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THE INTERSTATE LAND SALES FULL DISCLOSURE ACT: AN ANALYSIS OF ADMINISTRATIVE POLICIES IMPLEMENTED IN THE YEARS 1968-1975

A pair of observers remarked in 1969 that the Interstate Land Sales Full Disclosure Act\(^1\) might well be "the best kept secret of the century."\(^2\) The observation was ironic, for the purpose of the Act, as evidenced by its title, is full disclosure. Although its existence is no longer unknown, the practical administration of the Act by the Office of Interstate Land Sales Registration (OILSR) nevertheless remains an enigma to many parties. This article will review decisions rendered under the Act during the last six years and will analyze current administrative policies within the context of the Act's statutory mandate.\(^3\)

I. THE STATUTORY SCHEME: AN OVERVIEW

A. The HUD Filing

The Act's sole purpose is to prevent fraudulent sales of subdivided land by providing full disclosure of facts, and by rendering deceptive sales practices actionable. The heart of the scheme is embodied in section 1703 of the Act, which prohibits sales of subdivided land unless, prior to sale, a statement of record is in effect and a property report has been provided to the purchaser. Violation of either condition renders the sale voidable. The statement of record is a comprehensive report about the subdivision and the developer. To be effective, the statement must be filed in proper form and contain properly documented information. The property report is an abstract of the statement of record. OILSR's administrative responsibility is to determine whether the format and documentation requirements are met. OILSR has no authority to regulate the merits of any offering. Thus, for example, a development may violate local health regulations, but

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3. This article provides an analysis of enforcement policies and remedies. The topics of jurisdiction, exemptions, and remedies are given primary treatment. For a comprehensive discussion of the Act's history, mechanics, and legislative alternatives, see Coffey & Welch, supra note 2.
its statement of record can still be effective if the violation is disclosed. Once submitted, a continuing duty exists to amend any filing whenever changed circumstances render its representations inaccurate.

Assuming the property report is actually read, it achieves two consumer purposes: it provides the knowledgeable consumer with a convenient source of information, and it suggests to unknowledgeable purchasers pertinent topics for consideration. However, the excessive length of the report, including verbatim inclusion of detailed financial reports, discourages consumer reading.

B. Advertising Regulations

In addition to requiring full disclosure, HUD regulations also mandate fair disclosure. Regulation 1715.5 prohibits any promotional statements that materially differ from any OILSR disclosure filing and further prohibits any false or misleading advertising. The latter prohibition is defined by 40 standards and guidelines published in regulation 1715.15. Three themes permeate the guidelines. First, advertising must be complete, with no material omissions. Second, all claims and representations must be specific and accurate. Third, "[a]ny inference reasonably to be drawn from advertising or promotional material will be considered to be a positive assertion" unless it is clearly negated. Thus, the truth of the implication must be reasonably guaranteed.

This last requirement is particularly problematic, for it requires developers to anticipate every reasonable inference any buyer could make. The guidelines do not advise how or where the negation of inferences should be accomplished. Regulation 1715.10 further requires the printing of a disclaimer upon all printed advertising material and upon certain classified advertisements. The balance of the regulation prohibits a variety of

6. For a comprehensive discussion of suggested procedures for complying with these guidelines, see Martin, Advertising Guidelines Under the New OILSR Regulations, 1 LAND DEV. L. REP. at E-100.
7. For example, section 1715.15(1) prohibits use of the phrase "guaranteed refund" unless the refund is unconditional.
8. See, e.g., 24 C.F.R. § 1715.15(k) (1976), which provides that "use of maps to show proximity to other communities is prohibited unless such maps shall be drawn to scale and scale included, or the specific road mileage appears in easily readable print."
10. For example, the word "homesite" implies that the "lots are immediately usable for such purpose without any further improvement or development by the prospective purchaser and that there is an adequate potable water supply available." Id.
11. The disclaimer provided in the regulation states: "Obtain the HUD Property
specific advertising practices.\textsuperscript{12}

OILSR’s policy is to treat the standards as substantive requirements rather than as mere “guidelines.”\textsuperscript{13} Few developments have occurred in the enforcement of the advertising regulations, however, partly because regulation 1715.5(b) provides only for the ponderous remedies of indictment and injunction, and for the innocuous remedy of conducting investigations. Consequently, OILSR’s practical enforcement sanctions are blustery but toothless warnings.\textsuperscript{14}

C. Environmental Impact Statement

A possible conflict between the disclosure requirements of the National Environmental Protection Act (NEPA)\textsuperscript{15} and the Interstate Land Sales Act came to a head in Flint Ridge Development Co. \textit{v.} Scenic Rivers Association.\textsuperscript{16} Scenic Rivers sought an injunction to suspend the effective date of a disclosure statement filed with HUD by the developer, pursuant to OILSR regulations, pending compliance with the NEPA provision requiring the filing

\textsuperscript{12} Of special interest is regulation 1715.25, which prohibits the provision of a property report “along with other materials when this is done in such a manner as to conceal the property report from the purchaser.” This regulation aims at preventing the practice of heaping upon the purchaser at closing a ream of brochures and documents. The regulation requires proof of a specific intent, however, thereby imposing severe evidentiary burdens upon a prospective plaintiff.

\textsuperscript{13} Interview with Rex Glaspey, \textit{supra} note 11.

\textsuperscript{14} See, e.g., Letter from John McDowell, Deputy Administrator, OILSR, to Barbara Nordeen (Jul. 31, 1975), Holmes Harbor, OILSR No. 0-3930-56-112, in which the developer was ordered to cease publication of an advertisement which omitted the required HUD disclaimer. Additional sanctions may be available in certain circumstances, however. Should a developer fail to cooperate in an investigation, for example, his filed statement may be summarily suspended. 24 C.F.R. § 1710.45(b) (2) (1976).

In at least one case, OILSR has suspended a statement of record for advertising violations. \textit{See} HUD News, May 29, 1973, \textit{reprinted in} 1 \textit{LAND DEV. L. REP.} at E-67. OILSR suspended the filing essentially because the developer had not disclosed facts as they were advertised. Interview with Rex Glaspey, \textit{supra} note 11. As this basis for suspension is not listed in section 1710.45, however, the action appears to have been beyond OILSR’s statutory authority. \textit{See also} 1 \textit{LAND DEV. L. REP.} at D-132, which discusses Hills \textit{v.} Omega Properties, Civil No. 75-280 (M.D. Fla., June 19, 1975) and the issuance of injunctions for violation of advertising standards and guidelines.


of an environmental impact statement because of possible ecological damage to a nearby river. Two issues were before the Supreme Court. First, the Court was asked to decide whether allowing a disclosure statement to take effect was a major federal action significantly affecting the quality of the human environment within the meaning of NEPA. Second, even if a major federal action were involved, HUD contended that it would be exempt from filing an environmental impact statement because compliance with NEPA was impossible since HUD was also required to comply with the Interstate Land Sales Act's provision that a statement of record must become effective within 30 days of filing. The Court never reached the federal action issue, however. Instead, it held that even if HUD's action were a major federal action significantly affecting the quality of the human environment which normally would require an environmental impact statement, in this case, because of the clear conflict between the two statutes, NEPA would give way to the Interstate Land Sales Act's disclosure requirements and NEPA's impact statement requirement would not apply.

II. ELEMENTS OF STATUTORY JURISDICTION

The most crucial determination in the administrative process is whether a given subdivision is subject to the Act. Three issues are involved: whether the subdivision has been promoted in interstate commerce, whether the development constitutes a "subdivision" containing "lots," and whether the subdivision consisted of 50 or more lots on or after April 28, 1969. Each of these three elements must exist in order to establish jurisdiction.

18. 96 S. Ct. at 2437. The district court had held that the NEPA requirement applied to HUD since the allowing of the developer's statement of record to become effective constituted a major federal action. 382 F. Supp. 69 (E.D. Okla. 1974). In affirming the Tenth Circuit agreed that it was such an action because there could be no interstate sales from the subdivision without an effective statement. 520 F.2d 240 (10th Cir. 1975). Further, the potential development of 3,000 homesites serviced by septic tanks would significantly affect the environment. Failure to suspend this particular statement was thus governed by NEPA. In addition, the court held that OILSR's 30-day rule for statement clearance, 24 C.F.R. § 1710.21(a) (1976), was not inherently incompatible with NEPA. Even though compliance with NEPA required a minimum of 75 days, suspension of the statement pending compliance with the Act was the proper procedure. So construed, the acts were entirely consistent, even complementary. 520 F.2d at 245.
19. 96 S. Ct. at 2437-38.
21. Id. § 1703(a)(1).
A. Promotion Through the Means of Interstate Commerce

Since federal regulatory authority over land is derived from the commerce clause, promotion in interstate commerce is a condition precedent to any OILSR assertion of jurisdiction. Discussion of the law of interstate commerce within the land sales context has centered largely on two topics: the regulation of intrastate activities and the concept of indirect uses of the jurisdictional means.

Intrastate Promotions. The threshold issue regarding intrastate promotions is what quantum of involvement with the instruments of interstate commerce is sufficient to confer federal jurisdiction. OILSR asserts that minimal use of the means of interstate commerce, even minimal intrastate uses, by a developer will suffice. This position is based on two premises: that Congress possesses the power to regulate intrastate activities and that Congress has delegated this power to HUD. Since the first premise is apparently settled, the issue of delegation is paramount.

Section 1703(a) of the Act prohibits the “use of any means of transportation or communication in interstate commerce, or of the mails” in violation of the statute. Due to the grammatical position of the modifying term “in interstate commerce,” a literal reading of the Act indicates that Congress has imposed two separate prohibitions: any use of the mails, interstate or otherwise; and interstate uses of all other means or instruments of commerce. Thus, to be prohibited, the use of “means or instruments,” other than the mails, must be “in interstate commerce.”

25. In a letter to counsel for one subdivision, OILSR stated:

   The Act provides, generally, that any subdivision of 50 or more lots is subject to jurisdiction if the developer or agent directly or indirectly makes use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or lease the lots. There is no statutory reference to interstate “activity.” This means that any use of the telephone, the mail or any newspaper (etc.) to sell lots in the subdivision would subject the developer to the requirement to comply with the Act [unless otherwise exempt]. Letter from John McDowell to Sam Allgood, Esquire, Virginia City Subdivision (Mar. 20, 1975), OILSR No. 3-0821-09-41.
Since the statute possesses a facially plain meaning, no further analysis is necessary.\textsuperscript{28} As added force, however, the secondary canons of statutory construction also support this plain meaning. One secondary canon provides that a statute copied from another statute must be construed consistently with contemporaneous judicial interpretations of the earlier enactment.\textsuperscript{29} In \textit{Myzel v. Fields},\textsuperscript{30} the Eighth Circuit interpreted the jurisdictional phrase "instruments of interstate commerce," contained in the Securities Exchange Act of 1934,\textsuperscript{31} to include purely intrastate telephone conversations, and distinguished it from the phrase "in interstate commerce," which excluded such transactions.\textsuperscript{32} Thus, the use of "in interstate commerce" in section 1703(a) imports to Congress an intent to regulate only \textit{interstate} uses of the means of commerce.\textsuperscript{33}

Another secondary constructional canon, mandating that remedial statutes be liberally construed to achieve their intended purpose,\textsuperscript{34} appears to support the opposite conclusion. This interpretation should be rejected, however, because Congress clearly did not intend that the Act cover every sales transaction.\textsuperscript{35} Since Congress obviously did not intend to exercise its full plenary powers, OILSR should not expand the Act beyond its facial limitation. On

\begin{footnotes}

\item[29] A. Sutherland, \textit{supra} note 28, §§ 52.02-.03.

\item[30] 386 F.2d 718 (8th Cir. 1967).


\item[32] 386 F.2d at 727 n.2. The court was relying on this distinction previously acknowledged in Rosen \textit{v. Albern Color Research, Inc.}, 218 F. Supp. 473 (E.D. Pa. 1963). Although the distinction may seem merely semantical, the Sixth Circuit has recently adopted it in Aquionics Acceptance Corp. \textit{v. Kollar}, 503 F.2d 1225 (6th Cir. 1974).

\item[33] One article has asserted that although section 1404(a) [15 U.S.C. § 1703(a)] uses the term "in" interstate commerce, rather than the more encompassing words "of" or "affecting"; the operation of this language has not been limited to the use of interstate facilities across state lines. "Interstate commerce" . . . has been interpreted to include the \textit{intrastate} use of \textit{interstate} facilities, such as an \textit{intrastate} telephone call . . . .

\item[34] A. Sutherland, \textit{supra} note 28, § 70.01.

\item[35] For example, Congress specifically refrained from asserting jurisdiction over subdivisions containing less than 50 lots. 15 U.S.C. § 1701(3) (1970). Congress further created several statutory exemptions. \textit{Id.} § 1702(a). This intent to assert less than full jurisdiction distinguishes the Land Sales Act from the federal securities acts in which Congress intended to assert its full plenary powers to throttle fraud. \textit{See} Creswell-Keith, Inc. \textit{v. Willingham}, 264 F.2d 76, 80 (8th Cir. 1959).
\end{footnotes}
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balance, then, it appears that OILSR's jurisdictional policy is not supported by its statutory delegation.  

To date, only one decision has been rendered on the jurisdictional issue. In *Wiggins v. Lynn*, plaintiff Wiggins promoted lots through a variety of purely intrastate means, including direct mail. From 1969 to mid-1973, only three of plaintiff's 5,451 lots sold were bought by non-Texas residents. Wiggins sought equitable and declaratory relief from OILSR enforcement action; the government defendants counterclaimed to enjoin further sales pending a registration. In denying Wiggins' request and granting OILSR's counterclaim, the court merely recited the facts and issued bare legal conclusions. Since the opinion did not indicate which specific activities rendered the promotion subject to the Act, the underlying issue concerning interstate commerce remains undecided.  

*Direct and Indirect Promotion.* The second commerce issue, that of OILSR jurisdiction over indirect uses of the means of commerce, presents two questions. First, must OILSR, as a condition precedent to jurisdiction over a given complaint, find that an individual sale involved interstate commerce, or need OILSR find only that some lots within the subject subdivision—not necessarily the complainant's lot—were promoted in interstate commerce? OILSR has adopted the latter alternative.  

The second facet of the promotion problem is whether OILSR must find that the actual consummation of a sale was accomplished through use of the means of commerce for it to have jurisdiction. Apparently it need not. The Act itself explicitly forbids direct and indirect use of any means of commerce. This sweeping prohibition would appear to proscribe any use of the means of commerce to sell lots, including general advertising and preliminary offers. Furthermore, numerous judicial constructions of the securities acts have held that interstate commerce need only be used to "further" the sale in order to support jurisdiction.  

36. Indicative of HUD's position is the fact that OILSR uses the phrases "of interstate commerce" and "in interstate commerce" interchangeably. Compare Letters from John McDowell to Eugene Hines (Jul. 31, 1975), Albee's Subdivision, OILSR No. 2-1105-32-6 (of interstate commerce), with Letter from John McDowell to Edward Brown (Jul. 30, 1975), Lake O' the Woods, OILSR No. 0-2114-49-99 (interstate commerce).  


39. In pursuing administrative settlements for preeffective sales promotions, see pp. 382-83 *infra*, OILSR does not distinguish between interstate and intrastate purchasers. See OILSR Form Letters L, O and Q.  

40. See, e.g., Blackwell v. Bentson, 203 F.2d 690, 693 (5th Cir. 1953) (returning
B. Lots and Subdivisions

A second jurisdictional element, that the lot is in a subdivision, requires a finding that the realty offering is a "subdivision" within the statutory meaning, and that "lots" are offered for sale. Each term possesses a specific regulatory definition that creates numerous interpretational problems.

Definition of Subdivision. One standard definition of subdivision is "the division of a particular subject or thing into smaller parts." This definition is adopted by the Act, which defines subdivision as "any land . . . which is divided or proposed to be divided into fifty or more lots . . . ." The only interpretational problem occurs when lots are developed and sold piecemeal. This can occur in one of two ways. Several hundred lots may be platted, but marketed in consecutive blocks of less than 50, or a subdivision of less than 50 lots may be created on the fringe of a large undeveloped tract of commonly owned realty. In both instances, the OILSR position is that jurisdiction exists from the inception over any development that ultimately will contain 50 or more lots. In the first case, the platting of more than 50 lots is viewed as conclusive evidence of intent to exceed the jurisdictional minimum. In the second situation, OILSR presumes contiguous lots are part of a common promotional scheme unless the developer makes an affirmative statement that they are not.

completed contracts to vendee by mail confers jurisdiction). Scholarly authorities concur. See, e.g., 1 L. Loss, SECURITIES REGULATION 209 (2d ed. 1961); Coffey & Welch, supra note 2, at 22-23.

43. See, e.g., Roseland Gardens, E-163-71 (Feb. 19, 1971), OILSR No. 1-0271-09-13, reprinted in 1 LAND DEV. L. REP. at B-30 (developer platted 120 contiguous lots but proposed to market them in units of 49 lots; all lots, including the initial unit, held subject to the Act).
44. Interview with Alan J. Kappler, Acting Deputy Assistant Secretary for Regulatory Functions, OILSR, in Washington, D.C. (Feb. 9, 1977). In the past, however, that policy has not been consistently followed. See, e.g., Commerce World on Puget Sound, E-290-14 (May 16, 1974), OILSR No. 1-0454-56-10 (48 platted lots were contiguous to an undeveloped tract owned by the developer, but sales literature and federal environmental impact statement announced intention to develop 300 additional lots. Jurisdiction was found to exist from the inception.); Starwood Subdivision, E-238-71 (Oct. 29, 1971), OILSR No. 1-0356-05-12, reprinted in 1 LAND DEV. L. REP. at B-40 (involving a subdivision of 49 lots that was adjacent to 76 acres of commonly owned undeveloped land). But see Arden Estates, E-202-71 (Jun. 2, 1971), OILSR No. 1-0318-02-62, in which a developer platted 49 lots, sold and deeded 4 lots, and then acquired a nearby noncontiguous lot. The development was considered exempt because "at no time did the developer . . . own fifty or more lots which were offered as a common promotional plan." One variation of this theme involves developers, often farmers, who market unplatted tracts by metes and bounds. Depending on the future purchasers, the developer may sell 1 lot or 100 lots. See, e.g., Bell Mountain Estates, OILSR No,
The statutory definition of subdivision contains additional interpretational difficulties engendered by the phrase "common promotional plan." The full statutory definition reads:

"Subdivision" means any land . . . which is divided or proposed to be divided into fifty or more lots, whether contiguous or not, for the purpose of sale or lease as part of a common promotional plan and where subdivided land is offered for sale or lease by a single developer or a group of developers acting in concert, and such land is contiguous or is known, designated, or advertised as a common unit or by a common name such land shall be presumed, without regard to the number of lots covered by each individual offering, as being offered for sale or lease as part of a common promotional plan . . . .

Analytically, the statutory definition breaks into three component parts. First, the contiguity of the lots is expressly deemed irrelevant. Second, OILSR need only establish the existence of a common plan of promotion in order to exercise jurisdiction over a given group of lots. Third, lots are presumed to be commonly promoted whenever one of two alternative factual conditions are found to exist: when all lots are owned by a single developer or syndicate and all lots are contiguous, or when all lots are owned by a single developer or syndicate and the lots are known, designated, or advertised as a common unit or by a common name.

The Statutory Presumption. In interpreting this definition of subdivision, OILSR has had to make judgments concerning the legal construction of the statutory presumption and mixed factual-legal judgments of whether a given group of lots was actually promoted in common. The threshold legal issue is whether a common promotional plan is precluded if the terms of the presumption are not strictly met. OILSR maintains that the conditions stated in the statutory text are not exclusive. The cases of Jack Pine Village and River Pine Estates are illustrative. Both subdivisions were developed and promoted by the same developer-broker. Although they had different names and were not contiguous, the promotion of the second offering in each case began before all lots in the first subdivision were sold. Although the presumptive language did not strictly apply, OILSR neverthe-

46. OILSR No. 2-0948-43-16.
47. OILSR No. 2-0729-43-6.
less held that the two offerings constituted a common promotion. The agency asserted that

in the absence of the elements necessary for a presumptive common promotional plan, other characteristics are evaluated in determining whether a common promotion exists. These characteristics include: a thread of common ownership, any elements of common promotion, common sales agents, common sales office, a close proximity of location and the like.48

This "common thread" test is subject to several legal criticisms. First, the policy violates the basic statutory interpretive canon expressio unius est exclusio alterius.49 The "common thread" test further disregards both the canon of interpretation mandating that jurisdictional statutes should be construed narrowly against the government50 and OILSR's own regulatory definitions.51 The test is also subject to procedural criticism under the Administrative Procedure Act,52 which requires publication in the Federal Register of all "statements of general policy or interpretations of general applicability formulated and adopted by the agency,"53 OILSR only recently complied with this statutory requirement,54 even though most of its operational policies, including the "common thread" test, have been in force for several years. Consequently, OILSR's belated publishing may offer a possible defense to all developers not possessing actual knowledge of the rule prior to its publication.

Analytic Criteria For Determining A Common Promotion. Aside from matters of statutory construction, OILSR must also determine from the

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48. Letter from John McDowell to Donald V. McCallum, Esquire (Mar. 27, 1975), River Pine Estates, OILSR No. 2-0729-43-6. See Letter from John McDowell to Mr. B. J. Thomas (Jun. 2, 1975), Highland Country Estates, OILSR No. 3-1103-42-42. Common inventory is also a factor to be considered in determining whether a common promotional plan exists. Id.

49. "Expression of one thing is the exclusion of another." See generally A. SUTHERLAND, supra note 28, § 47.23.

50. Id. § 64.01.

51. See id. § 47.07, where the author asserts that the definitional term "means" is a term of limitation indicating that the following definition excludes all other definitions. Conversely, the term "includes" is "more susceptible to extension of meaning by construction than where the definition declares what a term 'means.'" Id. 24 C.F.R. § 1710.1(q) (1976), which deals with the issue of "common promotional plans," states that "[s]ubdivision means any land . . . ." (emphasis supplied). This contrasts with 24 C.F.R. §§ 1710.1(m) & (p) (1976), which respectively employ the expansive terms "refers" and "includes." This suggests, therefore, that under OILSR's own regulatory definitions, there is little room for a liberal or expansive construction of the term "common promotional plan."


53. Id. § 552(a)(1)(D).

facts whether a common promotional plan exists in each individual case. The agency has recited four criteria: common elements of promotion, distance between subdivisions, time sequence of promotion, and common identity of ownership interest.

A "common element of promotion" is any promotional activity tending to connect physically distinct offerings. There are two analytical subconcepts: common advertising techniques and customer cross-referrals. Common advertising by definition includes media advertisements mentioning two subdivisions and directing potential buyers of different subdivisions to a common sales agent. Use of common sales personnel or sales offices and even reliance by one subdivision upon the advertising of another nearby subdivision to attract customers to the general area has been characterized as common advertising. Cross-referrals occur whenever potential customers attracted to one subdivision are directed to lots at another subdivision.

Geographical distance between subdivisions is a second criteria often mentioned in agency rulings. A review of OILSR decisions indicates that dis-

55. See, e.g., Letter from John McDowell to Mr. M. C. McGuffy, Jr. (Jun. 4, 1974), Crescent Oaks, OILSR No. 4-0635-49-119.
56. See, e.g., Letter from John McDowell to Clark G. Thompson (Jul. 8, 1974), Green Forest Estates, OILSR No. 3-0478-49-134.
58. See, e.g., Letter to Donald V. McCallum, Esq., supra note 48; Antelope Hills Second Subdivision, E-196-71 (Apr. 30, 1971), OILSR No. 1-0324-02-63, reprinted in 1 LAND DEV. L. REP. at B-54 (noncontiguous offerings, having common ownership and sales personnel but different designations and sales clientele held to constitute common promotion). Cf. Orange Grove Valley No. 1, E-175-71 (Mar. 4, 1971), OILSR No. 1-0280-02-44, reprinted in 1 LAND DEV. L. REP. at B-26 (use of local brokers to promote a subdivision held not to constitute a common promotional plan when local brokers had no connection with other subdivisions promoted by developer); Avra Valley Estates Nos. 1 and 3, E-36-69 (Oct. 20, 1969), OILSR No. 1-0059-02-11, reprinted in 1 LAND DEV. L. REP. at B-70, and Park Valley Subdivision, E-204-71 (Jun. 23, 1971), OILSR No. 1-0329-02-65 (two noncontiguous subdivisions with common ownership but separate advertising and separate sales staffs held not in common promotion). But cf. Kimberland Tract, E-260-72 (Jul. 20, 1972), OILSR No. 1-0411-26-11, reprinted in 1 LAND DEV. L. REP. at B-58 (122 lots located in 3 different states and in 17 different counties were held not to be a subdivision despite a common promotion, common ownership, and common sales personnel).
59. See Nimrod River Park 8th Addition, E-89-70 (Jan. 26, 1970), OILSR No. 1-0057-43-2, reprinted in 1 LAND DEV. L. REP. at B-14 (two contiguous subdivisions owned by separate corporate entities were found under common promotional plan when corporations had common shareholders, subdivisions had similar names, and one corporation did not advertise and planned to profit from advertising done by the other corporation).
60. Letter to Clark G. Thompson, supra note 56.
tant subdivisions tend not to be found in common promotion.\textsuperscript{61} However, a close reading of the facts indicates that common elements of promotion existed whenever a common promotion was declared. It appears, therefore, that geographical distance was not dispositive in these rulings.\textsuperscript{62}

A third oft-cited factor is concurrence of promotion. OILSR will not find a common promotion where two promotions are clearly separated in time, such as when every lot in the first subdivision is sold before any lots within the second are promoted.\textsuperscript{63} As suggested by \textit{River Pine Estates}, this rule is strictly applied. Within this context, "sale" is specially defined as a transfer of legal title by the developer under conditions where legal title to the lot could not revert to the developer.\textsuperscript{64} Cash or third party-financed sales would satisfy these conditions. However, when the developer takes back a mortgage from the purchaser, or when the developer sells a lot under a straight installment contract, it is possible for a lot to revert to the developer, who may then repromote the lot after the inception of the second subdivision promotion. Because a concurrent promotion is possible under these conditions, OILSR will likely declare a common promotion.\textsuperscript{65}

The last of the four criteria recited in the context of common promotions is identity of interest. This factor is relevant in three situations: when the same developer operates two different subdivisions,\textsuperscript{66} when technically dis-
tinct business entities operate different subdivisions but the entities share a common identity of interest,\(^6\) and when a syndicate of developers pool their respective lots to form a single offering.\(^7\) In the first case the two offerings possess by definition a common promoter;\(^6\) in the second, OILSR will declare a common element of ownership to exist whenever the same person or corporation owns 10 percent or more of each entity.\(^7\) The third situation is rare.

Real estate brokers pose special problems within the context of collusive activity since brokers deliberately act in concert with diverse individuals in order to offer a wide variety of inventory. OILSR has suggested that the use of brokers to sell lots constitutes collusive activity only when the diverse developers agree to pool their lots into a single offering prior to retention of a broker.\(^7\)

**Definition of Lot.** The concept of “lot” is crucial in defining the Act’s boundaries. Lots are the individual units comprising a subdivision.\(^7\) The common construction of the term is a portion of land having fixed boundaries.\(^7\) The full regulatory definition\(^7\) expands upon the nontechni-

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\(^6\) estates. See text accompanying notes 47-48 supra. In addition to the two conventional subdivisions, the developer occasionally purchased and resold isolated lots (often homes, commercial properties, or farms). Due to the common ownership and common means of promotion, OILSR found the two subdivisions and the satellite lots to be in common promotion. Letter to Donald V. McCallum, supra note 48.

\(^7\) See, e.g., Nimrod River Park 8th Addition, supra note 59; Bamboo Point, E-209-71 (Jun. 16, 1971), OILSR No. 1-0322-10-4.

\(^8\) 40 Fed. Reg. 47,166 (1975). See also Hatteras Colony at Salvo Section D, OILSR No. 2-0349-38-28 (when a developer partnership dissolves, distributes lots to individual partners, and the individuals continue to promote the lots under a common name, a common promotion exists); Interlaken, Inc., OILSR No. 2-0329-05-24 (dissolution of corporation and sale of lots to individual stockholders and officers may also create a common identity). However, a bona fide arm’s length sale will not result in a common identity of interest. See Letter from John McDowell to Vincent Barth (May 5, 1975, Lake Somerset), OILSR No. 1-0493-44-17.

\(^9\) 69. See Meadows Fourth Addition, E-284-74 (Mar. 27, 1974), OILSR No. 1-0442-42-5 (one member of a developer partnership also the sole developer of another noncontiguous subdivision; common identity of interest found); Letter to Donald McCollum, supra note 48. Cf. Antelope Hills, supra note 58.

\(^10\) Interview with John McDowell, supra note 57. The 10-percent figure is the result of pure agency discretion. Id.

\(^11\) Cf. Orange Grove Valley No. 1, supra note 58 (if a developer retains a broker to promote several commonly owned subdivisions, the broker would constitute a common sales agent).


\(^13\) WEBSTER’S 7th NEW COLLEGIATE DICTIONARY 500 (1975); BLACK’S LAW DICTIONARY 1096 (4th ed. 1968).
ical concepts in two ways. First, a lot need not possess fixed boundaries.\textsuperscript{75} Second, the technical definition renders the Act applicable to other forms of realty containing physical divisions\textsuperscript{76} in addition to the common platted subdivision, such as condominiums and membership recreational developments.

OILSR treats condominiums as a form of realty ownership. Since estates in the structure can be created regardless of whether the structure has actually been built,\textsuperscript{77} unbuilt condominiums are considered equivalent to undeveloped land.\textsuperscript{78} This policy rests upon two assumptions: that each condominium unit constitutes a lot, and that such offerings involve the promotion of land.\textsuperscript{79} The first assumption is largely self-evident since the typical condominium conveyance transfers a fee simple interest in a specific unit.\textsuperscript{80} The transfer of additional bona fide undivided interests in realty and fixtures does not alter this threshold fact.\textsuperscript{81} The second assumption is not nearly as self-evident, but rests upon strong authority. OILSR's position is two-pronged. First, a condominium is viewed as establishing separate living areas and, therefore, it
necessarily divides the land. This argument incorrectly analyzes the problem. The core issue is whether the term “land” includes the adjacent airspace above the earth or merely encompasses the conception of earthen soil. In a multi-story condominium development, the purchaser receives a separate interest in airspace and structural fixtures but shares an undivided interest in the earth beneath the building. Consequently, if the term “land” encompassed only the concept of soil, OILSR would have no regulatory authority over the condominium offering. The common law, however, viewed land as a concept encompassed by metes and bounds extending infinitely above and below the surface of the earth. Except in certain defined cases, this view is still accepted. The theory of trespass corroborates this position. Although trespass to real property is defined as “unauthorized entry upon the soil of another,” violation of airspace has been held a trespass, regardless of whether soil has actually been touched. Under common law theory, therefore, the condominium interest in airspace would constitute land.

The second OILSR argument is that “condominiums carry the indicia . . . of real estate.” OILSR notes that state condominium enabling legislation “makes it clear that the property interest of the owner has all the characteristics of real property.” There are two criticisms of this argument. First, OILSR has previously rejected state attempts to define restrictively OILSR jurisdiction. It is inconsistent to rely upon state definitions merely because they are self-serving. Second, the fact that special state legislation establishes ownership rights in airspace does not determine the issue in the context of a federal statute. If states possessed this power, they could unilaterally amend OILSR jurisdiction by legislative act, rendering it inconsistent from state to state.

82. Letter from Alfred Lehtonen, supra note 72.
83. See N. Penney & R. Broude, supra note 80, at 138.
85. See generally 63 AM. JUR. 2d Property § 12 (1972).
86. See, e.g., United States v. Causey, 328 U.S. 256 (1946) (air flights); Katz v. Walkinshaw, 141 Cal. 116, 74 P. 766 (1903) (water rights).
89. See, e.g., Puroto v. Chieppa, 78 Conn. 401, 62 A. 664 (1905) (eaves projecting over property line held to be a trespass).
91. Letter from Alfred Lehtonen, supra note 72.
92. See Letter from John McDowell to D. Scott Sandelin (Nov. 1, 1974), Lake Trask Timber Trails, OILSR No. 0-4586-56-154.
The promotion of recreational camping developments also poses unique administrative problems, because often it is not apparent whether camping clubs offer "lots" for sale. The initial step in determining which individual promotions are subject to OILSR jurisdiction is to apply the regulatory definition of lot. Certain promotions, such as platted campsite lots, clearly fall within the definition. In less certain cases, however, OILSR views the element of "exclusive use" as being decisive. The existence of "exclusive use" is liberally found. The possession of the right to eject another person, even for a portion of a year, is deemed sufficient. A camping membership entitling the purchaser to exclusive use of a campsite while the camping association reserves the right to move an individual from campsite to campsite, and a membership by which the holder may exercise rights over a given lot also appear to fall within this definition. The right of a camping association to terminate a membership does not affect the right of exclusive use. When the right of exclusive use exists, it appears immaterial whether the actual property interest conveyed to the purchaser is labeled a license or a leasehold. Where the right to exclusive use attaches only when the member affirmatively elects to purchase, jurisdiction exists over only those memberships for which the right was elected.

A final interpretational issue is whether the simultaneous conveyance of multiple contiguous platted lots to a single buyer constitutes conveyance of multiple lots or one large lot. In such cases, OILSR has consistently treated the conveyance as one of multiple lots. This policy appears analytically sound for several reasons. First, the regulatory definition defines lot as a division. By virtue of platting, the developer has effected a legal division of land which continues despite any subsequent conveyances by metes and bounds.

93. Letter from John McDowell to Richard D. Nelson (Jan. 14, 1975), Birch Bay Leisure Park, OILSR No. 4-1044-56-44.
95. See Memorandum from K. H. Sauerbrunn, supra note 75.
96. See Letter from John McDowell to Arthur McKean, Esquire (Oct. 8, 1974), Issaquah Highlands Camping Club, OILSR No. 4-1058-56-58; Letter to Herbert I. Lakefish, supra note 94.
97. Letter from John McDowell to Floyd J. Windsor (Jan. 8, 1975), Lake Curlew-Trout Creek Recreational Area, OILSR No. 4-1042-56-42.
98. For example, in Lake Meade Rancheros, supra note 79, OILSR ruled that two 2½-acre lots could not be treated as one 5-acre lot. Accord, Antelope Hills Second Subdivision, supra note 58. In Antelope Hills, a conventional subdivision of 44 lots and a separate subdivision of 14 lots were held to be a common promotion even though the developer had specifically ordered the 14 lots to be sold in a single transaction.
A contrary interpretation would create incredible jurisdictional problems. For example, jurisdiction could not definitely be established until after the promotion was substantially completed, since a developer could always sell 48 lots and then convey the balance in a bulk sale.99

C. Subdivisions Containing 50 or More Lots

The third prima facie element of jurisdiction is the requirement that the subdivision consist of 50 or more lots.100 The threshold issue for this element relates to the "universe" or "set" from which OILSR may count lots in order to establish the jurisdictional minimum. The concept of common promotion defines the outer boundaries of the pool of countable lots. Arguably, exempted lots should not be counted for jurisdictional purposes. OILSR has rejected this approach, however, and counts all lots within the common promotion, notwithstanding that individual lots may be exempt from the registration or antifraud provisions of the Act.101

The other issue of this jurisdictional element relates to the time frame for counting lots. Since the Act became effective on April 27, 1969, lots sold prior to this date are excluded from the count;102 however, commonly promoted lots developed but not sold prior to the effective date, and all commonly promoted lots developed subsequent to the date are subject to the count.

III. Exemptions

If jurisdiction is asserted over a subdivision, the developer has the option

99. This same result could arguably be achieved by replatting lots into larger parcels for purposes of sale, but such replatting has been held to be a means of promotion adopted for purposes of evasion of the Act pursuant to 24 C.F.R. § 1710.12 (1976). See San Luis Ranches, E-298-11, OILSR No. 1-0262-05-9 (the exemption advisory opinion was drafted but never issued due to developer's withdrawal of request).


101. See, e.g., Antelope Hills Second Subdivision, supra note 58. See also letter from John McDowell to H.D. Perrett (Jan. 2, 1975), Westwood, OILSR No. 4-1314-43-147, which stated that "OILSR Regulation 1710.10(d) does exempt lots sold pursuant to a court order from any disclosure filing. However, the regulation does not exempt the lots from being counted in order to determine the size of the subdivision for purposes of jurisdiction." Id.

One unfortunate effect of this policy is that a costly statement of record may be required in order to promote a handful of lots in a subdivision comprised largely of exempt lots. The only alternatives are abandonment or selling in violation of the Act.

102. See, e.g., Potomac Farms Subdivision, E-41-69 (Aug. 14, 1969), OILSR No. 1-0074-54-222, reprinted in 1 LAND DEV. L. REP. at B-2 (subdivision of 161 lots, of which 121 were sold prior to April 28, 1969, held to constitute a common promotion of 40 lots subject to the Act.)
to seek an exemption. Two classes of exemptions are available: self-operating and conditional. The former arises automatically whenever the facts warrant, but to obtain an exemption in the latter category the developer must submit a report and obtain an agency statement that the exemption applies. Sales made prior to such a statement will be considered violations, notwithstanding the fact that the statement might ultimately issue. OILSR has construed both classes of exemptions very strictly.

A. Self-Operating Exemptions

Lots Not Promoted Pursuant To A Common Promotional Plan. The first exemption in section 1710.10, relating to lots not promoted "pursuant to common promotional plan to offer 50 or more lots in a subdivision," is not an exemption at all but rather an element of jurisdiction. Jurisdiction denotes possession of power to regulate, whereas exemption denotes

103. Compliance with OILSR filing requirements is costly. Costs include a maximum $1,000 filing fee, attorney and accountant retainers to prepare the disclosure filing, the staggering costs of a certified audit, and the cost of time delays. The most expedient means of avoiding these costs is to simply avoid OILSR jurisdiction. Where the subdivision contains fewer than 300 lots, a second alternative is to carefully conform promotion of the subdivision to the requirements of the Limited Offering Exemption, discussed infra at pp. 374-77. That exemption avoids the cost of a certified audit.

105. 24 C.F.R. §§ 1710.14-.17 (1976). However, statements of record automatically become effective 30 days after their filing unless the agency affirmatively declares an earlier date or the effective date had been suspended. 24 C.F.R. § 1710.21 (1976).
106. See, e.g., Lake Laguna Palma, OILSR No. 3-0424-29-12.
107. In addition to the exemptions discussed in the text, there are several automatic exemptions listed in section 1710.10 which have generated little or no activity. Paragraph (e) exempts "the sale of evidences of indebtedness secured by a mortgage or deed or trust." Additionally, the "sale of securities issued by a real estate investment trust" is exempted by section 1710.10(f). However, an offering is not exempt under this provision merely because it is labeled a security. Tropical River Groves, E-211-71 (May 19, 1969), OILSR No. 1-0001-09-1, reprinted in 1 LAND DEV. L. REP. at B-175. Likewise, offerings subject to federal securities regulation are not exempt. Id. The Act is further rendered inapplicable to lot sales by "governments or government agencies." This exemption does not extend to organizations that are merely regulated or chartered by a government such as banks or savings and loan associations. 40 Fed. Reg. 47,167(1975). However, the Philadelphia Authority for Industrial Redevelopment, which possessed condemnation powers, was construed to be a bona fide government agency. Various Philadelphia Industrial Parks, E-275-73 (Nov. 6, 1973), OILSR No. 1-0436-44-16, reprinted in 1 LAND DEV. L. REP. at B-208. Paragraph (h) exempts "the sale or lease of cemetery lots." Finally, section 1710.10(j) provides a complex exemption for commercially or industrially zoned realty. For a detailed analysis of this exemption, see 40 Fed. Reg. 47,168 (1975).
108. 24 C.F.R. § 1710.10(a) (1976).
voluntary withholding of lawfully possessed power. Since offerings of less than 50 lots do not fall within the statute, OILSR does not possess any power that it can voluntarily withhold. Although the distinction is academic in cases involving only one subdivision, it becomes important where several subdivisions are arguably linked by a common promotional plan. Whether "common promotion" is applied liberally or strictly can depend, respectively upon whether it is an exemption or an element of jurisdiction.

_Subdivisions Comprised of 5-Acre Lots._ Section 1710.10(b) exempts the "sale or lease of lots in a subdivision, all of which are 5 acres or more in size." Each term in this provision is strictly interpreted. If even one lot within the subdivision is less than five acres, none of the lots qualify. When a subdivision of 5-acre lots is adjacent to undeveloped commonly owned land, OILSR will demand assurance that any future lots will exceed five acres. Contiguous platted lots, each containing 2½ acres, may not be combined into units of two and promoted under this exemption. When small lots in a subdivision were initially promoted but later only lots exceeding five acres were promoted, exemption has been similarly denied. A promotion following the replatting of a subdivision in order to create lots containing five acres also has been held in conflict with the regulation.

_The Builders' Exemptions._ Paragraph (c) of section 1710.10 establishes one of two builders' exemptions. The paragraph exempts the "sale or lease of any lots on which there is a residential, commercial, or industrial building, or . . . the sale or lease of land under a contract obligating the seller to erect such a building thereon within a period of 2 years." Section 1710.10(i) sets forth the second builders' exemption, which exempts the "sale or lease of lots to any person who acquires such lots for the purpose of engaging in the business of constructing residential, commercial or industrial buildings or for the purpose of resale or lease of such lots to persons

111. San Luis Estates South, E-299-74 (Jul. 30, 1974), OILSR No. 1-0451-05-20, and Wintergreen, E-294-74 (May 28, 1974), OILSR No. 1-0452-58-3 (a subdivision comprised only of lots five acres or more, but promoted in common with other lots less than five acres in size, not exempt). Cf. Avra Valley Estates Nos. 1 and 3, supra note 58 (lots containing five acres or more, not commonly promoted with other properties owned by developer, held exempt).
113. See Lake Meade Rancheros, supra note 79.
114. See Tropical River Groves, supra note 107.
115. See San Luis Ranches, supra note 99. This particular form of promotion was found by OILSR to have been adopted by the developer for purposes of evasion of the Act. See generally Coffey & Welch, supra note 2, at 38-39.
engaged in such business.” Since the exemptions relate to the sale of individual lots, single lots in a subdivision may be promoted pursuant to this exemption regardless of whether other lots in the subdivision are exempt.\textsuperscript{118}

Several concepts mentioned in the exemptions require interpretation. The first is the term “building.” OILSR construed “building” as a physically habitable structure containing the full range of all utilities necessary to support normal occupancy.\textsuperscript{117} If the “primary inducement” for the sale of the building is determined to be its common recreational facilities, OILSR further requires the completion of such facilities.\textsuperscript{118}

This definition appears to be outside OILSR’s authority. All statutes should be given their ordinary meaning unless a technical meaning is clearly indicated.\textsuperscript{119} The common notion of a “building” is a structure or edifice,\textsuperscript{120} not necessarily including utility services and recreational facilities. Additionally, the provision of utility services and recreational facilities necessarily requires off-lot construction.\textsuperscript{121} The terms of section 1710.10(c) of the Act clearly do not condition the exemption upon conditions existing outside of the lot.

When applied to condominiums, the definition of building raises the additional issue of whether “building” refers to the individual condominium unit or to the complete apartment house. The former view is the better alternative, for the latter view would require “buildings” to be erected on every “lot” in the “subdivision” as a condition for exemption.

Additional issues regarding the term “building” are raised by mobile home developments. In Redwood Estates,\textsuperscript{122} a package promotion of lots and mobile homes was held exempt where the purchaser was contractually obligated to buy a mobile home from the developer and to have the developer place the home on the lot. When a purchaser covenants that he will obtain a

\begin{itemize}
\item \textsuperscript{116} See Tahoe Donner Golf Club Condominium, E-313-74 (Nov. 29, 1974), OILSR No. 1-0462-04-62, \textit{reprinted in} 1 LAND DEV. L. REP. at B-236.
\item \textsuperscript{118} 39 Fed. Reg. 7,825 (1974). For purposes of this determination, the primary inducement for sales of urban residential condominiums is assumed to be the residential nature of the complex. The fact that luxurious common facilities form a strong selling point is not considered. Interview with William Heyman, Programs Analyst, OILSR, in Washington, D.C. (Aug. 29, 1975).
\item \textsuperscript{119} A. SUTHERLAND, \textit{supra} note 28, \textsection 47.28. OILSR has expressly adopted this canon. Letter from Alfred Lehtonen, \textit{supra} note 72.
\item \textsuperscript{120} See \textit{BLACK’S LAW DICTIONARY} 244 (4th ed. 1968) and cases cited therein.
\item \textsuperscript{121} For example, trunk and feeder utility lines necessitate off-lot construction. This issue becomes especially critical in cases where sewer hook-up moratoria are in effect.
\item \textsuperscript{122} E-208-71 (Jun. 14, 1971), OILSR No. 1-0332-49-29, \textit{reprinted in} 1 LAND DEV. L. REP. at B-95.
\end{itemize}
mobile home within two years for a developer to install upon a trailer lot, however, the sale is not exempt.\footnote{128} A second phrase requiring OILSR interpretation is the 2-year contractual provision in section 1710.10(c). The 2-year period begins when the purchaser executes the contract;\footnote{124} execution of a nonbinding option does not suffice.\footnote{125} The only exception to the strict 2-year limit is the contractual defense of impossibility.\footnote{126} OILSR construes "contract" to require "an independent covenant [requiring] the seller of the unimproved lot to erect a building thereon within two years of the date of the contract for the sale of the lot."\footnote{127} This covenant must unequivocally obligate the developer to complete the building within two years of the date of contract.\footnote{128} OILSR does not appear to have granted any exceptions to the binding nature of the required obligation.\footnote{129}

\begin{itemize}
  \item \footnote{123} See Siesta Mobile Estates Unit Three, E-315-74 (Jan. 3, 1975), OILSR No. 1-0478-02-89.
  \item \footnote{125} Id. However, any funds must be deposited in an escrow account and must be refundable upon purchaser's request. Additional affirmative action by the purchaser must be required in order to create a binding obligation. \textit{Id}.
  \item \footnote{127} Letter from Alfred Lehtonen, \textit{supra} note 72.
  \item \footnote{128} See Black Oak Cove, E-267-73 (May 3, 1973), OILSR No. 1-0428-29-18, \textit{reprinted in 1 LAND DEV. L. REP.} at B-20. The following language has been held sufficient:
  
  \textit{It is expressly warranted that in the event a sale of property yet to be constructed is made hereunder, said property and all other property contained in the same structure as said property shall be completed and a final closing consummated hereunder not more than two (2) years from the date hereof.}
  
  \item \footnote{129} Examples of impermissible contract clauses include: an obligation to build a structure "only if the request is made by the buyer within two years after the date of the sale contract," St. Andrews on the Gulf, E-33-69 (Jul. 29, 1969), OILSR No. 1-0070-28-1, \textit{reprinted in 1 LAND DEV. L. REP.} at B-79; covenants permitting the developer to rescind unilaterally, Stonebridge Condominiums, Tamarack Townhouses, & Laurelwood Condominiums, E-57-69 (Oct. 28, 1969), OILSR No. 1-0063-05-5; covenants permitting the purchaser to rescind unilaterally, Black Oak Cove, \textit{supra} note 134; covenants permitting rescission upon a condition subsequent, Citrus Woods Estates, E-326-75 (Mar. 26, 1975), OILSR No. 1-0482-09-25, \textit{reprinted in 1 LAND DEV. L. REP.} at B-250; and covenants precluding buyer's suit for specific performance, Zion Summit Condominium, E-320-75 (Jan. 28, 1975), OILSR No. 1-0487-52-4, \textit{reprinted in 1 LAND DEV. L. REP.} at B-243; Skyline Plaza South Condominium Project, E-304-74 (Nov. 11, 1974), OILSR No. 1-0474-54-18.\end{itemize}
Similarly to the two builders' exemptions is section 1710.13(c),\textsuperscript{130} which exempts incidental sales in subdivisions that otherwise comply with section 1710.10(c)(i). There are three technical requirements: the total number of sales in the subdivision not exempt under sections 1710.10(c)(i) may not exceed 50 or five percent of the developer's total lots platted of record, all other sales in the subdivision must be exempt pursuant to the two builders' exemptions, and the lots must be platted. The five percent requirement mandates continuous monitoring of sales programs. If any conditions are breached, all sales not otherwise exempt will be deemed retroactive violations.\textsuperscript{131}

Sale or Lease of Real Estate Pursuant to Court Order. The fourth automatic exemption, concerning "the sale or lease of real estate pursuant to court order,"\textsuperscript{132} has encompassed a variety of judicial orders for exemption, including condemnation proceedings,\textsuperscript{133} bankruptcy proceedings,\textsuperscript{134} foreclosures and lien enforcements,\textsuperscript{135} and sheriff's auctions.\textsuperscript{136} OILSR has interpreted the term "pursuant," however, with great specificity. Thus, a direct order from a court to a trustee in bankruptcy to sell certain lots\textsuperscript{137} or an order to sell a group of lots according to specified terms\textsuperscript{138} is held exempt, but sales pursuant to a court order vesting general business discretion in the

\textsuperscript{130} For official commentary on the nature of this exemption, see 39 Fed. Reg. 9,431-32 (1974).

\textsuperscript{131} See, e.g., Letter from John McDowell to Donald J. Hearn (Aug. 16, 1974), The Great Hills, OILSR No. 4-0405-49-89.

\textsuperscript{132} 24 C.F.R. § 1710.10(d) (1976).

\textsuperscript{133} See Letter from John McDowell to H.D. Perrett (Jan. 2, 1975), Westwood Phase I, OILSR No. 4-1314-43-147.

\textsuperscript{134} See Letter from John McDowell to Honorable Paul W. LaPrade (Jun. 5, 1975), regarding State v. Combined Equity Assurance Co., No. C299,570 (Ariz. Super. Ct., filed Sept. 19, 1974). OILSR's general policy toward orders given in bankruptcy administration has been well received by the federal judiciary. For example, in his "Order Respecting Exemption from Requirements of the Interstate Land Sales Act," July 24, 1975, \textit{In re} Gulfo Investment Corp., No. Bk 74-484 (W.-D. Okla. filed Mar. 22, 1974), Judge Bohanon, after communication with HUD, directed the trustee to comply with the Act. But see Letter from William Ingersoll, Esquire, Office of the General Counsel, OILSR, to Samuel Rothman, Esquire (Sep. 5, 1975), Terre Du Lac, OILSR No. 0-1475-29-36 (A-E), in which a bankruptcy judge held that sales by a trustee under general grant of authority were exempt, provided purchasers were offered the opportunity to rescind after an effective filing was finally made with OILSR.

\textsuperscript{135} Interview with Richard Heinderman, Esquire, Special Assistant, OILSR, in Washington, D.C. (Sep. 5, 1975); Letter to Honorable Paul W. LaPrade, \textit{supra} note 134.


\textsuperscript{138} See Snowflake Highlands Unit I, II, III, \textit{supra} note 136.
trustee are not exempt. Out-of-court litigation settlements deviate from this general rule. A court-supervised settlement, under which the developer exchanges the purchased lots for others, inherently involves both specific lots and terms. However, OILSR considers such transfers nonexempt.

Regulatory Exemptions. Two additional self-operating exemptions are established in section 1710.13. Paragraph (a) exempts "sales or lease of lots, each of which will be sold for less than $100, including closing costs, provided that the purchaser will not be required to purchase more than one lot." Paragraph (b) exempts the "lease of lots for a term not to exceed five years provided the terms of the lease do not obligate the lessee to renew."

B. Conditional Exemptions

Claim of Exemption. To qualify for a conditional exemption under section 1710.11(a), a developer must prove that at the time of sale the subdivision was free and clear of all liens or encumbrances, and must observe certain procedural requirements with respect to the purchaser and OILSR. In addition, the developer must file a claim of exemption in a form prescribed by regulation. Each of the conditions for qualifying for a conditional exemption has received considerable administrative attention.

Two concepts in the requirement that "at the time of sale or lease, the real estate is free and clear of all liens, encumbrances, and adverse claims" require elaboration. Section 1710.11(c)(2) defines the liens, encumbrances, and adverse claims to exclude:

(i) Property reservations which land developers commonly convey or dedicate to local bodies or public utilities for the purpose of bringing public services to the land being developed.

(ii) Taxes and assessments imposed by a State, by any other public body having authority to assess and tax property or by a property owners' association which under applicable State or local law constitute liens before they are due and payable.

(iii) Beneficial property restrictions which would be enforceable by other lot owners or lessees in the subdivision.

139. See Letter from John McDowell to Honorable Patricia Ann Clark (Jun. 11, 1975), The Woodmoor Corp., OILSR No. 0-0965-05-50. This situation is viewed not as being directly court-ordered, but rather as the receiver "stepping into the shoes of the developer." Letter to Honorable Paul W. LaPrade, supra note 134.

140. See Letter from John McDowell to Honorable James Walsh (Jul. 9, 1975) (a letter to the court regarding O'Neil v. Horizon Corp., Civil No. 75-133 Tuc. (D. Ariz. filed May 23, 1975)).

141. 24 C.F.R. § 1710.11(a) (1976).

142. Id. § 1710.11(a)(3). The Claim of Exemption form is shown in regulation 1710.101.
Any reservation or encumbrance not falling within the literal terms of these requirements will render the subdivision nonexempt. For example, pursuant to section 1408.11(c)(2)(i), "the right of way of record . . . disqualifies the subdivision for the exemption unless it is for the express purpose of bringing public service to the land being developed." Examples of disqualifying rights-of-way include easements for power lines which do not service the subdivision, railroad rights-of-way, land patents containing reservations to the United States, mineral rights containing reservations which include rights of ingress or egress, and reservations or easements in favor of the developer to perform maintenance services. To qualify under subparagraph(ii), all taxes or assessments to which the land is subject must be imposed by a public entity possessing taxing authority or by a bona fide property owners' association. Thus, assessment owing directly to a developer or to a property owners' association controlled by the developer render the subdivision nonexempt. Finally, pursuant to subparagraph (iii), any derogation whatsoever of the rights of the lot owners, jointly or severally, to enforce a restriction will disqualify the subdivision for exemption.

144. See Letter from John McDowell to Ben H. Wilkenson, Esquire (May 19, 1975), Lake Tellavana, OILSR No. 2-0944-09-55; Letter to Norman Smith, Esquire (May 27, 1975), Deer Run, OILSR No. 2-0824-10-30.
146. See Letter from John McDowell to Gerald R. Kolb, Esquire (May 19, 1975), Antelope Meadows, OILSR No. 2-0933-43-914 (patent contained reservations to the United States permitting construction of ditches and canals). The Deputy Administrator of OILSR noted that most land west of the Mississippi River was conveyed by land patent and that if such patent contained a reservation to the federal government for construction of canals and ditches, the real estate would not qualify for exemption. Id.
147. See Letter from John McDowell to Mr. R. Ray Pope (May 19, 1975), Orenda Vista Estates, OILSR No. 2-0905-38-74.
148. See Letter from John McDowell to Paul Perona, Jr., Esquire (May 19, 1975), Hopewell Estates, OILSR No. 2-0902-13-5 (easement to drain surface water); Letter to J. John Anderholt, Esquire (Jun. 2, 1975), Del Safari Country Club Tract 4018, OILSR No. 2-0860-04-25 (reservation to developer to enter a lot to clear the land and to trim trees).
149. Letter from John McDowell to Jack D. Stokes, Esquire (May 20, 1975), Ponderosa Park Unit II, OILSR No. 2-0957-09-63.
150. This policy is rather strictly enforced. For example, even assessments resulting from the developer's supply of water to the subdivision have disqualified a subdivision from exemption. See Letter to Mark Kaplan, supra note 143.
151. OILSR deems such an association to be the "alter ego" of the developer, and therefore payment to the association is equivalent to payment to the developer. Interview with William Heyman, Programs Analyst, OILSR, in Washington, D.C. (Aug. 29, 1975).
Thus, the reservation of rights to the developer instead of the lot owners,\textsuperscript{152} or the vesting of discretionary enforcement powers in the developer\textsuperscript{153} or in a developer-controlled owners' association\textsuperscript{154} results in nonexemption. Exemption also will be denied if the developer retains the power to change restrictions on unsold lots,\textsuperscript{185} or if the power to enforce the covenants is retained by the developer beyond a "reasonable" time.\textsuperscript{156}

The second phrase in section 1710.11(a) which has a special definition is "time of sale." Section 1710.11(c)(1) defines "time of sale or lease" to be "the date the sales contract or lease is signed by the purchaser." The "effective date" of the conveyance may become the "time of sale" for determination of encumbrance purposes when two conditions are met: the contract of sale must require delivery of a deed to the purchaser within 120 days following the signing of the sales contract, and any payment made prior to the effective date of the conveyance must be placed in an escrow account fully protecting the interest of the purchaser.\textsuperscript{157} This exception, when applicable, may delay the "time of sale" up to 120 days after the contract execution. Thus, a subdivision may be encumbered with a blanket mortgage at the time of contract execution but still become eligible for exemption under section 1710.11(c).\textsuperscript{158}

Resales are not covered by the original claim of exemption because the original purchaser might subject the lot to a lien or mortgage during his term

\textsuperscript{152} See Letter from John McDowell to Gregory Meurer, Esquire (May 16, 1975), Wimble Shores and Wimble Shores North, OILSR No. 2-0940-38-79 (reservation by the developer of the right to disapprove individual lot sewage treatment plans found to disqualify the subdivision from exemption).

\textsuperscript{153} Letter from John McDowell to Thomas S. Recicar (Jun. 13, 1975), Bithlo Replat and Seminole Terrace, OILSR No. 2-0955-09-61 ("Reservations and restrictions which require the approval of or the exercise of discretion by the developer are unacceptable for purposes of this exemption since they would not be enforceable by the other lot owners."); Letter from John McDowell to Jerome Bauman (Jun. 2, 1975), Tuscan-\textsuperscript{154} willa (Winter Springs Unit 4), OILSR No. 2-0943-09-58 (discretionary power to release lots from restrictions if violations are "minor," held not to qualify for exemption).

\textsuperscript{154} Letter to J. John Anderholt, \textit{supra} note 148.

\textsuperscript{155} Letter to C. W. Coates (Jun. 13, 1975), Wood and Brooks Company Plat of Pigeon Cove, OILSR No. 2-0893-26-10.

\textsuperscript{156} OILSR views "reasonable" as three years, or when 30 percent of the lots are sold, whichever occurs first. \textit{See} Memorandum from Roger Henderson, Policy Development and Control Division, OILSR to John McDowell, Deputy Administrator, OILSR (Aug. 12, 1975) (on file at OILSR).

\textsuperscript{157} 24 C.F.R. § 1710.11(c)(1) (1976).

\textsuperscript{158} This escrow procedure should not be confused with a bona fide installment contract. No escrow provisions are required if no encumbrance is placed on the lot pending transfer of legal title. \textit{Interview with R. David Pankratz, Chief of Policy and Exemptions, OILSR, in Washington, D.C. (Nov. 14, 1975).}
of possession. Therefore, unless a repossessed lot qualifies under one of the self-operating exemptions, the developer must submit a new claim of exemption.

In addition to a showing of freedom from encumbrance, the developer must also observe certain procedural requirements. Section 1710.11(a) sets out three requirements for each purchaser: the purchaser or purchaser's spouse must make a personal on-site inspection of the lot prior to the execution of the sales contract, the purchaser must receive a "Statement of Reservation Restrictions, Taxes, and Assessments" prior to the contractual execution, and the purchaser must execute an acknowledgment confirming receipt of that statement prior to the signing of the contract.

The developer is further obligated by section 1710.11 to observe certain procedures vis-à-vis OILSR. Section 1710.11(a)(4) requires the developer to obtain OILSR's approval of the Statement of Reservation, Restrictions, Taxes, and Assessments prior to any sale, and section 1710.11(b) requires the developer to file with OILSR a copy of the developer's affirmation and a copy of the purchaser's acknowledgment for each sale no later than January 31 of the calendar year following the calendar year in which the sale was made. If the developer utilized the procedure detailed in paragraph (c), he is also obligated to file a copy of the sales contract.

In 1974, OILSR began systematically to enforce the annual filing requirement. Claims of exemption for which annual filings were not timely received were terminated effective upon receipt of the termination notice.

160. 24 C.F.R. § 1710.11(a) (1976). The requirement of acknowledgment prior to contract clearly indicates that the purchaser's signature on the statement must be obtained prior to the execution of the contract.
161. This procedure is set out at p.372 supra.
162. This enforcement policy highlighted a technical omission in the claim of exemption procedure, namely, that a developer was not obligated to make any annual filing unless sales were made. Consequently, OILSR ultimately terminated many exemptions in which the absence of the annual filing was caused by a lack of sales. See, e.g., Letter from John McDowell to Gordon Yates (Dec. 16, 1975), Yates Addition West, OILSR No. 2-0239-49-20; Yates Addition, OILSR No. 2-0236-49-19-A.

Pursuant to Goldberg v. Kelly, 397 U.S. 254 (1970), a fair hearing to establish probable cause must be afforded prior to government termination of an existing benefit where the "recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication." Id. at 262-63. It is arguable that an OILSR exemption is such a benefit, although OILSR officially disagrees. Interview with John McDowell, supra note 57. Despite statements to the contrary, e.g., Letter from John McDowell to Terrence Roche Murphy, Esquire (Nov. 4, 1974), Brigands' Bays, OILSR No. 2-0489-38-37, OILSR will afford an informal hearing to any terminated developer in its main offices, but will not withhold a termination action pending a factual hearing. Interview with John McDowell, supra note 57. However, neither the hearing and notice
Affirmations and acknowledgments were then requested for all sales for which annual filings were not made. If the developer ultimately furnished proper affirmations and acknowledgments to OILSR, further enforcement action was waived, since the ultimate production of the documents evidenced that the purchaser was afforded his full entitlement of disclosure. The total failure to produce the proper documents, however, may justify implementation of consumer remedies. Following termination of the claim of exemption, the subdivision possesses the status of an unregistered subdivision. A termination does not, however, disqualify the subdivision for a new claim of exemption.

The Limited Offering Exemption. The Limited Offering Exemption established in section 1710.14 exempts two distinct types of promotions: those in which the lots will be sold in a single bulk transaction and those in which the promotion is entirely, or almost entirely, intrastate.

The first exemption provides no major interpretational difficulty. On its face, the exemption contains no limitation on the residence of the buyer, no restrictions on the types of advertising, and no maximum limit on the number of lots. Most of the controversy has involved the intrastate promotion exemption, which sets forth five specific requirements:

(i) There are less than 300 lots in the subdivision.
(ii) The subdivision is located entirely within one State.
(iii) The offering of lots in the subdivision is entirely or almost entirely limited to the State in which the subdivision is located.
(iv) The use of all advertising and other promotional means, the distribution of which is within control of the developer or his agents, is confined to the State in which the subdivision is located. All use of billboards and similar signs, telephonic methods of communication and direct mail shall be presumed to be within the control of the developer or his agents.
(v) No more than five percent of the sales in the subdivision in any one year will be made to nonresidents of the State in which the subdivision is located.

requirement nor OILSR regulations require OILSR to remind the developer to submit his annual filing.
164. Interview with John McDowell, supra note 57.
165. See, e.g., Brigands Bay, OILSR No. 2-0489-38-37 (terminated); Brigand's Bay, OILSR No. 2-0804-38-71 (new claim of exemption).
166. The jurisdictional issue of the definition of "lot" also can be raised in this connection. See pp. 363-64 supra.
Admittedly, 300 is an arbitrary figure, since there is no inherent difference between 290-lot subdivisions and 310-lot subdivisions. However, HUD has the authority to exempt offerings solely on the basis of the limited number of lots contained therein; hence, this figure does not appear to be an abuse of discretion.

The third requirement, that the offering be "entirely or almost entirely" within the situs state, prohibits substantial promotional activity that crosses any state border. Promotions using a television station with a multistate broadcast range, magazines with 80 percent out-of-state circulation, a radio station that broadcasts to a "substantial portion" of a major population area of another state, and newspapers with substantial out-of-state circulation have all been held to be interstate promotions. However, insignificant interstate promotion by the same media has been found not to preclude the exemption. Interstate advertisements expressly stat-

169. Cf. Gavilan Park, E-93-70 (Jan. 28, 1970), OILSR No. 1-0039-04-7 (involving the magazine Trailer Life). This opinion was rendered under the now defunct section 1710.10(1), which exempted offerings that were, without further elaboration, "entirely or almost entirely intrastate" in nature. This precedent is still relevant, however, since the old section 1710.10(1) appears to be the functional equivalent of the present section 1710.14(a)(2)(iii).
173 The numerous agency decisions relating to newspaper promotion help define what OILSR considers "insignificant." When a large percentage of the circulation is out-of-state, the promotion will normally be nonexempt. See, e.g., Rudd Park Farms, Inc., supra note 171 (New York Times); Tall Timbers Development, E-212-71 (Jul. 8, 1971), OILSR No. 1-0315-49-16 (one-sixth of circulation out-of-state); Kingston Canyon Streamsites, E-203-71 (Jun. 25, 1971), OILSR No. 1-0331-33-2 (500-600 of 1,050 copies of daily circulation out-of-state); Cypress Bayou, E-182-71 (Apr. 6, 1971), OILSR No. 1-0309-09-15 (Tampa Tribune, 1,785 Sunday and 1,353 daily out-of-state circulation). Contra, King's Valley Custom Resort Development, supra note 171 (advertising in the Denver Post held exempt). However, a low out-of-state circulation, even though constituting a high percentage of overall circulation, may be exempt. See, e.g., El Encanto Estates, E-195-71 (Apr. 30, 1975), OILSR No. 1-0314-02-60 (4,000 total circulation of which 90 were out-of-state); Fort Clark Springs, supra; Sundowner Lake & Ranch Resort, supra; Memorandum from Leslie J. Carson, Associate General Counsel, to Alfred Lehtonen, Administrator, OILSR (May 4, 1970), Piedmont Enterprises, Inc., Middle
ing that only in-state responses will be honored appear exempt.\(^{173}\) OILSR has been inconsistent on whether purely intrastate uses of advertising media substantially affecting interstate commerce are exempt.\(^{174}\) They have been equally inconsistent in deciding whether one violation permanently disqualifies the subdivision.\(^{175}\) Use of out-of-state salesmen seems clearly to render the subdivision nonexempt.\(^{176}\)

Supplementing subsection (iii) are the stricter requirements of subsection (iv). This provision strictly confines the use of all promotional means "within the control of the developer" to the situs state. "Billboards and similar signs, telephonic methods of communication and direct mail" are presumed to be "within the control of the developer." This presumption is considered irrebuttable,\(^{177}\) and the intrastate limitation is literally enforced.\(^{178}\)

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\(^{174}\) For example, OILSR currently considers advertising on billboards not to affect exemption under section 1710.14 if the billboards are located within the same state as the promoted subdivision. Interview with Cora Spiva, Realty Specialist, OILSR, in Washington, D.C. (Sep. 8, 1975). Previous decisions have split. Compare Oceana Marin, E-234-71 (Oct. 10, 1971), OILSR No. 1-0367-04-51 (billboard located on U.S. Highway 101 in California held to constitute intrastate promotion), with Memorandum from John W. Kopecky, Acting Associate General Counsel, OILSR (Sep. 9, 1969), reprinted in 1 LAND DEV. L. REP. at B-126 and Letter from John McDowell to Gilvert Rooth (Jul. 23, 1975), Leisure Hills, OILSR No. 4-2771-09-337.

\(^{175}\) OILSR currently holds that one violation permanently disqualifies the subdivision. Interview with Cora Spiva, supra note 174. Numerous precedents exist to the contrary, however. See, e.g., King's Valley Custom Resort Development, supra note 171 (deliberately ignoring promotion through the Denver Post due to the "overall" compliance with regulations); Potomac Valley Farms, E-219-71 (Aug. 3, 1971), OILSR No. 1-0349-24-2 (exemption order issued in late 1971, although developer advertised in Washington Post until 1970). OILSR decisions are also split on whether interstate advertising "presumptively" disqualifies the subdivision. Compare Rudd Pond Farms, Inc. supra note 171 (promotion in New York Times "presumptively disqualifies") and Juniper Hills, E-187-71 (Apr. 16, 1971), OILSR No. 1-0203-43-47 (lots offered neither entirely nor almost entirely intrastate), with King's Valley Custom Resort Development, supra note 171 (OILSR looks to dominant intent, as manifested by overall promotion).

\(^{176}\) See Tract 29291, D & R Associates, Ltd., E-148-71 (Jan. 29, 1971), OILSR No. 1-0266-04-48, reprinted in 1 LAND DEV. L. REP. at B-135 (subdivision not exempt when "[t]here seems to be the implication that the subject lots could also be purchased [from] these (out of state) representatives.").

\(^{177}\) Interview with R. David Pankratz, supra note 158.

\(^{178}\) See, e.g., Letter from John McDowell to Lawrence J. Metz (May 28, 1975), Emerald Acres, OILSR No.3-1049-26-45 (one percent direct mailing out-of-state held non-exempt). Note that this standard for developer-controlled advertising is substantially stricter than the "entirely or almost entirely" intrastate standard applicable to non-developer-controlled means established in 24 C.F.R. § 1710.14(a)(2)(iii) (1976).
Use of local real estate brokers who do not substantially advertise, however, has been held to constitute only intrastate promotion.  

The final requirement is that no more than five percent of the sales “in any one year” be made to nonresidents. OILSR has not been restricted by the literal meaning of the phrase “in any one year.” For example, on May 28, 1975, the office terminated an exemption order for Shire Mobile Homes because four of 46 lots had been sold to out-of-state residents since January 1 of the same year. In view of the clear language calling for an annual, as opposed to ad hoc, accounting, the decision in Shire Mobile Homes appears to have been beyond OILSR’s authority.

To obtain an Exemption Order pursuant to a conditional exemption under regulation 1710.11, the developer must submit a filing in accordance with section 1710.14(b). The Policy and Exemption Branch requires specificity and full documentation of the required information. Even though a subdivision may strictly qualify, OILSR reserves the right to withhold exemption. An Exemption Order does not suspend the antifraud provisions of the Act nor the Act’s advertising guidelines.

C. Remedies

Remedial procedures vary with the violation. Any violation automatically terminates the exemption order and permanently disqualifies the subdivision from further exemption. Violation of the Act may also entail criminal or civil liability, the former being the ultimate sanction against a noncomplying developer.

180. See Letter from John McDowell to Clarence Engle (May 28, 1975), Shire Mobile Homes, OILSR No. 3-1095-09-54.
181. Interview with R. David Pankratz, supra note 158. For example, when a common promotional plan links two or more subdivisions and the developer fails to provide information on any component part, the Exemption Order will be withheld. Id.
183. See Letter from John McDowell to Charles Rawson (Jul. 29, 1975), Callender Lake, OILSR No. 3-0283-49-72.
In addition to criminal sanctions, the Act authorizes three forms of civil action. First, HUD is empowered to file suit to enjoin sales practices that may violate the Act\(^\text{186}\) and enforce the injunctions by subpoena.\(^\text{187}\) Second, a private plaintiff may seek damages for any of three promotional abuses:\(^\text{188}\) Selling of lots when the statement of record contains a material omission or untruth, use of a property report containing a material falsity or omission, and selling of lots without furnishing a valid property report.\(^\text{189}\) Several alternative formulas may be used to compute damages,\(^\text{190}\) but recovery is strictly restitutory and cannot exceed the plaintiff’s actual damages, including court costs.\(^\text{191}\)

The third civil action authorized by the Act is for rescission of the sales contract.\(^\text{192}\) The purchaser may seek this remedy on any of three different grounds. Section 1703(b) establishes an unqualified right for the purchaser to void his purchase contract unless he receives a valid property report prior to the execution of the contract. Recent amendments to this section have provided a second distinct cause for rescission. When the developer provides the property report less than 48 hours before execution of the contract, the purchaser may rescind the contract within three business days after the signing.\(^\text{193}\) Finally, section 1709(a) authorizes the purchaser to sue “either at law or in equity” if the statement of record covering the subject lot at the time of sale contained a material falsity or omission.

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(distinguishing the Mail Fraud Act, 18 U.S.C. § 1341 (1970), from the Land Sales Act as requiring different elements of proof, although not directly facing the issue of separate counts in the indictment).

186. 15 U.S.C. § 1714(a) (1970) vests discretionary authority with the Secretary to instigate such actions, implying that private plaintiffs may not file a similar suit nor a mandamus action.

187. At this writing there have been at least 13 cases of subpoena enforcement. Although largely unreported, one case in which a formal opinion was issued is Lynn v. Biderman, 536 F.2d 820 (9th Cir.), cert. denied sub nom., Biderman v. Hills, 97 S. Ct. 316 (1976).

188. 15 U.S.C. §§ 1709(a)-(b) (1970). For a comparison of the Act’s remedies with federal securities remedies, see Coffey & Welch, supra note 2, at 54.

189. Actions under section 1709(b), relating to property reports, differ from actions on statements of record under section 1709(a) in one fundamental respect. A suit under section 1709(a) may be defended on the ground that the purchaser actually knew of the falsity or omission in the statement. No such defense is accorded for actions under section 1709(b). See also Coffey & Welch, supra note 2, at 60-61. Neither action appears to require actual reliance by a purchaser. See id. at 60-62.

190. 15 U.S.C. § 1709(c) (1970). For a hypothetical application of these formulas, see Coffey & Welch, supra note 2, at 68-70.

191. 15 U.S.C. § 1709(e) (1970). Although nonpunitive in nature, these damages were intended to act as “enforcement machinery” for the antifraud provisions of the Act. See Coffey & Welch, supra note 2, at 54.


193. Id. (Supp. IV, 1974).
The major questions concerning construction of the Act's civil remedies have arisen in regard to proper parties, class action certification, pleading, and the statute of limitations.

**Proper Parties.** The issue of plaintiff standing under the Act has been litigated only once. In *Adolphus v. Zebelman*, the minority stockholders of a developer corporation sought to enjoin further sales pending an effective registration. The trial court acknowledged the "serious question" of whether plaintiffs were within the Act's zone of interest, but granted relief without further opinion. On appeal, the Eighth Circuit noted that liabilities flowing from illegal sales could damage the corporation and derivatively affect the value of plaintiffs' stock. The panel concluded that the allegation was "barely sufficient" to constitute "injury in fact."

**Class Action Certification.** The issue of class action certification for suits under the Act has received confusing treatment. In *Hoffman v. Charnita, Inc.*, a federal district court certified a class action complaint alleging damages stemming from omissions in a property report. Although the developer had filed several consolidations and amendments to his statement of record, the critical omission occurred in all editions of the report. Thus, the issue of liability was common to all plaintiffs. The court admitted that damages would differ for each plaintiff but found this to cause no administrative problem since each sum could be easily ascertained. A pendent complaint of common law fraud was not certified, however, since each plaintiff was obligated under that cause to prove individual reliance. Because *Hoffman* was premised upon the erroneous assertion that the "Act . . . provides only for a civil suit to recover damages and does not sanction the remedy of rescission," however, its persuasive authority appears dissipated.

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194. 486 F.2d 1323 (8th Cir. 1973).
196. 486 F.2d at 1326. *See also* Barlow v. Collins, 397 U.S. 159 (1970); Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970). In these cases, the Supreme Court appears to have established a two-pronged test for standing. An "injury in fact" is required in order to satisfy the constitutional "case or controversy" requirement and the plaintiff must also fall within the "zone of interests" protected by the statute. In *Adolphus*, the court of appeals found that there had been injury in fact. It ruled that it need not decide if the plaintiffs were within the "zone of interests" since that question had not been raised. 486 F.2d at 1325.
Subsequently, another federal district court refused to certify a class action in *Young v. Trailwood Lakes, Inc.*, primarily because some members of the class sought damages and some sought rescission. The court found that the conflicting remedies sought would thwart “effective administration of the class action.”

**Pleadings and Proof.** As one would expect, courts have generally required the pleadings to conform to the substantive elements of the statutory cause of action or defense. For example, the plaintiff in *Rockefeller v. High Sky, Inc.* alleged the developer’s failure to provide a timely effective property report pursuant to section 1703, and sought the rescission remedy provided by section 1703(b). Because section 1703(b) granted the absolute right to rescind in that circumstance, defendant’s affirmative answer that it had “substantially complied” with the Act raised no triable issue. Similarly, the Act does not require reliance on omissions from the property report; hence, a complainant should not be required to allege reliance, and lack of reliance should not constitute a defense.

The complaint’s allegations must, however, strictly conform to those particular causes of action recognized by the Act. In *Campbell v. Glacier Park Co.* the developer decided, after plaintiff had purchased the lot, to include a recreational facility within the subdivision. In compliance with the Act, the developer amended the filed statement of record and property report. Plaintiff contended that constructing the facility and amending the filings violated the “purpose and spirit” of the Act. No allegations of fraud, misrepresentation, or nondisclosure were made. Finding that the Act only authorized claims based on misrepresentation or nondisclosure, and that no cases granting rescission, see Rockefeller v. High Sky, Inc., 394 F. Supp. 303 (E.D. Pa. 1975) and Hall v. Bryce’s Mountain Resort, Inc., 379 F. Supp. 165 (W.D. Va. 1974).

201. Id. at 667. *Young* generally expressed a negative attitude toward class actions under the Act. For example, the court found that the individual claims of damages were not so small as to preclude individual litigators. The court also found that the proposed class represented “an easily identified and located assemblage of property holders” that could be easily joined for suit. Id. at 668.

204. See Hoffman v. Charnita, Inc., 58 F.R.D. 86 (M.D. Pa. 1973). The court in *Hoffman* analogized the Act to the federal securities acts which had been construed not to require a plaintiff to allege actual reliance on an omission in a prospectus. Id. at 90. A case which provided such an interpretation of the securities law was Johns Hopkins Univ. v. Hutton, 422 F.2d 1124 (4th Cir. 1970).

such claims had been asserted, the federal district court dismissed the complaint.\textsuperscript{206}

\textbf{Statute of Limitations.} The statute of limitations provision contained in section 1711 has been interpreted as being two years. In \textit{Hall v. Bryce's Mountain Resort, Inc.},\textsuperscript{207} a district court ruled that any rescission claim based on section 1703(b) must be filed within two years. The ruling in \textit{Hall} was followed in \textit{Melhorn v. Amrep Corp.}\textsuperscript{208} OILSR has conformed to these two rulings.\textsuperscript{209}

\textit{Melhorn} also addressed the critical issue of estoppel from assertion of the statute of limitations. The plaintiff purchasers filed a complaint slightly more than two years after the date of purchase. The purchasers admitted that the two year statute had run, but unsuccessfully urged the court to estop the developer from asserting it. The court noted that estoppel will be recognized only when defendant deceives plaintiff about the length of the statute or when plaintiff is "lulled" into forebearing a prompt assertion of his claims. The developer was found not to have induced a delay in suit, but rather had been, at most, ambivalent to the purchasers' complaints. The court ruled that such action was not sufficient to estop the developer from asserting the statute of limitations.\textsuperscript{210}

\textbf{Administrative Sanctions.} Concurrent with the foregoing legal remedies, OILSR may also employ a battery of administrative sanctions. A suspension may issue prior to a filing becoming effective (pre-effective) whenever the office receives a statement of record filing, or any amendment filing, that is on its face incomplete or inaccurate in any material respect.\textsuperscript{211} The suspension will prevent a filing from becoming automatically effective\textsuperscript{212} and will render the developer liable for civil and criminal action if he proceeds with the promotion.

\textsuperscript{206} \textit{Id.} at 1249. As a subsidiary matter, the district court also found that the cause of action was not dependent on the amount of monetary damage alleged, but rather that the federal question under the Act sufficed for federal jurisdiction. \textit{Id.} at 1247.

\textsuperscript{207} 379 F. Supp. 165 (W.D. Va. 1974).

\textsuperscript{208} 373 F. Supp. 1378 (M.D. Pa. 1974). OILSR did not formally intervene in either case, but did file a memorandum of law in \textit{Hall} which the plaintiffs adopted.

\textsuperscript{209} Telephone interview with Richard Heiderman, Special Ass't to the Deputy Adm'r, OILSR, in Washington, D.C. (Feb. 14, 1977).

\textsuperscript{210} 373 F. Supp. at 1381-82.


\textsuperscript{212} Absent a suspension, a statement of record becomes automatically effective 30 days after filing. 15 U.S.C. § 1706(a) (1970); 24 C.F.R. § 1710.21(a) (1976). To toll the 30-day period, the suspension notice must actually be received by the developer. See Lake Chapparell, OILSR No. 0-3557-18-20.
OILSR may also issue a suspension notice after a filing has become effective (post-effective) if the office believes that a filed statement of record contains an untrue assertion or a material omission, if a developer refuses to cooperate with an investigation to determine whether a statement of record is accurate, or if the agency receives any amendment to an effective statement of record.\footnote{213}

A pre-effective suspension is operative immediately upon receipt of notice. A post-effective suspension requires an affirmative order to take effect, but such order may be issued 15 days after notice unless a hearing is requested by the developer.\footnote{214} The pre-effective suspension automatically lifts 30 days after a corrective amendment is filed, unless OILSR notifies the developer of additional deficiencies in the amendment. A post-effective suspension will terminate upon OILSR's receipt of corrective material and its determination that such material is effective.\footnote{215}

Supplementing its legal and formal administrative prerogatives, OILSR actively pursues a policy of encouraging informal administrative compromises to remedy alleged violations. Although OILSR expressly disclaims the power to act as attorney on behalf of purchasers,\footnote{216} the chief objective in negotiating such settlements is, in fact, to assist the purchaser in effecting rescission of his contract and in obtaining restitution.\footnote{217}

The typical administrative settlement requires several steps. Whenever OILSR suspects that a developer has made pre-effective sales, the office will routinely request that the developer furnish an affidavit listing the names and addresses of all purchasers.\footnote{218} Upon receipt of the affidavit, OILSR will offer an "administrative settlement,"\footnote{219} under which OILSR will take

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  \item 215. Id. § 1710.45(b) does not provide for a "thirty day rule" to govern corrective amendments for post-effective suspensions and therefore actual correction, rather than the mere filing of a corrective amendment, is required. Cessation of the suspension is also conditioned upon an affirmative OILSR order, which OILSR "shall" issue upon compliance. \textit{Id.}
  \item 216. See Letter from John McDowell to Yvonne Edwards (Jul. 30, 1975), Port Lucie, OILSR No. 0-0025-09-11.
  \item 217. See, \textit{e.g.}, Letter from Alan J. Kappeler, Assistant Deputy Administrator, OILSR, to O. James Hunt (Jul. 24, 1975), Trailwood Lakes, OILSR No. 0-2302-20-32. However, due to its lack of power to act as attorney, OILSR carefully characterizes its settlements as a means of "disclosure." \textit{See, \textit{e.g.}, Letter from Alan J. Kappeler, Assistant Deputy Administrator, OILSR, to Frederick Lorig, Esquire (Dec. 16, 1974), Del Monte Forest, OILSR No. 0-3263-04-590 (the purpose of the settlement is to assure that "purchasers . . . be apprized of their rights . . . .").}
  \item 218. If the developer does not immediately comply with that requirement, OILSR will enforce the request through an administrative subpoena.
  \item 219. See, \textit{e.g.}, Letter from John McDowell to Mr. Scruby (Jul. 31, 1975), Jacksonville South, OILSR No. 4-5197-09-482.
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no further action provided the developer informs each purchaser,²²⁰ by certified mail, that the sale was not in compliance with the Act. The non-compliance notice must offer to rescind the sales contract and to refund all monies paid under the contract.²²¹ OILSR then requests that a form affidavit be submitted attesting that the letters were sent to all pre-effective purchasers.

Should the developer fail to consummate his "offer," OILSR has no regulatory authority to order restitution,²²² but has successfully sought affirmative injunctions to do so.²²³ Instead, OILSR usually advises the aggrieved purchaser to enforce his statutory rights through legal action.²²⁴ Should a developer refuse to make the offer, OILSR will mail its own letter to inform purchasers of their statutory right to rescind.²²⁵ OILSR's authority to make this mailing was recently upheld by the United States District Court for the District of Columbia.²²⁶

The OILSR remedial policy toward consumer complaints is limited. Upon receipt, OILSR will either forward a complaint to the developer requesting

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²²⁰. Purchasers who have subsequently sold their lots to third parties are excepted from notification. See Letter from John McDowell to David Douglas and James Pike (Jul. 23, 1975), Pine Hill Estates, OILSR No. 3-0895-03-7. This exclusion is questionable, since an aggrieved purchaser may sue for damages in the amount of the difference between the purchase price plus cost of improvements and "the price at which such lot shall have been disposed of in a bona fide market transaction. . . ." 15 U.S.C. § 1709 (c)(2) (1970).

²²¹. OILSR maintains that the purchaser’s right of rescission is absolute. See Letter from John McDowell to Ben E. Jarvis (Jul. 30, 1975), East Shore Estates, OILSR No. 0-3796-49-592. Further, "all monies" is interpreted by OILSR to include all payments of "principal and interest, taxes, special assessments, property owners' association dues, and [the reasonable cost of improvements]." See Letter from John McDowell to Frederick Lorig, Esquire (Apr. 24, 1974), Del Monte Properties, OILSR No. 0-3263-04-590.

²²². See Letter from John McDowell to Geordie Prince (Jul. 23, 1975), Country Club Estates, OILSR No. 4-0556-01-4. Although OILSR has no power to dictate the payment schedule of the restitutionary refund, it has on occasion suggested compromise payment schedules, usually involving full restitution within 90 days. See, e.g., Letter from John McDowell to Jimmy Reeves (Jul. 31, 1975), Rainbow Mountain Overlook, OILSR No. 2-1304-38-112.

²²³. See HUD News, Jul. 31, 1975. To date there are no reported cases on this point, but a restitution order was issued in Lynn v. Beard Land Co., No. Ty 74-273-CA (E.D. Tex., July 25, 1975).


²²⁵. See, e.g., Letter from John McDowell to Thomas E. Lea (Jul. 31, 1975), Valley View Acres, OILSR No. 0-3717-33-62.

an explanation\textsuperscript{227} or suggest remedial action.\textsuperscript{228} If the complainant provides convincing documentation in contradiction of the filed property report, the agency may even move to suspend the statement of record.\textsuperscript{229} Where the developer denies the complaint, however, the normal OILSR response is to declare the issue to be an irreconcilable factual dispute requiring private litigation.\textsuperscript{230} OILSR’s main concern appears to be with enforcement of registration requirements with little effort given to remedying actual fraud.

Bankruptcies of land developers have posed especially vexing problems for consumers. Notwithstanding lack of formal standing to intervene in bankruptcy proceedings,\textsuperscript{231} OILSR has conducted an active informal campaign to assist purchasers in asserting their rights when developers go bankrupt. The office corresponds with judges and trustees to express concern about the treatment of purchasers\textsuperscript{232} and to advise that purchasers who void their contracts pursuant to section 1703(a) have priority claims against the bankrupt estate.\textsuperscript{233} Although this latter position appears sound when the voidance is based on fraud, there is little basis for this conclusion in cases involving merely unregistered sales.

IV. RECOMMENDATIONS FOR CHANGE

A number of proposals can be offered as possible remedial amendments to existing law and policy. An initial suggestion would be to require all Exemption Advisory Opinions (EAO’s) to be indexed and made generally available. To date, no OILSR material is topically indexed. Even a min-

\textsuperscript{227} See OILSR Form Letter “F.”
\textsuperscript{228} See, e.g., Letter from Alan J. Kappeler, Assistant Deputy Administrator, OILSR, to Stuart Marshall Bloch (Jul. 16, 1975), Westwood Shores, OILSR No. 0-2222-49-129.
\textsuperscript{229} See, e.g., Hidden Acres Estates, OILSR No. 0-3931-49-615.
\textsuperscript{230} Cf. Letter from John McDowell to Leo Kissner (Jul. 30, 1975), Diamondhead, OILSR No. 0-3661-49-442. For this purpose, OILSR Form Letter “L” was devised, advising of OILSR’s inability to sue on a purchaser’s behalf and suggesting that the purchaser seek legal advice. See also Attachment A to Memorandum from John McDowell, Acting Administrator, OILSR, to Carla Hills, Secretary of the Department of Housing and Urban Development (Jul. 8, 1975), admitting that complaints “usually involve factual disputes which we do not attempt to resolve.”
\textsuperscript{231} See Memorandum from Richard Heidemann, Special Assistant to the Deputy Administrator, OILSR, to John McDowell, et al. (Nov. 12, 1974), on file at OILSR.
\textsuperscript{232} See, e.g., Letter from John McDowell to John McLaughlin, Trustee (Jul. 22, 1975), Diamondhead Lake and Country Club, OILSR No. 0-2153-16-4.
\textsuperscript{233} See Memorandum from Richard Heidemann, supra note 231. Where fraud has induced a sale, the equitable remedy of a constructive trust is appropriate. D. Dobbs, \textit{Handbook on Remedies} § 9.4 (1973). When that claim is invoked, the claimant should obtain a preference over other creditors. \textit{Id.}
imal "regulations construed" index for EAO's would be of great assistance to administrators, practitioners, and scholars. Additionally, significant EAO's should be published in the Federal Register. At present, the only service is an incomplete index published in the *Land Development Law Reporter*. EAO's should also be restructured to incorporate precedential rulings. Such opinions will assist interested parties in noting changes in policy and help prevent confusion engendered by widely divergent and conflicting agency rulings. When applicable, OILSR enforcement policies also should be noted.

A second suggestion is that the Act should be amended to require states to accept OILSR statements of record and property reports. This will obviate the need to submit duplicative filings to the state and federal governments. Since the states may legitimately desire to regulate federally exempt offerings, states should always have the prerogative of requiring additional disclosure or implementing more rigorous substantive regulation. The Act should also be amended to grant standing to OILSR to intervene on behalf of purchasers in any bankruptcy proceeding affecting a subdivision within its jurisdiction.

A third suggestion is that the instructions for all disclosure filings be amended to require submission of advertising and promotional material currently in use, copies of any written or printed sales material, texts of all electronic or telephonic promotional messages, and facsimiles or photographs of all visual materials. This proposal would assist OILSR in ascertaining the scope of any pre-effective sales violations and would assist processing of exemption order filings. Additionally, it would assist enforcement of the advertising regulations by making all advertising material readily available for OILSR review. Since the advertising material would be deemed part of the statement of record, any substantial discrepancy between the advertising and the balance of the statement would justify a suspension under regulation 1710.45. This would correct the remedial hiatus present under current regulations.

Two final suggestions are that Congress should amend the Act to exempt statements of record and exemption filings from the provisions of NEPA, and regulation 1710.11 should be amended to require an annual filing, where the facts warrant, stating that no lots were sold during the calendar year.

V. CONCLUSION

Since 1969, the administration of the Act by OILSR has produced some impressive statistical results. However, these figures are countered by such unflattering statistics as the burdensome costs of compliance with the Act. It is too soon to take a position on whether the ultimate value derived from the Act is worth the monetary and social costs of its administration, although one previous Administrator has publicly expressed doubt concerning the validity of full disclosure as a form of consumer protection. Regardless, one clear fact emerges: after six years, both the Act and the OILSR exist as significant forces that spell potential ruin to careless developers and salvation to unwary buyers. Consequently, it behooves consumers, developers, and the bar to become fully educated about the structure, purposes, and implications of OILSR and the Act. Any lesser precaution is an invitation to liability.

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235. For example, over 7,000 subdivisions have been registered pursuant to the Act.