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Disclosure of Foreign Investment in U.S. Agricultural Land

By Rex J. Zedalis*

I. INTRODUCTION

On October 14, 1978, the Agricultural Foreign Investment Disclosure Act of 1978¹ (Act) was signed into law.² Passed during the closing days of the Ninety-Fifth Congress in response to growing apprehension and uncertainty over foreign investment in United States agricultural land,³ the Act simply is designed to facilitate the development of an accurate picture concerning the extent of that investment.⁴

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1. 7 U.S.C.A. ch. 66 (West Supp. 1979).

2. The Act evolved from several legislative proposals, the most important of which were S. 3384, 95th Cons., 2d Sess. (1978) and H.R. 13,356, 95th Cong., 2d Sess. (1978).

3. Prior to the passage of the Act, reports concerning the extent of such investment varied widely. See Davies, *Foreigners and Farmland: The Myths Won't Die*, 5 ST. LEGISLATURES, 14, 15-16 (1979). See also 124 CONG. REC. H10,757 (daily ed. Sept. 26, 1978) (remarks of Rep. Grassley) and SENATE COMM. ON AGRICULTURE, NUTRITION, AND FORESTRY, 95TH CONG., 2D SESS., FOREIGN INVESTMENT IN UNITED STATES AGRICULTURAL LAND 75-86 (Comm. Print 1978). The major reasons for such investment are the political and economic stability of the U.S., the fact that political confiscation of private property is rare, the tendency of U.S. land to appreciate faster than inflation, the favorable tax treatment given such land, and the reduction in prices resulting from the decline of the dollar.

4. See Congressman Grassley's statement to the effect that:

the intent of the legislation is to get some current information that we do not now have, without any inference that foreign ownership ought to be regulated in any way. There definitely is not any inference that if there is not any regulation at the State level, it ought to be done at the Federal level.

124 CONG. REC. H10,759 (daily ed. Sept. 26, 1978).

See also 124 CONG. REC. H10,757 and H10,761 (daily ed. Sept. 26, 1979) (remarks of Rep. Smith and Rep. Clausen) and 124 CONG. REC. S13,142 (daily ed. Aug. 11, 1978) (remarks of Sen. Talmadge). Nevertheless, since the information to be collected, including the name and address of the foreign investor, is available for public inspection under 7 U.S.C.A. § 3056, the Act could possibly discourage a certain amount of investment by nationals of countries with laws imposing restrictions on such investments.

With certain limited exceptions, there are no federal laws directly limiting foreign invest-

In general, the Act, as supplemented by the regulations issued pursuant thereto,⁵ provides that any foreign person holding, acquiring, or transferring U.S. agricultural land must file a report with the Agriculture Department's Agricultural Stabilization and Conservation Service (ASCS) office in the county where the land is located.⁶ All reports concerning agricultural land holdings were required to have been filed on or before August 1, 1979.⁷ Reports concerning acquisitions or transfers made on or after February 2, 1979, however, must be filed within ninety days of the date of that transaction.⁸ The report actually submitted must contain certain information about the foreign person; the agricultural land held, acquired, or transferred;⁹ and those who have an ownership interest in the entity holding, acquiring, or transferring the land.¹⁰ The information collected from reporting foreign persons will form the basis of an analytical report to the President and both Houses of Congress concerning the impact of foreign acquisitions, holdings, and transfers on family farms and rural communities.¹¹ Failure of a foreign person to submit a required report, or knowing submission of an incomplete, misleading, or false report,¹² will subject the foreign person to a civil penalty not exceeding twenty-five percent of the fair market value, on the date the penalty is assessed, of the interest in the agricultural land with respect to which a violation has occurred.¹³

ment in United States land. See Section of Real Property, Probate and Trust Law/American Bar Association, Committee on Foreign Investment in U.S. Real Estate, *Foreign Investment in U.S. Real Estate: Federal and State Laws Affecting the Foreign Investor*, 14 REAL PROP., PROB. & TR. J. 1, 3 (1979). Several states, however, do have laws affecting foreign investment in U.S. land. See SENATE COMM. ON AGRICULTURE, NUTRITION, AND FORESTRY, 95TH CONG., 2D SESS., FOREIGN INVESTMENT IN UNITED STATES AGRICULTURAL LAND 201-03 (Comm. Print 1979). For discussion of the Constitutional limits of federal regulation of foreign investment, see Morrison, *Limitations on Alien Investment in American Real Estate*, 60 MINN. L. REV. 621, 639-56 (1976). For a discussion of the limitations imposed by treaties, see Morrison at 656-63.

5. Since the inception of the reporting program, the Department of Agriculture has promulgated two sets of final rules. The first appeared at 44 Fed. Reg. 7115 (1979); the second, revising the first, appeared at 44 Fed. Reg. 29,029 (1979) (to be codified in 7 C.F.R. § 781).

6. 44 Fed. Reg. 29,029, 29,032 (1979) (to be codified in 7 C.F.R. § 781.3(a)).

7. *Id.* (to be codified in 7 C.F.R. § 781.3(c)).

8. *Id.*

9. *Id.*

10. 44 Fed. Reg. 29,029, 29,032 (1979) (to be codified in 7 C.F.R. § 781.3(f)).

11. 7 U.S.C.A. § 3504 (West Supp. 1979).

12. 7 U.S.C.A. § 3502(a) (West Supp. 1979) and 44 Fed. Reg. 29,029, 29,033 (1979) (to be codified in 7 C.F.R. § 781.4(a)).

13. 7 U.S.C.A. § 3502(b) (West Supp. 1979) and 44 Fed. Reg. 29,029, 29,033 (1979) (to be codified in 7 C.F.R. § 781.4(b)). 19 HARV. INT'L L.J. 1026, 1029 (1978) suggests that the penalty may be 25% of the value of the land rather than 25% of the value of the interest in the land. At the writing of this article, the Department was proposing a comprehensive revision of § 781.4(b). See 44 Fed. Reg. 61,601 (1979).

It is not the objective of this article to undertake a broad survey of all the legal and operational aspects of the Act, but rather to examine, in depth, the two most important and perhaps most problematic issues involving the foreign disclosure program and conclude with a few brief observations on some of the deficiencies of the legislation itself.

Specifically, the issues examined involve, first, the indicia which must be satisfied before one holding, acquiring, or transferring land can be said to have an obligation to file a report with the Department, and second, the operation and nature of reporting requirements concerning the tracing of second and third tier interest holders. Though the narrow scope of this article is in no way intended to imply that the other concerns of the Act merit less attention, it is evident from a cursory reading of the other applicable provisions that few problems of comparable significance will arise in construing those portions of the Act. This approach should prove profitable in providing assistance to practitioners who are struggling with the language of the Act and the regulations, and insight for critics concerning the effect of the various legislative deficiencies to be examined.

II. ANALYSIS OF APPLICABLE PRINCIPLES

It should be noted at the outset that, in view of the fact that reports concerning U.S. agricultural land held on February 1, 1979 were required to have been filed on or before August 1, 1979,¹⁴ the focus of attention will be acquisitions or transfers of agricultural land subsequent to the first day of February. Nevertheless, the analysis of these acquisitions or transfers is also useful in determining whether a foreign person actually violated an obligation to file a report concerning land held by that person.

A. *Who Must File a Report Concerning U.S. Agricultural Land?*

Section 3501 of the Act provides that any foreign person who holds, acquires, or transfers any interest in agricultural land situated within the United States¹⁵ must submit a report to the Secretary of Agriculture¹⁶

14. 44 Fed. Reg. 29,029, 29,032 (1979) (to be codified in 7 C.F.R. § 781.3(c)).

15. 7 U.S.C.A. § 3501 (West Supp. 1979) does not expressly provide that the land be within the United States. However, § 3508(1) defines agricultural land as "land located in one or more States. . . ." Section 3508(6) then defines state to mean "any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Northern Mariana Islands, Guam, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, or any other territory or possession of the United States."

16. 44 Fed. Reg. 29,029, 29,032 (1979) (to be codified in 7 C.F.R. § 781.3(a)), provides that the reports "shall be filed with the ASCS county office where the land . . . is located or where the ASCS county office administering programs carried out on such land is located."

It should be noted that § 781.3(d), 44 Fed. Reg. 29,029, 29,032 (1979), provides that if a nonforeign person holds U.S. agricultural land and subsequently becomes a foreign person, then a report must be filed within 90 days of such transformation. A similar report is re-

within specifically prescribed time periods. However, it is not always simple to determine whether someone is a foreign person; whether the land held, acquired, or transferred is viewed as reportable agricultural land; or whether the indicia of ownership possessed by the foreign person is sufficient to trigger a reporting obligation.

The following questions may serve to whet the intellectual appetite as well as illustrate the difficulty of deciding whether a report must be filed. Should an option to purchase, a long-term installment land sales contract, or a lease be considered a reportable interest in agricultural land? Similarly, should a small backyard garden plot, or a country estate classified as agricultural land for property tax purposes but used only for living purposes be viewed as reportable agricultural land? Further, should a U.S. corporation holding agricultural land be defined as a foreign person merely because another wholly foreign owned U.S. corporation owns a portion of its common and preferred stock?

Requirement that the Person Acquiring or Transferring the Land Be "Foreign." There are several categories of entities considered to be foreign persons. Section 3508(3) of the Act provides that these include individuals who are not citizens or nationals of the United States¹⁷ or who are not lawfully admitted to the United States for permanent residence;¹⁸ foreign governments;¹⁹ and persons²⁰ which are created or organized under the laws of a foreign nation or which have their principal place of business located outside of the United States.²¹ Also included are entities which are created or organized under the laws of any state of the United States and in which foreign individuals, foreign legal entities, foreign governments, or any combination of these directly or indirectly hold "significant interest or substantial control."²² Regulations issued by the Department provide that five percent ownership interest constitutes significant interest or substantial control.²³ As a result, if the aggregate foreign interest in a U.S.

quired under § 781.3(a), 44 Fed. Reg. 29,029, 29,032 (1979), which provides that if a foreign person holds nonagricultural land which becomes agricultural, a report must be filed concerning such transformation within 90 days thereafter.

17. 7 U.S.C.A. § 3508(3)(A)(1) (West Supp. 1979).

18. *Id.* § 3508(3)(A)(iii). This apparently includes foreign nationals in the United States without an I-151 or I-551 card from the Immigration and Naturalization Service.

19. *Id.* § 3508(3)(D).

20. The term person is defined in 7 U.S.C.A. § 3508(4) (West Supp. 1979) as including any "individual corporation, company, association, firm, partnership, society, joint stock company, trust, estate, or any other legal entity."

21. 7 U.S.C.A. § 3508(3)(B) (West Supp. 1979). This apparently includes companies organized in the United States and completely owned by citizens of the United States if they have their principal place of business located in a foreign nation.

22. *Id.* § 3508(3)(C)(ii).

23. 44 Fed. Reg. 29,029, 29,032 (1979) (to be codified in 7 C.F.R. § 781.2(1)). At the writing of this article, the Department was proposing to redefine "significant interest or substantial control." See 45 Fed. Reg. 6115 (1980) which provides in essence that "significant

corporation which acquires or transfers U.S. agricultural land equals or exceeds five percent of the corporation's total ownership interest, then the U.S. corporation is defined to be a "foreign person" and must file a report.

Foreigners acquiring or transferring U.S. agricultural land cannot circumvent the reporting obligations contained in the Act simply by establishing several shell corporations incorporated under the laws of one of the states of the United States, with one corporation acquiring or transferring the land and all the others holding nothing but an ownership interest in the next succeeding corporation in the chain. Section 3508(3)(C)(ii) of the Act provides that a U.S. business entity is defined to be a foreign person if foreign individuals, governments, or other legal entities directly or indirectly hold significant interest or substantial control in that business entity.²⁴ Therefore, there is no need for the foreign individuals, governments, or legal entities to have invested directly in the corporation acquiring or transferring the land in order to obligate that corporation to file a report. Five percent ownership interest held indirectly in such entity is sufficient. In fact, the Department appears to have taken just that position. A recent interpretive rule provides that five percent ownership interest is present, indirectly, if each of the intervening legal entities holds, by itself or taken together with the interest held by other foreign persons, at least five percent interest in each succeeding intervening legal entity.²⁵

Some may suggest that it is inappropriate to fix a reporting obligation

interest or substantial control" exists whenever a five percent interest is held by a single entity or, if no single entity holds a five percent interest, whenever a twenty percent interest is held by several entities.

24. 7 U.S.C.A. § 3508(3)(C)(ii) (West Supp. 1979).

25. The interpretation following 44 Fed. Reg. 47,526 (1979) (to be codified in 7 C.F.R. § 781.2).

In a case where one or more legal entities intervene between the interest holding foreign person(s) and the legal entity actually holding the U.S. agricultural land, then such foreign person(s) will be said to indirectly hold significant interest or substantial control pursuant to §781.2(g)(4)(ii) in the land holding entity only if each of the legal entities intervening between the legal entity in which the foreign person(s) hold significant interest or substantial control, hold, themselves, five percent or more interest in each succeeding intervening legal entity or, if when taken together with holdings by other foreign persons, the total amount of interest held in each succeeding intervening entity is five percent or more.

To illustrate, suppose a foreign individual owns five percent of corporation B, incorporated in Delaware, and corporation B owns, by itself or in conjunction with other unaffiliated foreign individuals, governments or legal entities, five percent of corporation A, incorporated in California. The foreign individuals who invested in corporation B will be said to hold, indirectly, five percent ownership interest in corporation A, which causes A to be defined as a foreign entity for the purposes of having to file a report concerning its agricultural land holdings. The analysis applies regardless of how many U.S. business entities intervene between the land holding entity and the business entity in which the foreign individuals, governments, and other legal entities hold the five percent interest.

on a business entity with only indirect foreign ownership since that business is not likely to have knowledge of the indirect foreign interest. That suggestion, however, has little basis in fact. Though the reporting obligation admittedly derives from the indirect ownership interest, the interpretive rule assures the business entity that only *immediate* foreign ownership must be determined rather than ownership removed by several intervening entities.²⁶

Requirement of Any Interest. Any foreign person, including a U.S. business entity defined to be a foreign person, must file a report if it has "any interest, other than a security interest," in U.S. agricultural land.²⁷ In order to fully comply with the prescriptions of the Act, a report must be filed concerning present interests. This includes interests resulting from trust deeds, purchase money mortgages, and installment land sales contracts.²⁸ Reports also must be filed concerning future interests and interests in the land of another.²⁹ A report need not be filed, however, if the interest merely arises from a mortgage, a loan secured by realty, a mechanics or judgment lien, or some similar device.

Section 781.2(c) of the regulations issued by the Department provides that certain other interests are not reported.³⁰ These interests include leaseholds which by their express terms do not run for a period of at least ten years, contingent future interests, noncontingent future interests which do not become possessory once the present possessory estate ends, and easements or rights of way used for nonagricultural production purposes.³¹ Leases of less than ten years, even those including an option to renew, need not be reported. Similarly, noncontingent future interests which become possessory only after the termination of several intervening estates are not reportable interests in agricultural land.

In addition, easements or rights of way across the agricultural land of another need not be reported as long as they are used for some nonagricultural production purpose. These interests apparently were excepted from the reporting requirements due to the Department's recognition that they are often used for ingress and egress, rather than the production of agricultural commodities. As a case in point, the interpretive rule following the definition of "any interest" states that mineral rights in agricultural land are not reportable.³² Had an exception to the reporting requirements

26. *Id.*

27. 7 U.S.C.A. § 3501 (West Supp. 1979).

28. See S. REP. NO. 1072, 95th Cong., 2d Sess. 8-9 (1978).

29. There is some indication that an option to purchase agricultural land is a reportable interest in land. See S. REP. NO. 1072, 95th Cong., 2d Sess. 8-9 (1978). Traditionally, however, these have not been viewed as an interest in land. See 8A G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 4444 (1963).

30. 44 Fed. Reg. 29,029, 29,031 (1979) (to be codified in 7 C.F.R. § 781.2(c)).

31. *Id.* § 781.2(c)(1-4).

32. See interpretation following 44 Fed. Reg. 29,029, 29,031 (1979) (to be codified in 7 C.F.R. § 781.2(c)(4)).

not been made for nonagricultural easements and rights of way, companies with mineral interests in the subsurface of agricultural land would have been obligated to file a report pertaining to any easements across that land.³³ Of course, the exception of easements from the reporting requirements is not limited in its application to easements necessary for mineral extraction.

Requirement That the Land Be "Agricultural." As used in the Act, "agricultural land" refers to all land "used for agricultural, forestry, or timber production purposes."³⁴ Section 781.2(b) of the regulations further defines agricultural land as all land exceeding one acre in the aggregate which currently is being used for agricultural, forestry, or timber production purposes, as well as presently idle land if the last use of that land, within the past five years, was for agricultural, forestry, or timber production purposes.³⁵ The definition does not mean simply that presently idle land which exceeds one acre and was used at any time within the last five years for agricultural, forestry, or timber production must be reported even though the last use of the land before becoming idle was nonagricultural. Nor does the definition mean that formerly productive agricultural, forestry, or timber land must remain completely idle, in other words, must not be put to *any* use, for a full five years before it is transformed into nonagricultural land. This means that if land exceeding one acre currently is being used for agricultural production (which includes periods when the land is lying fallow), then it is considered to be reportable agricultural land. In addition, land exceeding one acre which formerly was used for agricultural production within the past five years, but presently is lying idle, still is considered reportable agricultural land if the *last* use of the land before it became idle was for agricultural production. Otherwise, the land is no longer considered agricultural, despite the fact that it

33. See Easements, 44 Fed. Reg. 29,029 (1979).

[I]nformation is to be reported with respect to interest in land dedicated to use for some agricultural rather than some nonagricultural purpose, such as access, which affects only a small amount of land. Moreover, in the reports required to be prepared for Congress and the President, the information submitted to the Department is to be analyzed to determine the effects of foreign ownership on family farms and rural communities. It appears that easements or rights of way across agricultural land would have only a modicum, if any, effect on family farms and rural communities, and, therefore, information on such would prove of little use in the preparation of the analytical report.

34. 7 U.S.C.A. § 3508(1) (West Supp. 1979).

35. 44 Fed. Reg. 29,029, 29,031 (1979) (to be codified in 7 C.F.R. § 781.2(b)). In this context, idle land would be land which has been permitted to grow over or fall into disuse.

At the writing of this article, the Department was proposing to change the definition of "agricultural land." See 45 Fed. Reg. 6115 (1980). The principal change would be to raise the level of "agricultural land" which would not have to be reported from one acre to a ten acre limit. The \$1,000 annual gross sales figure would continue to apply to land used for "agricultural production," but not to land used for "forestry or timber production."

could be used for agricultural production in the future.³⁶ Thus, only when the last use was for agricultural production, must land such as this remain idle for a full five years before it is transformed into nonagricultural land.

Perhaps some illustrations will serve to elucidate the foregoing. It is clear that if a foreign person acquires or transfers a large piece of cropland, which at the time of the transaction is producing an agricultural commodity, then the foreign person must file a report with the Department, even though the land will be used for nonagricultural purposes immediately after the transaction. However, if the land is simply an estate which is not producing crops of timber products, then it is not considered reportable agricultural land, since it is not *currently* being put to some productive agricultural use nor is it *idle* land. Specifically, the land is being used as a residence. Of course, if grass growing on the estate is cut and sold as hay or used for grazing livestock, even though the livestock may be for personal pleasure, then the land is used for agricultural production and must be reported.

A different situation exists when a foreign person acquires or transfers idle land. Assume, for instance, that a foreign person acquires idle land which had been productive cropland four years ago. At that point the vendor was overcome with athletic fervor and turned the cropland into a baseball field for the local Little League. It was used as such for three and one-half years until the vendor had a sudden change of interest, refused to permit the field to be used, and allowed it to fall into disrepair for the six months preceding the acquisition. The fact that the land was used for agricultural production within the past five years is of no consequence since its *last* use before becoming idle was nonagricultural. For the purposes of the reporting requirements, it would not be considered reportable agricultural land. If, however, there had been no intervening use as a baseball field, the acquisition of the land by a foreign person would have to be reported since the land would have been idle for only four rather than the requisite five years.

The situation is much the same when the land purchased is forest or timber³⁷ rather than cropland. The acquisition of that land by a foreign

36. An interesting question concerns the acts which must be performed to convert land which has not been idle for five years into nonagricultural land. Although such decisions must be made on a case by case basis, a strong argument can be made that having the land rezoned, and planned or platted for some nonagricultural purpose would be more than sufficient. The same argument should apply with equal force to converting productive agricultural land directly into nonagricultural land.

37. At the writing of this article, the Department was taking the position that forest or timber land includes all land, in excess of one acre, with a considerable number of trees growing on it. As a result, many people owning summer homes on wooded lots have been required to file reports to avoid being penalized. This definition could be improved substantially by either establishing minimum figures for density plus prospective gross sales or an-

person must be reported within ninety days. The mere fact that trees are growing on the land is sufficient to constitute current forest or timber "production," and it is not imperative that actual harvesting take place. Since cropland may become idle agricultural land, and if idle long enough may be transformed into nonagricultural land, it is arguable that the same should happen to forest or timber land. However, in view of the fact that most living trees, even after maturity, continue to drop seeds which produce saplings, that transformation could only come about in a controlled growing environment in which only fully matured trees are permitted to exist. Once those trees have survived five years beyond maturity, the idle forest land would, at least theoretically, be converted into nonagricultural land. Of course, the minute such trees are cut and either sold commercially or used for personal purposes, the land would revert to agricultural land, and a report signifying this would have to be filed within ninety days. For all practical purposes, however, it is highly unlikely that such a controlled growing environment exists.

Complicating the definition of agricultural land is the language in section 781.2(b) of the regulations, which says that even if the land is productive agricultural land, a report need not be filed if the portion of land covered with trees or used for growing crops does not exceed one acre in the aggregate, and the items grown thereon account for less than \$1,000 in annual gross receipts.³⁸ The mere fact that the items produced on that land would yield more than \$1,000 in gross receipts if sold is not determinative. A report must be filed only if the items grown are actually sold, and those sales generate more than \$1,000 in annual gross receipts.

B. Tracing of Second and Third Tier Interest Holders

When a first tier foreign person determines that an obligation exists to file a report concerning the acquisition or transfer of U.S. agricultural land, the report must reveal the previously mentioned information about the land itself, the foreign person who acquired or transferred the land, and if the first tier foreign person is an entity, other than an individual or a government, certain second tier persons holding an ownership interest in the first tier foreign person. This provides a basis for requesting additional information from the first tier concerning second tier interest holders not

nual yield in board feet, or by simply raising the number of acres of wooded land excepted from the reporting requirement. Since the latter would be much easier to apply, it is more preferable than any definition which includes prospective gross sales or annual yield in board feet. A simple acreage figure would enable an owner of wooded land to readily determine whether a reporting obligation existed. In addition, it would not suffer from the defect of possibly removing large foreign timber holdings from the ambit of the reporting requirements, since neither large nor small timber holdings would have to be reported if the density and yield figures were not met. *See* note 35 *supra*.

38. 44 Fed. Reg. 29,029, 29,031 (1979) (to be codified in 7 C.F.R. § 781.2(b)).

listed on the initial report, as well as information from second tier interest holders concerning certain third tier interest holders.

Admittedly, questions exist concerning the legislative jurisdiction³⁹ to require a report from second tier interest holders located beyond the territorial confines of the United States.⁴⁰ However, this section will not examine the jurisdictional issue, but will address questions such as who must reveal, who must be revealed, and whether that information must be disclosed automatically or only at the request of the Department. In reading this section, one should be sensitive to the fact that while the Department's authority to compel the disclosure of interest holders beyond the third tier is circumscribed,⁴¹ the basic obligation to file a report concerning an acquisition or transfer of U.S. agricultural land cannot be escaped by establishing more than three tiers. This is because an indirect foreign ownership interest of five percent will be said to exist in every U.S. entity which acquires or transfers U.S. agricultural land if each of the intervening entities holds, when taken alone or together with the interests held by other foreign persons, at least five percent interest in each succeeding, intervening entity. Therefore, the only benefit which can be derived from establishing an investment structure with more than three tiers is that the identity of the foreign person who is the beneficial owner can be concealed.

Tracing of Second Tier Interest Holders. Section 3501(e) of the Act authorizes the Secretary to issue regulations providing that any first tier foreign person who is an entity, other than an individual or a government,

39. As distinguished from judicial jurisdiction, legislative jurisdiction refers to the power of a state or nation to apply its law to a foreign state or nation. *See generally* Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587 (1978). *See also* Home Ins. Co. v. Dick, 281 U.S. 397 (1930).

40. *See generally* Reese, *Limitations on the Extraterritorial Application of Law*, 4 DALHOUSIE L.J. 589, 592 (1978) which indicates that the standards enunciated in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), apply with equal force to questions of legislative jurisdiction. The fundamental considerations are fairness to the defendant and the interest of the international legal system.

Several cases indicate that it is particularly doubtful that a penalty will be imposed when municipal law prevents the defendant from revealing the information requested. *See Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197 (1958); *Arthur Anderson & Co. v. Finesilver*, 546 F.2d 338 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); and *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 563 F.2d 992 (10th Cir. 1977).

It should be noted in this request that a provision considered by Congress which would have obligated the Secretary of Agriculture to give deference to foreign secrecy laws in efforts to trace beneficial ownership was deleted by an amendment. *See* H.R. REP. No. 1570, 95th Cong., 2d Sess. 22 (1978).

41. *See* H.R. REP. No. 1570, 95th Cong., 2d Sess. 23 (1978) which indicates that a special amendment was adopted to entitle the Secretary to trace to the third tier rather than only the second. Had further tracing been contemplated, additional tiers would have been specified.

must reveal certain information, including the name and address, of each second tier person holding any interest in it.⁴² Rather than require this information about every second tier interest holder, the Secretary has issued regulations providing that the only second tier interest holders required to be disclosed in an initial report are those considered to be "foreign persons" individually holding at least a five percent ownership interest.⁴³ However, the Secretary has reserved the authority granted under section 3501(e) of the Act by providing that additional information about all other interest holders not revealed in the initial report must be reported if that information is formally requested by the Department.⁴⁴

Specifically, a report filed by a first tier foreign person must contain information about the land itself,⁴⁵ the first tier foreign person who acquired or transferred the land,⁴⁶ as well as the legal name and address of any foreign person individually holding at least a five percent interest in that first tier foreign person.⁴⁷ If the holder of the interest is an individual, then the report must also list the citizenship of the holder.⁴⁸ If the holder is a legal entity, other than an individual or a government, then the report must list the nature and the name of the holder, the country in which it is created or organized, and its principal place of business.⁴⁹ However, if none of the second tier foreign persons holding an ownership interest in the first tier foreign person have an individual interest equal to or in excess of five percent of the total, then the report filed by the first tier foreign person must contain only the requested information concerning the land and the reporting foreign person. Information about second tier foreign persons individually holding less than a five percent ownership interest in that first tier foreign person must be revealed only in response to a Departmental request.⁵⁰ The same requirement applies to second tier nonforeign interest holders, regardless of the amount of ownership interest they hold.⁵¹

Tracing of Third Tier Interest Holders. Once the Department obtains the requisite information from the first tier foreign person concerning the second tier interest holders, certain information from those second tier "foreign persons" who are entities, other than individuals or governments, must be reported if formally requested.⁵² Though earlier regulations also

42. 7 U.S.C.A. § 3501(e)(A)(C) (West Supp. 1979).

43. 44 Fed. Reg. 29,029, 29,032 (1979) (to be codified in 7 C.F.R. § 781.3(f)(1)). The earlier regulation required a report from all foreign persons holding "any" interest. See 44 Fed. Reg. 7118 (1979).

44. 44 Fed. Reg. 29,029, 29,032 (1979) (to be codified in 7 C.F.R. § 781.3(f)(2)).

45. 7 U.S.C.A. § 3501(a)-(d) (West Supp. 1979).

46. *Id.*

47. 7 U.S.C.A. § 3501(e)(A) (West Supp. 1979).

48. 7 U.S.C.A. § 3501(e)(B) (West Supp. 1979).

49. 7 U.S.C.A. § 3501(e)(C) (West Supp. 1979).

50. 44 Fed. Reg. 29,029, 29,032 (1979) (to be codified in 7 C.F.R. § 781.3(f)(2)).

51. *Id.*

appeared to fix an obligation on those second tier interest holders to file a report concerning the land itself,⁵³ it is now clear that these reporting requirements relate only to the identity of those located in the third tier who hold an interest in the second tier. The conditions under which the report is required to be filed by second tier interest holders, as well as the nature of the required information, will be considered below.

As with the report filed by the first tier foreign person concerning second tier interest holders, the regulations dealing with reports filed by the second tier entities concerning third tier interest holders, establish requirements much less extensive than those the Secretary was authorized by section 3501(f) of the Act to promulgate. Specifically, the Act grants the Secretary the authority to require any second tier interest holder who is an entity, other than an individual or a government, to file a report revealing the identity of any person holding any interest in it.⁵⁴ However, the regulations issued pursuant thereto merely require the second tier interest holders who are "foreign persons" to file a report with the Department.⁵⁵ That report is only required to list the name and address of each foreign individual or government individually holding at least a five percent ownership interest in the second tier entity.⁵⁶ If the third tier foreign person is an individual, the report must list the citizenship of the holder.⁵⁷ If the third tier foreign person is a legal entity, other than an individual or a government, then the report must also list the nature and the name of the foreign person, the country in which it is created or organized, and the principal place of business of the third tier foreign person.⁵⁸

52. 44 Fed. Reg. 29,029, 29,033 (1979) (to be codified in 7 C.F.R. § 781.3(g)).

53. This obligation existed by virtue of the definition in 44 Fed. Reg. 7115, 7117 (1979) (to be codified in 7 C.F.R. § 781.2(1)) of "significant interest and substantial control" which provided:

A foreign person shall be deemed to hold substantial interest and significant control in a legal entity for the purposes of reporting if such foreign person holds five percent or more interest in any legal entity which holds, directly or indirectly any interest in United States agricultural land.

See note 23 *supra*. The Department is proposing to redefine this requirement. See also 19 HARV. INT'L L.J. 1026, 1029-1030 (1978) indicating that the statute may have actually authorized the Secretary to require a report concerning the land from foreign persons who *indirectly* hold an interest in such land by virtue of holding shares in a legal entity which directly holds the land.

54. 7 U.S.C.A. § 3501(f) (West Supp. 1979).

55. 44 Fed. Reg. 29,029, 29,033 (1979) (to be codified in 7 C.F.R. § 781.3(g)). Pursuant to the regulations, second tier *nonforeign* interest holders are not required to reveal information pertaining to the third tier interest holders, foreign or nonforeign, with an interest in them. Section 2(f) of the Act, however, entitled the Secretary to request this information from these second tier interest holders. See 7 U.S.C.A. § 3501(f) (West Supp. 1979). This authority has not been exercised, and it is difficult to understand why it was granted to the Secretary.

56. 44 Fed. Reg. 29,029, 29,033 (1979) (to be codified in 7 C.F.R. § 781.3(g)(1)(i)).

57. *Id.* (to be codified in 7 C.F.R. § 781.3(g)(1)(ii)).

58. *Id.* (to be codified in 7 C.F.R. § 781.3(g)(1)(iii)).

Second tier interest holders also may be required, upon request, to report certain information pertaining to other third tier interest holders. These third tier interest holders would include all "foreign persons" individually holding less than five percent of the second tier foreign persons total ownership interest and all nonforeign third tier interest holders, regardless of the amount of their ownership.⁵⁹ However, the second tier interest holders are not required to reveal nonforeign third tier interest holders unless information pertaining to second tier nonforeign interest holders was requested earlier from the first tier foreign person.⁶⁰ Thus, the Department recognizes that if a first tier foreign person is only required to reveal the identity of its second tier foreign interest holders, even though they may include those with less than five percent ownership interest, then there is little need to ask those second tier foreign interest holders to report information concerning third tier nonforeign interest holders.⁶¹

In summary, the first tier foreign person who is an entity, other than an individual or a government, must *automatically* report information, including name and address, about each second tier foreign person individually holding five percent or more of its total ownership interest. That first tier foreign person is also required, upon *request*, to reveal similar information about other second tier interest holders. Second tier foreign interest holders, other than individuals or governments, may then be required, also upon *request*, to report information concerning the identity of third tier foreign persons holding any interest in them. Those second tier interest holders may also be required to provide facts concerning third tier *nonforeign* persons, regardless of the extent of their interests, if the first tier foreign person who acquired or transferred the U.S. agricultural land had been requested to report the identity of second tier interest holders who are nonforeign persons.

III. OBSERVATIONS

While Congress' desire to establish an effective date collection system for ascertaining the magnitude of foreign investment in U.S. agricultural land prior to considering regulatory legislation is commendable, the terms of the Agricultural Foreign Investment Disclosure Act of 1978 seem to assure that analytical reports concerning the impact of investment will fail to depict precisely the extent of this investment. Although the Act has

59. *Id.* (to be codified in 7 C.F.R. § 781.3(g)(2)).

60. *Id.* (to be codified in 7 C.F.R. § 781.3(g)(2)(ii),(iii)).

61. See 44 Fed. Reg. 29,029, 29,030-31 (1979) on "Reporting of the Second Tier," which indicates that this regulation represents a change from the earlier rule which would have authorized the Department to require the second tier foreign interest holders to report information about any third tier interest holder, even though the Department may never have requested the first tier foreign person to file a report concerning its nonforeign interest holders.

many shortcomings, the following are the most illustrative.

As has been stated, any foreign person who acquires U.S. agricultural land must file a report within ninety days of the transaction. Essentially, this report must contain certain information about the land, the foreign person acquiring it, and, if the first tier foreign person is an entity other than an individual or a government, those second tier foreign persons individually holding five percent of the first tier's total ownership interest. If the foreign person is a U.S. corporation, five percent of whose total ownership interest is held by certain second tier foreign persons, the obligation to file attaches at the time of acquisition and continues even if, at some point before the report is timely filed, the amount of foreign investment in the U.S. corporation drops below five percent.⁶² Those reports may distort figures relating to the amount of foreign investment in U.S. agricultural land.

The problem is that, unlike the situation in which land is acquired and then transferred prior to the deadline for filing a report concerning the acquisition, the Department does not require the filing of a report updating the status of the foreign investment in the U.S. corporation. In the acquisition and transfer situation, even though the foreign person disposes of the land prior to the last day for filing a report of acquisition, a report concerning the transfer also must be filed. This is not the case when the aggregate foreign investment in a U.S. corporation drops below the five percent trigger level.

A further complication is the Act's requirement that a report be filed within ninety days after a nonforeign person holding U.S. agricultural land becomes a foreign person.⁶³ As a result, if the amount of foreign investment in that same U.S. corporation subsequently rises to five percent, then another report concerning the land must be filed even though the total amount of land held has remained constant.

The statistical results of the report also will be inflated by the lack of a requirement that a report be filed when land is transformed from agricultural to nonagricultural.⁶⁴ Consequently, much of the agricultural land purchased by foreigners and then used for nonagricultural purposes such as construction of residential communities, high rise office buildings, or industrial centers, will be included as foreign agricultural land in the report prepared by the Department.

These problems have resulted from certain inadequacies in the Act itself and could have been avoided had the legislation explicitly required that reports be filed whenever U.S. agricultural land held by a foreign

62. 7 U.S.C.A. § 3501(a) (West Supp. 1979).

63. 44 Fed. Reg. 29,029, 29,032 (1979) (to be codified in 7 C.F.R. § 781.3(c)).

64. See H.R. REP. No. 1570, 95th Cong., 2d Sess. 12 (1978), which indicates that the language in H.R. REP. No. 13,356, *supra* note 2, which is similar to that in the Act, did not require a report of change.

person changes to nonagricultural land, as well as when a foreign person holding U.S. agricultural land becomes a nonforeign person. Any effort by the Department to correct legislative inadequacies through the issuance of rules requiring that reports of that nature be filed would be subject to question, since section 3502(a)(1) of the Act explicitly states, *inter alia*, that a penalty may be imposed only if one fails to submit a report "in accordance with the provisions of [section 3501] . . ."⁶⁵ Unfortunately, section 2 neither requires nor authorizes the Department to demand information which could avert the aforementioned problems. Moreover, those subsections which authorize the Department to request "such other information as the Secretary may require by regulation,"⁶⁶ authorize nothing more than the collection of additional information from those specifically required to report. Since only foreign persons that hold, acquire, or transfer U.S. agricultural land have a reporting obligation, the Secretary may only require those persons to disclose additional information pertaining to that holding, acquisition, or transfer. Clearly, the Secretary lacks the authority to establish additional reporting requirements concerning changes in the nature of the land or the person holding that land. The fact that the "additional information" provisions are not contained in a separate section of the Act appears to support this construction.

The deficiencies discussed virtually were inevitable given Congress' sensitivity to the urgent need for legislation establishing a system for the collection of information to ultimately verify or disprove rumors concerning the extent of foreign investment in U.S. agricultural land.⁶⁷ Though the picture the Department will provide in its report to the President and Congress may be flawed, if the conclusions are prefaced by an adequate description of the problems endemic to the Act, the impression left by the report indeed may impart some accurate information concerning foreign investment and could lead to remedial legislative action to insure that subsequent reports will be more precise.

65. 7 U.S.C.A. § 3502(a)(1) (West Supp. 1979).

66. 7 U.S.C.A. §§ 3501(a)(9), (b)(8) (West Supp. 1979).

67. International Investment Survey Act of 1976, 22 U.S.C.A. § 3101 (West Supp. 1979), authorizes a study of land reporting systems. Had Congress awaited the conclusion of this study, perhaps some of the problems with the Agricultural Foreign Investment Disclosure Act of 1978 could have been averted.

