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## Implications of Florida Restriction on Ownership by Foreign Principals of Interests In Real Property

On May 8, 2023, Florida Governor Ron DeSantis signed into law Senate Bill 264 (“SB 264”), which restricts the ability of a wide range of governmental bodies and persons or entities referred to as “foreign principals”<sup>1</sup> from or domiciled in any “foreign country of concern”<sup>2</sup> to directly or indirectly own, have a controlling interest<sup>3</sup> in, or acquire any interest in “real property”<sup>4</sup> in the state of Florida (subject to certain limited exceptions discussed below).

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While SB 264 has certain broad sweeping restrictions on foreign principals owning direct or indirect interests in real property consisting of “Agricultural Land” and/or real property within 10 miles from “Critical Infrastructure” (as each term is defined in SB 264), this Alert is focused on the restriction on direct or indirect ownership of any interest in real property by “PRC Investors”<sup>5</sup>.

### Application of SB 264

The general restriction on PRC Investors owning or acquiring direct or indirect interests in real property goes into effect on July 1, 2023. Note that SB 264 is not retroactive and does not require a PRC Investor to divest ownership acquired prior to July 1, 2023; however, any such ownership would be subject to reporting requirements that have not yet been promulgated by the Florida Real Estate Commission along with other rules and regulations providing for the implementation of SB 264. Such rules and regulations hopefully will address various material issues that have arisen in the context of interpreting SB 264 including the scope of the so-called “*de minimus* exception” (as discussed below), the definition of an “interest” in real property, and the applicability of SB 264 to leasehold and ground leasehold estates.

It is also worth noting that, on May 22, 2023, the ACLU filed a complaint in the United States District Court for the Northern District of Florida on behalf of four Chinese citizens who reside in Florida and a real estate brokerage firm that principally services Chinese and Chinese American clients. The complaint challenges the constitutionality of SB 264 under the 14th Amendment, the Fair Housing Act, and the Supremacy Clause of the U.S. Constitution. The outcome of this challenge is pending.

### Consequences of Violation

The most significant consequence of a violation of SB 264 is a civil action to cause the forfeiture of the real property. After forfeiture and upon the sale of such real property, the proceeds first will be used to repay lienholders, satisfy fines and judgments, and reimburse any costs associated with such civil action, with the balance being paid to the property owner. Other consequences include a potential third-degree felony and fines and penalties.

### De Minimus Exception and Other Exceptions

SB 264 includes a few limited exemptions pursuant to which a PRC Investor may acquire real property in Florida after July 1, 2023. In the event a PRC Investor acquires real property on or after July 1, 2023 in accordance with one of such exemptions, the PRC Investor must register the real property or interest within 30 days after the property or interest is owned or acquired.

Notably, SB 264 includes a limited *de minimus* exception, though it is unclear who would get the benefit of this exception. This exception, as drafted, appears to apply only in situations in which the PRC Investor owns registered equities in a public company that owns the land **and** if the PRC Investor’s ownership interest in such company

is **either** (x) 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** (y) a noncontrolling interest in an entity controlled by a company that is both registered with the SEC as an investment adviser under the Investment Advisers Act of 1940 and is not a foreign entity. It is unclear whether the Florida legislature intentionally limited the *de minimus* exception to ownership of land as opposed to all real property (which includes buildings, fixtures, and all other improvements to land) and whether they intended for this exception to apply more broadly than it appears to apply as drafted.

SB 264 also contains other limited exceptions permitting a PRC Investor to own or acquire interests in real property in the state of Florida. For example, there would not be a violation of SB 264 if a PRC Investor acquires an interest in real estate by devise or descent through the enforcement of security interests or collection of debts, provided that the PRC Investor transfers such interest within three years after acquiring it. However, under such circumstances, it appears that such PRC Investor would still be required to register. In addition, SB 264 permits the acquisition of a single residential property of up to two acres in size, if (a) the land is not on or within five miles of a military installation, (b) the person either has a current U.S. visa that is not limited to tourist-based travel or official documentation confirming that they have been granted asylum in the United States, and (c) the purchase is in the name of the person holding the visa or asylum documentation.

## Considerations for Fund Managers

While numerous questions concerning the application of SB 264 remain, the lack of substantial, explicit carve-outs for a variety of direct or indirect interests in real property creates uncertainty. Managers should continue monitoring developments regarding SB 264, assess its application to their funds and portfolio investments, and consider developing an action plan for complying with SB 264.

1. A “foreign principal” means:
  - 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;
  - 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; or
  - e. Any person, entity or collection of persons or entities, described in subclauses (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 Florida.
2. A “foreign country of concern” includes China, Russia, Iran, North Korea, Cuba, Venezuela or Syria (including any agency or other entity with significant control of such foreign country of concern).
3. A “controlling interest” means “the power to direct or cause the direction of the management or policies of a company, whether through the ownership of securities, by contract, or otherwise. A person or entity that directly or indirectly has the right to vote 25 percent or more of the voting interests of the company or is entitled to 25 percent or more of its profits is presumed to have a controlling interest.”
4. “Real property” means land, buildings, fixtures, and all other improvements to land.
5. A “PRC Investor” means a “foreign principal” of the People’s Republic of China, the Chinese Communist Party, or any official or member of the People’s Republic of China or the Chinese Communist Party.