

**Interstate Land Sales Full Disclosure Act  
Update  
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**I. The Act and its General Rules**

**A. The Act and Regulations**

1. Statute: Interstate Land Sales Full Disclosure Act, 15 U.S.C.A. §§ 1701-1719 (“ILSA” or the “Act”).

2. Regulations: Originally, 24 C.F.R. §§ 1710.1-1720.635, administered by the U.S. Department of Housing and Urban Development (“HUD”); now replaced by nearly identical regulations issued by the Consumer Financial Protection Bureau (“CFPB”) in 12 C.F.R. Parts 1010 through 1012. (Effective July 21, 2011, the responsibility for administering the Act was transferred from HUD to CFPB under the Dodd-Frank Wall Street Reform and Consumer Protection Act.)

3. Guidelines: Guidelines to the Interstate Land Sales Registration Program published at 61 F.R. 13596 (Mar. 27, 1996). The Guidelines were interpretive rules issued by HUD to illustrate the exemptions from the Act in various circumstances. In court cases coming out of the 2007-2010 recession, some federal judges declined to defer to the Guidelines, reasoning that the Guidelines did not have the force of law and could not be enforced to contradict the plain wording of the statutes. By the time CFPB took over the administration of the Act in 2011, CFPB had decided against posting the Guidelines on the agency’s ILSA website.

However, before the recession, courts and commentators regularly cited and relied on the Guidelines, and more recently, the Colorado Court of Appeals referred to the Guidelines in *PFW, Inc. v. Residences at Little Nell Development, LLC*, 242 P.3d 1094 (Colo. App. 2012). The Guidelines may still be instructive, then, in analyzing selected exemptions from the Act. HUD continues to post the Guidelines at [https://portal.hud.gov/hudportal/HUD?src=/program\\_offices/housing/rmra/ils/ilsexemp](https://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/rmra/ils/ilsexemp).

4. CFPB’s Web Page:  
[www.consumerfinance.gov/privacy/interstate-land-sales-registration-files-ils/](http://www.consumerfinance.gov/privacy/interstate-land-sales-registration-files-ils/).

**B. Registration and Disclosure (15 U.S.C.A. § 1703(a))**

1. The Rule: Except in the case of a transaction that is exempt from the Act’s registration and disclosure requirements, it is unlawful for a developer or its agent to sell or lease subdivision lots, making use of the mails or any means or instruments of transportation or communication in interstate commerce, unless the developer has (a) filed with CFPB an effective **Statement of Record**, including a **Property Report**, prepared in accordance with the Act, and (b) provided the prospective buyer or tenant with the Property Report before the buyer or tenant signs the agreement for sale or lease.

Exemption for Short-Term Leases. As indicated above, the Act applies to sales and leases alike. However, the regulations include an exemption for the lease of lots for five years or less if the terms of the lease do not obligate the tenant to renew. This regulatory exemption for short-term leases is a “partial exemption” and accordingly, subject to the Act’s anti-fraud provisions, as explained below. (12 C.F.R. §§ 1010.14(a)(2) and (c))

2. The Rule Applied to Condominiums: HUD and the courts have long taken the position that a condominium is a “lot” governed by the Act. *See, e.g., Giralt v. Vail Village Inn Associates*, 759 P.2d 801 (Colo. App. 1988).

3. Completing a Registration. The Statement of Record is the complete filing required by CFPB for any offering of lots that must be registered under the Act. It is comprised of two parts. The first is the Property Report, written in a narrative format according to strict guidelines in the CFPB regulations, to provide prospective buyers and tenants with information about the developer, the lots offered for sale or lease, and the title, lay-out, services, amenities and locale of the subdivision. The second part of the Statement of Record is the Additional Information section. It is written as a detailed outline with extensive exhibits, including, for example, USGS maps depicting the subdivision location, a title report with all exception documents covering the subdivision, a general plan of the subdivision, the lot sale contract or lease form, and the developer's financial statements.

4. Note Regarding Contracts for Non-Exempt Offerings. A contract for the sale or lease of a lot that is **not exempt** from the Act's registration and disclosure requirements is subject to two important restrictions:

(a) Purchaser's 7-Day Revocation Right: The contract may be revoked by the buyer or tenant until midnight of the seventh day after the purchaser or tenant signed the contract (or until the expiration of any longer revocation period provided by state law). The contract must clearly state the revocation right. (15 U.S.C.A. § 1703(b)).

(b) Purchaser’s Two-Year Revocation Right: The purchaser of a lot that is not exempt from the Act's registration and disclosure requirements is entitled to cancel the contract within two years after the date of signing the contract unless one of these two conditions are met:

(i) The developer delivers a warranty deed conveying the lot (free and clear of liens and encumbrances) to the buyer within 180 days after the buyer signs the contract;

or

(ii) The contract contains these provisions:

(A) A legally sufficient and recordable lot description; and

(B) A covenant by the seller to give the buyer written notification of any default by the buyer and a period of at least 20 days to cure the default; and

(C) An agreement by the seller that, if the buyer defaults after depositing earnest money equal to 15% or more of the purchase price, the seller will refund to the buyer any

earnest money in excess of (i) 15% of the purchase price or (ii) the seller's actual damages, whichever is greater. (15 U.S.C.A. § 1703(d))

**B. Definitions Important to the Rule (15 U.S.C.A. § 1701 and related regulations)**

1. Subdivision: Any land located in any state or in a foreign country, divided or proposed to be divided into lots, contiguous or not, for the purpose of sale or lease as part of a common promotional plan.

2. Lot: Any portion, piece, division, unit, or undivided interest in land located in any state or foreign country, if the interest includes the right to the exclusive use of a specific portion of the land. The concept includes a condominium, cooperative or campsite, and notwithstanding the use of the word "land" in the definition, the jurisdiction of the Act could be triggered by the offering of a "dockominium" or other real property interest off land.

The key test in determining whether a developer is offering a lot, as defined under the Act and regulations, apparently lies in the right of the buyer or tenant to use the property repeatedly, on an exclusive basis (so that the owner could evict another person from using the property during the owner's allotted time), for even a portion of the year. A membership that carries these rights allowing exclusive, repeated use of a particular parcel is included in the definition of a "lot," according to the Guidelines. As a result, some timeshare regimes may trigger ILSA requirements, depending on the description of the interest sold to the buyer and the reservation/occupancy plan and rights. (See, *PFW, Inc.*, cited in Part 1A of this outline above.)

3. Common Promotional Plan: Any plan undertaken by a single developer or a group of developers acting together to offer lots for sale or lease. The Guidelines list these factors to be assessed in determining the existence of a common promotional plan:

(a) The existence of a common promotional plan is presumed when a developer or a group of developers acting together offers lots which are contiguous or which are known, designated, or advertised under a common name.

(b) The number of lots offered is not determinative in a finding of a common promotional plan.

(c) Other characteristics considered in a finding of a common promotional plan include those listed below (but note, the presence or absence of one or more of these characteristics will not be conclusive):

- (i) 10% or greater common ownership of the lots offered;
- (ii) the same or similar name for the lots;
- (iii) common sales/leasing agents;
- (iv) common sales/lease office facilities;
- (v) common advertising; and
- (vi) common inventory.

4. Site: A group of contiguous lots, whether such lots are actually divided or proposed to be divided. Lots are considered to be contiguous even if the contiguity is broken by a road, park, small body of water, recreational facility or similar feature.

5. Sale: Any obligation or arrangement for consideration to purchase or lease a lot directly or indirectly.

6. Developer: Any person who, directly or indirectly, sells or leases or offers to sell or lease, or advertises for sale or lease, any lots in a subdivision.

7. Agent: Any person who represents or acts for or on behalf of a developer in selling or leasing or offering to sell or lease a lot in a subdivision. (The statute excludes from the definition of "agent" an attorney whose representation of a party is limited to rendering legal services only.)

## II. Exemptions for Condominiums

### A. General Rules Regarding Transactions Exempt Under the Act

1. Evasion of the Act (15 U.S.C.A. § 1702). The exemptions available under the Act and regulations are not applicable when the method of sale or lease is adopted in order to evade the Act. Case law from the recession indicate that a developer should state in its sale contract or lease form that (i) the developer is relying on a particular exemption, and (ii) the developer's reliance on the exemption does not represent an effort to evade the Act, but instead, is based on a "legitimate business purpose" (in the words of the court in *Gentry v. Harborage Cottages-Stuart, LLC*, 654 F. 3d 1247 (11<sup>th</sup> Cir. 2011)). Those decisions from the downturn did not provide examples of such purposes, but commentators suggest that a developer might cite, for example, the purpose of improving the marketability and financing options for the project or the purpose of saving costs that otherwise would be required in filing and maintaining registration with CFPB.

2. Anti-fraud Provisions. The Act includes "anti-fraud" provisions which apply to the offerings of lots that are registered with CFPB. The anti-fraud rules also extend to lots that qualify for selected exemptions from the registration and disclosure requirements of the Act (and those exemptions are sometimes called "**partial exemptions**," because only the anti-fraud provisions of the Act are applicable). A limited number of transactions qualify as "**full exemptions**," which escape all scrutiny under the Act. In other words, a developer qualifying for a full exemption may sell or lease lots wholly outside the Act's restrictions, including the anti-fraud provisions. (Of course, any offering, whether registered, fully exempt or partially exempt under the Act, remains subject to other federal and state fair trade and anti-fraud laws.)

(a) ILSA's Anti-fraud Provisions (15 U.S.C.A. § 1703(a)(2)): It is unlawful for a developer or his agent to (i) employ any device, scheme or artifice to defraud; (ii) obtain money or property by means of an untrue statement of a material fact; (iii) omit to state material facts necessary to make the statements regarding the lot or subdivision not misleading; or (iv) engage in any transaction, practice, or course of business which operates as a fraud or deceit upon a purchaser.

CFPB implements these principles with regulations on sales and leasing practices and standards, including restrictions on certain advertising materials and promotional activities. (12 CFR §§ 1011.10-1011.30)

(b) Note the Contract Requirement: The anti-fraud provisions also require that if a developer or his agent represents that the developer will provide or complete roads, sewers, water, gas or electric service or recreational amenities, then the contract must include that covenant by the developer. (15 U.S.C.A. § 1703(a)(2)(D)).

3. Exemptions Self-Operative. No notice or filing is necessary to take advantage of an exemption unless the text of a particular exemption specifically provides otherwise. However, developers should maintain records to demonstrate that they have met the requirements of any claimed exemption.

## **B. Exemptions available for Condominiums**

1. Exemption for 25 Lots (15 U.S.C.A. § 1702(a)(1)). Sale or lease of lots in a subdivision containing **fewer** than 25 lots. (The exemption would be more accurately described as the “24-lot exemption.”)

(a) Counting 25 Lots. If a subdivision contains 25 or more lots, but fewer than 25 are offered pursuant to a common promotional plan (because, for example, several lots have been permanently dedicated for public park uses), the offering is exempt.

(b) Trap Laid by the Definition of Subdivision. If a developer acquires fewer than 25 lots in a larger subdivision, and continues to act in concert with the developer of the balance of the subdivision, the offering may be subject to the Act, because all the lots under that “common promotional plan” could be considered a single subdivision, and so the 24-lot limit is at risk.

(c) Anti-fraud Provisions. Not applicable. A sale or lease under this exemption is not subject to the registration and disclosure requirements or the anti-fraud rules. This is a “full exemption.”

2. Exemption for Improved Lots (15 U.S.C.A. § 1702(a)(2)). Sale or lease of improved land on which there is a residential, commercial, condominium or industrial building, or sale or lease of land under a contract specifically obligating the seller or lessor to complete such building within two years.

(a) Standard of Completion. A building is deemed complete when it is physically habitable and usable for the purpose for which it was purchased or leased. For example, a residential building is complete when ready for occupancy, with all utilities connected.

(b) Measuring Two Years. The two-year building period begins on the date the purchaser or lessee signs the contract (as opposed to the date when the contract is fully signed).

(c) Requirements for the Contract Form. Requirements relating to the contractual covenant to build within two years:

(i) Seller’s Discretion to Perform is Curtailed. The contract must not allow nonperformance by the seller or lessor in its discretion. (Beware, for example, of contract provisions that give the seller discretion to cancel the contract instead of curing title objections cited by the buyer

during the due diligence period, or to unilaterally terminate the contract following casualty damage instead of rebuilding.)

(ii) Contingencies Generally Put the Exemption at Risk. If the contract conditions the obligation to build on another contingency (such as the buyer's obtaining construction financing) which is not fulfilled, the sale will not be exempt.

(iii) Specific Performance Remedy is Essential. The contract must not negate the purchaser's or tenant's right to specific performance. The best practice is to *expressly provide* a specific performance remedy for the developer's default.

(iv) Force Majeure Delays May Be Permitted. The contract may allow for nonperformance or delays beyond the two-year building period for reasons not within the seller's or lessor's control if such provisions are legally recognized as defenses to contract actions in the jurisdiction where the building is to be constructed. Accordingly, provisions allowing for time extensions due to acts of God, casualty losses or material shortages may be permissible. Case law coming out of the recession indicates that using a "kitchen-sink" description of force majeure events that may excuse a developer's delay could be risky, in that such an exhaustive list could indicate that the obligation to build the dwelling is not a real and binding covenant.

(d) Special Considerations for Phased Projects. In a multi-phased project, the obligation to build within two years does not require completion of the entire project within that period, but only completion of the phase in which the unit sold or leased is to be located. The contract should clearly state that the developer is undertaking to build only the unit and the remaining facilities in that particular phase, and not in the entire project.

(e) Rule on Pre-sale Clauses (CFPB Regulations). In the case of a condominium or other multi-unit project, a pre-sale clause conditioning the sale or lease of a unit on the sale of a certain percentage of other units is permissible if the pre-sale period is no longer than 180 days, calculated from the date the first purchaser signs a contract in the project, or in a phased project, from the date the first purchaser signs the first contract in the phase in question. The pre-sale period cannot extend the two-year building period.

(f) Anti-fraud Provisions. Not applicable. A contract complying with the improved lot exemption requirements enjoys "full exemption" status.

3. **Exemption for Industrial or Commercial Developments (15 U.S.C.A. § 1702(a)(8)).** Sale or lease of real estate which is zoned for industrial or commercial development or which is restricted to such use by a recorded declaration of covenants, conditions and restrictions, provided specified conditions are satisfied.

(a) Conditions for the Exemption.

(i) Approved Access. Local authorities must have approved access to a public street or highway running at least to the legal boundary of the subdivision, if not to each lot.

(ii) Business Entity Purchase. The purchaser or lessee must be a duly organized corporation, partnership, trust or business entity engaged in commercial or industrial business.

(iii) Representation of Purchaser. The purchaser or lessee must be represented in the transaction by a representative of its own selection. The representative need not be an attorney, and a sole proprietor is not excluded from representing himself.

(iv) Purchaser's Affirmation. The purchaser or lessee must affirm in writing as follows:

(A) The purchaser or lessee is either purchasing or leasing the real estate substantially for its own use, or has a binding commitment to sell, lease, or sublease the property to an entity which is a duly organized corporation, partnership, trust or business entity engaged in a commercial or industrial business;

(B) The purchaser or lessee is engaged in commercial or industrial businesses; and

(C) The purchaser or lessee is not affiliated with the seller or lessor or its agent.

These affirmations should be retained by the developer for three years or for the period of the applicable statute of limitations in the applicable jurisdiction, whichever is longer. If the affirmations are contained in the contract, a space must be provided for the initials of the purchaser or lessee.

(v) Title. A title policy or opinion must be issued in connection with the transaction showing title vested in the seller or lessor, subject only to exceptions approved in writing, preferably in a separate document, by the purchaser or lessee prior to recording of the deed or execution of the lease, but note:

(A) Recording of a lease is not required because of this regulation; and

(B) The purchaser or lessee may waive the requirement for a title policy or opinion.

(b) Anti-fraud Provisions. Not applicable. This is another "full exemption."

4. **The 99 Lot Exemption (15 U.S.C.A. § 1702(b)(1))**.

(a) General Rule. Subdivision lot sales are exempt from registration requirements if the following conditions are met:

(i) The subdivision contained fewer than 100 lots on April 28, 1969 (the effective date of the Act).

(ii) Since April 28, 1969, the subdivision has contained fewer than 100 lots.

(iii) The subdivision will continue to contain fewer than 100 lots.

(b) Counting 99 Lots Under the Rule.

(i) Fully Exempt Lots May Not Count..... The 99 lot count excludes lots that are wholly exempt from the Act. The exemptions that are completely exempt are listed currently at 15 U.S.C.A. § 1702(a) (and they include the three exemptions listed in this outline above). A developer need not count the lots that fall within any category (or combination of categories) of transactions that are entirely exempt from the Act.

(ii) But Beware of Piggy-Backing. Before the recession, developers of large-scale condominium projects routinely took advantage of a long established practice, which HUD had expressly permitted under the Guidelines, of combining the 99-lot exemption and the two-year build-out exemption to avoid the Act's registration requirements. Under this "piggy-back" approach to the exemptions, developers of large condominium projects would sell the first 99 units under the 99-lot exemption, and then sell the remaining units under the two-year build-out exemption as soon as the project completion date could be comfortably scheduled in the following two years. Federal courts in New York and Florida held against developers using the strategy, and no developer should rely on piggy-backing now. However, with the adoption of the new condominium exemption noted below, developers of large scale condominium projects have a new tool for complying with the Act without registering.

(c) Anti-fraud Provisions. The Act's anti-fraud provisions do apply to the sale or lease of lots under this section of the Act.

5. **The New Condominium Exemption (15 U.S.C.A. §§ 1702(b)(9) and 1702(d)).** The sale or lease of a condominium unit that is not already fully exempt from all the Act's requirements under 15 U.S.C.A. §1702(a), is exempt from the Act's registration and disclosure requirements.

(a) Effective date: March 25, 2015.

(b) Developer's alternative strategy for compliance: This exemption does not replace other exemptions that may be available, as described above. However, using this ILSA amendment, developers of large condominium projects may offer contracts without registering with the CFPB and delivering Property Reports to prospective buyers, and without concerns for limiting the number of units under the 24-lot or 99-lot exemptions, or for completing construction within two years under the improved lot exemption

(c) Definition of "condominium unit": "a unit of residential or commercial property to be designated for separate ownership under a condominium plan or declaration provided that upon conveyance –

(i) the owner of such unit will have sole ownership of the unit and an undivided interest in the common elements appurtenant to the unit; and

(ii) the unit will be an improved lot.



(d) Anti-fraud provisions: This is a “partial exemption,” in that the Act’s anti-fraud provisions govern the conduct of developers and their agents who rely on this exemption.

### **III. Penalties for Non-Compliance with ILSA**

#### **C. Two Year Revocation Right**

1. Failure to Deliver Property Report (15 U.S.C.A. § 1703(c)). If the seller or lessor of a lot that is not exempt from registration fails to give a Property Report, filed with CFPB and effective under the Regulations, to the buyer or tenant before the sale or lease contract is signed, the buyer or tenant may revoke the contract within two years after signing the contract.

2. Failure to Comply with Requirements for Contract Terms (15 U.S.C.A. § 1703(d)). A contract for a non-exempt lot, even if registered with CFPB, must meet certain requirements; otherwise, the contract may be revoked within two years after the buyer or tenant signs it. (See Part I.C in this outline for the contract additions that will avoid the application of this rule.)

#### **B. Criminal Penalties (15 U.S.C.A. § 1717)**

For willful violations of the Act or Regulations, including misrepresentations in the Statement of Record, the Act imposes a fine of up to \$10,000 and imprisonment for up to five years.

#### **C. Administrative Penalties (15 U.S.C.A. § 1717a(a))**

The CFPB may impose a civil money penalty of \$1,000 for each violation of the Act or Regulations, up to a maximum of \$1,000,000 in any one year. Each violation is counted separately with respect to each sale or lease transaction affected by the violation, and each day of a continuing violation may be counted as a separate violation.

#### **D. Civil Liabilities (15 U.S.C.A. § 1709)**

A buyer or tenant may bring suit for damages, specific performance or other relief at law or in equity and receive attorneys' fees, appraisal fees and other costs of the suit. The courts have wide latitude in providing such relief as they find "fair, just and equitable."

#### **E. Additional Penalties (15 U.S.C.A. § 1713)**

The rights and remedies provided in the Act supplement any other remedies available at law or in equity.