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Legal Sidebar

Supreme Court Narrows Dormant Commerce Clause and Upholds State Animal Welfare Law

August 31, 2023

On May 11, 2023, the Supreme Court upheld a California rule (Proposition 12) banning the in-state sale of whole pork meat from pigs that had been "confined in a cruel manner," even if those pigs were confined in another state. In *National Pork Producers Council v. Ross*, the Court held that Proposition 12 did not violate the dormant Commerce Clause, which bars state laws that unduly restrict interstate commerce. In general, the Court's decision narrows the dormant Commerce Clause doctrine by rejecting a *per se* rule against nondiscriminatory state regulations that affect out-of-state interests. However, the Justices fractured over which legal standard to apply in evaluating Proposition 12. The five opinions authored in the case reveal extensive disagreements among the Justices that do not follow typical ideological fault lines, but they offer little clarity about the continued relevance of the dormant Commerce Clause or the way in which the Court will apply various lines of precedent in future cases.

Overview of the Dormant Commerce Clause

Article I, Section 8, Clause 3 of the Constitution provides that "[t]he Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Although the Commerce Clause is framed as a positive grant of power to Congress and not an explicit limit on states' authority, the Supreme Court has interpreted this clause to prohibit state laws that unduly restrict interstate commerce even in the absence of congressional legislation—i.e., where Congress is "dormant." This negative or dormant interpretation of the Commerce Clause "prevents the States from adopting protectionist measures and thus preserves a national market for goods and services."

The Supreme Court has identified two principles that animate its modern dormant Commerce Clause analysis. First, subject to certain exceptions, states may not discriminate against interstate commerce by enacting laws that are "driven by economic protectionism" or "designed to benefit in-state economic interests by burdening out-of-state competitors." A law that clearly discriminates against out-of-state goods or nonresident economic actors will generally be struck down unless the regulatory entity meets the burden of showing that it is "narrowly tailored to advance a legitimate local purpose" and that there is no reasonable, nondiscriminatory regulatory alternative.

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Second, states may not take actions that are facially neutral but unduly burden interstate commerce. To evaluate facially neutral laws, the Court applies a balancing test most famously articulated in *Pike v. Bruce Church, Inc.*:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will, of course, 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.

The Supreme Court has also at times applied an "extraterritoriality principle" in its dormant Commerce Clause analysis, striking down facially neutral state laws that have the effect of regulating conduct entirely beyond a state's borders. While the Court did not articulate a general rule for when it would consider a state's law to have the practical effect of regulating extraterritorial commerce, it recognized that the extraterritoriality principle "protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State" and "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the [regulating] State."

Proposition 12 and the Lower Court Litigation

In November 2018, California adopted a ballot initiative known as Proposition 12, which amends California law to forbid the in-state sale of whole pork meat that comes from breeding pigs or their immediate offspring that were "confined in a cruel manner." The law defines *confined in a cruel manner* to include preventing a pig from "lying down, standing up, fully extending [its] limbs, or turning around freely."

The National Pork Producers Council and the American Farm Bureau Federation sued, alleging that Proposition 12 impermissibly burdened interstate commerce because California imports most of the pork consumed in the state. As a result, the petitioners claimed, out-of-state producers would bear most of the law's compliance costs. The district court dismissed the case, holding that the plaintiffs failed to state a claim that Proposition 12 imposed a substantial burden on interstate commerce and that it was therefore unnecessary for the court to evaluate the purported benefits of the regulation. The Ninth Circuit affirmed, and the Supreme Court agreed to review whether Proposition 12 violated the dormant Commerce Clause.

In their briefs, the petitioners conceded that Proposition 12 imposes the same burdens on in-state and out-of-state pork producers. Under the extraterritoriality principle, however, the petitioners argued that Proposition 12 violated an "almost *per se*" bar on laws that have the "practical effect of controlling commerce outside the State" irrespective of whether those laws purposely discriminate against out-of-state economic interests. The petitioners also argued in the alternative that Proposition 12 failed the *Pike* balancing test because the law's benefits to Californians did not outweigh the costs imposed on out-of-state economic interests.

The Supreme Court's Decision

The opinions in the *National Pork Producers* case primarily addressed three questions. First, should the Court adopt the petitioner's proposed "almost *per se*" rule, in which a law that is not facially discriminatory nor motivated by a discriminatory purpose can be unconstitutional based on its practical effects? Second, did Proposition 12 substantially burden interstate commerce? And third, if Proposition 12 did substantially burden interstate commerce, should the lower courts have applied a *Pike* balancing test to determine whether that burden was excessive?

A fractured Supreme Court affirmed the Ninth Circuit's ruling and upheld Proposition 12 through a plurality opinion. Although five Justices agreed that Proposition 12 did not violate the dormant Commerce Clause, those Justices did not agree on *how* the Court should evaluate dormant Commerce Clause challenges to state regulation. Justice Gorsuch delivered the opinion for the Court but garnered a majority of votes for only part of his opinion. Four other opinions concurred, dissented, or both with respect to various aspects of the plurality opinion's reasoning.

Justice Gorsuch's Opinion for the Majority Rejects the "Almost *Per Se*" Rule

The Court unanimously rejected the petitioners' proposed "almost *per se*" rule against laws with extraterritorial effects. In an opinion by Justice Gorsuch, the majority held that the cases cited by the petitioners did not support an "almost *per se* rule" against state laws that effectively control out-of-state commerce but instead typified "the familiar concern with preventing purposeful discrimination against out-of-state interests." The majority stressed the specific context of various cases on which the petitioners relied, explaining that "the challenged statutes had a *specific* impermissible 'extraterritorial effect'—they deliberately 'prevent[ed out-of-state firms] from undertaking competitive pricing' or 'deprive[d] business and consumers in other States of 'whatever competitive advantages they may possess.'" The majority acknowledged that many if not most state laws have the practical effect of controlling extraterritorial behavior, and it cautioned that the petitioners' proposed rule "would cast a shadow over laws long understood to represent valid exercises of the States' constitutionally reserved powers."

The majority also rejected the petitioners' argument that Proposition 12 was unconstitutional under *Pike*. The majority described that case as concerned with the *purpose* of a law: If a state law's "practical effects" disclosed a discriminatory purpose, then it might run afoul of *Pike*. Because the petitioners alleged neither that Proposition 12 was facially discriminatory nor that its practical effects would disclose purposeful discrimination against out-of-state businesses, the majority concluded that their claim "falls well outside *Pike*'s heartland."

Five Justices Would Have Held That Proposition 12 Created a "Substantial Burden"

Even without purposeful discrimination, a state law might violate the dormant Commerce Clause under *Pike* if it imposed a "substantial burden" on interstate commerce. Five Justices (in two separate opinions) would have held that Proposition 12 had adequately alleged such a burden.

Chief Justice Roberts, joined by Justices Alito, Kavanaugh, and Jackson, wrote an opinion concurring in part and dissenting in part. While he agreed with the majority's rejection of the petitioners' *per se* rule against state laws with extraterritorial effects, Chief Justice Roberts argued that the petitioners plausibly alleged a substantial burden on interstate commerce and would have vacated and remanded the case for the lower court to reapply *Pike*.

Justice Kavanaugh joined the opinion written by Chief Justice Roberts and wrote separately to argue that Proposition 12 imposes substantial burdens on the interstate pork market. In his view, Proposition 12 was a significant departure from agricultural practices that are common and lawful in other states and could actually worsen animal health and welfare, but pork producers had little choice but to comply because of California's large market share. Justice Kavanaugh wrote that state regulations such as Proposition 12 may also implicate the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause.

In contrast, Justice Gorsuch wrote that balancing burdens and benefits under *Pike* was unnecessary because the petitioners failed to establish that Proposition 12 imposed substantial burdens on interstate commerce. Joined by Justices Thomas, Sotomayor, and Kagan, Justice Gorsuch wrote that out-of-state pork producers could choose to modify their existing operations in order to comply with Proposition 12, segregate their operations to ensure that pork products entering California are compliant, or withdraw

from the California market. Justice Gorsuch concluded that the fact that California's new law might shift market share from one set of producers to another did not constitute a sufficient burden on interstate commerce to warrant further judicial scrutiny.

Finally, Justice Barrett agreed with Chief Justice Roberts on this question. In a concurring opinion in which no other Justice joined, Justice Barrett argued that the petitioners' complaint plausibly alleged that Proposition 12 substantially burdened interstate commerce. She accordingly would have permitted the petitioners to proceed with their *Pike* claim "[i]f the burdens and benefits were capable of judicial balancing." That important qualifier, however, split the Court, preventing the five Justices who would have found a "substantial burden" from determining the outcome of *National Pork Producers*.

The Debate on the Court Over the *Pike* Balancing Test

Under *Pike*, if a state law has a substantial burden on interstate commerce, a reviewing court would next apply a balancing test to determine whether that burden was excessive in relation to the local benefits of the law. The question of whether the burdens and benefits of a state law are "capable of judicial balancing," in Justice Barrett's words, became a significant point of discussion in the *Pork Producers* opinions. None of the opinions on that question, however, gained the support of a Court majority, leaving the long-term consequence of this debate uncertain.

In a portion of his opinion joined by two other Justices (Justices Thomas and Barrett), Justice Gorsuch would have ruled that the *Pike* balancing test was judicially unworkable because a court cannot meaningfully compare or weigh economic costs against noneconomic benefits. In this particular case, the three Justices described the competing concerns of new costs for out-of-state producers who choose to comply with Proposition 12 and the moral and health interests of in-state residents as "incommensurable" and argued that policy choices that require the weighing of relevant political and economic costs and benefits are more appropriately made by the political branches. In her separate opinion, Justice Barrett agreed with Justice Gorsuch that it was not possible for a court to weigh California's interest in "eliminating allegedly inhumane products from its markets" against the economic effects on out-of-state producers.

Justice Sotomayor, joined by Justice Kagan, rejected the view that the *Pike* balancing test was judicially unworkable, arguing that *Pike* and its progeny allow at least some challenges to nondiscriminatory state laws.

Chief Justice Roberts's opinion on behalf of four Justices acknowledged that *Pike* is "susceptible to misapplication as a freewheeling judicial weighing of benefits and burdens." He argued, however, that it "also reflects the basic concern of our Commerce Clause jurisprudence that there be free private trade in the national marketplace" and rejected the notion that *Pike* was judicially unworkable or applied only to cases involving discriminatory state laws or implicating the instrumentalities of interstate transportation.

Implications of the Court's Decision

The unusual lineup of opinions in *National Pork Producers* may appear to present a dilemma: Five Justices agreed that Proposition 12 was a substantial burden on interstate commerce, while a different set of six Justices agreed that *Pike* balancing is an appropriate method to evaluate such a law under the dormant Commerce Clause. Despite this, the Court did not order *Pike* balancing for Proposition 12. The reason for that outcome is that five Justices voted to affirm the lower court decision, but on divergent grounds: Justices Sotomayor and Kagan because they did not believe that the particular state law at issue here imposed a substantial burden on interstate commerce; and Justices Gorsuch, Thomas, and Barrett because they believed more generally that *Pike* balancing is unworkable. What, then, does this complex set of opinions mean?

Most directly, the Court's decision in *National Pork Producers* allows California to continue regulating animal welfare conditions for pork sold in the state and could empower other states to impose their own similar requirements. The ruling could also bolster efforts by states to enact other types of regulations that have impacts on out-of-state businesses, including when the benefits of those regulations are non-economic in nature. In particular, some commentators have suggested that the case could most directly affect challenges to state energy policies that require a specific percentage of electricity sold in the state to come from renewable resources. The Justices left unanswered, however, how courts should approach state laws that impose conflicting requirements on out-of-state actors. Some scholars have observed that burdens arising from "mismatches" among two or more states' laws have historically been evaluated under a framework that focuses on different benchmarks than how courts consider the burden imposed by a single state's law. Courts could confront this question in the future if states adopt animal welfare laws that conflict with California's Proposition 12.

More broadly, it is difficult to parse are the decision's effects on the dormant Commerce Clause. The fractured ruling, which did not align with traditional ideological divisions on the Court, indicates disagreement among the Justices about how to evaluate dormant Commerce Clause challenges to state regulations. For now, the *Pike* balancing test remains viable even though some Justices disfavor its continued use. In light of the majority's yoking of *Pike* to the Court's "core antidiscrimination precedents," however, future litigants will need to allege that a challenged law is discriminatory in order for a review court to weigh its benefits and burdens under *Pike*.

Even under that test, lower courts may disfavor striking down state and local regulations on dormant Commerce Clause grounds in light of the *National Pork Producers* majority's insistence that "[e]xtreme caution is warranted" before invalidating a democratically adopted state law. Some Justices have also periodically argued that the Court should turn its focus away from the dormant Commerce Clause and instead evaluate the constitutionality of state regulations under other frameworks, such as the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause. Justice Kavanaugh's opinion highlighting those constitutional provisions indicates that there remains some interest in this approach among the Justices, though it has not gained the support of a majority of the Court. Litigants seeking to challenge state and local regulations thus may increasingly focus on other constitutional arguments instead of or in addition to the dormant Commerce Clause.

The relevance of extraterritorial effects in evaluating future dormant Commerce Clause challenges is also unclear. The majority rejected a *per se* rule against extraterritoriality and distinguished earlier cases that the petitioners cited in support of their proposed approach. While the Court unanimously ruled that such effects may not form the sole basis for invalidating a state regulation, Chief Justice Roberts's concurring opinion suggests that there could be room for courts to consider "sweeping extraterritorial effects" among other aspects of a challenged law in applying *Pike*. None of the *National Pork Producers* opinions addressed how future courts should weigh extraterritorial effects as one factor in applying *Pike*, however.

The Supreme Court's modern dormant Commerce Clause jurisprudence has been highly fact-specific and may continue to be so. The *National Pork Producers* majority warned against "read[ing] too much" into the language of individual dormant Commerce Clause cases, emphasizing that the Court's opinions "dispose of discrete cases and controversies and ... must be read with a careful eye to context." As the Court's jurisprudence in this area continues to develop, the applicability of both *National Pork Producers* and prior lines of precedent to future cases is difficult to predict.

Considerations for Congress

Courts analyze state regulations under the dormant Commerce Clause framework where Congress is "dormant"—i.e., where there is not relevant federal legislation. Currently, there are not nationally applicable laws governing the confinement of pigs. As noted by Justices Gorsuch and Kavanaugh,

Congress could exercise its Commerce Clause authority to impose nationwide requirements for pig confinement or for other aspects of pork production. Congress could also limit states' ability to regulate livestock and other agricultural production, but federal laws that issue direct commands to states, rather than regulating private actors, may raise anticommandeering concerns.

Some Members have expressed support for Proposition 12. Following the Court's ruling in *National Pork Producers*, other Members who opposed Proposition 12 reintroduced legislation to prohibit states from imposing requirements on out-of-state agricultural producers that would be more stringent than federal requirements or the laws of the state in which the production takes place. The Ending Agricultural Trade Suppression Act (H.R. 4417 and S. 2019), which was also introduced in the 117th Congress (H.R. 4999 and S. 2619), would create a right of action for producers and other entities that are affected by state agricultural regulations to sue to invalidate a regulation and seek damages for economic loss resulting from the regulation.

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II

119TH CONGRESS
1ST SESSION

S. 1326

To prevent States and local jurisdictions from interfering with the production and distribution of agricultural products in interstate commerce, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 8, 2025

Ms. ERNST (for herself, Mr. GRASSLEY, Mr. MARSHALL, Mr. CRAMER, Mr. BUDD, Mr. RICKETTS, and Mr. TILLIS) introduced the following bill; which was read twice and referred to the Committee on Agriculture, Nutrition, and Forestry

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A BILL

To prevent States and local jurisdictions from interfering with the production and distribution of agricultural products in interstate commerce, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 **SECTION 1. SHORT TITLE.**
4 This Act may be cited as the "Food Security and
5 Farm Protection Act".

1 **SEC. 2. PROHIBITION AGAINST INTERFERENCE BY STATE**
2 **AND LOCAL GOVERNMENTS WITH PRODUC-**
3 **TION OF ITEMS IN OTHER STATES.**

4 (a) DEFINITION OF AGRICULTURAL PRODUCTS.—In
5 this section, the term ''agricultural products'' has the
6 meaning given the term in section 207 of the Agricultural
7 Marketing Act of 1946 (7 U.S.C. 1626).

8 (b) PROHIBITION.—The government of a State or a
9 unit of local government within a State shall not impose
10 a standard or condition on the preharvest production of
11 any agricultural products sold or offered for sale in inter-
12 state commerce if—

13 (1) the production occurs in another State; and

14 (2) subject to subsection (c), the standard or
15 condition is in addition to the standards and condi-
16 tions applicable to the production pursuant to—

17 (A) Federal law; and

18 (B) the laws of the State and unit of local
19 government in which the production occurs.

20 (c) RULE OF CONSTRUCTION.—If no standards or
21 conditions are applicable to the production of an agricul-
22 tural product pursuant to Federal law, or the laws of a
23 State or unit of local government in which the production
24 occurs, that lack of standards and conditions shall be
25 deemed to be the standards and conditions applicable to

1 the production of the agricultural product for purposes of
2 subsection (b)(2).

3 **SEC. 3. FEDERAL CAUSE OF ACTION TO CHALLENGE STATE**
4 **REGULATION OF INTERSTATE COMMERCE.**

5 (a) DEFINITION OF AGRICULTURAL PRODUCTS.—In
6 this section, the term ''agricultural products'' has the
7 meaning given the term in section 207 of the Agricultural
8 Marketing Act of 1946 (7 U.S.C. 1626).

9 (b) PRIVATE RIGHT OF ACTION.—A person, includ-
10 ing a producer, a transporter, a distributer, a consumer,
11 a laborer, a trade association, the Federal Government,
12 a State government, or a unit of local government, that
13 is affected by a regulation of a State or unit of local gov-
14 ernment that regulates any aspect of 1 or more agricul-
15 tural products that are sold in interstate commerce, in-
16 cluding any aspect of the method of production, or any
17 means or instrumentality through which 1 or more agri-
18 cultural products are sold in interstate commerce may
19 bring an action in the appropriate court to invalidate that
20 regulation and seek damages for economic loss resulting
21 from that regulation.

22 (c) PRELIMINARY INJUNCTION.—On a motion of the
23 plaintiff in an action brought under subsection (b), the
24 court shall issue a preliminary injunction to preclude the
25 applicable State or unit of local government from enforc-

1 ing the regulation at issue until such time as the court
2 enters a final judgment in the case, unless the State or
3 unit of local government proves by clear and convincing
4 evidence that—
5 (1) the State or unit of local government is like-
6 ly to prevail on the merits at trial; and
7 (2) the injunction would cause irreparable harm
8 to the State or unit of local government.
9 (d) STATUTE OF LIMITATIONS.—No action shall be
10 maintained under this section unless the action is com-
11 menced not later than 10 years after the cause of action
12 arose.
13 (e) JURISDICTION.—A person described in subsection
14 (b) may bring an action under that subsection in—
15 (1) the district court of the United States for
16 the judicial district in which the person—
17 (A) is affected by a regulation described in
18 that subsection; or
19 (B) resides, operates, or does business; or
20 (2) any other appropriate court otherwise hav-
21 ing jurisdiction.

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II

119TH CONGRESS
1ST SESSION

S. 1496

To amend the Federal Meat Inspection Act and the Poultry Products Inspection Act to allow the interstate sale of State-inspected meat and poultry, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 10, 2025

Mr. ROUNDS (for himself, Mr. KING, Mr. DAINES, Ms. SMITH, Mr. CRAMER, Mr. BARRASSO, Mr. THUNE, Ms. LUMMIS, Mr. GRASSLEY, and Mr. HOEVEN) introduced the following bill; which was read twice and referred to the Committee on Agriculture, Nutrition, and Forestry

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A BILL

To amend the Federal Meat Inspection Act and the Poultry Products Inspection Act to allow the interstate sale of State-inspected meat and poultry, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "New Markets for
5 State-Inspected Meat and Poultry Act of 2025".

1 SEC. 2. STATE-INSPECTED MEAT.

2 Section 301 of the Federal Meat Inspection Act (21
3 U.S.C. 661) is amended—
4 (1) by striking the section designation and in-
5 serting the following:
6 "SEC. 301. SALE OF INSPECTED MEAT AND MEAT FOOD
7 PRODUCTS.";
8 (2) in subsection (a)—
9 (A) by striking "In furtherance of this pol-
10 icy" in the matter preceding paragraph (1) and
11 all that follows through "(1) The Secretary" in
12 paragraph (1) and inserting the following:
13 "(B) STATE PROGRAMS.—
14 "(i) IN GENERAL.—The Secretary";
15 (B) by striking "(a) It is" and inserting
16 the following:
17 "(a) STATE MEAT INSPECTION PROGRAM.—
18 "(1) IN GENERAL.—
19 "(A) POLICY.—It is"; and
20 (C) in paragraph (1)(B) (as so des-
21 ignated)—
22 (i) in clause (i) (as so designated), by
23 striking "solely for distribution within such
24 State" and inserting "for distribution";
25 and

1 (ii) by adding at the end the fol-
2 lowing:
3 "(ii) INTERSTATE COMMERCE.—
4 "(I) IN GENERAL.—Notwith-
5 standing any other provision of this
6 Act, the Secretary may allow the ship-
7 ment in interstate commerce of car-
8 casses, parts of carcasses, meat, and
9 meat food products inspected under
10 the State meat inspection program de-
11 scribed in clause (i).
12 "(II) ACCEPTANCE OF INTER-
13 STATE SHIPMENTS OF MEAT AND
14 MEAT FOOD PRODUCTS.—Notwith-
15 standing any provision of State law, a
16 State or local government shall not
17 prohibit or restrict the movement or
18 sale of meat or meat food products
19 that have been inspected and passed
20 in accordance with this Act for inter-
21 state commerce.";
22 (3) in subsection (b), by striking "(b) The ap-
23 propriate" and inserting the following:
24 "(b) COOPERATION OF STATE AGENCY.—The appro-
25 priate";

1 (4) in subsection (c)—
2 (A) by striking "(c)(1) If the Secretary"
3 and inserting the following:
4 "(c) ENFORCEMENT OF FEDERAL REQUIRE-
5 MENTS.—
6 "(1) DESIGNATION OF STATES.—
7 "(A) IN GENERAL.—If the Secretary";
8 (B) in paragraph (1) (as so designated)—
9 (i) in subparagraph (A) (as so des-
10 ignated)—
11 (I) in the first sentence, by strik-
12 ing "solely for distribution within
13 such State" and inserting "for dis-
14 tribution"; and
15 (II) in the second sentence, by
16 striking "If the Secretary" and insert-
17 ing the following:
18 "(B) DESIGNATION OF STATES.—
19 "(i) IN GENERAL.—Except as pro-
20 vided under clause (ii), if the Secretary";
21 (ii) in subparagraph (B) (as so des-
22 ignated)—
23 (I) in clause (i) (as so des-
24 ignated)—

1 (aa) in the first sentence, by
2 striking "wholly"; and
3 (bb) by striking "State; *Pro-*
4 *vided*, That if" and inserting the
5 following: "State.
6 "(ii) EXCEPTION.—If"; and
7 (II) in clause (ii) (as so des-
8 ignated)—
9 (aa) in the first sentence—
10 (AA) by striking "such
11 designation" and inserting
12 "a designation made under
13 clause (i)"; and
14 (BB) by striking "he"
15 each place it appears and in-
16 serting "the Secretary"; and
17 (bb) in the second sentence,
18 by striking "The Secretary shall"
19 and inserting the following:
20 "(C) PUBLICATION OF DESIGNATION.—
21 The Secretary shall";
22 (iii) in subparagraph (C) (as so des-
23 ignated)—
24 (I) in the first sentence—

1 (aa) by striking "if such";
2 and
3 (bb) by striking "were"
4 after "transactions"; and
5 (II) in the second sentence, by
6 striking "Thereafter, upon request"
7 and inserting the following:
8 "(D) REVOCATION OF DESIGNATION.—On
9 request";
10 (iv) in subparagraph (D) (as so des-
11 ignated)—
12 (I) in the first sentence, by strik-
13 ing "such designation" and inserting
14 "a designation made under subpara-
15 graph (B)(i)"; and
16 (II) by striking "title IV of this
17 Act: *And provided further*, That, not-
18 withstanding"; and inserting the fol-
19 lowing: "title IV.
20 "(E) ADULTERATED MEAT OR MEAT FOOD
21 PRODUCT.—
22 "(i) IN GENERAL.—Notwithstanding";
23 and
24 (v) in subparagraph (E) (as so des-
25 ignated)—

1 (I) in clause (i) (as so des-
2 ignated)—
3 (aa) in the first sentence—
4 (AA) by striking "with-
5 in such State"; and
6 (BB) by striking "sec-
7 tion 301 of the Act" and in-
8 serting "this section"; and
9 (bb) in the second sentence,
10 by striking "If the State" and in-
11 serting the following:
12 "(ii) ENFORCEMENT.—If the State";
13 and
14 (II) in clause (ii) (as so des-
15 ignated), by striking "as though en-
16 gaged in commerce";
17 (C) in paragraph (2), by striking "(2) The
18 provisions" and inserting the following:
19 "(2) EXCEPTIONS TO INSPECTION.—The provi-
20 sions";
21 (D) in paragraph (3)—
22 (i) by striking "(3) Whenever" and in-
23 serting the following:
24 "(3) TERMINATION OF DESIGNATION.—If"; and

1 (ii) by striking ‘‘he’’ and inserting
2 ‘‘the Secretary’’; and
3 (E) in paragraph (4), by striking ‘‘(4) The
4 Secretary’’ and inserting the following:
5 ‘‘(4) REPORT.—The Secretary’’; and
6 (5) in subsection (d), by striking ‘‘(d) As used
7 in’’ and inserting the following:
8 ‘‘(d) DEFINITION OF STATE.—In’’.
9 **SEC. 3. STATE-INSPECTED POULTRY PRODUCTS.**
10 Section 5 of the Poultry Products Inspection Act (21
11 U.S.C. 454) is amended—
12 (1) by striking the section heading and designa-
13 tion and inserting the following:
14 **‘‘SEC. 5. SALE OF INSPECTED POULTRY PRODUCTS.’’;**
15 (2) in subsection (a)—
16 (A) by striking ‘‘In furtherance of this pol-
17 icy’’ in the matter preceding paragraph (1) and
18 all that follows through ‘‘(1) The Secretary’’ in
19 paragraph (1) and inserting the following:
20 ‘‘(B) STATE PROGRAMS.—
21 ‘‘(i) IN GENERAL.—The Secretary’’;
22 (B) by striking ‘‘(a) It is’’ and inserting
23 the following:
24 ‘‘(a) STATE POULTRY PRODUCT INSPECTION PRO-
25 GRAM.—

1 "(1) IN GENERAL.—
2 "(A) POLICY.—It is"; and
3 (C) in paragraph (1)(B) (as so des-
4 ignated)—
5 (i) in clause (i) (as so designated), by
6 striking "solely for distribution within such
7 State" and inserting "for distribution";
8 and
9 (ii) by adding at the end the fol-
10 lowing:
11 "(ii) INTERSTATE COMMERCE.—
12 "(I) IN GENERAL.—Notwith-
13 standing any other provision of this
14 Act, the Secretary may allow the ship-
15 ment in interstate commerce of poul-
16 try products inspected under the State
17 poultry product inspection program
18 described in clause (i).
19 "(II) ACCEPTANCE OF INTER-
20 STATE SHIPMENTS OF POULTRY
21 PRODUCTS.—Notwithstanding any
22 provision of State law, a State or local
23 government shall not prohibit or re-
24 strict the movement or sale of poultry
25 products that have been inspected and

1 passed in accordance with this Act for
2 interstate commerce.'';
3 (3) in subsection (b), by striking ''(b) The ap-
4 propriate'' and inserting the following:
5 ''(b) COOPERATION OF STATE AGENCY.—The appro-
6 priate'';
7 (4) in subsection (c)—
8 (A) by striking ''(c)(1) If the Secretary''
9 and inserting the following:
10 ''(c) ENFORCEMENT OF FEDERAL REQUIRE-
11 MENTS.—
12 ''(1) DESIGNATION OF STATES.—
13 ''(A) IN GENERAL.—If the Secretary'';
14 (B) in paragraph (1) (as so designated)—
15 (i) in subparagraph (A) (as so des-
16 ignated)—
17 (I) in the first sentence, by strik-
18 ing ''solely for distribution within
19 such State'' and inserting ''for dis-
20 tribution''; and
21 (II) in the second sentence, by
22 striking ''If the Secretary'' and insert-
23 ing the following:
24 ''(B) DESIGNATION OF STATES.—

1 "(i) IN GENERAL.—Except as pro-
2 vided under clause (ii), if the Secretary";
3 (ii) in subparagraph (B) (as so des-
4 ignated)—
5 (I) in clause (i) (as so des-
6 ignated)—
7 (aa) in the first sentence, by
8 striking "wholly"; and
9 (bb) by striking "State: *Pro-*
10 *vided*, That if" and inserting the
11 following: "State.
12 "(ii) EXCEPTION.—If"; and
13 (II) in clause (ii) (as so des-
14 ignated)—
15 (aa) in the first sentence—
16 (AA) by striking "such
17 designation" and inserting
18 "a designation made under
19 clause (i)"; and
20 (BB) by striking "he"
21 each place it appears and in-
22 serting "the Secretary"; and
23 (bb) in the second sentence,
24 by striking "The Secretary shall"
25 and inserting the following:

1 "(C) PUBLICATION OF DESIGNATION.—
2 The Secretary shall";
3 (iii) in subparagraph (C) (as so des-
4 ignated)—
5 (I) in the first sentence—
6 (aa) by striking "if such";
7 and
8 (bb) by striking "were"
9 after "transactions"; and
10 (II) in the second sentence, by
11 striking "However, notwithstanding"
12 and inserting the following:
13 "(D) ADULTERATED POULTRY PROD-
14 UCT.—
15 "(i) IN GENERAL.—Notwithstanding";
16 and
17 (iv) in subparagraph (D) (as so des-
18 ignated)—
19 (I) in clause (i) (as so des-
20 ignated)—
21 (aa) in the first sentence—
22 (AA) by striking "with-
23 in such State"; and
24 (BB) by striking "sub-
25 paragraph (a)(4) of this sec-

1 tion'' and inserting ''sub-
2 section (a)(4)''; and
3 (bb) in the second sentence,
4 by striking ''If the State'' and in-
5 serting the following:
6 ''(ii) ENFORCEMENT.—If the State'';
7 and
8 (II) in clause (ii) (as so des-
9 ignated), by striking ''as though en-
10 gaged in commerce'';
11 (C) in paragraph (2), by striking ''(2) The
12 provisions'' and inserting the following:
13 ''(2) EXCEPTIONS TO INSPECTION.—The provi-
14 sions'';
15 (D) in paragraph (3), by striking ''(3)
16 Whenever'' and inserting the following:
17 ''(3) TERMINATION OF DESIGNATION.—If''; and
18 (E) in paragraph (4), by striking ''(4) The
19 Secretary'' and inserting the following:
20 ''(4) REPORT.—The Secretary''; and
21 (5) in subsection (d), by striking ''(d) As used
22 in'' and inserting the following:
23 ''(d) DEFINITION OF STATE.—In''.

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Update on State Pesticide Liability Limitation Bills

Brigit Rollins, Staff Attorney, National Agricultural Law Center

This legislative session has seen various trends in legislation among different states, including at least nine states that have introduced bills to limit the liability of pesticide companies in injury and product liability lawsuits. While the trend initially kicked off last year with a handful of states introducing pesticide liability limitation bills during the 2024 session, it gained new momentum this year as more states introduced bills and a few have come close to passing. However, with the end of the legislative session approaching for many states, there is still some question as to whether any of the pesticide liability limitation bills introduced in 2025 will clear the finish line.

Background

The last decade has seen a sharp rise in lawsuits filed by plaintiffs claiming that exposure to a pesticide product caused them to develop some sort of illness or injury. While the highest profile pesticide injury cases have involved plaintiffs who claim that exposure to glyphosate, the active ingredient in the pesticide Roundup, have caused them to develop non-Hodgkin's lymphoma, plaintiffs have also filed cases alleging injury as the result of exposure to paraquat, chlorpyrifos, and other commonly used pesticide products. Despite the pesticide at issue in a particular lawsuit, most pesticide injury plaintiffs raise similar legal claims, which the National Agricultural Law Center have reviewed in a series called Plaintiffs & Pesticides. Over the last few years, one of those legal claims, the claim that pesticide manufacturers failed to warn consumers about health risks allegedly associated with exposure to certain pesticide products, has become central to pesticide injury litigation.

Failure to warn claims are raised by almost every plaintiff in a pesticide injury lawsuit. Failure to warn arises out of state law and is most often raised during product liability lawsuits by plaintiffs claiming that the manufacturer of a particular product failed to warn consumers about potential injuries that can result from normal use of the product. For example, a plaintiff who alleges failure to warn in a glyphosate injury lawsuit will argue that Bayer, the manufacturer of glyphosate, failed to warn consumers that regular exposure to glyphosate could cause the user to develop cancer.

Pesticide manufacturers have pushed back against failure to warn claims by arguing that pesticides are regulated under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), a federal law that requires all pesticides bear a federally-approved label in order to be legally sold in the United States. Part of registering a pesticide product label requires the Environmental Protection Agency ("EPA") to conduct a human health risk assessment and make a carcinogenicity classification. Additionally, FIFRA prohibits states from adding language to a federally registered pesticide label that is "in addition to or different from" federal requirements. Pesticide manufacturers, and Bayer in particular, argue that failure to warn claims in pesticide injury lawsuits should be

dismissed because the only way to avoid the claims would be for Bayer to affix cancer warning statements to the packaging of any product containing glyphosate. Bayer argues that this would violate FIFRA by introducing label language that is different from the federally approved label as EPA has never concluded that glyphosate is carcinogenic in humans.

While courts continue to consider whether failure to warn claims should be permitted in pesticide injury lawsuits, some states are looking to pass legislation that would limit the liability of pesticide manufacturers facing failure to warn lawsuits over pesticide products that bear federally approved labels that are consistent with the most recent human health risk evaluations and carcinogenicity classifications from EPA.

Pesticide Liability Limitation Bills

In 2025, at least nine states have introduced liability limitation bills for pesticide manufacturers. As the end of the 2025 legislative session approaches for many states, this is where the various pesticide liability limitation bills stand.

Florida

Legislators in Florida introduced HB 129 in early January. Originally, HB 129 would have only limited liability for anyone who distributed, sold, or applied pesticide products and would extend that liability limitation to "any products liability actions, including failure to warn." However, the bill has since been amended to limit any products liability action based on failure to warn for any pesticide product that is registered under FIFRA provided that the pesticide bears a label that has been approved by EPA, and is consistent with both the most recent human health risk assessment and carcinogenicity classification of the pesticide. HB 129 would only allow a failure to warn claim to proceed in a pesticide products liability case if EPA determines that the pesticide manufacturer "knowingly withheld, concealed, misrepresented, or destroyed material information" related to the human health risks or possible carcinogenicity of the pesticide.

Currently, HB 129 is before the Housing, Agriculture & Tourism Subcommittee in the Florida House of Representatives. The Florida legislative session is set to adjourn on May 2.

Georgia

Legislators in Georgia introduced SB 144 in February alongside companion bill HB 424. While HB 424 was withdrawn in early April, SB 144 has passed both the Georgia Senate and House of Representatives and is headed to the Governor's desk to be signed into law. Under SB 144, a pesticide label that is approved by EPA under FIFRA and is consistent with the most recent human health risk assessment for the pesticide shall be considered "a sufficient warning label" for any failure to warn claims raised under state law. Like the bill in Florida, the only exception under SB 144 arises if EPA determines

that a pesticide manufacturer knowingly "withheld, concealed, misrepresented, or destroyed material information regarding the human health risks of such pesticide."

Georgia's governor has 40 days following the end of the legislative session to review all bills that passed the legislature and decide whether to sign them into law. Georgia's legislative session ended on April 4 which gives the governor's office until May 14 to make the decision. Should the governor sign SB 144, it will go into effect on January 1, 2026. Should the governor veto the bill, it will return to the legislature during the next session to determine whether lawmakers wish to override the veto which requires a two-thirds majority of each legislative chamber. Should the governor choose to do nothing at all, SB 144 would become law automatically 40 days after the legislative session ends. Should SB 144 become law, it would make Georgia the first state to successfully enact a pesticide liability limitation law.

Iowa

SF 394 was originally introduced to the Iowa legislature in late February as SSB 1051. The bill is nearly identical to one that was introduced in the Iowa legislature in 2024 and, like other pesticide liability limitation bills, would provide that a pesticide label which is registered under FIFRA and consistent with both the most recent human health risk assessment and carcinogenicity classification would be an adequate defense to any claims that manufacturer failed to warn consumers about possible health risks of the pesticide. SF 394 passed the Iowa Senate on March 26 and is currently in the Iowa House of Representatives Judiciary Committee. Iowa's legislative session ends on May 2.

Mississippi

Lawmakers in Mississippi introduced HB 1221 and its companion bill SB 2472 in late January. Both bills would have exempted pesticide manufacturers from liability for failure to warn claims for any pesticide product that bears a label approved by EPA. However, both bills died on the calendar in early February. It is possible that similar legislation could be reintroduced during the next legislative session.

Missouri

Missouri's HB 544 was pre-filed in late December 2024 and is largely identical to a bill introduced during Missouri's 2024 legislative session. HB 544 provides that a pesticide label that has been approved by EPA and is consistent with the most recent human health risk assessment and carcinogenicity classification would be a sufficient defense for state law failure to warn claims. The bill passed the Missouri House of Representatives in late February and is currently before the Missouri Senate. Missouri's legislative session concludes on May 30.

North Dakota

HB 1318 was introduced to the North Dakota legislature in January and is similar to other pesticide liability limitation bills. It would make a federally approved pesticide

label that is consistent with the most recent human health risk assessment and carcinogenicity classification a sufficient defense to any failure to warn claims. HB 1318 unanimously passed the North Dakota House of Representatives before the end of January and is currently before the Senate. A Senate hearing on HB 1318 is scheduled for April 20. North Dakota will adjourn its legislative session on May 9.

Oklahoma

Oklahoma legislators introduced HB 1755 at the start of February. Like other bills, HB 1755 would find that a pesticide label is a sufficient defense to any failure to warn claims if it is approved by EPA and consistent with the most recent human health risk assessment and carcinogenicity classification. HB 1755 is currently before the Oklahoma House of Representatives Rules Committee. It has yet to be introduced to the House floor. Oklahoma's legislative session is scheduled to conclude on May 30.

Tennessee

SB 527 and its companion bill HB 809 were introduced to the Tennessee Senate and House of Representatives in late January and early February respectively. The two bills are identical to one another, although both are slightly different than the pesticide liability limitation bills that have been introduced in other states. SB 527 and HB 809 would provide that a pesticide manufacturer is not liable for any civil action related to the labeling of the pesticide, including failure to warn, so long as the pesticide bears a label approved by EPA and the pesticide itself was not manufactured or sold in violation of FIFRA. This makes the Tennessee bills slightly broader than other pesticide liability limitation bills which are focused primarily on failure to warn claims. SB 527 passed the Senate in early April and has been sent to the Tennessee House of Representatives. However, the House tabled HB 809, opting to schedule it for the 2026 calendar instead of hearing it this year. With Tennessee's legislative session set to adjourn on April 25, it appears unlikely that either SB 527 or HB 809 will pass this year.

Wyoming

Lawmakers in Wyoming introduced HB 0285 in late January. The bill would have provided that a pesticide manufacturer's duty to warn consumers about the risks associated with a particular pesticide would be presumed satisfied so long as the pesticide bore a label approved by EPA. That presumption could only have been overcome if the weight of scientific evidence showed that an additional warning label was necessary. HB 0285 died in committee in early March, however it is possible that the bill could be reintroduced during the 2026 legislative session.

Conclusion

As the end of the 2025 legislative session approaches, it appears that so far only one state is on track to successfully enact a pesticide liability limitation bill. Georgia is currently poised to be the first state to adopt such a bill. Should Georgia's SB 144 become law, starting on January 1 of next year, a federally approved pesticide label that

is consistent with the most recent human health risk assessment and carcinogenicity classification will be a sufficient defense to state law failure to warn claims filed by pesticide injury plaintiffs in Georgia state court. Recently, a jury in Georgia awarded the plaintiff in a pesticide injury lawsuit $2.065 billion. Similar lawsuits pending in Georgia state court could ultimately be less successful after SB 144 goes into effect.

Overall, it is currently unclear what the impact of pesticide liability limitation bills will be. There are currently thousands of pesticide injury lawsuits pending in states across the country and even if all nine states that introduced pesticide liability limitation bills in the 2025 legislative session had passed them, it is not clear how many lawsuits would be resolved. For the moment, it appears that pesticide injury lawsuits will continue to make their way through the court system.

EPA Releases Draft Insecticide Strategy

Brigit Rollins, Staff Attorney, National Agricultural Law Center

On July 25, 2024, the Environmental Protection Agency ("EPA") released its highly anticipated draft Insecticide Strategy, the latest step in the agency's effort to revise its approach to reducing pesticide exposure to endangered species. The draft Insecticide Strategy is similar to the draft Herbicide Strategy published by EPA in 2023, with a focus on reducing pesticide spray drift and runoff to better protect species listed as threatened or endangered under the Endangered Species Act ("ESA") from harmful levels of exposure. EPA began its current effort to reduce pesticide exposure to listed species in 2022 after facing years of litigation over the agency's struggle to comply with both its ESA responsibilities and its Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") responsibilities. By adopting this new policy, EPA hopes to create stronger pesticide labels while reducing impacts to listed species.

Background

In April 2022, EPA published a work plan titled Balancing Wildlife Protection and Responsible Pesticide Use: How EPA's Pesticide Program Will Meet its Endangered Species Act Obligations. That work plan, together with an update released the following November, outlined EPA's plan to begin introducing new mitigation measures to pesticide labels in order to reduce exposure to threatened and endangered species. According to EPA, this new policy approach was necessary to address what the agency described as a "decades-old challenge" of how to satisfy its ESA obligations when taking action under FIFRA.

The ESA is the primary federal wildlife protection law in the United States. It is jointly administered by the U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") (collectively, "the Services") which are responsible for identifying species at risk of extinction and then listing those species as either "threatened" or "endangered" under the ESA. However, the Services are not the only federal agencies that have ESA responsibilities. All federal agencies are required to further the purposes and aims by the ESA in part by consulting with the Services any time they carry out an agency action to ensure that the action does not jeopardize the continued existence of any listed species. 16 U.S.C. § 1536(a)(2).

Under the ESA, an agency action is broadly defined as any activity that a federal agency has "authorized, funded, or carried out[.]" 16 U.S.C. § 1536(a)(2). Any time an agency does something that would be considered an agency action, the ESA requires the agency to determine whether its action "may affect" any listed species. 50 C.F.R. § 402.14. If an agency concludes that its action "may affect" any species listed under the ESA, it must then determine whether the action is likely to adversely affect any listed species. If the agency finds that its action is likely to adversely affect listed species, then the ESA requires the agency to reach out to the Services for formal consultation. During formal

consultation, the Services will prepare a detailed document known as a Biological Opinion ("BiOp"). 50 C.F.R. § 402.14(e). The overall goal of formal consultation is to ensure that the proposed agency action will not jeopardize the continued existence of a listed species. Therefore, if the Services conclude that the proposed action is likely to jeopardize a species, the BiOp will contain a selection of mitigation measures or alternative proposals that will allow the agency to meet its goals while avoiding jeopardy of a species. Once the BioOp is issued, formal consultation is at an end. The agency has satisfied its ESA responsibilities and may determine how best to proceed. To learn more about ESA consultation, click here to read the NALC's ESA Manual.

Just as the ESA is the primary federal wildlife statute in the Untied States, FIFRA is the primary federal statute regulating the sale and use of pesticide products. EPA is responsible for administering FIFRA, and in that capacity the agency takes numerous agency actions every year. Under FIFRA, no pesticide product may be legally sold or used in the United States until EPA has registered a label for that product. 7 U.S.C. § 136a(a). To register a pesticide label, EPA is required to determine whether use of the pesticide product according to the proposed label instructions will result in "unreasonable adverse effects to the environment." 7 U.S.C. § 136a(c)(5)(C). Registering a pesticide label is considered an agency action. Along with registering labels for new pesticide products, FIFRA also requires EPA to review all registered pesticides once every fifteen years. The registration review process can take several years to complete and may involve issuing an interim decision prior to a final decision. Both the interim and final review decisions are considered agency actions. Additionally, EPA may amend an existing pesticide label in a variety of ways such as adding a new use, approving an emergency use, or introducing a new label requirement. Those may be considered agency actions as well. Because any single pesticide may have a wide use area – for example, glyphosate is registered for use through out the United States – ESA consultation on the effect of any one FIFRA action can take months to years to complete.

In the fifty years since the ESA was first adopted, EPA has struggled to fully comply with its consultation responsibilities when taking action under FIFRA. Over the last several years, EPA has faced mounting lawsuits challenging the agency for its failure to fully comply with FIFRA. Most of these lawsuits end in favorable rulings for the plaintiffs because of how strictly courts interpret the ESA's consultation requirements. According to EPA, completing all the ESA consultations for FIFRA actions that are currently subject to court orders would take the agency at least until the 2040s and would represent only 5% of EPA's ESA obligations. In an effort to more efficiently meet its ESA obligations and craft stronger pesticide labels, EPA has developed its new ESA-FIFRA policy. The draft Insecticide Strategy is the latest step in that process.

Draft Insecticide Strategy

In its initial workplan, EPA outlined two primary strategies the agency would use to reduce pesticide exposure to listed species. The first strategy involves breaking out

registered pesticides into similar groups – herbicides, insecticides, and rodenticides – and then identifying and implementing early ESA mitigation measures for those groups. The second strategy involves identifying threatened and endangered species that are considered highly vulnerable to pesticides and developing mitigation measures to protect those species from pesticide exposure. The draft Insecticide Strategy reflects the first of the two strategies by proposing mitigation measures that would apply specifically to insecticides. Last year's draft Herbicide Strategy did the same for herbicides, and both draft Strategies share similarities. To learn more about the draft Herbicide Strategy, click here.

The draft Insecticide Strategy proposes additional mitigation measures that will be added to the labels of "conventional insecticides, insect growth regulators, and miticides that are used in agriculture." Like the draft Herbicide Strategy, the mitigations identified in the draft Insecticide Strategy are focused on reducing pesticide exposure via spray drift and runoff/erosion. According to EPA, the mitigations are intended to address impacts to listed aquatic and terrestrial invertebrates which EPA states are the types of species most heavily impacted by insecticides.

In the draft Insecticide Strategy, EPA outlines a three-step framework the agency will use to determine whether a particular insecticide requires additional mitigations. During step one, EPA will establish what level of potential a particular pesticide has for population-level impacts to listed species. Possible outcomes include "not likely," "low," "medium," or "high." If an insecticide is found to pose either low, medium, or high levels of possible population-level impacts, then the product will require some degree of additional mitigation. EPA will base that determination on "long standing FIFRA risk assessment approaches EPA uses to identify potential ecological risk to non-target species, with additional considerations to refine the typical FIFRA risk assessment." Specifically, EPA will consider both the use pattern of a particular pesticide, and how that pesticide behaves in the environment to reach its final determination. Ultimately, mitigation will be lesser when the potential for population impacts is lower, and higher when the potential is higher.

After making its final determination in step one, EPA will proceed to step two. There, EPA will use the potential of population level impacts to identify levels of mitigation needed to reduce spray drift and runoff/erosion. Many of the mitigation measures identified in the draft Insecticide Strategy are similar if not identical to the mitigation measures identified in the draft Herbicide Strategy. To reduce spray drift, EPA is proposing increased spray buffers, with the size of the spray buffer increasing with the level of mitigation required. Insecticides identified in step one as low risk will have smaller spray buffers, while those identified as high risk will have larger buffers. Additionally, EPA has identified mitigation measures that could be used to reduce the required buffer distance, such as use of specific equipment, reduced application rate, and increased droplet size.

For runoff/erosion, EPA has identified a variety of mitigation measures that it has organized into the following categories:

- Application Parameters – methods of application that reduce runoff/erosion such as annual application rate reductions, partial field treatments, and soil incorporation
- Field Characteristics – characteristics that indicate a particular field will have less runoff/erosion, includes fields with a low slope, or fields that have permeable soils
- In-field Mitigation Measures – methods of managing a field such as management of irrigation water, use of cover crops, reduced tillage, and use of mulch
- Adjacent to the Field Mitigation Measures – management techniques used next to a field and down-gradient from where applications occur, including grass waterways, vegetation filter strips, and habitat improvement areas
- Systems that Capture Runoff and Discharge – methods of capturing runoff and erosion through discrete conveyances such as water retention ponds, sediments basins, and catch basins
- Other Mitigation Measures – methods of reducing runoff/erosion that do not fit into any of the above categories

Just as in the draft Herbicide Strategy, the various mitigation measures used to reduce runoff/erosion will be placed into a mitigation menu and each measure will have a point value of either 1, 2, or 3. EPA will identify a mitigation level for individual insecticides (none, low, medium, and high) with up to 9 points of mitigation possible. From there, applicators can choose the mitigation measures that work best for their fields and meet the number of points needed to apply a particular pesticide.

Finally, step three of the framework outlined in the draft Insecticide Strategy requires EPA to determine where in the contiguous United States mitigations will apply. In some circumstances, EPA expects mitigations to be required across an insecticide's entire use area. In those instances, the mitigation requirements will be included on the insecticide's general label. However, in other circumstances, EPA expects that mitigation requirements will be geographically limited to protect a specific species. For those instances, EPA will rely on its website Bulletins Live! Two to alert applicators to the specific geographic areas where mitigations will be required. EPA will use labeling language to direct applicators to check Bulletins Live! Two for any active bulletins in the area.

Along with providing the three-step framework EPA will use to assign mitigations to insecticides, the draft Insecticide Strategy provides information on how and when mitigations will begin to appear on insecticide labels. Importantly, EPA notes that the draft Insecticide Strategy is not self-implementing. Instead, mitigations will appear on labels as EPA registers new insecticide products and conducts re-registration reviews of

existing products. This indicates both that mitigation measures will not appear suddenly across all insecticide labels at once, and that farmers and applicators will have some warning as to when new language will appear on general labels.

Going Forward

The draft Insecticide Strategy is the most recent step EPA has taken to implement its new policy for balancing the agency's ESA and FIFRA responsibilities. Like the draft Herbicide Strategy published in 2023, the draft Insecticide Strategy focuses on reducing pesticide spray drift and runoff in order to limit exposure to listed species. The draft Insecticide Strategy is currently open for a 60-day public comment period that will conclude on September 23. Click here to learn more about submitting a comment.

While the draft Insecticide Strategy is the latest action EPA has taken to roll out its new policy, it will not be the last. A final draft of the Herbicide Strategy is expected before the end of 2024, and a final draft of the Insecticide Strategy is expected in 2025. It is currently unclear when new mitigation requirements will begin appearing on pesticide labels.

Fish & Wildlife Service Proposes Rescinding Definition of “Harm” Under ESA

Brigit Rollins, Staff Attorney, National Agricultural Law Center

On April 17, 2025, the United States Fish and Wildlife Service (“FWS”) together with the National Marine Fisheries Service (“NMFS”) (collectively, “the Services”) introduced a proposed rule to rescind the regulatory definition of “harm” under the Endangered Species Act (“ESA”). The term “harm” is found in the ESA’s statutory definition of “take,” and for decades has been defined through regulation as an action that either kills or seriously injures protected wildlife through actions that include habitat modification. Removing the regulatory definition of “harm” would ultimately redefine what constitutes “take” of a species.

“Take” and the ESA

The ESA became law in 1973 for the primary purpose of conserving endangered species of wildlife and the ecosystems on which those species depend. 16 U.S.C. § 1531(b). The statute is implemented jointly by the Services who are responsible for identifying species of wildlife that should be protected by the Act. Species protected under the ESA are categorized as either “threatened” or “endangered” depending on the current risk the species is facing. A species will be listed as endangered if it is “in danger of extinction throughout all or a significant portion of its range,” or as threatened if it is “likely to become an endangered species within the foreseeable future.” 16 U.S.C. § 1532(6), (20).

Once a species is listed as threatened or endangered under the ESA, it receives the various protections that the Act has to offer. At the heart of those protections is the prohibition against “take” of a listed species. Under the ESA, it is “unlawful for any person” to “take” any listed species. 16 U.S.C. § 1538(a)(1)(B). The statute defines “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). The statutory definition of “take” is relatively broad, and when the Services adopted regulations to fully implement the ESA in 1975, they chose to further define some of the words included in the “take” definition. Specifically, the Services chose to define “harm” for the purposes of “take” as “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. In other words, since 1975 “take” of a species has included any activity that modifies or destroys the habitat of a protected species in such a way that the species essential behavior patterns are significantly impaired ultimately causing injury or death to the species.

Because the prohibition on “take” of a species applies to everyone, the current definition of “harm” can make it unlawful for a private party operating on private property to

damage or destroy habitat for listed species unless the private party receives a permit from the Services authorizing "take" of a species.

Proposed Change

In mid-April, the Services published a proposal in the Federal Register to completely remove the regulatory definition of "harm" under the ESA. Instead of proposing a new or altered definition, the Services propose to rescind the definition entirely. Should the proposal become finalized, "take" of a species would no longer include activities that modify or degrade species habitat in such a way that species are actually killed or injured. While "take" would still prohibit activities that directly injure or kill wildlife through the term's inclusion of the words "wound" and "kill," rescinding the definition of "harm" would result in habitat modification or destruction no longer being considered a violation of the ESA.

In the explanation for why the change to the definition of "harm" has been proposed, the Services reference a Supreme Court case from 1995 known as ***Babbit v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995)**. In that case, a coalition of private landowners challenged the regulatory definition of "harm" under the ESA. While the Court ultimately upheld the definition, the Services claim that the Court never held that the regulatory definition of "harm" was the best meaning of the statutory text of the ESA, only that it was a permissible definition. Because the *Babbit v. Sweet Home* decision was based on the judicial doctrine of *Chevron* deference which the Supreme Court overturned in 2024 with its landmark ruling in ***Loper Bright Enters. v. Raimondo*, No. 22-451 (2024)**, the Services conclude that rescinding the regulatory definition of "harm" is appropriate. To learn more about the Court's decision in *Loper Bright*, click here. The Services also highlight the dissent in *Babbit v. Sweet Home* which was authored by Justice Scalia to support a more limited definition of "harm." Because the Services rely on *Babbit v. Sweet Home* as part of their reasoning for rescinding the current regulatory definition of "harm," it is helpful to take a closer look at the ruling.

Babbit v. Sweet Home Chapter of Communities for a Great Oregon

The group of plaintiffs that initiated *Babbit v. Sweet Home* was made up of small landowners, logging companies, and others who depended on the forest products industries in Oregon and the rest of the Pacific Northwest. They initially filed the lawsuit to challenge the regulatory definition of "harm," arguing that the inclusion of habitat modification and degradation in the definition had injured them economically by limiting logging activities that would result in modification or destruction of habitat for the protected red-cockaded woodpecker and northern spotted owl. The plaintiffs argued that Congress did not intend for "take" to include habitat modification and that the word "harm" should be interpreted as applying only to a "direct application of force" taken against a member of a protected species.

Ultimately, the Supreme Court disagreed with the plaintiffs. According to the Court, there were three reasons why the text of the ESA did not support the definition of "harm" that the plaintiffs put forward. First, the statutory definition of "take" already included words such as "wound" and "kill" that prohibited a "direct application of force" taken against a protected species. According to the Court, if "harm" did not include both direct and indirect action, the word would have "no meaning." Second, the Court found that the "broad purpose of the ESA" supports including habitat modification in the definition of "harm" because the text of the Act states that one of its primary goals is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). Finally, the Court noted that Congress amended the ESA in 1982 to allow the Services to issue permits to authorize "take" of species that is incidental to otherwise legal activities. According to the Court, Congress understood that "take" of species was defined to include indirect injury as a result of otherwise lawful habitat modification and instead of changing the definition of "take," it created a permit system that would instead authorize such activity in certain circumstances.

While the Supreme Court identified three reasons why it did not believe the text of the ESA supported the argument that "harm" should be limited to direct applications of force, the Court also relied on the doctrine of *Chevron* deference. Under that doctrine, if the language of a statute is ambiguous as to the intention of Congress, then an agency's reasonable interpretation of the language should be upheld in court. In *Babbit v. Sweet Home*, the Supreme Court found that Congress granted the Services broad authority to interpret and enforce the ESA, and that the regulatory definition of "harm" was a reasonable interpretation of the statute. For those reasons, the Court upheld the definition of "harm" to include habitat modification.

The *Babbit v. Sweet Home* decision included a dissent authored by Justice Scalia. In that dissent, Justice Scalia argued that the regulatory definition of "harm" was not supported by the structure of the ESA.

Specifically, the dissent argued that the definition of "take" found in the text of the ESA contains a list of actions that describe "affirmative conduct intentional directed against a particular animal or animals." In contrast, the regulatory definition of "harm" would include habitat modification that ultimately results in injury to protected wildlife even though that was not the intention of the activity. Justice Scalia claimed that the broader definition of "harm" would not be reasonable because the rest of the words used to define "take" refer to intentional actions such as intentionally wounding, killing, trapping, or pursuing a member of a protected species. Additionally, Justice Scalia claimed that defining "harm" to include habitat modification is not necessarily because the definition of "take" would already prohibit habitat modifications that are specifically intended to injure or kill a protected species.

Going Forward

A comment period on the proposal to rescind the regulatory definition of "harm" under the ESA is open through May 19, 2025. Should the proposal become finalized, it would mean that "take" under the ESA would no longer include acts that cause death or injury to protected wildlife as a result of significant habitat modification or degradation. Currently, it is not clear whether the Services intend to issue a new regulatory definition of "harm." Whether a new definition is issued or not, it is likely that the final rule will be challenged in court.

House Bill 424

By: Representatives Meeks of the 178th, Dickey of the 134th, Burchett of the 176th, Wade of the 9th, McDonald III of the 26th, and others

A BILL TO BE ENTITLED

AN ACT

1 To amend Article 6 of Chapter 7 of Title 2 of the Official Code of Georgia Annotated,
2 relating to liability for use of fertilizers, plant growth regulators, or pesticides, so as to clarify
3 that a manufacturer cannot be held liable for failing to warn consumers of health risks above
4 those required by the United States Environmental Protection Agency with respect to
5 pesticides; to provide for legislative findings; to provide for related matters; to provide for
6 applicability; to repeal conflicting laws; and for other purposes.

7 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

8 **SECTION 1.**

9 The General Assembly finds that:
10 (1) Agriculture and its related industries contribute over $91 billion to Georgia's economy,
11 and Georgia farmers are the backbone of that activity;
12 (2) As the nation's largest producer of peanuts and the second largest producer of cotton,
13 Georgia farmers rely on inputs to grow their crops and keep yields high;
14 (3) Without reliable access to the most widely used crop protection products, costs to
15 farmers could more than double;

16 (4) A domestic supply chain for crop protection products is critical to ensuring farmers
17 have access to all the tools they need to grow food and fiber;
18 (5) Dependence on Chinese imports for critical ingredients in crop protection products
19 creates supply chain vulnerabilities for the United States and opportunities for foreign
20 adversaries to restrict access to crop protection products for American farmers; and
21 (6) Every effort must be made to strengthen the United States domestic production of
22 pesticides, including clarifying regulatory authority of pesticide labeling.

23 **SECTION 2.**

24 Article 6 of Chapter 7 of Title 2 of the Official Code of Georgia Annotated, relating to
25 liability for use of fertilizers, plant growth regulators, or pesticides, is amended by adding
26 a new Code section to read as follows:
27 "2-7-171.
28 (a) As used in this Code section, the term:
29 (1) 'Environmental Protection Agency' means the United States Environmental
30 Protection Agency.
31 (2) 'FIFRA' means the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C.
32 Section 135, et seq., and the amendments thereto.
33 (b) Notwithstanding anything to the contrary in this chapter, beginning on January 1, 2026,
34 any pesticide registered with the Commissioner, pursuant to Code Section 2-7-55, or the
35 Environmental Protection Agency, pursuant to FIFRA, which displays a label that has been
36 approved by the Environmental Protection Agency in registering the pesticide or is
37 consistent with the most recent human health risk assessment performed under FIFRA shall
38 be deemed a sufficient warning label for the purposes of an action commenced under any
39 provision of state law concerning the duty to warn or label, or any other common law duty
40 to warn."

41 **SECTION 3.**

42 All laws and parts of laws in conflict with this Act are repealed.

Sixty-ninth Legislative Assembly of North Dakota
In Regular Session Commencing Tuesday, January 7, 2025

HOUSE BILL NO. 1318
(Representatives Hagert, Lefor, Beltz, Headland, Klemin, Koppelman, Weisz)
(Senators Hogue, Kessel, Thomas, Weber)

AN ACT to create and enact a new section to chapter 28-01.3 of the North Dakota Century Code, relating to pesticide labeling.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 28-01.3 of the North Dakota Century Code is created and enacted as follows:

Pesticide labeling - Duty to warn - Defenses.

Notwithstanding any other provision in this title, any pesticide registered with the agriculture commissioner under chapter 4.1-33 or the United States environmental protection agency under the Federal Insecticide, Fungicide, and Rodenticide Act [61 Stat. 163; 7 U.S.C. 136 et seq.] which displays a label approved by the United States environmental protection agency in registering the pesticide, displays a label consistent with the most recent human health assessment performed under the Federal Insecticide, Fungicide, and Rodenticide Act [61 Stat. 163; 7 U.S.C. 136 et seq.], or displays a label consistent with the United States environmental protection agency carcinogenicity classification for the pesticide under the Federal Insecticide, Fungicide, and Rodenticide Act [61 Stat. 163; 7 U.S.C. 136 et seq.] is sufficient to satisfy any requirement for warning or labeling regarding health or safety under this chapter and any other provision or doctrine of state law concerning the duty to warn or label, or any other common law duty to warn.

______________________ Speaker of the House	______________________ President of the Senate
______________________ Chief Clerk of the House	______________________ Secretary of the Senate

This certifies that the within bill originated in the House of Representatives of the Sixty-ninth Legislative Assembly of North Dakota and is known on the records of that body as House Bill No. 1318.

House Vote:	Yeas 51	Nays 40	Absent 3
Senate Vote:	Yeas 29	Nays 18	Absent 0

____
Chief Clerk of the House

Received by the Governor at ________M. on ______________________________________, 2025.

Approved at ________M. on ____, 2025.

____
Governor

Filed in this office this ___________day of ____, 2025,

at ________ o’clock ________M.

____
Secretary of State

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Foreign Ownership, Control, and Influence (FOCI) Risks in the Food and Agriculture Sector

June 13, 2024

Congressional Research Service
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R48094

CRS REPORT
Prepared for Members and
Committees of Congress

Congressional Research Service
Informing the legislative debate since 1914

Foreign Ownership, Control, and Influence (FOCI) Risks in the Food and Agriculture Sector

SUMMARY

R48094

June 13, 2024

Brian E. Humphreys
Analyst in Science and Technology Policy

In recent years, congressional concerns over potential risks to domestic food security posed by foreign ownership, control, and influence (FOCI) of critical infrastructure in the U.S. food and agriculture sector (FA Sector) have grown. FA Sector critical infrastructure encompasses many elements of the nation's food supply chain. Examples include farms, grain elevators, certain testing laboratories, meatpacking facilities, and supermarkets.

The U.S. Department of Agriculture (USDA) and the Food and Drug Administration (FDA) are the designated Sector Risk Management Agencies (SRMAs) for the FA Sector (1 of 16 federally designated critical infrastructure sectors). The SRMAs identify four main categories of risk to FA Sector-related functions: food contamination and disruption (accidental or intentional), disease and pests, severe weather, and cybersecurity. Partnerships are premised on the overarching assumption that private-sector owners of critical systems and assets are good-faith actors in a shared enterprise focused on ensuring availability and continuity of "national critical functions."

However, FOCI risks more often relate to the control, exploitation, or malicious use of otherwise operable systems and assets by self-interested foreign adversaries—instances where the good faith of asset owners cannot be assumed. This type of risk has not been consistently or systematically assessed within the existing critical infrastructure security and resilience (CISR) voluntary partnership framework. Potential FOCI risks in the FA Sector include prioritization of foreign markets over domestic food security considerations; intellectual property (IP) theft of strategically important genetic engineering research; illicit or forced technology transfer; control of agricultural land and basic agricultural inputs; access to sensitive infrastructure information (e.g., vulnerability assessments based on voluntary disclosures by private-sector entities); and control of critical cyber systems, assets, and networks.

The Biden Administration has released several policy directives that address various infrastructure and supply chain issues specific to the FA Sector or—more broadly—to FOCI risks affecting multiple sectors. This includes a 2022 National Security Memorandum (NSM), "Strengthening the Security and Resilience of United States Food and Agriculture" (NSM-16), which contains provisions that expand federal regulatory reviews of foreign acquisitions of agricultural firms to include food security (in addition to national security) and that mandate supply chain security assessments by federal agencies (including USDA in the FA Sector).

Many recent assessments note trends toward consolidation and foreign ownership within key segments of U.S. agriculture. For example, a USDA report identified the growing ownership concentration in meat and poultry manufacturing, pesticides and crop seeds, and farm machine parts as sources of potential supply chain risk, although it did not specifically identify FOCI as a factor. A 2021 joint report on FA Sector risks by the Department of Homeland Security (DHS) and the Office of the Director of National Intelligence (ODNI) warned of the possibility of a "takeover of [an] important supply chain entity by foreign investors" as part of an economic coercion and manipulation campaign. Foreign-owned or -controlled multinationals already have large, legally acquired holdings in various FA Sector segments.

Some Members of Congress have expressed concern about the People's Republic of China's (PRC's) acquisition of major food processing and agrochemical firms that have significant market share in the United States. Some public interest groups allege that multinationals may abuse IP protections for agrochemicals and genetically engineered seed, effectively control use of agricultural land, and gain access to farm-level data. Multinationals counter that IP protections allow for investments in new technologies and provision of innovative products at affordable prices to U.S. food producers. Foreign acquisitions of U.S. farmland have also caused concern, prompting legislative proposals that would restrict certain acquisitions. According to USDA, as of December 31, 2022, foreign entities—mainly Canada and some Western European countries—held an interest in 44.3 million acres of U.S. agricultural land, or about 3.4% of the total. PRC-linked holdings are small by comparison but have garnered scrutiny.

Policy options for Congress exist in several areas related to FOCI risks in the FA Sector. These areas include (1) federal reviews of foreign investments and acquisitions of FA Sector assets, (2) requirements for data and reporting of foreign land purchases, (3) resourcing of SRMA programs and activities, (4) assessments of FOCI risk, and (5) IP protections in the bioeconomy and farming.

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Introduction

In recent years, congressional concerns have grown over potential risks to domestic food security posed by foreign ownership, control, and influence (FOCI) of critical infrastructure in the U.S. food and agriculture sector (FA Sector). *Critical infrastructure* is defined in statute as "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters."[1] Critical infrastructure systems and assets in the FA Sector encompass many elements of the nation's food supply chain. Examples include farms, grain elevators, farm supply wholesalers, certain testing laboratories, meatpacking facilities, bars and restaurants, and supermarkets.[2]

The national critical infrastructure security and resilience (CISR) enterprise combines both varying degrees of regulation and voluntary public-private partnerships for information sharing and best practices.[3] The Department of Homeland Security (DHS) coordinates national strategy, interagency activities, and public-private partnerships for infrastructure security and resilience. DHS delegates sector leadership to other federal agencies in some cases, including the FA Sector. The FA Sector is 1 of 16 designated critical infrastructure sectors under current presidential directives.[4]

CISR programs and activities in the FA Sector are led by the U.S. Department of Agriculture (USDA) and Food and Drug Administration (FDA), which are the FA Sector's designated Sector Risk Management Agencies (SRMAs). Public-private partnerships are largely voluntary and are premised on the overarching assumption that private-sector owners of critical systems and assets are good-faith actors in a risk management enterprise focused on protecting critical systems and assets and the functions they enable.[5] USDA and FDA identify four main categories of risk to FA Sector-related functions: food contamination and disruption (accidental or intentional), disease and pests, severe weather (i.e., droughts, floods, and climate variability), and cybersecurity.[6]

FOCI risks in the FA Sector are not associated with the incapacity or destruction of critical systems and assets or disruption of essential functions. More often, FOCI risks relate to the

[1] The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act (P.L. 107-56). The FA Sector is 1 of 16 designated critical infrastructure sectors under current presidential directives. For information on the critical infrastructure risk management framework, see Department of Homeland Security (DHS), *The National Infrastructure Protection Plan (NIPP) 2013: Partnering for Critical Infrastructure Security and Resilience*, 2013, and Food and Drug Administration (FDA), U.S. Department of Agriculture (USDA), and DHS, *Food and Agriculture Sector-Specific Plan*, 2015, pp. 5-7, https://www.usda.gov/sites/default/files/documents/2015-food-and-agriculture-sector-specific-plan.pdf (hereinafter FA SSP).

[2] See Appendix 6, FA SSP. According to the DHS Cybersecurity and Infrastructure Security Agency (CISA), the FA Sector has critical dependencies with several other designated critical infrastructure sectors, including Water and Wastewater Systems, Transportation Systems, Energy, and Chemical. However, an examination of foreign ownership risks in these sectors and their potential applicability to the FA Sector is beyond the scope of this report. Likewise, this report does not cover foreign ownership of systems, assets, and networks outside U.S. jurisdiction or imports of essential foreign-sourced agricultural production materials into the United States.

[3] See White House, "National Security Memorandum on Critical Infrastructure Security and Resilience," (NSM-22), presidential memorandum, April 30, 2024, https://www.whitehouse.gov/briefing-room/presidential-actions/2024/04/30/national-security-memorandum-on-critical-infrastructure-security-and-resilience.

[4] Ibid.

[5] FA SSP.

[6] For information on the critical infrastructure risk management framework, see DHS, *The National Infrastructure Protection Plan (NIPP) 2013: Partnering for Critical Infrastructure Security and Resilience*, 2013, and FA SSP, pp. 5-7.

control, exploitation, or malicious use of productive systems and assets by self-interested foreign adversaries—instances where the good faith of asset owners cannot be assumed. This type of risk has not been consistently or systematically assessed within the existing CISR voluntary partnership framework.

Potential FOCI risks in the FA Sector identified in this report include prioritization of foreign markets over domestic food security considerations; intellectual property (IP) theft of strategically important genetic engineering research; illicit or forced technology transfer; control of agricultural land and basic agricultural inputs; access to sensitive infrastructure information (e.g., vulnerability assessments based on voluntary disclosures by private-sector entities); and control of critical cyber systems, assets, and networks.

This report provides analysis of potential FOCI risks in the FA Sector and the bearing these risks might have on the overall security and resilience of the sector. The report also provides options for congressional legislation and oversight.

Background: The Food and Agriculture Sector

Presidential directives established critical infrastructure sectors that encompass broad areas of the economy, government, and public services.[7] There are currently 16 sectors and numerous subsectors. The William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (FY2021 NDAA; P.L. 116-283) defined the role of SRMAs.[8] In each sector, SRMAs chair the Government Coordinating Councils (GCCs), which provide for coordination among interagency and intergovernmental partners. Sector Coordinating Councils (SCCs) operate as counterparts to the GCCs, representing the interests of private-sector partners and other nongovernmental stakeholders within a given sector. SCCs are voluntary, self-organized, and self-governing bodies, often chaired by private-sector industry leaders.

The Department of Health and Human Services (HHS), acting through FDA, and USDA are the designated co-SRMAs for the FA Sector. FA SCC membership is composed of major industry enterprises and trade groups.[9] Most sectors have a recognized Information Sharing and Analysis Center (ISAC), which serves as a hub for threat reporting, analysis, and information sharing with sector partners on cybersecurity and other matters.

The FA Sector's ISAC was originally formed in 2002 but closed in 2008 after failing to attract an active user base.[10] Sector stakeholder interests were then represented by the Food and Ag Special Interest Group (SIG) within the Information Technology (IT) ISAC. Some observers criticized

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[7] White House, "National Security Memorandum on Critical Infrastructure Security and Resilience" (NSM-22), presidential memorandum, April 30, 2024, https://www.whitehouse.gov/briefing-room/presidential-actions/2024/04/30/national-security-memorandum-on-critical-infrastructure-security-and-resilience/.

[8] See Section 9002, "Sector Risk Management Agencies." These coordinating bodies are chartered under Critical Infrastructure Protection and Advisory Council (CIPAC) auspices. CIPAC authorities, originally established by DHS in 2006 pursuant to the Homeland Security Act of 2002 (P.L. 107-296), afford certain exemptions from public reporting of meetings and disclosure of sensitive infrastructure information. See DHS, "Critical Infrastructure Partnership Advisory Council," 71 *Federal Register* 14930, March 24, 2006.

[9] For a full list of FA Sector Coordinating Council membership and links to the current charter, see CISA, "Food and Agriculture Sector: Council Charters and Membership," https://www.cisa.gov/food-and-agriculture-sector-council-charters-and-membership.

[10] The Food Marketing Institute, an industry group, established an agriculture Information Sharing and Analysis Center (ISAC) in 2002 prior to the establishment of DHS as an agency but disbanded it in 2008 due to "lack of activity and information flow," according to media reports. See "Food Sector Abandons Its ISAC," *Security Management*, September 1, 2008, https://www.asisonline.org/security-management-magazine/articles/2008/09/food-sector-abandons-its-isac/.

this arrangement as inadequate to the scale of cyber threats faced by the FA Sector.[11] Industry leaders rebranded the Food and Ag SIG as the Food and Agriculture Sector ISAC in 2023.[12] Although the new ISAC continued to operate under IT-ISAC auspices, its leaders asserted that the change would raise the profile of the organization and clarify its mission.[13] Separately, in 2022, DHS sponsored preliminary development of a state-level pilot ISAC for FA Sector issues through the National Agriculture Biosecurity Center at Kansas State University.[14]

Policy options for Congress include whether current information-sharing organizations are appropriately organized and have the necessary resources to meet FA Sector cybersecurity and other security needs, as well as legislation to create new information-sharing organizations.[15]

Risk Management in the FA Sector

SRMAs consider a wide range of plausible man-made and natural hazard events that could negatively affect availability and continuity of critical infrastructure functions.[16] CISR programs and activities in the FA Sector to date have been limited in scale and centered on traditional agency missions, such as maintaining the national food safety system and safeguarding farm production of raw foodstuffs from contamination.

FOCI risks affecting food and agriculture may be addressed through national security reviews of certain covered foreign investment transactions, including mergers and acquisitions, by the interagency Committee on Foreign Investment in the United States (CFIUS)—CFIUS authorities are governed by Section 721 of the Defense Production Act of 1950 (P.L. 81-774), as amended. CFIUS may recommend that the President block certain foreign investments, including those that would result in foreign control of any critical infrastructure, if it determines that the transaction would threaten to impair U.S. national security and the risk cannot be mitigated. CFIUS may review certain covered foreign investment and real estate transactions involving the acquisition of

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[11] See Eric Geller, "The Dangerous Weak Link in the U.S. Food Chain," *Wired*, April 6, 2023, https://www.wired.com/story/us-food-agriculture-isac-cybersecurity/. The Food and Agriculture Industry Cybersecurity Support Act, introduced in the 118th Congress (S. 2393 and H.R. 1219), would mandate creation of a cybersecurity clearinghouse for the sector hosted by the National Telecommunications and Information Administration, a Department of Commerce agency.

[12] Food and Ag ISAC (an IT ISAC Community), "Built by Industry for Industry," https://www.foodandag-isac.org/, and "Food and Ag-ISAC Forms to Protect Agrifood Sector from Cybersecurity Threats," *Food Safety Magazine*, May 26, 2023, https://www.food-safety.com/articles/8617-food-and-ag-isac-forms-to-protect-agrifood-sector-from-cybersecurity-threats.

[13] Tim Starks, "The Food and Agriculture Industry Gets a New Center to Share Cybersecurity Information," *Washington Post*, May 24, 2023, https://www.washingtonpost.com/politics/2023/05/24/food-agriculture-industry-gets-new-center-share-cybersecurity-information/.

[14] FDA, USDA, DHS, *Food and Agriculture Sector Annual Report: Fiscal Year 2022*, p. 17, https://www.fda.gov/media/171959/download; Kansas State University, "Creation of a Kansas Food and Agriculture Information Sharing and Analysis Organization," https://www.k-state.edu/govrelations/federal/NABC-CreationofaKansasFoodandAgricultureInformationSharingandAnalysisCenter.pdf.

[15] Representative Pfluger introduced a bill in the 118th Congress, "Food and Agriculture Industry Cybersecurity Support Act" (H.R. 1219), which directs the Government Accountability Office to report on the feasibility of creating a dedicated FA Sector ISAC.

[16] CISA defines a set of 55 National Critical Functions as "functions of government and the private sector so vital to the United States that their disruption, corruption, or dysfunction would have a debilitating effect on security, national economic security, national public health or safety, or any combination thereof."

agricultural land and corporate entities, and may consider "elements of the agriculture industrial base that have implications for food security."[17]

However, the range of transactions CFIUS covers is relatively narrow, focusing on national security risks of corporate acquisitions, noncontrolling investments, and real estate transactions, rather than CISR writ large. Options for Congress include legislation to expand CFIUS jurisdiction over transactions in the FA Sector and to add the Secretary of Agriculture as a full member of CFIUS.[18] Another option is to provide USDA with additional appropriations to fund expansion of CFIUS-related programs and activities to cover a wider range of FOCI risks in the FA Sector.

SRMA Organization and Resourcing for FA Sector Engagements

USDA SRMA responsibilities reside with USDA's National Security Division within the Office of Homeland Security (OHS). The division oversees the agency's programs and participation in interagency activities, which may include FOCI-related risk management activities under programs such as CFIUS, Critical Infrastructure and Insider Threat, Foreign National Vetting, Intelligence, and FA Sector.[19] FDA SRMA responsibilities reside with the Office of Analytics and Outreach/Food Defense and Emergency Coordination Staff at the Center for Food Safety and Applied Nutrition (CFSAN). Neither USDA/OHS nor FDA/CFSAN receives dedicated appropriations for SRMA-related programs and activities. Instead, SRMA engagement appears to be carried out in addition to other customary activities included in these offices' program portfolios.[20]

USDA requested $225,000 in funds to support OHS engagements with FA Sector stakeholders in its FY2024 budget request.[21] Referencing a ransomware attack on JBS—a Brazilian-owned meat processing firm with extensive operations in the United States—USDA/OHS stated that as "cybersecurity threats and vulnerabilities continue to grow, USDA is unable to conduct ... SRMA responsibilities[,] which could have a significant impact on the safety and security of U.S. agriculture" because of a lack of dedicated appropriations for this purpose.[22] The FDA budget

[17] Executive Order (E.O.) 14083, "Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States," 87 *Federal Register* 57369, September 15, 2022. Committee on Foreign Investment in the United States (CFIUS) reviews may involve consultation with a designated USDA official. CFIUS is an interagency body comprising nine Cabinet members and others, as appointed. For more information on CFIUS authorities and activities, see CRS In Focus IF10177, *The Committee on Foreign Investment in the United States*, by Cathleen D. Cimino-Isaacs and Karen M. Sutter.

[18] See CRS In Focus IF12312, *Foreign Ownership of U.S. Agriculture: Selected Policy Options*, by Renée Johnson.

[19] See USDA, National Security Division, "National Security Division Related Topics," https://www.usda.gov/da/ohs/nsd.

[20] Based on review of the FA SSP; USDA Office of Homeland Security (OHS), *2024 USDA Explanatory Notes*, 2023, https://www.usda.gov/sites/default/files/documents/02-2024-OHS.pdf; Department of Health and Human Services (HHS), *Food and Drug Administration: Justification of Estimates for Appropriations Committees*, 2023, https://www.fda.gov/media/166182/download; FDA, "Food Defense," https://www.fda.gov/food/food-defense; and FDA, "What We Do at CFSAN," https://www.fda.gov/about-fda/center-food-safety-and-applied-nutrition-cfsan/what-we-do-cfsan.

[21] See USDA OHS, *2024 USDA Explanatory Notes*, p. 2-7; and Geller, "The Dangerous Weak Link in the U.S. Food Chain." Geller notes, "By comparison, the Energy Department requested $245 million for its Office of Cybersecurity, Energy Security, and Emergency Response."

[22] USDA OHS, *2024 USDA Explanatory Notes*, p. 2-7.

justification for FY2025 does not show any dedicated SRMA appropriations for FA Sector activities.[23]

USDA and FDA list FA Sector engagement activities in annual Food and Agriculture Sector Specific Plan (FA SSP) progress reports, including exercises with FA Sector stakeholders.[24] The exercises include several food defense emergency scenarios but do not include FOCI-related threats or other FOCI issues that might affect emergency response. In April 2024, the Cybersecurity and Infrastructure Security Agency (CISA) hosted the Cyber Storm IX exercise, a major national cybersecurity exercise, which focused on the FA Sector as a possible target of cyberattacks.[25] The extent to which potential FOCI-related vulnerabilities or threats were incorporated into the exercise scenario is not clear.[26]

The USDA Office of Inspector General (OIG) has participated in the interagency Foreign Influence Investigations Working Group, but it is not clear what the scope of the activity was or whether the group is still active.[27] Some former agency officials and infrastructure protection experts have publicly voiced general concerns about the scope and effectiveness of FA Sector SRMA engagements with key stakeholders, according to media reports, although these concerns do not appear to be specific to management of FOCI risks.[28]

USDA is not an official member of CFIUS but is sometimes brought in at the Treasury Department's discretion on certain transactions. Some Members of Congress have argued that USDA should be a full member given the number of CFIUS cases and sensitive foreign acquisitions involving agriculture, biotechnology, and other USDA equities.[29] USDA/OHS currently has one staff member fully dedicated to CFIUS, according to the agency's FY2024 budget justification. USDA requested an additional $500,000 and two full-time employees in anticipation of a potential increase in the scope of CFIUS activity, to include a wider array of agriculture-related transactions. According to its FY2024 budget justification, USDA concluded an agreement with the Treasury Department, giving it "enhanced access" to CFIUS cases that "requires additional OHS and [Office of the General Counsel] resources to ensure we support the

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[23] HHS, FDA, *Justification of Estimates for Appropriations Committees: Fiscal Year 2025*, 2024, https://www.fda.gov/media/176925/download.

[24] See DHS, *Food and Agriculture Sector Annual Report: Fiscal Year 2021*, https://www.fda.gov/media/165833/download. FDA provides free emergency exercise scenarios for FA Sector stakeholders on its website, "Food Related Emergency Exercise Bundle (FREE-B) Download," https://www.fda.gov/food/food-defense-tools/food-related-emergency-exercise-bundle-free-b-download. The content is listed as current as of March 5, 2024.

[25] See Jen Easterly, "Prepared Together—Cyber Storm IX Recap," Cybersecurity and Infrastructure Security Agency (CISA), May 16, 2024, https://www.cisa.gov/news-events/news/prepared-together-cyber-storm-ix-recap. According to Jen Easterly, the CISA Director, "Participating organizations worked directly with CISA and coordinating bodies such as Sector Risk Management Agencies and Information Sharing and Analysis Centers to understand roles and capabilities during a cyberattack."

[26] CISA has released after-action reports for past Cyber Storm exercises, typically several months after their conclusion. No after-action report for Cyber Storm IX is available as of this writing.

[27] See FY2021 FA SSP annual progress report, and USDA Office of Inspector General, *Semiannual Report to Congress: Second Half April 1, 2022–September 30, 2022*, no. 88, October 2022, p. 32, https://usdaoig.oversight.gov/sites/default/files/reports/2023-12/SARC_FY%25202022_Second%2520Half_508.pdf.

[28] Geller, "The Dangerous Weak Link in the U.S. Food Chain." For example, Geller quotes Mark Montgomery, former executive director of the Cyberspace Solarium Commission, as saying that USDA as co-SRMA is "significantly less effective" than other SRMAs. Brian Harrell, a former assistant director for infrastructure security at CISA, is quoted as saying that the FA Sector needs its own ISAC to provide "a true operational assessment."

[29] For example, Congressman Frank Lucas, "Lucas Legislation Addressing Foreign Land Acquisition Passes Through Committee," press release, September 29, 2023, https://lucas.house.gov/posts/lucas-legislation-addressing-foreign-land-acquisition-passes-through-committee.

agreement between Departments. Previously USDA reviewed less than 50 CFIUS cases annually, and since August 2022, our workload has increased to over 250 cases."[30]

Options for Congress include requesting additional information about the scope and extent of FDA and USDA activities to support CISR (and specifically FOCI) risk management programs and activities in the FA Sector and providing appropriations to support additional SRMA engagement with the FA Sector. A potential oversight question for Congress could be whether FOCI-related risks are included in relevant exercise scenarios provided by SRMAs (see above). Congressional oversight could also include examination of reports and data on sector engagement from the relevant FA Sector SRMAs—to include appropriate quantifiable metrics and criteria of success. Greater overall engagement with industry stakeholders may clarify what, if any, differences exist between the rate and quality of foreign- and U.S.-owned firms' participation in public-private partnerships and the nature of those differences.

DHS Leadership and Coordination

DHS is responsible for overall coordination of federal CISR activities. It maintains food and agriculture defense programs and activities through the Office of Health Security to support the FA Sector according to legislative requirements and executive branch policy directives.[31] In addition, DHS previously provided grant funding to the University of Minnesota Center of Excellence for food protection and defense, which now operates independently as the Food Protection and Defense Institute. The institute supports interdisciplinary research on protection of the global food supply, "including supply chain resilience, information sharing, risk analysis and assessment, education, epidemiology, [and] economics," among other topics.[32]

In 2019, CISA introduced National Critical Functions as a conceptual framework for identifying and assessing cross-sector risk to essential or systematically important infrastructure systems, assets, and networks, to complement and expand the existing sector-based CISR framework. CISA defines National Critical Functions as

> functions of government and the private sector so vital to the United States that their disruption, corruption, or dysfunction would have a debilitating effect on security, national economic security, national public health or safety, or any combination thereof.[33]

The 55 designated National Critical Functions include production and provision of agricultural products and services, and human and animal food products and services.[34]

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[30] USDA OHS, *2024 USDA Explanatory Notes*, pp. 2-7.

[31] See DHS, *DHS Fact Sheet on National Security Memorandum-16 on Strengthening the Security and Resilience of United States Food and Agriculture*, 2022, https://www.dhs.gov/sites/default/files/2022-11/NSM_DHS%20FACT%20SHEET%20on%20NSM%20Food%20and%20Agriculture.pdf; also see DHS, Science and Technology Directorate (DHS S&T), "Food and Agriculture Defense," https://www.dhs.gov/science-and-technology/food-and-agriculture-defense. According to the web page, "S&T's food and agriculture defense work includes risk assessments; threat characterizations; countermeasures to defend against pathogens, pests, and toxins; food defense and ingestion threat modeling; characterizations of chemical threats for food contamination and adulteration; laboratory experiments and foundational research; diagnostics; veterinary medical countermeasures; decontamination strategies; trainings; and coordination with partners for joint efforts that defend food and agriculture systems."

[32] See University of Minnesota, Food Protection and Defense Institute, "Protecting the Global Food Supply Through Research, Education, and the Delivery of Innovative Solutions," https://foodprotection.umn.edu/.

[33] See CISA, "National Critical Functions," https://www.cisa.gov/national-critical-functions.

[34] See CISA, "National Critical Functions Set," https://www.cisa.gov/national-critical-functions-set.

Related Programs, Policies, and Directives

The 2013 National Infrastructure Protection Plan (NIPP) and the FA SSP have provided the primary risk management guidance for FA Sector stakeholders over the past decade.[35] The FA SSP defines risk "in the context of the NIPP 2013 ... as the potential for loss, damage, or disruption to the Nation's critical infrastructure resulting from destruction, incapacitation, or exploitation during some future manmade or naturally occurring event."[36] These documents outline an organizational approach and framework for sector risk management—primarily through voluntary public-private partnerships—but generally do not direct specific agency actions. FA Sector Annual Reports provide updates on progress toward meeting FA SSP goals.[37] (The FA SSP and the subsequent annual progress reports do not specifically identify foreign ownership of agricultural land or sector assets as threats to the FA Sector.)

Section 9002 of the FY2021 NDAA (P.L. 116-283) directed the Secretary of Homeland Security to assess the current CISR policy framework and assess the need for changes to the existing critical infrastructure sectors. In November 2021, CISA submitted a statutorily mandated report on its assessment of the CISR framework and preliminary findings. It suggested, among other things, that the review process offered "an opportunity" to designate a Bioeconomy Sector separate from the existing FA Sector.[38] (The National Security Memorandum [NSM] on Critical Infrastructure Security and Resilience [NSM-22] retained existing sectors without modification but did not foreclose the possibility of new sectors in the future.) The bioeconomy is the portion of the economy based on products, services, and processes derived from biological resources (e.g., plants and microorganisms). Some of the FOCI risks in the FA Sector, such as IP protection of genetically engineered seed traits, relate to the bioeconomy.

Options for congressional action include oversight over DHS updates of its CISR policy framework as mandated in the FY2021 NDAA, to include changes to risk assessment scope and methods, and creation of a new Bioeconomy Sector. Another option would be oversight of executive branch programs and activities set forth in Executive Order (E.O.) 14017, NSM-16, NSM-22, Section 9002(b) of P.L. 116-283, and other laws, policies, and directives that may have a bearing on assessment of FOCI risks in the FA Sector.

National Security Memorandum for the FA Sector

On November 10, 2022, the White House released an NSM, "Strengthening the Security and Resilience of United States Food and Agriculture" (NSM-16), which covers the security and resilience of food and agriculture systems and supply chains; directs federal agencies to take actions to "identify and assess threats, vulnerabilities, and impacts" from high-consequence and catastrophic incidents; and prioritize resources "to prevent, protect against, mitigate, respond to,

[35] NSM-22 directs SRMAs to submit new sector-specific plans to the Secretary of Homeland Security within 270 days of issuance—January 25, 2025—and then biennially by February 1 of each year.

[36] FA SSP, p. 5.

[37] See FDA, "Food and Agriculture Sector and Other Related Activities: Food and Agriculture Sector Reports," https://www.fda.gov/food/food-defense-initiatives/food-and-agriculture-sector-and-other-related-activities. The website has links to four FA Sector Annual Reports since 2015, for 2020, 2021, 2022, and 2023, respectively.

[38] CISA, *FY 2021 National Defense Authorization Act: Section 9002(b) Report*, November 12, 2021, p. 2, https://www.cisa.gov/resources-tools/resources/section-9002b-report. The term bioeconomy "refers to the share of the economy based on products, services, and processes derived from biological resources (e.g., plants and microorganisms). The bioeconomy is crosscutting, encompassing multiple sectors, in whole or in part (e.g., agriculture, textiles, chemicals, and energy)." See CRS Report R46881, *The Bioeconomy: A Primer*, by Marcy E. Gallo.

and recover from the threats and hazards that pose the greatest risk."[39] It supersedes previous White House policy guidance given in Homeland Security Presidential Directive 9 (HSPD-9), issued in 2004.[40]

NSM-16 identifies a wide range of threats facing sector stakeholders, to include chemical, biological, radiological, and nuclear (CBRN) threats; intentional introduction of hazardous contaminants; natural or genetically engineered pathogens and pests; and cybersecurity breaches leading to disruption of networked systems or IP theft. As with the earlier plans and directives, it does not specifically identify foreign ownership and control as a threat.

NSM-16 assigns primary responsibility for coordinating executive branch actions to the Assistant to the President for National Security Affairs (APNSA). The APNSA must provide an annual report to the President summarizing implementation progress, identifying capability gaps, and providing recommendations to close those gaps. Relevant provisions and reporting requirements are summarized in **Table 1**.

In March 2023, the FA Sector SRMAs and DHS jointly published the interim risk review mandated under NSM-16. The review contains a short section on foreign acquisitions in the FA Sector as a "potential factor contributing to risk," which states[41]

> Foreign acquisition of U.S. agricultural assets may pose risks to the U.S. food and agriculture sector in some cases. For example, a recent research report prepared to support the deliberations of the U.S.-China Economic and Security Review Commission describes several potential risks to U.S. agriculture associated with recent acquisitions and attempted acquisitions of U.S.-based agricultural assets (including agricultural land, intellectual property [such as IP related to genetically modified seeds], and U.S.-based food producers and logistics companies), which may include loss of economic competitiveness, reduced exports, negative environmental impacts, and associated public health risks.[42]

The review supports several other required assessment and planning products mandated by NSM-16 (see **Table 1**), which are in progress as of this writing, according to information posted on agency websites.[43]

Three other relevant E.O.s preceded NSM-16—E.O. 14081 on the bioeconomy, E.O. 14083 related to CFIUS reviews, and E.O. 14017 on supply chain security and resilience. They are discussed below.

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[39] See White House, "National Security Memorandum on Strengthening the Security and Resilience of United States Food and Agriculture," presidential memorandum, November 10, 2022, https://www.whitehouse.gov/briefing-room/presidential-actions/2022/11/10/national-security-memorandum-on-on-strengthening-the-security-and-resilience-of-united-states-food-and-agriculture/.

[40] White House, "Homeland Security Presidential Directive 9 (HSPD-9), Defense of United States Agriculture and Food," presidential memorandum, January 30, 2004, https://georgewbush-whitehouse.archives.gov/news/releases/2004/02/20040203-2.html.

[41] HHS, USDA, DHS, *National Security Memorandum on Strengthening the Security and Resilience of United States Food and Agriculture: 120-Day Food and Agriculture Interim Risk Review*, March 2023, p. 16, https://www.fda.gov/media/170114/download.

[42] Ibid., p. 22.

[43] See FDA, "National Security Memorandum on Strengthening the Security and Resilience of United States Food and Agriculture" (content current as of March 5, 2024), https://www.fda.gov/food/food-defense/national-security-memorandum-strengthening-security-and-resilience-united-states-food-and; and USDA, "Vulnerability Assessments" (content current as of July 31, 2023), https://www.fsis.usda.gov/food-safety/food-defense-and-emergency-response/food-defense.

Table 1. Agency Deliverables in "National Security Memorandum on Strengthening the Security and Resilience of United States Food and Agriculture" (NSM-16)

Department and Agency	Requirement	Timeline	Status
DOJ, DHS (in coordination with DOD and relevant agencies)	Provide threat assessment to leaders of relevant federal agencies on actors, threats, delivery systems, and methods that could be directed against the FA Sector.	Within 60 days (January 9, 2023) of publication of NSM-16, then annually.	No information
USDA, HHS, other relevant agencies (in coordination with FSLTT partners)	Conduct sector vulnerability assessment based on identified threats.	Within 180 days (May 9, 2023) of publication of NSM-16, then as needed.	In progress
DHS (in coordination with DOJ, USDA, HHS, and relevant agencies)	Provide comprehensive data-driven sector risk assessment informed by required threat and vulnerability assessments, prioritizing highest risks.	Within 1 year (November 10, 2023) of publication of NSM-16, then annually.	In progress
USDA, HHS (in coordination with relevant agencies)	Develop strategy and action plan based on risk assessment. Provide information on resilience capabilities, costs, and benefits; conduct risk mitigation analysis; and recommend research and development options to support mitigation.	Within 180 days of risk assessment completion, then revisions as needed.	In progress
USDA, HHS, DHS (in coordination with relevant agencies)	Conduct interim risk review on critical and emergent risks to FA Sector.	Within 120 days (March 10, 2023) of publication of NSM-16.	Published

Sources: CRS analysis of NSM-16 and U.S. Department of Agriculture (USDA) and Food and Drug Administration online updates.

Notes: DHS = Department of Homeland Security; DOD = Department of Defense; DOJ = Department of Justice; FA Sector = Food and Agriculture Sector; FSLTT = federal, state, local, territorial, and tribal; HHS = Department of Health and Human Services.

Executive Order on Bioeconomy

On September 12, 2022, President Biden issued E.O. 14081, "Advancing Biotechnology and Biomanufacturing Innovation for a Sustainable, Safe, and Secure American Bioeconomy."[44] The E.O. focused on the economic potential of the bioeconomy and federal support of research and development (R&D), data sharing, workforce training, regulatory reforms, and other goals and objectives. In addition, it contained a security-related objective:

> Secure and protect the United States bioeconomy by adopting a forward-looking, proactive approach to assessing and anticipating threats, risks, and potential vulnerabilities (including digital intrusion, manipulation, and exfiltration efforts by foreign adversaries), and by partnering with the private sector and other relevant stakeholders to jointly mitigate risks to protect technology leadership and economic competitiveness.

[44] E.O. 14081, "Advancing Biotechnology and Biomanufacturing Innovation for a Sustainable, Safe, and Secure American Bioeconomy," 87 *Federal Register* 56849, September 15, 2022.

Accordingly, the E.O. instructed the APNSA and the Assistant to the President for Economic Policy to coordinate with the Secretaries of Defense and Agriculture and other agency leaders to identify actions to "mitigate risks posed by foreign adversary involvement in the biomanufacturing supply chain and to enhance biosafety, biosecurity, and cybersecurity in new and existing infrastructure." Additionally, it required the Secretary of Homeland Security to conduct vulnerability assessments of bioeconomy-related critical infrastructure and National Critical Functions and to "enhance coordination with industry on threat information sharing, vulnerability disclosure, and risk mitigation for cybersecurity and infrastructure risks to the United States bioeconomy."

For more information on E.O. 14081 and bioeconomy issues, see CRS Report R47274, *White House Initiative to Advance the Bioeconomy, E.O. 14081: In Brief*; CRS Report R46881, *The Bioeconomy: A Primer*; and CRS Report R47265, *Synthetic/Engineering Biology: Issues for Congress*.

Executive Order on CFIUS

On September 15, 2022, President Biden issued E.O. 14083, "Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States," to update the factors taken into consideration in the CFIUS review process as part of ongoing implementation of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA; P.L. 115-232, Title XVII, Subtitle A).[45] E.O. 14083 notes that certain foreign investments "may undermine supply chain resilience efforts and therefore national security by making the United States vulnerable to future supply disruptions" and directs CFIUS to consider the effect of covered transactions on supply chain resilience and security, including with respect to "elements of the agriculture industrial base that have implications for food security," among other sectors. For more information on E.O. 14083, see CRS In Focus IF12415, *CFIUS Executive Order on Evolving National Security Risks and CFIUS Enforcement Guidelines*.

Executive Order on America's Supply Chains

On February 24, 2021, President Biden signed E.O. 14017, "America's Supply Chains," to ensure that supply chains are "resilient, diverse, and secure" against threats and hazards that might affect the "availability and integrity of critical goods, products, and services."[46] It contains two requirements related to foreign investment issues (not specific to the FA Sector): (1) a progress report on developing domestic critical minerals supply chains and (2) recommendations for federal incentives and regulatory changes to encourage domestic and foreign investment in critical goods and materials. As with the more recent NSM, it assigns the White House coordination role to the APNSA. It requires each critical infrastructure sector SRMA to produce a report on relevant supply chain risks within one year. USDA, as co-SRMA in the FA Sector, published the required report (hereinafter the USDA supply chain report) in February 2022.[47]

[45] E.O. 14083, "Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States," 87 *Federal Register* 57369, September 15, 2022.

[46] E.O. 14017, "America's Supply Chains," 86 *Federal Register* 11849, March 1, 2021.

[47] USDA, *Agri-Food Supply Chain Assessment: Program and Policy Options for Strengthening Resilience*, Washington, DC, February 2022, https://www.ams.usda.gov/supply-chain.

Prospective Cyber Incident Reporting Requirements

In April 2024, DHS issued a proposed rule, "Cyber Incident Reporting for Critical Infrastructure Act Reporting Requirements."[48] The proposed rule was issued in compliance with provisions of the Cyber Incident Reporting for Critical Infrastructure Act of 2022 (CIRCIA), enacted under Division Y of the Consolidated Appropriations Act, 2022 (P.L. 117-103). It requires CISA to (1) engage in rulemaking to mandate reporting of cybersecurity incidents to the agency, (2) enforce noncompliance with required reporting, and (3) disseminate analysis based on the information collected. The FA Sector annual progress report for FY2022 noted that the FA Sector GCC and SCC "assisted in shaping the implementation" of CIRCIA requirements, without providing further detail.[49]

According to P.L. 117-103, the reporting requirements apply to entities in federally designated critical infrastructure sectors "that [satisfy] the definition established by the Director in the final rule." In designating covered entities, CISA proposed both general (e.g., size) and sector-based criteria. CISA declined to apply sector-based criteria to the FA Sector following consultations with the co-SRMAs.[50] Instead, CISA would apply a general size-based criterion to agricultural enterprises, which exempts small businesses from regulatory compliance, likely "based on the mean, median, or mode of number of employees across such entities."[51] According to CISA, the intent is to cover larger entities in the FA Sector to allow for development of "sector-specific threat and trends analysis."[52] The threat of state and non-state foreign adversaries was discussed throughout the proposed rule. However, the discussion did not include potential FOCI risks.

Potential FOCI Risks in the FA Sector

Supply Chain Security

A 2021 joint report on FA Sector risks by DHS, the Office of the Director of National Intelligence (ODNI), academics, and industry stakeholders (hereinafter the joint report) identified certain FOCI threats in agricultural supply chains.[53] Specifically, it identified the possibility of a "takeover of [an] important supply chain entity by foreign investors" as part of an economic coercion and manipulation campaign but did not elaborate on specific cases, threats, or acquisition mechanisms.[54] A 2022 report (hereinafter the Review Commission report) by the congressionally mandated U.S.-China Economic and Security Review Commission provided information on these and other issues as they related to China. The report stated that acquisition of major domestic agribusinesses may "confer undue leverage over U.S. supply chains" and lead to restructuring of supply chains that negatively affects domestic producers and service providers.[55]

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[48] DHS, "Cyber Incident Reporting for Critical Infrastructure Act (CIRCIA) Reporting Requirements," 89 *Federal Register* 23644, April 4, 2024 (hereinafter CIRCIA rulemaking).

[49] FA SSP FY2022 update, p. 12, https://www.fda.gov/media/171959/download.

[50] CIRCIA rulemaking, p. 23702.

[51] Ibid.

[52] Ibid., p. 23683.

[53] Office of the Director of National Intelligence and DHS, *Threats to Food and Agricultural Resources*, Washington, DC, 2021.

[54] Ibid., p. 61.

[55] Lauren Greenwood, *Staff Research Report: China's Interests in U.S. Agriculture: Augmenting Food Security* (continued...)

The Review Commission report also identified risks of IP theft, illicit technology transfer, and foreign control of domestic FA Sector supply chains. According to the report, these activities are part of a coordinated and deliberate policy of the government of the People's Republic of China (PRC) to address China's domestic food security challenges by increasing productivity through illicit technology transfer and overseas diversification of its agricultural supply chains.[56] In addition, the report warned that the PRC-linked firms may attempt to reverse-engineer illegally acquired U.S. seed varieties to identify vulnerabilities to crop disease and other threats.

The USDA supply chain report identified the growing ownership concentration in meat and poultry manufacturing, pesticides and crop seeds, and farm machine parts as sources of potential risk.[57] It did not specifically identify FOCI as a threat or risk factor. However, foreign-owned or -controlled multinationals have significant presence in these areas of production.

Foreign Acquisition of Seed and Agricultural Chemical Suppliers

In 2016, ChemChina announced plans to acquire Syngenta, a Swiss-based agricultural conglomerate (with extensive business operations in the United States) for $43 billion.[58] The acquisition—claimed as the largest foreign acquisition by a PRC company at the time—became the subject of CFIUS review and was eventually approved.[59] While CFIUS reviews are not public, media reports suggested that the review would likely focus on defense-specific issues, such as proximity of Syngenta facilities to U.S. military bases and ownership of potentially sensitive military contracts, more than food-security-related FOCI issues.[60]

In a press release following CFIUS's approval of the transaction, Senator Grassley (IA) stated

> It's clear that China is looking at purchasing companies with food production expertise as part of a long-term strategic plan and a component of their national security. We need to be looking at these mergers in the same way, so it makes sense for CFIUS to take that angle

Through Investment Abroad, U.S.-China Economic and Security Review Commission, May 26, 2022, p. 3, https://www.uscc.gov/annual-report/2022-annual-report-congress.

[56] The government of the People's Republic of China has released national-level strategies in recent years highlighting acquisition of biotechnology from foreign firms as a priority. For more information, see CRS In Focus IF11684, *China's 14th Five-Year Plan: A First Look*, by Karen M. Sutter and Michael D. Sutherland.

[57] According to the report, "In 2019, the four largest fed cattle processing companies accounted for 85 percent of the total U.S. annual slaughter; the four largest hog processing companies accounted for 67 percent of the total annual hog slaughter; and the four largest chicken processing companies accounted for 53 percent of the total annual slaughter." See USDA, *Agri-Food Supply Chain Assessment: Program and Policy Options for Strengthening Resilience*, Washington, DC, February 2022, p. 13.

[58] Syngenta is one of the four largest suppliers of crop seeds and agricultural chemicals in the United States, according to the USDA Economic Research Service. See USDA Economic Research Service, "Two Companies Accounted for More than Half of Corn, Soybean, and Cotton Seed Sales in 2018-2020," https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=107516.

[59] Michael Shields, "ChemChina Clinches Landmark $43 Billion Takeover of Syngenta," Reuters, May 5, 2017, https://www.reuters.com/article/idUSKBN1810CM/; Shangjing Li, "Simpson Thacher Helps ChemChina Obtain CFIUS Clearance for $43 Bln Syngenta Buy," *Asian Legal Business*, August 26, 2016, https://china.legalbusinessonline.com/node/73060; ChemChina and Syngenta, "ChemChina and Syngenta Receive Clearance from the Committee on Foreign Investment in the United States," press release, August 22, 2016, https://www.syngenta.com/sites/syngenta/files/press-release-pdf/2017/20160822-en-joint-release.pdf.

[60] Diane Bartz, "ChemChina, Syngenta to Move Quickly on U.S. National Security Review," Reuters, February 3, 2016, https://www.reuters.com/article/idUSKCN0VD03C/; "'No Security Issues' in Syngenta Sale to China," *CHEManager International*, July 4, 2016, https://www.chemanager-online.com/en/news/no-security-issues-syngenta-sale-china.

> into consideration when reviewing these transactions. The fact that a state-owned enterprise may have yet another stake in U.S. agriculture is alarming.[61]

In 2020, ChemChina and Sinochem—a Chinese state-owned multinational chemical manufacturing conglomerate—consolidated their agricultural assets into Syngenta.[62] In response, some Members of Congress called upon the Treasury Secretary, as chair of CFIUS, to include food security issues in assessments of any foreign acquisitions of FA Sector entities.[63] In the 118th Congress, several bills under consideration would expand CFIUS reviews of foreign investment transactions in the FA Sector to include food security issues and would mandate regular USDA membership as opposed to informal, ad hoc participation.

The Consolidated Appropriations Act, 2024 (P.L. 118-42, §787), enacted in March 2024, requires the Secretary of Agriculture to be included as a member of CFIUS on a case-by-case basis with respect to covered transactions involving agricultural land, agriculture biotechnology, or the agriculture industry (including agricultural transportation, agricultural storage, and agricultural processing), as determined by the chair of CFIUS in coordination with the Secretary of Agriculture.[64] Congress provided $2 million in appropriated funds, to remain available until expended, for USDA to implement this provision.

Foreign Acquisition of Meat and Poultry Suppliers

The MITRE Corporation noted in a July 2021 report (hereinafter the MITRE report) on domestic meat and poultry supply chains that some foreign-owned U.S. meat and poultry providers prioritized exporting meat products to their home country rather than supplying domestic consumption needs when spot shortages occurred during the COVID-19 public health emergency.[65] Further, the report recommended that FA Sector SRMAs and certain interagency partners identify foreign ownership of key processing and production facilities and analyze "the policy implications of non-compliance with U.S. government mandates during an emergency."[66]

Four major multinational agricultural companies control the majority of U.S. beef production. Two of these—JBS and National Beef Packing Company—are owned or controlled by Brazilian

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[61] Office of Sen. Chuck Grassley, "Grassley Statement on Conclusion of CFIUS Review of ChemChina-Syngenta Merger," press release, August 22, 2016, https://www.grassley.senate.gov/news/news-releases/grassley-statement-conclusion-cfius-review-chemchina-syngenta-merger.

[62] Reuters, "ChemChina, Sinochem Merge Agricultural Assets - Syngenta," January 5, 2020, https://www.reuters.com/article/idUSKBN1Z40HA/.

[63] House Foreign Affairs Committee, "McCaul, Crawford Urge Treasury Department to Review Merger Between Chinese Government-Backed Military Companies," press release, April 15, 2021, https://foreignaffairs.house.gov/press-release/mccaul-crawford-urge-treasury-department-to-review-merger-between-chinese-government-backed-military-companies/.

[64] Other legislation in the 118th Congress would broaden CFIUS's authorities to review and potentially prohibit certain foreign purchases of real estate and/or agricultural land (e.g., H.R. 917/S. 369, H.R. 558, S. 1066, H.R. 1448, H.R. 4577, H.R. 5078/S. 2060), add USDA as a permanent CFIUS member agency (e.g., H.R. 683/S. 168, S. 2312, H.R. 3378, H.R. 4577, S. 2312, H.R. 5078/S. 2060), and expand the defined scope of U.S. critical infrastructure to explicitly include agricultural systems and supply chains (e.g., H.R. 513/S. 68).

[65] Bradford Brown et al., *U.S. Food Supply Chain Security: A Network Analysis*, MITRE Corporation, July, 2021, p. 4, https://www.mitre.org/sites/default/files/2021-10/pr-21-1826-us-food-supply-chain-security-a-network-analysis.pdf.

[66] Ibid., p. 6.

entities.[67] Similarly, the acquisition of Smithfield Foods by WH Group Limited—a PRC firm—conferred control of 20% of the domestic pork processing industry to a foreign owner.[68]

Reports that some foreign-owned meat processing plants prioritized deliveries to their home countries during the COVID-19 pandemic could also be a subject for congressional oversight and legislation.

Food Processing, Packaging, and Production

The MITRE report found that trends toward consolidation of entities were highly pronounced in the processing, packaging, and production of meat and poultry, creating a "dense and complex network" with several "key hubs" that were potentially vulnerable to disruption by man-made or natural causes:[69]

> With their high connectivity, these five key hubs have significant and extensive influence on the resilience and continuity of the U.S. meat supply chain. A disruption in any one of these hubs can have a large downstream effect on the rest of the network. The potential for disruption is further exacerbated by the network structure of "super embedded hubs" where each of these five key hubs are tightly interconnected.[70]

The MITRE report considered several types of intentional threats to such hubs, to include biological, physical, or cyber-based attacks. The report did not specifically consider FOCI risks as they might relate to any of these types of attacks. It is not clear whether foreign-owned entities are more vulnerable to these attacks than their U.S.-owned counterparts or whether the fact of foreign ownership itself may be a threat in some cases. A report by the Food Protection and Defense Institute (hereinafter the FPDI report) asserts that cybersecurity vulnerabilities, exacerbated by poor technical competence and a lax security culture, are widespread throughout FA Sector supply chains, but the FPDI report does not attribute specific risks to FOCI threats in the FA Sector.

Although not specific to the FA Sector, E.O. 14083 of September 2022 states

> investments by foreign persons with the capability and intent to conduct cyber intrusions or other malicious cyber-enabled activity—such as ... the operation of United States critical infrastructure ... may pose a risk to national security.

It is not yet clear whether FOCI risks to critical infrastructure identified in E.O. 14083 would fall within the scope of various risk management activities mandated in NSM-16, because the latter directive is still in the early implementation phase as of the date of this report (see "National Security Memorandum for the FA Sector" section).

Agricultural and Food Supporting Facilities

Agricultural and food supporting facilities include R&D facilities. The joint report states that these may be targeted by foreign entities for purposes of espionage, theft of trade secrets, and IP

[67] Christopher Walljasper, "More Foreign Ownership of U.S. Beef Processors Raises Food Safety Concerns," *Investigate Midwest*, December 19, 2019, https://investigatemidwest.org/2019/12/18/more-foreign-ownership-of-u-s-beef-processors-raises-food-safety-concerns/.

[68] See Fitch Ratings, "Fitch Affirms Smithfield Foods, Inc.'s IDR at 'BBB'; Outlook Stable," October 10, 2022, https://www.fitchratings.com/research/corporate-finance/fitch-affirms-smithfield-foods-inc-idr-at-bbb-outlook-stable-10-10-2022.

[69] Bradford Brown et al., *U.S. Food Supply Chain Security: A Network Analysis*, p. 4.

[70] Ibid.

theft.[71] Further, these activities may confer competitive advantages on foreign entities and provide "coercion points on aggressive corporate takeovers of U.S. corporations."[72] The joint report identifies "small and emerging corporations, universities, and government research organizations" as the most vulnerable entities of such targeting.[73]

Regulatory, Oversight, and Industry Organizations

The USDA OIG noted investigations involving foreign influence or interference in the FA Sector in some recent reports to Congress. In its FY2022 (second half) semiannual report to Congress, the USDA OIG reported substantiated allegations of insider threat activity involving a senior official at USDA's Animal and Plant Health Inspection Service (APHIS). Investigators found that the official maintained "inappropriate relationships" with foreign nationals, failed to report personal and official foreign travel, violated IT security, and accepted a gift from a foreign official without properly reporting it.[74] The FY2020 (first half) report noted that OIG audited USDA controls to prevent "unauthorized access to, and transfer of, USDA-funded research technology to foreign countries" by foreign research collaborators and found weaknesses that required correction by USDA agencies.[75] Semiannual USDA OIG reports for FY2023—the most recent available as of this writing—do not note any FOCI-related activities.

An option for Congress would be to exercise its oversight authorities to ascertain whether the recommended corrections suggested by USDA OIG to prevent further occurrences of IP theft by foreign entities were implemented. Another option for Congress would be to request the relevant OIG report in nonredacted form from USDA.

The Role of Transnational Criminal Organizations

A 2019 study included in the FPDI report found that FOCI threats in the FA Sector were not necessarily limited to otherwise legitimate business transactions. According to the FPDI study, "transnational criminal organizations (TCOs) are already heavily involved in large-scale food-related crimes such as counterfeiting, economically motivated adulteration, theft and resale, and smuggling."[76] Further, cargo thefts are often aided by malicious cyber intrusions to penetrate agricultural supply chains and to identify and reconnoiter targets.[77]

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[71] Office of the Director of National Intelligence and DHS, *Threats to Food and Agricultural Resources*, p. 26.

[72] Ibid.

[73] Ibid.

[74] See USDA Office of Inspector General, *Semiannual Report to Congress: Second Half April 1, 2022–September 30, 2022*, no. 88, October, 2022, p. 87, https://usdaoig.oversight.gov/sites/default/files/reports/2023-04/SARC_FY%25202022_Second%2520Half_508.pdf. No motive was reported. Among other activities, the Animal and Plant Health Inspection Service (APHIS) has oversight responsibilities in animal health, biotechnology, imports and exports of food and plant products, and international services. The Department of Justice (DOJ) declined to prosecute the official; their security clearance was revoked by the agency.

[75] USDA Office of Inspector General, *Semiannual Report to Congress: First Half, October 1, 2019–March 31, 2020*, no. 83, May 2020, p. 5, https://usdaoig.oversight.gov/sites/default/files/reports/2023-04/sarc2020_1st_half_508.pdf. The public report was fully redacted. According to USDA, "Due to the nature of our findings and the agency's responses, the report contains sensitive content. Thus, we are withholding it from public release due to concerns about the risk of circumvention of law." See USDA Office of Inspector General, *USDA's Controls to Prevent the Unauthorized Access and Transfer of Research Technology*, p. 1, https://www.oversight.gov/sites/default/files/oig-reports/50701-0002-21.pdf.

[76] Food Protection and Defense Institute, *The Cyber Risk to Food Processing and Manufacturing*, September 2019, p. 9, https://conservancy.umn.edu/bitstream/handle/11299/217703/FPDI-Food-ICS-Cybersecurity-White-Paper.pdf.

[77] Ibid.

In some cases, foreign-controlled firms have been targeted by TCOs for criminal exploitation or have themselves engaged in criminal practices. According to media reports, meat production by JBS facilities in the United States was disrupted in 2021 by a ransomware attack, which JBS attributed to a Russian TCO.[78] It is not clear whether foreign-owned entities are more vulnerable to these attacks than their U.S.-owned counterparts. The previous year, J&F Investimentos S.A., the Brazilian investment group that controls JBS,[79] pleaded guilty to violations of the Foreign Corrupt Practices Act as part of a bribery scheme in Brazil to obtain financing and other benefits and agreed to pay a $256 million criminal penalty.[80]

Foreign Control of U.S. Farmland

FOCI risks to U.S. farmland may involve direct ownership of the land or de facto control over land use for agricultural purposes, such as use of specific seed varieties and pesticides.

Land Ownership Risks

Increasing scarcity of arable land globally coupled with increasing demand for agricultural commodities has made U.S. farmland an attractive investment for certain foreign entities. Motivations for land acquisitions may be economic, strategic, or both. USDA tracks foreign acquisition of agricultural and nonagricultural land under authorities of the Agricultural Foreign Investment Disclosure Act of 1978 (AFIDA; P.L. 95-460). According to USDA, as of December 31, 2022, foreign persons and entities held an interest in 44.3 million acres of U.S. agricultural and nonagricultural land, accounting for 3.4% of total privately owned land.[81]

Owners from five countries (Canada, the Netherlands, Italy, the United Kingdom, and Germany) accounted for approximately 62% of all foreign-owned U.S. agricultural land in 2022. Other countries with aggregate owner holdings of more than 500,000 acres were Portugal, France, Denmark, Luxembourg, Mexico, Switzerland, the Cayman Islands, Japan, and Belgium. As of year-end 2022, USDA reports that PRC entities accounted for 383,935 acres, or 0.8%, of total foreign-owned U.S. agricultural land.[82]

Ownership of U.S. agricultural land by PRC entities, as reported by USDA under AFIDA, appears negligible, accounting for less than 1% of total foreign-owned U.S. agricultural land as of year-end 2022. However, the Review Commission report raised concerns about the noncommercial purposes of PRC acquisitions (i.e., increasing China's food security) and the apparent acceleration of the pace of acquisitions, which have elicited concern both from Congress and

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[78] Tom Polanske and Jeff Mason, "U.S. Says Ransomware Attack on Meatpacker JBS Likely from Russia," Reuters, June 1, 2021, https://www.reuters.com/world/us/some-us-meat-plants-stop-operating-after-jbs-cyber-attack-2021-06-01/.

[79] See JBS, "Ownership and Corporate," https://ri.jbs.com.br/en/esg-investors/corporate-governance/ownership-and-corporate/.

[80] DOJ, "J&F Investimentos S.A. Pleads Guilty and Agrees to Pay over $256 Million to Resolve Criminal Foreign Bribery Case," press release, October 14, 2020, https://www.justice.gov/opa/pr/jf-investimentos-sa-pleads-guilty-and-agrees-pay-over-256-million-resolve-criminal-foreign.

[81] CRS from USDA, *Foreign Holdings of U.S. Agricultural Land Through December 31, 2022* (Report 6), https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/EPAS/PDF/2022_afida_annual_report_12_20_23.pdf. Data cover sole foreign and joint U.S. ownership of privately held agricultural and nonagricultural land (out of a total of 1,290.5 million acres).

[82] Ibid. For more background on the Agricultural Foreign Investment Disclosure Act of 1978 and foreign ownership of farm land, see CRS In Focus IF11977, *Foreign Ownership and Holdings of U.S. Agricultural Land*, by Renée Johnson, and CRS Report R47893, *Selected Recent Actions Involving Foreign Ownership and Investment in U.S. Food and Agriculture: In Brief*, by Renée Johnson.

from certain agricultural stakeholders and industry observers.[83] Legislation to restrict certain sales of agricultural land, tighten disclosure requirements, and expand federal review of foreign investment transactions has been introduced in recent Congresses.[84]

Neither USDA, FDA, nor businesses associated with the FA Sector track or compile data on any associated farm assets and property conveyances that may be attached to the farmland ownership or property investment, such as buildings, equipment, machinery, livestock, and IP and other production-related or technology rights. This may create data gaps that complicate analysis of relevant events or trends. Congress may consider what data categories used for AFIDA disclosures are sufficient to identify FOCI-related risks to the FA Sector.

Technology Use Agreements for Basic Agricultural Inputs

Large agrochemical and seed firms—many foreign owned—commonly require customers to sign technology use agreements for use of seed and pesticides. Technology use agreements for patented seed varieties typically impose legally enforceable conditions on end users (farmers) that cover a range of common agricultural practices.[85] Some public interest groups and critics claim that the current patent system gives too much power to large firms, exceeds congressional intent, and allows for agency overreach in granting and enforcing IP rights.[86]

"Ownership of [seed] biotech traits enable a level of control over every acre containing the trait," one law firm wrote in response to a 2022 USDA request for public comment on competitiveness in the agricultural seed production business. "The contractual terms reach far beyond grants of [IP] rights and impose wide-ranging, intrusive, and often poorly defined, obligations and requirements on licensees."[87]

Enforcement clauses of technology use agreements may allow firms to have unrestricted access to licensees' properties and facilities, business records (including receipts for chemicals and herbicides), internet service provider details, required crop-record submissions to USDA, and detailed records of farming practices (e.g., fertilizing, planting, and harvesting).[88] Violations may result in lawsuits or cancellation of use agreements, which may have the practical effect of cutting off access to seed supply for planting.

Some public interest groups assert that corporate collection and ownership of detailed data on farming practices may also raise fair data use and privacy issues. According to the American Antitrust Institute, "digital farming will likely enhance incentives to amass and appropriate valuable farm data for potential use as a strategic competitive asset."[89]

[83] See Review Commission report.

[84] For more information on recent legislation and policy development, see CRS In Focus IF12312, *Foreign Ownership of U.S. Agriculture: Selected Policy Options*, by Renée Johnson, and CRS Report R47893, *Selected Recent Actions Involving Foreign Ownership and Investment in U.S. Food and Agriculture: In Brief*, by Renée Johnson.

[85] For an overview of relevant legislation, court cases, and enforcement policies as presented to farmers, see Wisconsin Department of Agriculture, Trade and Consumer Protection, *What Is the U.S. Plant Variety Protection Act?* https://datcp.wi.gov/Documents/BrownBagSeed.pdf.

[86] For a public interest group perspective on congressional intent and other legal issues, see Debbie Barker et al., *Seed Giants vs. U.S. Farmers*, Center for Food Safety & Save Our Seeds, 2013, pp. 13-15, https://www.centerforfoodsafety.org/files/seed-giants_final_04424.pdf.

[87] Joel E. Cape, *Comments of Cape Law Firm*, Cape Law Firm, USDA Docket No. AMS-AMS-22-0025, June 15, 2022, pp. 2 and 4, https://www.regulations.gov/comment/AMS-AMS-22-0025-0062.

[88] Debbie Barker et al., *Seed Giants vs. U.S. Farmers*, p. 23.

[89] Diana L. Moss, *Comments of the American Antitrust Institute*, American Antitrust Institute, USDA Docket No.
(continued...)

Because foreign-owned agrochemical and seed firms predominate in the U.S. market (see "Foreign Acquisition of Seed and Agricultural Chemical Suppliers" section), it follows that foreign-owned and -controlled entities may be able to amass detailed farm-level data—whether collected through IP enforcement activities or other means—across broad swaths of U.S. agricultural land.

Global agriculture firms assert that the patent system incentivizes and protects long-term R&D investments, which are necessary to produce seed traits such as those that have made higher crop yields possible over time at reasonable cost to farmers.[90] Additionally, they assert that acquisition of farm-level data facilitates development of precision agriculture products, as well as individualized recommendations for seed and herbicide use that benefit farmers.

In 2021, the Biden Administration directed USDA to prepare a report on consolidation within the agricultural seed industry, for which the agency subsequently sought public comment.[91] Commenters—ranging from small organic farmers to major multinational conglomerates—noted the trend toward consolidation and globalization in the seed industry, the seed industry's convergence with the agrochemical industry, and the increasing prevalence of seeds engineered to withstand various treatments (often sold by the same firms) against pests, weeds, and disease. In general, arguments centered on ecological, economic, and competitiveness concerns, rather than potential FOCI risks. Nonetheless, in some cases, foreign firms' acquisitions of major seed producers have raised security concerns (see "Foreign Acquisition of Seed and Agricultural Chemical Suppliers" section).

Options for Congress include amending patent law to clarify its intent regarding the use of utility patents for genetically engineered seed traits and examining IP enforcement practices that foreign-owned firms may use to collect farm-level data and whether data are aggregated and used in ways that safeguard U.S. security interests.

Conclusion

FOCI within the U.S. FA Sector is widespread. Foreign-owned multinationals are present throughout the sector, in segments such as meat processing, agricultural chemicals, and crop seeds. Some foreign acquisitions of corporate entities or agricultural land may be subject to CFIUS review but are generally legal and generally allowed. In the R&D field, collaboration with foreign nationals and research institutions is commonplace in both the public and private sector. Further, the national CISR enterprise itself frequently relies on collaboration of U.S. public- and private-sector entities with their foreign counterparts. SRMAs generally assume that asset owners are good-faith actors, regardless of nationality.

However, FOCI may also present potential risks to the FA Sector, as seen in allegations of unauthorized technology transfer, theft or misappropriation of IP, prioritization of overseas markets over domestic demand, and attempted land purchases near sensitive military assets. Other potential areas of concern, such as farm-level data gathering by multinational firms and alleged

AMS-AMS-22-0025, May 16, 2022, p. 17, https://www.antitrustinstitute.org/wp-content/uploads/2022/05/USDA-Comment-Agbiotech-6-10-22-REVISED-FINAL-FOR-AAI-WEBSITE.pdf. Another nonprofit, The Open Markets Institute makes substantially similar arguments in its comments. See Open Markets Institute, *The Open Markets Institute's Comments on "Competition and the Intellectual Property System: Seeds and Other Agricultural Inputs*," May 16, 2022, pp. 5-7, https://www.regulations.gov/comment/AMS-AMS-22-0025-0033.

[90] For example, see Syngenta, "Intellectual Property & Regulatory," https://www.syngenta.com/en/about/faq/intellectual-property-regulatory.

[91] USDA Agriculture Marketing Service, "Competition and the Intellectual Property System: Seeds and Other Agricultural Inputs," https://www.regulations.gov/document/AMS-AMS-22-0025-0001.

abuse of IP protections to control farming practices, relate primarily to concerns about corporate consolidation and concentration that are not specific to foreign ownership. Nonetheless, some Members of Congress and other observers have raised concerns over foreign acquisitions of U.S. and multinational firms in key FA Sector segments.

The full extent to which specifically *foreign* ownership, control, or influence over critical infrastructure systems and assets affects the overall level of risk to critical functions of the FA Sector (i.e., the safe production, distribution, and supply of food) has yet to be established. Much of the publicly available reporting is conjectural and anecdotal, complicating any more systemic analysis of FOCI risk to the FA Sector. Legislative mandates for data gathering on certain commercial transactions (e.g., AFIDA) and cybersecurity incident reporting (e.g., CIRCIA), as well as executive branch directives to appropriate federal agencies to conduct relevant studies, may offer an opportunity for more authoritative analyses.

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Congress Seeks to Strengthen Oversight: Proposed Amendments to AFIDA

https://nationalaglawcenter.org/congress-seeks-to-strengthen-oversight-proposed-amendments-to-afida/

by NALC Staff

Over the past few years, federal and state lawmakers have become increasingly concerned about foreign investments in U.S. agricultural land. While there is no federal law that restricts foreign investments of agricultural land, the federal government does monitor certain foreign acquisitions and landholdings in agricultural land through a federal reporting law known as the **Agricultural Foreign Investment Disclosure Act ("AFIDA") of 1978**. Essentially, AFIDA requires certain foreign persons to disclose their interests in U.S. farmland to the U.S. Department of Agriculture ("USDA"). Recently, the Farmland Security Act of 2025 was introduced in Congress, which seeks to amend certain provisions of AFIDA.

Background

Enacted by Congress in 1978, AFIDA established a nationwide system for collecting certain information about foreign investments and ownership of U.S. agricultural land. According to a U.S. House Report from the Committee on Agriculture (H.R. Rep. No. 95-1570, 2d Sess. 1978) discussing AFIDA prior to its enactment, Congress was concerned with the growing number of foreign investments because these investments likely increase farmland prices, which was considered as a factor that was adding to the economic pressures affecting family-farm operations. However, the House Report asserts that determining the impact of foreign ownership of U.S. agricultural land "is difficult to gauge…because of the lack of data on the nature, magnitude, and scope of foreign investment activity." In order to measure the impact of foreign investments in agricultural land, Congress enacted AFIDA to collect the data necessary to assess foreign investment activity within the U.S.

Under AFIDA, "foreign person who acquires or transfers any interest…in agricultural land" is required to disclose their interest in the land to USDA. **7 U.S.C. § 3501(a)**. Thus, a foreign person who acquires, holds, transfers, or disposes an interest in agricultural land within the U.S. is required to disclose certain information concerning such transactions and

investments by filing an **FSA-153 reporting form** at the appropriate Farm Service Agency ("FSA") county office. FSA will soon accept electronic FSA-153 filings from foreign persons. This data is compiled into an **annual publication** that reports the amount of cropland, pastureland, forestland, and other types of agricultural land that is foreign owned. To learn more about AFIDA, read NALC's article titled *Answering to AFIDA: Reporting Requirements of Foreign Agricultural Land Investments* **here**.

Farmland Security Act of 2025

Over the past decade, foreign investments in agricultural land have grown. According to the **most recent AFIDA report**, which includes data through December 31, 2023, foreign persons held an interest in nearly 45 million acres of U.S. agricultural land. In response to these types of investments, there have been multiple bills introduced in the 119th Congress (2025-2026) that seek to increase oversight and restrict foreign investments and acquisitions of land located within the U.S. Some of these proposed measures seek to amend certain provisions of AFIDA.

Senators Tammy Baldwin (D-WI) and Chuck Grassley (R-IA) have introduced the **Farmland Security Act of 2025** ("S. 845") which seeks to amend AFIDA. According to the sponsors of this bill, foreign investments of U.S. agricultural land "have the potential to impact our food security and national security." During the 117th Congress, the pair of senators introduced a measure—Farmland Security Act of 2022—that was signed into law as part of the **Fiscal Year 2023 Omnibus Appropriations Bill**, directed USDA to accept AFIDA disclosures electronically and establish a database of certain disaggregated foreign ownership data that is accessible to the public. S. 845 seeks to take additional steps to increase monitoring foreign investments in U.S. farmland and support transparency of these investments.

One way S. 845 seeks to increase monitoring of foreign investments in U.S. farmland and forestland is by penalizing shell corporations 100% of the fair market value of the entity's interest in agricultural land not reported to USDA. Under the bill, a "shell corporation" is a business entity, including partnerships, joint stock companies, trusts, estates, or any other legal entity "that has no or nominal operations." In other words, a business entity that has no significant business operations or assets. Currently, it is unclear whether a shell corporation that is part of a larger business structure, and contains some level of foreign interest, is required to disclose its agricultural landholdings under AFIDA. Accordingly, S. 845 seeks to require all foreign-owned shell corporation to disclose its agricultural landholdings or risk a penalty equal to the foreign person's interest in the agricultural land.

While S. 845 seeks to establish a civil penalty against shell corporations that fail to file or submit a defective AFIDA disclosure, the legislation does provide shell corporations the

ability to correct its filing or submit a disclosure without incurring a penalty. If USDA provides notice to a shell corporation's failure to properly file an AFIDA disclosure, the entity has 60 days to remedy its failure to file or a defective filing. If the entity correctly files a disclosure within this 60-day period, it will not incur a penalty.

Further, S. 845 will require USDA to conduct annual audits of at least 10% of the AFIDA disclosures the agency received during the year. In conducting these audits, USDA will be required to ensure the completeness and accuracy of the AFIDA disclosures submitted during the year. This piece of legislation also seeks to require USDA to provide training to state and county-level employees to identify agricultural and forestland that should be reported as having some level of foreign ownership and farmland that has not yet been reported by the applicable foreign person.

S. 845 will require USDA to conduct research on leases of agricultural land by foreign persons and the impact these leases have on family farms, rural communities, and the U.S. food supply. This legislation directs USDA to examine trends of foreign investments in U.S. agricultural land by shell corporations, and the agricultural production capacity of foreign-owned agricultural land (*i.e.*, the amount of agricultural or forestry products that can be produced on foreign-owned land) and the overall foreign participation in the U.S. agricultural economy. USDA will be required to submit its research and findings to Congress on an annual basis.

Last, S. 845 will appropriate $2,000,000 to USDA each year from 2025 through 2030 to carry out the task of auditing AFIDA disclosures and conducting the research required under the legislation.

Conclusion

S. 845 was introduced and referred to the Senate Committee on Agriculture, Nutrition, and Forestry on March 6, 2025. A companion bill, **H.R. 1629**, which contains identical language to S. 845 has been introduced in the House and is currently being considered by the House Committee on Agriculture. At this stage, the committee can review the bill, hear testimony in support and opposition of the bill, amend the bill, pass the bill for consideration by its respective chamber, or vote to fail passage of the bill out of committee.

NALC will provide an update to this article as S. 845 and H.R. 1629 advance through the legislative process.

Soil for Sale? State Legislative Efforts to Restrict Foreign Investments – Parts One through Five

Series of blog posts on recent state proposals in the foreign ownership space

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An Agricultural Law Research Article

The Constitutionality of Corporate Farming Law in the Eighth Circuit

by

Harrison M. Pittman

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A National AgLaw Center Research Article

The Constitutionality of Corporate Farming Laws in the Eighth Circuit

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Introduction

Several states have enacted statutory or constitutional provisions that limit the power of corporations to engage in farming or agriculture, or to acquire, purchase, or otherwise obtain land that is used or usable for agricultural production.[1] Such legal provisions are commonly referred to as corporate farming laws. Most corporate farming laws are enacted as statutes rather than constitutional amendments. Proponents of corporate farming laws argue that these laws are necessary to protect family farms from the negative economic consequences of competition with corporate-owned or corporate-operated agricultural operations. Opponents of corporate farming laws argue that these laws are unconstitutional and an impediment to a vibrant free trade economy among the states.[2]

A number of courts, including the United States Supreme Court, considered whether states' corporate farming laws violated the Equal Protection Clause, Due Process Clause, Privileges and Immunities Clause, and Contract Clause of the United States Constitution.[3] In the context of these challenges, courts have consistently upheld the constitutionality of the challenged law. During the

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1. N.D. Cent. Code §§ 10-06.1-01 - 27 (North Dakota); Neb. Const. Art. XII § 8 (Nebraska); Kan. Stat. Ann. § 17-59-4 (Kansas); Okla. Const. Art. XXII, § 2, and Okla. Stat. Ann. Tit. 18 § 951 (Oklahoma); Wis. Stat. Ann. § 182.001 (Wisconsin); Minn. Stat. Ann. § 500.24 (Minnesota); Iowa Code §§ 202B.101, 202.B.201, & 202B.202 (Supp. 2004) (Iowa Code); Mo. Rev. Stat. § 350.015 (Missouri); and S.D. Complied Laws Ann. §§ 47-9A-1 - 23 (South Dakota).

2. The policy debate over corporate farming laws is somewhat more complex than these two arguments imply. A discussion of whether corporate farming laws are desirable or undesirable is not within the scope of this article. This article does not argue whether corporate farming laws are constitutional or unconstitutional.

3. *See* Asbury Hospital, 326 U.S. 207 (1945) (equal protection, due process, privileges and immunities, and contract clauses); State ex rel. Webster v. Lehndorff Geneva, Inc., 744 S.W.2d 801 (Mo. 1988) (equal protection and due process clauses); Omaha Nat'l Bank v. Spire, 389 N.W.2d 269 (Neb. 1986) (equal protection clause); Hall v. Progress Pig, Inc., 610 N.W.2d 420 (Neb. 2000) (equal protection and due process clauses); Asbury Hospital v. Cass County, 7 N.W.2d 438 (N.D. 1943) (equal protection, due process, privileges and immunities, and contract clauses); Asbury Hospital v. Cass County, 16 N.W.2d 523 (N.D. 1944) (equal protection, due process, privileges and immunities, and contract clauses); Coal Harbor Stock Farm, Inc. v. Meier, 191 N.W.2d 583 (N.D. 1971) (equal protection clause); State v. J.P. Lamb Land Co., 401 N.W.2d 713 (N.D. 1987) (due process clause).

twentieth century, no state appellate court or federal court held that a state's corporate farming law was unconstitutional.[4]

The trend of systematically upholding the constitutionality of corporate farming laws ended when the United States District Court for the District of South Dakota held in *South Dakota Farm Bureau, Inc. v. Hazeltine*[5] (hereinafter *Hazeltine I*) that a corporate farming law enacted as a voter-approved amendment to the South Dakota constitution was unconstitutional because it violated the dormant Commerce Clause. Soon thereafter, the United States District Court for the Southern District of Iowa held in *Smithfield Foods, Inc. v. Miller*[6] (hereinafter *Smithfield I*) that the Iowa corporate farming statute in effect at that time violated the dormant Commerce Clause. These two cases marked the first instances in which a corporate farming law was challenged on dormant Commerce Clause grounds. In *South Dakota Farm Bureau, Inc. v. Hazeltine*[7] (hereinafter *Hazeltine II*), the United States Court of Appeals for the Eighth Circuit affirmed *Hazeltine I* but did so on different grounds.

The Eighth Circuit's decision in *Hazeltine II* is important for several reasons, not the least of which is that the Eighth Circuit exercises jurisdiction over six of the nine states that have enacted corporate farming laws.[8] Thus, any decision rendered by the Eighth Circuit regarding corporate farming laws is significant. Furthermore, it is probable that other courts, namely courts within the Seventh and Tenth Circuits, would look to Eighth Circuit case law on this issue in considering whether a corporate farming law violates the dormant Commerce Clause.[9]

The most recent activity in the Eighth Circuit regarding the constitutionality of corporate farming laws occurred on May 21, 2004, when in *Smithfield Foods, Inc.* v. *Miller*[10] (hereinafter *Smithfield II*) the Eighth Circuit remanded *Smithfield I* to the federal district court. The Iowa legislature amended the statute at issue in *Smithfield I* while the matter was on appeal to the Eighth Circuit. In *Smithfield II* the Eighth Circuit stated that "[s]ince . . . [the statute at issue] has been amended, we cannot resolve this important constitutional question on the current record and must remand the case

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4. In *J.P. Lamb*, 401 N.W.3d 713, the North Dakota Supreme Court stopped short of holding that a provision of the North Dakota corporate farming statute violated the due process clause. The provision at issue required a corporation to divest agricultural land within one year of an adjudication that the corporation held that land in violation of the statute. The corporation arguably was in compliance with the state's corporate farming law (which was originally enacted in 1932) prior to its amendment in 1981, but was found to be in violation of the statute in its post-amendment form. The court held that under the unique and particular circumstances of the case, the corporation should be allowed the longer period of ten years to divest the land, rather than the one-year period established under the statute. The court did not, however, hold that the one-year period violated the due process clause.

5. 202 F.Supp.2d 1020 (D.S.D. 2002) (*Hazeltine I*).

6. 241 F.Supp.2d 978 (S.D. Iowa 2003) (*Smithfield I*).

7. 340 F.3d 583 (8th Cir. 2003) (*Hazeltine II*), *cert. denied*, 124 S.Ct. 2095 (2004).

8. Arkansas is the only state within the Eighth Circuit that has not enacted a corporate farming law.

9. Oklahoma and Kansas are in the Tenth Circuit. Wisconsin is in the Seventh Circuit.

10. *See* Smithfield Foods, Inc. v. Miller, No. 03-1411, 2004 WL 1124476 (8th Cir. May 21, 2004) (*Smithfield II*).

to the district court for further consideration."[11] There are at least two obvious questions following the *Smithfield II* decision: first, what will the federal district court hold post-remand now that the Iowa statute has been amended, and, second, what will the Eighth Circuit hold when it reviews that decision?[12] This article ignores the former question and focuses on the latter because the former question may be irrelevant in light of *Hazeltine II*.

Based on the holding and reasoning of *Hazeltine II*, the Eighth Circuit can hold that the amended Iowa statute at issue in *Smithfield* is unconstitutional under the dormant Commerce Clause without ever examining the amended or pre-amended forms of that statute. Moreover, after *Hazeltine II* it may be that most any corporate farming law challenged before the Eighth Circuit can be held unconstitutional on dormant Commerce Clause grounds.

This article suggests that the Eighth Circuit could have held that the Iowa statute violated the dormant Commerce Clause if the types of evidence it relied upon in *Hazeltine II* had been a part of the appeal record in *Smithfield II* and that this holding could have been reached without the Eighth Circuit examining or relying on the statutory language. Thus, one might question why the court remanded the matter with the statement "[s]ince . . . [the statute at issue] has been amended, we cannot resolve this important constitutional question . . . ." Before examining the relevant aspects of *Hazeltine II* and its implications, it is useful to discuss briefly the dormant Commerce Clause and the analysis applied when a state law is challenged on dormant Commerce Clause grounds.

Dormant Commerce Clause[13]

The Commerce Clause of the Constitution grants Congress the exclusive authority to regulate commerce.[14] Thus, a federal law controls over a state law if the state law conflicts with a federal law enacted pursuant to the Commerce Clause. The Constitution, however, does not expressly define the extent of Congress' Commerce Clause authority in the event that Congress has not spoken. In a circumstance where Congress has not clearly spoken and where a state has enacted legislation that arguably regulates commerce, courts must sometimes grapple a legal doctrine commonly referred to as the dormant Commerce Clause. The dormant Commerce Clause has been summarized as follows: "The dormant Commerce Clause is the negative implication of the Commerce Clause: states may not enact laws that discriminate against or unduly burden interstate commerce."[15]

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11. It also stated that it could not determine whether an offending portion of the law could be severed from the statute so as to preserve the constitutionality of the remaining statute.

12. This second question assumes that *Smithfield* will be revisited by the Eighth Circuit. It is reasonable to assume that it will be. On the outside chance it is not, however, this article is applicable because the constitutionality of other states' corporate farming laws may be considered by the Eighth Circuit.

13. For an excellent discussion of the origins, historical development, and current status of the dormant Commerce Clause, see BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE, §§ 6.01-6.08 (1999).

14. U.S. Const. Art I, § 8, cl. 3 (stating that Congress has the authority to "regulate Commerce with foreign nations, and among the several States, and with Indian Tribes"). *See also generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §§ 8.1-8.11 (6th ed. 2000).

15. *Hazeltine*, 340 F.3d at 592 (citing Quill Corp. v. North Dakota, 504 U.S. 298 (1992)).

Courts that consider dormant Commerce Clause challenges to state laws, including the *Hazeltine* and *Smithfield* courts, apply a two-tiered analysis. Under the first tier, courts examine whether the challenged law discriminates against interstate commerce.[16] Discrimination in the dormant Commerce Clause context refers to "'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'"[17] Three "indicators" have been identified to determine whether a challenged state law is discriminatory: (1) whether a statute was enacted with a discriminatory purpose, (2) whether a statute has a discriminatory effect, and (3) whether a statute discriminates against interstate commerce on its face.[18] If a challenged law is determined to be discriminatory, it is subject to the "strictest scrutiny" and will be upheld only if it can be shown that the law sought to accomplish a legitimate local interest and that there were no other means available to advance that legitimate local interest.[19]

A law that is not discriminatory may still be held unconstitutional under the second tier of dormant Commerce Clause analysis. Under the second tier, commonly referred to as the *Pike* balancing test, a challenged law will be struck down "if the burden it imposes on interstate commerce 'is clearly excessive in relation to its putative local benefits.'"[20]

Hazeltine II

In 1998 voters in South Dakota approved by nearly 60% a ballot initiative that amended the state constitution to prohibit corporations and syndicates, subject to certain exceptions, from acquiring or obtaining any interest in any real estate used for farming and from engaging in farming. The constitutional amendment is commonly referred to as Amendment E. Several plaintiffs challenged the constitutionality of Amendment E on several grounds, including the dormant Commerce Clause.

In *Hazeltine II* the Eighth Circuit held that Amendment E was discriminatory under the first tier of dormant Commerce Clause analysis because the evidence in the record established that Amendment E was enacted with a discriminatory purpose.[21] In so doing, the Eighth Circuit expressly declined to consider whether Amendment E violated the dormant Commerce Clause under the second tier of analysis, the *Pike* balancing test. It also expressly declined to consider whether

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16. *See id.* at 593 (citing Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994)).

17. *Id.* (quoting *Or. Waste*, 511 U.S. at 99).

18. Smithfield Foods, Inc. v. Miller, No. 03-1411, 2004 WL 1124476 (8th Cir. May 21, 2004) (citing and quoting Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270 (1984) (discriminatory purpose), Maine v. Taylor, 477 U.S. 131, 148 n.19 (1986) (discriminatory effect), and Chem. Waste Mgmt. v. Hunt, 504 U.S. 334, 342 (1992) (facially discriminatory)).

19. *Hazeltine II*, 340 F.3d at 593 (quoting C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 93, 99 (1994)).

20. *Id.* (quoting Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)). *See also* David S. Day, Revisiting Pike: THE ORIGINS OF THE NONDISCRIMINATION TIER OF THE DORMANT COMMERCE CLAUSE DOCTRINE, 27 HAMLINE L. REV. 45 (2004).

21. Ironically, *Hazeltine I* held explicitly that Amendment was not discriminatory on its face, in its purpose, or in its effect. Rather, the district court held that Amendment violated the dormant Commerce Clause under the *Pike* balancing test. In this sense, *Hazeltine I* and *Hazeltine II* are paradoxical to one another.

Amendment E was discriminatory on its face or in its effect. The court based its determination that Amendment E was enacted with a discriminatory purpose solely on "direct" and "indirect" evidence in the record. The only evidence the court considered direct evidence of a discriminatory purpose were an election pamphlet issued by the Secretary of State prior to the referendum on Amendment E that described "pro" and "con" arguments for and against Amendment E, statements made by individuals at Amendment E drafting meetings, and statements made at trial. The only evidence the court considered to be indirect evidence of a discriminatory purpose were "irregularities in the drafting process," such as statements made at trial that referenced the drafting process.[22] The specific items of evidence considered by the court and the interpretation given them is discussed below.[23]

Direct Evidence

The court explained that the "most compelling" evidence in the record indicating a discriminatory purpose was "pro" language contained in the election pamphlet distributed by the Secretary of State prior to the referendum. The court found two statements troublesome. The first was the statement that "without the passage of Amendment E, '[d]esperately needed profits will be skimmed out of local economies and into the pockets of distant corporations.'"[24] The second was a statement that "'Amendment E gives South Dakota the opportunity to decide whether control of our state's agriculture should remain in the hands of family farmers and ranchers or fall into the grasp of a few, large corporations.'"[25] The court concluded that the "pro" statement (it did not specifically identify which statement) was "'brimming with protectionist rhetoric.'"[26]

The court then turned to its examination of statements made by individuals at Amendment E drafting meetings. The court pointed to a meeting in which discussions were held "concerning the best way to combat Tyson, Murphy, and others."[27] It also pointed to a memorandum written by the director of Dakota Legal Action, a group that assisted in drafting Amendment E and a defendant in the *Hazeltine* cases, that stated in reference to an earlier drafting meeting that "'[m]any have commented that just as they do not want Murphys and Tysons walking all over them, they don't want Farmland or Minnesota Corn Producers walking over them . . . either.'"[28] The Eighth Circuit stated that these particular comments "concern the drafters' desire to prohibit out-of-state cooperatives, in addition to

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22. *See Hazeltine II*, 340 F.3d at 593 (stating "[t]he Plaintiffs have the burden of proving discriminatory purpose . . . and can look to several sources to meet that burden. The most obvious would be direct evidence that the drafters of Amendment E or the South Dakota populace that voted for Amendment E intended to discriminate against out-of-state businesses.") (citations omitted).

23. In relying on this evidence the court recognized that although the Supreme Court "has not laid out a specific test for determining discriminatory purpose," it was "guided by precedent in selecting the types of evidence on which we have relied to reach our conclusion." The precedents cited by the court may be distinguishable in several ways from the facts, law, and circumstances of *Hazeltine II*. A discussion of these precedents is outside the scope of this article.

24. *Id.* at 594 (citation omitted).

25. *Id.* (citation omitted).

26. *Id.* (citation omitted).

27. *Id.* (citation omitted).

28. *Id.* (citation omitted).

corporations, from farming in South Dakota."[29] The court further noted that the meetings that led to the drafting of Amendment E were known as the "hog meetings," a description it considered to be "a specific reference to the out-of-state corporations who enter into contracts with South Dakota farmers to raise hogs."[30]

The court also determined that two statements made at trial were direct evidence that Amendment E was enacted with a discriminatory purpose. First, the court noted that a person who assisted in drafting Amendment E testified that Tyson Foods and Murphy Family Farms were proposing to construct hog farming facilities in South Dakota "and that Amendment E's supporters wanted 'to get a law in place to stop them.'"[31] Second, the court noted that a co-chairman of an organization that helped draft Amendment E testified that "Amendment E was at least motivated in part by 'the Murphy hog farm unit [in North Carolina] and what its [sic] done to the environment.'"[32]

Indirect Evidence

The court explained that "irregularities in the drafting process" can be a "hint" of indirect evidence that Amendment E was enacted with a discriminatory purpose. It added the following:

> Our concern in this case about the drafting process is the information used by the drafters. In this case, the record leaves a strong impression that the drafters and supporters of Amendment E had no evidence that a ban on corporate farming would effectively preserve family farms or protect the environment, and there is scant evidence in the record to suggest that the drafters made an effort to find such information.[33]

As support for its determination that there were "irregularities in the drafting process," the court noted testimony given at trial by Mary Napton, the Secretary of the Amendment E drafting committee and a "registered environmental professional." The court explained that Napton testified during the trial that she was "unfamiliar with all of South Dakota's environmental regulations at the time Amendment E was drafted" but that she "nevertheless believed that Amendment E would be necessary even if the State's current environmental regulations were enforced."[34] The court stated that it was "disconcerting that Napton . . . could not explain the present and future effects of the current environmental laws. If she lacked this information, we can presume that the entire committee did, too."[35]

The court also determined that based on the record there was insufficient evidence to show that the drafters of Amendment E considered how it would affect the economic viability of family

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29. *Id.*

30. *Id.*

31. *Id.* (citation omitted).

32. *Id.* (citation omitted).

33. *Id.*

34. *Id.* (citations omitted).

35. *Id.* at 595.

farmers. The court noted that the drafters relied on studies that "correlated industrialized farming with higher levels of poverty" but that the record was devoid of evidence that the drafters "utilized or commissioned any economic forecasts as to the effect of wholly shutting out corporate entities from farming in South Dakota."[36] The court concluded that "this lack of information serves as indirect evidence of the drafters' intent to create a law specifically targeting out-of-state businesses, which the drafters viewed as the sole cause of the perils facing family farmers and leading potential cause of environmental damage."[37] The court further concluded that "the evidence . . . demonstrates that the drafters made little effort to measure the probable effects of Amendment E and of less dramatic alternatives. We are thus left, like the South Dakota populace that voted on Amendment E, without any evidence as to the law's potential effectiveness."[38]

Having held that Amendment E was discriminatory, the court considered whether any other method existed for advancing the legitimate local interests of promoting the family farm and protecting the environment. The court explained that although the record contained evidence that linked corporate farming with poverty and environmental degradation, it did not contain evidence "that suggests, evaluates, or critiques alternative solutions."[39] The court also noted that the defendants submitted a federal government report that advocated regulations designed to favor family farms. After describing several of the alternatives proposed in the report, the court determined that the defendants had failed to satisfy the high burden of demonstrating the ineffectiveness of any of the proposals. The court therefore held that the defendants had failed to show that there was no other method of advancing the legitimate local interests of promoting the family farm and environmental protection.

Analysis

As a practical matter, it is likely that in enacting or amending a corporate farming law the types of evidence relied upon in *Hazeltine II* would be created during the enacting or amending process. For example, it is likely that pamphlets or other similar documents that describe the "pros" and "cons" of a particular law will be distributed to legislators or voters. Citizens and committee members, like those in South Dakota who sought to amend their state constitution, will stand up in high school gymnasiums, community centers, and other meeting places and give their opinions as to why they

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36. *Id.*

37. *Id.*

38. *Id.* at 595-96. *But see* MSM Farms, Inc. v. Spire, 927 F.2d 330 (8th Cir. 1991). In *MSM Farms*, the Eighth Circuit rejected an equal protection clause challenge to the Nebraska corporate farming law, which like Amendment E, was a constitutional provision. In *MSM Farms*, the court stated that "[i]t is up to the people of the State of Nebraska, not the courts, to weigh the evidence and decide on the wisdom and utility of measures adopted through the initiative and referendum process." *MSM Farms*, 927 F.3d at 333. It added that "[w]e agree with the district court that voters reasonably could have believed that by enacting the initiative in question they would be promoting family farm operations by preventing non-family corporate ownership of farmland." *Id. See also Hazeltine II*, 340 F.3d at 596 (examining the mindset of the *drafters* of Amendment E, rather than the mindset of the *voters* as it did in *MSM Farms*, to wit: "discerning the purpose of a constitutional provision is an impossible exercise. . . . We do, however, have evidence of the intent of individuals who drafted the amendment that went before the voters. It is clear that those *individuals* had a discriminatory purpose.") (emphasis added).

39. *Hazeltine II*, 340 F.3d at 597. *See also MSM Farms*, 927 F.2d at 333 (holding in context of equal protection challenge that promoting family farms is a legitimate state interest).

believe a corporate farming law should be enacted or modified. In the event that a law is challenged, it is not unlikely that some of these individuals would testify about their motives for supporting the enactment or modification of the law. When a corporate farming law to be enacted or modified is statutory, such as the statutes considered in *Smithfield I* and *II*, legislators presumably will make publicly available statements about why the statute should be enacted or modified. Such communications are unavoidable in enacting and amending constitutional and statutory provisions; such provisions are not enacted telepathically.

Moreover, it is not improbable that proponents of corporate farming laws will or would from time to time specifically name the corporation or corporations sought to be prohibited from engaging in agricultural production in their state. In *Hazeltine II* it was noted that citizens specifically named Tyson Foods, Inc. and Murphy Family Farms; in *Smithfield I* it was noted that an Iowa legislator specifically named Smithfield Foods, Inc.[40] The courts in both cases found such specific naming of companies to be evidence that the law at issue was enacted with a discriminatory purpose.[41] Consider the following the statement made in 1994 by then Secretary of Agriculture Dan Glickman: "Perhaps the single biggest issue I have heard about while traveling the country the last several months has been about concentration in the meat processing industry. Today, four companies control nearly 95% of the industry. Four companies control this country's supply of meat . . . ."[42] This statement highlights that it is neither an accident nor a surprise that proponents of the corporate farming laws at issue in the *Hazeltine* and *Smithfield* cases could and would name specific agricultural companies they wished to prohibit from operating within their state.

The direct and indirect evidence relied upon in *Hazeltine II* had no relationship to the language of Amendment E. In *Smithfield II*, however, the Eighth Circuit stated that the matter should be remanded in part because the statute at issue–i.e., the language of the statute at issue–had been amended. One could presume that if the types of direct and indirect evidence relied upon in *Hazeltine II* had been a part of the record before the Eighth Circuit in *Smithfield II*, the court could have ruled that the Iowa statute was enacted with a discriminatory purpose. One could also presume that when the Eighth Circuit revisits *Smithfield*, it can strike the amended Iowa statute down as unconstitutional without ever examining the statutory language, just as it did not examine the language of Amendment E in *Hazeltine II*. The court would only need the types of direct and indirect evidence it relied on in *Hazeltine II* to make its determination that the Iowa statute is discriminatory.

Perhaps the reason the Eighth Circuit remanded *Smithfield* is contained in the second half of the following passage that was quoted earlier in this article: "[s]ince . . . [the statute at issue] has been amended, *we cannot resolve this important constitutional question on the current record and must remand* the case to the district court for further consideration. In the final portion of its opinion in *Smithfield II* the court stated that

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40. The facts in *Smithfield I* describe the relationship between Smithfield Foods, Inc., Murphy Farms, LLC, as well as another corporation, Prestage-Stoecker Farms, Inc.

41. *See Smithfield I*, 241 F.Supp.2d at 978, 992 (S.D. Iowa 2003).

42. Dan Glickman, *Address Before the National Press Club (Oct. 18, 1994)*, FEEDSTUFFS, Nov. 6, 1995, at 10. *See also generally* USDA, GRAIN INSPECTION AND PACKERS AND STOCKYARDS ADMINISTRATION, *Assessment of the Cattle and Hog Industries*: Calendar Year 2001 (2002). *See also* Christopher R. Kelley, AN OVERVIEW OF THE PACKERS AND STOCKYARDS ACT *at* http://www.nationalaglawcenter.org/assets/article_kelley_packers.pdf.

> [o]n the *record* before us, we are unable to determine whether the . . . [amended statute] possesses a discriminatory purpose. Courts look to *direct and indirect evidence* to determine whether a state adopted a statute with a discriminatory purpose. This evidence includes (1) statements by lawmakers; (2) *the sequence of events leading up to the statute's adoption, including irregularities in the procedures used to adopt the law*; (3) the State's consistent pattern of "disparately impacting members of a particular class of persons"; (4) the statute's historical background, including "any history of discrimination by the [state]"; and (5) the statute's use of highly ineffective means to promote the legitimate interest asserted by the state.[43]

This passage could be construed as a direct invitation from the Eighth Circuit to the parties challenging the Iowa statute to include the types of direct and indirect evidence in the record that the court will need to hold that the statute was enacted with a discriminatory purpose. The parties challenging the Iowa statute need only to place the necessary indirect and direct evidence in the record before the matter is revisited by the Eighth Circuit; the statutory language–amended or unamended–is not necessarily relevant in light of *Hazeltine II*.

Conclusion

Post-*Hazeltine II*, the Eighth Circuit should have little difficulty finding the direct and indirect evidence needed to hold that a corporate farming law is discriminatory under the first tier of dormant Commerce Clause analysis. Given that this type of evidence will almost always exist, it is reasonable to assume that such evidence will be part of the record (or be remanded with instructions to make such evidence part of the record).

Of course, a finding that a challenged law is discriminatory is still subject to the question of whether the law was enacted to accomplish a legitimate local interest and whether there existed any other means to accomplish that legitimate local interest, assuming one existed. *Hazeltine II* signals that this question will not prevent the Eighth Circuit from holding that a law that is first determined to be discriminatory is unconstitutional under the "legitimate local interest" test.[44] *Hazeltine II* does not, however, completely shut the door on arguments raised by proponents or opponents of corporate farming laws on this portion of the dormant Commerce Clause analysis. Because of the likelihood that the Eighth Circuit will hold that the statute at issue in *Smithfield* was enacted with a discriminatory purpose, the "legitimate local interest" portion of the first tier dormant Commerce Clause analysis could be either the last stand for proponents of the Iowa statute or the last hurdle for opponents of the statute. The "legitimate local interest" test therefore could be very important when the Eighth Circuit revisits *Smithfield* or when it considers other challenges to corporate farming laws.[45]

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43. *Id.* at *3 (citations omitted) (emphasis added).

44. *See generally Hazeltine II*, 340 F.3d at 597 (holding that the defendants failed to show whether reasonable non-discriminatory alternatives exist to advance the legitimate local interests of promoting family farms and protecting the environment).

45. It is important to note, however, that the Eighth Circuit may look to *Hazeltine I* to support a holding that a corporate farming law violates the dormant Commerce Clause under the *Pike* balancing test.