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The Real Estate Roundtable

September 5, 2023

Ms. Patricia Fitzgerald

Chair

Florida Real Estate Commission, Illustrated Properties
5693 SE Crooked Oak Avenue
Hobe Sound, FL 33455-8319

Dear Chair Fitzgerald:

We appreciate your role in implementing Senate Bill 264, which was intended to advance Florida's efforts to safeguard national security. The Real Estate Roundtable¹ shares your concerns about national security, and we are pleased to offer several suggested interpretations to help achieve the stated goals of this new law without discouraging safe and sound real estate investment.

National Security Engagement

As stated above, we support efforts to protect national security and have worked successfully since 2003 with regional and federal law enforcement and intelligence agencies – including the Cybersecurity and Infrastructure Security Agency (CISA) – to mitigate the risks associated with terrorism and criminal activity on a broad array of physical and cyber threats to help protect commercial facilities and the people who use them.

The real estate industry has also played an important role in fostering security-related information-sharing practices between the U.S. government and the business community by creating the Real Estate Information Sharing and Analysis Center (RE-ISAC), a public-private information sharing partnership between the U.S. commercial facilities sector.²

¹ The Real Estate Roundtable and its members lead an industry that generates more than 20 percent of America's gross national product, employs more than 9 million people, and produces nearly two-thirds of the taxes raised by local governments for essential public services. Our members are senior real estate industry executives from the U.S.'s leading income-producing real property owners, managers and investors; the elected heads of America's leading real estate trade organizations; as well as the key executives of the major financial services companies involved in financing, securitizing, or investing in income-producing properties.

² The RE-ISAC, managed by The Real Estate Roundtable, has been designated by the Department of Homeland Security as the conduit for the commercial real estate industry for sharing information about potential physical and cyber security threats and vulnerabilities to help protect commercial facilities and the people who use them.

Foreign Investors in U.S. Real Estate

Foreign investment in United States real estate is a major source of investment for the industry, leading to economic growth, more vibrant markets and job creation. Foreign investment in U.S. real estate is overseen by the Committee on Foreign Investment in the United States (CFIUS), an interagency federal body tasked to review foreign investment in U.S. businesses and domestic real estate that implicate national security concerns³. Laws overseeing foreign investment vary throughout the world and continue to evolve due to the shifting geopolitical environment.

Real estate is a critical element of the Florida economy, and the state is one of the most popular states for foreign investment. Property taxes contribute over 18% of Florida's overall tax revenue. Further, approximately \$1.5 trillion of U.S. commercial real estate debt will come due in the next three years. Much of this debt will need to be restructured and refinanced, and foreign equity investments in these U.S. assets would help commercial real estate owners restructure, refinance or sell their properties – so it is imperative to protect capital formation to aid this process.

As such, care must be taken to ensure that Senate Bill 264 does not deter investment into real estate in the state or undermine the economic benefits of this important industry..

Impact of Senate Bill 264

While the new law is intended to help guard Florida from foreign countries of concern, the technical language of Senate Bill 264 is much broader in scope than the publicly-stated intent of the law, which could have unintended and negative consequences for investment in Florida and therefore limit the freedom of Florida's future growth.

In particular, many investment funds that are controlled or advised by regulated U.S. asset managers—including those that actively invest in Florida real estate—source investment capital in global capital markets. Non-U.S. investors routinely subscribe for small, generally passive minority interests in these funds, which may from time to time include investors from China. Our concern with the new law is that these U.S.-managed investment funds, which are controlled and managed by U.S. nationals, may now be precluded from pursuing investment opportunities in Florida if there is any level of investor participation in the fund from countries of concern like China. Based upon feedback from our members, the new law has served as a significant impediment to further investment in Florida real property, and is likely to impact Florida real estate markets. We do not believe that this was the intent when enacting the new law, and do not consider this outcome to serve the national security-focused policy objectives of the legislation.

For additional context, investment funds such those described above are often structured as limited partnerships that delegate to the general partner of the partnership the sole responsibility to operate, manage, and exercise control over the affairs of the partnership and its investments. Third-party investors, including the small, passive Chinese investors that may participate in those funds, ordinarily invest as limited partners in the partnership, and do not have the right to participate in the management or in any way exercise control over the partnership or its underlying investments. These passive limited partners cannot direct or control the operations, management or investment decisions of the fund in relation to the underlying investments, nor do they have any information or access rights in relation to the day-to-day operations of the underlying investments, sensitive information or the personnel or property associated with such investments.

³ CFIUS laws contain an investment fund “safe harbor” that states certain passive investments by foreign limited partners in U.S.-controlled investment funds are not covered transactions under CFIUS regulations provided certain requirements are met.

While there is a *de minimis* exception available for investment funds controlled by U.S. registered investment advisers,⁴ one reading of the legislation is that the exception applies only to the extent that the investor's ownership is maintained through registered equities of publicly traded companies. While it is unclear whether the Florida legislature purposefully crafted the *de minimis* exception with this intention, such a reading of the law would nullify the exception's application to many different types of private investment funds controlled by U.S. asset managers that regularly invest in Florida real property.

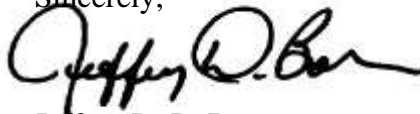
There is also a definition of "controlling interest" in Section 287.138⁵ that narrows the application of that section of the law to circumstances wherein the investor would have meaningful ownership or influence over the entity in question. Limiting the application of the prohibitions set forth in Sections 692.204, 692.202, and 692.203 only to instances where the investor from a country of concern has a "controlling interest" would also appropriately narrow the scope of the law without jeopardizing the original legislative intent. It would seem prudent to make these limitations consistent with the construct in Section 287.138.

We suggest clarifying that, notwithstanding any alternate interpretations, any investments that do not constitute a 'controlling interest' (as defined in 287.38) and are managed by an investment adviser registered with the U.S. Securities and Exchange Commission are permissible under 692.204, 692.202 and 692.203. It also may be desirable to clarify that the guidance is meant to eliminate conflicting language in each of those provisions relating to exceptions to the stated rule.

Conclusion

We respectfully ask that you carefully consider the impact of your agency's interpretation and implementation efforts of this new law so that it does not prohibit major investments in the state, which are safe from control by foreign countries of concern and promote growth without sacrificing the security or economic interests of Florida.

Sincerely,



Jeffrey D. DeBoer
President and Chief Executive Officer

⁴ For example, see Section 692.204(1)(b)(2).

⁵ Section 288.007 has a substantially similar definition.