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RURAL AREAS: LEGAL FRAMEWORK AND IMPLEMENTATION

REPORT FOR THE UNITED STATES

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RURAL AREAS IN THE UNITED STATES: LEGAL FRAMEWORK AND IMPLEMENTATION

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In the United States, a majority of land is rural -- farms, forests, small communities, rural homes, recreational areas, and other rural amenities. Farmers and other rural residents enjoy the same constitutional rights and protections as other citizens; they are subject to federal and state statutes and regulations and local ordinances. Common law principles, established in court decisions, apply. Rural areas are also the subject of special legislation, often designed to encourage economic development, enhance the quality of rural life, and protect environmental resources, including agricultural land. This Report, which adapts the Commission II questionnaire to the US situation, discusses some measures for rural development in federal agricultural legislation, focusing on programs with analogies to EU legislation. In addition, it discusses cross-border acquisition of farmland -- that is, federal reporting requirements for foreign owners of agricultural land and state restrictions on ownership of farmland.

I. BACKGROUND

A. US Agricultural Legislation

In the United States, federal agricultural legislation (Farm Bills), supplemented by other statutes and implemented by regulations, establishes policy for agriculture and related areas. The US Congress enacts a Farm Bill every few years, and each Farm Bill applies until its provisions expire (or are extended) and a new statute is enacted.

The Agricultural Act of 2014,¹ the most recent US Farm Bill, governs many, but not all, aspects of agriculture and nutrition assistance through 2018. Enacted after long debate, the Farm Bill amended prior legislation, repealed programs, and established new programs. Its twelve Titles govern commodities, conservation, trade and food aid, nutrition, farm credit, rural development, research and extension, forestry, energy, horticulture, crop insurance, and other subjects.

In a significant change to US commodity programs, Title I of the 2014 Farm Bill repealed producer support from Direct and Counter-Cyclical payments and ended the Average Crop Revenue Election program.² New crop insurance programs, Price Loss Coverage and two types

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¹ Pub. L. 113-79, 128 Stat. 649-1005 (7 Feb. 2014). Many Farm Bill provisions are amendments to prior law, so the statute must be read in conjunction with existing statutes.

² The 2014 Farm Bill retained the Marketing Assistance Loan program, as well as Loan Deficiency Payments. Eligible producers must be actively engaged in farming; producers face payment limitations and income limitations. The per-individual or entity payment limitation for commodities is \$125,000 in any crop year. 2014 Farm Bill § 1603, 7 United States Code [USC] § 1308. No limit applies to crop insurance payments. Individuals or entities with an average adjusted gross income over \$900,000 are ineligible for many payments, including conservation payments. 2014 Farm Bill § 1605, 7 USC § 1308-3a(b). For links to comprehensive information, see USDA, The Farm Bill, <http://www.usda.gov/wps/portal/usda/usdahome?navid=farmbill>.

of Agricultural Risk Coverage, provide income support for commodity producers of program crops.³ These complex programs are beyond the scope of this Report.

Title VI of the 2014 Farm Bill governs rural development, primarily through programs that support infrastructure in rural areas -- for example, water systems, waste disposal, solid waste management, business development, loans for public entities, rural telecommunications, high-speed internet service, transportation, technology transfer, and other programs. The provisions of this Rural Development Title do not parallel those in EU Regulation 1305/2013.⁴ Other Titles of the 2014 Farm Bill govern activities -- e.g., conservation, forestry -- supported in the EU by Regulation 1305/2013. Title II, for example, continues and amends conservation programs; Title VIII governs Forestry. In addition, permanent legislation governs other aspects of rural development, including rural housing and utilities services, not discussed in this Report.

B. Rural Development

Rural development has played an important role in the United States since the 1930s.⁵ Beginning in 1973, each US Farm Bill has included a separate Title that governs rural and community economic development. As fewer rural residents are employed in agriculture, and most farm household income is off-farm, a healthy rural economy and a modern physical infrastructure are critical.⁶ Indeed, in USDA's Strategic Plan for 2014-2018, the first strategic goal is to "assist rural communities to create prosperity so they are self-sustaining, repopulating, and economically thriving."⁷ Objectives of this strategic goal are to enhance rural prosperity (infrastructure, education, and economic development); to increase agricultural opportunities (a farm safety net, new domestic and international markets, and a "financially sustainable and competitive agricultural system"); and to expand the bioeconomy (renewable energy, biobased products).⁸ The US Department of Agriculture is the lead agency for rural development, but almost 90 programs "administered by 16 different federal agencies target rural economic development."⁹

³ In addition, the supplemental coverage option provides premium assistance for insurance, but does not apply if producers enroll in one of the ARC programs. 7 Code of Federal Regulations [CFR] parts 718, 1412, 1416.

⁴ Regulation No. 1305/2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation No. 1698/2005, 2013 O.J. (L 347) 487 (20 Dec. 2013); Commission Implementing Regulation No. 808/2014, 2014 O.J. (L 227) 18 (31 July 2014).

⁵ The White House Rural Council, established in 2011, coordinates development of policy recommendations for rural areas. Barack Obama, Executive Order 13575, Establishment of the White House Rural Council, 76 Federal Register [Fed. Reg.] 34,841, 34,842 (14 June 2011). See *White House Rural Council*, <https://www.whitehouse.gov/administration/eop/rural-council>

⁶ Tadlock Cowan, Rural Development Provisions in the 2014 Farm Bill (P.L. 133-79), at 1-2 (CRS R43718, 2014). Fewer than 8% of rural residents work in agriculture, and 90% of farm household income (including small lifestyle farms) comes from off the farm.

⁷ USDA, Strategic Plan FY 2014-2018, at 1 (2014). Other goals are conservation of forests and private working lands, resilience to climate change, and enhancement of water resources; agricultural production, biotechnology exports, and food security; nutrition for children; and creation of a high-performing, efficient, and adaptable USDA for the 21st century.

⁸ *Id.* at 5-12 (quotation at 9).

⁹ Cowan, Rural, *supra* note 6, at 3. Agencies in USDA administer rural development: Rural Housing Service, Rural Business-Cooperative Service, Rural Utilities Service, Office of Community Development. For more detail on these programs, including information on authorizing legislation, see Tadlock Cowan, An Overview of USDA Rural Development Programs (CRS, RL31837, 2014).

Rural development and other government programs define rural areas and farms differently. At least 15 different definitions of “rural,” 11 from USDA, have applied.¹⁰ Census Bureau definitions focus on population size and density. Rural areas are “all population, housing, and territory not included with an urban area” -- that is, open land and towns with fewer than 2,500 residents.¹¹ Some USDA programs define rural in terms of geographic isolation and others in terms of population density. Population thresholds for rural communities range from 2,500 to 50,000, depending on the program.¹² For example, eligibility for certain USDA rural housing programs allow a maximum rural population of 35,000.¹³ Loans and grants for certain water and waste facilities are limited to areas with a maximum population of 10,000.¹⁴ Farms are defined more consistently. For statistical purposes, both the Census Bureau and USDA define “farm” broadly as any place which produces or sells (or normally would produce or sell) \$1,000 of agricultural products. For research and reporting, the Economic Research Service of USDA developed a farm typology based on gross farm income.¹⁵

However defined, rural America faces challenges. Total rural population has declined for the last several years, reflecting a failure of natural population change to balance outmigration. Rural poverty has remained stable, despite a national decline in poverty rates. Rural employment remains weak in many areas, with low job growth and declining participation in the labor force. Highly-educated workers continue to gravitate to urban areas, where higher earnings are possible.¹⁶ Return migration by professionals with young families, however, reflects the importance of family motivations and rural lifestyle, albeit often at financial sacrifice.¹⁷

C. Rural and Agricultural Land in the United States

The majority of US land is rural, and agriculture is a major land use. The total land area is about 2.3 billion acres (1 hectare is 2.469 acres). The federal government owns and manages about 28 percent of US land (640 million acres), primarily in Alaska and the mountainous West.¹⁸ More than 60 percent of US land (99 percent of cropland) is privately owned.¹⁹ Land and water areas in the United States (excluding Alaska) occupy about 1.95 billion acres. Almost 1.4 billion acres are nonfederal rural land: cropland (361 million, including 316 million acres of prime farmland),

¹⁰ *The federal definition of ‘rural’ -- times 15*, Washington Post, 8 June 2013.

¹¹ See US Census Bureau, 2010 Census Urban and Rural Classification and Urban Area Criteria, <http://www.census.gov/geo/reference/ua/urban-rural-2010.html>. Urbanized areas have an urban nucleus of 50,000 or more people; urban clusters have at least 2,500 and fewer than 50,000 people.

¹² ERS, USDA, *What is Rural?*, <http://www.ers.usda.gov/topics/rural-economy-population/rural-classifications/what-is-rural.aspx> (Mar. 2015). Rural populations have declined in recent years. ERS, USDA, *Rural America at a Glance* (EB 26, 2014), <http://www.ers.usda.gov/media/1697681/eb26.pdf>.

¹³ Housing Act of 1949, 42 USC § 1490, amended by 2014 Farm Bill § 6208.

¹⁴ Cowan, Overview, *supra* note 9, at 5.

¹⁵ See Robert A. Hoppe & James M. MacDonald, *Updating the ERS Farm Typology* (ERS, USDA, EIB 110, 2013).

¹⁶ ERS, *Rural America*, *supra* note 12. This report compares metropolitan and nonmetropolitan counties. About 15% of the population lives in the 1,976 nonmetro counties.

¹⁷ John Cromartie et al., *Factors Affecting Former Residents’ Returning to Rural Communities* (ERS, USDA, ERR 185, 2015).

¹⁸ Carol Hardy Vincent et al., *Federal Land Ownership: Overview and Data* (CRS, R42346, 2015). Most of this land (609 million acres) is administered by the Bureau of Land Management, Fish and Wildlife Service, National Park Service, and Forest Service.

¹⁹ Cynthia Nickerson et al., *Major Uses of Land in the United States, 2007*, at 35-36 (ERS, USDA, EIB 89, 2011). Private land includes land in foreign ownership. *Id.* at 40.

rangeland (409 million), pasture (120 million), and forest (409 million). Urban uses are only a small percentage of total US land.²⁰

The 2012 Census of Agriculture, published in 2014, indicated that the United States has 2.1 million farms, which occupy almost 915 million acres of land (including 390 million acres of cropland). The average farm size is 434 acres, slightly larger than the 418 acre average in 2007. The majority of US farms are small, both in size and in value of sales. About 1.6 million farms have sales of less than \$50,000, and 1.4 million are smaller than 180 acres. In contrast, about 155,000 farms have sales over \$500,000, and about 173,000 are larger than 1000 acres. Most farms are operated by individuals or families, with only about 13 percent operated by partnerships, corporations, or other entities.²¹ Full owners operate about 68 percent of farms (average size, 235 acres); part owners, 25 percent (average size, 922 acres); full tenants, 7 percent (average size, 588 acres).²²

II. LEGAL IMPLEMENTATION OF PROGRAMS FOR RURAL DEVELOPMENT

A. Conservation Programs

Since the 1930s, the United States has implemented conservation programs for farmers, often with cost-sharing and technical assistance to encourage soil conservation practices. The 1985 Farm Bill, influenced by environmental interest groups, added innovative conservation programs, including retirement of vulnerable land. Subsequent Farm Bills added new programs and emphasized conservation on working lands.²³ Many federal conservation programs are voluntary; they offer incentives for conservation practices, but do not impose requirements.

The 2014 Farm Bill (Title II) consolidated USDA conservation programs by repealing several easement and cost-share programs available to private landowners, as well as other programs. The Farm Bill repealed programs for Farmland Protection, Grassland Reserve, Wetland Reserve, and Wildlife Habitat Incentives. Their benefits will continue, however, because components of these programs are now included in the Agricultural Conservation Easement Program (Wetland Reserve, Farmland Protection, Grasslands Reserve easements), the Conservation Reserve Program (Grasslands Reserve rental contracts), and the Environmental Quality Incentives Program (Wildlife Habitat Incentives).²⁴ Some programs provide support for conservation in watersheds or regions. The new Regional Conservation Partnership Program (RCPP), created

²⁰ NRCS, USDA & CSSM, Iowa State University, Summary Report: 2010 National Resources Inventory, at 7 (2013). The total land and water area includes the 48 contiguous states, plus Hawaii, Puerto Rico and the US Virgin Islands. Developed land in 2010 was about 113 million acres (an increase of 58% since 1982). *Id.* at 8.

²¹ NASS, USDA, 2012 Census of Agriculture, United States Summary and State Data, vol. 1, Table 1, at 7; Table 8, at 16 (AC-12-A-51, 2014). The first census was in 1840, and a census is normally taken every five years.

²² *Id.* Table 70, at 231.

²³ Pub. L. 99-198, 99 Stat. 1354 (1985); Pub. L. 101-624, 104 Stat. 3356 (1990); Pub. L. 104-127, 110 Stat. 888 (1996); Pub. L. 107-171, 116 Stat. 134 (2002); Pub. L. 110-246, 122 Stat. 1651 (2008). For details on conservation programs before 2014, see Margaret Rosso Grossman, *Farmers, Farmland, and Conservation Programs in the United States*, in *Horizon 2020*, at 425, 437-445 (Esther Muñiz Espada & Pablo Amat Llobart eds., 2013).

²⁴ Megan Stubbs, *Agricultural Conservation: A Guide to Programs*, at 4 (CRS R40763, 2015).

from four programs repealed in the 2014 Farm Bill, authorizes and supports multi-state or watershed projects and conservation of critical conservation areas.²⁵

Even after consolidation in the 2014 Farm Bill, the USDA's Natural Resources Conservation Service and Farm Service Agency administer 18 conservation program (13 Farm Bill programs), albeit with reduced funding. This discussion reviews US conservation programs available to owners of private land. Some of these programs have elements similar to agri-environmental and related measures in the EU.²⁶

1. Conservation Compliance

Conservation compliance, introduced in 1985, required producers who received most types of federal farm support, but not federal crop insurance, to conserve highly erodible land and to protect wetlands.²⁷ Under the 2014 Farm Bill, conservation compliance now applies to producers who participate in the new federal crop insurance programs, as well as to producers who participate in other government support programs, including loans and conservation programs.²⁸ Conservation compliance is voluntary, in theory, because only farmers who accept federal farm payments must comply. In 2011, 35 percent of farms received federal farm support, with larger farms more likely to receive payments.²⁹

Conservation compliance for highly erodible land applies if a producer “in any crop year produces an agricultural commodity on a field on which highly erodible land is predominant.”³⁰ To keep highly erodible land in production, to protect soil productivity, and to reduce off-site damage (e.g., water pollution) from soil erosion, producers must apply a conservation plan, using approved conservation systems. Many approved systems, which must be feasible and cost-effective, are inexpensive. Violations normally result in loss of federal farm program payments for all commodities and on all land farmed by the producer.³¹

After decades of government policy that supported conversion of wetlands for cultivation, federal law now protects wetlands. The “swampbuster” provision makes producers ineligible for farm program payments if they produce commodities on converted wetlands after 1985 or

²⁵ 2014 Farm Bill § 2401, codified at 16 USC §§ 3871-3871f. Funding will be allocated between national and multi-state projects (40%); state projects (25%), and critical conservation areas identified by the Secretary of Agriculture (35%). See Stubbs, Guide, *supra* note 24, at 20.

²⁶ This discussion of conservation uses material, with updates, from Grossman, *Farmers, Farmland*, *supra* note 23, at 437-445.

²⁷ For analogous, but more onerous, measures in the EU, see the cross-compliance requirements in Regulation 1306/2013, arts. 91-94 & Annex II, 2013 OJ [L 347] 549, 591-593, 602-603.

²⁸ 2014 Farm Bill § 1118, codified at 7 USC § 9018; § 2611, amending 16 USC §§ 3811, 3812, 3821. See the interim rule, 7 CFR part 12, at 80 Fed. Reg. 22,873 (24 Apr. 2015). Compliance requirements differ for highly erodible cropland and wetlands. For operations with highly erodible lands that are new to compliance because of the inclusion of crop insurance, producers have 5 years to develop and implement an approved conservation plan. 16 USC § 3812. Farmers must keep program land in agricultural or conservation use, control noxious weeds, and maintain the land using sound agricultural practices.

²⁹ Robert A. Hoppe, Structure and Finances of U.S. Farms: Family Farm Report, 2014 Edition, at 27 (ERS, USDA EIB 132, 2014). In 2011, 9.9% of farms received only conservation payments; 19%, only commodity payments; 6.2%, both conservation and commodity. *Id.* at 28, Table 6.

³⁰ 16 USC §§ 3811-3812 (quotation, § 3811(a)); regulations at 7 CFR part 12.

³¹ Program benefits may be reduced for violations committed in “good faith and without an intent to violate.” 16 USC § 3812(f)(4).

converted wetlands for crop production after 1990.³² A “sodsaver” program enacted in 2008 limits benefits under federal crop insurance programs for farmers in 6 “prairie pothole” states who produce crops on more than 5 acres of newly-tilled native sod. Amendments in the 2014 Farm Bill made the program effective upon enactment, without approval of each state’s governor.³³

2. Conservation Incentives

Conservation incentives in the United States include measures for land retirement and support for conservation activities on working land. Land retirement payments have made up about 65 percent of conservation payments, with working land programs making up 35 percent. Since 2003 and continuing in the 2014 Farm Bill, programs for working land enjoy increased funding. In 2011, midsize farms received 33 percent of working land payments; small farms and very large farms received smaller shares. In contrast, 77 percent of land retirement payments went to small farms, including retirement farms and farms with significant off-farm employment.³⁴

a. Land Retirement

The Conservation Reserve Program (CRP) offers 10- to 15-year contracts to owners, operators, or tenants who retire eligible land from agricultural use, implement an approved conservation plan, and plant a vegetative cover crop on CRP land. Participants receive annual rental payments, as well as technical assistance and cost-share payments, to establish conservation practices. The 2014 Farm Bill reauthorized and amended the CRP, included environmentally sensitive grasslands, and added activities permitted on CRP land.³⁵ During general sign-up periods, producers bid to enroll land, and the Farm Service Agency selects land for enrollment that provides maximum environmental benefits under an Environmental Benefits Index. Land that offers high-priority environmental benefits (e.g., riparian buffers, filter strips) can be enrolled under continuous signup. Continuous signup also applies to a farmable wetlands program and the Conservation Reserve Enhancement Program which, with cooperation of state and local entities, identifies and retires environmentally sensitive land with high priority for the state or nation.

The 2014 Farm Bill reduced maximum acreage for the CRP. By fiscal year 2018, no more than 24 million acres (reduced from a maximum of 32 million in 2013) can be enrolled. In recent years, however, CRP acreage declined from a high of 36.8 million acres in 2007.³⁶ At the end of May 2015, the CRP held 24.25 million acres under almost 654,000 contracts on 366,000 farms. Average rental payments were \$67 per acre, with lower payments (\$51 per acre) for the 18

³² 16 USC §§ 3821-3822; regulations at 7 CFR part 12. Other legal requirements protect wetlands. E.g., Clean Water Act § 404, 33 USC § 1344, which requires permits for disposal of dredged or fill material into navigable waters, including certain wetlands.

³³ 7 USC §§ 1508(o), 7333(a), as amended by 2014 Farm Bill § 11,014. Sodbuster applies only in Minnesota, Iowa, North Dakota, South Dakota, Montana, and Nebraska.

³⁴ Hoppe, *supra* note 29, at 30.

³⁵ 16 USC §§ 3831-3835a; regulations at 7 CFR part 1410. The 2014 Farm Bill §§ 2001-2008, amended the CRP. An interim rule to implement amendments is at 80 Fed. Reg. 41,987 (16 July 2015). The interim rule governs grazing practices on grasslands and permits wind turbines on CRP land under certain conditions.

³⁶ Megan Stubbs, Conservation Provisions in the 2014 Farm Bill, at 9 (CRS R43504, 2014).

million acres enrolled in general sign-ups, and higher payments for especially vulnerable land in other programs.³⁷

The new Agricultural Conservation Easement Program (ACEP)³⁸ replaces several repealed programs: Wetlands Reserve, Farmland Protection, and Grassland Reserve. ACEP now governs voluntary agricultural land and wetland reserve easements, which impose permanent or long term land-use restrictions. The USDA provides funding to help “eligible entities” (state or local government agencies or conservation organizations) purchase agricultural land easements on environmentally significant land and may provide technical assistance for conservation activities under an agricultural land easement plan. Generally the federal share will not exceed 50 percent of the appraised value of the easement. Land selected for easements should protect agricultural uses and conservation values.³⁹ Wetland reserve easements are intended to “restore, protect, and enhance wetlands” through permanent or 30-year easements.⁴⁰ Landowners submit offers for participation to USDA for evaluation under criteria that maximize the benefits of federal investment. Wetland easements that will enhance habitat for migratory birds and other wildlife receive priority. Landowners must agree to grant an easement on their land and to implement a wetland reserve easement plan developed by USDA. In exchange, landowners receive payment for the easement, along with financial and technical assistance for conservation measures.

b. Working Lands

The Environmental Quality Incentives Program (EQIP)⁴¹ promotes agricultural production and environmental quality as compatible goals. Under the 2014 Farm Bill, EQIP now incorporates the goals of the repealed Wildlife Habitats Incentive Program. By providing assistance for installing and maintaining conservation practices compatible with continued food and fiber production, EQIP helps producers to comply with regulatory requirements that protect soil, water and air quality, preserve wildlife habitat, and conserve surface and groundwater.

EQIP authorizes the USDA to enter contracts with producers who implement eligible environmental and conservation practices, including site-specific structural practices, land management practices, comprehensive nutrient management planning, irrigation and water conservation, wildlife habitat protection, and conservation practices related to organic production. Participants must submit and implement an EQIP conservation plan. They receive cost-share payments to plan and implement conservation practices and payments for income foregone. Contracts may not exceed 10 years, and EQIP payments are generally limited to

³⁷ USDA, Conservation Reserve Program, Status -- End of May 2015, <http://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/Conservation/PDF/One-PagerMay2015.pdf>. The CRP total includes acres enrolled in general and continuous sign-ups, farmable wetlands, and Conservation Reserve Enhancement Program. The next general signup is 1 Dec. 2015 to 26 Feb. 2016.

³⁸ 16 USC §§ 3865-3865d, enacted by 2104 Farm Bill § 2301. An interim regulation, 7 CFR part 1468, is at 80 Fed. Reg. 11,032 (27 Feb. 2015). ACEP requirements are similar to those in the repealed programs.

³⁹ 16 USC § 3865b. Easements must be permanent or for the maximum duration permitted under state law. Eligible entities must be certified to participate. Grasslands leaving the CRP have priority for enrollment. *Id.* § 3865d.

⁴⁰ 16 USC § 3865c. High value wetlands leaving CRP that are likely to return to production have priority. *Id.* § 3865d.

⁴¹ 16 USC §§ 3839aa-3839aa-8; regulations at 7 CFR pt. 1466. 2014 Farm Bill § 2201-2208 amended EQIP. Competitive Conservation Innovation Grants, authorized by § 3839aa-8, support practices that address air quality concerns.

\$450,000 between fiscal years 2014 through 2018.⁴² Environmental practices related to livestock production must receive at least 60 percent of EQIP funds, and practices that benefit wildlife habitat must receive at least 5 percent of EQIP funds.

While EQIP provides funding to implement practices, the Conservation Stewardship Program (CSP)⁴³ is a voluntary “payment for performance” program that provides on-going support for environmental performance on many types of land. The 2014 Farm Bill reauthorized the CSP, rewrote its statutory language, and demanded additional conservation benefits from participants.⁴⁴ The amended CSP, encourages producers to address “priority resource concerns” by “improving, maintaining, and managing existing conservation activities” and “undertaking additional conservation activities.”⁴⁵ To participate, producers must meet a stewardship threshold (effective level of management) for at least two priority resource concerns; by the end of the 5-year contract, the producer must meet or exceed the stewardship threshold for at least one additional concern. USDA ranks applications, and participants who enroll must operate under a conservation stewardship plan.

Enrollment in CSP is limited to 10 million acres per year (reduced from 12.8 million under prior law) in 2014 through 2022; average total cost per CSP acre should be \$18. CSP payments are limited to \$200,000 between fiscal years 2014 through 2018.⁴⁶

Payments under USDA Farm programs help to encourage adoption of some conservation practices. USDA research concluded that, even without government payments, farmers are more likely to adopt practices that increase profits. But government payments encourage producers to adopt expensive practices (e.g., structural practices like terraces, buffers) and those with “limited onfarm benefits” or to adopt those practices sooner.⁴⁷

3. Forestry

In many rural areas, forests are a significant land use, especially for timber, and most are privately-owned.⁴⁸ One goal of the current USDA Strategic Plan is management of resources in forests, grasslands, and working lands with objectives to improve management, reduce the risk of wildfires, mitigate and adapt to climate change, and protect water resources.⁴⁹ The USDA has

⁴² On payments, see 16 USC § 3839aa-2. Payments for organic practices may not exceed \$20,000 per year or \$80,000 in 6 years.

⁴³ Conservation Stewardship Program, 16 USC §§ 3838d-3838g, rewritten by 2014 Farm Bill § 2101; regulations at 7 CFR part 1470. The interim rule is at 79 Fed. Reb. 65,836 (5 Nov. 2014).

⁴⁴ Stubbs, Conservation, *supra* note 36, at 8-9.

⁴⁵ 16 USC § 3838e. For examples of activities, see NRCS, Conservation Stewardship Program, Conservation Activity List and 2015 CSP Enhancement Activity Job Sheets, linked from http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/programs/financial/csp/?cid=nrcs143_008316.

⁴⁶ 16 USC § 3838g.

⁴⁷ Roger Claassen et al., *Additionality in U.S. Agricultural Conservation and Regulatory Offset Programs*, at iii, 1 (ERS, USDA, ERR 170, 2014). Changes are “additional” if “a voluntary payment causes a change in practice(s) that leads to improved environmental quality.” *Id.* at iii.

⁴⁸ The USDA’s Forest Service manages federally-owned forests under the National Forest Management Act, 16 USC §§ 1600-1614, which balances logging with natural values. See also the Multiple Use Sustained Yield Act of 1960, 16 USC §§ 528-531. See Margaret Rosso Grossman, *Use and Protection of Land in the US Countryside*, 71 *Tijdschrift voor Agrarisch Recht* 408, 413-414 (2011).

⁴⁹ USDA, Strategic Plan, *supra* note 7, at 13.

also published a Strategic Framework to promote agroforestry -- “the intentional combining of agriculture and forestry to create integrated and sustainable land-use systems” in which producers plant trees and shrubs with crops and/or livestock.⁵⁰ Five USDA agencies, state foresters, and conservation districts will cooperate to increase agroforestry, integrate agroforestry with conservation and economic development, and advance the science of agroforestry.

The 2014 Farm Bill (Title VIII) repealed several programs that provided support for forestry. It reauthorized much of the Cooperative Forestry Assistance Act,⁵¹ which provides federal assistance for state efforts to manage and protect non-federal forests. A Forest Stewardship Program works with state forestry agencies to help private owners of nonindustrial forests adopt sustainable management practices.⁵² Although this program does not provide financial support for owners, private forest land is eligible for support under some federal conservation programs (e.g., the CSP).

The Healthy Forest Restoration Act of 2003,⁵³ authorizes actions, including clearing brush and controlling insects, to prevent forest fires. It includes a voluntary Healthy Forest Reserves Program,⁵⁴ which authorizes easements and financial support for forests on privately-owned land in 16 states. The 2014 Farm Bill continued this program, which is connected with the RCPP.⁵⁵ Through easements, 30-year contracts, and 10-year cost-share agreements, the Program helps landowners to promote the primary goal, recovery of endangered or threatened species; secondary goals are to improve biodiversity and to enhance carbon sequestration. Land enrolled in the program is subject to a restoration plan, and landowners receive payments and technical assistance.⁵⁶

B. Support for Specialized Producers

1. Organic Agriculture

USDA statistics indicate that almost 20,000 US farms and processing facilities had earned organic certification by the end of 2014 -- a 250 percent increase since 2002.⁵⁷ Almost 9,000 farms (average size, 321 acres) have 50 percent or more of total sales from organic products; about 5,500 farms (average size, 589 acres) have less than 50 percent organic sales.⁵⁸ Although organic products often command a price premium, more than 4 percent of US food sales in 2014

⁵⁰ USDA Agroforestry Strategic Framework -- Fiscal Year 2011-2016, at 1 (2011), http://www.usda.gov/documents/AFStratFrame_FINAL-lr_6-3-11.pdf.

⁵¹ 16 USC §§ 2101-2114.

⁵² 16 USC § 2103a. See US Forest Service, Forest Stewardship Program, <http://www.fs.fed.us/spf/coop/programs/loa/fsp.shtml>.

⁵³ 16 USC §§ 6501-6591.

⁵⁴ 16 USC §§ 6571-6578; regulations at 7 CFR part 625. 2014 Farm Bill § 8203 amended the Program to make tribal lands eligible. Participation may help landowners avoid restrictions under the Endangered Species Act; see 16 USC §§ 6576, 1536(b).

⁵⁵ 16 USC § 3871a. On the RCPP, see *supra* note 25.

⁵⁶ The program is small. In Fiscal 2014, it enrolled about 677,000 acres under 109 agreements. Stubbs, Guide, *supra* note 24, at 19.

⁵⁷ Results of the 2014 US Organic Survey will be released in August 2014, at www.agcensus.usda.gov. Organic Integrity Quarterly (June 2015), <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5111670>.

⁵⁸ NASS, USDA, 2012 Census of Agriculture: Characteristics of All Farms and Farms with Organic Sales, at 2, Table 1 (2014).

were organic products, with fruits and vegetables accounting for 43 percent of organic sales.⁵⁹ Relatively few farmers produce organic field crops; in 2011, organic corn, soybeans, and wheat used “less than 1 percent of the total acreage of each crop.”⁶⁰

The US Organic Food Production Act and related regulations govern organic certification under the National Organic Program.⁶¹ Legislation authorizes support for producers who will transition to organic production and seek certification.⁶² The USDA’s Agricultural Marketing Service operates the National Organic Certification Cost-Share Program, which provides up to 75 percent of certification costs for producers who seek organic certification.⁶³

Voluntary conservation programs also support organic practices. EQIP, discussed above, offers financial support and technical assistance to producers who implement conservation practices, specified in an organic plan approved under the National Organic Program, related to organic production or transition to organic production.⁶⁴ Organic producers may participate in the Conservation Stewardship Program, and they may initiate organic certification while farming under a CSP contract.⁶⁵

Other provisions encourage organic agriculture. For example, the 2014 Farm Bill increased availability of federal crop insurance for organic crops.⁶⁶ The Farm Bill also authorized grants to support research, education, and outreach on a number of subjects that will facilitate organic agricultural production.⁶⁷

2. *Local and Regional Foods*

Local and regional food systems are “place-specific clusters of agricultural producers of all kinds -- farmers, ranchers, fishers -- along with consumers and institutions engaged in producing, processing, distributing, and selling foods.”⁶⁸ Many types of farm operations participate in local food systems, which include, for example, direct sales, community-supported agriculture,

⁵⁹ For information on US organic production, see ERS, USDA, *Organic Agriculture* and links, <http://www.ers.usda.gov/topics/natural-resources-environment/organic-agriculture.aspx> (updated 2 June 2015).

⁶⁰ William D. McBride et al., *The Profit Potential of Certified Organic Field Crop Production*, at 3 (ERS, USDA ERR 188, 2015). Organic field crops command higher prices, but have higher production costs and lower yields.

⁶¹ 7 USC §§ 6501-6523; regulations at 7 CFR part 205. On certification see Margaret Rosso Grossman, *Diversification of Farm Enterprises in the United States: Legal Incentives and Legal Obstacles*, 70 *Tijdschrift voor Agrarisch Recht* 4, 8-9 (2010). 2014 Farm Bill § 10,005 imposed more stringent enforcement of organic regulations, and other provisions increased funding for organic agriculture.

⁶² See EU Regulation 1305/2013, *supra* note 4, art. 29 (per-hectare support for conversion to organic production).

⁶³ With state cooperation, producers can receive up to \$750 for each certification scope, including crops, wild crops, livestock, and handling. Organic Integrity, *supra* note 57, at 6.

⁶⁴ 16 USC § 3839aa-2.

⁶⁵ 16 USC § 3838g(g),(h).

⁶⁶ 7 USC § 1508(c)(6), amended by 2014 Farm Bill § 11,023.

⁶⁷ 7 USC § 5925b, amended by 2014 Farm Bill § 7211. See also 7 USC § 5925c (production and marketing data), amended by § 10,004.

⁶⁸ Sarah A. Low et al., *Trends in U.S. Local and Regional Food Systems: A Report to Congress*, at 1 (ERS, USDA AP 68, 2015). The Food Safety Modernization Act, Pub. L. 111-353, 124 Stat. 3885 (2011) and its Produce Safety and Preventive Controls regulations will affect producers of locally produced food, especially those who use untreated manure as fertilizer. *Id.* at 20-29.

farmers' markets, farm-to school, on-farm sales, and others.⁶⁹ In 2012, almost 8 percent of US farms marketed foods locally, with a sales total of about \$6.1 billion; about half of local food sales were produce (vegetables, fruits, nuts). Most farms (85 percent) selling in local markets were small, with less than \$75,000 gross cash farm income, but mid-size farms (gross cash farm income over \$350,000) had 67 percent of local sales.⁷⁰ Little overlap exists between producers of organic and local foods. Few local foods farms (about 5 percent) are certified (or certification-exempt) organic. About 46 percent of certified organic farms sold directly to consumers or in marketing channels.⁷¹

Producers of food sold locally, like other producers, are eligible to participate in various USDA programs. In addition, the federal government supports local food through its Farmers' Market and Local Food Promotion Program,⁷² which provides grants to eligible entities (agri-business networks, local governments, nonprofits, etc.) to increase consumption of locally- and regionally-produced foods, develop market opportunities, and assist in development of direct markets (e.g., farmers' markets, community-supported agriculture) and business enterprises. Specialty Crop Block Grants⁷³ fund projects, administered by states, to support local foods, especially fruits and vegetables. Value-Added Producer Grants (see below) can be used to develop value-added products sold in local markets. Know Your Farmer, Know Your Food, a USDA program, strengthens local and regional food production. It helps individuals and communities to identify USDA programs and sources of funding and expertise to support local food projects.⁷⁴ The Farm-to-School program, provides cost-share grants for pilot projects that improve access to local foods for schools.⁷⁵

State and local food programs also help to provide access to local foods. States, for example, support farm-to-school programs, facilitate farmers' markets, and encourage urban agriculture. Local governments and nongovernmental organizations also promote local food.⁷⁶

3. Value-Added Agricultural Products

USDA Market Development Grants provide planning and working capital for agricultural producers and specified producer groups to develop enterprises that produce value-added products. For purposes of the grant program, a "value-added agricultural product" is any agricultural commodity or product that has undergone a "change in physical state" (e.g., diced tomatoes or wool rugs), is produced or segregated in a way that enhances its value (e.g., organic crops), is a source of renewable energy (including E-85 fuel), or is marketed as locally-produced food. In addition, the physical change or manner of production must expand the customer base,

⁶⁹ See Renée Johnson, *The Role of Local Food Systems in U.S. Farm Policy*, at 1 (CRS R42155, 2013). Local and regional sales include both direct-to-consumer markets and "intermediated marketing channels" -- that is, sales to "restaurants, institutions or to regional food aggregators." Low et al., *supra* note 68, at 2.

⁷⁰ Low et al., *supra* note 68, at 2, 10.

⁷¹ *Id.* at 48

⁷² 7 USC § 3005, amended, with increased funding, by 2014 Farm Bill § 10,003. The program is part of the Farmer-to-Consumer Direct Marketing Act of 1976. 7 USC §§ 3001-3007.

⁷³ 7 USC § 1621 note, amended by 2014 Farm Bill § 10,010.

⁷⁴ USDA, *Know Your Farmer*, <http://www.usda.gov/wps/portal/usda/usdahome?navid=KNOWYOURFARMER>.

⁷⁵ 42 USC § 1769(g). See FNS, USDA, *Farm to School Grant Program*, <http://www.fns.usda.gov/farmtoschool/farm-school-grant-program>. See Low et al., *supra* note 68, at 52-57 for more information on these and other federal policies.

⁷⁶ See Low et al., *supra* note 68, at 57-61.

and the producer must receive increased revenue from marketing, processing, or physical segregation of the product.⁷⁷

The 2014 Farm Bill amended this program, first enacted in 2000 and expanded in 2002 and 2008.⁷⁸ Under the amended provisions, grants are available both to certain organizations (e.g., producer groups, cooperatives) and to independent producers. Priority for grants goes to operators of small and medium sized family farms, beginning farmers or ranchers, social disadvantaged farmers (those subject to racial, ethnic, or gender prejudice; as defined by statute), and farmers or ranchers who are veterans of the US Armed Forces. A beginning farmer has operated a farm for no more than 10 years. A veteran farmer or rancher has not operated a farm or ranch or has operated for fewer than 10 years.⁷⁹ Maximum grants are \$75,000 for planning and \$250,000 for working capital.⁸⁰ Recipients must match grant funds with non-federal funds or in-kind contributions. The 2014 Farm Bill significantly increased mandatory annual funding for these grants.

C. Statutory Preferences for Producers

Some USDA programs identify farmers and ranchers who receive priority consideration, enhanced financial support, or other benefits. Depending on the program, these farmers include limited resource producers, beginning farmers and ranchers, socially disadvantaged producers, and (since 2014) military veterans. The following discussion focuses mainly on beginning and women farmers.⁸¹

1. Beginning Farmers

US farmers are growing older. In 2012, the average age of principal operators was 58.3 years.⁸² Operators younger than 35 make up a small proportion of US farmers. Many US producers combine farming with other employment. In 2012, among operators who spend more than 50 percent of their time farming (almost 48 percent of total farmers), only 2.6 percent were younger than 35. Among operators who spend less than 50 percent of time farming (52 percent), 3 percent were younger than 35.⁸³ Not all beginning farmers are young,⁸⁴ however, and for government programs the status of beginning farmer depends on time in farming. For some programs, a

⁷⁷ 7 USC § 1632a; 7 CFR part 4284, subpart J. This paragraph is quoted, with changes, from Grossman, *Diversification*, *supra* note 61, at 12.

⁷⁸ 7 USC § 1632a, amended by 2014 Farm Bill § 6203.

⁷⁹ Definitions are at 7 USC § 2003(e) (socially disadvantaged farmer); 7 USC § 1991(a) & 7 CFR § 4284.902 (beginning farmer); 7 USC § 2279(e)(7) (veteran farmer). See further definitions at 7 CFR § 4284.902 (final regulations, adopted 8 May 2015).

⁸⁰ USDA, *Value-Added Producer Grants*, <http://www.rd.usda.gov/programs-services/value-added-producer-grants>. See USDA, *Inviting Applications for Value-Added Producer Grants*, 80 Fed. Reg. 26,528 (8 May 2015).

⁸¹ See EU Regulation 1305/2013, *supra* note 4, art. 7 (authorizing special Member State sub-programs for young farmers and women in rural areas; authorizing higher support rates for young farmers). Eligible young farmers are no more than 40 at the time of application, possess skills and competence, and are head of an agricultural holding for the first time. *Id.* art. 2(n).

⁸² NASS, *supra* note 21, Table 1, at 7. The average age in 2007 was 57.1; in 2002, 55.3; in 1997, 54.

⁸³ *Id.* Table 69, at 204-205.

⁸⁴ Census of Agriculture data indicates that in 2012, 25% of the 2.1 million farmers in the United States were beginning farmers who had operated their current for 10 or fewer years. Though younger than established farmers, the average age of those on their farm for 5 years or fewer was 46.9; 6-10 years; 50.8; established farmers, 61.4. USDA, *Beginning Farmers -- Characteristics of Farmers by Years on Current Farm* (ACH 12-5, 2014).

beginning farmer is an individual with no more than 10 years of experience as an operator; for others, the limit is 5 years of experience.⁸⁵

Beginning farmers benefit from dedicated programs and also from special provisions in more general USDA programs. Many of these benefits also apply to socially disadvantaged farmers and veterans of military service.⁸⁶ For example, beginning farmers enjoy special educational opportunities. The Beginning Farmer and Rancher Development Program, first adopted in 2002, offers grants to organizations “to provide training, education, outreach, and technical assistance initiatives” for a new generation of farmers.⁸⁷ Educational goals are broad and focus on most subjects helpful to beginning farmers. Public or private entities, including colleges and universities, government agencies, and non-governmental organizations, are eligible for grants. Projects led by academic institutions have received a significant share (in 2014, the majority) of grant money under the program. These educational grants are “a key way for the nation to invest intelligently and cost-effectively” in the success of “the next generation of family farmers.”⁸⁸

Beginning farmers sometimes receive enrollment priority or higher payments under USDA programs. For example, 10 percent of funding for Value-Added Producer Grants is reserved for beginning and socially-disadvantaged farmers.⁸⁹ Under the Farm Bill’s supplemental coverage crop insurance program, which provides financial support to pay certain insurance premiums, a beginning farmer may receive 10 percent more premium assistance than other farmers.⁹⁰

Some conservation programs (EQIP and CSP) set aside a portion of available acres or funds or offer higher cost-share payments for beginning farmers.⁹¹ Under EQIP, for example, beginning, socially disadvantaged, veteran, and limited resource farmers can receive cost-share payments of 90 percent (instead of 75 percent) and at least 25 percent more than the applicable rate for other payments.⁹² Under the CSP, at least 5 percent of eligible acres in each fiscal year must assist beginning farmers, and 5 percent, socially disadvantaged farmers. USDA must make a special outreach effort to inform these farmers about the CSP.⁹³ To encourage transfer of land enrolled in the Conservation Reserve to beginning farmers, the USDA may authorize contract modifications that facilitate transitions of land from retiring owners to beginning (or socially disadvantaged) farmers who will farm the land using sustainable methods. A transition incentives program authorizes two extra years of CRP payments to retiring landowners or

⁸⁵ E.g., Value-added producer grants, 10 years, 7 CFR § 4284.902; premium adjustment for crop insurance, 5 years, 7 USC § 1502(b).

⁸⁶ The 2014 Farm Bill § 12,304 established a Military Veteran’s Agricultural Liaison to assist veterans with education and participation in USDA programs. 7 USC § 6919.

⁸⁷ 7 USC § 3319f. Under 2014 Farm Bill § 7409, mandatory funding is \$20 million per year through 2018. Some funds are set aside for projects that serve military veterans and social disadvantaged farmers.

⁸⁸ The Land Stewardship Project, Beginning Farmer and Rancher Development Program: 2014 Progress Report (2015).

⁸⁹ USDA, Inviting Applications, *supra* note 80.

⁹⁰ 7 USC § 1508(e)(8). The supplemental coverage option applies with Price Loss Coverage for program crops or for crops not insured under Title I programs. Titles XI (Crop Insurance) and XII (Miscellaneous) have other provisions for limited resource, beginning, and socially disadvantaged farmers.

⁹¹ See Suresh Sureshwaran & Stephanie Ritchie, *U.S. Farm Bill Resources and Programs for Beginning Farmers*, 26(2) Choices (2011). Link from www.choicesmagazine.org.

⁹² 16 USC § 3839aa-2(d)(4).

⁹³ 7 USC §§ 1470.4, 1470.5.

operators with expiring CRP contracts, if they sell or lease their land to beginning farmers who will plant a crop using a conservation plan.⁹⁴

The Farm Service Agency of USDA is the “lender of first opportunity for borrowers who are not yet creditworthy for regular commercial business loans.”⁹⁵ Loan funds from the FSA are reserved for beginning farmers, defined as those who have not operated a farm for more than 10 (or, for some loans, fewer) years and (for ownership loans) who do not own a farm larger than 30 percent of the average farm size in their county.⁹⁶ Beginning farmers have priority for 75 percent of funding for farm ownership loans and 50 percent of operating loans for the first 11 months of each fiscal year; they have priority for 40 percent of guaranteed farm ownership and operating loans for the first 6 months.⁹⁷ Some state programs, too, encourage beginning farmers by authorizing loan guarantees, subsidizing reduced interest rates, and encourage landowners to lease farmland.⁹⁸

2. *Female farmers*

In the United States, women principal operators are a minority, only 14 percent of total principal operators. In 2012, about 288,000 women were principal operators on farms (most fully owned) with land totaling about 63 million acres. Most farms operated by women are small; the majority are smaller than 50 acres, and only about 6 percent are larger than 500 acres. Only 9 percent have sales over \$50,000. Sales from farms operated by women were 3.3 percent of the US total, on 6.9 percent of farmland.⁹⁹

Women receive priority for some federal programs as socially disadvantaged farmers. That is, they are members of a socially disadvantaged group, “whose members have been subjected to ... gender prejudice ... without regard to their individual qualities.”¹⁰⁰ Thus, women are eligible for a number of the programs for beginning farmers discussed above. The Farm Service Agency of USDA targets loan funds to women and other socially disadvantaged applicants. These include guaranteed loans, direct farm operating loans (for equipment and other operating expenses), and direct farm ownership loans (loans up to \$300,000 for farmers with at least 3 years of experience in day-to-day farm management).¹⁰¹

⁹⁴ 16 USC § 3835(c)(1)(B), (f); regulation at 7 CFR § 1410.64. The transition option under 16 USC § 3835(f) also applies to transfers to veteran and socially disadvantaged farmers.

⁹⁵ Jim Monke, *Agricultural Credit: Institutions and Issues*, at 7 (CRS RS21977, 2014).

⁹⁶ Link from FSA, *USDA Farm Loan Programs*, <http://www.fsa.usda.gov/programs-and-services/farm-loan-programs/index>. FSA loan provisions for beginning farmers are at 7 USC § 1922(b) (direct loans), § 1929 (loan guarantees), § 1935 (down payment loans), § 1941(c) (operating loans).

⁹⁷ 7 USC § 1994(b)(2).

⁹⁸ National Council of State Agricultural Finance Programs, *State by State Agricultural Loan Programs, 2014 Biennial Directory*, <http://www.stateagfinance.org/directory-of-state-programs>. See also Edward Cox, *Helping Landowners Help New Farmers: Incentive Programs and Other Legal Tools for Transitioning Land to the Next Generation of Farmers*, 17 *Drake Journal of Agricultural Law* 37, 44-48 (2012); Grossman, *Farmers, Farmland*, *supra* note 23, at 432-435.

⁹⁹ NASS, *supra* note 21, Tables 56 & 57, at 54-55. Average age of women principal operators is 60.1; all women operators, 55.6 years. For all principal operators (male and female), average age is 58.3 years; all operators, 56.3 years. Table 55, at 53. See also USDA, *Women Farmers* (ACH 12-12, 2014).

¹⁰⁰ 7 USC § 2003(e). See also 7 CFR § 712.8, defining social disadvantaged farmer or rancher, with specific inclusion of women.

¹⁰¹ FDA, USDA, *Minority and Women Farmers and Ranchers*, <http://www.fsa.usda.gov/programs-and-services/farm-loan-programs/>.

III. OWNERSHIP OF AGRICULTURAL LAND: CROSS-BORDER ACQUISITIONS

The United States enjoys large expanses of productive agricultural land and even more timber and forest land. Ownership of these lands is attractive for investors, as well as for agricultural producers. National concerns about ownership of agricultural land by foreign investors has resulted in federal disclosure requirements.¹⁰² In addition, states have authority to regulate land within their borders, using their general “police power.” Some states have restricted the ownership of farmland by aliens, residents of other states, or business entities, particularly corporations. Some of these state laws have faced constitutional challenges.

A. Federal Law

1. Agricultural Foreign Investment Disclosure Act

In the 1970s, both federal and state governments in the United States noted the significant loss of agricultural land to non-agricultural uses. The National Agricultural Lands Study evaluated state and local programs to protect farmland and made recommendations for avoiding loss of farmland to other uses.¹⁰³ The focus on protection of agricultural land was accompanied by concern about the extent and the effects of foreign ownership of farmland. No national system collected information about alien ownership of agricultural land in the United States. Moreover, most states had no records of the status -- citizen or alien -- of landowners, and only two states required alien owners of farmland to report their holdings.¹⁰⁴

This lack of information about foreign ownership of farmland, accompanied by concern about its effects on land prices and other issues, led to the passage of the Agricultural Foreign Investment Disclosure Act of 1978.¹⁰⁵ The law (AFIDA) was intended in part to “determine the effects of foreign persons acquiring, transferring, and holding agricultural land, particularly the effects ... on family farms and rural communities.”¹⁰⁶

AFIDA does not restrict foreign investment in agricultural land. Instead, it requires foreign investors to report their holdings. The law requires any “foreign person who acquires or transfers

¹⁰² For an analysis of cross-border ownership of land in developing countries (“land-grabbing”), see Olivier De Schutter, *The Green Rush: The Global Race for Farmland and the Rights of Land Users*, 52 *Harvard International Law Journal* 503 (2011).

¹⁰³ E.g., National Agricultural Lands Study, *The Protection of Farmland: A Reference Guidebook for State and Local Governments* (1981).

¹⁰⁴ General Accounting Office (GAO), *Foreign Ownership of U.S. Farmland: Much Concern, Little Data*, at 2 & Appendix VI, at 15-16, 53 (CED-78-132, 1978). GAO now refers to the Government Accountability Office.

¹⁰⁵ Pub. L. 95-460, 92 Stat. 1263 (1978), codified at 7 U.S.C. §§ 3501-3508; regulations at 7 CFR part 781. See also the Foreign Investment Study Act of 1974, Pub. L. No 93-479, 88 Stat. 1450-1454 (1974) (authorizing a study of the scope and significance of foreign direct and portfolio investment in the United States) and the International Investment Survey Act of 1976, Pub. L. 94-472, 90 Stat. 2059, now the International Investment and Trade in Services Survey Act, codified at 22 USC §§ 3101-3108 (imposing reporting requirements for aliens who invest in the United States). For a brief history of federal regulation of alien landownership, see Grant Wilson, Note, *Reforming Alien Agricultural Landownership Restrictions in Corporate Farming Law States: A Constitutional and Policy View from Iowa*, 17 *Drake Journal of Agricultural Law* 709, 719-721 (2013); James Frechter, Note, *Alien Landownership in the United States: A Matter of State Control*, 14 *Brooklyn Journal of International Law* 147 (1988).

¹⁰⁶ Pub. L. 95-460, § 5, codified at 7 USC § 3504, now repealed.

any interest ... in agricultural land” to report that transaction to the US Secretary of Agriculture within 90 days. The report, on a prescribed USDA form, must provide information about the foreign person, the price, the land (including a legal description and acreage), its proposed use, and the purchase price.¹⁰⁷ State Departments of Agriculture receive copies of reports involving land in their states.¹⁰⁸

AFIDA definitions ensure comprehensive reporting. “Agricultural land” includes any land “used for agricultural, forestry, or timber production.”¹⁰⁹ AFIDA defines “person” broadly to include both individuals and legal entities (e.g., corporations, associations, and others). “Foreign person” includes any individual who is not a citizen or permanent resident of the United States and any foreign government. It also includes a legal entity created under the laws of a foreign government or with its principal place of business outside the United States. In addition, it includes an entity created under the laws of a US state, but in which a “significant interest” (defined by regulation) is held by foreign persons (individuals, entities, or governments).¹¹⁰

2. Current Foreign Holdings

Reports required under the Agricultural Foreign Investment Disclosure Act provide data about foreign ownership, and the USDA publishes annual reports of foreign holdings. The majority of US land in foreign ownership is agricultural land, including forests. The most recent USDA report, with data for 2012, indicates that about 2 percent of privately-owned agricultural land in the United States (1 percent of all US land) is in foreign ownership. Foreign holdings of all US land totaled almost 26.8 million acres in 2012. Most of these holdings, slightly more than 26.1 million acres, were agricultural land. Between 2011 and 2012, foreign holdings increased by almost 423,000 acres.¹¹¹

The USDA reported that foreign holdings include the following: timber or forest, 52 percent; cropland, 19 percent; pasture and other agricultural land, 26 percent. Only 2 percent of foreign holdings are non-agricultural land. Foreign holdings exist in all 50 states. Maine, in the Northeast, has the largest number of acres, mostly forest or timber. Texas and Washington follow with the second and third highest number of acres in foreign holdings. In general, however, most foreign holdings are in the South and the West of the United States.¹¹²

Investors from various countries own land in the United States. Canadians hold 27 percent; other important investors represent the Netherlands (18 percent), Germany (7 percent), the United

¹⁰⁷ 7 USC § 3501, supplemented by 7 CFR § 781.3. The form is FSA-153. Foreign investors who owned farmland when AFIDA took effect were also required to report their holdings.

¹⁰⁸ 7 USC § 3505.

¹⁰⁹ 7 USC § 3508. Regulations exempt land areas less than 10 acres if gross receipts on the land were \$1,000 or less. 7 CFR § 781.2(b).

¹¹⁰ 7 USC § 3508. Regulations define “significant interest” as an interest of 10% or more held by a single foreign person or by multiple foreign persons acting in concert, and as a total interest of 50% or more held by foreign persons who do not act in concert. 7 CFR § 781.2(k). See also the Foreign Investment in Real Property Tax Act of 1980, Pub. L. 96-499, §§ 1121-1125, 94 Stat. 2599 (1980), which enacted IRC § 897 (imposing tax on sales and other transfers of real property held by foreign owners).

¹¹¹ Lesa A. Johnson et al., *Foreign Holdings of U.S. Agricultural Land through December 31, 2012*, at 4 (FAS, USDA, 2014). Totals were 26,792,903 acres, of which 26,138,555 were agricultural. Because some transactions are reported late, these numbers may be understated. *Id.* at 6.

¹¹² *Id.* at 5-6.

Kingdom (6 percent), and Portugal (5 percent). Investors from all other countries hold the other 37 percent of foreign held land.¹¹³

B. State Law Measures

Traditionally, states have controlled land ownership and land use within their borders. Using their police power, some states have enacted laws (or, less frequently, constitutional provisions) that govern ownership of real property by aliens or by business entities. Some states have enacted provisions intended to protect their agricultural land from foreign or corporate ownership. The following discussion focuses on these provisions and provides a few state-law examples.

1. Foreign Ownership

In the late 1970s, state laws did not significantly restrict foreign ownership of land.¹¹⁴ A government report published in 1978 indicated that although 25 states regulated some aspects of alien ownership of farmland, few states imposed major restrictions.¹¹⁵ Only 9 states prohibited alien ownership or imposed major restrictions; 11 restricted the amount or duration of ownership.

Now, decades later, many states place no restrictions on alien ownership of real property.¹¹⁶ A number of states, however, distinguish between resident and nonresident aliens. In these states, resident aliens are free to own land, but nonresident aliens are subject to prohibitions or restrictions on ownership or only to obligations to report their ownership. Some states regulate ownership by foreign (including out-of-state) corporations.¹¹⁷

Because of the importance of agriculture, Midwest farm states are mostly likely to regulate ownership of agricultural land by nonresident aliens. Indeed, many of the states with corporate farming laws (discussed below) also restrict alien ownership of farmland.¹¹⁸ These restrictions vary among the states, but may prohibit ownership by nonresident aliens, impose acreage limitations, or set time limits on ownership.¹¹⁹

¹¹³ *Id.* at 6. Many of the foreign-held acres (9.7 million acres) are owned by US corporations with foreign shareholders. *Id.* at 202-203.

¹¹⁴ For information on alien land holding, see Frechter, *Alien Landownership*, *supra* note 105, at 149-159. States enacted laws in four periods: 1880-1900 (11 states), 1920s, during World War II, and 1970s. *Id.* Frechter argues that state regulation of alien landownership, rather than federal control, is both legally supported and appropriate, but perhaps unnecessary, at least for resident aliens.

¹¹⁵ GAO, *Foreign Ownership*, *supra* note 104, at 2. In 1978, 25 states did not restrict alien ownership of farmland, and 13 restricted corporate ownership. *Id.* at 3.

¹¹⁶ Frechter, *supra* note 105, at 153 & n. 53 (listing 26 states that treat aliens and citizens alike).

¹¹⁷ See Wilson, *supra* note 105, at 721-722. For criticism of inconsistent state regulation and a plea to decouple citizenship and property rights, see Allison Brownell Tirres, *Property Outliers: Non-Citizens, Property Rights and State Power*, 27 *Georgetown Immigration Law Journal* 77 (2012).

¹¹⁸ Wilson, *supra* note 105, at 727. States with statutes are Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, and Wisconsin. *Id.* n. 142 See Kansas Constitution, Bill of Rights § 17 (allowing statutory regulation of alien rights); Oklahoma Constitution, art. XXII (restricting ownership of land by nonresident aliens and corporations).

¹¹⁹ For a list of state restrictions, see National Association of Realtors, *Alien Land Ownership Guide: State Laws Relating to Ownership of U.S. Land by Aliens and Business Entities* (2006).

Iowa, for example, allows alien ownership of most real property.¹²⁰ But, with a few exceptions, Iowa does not permit individual nonresident aliens, or business entities with majority ownership by nonresident aliens, to purchase or acquire agricultural land.¹²¹ In the few instances when aliens own agricultural land, Iowa requires annual reports of the land ownership and its present and anticipated use.¹²² Iowa also requires reports from business entities that own agricultural land.¹²³

In Illinois, an 1887 statute limited the duration of alien ownership of real property. After repeal of that statute in 1992, aliens may acquire, hold, and dispose real property without special restrictions.¹²⁴ The Illinois Agricultural Foreign Investment Disclosure Act, enacted in 1979, requires any “foreign person” (defined broadly to include legal entities) or foreign government to report their ownership of agricultural land to the state Director of Agriculture.¹²⁵

2. Corporate Ownership and Operation

Federal statistics indicate that in 2012, only about 13 percent of farms were operated as corporations, partnerships, or other legal entities; only about 5.1 percent of farms were corporations.¹²⁶ Of these, 4.5 percent were family owned, most with 10 or fewer shareholders; only 0.5 percent were not family owned. Corporate farms averaged 1,230 acres, but many are larger.¹²⁷

As of 2013, nine states had enacted restrictions on corporate farming, either as statutes or as amendments to state constitutions.¹²⁸ These laws “restrict corporations [and other limited-liability entities] from owning agricultural land and, often, engaging in production agriculture, unless the corporation is closely held (usually by family members) and active farmers or rural residents are included as owners.”¹²⁹ In the aggregate, they limit corporate farming on 312 million acres, about one-third of US farmland.¹³⁰ Although numerous arguments (e.g., concerns about limited liability or large-scale land ownership) support their existence, many view these laws simply as attempts to “protect the family farm.”¹³¹

Although state laws vary, they generally prohibit corporations from specific activities -- that is, from owning farmland and sometimes also from farming. The laws provide exceptions for some

¹²⁰ Iowa Code § 9I.2.

¹²¹ Iowa Code § 9I.3. In 1965, Iowa had increased, from 320 to 640 acres, the land that a nonresident alien or corporation could own. Wilson, *supra* note 105, at 728.

¹²² Iowa Code § 9I.8.

¹²³ Iowa Code § 10B.4. Reports are confidential. *Id.* § 10B.5.

¹²⁴ Property Owned by Aliens Act, 765 ILCS 60/7-8.

¹²⁵ 765 ILCS 50/1-8. A copy of the report filed under the federal Agricultural Foreign Investment Disclosure Act, discussed above, meets the Illinois reporting requirement.

¹²⁶ NASS, *supra* note 21, Table 1, at 7; Table 67, at 147.

¹²⁷ NASS, *supra* note 21, Table 67, at 147.

¹²⁸ Wilson, *supra* note 105, at 725. Nebraska has a constitutional provision; Iowa, Kansas, Minnesota, Missouri, North Dakota, South Dakota, and Wisconsin have statutes; Oklahoma has both. *Id.* n.122. On South Dakota’s constitutional measure, see below.

¹²⁹ Anthony B. Schutz, *Corporate-Farming Measures in a Post-Jones World*, 14 Drake Journal of Agricultural Law 97, 98 (2009).

¹³⁰ *Id.* at 98. A few states (Arizona, South Carolina, Texas, West Virginia) have other restrictions on corporate ownership. *Id.* at 106-107.

¹³¹ *Id.* at 102. See *id.* at 98-102 for a list of justifications.

agricultural activities (e.g., poultry or swine production or operation of livestock facilities). In addition, some corporations -- family farm corporations with restricted size and ownership structure -- are not prohibited from owning agricultural land and farming. In some states, a family member must live on the farm or be engaged in farming.¹³² Because most agricultural corporations are small family-owned entities, the family-farm exemption is significant.

Restrictions on corporate ownership are vulnerable to constitutional challenge. The Commerce Clause of the US Constitution authorizes Congress “to regulate commerce ... among the several states.”¹³³ Even when Congress has not regulated, the so-called Dormant Commerce Clause prohibits states from enacting laws that discriminate against, or unduly burden, interstate commerce. Dormant Commerce Clause doctrine is complex, and the result of a challenge depends on the language and intent of the state law, the nature of the state interest, and the degree of burden (including economic) on interstate commerce. Although a few exceptions apply, a state law that discriminates against interstate commerce is likely to be invalid under the Dormant Commerce Clause. If a state law does not discriminate and serves a legitimate public interest, “the extent of the burden [on commerce] that will be tolerated will ... depend on the nature of the local interest involved and on whether it could be promoted as well with a lesser impact on interstate activities.”¹³⁴

Federal appellate court judgments held that corporate farming measures in Nebraska and South Dakota violate the Dormant Commerce Clause.¹³⁵ The Nebraska restriction on corporate farming was embedded in the state Constitution. The exception for family farm corporations required a family member to be “residing on or actively engaged in the day to day labor and management of the farm.”¹³⁶ The US Court of Appeals for the Eighth Circuit interpreted this exception, coupled with the definition of “the farm,” to require the family member to be physically present in Nebraska. The court therefore held that the statute discriminated against residents of other states and violated the Dormant Commerce Clause.¹³⁷ Similarly, South Dakota had a constitutional restriction on corporate farming, Amendment E, approved by voters in 1998.¹³⁸ In a Dormant Commerce Clause challenge, the Eighth Circuit found that Amendment E, neutral on its face, had been enacted with discriminatory intent, evidenced by language in documents supporting the amendment, statements made by those drafting the amendment, and even in statements at trial.¹³⁹ The state had no legitimate state interest in adopting Amendment E, nor could it show that its

¹³² *Id.* at 107-116 (providing details about the 9 state statutes).

¹³³ U.S. Const. art. I, § 8, cl. 3.

¹³⁴ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

¹³⁵ See also *Smithfield Foods, Inc. v. Miller*, 241 F. Supp. 2d 978 (S.D.Iowa 2003), a federal district court decision holding the Iowa law, Iowa Code § 9H.2, which restricted activities of out-of-state swine processors, violated the Dormant Commerce Clause.

¹³⁶ Nebraska Const. art. XII, § 8(1)A (adopted in 1982).

¹³⁷ *Jones v. Gale*, 470 F.3d 1261 (8th Cir. 2006) (finding both discriminatory intent and discrimination on the face of the measure). See Schutz, *supra* note 129, at 121-122 (noting the court’s interpretation of the term “the farm” to mean land “in this state,” thus requiring presence in Nebraska). For more information on *Jones v. Gale*, see Anthony Schutz, *Nebraska’s Corporate-Farming Law and Discriminatory Effects under the Dormant Commerce Clause*, 88 Nebraska Law Review 50 (2009).

¹³⁸ South Dakota Const., art. XVII, § 21.

¹³⁹ *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583 (8th Cir. 2003). See Roger A. McEowen & Neil E. Harl, *South Dakota Amendment E Ruled Unconstitutional -- Is There a Future for Legislative Involvement in Shaping the Structure of Agriculture?*, 37 Creighton Law Review 285, 298-301 (2004); Harrison M. Pittman, *The Constitutionality of Corporate Farming Law in the Eighth Circuit*, at 4-6 (NALC, 2004) (noting that 6 of the 9 states that restrict corporate farming are in the Eighth Circuit).

purpose could not be achieved in a nondiscriminatory way. Therefore the court held that Amendment E violated the Dormant Commerce Clause.¹⁴⁰

IV. CONCLUSION

The United States, with abundant rural land and natural resources, is an agrarian nation. Rural areas are valued for production of food, fiber, and timber; as living space for rural residents; and for their natural beauty, habitat, recreational opportunities, and other amenities. The majority of US rural land is privately owned. Only a small percentage is owned by foreign investors.

The US Department of Agriculture implements federal laws and regulations that support rural development, improve the quality of life, and protect environmental resources. Under the 2014 Farm Bill and other statutes, conservation programs impose conservation compliance requirements, support retirement of vulnerable land, and promote conservation activities on working land. Other statutory provisions support organic agriculture, promote local and regional food sales, and help producers to add value to their products. Beginning farmers, veterans, and socially disadvantaged farmers, including women, receive priority for some USDA programs.

US rural development measures, along with other programs, provide opportunities to ensure continued agricultural production, promote environmental sustainability, stimulate economic development, and improve living conditions in rural areas in the United States.

¹⁴⁰ The South Dakota Family Farm Act of 1974 continues to govern corporate farming. S.D. Codified Laws §§ 47-9A-1 to 47-9A-23.