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STATE AND FEDERAL REGULATION OF CONDOMINIUMS

DANIEL J. MINAHAN*

INTRODUCTION

Over the last decade use of the condominium form of land ownership in real estate development has grown tremendously in the United States. A significant part of this growth has involved condominium developments at major recreational areas throughout the country. Most notable are the vacation and retirement developments in California, Hawaii and Florida and the mountain ski resort developments in the Rockies. The activity, however, has not been limited to these well-known sun and ski vacation spots, but is increasingly making a mark in Wisconsin which has long been recognized for its recreational amenities. Indeed, this state and others like it, have a recreational lure that will continue to encourage the development of second home condominiums.

The booming condominium market has not been without flaws. Unscrupulous developers have employed a wide variety of legal loopholes and deceptive selling practices to con condominium buyers. In recent years, consumer complaints have mounted over misleading sales representation, hidden clauses in contracts, shoddy construction, and built-in escalation schemes that raise the cost of ownership and force foreclosures.¹ Consumer outrage over these abuses has resulted in a myriad of regulatory measures on both state and national levels.

In earlier times developers of recreational condominiums² were little concerned with the potential securities law implications of the offer and sale of their units. However, to the dismay of the devel-

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1. *Florida Scandal: Sharp Schemes Used to Con Condominium Buyers*, Milwaukee Journal, Feb. 24, 1974, Home Section, which discussed a number of the complaints that have arisen in Florida condominium development. Also included among the complaints were ninety-nine year recreational leases for common areas, postponed occupancy dates, phase-type construction that added new buildings to already overcrowded facilities.

2. The author has opted to use the term "recreational condominium" rather than "resort condominium" in describing those condominium developments in vacation areas around the country. The Securities Exchange Commission adopted the resort condominium language in its 1973 guidelines. (See *Guidelines as to the Applicability of the Federal Securities Laws to Offers and Sales of Condominiums or Units in a Real Estate*

opers, it is generally true today that both federal and state "blue sky" securities laws are applicable to condominium unit offerings. The regulation has not stopped there. In recent years governmental regulation of recreational land sales has intensified with the passage of land sales acts by Congress and state legislatures. It is the purpose of this article to discuss those aspects of the federal and state securities and land sales regulation that are most relevant to the development of recreational condominiums. Escape routes available to developers under the broad regulation will also be discussed.

Although this article will speak in narrow terms of condominiums as they are commonly conceived (*i.e.* a constructed building unit for physical occupancy), it must be emphasized at this juncture that the term applies to all types of units in real estate development that utilize the condominium form of land ownership. The condominium form is characterized by divided ownership of individual units with undivided ownership of common areas with recreational amenities, such as clubhouses, tennis courts and swimming pools. In these broad terms, recreational development of campgrounds falls within the purview of regulatory legislation.

I. APPLICATION OF SECURITIES ACT OF 1933

A. *History of Security Regulation of Real Estate Transactions*

Although it was once commonly thought that real estate development had nothing to do with securities regulation, the general consensus today is that federal securities laws are applicable to the offerings of interests in real estate. Real estate developers and their counsel thus are frequently faced with the difficulty of determining whether the development and marketing devices they utilize will require registration under the Securities Act of 1933.³ This determination involves a two-step consideration; first, whether the interests being offered are securities; and second, whether an exemption from the registration requirement is available if a security is involved. A developer cannot afford to avoid consideration of potential securities law regulation of its development. Failure to comply with the registration requirements can be disastrous, as is illus-

Development, CCH FED. SEC. L. REP. [Transfer Binder '72-'73] ¶79,163.) Although synonymous, recreational is sufficiently broad in scope to cover all the developments regulated on national and state levels. See Krueger, *Recreationally-Oriented Land Developments*, 3 REAL PROP., PROB. & TRUST J. 353 (1968).

3. 15 U.S.C. § 77(a) - 77(bbbb) (Hereinafter referred to as Securities Act.)

trated by the Hale Kaanapali experience.⁴ Any or all of the following could result: civil actions by purchasers for damages and rescission,⁵ criminal prosecution,⁶ and injunctive action by the SEC.⁷

The broad, all-inclusive definition given to "security" in section 2(1) of the Securities Act⁸ covers many specific interests and instruments (including notes, stocks, bonds, interests in oil, gas, or mineral rights) and also several general interests (including investment contracts, evidences of indebtedness and certificates of interest). Because no specific reference is made to real estate interests, and because "investment contract" is probably the broadest of the general terms, the determination of whether a real estate interest is a security generally depends on whether it is an "investment contract." The courts as well as the Securities Exchange Commission have long attempted to provide a generally accepted definition of "investment contract."⁹

In the landmark case of *SEC v. W. J. Howey Co.*,¹⁰ the U.S. Supreme Court formulated its definition of an investment contract for purposes of the Securities Act which is as follows:

A contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise.¹¹

4. The Hale Kaanapali Apartment Hotel Development Company did not register with the SEC before selling condominium units in a Hawaiian project. The SEC intervened and caused the developer to register his plan. Original purchasers were allowed to rescind and the developer was forced to refund downpayments, plus interest, totaling \$205,776.72. For a discussion of the consequences of a failure to register see ROHAN and RESKIN, CONDOMINIUM LAW & PRACTICE, § 18.04 (1965).

5. Securities Act of 1933, § 12, 13; 15 U.S.C. § 77(k), 77(l).

6. *Id.*, § 24; 15 U.S.C. § 77(x).

7. *Id.*, § 20; 15 U.S.C. § 77(t).

8. *Id.*, § 4(1); 15 U.S.C. § 77(d)(1). Most jurisdictions agree that there can be no set definition of what constitutes security under the Securities Act.

9. Courts have indicated guidelines to be used in individual fact situations to determine whether the real estate interest is one which should come within the contemplation of the Securities Act. As always under the securities law, substance and economic reality prevail over form.

10. 328 U.S. 293 (1946). The defendants were Florida corporations which developed large tracts of citrus acreage for sale under a land sales contract. A service contract was offered to prospective purchasers whereby the defendant's subsidiary company would service the citrus groves. The sales of the land with the service contracts were found to constitute an investment contract within the meaning of section 2(1).

11. *Id.* at 298.

Therefore, the test for ascertaining the existence of an investment contract involves three important elements; (1) the participation in a common scheme or plan, (2) reliance upon a third party to manage the investment, and (3) profit realization as a goal. Since *Howey* in 1946, additional interpretations have been given to what constitutes an investment contract in real estate-oriented developments that involve the efforts of a third-party promoter.¹² Passive investment for profit in transactions involving citrus groves,¹³ cemetery lots,¹⁴ silver foxes,¹⁵ chinchillas,¹⁶ oil and gas leases,¹⁷ and tung-trees¹⁸ has been held by courts to involve securities. More recently, investments in real estate limited partnerships,¹⁹ real estate ventures,²⁰ and real estate investment trusts²¹ by outside investors have been determined to be securities.

The most recent judicial interpretation of what constitutes an investment contract security came from the Ninth Circuit in *SEC v. Glen W. Turner Enterprises, Inc.*²² The defendant offered and sold to the public self-improvement contracts which primarily offered the buyer the opportunity of earning commissions on the sale of contracts to others. Although each individual investor relied heavily on the managerial efforts of others for the expectation of profits, it could not be said that the profits were coming "solely" from the efforts of others, as the *Howey* decision seems to indicate is a necessary element of an investment contract security. The court held that the word "solely" should not be strictly construed,

12. For an excellent summary of the types of real estate transactions, schemes, or plans which have been alleged to be within the definition of the security within the Securities Act and a typical state "blue sky" security law, see Wharton, *Application of Federal and State Security Regulations to Real Estate Transactions*, 12 S. TEX. L. J. 237 (1971).

13. *Blackwell v. Bentsen*, 203 F.2d 690, cert. denied, 347 U.S. 925 (1953); *SEC v. Orange Grove Tracts*, 210 F. Supp. 81 (D.C. Mass. 1962).

14. *Memorial Gardens of the Valley, Inc. v. Love*, 5 Utah 2d 270, 300 P.2d 628 (1956).

15. *SEC v. Payne*, 35 F. Supp. 873 (S.D. N.Y. 1940).

16. *Hollywood State Bank v. Wilde*, 70 Cal. App. 2d 103, 160 P.2d 846 (1945).

17. *SEC v. Joiner Leasing Corp.*, 320 U.S. 344 (1943); *Woodward v. Wright*, 266 F.2d 108 (10th Cir. 1959); *Roe v. U.S.*, 287 F.2d 435 (5th Cir. 1961); *Creswell-Keith, Inc. v. Willingham*, 264 F.2d 76 (8th Cir. 1959).

18. *SEC v. Tung Corp.*, 32 F. Supp. 371 (N.D. Ill. 1940); *SEC v. Bailey*, 41 F. Supp. 647, (S.D. Fla. 1941).

19. See Fass, *The Regulated World of the Real Estate Syndicates*, 1 REAL ESTATE REV. 52 (Winter, 1972) and immediately followed by Haft, *For Whom the SEC Tolls: Real Estate and Thee*, 1 REAL ESTATE REV. 57 (Winter, 1972).

20. *SEC v. Federal Shopping, Inc.*, 433 F.2d 148 (9th Cir. 1970).

21. Rifkind and Borton, *SEC Registration of Real Estate Interests: An Overview*, 27 BUS. LAW. 649 (April, 1972) discusses each of these common methods of offering interest in real estate at 653-656.

22. 474 F.2d 476 (9th Cir. 1973).

but rather must be construed realistically, so as to include within the definition those schemes which involve in substance, if not form, securities.

The Securities Exchange Commission in 1962 reiterated the generally accepted definition by the courts and the Commission of "investment contract" in a release. The Commission stated that:

. . . Transactions which in form appear to involve nothing more than a sale or real estate, chattels, or services have been held to be investment contracts where in substance they involve the laying out of money by the investor on the assumption and expectation that the investment will return profit without any effort on his part, but rather as a result of the efforts of someone else.²³

Concerned with the increased sales of interests in real estate syndications, generally in the form of limited partnership interest or interests in joint or profit-sharing ventures, which were not registered with the Commission nor the appropriate state regulatory body, the Commission in a 1967 release again elaborated on the "investment contract" definition in light of the offering of real estate interests.²⁴ The Commission concluded that:

In determining what is an investment contract, substance and economic reality prevail over the form of the transaction involved. Interests in novel and uncommon ventures fit the broad definition of an "investment contract." Therefore, if the promoters of a real estate syndication offer investors the opportunity to share in the profits of real estate syndications or similar ventures, particularly when there is no active participation in the management and operation of the scheme on the part of the investors, the promoters are, in effect, offering a "security."

B. The Condominium Unit as a Security

With this historical prelude one can readily understand why a growing number of condominium unit offerings do constitute securities under the investment contract definition of a security and, as a result, are subject to registration under the Securities Act unless an exemption is available. Use of the condominium form of

23. SEC Release No. 33-4491 (May 22, 1962).

24. Joint Release of Maryland Division of Securities, Virginia Division of Securities, Public Service Commission of the District of Columbia and the Securities and Exchange Commission, SEC Release No. 33-4877 (August 8, 1967), CCH FED. SEC. L. REP. [Transfer Binder '66-'67] ¶177,462. Offers and subsequent sales of interests in real estate syndications had been especially prevalent in the District of Columbia, Maryland and Virginia.

real estate ownership has increased with the greater need for housing and the advance in architectural development and construction technology. Different types of condominium ownership have evolved and the type utilized determines the potential securities laws implications of the offerings. The traditional owner-occupied condominium development (*i.e.* full-time occupation of a unit by the owner as his primary residence) in most cases fails to satisfy the entire test of an investment contract; and therefore, it is without the purview of the Securities Act. Normally the motive for buying is not profit realization. Condominiums of this type are viewed as real estate and as such are subject only to real estate regulation.²⁵

As previously stated, significant use of condominium ownership has taken place in the recreational developments in the sun and ski vacation locations in the United States. The offering of units in these developments have unique characteristics that feature all three necessary elements of an investment contract; third-party reliance as well as a common scheme with a profit motive; and thus bring an otherwise exempt condominium offering within the purview of the Securities Act. A typical recreational condominium with security characteristics can be summarized as a unit owned by an out-of-state resident who can only be present in a vacation area for a small part of the year and rented to other vacationers the remainder of the time using a rental agreement.²⁶ The recreational type can take many forms and utilize several marketing devices, but the end result is the same: a profit-seeking investment resulting in securities regulation. Several legal commentators have analyzed the securities law implications of condominium developments and each provides helpful background.²⁷ However, until

25. An owner-occupied condominium development may involve investment participation as in the case of a real estate syndication which pools investors together for the development of the project. The offering of the partnership interests are considered securities, but the offering of the units as primary residences retains the characteristics of real estate.

26. For an elaborate discussion of rental arrangements in condominium developments, see ROHAN and RESKIN, *CONDOMINIUM LAW & PRACTICE*, § 18.02 (1965).

27. Housington, *Condominiums and Corporate Securities Law*, 14 HAST. L. J. 241 (1961); Rohan, *The Securities Law Implications of Condominium Marketing Programs Which Feature a Rental Agency or Rental Pool*, 2 CONN. L. REV. (1969); Schreiber, *The Lateral Housing Development: Condominium or Homeowners Association?*, 117 U. PENN. L. REV. 1104 (1969); Clurman, *Are Condominium Units Securities?*, 2 REAL ESTATE REV. 18 (Spring, 1972); Comment, *Florida Condominiums*, 25 U. FLA. L. REV. 25, 360-64 (1973); Grimes and King, *A Look at Condominium Offerings*, 9 IDAHO L. REV. 149 (1973); and Ellsworth, *Condominiums are Securities?*, 2 REAL ESTATE L. J. 694 (Winter, 1974).

1973 guidelines as to the applicability of the federal securities laws to condominium offerings in real estate development were layered and inconsistent, providing little assistance to a well-meaning developer and little protection to the investing public. Uncertainty existed as to when such offerings of condominiums would be considered offerings of securities that should be registered.

1. SEC Guidelines

Recognizing the need for a review of the SEC's disclosure procedures and policy objectives in the area of real estate security interests, Chairman William Casey in May of 1972 established the Real Estate Advisory Committee to study the situation. Five months later the Committee, after a complete review of the current and proposed regulations for a public offering of real estate securities on both federal and state levels, submitted its report to the Commission.²⁸ The report concluded that there was no need for substantive federal regulation in the real estate field similar to that provided by the Investment Company Act of 1940. It suggested, rather, that the current disclosure requirements under the Securities Act and Exchange Act be increased and strictly enforced. The detailed recommendations in the report covered several real estate security interests, included among them were recreational condominiums.

In a quick response the Commission, on January 4, 1973, issued Release No. 5347 which adopted certain of the Committee's recommendations with respect to condominium offerings which coupled the offer and sale of the unit with an offer or agreement to perform or arrange certain rental or other services for the purchaser.²⁹ Its dual purpose was to alert developers engaged in the business of building and selling condominiums to their responsibilities under the Securities Act and to provide guidelines for a determination of when a condominium offering may be viewed as an offering of securities. Authority for the Release was based on the *Howey* definition of an investment contract security and recent

28. Report of the SEC Real Estate Advisory Committee (Oct. 12, 1972), CCH FED. SEC. L. REP. [Transfer Binder '72] ¶79,265.

29. *Guidelines as to the Applicability of the Federal Securities Law to Offers and Sales of Condominiums or Units in a Real Estate Development*, SEC Release No. 5347 (Jan. 4, 1973), CCH FED. SEC. L. REP. [Transfer Binder '72-'73] ¶79,163. It is important to note, as before, the express applicability of the guidelines to "other units in a real estate unit." Express reference was made in the Release to the fact that its scope was not limited to condominiums, but applies to offerings of all types of units in real estate developments which have similar characteristics; e.g. recreational campgrounds.

interpretations of the same as in *Glen W. Turner*, both discussed *supra*. The Release emphasized the fact that application of *Glen W. Turner* to condominium units means that an investment contract is present in situations where an investor is not wholly inactive, but participates to a limited degree by expecting a profit from rental of the unit. After elaborating on collateral arrangements of rental pools and rental agencies, the Release made it clear that condominiums, coupled with a rental arrangement, would be deemed to be securities if offered and sold through an advertising scheme which emphasizes economic benefits to the purchaser to be derived from the managerial efforts of the promoter renting the units.³⁰

In summarizing, the Commission listed three circumstances, any one of which would cause a condominium offering to be viewed as an offering of securities in the form of an investment contract requiring application of the Securities Act: (1) a rental arrangement sold with emphasis on economic benefits, (2) a rental pool arrangement, and (3) an exclusive rental agency arrangement.

Release No. 5347 also indicated three circumstances under which a condominium offering would not be considered the offering of an investment contract security. First, subsequent to the purchase of the unit, an owner of a condominium unit may enter into a non-pooled rental arrangement with an agent not designated or required to be used as a condition to the purchase, without causing securities law implication. Second, the developers of a condominium project may continue their affiliation with the project by reason of maintenance arrangements without making the unit a security. Third, commercial facilities may be a part of the common area of a recreational condominium under the investment contract rationale if two tests are met: (1) income from the commercial facilities must only be used to offset common area expenses; and (2) the operation of such facilities must be incidental to the whole project, not a primary income source from the individual owners.

On April 9, 1973 condominium securities were again the topic

30. The manner of the offering and economic inducements held out to the prospective purchasers play an important role in determining whether the offerings involve securities. The Supreme Court in *SEC v. Joiner Leasing Corp.*, *supra* note 17, at 353, noted that:

In enforcement of the [Securities Act], it is not inappropriate that promoters' offerings be judged as being what they were represented to be.

The manner of the offering is a very important factor in the no-action letter procedure.

of a release³¹ in which the Commission called attention to the requirement that public offerings of condominium units registered under the Securities Act be made in conformity with the requirements of section 5(a).³² The Release generally noted that compliance with federal securities laws often requires offerors of the condominium offerings involving an investment contract to refrain from certain sales practices and procedures used by sellers of condominium offerings not subject to security regulation. More specifically, the Release discussed the sales practices which a developer may not use in the offering of its condominium units. Prior to the filing of a registration statement, there can be no advertising of the units.³³ In addition, no purchase price payments, deposits, or purchase commitments may be accepted, nor may indications of interest be solicited. After the registration statement is filed, and before its effective date, no written offer may be made except by means of the preliminary prospectus provided for in section 10(b) and Rule 433 thereunder.³⁴ Oral offerings and indications of interest and permitted; however, as in the pre-filing period, there can be no acceptance of purchase price payments, deposits or purchase commitments. After the registration statement has become effective, a final statutory prospectus must precede or accompany any written offer.³⁵

The guidelines promulgated in Release No. 5347 and Release No. 5382 were an effort by the Commission to bring a degree of certainty into the real estate offering area. The Commission succeeded in clarifying its treatment of the most commonly utilized condominium arrangements. However, because of the difficulty of anticipating the variety of arrangements that may accompany the offering of a condominium project, clear-cut answers are still not available in the many gray-area situations. The facts and circum-

31. SEC Release No. 33-5382, *Advertising and Sales Practices in Connection with Offers and Sales of Securities Involving Condominium Units and Other Units in Real Estate Developments*, CCH FED. SEC. L. REP. [Transfer Binder '72-'73] ¶1050.

32. Securities Act of 1933 § 5(a), 15 U.S.C. § 77(e) provides that it is unlawful, absent an exception, for any person, directly or indirectly, to sell security using the means or instruments of interstate commerce or the mail unless a registration statement is in effect as to such security.

33. Advertising in general terms means the dissemination of sales literature, brochures or publicity concerning the units. Under the provisions of Rule 135, notices by an issuer are not offers of securities for sale for the purposes of § 5 and accordingly, may be published prior to the filing of a registration statement.

34. Securities Act of 1933 § 10(b), 15 U.S.C. § 77(j)(b).

35. Prospectus must meet the requirements of § 10(a).

stances of each particular case determine whether an offering of securities is involved. In these gray-area situations, the Commission invited developers to make written inquiries to its staff through the no-action procedure.

2. No-Action Request Procedure

It can readily be seen why in some cases it is impossible for the recreational real estate developer and its counsel to state flatly that its condominium offering is not subject to federal securities regulation. Because of the drastic ramifications in cases of non-compliance of regulated offerings, a developer may not desire to rely exclusively on the guidelines for assurance. Assurance may be provided by following the no-action request procedure of the SEC.

The procedure is initiated by a no-action request to the staff of the SEC requesting an interpretation, an opinion, or assurance that no action will be recommended to the Commission on the basis of the information submitted.³⁶ In the case of condominium offerings, requests are referred by the Chief Counsel's office to the Division of Corporation Finance Branch 15.³⁷ A reply is drafted by one of the attorneys in the Branch which is then forwarded to the Chief Counsel's office where the draft reply is reviewed, finalized and mailed out over the signature of one of the staff attorneys in the Chief Counsel's office.³⁸ A no-action letter is the written reply by the staff to such a request. When the reply indicates a no-action recommendation, the Commission, pursuant to its own rules, is bound by it.³⁹ Such an assurance also has the effect of discouraging private lawsuits based on sales made without registration.

The SEC guidelines published in Release No. 5347 resulted in

36. SEC Securities Act No. 4924 (Sept. 20, 1968), CCH FED. SEC. L. REP. [Transfer Binder '67-'69] ¶77,606.

37. Originally the Division of Corporation Finance Branch 13 was designated to handle all real estate offerings. However, in July 1973, recreational condominium security offerings were shifted from SEC Division of Corporation Finance Branch 13 to Branch 15. The shift was brought about by the heavy caseload of Branch 13 which attempted to handle all real estate security offerings such as real estate syndications, investment trusts, oil and gas offerings, and recreational condominium offerings. Branch 15 now handles only recreational condominium security offerings and agricultural security offerings. See Ellsworth, *supra* note 27, at 699.

38. For a study and an examination of the no-action process, see Lowenfels, *SEC "No-Action" Letters: Some Problems and Suggested Approaches*, 71 COLUM. L. REV. 1256 (1971) and Lockhart, *SEC No-Action Letters: Informal Advice as a Discretionary Administrative Clearance*, 37 LAW & CONTEMP. PROB. 95 (1972).

39. Loss, SEC REP 1843-44 (2d ed. 1961) and SEC Release No. 5098 (Oct. 29, 1970), CCH FED. SEC. L. REP. [Transfer Binder '70-'71] ¶77,921. However, the estoppel effect of such a letter has not been judicially determined.

both the increased awareness among the recreational condominium developers of the potential applicability of federal securities laws to the offers and sales of condominium units and an increased use of the no-action request procedure. In 1973 the SEC published twenty-nine no-action requests in its responses thereto.⁴⁰ Of the twenty-nine requests, assurances of no-action were given by the staff in twenty-three, no opinion was given in three, and compliance with registration requirements was ordered in three.⁴¹

A review of the no-action requests submitted indicates that the procedure has resulted in a uniform processing of all recreational condominium security offerings. The staff of the SEC follows closely the guidelines promulgated in Release No. 5347 by applying the basic elements of a securities offering to the variety of arrangements it encounters. In this regard the staff of the SEC has not abused the no-action procedure by over-extending or overruling formal legislative, judicial, or administrative policies in the area of condominium security offerings.⁴²

In sum, the no-action letters indicate that the sale of condominium units will not constitute a "security" within the meaning of section 2(1) if: (1) no representations regarding income or tax benefits to be derived from the rental of the units are made orally or in sales literature; (2) condominium owners are not required to use the rental service of the developer or its subsidiary, under a rental pool arrangement, or to use an exclusive rental agency; and (3) no restrictions are placed on owner's occupation or rental of his unit. A rental program is permissible only when it is voluntary, non-

40. Pursuant to a recent ruling, all no-action letters are made available to the public.

41. Washington Service Bureau, Inc. provides a service which summarizes each no-action letter. Selected no-action letters are published in CCH FED. SEC. L. REP., copies of others can be obtained from the SEC at nominal cost. Recreational campground developments utilizing the condominium form of ownership were a subject of several no-action requests. In 1973 the SEC published twelve no-action requests and responses thereto with respect to such developments. Of the twelve requests, ten received assurances of no-action and two were required to comply with the registration requirements.

42. A recent article discussed one commentator's opinion that the publication of no-action requests and letters has created a new source of substantive law, frequently resulting in confusion and often de facto overruling the formal legislative, judicial or administrative policies rather than clarification of relevant statutes, court decisions, and formal SEC decisions and releases. The article warns that no-action requests and letters are a startling, and potentially very dangerous developments under federal securities law, especially when the staff, and sometimes the junior staff members, create substantive law under the securities law without any of the checks and balances which are inherent in our system of government. Lowenfels, *SEC No-Action Letters: Conflicts with Existing Statutes, Cases, and Commission Releases*, 59 VA. L. REV. 303 (1973).

exclusive, without a rental pool arrangement, and unrelated to the developer.⁴³

Resourceful real estate developers and their counsel will do well by studying the no-action requests that parallel their particular plans, and by molding their plans to fit those arrangements already determined to be outside the scope of federal securities laws. In some cases it may be determined that compliance with the registration requirement cannot be avoided.

C. Exemptions

A real estate developer whose condominium offering is subject to the registration requirements of the Securities Act must consider whether an escape route is available under one of the numerous exemptions from registration. With an express exemption in mind a developer may be able to structure his offering in such a way as to come within the requirements of the exemption, without hindering overall investment and marketing objectives. Although there are a number of exceptions recognized in the Securities Act, only three appear relevant to condominium offerings, and there is doubt whether even they offer a practical alternative for the developer. The three exemptions are (1) the private offering exemption set forth in section 4(2);⁴⁴ (2) the intrastate offering exemption in section 3(a)(11);⁴⁵ and (3) the small offerings exemption provided in section 3(b).⁴⁶ These exceptions have been frequently referred to by

43. Examples of various rental programs that do not cause the sale of condominium units to involve a "security" are: In *The 1972 Corp.*, No-Action Letter, March 16, 1973, where non-profit membership corporation was established to provide management services to the unit owners. Ultimate unit purchasers were to control the rental service program provided by the corporation.

In *Kaanapali Properties*, No-Action Letter, April 30, 1973, where the developer made available to the unit owners lists of the available local real estate brokers interested in a rental arrangement.

In *Tahoe Donner Ski Bowl Condominiums*, No-Action Letter, August 6, 1973, where the developer offered a rental procedure whereby the unit owner may in his sole discretion elect from time to time to use the condominium for his own use, rent his condominium, or use a rental agency of a licensed real estate broker, including but not limited to a subsidiary of the issuer, during periods when he does not wish to be in residence.

44. Securities Act of 1933 § 4(2), 15 U.S.C. § 77(d)(2) which provides simply that "the provisions of section 5 [the registration requirements of the Act] shall not apply to . . . transactions by an issuer not involving any public offering."

45. Securities Act of 1933 § 3(a)(11), 15 U.S.C. § 77(c)(a)(11) which provides an exemption for "any security which is part of an issue offered and sold only to persons resident within a single state or territory, where the issuer of such security is a person resident and doing business within, or if a corporation incorporated by and doing business within such state or territory."

46. Securities Act of 1933 § 3(b), 15 U.S.C. § 77(b)(3).

legal commentators and therefore will be discussed only briefly here.⁴⁷

The so-called private offering exemption will be available only to condominium offerings made to a limited number of prospective unit purchasers. No public advertising of the project would be possible, even though the unit will be sold to only one person. With the marketing campaigns necessary for successful development of recreational condominium projects, this exemption offers no practical alternative, except in rare situations.

A condominium offering will be exempt from the registration requirements under the intrastate exemption if the units are offered and sold exclusively to residents of the state in which the developer is both incorporated and doing business. The exemption will be lost if only one offeree or purchaser is a nonresident. Clearly, the strict conditions of this exemption make it of little practical value to the recreational condominium development in recreation areas. However, a developer of a small recreational project with local appeal may be able to take advantage of this exemption.

The small offerings exemption should also be considered by a developer when contemplating a condominium security offering. The exemption is limited to security offerings which do not exceed \$500,000 in aggregate amount, and requires adherence to several requirements before it can be relied upon.⁴⁸

It should be emphasized here that the exemptions from registration do not exempt securities from the anti-fraud provisions of the Securities Act and the Exchange Act. The condominium developer is still subject to civil liabilities and is obligated to make full disclosure of all material facts when selling the exempt security.⁴⁹

II. APPLICATION OF THE INTERSTATE LAND SALES ACT

A. *History and Provisions of the Act*

In response to wide-spread abuses in the interstate sales of undeveloped subdivided land, Congress passed the Interstate Land Sales Full Disclosure Act in 1968.⁵⁰ The primary purpose of the Land Sales Act is to require the developers of certain subdivided property to make a full, complete and accurate disclosure to the

47. See Rohan, *supra* note 27, at 8-11; Grimes, at 158-166; *supra* note 27, at 651-53.

48. SEC REG. A, 17 C.F.R. § 230.251-230.263 (1956).

49. Securities Act of 1933 § 12, 15 U.S.C. § 77.

50. 15 U.S.C. § 1701-1720 (1970). Chapter IX of Title XIV, Housing and Urban Development Act of 1968, which became effective April 28, 1969.

purchaser or lessee of all relevant information about the property. Originally aimed at the high-pressure, sight-unseen sales tactics of certain recreational land developers that forgot the promises their salesmen made once all the lots had been sold, the Land Sales Act makes it unlawful for any developer to sell or lease, by use of the mail or by any means in interstate commerce, any such land offered as part of a common promotional plan unless the land is registered with the Department of Housing and Urban Development and a Property Report is furnished to the purchaser or lessee in advance of the signing of an agreement for sale or lease.⁵¹ As is true with the Securities Act, violation of the Land Sales Act can be disastrous to the developer, resulting in any one or more of the following: suspension of land sales,⁵² criminal and injunctive proceedings by the government,⁵³ and civil actions by purchasers to recover damages.⁵⁴

Administration of the Land Sales Act is under the Secretary of Housing and Urban Development (HUD) and the newly formed Office of Interstate Land Sales Registration (OILSR).⁵⁵ The guidelines and interpretations of the Land Sales Act promulgated by OILSR became effective upon publication in the Federal Register on March 29, 1969.⁵⁶ These regulations, as amended several times,⁵⁷ are the basic tools with which to discern the application of the Land Sales Act to individual developments.

B. *OILSR Guidelines on Condominium Coverage*

As originally enacted, the Land Sales Act and its supporting

51. *Id.* § 1703(a)(1) (1970).

52. *Id.* § 1706(d), (e).

53. *Id.* § 1714(a), 1717.

54. *Id.* § 1709, 1713.

55. *Id.* § 1715 prescribes the authority of the Secretary:

Sections 1416(a) of the Act vests authority and responsibility in the Secretary of Housing and Urban Development and authorizes the Secretary to delegate any of his functions, duties imposed thereunder to employees of the Department of Housing and Urban Development.

Id. § 1700.15 established the Office of Interstate Land Sales Registration as an organizational unit of HUD.

Id. § 1700.20 authorizes the Secretary to name an Interstate Land Sales Administrator as head of the OILSR.

56. 34 Fed. Reg. 9757 (1969).

57. As of March 1, 1974 and since April 1, 1973, the following amendments have been made to Title 24, Chapter IX: 38 Fed. Reg. 134081 (May 22, 1973); 38 Fed. Reg. 23874 (Aug. 24, 1973); 38 Fed. Reg. 32442 (Nov. 26, 1973); 38 Fed. Reg. 238866 (Sept. 4, 1973); 39 Fed. Reg. 7824 (Feb. 28, 1974).

regulations did not specifically establish whether the definitions thereunder were sufficiently broad to apply to the condominium form of land ownership. The difficulty arose because of the broad definition given to "subdivision" in the original Act.⁵⁸ Although no express authority existed in the Land Sales Act or the regulations, OILSR took the position that condominiums were included within the definition of "subdivision," each unit constituting one lot.⁵⁹ Because of the weak enforcement of the Land Sales Act by OILSR, these interpretative problems caused little concern to most condominium developers prior to 1972. Only after the appointment of the first Administrator of Interstate Land Sales in March, 1972, and the subsequent increased activity at OILSR, did condominium developers become fully aware of the ramifications of the Land Sales Act.⁶⁰ New regulations which became effective December 1, 1973 have expressly clarified OILSR policy on the application of the Land Sales Act to condominiums.⁶¹

In late 1972 OILSR conducted public hearings throughout the country in an effort to determine the necessity for changes in the regulations.⁶² The result of the hearings was a proposed revision of chapter 9 of title 24, published for public comment on May 4, 1973.⁶³ After considering all the comments and suggestions, the

58. In 15 U.S.C. § 1710.1(p) (1970) "subdivision" is defined as follows:

"Subdivision" means any land which is divided or proposed to be divided into 50 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, in 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 the individual offering, as being offered for sale or lease as part of the common promotional plan.

59. A former OILSR Administrator expressed his view that the definition of "lot" as contained in the Land Sales Act was not limited to parcels of surface land "laid out into blocks or units regularly numbered and plotted" and that the offering of condominium units or other divisions of air space did fall within the purview of the Act. See Lehtonen, *Interstate Land Sales Full Disclosure Act and Its Effect on Land Titles*, Title News, January, 1971, pgs. 29-33.

60. Discussion of the enforcement policy of OILSR in Comment, *Interstate Land Sales Regulation: The Case For An Expanded Federal Role*, 66 MICH. J. L. REFORM. 511, 515-520 (1973).

61. 39 Fed. Reg. 23866 (1973).

62. The first of a series of public hearings were announced in May, 1972, the purpose of which was "to aid the Administrator in enforcing the Interstate Land Sales Full Disclosure Act and in determining the necessity for and the basis of recommendations for further legislation or regulations or both." See 37 Fed. Reg. 10408 (1972).

63. Within the chapter, amendments were proposed to §§ 1700, 1710 and 1720. An informal public hearing was held on June 6, 1973 and written comments were accepted to June 28, 1973.

new regulations were promulgated.⁶⁴ The new regulations added the definition of "lot" and amended the definition of "sale."⁶⁵ The definition of lot in section 1710.1(h) is intended to demonstrate the nature of the interest which is subject to the coverage of the Land Sales Act. That interest clearly includes, and therefore clearly brings within the purview of the Land Sales Act, a condominium concept of ownership for horizontal land development.⁶⁶ The breadth of this definition was a subject of considerable comment from developers and builders at the public hearings, especially on the coverage of condominiums. Because of these comments, OILSR's policy on condominiums was set forth in the new guidelines and is in full as follows:⁶⁷

The application of the Act to condominiums has been consistent with OILSR policy since the issue was first raised in 1969. The bases of this position are that condominiums carry indicia of and in fact are realistic, whether or not the units therein have been constructed. Condominium is accordingly viewed by OILSR as equivalent to a subdivision, each unit constituting a lot. Adverse comment, particularly from builders, asserts that condominiums are equivalent to houses and the sale of houses was not intended to be covered by the Act. However, the right to condominium space is a form of ownership, not a structural description. This condominium concept is employed as an ownership form for completely horizontal developments and even for campgrounds.

Condominium developers and other recreational land developers will have to live with this new form of land regulation unless Congress reverses the increased scope of OILSR's authority. Legislative history on the present Land Sales Act in negligible and

64. Published in 38 Fed. Reg. 23866-23909 on Tuesday, Sept. 4, 1973, the new regulations did not become effective until December 1, 1973. This allowed a lead time of approximately ninety days in which developers could evaluate or prepare their advertising under the new guidelines or take steps necessary to prepare any actions in accordance with the regulations.

65. 15 U.S.C. § 1700-1(h), as amended, defines "lot" as follows:

"Lot" means any portion, part, division, unit or undivided interest in land if such interests excludes the right to the exclusive use of a specific portion of the land.

In *Id.* § 1700.1(h) "sale" is defined as:

"Sales" means any obligation or arrangement for consideration to purchase or lease a lot directly or indirectly. The terms "sale" or "seller" include in their meanings the terms "lease" and "lessor."

66. Clearly the condominium concept in the regulations is not limited to the conventionally-constructed condominium unit, but extends to any type of recreational development, e.g., again recreational campgrounds that employ the condominium concept.

67. 38 Fed. Reg. 23866 (1973).

predecessor bills are unclear on the subject.⁶⁸ With the amended definition of lot, OILSR's position on condominiums has now been codified and it is within the Secretary's regulatory authority to do so.⁶⁹ Judicial interpretation is sparse because of its relatively recent enactment.⁷⁰

C. *Alternatives Available to Condominium Developers*

Recreational developers who find their plans within the purview of the Land Sales Act as recently amended can take solace with several specific exceptions, unless they are used purposely to evade its application. Thus, a common promotional plan which involves either (1) sale or lease of fewer than 50 lots⁷¹ or (2) sale or lease of lots which are all five acres or more⁷² are exempt from the coverage of the Act. This provides no escape for a condominium or recreational campground development whose units are many and small.

1. *Builder's Exemption*

An important statutory exemption available to most condominium and recreational developers provides for exemption for the sale or lease of any improved land on which there is an existing building, or where the seller is obligated by contract to construct a building within a period of two years.⁷³

As applied to a condominium or other recreational unit sale, sale of units will qualify for exemption if, either the unit is completed before it is sold, or it is sold under a contract obligating the developer to erect the unit within two years from the date the purchaser signed the contract. On the surface it appears this exemption is easily met, but the meaning given to "building" as used in the Land Sales Act provides a hidden trap for the unwary.

68. Federal legislation was recommended and bills were introduced in the 89th and the 90th Congresses [S. 2672, 89th Cong., 1st Sess. (1965) and S. 275, 90th Cong., 1st Sess. (1967)]; the final result being the enactment in 1968.

69. 15 U.S.C. § 1719.

70. For the only recent cases, see *Adolphus v. Zebelman*, 354 F. Supp. 309 (E.D. Mo. 1973) (action by minority shareholders against the corporation for making sales in violation of Interstate Land Sales Act, resulting in civil suits against the corporation); and *SEC v. Thunderbird Valley, Inc.*, 356 F. Supp. 184 (1973) (the Land Sales Act failed to regulate the aspect of the defendant corporation's business which involved the issuing of notes and evidences of indebtedness).

71. 15 U.S.C. § 1702(a)(1).

72. *Id.* § 1702(a)(2).

73. *Id.* § 1702(a)(3). The exemption was apparently inserted in the Land Sales Act as a result of the strong lobbying effect of the building and construction trades counsel. See Coffey and Welch, *Federal Regulation of Land Sales: Full Disclosure Comes Down to Earth*, 21 CASE W. RES. L. REV. 5, 40 n. 7 (1969).

OILSR construes "building" as comprising of the dwelling unit and all utilities or systems necessary to support normal occupancy. As is the case in most recreational developments, individual dwelling units are just part of a plan that includes a variety of common facilities. Thus, when divided dwelling units are merely incidental to the common facilities, all common facilities must be completed within the two year period to qualify for any exemption.⁷⁴ In addition, when the building exemption of section 1702(a)(3) is being used, it is important to note that the language of the contract must be so worded that the seller himself is obligated to actually complete the development.⁷⁵

On February 28, 1974, OILSR published additional guidelines in an effort to clarify its position on this so-called builder's exemption.⁷⁶ Following the 1973 guidelines which emphasized attention to the applicability of the Land Sales Act to the offer and sale of condominiums and other similar structures, OILSR was deluged with inquiries from condominium developers and trade associates concerning the construction of the building exemption.⁷⁷

The new OILSR guidelines begin with a caveat to all builders, other than condominium builders, that they are not automatically exempt from the Land Sales Act merely by virtue of their primary occupations or the type of buildings they erect. OILSR states that all lot sales which are not exempt by reason of section 1702(a)(3) or because of the lack of jurisdiction are covered by the Land Sales Act regardless of the type of status of construction. The only reason why special attention was given in the regulations to condominiums was because of the growing popularity of that type of owner-

74. 38 Fed. Reg. 23866 (1973). The statement of OILSR policy on a condominium coverage justifies this construction of "building" by inferring that registration is necessary when vacation sites are sold without assurances that such common facilities will be completed. The policy statement also distinguishes owner-occupied condominiums where OILSR believes registration typically is unnecessary because the development would qualify for exemption inasmuch as they are able to deliver a completed unit to a purchaser within two years after the contract of sale has been signed.

75. Krechter, *Federal Regulation of Interstate Land Sales*, 4 REAL PROP., PROB. & TRUST J. 327, 329 (1969). In discussing the building exemption, no justification for requiring that the seller himself be the sole person who can build on the land in order to qualify for the exemption.

76. 39 Fed. Reg. 7824 (1974).

77. Administrator George Bernstein reported that many condominium developers and trade associations had inquired concerning coverage of a condominium development in light of § 1403(a)(3). Considerable comment was received concerning the applicability of the exemption to situations involving the two year construction period, while there was little question about the operation of the statute to existing buildings.

ship. In addition, OILSR warns developers that if a contract obligating the seller to erect a building within a period of two years was used to give the color of exemption in an effort to evade the Land Sales Act, it would clearly have a remedy in its injunctive authority⁷⁸ and would most likely seek prosecution.

The remainder of the new guidelines sets out OILSR's position in connection with several problems that developers have faced in attempting to apply the requirements of the building exemption to the realities of the construction and marketing of the condominium projects.⁷⁹ The contract of sale may contain provisions which allow time extensions beyond the two-year period. The contract provisions being permissible are those which reflect customary industry practices, mainly provisions allowing time extensions for acts of God, material shortages, etc., which are beyond the control of the developer. The test OILSR will use in judging the acceptability of the contract provisions allowing delay will be whether such delays would be legally supportable in the jurisdiction where the building is being erected.

Recognizing the need for pre-sale marketing of condominium projects,⁸⁰ the new guidelines distinguish between a sale of a condominium unit and the reservation of a condominium unit. A sale is defined as any transaction for consideration whereby a purchaser is obligated to acquire a condominium unit directly or indirectly. Reservation, as denoted by OILSR, is not a sale but an agreement by which a purchaser expresses an interest to buy into a condominium sometime in the future. The effect of this distinction is that the two-year construction period does not begin to run until a contract of sale containing the obligation to erect the unit is signed by the purchaser, thereby granting the developer time for pre-sale activity. Under a reservation agreement, deposit may be accepted from the purchaser provided that it is placed in escrow within an independent institution having trust powers and is refundable at any time after the purchaser's option. The reservation must require a subsequent affirmative action by the purchaser to create his obligation. Also no HUD Property Report is to be delivered to a

78. Presumably, the injunctive power under 15 U.S.C. § 1710.12.

79. As to one point, OILSR is definite that as a rule the two-year period is sufficient building time for the purpose of builder's exemption.

80. Pre-sale marketing activities are necessary in condominium construction for a variety of reasons; including determination of market feasibility and preliminary basis for constructional commitments.

prospective purchaser at the time of the execution of the reservation for a condominium unit.

The problem of what stage construction a unit must be expected to reach before a contract can qualify as obligating the developer to erect within a period of two years was also discussed by the new guidelines. For an owner-occupied residential condominium a unit is required to be ready for occupancy, *i.e.* physically habitable.⁸¹ For those condominiums in which the promotion of the common facilities is a primary inducement to purchase, as is the case in recreational condominiums, the expected completion of these facilities is deemed integral and must coincide with the expected completion of the condominium unit.

2. Limited Offering — Intrastate Exemption

The initial regulations under OILSR contained a major exemption⁸² for the sale or lease of lots which were offered "entirely or almost entirely intrastate." Although practical guidelines were never established to develop an objective standard for determining what is "almost entirely intrastate" many developers relied on this so-called "intrastate exemption."⁸³ Beginning in 1972, new regulations did away with the intrastate exemption and as a substitute established a new regulatory exemption dealing with "limited-offerings."⁸⁴

Under the discretionary power of the Secretary, the sale or lease of lots in a subdivision which otherwise would be covered by the Act may be declared exempt by written order upon request by the developer.⁸⁵ A request for an exemption order will be consid-

81. The test used is the definition of the date of substantial completion, as "when construction is sufficiently complete so that the owner may occupy the work or designated portion thereof for the use for which it is intended."

82. 15 U.S.C. § 1710.10(1) (1969).

83. Krechter, *supra* note 75, at 330-331 (1969) and Comment, *Handbook to the Interstate Land Sales Full Disclosure Act*, 27 ARK. L. REV. 65, 66-68 (1973).

84. 37 Fed. Reg. 1301, effective upon publication in the Federal Register, January 27, 1972. 15 U.S.C. § 1710.14. As a regulatory exemption, it was promulgated by the Secretary under his rule making power found in 15 U.S.C. § 1702(b). The section sets forth most of the criteria used in determining exemptions under the former § 1710.10(1), but adds certain additional criteria, the most notable being the maximum offering of less than 300 lots.

85. *Id.* § 1710.14(a). The regulation provides for two subjective criteria that the Secretary includes before issuing an exemption order, in addition to explicit requirements. If by reason of the small amount involved or the limited character of the offering, enforcement of the act with respect to the subdivision is (1) not necessary in the public interest; and (2) not necessary for the protection of purchasers.

ered only where it is limited to a single transaction⁸⁶ or where all of the following criteria are met: (1) a maximum lot figure of 300; (2) a subdivision is located within one state; (3) offering is entirely or almost entirely limited to resident purchasers; (4) where the advertising and promotional devices are almost exclusively intrastate activities; and (5) no more than 5% of the lot sales in any one year will be made to nonresidents.⁸⁷

The condominium developer who can meet all of the above mentioned requirements is not automatically eligible for land exemption determination by the Secretary. In addition, pursuant to the regulations, a developer has the affirmative duty of (1) filing a partial statement of record in accordance with section 1710.25; (2) pay a refundable filing fee of \$100; and (3) submit a comprehensive statement disclosing various information about the development.⁸⁸ To the dismay of many practitioners counseling condominium developers, the so-called intrastate exemption is not an absolute exemption at all. Even assuming all of the criterial are met, the developer must be prepared to incur expenses and delays in attempting to obtain an exemption from OILSR under the limited-offering intrastate exemption.⁸⁹

3. State Filings

An alternative to federal registration is available to developers who comply with the registration requirements of certain states. Under the regulations⁹⁰ OILSR has the authority to accept state registrations for filing on the federal level in lieu of the registration requirement under the Land Sales Act. Only four states (California, Florida, Hawaii and New York) have been determined by the OILSR to have acceptable filings under this provision.⁹¹ Acceptable state filings must be filed with OILSR pursuant to the procedure outlined in the regulations.⁹²

86. *Id.* § 1710.14(a)(1). Not functionally useful to a condominium developer where the sale of each unit is considered a separate transaction.

87. *Id.* § 1710.14(a)(2). Any condominium development with over 299 units would not qualify for an exemption determination.

88. *Id.* § 1710.14(b).

89. The developer should be prepared for at least a one-month's delay before HUD acts upon his request, in addition to being prepared to furnish additional information if HUD requests it. It must be noted that under § 1710.14(c), any exemption will be automatically terminated if there is a material change in the facts in an application, so as counsel one must police the developer's methods of operation to ensure that no material changes are made and if any are contemplated, they are first cleared with HUD.

90. *Id.* § 1710.25.

91. *Id.* § 1710.26.

92. *Id.* § 1710.27.

The state filing provision was an attempt by Congress to coordinate the field of land sale regulations, thus avoiding increased costs due to multiple registrations.⁹³ Thus a developer who is marketing condominium units nationwide is able to avoid filing federal forms by registering in any one of the acceptable states. But as at least one commentator has noted, avoidance of federal registration does not completely avoid multiple registration.⁹⁴ Because of the lack of interstate coordination and state acceptance of federal registration, the condominium developer will still be required to register in each individual state in which he plans to offer the units for sale, and pay all at increased cost to him.⁹⁵

III. REGULATION OF CONDOMINIUMS IN WISCONSIN

A. State "Blue Sky" Securities Law

The language of each state statute may be slightly different from that of any other, and any interpretation thereunder may be based upon that specific language. However, most state blue sky laws are patterned somewhat along the same lines as the federal Securities Act with the exception that many are more stringent in both requirement and enforcement. Therefore, it is not surprising that the definitions contained in the state blue sky laws are often very similar to the Securities Act.

The Wisconsin definition of security is set forth in section 551.02(13)(a) of the Wisconsin Uniform Securities Law which provides as follows:

"Security" means any stock; treasury stock; note; bond; debenture; evidence of indebtedness; share of beneficial interest in a business trust; certificate of interest or participation in any profit sharing agreement; collateral trust certificate; preorganization subscription; transferable share; *investment contract*; commodity futures contract; voting trust certificate; certificate of deposit for a security; limited partnership interest; certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease; or, in general, *any interest or instrument commonly known as or having the incid-*

93. Federal preemption was suggested, but Congress chose a coordination effort. For discussion see Comment, *Regulation of Interstate Land Sales*, 25 STAN. L. REV. 605, 615-616 (1973).

94. *Id.* at 616 for discussion of progress made on interstate coordination and state acceptance of federal registration.

95. See Comment, *supra* note 83 at 70, and Ellis, *Land Sales Full Disclosure Laws: Federal and Illinois*, 60 ILL. BAR J. 16, 23 (1971).

*ence of a security or offered in the manner in which securities are offered; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of or option, warrant or right to subscribe to or purchase or sell, any of the foregoing. (Emphasis supplied.)*⁹⁶

Historically, the typical land sales agreement has not been generally thought of as a security under this definition. Notwithstanding, certain dispositions of real estate, including the offer and sale of condominium units, have been determined by the Wisconsin Commissioner of Securities to constitute investment contract securities within the meaning of section 551.02(13)(a). If the Wisconsin Commissioner is of the opinion that the condominium units constitute "securities," the developer must comply with state registration requirements unless the security or transaction is exempted.⁹⁷ Consequently, the condominium units must be sold by persons licensed as "securities agents" under section 551.31⁹⁸ and a prospectus must accompany all advertising material.⁹⁹

96. WIS. STAT., § 551.02(13)(a) (1971).

97. Exemptions from registration are set forth in §§ 551.22 and 551.23. The various exceptions are not practical alternatives to registration for the developer of condominiums and will not be discussed in this comment.

98. See WIS. STAT. §§ 551.31-.34 for the licensing of brokerdealers, agents and investment advisors. The Office of the Commissioner of Securities does not always require securities agents representing issuers to successfully complete a written examination. In some cases, the issuer may submit an undertaking setting forth the name of the corporate officer delegated with the responsibility of supervising the offer and sale of its securities. The undertaking must set forth written supervisory procedures governing such offers and sales, and will not be deemed adequate unless it includes, but not necessarily limited to the following:

(1) The issuer undertakes to familiarize its securities agents with the prospectus required to be used in the offering and sales of the securities;

(2) The issuer undertakes to submit all sales literature proposed to be used in the offer or sale of its securities to the Commissioner's Office for approval prior to use, and to require that all such literature be accompanied or preceded by the delivery of a current prospectus;

(3) The issuer undertakes to familiarize its securities agents with its Order of Registration and the issuer's responsibilities thereunder;

(4) The issuer undertakes to acquaint its securities agents with the rules and regulations governing the sale of securities in Wisconsin, and in particular, the provisions of § 4.09(1)(c) of the WIS. ADMIN. CODE, relating to the issuer and its agents' responsibility, to make reasonable inquiry, of prospective investors, concerning the investment objectives, financial situations and needs, so as to determine that the offer or sales of the issuer's securities reasonably meet such investor's investment objectives;

(5) The issuer undertakes to have the Officer in charge of agents supervision, to perform the following:

(a) Review and record written approval of the opening of each new customer account, and

(b) Review and record written approval before the mailing of all correspondence per-

The Wisconsin Commissioner appears to have taken a more liberal view in regard to the investment contract form of security than the federal approach under the guidelines discussed *supra*. Although there is only limited case authority under state blue sky laws,¹⁰⁰ the necessity of profit expectation is precluded as an element in the definition of security. The Commissioner's reasoning is that section 551.02(13)(a) does not preclude profit expectation, per se, in the statutory definition of security. There, it is enough that the interest in question be "offered in the manner in which securities are offered" or have "the incidents of a security." The test employed for an investment contract security is not whether a conventional profit expectation is present, but whether the sale of the units involves the placing of capital or laying out of money in a way intended to realize expectations for benefit (e.g. future recreational benefits) from its employment. Under this approach, units in most recreational condominium developments, and other developments utilizing the condominium form of ownership, do in fact constitute investment contract securities in Wisconsin.

B. State Real Estate Law

The existence of state land sales legislation has been uneven and unclear, notwithstanding the passage federally of the Land Sales Act. Many states have no such laws, and those that do differ considerably in approach. Under the authority of the Real Estate Examining Board, Wisconsin has regulated the sales of lots or acres on a very limited basis. Pursuant to its rule-making powers,

taining to the solicitation or execution of all sales of the issuer's securities by its securities agents, and

(c) Initiate proper review and disposition of all customer complaints relating to investment in the issuer's securities.

99. WIS. STAT. § 551.53 (1971) provides that "all advertising shall be filed with the Commissioner not later than the date of use, except advertising which the Commissioner exempts by rule or order." Pursuant to the WIS. ADMIN. CODE § 6.02 a prospectus circulated in connection with an offering of a security for which a registration statement has been filed is exempt from filing. In limited situations the Commissioner's Office waives the requirement that all mailings of advertising materials must contain a copy of a current prospectus. If the form of the advertisement is deemed to be in the interest of the public or appropriate for the protection of investors, the activity will be permitted. For example, mailings which contain language to the effect that, "This is neither an offer to sell nor a solicitation of an offer to buy the securities. The offering is made only by the prospectus which may be obtained from the developer," has been deemed permissible.

100. *Silver Hills Country Club et al. v. Sobieski*, 55 Cal. 2d 811, 361 P.2d 906, 13 Cal. Rptr. 186 (1961); *Creasy Corp. v. Enz Bros.*, 177 Wis. 49, 187 N.W. 666 (1922); *First National Savings v. Samp*, 274 Wis. 118, 80 N.W.2d 249 (1956), and *State v. Lawrence Brill*, *State v. George Brill*, Circuit Court, Dane County, Wis. (7-022, 7-023).

the Board regulates the sales of out-of-state subdivisions by placing affirmative duties on real estate brokers licensed in Wisconsin.¹⁰¹ The rules apply only when a broker is selling encumbered lots or acreage located outside of the state of Wisconsin. Obviously the scope of this protection is limited and its applicability to condominium units is doubtful.¹⁰²

Some measure of control over the sale of condominium units is exercised by the state through the licensing provisions for "real estate brokers" and "real estate salesmen" under chapter 452 of the Wisconsin Statutes.¹⁰³ Under Wisconsin's Unit Ownership Act, units of a condominium constitute real estate and therefore any person selling such a unit is deemed to be a real estate broker.¹⁰⁴ Unscrupulous activity is monitored to the extent that trust accounts must be established¹⁰⁵ and that the Real Estate Examining Board has power to make investigations and revoke licenses.¹⁰⁶ In addition, the Wisconsin Unit Ownership Act is applicable to condominiums and requires a formal declaration of purpose,¹⁰⁷ a survey, and the recording of a survey map fixing the limit of each unit.¹⁰⁸ The formal declaration, however, does not provide for full disclosure to the purchaser as does a securities prospectus.

The question arises as to the method of regulating the offer and sale of condominium units in Wisconsin. Under current Wisconsin statutes both the Commissioner of Securities and the Real Estate Examining Board have available adequate statutory powers and sanctions, and responsibility for establishing adequate standards, with respect to the trustworthiness and business conduct of selling agents. The result is conflicting regulation when the proceeds of sales of units are required to be deposited in an impounded account under the supervision of the Commissioner and in a real estate

101. WIS. ADMIN. CODE § REB 5.01. The broker's duties include making arrangements for the release of any encumbrances, final payment and providing full and complete advice to the purchasers of the seller's interest. The broker must submit all of the information to the Board for consideration.

102. No authority was found to justify inclusion of condominium units within the meaning of "lots."

103. WIS. STAT. § 452.03 (1971). "No person shall engage in or follow the business or occupation of, or advertise or hold himself out as or act temporarily or otherwise as a real estate broker or salesman without a license."

104. WIS. STAT. ch. 703 (1971).

105. WIS. STAT. § 452.09 (1971).

106. WIS. STAT. §§ 452.10, 452.11 (1971).

107. WIS. STAT. § 703.03 (1971).

108. WIS. STAT. § 703.13 (1971).

broker's trust fund account. The requirement for dual licensing of the persons who sell condominium units places an unnecessary burden on the developer. Under the current statutory scheme, the sales of condominiums have retained their real estate characteristics under the Unit Ownership Act, but the requirement of a formal declaration of purpose thereunder does not permit a full disclosure for prospective purchasers. The Securities Act then enters the picture and assures the protection afforded by full disclosure by regulating the offer and sale of the units as a securities offering.

In a recent Attorney General Opinion¹⁰⁹ it was noted that changing forms of utilization of real property may require further legislation to protect the public, and that it will be for the legislature to determine which state agency, if any, shall administer necessary laws. Other states have been faced with the problem of regulating changing forms and have followed various approaches. Regulation of condominium sales has been accomplished by bringing condominiums within the scope of either state securities regulations,¹¹⁰ state real estate regulations,¹¹¹ a combination of both,¹¹² or a securities-type regulation.¹¹³ In New York the condominium is treated as if it were a security, even if the sale of principal residence is their avowed purpose of the offering. In Virginia and other states, subdivision laws have been the vehicle for requiring disclosure of condominium particulars. In California the courts have given a broad scope to the definition of securities,¹¹⁴ but subsequent legislation covers condominiums under the real estate law. In New Jersey and Florida, securities-type protection legislation was passed which treats condominiums as securities, but without any reference to the state securities laws. By this procedure, the question of defining condominiums as securities becomes of little significance, because condominium offerings of all types are treated as if they were securities. For this reason at least one commentator believes that this is the wisest approach.¹¹⁵ Others suggest that

109. — Op. Att'y. Gen. (July 31, 1973).

110. N.Y. Real Prop. Law Art. 9B (McKinney 1970).

111. HAWAII REV. STAT. § 514-32 (1970); MICH. COMP. LAWS § 559.24 (1970); VA. CODE ANN. § 55-79.17 (1969).

112. CAL. BUS. & PROF. CODE § 11010 (West Supp. 1972).

113. FLA. STAT. ANN. § 711.24 (1971); N. J. STAT. ANN. 45:22A-4(e) (1971).

114. On the basis of *Silver Hills Country Club v. Sobieski*, *supra* note 100, it was assumed that all new construction or conversion condominiums, housing corporations, and plan unit developments could also be construed as securities offerings. Subsequent regulatory coverage of all such ventures for registration came under the real estate law.

115. Clurman, *supra* note 27, at 23.

condominium offerings should fall under the authority of state real estate agencies.¹¹⁶ In the near future Wisconsin will have to decide on which regulatory route to proceed.

IV. MULTIPLE REGULATION AND ITS PROBLEMS

Legislative response to the unscrupulous practices of some real estate developers has been to regulate the interstate sale of recreational land on both federal and state levels. As discussed in the previous sections, the scope of this regulation has been extended by judicial and administrative fiat to the offer and sale of condominium units or other types of units in real estate developments which have the characteristics of condominium ownership. Because of the abuses of a few, many reputable condominium developers are now faced with excessive burdens in attempting to comply with the various federal and state statutes regulating their interstate offerings. The regulatory provisions have created problems of multiple registrations and overlapping enforcement.

During the Congressional hearings over the Land Sales Act,¹¹⁷ William Casey and Manuel Cohen, both prior chairmen of the SEC, gave little thought to the possible applicability of the securities law to certain sales of "lots" under the then proposed legislation. At that time there may have been some doubt that condominium offerings would be subject to both state and federal securities laws and both federal and state land sales laws, but it is rather clear today that dual, triple, and even quadruple registrations are indeed required under the letter of the law for certain types of offerings.¹¹⁸ Registration under state "blue sky" securities laws will not satisfy the requirements of the Securities Act of 1933, or vice versa; and except for the limited state filing provision, registration under state land sales laws will not satisfy the requirements of the Land Sales Act, or vice versa.

In addition, registration under the Securities Act will not satisfy the requirements of the Land Sales Act, or vice versa. In *SEC*

116. Note, *Florida Condominiums*, 25 U. FLA. L. REV. 350, 364 (1973); Crockett, *Protecting the Deposit of the "Consumer" Who Purchases a New Condominium Apartment*, 8 HAWAII BAR J. 103, 116 (1972).

117. See 1967 Hearings 151; 1966 Hearings 85, 367-368; 1964 Hearings 326; and 1963 Hearings 487.

118. As early as 1969 one legal commentator recognized the possibility of double compliance requirements at the federal level and also dual registration at the state level. See Coffey, *supra* note 73, at 13-14. In cases where state blue sky is the only vehicle by which state land sales are controlled, one of the registrations would be avoided.

v. Lake Havasu Estates,¹¹⁹ the SEC filed a complaint and sought injunctive relief against the developer of Lake Havasu Estates for offering and selling unregistered securities. In defense, Lake Havasu argued unsuccessfully that its offering was not a security since the notes sold investors stemmed from a land sales transaction which was subject to regulation by HUD under the Land Sales Act, which pre-empted the Securities Act. In answering Lake Havasu's argument, the Court failed to see what bearing the existence of all of this regulation could have on a company registering its securities under the 1933 Act and intimated that the two agencies have concurrent jurisdiction.¹²⁰ A complaint recently filed in U.S. District Court, Northern District of California, in *McCubbray v. Boise Cascade, Inc.*,¹²¹ alleged violations of both the Securities Act and the Land Sales Act and sought compensatory and exemplary damages under each.

The SEC approach has been made clear in responses to no-action requests. For example in *Edward S. Jaffry*¹²² a condominium developer inquired whether his condominium offering constituted a sale of a security in view of the fact that the activities in regard to the sale of land were presently regulated by the Florida Land Sales Board and the OILSR under the Land Sales Act. The SEC staff reply was that the offering of units would constitute the offering of a security within the meaning of section 2(1), and any public offering of the units would require registration under the Securities Act.

Little justification can be found for concurrent jurisdiction of the two federal acts. At one time, it was justified on the ground that the Land Sales Act is concerned principally with the facts concerning the land which the developer is marketing and the Securities Act is aimed primarily at the disclosure of facts about the developer. However, comments to the recent changes in the Land Sales Act, in response to arguments that purchasers of lots, unlike purchasers of stock, have no need to inquire into the financial strength of their developer, stated that in reality the prices purchasers pay for lots typically include promised or proposed improvements to be made by the developer, and the developer's financial

119. 340 F. Supp. 1318 (D.C. Minn. 1972).

120. See *Securities-SEC v. Lake Havasu Estates*, 5 LOYOLA OF L.A.L. REV. 417 (1972) for a complete discussion of the decision.

121. U.S. District Court, Northern District of California, C-72-470 (March 16, 1972) CCH FED. SEC. L. REP. [Transfer Binder '72-'73] ¶ 93, 414.

122. CCH FED. SEC. L. REP. August 25, 1971 [Transfer Binder '70-'71] ¶ 78,395.

status has a direct bearing on its ability to provide such improvements.¹²³ Where is the justification now? Obviously, the Congress was not satisfied that existing securities laws could afford adequate protection in the land sales context. Protection of the individual condominium unit purchaser through full disclosure of all pertinent financial and other material information concerning the units offered to members of the public now appears to be accomplished by the registration process established under both acts.

Because of the abuses that have occurred, and continue to occur,¹²⁴ the need of regulation of interstate sale of condominiums is clearly demonstrated. Many authorities, recognizing the need for state responsiveness, believe that condominiums should be policed on the local level by state law.¹²⁵ Other sources, pointing to the abuses that have occurred in spite of state regulation, recognize the necessity for regulation of condominium sales on a national level by a federal agency. The controversy has resulted in overburdensome, multiple regulation by real estate and securities agencies on both state and federal levels. The existing multiple regulation complicates the interstate sale of recreational land, resulting in prohibitive costs to the developer which are often passed on to the purchaser in the form of higher prices.¹²⁶ Regulation should strike a proper balance between the protection of the purchaser and the rights of the developer, and should not stunt future condominium growth in a period of growing housing and recreational needs. The solution to the problem must lie in the coordination of the existing regulations. One federal agency, preferably the Department of Housing and Urban Development which has considerable expertise in real estate development, as opposed to the Securities Exchange Commission, should regulate all interstate offerings of condominium units. The federal agency would allow a liberal policy of accepting state filings in lieu of the federal filing. In addition, state

123. 38 Fed. Reg. 23870 (1973).

124. *Florida Scandal: Sharp Schemes Used to Con Condominium Buyers*, Milwaukee Journal, February 24, 1974, Home Section, reported that because of the continuing consumer complaints the Florida Condominium Commission was formed and the panel has suggested recommendations for further legislation.

125. See Comment, *Cooperative Housing Corporations and the Federal Securities Laws*, 71 COLUM. L. REV. 118, 122-26 (1971); ROHAN and RESKIN, *CONDOMINIUM LAW & PRACTICE* § 18.05 (1965); Krechter, *supra* note 75.

126. Costs involved in multiple registration include: multiple registration fees, on-site inspection fees in each state in which units are to be sold, and higher legal and accounting fees. Often times registration causes a delay of several months resulting in a loss of sales.

agencies would reciprocate by accepting the federal filing if the developer chose or was required to register federally.

CONCLUSION

The foregoing discussion has made an attempt to acquaint real estate condominium developers and their counsel with some of the major considerations involved in offering their condominium units to the public. The wide implications of the securities and land sales regulation procedures must be studied to determine whether an offering is the subject of one or more of the regulations, and, if so, whether an exemption from such regulation is available. The drastic consequences of noncompliance which a developer faces were discussed briefly in the text. Counsel who wrongly advise a developer also face a great amount of potential liability, both to his client and the investing or consuming public.¹²⁷

The total impact that the various regulations will have on the real estate development industry is just now beginning to hit home. In a recent consent decree a major NYSE-listed land development firm agreed to reimburse land buyers for more than \$17,000,000 estimated as damages due to deceptive advertising.¹²⁸ Although this particular action was precipitated by the Federal Trade Commission and its Bureau of Consumer Protection, it is an indication that federal agencies, such as the SEC and OILSR, will not hesitate to

127. For an elaborate discussion of the responsibility and potential liability of attorneys to the investing public, see Small, *An Attorney's Responsibilities Under Federal and State Securities Laws: Private Counselor or Public Servant?*, 61 CALIF. L. REV. 1189, 1198, 1199 (1973):

. . . [W]hen an attorney knows that his opinion is being utilized to effect a sale of securities unlawful under the 1933 Act or does not undertake the inquiry necessary to permit him to express an honest and informed opinion that the sale is exempt from registration, or is in possession of facts which would cause a prudent lawyer to make further inquiry, or otherwise acts in a reckless manner, his degree of culpability may suggest that the balance be struck in favor of holding him liable to a larger class of plaintiffs.

. . . When the attorney has not made an investigation sufficient to permit the good faith rendition of an opinion, or when he is on notice of facts which, if inquired into, would disclose that he could not render an opinion, he may be guilty of such recklessness that his activities should be proscribed even if he was not a conscious or knowing participant in a violation of law.

128. The consent decree was negotiated between the Federal Trade Commission and GAC Corporation, a Miami based company and marks the FTC entry into regulation of the land development marketing field. The agreement required GAC to provide prominent warning statements in all future sale contracts and to offer refunds to eligible purchasers who default on payments. The FTC is expected to use the decree as a model for settlements with other firms in the recreational land sales industry. *The Milwaukee Journal*, Tuesday, March 26, 1974, p. 1.

crack down on illegal sales practices in the real estate industry.¹²⁹ In light of the large number of recreational condominium offerings being made that are subject to registration under the Securities Act and the Land Sales Act,¹³⁰ a strict enforcement policy by the agencies would be devastating.¹³¹ It is hoped that these agencies will exercise reasonable restraint in all cases of possible enforcement action. The abuses of a few should not result in actions which overprotect the investor and consumer and overregulate the well-meaning developer.

129. OILSR has substantially expanded its enforcement staff by adding a new Field Review Branch. Thirty trained investigators began inspecting subdivisions throughout the country and abroad in June of 1974.

130. The scope of this comment was limited to federal and state registration requirements for condominium offerings under securities laws and land sales laws. Condominium developers and their counsel must also be aware of other requirements, including broker/dealer registration under section 15 of the Securities Exchange Act of 1934 (see Weiss, REGISTRATION OF BROKERS AND DEALERS, 1965), state "blue sky" broker/dealer registration, state real estate broker law (see *Condominium Marketing, Inc.*, CCH, FED. SEC. L. REP. [Transfer Binder '70-'71] ¶78,153 for necessity of dual qualification of dealer/broker under state and federal acts) and compliance with Regulation Z of the Truth in Lending Act.

131. Knowledgeable experts estimate that there were between 500 and 700 unregistered recreational condominium offerings being made in early 1974 that were subject to registration under the Securities Act (see Ellsworth, *supra* note 27, at 698). It has been estimated that more than two-thirds of the eligible developments in the country have not yet complied with the requirements of the Land Sales Act (see *U.S. News & World Report*, August 14, 1972 at 63-64).

