

Foreign Ownership of Agricultural Land

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Overview

An issue that has been around a very long time and dates back to the foundation of the United States is that of agricultural land being owned by non-U.S. citizens and/or entities. It's a national security and food security issue. Some states have had restrictions for many years and are considering strengthening existing provisions. Others are looking at the issue for the first time. The Kansas legislature currently has bills under consideration in both houses.

Foreign ownership of agricultural land – it's the topic of today's post.

Background of Foreign Ownership Restrictions

Under the English common law, aliens could not acquire title to land except with the King's approval. The King understood that control and ownership of the land was critical to national security and did not want disloyal subjects owning or acquiring an interest in land. The common law rule existed in England until it was abolished by statute in 1870. However, by that time, the notion of limiting alien ownership of agricultural land was well imbedded in United States jurisprudence. In the 1970s, the issue of foreign investment in and ownership of agricultural land received additional attention because of several large purchases by foreigners and the suspicion that the build-up in liquidity in the oil exporting countries would likely lead to more land purchases by nonresident aliens. The lack of data concerning the number of acres actually owned by foreigners contributed to fears that foreign ownership was an important and rapidly spreading phenomenon.

Agricultural Foreign Investment Disclosure Act

In 1978, the Congress enacted the Agricultural Foreign Investment Disclosure Act (AFIDA). *7 U.S.C. 3501 et seq.* Under AFIDA, the USDA obtains information on U.S. agricultural holdings of foreign individuals and businesses. In essence, AFIDA is a reporting statute rather than a regulatory statute. The information provided in reports by the AFIDA helps serve as the basis for any future action Congress may take in establishing direct controls or limits on foreign investment in agricultural land and provides useful information to states considering limitations on foreign investment. The Act requires that foreign persons report to the Secretary of Agriculture their agricultural land holdings or acquisitions. The Secretary assembles and analyzes the information contained in the report, passes it on to the respective states for their action and reports periodically to the Congress and the President.



AFIDA requires reports in four situations: (1) when a foreign person “acquires or transfers any interest, other than a security” in agricultural land; (2) when any interest in agricultural land, except a security interest, is held by any foreign person on the day before the effective date of the Act; (3) when a nonforeign owner of agricultural land subsequently becomes a foreign person; and (4) when nonagricultural land owned by a foreign person subsequently becomes agricultural land.

AFIDA defines “agricultural land” as “any land located in one or more states and used for agricultural, forestry, or timber production purposes...”. 7 U.S.C. § 3508(1). The regulations define agricultural land as “land in the United States which is currently used for, or if idle and its last use within the past five years was for, agricultural, forestry, or timber production, except land not exceeding one acre from which the agricultural, forestry, or timber products are less than \$1,000 in annual gross sales value and such products are produced for the personal or household use of the person or persons holding an interest in such land.” 44 Fed. Reg. 7117 (1979); 7 C.F.R. § 781.2(b). In 1980, the Secretary proposed a change in this definition to increase the acreage amount to ten acres, while preserving the gross sales test. However, the proposed change has not yet become effective.

The reporting provisions of the AFIDA require the disclosure of considerable information regarding both the land and the reporting party. The information must be reported on Form FSA-153 and includes: (1) the legal name and address of the foreign person; (2) the citizenship of the foreign person, if an individual; (3) if the foreign person is not an individual or government, the nature of the legal entity holding the interest, the country in which the foreign person is created or organized, and the principal place of business; (4) the type of interest in agricultural land that the person acquired or transferred; (5) the legal description and acreage of the agricultural land; (6) the purchase price paid, or other consideration given, for such interest; (7) if a foreign person transfers an interest, the legal name and address of the person to whom the interest is transferred; (8) the agricultural purposes for which the agricultural land is being used and for which the foreign person intends to use the agricultural property; and (9) such other information as the Secretary of Agriculture may require by regulation. 7 U.S.C. § 3501(a)(9).

State Restrictions

State statutes designed to restrict alien ownership of real property are generally of three types: (1) outright restrictions on the acquisition of certain types of property; (2) limitations on the total amount of land that can be acquired; and (3) limitations on the length of time property can be held. Acquisition restrictions are common in the agricultural context, with the restriction generally applying only to the acquisition of farmland, as defined by the law. Exceptions are common for the acquisition of land for conversion to nonagricultural purposes, land acquired by devise or descent, and land acquired through collection of debts or enforcement of liens or mortgages. Acreage restrictions allow foreign investment but place a premium on having an effective method of discovering and preventing multiple acquisition by the same individuals through the use of various investment vehicles. Time restrictions generally do not apply to voluntary acquisition of the land by foreign investors but are associated with involuntary acquisitions. Some states require the disclosure of information concerning the land acquired and the investors.



Currently, about one-half of the states restrict agricultural land acquisition by aliens. The number is approximate because legislative efforts to legislate in this area have been swift in recent years and continue during the 2023 session in several states. The states with the most restrictive laws are IL, IN, IA, KY, MN, MO, NE, ND, OK, SD and WI. Approximately 13 other states have minor restrictions on foreign ownership of agricultural land.

Recently, the issue of restricting foreign investment in and/or ownership of agricultural land has been raised in Alabama, Arkansas, California, Florida, Indiana, Mississippi, Missouri, Montana, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. Each of these states have proposed, or plan to propose, legislation restricting foreign ownership and/or investment in agricultural land to varying degrees. Several high-profile events have spurred this renewed interest including a Chinese-owned company acquiring over 130,000 acres near an Air Force base in Texas and a 300-acre purchase by another Chinese company near a different Air Force base in North Dakota. Also, the very recent and slow “fly-over” of a Chinese spy balloon from Alaska to South Carolina, mysterious damages to many food processing facilities, pipelines and rail transportation have contributed to the growing interest in national security and restrictions on ownership of U.S. farm and rangeland by known adversaries.

The following is a brief summary of what some of the other states have proposed recently:

Colorado HB 23-1152

- Prohibits, starting on January 1, 2024, a nonresident foreign citizen, entity, or government of the People’s Republic of China, the Russian Federation or any country determined by the US secretary of state to be a state sponsor of terrorism from acquiring a controlling ownership share in ag land, mineral rights, or water rights in the state.
- A covered foreign person who acquires a controlling ownership share in a property interest in the state prior to January 1, 2024, may continue to own the property interest but not acquire controlling ownership in any additional property interests.
- A covered foreign person must register with the secretary of state within 60 days of acquiring ownership in property interests.
- If the state attorney general has reason to believe a covered foreign person has not complied with the law, the attorney general must bring a civil action against the covered person. If the court finds the covered foreign person has violated the prohibition the judgment will revert the property interest to the state.

Illinois HB 1267

- Would bar the purchase of public or private real estate by noncitizens for five years after the effective date.



- A “noncitizen” includes an foreign government, entity, corporation, partnership, or other association created under the laws of a foreign country and beneficially owned by a national of that foreign country

New Jersey A5120

- A foreign government or person owning or holding interest in ag land shall sell or convey the ownership within 5 years of the effective date of the Act.
- Ag land acquired by a foreign government or person shall be sold or conveyed within two years after title to the land is transferred thereto. Upon such conveyance, a deed of easement shall be attached to the land requiring it to remain devoted to ag use.
- The land conveyed should not be conveyed to a foreign person or government.

North Dakota SB 2371

- The bill gives counties and municipalities the power to prohibit local development by a foreign adversary.
- County commissions, city commissions, or city council may decide not to authorize a development agreement with a foreign adversary whether individual or government.

Oklahoma SB 212

- No person who is not a US citizen shall acquire title to land either directly through a business entity or trust.
- Exempt is any business entity that has legally operated in the U.S. for at least 20 years.
- Any deed recorded with a county clerk shall include proof that the person or entity obtaining the land is in compliance with the provision.
- No application to lands now owned by aliens so long as they are held by the present owners nor to any alien who shall take up bona fide resident of the state or any lawfully recognized business entity.
- It is the duty of the attorney general or district attorney to institute a suit on behalf of the state if they have reason to believe any lands are being held contrary to the Act.
- Creates a citizen land ownership unit to enforce the provisions of the act within the office of the attorney general.

Texas SB 711

- Prohibited foreign actors may not acquire title to real property without written notification to the seller.



- A “prohibited foreign actor” is an alien, business, government, or an agent from a country identified as a country that poses a risk to the national security of the U.S. in the most recent Annual Threat Assessment issued by the Director of National Intelligence.
- A buyer required to provide written notification shall do so as soon as possible but not later than 10 days before the closing of the property.
- Upon receipt of notification, seller may choose to proceed or revoke sale.
- Court shall dismiss any action brought against seller for revoking a sale.

Current Kansas Law

The Kansas restriction on foreign ownership, to the extent there is one, is contained in the Kansas Constitution and in the anti-corporate farming law. Section 17 of the Kansas Bill of Rights states as follows:

“No distinction shall ever be made between citizens of the state of Kansas and the citizens of other states and territories of the United States in reference to the purchase, enjoyment or descent of property. The rights of aliens in reference to the purchase, enjoyment or descent of property may be regulated by law.”

The Kansas Bill of Rights, as noted, gives the legislature the power to regulate foreign ownership of “property” – in terms of its, purchase, enjoyments or descent. One manner that the legislature has chosen to do that is by means of the anti-corporate farming law. *Kan. Stat. Ann. §17-5904*. This provision states that, “no corporation, trust, LLC, limited partnership or corporate partnership other than a family farm corporation ... shall either directly or indirectly, own, acquire or otherwise obtain or lease any agricultural land in this state. However, there are many situations to which the restriction does not apply (in addition to not applying to a family farm corporation).

The law was later amended to provide that production contracts “shall not be construed to mean the ownership, acquisition, obtainment, or lease either directly or indirectly on any ag land.”

A violation of the anti-corporate farming law subjects the violator to a civil penalty of not more than \$50,000 and the violator must divest itself of all land acquired in violation of the anti-corporate farming law. Violations may be pursued by either the state attorney general or by a county attorney.

Kan. Stat. Ann. §17-7505 contains a reporting requirement. It provides as follows:

1. Every foreign corporation doing business in this state shall make a written business entity information report to the secretary of state.
2. The report shall be made on a form prescribed by the secretary of state.
3. The report shall contain:
 1. The name and the state or country of incorporation.
 2. The location of its principal office
 3. The names and addresses of the officers and board of directors.
 4. The number of shares of capital stock issued.



5. The nature of the business
6. If the corporation holds more than 50% equity in ownership in any other business registered with the secretary of state, the name and ID number of that other business.
4. Corporations subject to the provisions of this section that holds ag land within this state shall show the following additional information.
 1. The acreage and location of ag land this state owned or leased by or to the corporation.
 2. The purposes of the ownership or lease
 3. The value of the ag and non-ag assets owned and controlled by the corporate within and without the state of Kansas and where situated.
 4. The number of stockholders of the corporation
 5. The number of acres owned and leased by the corporation and to the corporation.
 6. The number of acres of ag land held and reported in each category under paragraph 5
 7. Whether any of the ag land was acquired after July 1, 1981
5. The official title of the person signing the report must be designated.

Note: Presently, 2.3 percent of all privately held agricultural land in Kansas is held by a foreign individual or entity. “Held” means anything from outright title ownership to any interest in the land other than a security interest. But, “held” does not include leaseholds of less than 10 years’ duration, contingent future interests, non-contingent future interests that don’t become possessory upon termination of the present estate, non-agricultural easements and rights-of-way, and interests solely in mineral rights. The percentage of foreign “holdings” includes land under long-term wind energy leases where the lessee is a foreign-owned entity.

Current Kansas Proposals

House Bill 2397

This bill, which would be effective, July 1, 2023, specifies that no person who is owned by or controlled by or subject to the jurisdiction of a “foreign adversary” shall purchase, acquire by grant, devise or descent or otherwise obtain ownership of any interest in real property. This is defined as an individual or entity acting as an agent, representative or employee, or anyone acting at the order, request or under the direction or control of a foreign adversary or whose activities are directly or indirectly under the supervision, control, direction or are being financed or otherwise subsidized primarily by a foreign adversary. An exception exists for a person that has acquired dual citizenship with the U.S. and a foreign adversary.

Note: While the bill does not limit the restriction on foreign ownership to agricultural land, it doesn’t prevent residential home ownership, for example, by a person who has dual residency in the U.S. and a foreign adversary or a “nation state” that is controlled by a foreign adversary. This is a reasonable approach to ensuring that home ownership is by a person that is not disloyal to the U.S. given the time necessary to become a dual citizen and the associated vetting that is done during the process to achieve dual citizenship. Of course, as noted below, there are very few countries that are on the



foreign adversary list. In essence, home ownership by a non-U.S. citizen (even one that has dual citizenship with a foreign adversary) is permissible so long as the person is not a foreign agent.

“Foreign adversary” is defined by tying it to a federal regulation that provides a list set forth in 15 C.F. R Sec. 7.4 as that list exists on July 1, 2023. Currently on that list are: (1) the People's Republic of China, including the Hong Kong Special Administrative Region (China); (2) the Republic of Cuba (Cuba); (3) the Islamic Republic of Iran (Iran); (4) the Democratic People's Republic of Korea (North Korea); (5) the Russian Federation (Russia); and (6) Venezuelan politician Nicolás Maduro (Maduro Regime). The bill vests power in the Secretary of Agriculture to modify the list, but only if the federal government amends the list after July 1, 2023.

The provision does not apply to land acquired by the collection of debts, foreclosure pursuant to a forfeiture of a contract for deed, and any procedure for the enforcement of a lien or claim on the land.

Land subject to the provision, is to be sold or otherwise disposed of within two years after title is transferred, and a covered “person” who inherits real property on or after July 1, 2023, has 12 months to divest of property once the violation is known. Other subject land transaction may be forfeited.

The Kansas Attorney General has the power to enforce the provisions of the bill.

Senate Bill 100

Senate Bill 100 has also been proposed this session in the Kansas Senate. This bill seeks to restrict a “foreign national, foreign business entity, and foreign government” from acquiring, purchasing, or holding any interest in land within the state. A “foreign business entity” is defined by ownership. Ownership of land in Kansas is barred under the provision if the majority ownership of an entity is held by a foreign national (non-U.S. citizen) or foreign government (any non-U.S. nation); or foreign business entity. The provision is prospective only and does not apply to any real property purchased or otherwise acquired before July 1, 2023. Also, the provisions of the bill do not apply to real estate located wholly in Johnson, Sedgwick, Shawnee or Wyandotte counties.

Enforcement rests with the Kansas Attorney General and a violation of the provisions of the bill is deemed to be a level 10 nonperson felony. The Attorney General may investigate any transaction believed to violate the bill. Further. The bill specifies that land held in violation of the restriction is subject to forfeiture, with the state then taking possession of the land.

General Comments on the Kansas Proposals

The bills take different approaches to address the issue. The House Bill is more specifically tailored to restricting ownership by a “foreign adversary” as the federal government defines that term. The Senate Bill focuses on percentage ownership by a “foreign business entity” defined as ownership by persons that are not U.S. citizens as well as entities that are majority owned by non-U.S. citizens.

Over the past 30 years, the Kansas legislature has encouraged the use of “renewable” forms of energy. Often, the companies heavily involved in such energy production are foreign-owned. While the House Bill would not impact current or future development of projects on agricultural land (because the companies involved are not presently on the “foreign adversary” list), the Senate Bill



appears to present some issues by its percentage ownership requirements and defining “foreign” as non-U.S. citizen.

Conclusion

Whichever approach the Kansas legislature takes on this issue, what should remain in focus is that the whole matter involves national security and control of the food supply. Neither of those are political issues. That’s true in Kansas and nationwide. Foreign ownership of agricultural land has been an issue from the time of the founding of the U.S. It’s an even greater concern today.

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