

To read the State of Florida's Senate Bill 264, please [click here](#).

To read the Department of the Treasury's proposed rulemaking, please [click here](#).

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## Report from Washington

### New Legislative Restrictions on Foreign Ownership of Real Estate Introduce Uncertainty and Potential Legal Consequences for Investment Fund Managers and China

May 15, 2023

On May 8, 2023, the State of Florida enacted sweeping legislation prohibiting Chinese investors from acquiring certain interests in real property throughout the Sunshine State, effective as of July 1, 2023. In addition, Chinese investors with existing ties to Florida real estate will need to register those interests with the state government by January 2024. These provisions may be triggered by even small indirect interests held by such investors (unless a *de minimis* exception applies). The law will impede companies from China that are seeking to grow their geographic footprint in Florida, but will also introduce significant legal uncertainty and consequences for U.S. companies with Chinese shareholders as well as the private equity industry, including U.S. and foreign managers of private investment funds that have passive financial investors from China.

The Florida law is among a litany of state legislative proposals across the country that similarly seek to impose restrictions on the acquisition of real estate by China in response to mounting national security concerns with land ownership. At present, at least 20 states have now enacted laws that prohibit or restrict foreign ownership and investments in certain types of real property within the state, with at least 12 other states considering such bills. In 2023 alone, the states of Arkansas, Florida, Idaho, Mississippi, Montana, North Dakota, Utah, Virginia and South Dakota have each signed into law varying restrictions on foreign ownership of real property. The constitutionality of these proposals is uncertain, as foreign investment restrictions such as these could be viewed as an area of the law that is preempted by federal statute, given the analogous role that is already vested in the Committee on Foreign Investment in the United States (“CFIUS” or the “Committee”).

At the federal level, the Biden administration has also recently proposed new rules to expand the scope of the Committee's real estate jurisdiction to include military sites in North Dakota, South Dakota, California, Iowa and Texas. In addition, proposed legislation such as the Foreign Adversary Risk Management Act (the “FARM Act”) and the Security and Oversight of International Landholdings Act (the “SOIL Act”) would expand the Committee's jurisdiction over certain acquisitions of agricultural land.

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As a practical matter, U.S. and foreign investors acquiring real estate—or any investment target that may own real estate—in affected states will want to consider these laws to the extent that there is Chinese participation in their ownership structure. In addition, investment managers may also need to evaluate their real estate interests across their existing investment portfolio to determine if retrospective registration requirements or other measures may be warranted in respect of any Chinese limited partners.

### **Florida's Prospective Prohibition and Retrospective Registration**

Florida's new legislation will prohibit, as of July 1, 2023, Chinese investors from directly or indirectly acquiring "any interest" in real property in the state unless such interest is *de minimis*. In order to be *de minimis*, the interest must be the result of the investor's "ownership of registered equities in a publicly traded company owning the land" **and** either (1) the interest is less than five percent of any class of registered equities or less than five percent in the aggregate in multiple classes of registered securities; or (2) a non-controlling interest in an entity controlled by a U.S. company that is a registered investment adviser under the Investment Advisers Act of 1940. Because the *de minimis* language is specifically limited to instances where ownership is held through publicly registered securities, the provision does not appear on its face to exempt interests held by Chinese investors in private investment funds—even when managed by a U.S. adviser—or as minority shareholders in privately held companies. Any such land interests already held by Chinese investors prior to July 1, 2023 do not need to be divested, but will require the investor to register those interests with the state of Florida by January 2024.

In addition to the broad prohibitions on China, the law also imposes restrictions on investors from Russia, North Korea, Cuba, Venezuela and Syria, effective July 1, 2023, precluding them from acquiring any interest in agricultural land or real property that is within ten miles of any military installation or critical infrastructure facility. Military installations include any base, camp, post, station, yard, or center encompassing at least ten contiguous acres that is under the jurisdiction of the U.S. Department of Defense. A critical infrastructure facility includes any of the following to the extent that it employs measures such as fences, barriers, or guard posts that are designed to exclude unauthorized persons: chemical manufacturing facilities; refineries; electrical power plants; water treatment facilities or wastewater treatment plants; liquid natural gas terminals; telecommunications central switching offices; gas processing plants; and air, sea and space ports. Interests held prior to July 1, 2023 do not need to be divested but are also subject to similar registration requirements with the State of Florida as noted above.

These prohibitions do not appear to preclude lending activities, and the law permits affected investors to acquire otherwise-prohibited interests in real property through the enforcement of security interests, or through the collection of debts, so long as the affected investor divests the real property within three years. In addition, the law permits natural persons to acquire certain otherwise-prohibited interests in real property if the property is less than two acres in size, the property is not within five miles of any military installation, and the acquirer enjoys certain forms of immigration status to remain in the United States.

Failure to comply with the prohibitions or registration obligations can result in civil penalties, liens and forfeiture of the underlying property.

Many members of the investment community expect that the Florida government will seek to clarify the aforementioned prohibition and registration requirements through a rulemaking process that will be the subject of public review and comment. However, it is not anticipated that any such clarifications will be in effect in advance of the prohibition's July 1<sup>st</sup> effective date.

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### **Other State Legislative Proposals On the Horizon**

More than half of U.S. states have either implemented or proposed legislation restricting foreign ownership of real property. These legislative proposals vary in scope; for example, some state proposals, such as in Texas and Washington, focus on restricting investments in agricultural land by companies headquartered in adversarial foreign nations, including China, or majority-owned by nationals of such countries. Other proposals, such as in Louisiana, may apply more broadly to even small indirect minority interests held in certain types of land by Chinese investors. South Carolina's proposal, which has passed in the state's Senate and is currently advancing through the House legislature, would impose economic thresholds on businesses acquiring interests in real property in the state. As currently drafted, the bill precludes such investors from having a "dominant shareholder" from a country considered to a foreign adversary, which includes China, Russia, Cuba, Iran and North Korea. A "dominant shareholder" would include any single owner that holds ten percent or more, or multiple owners that hold twenty percent or more, of a legal entity.

### **Expanded Scope of CFIUS Real Estate Jurisdiction**

Separately from the aforementioned state proposals, the Biden administration recently proposed new rules to expand the scope of the Committee's jurisdiction vis-à-vis land purchases by foreign buyers near military installations. CFIUS currently has the authority to review proposed land acquisitions for national security concerns if the land in question, among other factors, is located near a sensitive military base. If finalized, the new rules

would add eight additional military installations, located in North Dakota, South Dakota, California, Iowa and Texas, to the current list.

In addition, various federal legislative proposals that would strengthen U.S. oversight of land acquisitions by foreign purchasers are making their way through Congress. The FARM Act, first introduced in the U.S. Congress in 2021, was recently re-introduced with bipartisan support in both the House and Senate. Notably, if passed, the legislation would designate the agricultural supply chain as critical infrastructure and critical technology, expanding the Committee's jurisdiction to review farmland and related facilities. Among other changes, the legislation would also add the U.S. Secretary of Agriculture as a permanent member of CFIUS.

Another bipartisan piece of legislation, the SOIL Act, was also re-introduced this year. The SOIL Act seeks to deter adversarial foreign investment in U.S. agriculture by requiring CFIUS to review agriculture real estate acquisitions by certain foreign entities and broadening disclosure requirements for certain land acquisitions by foreign entities. At this time, it is unclear whether the FARM Act or the SOIL Act are likely to become law.

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The new rules come at a time when many government officials warn of national security risks associated with unchecked investment by China in certain types of real property in the country. For example, in December of last year, CFIUS concluded that it did not have jurisdiction over China-based Fufeng Group Limited's proposal to acquire a large parcel of land in North Dakota that was within the vicinity of Grand Forks Air Force Base. The purpose of the acquisition was purportedly greenfield in nature, and would have been used to construct a corn milling plant, but was ultimately abandoned after local government officials withdrew necessary approvals for the project following intense media scrutiny and public objections from federal government officials.

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As the legislative landscape unfolds across the country, investors will need to consider these existing and forthcoming rules in the context of their ownership structure to ensure that particular transactions involving affected real estate do not run afoul of any foreign ownership restrictions.

Simpson Thacher & Bartlett is experienced in navigating the complexities of foreign investment screening, and continues to monitor the relevant legislative and regulatory developments on this issue.

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