THOMPSON COBURN LLP

insights

Regulations for businesses owning farmland: A primer on AFIDA and state rules

Your business or bank may not grow soybeans, corn or wheat, but if your real estate holdings include properties that regulators consider “farmland,” you could be on the hook for significant penalties until you properly address or dispose of the land.

This article discusses the state and federal laws that may affect investments and businesses with regard to the acquisition and sale of farmland by non-farming businesses (foreign and domestic businesses). Since identifying what constitutes farmland is defined by the regulators, many investors and businesses may own farmland without realizing it.

Investment in agricultural land is an asset class that is or could be a useful part of many portfolios. Analyses of the economy over the last 125 years has shown that the value of agricultural real estate shifts based on factors that often do not match the broader economy and markets. For that reason, it’s possible your business or your customers may have intentionally invested in farmland ownership.

Conversely, many owners of land also unknowingly own “farmland” that they consider to be “development” land that is being held for possible future development. If this “development” or “urban fringe” property is currently being farmed or rented out for pastureland to a tenant before development begins, then it is technically farmland right now. The farmland rules below will apply to this land. For foreign and domestic investors and businesses that are not closely held family farming companies, owning farmland comes with its own set of legal rules that must be followed to avoid violating law and incurring substantial penalties.

What is AFIDA?

At the federal level, owners of farmland must follow the reporting requirements promulgated by the U.S. Department of Agriculture under the Agricultural Foreign Investment Disclosure Act (“AFIDA”). AFIDA reporting requirements apply to any non-U.S. based direct or indirect owners of farmland, including foreign banks. It is important to note that for purposes of AFIDA, all so called “corporate veils,” with the exception of U.S. based publicly traded companies, are ignored. So if the company that owns an interest in farmland is owned by a company organized in a U.S. state, but ultimately owned by a company in Europe, then the U.S. company is a “foreign” company for purposes of AFIDA.

The penalties for failure to file AFIDA reports can be material since they are measured as a substantial percentage of the value of the farmland owned. There are no exceptions to the reporting requirements. A high penalty rate of interest on the fines begins to accrue as of the actual date of acquisition if timely reporting is not made.

Are foreign owned banks subject to AFIDA?

Many banks wrongly believe that since they acquired farmland in satisfaction of debt, and not as an investment, that AFIDA does not apply. That is simply wrong. AFIDA reporting requirements apply to any foreclosed property owned by a business or bank with ultimate foreign ownership. Unfortunately, neither the banking regulators nor the FTC include AFIDA in their exam manuals, so non-U.S. based companies and banks can be in good graces with their primary regulators and still be unknowingly subject to substantial fines and penalties under AFIDA.

Fortunately, knowledgeable counsel can assist such owners in approaching the USDA with a presentation in which the business agrees to begin to report and also adequately and properly explains past inaction as a “good faith failure to report.” USDA has the flexibility to materially reduce, but not completely eliminate, fines and penalties in such cases if the presentation on good faith meets the requirements.

State regulations for owning farmland

The vast majority of rules for reporting and restrictions on owning farmland are at the state level in states that have a substantial agricultural economy, such as Missouri or California. These break down into a few categories.

Foreign business state level reporting: State-level regulations also exist in many, but not all states. These requirements provide for mandatory reporting by “ foreign” owners also accompanied by civil fines or occasionally criminal penalties for failure to timely report. The rules for determining “foreign owners” are usually very closely aligned with the AFIDA rules.

Domestic and foreign “corporate” ownership of farmland: Some states have reporting requirements that also apply to all businesses (including US businesses) that are not closely held family farming businesses as defined under the local rules.

Domestic and foreign prohibitions on owning farmland: Outright prohibitions on foreign and/or “corporate” ownership of farmland are provided in some states, including Missouri and Iowa. So called “corporate” ownership refers to ownership by any business that is not a closely held family farming business. The prohibitions are usually subject to a few exceptions that may or may not apply to any specific farmland investment as well as time limits for prompt divestment of ownership of the farmland with civil or criminal penalties for failure to comply.

For example, Missouri limits both foreign and “corporate” ownership of farmland with laws that do not apply to any other classes of land. For foreigners and businesses that are not closely held farming businesses, an annual report is required. A business can be punished both for owning farmland and for failing to report that illegal ownership. The penalty for each failure to file is up to 25% of the value of the real property that was not properly reported. In addition, the Missouri Legislature is currently considering a full ban on foreign ownership of farmland in the current legislative session, since this was a hot topic in the most recent election.

As with the AFIDA reporting, it is important to collaborate with your counsel of choice to work with state level regulators to repair any failures to report and build processes to make sure no future failures occur.

As a law firm with strong roots in production agriculture and food law, Thompson Coburn can advise many businesses on complying with the special rules that apply to ownership of farmland while building a working relationship with agricultural land ownership regulators.

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