

All Domestic Condominiums Can Now Be Exempt from Filing & Registration Requirements of the Interstate Land Sales Full Disclosure Act

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Until now, when developers intending to develop and then market, on a multi-state or national basis, resort, vacation, and even large (over 100 units) principal residence condominium projects, their real estate attorneys often had to scurry off to the firm's library to study the exemptions from the tedious and often duplicative filing and registration requirements of the federal Interstate Land Sales Full Disclosure Act ("ILSA"). Failure to register when required could lead to cancellation of the sales contract between the developer and consumers or even worse--could result in damages payable by the developer to the consumer.

ILSA was originally intended to protect consumers against fraudulent land sale practices such as the sale of swamp land or lots that had no practical access or the necessary utility services for development. Expanding on the scope of the law, the federal Department of Housing and Urban Development ("HUD"), the agency empowered to administer and enforce ILSA, issued interpretative rulings that ILSA also applied to the sale of condominium units as well as land and lot sales.

Most condominium projects have been exempt from ILSA either because (a) they had completed projects on them before sales activity commenced or the housing units could be built, completed, and delivered to the consumer within two years after the date of the contract of sale; or (b) they had fewer than 100 units, were to be sold entirely within the same state as the project, and were to be sold solely to in-state residents who visited the unit.

After the real estate collapse in 2008, lawyers representing consumers who were startled to learn that their units were worth far less than the original purchase price, turned to ILSA either to cancel the purchase contract or to seek damages from the developer's violation of ILSA. Those developers who had structured their purchase agreement to qualify for an ILSA exemption were able to enforce those contracts with the consumers. Others who had not paid attention to HUD's detailed requirements for an exemption found that their sale evaporated and the consumers' deposits had to be returned, often forcing the project into foreclosure or bankruptcy.

Although most condominium projects could qualify for an exemption, the larger, high-rise buildings and many resort properties could not be completed within the two year period and therefore were required to register with HUD and distribute to consumers an HUD-approved Property Report which could take up to six months to be approved--in addition to any disclosure documents required by individual state condominium laws.

Congress, in its wisdom, and not without the lobbying of the real estate developer community, on September 18, 2014, expanded the exemption in clause (b) of ILSA so that a condominium unit which is not otherwise exempt as a completed or short-term construction project (under clause (a) of ILSA) can be exempt under the clause (b) regardless of the number of units, if it is designated for separate ownership in accordance with a condominium plan or declaration and further provided that upon delivery to the consumer, the owner of such unit will have sole ownership to the unit and an undivided interest in the common area associated with the unit and the unit will be an improved lot.

Understandably, the amendment to the law that creates the new exemption does not affect ILSA's prohibitions against misrepresentations and fraud, which will continue to apply to otherwise exempt projects.

In addition, no one knows how HUD will interpret and implement this expanded exemption. HUD will have to determine whether there should be additional regulatory requirements for the purchase contract regarding (i) delays caused by events beyond the control of the developer, (ii) a consumer's contractual right to demand that the developer sell the identified unit to him, and (iii) whether the 180 day limit on the developer's right to cancel for failure to meet a presale requirement will continue to apply in order to qualify for the exemption in clause (a) above.

Nevertheless, the new or expanded exemption finally permits larger condominium projects to avoid the duplicative disclosure requirements without reducing the necessary protections for consumers.