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Updates on SB 264 – Florida Law Restricting Persons From Foreign Countries of Concern From Owning, Having a Controlling Interest in, or Acquiring Certain Real Estate, Including Hotels and Condominium Hotel Units

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🔑 Key Take: *New restrictions on land ownership in Florida by non-U.S. nationals is being challenged in court and pending resolution*

Owners, purchasers, and sellers of real estate located in Florida, including hotels and condominium hotel units, should be aware of recent legislation and pending court challenges affecting the implementation of such legislation.

The U.S. Court of Appeals for the Eleventh Circuit heard oral arguments on the merits of the Florida law restricting persons from “foreign countries of concern” from owning, having a controlling interest in, or acquiring an interest in certain Florida real

property. The court of appeals halted the enforcement of Senate Bill 264, which introduced Chapter 692, Florida Statutes (the Bill), against two individual Chinese plaintiffs/appellants who were in the process of buying property in Florida when the Florida governor signed the Bill. The plaintiffs allege that SB 264 violates the Fourteenth Amendment's Equal Protection and Due Process Clauses, the Supremacy Clause, and the Fair Housing Act. The court previously held that those Chinese plaintiffs/appellants showed a substantial likelihood of success on their claim that the state statute is preempted by federal law, specifically the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), and we anticipate the court will be issuing its decision on the issues presented at oral arguments shortly.

Overview of Florida Senate Bill 264

Florida enacted Senate Bill 264 in May 2023, creating Chapter 692, Florida Statutes, that restricts select persons and entities from “foreign countries of concern”[1] from owning, having a controlling interest[2] in or acquiring by purchase, grant, devise, or descent an interest in certain Florida real property. The Bill generally prohibits, *inter alia*, foreign principals[3] of a foreign country of concern from owning, having a controlling interest in, or acquiring real property within 10 miles of any military installation[4] or critical infrastructure[5] in the state. An exception permits foreign principals who are “natural person[s]” with a valid non-tourist visa or who have been granted asylum to purchase one residential real property, as long as the property is less than two acres in size and not within five miles of a military installation. Current owners and prospective buyers identified as “foreign principal[s]” under the Bill must register real property located on or within 10 miles of any military installation or critical infrastructure facility with Florida's Department of Economic Opportunity. The Bill also generally prohibits the real property ownership by any foreign principal.

The second group of restrictions are China-specific restrictions, which prohibit China, Chinese Communist Party or other Chinese political party officials or members, Chinese business organizations, and persons domiciled in China but who are not citizens or lawful permanent residents of the U.S., from directly or indirectly owning, having a controlling interest in, or acquiring by purchase, grant, devise, or descent any interests, except a de minimis indirect interest[6], in real property in Florida. This prohibition includes the same two-acre residential property exception described above for “natural person[s]” with a valid non-tourist visa or who have been granted asylum, and the same requirement to register property with the state.

The Bill imposes both civil and criminal penalties for violations of the statute. Failure to file the required registration by January 31, 2024, for property acquired before July 1, 2023, may result in a civil penalty of \$1,000 for each day that the registration is late, a lien against any unregistered real property for the unpaid balance of any penalties assessed, and/or potential forfeiture of any real property owned or acquired in violation of the statute. With respect to criminal penalties, foreign principals or property sellers found in violation of the first set of restrictions may be charged with a second-degree misdemeanor, punishable by up to 60 days’ imprisonment and a \$500 fine. The prohibitions aimed at China carry more severe consequences: a person who “ knowingly sells real property” to Chinese persons or entities in violation of the Bill commits a misdemeanor of the first degree, punishable by up to one year of imprisonment and a \$1,000 fine. Chinese purchasers of real property in violation of the law commit a third-degree felony, punishable by up to five years in prison and a \$5,000 fine.

New Regulations Adopted

The Bill requires three Florida regulatory agencies to promulgate rules in order to implement certain sections of the Bill, specifically registration: the Florida Department of Commerce (Commerce), the Florida Department of Agriculture and Consumer Services (FDACS), and the Florida Real Estate Commission (FREC). On January 4, 2024, Commerce adopted Rule 73C-60, Florida Administrative Code, implementing section 692.203, Fla. Stat., which applies to the purchase of certain real property on or around military installations or critical infrastructure facilities by certain foreign principals, and not to the law applicable to agricultural land or to the ownership of Florida real property pertaining to persons or entities from the People's Republic of China. Commerce also established the State's registration system for these applicable properties.

Commerce's rules add the following example and extends the exception of what qualifies as a de minimis indirect interest: "[a]ny passive ownership interest of a foreign principal in an entity, provided that the foreign principal does not possess, by virtue of that ownership interest or otherwise, the power to direct or cause the direction of the management or policies of the entity with respect to the interest in real property."

The Commerce's rules also clarify that individuals approved by the federal government to participate in the EB-5 Program are not prohibited foreign persons. Generally, under the EB-5 Program, investors (and their spouses and unmarried children under 21) are eligible to apply for lawful permanent residence (i.e., become a green card holder) if they make the necessary investment in a commercial enterprise in the United States, and plan to create or preserve 10 permanent full-time jobs for qualified U.S. workers.

During the rule-making process, many companies raised concerns whether the new Bill applied to leasehold interest, considering the Bill contemplates the acquisition of real property by "purchase, grant,

devise or descent.” In this regard, Commerce’s rules provide that a lease is not an interest in real property.

Similarly, the FDACS adopted Rule 5J-27 to implement provisions related to foreign ownership of agricultural land in Florida, which became effective on April 4, 2024. The FDACS’ new rules clarify terms used in the statute and the rule, detail the registration requirements that foreign principals must comply with, summarize the enforcement action that FDACS will take for violating the rules, and provide a safe harbor provision to closing agents and sellers of agricultural land when certain conditions are met.

These new rules, however, do not mirror one another, and there are disparities between the agricultural land rules and Commerce’s rules. Most notably are the different definitions of terms. For instance, the new rules defining “controlling interest” in agricultural land differ from those governing controlling interest in certain real property on or around military installations or critical infrastructure facilities. Commerce’s rules narrow the definition of “controlling interest” to an interest giving the prohibited person the “right to improve or develop the real property” and “to attach fixed or immovable structures or objects,” whereas the FDACS’ definition of “controlling interest in agricultural land” adds any interest that gives the foreign principal the right to physically access the agricultural land and to exclude others from physically accessing the agricultural land.

Critical to real estate transactions, on January 17, 2024, the FREC adopted Rule Chapter 61J2-10.200, which contains the form affidavit a buyer must provide under the Bill.

We will continue to closely monitor subsequent developments related to the Bill, both on the regulatory front and as rules are developed and enforcement as the result of the pending litigation in

Shen v. Simpson, No. 4:23-cv-208-AW-MAF (N.D. Fla. 2023), appeal docketed, No. 23-12737 (11th Cir. Aug. 23, 2023).

[1] Foreign countries of concern include the People's Republic of China, the Russian Federation, the Islamic Republic of Iran, the Democratic People's Republic of Korea, the Republic of Cuba, the Venezuelan regime of Nicolás Maduro, and the Syrian Arab Republic.

[2] “*Controlling interests*” is broadly defined as “possession of the power to direct or cause the direction of the management or policies of a company, whether through ownership of securities, by contract, or otherwise. A person or entity that directly or indirectly has the right to vote 25% or more of the voting interests of the company or is entitled to 25% or more of its profits is presumed to possess a controlling interest.”

[3] The Bill defines “*foreign principal*” as “(a) the government or any official of the government of a foreign country of concern; (b) a political party or member of a political party or any subdivision of a political party in a foreign country of concern; (c) a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country of concern, or a subsidiary of such entity; or (d) Any person who is domiciled in a foreign country of concern and is not a citizen or lawful permanent resident of the United States. (e) Any person, entity, or collection of persons or entities, described in paragraphs (a) through (d) having a controlling interest in a partnership, association, corporation, organization, trust, or any other legal entity or subsidiary formed for the purpose of owning real property in this state.”

[4] “*Military Installation*” is defined as “a base, camp, post, station, yard, or center encompassing at least 10 contiguous acres that is under the jurisdiction of the Department of Defense or its affiliates.”

[5] Critical infrastructure facilities include chemical manufacturing facilities, refineries, electrical power plants, water treatment facilities or wastewater treatment plants, liquid natural gas terminals, telecommunications central switching offices, gas (and natural gas) processing plants, seaports, spaceports, and airports.

[6] A person or entity (or foreign principal, as applicable) has a de minimis indirect interest if any ownership is the result of the foreign principal’s ownership of registered equities in a publicly traded company owning the land and if the foreign principal’s ownership interest in the company is either: (a) less than 5 percent of any class of registered equities or less than 5 percent in the aggregate in multiple classes of registered equities; or (b) a noncontrolling interest in an entity controlled by a company that is both registered with the United States Securities and Exchange Commission as an investment adviser under the Investment Advisers Act of 1940, as amended, and is not a foreign entity. (Fla. Stat. §§ 692.201-.205).