NATIONAL FAMILY FARM COALITION

The Agricultural Foreign Investment Disclosure Act (AFIDA)

Introduction

Over four hundred million acres of U.S. farmland will change hands in the next decade. The trends of this land transition are already cause for concern: wealthy buyers are purchasing large tracts of land in high-value transactions that are unattainable for independent farmers, including beginning farmers and farmers of color. Average farmland prices have nearly doubled from 2005 to 2019, with even greater increases in some states.

Additionally, since the 2008 financial crisis, a new kind of buyer has entered the farmland market: Wall Street investors, pension funds, and other financiers looking for a safe place to park their money. These entities are buying large tracts of land both in the U.S. and abroad, in transactions that effectively amount to land grabs. In many cases, the buyers are multinational corporations or firms, based in the U.S. or abroad.

Foreign investments in the U.S. came to the attention of Congress in the early 1970s, as an increasing number of offshore entities – including individuals, governments, or corporations – purchased agricultural land in the U.S. Local and federal governments wanted more information about these sales, prompted by economic and national security concerns and likely stoked by xenophobic fears. Policymakers soon found that there was no reliable source of information on these transactions. This memo discusses a decade of efforts to collect this data and the ongoing challenges to transparency in foreign farmland investments.

Initial Reporting Laws

Citing inadequate reporting mechanisms for foreign investments,[1] Representative John Culver (D-Iowa) sponsored the Foreign Investment Study Act (FISA) of 1974 to collect and compile

[1] 120 Cong. Rec. 8596 at 8621 (1974) (observing an "inadequacy of existing information" given the outdated Department of Commerce benchmark surveys, and claiming that "given the existing state of information, we have no concrete body of evidence upon which our Government can properly base an informed judgment on this issue.")

reliable data.[2] The law ordered the Secretaries of Treasury and Commerce to consult with representatives of agriculture and "analyze the effects of foreign direct investment on United States Agriculture," as well as on other sectors including energy and the environment.[3]

In 1976, the International Investment Survey Act (IISA) was passed, requiring research on "specific aspects of international investment which may have significant implications for the economic welfare and national security of the United States."[4] The law mandates benchmark surveys every five years,[5] and that research for the surveys be released to the public.[6] IISA also required a feasibility study for a system to monitor foreign investment in farmland.[7] (Before this study was completed, Congress passed the Agricultural Foreign Investment Disclosure Act, see below.[8])

Two years later, a Government Accountability Office (GAO) report on foreign investment in farmland reiterated the need for accurate data.[9] This report found that state laws did not significantly inhibit foreign ownership and that "reliable data was difficult to obtain" on farmland investment. GAO found that of all possible alternatives to address the ongoing data gap, a federal registration system "may be the simplest and best means for obtaining nationwide data."[10]

Agricultural Foreign Investment Disclosure Act

The Agricultural Foreign Investment Disclosure Act (AFIDA) was proposed as a solution to the problems discussed in the GAO report.[11] The bill was not an attempt to mitigate foreign

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[2] Foreign Investment Study Act of 1974, Pub.L. No. 93-479, 88 Stat. 1450.

[3] Pub. L. 93–479 §§ 4(2)-5(6) (1974).

[4] International Investment Survey Act of 1976, 22 USC §3101 et al.

[5] 22 U.S.C. §§ 3103(b) & (c) (subsection (b) states "With respect to the United States direct investment abroad and foreign direct investment in the United States [...]. Subsection (c) refers to "foreign portfolio investment in the United States"

[6] 22 U.S.C. §3103(a)(4) (subsection (b) directs the president to conduct benchmark surveys every 5 years of "foreign direct investment" where direct investment "means the ownership or control, directly or indirectly, by one person of 10 per centum or more of the voting securities; subsection (c) requires benchmark studies of "foreign portfolio investment in the United States," which includes all non-direct investments).

[7] 22 U.S.C. §3103(d)

[8] Gary E. Herzlich, *Monitoring Foreign Investment in United States Real Estate*, 2 B.U.INT'l L. J. 29, 41 (1983).

[9] U.S. Gov't Accountability Office, Foreign Ownership of U.S. Farmland: Much Concern, Little Data. CED-78-132; B-114824 (June 1978).

[10] *Id.*

[11] 124 Cong. Rec. 31615 (1978)

investment in farmland, but to gather information to allow Congress and the public to make an informed decision on the matter.[12] Proponents of the bill pointed out that the decennial U.S. Department of Agriculture (USDA) Census was not effective for collecting farmland investment information, while the foreign investment surveys conducted by the Commerce Department under the IISA failed "to isolate agricultural land for special study or specifically analyze the impact of foreign investment on farmland."[13]

Supporters of AFIDA also emphasized a desire to determine the impact of foreign investment on family farms and rural cities[14] – due in part to media attention that highlighted the largest foreign purchases of farmland.[15] In testimony for the bill, California Congressman John Krebs said, "the effect on the family farmer can be disastrous, reducing the ability of young farmers to purchase land and preventing marginal farmers from expanding in order to succeed in their present operations."[16]

The Agriculture Foreign Investment Act (AFIDA) was meant as a federal tool to track foreign investment in farmland specifically, improving upon existing USDA Census and Commerce Department information. This new information would provide important insight on the impact of foreign investment on US family farmers.

Purpose

Congress passed AFIDA in 1978.[17] The Act required that "any foreign person who acquires or transfers any interest, other than a security interest, in agricultural land shall submit a report to the Secretary of Agriculture not later than 90 days after the date of such acquisition or transfer."[18] USDA is to publish an annual report on foreign

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[12] 124 Cong. Rec. 31615 (1978) ("Our bill is not an attempt to cut off foreign investment in farmland as we do not yet know the true impact of this type of investment. It is simply an attempt to gather the necessary information to make this determination and provides us with the necessary enforcement powers to insure that all relevant information is reported") (statement by Rep. Don Clauson (R-Cal))

[13] Id. at 31678 (statement by John Krebs (D-Cal)).

[14] *See* statement of Rep. Thomas Foley (D-WA) introducing AFIDA (Mr. Speaker, I move to suspend the rules and pass the bill (H.R.13356) to require foreign persons who acquire, transfer, or hold interests in agricultural land to report such transactions and holdings to the Secretary of Agriculture and to direct the Secretary to analyze information contained in such reports and determine the effects such transactions and holdings have, particularly on family farms and rural communities, and for other purposes, as amended." (emphasis added))

[15] *See* 124 Cong. Rec., *supra* Note 125 ("Media accounts have high-lighted a number of purchases of large tracts of land by foreign investor") (Statement by Rep. Thomas Foley).

[16] *See* Statement by John Krebs, *supra* note 127.

[17] Pub. L. No. 95-460, 92 Stat. 1263 (1976) (codified at 7 U.S.C. §§ 3501-3508).

[18] 7 U.S.C.A. § 3501 et al. (1976).

land holdings, and pass along specific information to each state. The purpose of the bill is to collect data and mandate reports that allow Congress to create a substantive solution regarding foreign investment in American farmland.[19]

AFIDA 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."[20] Under AFIDA, a "person" is "any legal entity" including a corporation.[21] The Secretary is charged with determining when "a significant interest or substantial control is directly or indirectly held" by a foreign person, individual, government, or combination thereof."[22] Current regulations state that a foreign person or group of persons has significant interest/substantial control when they own 10 percent or more interest in the farmland.[23] The voluntary self-reporting that is required by "foreign persons" is enforced with civil penalties for foreign investors who fail to disclose a transaction involving agricultural land.[24]

AFIDA Results and Challenges

However, in practice, the self-reporting and the lack of verification by USDA means the AFIDA lacks teeth.

Just one year after AFIDA was enacted, a GAO report exposed its shortcomings:[25] only half of

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[19] See Foreign Investment in U.S. Real Estate: Federal and State Laws Affecting the Foreign Investor - An Update, 16 REAL PROP. PROB & TR. J. 465 (1981)

[20] 7 U.S.C. §3508

[21] *Id.*

[22] *Id.*

[23] 7 C.F.R. § 781.2(k)(l)-(3) (2018).

[24] Pub. L. No. 95-460, 92 Stat. 1263 (1976) (codified at 7 U.S.C. §§ 3501-3508).

[25] U.S. Gov't Accountability Office, Implementation of the Agricultural Foreign Investment Disclosure Act of 1978, B-196874 (1979).

foreign entities were reporting their farmland transactions, and the majority reportedly did not know the law existed.[26] The report observed that a lack of awareness, lack of desire to be identified, and a lack of resources at the USDA all contributed to the act's weak impact after a year.[27]

The GAO report made 15 observations of problems with AFIDA implementation. The first three are telling:
"(1) foreign owners with relatively small tracts of land appear most likely to have been unaware of the act," (2) if USDA does not continue to publicize the act, new foreign investors may not be aware of the reporting requirements, (3) it will be unfeasible to identify a foreign investor who does not want to be identified and who does not file voluntarily"[28]

Offshore Farmland Investment Trends

Per AFIDA, the USDA Farm Service Agency (FSA) periodically publishes reports that analyze foreign holdings in agricultural land. The reports often are delayed due to late reporting and the immense amount of information that must be communicated from local and state agencies to FSA.[29] Nonetheless, the FSA website contains reports from almost every year of the past two decades.[30] The trends found in these reports can be briefly summarized as follows.

Between 1993 and 2003, there was "a relatively small increase, if any, in the numbers" of reported foreign investment in cropland, pasture, and other agricultural land,[31] with foreign

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[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] U.S. Dept. of Agr'l, Farm Service Agency: Foreign Holdings of U.S. Agricultural Land at 3 (2018).

[30] https://www.fsa.usda.gov/programs-and-services/economic-and-policy-analysis/afida/index

[31] U.S. Dept. of Agr'l, Foreign Ownership of U.S. Agricultural Land (2004)

AFIDA reports published by the USDA shows consistent increases in foreign investment in agricultural land, especially in the last 20 years. From 2000 to 2019, foreign cropland ownership jumped from 2.4 to 9.1 million acres, a 279 percent increase.

Since AFIDA relies on self-reporting, the actual number of foreign-owned cropland is likely even higher.

investment holding steady at around one percent.[32] From 2000 to 2010, total foreign-owned agricultural land grew from one to 1.9 percent. In that time, foreign cropland ownership nearly doubled from 2.4 million to 4.1 million acres, and pastureland ownership increased from 4 million to 5.5 million acres. [33]

The total foreign holdings by 2016 were about 2.2 percent of total agricultural land, with timber and forestland accounting for the greatest increase.[34] Foreign cropland holdings increased in 2016 to 5.6 million acres, while pastureland holdings increased to 6 million acres.[35]

Finally, the most recent report (2019) shows that the total percentage of U.S. agricultural land owned by foreign investors has increased to 2.7 percent.[36] Cropland holdings jumped from about 6 million in 2017 to 9.1 million acres in 2019.

Current legislation before Congress would amend AFIDA to "increase oversight and enforcement with respect to foreign investment in agricultural lands within the United States."[37] The proposed update would require that USDA use its resources, including AFIDA reporting, to maintain a database of all foreign-owned agricultural land that is to be updated every 90 days.

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32 *Id.*

33 U.S. Dept. of Agr'l, FARM SERVICE AGENCY: FOREIGN HOLDINGS OF U.S. AGRICULTURAL LAND AT 6 (2010).

34 *Id.*

35 U.S. Dept. of Agr'l, FARM SERVICE AGENCY: FOREIGN HOLDINGS OF U.S. AGRICULTURAL LAND AT 6 (2016).

36 U.S. Dept. of Agr'l, FARM SERVICE AGENCY: FOREIGN HOLDINGS OF U.S. AGRICULTURAL LAND AT 5 (2019).

37 H.R. 8522, 116th CONGRESS, 2nd Session (2020) (introduced by Rep. Mark Pocan (D-WI)).

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