

THIS CAN BE YOUR LAND, BUT THIS LAND IS MY
LAND: HOW THE UNITED STATES FEDERAL
GOVERNMENT PLANS TO ADDRESS FOREIGN
ENTITY OWNERSHIP OF AMERICAN
AGRICULTURAL LAND

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ABSTRACT

The United States has long had some of the most bountiful and plentiful agricultural land for farming and ranching, which constitutes a significant portion of its economy and international trade. However, what happens when the livestock and crops grown on American soil aren't owned by Americans? This Note explores the existing implications of increasing levels of foreign ownership of U.S. agricultural land. The possible concerns include supply chain shortages, poor resource conservation, and potential threats to national security. Yet, the federal government doesn't have the full picture due to unreliable self-reporting of foreign entity ownership of land. The Farmland Security Act of 2023 aims to amend the American Foreign Investment Disclosure Act of 1978 to improve the information the federal government receives to address its concerns more effectively.

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I. INTRODUCTION

The United States has seen over a decade of steadily rising levels of foreign ownership of its agricultural land.¹ This is true for America's pastures, and especially true for its forests and croplands.² This agricultural land is owned by entities from a handful of countries, ranging from bordering nations like Canada, to American allies throughout Europe, and even potential American adversaries such as the People's Republic of China (China).³ These growing levels of ownership have sparked a variety of concerns on both national and local levels of government, which will be expanded on throughout this Note.⁴

Despite more recent coverage of this topic, both governmental and business interests have desired to monitor foreign agricultural land holdings for decades.⁵ The first major development in this field was brought about by Congress with the passage of the Agricultural Foreign Investment Disclosure Act of 1978 (AFIDA).⁶ This legislation's main thrust was to mandate that particular foreign persons disclose any interests in United States farmland to USDA.⁷ Several states have passed laws which correspond with AFIDA, requiring foreign entities to communicate their agricultural land interests within that particular state's boundaries.⁸ Even with the additional regulations created by some states, AFIDA still serves as the nation's principal source of statistical data pertaining to foreign ownership and investments in United States agricultural land.⁹ Despite the successes of AFIDA and USDA in collecting this data, there is clearly a demand for some additional regulatory muscle due to the recent passage of the Farmland

1. FARM SERV. AGENCY, U.S. DEP'T OF AGRIC., FOREIGN HOLDINGS OF U.S. AGRICULTURAL LAND 5 (2022), https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/EPAS/PDF/2021_afida_annual_report_through_12_31_2021.pdf [<https://perma.cc/GX4A-DTHA>].

2. *Id.*

3. *Id.* at 4.

4. Jamie Lutz & Caitlin Welsh, *Foreign Purchases of U.S. Agricultural Land: Facts, Figures, and an Assessment of Real Threats*, CTR. FOR STRATEGIC AND INT'L STUD. (Sept. 8, 2021), <https://www.csis.org/analysis/foreign-purchases-us-agricultural-land-facts-figures-and-assessment-real-threats> [<https://perma.cc/JF92-9XZR>].

5. *Answering to AFIDA: Reporting Requirements of Foreign Agricultural Land Investments*, NAT'L AGRIC. L. CTR. (Nov. 15, 2023), <https://nationalaglawcenter.org/answering-to-afida-reporting-requirements-of-foreign-agricultural-land-investments/> [<https://perma.cc/XCY4-5BY3>].

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

Security Act of 2022, and the potential passage of the Farmland Security Act of 2023, both amendments to AFIDA.¹⁰ This Note and the acts it analyzes considers issues large and small, old and new. From a stable domestic food supply to national security, from ensuring jobs for future American farmers to conserving critical natural resources—all areas this legislation addresses will be viewed.¹¹ Before specifically explaining how these acts strive to guarantee transparency, it would be proper to delve into the various concerns facing Americans across the country.

II. WHY SO SERIOUS?

In the late 1970s, prior to the passage of AFIDA, the main issue Congress had with foreign-held agricultural land was the apparent strain it had on domestic family farms.¹² Commentary on a House Report from the Committee on Agriculture explained:

[M]any members of Congress contend that foreign investments in agricultural land are harmful because it does not offer the same economic-stimulating and job-producing benefits as foreign investments in the U.S. business or industry sectors. The House Report claimed that farmland as an investment rather than a means of production threatens “the continued viability of family farms” because these investments escalate land prices, which increases property taxes and makes it difficult for beginning and existing producers to purchase or expand their farming operations.¹³

In spite of Congress’s aforementioned worries, the House Report eventually determined that “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.’”¹⁴ This lack of data was the main facilitator behind the enactment of AFIDA in 1978, and Congress has continued monitoring foreign investments in American agricultural land ever since.¹⁵

10. Tammy Baldwin & Chuck Grassley, *The Farmland Security Act of 2023* (Apr. 21, 2024, 11:41 PM) [hereinafter Baldwin & Grassley (2023)], https://www.grassley.senate.gov/imo/media/doc/farmland_security_act_of_2023_one_pager.pdf [https://perma.cc/PY7N-PGBY].

11. *See id.*

12. *Answering to AFIDA, supra* note 5.

13. *Id.*

14. *Id.*

15. *Id.*

A. Don't Turn Your Back on the Family

As stated, Congress's original worry back in the 1970s was foreign investment hurting and replacing domestic family farms.¹⁶ While new concerns have arose regarding foreign ownership, the potential negative impact on family farm operations has remained near the top of the list.¹⁷ However, when contemplating the threat family farms may face from foreign entities, the focus has shifted much more to the aging of the industry and what that means for the future.¹⁸ According to the National Agricultural Statistics Service, close to 100 million acres of United States farmland will experience a change in ownership in the next few years, and this process has already begun.¹⁹

With farm owners and operators aging and immense amounts of agricultural land expected to change hands, the natural presumption in both Washington D.C. and the industry as a whole is that many foreign investors will take advantage of these imminent opportunities.²⁰ This apprehension sounds similar to that which caused Congress to enact AFIDA in 1978, simply to help stabilize land prices and keep more American jobs domestic.²¹ However, as time goes on, and with the assistance of a global pandemic, many have realized that the rising levels of foreign ownership has become of much greater importance than just the fear of Ma and Pa's farm getting new management.²²

B. Farms Keep Us Free

During a question-and-answer session in January of 2023, Senator Chuck Grassley cited the huge potential swing in farmland ownership as a warning sign warranting governmental action, stating "nearly 100 million of these acres are expected to change ownership in the next decade. That raises a red flag for Congress to act now. Without a doubt, foreign ownership of U.S. farmland poses

16. *Id.*

17. Baldwin & Grassley (2023), *supra* note 10.

18. *Id.*

19. SOPHIE ACKOFF ET AL., NAT'L YOUNG FARMERS COAL., BUILDING A FUTURE WITH FARMERS II: RESULTS AND RECOMMENDATIONS FROM THE NATIONAL YOUNG FARMER SURVEY 7 (2017), https://www.youngfarmers.org/wp-content/uploads/2019/03/NYFC-Report-2017_LoRes_Revised.pdf [<https://perma.cc/LYQ2-UPGY>].

20. Baldwin & Grassley (2023), *supra* note 10.

21. *Answering to AFIDA*, *supra* note 5.

22. Ally J. Levine et al., *A Meaty Problem*, REUTERS (May 11, 2020), <https://www.reuters.com/graphics/HEALTH-CORONAVIRUS/USA-MEATPACKING/qmypybnxxbvr/index.html> [<https://perma.cc/8C49-CFQQ>].

a consequential risk to food security. And food security is national security.”²³ But how exactly does foreign ownership of United States farmland threaten the domestic food supply? We saw the effects of this threat during the supply-chain squeezes of the COVID-19 pandemic.²⁴ Some meat and poultry producers increased exports to foreign nations where demand had surged, such as China, while grocery store shelves and aisles in the United States were left bare.²⁵

Some of the shortage can be attributed to international trade deals, signed off on by heads of government, such as the President.²⁶ Just before the COVID-19 pandemic hit the United States in full force, President Donald Trump signed a trade deal with China which guaranteed billions in increased purchases of United States farm products to alleviate the trade war that had been going on between the two nations for most of Trump’s presidency at that point.²⁷ While this trade deal seemed like a good idea at the time, many could not predict the massive closure of restaurants and slaughterhouses that would occur as a result of COVID-19.²⁸ At a moment when Americans had the highest demand for meat and poultry in a lifetime; much of the meat that was raised, slaughtered, and processed in the United States was now guaranteed as part of China’s food supply.²⁹ It is admitted that very few had predicted the negative effect on the United States’ supply chain brought by the COVID-19 pandemic.³⁰ A silver-lining to this issue is the fact that the final decision to export food overseas was an American decision, so at least a lesson can be learned and a different course of action can be taken in the future.³¹ But what happens when the United States and its companies lose their power to make the final decision?

While many producers during the supply-chain problems of 2020 were beholden to foreign powers to sell them their agricultural products, there were also foreign-owned companies operating in the United States that did not have such

23. *Q&A: Foreign Ownership of U.S. Farmland*, CHUCK GRASSLEY U.S. SENATOR FOR IOWA (Jan. 13, 2023), <https://www.grassley.senate.gov/news/news-releases/01/13/2023/qanda-foreign-ownership-of-us-farmland#:~:text=Nearly%20half%20of%20U.S.%20farmland,consequential%20risk%20to%20food%20security> [https://perma.cc/EGH2-LV68].

24. Levine et al., *supra* note 22.

25. *Id.*

26. *Id.*

27. *See id.*

28. *Id.*

29. *See id.*

30. *Id.*

31. *See id.*

contractual obligations, but still decided to sell their farm products abroad.³² Some companies exemplified this better than others:

Total export sales for [United States] chicken supplier Pilgrim's Pride Corp, which is mostly owned by Brazilian-owned JBS USA, jumped 24% in the first quarter, with China accounting for about 20% of sales The disruptions mean [United States] consumers could see 30% less meat in supermarkets by the end of May, at prices 20% higher than last year.³³

Americans have seen how foreign investment and entanglement can affect their lives and grocery stores firsthand, thus providing further reason to monitor foreign land ownership more closely.³⁴

C. *Someone Drained the Waterhole!*

It has been fairly established that there are concerns over foreign entities sending farm products grown in the United States abroad, but this concern grows even more when this process consumes the domestic resources needed to make these farm products.³⁵ The chief example of this happening is when foreign-owned companies operate in regions throughout the United States where there is water scarcity.³⁶ Companies such as Saudi-Arabian-owned Fondomente operate in states like Arizona, where they grow alfalfa to then be shipped overseas and be fed to dairy cows.³⁷ The problem with this land use is that the wells used to irrigate these crops are actively running dry, upsetting nearby residents who rely on the water for their personal use.³⁸ Another instance of water use upsetting local residents is in Wenden, Arizona.³⁹ In Wenden, the United Arab Emirates-based company Al Dahra has been farming alfalfa on about 3,000 acres of land, and neighbors have

32. *Id.*

33. *Id.*

34. *Id.*

35. Lutz & Welsh, *supra* note 4.

36. *Id.*

37. Rob O'Dell & Ian James, *These 7 Industrial Farm Operations are Draining Arizona's Aquifers, and No One Knows Exactly How Much They're Taking*, AZCENTRAL: THE REPUBLIC (Dec. 20, 2019, 1:57 PM), <https://www.azcentral.com/in-depth/news/local/arizona-environment/2019/12/05/biggest-water-users-arizona-farms-keep-drilling-deeper/3937582002/> [<https://perma.cc/XY2Y-HSE8>].

38. *Id.*

39. Anita Snow & Thomas Machowicz, *Arizona Alfalfa Farmers Clash with Foreign Firms Over Water Use*, PBS (Nov. 28, 2023, 10:44 AM), <https://www.pbs.org/newshour/world/arizona-alfalfa-farmers-clash-with-foreign-firms-over-water-use> [<https://perma.cc/B39Y-VJKS>].

been complaining that the water wells in their backyards are drying up.⁴⁰ This irrigation issue has already ran its full course in multiple Middle Eastern nations with arid climates, prompting them to set up shop where water is more accessible.⁴¹ In fact, in 2018 the growing of alfalfa was banned in Saudi Arabia due to the high volume of water the plant requires compared to the exhausted water sources in the country.⁴²

In all fairness, the trend in southwestern agriculture of using dwindling water supplies is true for nearly all domestic farming operations, as well as the foreign ones.⁴³ Even so, locals are undoubtedly more upset at foreign companies who consume their water supply and then ship the farm products out of country, compared to the domestic producers.⁴⁴ Surely, this problem will only grow of greater importance as time goes on and sources of critical natural resources like water continue to shrink.

D. Beware the Second Red Scare

Up to this point, every mentioned reason the United States and its people have had to be worried about foreign-controlled agricultural assets has been directly connected to agriculture itself and our interconnected food supply. However, another area of serious relevance does not pertain to American food security, but American national defense.⁴⁵ While it can sometimes seem like China and the United States have a love-hate relationship, the last several years have shown that China has taken on a more adversarial role against the United States in multiple spheres of influence.⁴⁶ While China can often appear to be America's biggest competitor on the world stage, they are far from the biggest owner of land

40. *Id.*

41. Ella Nilsen, *Wells Are Running Dry in Drought-Weary Southwest as Foreign-Owned Farms Guzzle Water to Feed Cattle Overseas*, CNN (Nov. 27, 2022, 3:02 AM), <https://www.cnn.com/2022/11/05/us/arizona-water-foreign-owned-farms-climate/index.html> [<https://perma.cc/NE53-WFX9>].

42. *Id.*

43. See O'Dell & James, *supra* note 37.

44. *Id.*

45. Ximena Bustillo & Connie Hanzhang Jin, *China Owns 380,000 Acres of Land in the U.S. Here's Where*, NPR (Jun. 26, 2023, 5:01 AM), <https://www.npr.org/2023/06/26/1184053690/chinese-owned-farmland-united-states> [<https://perma.cc/GFU9-8T79>].

46. *U.S. – China Relations*, U.S. GOV. ACCOUNTABILITY OFF. (Apr. 21, 2024, 11:55 PM), <https://www.gao.gov/u.s.-china-relations#:~:text=In%20recent%20years%2C%20tensions%20between,challenges%20to%20the%20U.S.%20military> [<https://perma.cc/R57-LCT2>].

holdings, especially in comparison to other countries that own American agricultural land.⁴⁷ In fact, Chinese investors, firms, and entities own a little more than 383,934 acres of United States land, making it 18th on the list of countries that have the biggest land holdings.⁴⁸ Put another way, Chinese land holdings represent less than 1% of farmland that has been purchased by a foreign entity in any state in the United States.⁴⁹ Despite the fact that Chinese interests represent a very miniscule fraction of foreign owned land, there are some glaring differences to policymakers and military leaders in the United States between land owned by Chinese firms, and land held by most other countries.⁵⁰

Autonomous control of land ownership is one key difference between United States and Chinese firms. Chinese-owned and operated firms fear losing their autonomy to the Chinese Communist Party, essentially becoming companies and tools of the state at a moment's notice.⁵¹ This fear has been expressed by some of America's highest leaders, including Montana Senator Jon Tester.⁵² In an interview, Tester explained, “[a]ny company and any individual living in China that comes and tries to buy land can be controlled by the Chinese Communist Party because they have that kind of control over their people.”⁵³ According to data from USDA, as of 2021, no foreign government directly owned any agricultural land in the United States.⁵⁴ However, the possibility that practically any entity based in China could lose its autonomy as solely a business interest puts fear into those who highly value American sovereignty over its agricultural land.⁵⁵

The Chinese government has already created mandatory policies to prod Chinese firms into adopting amendments that allow Chinese Communist Party involvement in the company's operations.⁵⁶ Another tool the Chinese government uses to influence its domestically based companies is their Corporate Social Credit System.⁵⁷ This system aggregates data on some of the technical factors of the

47. Bustillo & Hanzhang Jin, *supra* note 45.

48. *Id.*

49. *Id.*

50. *Id.*

51. *See id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. Scott Kennedy & Ilaria Mazzocco, *Can Chinese Firms Be Truly Private?*, BIG DATA CHINA (Feb. 7, 2023), <https://bigdatachina.csis.org/can-chinese-firms-be-truly-private/> [<https://perma.cc/EG7B-5QY6>].

57. *Id.*

company, such as its financial health, taxes, and regulatory compliance.⁵⁸ While these metrics seem quite normal, a firm's Corporate Social Credit Score is also influenced by a social responsibility metric, which takes into account the company's charitable donations and any awards given to it by the communist party or central government of China.⁵⁹ The leverage the Chinese government possesses here becomes more apparent with the high correlation between a company's social responsibility score, and how well-aligned or well-connected that company is with the Chinese Communist Party.⁶⁰

A company's Corporate Social Credit Score is a lot more than just a badge of approval.⁶¹ A company's score could mean they are put on a "redlist," and given access to more attractive financing opportunities.⁶² However, a company with a poor enough score to be on the "blacklist" could be restricted from getting government approvals, face more inspections, and even be prohibited from getting credit or issuing shares of their company.⁶³ This entire system exemplifies the pressure the Chinese government can exert on its companies, along with the high level of importance their government places on these companies following party ideology, doctrine, and values.⁶⁴

The idea that the Chinese government could have nefarious or predatory aims for the United States economy is not a new one.⁶⁵ For several years now, many in the business-world, the FBI, and the Department of Justice have been aware of Chinese agents committing acts of corporate espionage.⁶⁶ Since this was discovered, the primary concern for American companies was that Chinese nationals either working in the United States, or working in American firms located in China, were stealing United States' technology, trade secrets, and other corporate information to give Chinese companies a leg-up on the competition.⁶⁷ However, this concern has now shifted from a fear of unfair competition on the

58. *Id.*

59. *Id.*

60. *Id.*

61. Lauren Yu-Hsin Lin & Curtis J. Milhaupt, *China's Corporate Social Credit System: The Dawn of Surveillance State Capitalism?*, 256 *THE CHINA Q.* 835, 836 (2023).

62. *Id.* at 838.

63. *Id.*

64. *Id.*

65. Eamon Javers, *Inside China's Spy War on American Corporations*, CNBC (June 21, 2023, 9:10 PM), <https://www.cnbc.com/2023/06/21/inside-chinas-spy-war-on-american-corporations.html> [<https://perma.cc/K69A-TCWJ>].

66. *Id.*

67. *Id.*

world market.⁶⁸ There is now the legitimate fear in the United States' intelligence community that Chinese companies stealing information and spying on United States' companies have the ultimate goal of eliminating and replacing these businesses with their own firms.⁶⁹ The fact that the Chinese government and its agents are targeting United States' industry players for elimination should be all the more concerning given the seismic shift in ownership of American agricultural land taking place.⁷⁰

Now, the possibility of Chinese or Hong Kong owned and operated firms being less than entirely truthful reporting their American holdings with United States regulators is no longer a hypothetical.⁷¹ As recent as 2021, two different Chinese entities, Brazos Highland Properties LP and Harvest Texas, were penalized for failing to report land ownership.⁷² The purchases that the companies failed to disclose had occurred more than 20 years before they were fined, pertaining to land on the United States' southern border in Texas.⁷³ For many in the United States, this confirms some of the concerns that these entities have different intentions for their operations than simply managing an above the board business.⁷⁴ Within the last decade, however, only six foreign entities were penalized for filing their holdings with USDA late, or for failing to file whatsoever.⁷⁵

The infrequency with which penalties have been assigned compared to the sheer number of foreign owned entities with land in the United States has caused multiple members of Congress and the Executive branch to fear that a far larger number of foreign firms are failing to file their holdings with USDA.⁷⁶ The desire to give USDA more authority and funding to assure compliance with the reporting of foreign companies has fueled the passage of the Farmland Security Act of 2022,

68. *Id.*

69. *Id.*

70. *Id.*; ACKOFF ET AL., *supra* note 19, at 7.

71. Laura Strickler & Nicole Moeder, *Is China Really Buying up U.S. Farmland? Here's What We Found*, NBC NEWS (Aug. 25, 2023, 5:30 AM), <https://www.nbcnews.com/news/investigations/how-much-us-farmland-china-own-rcna99274> [<https://perma.cc/9Q94-B5VT>].

72. *Id.*

73. *Id.*

74. *See id.*

75. *Id.*

76. *See id.*

and continues to back up calls for the Farmland Security Act of 2023 to be enacted as soon as possible.⁷⁷

Out of all the reasons American policymakers are skeptical of the intentions of foreign owned firms, especially those based in China, one of the biggest sticking points actually lies in where many of these firms are purchasing agricultural land.⁷⁸ The most poignant example of this specific concern happened when a Chinese company purchased land conspicuously close to a United States Air Force base centered in Grand Forks, North Dakota.⁷⁹ This situation involved the Chinese agricultural company Fufeng Group purchasing over 370 acres of land in an agribusiness park about 14 miles from the Air Force base in Grand Forks.⁸⁰ The Air Force base primarily specializes in state-of-the-art drone technology as well as space operations, and Fufeng Group planned to build a wet corn milling plant nearby.⁸¹ Elected representatives in North Dakota who were concerned about the project released a letter sent to them from Assistant Secretary of the Air Force Andrew Hunter, in which he wrote, “The proposed project presents a significant threat to national security with both near- and long-term risks of significant impacts to our operations in the area.”⁸²

Despite no evidence or details presented on why the project posed a severe risk, the proposed corn milling plant was canceled in 2023 due to all of the opposition that it faced.⁸³ Even though this particular instance ended up resolving itself, the Treasury Department’s Office of Investment Security proposed a rule requiring foreign entities to gain United States government approval to purchase

77. Farmland Security Act of 2023, S. 2382, 118th Cong. (2023); see Baldwin & Grassley (2023), *supra* note 10.

78. Bustillo & Hanzhang Jin, *supra* note 45.

79. *Id.*

80. James Macpherson, *Burgum Calls for Security Review of Chinese Firm’s Project*, AP NEWS (July 26, 2022, 3:56 PM), <https://apnews.com/article/united-states-north-dakota-grand-forks-national-security-8908ca235804194a601ec6044ed1d6d2> [<https://perma.cc/C8J6-LANQ>].

81. Steve Karnowski, *Air Force Opposes Chinese-Owned Corn Plant for North Dakota*, AP NEWS (Feb. 1, 2023, 5:22 PM), <https://apnews.com/article/politics-north-dakota-state-government-kevin-cramer-doug-burgum-china-9345443132364783ba3f94e34352f0c2> [<https://perma.cc/G57F-DQR6>]; Ken Moriyasu, *U.S. Checks on Chinese Farmland Purchases are Flawed, Watchdog Warns*, NIKKEI ASIA (Jan. 20, 2024, 6:05 JST), <https://asia.nikkei.com/Business/Agriculture/U.S.-checks-on-Chinese-farmland-purchases-are-flawed-watchdog-warns> [<https://perma.cc/3GSK-JYH9>].

82. Karnowski, *supra* note 81.

83. See Moriyasu, *supra* note 81.

property within 100 miles of eight different military bases.⁸⁴ While this rule was aimed at addressing government and military concerns with some foreign land ownership, it also showed how few rules were already in place.⁸⁵ The situation in Grand Forks also motivated Senators Mike Rounds and Jon Tester to introduce a bill designed to prohibit American adversaries such as China, Russia, Iran and North Korea from purchasing United States farmland, yet another call for greater regulations and restrictions on foreign agricultural land ownership.⁸⁶

There was already the fairly improbable concern that Chinese firms would slowly gain control of domestic United States markets.⁸⁷ However, now the much more troubling prospect that these Chinese firms could covertly take over large aspects of the American food supply, energy supply, and even critical infrastructure has become the chief concern.⁸⁸ The fact that foreign-owned Chinese companies were even able to purchase land within tens of miles of American military bases and infrastructure in the first place has created an outcry in Congress to give USDA more bite in its authority, and put greater restrictions on purchases.⁸⁹ This has been proclaimed by Senator Joni Ernst of Iowa, who recently stated:

Any acre of land that the Chinese Communist Party can use against the United States is a threat that must be taken seriously. We have already witnessed the danger their malign influence poses in our backyard as they bought critical land near our military installations. We need to bolster the law because currently, USDA is not fully able to enforce or police foreign investment. That's why I'm working across the aisle with Democrats to protect our agriculture security that would . . . modernize USDA's process to protect our land against our adversaries, and ensure China cannot use any loophole against us.⁹⁰

84. Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States, 88 Fed. Reg. 29003 (proposed May 5, 2023) (to be codified at 31 C.F.R. pt. 802); Margaret Stafford et al., *US to Control Land Sales to Foreigners Near 8 Military Bases*, AP NEWS (May 5, 2023, 8:41 AM), <https://apnews.com/article/china-bomber-spying-cfius-bases-68c3945b8cddb242fbaf3dd88d659021> [<https://perma.cc/GS3Q-BLST>].

85. See Stafford et al., *supra* note 84.

86. *Id.*

87. See Bustillo & Hanzhang Jin, *supra* note 45.

88. *Id.*

89. Strickler & Moeder, *supra* note 71.

90. *Id.*

It is by now apparent that there have been a multitude of calls for the federal government to act on this matter and take charge where previous legislation has evidently fallen short of its aims.⁹¹

III. WHERE DID WE LEAVE OFF?

Considering the full array of issues and concerns present in the United States, there have been calls that more must be done on the matter of foreign-owned agricultural land.⁹² To gain a well-rounded perspective for what course of action is best, it is illuminating to examine the history behind past legislation, along with where it may have fallen short.

When it passed in 1978, the Agricultural Foreign Investment Disclosure Act (AFIDA) was revolutionary in the standards that it put in place.⁹³ AFIDA originally stated that a “foreign person who acquires or transfers any interest . . . in agricultural land” must disclose their interest in that land to USDA.⁹⁴ The required information for disclosure included the individual’s name, address of holdings, country of citizenship, the type of interest that was acquired or transferred, a legal description of the real property, and the total acreage of the property.⁹⁵ For the sake of enforcement, the term “foreign person” is defined as any individual who is not a citizen of the United States, its territories, or is allowed some form of permanent residence in the United States in accordance with the Immigration and Nationality Act.⁹⁶

In addition to individuals, the umbrella of “foreign person” includes foreign governments, any entities which are organized or incorporated under the laws of any foreign government, or any entity which has its principal place of business outside of the United States.⁹⁷ However, under AFIDA, even a United States entity can constitute a “foreign person” if any foreign individual, government, or entity possesses “a significant interest or substantial control” of the United States based entity.⁹⁸ A “foreign person” has “significant interest or substantial control” of any domestic entity when they individually, or when “acting in concert” with other foreign persons, hold a combined 10% or more of that business entity.⁹⁹ Even when

91. *See id.*

92. *See* Baldwin & Grassley (2023), *supra* note 10.

93. *See Answering to AFIDA*, *supra* note 5.

94. 7 U.S.C. § 3501(a).

95. 7 C.F.R. § 781.3 (2024).

96. 7 U.S.C. § 3508(3)(A).

97. *Id.* § 3508(3)(C).

98. *Id.*

99. 7 C.F.R. § 781.2(k).

multiple foreign persons “may not be acting in concert,” if the foreign persons collectively own 50% or more of a domestic entity, each and every foreign person will be considered to have a “significant interest or substantial control.”¹⁰⁰ Though it may seem to go too far down the legislative rabbit hole, seeing how these standards were originally articulated and set in place is necessary to evaluate the successes and shortcomings of AFIDA.

A. A Well-Intentioned Act

If any real changes are to be expected out of today’s proposed legislation, the mistakes of past legislation should be taken as a warning. After the passage of AFIDA, it was soon evident that a lack of practical definitions in the Act made the Act less enforceable.¹⁰¹ A prime example was the term “acting in concert,” when referring to multiple foreign persons owning a certain portion of the domestic entity in question.¹⁰² This term of art was added as a section to AFIDA to widen the scope with which it examined domestic entities, and shrink the size of any potential loopholes.¹⁰³ However, there is no section of AFIDA, or any of its associated regulations or handbook, that contains an actionable definition for “acting in concert.”¹⁰⁴ Despite having the original intention of preventing a loophole, this term essentially takes power away from the act it was supposed to help by not informing enforcers of what it actually applies to.¹⁰⁵ Given the lessons learned from AFIDA, lawmakers should take heed of how to move forward.

B. The Farmland Security Act of 2022 Comes to the Rescue

After decades of lack luster performance, AFIDA was finally amended through the passage of the Farmland Security Act of 2022 (2022 Act), which was a part of the Fiscal Year 2023 Omnibus Appropriations Bill.¹⁰⁶ The 2022 Act was intended to address the same general concerns of AFIDA that still face the agricultural sector today.¹⁰⁷ The main thrust of the 2022 Act was to give Congress,

100. *Id.*

101. *Answering to AFIDA*, *supra* note 5.

102. 7 C.F.R. § 781.2(k).

103. *Answering to AFIDA*, *supra* note 5.

104. *Id.*

105. *Id.*

106. Baldwin & Grassley (2023), *supra* note 10; Consolidated Appropriations Act 2023, Pub. L. No. 117-328, § 773, 136 Stat. 4459, 4509 (2022) (to be codified at 7 U.S.C. § 3501).

107. See Tammy Baldwin & Chuck Grassley, *The Farmland Security Act of 2022* (Apr. 22, 2024, 12:08 AM) [hereinafter Baldwin & Grassley (2022)],

as well as the American public, access to the whole of foreign ownership data collected by USDA.¹⁰⁸ This goal of the 2022 Act shows just how in the dark everyone is to this growing issue, including those who sit at the highest levels of the United States government.¹⁰⁹

To help give a clearer picture of the risks associated with more foreign ownership of United States agricultural land, the 2022 Act was intended to amend 7 U.S.C. 3505 to require “the Secretary of the [USDA] to publish all prior year disclosures of foreign investments in American agricultural land on an interactive and public USDA database that is updated in real time.”¹¹⁰ This amendment was aimed to allow other agencies that use AFIDA data to receive it when needed, opposed to having to wait on annual updates.¹¹¹ The 2022 Act also required “the Secretary of [USDA] to report to Congress on foreign investments in American agricultural land, including the impact foreign ownership has on family farms, rural communities, and the domestic food supply.”¹¹² This part was put in place to get a better idea of the impact foreign agricultural holdings had on the United States, but did not include a change in funding.¹¹³

After decades of not knowing the true scale of the problem at hand, the 2022 Act was a recent and significant step in informing the American people of what was really happening behind the scenes. Evidently, the 2022 version of this Act didn’t go far enough, given that the Farmland Security Act of 2023 (2023 Act) is being debated in Congress.¹¹⁴

IV. WHAT’S THE PLAN NOW?

The 2022 Act strived to create a national digital database for the entire public to utilize, but this has primarily been informative in telling the American public how little is actually known about foreign entity ownership of agricultural land.¹¹⁵

https://www.grassley.senate.gov/imo/media/doc/farmland_security_act_summary.pdf
[<https://perma.cc/H2FC-4MDC>].

108. *Id.*

109. *See id.*

110. *Id.*; *see* § 773, 136 Stat. at 4509.

111. *Foreign Investments in U.S. Agricultural Land: Enhancing Efforts to Collect, Track, and Share Key Information Could Better Identify National Security Risks*, U.S. Gov. ACCOUNTABILITY OFF. (Jan. 18, 2024), <https://www.gao.gov/products/gao-24-106337> [<https://perma.cc/QA9P-BYJ5>].

112. Baldwin & Grassley (2022), *supra* note 107; § 773, 136 Stat. at 4509.

113. *See* Baldwin & Grassley (2022), *supra* note 107.

114. *See generally* Farmland Security Act of 2023, S. 2382, 118th Cong. (2023).

115. Baldwin & Grassley (2023), *supra* note 10.

The 2023 Act has been proposed to go much further than the 2022 version of the Act.¹¹⁶ Less than one year after the passage of the last Farmland Security Act, a newly expanded round of measures has been proposed that addresses a variety of longstanding issues related to AFIDA.¹¹⁷

To get a bigger picture of the lack of reported agricultural land, the new Act would start requiring research into “foreign ownership of agricultural production capacity and foreign participation in agricultural economic activity in the United States.”¹¹⁸ The proposed Act also plans to begin requiring USDA to conduct annual compliance audits of “not less than 10 percent of the reports . . . to ensure the completeness and accuracy” of filings.¹¹⁹ This provision will help address the issue that USDA doesn’t adequately review and verify the self-reported data it collects through AFIDA.¹²⁰

Another aspect of the 2023 Act requests a report to Congress with research into foreign entities’ agricultural leasing activities and its impact on “family farms, rural communities, and the domestic food supply.”¹²¹ This point intends to address previously mentioned concerns involving American family farmers being pushed or priced out of farming their land at a time when an unprecedented amount of agricultural land is changing hands from generation to generation.¹²² This suggested report to Congress also aims to analyze foreign control of our domestic food supply, with the goal of preventing severe shortages of food products like those seen during the COVID-19 pandemic.¹²³

To help improve standards of finding AFIDA violators, the Act will begin “[r]equiring USDA to provide annual training to state and county-level staff re: identification of non-reporting foreign-owned agricultural land.”¹²⁴ According to a government watchdog group, the current AFIDA handbook lacks detailed instructions for the reliable collection of AFIDA data.¹²⁵ To help better predict where foreign-ownership concerns may arise, this legislation also calls for research

116. *Id.*

117. *Id.*

118. Farmland Security Act of 2023, S. 2382, 118th Cong., § 6(b)(2)(C) (2023).

119. *Id.* at § 2.

120. *Foreign Investments in U.S. Agricultural Land*, *supra* note 111.

121. S. 2382 § 6(b)(2)(A).

122. *See generally* ACKOFF ET AL., *supra* note 19.

123. Levine et al., *supra* note 22.

124. Baldwin & Grassley (2023), *supra* note 10.

125. *Foreign Investments in U.S. Agricultural Land*, *supra* note 111.

into “trends relating to the purchase of agricultural land in the United States by foreign-owned shell corporations.”¹²⁶

The 2023 Act will also ensure that USDA has stronger deterrents to non-compliance, and the funding to back them up.¹²⁷ It plans to raise penalties by “[s]triking the cap on fee of 25% of the agricultural lands valuation for failing to report or misreporting foreign-owned acreage.”¹²⁸ In addition, this will make sure USDA is “[r]equiring a fee of 100% of the agricultural lands valuation for shell corporations that are failing to report or misreporting foreign-owned acreage, except in cases where the shell corporation remedies non-filing or defective filing within 60 days of notice by the Secretary.”¹²⁹ This aspect of the proposal will really give AFIDA some teeth by informing foreign-owned shell companies that their fees will no longer be reduced as they had in the past.¹³⁰ To wrap it all together, this Act will reinforce AFIDA by “[a]uthorizing \$2 million annually for the activities prescribed under [AFIDA], as amended.”¹³¹ When it comes to examining many of the problems currently faced by AFIDA, one of the most common reasons for any inadequacy is a severe lack of funding.¹³²

A fundamental concern over AFIDA’s effectiveness has always been related to the self-reported nature of the data it has collected, making it much easier for foreign-owned and operated companies to stay under the radar from oversight for decades, if not indefinitely.¹³³ Though the 2023 Act does not propose self-reporting be done away with, it ensures state and local authorities are trained on how to target and identify non-reporting foreign-owned assets.¹³⁴ To say that the proposed measures of the 2023 Act take a bigger step than the same Act of 2022 is a vast understatement. If the Act is passed as currently proposed, USDA will receive a lot more resources to help enforce AFIDA in the 21st century.¹³⁵

AFIDA in and of itself cannot block any form of agricultural land purchase, the data it collects is purely prudential in case another government agency finds it useful.¹³⁶ Despite AFIDA’s primary responsibility, there is legitimate demand for

126. S. 2382 § 6(b)(2)(B).

127. Baldwin & Grassley (2023), *supra* note 10.

128. *Id.*

129. *Id.*

130. Strickler & Moeder, *supra* note 71; Baldwin & Grassley (2023), *supra* note 10.

131. Baldwin & Grassley (2023), *supra* note 10.

132. *Foreign Investments in U.S. Agricultural Land*, *supra* note 111.

133. Bustillo & Hanzhang Jin, *supra* note 45.

134. Baldwin & Grassley (2023), *supra* note 10.

135. *See id.*

136. *Answering to AFIDA*, *supra* note 5.

USDA to make AFIDA's data more readily accessible to the agencies who utilize it.¹³⁷ The most important group that monitors transactions for any potential national security concerns is the Committee on Foreign Investment in the United States (CFIUS).¹³⁸ This interagency committee includes the heads of several departments including: the Department of the Treasury, Department of Justice, and the Department of Defense (DOD), to name a few.¹³⁹ The DOD in particular has requested that USDA provide current data that is updated regularly from AFIDA.¹⁴⁰ Once the DOD has access to real time data, they could respond or prevent controversial purchases like that in Grand Forks, North Dakota.¹⁴¹ Issues with agencies exchanging information inefficiently will be addressed if the 2023 Act is passed in its current state, giving CFIUS and its concurrent agencies a widespread public database with the right knowledge at the right time to help administrate more efficiently.¹⁴²

V. CONCLUSION

How American farms are run and maintained touches on many aspects of United States policy, both foreign and domestic. AFIDA was originally created to help understand the complex intersection of foreign persons and entities operating farmland on domestic United States soil.¹⁴³ In 1978, AFIDA was a big leap forward into creating awareness about something that most Americans didn't know was an issue, or at least had no clue as to its scope.¹⁴⁴ However, as time has passed, the inadequacies of AFIDA have become too much for many to bear, and the issues surrounding foreign ownership of agricultural land have only grown in number and importance.¹⁴⁵ If passed, the Farmland Security Act of 2023 will ensure that concerns related to foreign control of food markets, national security, and resource management can be identified and potentially stopped before they become too serious.

137. *Foreign Investments in U.S. Agricultural Land*, *supra* note 111.

138. *Id.*

139. *CFIUS Overview*, U.S. DEP'T OF THE TREASURY (Apr. 22, 2024, 12:11 AM), <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-overview> [<https://perma.cc/2YM6-62ZM>].

140. *Foreign Investments in U.S. Agricultural Land*, *supra* note 111.

141. *See* Strickler & Moeder, *supra* note 71.

142. *Foreign Investments in U.S. Agricultural Land*, *supra* note 111; Baldwin & Grassley (2023), *supra* note 10.

143. *Answering to AFIDA*, *supra* note 5.

144. *Id.*

145. *See generally* Baldwin & Grassley (2023), *supra* note 10.