

# THE INVESTMENT COMPANY ACT



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# Investment Company

EB-5 projects often involve the formation of a fund entity (NCE) which pools investors' funds to invest in a project entity (JCE).

- The fund entity is therefore, potentially an investment company.
- Investment companies generally must register with the SEC.
- Entities deemed to act as investment advisers to such companies generally must register with the SEC as investment advisers.

# Investment Company

The most common exemption from investment company registration is limiting the number of investors in the NCE fund entity to not more than 100 and not engaging in a public offering.

Multiple funds under common control and investing in a single EB-5 project would likely be deemed to be a single fund for the purposes of determining whether the 100 investor threshold is exceeded.

# Capital Trust - No Action Letter

The facts and representations are:

1. Mezzanine loan is a subordinated loan made for financing real estate.
2. Both the 2nd mortgages and Mezzanine loans are underwritten based on the same considerations and after the lender performs a hands-on analysis of the property
3. Mezzanine lender exercises ongoing control rights over the management of the underlying property.

# Capital Trust - No Action Letter

The facts and representations are:

4. Mezzanine lender has the right to readily cure defaults or purchase the mortgage loan in event of default of mortgage loan.
5. The true measure of the collateral securing the mezzanine loan is property being financed
6. Mezzanine lender has the right to foreclose on the collateral and through its ownership of the property entity, become the owner of the underlying property.

# Investment Company

Section 3(c)5(C) - Is an exemption for funds which make investments in real estate or real estate backed obligations, which may be available to the extent that the NCE fund makes a loan to the JCE which is fully secured by a mortgage.

# Section 3(c)(5)(C) Exemption

**Qualifying Interest:** An asset that represents an actual interest in Real Estate or is a loan or lien fully secured by real estate.

# Section 3(c)(5)(C) Exemption

## Qualifying Interest:

- Assets that can be viewed as the functional equivalent of, and provide the same economic experience as an actual interest in real estate or a loan or lien fully secured by real estate.

The SEC also notes (without expressing a view) that some issuers have taken the position that the following assets are qualifying interests as long as such assets are fully secured by real estate:

- Bridge loans
- Certain construction loans



# Conjoining funds

Multiple funds under common control and investing in a single EB-5 project would likely be deemed to be a single fund for the purposes of determining whether the 100 investor threshold is exceeded.