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Publisher: Morgan Morrissette Wright

Production Editor: Sharon D. Ray

Cover Art Design: Morgan Morrissette Wright and Sharon D. Ray

This journal's cover includes a photo of Washington D.C.'s Metro Center underground station. The Metro's distinctive coffered and vaulted ceilings were designed by Harry Weese in 1969. They are one of the United States' most iconic examples of the brutalist design style often associated with federal administrative buildings. The photographer is by XH\_S on Unsplash, used with permission.

Cite this publication as:

The Journal of Federal Agency Action (Fastcase)

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<https://www.fastcase.com/>

POSTMASTER: Send address changes to THE JOURNAL OF FEDERAL AGENCY ACTION, 729 15th Street, NW, Suite 500, Washington, D.C. 20005.

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ISSN 2834-8796 (print)

ISSN 2834-8818 (online)

# The Committee on Foreign Investment in the United States Says Chinese Investment in North Dakota Agricultural Land Is Outside Its Jurisdiction

Antonia I. Tzinova, Robert A. Friedman,  
Marina Veljanovska O'Brien, and Sarah K. Hubner\*

*In this article, the authors discuss a recent decision by the Committee on Foreign Investment in the United States and its implications.*

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Fufeng USA Inc., a subsidiary of Chinese food manufacturer Fufeng Group Ltd., announced on December 13, 2022, that after an “extensive two-phase review,” the Committee on Foreign Investment in the United States (CFIUS) had determined that Fufeng USA’s acquisition of Grand Forks, North Dakota, agricultural land is not a “covered transaction” under Section 721 of the Defense Production Act of 1950. As a result, CFIUS will not be taking any further action on the deal. The CFIUS decision comes as lawmakers urge scrutiny of Chinese investment in U.S. agriculture, with approximately 14 states passing laws that specifically forbid or limit nonresident aliens, foreign business entities, or foreign governments from acquiring an interest in private agricultural land within the boundaries of their state.<sup>1</sup> Substantial media coverage and concerns raised by prominent Republican legislators and the U.S.-China Economic and Security Review Commission (USCC) prompted the U.S. government to further examine the transaction.

## Transaction Background

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Fufeng Group announced<sup>2</sup> on November 8, 2021, that it had selected Grand Forks as the location for its first U.S.-based manufacturing facility. Through its U.S. subsidiary, Fufeng Group purchased a 370-acre site in Grand Forks to build a \$700 million

wet corn milling facility where Fufeng Group intends to extract high-valued amino acids, lysine and threonine, which are essential ingredients in animal nutrition feed formulations. The Grand Forks City Council gave Fufeng Group initial approval for the proposed facility in February 2022.

Despite this initial approval, the land purchase sparked great concern among officials at the federal, state, and local level due largely to the land's close proximity to Grand Forks Air Force Base and Cavalier Space Force Station. The proposed site is located 12 miles from the base. In May 2022, the Fufeng purchase was cited as a risk in a USCC report<sup>3</sup> on Chinese interests in U.S. agriculture, noting that Grand Forks Air Force Base “houses some of the United States’ top intelligence, surveillance, and reconnaissance capabilities.” Likewise, in July 2022, Senators Marco Rubio, John Hoeven, and Kevin Cramer called on CFIUS to review the acquisition, sending a letter<sup>4</sup> to U.S. Defense Secretary Lloyd Austin and U.S. Treasury Secretary Janet Yellen.

It was reported<sup>5</sup> on October 17, 2022, that Fufeng Group had filed a voluntary notice with CFIUS. In a statement on December 13, 2022, Fufeng USA Chief Operating Officer Eric Chutorash announced that CFIUS had concluded its review and determined that the land purchase was not a “covered transaction” under CFIUS jurisdiction. In a rare look into CFIUS operations, Grand Forks City Administrator Todd Feland noted that the lead federal agencies in the review were the U.S. Departments of the Treasury, Defense, and Agriculture.

## **CFIUS Statutory Authority Over Real Estate Transactions**

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Calls to block the Grand Forks land acquisition were based primarily on CFIUS’s expanded jurisdiction under the Foreign Investment Risk Review Modernization Act (FIRRMA) to review certain U.S. real estate transactions, including the purchase of undeveloped land (or greenfield investments in land).<sup>6</sup> FIRRMA authorized the review of certain real estate transactions, that is, purchase, lease, or concession of both developed and undeveloped real estate, within close proximity of designated sensitive sites such as airports, maritime ports, military installations, or other sensitive U.S. government facilities. To be considered a covered real estate transaction, the foreign person would have to obtain a combination

of certain property rights (e.g., such as the right to exclude others from accessing the property). Real estate parcels in an urbanized area or cluster and certain other real estate are exempt from the rule. Until FIRRMA, the mere acquisition of undeveloped land—that did not qualify as a U.S. business or a going business concern—was outside of the scope of CFIUS jurisdiction.

## CFIUS Decision

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CFIUS deliberations and decisions are not public. However, in a rare occurrence, Fufeng’s counsel released the letter the company received from the CFIUS staff chair explaining that, based on the information received in the October 2022 notice and the answers the transaction parties provided in response to CFIUS follow-up questions, CFIUS concluded that it did not have jurisdiction under 31 C.F.R. Part 800.<sup>7</sup> The letter also reveals that Fufeng filed its notice under Part 800 of CFIUS regulations, that is, as a covered transaction where a foreign person acquires a U.S. business (and not under Part 802, as purchase of real estate). The letter, however, stated that CFIUS reserved all rights and authority under Sec. 721 to initiate a new review of the matter as permitted by law.

The proposed site of Fufeng’s wet corn milling plant is undeveloped land; as such, it cannot be deemed to be a going concern to trigger CFIUS jurisdiction over the acquisition of a U.S. business under Part 800. Interestingly, while not located in any urbanized area or cluster, the Grand Forks Air Force Base and Cavalier Space Force Station are not on the list of designated military installations or U.S. government sites subject to CFIUS jurisdiction under Part 802, which authorizes CFIUS to review real estate transactions. Nevertheless, CFIUS reserved the right, as permitted by law, to revisit the transaction if new facts or information became available.<sup>8</sup>

## A U-Turn After Air Force Speaks Out: City of Grand Forks Votes to Halt Further Development of the Project

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Following CFIUS’s decision, the City of Grand Forks reviewed CFIUS’s determination and actively considered next steps for finalizing the Fufeng Project.<sup>9</sup> However, it quickly reversed course and voted to halt the development after Andrew Hunter, the U.S. Air



Force's Assistant Secretary for Acquisition, Technology & Logistics sent letters to Senators Hoeven and Cramer expressing the unambiguous view of the U.S. Air Force that the proposed project presents a significant threat to national security.<sup>10</sup> A week prior to the council's vote, the mayor of Grand Forks, Brandon Bochenski, announced on January 31, 2023, that "the Federal Government has requested the City's help in stopping the Project as geo-political tensions have greatly increased since the initial announcement of the Project."<sup>11</sup> Bochenski stated that the city of Grand Forks would take all possible remedies to meet this directive, including refusing to connect industrial infrastructure and denying building permits. The Grand Forks City Council formally addressed the Fufeng project on February 7, 2023, voting unanimously to block the development of the land.<sup>12</sup> Notably, the city's actions to effectively block the continued development of the wet corn milling facility do not affect Fufeng's ownership of the agricultural land. It remains to be seen what Fufeng USA decides to do with the land it legally owns.

## Impact of Heightened Federal and State Regulatory Scrutiny on the Future of Foreign Investment in the Agricultural Sector

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CFIUS's determination and the city of Grand Forks' ultimate decision to halt the further development of the plant by the Fufeng suggest that—even with FIRRMA's expanded jurisdiction—certain gaps exist in the foreign investment regulatory regime, which focuses primarily on investments in U.S. businesses and certain limited real estate transactions. The Fufeng transaction highlights national security considerations related to food security and the agricultural sector—exacerbated by the global food crisis caused by Russia's invasion of Ukraine—that are not expressly covered by FIRRMA.<sup>13</sup> These developments have several implications:

- *Food Security as a National Security Consideration.* The U.S. government's view of national security has evolved and increasingly includes nondefense considerations such as food security. Senator Cramer has voiced his opposition to the CFIUS decision in the Fufeng case and stated that the U.S. food supply chain is a national security issue. Furthermore, more than 100 Republicans in the House of

Representatives have asked the U.S. Government Accountability Office to study foreign investment in U.S. farmland and its impact on national security, trade, and food security. In addition, recent legislative proposals would require CFIUS to consider a transaction's impact on safety, availability, continued access to, and quality of U.S. food and agricultural systems as factors in evaluating the threat to national security by foreign investments.

- *Future Expansion of CFIUS Jurisdiction.* Several legislative proposals have been introduced to further restrict the ability of foreign persons to pursue greenfield investments.<sup>14</sup> Some of the proposals would make the U.S. Department of Agriculture (USDA) a permanent member of CFIUS and amend “critical infrastructure” to include “agricultural systems and supply chains.”<sup>15</sup> Some of the proposed legislation would go even further and would put a moratorium on all foreign persons' acquisition of public or private real estate in the United States, but this does not appear likely to pass.<sup>16</sup> It is also possible that the U.S. Department of the Treasury, through its rulemaking authority, will add Grand Forks Air Force Base and Cavalier Space Force Station to the list of designated military installations or U.S. government sites subject to CFIUS jurisdiction under Part 802, which authorizes CFIUS to review real estate transactions. Doing so would provide a legal basis for CFIUS to review transactions involving these sites in the future under Part 802.
- *State Government Scrutiny.* In light of the recent Fufeng controversy, South Dakota Governor Kristi Noem called for an immediate review of the state's investments to determine whether any are in companies with ties to China. Moreover, Noem has expressed support for legislation that would establish a Committee on Foreign Investment in the United States for South Dakota (CFIUS-SD) to examine possible acquisitions in South Dakota by foreign interests. South Dakota is not the only state to take such actions.<sup>17</sup> As previously mentioned, approximately 14 states specifically forbid or limit nonresident aliens, foreign business entities, or foreign governments from acquiring or owning an interest in private agricultural land within the boundaries of their state.<sup>18</sup> And nearly a dozen additional states

have proposed legislation that seeks to restrict certain foreign investments in agricultural land located within the boundaries of their state.<sup>19</sup> A key takeaway from these developments is that cross-border deal-makers investing in or acquiring real estate—particularly, agricultural interests—must analyze the impact of the CFIUS regulatory framework, as well as a patchwork of state and local laws that could derail their transaction.

## Conclusion

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CFIUS's determination in the Fufeng transaction brings a renewed focus on foreign investment in real estate, particularly in the agricultural sector. Businesses engaging in real estate transactions with foreign investors and acquirers—especially if the transaction involves agricultural land or assets related to food security—should, as a standard practice, evaluate whether the land or assets are located in close proximity to military bases or other sensitive government installations. Importantly, parties to any real estate transaction involving a foreign investor or acquirer should be prepared for heightened scrutiny at the federal level from CFIUS and, increasingly, at the state and local levels. Investors should also be aware that clearance by CFIUS or the determination that a transaction falls outside of CFIUS jurisdiction does not mean that a transaction will not face regulatory hurdles from other U.S. federal, state, or local governmental authorities, and consider a holistic strategy in securing approvals for the investment.

## Notes

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1. Foreign Investments in Agricultural Land: FAQs & Resource Library, National Agricultural Law Center, <https://nationalaglawcenter.org/foreign-investments-in-ag/>.

2. <https://grandforks.org/fufeng-group-ltd-selects-grand-forks-as-u-s-manufacturing-site/>.

3. [https://www.uscc.gov/sites/default/files/2022-05/Chinas\\_Interests\\_in\\_U.S.\\_Agriculture.pdf](https://www.uscc.gov/sites/default/files/2022-05/Chinas_Interests_in_U.S._Agriculture.pdf).

4. [https://www.rubio.senate.gov/public/\\_cache/files/e2101635-dceb-4c72-8252-5c6ca311d118/F12B61E87A55BD3A02AA7B3DD00B4621.07.14.22-rubio-hoeven-cramer-letter-to-yellen-and-austin-re-fufeng-cfius.pdf](https://www.rubio.senate.gov/public/_cache/files/e2101635-dceb-4c72-8252-5c6ca311d118/F12B61E87A55BD3A02AA7B3DD00B4621.07.14.22-rubio-hoeven-cramer-letter-to-yellen-and-austin-re-fufeng-cfius.pdf).

5. <https://www.grandforksherald.com/news/local/committee-on-foreign-investment-in-the-united-states-will-review-proposed-fufeng-project-in-grand-forks>.

6. See 31 C.F.R. Part 802.

7. A letter from CFIUS Staff Chair Andrew Fair to Fufeng Group's Counsel regarding the Committee's decision was published by North Dakota radio station KVRR Local News, <https://www.kvrr.com/2022/12/13/fufeng-usa-looking-to-move-ahead-with-grand-forks-project-after-federal-agency-review-suddenly-ends/>.

8. We Could Speculate What Might Happen if the Grand Forks Air Force Base or the Cavalier Space Force Station Were Added to the List of Designated Sensitive Facilities in Appendix A to 31 C.F.R. Part 802.

9. See, e.g., CFIUS: GF Considers Steps for Fufeng, KNOX Radio (Dec. 14, 2022), <https://knoxradio.com/2022/12/14/cfius-gf-considers-steps-for-fufeng/>; After CFIUS Announcement on Fufeng Project, Everyone Waiting for Next Steps, Grand Forks Herald (Dec. 14, 2022), <https://www.grandforksherald.com/news/local/after-cfius-announcement-on-fufeng-project-everyone-foes-and-proponents-alike-waiting-for-next-steps>.

10. See, e.g., Letter from Sec. Hunter to Sen. Hoeven (Jan. 27, 2023), <https://www.hoeven.senate.gov/imo/media/doc/USAIRFORCE-FUFENG-LETTER-HOEVEN.pdf>; Letter from Sec. Hunter to Sen. Cramer (Jan. 27, 2023), <https://senatorkevincramer.app.box.com/s/l4v3ss15sru21z8ifmkwec229dxt1k9x>.

11. <https://www.grandforksgov.com/Home/Components/News/News/7066/550>.

12. <https://www.youtube.com/watch?t=6999&v=L7ITSdhiUh0&feature=youtu.be>.

13. It is interesting that CFIUS did not find the agricultural land to be "critical infrastructure" under its general authority under Part 800 of CFIUS regulations.

14. See, e.g., FARM Act, S. 68, 118th Congress (2023), <https://www.congress.gov/bill/118th-congress/senate-bill/68?s=1&r=2&q=%7B%22search%22%3A%5B%22S.68%22%5D%7D>; Securing America's Land from Foreign Interference Act, H.R. 344, 118th Congress (2023), <https://www.congress.gov/bill/118th-congress/house-bill/344?q=%7B%22search%22%3A%5B%22H.R.344%22%5D%7D&s=3&r=1>; FARM Act, S. 2931, 117th Congress (2021), <https://www.congress.gov/117/bills/s2931/BILLS-117s2931is.pdf>; Food Security Is National Security Act of 2021, S. 3089, 117th Congress (2021), <https://www.congress.gov/117/bills/s3089/BILLS-117s3089is.pdf>; Exposing China's Belt and Road Investment in America Act of 2021, S. 3038,

117th Congress (2021), <https://www.congress.gov/117/bills/s3038/BILLS-117s3038is.pdf>; Prohibition of Agricultural Land for the People's Republic of China Act, H.R. 7892, 117th Congress (2022), <https://www.congress.gov/117/bills/hr7892/BILLS-117hr7892ih.pdf>; and National Security Moratorium on Foreign Purchases of U.S. Land, H.R. 6383, 117th Congress (2022), <https://www.congress.gov/117/bills/hr6383/BILLS-117hr6383ih.pdf>.

15. FARM Act, S. 68, 118th Congress (2023), <https://www.congress.gov/bill/118th-congress/senate-bill/68?s=1&r=2&q=%7B%22search%22%3A%5B%22S.68%22%5D%7D>; FARM Act, S. 2931, 117th Congress (2021), <https://www.congress.gov/117/bills/s2931/BILLS-117s2931is.pdf>; Food Security Is National Security Act of 2021, S. 3089, 117th Congress (2021), <https://www.congress.gov/117/bills/s3089/BILLS-117s3089is.pdf>. Notably, the land acquired by Fufeng was not developed, so it is not clear whether it would be deemed an “agricultural system.”

16. Exposing China's Belt and Road Investment in America Act of 2021, S. 3038, 117th Congress (2021), <https://www.congress.gov/117/bills/s3038/BILLS-117s3038is.pdf>.

17. Press release, Government of South Dakota, Gov. Noem Announces Plan to Restrict Foreign Purchases of Ag Land (Dec. 13, 2022), [https://www.sd.gov/news?id=news\\_kb\\_article\\_view&sys\\_id=f7e9ed401b50a9506e4aa97ae54bcb9e](https://www.sd.gov/news?id=news_kb_article_view&sys_id=f7e9ed401b50a9506e4aa97ae54bcb9e).

18. Foreign Investments in Agricultural Land: FAQs & Resource Library, National Agricultural Law Center (last updated Nov. 2022) (currently, states that have a law prohibiting or restricting foreign ownership and investments in private farmland include Indiana, Iowa, Kansas, Kentucky, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, and Wisconsin. Other states, such as Georgia, Maryland, New Jersey, and Virginia, have enacted statutes that restrict foreign persons from purchasing real estate within their state), <https://nationalaglaw-center.org/foreign-investments-in-ag/>.

19. *Id.* (these include Alabama, Arkansas, California, Indiana, Missouri, Oklahoma, South Dakota, Tennessee, and Texas).