

**Risk Management Update
February 2016**

EB-5 PROGRAMS – WHEN IS FINRA REGISTRATION REQUIRED?

What is the EB-5 Program?

The EB-5 Program began in 1990 and is administered by the United States Customs and Immigration Service (“USCIS”). An EB-5 Program provides foreign nationals who have the means to invest in certain job creating commercial enterprises in the US, with the ability to obtain an accelerated United States Green Card, a two-year period of lawful residency and the possibility of eventual permanent residency.¹

In order to qualify for the U.S. Green Card, the applicant must invest a minimum of \$1,000,000 in a commercial enterprise, or \$500,000 in an enterprise that is located in a Targeted Employment Area (defined as rural areas and areas of high unemployment), which creates or preserves at least 10 jobs for U.S. workers.

As part of the application process, most applicants place their investments in a “Regional Center”. A Regional Center is an entity designated by USCIS and who sponsors capital investment projects for investment by EB-5 investors. In order to become a USCIS approved Regional Center, the Regional Center must go through an extensive approval process that includes the completion of Form I-924 “Application for Regional Center Under the Immigrant Investor Program.” The placement of investments into a Regional Center is where the requirements for registration with the Financial Industry Regulatory Authority (“FINRA”) begin.

EB-5 Regional Center Placements are considered Securities Transactions

While there has been some debate regarding this point, regulators consider EB-5 investments to be “securities” as such term is defined in The Securities Act of 1933. Therefore, in order for a firm or individual to receive compensation for assisting EB-5 applicants with selecting and placing Regional Center investments, you must be a registered representative of a broker/dealer and the sale of the securities must be done in accordance with FINRA regulations.

Registration Steps

To become registered as a broker-dealer, a firm must take the following main steps:

- File Form BD with the Securities and Exchange Commission (“SEC”);
- Become a member of a Self-Regulatory Organization, in this case FINRA;
- Become a member of the Securities Investor Protection Corporation (“SIPC”);
- Ensure compliance with applicable state requirements; and

¹ See <https://www.uscis.gov/eb-5>.

- Ensure its "associated persons" have satisfied applicable qualification and licensing requirements.

In order for an individual to become registered to receive compensation for EB-5 placements, they must be sponsored by a broker/dealer and must pass the FINRA-administered Series 7 examination (known as the General Securities Representative Exam) or the Series 82 Limited Representative Qualifications Exam. State laws also require the registered individual to obtain the Series 63 license (known as the Uniform Securities Agent State Law Exam).

Penalties for Non-Compliance

Non-compliance with registration requirements can lead to regulatory enforcement action and severe penalties.

In an SEC press release dated December 7, 2015², the SEC outlined recent enforcement cases pertaining to the offering of EB-5 programs by unregistered brokers. In that release, Mr. Andrew J. Ceresney, Director of the SEC Enforcement Division stated:

“Individuals and entities performing certain services and receiving commissions must be registered to legally operate as securities brokers if they’re raising money for EB-5 projects. The lawyers in these cases allegedly received commissions for selling, recommending, and facilitating EB-5 investments, and they are being held accountable for disregarding the relevant securities laws and regulations.”

Conclusion

Both FINRA and the SEC have put the EB-5 program on their respective regulatory examination priorities list for 2016. In the SEC’s National Examination Priorities letter issued in January 2016³, they state:

“We will review private placements, including offerings involving Regulation D of the Securities Act of 1933 or the Immigrant Investor Program (“EB-5 Program”) to evaluate whether legal requirements are being met in the areas of due diligence, disclosure, and suitability.”

FINRA’s letter also echoes this increased scrutiny stating:

“FINRA’s focus on private placements in 2016 will address concerns with respect to suitability, disclosure and due diligence. These concerns are relevant regardless of the underlying industry of the issuer or the type of investment (e.g., notes offerings, pre-

² SEC Release 2015-274 December 7, 2015 “SEC: Lawyers Offered EB-5 Investments as Unregistered Brokers” <https://www.sec.gov/news/pressrelease/2015-274.html>.

³ See SEC National Exam Program Examination Priorities for 2016: <https://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2016.pdf>.



initial public offering investment funds, real estate programs, EB-5 investment funds or start-up companies).”⁴

The first steps firms and/or individuals should take if considering entering into the EB-5 space is ensure that proper registration is obtained and implement controls and protocols implemented to adhere to applicable regulatory compliance requirements.

For more information, or to learn about how CCLS may be of assistance, please do not hesitate to contact us at (619) 278-0020.

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⁴ See FINRA 2016 Regulatory and Examination Priorities Letter: <http://www.finra.org/industry/2016-regulatory-and-examination-priorities-letter>