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Florida Law Restricting Foreign Ownership of Real Property Gets Initial Set of Proposed Rules

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On September 20, 2023, the Florida Department of Commerce (“DOC”) (formerly known as the Florida Department of Economic Opportunity) released its initial set of proposed Rules for implementing SB 264 (Chapter No. 2023-33, Laws of Florida). The law, which went into effect on July 1, 2023, restricts certain individuals and entities associated with China, Russia, Iran, North Korea, Cuba, Venezuela and Syria from owning real property in Florida. The DOC’s initial set of proposed Rules only apply to Section 692.203, Florida Statutes, relating to the purchase of real property on or around military installations or critical infrastructure facilities. However, they may be similar to the ones still outstanding for the purchase or acquisition of real property by those associated with China — see Section 692.204(10), Florida Statutes.

The proposed Rules for Section 692.203, Florida Statutes, are comprised of seven sections: (1) definitions; (2) real estate transactions prior to July 1, 2023; (3) registration; (4) computation of time; (5) fines; (6) liens; and (7) rebuttable presumption (related to the Florida Real Estate Commission’s (“FREC”) pending affidavit).

Rule 73C-60.001 is a definitions section designed to further interpret and clarify the terms used throughout Section 692.203, Florida Statutes, including those surrounding the direct and indirect interest owned in real property. For example, “a controlling interest in real property” means any interest other than a lease where the foreign principal has (i) the right to improve or develop the real property, and (ii) the right to attach fixed or immovable structures or objects to the real property. The DOC also added a definition for “domicile,” presumably to address its varying interpretations

as raised in *Shen v. Simpson*, the federal lawsuit challenging the law. Another key clarification was the exclusion of EB-5 participants from the definition of “foreign principal.”

With respect to the law’s impact on institutional buyers and investors, proposed Rule 73C-60.001 expands the “de minimus indirect interest” exception. Specifically, it now includes “any 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.” Questions remain, however, as to what retained “powers” may undermine the exception (e.g., the right to veto major decisions), and whether a foreign principal’s interest is still passive if it can direct management or policies with respect to everything other than an interest in real property.

Another major concern was whether pending real estate contracts (i.e., those entered into prior to July 1, 2023) could proceed to closing if the property was restricted under the new law. Proposed Rule 73C-60.002 clarifies that foreign principals, in this situation, may own or acquire the property subject to the pending contract, but the foreign principal must still register the property with the DOC.

Proposed Rule 73C-60.003 expands on the DOC registration requirements. First, it states the DOC will provide a website for individuals to determine the proximity of real property to military installations and critical infrastructure facilities in Florida. Second, it tolls the 30-day registration deadline for properties acquired between July 1, 2023, and the Rule’s effective date. Third, it creates Form COM-73C-60, Foreign Principal Real Property Registration Form (“Form”), which will be available to download and submit online. Fourth, it requires registration within 120 days of a foreign principal obtaining equitable title to real property by virtue of a contract not expected to close within 90 days of executing the contract. Lastly, it adds guidelines on updating registrations with the DOC.

And finally, proposed Rules 73C-60.004 through 73C-60.007 clarify the

computation of time within the statute; the DOC's fining authority; the DOC's lien rights for the nonpayment of fines; and the effect of FREC's pending affidavit — providing that it establishes a rebuttable presumption that the closing agent and seller did not have actual knowledge that the transaction violated the law.

Conclusion

It is important to note that the proposed Rules for Section 692.203, Florida Statutes, remain subject to public comment or hearing, if requested, until October 11, 2023. The DOC may also publish a notice of change or withdrawal, before approving the final version of the Rules, at least 21 days prior to adoption, based on any public comments or result of the public hearing. Until then, the proposed Form and website mentioned in the Rules will likely be unavailable for any type of preview or inspection.

Moreover, the Florida Department of Agriculture, Consumer Services and the Florida Real Estate Commission have yet to complete their respective rules to help implement the new law. This means real estate practitioners will likely continue to use interim forms and disclosures (e.g., prepared by the title companies) until the official State guidance is available.

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