

Securities Alert

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FINRA and the SEC Issue 2016 Examination Priorities Targeting EB-5 Program

Earlier this month, both the Securities and Exchange Commission's (SEC) Office of Compliance Inspections and Examinations (OCIE) and the Financial Industry Regulatory Authority (FINRA) included the EB-5 Immigrant Investor Program ("EB-5") in their examination priorities for this year. Cybersecurity, municipal advisors and the protection of retail investors and investors saving for retirement continue to top the list of compliance focuses for the SEC. Similarly, technology, including cybersecurity, supervision and conflicts controls, and sales practices were yet again an area of focus for FINRA. But these regulators have now made explicitly clear what issuers and practitioners involved in the EB-5 program had already discerned: the SEC and FINRA have specifically made the review of EB-5 one of their priorities.

Congress created the EB-5 program in 1990 to benefit the U.S. economy by attracting investments from qualified foreign investors. The program has been reauthorized nine times since 2002, most recently reauthorized through September 30, 2016. Today, 95 percent of all EB-5 capital is raised through regional centers, which are organizations designated and regulated by the United States Citizenship and Immigration Service (USCIS) that facilitate investment in job-creating economic development projects by pooling capital raised under the EB-5 program.

EB-5 investments that are affiliated with EB-5 regional centers are made through private placements, which are governed by federal and state securities laws and regulations. With the growth and expansion of the EB-5 program—investments made through the program in 2014 contributed more than \$4 billion to U.S. GDP—the SEC and FINRA have taken note. Particularly in light of some recent high-profile fraud cases against EB-5 regional centers and their officers, attorneys and broker-dealers, attention and scrutiny has been snowballing.

And now, the SEC has made a formal proclamation: "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." Additionally, FINRA announced: "These [focus on private placement] concerns are relevant regardless of the underlying industry of the issuer or the type of investment (e.g., notes offering, pre-initial public offering investment funds, real estate programs, **EB-5 investment funds** or start-up companies)." It is clear that the EB-5 program is at the forefront of these regulators' scrutiny.

Accordingly, EB-5 regional centers and issuers would be wise to:

- confirm that disclosures to investors are adequate and appropriate for the types of investors in your offerings
- make sure that offerings and entities fall squarely within the relevant exemptions and exclusions from SEC registration, or register if necessary
- audit your offering documents, particularly with respect to return on investment, use of proceeds, and prospects and performance of the EB-5 project
- remain vigilant about the payment of commissions and fees and understand when registration is required for such payment
- conduct due diligence on your developers and land owners, as well as migration agents and broker-dealers.

Last, but certainly not least, make sure you have a compliance program in place, clearly documented with policies and procedures demonstrating a commitment to compliance.

To learn more, see the full list of the [OCIE](#) and [FINRA](#) examination priorities for 2016.

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