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# ENERGY LAW

## REPORT



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# AFIDA Penalties Are Coming: Costs for Renewable Development May Be More Than You Think

*By Anne E. Callenbach and Alan Claus Anderson\**

*The authors of this article discuss the costs associated with Agricultural Foreign Investment Disclosure Act enforcement and compliance when undertaking renewable development projects.*

When evaluating the all-in costs of a renewable development project, it is critical that costs associated with Agricultural Foreign Investment Disclosure Act (AFIDA) enforcement and compliance are considered. Since its enactment in 1978, AFIDA has provided for substantial penalties for the failure to file, or the late filing, of mandated reports on agricultural acreage held by an entity with an ultimate non-U.S. parent.

## **AFIDA COMPLIANCE REPORTING AND POTENTIAL PENALTIES**

AFIDA reporting requirements are applicable to any non-U.S. based direct or indirect owner of agricultural land, which includes every company organized in the United States but in which a significant interest or substantial control (i.e., ten percent or more) is held by a non-U.S. parent.

A substantial percentage of renewable development in the United States is driven by companies that fall within the bounds of AFIDA's reporting obligations, yet a small number of renewable developers appear to be current with their AFIDA reporting obligations.

Both the acquisition and disposition of agricultural land are required to be reported to the United States Department of Agriculture (USDA) within 90 days of the acquisition or disposition. Stated another way, each executed lease or fee interest purchase of agricultural land, or the disposition of either, starts the clock ticking.

If AFIDA compliance reporting and potential penalties are not yet on your company's diligence checklist, this may be about to change.

Penalties for failure to file or late-filing can be a substantial cost to renewable development. Federal regulations enable penalties of up to 25% of the fair market value of the land, as determined by the USDA.

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\* Anne E. Callenbach is a shareholder at Polsinelli. Alan Claus Anderson is a shareholder at the firm and chair of its national Energy Practice. The authors may be reached at [acallenbach@polsinelli.com](mailto:acallenbach@polsinelli.com) and [aanderson@polsinelli.com](mailto:aanderson@polsinelli.com), respectively.

Although penalties have been an option since AFIDA's enactment, a review of the USDA's annual report to Congress reveals that relatively few, and relatively small, penalties were assessed up until 2010. The USDA assessed only eight penalties for AFIDA violations between 2012-2022, although the number of filings dramatically increased during the same time period. AFIDA filings were made for 911 parcels of land in 2012, which jumped to 6,363 parcels in 2021. No penalties were assessed for AFIDA violations during the period 2015-2018 due to low levels of staffing in the office tasked with enforcing the law.

The number of AFIDA compliance and enforcement specialists at the USDA has doubled within the last year and a half, in part due to questioning of the gap in AFIDA enforcement by concerned members of the House of Representatives. In response to this concern, the USDA responded by noting its increased staffing and its renewed commitment to assessing ex post penalties starting with late filings in the calendar year 2021 and going forward.

If your company acquires leasehold or fee interests in agricultural property and has a non-U.S. parent, it is very likely that federal AFIDA reporting obligations apply. More than half of all states have similar reporting requirements as well.

If AFIDA is applicable to your business, it is critical that you engage counsel experienced in AFIDA matters to rectify any historical failures to report and establish a process for ongoing AFIDA compliance. Waiting until the final due diligence call to mention AFIDA compliance to counterparties is not the best strategy.

## **AFIDA IN BRIEF**

### **Who Must Report?**

Foreign investors who have significant interest or substantial control and acquire, dispose of, or hold an interest in U.S. agricultural land must report their holdings and transactions to the U.S. Department of Agriculture. Interests include land owned as well as land leased for ten years or more. This includes:

- Foreign individuals.
- Foreign organizations.
- Foreign governments.
- U.S. organizations – if a significant interest or substantial control is directly or indirectly held by foreign individuals, organizations, or governments.

### **How Is Agricultural Land Defined by AFIDA?**

- Land exceeding 10 acres in the aggregate that has been used within the

last 5 years for farming, ranching, forestry, or timber production.

- Land exceeding 10 acres in which 10 percent is stocked by trees of any size, including land that formerly had such tree cover and will be naturally or artificially regenerated.
- Landholding totaling 10 acres or less in the aggregate if producing annual gross receipts in excess of \$1,000 from the sale of farm, ranch, forestry, or timber production.