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# Foreign Direct Investment in U.S. Real Estate: A Survey of Federal and State Entry Level Regulation

by Mary Patricia Azevedo\*

Land ownership by nonresident alien investors in the United States is regulated simultaneously at the federal and state levels. At the federal level, no blanket restrictions exist on the amount, location or type of land that an alien investor may hold.<sup>1</sup> Rather, federal regulation requires that foreign investors in certain types of U.S. real estate report their ownership to the government<sup>2</sup> and limits the rights that foreigners may enjoy with respect to federally-owned land.<sup>3</sup> At the state level, by contrast, a foreign investor may find himself precluded from direct ownership of land in some jurisdictions or limited to holding a certain number of acres.

As an aid to understanding the sources and motivations behind current restrictions on foreign investment in U.S. real estate, this article will provide a brief overview of the origins of anti-alien land regulation. Then, it will review both state and federal regulation of land ownership by aliens.

## I. Background

State laws restricting alien ownership of U.S. land have a long and vital history.<sup>4</sup> Springing out of the basic concept that he who owed no fealty to the sovereign could take no land in freehold,<sup>5</sup> anti-alien land law was a part of England's real property law for centuries and came to

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<sup>1</sup> Some federal statutes limit direct foreign participation in very specific types of real estate in the United States. These statutes are reviewed in text accompanying notes 12 through 68, *infra*.

<sup>2</sup> See Agricultural Foreign Investment Disclosure Act of 1978, (AFIDA), 7 U.S.C. §§ 3501-3508 (Supp. III 1979).

<sup>3</sup> See *infra* discussion accompanying notes 12 through 68.

<sup>4</sup> For a good historical discussion of anti-alien land laws, see Sullivan, *Alien Land Laws: a Re-evaluation*, 36 Temp. L. Rev. 15 (1962).

<sup>5</sup> See 2 W. Blackstone, *Commentaries on the Laws of England* 268-74, 288-93 (9th ed. 1783).

America's shores through the earliest settlers' embrace of common law principles. During the period between 1780 and 1880, however, many states in the United States liberalized their anti-alien land laws; by about 1880, aliens could hold land on the same terms as U.S. citizens in over half of the state jurisdictions.<sup>6</sup> During this time, a sharp increase occurred in land investment by aliens who did not intend to occupy it,<sup>7</sup> very possibly as a result of these modifications. Often the purchasers were foreign speculators who intended to market the land to aliens bound for America in search of homesteads. Indeed, during this time the business of acting as middle man and financier became a lucrative one for many non-resident aliens.<sup>8</sup> Many farm states like Wisconsin and Iowa became alarmed by the prospect of large amounts of their land being controlled by aliens and, accordingly, they passed new restrictive legislation during the 1880's and 1890's.<sup>9</sup>

The history of federal regulation of foreign investment in U.S. real property is different from that of state laws. Direct federal regulation of alien land investments in the United States is a relatively new phenomenon and reflects the basic tenet of U.S. law that the regulation of real property ownership and conveyance in the United States should be a matter of state law. Indeed, when Congress has intervened at all in recent years, such as with the Agricultural Foreign Investment Disclosure Act, the theory has been that Congress has the authority to regulate interstate and foreign commerce,<sup>10</sup> not that Congress has the inherent power to regulate transactions in real property.<sup>11</sup>

The general rule that the regulation of foreign investment in U.S. land is a matter of state regulation does have a few exceptions. For example, federally-owned lands that contain grazing land, timber or minerals traditionally have been available for exploitation exclusively to U.S. residents and U.S. juridical persons. In addition, as noted earlier, reporting requirements concerning foreign investment in U.S. agricultural land have recently been adopted by the U.S. government.

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<sup>6</sup> See Sullivan, *supra* note 4, at 9.

<sup>7</sup> See C. Lewis, *America's Stake in International Investment* 80 (1938).

<sup>8</sup> For a more detailed discussion see T. Anderson, *A Survey of Alien Land Investment in the United States, Colonial Times to Present*, 8:apps L-M, Report of the Secretary of Commerce to Congress, in *Compliance with the Foreign Investment Study Act of 1974, Foreign Direct Investment in the United States*, U.S. Dep't of Commerce L4-L11 (1976).

<sup>9</sup> See, e.g., 1887 Wis. Laws ch. 479, §§ 1-3 and 1888 Iowa Acts ch. 85, § 1, and compare Wis. Stats. of 1849, ch. 62, § 35 and Iowa Code of 1873, §§ 1908, 1909.

<sup>10</sup> The Constitution of the United States enumerates the powers of the legislature and the executive in Articles I and II. In addition, the Constitution grants to Congress the power to enact all laws "necessary and proper" to effect the specific powers granted. All other powers of government are reserved to the people and the states. U.S. Const. amends. IX and X.

<sup>11</sup> *Id.* The power to regulate private transactions in land, in almost all cases, lies with either the state or the municipality where the property is situated or both. This is true of matters involving transfers in ownership and inheritance. The most important exception to this rule involves federally owned lands. See U.S. Const. art. IV, § 3, cl. 2.

## II. Federal Regulation of Foreign Investment in U.S. Real Estate

### A. *Agricultural Foreign Investment Disclosure Act*

In 1977 and 1978 several committees of the U.S. Congress held hearings on foreign investment in U.S. real estate, particularly agricultural land.<sup>12</sup> The hearings were prompted by the concerns of many farmers and their representatives. These parties testified that little was known about foreign investment in U.S. agricultural land; that fears were developing about the connection between rapidly increasing prices of prime U.S. agricultural acreage and investments by foreigners in U.S. agricultural acreage; that foreigners, because they were often absentee owners, might not be as motivated as native owners to practice soil conservation; and, finally, that foreign-based speculators might sell more readily to developers than U.S. landowners would and thus contribute to the decrease of productive farm acreage in the United States.

Responding to these concerns, Congress passed the Agricultural Foreign Investment Disclosure Act (AFIDA).<sup>13</sup> The purpose of the law is not to restrict present holdings or future acquisitions of agricultural land by foreign investors. Rather, the Act focuses on data collection and requires certain categories of foreign investors to supply specific information about their investment transactions.

AFIDA requires that all foreign investors in U.S. agricultural land<sup>14</sup> report their holdings to the U.S. Secretary of Agriculture.<sup>15</sup> Any foreign person with any interest other than a security interest in U.S. agricultural property must disclose his legal name and address,<sup>16</sup> his nationality,<sup>17</sup> the nature of any foreign juridical person that may be the direct holder of the real estate interest,<sup>18</sup> the type of interest held,<sup>19</sup> the price paid for the real estate,<sup>20</sup> the agricultural purpose for which the foreign person intends to use the land,<sup>21</sup> and any other information that the Secretary of Agriculture may require.<sup>22</sup>

#### 1. *Foreign person*

AFIDA's definition of the term "foreign person" reflects much

<sup>12</sup> See House Comm. on Agriculture Investment Disclosure Act of 1978, H.R. Rep. No. 1570, 95th Cong., 2d Sess. 16-21, reprinted in [1978] U.S. Code Cong. & Ad. News 2914, 2924-30 for a summary of these hearings. See also Sen. Comm. on Agriculture, Nutrition and Forestry, Foreign Investment in United States Agricultural Land, 95th Cong., 2d Sess. (1979).

<sup>13</sup> See *supra* note 2. Regulations issued under the Act may be found at 7 C.F.R. §§ 781.1-5 (1981).

<sup>14</sup> See 7 U.S.C. § 3508(1) (Supp. III 1979).

<sup>15</sup> *Id.* § 3501(b).

<sup>16</sup> *Id.* § 3501(a)(1).

<sup>17</sup> *Id.* § 3501(a)(2).

<sup>18</sup> *Id.* § 3501(a)(3).

<sup>19</sup> *Id.* § 3501(a)(4).

<sup>20</sup> *Id.* § 3501(a)(6).

<sup>21</sup> *Id.* § 3501(a)(8).

<sup>22</sup> *Id.* § 3501(a)(9).

thought on the part of lawmakers about how foreign investments in U.S. land are structured.<sup>23</sup> The Act recognizes that alien land holders may include foreign individuals, foreign governments, foreign juridical persons or a U.S. legal entity (corporation, partnership or limited partnership) with foreign participation exceeding five percent.<sup>24</sup> Anticipating the use of nominee entities to avoid the reporting requirements, Congress authorized the Secretary of Agriculture to request any information regarding beneficial ownership from legal entities that intervene between the investment and the true owner.<sup>25</sup> Failure to comply with the AFIDA reporting requirements may result in a civil penalty.<sup>26</sup>

## 2. *Agricultural land*

AFIDA defines "agricultural land" as property used for agricultural, forestry or timber production.<sup>27</sup> By definition, it does not include an interest in subjacent mineral rights.<sup>28</sup> Furthermore, regulations issued under the Act provide that if the agricultural land is currently idle and has not been used for agricultural purposes for the past five years, then the foreign holder need not report his holdings.<sup>29</sup> Reporting is triggered only on holdings that exceed one acre.<sup>30</sup>

As noted earlier, a foreign holder of a security interest in U.S. agricultural land is not considered to fall within the AFIDA reporting requirements. Certain future interests held by foreigners also need not be reported.<sup>31</sup> Foreign holders of leaseholds in agricultural land that exceed ten years must report, however.<sup>32</sup>

## 3. *Avoidance of AFIDA reporting requirements*

Whether AFIDA will succeed in identifying the true foreign owners of all U.S. agricultural property is questionable. The drafters of the Act certainly understood that the real owners of the land might be several juridical persons removed from directly holding their acreage. Accordingly, they provided the Secretary of Agriculture with investigative powers. Yet it is unlikely that the Secretary of Agriculture in fact could compel a foreign holding company to disclose the "true" holders of control of U.S. agricultural property if the representatives of the holding companies were outside the federal government's jurisdiction.

<sup>23</sup> Foreign person is defined at *id.* § 3501(a)(9).

<sup>24</sup> See 7 C.F.R. § 781.2(g) (1981).

<sup>25</sup> See 7 U.S.C. § 3501(a)(9) (Supp. III 1979) and 7 C.F.R. § 781.2(g) (1981).

<sup>26</sup> This penalty may not exceed 25% of the fair market value of the land interest in question. See 7 U.S.C. § 3502(b) (Supp. III 1979).

<sup>27</sup> *Id.* § 3508(1).

<sup>28</sup> See 7 C.F.R. § 781.2(c)(4) (1981).

<sup>29</sup> *Id.* § 781.2(b).

<sup>30</sup> *Id.*

<sup>31</sup> These future interests are contingent future interests and noncontingent future interests that do not become possessory on expiration of a present possessory estate. *Id.* at § 781.2(c).

<sup>32</sup> See *id.* at § 781.2(c)(1).

Take, for example, the hypothetical case of an investment in five hundred acres of Wisconsin farmland. The record owner is a Texas limited partnership, whose partners are two Netherlands Antilles corporations. The owners of the Netherlands Antilles corporations are European based holding companies, which in turn may or may not be directly controlled by the ultimate beneficiaries of ownership. Complying with AFIDA, the Texas partnership would report to the Secretary of Agriculture that the agricultural land was foreign owned, since more than five percent of the Texas partnership is foreign controlled. The partnership, however, may be aware only that its partners are two Netherlands Antilles corporations, and be unaware of the ultimate beneficial owners.

Knowing that Netherlands Antilles corporations are rarely, if ever, the ultimate beneficial owners,<sup>33</sup> the Secretary of Agriculture might initiate an investigation to discover the true beneficial owner. It could order the Texas partnership to disclose the identities of the ultimate owners, but if the Texas partnership knows only the identities of its Netherlands Antilles partners, it cannot supply the Secretary of Agriculture with the desired information. In its efforts to compel disclosure, the Secretary of Agriculture could fine the Texas partnership, but the maximum penalty is twenty-five percent of the fair market value of the agricultural acreage involved.

The Secretary of Agriculture might next consider a direct investigation of the Netherlands Antilles holding companies. Because these holding companies are creatures of another jurisdiction, the Secretary's efforts will probably prove unsuccessful. Operating outside of the United States, the Secretary's investigative powers are at their weakest. Thus, because the Secretary would be forced to investigate in a foreign jurisdiction where he cannot compel disclosure, his attempts to discover the identity of the owners of the Netherlands Antilles holding companies most likely will fail.

The foregoing example illustrates the problems of administering even a well-drafted statute like AFIDA, where the extraterritorial application of U.S. law is involved. Furthermore, in an environment of increasing hostility to extraterritorial enforcement of U.S. law,<sup>34</sup> perhaps lawmakers must reluctantly admit that without the voluntary compliance of foreigners with U.S. laws like AFIDA, there is little hope for determining the true identities of foreign investors in the United States.<sup>35</sup>

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<sup>33</sup> The favorable tax treatment that a foreign investor can attain by structuring a U.S. investment through a Netherlands Antilles holding company is documented in M. Länger, *International Tax Planning* (1979).

<sup>34</sup> Several foreign jurisdictions have enacted laws in the past year that make it more difficult to acquire information in their jurisdictions in order to comply with U.S. laws or U.S. judicial orders. See, e.g., French Republic Law No. 80-538 of July 16, 1980; Declaration of the United Kingdom Concerning Article 23 of the Hague Convention.

<sup>35</sup> Of course, excessively severe penalties for failure to disclose the names and nationalities of the ultimate beneficiaries of U.S. investments could be imposed. Difficulties might arise, however, when the penalties are so high that they amount to confiscation.

## B. Other Federal Regulation

### 1. Grazing rights

For foreign owners of U.S. livestock, the regulation of grazing rights on federal lands may be an important concern. Control of grazing rights is vested in two administrative agencies of the federal government, the Bureau of Land Management (BLM) and the Forest Service (FS). These agencies have the authority to issue permits for grazing rights to interested parties.

For federal lands under the jurisdiction of the BLM, the Taylor Grazing Act<sup>36</sup> and regulations issued by the BLM outline the qualifications that successful permit applicants must possess. The Act and regulations provide that applicants for grazing rights must

- (1) be in the livestock business *and*
- (2) own or control land or water-based property *and*
- (3)(a) be a U.S. citizen or file a declaration that the applicant intends to become a U.S. citizen, *or*
  - (b) be an association recognized under state law with all members qualifying under (a), *or*
  - (c) be a corporation authorized to do business in the state where the grazing land is located.<sup>37</sup>

Clearly, the easiest method for a foreign investor to use in acquiring a grazing permit is (c). Neither the Act nor regulations issued under it suggest that the corporation will be scrutinized for foreign participation or control.<sup>38</sup>

The Forest Service, on the other hand, appears to apply a somewhat stricter scrutiny and regulation of grazing rights on FS land than is the case with lands regulated by the BLM. Foreign investors interested in acquiring grazing rights should be aware of the following inconsistency. According to Bruce Zagaris, author of a study on foreign investment in U.S. natural resources and land, the Forest Service has issued regulations in the Forest Service Manual which preclude alien investors from receiving grazing permits to FS land until they have received their final citizenship papers.<sup>39</sup> Zagaris notes further that while the Forest Service allows corporations, partnerships, and trusts to apply for permits, these entities will undergo "special, but unspecified scrutiny."<sup>40</sup> The regulations do not describe what is meant by "special, but unspecified scrutiny," but Zagaris implies that the FS may well disapprove applications by corporations, partnerships, and trusts that have significant foreign participation.

By contrast, a federal regulation provides that applicants for grazing

<sup>36</sup> 43 U.S.C. §§ 315-315r (1976).

<sup>37</sup> 43 U.S.C. § 315(b) (1976) and 43 C.F.R. § 4110.1 (1980).

<sup>38</sup> See B. Zagaris, *Foreign Investment in the United States* 48 (1980).

<sup>39</sup> *Id.* Mr. Zagaris cites the Forest Service Manual §§ 2231.14, 2231.16, and 2231.18 (1969) in support of this proposition.

<sup>40</sup> *Id.*

permits for forest lands may include corporations established under state law and other associations.<sup>41</sup> No mention is made of unfavorable or discriminatory treatment of alien investors and their affiliates. However, the same federal regulations do vest broad discretionary powers in the administrator of the Forest Service concerning the issuance of grazing permits.<sup>42</sup> The regulations cited by Zagaris in the Forest Service Manual were apparently issued under this discretionary authority. Nevertheless, foreign investors adversely affected by these regulations might do well to question the apparent inconsistency in the Code of Federal Regulations and Forest Service Manual regulations.

## 2. *Mineral rights*

Natural resources are plentiful in the United States. Blessed with much of the world's coal and some of the richest oil fields, on and offshore, in the world, the United States has a highly developed body of mineral related law. Given the worldwide scarcity of several types of natural resources, it should be expected that foreign investors in the United States are interested and active in mineral exploration.<sup>43</sup>

Like property regulation, mineral-related laws are both a matter of state and federal law. Federal laws regulating the entry of aliens into new mining ventures are relatively few: the Mining Law of 1872,<sup>44</sup> the Mineral Lands Leasing Act of 1920,<sup>45</sup> the Outer Continental Shelf Lands Act,<sup>46</sup> and the Geothermal Steam Act of 1970.<sup>47</sup> Most if not all of their provisions deal with resource exploration on federally controlled lands.

Until 1920, the Mining Law of 1872<sup>48</sup> controlled the granting of mining leases for all minerals on federal land. After that time, however, the Mineral Lands Leasing Act of 1920<sup>49</sup> and subsequent congressional enactments displaced much of the broad jurisdiction of the Mining Law of 1872.

While the most important applications of the 1872 Law appear to-

<sup>41</sup> 36 C.F.R. § 222.3(1) (1980).

<sup>42</sup> See 36 C.F.R. §§ 222, 293.7 (1980).

<sup>43</sup> While *de novo* mineral investments by foreigners in the United States may be thought to be few and far between, foreign interests in U.S. energy and energy related companies are commonplace. Thus, even long-established U.S. companies with nonresident alien participation could be affected by the provisions which will be outlined in this discussion. A recent case in point involved Dome (Canada) Petroleum's efforts to acquire a controlling interest in Conoco Oil. In its attempts to rebuff Dome, Conoco made the point that several of its leases involving federal lands would be jeopardized by Dome's acquisition of a controlling interest in Conoco. Source: Dow Jones Wire May 18, 1981. See also Mufson, *Conoco Confronts Dome Bid by Changing Bylaws*, Wall St. J., May 20, 1981, at 16, col. 1.

<sup>44</sup> 30 U.S.C.A. §§ 21-54 (West & West Supp. 1980).

<sup>45</sup> 30 U.S.C. §§ 181-287 (1976).

<sup>46</sup> 43 U.S.C. § 1337 (1976 & Supp. III 1979).

<sup>47</sup> 30 U.S.C. §§ 1001, 1015 (1976 & Supp. III 1979) and 43 C.F.R. §§ 3200, 3202.2-1(b), and 3240 (1980).

<sup>48</sup> 30 U.S.C.A. §§ 21-54 (West & West Supp. 1980).

<sup>49</sup> 30 U.S.C. §§ 181-287 (1976 & Supp. III 1979).



day to concern uranium<sup>50</sup> and possibly pipelines,<sup>51</sup> the law provides that qualified parties may explore and purchase "all valuable mineral deposits in land belonging to the United States."<sup>52</sup> The law declares that parties must be citizens,<sup>53</sup> aliens who have declared their intentions to become U.S. citizens,<sup>54</sup> or a corporation organized under the laws of any state of the United States.<sup>55</sup> The law is silent on the question of whether participation by aliens in a U.S. corporation will disqualify the entity from engaging in mineral exploration. Case law indicates that proof of the corporation's organization under the laws of a state of the United States is sufficient to meet the citizenship test.<sup>56</sup> Indeed, at least one author has pointed out that several foreign-controlled corporations presently engage in uranium mining in the United States.<sup>57</sup> Whether these companies are active in uranium mining on *federal* lands, however, is not completely clear. It should be emphasized that the Mining Law of 1872 has largely been superseded by the Mineral Act of 1920 and when the 1872 Law does apply, it regulates only mining and mining-related rights on federal lands. Mining on non-federal lands, either on land under state or private control, is subject to separate regulations.<sup>58</sup>

The Mineral Lands Leasing Act of 1920<sup>59</sup> controls the leasing of federal onshore lands for a broad variety of mineral exploration.<sup>60</sup> The 1920 Act provides that citizens of the United States and associations of citizens, of corporations organized under the laws of the U.S. or any state, and of municipalities are qualified to apply for a mineral lease. Citizens of other countries that deny like privileges to U.S. persons cannot qualify, however.<sup>61</sup> Similarly, corporations in which non-qualifying foreign nationals hold an interest are not permitted to acquire leases under the Mineral Lands Leasing Act of 1920.<sup>62</sup>

The 1920 Act controls the leasing of federal lands for resource exploitation onshore only. Foreigners, citizens, and associations of citizens interested in acquiring leases to exploit resources situated offshore are

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<sup>50</sup> See D. Phillips, *Legal Restraints on Foreign Direct Investment in the United States* 7, Report to Congress, Foreign Direct Investment in the United States, U.S. Dep't of Com. K-124 (1976).

<sup>51</sup> See 43 C.F.R. § 2880 (1980).

<sup>52</sup> 30 U.S.C. § 22 (1976).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* § 24.

<sup>56</sup> See *Doe v. Waterloo Mining Co.*, 70 F. 455, 463 (9th Cir. 1895).

<sup>57</sup> See D. Phillips, *supra* note 50, at K-127. Mr. Phillips cites Rio Algon Mine Utah as an example.

<sup>58</sup> The regulation of mining on nonfederal lands by aliens is beyond the scope of this article.

<sup>59</sup> See 30 U.S.C. § 181-287 (1976 & Supp. III 1979).

<sup>60</sup> Subject to very limited exceptions, the Act governs mineral leases on federal lands with respect to the following resources: coal, phosphate, sodium, potassium, oil, oil shale, asphalt, bitumen, and gas. See *id.* § 181.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

regulated by the Outer Continental Shelf Lands Act (OCSA).<sup>63</sup>

First enacted in 1953, the OCSA outlines the terms under which bidders may acquire leases to explore for natural resources on the outer continental shelf. The Act is administered by the Department of the Interior<sup>64</sup> and sets forth the basic terms and conditions interested parties must adhere to in bidding for leases to conduct offshore mineral exploration, development and extraction. To qualify, the bidders must be U.S. citizens, resident aliens, corporations organized under U.S. or state law, or associations of the aforementioned.<sup>65</sup> Thus, under the regulations individual nonresident aliens are disqualified from bidding, but corporations with nonresident alien participation are not.

The Geothermal Steam Act of 1970<sup>66</sup> was passed by the U.S. Congress for the purpose of fostering the competitive development of geothermal resources on federally controlled land.<sup>67</sup> While the exploitation of such energy on federally owned property has not been a magnet for foreign investment activity in the United States, foreign controlled businesses should be aware that the Geothermal Act limits lessees to U.S. citizens, corporations organized under the laws of the United States or the states, and government units.<sup>68</sup> Thus participation in a U.S. corporation by nonresident aliens would not be a bar to the corporation's successful bid for geothermal rights on federal land.

### III. State Alien Land Laws

#### A. *Nonrestrictive States*

Of the fifty states, seven have neither any restriction on alien ownership of lands nor any positive statutory guarantee of the right of aliens, resident or nonresident, to hold interests in real property. These state jurisdictions are Arizona, Colorado, Florida, Montana, Louisiana,<sup>69</sup> Massachusetts, New Hampshire, and Vermont. The fact that a state jurisdiction lacks any provision regarding alien land ownership does not necessarily mean that a nonresident alien may enjoy the same rights as resident aliens. Should a controversy arise about some real property inherited by an alien in a jurisdiction where statutory law was silent, the court could apply the common law.

At common law, a nonresident alien could take, hold, and dispose of

<sup>63</sup> See 43 U.S.C. § 1337 (1976 & Supp. III 1979).

<sup>64</sup> In some cases, however, the Act is administered by the Department of Energy. See 43 U.S.C. § 1331(b) (Supp. III 1979).

<sup>65</sup> 43 C.F.R. § 3116.1(b) (1980).

<sup>66</sup> Geothermal Steam Act of 1970, Pub. L. No. 91-581, 84 Stat. 1566 (codified at 30 U.S.C. § 1001 (Supp. III 1979)).

<sup>67</sup> See H.R. Rep. No. 1544, 91st Cong., 2d Sess. 1, reprinted in [1970] U.S. Code Cong. & Ad. News 5113.

<sup>68</sup> See 30 U.S.C. § 1015 (Supp. III 1979).

<sup>69</sup> Louisiana is the only civil law jurisdiction of the fifty states. Thus, the discussion of common law which follows does not apply to Louisiana.

property if he had purchased the real estate.<sup>70</sup> If the alien had received the land by inheritance, however, then there was some question about whether the alien had good title.<sup>71</sup> Thus, today in states where the state code or statute is silent, it is very possible that in a controversy over land obtained by a nonresident alien through inheritance, the common law would be applied to his detriment. While most courts of the states listed above do not appear to be disposed to apply the common law,<sup>72</sup> counsel should be aware of this potential pitfall in state jurisdictions which neither confirm nor deny the property rights of nonresident aliens.

Sixteen other states provide guarantees to resident and nonresident alien investors that their property rights are equal to those enjoyed by citizens. These states are Arkansas,<sup>73</sup> Alabama,<sup>74</sup> California,<sup>75</sup> Delaware,<sup>76</sup> Idaho,<sup>77</sup> Maine,<sup>78</sup> Massachusetts,<sup>79</sup> Michigan,<sup>80</sup> New Mexico,<sup>81</sup> New York,<sup>82</sup> Rhode Island,<sup>83</sup> Tennessee,<sup>84</sup> Texas,<sup>85</sup> Utah,<sup>86</sup> Washington,<sup>87</sup> and West Virginia.<sup>88</sup> Thus, in almost half the states, foreign investors may buy as much real property as citizens. Furthermore, they may hold this property either directly, in partnership or through corporate intermediaries to the same extent as citizens.

### *B. Mildly Restrictive States*

The remaining twenty-seven states provide some form of restriction on foreign investors in land. Of these, thirteen have provisions that, practically speaking, do not constitute a substantial barrier to most alien investors. These states are Alaska, Connecticut, Georgia, Kansas, Maryland, Nevada, New Jersey, North Carolina, Ohio, Oregon, South Carolina, Virginia, and Wyoming.

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<sup>70</sup> 3 C.J.S. Aliens § 16 (1973).

<sup>71</sup> See *id.* §§ 32, 33. In general, title acquired by an alien by devise (by operation of will) was recognized; title acquired by an alien by intestate succession (by operation of law) was not recognized at common law.

<sup>72</sup> But see *Hanafin v. McCarthy*, 95 N.H. 36, 57 A.2d 148 (1948); *Lazarou v. Moraros*, 101 N.H. 383, 143 A.2d 669 (1958).

<sup>73</sup> See Ark. Stat. Ann. § 50-301 (1971).

<sup>74</sup> See Ala. Code § 35-1-1 (1975).

<sup>75</sup> See Cal. Civ. Code § 671 (1954).

<sup>76</sup> See Del. Code Ann. tit. 25, § 306 (1974).

<sup>77</sup> See Idaho Code §§ 55-103, 15-2-112 (1979).

<sup>78</sup> See Me. Rev. Stat. Ann. tit. 33, § 451 (1954).

<sup>79</sup> See Mass. Ann. Laws ch. 184, § 1 (1932).

<sup>80</sup> See Mich. Comp. Laws Ann. § 26-1105 (1970).

<sup>81</sup> See N.M. Stat. Ann. § 45-2-112 (1978).

<sup>82</sup> See N.Y. Real Prop. Law §§ 10(2), 15, 16 (McKinney 1968).

<sup>83</sup> See R.I. Gen. Laws § 34-2-1 (1969).

<sup>84</sup> See Tenn. Code Ann. §§ 64-201, -202 (1955) and 31-402 (1977).

<sup>85</sup> See Tex. Rev. Civ. Stat. Ann. art. § 166(a) (Vernon)(1965); Tex. Prob. Code Ann. § 41(c) (1969).

<sup>86</sup> See Utah Code Ann. § 75-2-112 (1975). This section guarantees the rights of aliens to inherit property.

<sup>87</sup> See Wash. Rev. Code Ann. § 64.16.005 (1967).

<sup>88</sup> See W. Va. Code §§ 42-1-4, 36-1-21 (1966).

Four of these states have provisions that guarantee the rights of all alien investors *except* "enemy aliens." These states are Georgia,<sup>89</sup> Maryland,<sup>90</sup> New Jersey,<sup>91</sup> and Virginia.<sup>92</sup> Just what constitutes an "enemy alien" in each jurisdiction is not always easy to ascertain. In New Jersey, for example, case law provides some guidance, but the definition offered is still unclear.<sup>93</sup> Similarly, Georgia law classifies enemy aliens as citizens of foreign jurisdictions with which the United States is not "at peace."<sup>94</sup> The nine other states have no such provisions for "enemy aliens."

Alaska, Nevada, North Carolina, and Wyoming condition the granting of certain rights to citizens of foreign jurisdictions on the granting of similar rights by the foreign jurisdictions to U.S. citizens. In Wyoming, all rights of nonresident aliens to hold and inherit property are subject to a reciprocity condition.<sup>95</sup> In North Carolina and Nevada, only inheritance rights are conditioned on reciprocity.<sup>96</sup> Alaska will permit alien investors to acquire mineral rights on public lands only where the alien's home country grants U.S. citizens the same opportunities.<sup>97</sup> This provision applies not only to alien individuals, but also to corporations that are more than fifty percent owned by aliens.<sup>98</sup>

Alaskan law also contains a rather weak reporting requirement concerning nonresident alien land investment. Specifically, the law directs all magistrates and district judges to file copies of conveyances that name nonresident aliens as owners with the commissioner of commerce.<sup>99</sup> Curiously, there is no requirement in the law that nonresident alien owners or beneficiaries be identified as such on the record. Thus, the reporting requirement could be easily circumvented.

Connecticut law provides generally that no nonresident alien investor may hold real property.<sup>100</sup> The law excepts French citizens, however, for as long as France provides reciprocal opportunities to American citizens.<sup>101</sup> Furthermore, nonresident aliens may acquire property in connection with mining ventures.<sup>102</sup> Finally, the law contains no mention of corporations with alien participation. Thus, aliens presumably could hold land indirectly, in corporate or other form, with impunity.

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<sup>89</sup> See Ga. Code Ann. § 79-303 (1973).

<sup>90</sup> See Md. Real Prop. Code Ann. § 14-101 (1974).

<sup>91</sup> See N.J. Stat. Ann. §§ 46:3-18, 3:3-13, 14:15-1 (West 1978).

<sup>92</sup> See Va. Code § 55-1 (1981).

<sup>93</sup> New Jersey law defines alien friends as any alien domiciled in the United States and suggests that corporations licensed to do business in the United States are also alien friends. Case law has defined an alien friend simply as not an alien enemy. See, e.g., *Caparelli v. Goodbody*, 132 N.J. Eq. 559, 29 A.2d 563 (1942).

<sup>94</sup> Ga. Stat. § 79-303 (1977).

<sup>95</sup> Wyo. Stat. § 34-15-101 (1977).

<sup>96</sup> See N.C. Gen. Stat. § 64-3 (1981).

<sup>97</sup> Alaska Stat. § 38.05.190(4) (1962).

<sup>98</sup> Id. § 38.05.190(6).

<sup>99</sup> Id. § 22.15.110(4) (1976).

<sup>100</sup> Conn. Gen. Stat. Ann. § 47-58 (West 1981).

<sup>101</sup> Id. § 47-57.

<sup>102</sup> Id. § 47-58.

The South Carolina Code contains a provision permitting the State's general assembly to limit the number of acres that foreign investors or their controlled corporate affiliates may own.<sup>103</sup> Interestingly, the general assembly enacted an acreage limitation so high—500,000 acres<sup>104</sup>—that it probably has little effect on foreign investment transactions in South Carolina property. Yet another provision of the South Carolina Code deals with alien investment in agricultural land. While foreigners are not precluded from investing in South Carolina farmland, if they choose to hold the real estate through a corporation, they are subjected to a higher property tax.<sup>105</sup> Specifically, the law applies to agricultural land held by corporations in which either an alien individual is a shareholder or a non-individual is a shareholder (i.e., a corporation, partnership, etc.). Under these conditions, the property tax is six percent of fair market value instead of four percent.<sup>106</sup>

Oregon law restricts purchasers of state-owned lands to citizens and those who declare their intent to become U.S. citizens.<sup>107</sup> The same provision prohibits aliens who do not intend to become U.S. citizens from acquiring mineral rights in land "in the unappropriated domain of the United States."<sup>108</sup> Oregon law is otherwise silent on the question of whether nonresident aliens may take title to real property by purchase or inheritance.<sup>109</sup>

Finally, Ohio's restrictions on foreign investment merely involve the reporting of agricultural land investment by foreigners. The reporting requirements essentially parallel those mandated by AFIDA<sup>110</sup> but must be filed with Ohio's Secretary of State.<sup>111</sup> Otherwise, Ohio law guarantees alien investors the same property rights as citizens.<sup>112</sup>

### *C. Severely Restricted States*

The last category of states, those with major but not insurmountable barriers to foreign investment in land, contains the following: Hawaii, Illinois, Indiana, Iowa, Kentucky, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Oklahoma, Pennsylvania, South Dakota, and Wisconsin. Due to the complexity and severity of the regulations in these jurisdictions, the relevant provisions of each state's code will be reviewed.

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<sup>103</sup> S.C. Const. art. 3, § 35.

<sup>104</sup> S.C. Code § 27-13-30 (1976).

<sup>105</sup> Id. § 12-43-220(d)(1)(B) (Supp. 1980).

<sup>106</sup> Id.

<sup>107</sup> See Or. Rev. Stat. § 273.255 (1974).

<sup>108</sup> Id.

<sup>109</sup> See *supra* text accompanying notes 70-72, on the application of common law in a state that is silent with respect to the rights of nonresidents in real property.

<sup>110</sup> See *supra* discussion of the Agricultural Foreign Investment Disclosure Act in text accompanying notes 12 through 34.

<sup>111</sup> Ohio Rev. Code Ann. § 5301.2.4 (Supp. 1980).

<sup>112</sup> Id. § 2105.16.

### 1. *Hawaii*

Since 1976, Hawaiian law has guaranteed to aliens the right to inherit Hawaiian land.<sup>113</sup> Because of the shortage of land on the island of Oahu, coupled with the development boom of the past few years, however, the legislature has enacted a restriction on transfers of real property. The sale of residential lots on Oahu by the Board of Land and Natural Resource Development must be to U.S. citizens or to aliens who have resided there for five years or more.<sup>114</sup> Apparently, the restriction does not apply to the sale of properties by the Board which are to be used for business purposes.<sup>115</sup> Another provision of the Hawaiian State Code limits the sale of state-owned lands to parties that have resided in the state for a minimum of three years.<sup>116</sup> Foreign residents should note that the residency rules of these two statutes are not citizenship requirements. While the foregoing provisions may impede some foreign investments, it should be emphasized that lands not directly held by Oahu's Board of Land and Resource Development or by the state may be bought and sold by aliens without restriction.

### 2. *Illinois*

Illinois law mandates that all nonresident aliens who take real property of any type may hold the interest for only six years. By the sixth year they must dispose of the interest to a U.S. citizen.<sup>117</sup> A unique feature of the Illinois statute is that any citizen may enforce the provision.<sup>118</sup> Thus, inaction by the state's Attorney General is no guarantee that the six year time limit will not be enforced.

On the other hand, the statute proscribing foreign ownership beyond the sixth year of holding does not make express mention of Illinois or other juridical persons. Thus, corporations, partnerships, and limited partnerships with foreign participation or control may hold real estate in Illinois beyond six years with impunity. While Illinois' strict provision will work hardship on the nonresident alien individual who wishes to hold property directly, it does not appear to affect foreign investors, individuals, groups, or corporate entities that are willing to hold real estate in partnership, limited partnership, or corporate form.

Illinois also has reporting requirements. Any foreign person, including corporations with "substantial" foreign control, that owns any interest in agricultural land must report to state officials the nature of the holding, the price paid, and any other information required by the

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<sup>113</sup> 46 Hawaii Rev. Stat. § 560-2-112 (1976).

<sup>114</sup> *Id.* § 206-9.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* § 171-68.

<sup>117</sup> Ill. Ann. Stat. ch. 6, § 2 (Smith-Hurd Supp. 1981).

<sup>118</sup> *Id.*

AFIDA.<sup>119</sup>

### 3. *Indiana*

Indiana law strictly limits the way in which a nonresident alien may take real property, the number of acres he may hold, and the duration of his estate. The Indiana Code affirms the rights of resident aliens who declare their intentions to become U.S. citizens to acquire and hold real property without limit.<sup>120</sup> It also mandates that all other aliens who acquire land by devise or descent must dispose of their interests within five years.<sup>121</sup>

Nonresident aliens who purchase their real property interests may hold up to only three hundred twenty acres,<sup>122</sup> and any excess must be conveyed within five years or it will escheat to the state.<sup>123</sup> As was the case with the Illinois provisions, indirect foreign holders, those who hold through corporations or partnerships, fall outside the scope of the Indiana law. Thus, the law is easily circumvented.

### 4. *Iowa*

Since January of 1980, Iowa has had a quite restrictive alien agricultural land law. Nonresident alien individuals or corporations with any participation by nonresident aliens<sup>124</sup> may not acquire an interest in agricultural land,<sup>125</sup> unless it is fewer than three hundred twenty acres and the acquisition is meant for non-farm use.<sup>126</sup> In other words, the property could be agricultural land at the time of purchase, but be acquired for the development of a shopping mall.

Iowa's ability to enforce this provision is enhanced by a requirement that any conveyance to or for the benefit of an alien owner must be recorded as such.<sup>127</sup> In addition, all nonresident aliens and foreign business owners of agricultural land must report their interests to Iowa authorities.<sup>128</sup>

With respect to inheritance, Iowa law provides that nonresident

<sup>119</sup> Ill. Ann. Stat. ch. 5, § 603 (Smith-Hurd Supp. 1981).

<sup>120</sup> Ind. Code Ann. § 32-1-7-1 (Burns 1980).

<sup>121</sup> Id. § 32-1-7-2.

<sup>122</sup> Id. § 32-1-8-2.

<sup>123</sup> Id.

<sup>124</sup> Interested parties should note that there is apparent conflict between two sections of Iowa law concerning what degree of participation by alien investors in a corporation causes a corporation to fall within the scope of these restrictions. Section 567.1, part of the 1980 law, and arguably the controlling provision, provides that only majority participation by nonresident aliens will subject the corporation to the acreage limitation. See Iowa Code Ann. § 567.1 (West Supp. 1980). Section 491.67 of the Iowa Code, on the other hand, provides that any participation by alien investors in a corporation makes that corporation an alien entity and subject to the restrictions outlined in the text.

<sup>125</sup> Id. Iowa Code Ann. § 567.2 (West Supp. 1980).

<sup>126</sup> Id.

<sup>127</sup> Id. § 558.44.

<sup>128</sup> Id. § 567.7.

aliens may inherit real property, but that any interests in agricultural land acquired by devise or descent must be disposed of within two years.<sup>129</sup> Despite the state's long series of restrictions on nonresident alien land owners, the Iowa Constitution guarantees to resident aliens the same property rights enjoyed by citizens.<sup>130</sup>

### 5. *Kansas*

The Kansas Constitution assures citizens of the several states that they may enjoy the same property rights as Kansas citizens, but it also provides that the property rights of aliens may be regulated by law.<sup>131</sup> The Kansas legislature took this cue and enacted several provisions regulating the property rights of aliens. Aliens "eligible to citizenship" (roughly, resident aliens) may take, hold, and dispose of property as do citizens.<sup>132</sup> All other aliens may inherit, purchase, and transmit property *only* where these rights are set out by treaty.<sup>133</sup> If an alien takes property in a manner which contravenes these terms, a court may order its sale.<sup>134</sup> Property that passes by descent or devise to an alien who is ineligible to take will escheat to the state.<sup>135</sup>

Due to the severity of these limitations on direct property ownership by nonresident aliens, indirect ownership is obviously an attractive alternative for alien investors in Kansas. While use of corporate vehicles will solve the problems of most nonresident alien investors, agricultural land investors should be aware of across-the-board limitations on corporate farming in Kansas. Agricultural corporations may have no more than ten shareholders<sup>136</sup> and may have no more than 5,000 acres. Most importantly, all shareholders must be Kansas residents.<sup>137</sup>

### 6. *Kentucky*

In Kentucky, aliens who intend to naturalize enjoy the same property rights as citizens.<sup>138</sup> Nonresident aliens and those resident aliens not intending to become U.S. citizens may hold real property for eight years. After that time, they must dispose of their real estate interests or suffer the possibility of escheat to the State.<sup>139</sup>

A series of opinions from the Kentucky Attorney General's office<sup>140</sup> has claimed that the restrictions just outlined do not apply to U.S. corpo-

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<sup>129</sup> Id. § 567.5.

<sup>130</sup> Iowa Const. art. 1, § 22.

<sup>131</sup> Kan. Const. Bill of Rights, § 17.

<sup>132</sup> Kan. Stat. § 59-511 (Supp. 1976).

<sup>133</sup> Id.

<sup>134</sup> Id. § 59-512.

<sup>135</sup> Id. § 58-22-38.

<sup>136</sup> Id. § 17-5901.

<sup>137</sup> Id.

<sup>138</sup> Ky. Rev. Stat. § 381.290 (1970).

<sup>139</sup> Id. § 381.300.

<sup>140</sup> Op. Ky. Att'y Gen. 77-576, 77-585 and 79-161.



rations with foreign shareholders. Thus, foreign holders of Kentucky land can insulate themselves from the eight year holding limitation by interposing a corporate entity between themselves and their real property. While this loophole eases considerably the burden of Kentucky's alien land law, counsel also should be aware that Kentucky law limits the amount of land that any corporation may hold to only that amount proper and necessary to carrying out a legitimate business purpose.<sup>141</sup>

### 7. *Minnesota*

Nonresident aliens and corporations, partnerships, and associations more than twenty percent owned by aliens may not purchase any interest in Minnesota agricultural land.<sup>142</sup> Nonresident as well as resident aliens may still inherit agricultural and other real property, however.<sup>143</sup> Furthermore, farmland may be acquired by foreign and foreign-affiliated parties for purposes of mining.<sup>144</sup>

Two Minnesota statutory provisions support the enforcement of the alien land laws just reviewed. Since 1973, all corporate farming has been very strictly limited to family farms.<sup>145</sup> Reporting to local authorities, comparable to AFIDA requirements, is also mandated by Minnesota law.<sup>146</sup>

### 8. *Mississippi*

Article 4, section 84 of the Mississippi Constitution provides that "the legislature shall enact laws to limit, restrict, or prevent the acquiring and holding of land in this state by nonresident aliens . . .".<sup>147</sup> Pursuant to this provision of the state constitution, the Mississippi legislature enacted a ban on the acquisition of land by nonresident aliens,<sup>148</sup> subject to three exceptions. First, a nonresident alien may take a lien on land to secure a debt and may purchase such land, freely transfer it, or hold title for up to twenty years to enforce payment of his debt.<sup>149</sup> Furthermore, if he becomes a citizen within the twenty year period, the twenty year limit is waived.<sup>150</sup> Second, a citizen of the United States who marries a foreign citizen and thereafter becomes an alien is excepted from the ban.<sup>151</sup> Third, nonresident aliens who are citizens of Syria or Lebanon may inherit property from citizens or residents of Mississippi.<sup>152</sup> Resident aliens

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<sup>141</sup> Ky. Rev. Stat. § 271A-705(1) (1980).

<sup>142</sup> Minn. Stat. Ann. § 500.221 subd. 2 (West Supp. 1980).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* § 500.24.

<sup>146</sup> *Id.* §§ 500.221 subd. 4, 500.24 subd. 4.

<sup>147</sup> Miss. Const. art. 4, § 84.

<sup>148</sup> Miss. Code Ann. § 89-1-23 (1972).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

are permitted to acquire, hold, inherit, and transfer land as are citizens.<sup>153</sup> Finally, Mississippi law flatly prohibits corporations, nonresident aliens, and associations with any nonresident alien participation from purchasing any publicly owned land.<sup>154</sup>

### 9. *Missouri*

Missouri law grants to resident and nonresident aliens alike the right to hold nonagricultural land interests.<sup>155</sup> Nonresident aliens, and corporations controlled by them, may not acquire any interests in more than five acres of agricultural land<sup>156</sup> unless the land is used for a nonagricultural purpose.<sup>157</sup> Those who hold more than five acres of agricultural land must report these holdings to Missouri authorities.<sup>158</sup>

### 10. *Nebraska*

Nebraska law prohibits aliens and foreign corporations<sup>159</sup> from purchasing title or procuring leaseholds longer than five years<sup>160</sup> in real estate beyond three miles of any corporate limits.<sup>161</sup> In addition, no corporation organized to hold real estate may elect a majority of aliens to its board of directors, have a majority of its stock owned by aliens, or have aliens as executive officers.<sup>162</sup> All corporations holding agricultural land must file extensive reports with state authorities.<sup>163</sup>

Despite these broad prohibitions, aliens and their affiliates may purchase land to establish manufacturing operations.<sup>164</sup> Nebraska also permits resident aliens to inherit any real property but provides that the alien must dispose of his interest within five years or else the property will escheat to the state.<sup>165</sup>

### 11. *North Dakota*

North Dakota law guarantees to all aliens the right to hold and dispose of real property in general,<sup>166</sup> but it also severely limits the rights of nonresident aliens to purchase agricultural land. A law enacted in 1979 provides that no nonresident alien may acquire any direct or indirect

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.* § 29-1-75.

<sup>155</sup> Mo. Ann. Stat. § 442.560 (West Supp. 1980).

<sup>156</sup> *Id.* § 442.566(1).

<sup>157</sup> *Id.* § 442.591.

<sup>158</sup> *Id.* § 442.592. For the definition of agricultural land, see *id.* § 442.566(1).

<sup>159</sup> Foreign corporations are defined as those corporations not incorporated under the laws of Nebraska. Neb. Rev. Stat. § 76-402 (1976).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* § 76-414.

<sup>162</sup> *Id.* § 76-406.

<sup>163</sup> *Id.* § 76-1503.

<sup>164</sup> *Id.* § 76-413.

<sup>165</sup> *Id.* § 76-405.

<sup>166</sup> N.D. Cent. Code § 47-01-11 (1978 & Supp. 1981).

interest in agricultural land.<sup>167</sup> Partnerships and other legal entities are also barred from holding agricultural land if any interest in the entity is held by a nonresident alien.<sup>168</sup>

North Dakota law also limits the ability of all corporations to engage in farming. No corporation may engage in farming unless it is a cooperative made up of at least seventy-five percent resident farmers.<sup>169</sup> The penalties for violating this statute are severe. The legal title to agricultural land acquired in breach of the law is not recordable and therefore not protected under the law.<sup>170</sup> Once the Attorney General discovers any violation of the foregoing provision, he must order divestment. Sale is to be consummated within one year; if not, then the Attorney General will order a public sale.<sup>171</sup>

## 12. Oklahoma

Oklahoma's Constitution provides that no alien may acquire title to land by purchase, descent or devise.<sup>172</sup> Apparently, resident aliens are excepted.<sup>173</sup> If a nonresident alien contravenes the constitutional prescription on alien ownership of land, he has five years to dispose of his interest<sup>174</sup> or it escheats to the state.<sup>175</sup>

A 1975 opinion of the Oklahoma Attorney General affirmed the right of corporations and other juridical persons, with or without alien participation, to hold real property subject to other statutory provisions regulating that particular type of entity.<sup>176</sup> Under these provisions, "foreign corporations," those corporations formed under the laws of another jurisdiction, are not allowed to engage in farming.<sup>177</sup> A corporation organized under the laws of Oklahoma is allowed to farm if its shareholders are natural persons, estates, trustees holding for the benefit of natural persons, banks organized in Oklahoma, or corporations with all shareholders in one of the preceding categories.<sup>178</sup>

Other provisions of Oklahoma law prevent the formation of corporations for the purpose of holding land outside of city limits.<sup>179</sup> No men-

<sup>167</sup> Id. § 47-10.1-02 (Supp. 1981).

<sup>168</sup> Id. This rule provides an exception where the alien acquires his interest by inheritance, by foreclosure, by virtue of a lien or debt, or by virtue of a treaty guaranteeing the alien's right to acquire the real property interest. In the case of foreclosure, the interest in the property must be transferred within three years. Id.

<sup>169</sup> Id. §§ 10-06-01, -04.

<sup>170</sup> Id. § 47-10.1-03.

<sup>171</sup> Id. § 47-10.1-04.

<sup>172</sup> Okla. Const. art. 22, § 1.

<sup>173</sup> Okla. Stat. Ann. tit. 60, § 122 (West 1971).

<sup>174</sup> Id. tit. 60, § 123.

<sup>175</sup> Id. tit. 60, § 124.

<sup>176</sup> 8 Op. Okla. Att'y Gen. 74-214 (1975).

<sup>177</sup> Okla. Stat. Ann. tit. 18, § 951 (West Supp. 1981).

<sup>178</sup> Id. The law also provides that no more than 35% of the gross receipts of a farm corporation may come from non-farm activities. Id.

<sup>179</sup> Okla. Const. art. 22, § 2.

tion is made of the ability or inability of limited partnerships or partnerships to hold such real estate. The apparent intent of Oklahoma's lawmakers is to limit multi-tiered, anonymous corporate ownership and operation of farms in the state.

### 13. *Pennsylvania*

Alien individuals may purchase up to 5,000 acres of real property of any type in Pennsylvania.<sup>180</sup> Corporations with alien participation fall outside this limitation, however.<sup>181</sup> If an alien individual inherits Pennsylvania realty by descent or devise, he has so-called "confirmed title" for up to 2,000 acres.<sup>182</sup> Resident aliens who are the subjects of any sovereign state which is at war with the United States and declare their intentions to become U.S. citizens are permitted to inherit only 200 acres under Pennsylvania law.<sup>183</sup>

The acquisition of agricultural property by foreign individuals and governments is further restricted by several statutes enacted in 1980. Under these provisions, nonresident aliens and foreign governments are precluded from holding more than 100 acres unless the agricultural property is acquired by devise, inheritance or as security for indebtedness.<sup>184</sup> If a nonresident alien acquires agricultural lands by devise or inheritance and is not a "Class A" beneficiary for inheritance tax purposes, then he must alienate such lands within three years.<sup>185</sup> The sanction for violating any of the foregoing sections is forfeiture.<sup>186</sup> The provisions contain no restrictions on corporate ownership of agricultural land where nonresident aliens participate in the corporation holding title to the property.

### 14. *South Dakota*

South Dakota's restrictions on alien land investment focus on agricultural land. Since 1979, no nonresident alien has been able to purchase more than 160 acres of South Dakota agricultural property.<sup>187</sup> If a nonresident alien acquires title to more than 160 acres through foreclosure, he may take title but must dispose of it within three years.<sup>188</sup> Similarly, if a nonresident alien inherits more than 160 acres of agricultural land in South Dakota, he must convey it to an eligible recipient within three years.<sup>189</sup> Failure to comply with the foregoing provisions

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<sup>180</sup> Pa. Stat. Ann. tit. 68, §§ 28, 32 (Purdon 1965).

<sup>181</sup> Id. tit. 15, § 2012 (Purdon Supp. 1980).

<sup>182</sup> Id. tit. 68, § 31. "Confirmed title" is that title that is recognized by the state as valid.

<sup>183</sup> Id. tit. 68, § 27.

<sup>184</sup> Id. § 41 (West Supp. 1981).

<sup>185</sup> Id. § 44. "Class A" beneficiaries are direct lineal descendants or ancestors.

<sup>186</sup> Id. § 46.

<sup>187</sup> S.D. Comp. Laws Ann. § 43-2A-2 (Supp. 1981).

<sup>188</sup> Id. § 43-2A-4.

<sup>189</sup> Id. § 43-2A-3.

will result in the forfeiture of the land to the State.<sup>190</sup> Resident aliens are specifically exempted from all of the preceding restrictions.<sup>191</sup>

Corporate land holdings also are restricted by the South Dakota Constitution. Article 17 provides that no corporation shall hold real estate except as may be proper for its legitimate business purpose.<sup>192</sup> Thus, nonresident aliens cannot avoid the restrictions on agricultural land simply by incorporating. No similar prohibitions exist on the activities of partnerships and limited partnerships, with or without alien participation.

Despite these broad-based restrictions on alien participation, land investments, both resident and nonresident aliens are free to hold and dispose of other types of realty, and the law guarantees their rights to make such investments.<sup>193</sup>

### 15. Wisconsin

The Wisconsin Constitution guarantees to resident aliens the same property rights enjoyed by citizens.<sup>194</sup> Nonresident aliens, however, are subjected to discriminatory treatment with respect to their property rights. According to a Wisconsin statute, nonresident aliens, and corporations and associations in which they own more than twenty percent of the stock, may hold no more than 640 acres of land of any type in Wisconsin.<sup>195</sup> Parties found to be in violation of this provision stand to forfeit their property to the State.<sup>196</sup>

In the 1976 case of *Lehndorff Geneva v. Warren*,<sup>197</sup> the Wisconsin Supreme Court upheld the constitutionality of this statute<sup>198</sup> and likewise held that the provision did not contravene the Friendship, Commerce and Navigation Treaty<sup>199</sup> between the United States and the Federal Republic of Germany.<sup>200</sup> The case involved the purchase of options to buy property in excess of 640 acres by a limited partnership, Lehndorff Farms (Farms). Farms' limited partners were German citizens, not resident in the United States. Its general partner was a Texas corporation whose entire stock was owned by Germans, who also were nonresidents of the United States.

In addition to the treaty and constitutional issues, the Wisconsin court held that the Wisconsin alien land law was applicable to Farms

<sup>190</sup> Id. § 43-2A-6.

<sup>191</sup> Id. § 43-2A-5.

<sup>192</sup> S.D. Const. art. 17, § 7.

<sup>193</sup> S.D. Comp. Laws Ann. § 43-2-9 (Supp. 1981).

<sup>194</sup> Wis. Const. art. 1, § 15.

<sup>195</sup> Wis. Stat. Ann. § 710.01 (West 1981).

<sup>196</sup> Id. § 710.02.

<sup>197</sup> 74 Wis. 2d 369, 246 N.W.2d 815 (1976).

<sup>198</sup> Id. at 389, 246 N.W.2d at 825.

<sup>199</sup> Id. at 377, 246 N.W.2d at 819.

<sup>200</sup> Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, United States-West Germany, art. V, 7 U.S.T. 1839, T.I.A.S. No. 3593.

because it was an association with more than twenty percent of its stock owned by nonresident aliens.<sup>201</sup> Interestingly, the court appeared to focus on the identity of the Texas corporation's shareholders rather than on the identities of the limited partners. By doing so, the court has suggested that third tier, indirect ownership of more than 640 acres by nonresident aliens contravenes the Wisconsin statute.

### Conclusion

The foregoing survey of federal and state law as it affects entry level regulation of foreign investment in U.S. real estate suggests that great disparity exists in the treatment accorded to foreign real estate investors from state to state. Also noteworthy is the fact that while some states have had the same alien land laws for a century or more, several others have revamped their old laws to give *resident* aliens greater freedom, and then enacted new restrictions on the acquisition of farmland by *nonresident* aliens. These differences among state jurisdictions reflect the dissimilarities in attitudes across the country toward foreign investment in general, as well as the different interests that each state wishes to protect in its regulation of real estate investment by aliens. Accordingly, future regulation of foreign real estate investment very likely will be most volatile at the state and not the federal level. Although the moods of Congress are important, it behooves a foreign investor to take stock of the local attitudes toward real estate acquisitions by foreign interests before he undertakes to invest in real property in the United States.

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<sup>201</sup> 74 Wis. 2d at 373, 246 N.W.2d at 817.

