

SCOPE OF RESTRICTIONS ON CERTAIN FOREIGN LAND OWNERSHIP UNDER THE FLORIDA SENATE BILL REMAINS UNCERTAIN 5 MONTHS AFTER LAW IS ENACTED

On August 26, 2023, plaintiffs in the closely watched *Shen v. Simpson* case filed an emergency motion for an injunction pending appeal in the Eleventh Circuit Court after a Florida district judge refused to grant a preliminary injunction of a Florida law "Interests of Foreign Countries" (codified [Fla. Stat. Ann. §§ 692.201-205](#)) ("**SB 264**") that bans those from certain countries from purchasing property.

The legal challenge to SB 264, brought on behalf of four Chinese citizens living in Florida and a real estate firm,¹ argues that the SB 264 law violates the Equal Protection Clause, the Due Process Clause, the Fair Housing Act and Supremacy Clause of the U.S. Constitution, citing that federal regulatory frameworks, such as the Committee on Foreign Investment in the United States ("**CFIUS**"), preempt state law in this area.

Signed by Governor Ron DeSantis in May, SB 264 took effect on July 1, 2023, imposing restrictions on individuals and entities—who are not U.S. citizens or permanent residents and whose “domicile” is in China, or other so-called “foreign countries of concern” and certain foreign principals—from owning or purchasing interest in certain Florida real estate. As enacted, foreign countries of concern ("**FCOC**") include China, Cuba, Iran, North Korea, Russia, Syria, and Venezuela.

¹ The complaint was filed in the U.S. District Court for the Northern District of Florida on May 22, 2023.

While five months have passed since SB 264 was enacted, there have been no significant developments in terms of regulatory guidance on SB 264 or its enforcement. Uncertainties remain concerning the statute's broad sweeping restrictions, such as applicability to indirect ownership by foreign principals (e.g., investment funds), certain groups under the statute language (e.g., leaseholds and Hong Kong individuals and entities), as well as ambiguity on who is subject to its reporting requirements.

CURRENT FORM OF SB 264

The statute introduced three broad restrictions on the conveyance of property:²

- **Chinese Investment Restriction § 692.204**

Prohibits those from China—defined as the 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 owning or acquiring any interest in real property in the state, other than a *de minimus* indirect interest (defined below).

- **Agricultural Land Restriction § 692.202**

Prohibits foreign principals from owning or acquiring any interest in agricultural land in the state, classified under Florida Statute § 193.461, other than a *de minimus* indirect interest.

- **Critical Infrastructure Restriction § 692.203**

Prohibits foreign principals from owning or acquiring any interest in real property within ten miles of (x) any military installation more than ten acres in size; or (y) critical infrastructure (such as seaports, airports, power plants, or telecommunications systems), other than a *de minimus* indirect interest.

Who counts as a Foreign Principal?

Under Florida's statute, a "foreign principal" includes governments, government officials, and political parties and their members of an FCOC. A foreign principal can be a business entity organized or with a principal place of business in an FCOC. Individuals who are "domiciled in" an FCOC are also counted as foreign principals unless they are U.S. citizens or have a valid non-tourist visa to reside in the U.S. Finally, any "entity or subsidiary formed for the purpose of owning real property" is a foreign principal when a controlling interest in the entity or subsidiary is held by any individual or entity foreign principal.³ Any entity established to acquire real estate—including U.S. entities—in which a foreign principal or

² Fla. Stat. Ann. § 692.202 – 204.

³ Fla. Stat. Ann. § 692.201(5)(e).

multiple foreign principals have a “controlling interest” are themselves a foreign principal for purposes of this statute and are subject to the restriction.

De Minimus Exception

Under SB 264, a *de minimus* indirect interest is narrowly defined as a 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 (x) less than 5% of any class of registered equities or less than 5% in the aggregate in multiple classes of registered equities; or (y) a noncontrolling interest in an entity controlled by a company that is both registered with the U.S. Securities and Exchange Commission as an investment adviser under the Investment Advisers Act of 1940, as amended, and is not a foreign entity. Notably, SB 264 does not define “indirect interest,” and there is no minimum threshold for ownership or control. It is also unclear whether the *de minimus* exception only applies to ownership of land as opposed to all real property (which includes leases and other types of real property interests such as buildings, fixtures, and all other improvements to land).

Uncertainties in the Law

Among many uncertainties for investors, the statute does not define “domiciled in” or what constitutes a “controlling interest” in an entity to form “for the purpose of owning real property.” It is also unclear whether the provision applies to leaseholds of agricultural land or land within ten miles of military or critical infrastructure. The statute specifies that holding an ownership interest, whether direct or indirect, in agricultural land violates the restriction, but the provision also prohibits a foreign principal from directly or indirectly owning, holding, or acquiring “by purchase, grant, devise, or descent agricultural land or any interest . . . in such land.” § 692.202.

AFFIDAVIT AND REGISTRATION REQUIREMENTS

Affidavit

Under the statute, buyers of land covered under SB 264 must sign an affidavit. Specifically, at the time of purchase, buyers of agricultural land or property within ten miles of a military base, installation, or designated “critical” infrastructure must sign an affidavit attesting that they are not a foreign principal. Similarly, at the time of purchase, buyers of any real property must sign an affidavit attesting they are not “persons or entities associated with the PRC.” The Florida Real Estate Commission is expected to soon publish details of what needs to be included in the affidavit. In the meantime, various organizations have suggested unofficial affidavits for individuals to use in real estate transactions.⁴ It is unknown if these “gap filler” affidavits will comply with the statute.

Registration for Carveouts, Exceptions (other than *de minimus*), and Other Acquisitions

Carveout for Land Owned Prior to July 1, 2023

The SB 264 restrictions include a carveout for ownership and interest in land or real property owned or acquired prior to July 1, 2023. However, while the

⁴ <https://www.flta.org/ForeignInterests>; <https://www.thefund.com/resources/conveyances-to-foreign-entities.aspx>.

prohibition does not apply, such persons (1) must not acquire additional real property or interests and (2) must register with either the Florida Department of Agriculture and Consumer Services ("**DACS**") by January 1, 2024 (for those who would have been prohibited from owning property interests under the Agricultural Land Restriction) or with the Department of Commerce (formerly the Department of Economic Opportunity) by December 31, 2023 (for those who would have been prohibited from owning property interests under the Chinese Investment Restriction and Critical Infrastructure Restrictions). To date, neither agency has implemented the registration process. Failure to comply with the affidavit requirement does not affect the title or insurability of the land.

Exceptions

There is an exception for foreign principals who are natural persons, to purchase one residential property up to 2 acres in size if:

- The property is not located within 5 miles of any military installation;
- The person has a U.S. Visa that is not limited to tourism, or has official documentation confirming that the person has been granted asylum in the U.S.; and
- The purchase is in the name of the person who holds a visa or official documentation.

Similarly, there is an exception for natural persons associated with China to purchase one residential property up to 2 acres in size if:

- The property is not located within 5 miles of a military installation;
- The person has a U.S. Visa that is not limited to tourism, or official documentation confirming that the person has been granted asylum in the U.S.; and
- The purchase is in the name of the person who holds the visa or official documentation.

All individuals or entities who fall under an exception must still register with either DACS by January 1, 2024 (for those who would have been prohibited from owning property interests under the Agricultural Land Restriction) or with the Department of Commerce by December 31, 2023 (for those who would have been prohibited from owning property interests under the Chinese Investment Restriction and Critical Infrastructure Restrictions).

Other Acquisitions

SB 264 does not prohibit the acquisition of restricted land ownership from devise, descent, enforcement of security interests, or collection of debts. However, the foreign principal must sell or otherwise divest within 3 years after acquisition. The only approved acquisitions are those listed directly above.

All individuals or entities who fall under the "other acquisitions" provision must still register with either DACS by January 1, 2024 (for those who would have been prohibited from owning property interests under the Agricultural Land Restriction) or with the Department of Commerce by December 31, 2023 (for those who would

have been prohibited from owning property interests under the Chinese Investment Restriction and Critical Infrastructure Restrictions).

The DACS and Department of Commerce registration systems are not currently available.

PENALTIES

Criminal and civil penalties may attach to violations of the new statute:

- Land that is owned or acquired in violation of SB 264 may be forfeited to the state of Florida.
- Acquiring ownership or interest in real estate in Florida in violation of SB 264's prohibitions on Agricultural Land or Critical Infrastructure is a second-degree misdemeanor. In addition, a seller who knowingly sells land in violation of the Agricultural Land or Critical Infrastructure Restrictions commits a second-degree misdemeanor.
- More severely, acquiring ownership or interest in real estate in Florida in violation of the Chinese Investment Restriction is a third-degree felony. A seller who knowingly sells land in violation of the Chinese Investment Prohibition also commits a first-degree misdemeanor.
- Closing agents with actual knowledge that a transaction will result in a violation of SB 264 may also be penalized.
- A person or entity who fails to file a registration incurs a civil penalty of \$1,000 for each day that the registration is late.

Uncertainties also remain for the assessment of penalties. For example, for investors, it is unclear whether penalties attach to the company or the investor when the foreign principal owns a minority interest.

RECENT DEVELOPMENTS

The Florida Department of Commerce and the Department of Business and Professional Regulation (DBPR) published notices that they would begin rulemaking as required under SB 264.

Florida is one of fifteen states to enact a foreign ownership law in 2023 and is now one of more than twenty states that restricts certain foreign investments in land located within their state.

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