

Sales and Advertising in the United States of Real State Products  
located in the Dominican Republic

i. Overview of Real Estate Projects in the Dominican Republic.

The 80's and 90's boom in the hotel industry, together with the real estate boom experienced by the Dominican Republic ("DR") in 2005-2008, led to an increase of investment by local and foreign investors in the local real estate including vacation homes, second homes, or rental property.

Despite the economic crisis in the country's tourism sector, as a consequence of the 2008 worldwide financial crisis partially due to the collapse of the real estate bubble in the United States, the local tourism sector has continued to grow steadily, responding to changes in its demand, which led to the diversification of offers and commencement of multiple tourism real estate products in the DR.

Several factors have contributed to investment in the tourism real estate sector throughout the years, among which: (i) external factors, such as opening of international markets, enforcement of multiple free trade agreements, overall globalization, and maturity of the population and arrival of a wealthy consumer segment; and (ii) national or internal factors, such as governmental and legislative support of tourism industry evidenced by enactment of laws granting incentives and tax benefits (e, g., Law 158-01 on promoting the development of tourism in underdeveloped areas), sustainability of established projects, private business investment, and, obviously, promotion of the Dominican Republic as the global tourist destination.

One of the internal factors, the boost of the private business sector, was due to the business community's ability to appreciate the importance of the tourism real estate sector for the country by actively seizing existing opportunities to reach its goals, especially to stay afloat after the global real estate crisis.

Despite the sector's growth and viability of this type of projects, the developers, now more than ever, are facing a major challenge of attracting the right consumer to buy their products.

Selling products in the recovering foreign market can only be done by launching aggressive and competitive sale offers and advertising campaigns that live up to their objectives. Without these factors, developers run the risk of perishing in the midst of major infrastructure developments and scarcity of real estate buyers.

In that regard, even during the financial crisis, one of the coveted markets for this sector remained the United States. Indeed, the North American market is of great interest for several reasons: (i) it has a "high-end" solvent tourism, which can raise the Dominican tourism standards in general and attract greater capital inflows; (ii) since the Americans prefer to invest in locations close to their home country, the Caribbean is one of the places with more American investments in the recent years;<sup>1</sup> (iii) despite the financial crisis, the Americans continue looking for investment options, including outside of their own real estate market,<sup>2</sup> and easily qualify to obtain loans from Dominican banks to invest long and short term.

#### **i. Legal Aspects of Sales and Advertising of Real Estate Products in the United States.**

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<sup>1</sup> Frederick E. Flick and Lawrence Yun, *American Buying Homes Abroad: Trend Indicators and Some Initial Estimates. A White Paper for the Research Division of the National Association of Realtors*, available at: <http://www.bocadelmarmex.com/americans.pdf>.

<sup>2</sup> *The 2008 NAR Profile of International Home Buying Activity*, Research Division of the National Association of Realtors, available at: <http://www.realtor.org/research-and-statistics/research-reports>.

Real estate developers and promoters are in some cases intimidated by the complexity of the legislation that protect potential American purchasers. This perception is, in fact, wrong, because even though the American consumer is avidly protected, all it takes to efficiently pursue sales and advertising in the US is to understand (with some legal advice) how the US federal and state legislation operates.

In this regard, all foreign real estate enterprises that wish to offer its real estate products to the US consumers have to obtain a federal registration at the Department of Housing and Urban Development (HUD) within the Office of Interstate Land Sales Registration (OILSR), commonly known as the HUD registration.

The HUD registration is based on the Interstate Land Sales Full Disclosure Act (ILSFDA) and the Securities Law of 1933.

In the general sense, the ILSFDA regulates the sales of land subdivisions through interstate commerce (by any means or type of commerce) and requires that all developers of this type of real estate projects register with the HUD their subdivisions (or joint lots and/or lots within a specific project) or projects of 100 or more non-exempted lots and provide afterwards to each purchaser a HUD approved disclosure document, the Property Report.<sup>3</sup>

The HUD distinguishes the act of advertising and promotion of a real estate product from its sale, regulating and overseeing the content and advertising used by developers and promoters within the US for the sales of such products. Also, the HUD makes a distinction between the

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<sup>3</sup> "Regulatory Programs-Section X". US Department of Housing and Urban Development, *available at:* <http://www.hud.gov/sec10.cfm>

procedure for registration of lots on one hand and finished real estate products, such as homes, condominiums, and townhomes.

The HUD registration is not optional, but mandated by the federal law aiming to protect American consumers from fraud. Since the American buyer is defenseless before the unscrupulous foreign developers, on more than one occasion American purchasers and investors have acquired non-existing or unfinished properties.

What the Dominican developers and promoters need to know is that in this type of scenario the protection of the consumer by American legislation will be enforced by various means, thus preventing such developer or promoter from selling or promoting its products again in the US and even becoming subject to a number of sanctions, as described below.

Thus, the HUD registration and subsequent issuance of a Property Report constitutes a reliable source of information for the American investors. As sophisticated consumers, such investors would obtain the property information on more than one occasion before making a purchase. On the other hand, the absence of the Property Report can be used by the American consumers to invalidate the purchase of foreign property without incurring any liability (in the best scenario for the developer), by proving only that the sales offer was made in the US.

Registration of lots is always obligatory at the federal level; however, it is necessary to further verify the specific state laws and exemptions that apply in the state where sales offers and possible sales will take place (for example, in New York, the Martin Act requires additional state registration).

Finished real estate products are not federally required to be registered with the HUD; however, their registration provides certain exemptions on the condition that their sales and promotion are subject at all times to the HUD and/or OILSR supervision and oversight. The exemptions include the two year exemption rule, which exempts the developer or promoter from registering a product as long as the promoter or lessor undertakes to erect a dwelling within two years from the sale of the real property. Such conditions should be set forth in the purchase and sale agreements.<sup>4</sup>

Once registration and other formalities, such as application of federal and state-specific disclaimers, have been complied with, Dominican developers or promoters can sell and widely advertise real estate products in the United States following the applicable legal rules.

Those aggressive developers and promoters, who advertise through various means (e.g., in magazines, newspapers, internet or direct mailing or communication with prospective US consumers) and sell foreign property in the US without obtaining required registration, records or legal advice, run a risk of sanctions established by the OILSR, which can include: (i) prison sentences of up to five years, fines of up to \$5,000, or both; (ii) inability to re-sell or market in the US their products once the OILSR discovers violations; (iii) invalidation of purchase and sales agreements with the American purchasers, having to refund the total amount of purchase price to the purchasers;<sup>5</sup> and iv) a range of other sanctions ranging from civil to criminal liability

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<sup>4</sup> Section 1702(a)(2) of Title 15 of the US Code exempts "(1) the sale or lease of any improved land, on which there is a residential, commercial, condominium, or industrial building; or (2) the sale or lease of land under a contract obligating the seller or lessor to erect such a building on the lot within a period of two years."

<sup>5</sup> Robert Carlucci, *Consumer Protection and the Interstate Land Sales Full Disclosure Act*, St. John's Law Rev., No. 4, Vol. 48, 2012, available at: <http://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=2872&context=lawreview>.

of the developer, project promoter, and even on certain occasions developer's lawyers, accountants, bankers, partners and title companies, among others.<sup>6</sup>

Despite all the issues to be taken into consideration for promotion and sale of tourism real estate property in the US, the money and time needed to invest in addressing those issues are negligible compared to the benefits provided by venturing into and capturing the American market, since those processes are relatively fast and cost efficient, if accompanied by competent legal advice.

From the point of view of the consumer, good investment opportunities in the real estate sector largely depend on where to buy, how to buy, and who to buy from; while for a Dominican developer or promoter, the chances of success depend on where they sell, how they sell, and, especially, who they sell to.

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*This article does not constitute a legal opinion or advice to be acted on to conduct business. Any transaction related to any of the described aspects shall require adequate legal assistance in the appropriate jurisdiction.*

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<sup>6</sup> Regulatory Programs-Section X, US Department of Housing and Urban Development, *available at:* <http://www.hud.gov/sec10.cfm>.