

***FOREIGN INVESTMENTS: Often Overlooked
Filing Reporting Obligations***

Article contributed by:

*By John E. Schmeltzer, III
Patterson Belknap Webb & Tyler LLP*

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FOREIGN INVESTMENTS: Often Overlooked Filing Reporting Obligations

By John E. Schmeltzer, III of Patterson Belknap Webb & Tyler LLP¹

Over the last 30 years we have watched foreign funds flowing into the United States for investment in various kinds of real estate. The largest proportions of these funds have been invested in commercial real estate space such as the famous purchase and subsequent divestiture by the Japanese of an interest in Rockefeller Center in New York and in investment by the Japanese in the famous Pebble Beach Golf Course in California. In addition, over the years we have seen increasing levels of investment in condominium and co-op properties principally on the East Coast in New York and the Miami-Palm Beach areas in Florida. Some believe the oppressive weather conditions in northern portions of the European continent account for a significant portion of the co-op purchases in Florida.

In addition, there has been a significant foreign investment in this country by Europeans and South Americans in agricultural properties. Historically, purchases of large tracts of agricultural land have been thought of both as an investment and a hedge against the fall of democracies in western Europe, so called flight-investments. While all these types of investments require careful negotiation and draftsmanship, agricultural investments have important and little recognized reporting obligations.

Over the last 15 to 20 years investments in agricultural land in the United States have become far more sophisticated and have resulted in significant economic ventures and investments. Whereas, historically the holding of significant tracts of agricultural land with lower returns than otherwise available were thought of as assurances of the ability to immigrate in the event of significant political upheaval, such investments have increasingly become more complex and significantly more rewarding.

As a result of flows of foreign capital investing in agricultural holdings, and the resulting increased holdings of larger tracts of land, the US Congress passed the Agricultural Foreign Investment Disclosure Act of 1978 ("AFIDA")² with the purpose of obtaining information on

such investments³ and designated the Agricultural Stabilization and Conservation Service ("ASCS") of the US Department of Agriculture ("USDA") to administer the reporting requirements of AFIDA and report on such holdings to the States on a biannual basis. The Farms Services Agency of USDA annually has published its survey of agricultural land held by foreign persons and entities and biannually reports to the States on the ownership reports received and holdings so reported since 1981. AFIDA and the regulations promulgated thereunder require that "foreign persons" who acquire, dispose of, or hold "an interest" (other than a security interest) in United States "agricultural land" shall disclose such transactions and holdings to the Secretary of Agriculture by filing within ninety (90) days after such an acquisition or disposition a report of such ownership in triplicate with the ASCS county office where the land is located or, with permission from the ASCS with its office in Washington.

Although agricultural investments had remained fairly constant from 1997 through 2006, recent significant increases in forest holdings have resulted in noticeable increases in foreign holdings. Foreign persons or entities have reported agricultural holdings in all 50 States and Puerto Rico. As of February 27, 2007, foreign persons or entities have reported under AFIDA and the regulations promulgated thereunder, the holding of interests in approximately 21.2 million acres of United States agricultural land or 1.6 percent of all privately held US agricultural land or approximately .94 percent of all land in the United States.⁴ The current reported holdings represent a 5.3 million acre increase from the 2006 report. Forest land accounted for 54 percent of all foreign held agricultural acreage, with crop land accounting for seven percent (7%) and pasture and other agricultural land accounting for 25 percent. As previously reported, foreign holdings had held steady through the 10 year period from 1996 through 2006 and the 5.3 million acre increase from the 2006 and 2007 report appears significant.⁵

Continuing foreign capital investment in agricultural land has attracted more sophisticated development and management skills with the result that the heretofore passive holdings, or leasing, of agricultural properties have

given way to sophisticated longer term projects, such as forestry and timbering projects and development of vineyards and fruit orchards with long term exit strategies contemplating sales to high-end real estate developers.

Under AFIDA and the regulations promulgated thereunder, "agricultural land" is land in the United States used, or if currently idle, land used within five years, for farming, ranching, timber production or forestry production, except tracts that are not more than 10 acres in size in the aggregate. Tracts totaling 10 acres or less in the aggregate, and which produce annual gross receipts in excess of \$1,000 from the sale of farm, ranch, forestry or timber products must also be reported. Land used for forestry production, including land exceeding 10 acres in which 10 percent is stocked by trees of any size and land that formerly had such tree cover and will be naturally or artificially regenerated, is also included in the definition.⁶ Farming, ranching, or timber production includes, but is not limited to, activities set forth in the Standard Industrial Classification Manual (1987), Division A, exclusive of industry numbers 0711-0783, 0851, and 0912-0919 which cover animal trapping, game management, hunting carried on as a business enterprise, trapping carried on as a business enterprise and wildlife management.⁷

An "interest" means all interests acquired, transferred or held in agricultural lands by a foreign person, except: (i) security interests; (ii) leaseholds of less than 10 years; (iii) contingent future interests; (iv) noncontingent future interests which do not become possessory upon the termination of the present possessory estate; (v) surface or subsurface easements and rights of way used for a purpose unrelated to agricultural production; and (vi) an interest solely in mineral rights.⁸

Under AFIDA and the regulations promulgated thereunder, a "foreign person" is: (1) generally any individual who is not a citizen or national of the United States or who is not lawfully admitted or paroled into this country for permanent residence⁹; (2) any foreign government¹⁰; (3) any legal entity such as a corporation, company, firm, association, partnership, society, joint stock company, trust, estate which was organized under the laws of a government other than the United States, or which has its principal place of

business located outside the United States; or (4) any nongovernmental legal entity organized within the United States in which "foreign persons" hold a "significant interest or substantial control."¹¹ "Significant interest and substantial control" includes a ten percent (10%) interest in the entity held, directly or indirectly, by a single person or entity or government referred to in (1), (2) or (3), above, and persons, entities or governments referred to in (1), (2) or (3), above, acting in concert with respect to such interest, although no single individual person or government holds an interest of ten percent (10%) or more. In addition, "significant interest and substantial control" exists when an interest of fifty percent (50%) or more, in the aggregate is held by the persons and entities referred to in (1), (2) or (3), above, even though such individuals, persons or governments do not act in concert.¹²

Form FSA-153 is used to report acquisitions, divestitures and changes of use under AFIDA. In the case of acquisition of properties crossing county lines, multiple reports will have to be filed in the counties in which property is acquired. Form FSA-153 requires disclosure of: (i) ASCS tract number or other legal description, county, state and number of acres; (ii) the transferor (including type of organization and citizenship) and, if disposition, the transferee; (iii) date of acquisition or transfer or change of use; (iv) type of interest held; (v) current and intended land use; (vi) nature of legal interest; (vii) type of transaction; (viii) price (purchase or sale) and price of original acquisition if a disposition; and (ix) the name, address of foreign persons holding interests in the property.

Although the reporting of an acquisition by a "foreign person" which is the acquiring entity on Form FSA-153 is relatively straightforward, a Form FSA-153 is also due in the case of a "foreign person" acquiring an "interest" in "agricultural land" indirectly, such as in the case of a "foreign person" being an equity holder (stockholder, limited or general partner or member) of the acquiring entity where such equity interest is held by offshore persons or entities which hold a "significant interest" or "substantial control" (10 percent or more of the property holding entity's equity, or a combination of foreign persons holding

50 percent or more of the property holding entity's equity even though no single person or entity owns 10%).¹³

In such case the FSA-153 filed by the entity that acquires the property shall include, usually as an appendix: (i) the legal name and the address of each foreign individual or government holding "significant interest" or "substantive control" in the acquiring entity; (ii) in any case in which the holder of such interest is an individual, the citizenship of such holder; in any case in which the holder of significant interest or substantial control in such foreign person is not an individual or a government, the nature and name of the foreign person holding such interest, the country in which such holder is created or organized and the principal place of business of such holder; (iv) the legal name and the address of each individual or government whose legal name and address did not otherwise appear on the FSA-153, if such individual or government holds any interest in such foreign person; and (v) in any case in which the holder of such interest is not individual or a government, the nature and name of the person holding the interest, the country in which such holder is created or organized, the interest, the country in which such holder is created or organized and the principal place of business of such holder.¹⁴ Current practice requires such persons to be reported only up to the third level of ownership where "significant interest" or "substantial control" is held or to the level of a public company (see below) or trust company or custodian regulated under local law.¹⁵ In addition, publicly traded entities may, after quarterly review of their shareholder lists, upon a finding that stockholders with foreign mailing addresses do not hold a "significant interest" or "substantial control", determine no report is due under AFIDA.¹⁶

The following events require updated reports on FSA-153: (i) the conversion to agricultural land of nonagricultural land; (ii) the conversion to nonagricultural land of agricultural land; (iii) the change of status into a foreign person of a U.S. person holding any otherwise reportable interest in agricultural land; and (iv) the change of status into a U.S. person of a foreign person holding such a reportable interest.¹⁷

Failure to submit, failure to maintain, or knowing filing of an incomplete or inaccurate report constitute violations of the filing requirements of AFDA and the regulations promulgated thereunder. Filing penalties can be assessed at 1/10th of one percent of the fair market value of the property for each week the filing is late, subject to a maximum of 25 percent (25%) of the fair market value of the property.¹⁸ Submission of an incomplete or false report can result in assessment of a penalty of 25 percent of the fair market value of the foreign person's interest in the property.¹⁹ Penalties are levied by written notification and are deemed final if the "foreign person" does not respond within 60 days of mailing of the notice of penalty. Request for a hearing may be made and the Administrator, Farm Service Agency or its designee, will review and provide its written decision. No penalty is imposed by virtue of appealing.²⁰

The penalties prescribed above are subject to downward adjustment based upon the total time the violation existed, methods of discovery of the violation, nature of the information misstated or omitted and other extenuating circumstances.²¹ Although the penalties assessable are Draconian, we have found the members of the Economic and Policy Analysis Staff of the USDA to be receptive and understanding in the case of voluntary admissions of failure to file under AFIDA.

¹ Jack Schmeltzer, a partner at Patterson Belknap Webb & Tyler LLP in New York, has a wide range of experience in representing publicly traded oil and gas, mining and investment companies. He also represents hedge funds and a number of early stage companies. A large part of his practice involves transnational mergers and acquisitions and infrastructure projects. He has a long history of representing both investors and funds in the venture capital and hedge fund areas, having been responsible for creation of the "ERISA and foundation outs" used by most venture capital funds. Jack has spent significant time both in the CIS and Europe on project finance, acquisitions and other transactions. He may be reached by phone at 212.336.2580 or by e-mail at jeschmeltzer@pbwt.com. The author acknowledges the continuing contribution of his colleague, Mr. Darren Coggins, without whose professionalism and good counsel this article would never have been written and a number of filings would not have gotten done.

² Pub. L. No. 95-460, §2, Oct. 14, 1978, 92 Stat. 1263, 7 U.S.C. §§ 3501-3508 (1989) and Regulations at 7 C.F.R. Part 781 (1989).

³ 7 C.F.R. 781.1.

⁴ Interim Report of Foreign Holdings of US Agricultural Land, February 28, 2008 ("Interim Report"), US Department of Agriculture, Farm Service Agency, Summary page iii.

⁵ *Ibid.*

⁶ 7 C.F.R. 781.2(b).

⁷ 7 C.F.R. 781.2(b).

⁸ 7 C.F.R. 781.2(c).

- ⁹ 7 C.F.R. 781.2(f). Any person who holds an Immigration and Naturalization Service "Alien Registration Receipt Card" (green card) is considered lawfully admitted for permanent residence and is exempt from the requirements of the act.
- ¹⁰ 7 C.F.R. 781.2(e).
- ¹¹ 7 C.F.R. 781.2(g)(2).
- ¹² 7 C.F.R. 781.2(k).
- ¹³ *Ibid.*
- ¹⁴ 7 C.F.R. 781.3(f).
- ¹⁵ Interim Report of Foreign Holdings of US Agricultural Land, February 28, 2008 ("Interim Report"), US Department of Agriculture, Farms Service Agency, page 3.
- ¹⁶ 7 C.F.R. 781.3(h).
- ¹⁷ 7 C.F.R. 781.3(j).
- ¹⁸ 7 C.F.R. 781.4 (b)(1).
- ¹⁹ 7 C.F.R. 781.4(b)(2).
- ²⁰ 7 C.F.R. 781.5.
- ²¹ 7 C.F.R. 781.4(b)(3).