foreign ownership law to extend their restriction to foreign governments and foreign government-controlled entities. Proposals in Montana (SB 203) and Tennessee (HB 40) have been passed by the legislature but are not yet fully enacted.

*Q: Are there any states considering proposals to prevent foreign participation in farm programs?*

Currently, Kentucky is the only state considering such a measure. Kentucky's HB 500 seeks to restrict certain foreign individuals, business entities, and governments from obtaining an interest in the state's farmland, but the proposal also seeks to restrict these foreign parties from participating in any program administered by the state's Department of Agriculture, Agricultural Development Board, and the Kentucky Agricultural Finance Corporation.

*Q: Are foreign ownership laws and corporate farming laws the same?*

There are similarities in foreign ownership laws and corporate farming laws in that they both restrict certain corporations from acquiring, purchasing, or otherwise obtaining land that is used or usable for agricultural production. However, corporate farming laws restrict the power of foreign or domestic corporations from engaging in farming or agriculture. Proponents of corporate farming laws assert that these laws are aimed at protecting the economic viability of family farms from threats of competition with domestic and foreign corporate-owned or managed farms. Alternatively, proponents of foreign ownership laws generally assert these laws

seek to restrict only foreign investments in agricultural land as a way to discourage or prevent foreign competition in agriculture, increased production costs, and possible threats to the agricultural supply chain. Like foreign ownership laws, corporate farming laws vary from state to state, but each establish a general prohibition on corporate farming activities. Currently, eleven states have statutes or constitutional amendments that prohibit or limit corporate farming: Indiana, Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, Utah, and Wisconsin.

## **AGRICULTURAL FOREIGN INVESTMENT DISCLOSURE ACT (“AFIDA”)**

*Q: Is there a federal foreign ownership law?*

Currently, no federal law exists that restricts foreign persons, entities, or governments from acquiring or holding U.S. agricultural land. While there are approximately eighteen states that specifically forbid or limit foreign ownership of farmland within their state, the federal government only *monitors* certain foreign acquisitions and landholdings in agricultural land through the Agricultural Foreign Investment Disclosure Act (“AFIDA”) of 1978. The statutory text of AFIDA is in the U.S. Code at 7 U.S.C. § 3501 et seq.

*Q: What is AFIDA?*

Enacted by Congress in 1978, AFIDA established 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 the U.S. Department of Agriculture (“USDA”). Thus, a foreign person who acquires, holds, transfers, or disposes an interest in agricultural land within the U.S. is required to disclose certain information concerning such transactions and investments. 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.

*Q: Why did Congress enact AFIDA?*

According to a U.S. House Report from the Committee on Agriculture (H.R. Rep. No. 95-1570, 2d Sess. (1978)) discussing AFIDA prior to its enactment, Congress was concerned with the economic strains many family farmers were experiencing and the declining number of family-farm operations across the nation. According to the report, “[i]ncreased land prices, higher taxes, escalating costs of agricultural inputs, greater transportation expenses, and other operating costs have combined with low farm product prices to push many farm families to the brink of economic disaster.” The Committee determined that “[i]ncreased foreign investments which forces up prices of U.S. agricultural land is seen by many as” a factor that adds to the economic pressures affecting family-farm operations.

However, the House Report asserts that determining the impact of foreign ownership and investments in farmland “is difficult to gauge...because of the lack of data on the nature, magnitude, and scope of foreign investment activity.” Specifically, the Committee pointed to a study conducted by the General Accounting Office (“GAO”)—published on June 12, 1978—that

found that no accurate data exists on foreign ownership of agricultural land, and that none was likely to be produced through the current state and local recording efforts. As a result, Congress enacted AFIDA to collect this data in order to monitor foreign investments in U.S. agricultural land.

*Q: Are there federal regulations?*

Section 3507 of AFIDA directed USDA to implement regulations “for the purposes of carrying out the provisions” of AFIDA. These regulations are located in the Code of Federal Regulations at 7 C.F.R Part 781.

*Q: Is there an agency handbook?*

Yes. The Farm Service Agency (“FSA”) has published a handbook to assist the agency in administering the policies, procedures, and requirements of AFIDA. This handbook is available on FSA’s website.

*Q: How do foreign persons report their U.S. agricultural landholdings?*

In general, foreign persons are required to disclose their interest(s) in U.S. farmland by delivering a FSA-153 report to the FSA county office in the county where the tract of land is located within 90 days after the date of such acquisition or transfer. However, some transactions are complex or require multiple filings, usually when a tract of land is located in multiple counties, or a foreign person has acquired separate tracts in multiple counties. In these instances, FSA’s AFIDA handbook explains that USDA may grant permission to a foreign person to file their reports directly with the agency.

*Q: How are AFIDA disclosures used?*

The information collected from these disclosures is compiled into an annual report and made public by FSA. As of the date of this writing, the most recent report contains data on foreign ownership of U.S. farmland through December 31, 2020. This report and all previous AFIDA reports are available on FSA’s website. Section 3505 of AFIDA requires FSA to deliver, every 6 months, a copy of the disclosures to each state department of agriculture (or appropriate state agency) involving agricultural land within its state during the 6-month period.

*Q: Are there state-level reporting requirements?*

Yes. Some states (Arkansas, Illinois, Indiana, Iowa, Kansas, Maine, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin) require foreign persons and entities to report their purchase or ownership interest in farmland within their state. These state reporting statutes often correspond with the federal reporting law under AFIDA. Pennsylvania does not have reporting requirements separate from AFIDA; rather, the state has enacted a law that requires the Pennsylvania Department of Agriculture to review AFIDA data to ensure compliance with the state’s restriction on foreign ownership of agricultural land. In Virginia, foreign persons and entities are not required to report their agricultural landholdings, but state

law requires the Virginia Department of Agriculture and Consumer Services to compile an annual report that contains certain information concerning foreign ownership and investments in the state's agricultural land. State-level reporting statutes are compiled on the NALC's website.

*Q: Who must report under AFIDA?*

AFIDA explicitly states that “[a]ny foreign person who acquires or transfers any interest...in agricultural land” is required to disclose the transaction to USDA. 7 U.S.C. § 3501(a). Foreign persons with a direct or indirect interest in agricultural land are required to disclose this interest under AFIDA.

*Q: What is a “direct” and “indirect” interest in agricultural land under AFIDA?*

A direct interest in farmland means the foreign person has title to land. On the other hand, foreign persons generally have an indirect interest when they hold an ownership interest in an entity, such as a business or corporation, that has title to the agricultural land. In either case, individuals and entities that fall within the scope of “foreign persons” under AFIDA are likely required to disclose their ownership or leasehold interest.

*Q: What is a “foreign person” under AFIDA?*

AFIDA defines “foreign person” as an individual who is not: “a citizen or national of the United States”; “a citizen of the Northern Mariana Islands or the Trust Territory of the Pacific Islands”; or someone “now lawfully admitted to the United States for permanent residence, or paroled into the United States, under the Immigration and Nationality Act.” 7 U.S.C. § 3508(3)(A).

Additionally, the term “foreign person” includes foreign governments and entities organized under the laws of a foreign government or its principal place of business is located outside the U.S. Further, a U.S. entity is considered a “foreign person” under AFIDA if a foreign individual, entity, or government holds “a significant interest or substantial control” over the domestic entity. 7 U.S.C. § 3508(3)(C). Therefore, a “foreign person” subject to the reporting requirement under AFIDA includes nonresident individuals, foreign businesses and corporations, and foreign governments.

*Q: What is a “significant interest or substantial control”?*

Foreign persons have a “significant interest or substantial control” of a domestic entity when a foreign person or multiple foreign persons who are “acting in concert” collectively hold 10% or more interest in the domestic entity. Foreign persons that “may not be acting in concert” have a “significant interest or substantial control” when they own an interest of 50% or more in a domestic entity. See 7 C.F.R. § 781.2(k).

*Q: How does AFIDA define “agricultural land”?*

Under AFIDA, the term “agricultural land” means “any land located in one or more States and used for agricultural, forestry, or timber production purposes.” 7 U.S.C. § 3508(1). AFIDA's



associated regulations further define “agricultural land” as land totaling 10 or more acres in the aggregate that is used for forestry production or land currently used, or used within the past 5 years, for farming, ranching, or timber production. 7 C.F.R. § 781.2(b). Land totaling less than 10 acres in the aggregate that generates annual gross receipts exceeding \$1,000 from the sale of agricultural or timber products is considered “agricultural land.” Land used for forestry production is considered “agricultural land” when 10% of the land is “stocked by trees of any size, including land that formerly had such tree cover and that will be naturally or artificially regenerated.” 7 C.F.R. § 781.2(b).

In general, farming, ranching, and timber production means growing crops, livestock, or trees. Under AFIDA, farming, ranching, and timber production includes activities listed under the U.S. Department of Labor’s Standard Industrial Classification Manual except for the activities set forth in Major Group 07 (Agricultural Services), Industry Group 085 (Forestry Services), and Industry Group 091 (Commercial Fishing). Some activities listed in these classifications include soil preparation services, crop services, other animal services, contracted timber production services, forestry marketing and management plans, and catching or taking of certain fish for a commercial purpose. Accordingly, engaging in these types of activities would not warrant an AFIDA disclosure.

*Q: How does AFIDA define “any interest” in agricultural land?*

Under AFIDA, “any interest” in agricultural land means “all interest acquired, transferred or held in agricultural lands by a foreign person.” 7 C.F.R. § 781.2(c). An “interest” also includes leaseholds that are 10 or more years. There are certain types of ownership or investment interests in agricultural land that are excluded from the meaning of “any interests,” such as security interests, leases less than 10 years, contingent future interests, and interests solely in mineral rights. For a complete list of the types of interests excluded from AFIDA’s reporting requirement, see 7 C.F.R. § 781.2(c)(1)-(6).

*Q: What information must a foreign person include in their disclosure?*

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.

*Q: What are the penalties for noncompliance under AFIDA?*

Foreign persons that are determined by USDA to have violated AFIDA by either failing to report, submitting an incomplete report, or reporting false or misleading information may be subject to a fine up to 25% of the foreign person’s interest in the agricultural land. Late filings may be penalized at 0.1% of the fair market value of the foreign person’s interest in the land for each week the violation continues, up to 25%.

*Q: What type of land is under foreign ownership?*

AFIDA divides “agricultural land” into four different categories for the report: (1) cropland, (2) pasture, (3) forestland, and (4) other agricultural acreage. According to the most recent AFIDA data, which contains foreign interests through December 31, 2021, 47% of the reported foreign interests in U.S. land are timber or forest, 29% in cropland, and 22% in pastureland and other agricultural land.

*Q: How much U.S. agricultural land do foreign persons own?*

As of December 31, 2021, foreign persons reported holding an interest in over 40 million acres of U.S. agricultural land. This accounts for 3.1% of all privately held U.S. agricultural land and 1.8% of all land within the U.S. In the prior year’s data, foreign persons reported interests in nearly 37.6 million acres (or 2.9%) of private agricultural land.

*Q: What countries are represented by foreign investors of farmland?*

There are foreign investors from over 100 different countries that have an interest in U.S. land. Canadian investors own the largest amount of agricultural and non-agricultural acreage in the U.S. at 12.8 million acres, which represents 31% of all foreign-owned land. Investors from the Netherlands own 12% of all foreign-owned land, Italy is at 7%, and the United Kingdom and Germany each representing 6%.

*Q: How much U.S. land does China own?*

The most recent AFIDA data reports that China owns 194,179 agricultural acres within the U.S. According to this report, China owns 383,935 acres of agricultural and non-agricultural land, which is less than 1% of all foreign-owned acres.

*Q: What state has the highest agricultural acreage of foreign ownership?*

The most recent AFIDA data reports that Texas has the most foreign-held agricultural land at 4,719,144 acres, which is 3.1% of all the state’s private agricultural land. Texas is followed by Maine (3,504,096 acres), Alabama (1,780,937 acres), Colorado (1,766,890 acres), and Oklahoma (1,529,397 acres). To view all foreign investments by state, see Report 1 (pp. 12-13) of FSA’s most recent AFIDA report.

*Q: What state has the highest percentage of foreign ownership?*

Through December 31, 2021, Maine has 20.1% of its private agricultural land held by foreign persons. Hawaii has the second highest percentage of foreign-held agricultural land (9.2%), followed by Alabama (6.3%), Florida (6.3%), and Louisiana (5.8%). Thus, these states account for approximately 20.9% of foreign-owned agricultural land within the U.S.

*Q: Is Congress considering amendments to any provisions of AFIDA?*

Yes, there has been a few proposals introduced in Congress that seek to amend certain provisions of AFIDA. For example, the Farmland Security Act of 2022 (S. 4667) would establish a public database that updates foreign investments in U.S. agricultural land in real time. Another proposal, the Securing America's Land from Foreign Interference Act (S. 4703), seeks to revise the penalty provision under AFIDA. Under current law, persons determined by USDA to have violated AFIDA are subject to a fine up to 25% of the foreign person's interest in the agricultural land. This bill seeks to amend this provision by directing USDA to impose a fine no less than 10%, or more than 25%, of the fair market value of a violator's interest in the agricultural land.

Other measures seeking to amend certain provisions of AFIDA include the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2023 (S. 4661) and the Security and Oversight for International Landholdings Act ("SOIL Act") of 2022 (S. 4821).

Another bill known as the United States Innovations and Competition Act of 2021 (H.R. 4521) sought to amend AFIDA by including a new section to the law that would require USDA to establish and update every 90 days a database listing foreign landholdings of agricultural land within the U.S. However, this provision was not included in the final version of the bill that was passed in Congress.

On December 29, 2022, a spending package for FY23 known as the Consolidated Appropriations Act, 2023 ("CAA") (H.R. 2617) was signed into law. Section 773 of the legislation contained amendments to AFIDA.

*Q: What changes did the Consolidated Appropriations Act, 2023 bring to AFIDA?*

First, 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 required under the original language of AFIDA at 7 U.S.C. § 3504, but that provision was repealed in 1998. As required under the CAA, USDA will again be required to report certain data and analysis concerning foreign ownership and investments in U.S. farmland to Congress.

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

Third, the 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 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.”

*Q: What other actions has Congress taken concerning AFIDA?*

Aside from these legislative proposals, Congress has also requested an investigation in foreign farmland ownership. On October 1, 2022, U.S. House Republicans sent a letter to the Governmental Accountability Office (“GAO”) requesting a study on foreign transactions and acquisitions in U.S. agricultural land and its “impact on national security, trade, and food security.” The group of policymakers also requested this study to evaluate USDA’s procedures for collecting AFIDA data and whether these procedures ensure accurate disclosure of foreign ownership in U.S. farmland. The letter—including a complete list of issues House Republicans want GAO to address in a study—is available on the Republican’s House Committee on Agriculture website.

## **FEDERAL PROPOSALS**

*Q: Is there a federal foreign ownership restriction?*

Currently, no federal law exists that restricts foreign persons from acquiring or holding U.S. agricultural land. The federal government only monitors foreign investments in U.S. agricultural land through AFIDA.

*Q: Has Congress proposed a federal restriction?*

Yes, there were numerous proposals introduced in the 117<sup>th</sup> Congress (2021-2022) that sought to increase oversight and restrict foreign investments and acquisitions of U.S. land. Some of these measures sought to only prohibit the Chinese government and Chinese-owned entities from owning or investing in agricultural land, such as the Countering Communist China Act (H.R. 4792) and the Prohibition of Agricultural Land for the People’s Republic of China (H.R. 7892). Other measures (H.R. 4502; H.R. 8239; H.R. 8294) sought to compel USDA to take steps to prevent companies owned by China, Russia, North Korea, and Iran from purchasing agricultural land within the U.S. The 117<sup>th</sup> Congress also considered measures that sought to restrict foreign investments not only in agricultural land, but all public and private real estate located in the U.S., such as the Securing America’s Land from Foreign Interference Act (S. 4703/H.R. 3847) and the Protecting our Land Act (H.R. 8652).

Currently, the 118<sup>th</sup> Congress (2023-2024) is considering several proposals that seek to restrict certain foreign purchases and acquisitions of U.S. land. Some of these measures were considered during the previous legislative session, but have been reintroduced during the current

congressional session, such as the Prohibition of Agricultural Land for the People’s Republic of China Act (H.R. 809), the Protecting our Land Act (H.R. 212), and the Securing America’s Land from Foreign Interference Act (H.R. 344).

The Protecting our Land Act seeks to require the President to “direct the heads of Federal departments and agencies to promulgate rules and regulations to prohibit the purchase of public or private real estate...by a foreign adversary, a state sponsor of terrorism,...any agent or instrumentality...or any person owned or controlled by, or affiliated with” such foreign parties. The Securing America’s Land from Foreign Interference Act would direct the President to “take such actions as may be necessary to prohibit the purchase of public and private real estate...by members of the Chinese Communist Party and entities that are under the ownership, control, or influence” of the Chinese government.

Additionally, the Promoting Agriculture Safeguards and Security Act (“PASS Act”) of 2023 (S. 168/H.R. 683) has been reintroduced in the 118th Congress.

This measure would require the President to prohibit transactions that “would result in control by a covered foreign person of or investment by a covered foreign person in a United States business engaged in agriculture or private real estate used in agriculture.” Under the PASS Act, a “covered foreign person” includes individuals or entities and its subsidiaries that are domiciled or acting on behalf of China, Russia, Iran, or North Korea.

Other measures that have been introduced in the 118th Congress include the This Land Is Our Land Act (S. 684), which seeks to restrict certain foreign individuals and entities domiciled in or associated with China from obtaining an interest in farmland, and the Saving American Farms from Adversaries Act (H.R. 840), which would require the President to take actions necessary “to prohibit the purchase of public or private real estate...by any foreign person” for a five-year period.

*Q: What about the 2023 Farm Bill?*

Because federal policymakers have become increasingly concerned about foreign investments in U.S. agricultural land, coupled with the number of federal foreign ownership proposals being considered in Congress, it is likely a foreign ownership restriction will be proposed as part of the upcoming 2023 Farm Bill. The information provided here will be updated once more information is available.

## **MISCELLANEOUS**

*Q: Can foreign persons participate and receive benefits through USDA programs? What about foreign persons participating in USDA programs?*

There are some USDA-administered programs, such as certain Disaster Assistance Programs and Market Facilitation Program, which foreign persons are not eligible to participate. Other farm programs, like the Agricultural Risk Coverage and Price Loss Coverage programs, exclude foreign persons from receiving program benefits unless they satisfy the “foreign person rule.” To

satisfy this rule, a foreign person must contribute significant capital, land, and labor to a farming operation in order to receive program benefits.

*Q: Is Congress considering any proposals to prevent foreign participation in farm programs?*

Yes, there is legislation that has been introduced in the 117<sup>th</sup> Congress (2021-2022) that seeks to restrict foreign persons from participating in certain USDA-administered programs. For example, the Countering Communist China Act (H.R. 4792) seeks to restrict farmland owned by China or companies owned by China from participating in USDA programs. Another bill, known as the Farm Credit for Americans Act of 2022 (S. 4954), seeks to amend the Farm Credit Act by making foreign persons ineligible for “any credit or financial services provided by a Farm Credit System institution.”

*Q: Has Congress proposed legislation to increase oversight of foreign investments in agriculture?*

During the 117<sup>th</sup> Congress, a number of bills were introduced that sought to amend the Defense Production Act (“DPA”) of 1950 to place the Secretary of USDA in the Committee on Foreign Investment in the United States (“CFIUS”). The proposals that sought to add USDA as a member of CFIUS include:

- Foreign Adversary Risk Management Act (“FARM” Act) (H.R. 5490)
- Agricultural Security Risk Act (H.R. 3413/S.1755)
- Food Security is National Security Act (S. 3089)
- Promoting Agriculture Safeguards and Security Act (“PASS” Act) (H.R. 8274/S. 4786)
- Security and Oversight for International Landholdings Act (“SOIL Act”) of 2022 (S. 4821)

Some of these measures have been reintroduced in the 118<sup>th</sup> Congress, such as the FARM Act (S. 68/H.R. 513) and the PASS Act (S. 168/H.R. 683)

*Q: What is CFIUS?*

CFIUS is a multi-government agency entity that is authorized by the DPA (50 U.S.C. § 4565) to review certain transactions involving foreign investments and acquisitions of American companies and real estate to determine whether there is a threat to national security. Essentially, CFIUS has the power to suspend, renegotiate, and impose conditions to transactions (whether pending or already completed) that may pose a risk to the national security of the U.S. In other words, the Committee uses these measures to mitigate any threat to national security that arises from a transaction. Transactions that may pose a risk to the national security, for example, are investments and acquisitions of critical infrastructure, such as transportation, telecommunication, public health, and energy. CFIUS also closely reviews investments in critical technologies. In general, these technologies are created or used by certain U.S. businesses and industries that are essential to the nation’s economic and national security.

*Q: How does adding USDA as a member of CFIUS increase oversight of foreign investments in agriculture?*

Specifically, these bills seek to require CFIUS to consider agriculture-specific criteria when determining whether a foreign investment poses a risk to the United States national security. For example, some proposals incorporate provisions that direct CFIUS to review or investigate transactions that could result in foreign control of a U.S. business that engages in agriculture. Other proposals seek to include “security of food and agriculture systems” and “biotechnology related to the agriculture sector” as “critical infrastructure under the DPA. As a result, this would place the agricultural industry and food supply chains as areas CFIUS can consider as it relates to national security, meaning agriculture and food security will be considered as matters of national security. According to some sponsors of these bills, placing USDA as a CFIUS member will provide leverage to protect the interests of the agricultural industry in foreign investments and acquisitions of U.S. agricultural businesses.

*Q: Why are there foreign investments in states that have enacted a foreign ownership law?*

Each state that currently restricts foreign ownership includes exceptions to their restriction. In other words, states’ laws exempt certain foreign parties, agricultural practices, landholdings, and land use activities from the restriction. Many of these states’ laws include an acreage limit or cap to its restriction. In other words, a state’s foreign ownership law will only restrict a foreign investment in farmland if the investment exceeds a specified number of acres. For example, Wisconsin’s foreign ownership law caps foreign ownership to 640 acres before the restriction applies.

Some states also permit foreign persons to convert agricultural land into some use other than farming. Other states have an “estate exception” for situations where a foreign person obtains ownership of agricultural land by inheritance or through the terms of a person’s will. Further, other states’ laws permit foreign persons to acquire and hold title to farmland resulting from their enforcement of a lien against the property.

Additionally, foreign persons obtain an interest in real estate using different types of business entities and trusts that invests in property, such as a real estate investment trust (“REIT”).

*Q: What is a REIT?*

In general, a REIT is an entity that invests, owns, and operates real estate that generates income. Created in 1960 with the enactment of the REIT Act (a provision of the Cigar Excise Tax Extension Act), REITs were established to provide real estate investors the same benefits offered to mutual funds investing in stocks. REITs invest in various types of real property, such as office buildings, housing units, farmland, and forestland. The income generated from REIT-owned property is then distributed to its investors. Thus, REITs provide persons the ability to invest in real estate without having to hold the property directly.

Investing in REITs are sometimes attractive to foreign investors for a couple of reasons. First, a foreign person investing in a REIT is not taxed on their worldwide income, just the dividends

from their REIT investment. Second, investing in REITs permit foreign investors the ability to hold an ownership interest in U.S. property without having to manage the day-to-day activities of the property. In other words, foreign persons do not have to reside—or spend a significant number of days—in the U.S. to profit on income-producing U.S. property.



## Utah Enacts Law Prohibiting Certain Foreign Investments in Land

On March 13, 2023, Utah Governor Spencer Cox signed into law House Bill 186 (“HB 186”)—also known as the “Restrictions on Foreign Acquisitions of Land Act”—which seeks to restrict certain foreign purchases of real property located within the state. In 2023, the majority of states have proposed at least one piece of legislation that seeks to prohibit or restrict foreign investments and landholdings in land—specifically private farmland—located within their state to some degree. Utah is the first state in 2023 to enact a foreign ownership law. By enacting HB 186, Utah joins fourteen other states that have laws that specifically forbid or limit certain foreign investors from acquiring or owning an interest in land located within their state.

### House Bill 186

Like the other fourteen states that have a foreign ownership law, Utah takes its own approach to restricting foreign investments. In general, HB 186 prohibits a “restricted foreign entity” from acquiring an “interest in land” within the state. The definitions contained in any piece of legislation are important because they provide context to how the words or phrases are to be understood throughout the legislative text. This is especially true for legislation that seeks to restrict certain foreign investors from purchasing specific types of real estate within the state.

HB 186 defines “interest in land” as “any right, title, lien, claim, interest, or estate with respect to land.” Because “interest” is broadly defined, a “restricted foreign entity” is most likely in violation of the restriction prescribed under HB 186 if they acquire any property interest, including leaseholds and security interests in Utah land.

The law defines “land” to mean all real estate located in the state. Furthermore, the law specifies that “land” includes various types of real property, such as private land, public land, waters of the state, subsurface land, and agricultural land. Under Utah state law, “agricultural land” is “land devoted to the raising of useful plants and animals with a reasonable expectation of profit, including: (i) forages and sod crops; (ii) grains and feed crops; (iii) livestock...; (iv) trees and fruits; or (v) vegetables, nursery, floral, and ornamental stock...” *See* Utah Code Ann. §§ 4-46-102(1); 59-2-502(4)(a).

Under HB 186, a “restricted foreign entity” means a military company required to be identified by the U.S. Department of Defense (“DOD”) under Section 1260H of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (“NDAA 2021”). Under Section 1260H, DOD is required to identify Chinese military companies operating directly or indirectly in the U.S. The NDAA 2021 defines “Chinese military company” as an entity: (i) “directly or indirectly owned, controlled, or beneficially owned by...the People’s Liberation Army or any other organization subordinate to the Central Military Commission of the Chinese Communist Party; (ii) contributing to the Chinese “defense industrial base”; or (iii) “engaged in providing commercial services, manufacturing, producing or exporting”.

A business entity that is affiliated with or a holding company of a company identified under DOD's list is considered a "restricted foreign entity" under HB 186. In other words, subsidiaries or shell corporations for the listed entities are also restricted from acquiring Utah land.

Further, a country that has a listed company as part of their "commercial or defense industrial base" is also considered a "restricted foreign entity". In general, a "defense industrial base" is a collection of businesses that provide goods and services to satisfy the needs of a country's military. Because some or all the companies identified under DOD's list are part of China's defense industrial base, the country China is a "restricted foreign entity" and is prohibited from acquiring land within Utah. The restriction under HB 186 extends to China's governmental entities, committees, and agencies.

Although HB 186 restricts China, its governmental entities and institutions, and Chinese military companies identified by DOD from acquiring an interest in land located in Utah, there are some exceptions to the restriction. Specifically, HB 183 exempts restricted foreign entities that acquired an interest in land before May 3, 2023:

- By purchase, grant, gift, donation, devise, or bequest;
- As security for the repayment of a debt; or
- As a party to a contract for the transfer or conveyance of an interest in land to the restricted foreign entity.

Also, the law permits a restricted foreign entity that acquires land on or after May 3, 2023, by grant, gift, donation, devise, or bequest to hold that property up to five years from the date of acquisition, but the foreign party must divest or transfer their interest in the land before the five-year period expires. If a restricted foreign party fails to do so, their interest in the land escheats to the state, meaning the state takes ownership of the land. However, HB 186 does not specify who has authority to bring an escheat action against a restricted foreign entity suspected of violating this provision. Some states that have enacted foreign ownership laws authorize the state's attorney general to bring an escheat action against a suspected violator of the law, but Utah's law is unclear on the procedure for enforcement of this provision.

Under Utah's HB 186, the law provides that a "deed or other written instrument...purporting to convey an interest in land to a restricted foreign entity in violation of [this law] is invalid." While this provision penalizes a restricted foreign entity for acquiring land in violation of the law by invalidating their ownership, this provision could possibly raise title issues. Essentially, the law does not specify what happens to title to the land after a conveyance is deemed invalid. As a result, it is unclear who owns the land once a transaction is invalidated.

## **Conclusion**

Utah may not be the only state in 2023 to enact a law that restricts certain foreign acquisitions of land within their state. Since the beginning of 2023, the majority of states have proposed at least one piece of legislation to prohibit or restrict foreign investments and landholdings in land—specifically private farmland—located within their state to some degree. NALC is tracking each

states' foreign ownership proposal(s) and will update its Statutes Regulation Ownership of Agricultural Land compilation when there are changes to a state's law.

# **Idaho Enacts Law Limiting Foreign Investments in Agricultural Land**

On April 3, 2023, Idaho Governor Brad Little signed into law House Bill 173 (“H 173”) which seeks to restrict certain foreign purchases of farmland located within the state. In 2023, the majority of states have proposed at least one piece of legislation that seeks to prohibit or restrict foreign investments and landholdings in land, specifically agricultural land, within the boundaries of their states to some degree. Idaho is one of four states—along with Arkansas, Utah, and Virginia—to enact a foreign ownership law in 2023.

## **Background**

Ownership of U.S. land, specifically agricultural lands, by foreign persons or entities has been an issue that traces to the origins of the United States. Today, approximately eighteen states specifically forbid or limit nonresident aliens, foreign businesses and corporations, and foreign governments from acquiring or owning an interest in agricultural land within their state. To see a compilation of the various restrictions enacted by each state, check out the National Agricultural Law Center’s “Statutes Regulating Ownership of Agricultural Land” chart.

Although these states have instituted restrictions, each state has taken its own approach. In other words, a uniform approach to restricting foreign ownership has not yet been established because state laws vary widely. For instance, each state’s statute may define “agricultural land” and “farming” differently, only restrict certain types of foreign investors, make distinctions between resident and nonresident aliens, allow foreign purchasers to acquire up to a certain acreage amount of farmland, and provide different enforcement procedures and penalties for alleged violators.

Most states have not enacted restrictions or prohibitions on foreign ownership of privately held agricultural land. Rather, most of these states expressly allow foreign ownership of real property within their state. Before the enactment of H 173, Idaho was a prime example of such a state. In general, these states provide foreign persons and entities the same real property rights as natural born citizens of their state. For example, Idaho state law previously permitted an “alien” to “take, hold, and dispose of property, real or personal.” Idaho Code Ann. § 55-103 (effective to April 2, 2023; repealed by H 173). Accordingly, with the enactment of H 173, certain foreign investors are prohibited from acquiring the state’s farmland.

## **H 173**

Like the other seventeen states that have a foreign ownership law, Idaho takes its own approach to restricting foreign investments. Specifically, H 173 prohibits a “foreign government” and a “foreign state-controlled enterprise” from purchasing, acquiring, or holding a “controlling interest” in Idaho “agricultural land, water rights, mining claims, or mineral rights....” Although all foreign ownership laws prohibit or restrict foreign ownership of agricultural land, many states’ laws exempt certain foreign interests in oil, gas, and other mineral rights in the land.

Unlike those states, H 173 expressly prohibits certain foreign acquisitions in not just agricultural land, but rights and claims to minerals and water on any land located within Idaho.

In general, the definitions contained in any piece of legislation are important because they provide context to how the words or phrases are to be understood throughout the legislative text. This is especially true for legislation that seeks to restrict certain foreign investors from purchasing specific types of real estate within the state. H 173 defines “agricultural land” as “land actively devoted to agricultural purposes” as provided in I.C. § 63-604, and “mineral right” as defined under I.C. § 47-701. A “water right” is a legal right to the “use of water for beneficial purposes.” I.C. § 42-230(e). Further, the law defines “mineral claim” as “a portion of land containing minerals that a miner has a right to occupy and possess for the purpose of extracting minerals.”

H 173 defines “foreign government” as a government other than the U.S. government and the governments of any U.S. state, territory, or possession. A “state-controlled enterprise” includes business entities and wealth or investments funds which a foreign government has a controlling interest. Under the law, a “controlling interest” means: (i) an ownership interest in an entity that is more than 50%, or (ii) 50% or less ownership interest in an entity, but a foreign government “directs the business and affairs of the entity without the requirement or consent of any other party.” Accordingly, an entity is a “state-controlled enterprise” restricted from acquiring Idaho agricultural land if a foreign government owns 50.1% or more interest in the enterprise, or an interest 50% or less in the business entity whose business decisions are controlled by a foreign government.

Like every foreign ownership law, H 173 contains exceptions to the restriction prescribed under the law. Even so, the exceptions under Idaho’s law are limited compared to several states’ foreign ownership laws. First, the law includes a “grandfather clause,” which exempts certain persons from the requirements of a law by allowing these persons to continue with the activities that were permissible before the implementation of the new law. Under H 173, foreign governments and foreign state-controlled enterprises that held an interest in agricultural land, water and mineral rights, and mining claims before April 2, 2023, may continue to own those rights and lands without being in violation of the law.

Second, the restriction prescribed under H 173 does not apply to a “foreign pension fund.” The law defines “foreign pension fund” as an entity or trust—created under the laws of a foreign government—which provides retirement or pension fund benefits. This definition expressly excludes trusts and entities “owned by or subject to a controlling interest of a sovereign wealth fund” (i.e., a state-owned investment fund). Thus, private foreign investment and trust companies are the types of entities generally exempt from the restriction under H 173.

Although H 173 now restricts foreign governments and state-controlled enterprises from acquiring farmland within the state, the law is silent on enforcement. Many states’ foreign ownership laws contain an enforcement provision. These states generally authorize their state’s attorney general to bring legal action against a suspected violator. Usually, if a foreign party is found to be in violation of the restriction, these states’ laws direct a judge to order the agricultural land be sold through judicial foreclosure or public auction. Essentially, H 173 does

not contain a similar provision, meaning there are no specific procedure for the enforcement of the restriction prescribed under the law.

## **Conclusion**

Arkansas, Idaho, Utah, and Virginia may not be the only states in 2023 to enact a law that restricts certain foreign acquisitions of land within their state. In fact, proposals in Montana (SB 203) and North Dakota (HB 1135) have been passed by the legislature but are not yet fully enacted. NALC is tracking each states' foreign ownership proposal(s) and will update its *Statutes Regulating Ownership of Agricultural Land* compilation when there are changes to a state's law.