Securities Compliance and the U.S. EB-5 Program

Understanding Best Practices for Stakeholders and Counsel

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Key Takeaways

An immigration program; or a securities offering with an immigration benefit?

Immigration in Exchange for Economic Development

- The EB-5 Regional Center program is an immigration-based, private foreign direct investment program that stimulates job creation at no net cost to the U.S. government

Relies on Securities and Financing Tools

- The EB-5 Regional Center program relies on familiar financing tools and private equity structures, creating both enormous flexibility, but its technical requirements create enhanced securities compliance and oversight demands

Securities-Driven Program with an Immigration Benefit

- Although the immigration bar has long been the primary point of contact for EB-5 participants; properly managed EB-5 offerings require leadership from securities, corporate, tax, real estate, and corporate finance counsel

An EB-5 Program Nutshell

SECURITIES OFFERINGS WITH IMMIGRATION BENEFITS

What is the EB-5 Program?

An economic development tool overseen by a specific division of the U.S. Citizenship and Nationality Service

The Program

- The "EB-5 Program" refers to a visa category – Employment Based Fifth Preference (EB-5) – codified in 1991 as an immigration tool intended to promote job creation and encourage foreign investment in the U.S.
- The Regional Center "Pilot Program" was introduced formally in 1993 in order to simplify the process for investors and permit the creation of "passive" investment vehicles

Basic Investment Requirements

- Immigrant investors receive conditional resident status in the United States for a 2-year period upon an investment of $1,050,000 (or $800,000 in "targeted employment areas")
- Capital must be invested in a "new commercial enterprise" that creates 10 permanent U.S. jobs per investor
- Investors who successfully navigate the 2-year EB-5 Program waiting period are eligible to receive permanent legal resident status (a green card)

What is the EB-5 Program?

A significant if often overlooked source of foreign investment

Total Visa Volume

- 10,000 EB-5 visas are available for issuance each fiscal year with standard processing priorities
- 2,000 visas are set-aside each year for projects and investments made within “Rural” development areas, and a further 1,000 visas are set aside for those located in “high unemployment areas”
- Set asides are just one of many aspects of the program are often misunderstood or managed in securities offerings
- The EB-5 Program is administered by the U.S. Citizenship and Immigration Services (USCIS), which is overseen by the Department of Homeland Security (DHS)
- Each investor is subject to screening and diligence conducted by USCIS and DHS in communication and collaboration with other U.S. agencies

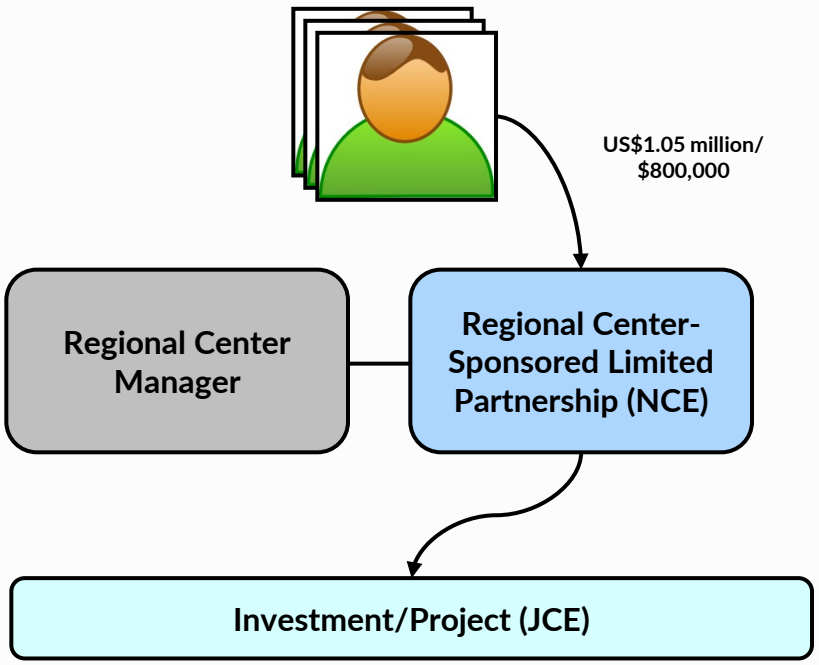
Relative Economic Impact

- From **2015 to 2024** alone, investors filed 90,297 total EB-5 visa petitions, or an average of **9,297 per year**
- Assuming only the minimum investment requirement, the EB-5 Program sourced over $55 billion during this same period, or **$5.5 billion per year**
- The creation of nearly **100,000** full-time jobs for U.S. workers

Basic Investment Structure

Private limited partnership; private offering

Regional Center Structure



Specific Parameters

- Minimum $1,050,000 investment (or $800,000 if in a TEA or Rural)
- NCE may be formed by Regional Center Manager
- Multiple EB-5 investors may be pooled into a Regional Center partnership
- Multiple Regional Center investments may be made by same vehicle (diversified structures) using the same framework
- Capital must be “at-risk” for a minimum of 2 years (5-7 years is common hold period for EB-5 investors)

The EB-5 Process in a Nutshell

The first steps for investors

How does an investor qualify for the EB-5 Program or the EB-5 visa?

- Each prospective investor must invest capital, fully "at-risk", in a securities offering with a single issuer known as a "New Commercial Enterprise" (NCE)
- The NCE may be a legal entity of any type (although typically a limited partnership), and may conduct an offering to a single investor, or multiple investors
- Each investor must subscribe to an offering, and put their investment capital fully "at risk" (in escrow or directly into NCE) prior to applying for an EB-5 visa
- Suitability and best interests often becomes a core issue in the management of EB-5 securities compliance risk

What does an investor need to prove it has done to file an EB-5 petition?

- Investment of either $800,000 or $1,050,000 in the NCE (the lower dollar amount reserved for "high unemployment" or "rural" investments
- Show that their **invested** capital was obtained through lawful means
- Illustrate that at least 10 full time jobs will be created a result of their investment

Economic Analysis and Available Capital

How many jobs?

Standards of Evidence are Unique

- In order to evidence requisite job creation, petitions may rely on regional input/output economic impact models, such as RIMS II and IMPLAN

Primary Methodologies

- Generally speaking, petitions may rely on one of two primary methodologies:
  - A "direct jobs" approach, which combines actual hiring with an econometric multiplier derived using a model such as IMPLAN
  - An "expenditure" approach, which looks primarily at costs expended and revenue generated as a result of the investment in order to generate a job-creation equivalent without relying on actual hiring

The Choice Matters

- Decisions regarding methodology depend on the availability of inputs that drive job creation (e.g., the amount of actual hiring will occur), the industry sector and geographic location of the investment
- This is not a choice for counsel alone
- Specialists of varying quality exist; although verification is essential
- Investors, of course, tend to favor the "expenditure" approach, as **proof of actual hiring** is not required

Economic Analysis and Available Capital

The engines of economic development

Total Capital/Total Jobs

- The total amount of capital that may be accessed in an EB-5 transaction depends primarily on the results of the economic study
- As each investment requires a minimum level of job creation, a certified economic study must be provided along with an investor's I-526E petition

Assess Early and Often

- Sponsors and Regional Centers will generally obtain economic estimates early in the assessment process in order to determine likely available capital (looking at LTV for example) in order to guide structuring
- Locations may fall without/without set-aside areas based on myriad factors and consistently updated data; what starts as qualified become non-qualified during process

General Rules

- Fortunately, after reaching a certain level of experience, practitioners are more easily able to guide sponsors with respect to the qualifications of estimates and offerings
- For example, over time it becomes obvious that a multi-family project (as hiring on-site will be limited) might permit a LTV of up to 50%, whereas a call center project (with significant on-site hiring) might permit up to an LTV of 100%+
- Suitability and conscionability should be consistently emphasized to sponsors and stakeholders

Paths to Access EB-5 Capital

How sponsors see it

Form a Regional Center

- Maintain control of the scope and management of a Regional Center
- Presently plan on a **6-12 month application approval** process
- Add an additional **2-4 months** after approval to source initial capital (without accessing "bridge" or other temporary capital)

Seek Capital From Existing Regional Center

- Access capital directly from an existing Regional Center, and act only as a "borrower"
- Plan on a **4-10 month** total timeline for the development of an initial offering and placement of all capital. Funding to typically starts within **2-3 months** of the launch of an offering to the investor community

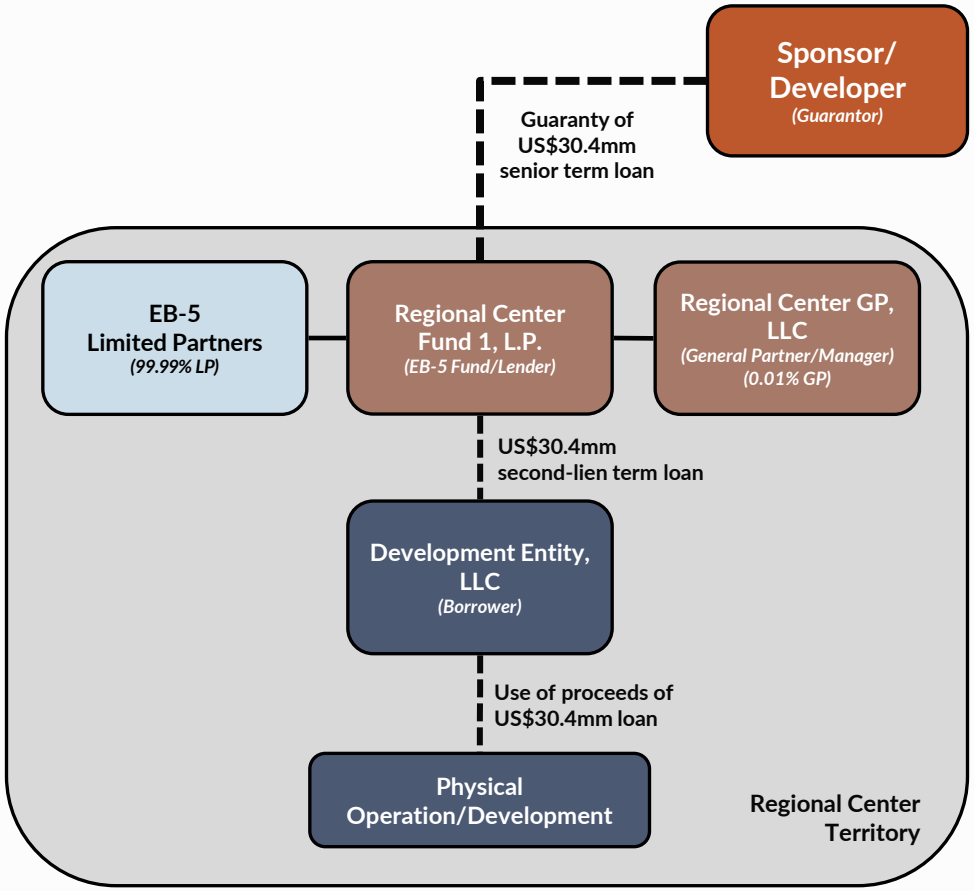
Seek Capital From Individual Investors

- Align directly with individual investors seeking to access the EB-5 Program without utilization of a Regional Center or intermediary
- Greatly enhanced compliance requirements generally outweighs the benefits of avoiding the "middle-man" or any truncating of the Regional Center timeline

Requirements	Senior Loan	Mezzanine Loan	Preferred Equity
Investment Size (TEA): $800,000 **Term of Investment**: 2-year minimum, but all principal/capital must remain invested until the earlier of (a) all temporary EB-5 visas are issued, or (b) 36 months after the first EB-5 visa is approved **Type of Company**: Operating company only. Cannot invest in a passive investment entity or company the equity of which is listed on an exchange **Job Creation**: Must create 10 permanent, full-time *(at least 35-hours per week) positions* that employ legal U.S. residents, *either directly or indirectly*, and that are supported by demonstrable evidence at month 24 (econometric analysis)	**Structure**: Secured term loan (construction to permanent) **Term**: Generally 5 years **Amortization**: Interest only with balloon at maturity **Interest**: 200-400bps **Collateral**: Required but varies **Equity Participation**: None **Documentation**: U.S. standard loan documentation	**Structure**: Second-lien or unsecured term loan **Term**: Generally 5 years **Amortization**: Interest only with balloon at maturity **Interest**: 400-600bps. **Collateral**: Silent second lien with recourse only to Project-related assets. Equity pledge of development entity **Equity Participation**: None **Documentation**: U.S. standard loan documentation	**Structure**: Non-participating, redeemable preferred **Term**: Generally a mandatory redemption/put within 5 years **Coupon/Dividend**: 200-1,000 bps *below* market **Documentation**: U.S. standard loan documentation Viability: Preferred equity may be used as the investment into a qualifying project; however, this tier of capital is generally not attractive to EB-5 investors in Regional Center investments and is not recommended

Friendly Capital

Why are sponsors motivated to use the EB-5 program?



- **Loan**: $30.4MM USD second-lien term loan to Development Company, LLC
- **Term**: 5 years on loan (+2, 1-year optional extensions of Regional Center Fund I to liquidate)
- **Interest Rate**: 5% annual interest (3% quarterly, 2% accrued and paid at maturity)
- **Collateral**: Second-lien security interest on hard assets. Pledge of 100% of the ownership interests of Operating Company, LLC
- **Subordination**: Deeply subordinated debt effectively creating truly silent second-lien holder with limited power to act prior to first-lien mortgage lender
- **Guaranty**: Partial to full guaranty of principal investment provided by a corporate guaranty, pool of assets, or similar structured solution
- **Administration Fee to Investors**: $45,000 USD
- **GP Management Fee**: 2% per annum
- **GP Profit Participation**: 20% or EB-5 investor profits
- **Total Investors**: 38 ($800,000 minimum investment)
- **USCIS Job Creation Requirement**: **380**

Sample EB-5 NCE/JCE Structure

Subordinate loan with sponsor/guarantor

Individual Investors

- Non-US nationals (existing LPRs may adjust status)
- Investor, spouse and lineal descendants
- Investors investing in own business

Regional Centers and Managers

- Intermediate service providers
- Public-private RCs
- Private RCs
- No RIA/BD requirement(s)
- Processing, monitoring and reporting function

USCIS
SEC
FINRA

Users of Capital

- Corporate borrowers seeking debt or equity capital
- Real estate developers seeking debt or equity capital
- Transaction sponsors, placement agents and other intermediaries placing capital

Service Providers

- Law firms (immigration specific or full service)
- Accounting firms and tax professionals
- Placement agents (deal and investors)
- Non-U.S. immigration services
- Broker-dealers

EB-5 Program Participant Summary

Not just immigration

Regional Centers

- Entity Formation and Organization
- USCIS Application Process
- Advocacy: TEA Designations
- Advocacy: State or Local Support
- Transaction Documentation
- Securities Offerings
- Regulatory Compliance (SEC/FINRA)
- Immigration Compliance
- Real Estate
- Controversy

EB-5 Investors

- RC market and legal diligence
- Personal and family immigration advocacy
- Personal and family tax counseling
- Personal and family investment diligence and assessment
- Full-service family representation
- Controversy

Debtors

- Structuring for RC capital
- RC market and legal diligence
- General corporate
- Securities
- Tax
- Real Estate
- Controversy

Potential Roles of Counsel

Immigration is only a part of proper representation

Issues Created by EB-5 Capital?

Does the program itself present challenges for sponsors?

Accounting and Reporting

- Financing structures are U.S. standard, as are the entities employed. GAAP accounting is acceptable, as is cash accounting in certain cases
- An audit of the LP vehicle in which EB-5 investors place capital is required
- For Regional Center managers, reporting to EB-5 investors is consistent with standard U.S. custom in dealing with individual limited partners (e.g., K-1s)

Legal

- Financing structures are U.S. standard, as are the entities employed. Legal cost structure is generally identical
- Addition of immigration compliance component is a unique legal feature that applies only to those managing Regional Centers. "Borrowers" need only comply with their standard, U.S.-based legal documentation (e.g., loan agreement, note)
- For Regional Center managers, being able to properly manage potential Patriot Act (as well as all money-laundering and related laws) issues is common, and counsel with experience is recommended

Regulatory or Securities Compliance

- As a result of EB-5 investments being private in nature, and no investor is a U.S. citizen, most securities rules do not apply
- Compliance with Regulation D is not as straightforward as it may appear in the conventional context
- For Regional Center managers, must be able to manage basic immigration compliance requirements, such as the filing of an "activity report" on an annual basis, the managing of potential large volumes of investors and subscriptions and other administrative and legal challenges that should not be ignored or trivialized

Evolving Securities Issues

RISK MITIGATING EB-5 OFFERINGS

Securities Compliance Alignments

The ERIA is an attempt to bring securities compliance standards into the INA

The EB-5 Reform and Integrity Act of 2022 (ERIA)

- Reauthorized the Regional Center Program through September 30, 2027, aiming to further enhance fraud prevention and facilitate and promote investment from a diversity of countries

Established the EB-5 Integrity Fund

- Requires Regional Center participants to pay annual fees from to fund audits, site visits, and fraud investigations

Clearer Oversight Requirements

- ERIA imposed strict oversight: mandatory background checks, enhanced reporting, third-party “fund administration”, and registration of placement agents and promoters with USCIS

Penalties and Fees

- ERIA increased transparency and accountability, with severe penalties for non-compliance, including fines, suspension, or termination of Regional Centers all being potential penalties
- Radically increased fees paid by Regional Centers and EB-5 investors to participate in the program

Securities Act Compliance Framework

Essential building blocks

Registration Exemptions

- Regulation D (Rule 506(b)/(c)): Primary exemption for private placements
- Rule 506(b): Prohibits general solicitation; non-accredited and accredited investor caps
- Rule 506(c): Permits broader solicitation with verified accredited investors
- Regulation S (?): For offshore offerings without U.S. solicitation or U.S. issuer

Critical Requirements

- Accredited investor verification
  - Background and personal history verification and forensics
  - Source of funds verification and evidence of accredited investor status
- Anti-fraud provisions
  - Reviewed as any other Regulation D offering (whether 506(b) or (c))
  - Standard disclosure and documentation requirements exist...**at a minimum** (more on disclosure pitfalls to follow)
- Recordkeeping and Due Diligence
  - Long-term requirements for issuers and sponsors often unfamiliar with such requirements

The SEC's enforcement results for 2024 show a significant shift compared to 2023.

- In 2024, the SEC filed **583** total enforcement actions, a **26%** decrease from the previous year.
- Despite fewer cases, the SEC obtained a record $8.2 billion in financial remedies, including $6.1 billion in disgorgement and $2.1 billion in civil penalties.
  - *50% of the financial total was due to a major case involving Terraform Labs and Do Kwon*
  - In contrast, 2023 saw more enforcement actions but lower financial remedies.
- The SEC's focus in 2024 included significant penalties for **recordkeeping violations**, **misleading marketing practices**, and whistleblower protection

How Does SEC Enforcement

Overall Results

Lots and Lots of Fraud

- The Division's investigations led to charges alleging frauds ranging from Ponzi schemes targeting specific communities to billion dollar frauds with thousands of victims;
- The SEC charged Xue Lee (aka Sam Lee) and Brenda Chunga (aka Bitcoin Beautee) for their involvement in an allegedly fraudulent crypto asset pyramid scheme known as HyperFund that raised more than $1.7 billion from investors worldwide;
- The SEC charged Cynthia and Eddy Petion and their company, NovaTech Ltd., for allegedly operating a fraudulent scheme that raised more than $650 million in crypto assets from more than 200,000 investors worldwide;
- The SEC charged five unregistered brokers and their companies in connection with an alleged pre-IPO fraud scheme that raised at least $528 million from more than 4,000 investors around the world; and
- The SEC charged Abraham Shafi, the founder and former CEO of Get Together Inc., a privately held social media startup known as "IRL," for raising approximately $170 million from investors by allegedly fraudulently portraying IRL as a viral social media platform that organically attracted the vast majority of its purported 12 million users.

SEC Enforcement in 2024

Impact on EB-5 Offerings?

Broad Risk Categories

Failures by sponsors and intermediaries abound and must lead to enhanced due diligence requirements

Risk Category	Description
Regulatory/Disclosure	Inadequate disclosure, non-compliance, increased fraud risk
Project/Execution	Failure to secure financing, incomplete capital raise, job creation shortfall
Conflicts of Interest	Affiliated parties, lack of independent oversight
Financial/Market	Subordination in capital stack, project failure, unreliable exit strategy
Reputational/Operational	Weak developer/center track record, immigration petition denials

Regulation D Disclosure Issues

Know your sponsor and the offering

Material Disclosure Minimums

- Sponsors must disclose all material facts about the offering, even if only accredited investors participate.
- While Regulation D does not mandate specific disclosures for accredited-only offerings, anti-fraud provisions under federal securities laws require transparency to avoid misrepresentation or omissions

What is Material?

- Material information includes risks related to the business model, financial health of the issuer, conflicts of interest, and use of proceeds
- All such standards and requirements should echo in the minds of securities counsel throughout the process of an EB-5 offering
- “Bad actor” events involving the issuer or principals

Regulation D Offering Due Diligence

Know your sponsor and the offering

Issuer and Offering Diligence

- Sponsors and counsel must conduct a "reasonable investigation" into the issuer's management track record, business prospects, financials, and claims made in offering documents
- This includes analyzing red flags (*e.g.*, unrealistic projections) and ensuring alignment between the offering terms and regulatory requirements
- How familiar are most practitioners with the EB-5 program, the immigration specifics, the transaction specifics and all matters affecting the investors?

Complex or Not?

- For complex offerings (e.g., tax-advantaged structures), independent verification of key assumptions (e.g., valuations, legal opinions) is highly-recommended
- Specialists and third-party review should not be discouraged when dealing with the investors and sponsors in the EB-5 market

Regulation D Verification Issues

Standards adapted to account for investor cohort

Can an Issuer Verify?

- For Rule 506(c), sponsors must take "reasonable steps" to verify accredited investor status (*e.g.*, reviewing tax returns, bank statements, or using third-party verification services).
- For Rule 506(b), sponsors may rely on self-certification; however, also must have a reasonable belief of accreditation

Process to Verify

- Who is employed, or what is employed in terms of compliance process or system, to ensure that an issuer can defend against SEC/FINRA scrutiny where 100% of the investors are non-US?
- Largely inconsistent application of protocols by those other than USCIS leads to investor rejections and risk exposure for issuers and sponsors

Conflicts of Interest

Oversight is improved; but room remains to increase awareness

Who owns and controls the NCE or JCE?

- This topic has become the source of considerable debate over many years, and is often owned and controlled by the same sponsor seeking capital in the NCE offering

Limited Program Requirements

- The only third-party required to oversee the investment itself is the Regional Center that elects to “sponsor” the offering
- Many Regional Centers or more experienced practitioners will require the participation of independent third-parties
- That said, this is not oftentimes a registered investment advisor (RIA) or a broker-dealer (BD)
- The ERIA has served to increase awareness of this issue but does not require strict compliance

Solicitations and BDs

When is a BD required?

Solicitation Restrictions

- General solicitation and advertising are generally prohibited under Regulation D, Rule 506(b)
- Rule 506(c) allows general solicitation but requires verification that all investors are accredited
- *Any solicitation or investment by a person **located in the U.S.** requires U.S. broker-dealer sponsorship, except in limited circumstances*
- Is your sponsor in the U.S.? Is their placement agent? Who is in control of the offering? How are they being paid?

Broker-Dealer Involvement

- The process of originating and marketing EB-5 securities **in the U.S.** must involve a FINRA-registered BD
- Investment professionals involved must have appropriate FINRA licenses (e.g., Series 79, 82, 39, or 22, depending on the nature of the offering)
- Unregistered broker-dealer activity is strictly prohibited by **USCIS**, federal and state law, and subject to SEC/FINRA enforcement actions
- Additional filings required by USCIS to surface non-compliance

Investor Suitability in Focus

To what standards must NCEs and Sponsors adhere?

Due Diligence and Suitability

- Broker-dealers must conduct reasonable due diligence on the issuer and the offering to ensure all representations are accurate and complete
- Suitability assessments must be conducted to confirm the investment is appropriate for each investor, as required by FINRA Rule 2111

Investor Suitability in Focus

To what standards must NCEs and Sponsors adhere?

Applicable Suitability Standards?

- The project's job creation projections are credible and meet USCIS requirements
- The NCE is managed by a competent manager and/or has outsourced management to a competent service provider
- The JCE and its project are commercially viable when viewed together with the investment contemplated by the offering (are any deals over-leveraged?)
- The transparency of the sponsors and its advisors, as well as the Regional Center and its principals, including track record, time in business, prior successes and failures
- What has been omitted from the disclosure documents that would be included in a conventional private offering?

Avoiding Pitfalls in 2025 and Beyond

Avoiding common mistakes is more challenging with EB-5 offerings

Conflicts of Interest

- When the sponsor, developer, and Regional Center are all affiliated, obvious conflicts can arise regarding project oversight, the terms of the offering, how the offering is conducted, project loan administration, and prioritization of investor versus sponsor interests all come into focus
- Structures must establish independence to avoid unwanted scrutiny from regulators, or potential lawsuits from investors who, even with a successful immigration process, may not agree with investment practices
- Self-dealing and breach of fiduciary duty are clear paths to recovery for many investors and to which many EB-5 issuers are open for criticism

Avoiding Pitfalls in 2025 and Beyond

Avoiding common mistakes is more challenging with EB-5 offerings

Deal vs. Immigration Risk

- What is a proper evaluation of and disclosure with respect to the risk specific to an EB-5 offering, versus the project itself, versus the sponsor, versus the capital stack and/or the terms of subordination, anti-dilution, conversion or other topics?
- Does the sponsor have a duty to protect or preserve the investors in their immigration process?
- Is a broad and sweeping disclaimer of issuer responsibility for immigration processes enforceable or logical?
- How counsel navigates these question is something that makes the practice unique and capable of being performed at widely-varying levels of competency and quality

Avoiding Pitfalls in 2025 and Beyond

Avoiding common mistakes is more challenging with EB-5 offerings

Identifying Fraud and Lesser Violations

- Explain in detail the due diligence process associated with the intake of a sponsor or investor client
- Document the process for reviewing and information gathered as part of investor/issuer **versus** investment due diligence
- Can you conduct both safely and soundly without outside help? Should you?
- Develop a scorecard or similar approach to objectively and subjectively evaluate individual sponsors, offerings, disclosure requirements, investors and the legal structure being employed by all stakeholders
- From basic contracting issues to fundamental misunderstandings, the EB-5 Program creates equal issues and opportunity for the plaintiffs bar and the defense bar as it pertains to securities market participants

Avoiding Pitfalls in 2025 and Beyond

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Identifying Risky Investors and Sponsors

- Develop a consistent framework for evaluating sponsors and investors in every private offering
- Do not make exceptions based on brand name or visibility
- Trust your judgment. If something does not look or sound correct then, especially in the EB-5 context, silence is the enemy of risk mitigation. Be responsible to yourself and your firm

Avoiding Pitfalls in 2025 and Beyond

Avoiding common mistakes is more challenging with EB-5 offerings

Educate, Be Educated, and Observe

- Educate yourself about those involved, engaging third-party due diligence and information gathering tools that are readily available and should not be avoided
- Educate yourself about the financial tools being employed and the specific requirements that those around you likely believe are those with which you are familiar
- As with most things…here in particular…there are no dumb questions!
  - Only the ones you do not ask
  - We are lawyers, not financial quants or forensic accountants
  - But we need to realize when such practitioners, including legal practitioners, must be brought into cases that reach beyond our own capabilities or areas of specialization or knowledge

Key Takeaways

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- The EB-5 Regional Center program is an immigration-based, private foreign direct investment program that stimulates job creation at no net cost to the U.S. government

Relies on Securities and Financing Tools

- The EB-5 Regional Center program relies on familiar financing tools and private equity structures, creating both enormous flexibility, but its technical requirements create enhanced securities compliance and oversight demands

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- Although the immigration bar has long been the primary point of contact for EB-5 participants; properly managed EB-5 offerings require leadership from securities, corporate, tax, real estate, and corporate finance counsel

SECURITIES COMPLIANCE AND THE U.S. EB-5 PROGRAM

QUESTIONS AND PARTING THOUGHTS