

Virginia's New Foreign Entities and Ownership Act

Description

Context and Background of New Law

In response to growing global tensions between the United States and certain other adversarial nations, and concerns about such nations owning and acquiring lands within the Commonwealth, Governor Glen Younkin in the State of the Commonwealth address in January 2023 asked the General Assembly to send him a bill that would prohibit dangerous foreign entities tied to the Chinese Communist Party from purchasing Virginia farmland. In response, the General Assembly passed Senate Bill 1438 and companion House Bill 2325.

In the original form as passed by the General Assembly, the rights of lenders that hold security interests against such foreign-owned lands were almost completely eviscerated. Once the legislative committee of the VLTA learned of this, sensing the potential disruption such an approach would inflict upon lenders' rights and the uncertainty it would generate to those in the title industry relying upon the land records, it went into action suggesting alternate language that provided greater respect for the rights of such secured lenders.

The result is Virginia Code Section 55.1-507, et. seq. which was signed into law on April 12, 2023 and went into effect on July 1, 2023.

Foreign Ownership in Virginia

According to the 2021 USDA report, foreign investors own approximately 254,000 acres of agricultural land in the Commonwealth of Virginia. This amount of foreign-owned acreage is the fourteenth lowest amount among the various states. Most is forestland comprising 163,357 acres, along with 40,349 acres of cropland and 24,146 acres of pastureland.

Action By Other States, the Federal Government and ALTA

With the passage of the new law, Virginia joined 23 other states with laws restricting or limiting foreign ownership of land in their state. However, there has been no uniform approach among these states in how the laws operate. For instance, there is variation in how agricultural land is defined, or whether resident aliens are restricted. Most importantly, there is great variation in the way in which the statutes are enforced against alleged violators. Although Congress is considering such laws, currently no federal law restricts foreigners from acquiring or holding U.S. agricultural land, leaving such control to the states. However, the federal government does monitor such ownership under the Agricultural Foreign Investment Disclosure Act of 1978 (AFIDA). Under this law, a foreign person or entity is required to disclose the acquisition, change of control or use, or disposition of any interest in agricultural land to the U.S. Department of Agriculture.

With the concern created by different states taking such a varied approach, ALTA has been actively engaged in drafting sample legislative text with a focus on preventing the voiding of past transactions or creating perpetual clouds upon title.

The New Law in Virginia

The new Virginia law is comprised of three separate statutes- VA. Code Sections 55.1-507, 55.1-508 and 55.1-509.

55.1-507 provides the definitions of key terms used in the statutes. One key term is “Agricultural land” which is defined as real estate “used or zoned in a manner that would permit the use of the real estate for agricultural operation.” This definition casts a broad net, encompassing land that is not used currently for agricultural purposes, but based upon current zoning may be so used.

Another key term is “Interest in agricultural land” which is defined as “any right, title, or interest direct or indirect, in and to . . . agricultural land.” The statute then states that if the interest does not allow the interest holder to possess or occupy the land, or direct the conduct of the agricultural operation, it shall not be deemed an interest in agricultural land. This statutory definition also has broad application and begs certain questions. How does one effectively determine such interest, especially in multi-layered entities? How does one determine conclusively the operational control of an interest? These questions become especially important given the effects of enforcement of the statute discussed below.

The term “Foreign Adversary” is defined as a foreign government or nongovernment person who is determined by the U.S. Secretary of Commerce “. . . to have engaged in a long-term pattern or serious instances of conduct significantly adverse to the national security of the United States or security and safety of United States Persons, as set forth in 15 C.F.R. Section 7.4 . . .” Currently there are five nations and one individual so designated as a “Foreign Adversary”: China, Cuba, Iran, North Korea, Russia, and Venezuelan politician Nicolas Maduro.

Section 55.1-508 provides the operational framework of the statute. Under this code section an acquisition of a defined interest in agricultural land by a foreign adversary is held as void and the title to the interest is deemed vested in the Commonwealth as of the date the interest was acquired. The Commonwealth is not required to pay consideration for this interest. Any lien that attaches to the property interest shall remain; however, the lien holder may not foreclose so long as the Commonwealth owns the property. Furthermore, if the foreign adversary sells the interest in the agricultural land to a non-foreign adversary, title will vest in the non-foreign adversary transferee as if the property interest had never been acquired by the foreign adversary.

The final section, 55.1-509, states that the Virginia Department of Agricultural and Consumer Services shall compile an annual report providing information as to the total amount of agricultural land under foreign ownership, the percentage of change in such ownership over the past 10 years, how foreign-owned agricultural land is currently being used, any recent changes in foreign ownership of energy production, storage or distribution facilities, and any changes the Department recommends to legislative, regulatory or administrative policies based on its findings.

Effect of the New Law

Given the potential effect of the statute to divest ownership of property and impair the enforceability of secured interests, the implementation of the new law has created a significant stir throughout the Virginia title industry. Settlement agents and settlement attorneys should now determine whether the property in their transaction qualifies as agricultural land under the statute and, if so, whether or not their buyer is a foreign adversary and thus affected by the statute. Title insurers are grappling with how

to best advise their agents on addressing and implementing the new law from a title insurance perspective. Although title insurance policies generally exclude from coverage any loss sustained due to any governmental forfeiture, police, regulatory or national security power, title insurers are still generally requiring some due diligence to address the statute. Most title insurers require contacting underwriting counsel directly if the agent discovers the buyer is a foreign adversary under the statute. When there is no such indication, for all purchases of agricultural land many title insurers are either suggesting or requiring that an agent secure an affidavit wherein the buyer certifies they are not a foreign adversary. Some title insurers, such as Stewart Title Guaranty Company, are not at this time requiring a general exception addressing the new law in their policies. However, that may change depending on developments as the new law is enforced in the future. Agents should always follow their particular underwriter's requirements addressing the new law.

Lastly, there is concern that the new law restricting foreign ownership of agricultural land in Virginia, as well as similar laws implemented by other states, may create certain federal and state civil rights issues. Due to the broad effect of the new law, there is little doubt issues regarding enforcement will be raised and litigated in the future.

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