White and Williams LLP

Understanding the Real Estate and Tax Implications of Florida's Buyer Ban Law

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Last month, Gov. Ron DeSantis (R) of Florida signed a new law that would prohibit people who are not U.S. citizens or permanent residents and whose "domicile" is in China from purchasing certain real property in the state. Generally, the prohibition applies to agricultural land and other land within ten miles of restricted areas, including military bases and infrastructure like airports and wastewater treatment plants.

The law, which takes effect on July 1, 2023, would also impose criminal penalties on any person or real estate company that knowingly sells real estate in the Sunshine State to anyone impacted by the ban.

While the law reserves the harshest penalty—a felony—for those involved in transactions with a Chinese connection, other nations are targeted too. Those with permanent homes in Cuba, Venezuela, Syria, Iran, Russia, and North Korea are also subject to the rules, though the penalty for transactions involving those countries is a misdemeanor for buyers and sellers.

The law does not require Chinese persons or investors (including partnerships or other entities) with existing ties to Florida real estate to divest themselves of the properties, but they will be required to register those interests with the state by January 2024 unless a *de minimis* exception applies.

De minimis—a Latin phrase meaning too trivial to merit consideration—has a specific meaning within the statute. For these purposes, the exception applies to the ownership of registered equities in a publicly traded company owning the land where either the interest is less than 5% of any class of registered equities, or less than 5% in the aggregate in multiple classes of registered securities, or it is a non-controlling 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.

Because the *de minimis* language is limited to publicly registered securities, the provision does not appear to exempt interests held by Chinese investors in private investment funds or privately held companies.

You can read the text of the bill here Florida Senate Bill 264.

The law, slated to take effect on July 1, 2023, has already encountered a legal challenge. This month, Chinese citizens living and working in Florida sued the state, claiming, among other things, that the law is discriminatory and creates disproportionate punishments based on race, ethnicity, alienage, and national origin.

Other States

Florida isn't the only state with such laws in progress or already on the books. At least 20 states, including Pennsylvania, prohibit or restrict foreign ownership and investments in certain types of real property. Other states, including Maryland and New Jersey, have statutes that permit foreign persons to purchase or hold real estate within the state to some degree, based on certain factors.

At least 12 other states are considering bills that would limit the rights of foreign persons to buy real property.

Federal Issues

There are also various proposals at the federal level to limit foreign ownership of land. Those include the Foreign Adversary Risk Management Act—called the FARM Act—which would designate the agriculture supply chain as critical infrastructure and limit the ability of foreign persons to obtain significant U.S. farmland. It also includes the Security and Oversight of International Landholdings Act—called the SOIL Act—which would subject certain land purchases by foreign entities to additional review.

Additionally, the Committee on Foreign Investment in the United States—or CFIUS—recently proposed new rules related to real estate ownership near military bases. The rules would add eight military installations in North Dakota, South Dakota, California, Iowa, and Texas, to the current list and revise the meaning of the term "military installation."

CFIUS has the authority to review proposed land acquisitions for national security concerns. The scope of their review has become a concern for many lawmakers who are increasingly worried that foreign investors from some countries—like China—could pose a risk.

FIRPTA

It's not surprising to see farmland singled out in many of these laws. The Foreign Investment in Real Property Tax Act—or FIRPTA—was passed in 1980 as a response to concerns about foreign ownership of farmland in the U.S.

Under our tax laws, non-U.S. persons are typically taxed on certain kinds of income, like U.S. sourced income—such as compensation from a U.S. company—but not on capital gains. Before FIRPTA, foreign taxpayers could avoid paying capital gains tax when they sold real estate, which gave them a perceived unfair tax advantage over U.S. taxpayers.

FIRPTA changed that. Today, under Section 897 of the tax code, a disposition of an interest in U.S. real property is subject to tax. And, to ensure that the government gets paid, FIRPTA requires U.S. buyers to withhold a percentage—typically 15%—of the property sales price from foreign sellers. If that turns out to be more than the tax actually owed, the taxpayer can file a return and request a refund.

What You Need To Know

It's unclear how many of these laws will survive legal challenges intact. In the meantime, it's crucial that U.S. and foreign persons understand the laws in their jurisdictions and comply with any reporting requirements. That also applies to partnerships, limited liability companies, and other entities that may include foreign investors—and those U.S. persons and entities that may enter into contracts or other business agreements with affected persons and entities.

Additionally, taxpayers who engage in real estate transactions, or own an interest in entities that may buy and sell real estate, may have reporting, withholding, or other related responsibilities.

If you have questions about the steps you might need to take to stay compliant with real estate and tax laws, please contact Kelly Erb, Counsel (erbk@whiteandwilliams.com, 215.864.7186) or a member of our Tax or Real Estate practice groups.