REAL ESTATE BENEFICIAL OWNERSHIP REGULATORY ALERT: COMPLYING WITH FOREIGN OWNERSHIP REPORTING REQUIREMENTS IN US REAL ESTATE

Date: 24 July 2023

US Real Estate Alert

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The rise of foreign investment in the United States has renewed concern about tracking foreign inbound investment, as demonstrated by the passage of the Corporate Transparency Act and the expansion of CFIUS's purview with respect to certain real estate transactions. It has also increased interest in compliance and enforcement of the Agricultural Foreign Investment Disclosure Act of 1978 (AFIDA),[1] an often-overlooked law that seeks to disclose and track foreign ownership of US agricultural land, as well as state laws currently in effect. The below provides a brief overview of AFIDA, describes the impact of state level laws, and discusses the evolving developments in the law at both the federal and state level and how these rules impact investment in US real estate.

AFIDA

Under AFIDA, a foreign person or entity is required to disclose the acquisition, change of control or use, or disposition of any interest in agricultural land to the US Department of Agriculture.[2] However, due to the broad definition of “agricultural land” and the low threshold to be considered a “foreign person” for purposes of applying these rules, many transactions may inadvertently trigger a reporting requirement.

What is Agricultural Land?

For purposes of AFIDA, “agricultural land” is land used for forestry production or land currently used for, or, if currently idle, land last used within the past five years for, farming, ranching, or timber production. While the statute's applicability is obvious in the case of a standard farmland transaction, it is less so in the context of land acquired for unrelated uses. For example, an acquisition of former timber, grazing, or crop property acquired for development that has been replatted and rezoned for an alternative use (residential, office, retail, etc.), but on which construction has not commenced at the time of sale, may require an AFIDA filing. Similarly, land leased for the development of a wind or solar project, but for which construction has not commenced at the time of sale, may require a filing as well.

What is “Any Interest?"

AFIDA broadly defines “any interest” as any interest acquired, transferred, or held in agricultural land.[4] This encompasses foreign persons directly acquiring a fee ownership or leasehold interest in US agricultural land or

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indirectly obtaining an interest in or substantial control over an entity that may directly or indirectly hold a fee or leasehold interest in US agricultural land. However, there are exceptions for a security interest, a leasehold of less than 10 years in duration, contingent future interests, non-contingent future interests that do not become possessory upon termination of the present possessory estate, non-agricultural easements and rights-of-ways, and interests solely in mineral rights.[5]

Who is a "Foreign Person?"

Under AFIDA, a "foreign person" includes a foreign government, an individual who is not a US citizen or national, or an entity (e.g., corporation, limited partnership, LLC, etc.) created or organized under the laws of a foreign government or that has its principal place of business outside of the United States. In addition, a domestically-organized entity is also a foreign person if a significant interest or substantial control of such entity is directly or indirectly held by a government, person, or entity described above. A "significant interest or substantial control" of a domestic entity occurs if: (i) a single foreign person owns an interest of 10% or more in the domestic entity; (ii) multiple foreign persons acting in concert with one another own an interest of 10% or more in the domestic entity, in the aggregate; or (iii) multiple foreign persons own collectively an interest of 50% or more in the aggregate, whether or not acting in concert. Thus, a domestic entity should track its ownership to ensure that if its foreign ownership exceeds the threshold the appropriate filing is made.[6]

When are Filings Required?

Any foreign person who acquires or transfers an interest in agricultural land is required to report such transaction within 90 days of the date of acquisition or transfer. In addition, a report is required to be filed within 90 days of: (1) land subsequently becoming or ceasing to be agricultural land; or (2) any person who holds agricultural land subsequently becoming or ceasing to be a foreign person.[7]

Failure to Comply

A penalty may be issued for a failure to submit a report or knowingly submitting a false report (the penalty amount is capped at 25% of the fair market value of the interest in agricultural land). Importantly, the fair market value of the land is calculated as of the date of the assessment of such penalty not as of the date the reportable act occurred. The penalty for late-filed reports is 0.10% of the fair market value of the interest in the agricultural land times the number of weeks the report is late, with the amount capped at 25% of the fair market value. The USDA also considers a number of external factors when determining the penalty amount, including: how the violation was discovered (voluntary or request to report), involvement of legal counsel, and the nature of the information not reported.[8]

STATE LEVEL CONSIDERATIONS

Certain state-level laws affecting the foreign ownership of agricultural land were developed throughout the United States, some predating the enactment of AFIDA. Today, over half the states have some level of restriction (including reporting requirements) on foreign interest in agricultural land. For example, some states have caps on the amount of acreage that a foreign person may own in the state (with mandatory divestment of acreage in excess of the cap). Other states have instituted bans on certain foreign entities with ties to "countries of concern"

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holding real property.[9] Although many exemptions apply to these restrictions, many times reporting and other compliance measures are required to take advantage of such exemptions.

DEVELOPING LAW

Currently, all 50 states and Puerto Rico have some level of foreign investment. Specifically, foreign individuals and entities reported holding an interest in about 40 million acres of US agricultural land at the end of 2021 (an increase of over 2.4 million acres reported at the end of 2020).[10] The steady increase in foreign investment has raised concerns about national security as well as money laundering and led the federal government and many states to recently contemplate and pass laws related to foreign ownership of real estate.

In 2023, the states of Alabama, Arkansas, Florida, Idaho, Indiana, Louisiana, Mississippi, Montana, North Dakota, Oklahoma, South Dakota, Tennessee, Utah, and Virginia have each signed into law varying restrictions and/or reporting requirements on foreign ownership of real property, including reporting currently held property. There is still legislation pending at the state level and more than 20 bills (and counting) at the federal level. Examples of the proposals at the federal level include amendments to AFIDA to create a publically searchable registration/database detailing upstream ownership of real property, and a tax on the acquisition of property by foreign investors. We are closely monitoring these developments.

In this atmosphere of heightened scrutiny of foreign beneficial ownership, companies should ensure that they are not overlooking any compliance requirements with respect to any transaction. In addition, companies should also ensure that they are complying with any reporting obligations that are coming into effect as new legislation becomes law.

The United States is not unique in its interest in the identity of foreign owners of real estate within its borders. The United Kingdom and Australia, among others, have recently enacted laws to monitor inbound foreign investment. K&L Gates has lawyers that are equipped to advise on these compliance issues that are becoming commonplace.

FOOTNOTES

[1] 7 U.S.C. §§3501-3508.

[2] 7 U.S.C. §§3501-3508.

[3] 7 CFR § 781.2(b). “Agricultural land” does not include land not exceeding ten acres in the aggregate, if the annual gross receipts from the sale of the farm, ranch, or timber products produced thereon do not exceed US$1,000.

[4] [7] CFR § 781.2(c).

[5] 7 CFR § 781.2(c).

[6] 7 U.S.C. § 3508(3).

[7] 7 CFR § 781.3.

[8] 7 U.S.C. § 3502; 7 CFR § 781.4.

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[9] Fla. Stat. § 692.202

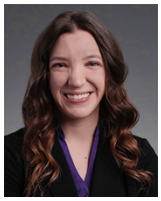
[10] Farm Service Agency, US Dept. of Agriculture*, Foreign Holdings of U.S. Agricultural Land Through December 31, 2021.*

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