Consumer Financial Protection Bureau
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March 12, 2013

Ms. Catherine O'Hagan Wolfe
Clerk of Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: *Berlin v. Renaissance Rental Partners*,
No. 12-2213

Dear Ms. Wolfe:

The Consumer Financial Protection Bureau (Bureau or CFPB) respectfully submits this letter brief in response to the Court's order of February 19, 2013, inviting the United States Department of Housing and Urban Development (HUD) to submit its views in this case. On July 21, 2011, the authority to implement the Interstate Land Sales Full Disclosure Act (ILSA), 15 U.S.C. § 1701 *et seq.*, was transferred from HUD to the Bureau pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1955 (2010). *See* 12 U.S.C. § 5581(b)(7); 15 U.S.C. § 1718. On that date, the Bureau published a notice stating that HUD's ILSA regulations—including 24 C.F.R. § 1710.1—"will be enforceable by the CFPB" and that the "official commentary, guidance, and policy statements issued [by HUD] prior to July 21, 2011 . . . will be applied by the CFPB pending further CFPB action." 76 Fed. Reg. 43569 (July 21, 2011); *see also* 12 U.S.C. § 5583(i). On December 21, 2011, the Bureau republished 24 C.F.R. § 1710.1 without material change as a CFPB

regulation, 12 C.F.R. § 1010.1.[1] *See* 76 Fed. Reg. 79486 (Restatement Rule). As the agency currently charged with implementing ILSA and the regulations promulgated thereunder, the Bureau has a substantial interest in, and is in the best position to offer this Court an authoritative position on, the principal question presented in this case: whether a condominium unit is a "lot" that is subject to the statute's disclosure and anti-fraud requirements.[2]

BACKGROUND

Enacted in 1968, "ILSA protects individual buyers or lessees who purchase or lease lots in large, uncompleted housing developments, including condominiums, by mandating that developers make certain disclosures." *Bacolitsas v. 86th & 3rd Owner, LLC*, 702 F.3d 673, 676 (2d Cir. 2012). Modeled after the "full disclosure provisions and philosophy of the Securities Act of 1933," *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 778 (1976), ILSA "protects consumers by requiring certain land developers to register their plans and to provide prescribed disclosures to prospective purchasers," Restatement Rule, 76 Fed. Reg. at 79486. Specifically, a developer may not sell or lease a lot unless "a statement of record with respect to such lot" has been filed with the CFPB (previously HUD) and become effective. 15 U.S.C. § 1703(a)(1)(A). A developer also must furnish the purchaser or lessee with "a printed property report . . . in advance of the signing of any contract." 15 U.S.C. § 1703(a)(1)(B). Neither the statement of record nor the property

[1] Because 24 C.F.R. § 1710.1 was the rule in effect during the relevant events in this case, this brief will refer to HUD's regulation rather than the Bureau's republished rule.

[2] The Bureau advised the clerk's office by telephone of its intent to submit this brief in lieu of HUD.

report may contain "an untrue statement of material fact" or exclude any information required to be disclosed. 15 U.S.C. § 1703(a)(1)(C). And the developer of a lot may not "employ any device, scheme, or artifice to defraud" or "engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser." 15 U.S.C. § 1703(a)(2)(A), (C).

ILSA defines a "developer" as "any person who, directly or indirectly, sells or leases, or offers to sell or lease, or advertises for sale or lease any lots in a subdivision." 15 U.S.C. § 1701(5). A "subdivision," in turn, is defined as "any land which is . . . divided or is proposed to be divided into lots." 15 U.S.C. § 1701(3). The term "lot" is not defined in the statute.

In 1973, HUD promulgated a definition of "lot" that in all relevant respects remains in effect today. A "lot" was defined as "any portion, piece, division, unit, or undivided interest in land if such interest includes the right to the exclusive use of a specific portion of the land." 38 Fed. Reg. 23866, 23876 (Sept. 4, 1973) (1973 Rule); *see also* 12 C.F.R. § 1010.1 (current definition). In the preamble to the 1973 rule, HUD explained that this definition "demonstrates the nature of the interest which is subject to [ILSA]," and specifically concluded that the definition covered condominium units. 38 Fed. Reg. at 23866. As HUD explained, "condominiums carry the indicia of and in fact are real estate, whether or not the units therein have been constructed," and, therefore, they are "viewed by [HUD] as equivalent to a subdivision, each unit being a lot." *Ibid.* HUD observed that the "application of [ILSA] to condominiums [had] been consistent [HUD] policy since the issue was first raised in 1969," and that defining "lot" to include condominiums was "a valid exercise of [HUD's] regulatory authority." *Ibid.*

The preamble also discussed the application of HUD's definition of "lot" to "condominiums intended as primary residences in metropolitan areas." 1973 Rule, 38 Fed. Reg. at 23866. HUD explained that such condominiums often would not be subject to ILSA, not because their units were excluded from the definition of "lot," but because "most professional builders would qualify for [an] exemption inasmuch as they are able to deliver a completed unit to a purchaser within two years after the contract for sale has been signed." *Ibid*.; *see* 15 U.S.C. § 1702(a)(2) (exempting from ILSA certain transactions involving constructed buildings and those in which the seller is contractually obligated to construct the building within two years).

In 1974, HUD issued guidance to "re-emphasiz[e] attention to the applicability of [ILSA] to the offer and sale of condominiums and other structures." 39 Fed. Reg. 7824, 7824 (Feb. 28, 1974) (1974 Guidance). In elaborating on how to apply the two-year construction exemption, HUD explained that it sought to address "the realities of condominium construction, especially high-rise construction." *Ibid.* HUD reiterated, however, that "[b]uilders are not automatically exempt from [ILSA] by virtue of their primary occupations or the type of buildings they erect." *Ibid*.

In the ensuing years, HUD has consistently reaffirmed its determination that ILSA applies to the sale or lease of nonexempt condominium units. *See* 40 Fed. Reg. 47166, 47166 (Oct. 8, 1975) ("For jurisdictional purposes, a condominium 'unit' is a 'lot.' "); 61 Fed. Reg. 13596, 13602 (Mar. 27, 1996) (1996 Guidance) (stating that the definition of "lot" applies to the "sale of a condominium or cooperative unit"). When the Bureau republished HUD's ILSA regulations in 2011, it similarly recognized the longstanding application of ILSA and HUD's regulations to the sale or lease of "unconstructed condominiums." Restatement Rule, 76 Fed. Reg. at 79487.

DISCUSSION

As framed by Appellants, the principal issue presented in this case is whether the purchaser of a condominium unit has acquired a "lot," as defined in 24 C.F.R. § 1710.1, if the purchaser's interest in the unit does not include the exclusive use of what Appellants call "raw land" or the "tangible surface of the earth."[3] Br. 13-14. Because that question turns on the interpretation of a federal regulation adopted pursuant to statutory rulemaking authority conferred upon HUD (and now the CFPB),[4] the "administrative interpretation" of the regulation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bruh v. Bessemer Venture Partners III L.P.*, 464 F.3d 202, 207 (2d Cir. 2006) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-414 (1945)), *cert. denied*, 549 U.S. 1209 (2007). In determining the "administrative construction of the regulation," the Court may look to the preamble of the agency's rulemaking decision. *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S.

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[3] The Bureau takes no position on the nature or extent of Appellees' property interests in this case. Nor does the Bureau take any position on the district court's decision to award attorney's fees to Appellees.

[4] When an "agency has statutory authority to issue regulations," its regulations "interpret[ing] ambiguous statutory terms" are entitled to deference. *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 395 (2008) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984)). Accordingly, to the extent Appellants have raised a challenge to 24 C.F.R. § 1710.1, the Court should uphold the regulation unless the statute "unambiguously forbids" it or the agency's interpretation of the statute otherwise "exceeds the bounds of the permissible." *Barnhart v. Walton*, 535 U.S. 212, 218 (2002).

141, 158 n.13 (1982); *see also Ramos v. Baldor Specialty Foods, Inc.*, 687 F.3d 554, 559 (2d Cir. 2012) (stating that the Court would "consider and defer to the Department of Labor's interpretation of a regulation—including the regulatory preamble included in the Federal Register"). In addition, this Court "ordinarily give[s] deference to an agency's interpretation of its own ambiguous regulations, even if that interpretation appears in a legal brief." *Union Carbide Corp. & Subsidiaries v. Comm'r of Internal Revenue*, 697 F.3d 104, 109 (2d Cir. 2012). For the reasons set forth below, the Court should defer to HUD's consistent and longstanding view (which the CFPB has adopted) that a condominium unit to which a purchaser or lessee has a right of exclusive use is a "lot" for purposes of 24 C.F.R § 1710.1 and ILSA.

1. Appellants contend that the condominium unit at issue in this case is not a "lot" under 24 C.F.R. § 1710.1 because the purchasers did not have "the right to the exclusive use of a specific portion of the land." Asserting that "land" under New York law refers to the "raw land" or the "tangible surface of the earth," Appellants argue that a purchaser's right to the exclusive use of an upper-floor condominium unit cannot by itself constitute an interest in "land" for purposes of § 1710.1. Br. 13-18.

The district court correctly rejected Appellants' argument. As the district court observed (SPA-10), HUD explained when it promulgated the definition of "lot" in 1973 that "condominiums carry the indicia of and in fact are real estate." 1973 Rule, 38 Fed. Reg. at 23866. Accordingly, "the proper focus regarding the analysis of whether a unit has exclusive rights to the use of land under 24 C.F.R. § 1710.1 is whether the purchase of the unit gave the purchasers the exclusive right to a unit, or any type of 'realty.' " SPA-10. In that regard, the preamble to the 1973 Rule makes clear that a condominium is "equivalent to a subdivision, *each unit being*

a lot." 38 Fed. Reg. at 23866 (emphasis added). Because the condominium unit is itself a lot for purposes of ILSA, a purchaser of the unit need not have a separate interest in "raw land" to be entitled to the protections of ILSA's disclosure and anti-fraud requirements.

HUD's definition of "lot" to include condominium units is entitled to "particular deference" because it reflects "an agency interpretation of 'longstanding' duration." *Barnhart*, 535 U.S. at 220. As HUD explained in 1973, the "application of [ILSA] to condominiums has been consistent [HUD] policy since the issue was first raised in 1969"—the year that ILSA took effect. 1973 Rule, 38 Fed. Reg. at 23866; *see* ILSA § 1422, 82 Stat. at 599 (effective date provision).[5] HUD consistently reaffirmed that determination in subsequent guidance documents. *See*, *e.g.*, 40 Fed. Reg. at 47166 ("For jurisdictional purposes, a condominium 'unit' is a 'lot.' "); 1996 Guidance, 61 Fed. Reg. at 13596 (stating that the definition of "lot" applies to the "sale of a condominium or cooperative unit"). The courts have upheld that interpretation as

[5] At the time of ILSA's enactment, the term "lot" referred broadly to "[a] share; one of several parcels into which property is divided" or "[a]ny portion, piece, division or parcel of land." Black's Law Dictionary 1096 (rev. 4th ed. 1968). Likewise, although the term "land" might refer merely to the "ground, soil, or earth," in a legal sense, it "signifies everything which may be holden," including "anything that may be classed as real estate or real property." *Id.* at 1019. HUD reasonably interpreted those statutory terms when it concluded that condominiums "carry the indicia of and in fact are real estate" subject to ILSA's disclosure and anti-fraud provisions. 1973 Rule, 38 Fed. Reg. at 23866. That interpretation is entitled to deference. *See*, *supra*, note 4.

within HUD's authority,[6] and this Court and others have repeatedly applied ILSA in private actions against condominium developers. *See Bacolitsas*, 702 F.3d at 680 (evaluating compliance with 15 U.S.C. § 1703(d)); *Bodansky v. Fifth on the Park Condo, LLC*, 635 F.3d 75, 83 (2d Cir. 2011) (considering availability of 100-lot exemption in 15 U.S.C. § 1702(b)(1)); *see also Markowitz v. Ne. Land Co.*, 906 F.2d 100, 106 (3d Cir. 1990); *Veneklase v. Bridgewater Condos, L.C.*, 670 F.3d 705, 709 (6th Cir. 2012).[7]

Congress likewise "was aware of, and approved of, HUD's construction" of ILSA. *Winter*, 777 F.2d at 1449 (footnote reference omitted). Congress amended ILSA in 1978 to add an express reference in the construction exemption for condominiums. *See* Housing and Community Development Amendments of 1978, Pub. L. No. 95-557, Title IX, § 907(a)(1), 92 Stat. 2080, 2127. As the Eleventh Circuit observed, by taking "specific action in 1978 to exempt the sale of some condominiums," the "implication to be drawn" is that ILSA "must apply to the sale of condominiums" as a general matter. *Winter*, 777 F.2d at 1449 n.12. In 1979, moreover, Congress amended ILSA's definition of "subdivision." Housing

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[6] *See, e.g.*, *Nickell v. Beau View of Biloxi, L.L.C.*, 636 F.3d 752, 754 (5th Cir. 2011); *Winter v. Hollingsworth Properties, Inc.*, 777 F.2d 1444, 1449 (11th Cir. 1985); *Indomenico v. 123 Washington, LLC*, 813 F. Supp. 2d 403 (S.D.N.Y. 2011); *Smith v. Myrtle Owner, LLC*, 2011 WL 2635717 (E.D.N.Y. Feb. 9, 2011), *report and recommendation adopted sub nom. Sanz v. Myrtle Owner, LLC*, 2011 WL 2635647 (E.D.N.Y. July 5, 2011).

[7] Courts have applied ILSA to cases involving high-rise condominiums since as early as 1985, *Grove Towers, Inc. v. Lopez*, 467 So. 2d 358 (Fla. Dist. Ct. App. 1985), and most recently in 2012. *See Rae v. WB Imico Lexington Fee, LLC*, 851 F. Supp. 2d 615 (S.D.N.Y. 2012).

and Community Development Amendments of 1979, Pub. L. No. 96-153, Title IV, § 401, 93 Stat. 1101, 1122. In doing so, Congress did not disturb HUD's application of ILSA to condominiums. Even if these actions do not "amount to congressional ratification" of HUD's view, "Congressional silence in the face of administrative construction of a statute lends support to the validity of that interpretation." *United States v. Chestman*, 947 F.2d 551, 560 (2d Cir. 1991) (en banc).

2. Notwithstanding HUD's longstanding view that "each unit" in a condominium development is a "lot," 38 Fed. Reg. at 23866, Appellants offer various arguments for why the particular unit at issue in this case is not covered by ILSA. None of them has merit.

First, Appellants suggest (Br. 7-9) that the definition of "lot" did not extend to condominium units (as opposed to "land") until 1996, when HUD issued the 1996 Guidance to "clarify agency policies and positions with regard to [ILSA's] exemption provisions." 61 Fed. Reg. at 13601. In that guidance document, HUD explained that a "lot" includes property interests that confer on the purchaser "the exclusive use of a specific portion of the land or unit," including units sold in "a condominium." *Id.* at 13602. Appellants contend (Br. 9) that the term "or unit" (which does not appear in the text of 24 C.F.R. § 1710.1) and other explanatory material in the guidance document reflect HUD's "acknowledgement that its regulation defining 'lot' does not cover condominiums" in which the purchaser's right to exclusive use extends only to the unit and not to the "raw land."

Appellants are mistaken. At the outset, even if the 1996 Guidance were the first statement by HUD on the meaning of "lot," it would still be entitled to deference. *See Lopes v. Dep't of Soc. Services*, 696 F.3d 180, 187 (2d Cir. 2012) ("The interpretive

guidance of an administrative agency . . . 'constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' ") (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). In any event, the 1996 Guidance did not articulate a new interpretation of the scope of "lot." HUD's statement in the 1973 preamble that "each unit" in a condominium constitutes a "lot" under ILSA settled the question whether a purchaser needs to acquire additional property interests (*e.g.*, interests in the "raw land") to receive ILSA's protections, with HUD concluding that the purchaser's right to exclusive use of the unit alone would suffice. The 1996 Guidance merely "repeated" that longstanding interpretation in the course of providing guidance on ILSA's exemption provisions. 1996 Guidance, 61 Fed. Reg. at 13602.

Second, Appellants argue that the 1973 regulation, by using the term "land," was intended to apply only to condominiums that were "horizontal developments and . . . campgrounds," Br. 7 (quoting 1973 Rule, 38 Fed. Reg. at 23866), and not "condominiums where purchasers have [only] exclusive use of their 'unit,' " *ibid*. That argument is contradicted by contemporaneous HUD statements that demonstrate its understanding that ILSA applies to multistory condominium developments. In the preamble to the 1973 rule, HUD made clear that ILSA would apply to "condominiums intended as primary residences in metropolitan areas" that did not qualify for the two-year construction exemption. 1973 Rule, 38 Fed. Reg. at 23866. As the district court found, HUD's discussion of condominiums "in metropolitan areas" reflected its view that ILSA's protections extend to purchasers of "high-rise or 'vertical' condominiums." SPA-8. Indeed, less than six months after issuing the 1973 Rule, HUD removed any doubt on the matter by issuing guidelines designed to accommodate "the realities of condominium construction, especially *high-rise*

construction." 1974 Guidance, 39 Fed. Reg. at 7824 (emphasis added). The 1974 Guidance thus makes clear that the term "lot" is not confined to "horizontal developments" and "campgrounds."

Third, Appellants argue (Br. 13) that the definition of the term "land" used in 24 C.F.R. § 1710.1 is determined by New York state property law, which they claim defines "land" to exclude "structures or improvements constructed on the land." As this Court observed, however, ILSA creates "a *national standard* to guarantee full disclosure for the benefit of prospective buyers." *Bacolitsas*, 702 F.3d at 682 (emphasis added). ILSA's national reach requires that the meaning of the federal regulatory term "land" be determined under federal law. *Cf. RTC v. Diamond*, 45 F.3d 665, 671-673 (2d Cir. 1995) (rejecting argument that "terms not expressly defined" in the statute "must be construed according to New York law" and concluding instead that "Congress is presumed to have intended the *common-law* meaning of terms it uses without express definition"). As the district court found, "the statutory history, along with the reasonable interpretations of it by HUD, clearly show that, in the context of ILSA, the definition of land is intended to be more broad than 'raw land.' " SPA-12.

Finally, Appellants contend (Br. 5) that "Congress in 1968 was concerned with deceptive practices in the sale of unimproved tracts of land." As the Eleventh Circuit noted, however, "[a]lthough Congress may have been primarily concerned with the sale of raw land, it struck a balance by making the statute applicable to *all* lots and providing an exemption, not for all improved land, but for improved land on which a residential, commercial, condominium, or industrial building exists or where the contract of sale obligates the seller to erect such a structure within two years." *Winter*, 777 F.2d at 1447. "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws

rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998). The district court correctly concluded that the "limitations placed upon the Act's scope are in the form of exemptions of certain lots and sales, rather than blanket limitations of the Act's applicability to certain types of real estate." SPA-9.[8]

3. The district court also correctly observed (SPA-10) that Appellants' interpretation of the term "lot" would lead to "nonsensical results." If ILSA only applied to sales or leases of a portion of the "surface of the earth" (Br. 14), a ground-floor condominium with an outdoor patio would be covered by ILSA, while the unit immediately above with a balcony would not. Likewise, the purchaser of an upper-floor unit whose deed includes a surface-level parking spot would be entitled to the disclosures ILSA requires; her next-door neighbor whose unit does not come with a parking spot would not. Appellants do not even attempt to explain how these arbitrary outcomes would be consistent with

[8] Appellants' reliance (Br. 12) on *Tencza v. Tag Court Square, LLC*, 803 F. Supp. 2d 279 (S.D.N.Y. 2011), is misplaced. The district court in that case recognized that "HUD has interpreted the term 'lot' to refer to condominium units" and that "with certain exceptions . . . , the requirements of [ILSA] generally apply to condominium units such as the [upper-floor] Unit Plaintiffs purchased." 803 F. Supp. at 283. Indeed, although the court considered whether the term "land" as used in 15 U.S.C. § 1702(a)(2) permitted a developer to invoke the construction exemption for upper-floor condominium units, the court did not have to decide that question because it concluded that the developer in that case would not qualify for the exemption in any event. *Id.* at 294. In sum, *Tencza* is consistent with the uniform view of the courts that ILSA applies to upper-floor condominium units.

ILSA's aim to "protect[] individual buyers or lessees who purchase or lease lots in large, uncompleted housing developments, including condominiums." *Bacolitsas*, 702 F.3d at 676.

CONCLUSION

For the foregoing reasons, the Court should conclude that the definition of "lot" in 24 C.F.R. § 1710.1 includes a condominium unit to which a purchaser enjoys the right of exclusive use, regardless of whether the purchaser has exclusive use of any surface-level property.

Respectfully submitted,

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