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## WORKING PAPER

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THE AGRICULTURAL FOREIGN INVESTMENT DISCLOSURE  
ACT OF 1978: THE FIRST REGULATION OF FOREIGN INVESTMENT  
IN UNITED STATES REAL ESTATE

by

Bruce Zagaris\*

November 1978

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THE AGRICULTURAL FOREIGN INVESTMENT DISCLOSURE  
ACT OF 1978: THE FIRST REGULATION OF FOREIGN INVESTMENT  
IN UNITED STATES REAL ESTATE

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This article is intended to be a description of the AFIDA and the circumstances under which it was written and prepared. At the time this article was written, regulations had not been prepared, and there was, of course, no record of implementation. Any opinions herein are those of the author and reproduction does not constitute endorsement or agreement by the Department of Agriculture.





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## INTRODUCTION

On October 14th, a Federal Law, entitled The Agricultural Foreign Disclosure Act of 1978 (hereinafter referred to as the AFIDA), was enacted. It constitutes the first Federal regulation of investment by foreigners in United States real estate, and may, therefore, be a watershed. This essay sets forth: the law's substantive contents; the reasons for its enactment; the potential impact of the law on foreign investment, including the potential responses to the Act by foreign investors in U.S. farmland; and the potential uses of the information to be derived from the Act and prospects for additional action by the Federal and State Governments.

### I. SUBSTANTIVE CONTENTS

#### A. REPORTING REQUIREMENTS

The AFIDA requires foreign persons who currently hold or in the future acquire interests in United States agricultural land to file reports. Foreign nationals holding interests on the day before the effective date of the reporting section of the Act are required to submit a report to the Secretary of the Agriculture within 180 days of the effective date of the section. The report, which must be submitted in such form and in accordance with such procedures as the Secretary may require, must contain: the legal name and the address of such foreign person; his or her citizenship if the person is an individual; if the person is an individual; if the person is not an individual or a government, the nature of the legal entity holding the interest, the



country in which such foreign person is created or organized, and the principal place of business of such foreign person; the type of interest in agricultural land (e.g., joint tenancy or tenancy in common) which is held by such foreign person; the legal description and acreage of such agricultural land; the purchase price paid for, or any other consideration given for such interest; the agricultural purposes (e.g., vineyards or cattle ranching) for which such foreign person is using such agricultural land on the date on which the report is submitted to the Secretary, and how the person intends, as of such date, to use such agricultural land; and such other information as the Secretary may prescribe by regulation.1/

Foreign persons who acquire or transfer U.S. agricultural land after the effective date of the Act also must submit a report to the Secretary of the Agriculture within thirty (30) days after the transaction. The report must contain essentially the same information as the report required of foreign persons currently holding U.S. farmland. In addition, if the foreign person transfers an interest in U.S. farmland, he or she must file a report, setting forth the legal name and address of the person to whom such interest is transferred. If the transferee is an individual, the citizenship of such transferee must be revealed in the report. If the transferee is not an individual or a government, the report must contain the nature of the legal entity holding the interest, the country in which such transferee is created or organized, and the principal place of business of such transferee.2/

A person who acquires or holds an interest in U.S. farmland at a



time when such person is not a foreign person and who subsequently becomes a foreign person must submit a report not later than ninety (90) days after the date on which such person becomes a foreign person.3/ A foreign person who holds or acquires an interest in land at a time when such land is not agricultural land and such land subsequently becomes agricultural land must submit a report to the Secretary not later than ninety (90) days after the date on which such land becomes agricultural land.4/

#### B. DEFINITIONS

To understand the scope of the Act requires a knowledge of the definitions contained in the Act. In some instances the provisions of the Act will be understood only after the regulations have been promulgated.

Since the AFIDA requires the filing of reports by foreign persons only when they hold or acquire interests in agricultural land, the Act's definition of "agricultural land" is critical. It is defined as any land located in one or more States of the U.S. that is generally used for agricultural, forestry, or timber production purposes, as defined further in regulations to be prescribed by the Secretary of Agriculture.5/ The inclusion of land used for forest products is a result of the adoption by the House Subcommittee of Family Farms, Rural Development, and Special Studies of Congressman Weaver's amendment.6/ Questions may arise as to whether certain land, which may have been used in the past, but is not currently being used or at least not being primarily used for





agricultural production (e.g., a garden) is within the scope of "agricultural land." In some cases the foreign person and/or his agent may have to await the regulations before they know whether they must report.

"Foreign person" and "person" are important terms in the Act. "Person" includes any individual, corporation, company, association, firm, partnership, society, joint stock company, trust, estate, and any other similar entity.<sup>7/</sup> "Foreign person" is defined as:

(i) an individual who is not a citizen or nation of the U.S. or its territories and who is not a permanent resident;

(ii) a person, other than an individual or government, that is created or organized under the laws of a foreign nation or that has its principal place of business outside of the U.S.;

(iii) a person, other than an individual or government that is created or organized under the laws of a State of the U.S.; and in which, as determined by the Secretary under the regulations which the Secretary prescribes, a significant interest or substantial control is directly or indirectly held

(a) by an individual referred to in (i) above;

(b) by a person referred to in (ii) above;

(c) by a foreign government; or

(d) by any combination of such individuals, persons, or governments; and

(iv) any foreign government.<sup>8/</sup>

The House Committee on Agriculture discussed the problem that foreign



investors may be able to avoid compliance with the Act through the creation of "dummy" organizations which will conceal the ultimate owners of the land and defeat the purposes of the Act.9/ In order to try to ascertain the actual owners of agricultural land, the House Committee adopted a broad definition of "foreign person" as mentioned above and adopted an amendment offered by Congressman Glickman, requiring "persons" filing under the Act who are not individuals to disclose the nature of their legal structure.10/ Specifically the Act provides that a foreign person, other than an individual or a government, who is required to submit a report may be required also by the Secretary to submit a report containing: the legal name and the address of each person who holds any interest in such foreign person; the citizenship of such holder if he or she is an individual; and if the holder of such interest is not an individual or a government, the nature of the legal entity holding the interest, the country in which such holder is created or organized, and the principal place of business of such holder.11/ Furthermore, to try to penetrate the third tier, if a person, other than an individual or a government, has its name contained in any report submitted under the Act, the person may be required by the Secretary to submit a report containing the same information as mentioned above which is required from other persons holding interests.12/ In addition, the Secretary of Agriculture may take such actions as the Secretary deems necessary to monitor compliance with the Act and to determine whether the information contained in any report accurately and completely contains the ownership interest of all foreign persons in any foreign person who is required to



submit a report under such section.13/ The following example provides some perspective on the operations and potential problems of implementing the Act.

EXAMPLE: Calvinfarm, a Netherlands Antilles N.V., owns Blackacre in California, an agricultural estate. Mr. A, an attorney and representative of Calvinfarm, advises the latter by telex of its obligation to file a report under the AFIDA. Mr. V, a board of director and President of Calvinfarm, telexes from the Netherlands Antilles that, inter alia, the shares in Calvinfarm are bearer shares, held by S Bank in Switzerland and CI Trust in the Cayman Islands. When the Secretary of Agriculture exercises his authority to penetrate the third tier by writing to S Bank and CI Trust, the Secretary receives replies from both that they are precluded by their jurisdictions' laws from disclosing the information requested. In fact, they write that they will be liable to criminal and civil penalties if they make such disclosures.14/ To ascertain additional information about the beneficial owners of S Bank and CI Trust, the Secretary at least may have to expend substantial resources. However, Congress is not providing additional funds to implement the new law. Even if the Secretary cannot penetrate further the corporate structure, the Secretary has made a beginning.

"Any interest in land," although not defined specifically by the Act, apparently includes all beneficial interest in agricultural land, such as contracts of sale, options to buy, certain leases, and similar arrangements.16/ However, the Act expressly excludes persons holding or acquiring security interests in U.S. agricultural land from having





to report.<sup>17/</sup> The apparent intention is to exclude mortgages, secured loans, mechanic liens, judgment liens, and similar security interests from coverage under the Act since a requirement that these interests be reported would be burdensome and would not accomplish the purpose of the legislation.<sup>18/</sup> Hence, if Whiteacre, a parcel of agricultural land in Idaho, is held by an Idaho limited partnership, and a foreign person wants to participate anonymously, he or she apparently is permitted to do so by holding debt interests. On the one hand, the use of debt usually maximizes after-tax cash flow by allowing the payor to deduct interest payments. On the other hand, the foreign payee benefits from receiving payments which will be subject to the zero rate of withholding tax pursuant to provisions in several tax treaties normally utilized to structure the acquisition and operation of U.S. income-producing property.<sup>19/</sup> Hence, the foreign person desiring to retain anonymity may be able to accomplish his goal while complying with the Act.<sup>20/</sup>

#### C. IMPLEMENTATION OF THE AFIDA

The Secretary of Agriculture will administer the Act and will develop and disseminate a standard report form and accompanying instructions in order to facilitate automatic data processing, analysis, and reporting of the information collected under the Act.<sup>21/</sup> The Secretary, in order to economize in the implementation of the Act, is expected to rely on the cooperation and assistance of state and county governments and field offices of the U.S. Department of Agriculture, to distribute the report forms, publicize the reporting requirements, and collect





reports required under the Act.22/ After collecting the information obtained through the reports, the Secretary must analyze this information and determine the effect that foreign investment in U.S. agricultural land is having on family farms and rural communities.23/ The Secretary must then convey his analyses and determinations to the President and the agricultural committees of Congress after an initial six month period, and, thereafter, on an annual and semi-annual basis.24/ In addition, the Secretary of Agriculture must transmit semi-annually to each State Department of Agriculture or such other appropriate state agency as the Secretary considers advisable a copy of each report received from foreign persons under the Act involving agricultural land located in the respective States.25/

Any report received by the Secretary is available for public inspection not later than ten (10) days after the date on which such report is received by the Secretary.26/ The wide availability of such information will have implications which are discussed below.

#### D. PENALTIES

Violators of the act or the regulations promulgated thereunder are subject to a civil penalty imposed by the Secretary. Violators are those persons who the Secretary determines (1) has failed to submit a report under the Act or regulations; or (2) has knowingly submitted a report which does not contain all the information required to be in such report or which contains information required to be in such report or which contains information that is misleading or false.27/



The amount of a civil penalty imposed by the Secretary is to be such amount as the Secretary determines to be appropriate to carry out the purposes of the Act, and shall not exceed 25 percent of the fair market value, on the date of the assessment of such penalty, of the interest in agricultural land with respect to which such violation occurred.28/ If the penalty is not paid, the Attorney General must recover the amount by bringing a civil action in a federal court.29/

Apparently the penalty provisions apply to representatives of a foreign person, such as a U.S. attorney or real estate agent, who file the report on behalf of a foreign person.

## II. REASONS FOR THE AFIDA

The principal reasons for the enactment of the AFIDA are to be able to assess whether consequences of unregulated foreign investment are adverse. At present no reliable data exists, and concern has been expressed as to the potentially adverse consequences of foreign investment in farmland. This section highlights the potential adverse consequences of unregulated foreign investment, describes current efforts by the U.S. Department of Agriculture to collect information, and summarizes recent conclusions of a GAO report, which added to the momentum causing Congress to enact the AFIDA.

### A. POTENTIAL ADVERSE CONSEQUENCES OF UNREGULATED FOREIGN INVESTMENT FOR WHICH NO RELIABLE DATA EXISTS

The desire to maintain the vitality of agriculture and particularly the family farm has provided the impetus for the AFIDA, which



requires the Department of Agriculture to gather data on foreign investment in U.S. agricultural land.30/ Earlier this year, farmers throughout the U.S. expressed their dissatisfaction with rising costs of production. Many farmers have complained that while the costs of their fuel and other inputs was increasing, their products were undersold and underpriced in foreign and domestic markets. High oil prices gave foreigners the exchange to bid up the price of U.S. farmland. In responding to these complaints, the Senate Committee on Agriculture, Nutrition and Forestry as others had done before found that reliable data were not available.31/

Senate hearings revealed that other current efforts by U.S. Government Agencies to collect information are not sufficient. For instance, although the U.S. Department of Commerce is expanding its monitoring of foreign investment in the U.S., its efforts do not cover many smaller investments made by individuals. In addition, the use of trusts, partnerships, and corporations with headquarters offshore do not come within the reach of the Department of Commerce studies. Another drawback about current data collected by various federal agencies is that it is aggregated and purchases of agricultural land cannot be segregated from purchases of other types of real estate.32/ Although other studies of foreign investment in U.S. agricultural land are now being conducted, Congress found that these are not adequate to quickly collect the data needed to regulate this rapidly growing investment.33/

The trend toward accelerating foreign investment in U.S. agricultural land has also persuaded Congress to act. Evidence indicates that





farmland in the U.S. has obtained more value as an investment asset than as a productive asset. Investment in U.S. farmland is both lucrative and safe, especially as compared to the general price index, common stock values, and other alternative investments. The current and prospective decline in value of the U.S. dollar makes the price of U.S. farmland even cheaper in real terms for foreign investors.34/

Several potential negative effects which may result from unregulated foreign investment in U.S. farmland also constituted a principal stimulus to the enactment of the AFIDA. The contention has been made that foreign investors often pay more than the prevailing market price, which inflates land prices beyond the reach of small family farmers.35/ Extensive foreign ownership may also diminish U.S. control over its own food products, adversely affecting food prices, supply, and international trade in agricultural commodities. Furthermore, foreign investors, as absentee owners, may neglect local community activities and responsibilities. They may leave the land idle and/or sell it to developers, thereby profiting only from its speculative value.36/ Since the data available at this point can neither confirm nor deny these potential adverse consequences, the AFIDA was passed in order to obtain enough information to determine the validity of the contentions that adverse consequences result from foreign investment in U.S. agricultural land.

#### B. SECTION 4(d) OF THE INTERNATIONAL INVESTMENT SURVY ACT OF 1976

A conclusion of the Senate Committee on Agriculture, Nutrition, and Forestry, and a motivation for its recommendation that AFIDA be





passed is that other Federal efforts to fill the information gap "show little promise."37/ Since substantial efforts by Federal Agencies to ascertain the proper institutional mechanisms by which to gather the needed information are in process, and may influence future legislation on this subject, it is useful to consider one current effort of the Department of Agriculture, which is being undertaken pursuant to the International Investment Survey Act of 1976.

The International Investment Survey Act of 1976 requires a study of the ways to obtain better information on land. The law was passed partly in response to a conclusion of a report in 1975, prepared by the Department of Agriculture (as part of a larger nine volume study conducted by the Department of Commerce of all foreign investment in the U.S.), that information of the status of landownership was grossly inadequate. Specifically, it provides:

The President shall conduct a study of the feasibility of establishing a system to monitor foreign direct investment in agricultural, rural, and urban real property, including the feasibility of establishing a nationwide multipurpose land data system, and shall submit (an interim report of his findings and conclusions to the Congress not later than two years after the enactment of this Act and a final report not later than three years after the enactment of this Act).38/

An Executive Order has given the Office of Management and Budget and subsequently the Department of Commerce the responsibility to coordinate the various aspects of the 1976 Act. By decision of an interagency committee the Department of Agriculture has been given oversight functions of the project.



The Department of Agriculture is currently undertaking a study in two distinct parts based on types of land information systems, and specifically: (1) those designed exclusively for identifying foreign owned land, and (2) those designed to provide several types of land information including foreign ownership. The studies under the direction of the Department of Agriculture are to be completed in the latter half of 1979.

#### C. THE GENERAL ACCOUNTING OFFICE'S STUDY

Due to the concern by U.S. farm interests over the adverse effect of foreign investment in U.S. agricultural land, Senator Talmadge, Chairman of the Senate Committee on Agriculture, Food, and Nutrition, asked the Comptroller General in January to have the General Accounting Office (GAO) conduct a study of the acquisition of agricultural land by foreigners. On June 12, 1978, the GAO submitted its report. In the report it was stated that twenty-five States have laws restricting holding or acquiring farmland by foreigners; but they are not very effective. In fact, the report verified prior reports<sup>39/</sup> that little data exists on alien ownership on a state level.<sup>40/</sup> The GAO also conducted a spot check on purchases of farmland and tried in vain to ascertain their effect on prices for twenty-four countries in five states.<sup>41/</sup> The report concluded that it is not possible to collect the data at the local level. The report also found that, after surveying efforts of various federal agencies, they were not adequate. Finally, and most importantly, the GAO report recommended that the Federal



Government establish some type of comprehensive reporting system in order to gather sufficient data for Congress.<sup>42/</sup> These recommendations appear to have been an important factor motivating Congress to take immediate action although the momentum was already present.

### III. IMPACT ON FOREIGN INVESTORS AND POTENTIAL RESPONSES

In this section the importance to foreign investors of anonymity is discussed. The potential responses of foreign investors are set forth, and include: exchanging agricultural land for other investment property; using additional intermediaries; and seeking relief through rights conferred in an FCN treaty or through the attorney-client privilege.

Indisputably a principal desire of many foreign investors investing in U.S. agricultural land is to invest anonymously. Anonymity in investing in both property and securities has been a traditional and legitimate practice in Europe and throughout the world.<sup>43/</sup> For instance, most individuals invest anonymously by holding bearer shares through intermediary banks which act as agents. The AFIDA will cause a loss of anonymity and may make foreign investors more reluctant to invest in U.S. agricultural land unless foreign investors can find relief from the AFIDA. Several methods of potential relief appear likely and will be highlighted.

A simple way to maintain anonymity and simultaneously profit from investing in U.S. real estate is to merely channel investments in U.S. land into non-agricultural properties. In most cases foreign demand for





various types of U.S. property appears highly elastic.44/ In addition, U.S. federal tax law enables owners of investment property to defer recognition of gains realized from the exchange of one investment property for another investment property.45/ Agricultural property ordinarily qualified for this "like-kind" tax deferral.46/ For example, a foreign investor who has bought a farm (or a ranch) for \$500,000, and does not want to disclose his investment, may trade the farm for other investment property, such as a commercial building, a hotel, or a property with mineral rights, worth \$2 million. The foreign investor must recognize for tax purposes only any cash or unlike property, which he has received. The foreign investor will have increased his equity, while safeguarding his anonymity and his financial investment.

A potential method of relief is for a foreign investor in U.S. agricultural land to employ additional intermediaries in order to maintain anonymity. Depending on what the regulations require by report, additional intermediaries may be used, if beneficial owners want to keep anonymous only their nationality or their companies' or individual identities. In this connection, U.S. representatives and agents involved in filing reports under the Act will have an ethical as well as a legal obligation to disclose the true identity(ies) of the owner(s). During the House Subcommittee hearings Congressman Bedell tendered an amendment that provided that the filing of a false report carries the same sanction as failure to submit a report.47/ The proposed amendment used the word "misleading" in addition to "false" to embrace circumstances where the information furnished in the report is technically in





compliance with the reporting requirements, but "knowingly" misleading because it was either incomplete or otherwise calculatedly subject to misinterpretation. It should be stressed that with respect to verifying the accuracy of the reports, the Secretary of Agriculture has the power to take whatever actions he thinks necessary to monitor compliance with the Act and to determine whether the information contained in any report accurately and completely reveals the ownership interest of all persons in any foreign person required to submit a report under the Act.48/

Another potential method of relief is for a foreign person aggrieved by the Act to bring a court action and to contend that the Act and the regulations promulgated thereunder violate an obligation of a treaty of Friendship, Commerce and Navigation entered into by the U.S. and the other Contracting State,49/ and that Congress did not intend for the Act to supercede the obligations of the treaty in question. Some of these treaties provide that nationals and companies of either Contracting State shall be accorded national treatment with respect to leasing, utilizing, and occupying real property of all kinds appropriate to the exercise of the rights accorded them by the other Articles of the Convention. However, many of the modern treaties only provide the most favored nation treatment with regard to the acquisition and possession of real property.50/ An allegation by a resident of a Contracting State that the Act treats such a person unequally from U.S. persons is supported by the Senate Report accompanying the Act:



Enactment of the bill will not affect the personal privacy of individual U.S. citizens or aliens with permanent residences in the United States; however, it would have an effect on the personal privacy of nonresident aliens who own U.S. agricultural land. The extent of this effect would be limited, however, only to the reporting of the size, price, and type of their landholdings and a minimum of personal information, including the owner's name, citizenship, and address.51/

Most FCN treaties also give foreign persons and companies of a Contracting State access to U.S. courts.52/

The case law which appears to control a potential conflict between an FCN treaty and the AFIDA is not favorable to the foreign investor's contention. In the Chinese Exclusion case53/ a federal law enacted in 1888 prohibited Chinese laborers from entering the U.S. This legislation violated rights of Chinese nationals as recognized in the Treaty of 1868 between the U.S. and China and in the Supplemental Treaty of 1880. In a habeas corpus proceeding brought by a Chinese laborer who was held in detention by the master of a steamship and who tried to enter the U.S., it was held that he was barred by virtue of the 1888 legislation, notwithstanding the treaty with China. "If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative Act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign most control."54/

If a foreign person is aggrieved by what the person considers a violation by the U.S. Government of an obligation of an FCN treaty, the person may seek remedy through the person's own Government. The latter



may have recourse against the U.S. if it can contend successfully that the U.S. has enacted and implemented legislation which constitutes a material breach of an obligation under an FCN treaty.55/ However, it does not seem likely that in the context of the reporting laws of other countries and the practices of FCN treaties, that the AFIDA constitutes a material breach by the U.S. The utility of taking action under an FCN treaty would depend, of course, on the wording of the provisions of the particular treaty and the surrounding circumstances.

Another potential response by a foreign investor or his attorney to attempts by the Secretary to penetrate the second and third tiers may be to refuse to reveal information on the basis of the attorney-client privilege.56/ The classic definition of such privilege applies to the following situations:

(1)...legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his insistence permanently protected (7) from the disclosure by himself or the legal advisor, (8) except the provision be waived.57/

One limitation in asserting the defense is that in some jurisdictions consultation by an attorney acting not as an attorney, but only as a business advisor, negotiator or scrivener may not come within the privilege.58/ Another potential problem against use of the privilege by a foreign investor is that traditionally communications which an attorney must make public to fulfill an obligation to his client,59/ or which have been made public or are accessible to the public, as by disclosure or otherwise,60/ or those which are known to a third non-privileged





person,<sup>61/</sup> are not "made in confidence" and therefore may not constitute grounds for the invocation of the attorney-client privilege. Since the new law and yet to be promulgated regulations require the foreign investor to file a disclosure report and since the foreign investor has statutory notice that communications to the attorney regarding beneficial ownership of his entity and interrelationships of beneficial owners are subject to review by a third non-privileged person, a Department of Agriculture official, as well as wider dissemination (e.g., to state officials), such communications may actually be deemed not to be confidential, and, hence, not protected by the attorney-client privilege.

At present the responses by foreign investors seeking anonymity to the AFIDA which appear most likely are to exchange agricultural land for other investment property and to use additional intermediaries rather than to pursue potential remedies under the FCN treaty.

#### IV. PROSPECTS FOR USE OF DATA FROM AFIDA AND FOR MORE REGULATION

In this section prospective use of data from the new law is discussed. Several possibilities for the use of the data are derived from the easy accessibility of the information which will even enable foreign governments as well as U.S. Federal and State Governments to use the information.

The most important use of the data gathered by the Secretary of Agriculture will be to assess what, if any, negative impacts of foreign investment has on U.S. farmlands and the U.S. economy. If the data indicates that the above mentioned potential or alleged adverse impacts





are occurring, then Congress may restrict the amount or types of geographic locations in which foreign persons can invest in U.S. agricultural land. Of course, Congress and the Secretary of Agriculture must bear in mind that the outflow of U.S. investment is nearly three times greater than the inflow of foreign investments abroad.

The AFIDA also may be a useful mechanism for deterring and prosecuting persons investing in U.S. farmland who are violating the laws of territories in which they reside or of which they are nationals or domiciliaries.

A potential way in which the reports may be useful in deterring or prosecuting criminals illegally taking money from a country or failing to report or underreporting income from investments in U.S. agricultural land is derived from the provisions of the Act which make any report submitted under the Act available for public inspection at the Department of Agriculture not later than ten days after the date on which such report is received by the Secretary. A representative of a concerned foreign government would need only read such reports and transmit the information to its own authorities for comparison with information available in its jurisdiction. Such information can be useful in deterring and prosecuting persons committing many economic crimes.

The provisions of recently concluded treaties on mutual assistance in criminal matters offer examples of types of new mechanisms by which the United States Government can cooperate with other Governments in prosecuting those suspected of tax fraud and other serious crimes, especially those involving organized criminals. For example, in the Treaty between



the U.S. and Switzerland on Mutual Assistance in Criminal Matters, the U.S. is required to assist Switzerland in, inter alia, its investigation or court proceedings of offenses, involving income tax fraud by a person who is suspected of belonging to an upper echelon of an organized criminal group (as defined in the Treaty) or participating significantly as a member, affiliate or otherwise in an important activity of such group.63/

On the state level in the United States additional restrictions on foreign investment in agricultural and other types of land seem imminent. The recent GAO study reveals that ten States have bills pending in their legislatures.64/ Federal constitutional requirements as well as treaties and federal statutes constitute the outerlimits of state regulatory authority.65/

#### CONCLUSION

The need for information is so great that, despite whatever limitations may be inherent in either the law or the resources available to implement it, our Federal and State Governments will derive substantial benefits. Many foreign investors will dislike the new law, particularly if they feel it portends future restrictions. Prospective Governmental action will depend on the experience gained from the implementation of the Act, the analyses derived from the new data, and the results of the current efforts by Federal Agencies such as the Department of Agriculture to monitor foreign investment in U.S. agricultural land.



## FOOTNOTES

1. AFIDA, Sec. 2(b).
2. AFIDA, Sec. 2(a).
3. AFIDA, Sec. 2(c).
4. AFIDA, Sec. 2(d).
5. AFIDA, Sec. 9(1).
6. U.S. House of Repres., Agricultural Foreign Investment Disclosure Act of 1978, Report No. 95-1570 (accompanying H.R. 13356) at 21.
7. AFIDA, Sec. 9(4).
8. AFIDA, Sec. 9(3).
9. U.S. House of Repres., supra note 6, at 22-23.
10. Id. at 22.
11. AFIDA, Sec. 2(e).
12. AFIDA, Sec. 2(f).
13. AFIDA, Sec. 4.
14. With respect to the Cayman Islands secrecy laws, see M. Langer and W. Walker, "The Cayman Islands—An Important New Tax Haven," U.S. Taxation of International Operations 8503, at 8549 (March 28, 1973, Prentice-Hall). With respect to Swiss secrecy laws, Art. 273 provides:  

Whosoever seeks out a manufacturing or business secret in order to make it available to a foreign authority or to a foreign organization or private enterprise or to their agents,  
 Whosoever makes available a manufacturing or business secret to a foreign authority or to a foreign organization or to a private enterprise or to their agents, shall be punished with imprisonment.

A similar provision exists in the Liechtenstein law of March 14, 1949, art. 4. See, C. Markees, "The Difference in Concept Between Civil and Common Law Countries as to Judicial Assistance and Cooperation in Criminal Matters," 171, 179, in M.C. Bassiouni & V. Nanda (ed.), II A Treatise on International Criminal Law (Springfield, Ill., 1973). Also see J. Kelly, "U.S. Foreign Policy: Efforts to Penetrate Bank Secrecy in Switzerland from 1940 to 1975," 6 Cal. W. Intntl. L.J. 211-62 (1976). For a discussion of countries with legislation enforcing secrecy, see W. Diamond, Tax Havens of the World xxvi, 100 (N.Y., 1978); M. Langer, How to Use Foreign Tax Havens 104-5 (P.L.I., N.Y., 1975).
15. It should be noted that one House bill required the Secretary of Agriculture to consult with the Securities and Exchange Commission prior to establishing regulatory guidelines for the determination of whether or not a "significant interest or substantial control" is directly or indirectly held. The resources and experience of the SEC in dealing with similar transactions and reporting requirements seem useful. U.S. House of Repres., supra note 6, at 23.





16. See remarks by Sen. Talmadge, Congressional Record 13142 (Aug. 11, 1978).
17. AFIDA, Sec. 2(a), (b), (c), (d).
18. U.S. House of Repres., supra note 6, at 21.
19. See, e.g., B. Zagaris, "Investment by Nonresident Aliens in U.S. Real Estate," 31 U. of Miami L.R. 566, at 595, 606 (No. 3, 1977).
20. For a criticism of reporting law not covering debt security interests, see S. Zumbach and N. Harl, "Anonymity and Disclosure in Ownership Reporting Systems," Foreign Investment in U.S. Real Estate 320, at 332 (Econ. Res. Serv., U.S. Dept. of Agric., 1976).
21. AFIDA, Sec. 5(a).
22. See, e.g., remarks of Congressman Grassley, Congressional Record 10760 (Sept. 26, 1978).
23. AFIDA, Sec. 5(a).
24. AFIDA, Sec. 5(a), (b).
25. AFIDA, Sec. 6.
26. AFIDA, Sec. 7.
27. AFIDA, Sec. 3(a).
28. AFIDA, Sec. 3(b).
29. AFIDA, Sec. 3(a).
30. AFIDA, Sec. 3(a).
31. U.S. Sen., Agricultural Foreign Investment Information Act of 1978, Rep. No. 994 (Aug. 8, 1978) at 2. Deficiencies in information revealed in Foreign Investment in U.S. Real Estate were acknowledged by Section 4(d) of the International Investment Survey Act of 1976.
32. Id. at 3.
33. Id. at 3-4.
34. Id. at 4-5.
35. Id. at 5; for a discussion of problems faced by foreign investors in U.S. real estate, see S. Zell, "Emma's Allure, or Foreign Capital Seeks a New Home," 6 Real Estate Review 31-36 (No. 4, 1977).
36. U.S. Senate, supra note 31, at 6.
37. U.S. Senate, supra note 31, at 3.
38. 22 U.S.C. 31-3(4)(d) (1976).
39. See, e.g., G. Wunderlich, "Foreign Ownership of U.S. Real Estate in Perspective," 1-4 (U.S. Dept. of Agric., Economics, Statistics, and Cooperatives Service, ESCS-24).
40. GAO, "Foreign Ownership of U.S. Farmland—Much Concern, Little Data," 4 (June 12, 1978, CED-78-132).
41. Id. at 7-9.
42. Id. at 10.
43. See, e.g., R. Schlesinger, Comparative Law 570-89 (Foundation Press, Mineola, N.Y., 1970).
44. See, e.g., A. Paulsen, "Goals and Characteristics of Foreign Purchasers of Farmland in the United States," in Foreign Investment in U.S. Real Estate 95-102 (Econ. Res. Serv., U.S. Dept. of Agriculture, 1976).
45. I.R.C., Sec. 1031; also see H. Gannet, "Sale or tax-free exchange? How to decide which you want; tax planning to get it," J. of Taxation





- 226 (April, 1969); and S. Dean, "Real estate: defining the outer limits in a Section 1031 three-party exchange," J. of Taxation 294 (May, 1968).
46. E.R. Braley, 14 B.T.A. 1153 (1929), acq. VII-2 C.B. 6 (exchange of city real estate held for rental purposes qualifies under Sec. 1031 when it is exchanged for a farm).
  47. U.S. House of Repres., supra note 6, at 21.
  48. AFIDA, Sec. 4.
  49. J. Morse, "Legal Structures Affecting International Real Estate Transactions," 26 Amer. U.L.R. 32, 37-45 (1976).
  50. Id., Table 1, at 42; R.R. Wilson, U.S. Commercial Treaties and International Law 150 (The Hauser Press, New Orleans, 1960).
  51. U.S. Senate, supra note 31, at 12.
  52. See Wilson, supra note 50, chapter 8.
  53. Chae Chan Ping v. U.S., 130 U.S. 581, 9 S.Ct. 623, 32 L.Ed. 1068 (1889).
  54. Field, J., id. 130 U.S. at 600. See Nelson, "The Termination of Treaties and Executive Agreements by the U.S. Theory and Practice," 42 Minn. L.R. 879 (19158); Comment, "The Interpretation of Treaties by U.S. Courts," 30 Colum. L.R. 521 (1930).
  55. See the Vienna Convention on the Law of Treaties, May 23, 1969; 63 Am. J. of Intntl. L. 875 (1969); McNair, Law of Treaties 539-586 (1961).
  56. See generally C. McCormick, Handbook of the Law of Evidence 91-100 (St. Paul, Minn., 1954).
  57. J. Wigmore, Evidence 2292 (footnote omitted) (McNaughten rev. 1961). Before the privilege applies, all eight of Wigmore's requirements must be met. In re Bonano, 344 F.2d 830 (2d Cir. 1965); Radiant Burners, Inc. v. Amer. Gas Ass'n., 320 F.2d 314 (7th Cir.), cert. den., 375 U.S. 929 (1963); U.S. v. Threlkeld, 241 F. Supp. 324 (W.D. Tenn. 1965).
  58. C. McCormick, supra note 56, at 97.
  59. Ex parte Griffith, 178 So. 2d 169 (Ala. 1965), cert. den., 382 U.S. 988 (1966).
  60. Cranston v. Stewart, 334 P.2d 337 (Kan. 1959).
  61. Trupp v. Wolff, 335 A.2d 171 (Ct. Spec. App. 1975).
  62. 12 Int'l. Legal Materials 916 (1973) Art. 1a (hereinafter cited as Treaty). Noted in 15 Harv. Int'l. L.J. 349 (1974), 7 N.Y.U.L.J. Int'l. L.J. 349 (1974), 7 N.Y.U.L.J. Int'l. L. & Pol. 103 (1974), 7 Vand. J. Transnatl. L. 469 (1974).
  63. Treaty, Art. 7a.
  64. GAO, supra note 40, Appendix II, at 11-14.
  65. F. Morrison and K. Krause, State and Federal Legal Regulation of Alien and Corporate Land Ownership and Farm Operation 23-34, 42-43 (Econ. Res. Serv., U.S. Dept. of Agric., Agric. Econ. Report No. 284, 1975).

