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Center for
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**“Understanding EB-5 Securities –
NYU Stern Database of SEC
EB-5 Securities Enforcement Actions”**

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“Understanding EB-5 Securities – NYU Stern Database of SEC EB-5 Securities Enforcement Actions”¹ **DRAFT**

I Introduction²

An immigrant’s investment through the EB-5 Regional Center Program constitutes a security for purposes of the federal securities laws (sometimes referred to as an “EB-5 security”).³ The immigrant investor’s goal - to obtain a visa - is fundamentally different than the goal of a conventional investor who invests in non-EB-5 securities to maximize his economic return. This difference justifies a closer examination, from an EB-5 perspective, of the federal securities laws and recent enforcement actions brought by the U.S. Securities and Exchange Commission (“SEC”) as a result of fraud and the misappropriation of the investors’ funds. Thus, we have designed and compiled a Database of these actions that helps to identify important trends and developments.⁴

As explained in the “Special Vulnerability of EB-5 Investors” section of this paper, the overlay of the immigration process makes the EB-5 investors as a class particularly vulnerable to securities fraud. Even though the EB-5 investor possesses the legal right under the federal securities laws to sue the wrongdoers, the typical EB-5 investor is reluctant to sue because he believes that the lawsuit might adversely affect his ability to obtain the visa. Similarly, the investor is reluctant to report a potential fraud to the USCIS or SEC. Thus, the SEC’s aggressive pursuit of fraud plays a vital role in protecting EB-5 investors against the misappropriation of their funds.

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² For the reader’s convenience, the paper generally does not use legal citations. For example, we refer to the common name of the enforcement case as indicated in the Database. The link to the Securities Litigation Releases includes a link to the complaint filed in the particular action. For ease of reading, the reference to other Sections of this paper in some cases does not include the full title of that Section. Sometimes we provide a link to a court decision or filing, rather than the legal citation to the case.

³ See *SEC v. Hui Feng et al.*, C.D. Cal. 6/29/2017, Case 2:15-cv-09420-CBM-SS, <https://eb5projects.com/system/uploads/document/file/405/96 - Order on MSJ 1 .pdf>; See also *SEC v. Liu et al.*, <https://www.courthousenews.com/wp-content/uploads/2017/04/Securities-fraud.pdf>. The Database refers to the *Liu* case as *Proton*, the name that is commonly associated with media reports about this enforcement action.

⁴ The Database is described in Section V, *infra*. It is limited to enforcement actions in the EB-5 arena in which the SEC has alleged securities fraud. These cases involve the misappropriation of investors’ funds.

This paper provides an overview of an extremely technical area for the EB-5 community. Thus, the Database emphasizes those factors that are distinctive to EB-5 projects.

The Database employs a methodology that focuses on categories most relevant to EB-5 analysis, rather than one that is generally applied to analyze other types of securities law actions. For example, the categories include such factors as: the EB-5 roles of the defendant⁵; the delay between the alleged wrongdoing and the commencement of the enforcement action; whether the Regional Center has been terminated by USCIS and the status of the investors' immigration petitions; project location – rural or urban; EB-5 capital deployed as a loan or equity; and escrow provisions including early release of the investors' funds.

This paper will serve as the first in a series of annual updates on SEC enforcement actions and other important securities law developments in the EB-5 space. One of the reasons we believe this area merits coverage is that the securities laws will become even more relevant to EB-5 stakeholders when EB-5 reform legislation is enacted.⁶ The federal legislation will undoubtedly include integrity measures and expand the securities law compliance responsibilities of Regional Centers among others.⁷

Since this paper is the first in a series, and is aimed at the entire EB-5 stakeholder community, the paper begins with a simple overview of some of the key federal securities law principles, as well as the SEC procedure for conducting the investigation of violations and the commencement of an enforcement action (civil lawsuit or administrative proceeding) against the alleged wrongdoers. While the SEC is the primary agency to enforce and bring civil actions for violations of the federal securities laws, the Department of Justice, through the Office of the US Attorney, has exclusive jurisdiction to bring criminal prosecutions. The paper discusses the US Attorney's role in less detail because only 4 of the 16 civil enforcement actions have also involved criminal prosecutions.

⁵ These roles include Regional Center, New Commercial Enterprise, Job Creating Entity, General Partner or other owner or manager.

⁶ Although the EB-5 reform legislative bills, first introduced in 2015, have encountered resistance, we expect that optimistic that an EB-5 reform bill, in one form or another, will be passed in 2018, if not sooner. See S. 1501 and H.R. 5992.

⁷ As discussed in this paper, undoubtedly the provisions of the final bill will differ from those of the previously proposed bills.

Next, the “Database – Methodology” section discusses in detail the methodology we created and applied to develop the Database, including the key categories and the reasons they were selected.

The “Database - Trends and Observations” section includes a review of the data. More importantly, it expands upon many of the findings that are not apparent from merely reviewing the data. This is based on a review of the relevant complaints and other court documents, as well as on media reports. This discussion makes numerous references to the relevant topics described in the SEC’s Enforcement Manual.⁸

Independent of the governmental action, the immigrant investors have a private right to sue for fraud under the federal securities laws and under state law. Only a few investor lawsuits have been filed. The paper discusses two major pending lawsuits filed against Regional Centers, as well as related entities and individuals. The SEC has not filed an action in either case. However, if the allegations in one of the cases are true (and the documents attached to the 450-page complaint are compelling), this would represent one of the most egregious EB-5 securities violations in the history of the Program.⁹ The other case alleges common law fraud under state law but does not allege the misappropriation of funds or federal securities law violations.¹⁰ However, the defendants in that case include the New York City Regional Center (“NYCRC”), one of the most successful and largest Regional Centers in the country, and the first to be designated in New York City. The paper compares and contrasts the alleged fraud and other abuses in the two cases.

The paper devotes special attention to another topic of importance to EB-5 securities actions that has not been extensively covered. The Whistleblower Program serves as a valuable tool for the SEC to obtain information about potential violations, in addition to other cooperation tools in the SEC’s arsenal to combat securities fraud, and EB-5 funds’ misappropriations.

⁸ <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>

⁹ *Lan Li, et al, v. Joseph Walsh, et al*, SD FLA (11/14/2016), Case No. 9:16-cv-81871-KAM; https://eb5projects.com/system/uploads/document/file/325/Palm_House_Complaint_with_exhibits.pdf

¹⁰ *Chen Dongwu et al. v. New York City Regional Center et al.*, Sup Ct, NY County, (May 5,2017), Index No. 652024/2017.

Until recently, the SEC enforcement actions alleging the misappropriation of EB-5 investor funds have involved related parties where the Regional Center, NCE and JCE are under common control by one or two individuals. However, Green Box, an SEC complaint filed in September 2017, involves a JCE unrelated to the NCE and Regional Center.¹¹ The most recent SEC enforcement action alleging the misappropriation of investor funds, Home Paradise,¹² involves a Regional Center that has sponsored two of the largest EB-5 real estate megaprojects during the past 18 months, each of which is being developed by a major Chinese developer unrelated to the Regional Center.¹³ In addition, the two major investor lawsuits referred to above also involve a JCE unrelated to the NCE and Regional Center.¹⁴

Some of the Regional Centers whose projects were the subject of enforcement actions have been terminated by USCIS, and others have not. We review the impact of Regional Center termination upon the innocent investors, and the alternative relief that would be provided by the proposed regulations issued by USCIS on January 13, 2017, and by HR 5992, the most recent reform bill. We also discuss alternative approaches recently proposed by the receivers in the Jay Peak case and the Path America case to preserve the investors' opportunity to successfully complete the visa process.

Independent fund administration is the one provision contained in H.R. 5992¹⁵ aimed specifically at addressing EB-5 fund misappropriation.¹⁶ A review of the cases suggests that implementation of that provision would curb a substantial amount of EB-5 misappropriations. However, the paper discusses recent developments that indicate this provision might be eliminated from the reform bill that ultimately becomes law, or at least might be weakened.

¹¹ <https://www.sec.gov/litigation/litreleases/2017/lr23938.htm>

¹² <https://www.sec.gov/litigation/litreleases/2017/lr23944.htm>. As explained in the paper, the enforcement actions relate to two other projects sponsored by the same regional center. The JCE of each of those projects is related to the Regional Center and NCE.

¹³ See pages 7, DS-13 and DS-14 of <http://www.stern.nyu.edu/sites/default/files/assets/documents/2017%20EB-5%20Project%20Database%20with%20Trends%208.16.2017.pdf>

¹⁴ Lan Li, et al, v. Joseph Walsh, et al, SD FLA (11/14/2016), Case No. 9:16-cv-81871-KAM; https://eb5projects.com/system/uploads/document/file/325/Palm_House_Complaint_with_exhibits.pdf; Chen Dongwu et al. v. New York City Regional Center et al., Sup Ct, NY County, (May 5,2017), Index No. 652024/2017.

¹⁵ <https://www.congress.gov/bill/114th-congress/house-bill/5992/text>

¹⁶ Technically, Section P of H.R. 5992 added the "Account Transparency" Section. Subsequent informal drafts of H.R. 5992 replaced Account Transparency with a similar concept, Independent Fund Administration.

The paper also discusses another area of securities law violations in the EB-5 arena: illegal commissions paid by a Regional Center to an attorney whose immigrant clients invest in the Regional Center's associated EB-5 projects, based on the attorney's recommendation. Although these violations are likely to be less common in the future since the SEC has clearly articulated its position that the recipient of such commissions is deemed to be an unregistered broker-dealer subject to substantial monetary sanctions, we expect a new wave of cases to surface.

The paper concludes with a discussion of the future direction of the SEC Enforcement Division under the Trump administration with a focus on EB-5 securities.

II Basic EB-5 investment and the Federal Securities Laws

A. Brief overview of EB-5 investments

An immigrant invests in an EB-5 project to become eligible to qualify for a visa and thereby become a permanent lawful resident of the United States. The immigrant seeks to invest the minimum amount required - \$500,000 or \$1,000,000 under existing law - because the investor's return on the investment is minimal. The investor selects a project. The immigrant's funds are contributed as equity capital to a single purpose entity, a New Commercial Enterprise ("NCE"), in exchange for an equity ownership interest in the NCE. These funds are pooled together with the funds of other immigrants who select the same project as their vehicle for obtaining a visa. The NCE then deploys the pooled capital to the project as either a loan to, or an equity investment in, the job creating entity ("JCE") or its wholly-owned parent. In the current market, most EB-5 capital is deployed by the NCE as a mezzanine loan to the wholly-owned parent of the JCE. Whether the NCE's deployment of the EB-5 capital is structured as a loan or equity, similar principles apply under the federal securities laws.¹⁷

¹⁷ <http://www.stern.nyu.edu/sites/default/files/assets/documents/EB5%20paper%20final%205.24.2015.pdf>

B. Discussion of securities laws

For those unfamiliar or with little background in the federal securities laws, this section provides an overly-simplistic summary of the securities laws as applied to an EB-5 investment.¹⁸

1. EB-5 investment as a security

The SEC takes the position that the immigrant investor's equity ownership interest in the NCE constitutes a "security" for purposes of the federal securities laws.

Under the classical analysis, many investments are deemed to be securities under the federal securities law as an "investment contract" by applying the three-prong test formulated by the US Supreme Court in SEC vs. W.J. Howey Co., and its progeny.¹⁹ To pass the test, the following elements must be met: (1) an investment of money has been made; (2) in a common enterprise; and (3) the investor has an expectation of profits based solely or substantially from the efforts of the promoter or third party.

In the initial EB-5 securities enforcement cases brought by the SEC, the courts implicitly accepted the SEC's position.²⁰ Not until the recent decisions in Proton and Feng did a court squarely address the issue.²¹

Interestingly, most articles about EB-5 securities cite Feng as the first case to address whether an EB-5 investment constitutes a security. However, a few months earlier, in Proton, the same court as Feng, the US District Court for the Central District of California, held that the investment constitutes a security. In both cases, the court applied the three-part Howey test.²² In Feng, the defendant was

¹⁸ This summary does not include a discussion of broker-dealer registration requirements of the Securities Exchange Act of 1934. We discuss the applicable statutory provisions (and rules) in the "Administrative Proceedings" section of this paper.

¹⁹ SEC v. W.J. Howey Co., 328 U.S. 293 (1946); <https://supreme.justia.com/cases/federal/us/328/293/case.html>

²⁰ Some of the enforcement cases have not reached the point where the issue is ripe for the court to address.

²¹ Both decisions were embodied in an order re motions for summary judgment Proton: <https://www.courthousenews.com/wp-content/uploads/2017/04/Securities-fraud.pdf>; Feng: <https://eb5projects.com/system/uploads/document/file/405/96 - Order on MSJ 1 .pdf>;

²² Both cases focused on whether the third prong of the Howey test – an investment made with the "expectation of profit" – had been met. In each case, the defendant argued that there could be no expectation of profit because the investment fees exceeded the potential profit: the total amount of the immigrant's investment, including the administrative fee, exceeded the total amount to be returned to the investor (initial capital plus a return on the capital). However, the court rejected this argument. The Feng decision relied on the reasoning used in the Proton decision. Technically, the name of the Proton case is SEC v. Liu et al. Note that the Feng decision cited the case as S.E.C. v. Liu, 2016 U.S. Dist. LEXIS 181536, at *9-12 (C.D. Cal. Aug. 17, 2016), which is a different

an immigration attorney who allegedly acted as an unlicensed broker-dealer by accepting a fee in exchange for directing his clients to invest in securities associated with specific Regional Centers. Proton is one of the enforcement actions listed in our Database.

2. Consequences of EB-5 constituting a security

As a sale of a security, the federal securities laws apply to the immigrant's equity investment in the NCE.²³ The Securities Act of 1933 (the "1933 Act") and the Securities Exchange Act of 1934 (the "1934 Act") are the most relevant.²⁴

The SEC has distilled the main purpose of the 1933 Act and 1934 Act to two basic "full disclosure" concepts. First, companies offering securities for sale to the public must tell the truth about their business, the securities they offer for sale and the risks involved in investing. Secondly, all investors should have access to certain basic facts about an investment prior to buying it, and for so long as they hold it.²⁵

As a security, the offering of the equity interests in the NCE must be registered by the issuer with the SEC, unless an exemption applies.²⁶ The NCE, not the Regional Center, is the issuer of the securities because the investor contributes his capital to the NCE in exchange for an equity interest in the NCE, not in the Regional Center. The immigrant investor acquires a limited partnership interest in the NCE limited partnership or a membership interest in the NCE limited liability company, depending on the NCE entity structure. In virtually all EB-5 offerings, the offering is not registered with the SEC.

date than the Order that we found. <https://www.courthousenews.com/wp-content/uploads/2017/04/Securities-fraud.pdf>. We were unable to reconcile this. However, this does not affect the analysis of the decision.

²³ In addition to the federal securities laws, every state has its own set of securities laws—commonly referred to as "Blue Sky Laws"—that are designed to protect investors against fraudulent or misleading sales practices and activities in the offer and sale of securities to, from, or within their borders. A discussion of these state securities laws is beyond the scope of this paper.

²⁴ The Investment Company Act of 1940 ("ICA") may be applicable to an NCE that pools investors' funds to invest as a loan or equity in a JCE. An NCE should qualify for the exemption from registration under the ICA if the number of investors is limited to 100. Sec. 3(c)1 of the ICA. Also, if the EB-5 capital is deployed as a mezzanine loan by the NCE to the JCE and the loan is structured as the "functional equivalent" of a mortgage loan, an exemption from registration may be available under Section 3(c)(5)(C). See Capital Trust, Inc. No-Action Letter (5/24/2007) See <https://www.sec.gov/divisions/investment/noaction/2007/capitaltrust052407-3c5c.pdf>. Apparently, the SEC has not made it a priority to investigate EB-5 projects to determine compliance with the ICA. If the minimum investment amount for an EB-5 investor is raised by statute or regulation, the NCE is more likely to fit within the 3(c)(1) exemption because roughly the same amount of capital could be raised by the NCE with approximately half the number of investors.

²⁵ <https://www.sec.gov/answers/about-lawsshtml.html>

²⁶ See Sections 4 and 5 of the 1933 Act.

This paper focuses on the SEC enforcement actions in the EB-5 arena and those actions primarily relate to violations of the antifraud provisions of the 1933 Act and 1934 Act.²⁷ Accordingly, this section briefly discusses the most commonly relied upon exemptions used by the NCE in an EB-5 offering, and does not discuss the many technical issues that may arise.

The most readily available exemption is the “private offering exemption” under Section 4(a)(2) of the 1933 Act. Rules 506(b) and 506(c) of Regulation D provide alternative “safe harbors” that an issuer may rely on to meet the requirements of the Section 4(a)(2) exemption, under which an issuer can raise an unlimited amount of capital.²⁸ The NCE often relies on either Rule 506(b) or Rule 506(c), the latter added by the JOBS Act of 2012 to allow general solicitations of a much broader group of investors than permitted by Rule 506(b).²⁹ Both rules largely pivot on whether the securities are offered and sold to “accredited investors.”³⁰ Most EB-5 investors in an NCE should be able to qualify as an accredited investor by meeting the net worth test, which requires a net worth of at least \$1,000,000.³¹

Regulation S is an alternative exemption relied upon by some NCEs, available to offers and sale of securities that occur outside the United States.³² The NCE can rely on the Regulation D and Regulation S exemptions concurrently. Thus, even if all of the investors do not qualify as accredited investors, the NCE may be able to qualify under Regulation S for the remaining investors, so long as the offer and sale occur outside the US.³³ Regulation S raises delicate issues, such as contacts in the US that may disqualify eligibility for the exemption. If all of the immigrant investors

²⁷ In Luca, one of the enforcement actions included in this paper’s Database, the SEC alleged that the offering of EB-5 securities violated the registration provisions of the 1933 Act because the issuer mistakenly relied on Rule 506(b) where a general solicitation was made and some of the investors were nonaccredited. Moreover, in 2016, the SEC announced that one of its yearly priorities would be to “review private placements, including offerings involving Regulation D of the Securities Act of 1933 or the Immigrant Investor Program . . . to evaluate whether legal requirements are being met in the areas of due diligence, disclosure, and suitability.”

<https://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2016.pdf>

²⁸ See <https://www.sec.gov/fast-answers/answers-rule506htm.html>

²⁹ <https://www.sec.gov/news/press/2013/2013-124-item1.htm>

³⁰ Rule 506(b) compliance hinges on whether the securities are offered to only accredited investors. Rule 506(c) compliance hinges on whether all of the purchasers “reasonably” qualify as accredited investors.

³¹ A discussion of the offer, sale, verification of the accredited status, general solicitation and other aspects of the exemption is beyond the scope of this discussion.

³² See <https://www.sec.gov/rules/final/33-7505.htm>

³³ This linked discussion raises some of the issues with a concurrent offering.

<http://www.eb5diligence.com/articles/crowdfunding-concurrent-offerings>

who subscribe to the offering meet the accredited investor definition, the Regulation D alternative is the safer route. If no exemption is met, the investors will have the right to rescind their investment and recover their contributions as a result of the failure to register.

Unlike securities that are registered with the SEC, an issuer that relies on the Rule 506 safe harbor does not need to file any of the offering documents with the SEC. The only filing required to be made is a Form D which is a brief notice providing basic information about the offering.³⁴ Furthermore, the exemption does not require an offering plan, nor does it mandate the type of information to be included in the offering plan. It merely requires that the information provided does not violate the antifraud provisions of the securities laws. Even though an offering plan is not a condition to satisfy the Rule 506 requirements, it is routinely furnished to investors to provide full disclosure of all material facts, including risk factors, about the potential investment.

The equity investments in the JCE also constitute a sale of security subject to the federal securities laws. A separate and independent analysis is required to determine whether the equity investments in the JCE must be registered, or qualify for an exemption. The most commonly available exemption for real estate development projects is Rule 506.

Exemption from registration does not exempt a security from the application of the antifraud provisions of the 1933 Act and 1934 Act. The focus of this paper is the violation of the antifraud provisions rather than the exemptions from registration.

The most common antifraud violations in EB-5 transactions are the misappropriation or diversion of the investor's funds, and misrepresentations in the offering plan and related documents. The most relevant statutory provisions are Section 17 of the 1933 Act, Section 10(b) of the 1934 Act, and Rule 10b-5 thereunder.³⁵

³⁴ Issuers relying upon Regulation D are required to file a Form D within 15 days of the first sale pursuant to the offering. However, it is not a condition to qualify for the Regulation D exemption. The SEC has stated that the failure to file a Form D will not result in the loss of the exemption provided by Regulation D. See Question 257.07 of its [Securities Act Rules: Questions and Answers of General Applicability](#).

³⁵ <https://www.sec.gov/about/laws/sa33.pdf>;
<http://legcounsel.house.gov/Comps/Securities%20Exchange%20Act%20Of%201934.pdf>

III Role of the Federal Government Agencies

A. SEC's role

The SEC is the primary regulatory agency charged with enforcement of the federal securities laws. It has no role in administering or overseeing the EB-5 immigration program. However, in carrying out its mandate, the SEC scrutinizes allegations against specific investments arising out of the EB-5 Program.³⁶ The SEC has the authority to bring a civil claim against the alleged fraudster and other securities law wrongdoers, such as the Regional Center, NCE and JCE and their principals – the “Bad Actors”.

The SEC's Enforcement Division recommends to the Commission that an investigation of potential violations of the securities law should begin; conducts the investigation; recommends whether enforcement action should be brought against the alleged wrongdoers; and if the SEC brings an action, the Enforcement Division prepares and files the complaint or other legal documents and then litigates the case.

The SEC is headed by five Presidentially appointed commissioners. One of them is designated as the Chairman. The current chairman, Jay Clayton, was appointed by President Trump.³⁷ A majority vote of the commissioners is required for certain major actions, including whether to settle a case under investigation or to proceed to file an enforcement action.

B. USCIS's role

USCIS is the federal agency that oversees and administers lawful immigration to the United States, including immigration pursuant to the EB-5 Program. The main responsibilities of its Investor Protection Office (“IPO”) relate to the processing and adjudication of Regional Center applications (Form I-924) and investor petitions (Form I-526 and Form I-829).

Earlier this year, USCIS announced that it has initiated a program in which IPO staff will be conducting Regional Center Compliance Reviews to verify information contained in Regional Center petitions and annual statements, as well

³⁶ <https://www.sec.gov/news/testimony/cohen-testimony-02022016.html>

³⁷ <https://www.sec.gov/biography/jay-clayton>; No more than three of the commissioners may belong to the same political party.

as to improve integrity of the EB-5 Program. In addition, USCIS' Fraud Detection and National Security ("FDNS") personnel will be conducting site visits to the JCE.³⁸

The Investor Alert jointly released by the SEC and USCIS on October 1, 2013 to warn immigrant investors about fraudulent investment scams commonly used by fraudsters against EB-5 investors (the "EB-5 Investment Scam Alert") points out: "The fact that a business is designated as a Regional Center by USCIS does not mean that USCIS, the SEC, or any other government entity has approved the investments offered by the business, or has otherwise expressed a view on the quality of the investment."³⁹

The Department of Justice conducts criminal investigations of federal securities law violations. The Office of the U.S. Attorney prosecutes criminal actions against the Bad Actors.⁴⁰ During the course of an investigation, the Enforcement Division Staff sometimes informally refers matters to the Department of Justice for criminal investigation.⁴¹

IV SEC Enforcement Division

A. Investigation

This section provides a brief overview of the Enforcement Division's investigation of potential securities violations and the commencement of an enforcement action. The reader should refer to the SEC Enforcement Manual ("Enforcement Manual") to understand the considerations the SEC uses when it analyzes allegations of fraud and determines which cases to pursue.⁴²

The SEC website on "How Investigations Work" includes a list of the types of conduct that may lead to an SEC investigation. That list includes two types of conduct that have been the subject of most of the SEC enforcement actions alleging

³⁸ <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-regional-center-compliance-reviews>; <https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security/fraud-detection-and-national-security-directorate> https://www.uscis.gov/sites/default/files/talkingpoints_2017july_0.pdf

³⁹ https://www.sec.gov/oiea/investor-alerts-bulletins/investor-alerts-ia_immigranthtm.html ("Investor Alert")

⁴⁰ The SEC does not have authority to bring criminal actions against those persons who violate the securities laws.

⁴¹ See Section 5.6.1 of the Enforcement Manual for a discussion of the referral procedures and considerations that Staff takes into account in making a referral. <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>

⁴² The Enforcement Manual is an internal reference guide for Staff in the Enforcement Division for investigation of potential investigations. It contains general policies and procedures. <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.

fraud in the EB-5 area: misrepresentation or omission of important information about the securities; and stealing customers' funds.⁴³

In carrying out its basic responsibilities, the SEC is not in a position to obtain information about an EB-5 investment or project. As stated above, the SEC is not involved in the administration of the EB-5 Program. Accordingly, it does not review EB-5 petitions or applications, or the documents submitted with these filings to USCIS. Further, the NCE typically relies on exemptions from registration that do not require the filing of an offering plan or other documents with the SEC.⁴⁴ Thus, the SEC relies on tips, complaints and referrals from private individuals and other government agencies as the source of information to learn about potential securities law violations.

The SEC has limited staff and resources to allocate to the investigation of potential securities violations.⁴⁵ Thus, it ranks and prioritizes investigations.⁴⁶

Based on tips, complaints and referrals, the staff of the Enforcement Division ("Staff") may open an informal inquiry to gather facts. It typically seeks to meet with the investors and/or one or more of the principals of the issuer. If the Staff determines that further investigation is appropriate, a formal order of investigation is issued. As part of the formal investigation, Staff is authorized to issue subpoenas to obtain evidence. The investigation is kept private. The SEC conducts its investigations on a confidential basis as a matter of policy. The purpose of this policy is to protect the integrity of any investigation from premature disclosure and to protect the privacy of persons involved in the investigation.⁴⁷

After the fact-finding mission is completed, Staff determines whether violations have occurred or are likely to occur. It then typically issues a "Wells notice" to individuals or entities identifying securities laws violations that Staff believes have occurred or are likely to occur.⁴⁸ At this stage, the Staff may be willing to engage in discussions to settle the matter without a trial. However, Staff does not have the authority to settle the matter or to proceed to bring an enforcement

⁴³ <https://www.sec.gov/enforce/how-investigations-work.html>

⁴⁴ The Form D is the only required filing with the SEC for the Regulation D exemption.

⁴⁵ As noted in the "Conclusion" of this paper, the SEC budget is being cut and the staff will be dramatically reduced.

⁴⁶ Section 2.1.1 of the Enforcement Manual. <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>

⁴⁷ See Id.

⁴⁸ If there is a parallel criminal investigation that may be adversely affected, staff may choose not to provide a Wells notice. See Section 2.4 of the Enforcement Manual regarding the Wells Process.

<https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>

action. Instead, it makes a recommendation to the Commission which makes the decision. The Commission considers and votes on the Division’s recommendation in a session that is closed to the public.

In addition, the “Database - Trends and Observations” section contains a more detailed discussion of some of these concepts.

B. Enforcement actions

If the Commission decides to bring an enforcement action it can either bring a civil case in federal court or an administrative proceeding within the SEC before an administrative law judge. The SEC brings hundreds of enforcement actions each year. Yet only a handful relate to the funds invested by immigrants in EB-5 projects.⁴⁹

1. Civil actions

In civil cases, the SEC files a complaint with the appropriate U.S. District Court, a federal trial court, to seek relief. Typically, relief sought will include an injunction (a temporary restraining order or a preliminary injunction) to prevent any further securities law violations, and the appointment by the court of a receiver of entities involved in the wrongdoing.⁵⁰ In addition, the SEC seeks the return of illegal profits (known as “disgorgement”) and/or the imposition of monetary penalties, as well as the collection of prejudgment interest.⁵¹ The court may also bar or suspend an individual from serving as an officer or director. The SEC posts on its website “Litigation Releases,” that summarizes lawsuits filed by the SEC since 1995.⁵²

The defendants typically include the issuer of the security, “control persons”, as well as those individuals or entities who were not involved in the fraud but who are in receipt of some of the proceeds (these recipients are known as “relief defendants”).⁵³

⁴⁹ See <https://www.sec.gov/litigation/litreleases.shtml>

⁵⁰ “The Receiver is the individual who assumes responsibility for all assets of the entities in receivership in the civil enforcement action brought by the SEC. He is responsible for determining how the business was operated and where all of the assets are located. He also is charged with operating the business and reporting to investors and other interested parties. Ultimately, the Receiver will determine the amounts owed to individual creditors and investors and will distribute available assets in accordance with a plan approved by the Court.”

<https://jaypeakreceivership.com/faq/>

⁵¹ See <http://www.wlrk.com/docs/outlineofsecuritieslawliabilities2013.pdf>

⁵² <https://www.sec.gov/litigation/litreleases.shtml>

⁵³ See Section 20(a) of the 1934 Act

Although the SEC does not bring the civil action on behalf of the defrauded investors, the monetary amounts recovered from the defendants are typically returned to the investors. However, the law does not require that all of the recovered funds be paid to the investors. Also, as discussed in the “Private Rights of Action” section, the investors may bring a separate, private lawsuit against some or all of the defendants under the federal securities laws as well as under state law, not limited to the state securities law.

2. Administrative proceedings

Alternatively, the Commission can seek a variety of sanctions through the administrative procedure process, which is presided over by an administrative law judge.⁵⁴ Administrative sanctions include civil monetary penalties and disgorgement, cease and desist orders, and bars from association with the securities industry. The SEC posts on its website “Administrative Proceeding Releases,” a list of administrative proceedings instituted or settled since 1995, including notices and orders.⁵⁵

The SEC enforcement actions involving EB-5 securities alleging fraud have been brought as civil actions. The actions against alleged unregistered broker-dealers have been brought as administrative proceedings, except in the Feng case and in SEC v. Steve Qi, et al., filed on December 8, 2017.⁵⁶

C. Related criminal prosecutions by Office of the US Attorney

While the SEC is the primary authority to enforce and bring civil actions for violations of the securities laws, Department of Justice through the Office of the US Attorney has exclusive jurisdiction to bring criminal prosecutions.

Most of the actions brought against EB-5 Bad Actors have been civil actions brought by the SEC. The Office of the US Attorney has brought only a few criminal actions. The criminal action can be brought by the US Attorney before, at the same time as, or after the SEC brings an action.

The criminal prosecution can seek to impose a prison sentence as well as to require the payment of restitution and penalties. Unlike the disgorgement remedy in civil enforcement actions, the entire amount of the restitution paid must be distributed to the victims who suffered the financial loss.

⁵⁴ <https://www.sec.gov/alj>

⁵⁵ <https://www.sec.gov/litigation/admin.shtml>

⁵⁶ See the discussion in Section XII of this paper.

V Database of SEC EB-5 Securities Enforcement Actions

A. Database - Methodology

We have designed and compiled a Database of the actions initiated by the federal government involving EB-5 projects where fraud was alleged, most of which involve the misappropriation of the investors' funds (the "Database").⁵⁷ The SEC brought 15 of the 16 actions. We included in the Database one recent civil forfeiture case, involving the California Investment Immigration Fund Regional Center (CIIF), filed by the Office of the US Attorney because the matter involves similar issues to those raised by the SEC enforcement actions.⁵⁸

The Database is attached as Appendix A to this paper. The actions are listed in reverse chronological order, with the most recent SEC action listed first. We listed the CIIF action separately.

Below is a brief explanation of the various categories we selected to include in the Database. This explanation does not use the identical words as the category descriptions because the Database format has space limitations.

1. Case Reference: For ease of the reader's reference, the case is referred to by the name that has been commonly used in media coverage. This is based on the name or location of the project (such as Jay Peak, the Chicago Convention Center, or Green Box), name of the key defendant (such as Home America – Dargey or Caffe Primo) or name of the Regional Center (such as Home Paradise Regional Center).
2. Link to the SEC Litigation Release: This includes a link to the SEC complaint filed in U.S. District Court.⁵⁹ If the reader is interested in reading subsequent court filings, he or she can access the case by visiting PACER.⁶⁰ We also include the date the complaint was filed in the court.

⁵⁷ Section XII of this paper discusses the SEC enforcement actions (primarily administrative proceedings) in which the SEC alleges that an immigration attorney or others acted as an unregistered broker-dealer. These actions do not merit a separate database because, as explained in that Section, we expect the SEC to bring few additional actions. Generally, the SEC has not alleged fraud in these administrative proceedings.

⁵⁸ Here is a summary of the pending civil forfeiture action. <https://www.justice.gov/usao-cdca/pr/us-files-9-lawsuits-seeking-forfeiture-properties-worth-over-30-million-allegedly>. Furthermore, on November 27, 2017 a guilty plea was entered in the criminal prosecution of the individual key defendant in CIIF. Here is a summary of the criminal prosecution. <https://www.justice.gov/usao-cdca/pr/attorney-pleads-guilty-federal-charges-stemming-50-million-scheme-defrauded-eb-5-visa>

⁵⁹ The SEC issues an SEC Release concerning civil lawsuits it filed in federal court. In the case of a filing of a complaint, the release generally summarizes the key points of the complaint and provides a link to the complaint.

⁶⁰ <https://www.pacer.gov/>

3. EB-5 Roles of the Named Defendants: Rather than list the specific name of the defendants, we list the EB-5 role of the named defendants because we believe this is more valuable for the typical EB-5 stakeholder. The defendants' names are available in the complaint linked to the SEC Litigation Release. The roles may include the NCE, JCE and Regional Center and owner or manager of these entities (we sometimes refer to the owner or manager as the "operator"). The cases do not typically use or refer to the EB-5 role because this information is relevant only for immigration law purposes. We did not include other defendants, such as relief defendants to which the funds were diverted.
4. Alleged Amount of Diversion or Other Misuse of Funds:

Since most of the actions involve the alleged diversion or misuse of immigrant investors' funds, we included this as a question calling for a Yes/No response. Generally, this refers to investors' funds that have been used for a purpose other than as stated in the offering plan provided to the investors or other than the business plan that comprised part of the submission to USCIS to support the visa petitions. This category includes fraud such as the use of the Bad Actor's personal purposes, commingling of investors' funds with funds of other persons or entities, and Ponzi schemes.

This lists the amount of EB-5 capital diverted or misused compared to the amount raised. Bad Actors have used the diverted or misused funds for a variety of illegitimate purposes including personal use by the operators (for example, for the purchase of luxury condos, luxury automobiles and yachts and even Green Bay Packer football season tickets); use for projects unrelated to the EB-5 business plan; and Ponzi schemes. We do not categorize these uses because while they are interesting, they do not advance critical analysis.

In addition, the cases generally treat the personal use of the funds as a diversion or misappropriation, and treat the commingling of funds, Ponzi schemes and other uses not contemplated by the business plan, as a misuse of funds. For simplicity sake, the Database does not distinguish between the diversion of funds and misuse of the funds.

Furthermore, the Database does not include a list of the specific statutory sections that the defendants allegedly violated because this is not meaningful for EB-5 stakeholders. Most of the actions allege a violation of the antifraud provisions of the 1933 Act and 1934 Act, sections 17 and 10(b), respectively.

5. Years of Alleged Wrongdoing and Time from Initial Wrongdoing to SEC Filing of Complaint: Since in most cases, many years elapse from the time of the initial wrongdoing to the SEC’s commencement of an enforcement action, this comparison calculates that timeframe.
6. Project Location, City and State: This helps determine whether the fraud actions have been concentrated in locations in one part of the country or are widespread.
7. Urban vs. Rural: This helps determine whether the SEC actions have been filed with respect to projects in rural areas or projects in urban and rural areas. This does not precisely match the urban/rural TEA definitions under the current EB-5 statute and regulations.⁶¹
8. Regional Center’s Name and Date of Regional Center Designation (if not yet terminated) or Date of Termination by USCIS (if the Regional Center has been terminated): Since the Regional Center is not the issuer of the securities, in some cases the Regional Center is not named as a defendant. In any event, this category provides the name. Many, but not all, of the Regional Centers have been terminated. We base this Regional Center status on the list of designated Regional Centers and the list of terminated Regional Centers posted by USCIS and updated as of November 14, 2017.⁶² As discussed in the “Regional Center Termination” section of this paper, termination is likely to adversely impact investors who have a visa petition in process with USCIS.
9. Related Party Transactions – NCE and JCE:

Until recently, the SEC filed enforcement actions in the EB-5 arena against only related parties: where one or two individuals owned or controlled the Regional Center, NCE and JCE. The conventional wisdom had been that the misappropriation of investor funds is unlikely to occur where the NCE and JCE are unrelated. However, recent enforcement actions involve a JCE that is not related to the NCE or Regional Center.

Thus, we examined the relationship between the NCE and JCE relationship in the various actions. Any overlap in control or ownership

⁶¹ See

<http://www.stern.nyu.edu/sites/default/files/assets/documents/What%20TEA%20Projects%20Might%20Look%20Like%20under%20EB5%202.0%20Alternatives%20with%20Maps%20and%20Data%202%206%2016.pdf>

⁶²This list is updated periodically by USCIS. Thus, this link will reflect status updates subsequent to October 30, 2017. <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/immigrant-investor-regional-centers>; <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-immigrant-investor-process/regional-center-terminations>

between the NCE and JCE indicates vulnerability to fraud or other abuses because the flow of funds runs from the NCE to the JCE whether the deployment of capital is structured as debt or equity.

In the most common EB-5 structure, the NCE as lender makes a loan to the JCE, the developer-borrower entity.⁶³ If the NCE lender and JCE borrower are related (such as under common control or ownership by the same individuals or entities), then the potential for fraud or other abuse is greater. This arrangement poses obvious conflicts of interest that do not exist if the NCE and JCE are unrelated. Some Regional Centers attempt to minimize the potential by instituting third party controls, such as the appointment of an independent third-party fund administrator to administer the loan and to oversee the transfer of funds. This is not evident in any of the actions listed in the Database.

We also examined the relationship between the Regional Center and NCE, and Regional Center and JCE; however, we decided not to include this information as a category in the Database. It is common for the Regional Center and NCE to be related, even if the JCE is not related to either entity.

The typical Regional Center is formed with the legitimate business purpose to deploy the immigrant's investment capital as a loan to, or equity investment in, a JCE, related or unrelated to the NCE. The Regional Center or one or more its principals (owners, directors or officers) serves as the general partner or manager of the NCE. A portion of the periodic payments made by the JCE is allocated to the Regional Center or its affiliates. The relationship between the Regional Center and NCE is not an indicator that the NCE and JCE are, or will be, related. In most cases, where the NCE and JCE are related (with some overlap of ownership or control), the Regional Center and NCE will also be related and the Regional Center and JCE will be related.⁶⁴

10.EB-5 Capital - Actual Amount of EB-5 Capital Raised and the Maximum EB-5 Capital Sought to be Raised under the Offering: This recognizes that frequently less EB-5 capital is raised than the maximum amount sought under the offering. This category lists the amount of EB-5 capital raised by

⁶³ The EB-5 loan could be structured as a senior loan or mezzanine loan. If the loan is structured as a senior loan, the JCE is the borrower; if the loan is structured as a mezzanine loan, the parent of the JCE is the borrower.

⁶⁴ Some Regional Centers "rent" their Regional Center designation to an unrelated third party that may sponsor a project seeking to attract EB-5 investors. In the rental Regional Center situations, the renter or affiliates control the NCE and often, but not always, the JCE is related to the NCE. We did not include a separate category for rentals because it appears that none of the Enforcement Actions involved a rental Regional Center arrangement.

the NCE, to allow for a comparison to other EB-5 projects, as well as a comparison to the maximum amount of EB-5 capital sought to be raised. We tried to determine the composition of the total capital stack (including non-EB-5 capital) raised for the various projects, but we were unable to obtain the necessary information from the readily accessible court filings. We continue to pursue this information. It would be interesting to determine the percentage of the maximum EB-5 capital to be raised in these projects compared to the total development costs from all sources (not limited to EB-5 capital) to determine whether a pattern exists.

11. EB-5 Capital Diverted or Misused: Project Type: This lists the type of project described in the business plan to be funded with the EB-5 capital. Most EB-5 projects are real estate development projects.
12. Project Construction Status at Time of SEC Filings: This determines whether the project has started, was under construction or was substantially completed as of the date of the filing of the SEC complaint. Note that several of the cases involve a regional sponsor sponsoring multiple projects or multiple tranches of EB-5 capital in the same project by the same or related parties.
13. Location of Funds Immediately Prior to the Diversion: This indicates whether the diversion occurred before the funds reached the NCE, after the funds were released from escrow and held by the NCE, or after the funds were transferred or deployed by the NCE to the JCE.
14. Escrowed Funds Subject to Early Release: This focuses on whether the escrow provisions allowed early release (release of the funds to the NCE prior to USCIS approval of the investor's I-526 petition). It also indicates, where sufficient facts are referenced in the complaint, if the funds were released prior to the date permitted by the escrow agreement.
15. EB-5 Capital Deployed as Loan or Equity: In the EB-5 market in general, the aggregate proceeds of the EB-5 immigrants contributed to the NCE are most commonly deployed by the NCE as a loan to the JCE. This category determines whether the EB-5 capital for the individual projects was described in the offering materials as a loan or equity. We intended to further categorize the loan as a senior loan or mezzanine loan, but were unable to do so because insufficient facts were disclosed in the complaints and other readily accessible court filings.
16. Bank or Other Institutional Lender as Senior Lender: EB-5 investors generally prefer projects where a bank or other institutional lender will serve as the

senior lender because the financial commitment made by, and due diligence performed by, that lender provides informal comfort to the EB-5 investor that the lender approves the project.⁶⁵ Based on the complaint and other public documents we obtained, we were generally unable to determine and identify the institutional lender, if any, for a particular project.

17. Information about Immigrant Investors: This includes the actual or estimated number of immigrant investors who were seeking an EB-5 visa, the investors' country of origin, and the status of the immigrants' investment petitions as of the date of the SEC's filing of its complaint. The stated country of origin is based on that of most of the investors, unless otherwise indicated.
18. Relief Sought: As explained in this paper, the most common monetary relief available to the SEC for securities fraud include disgorgement, penalties and prejudgment interest. Other common forms of relief include injunctive relief (temporary restraining order or preliminary injunction – we do not distinguish between the two) and the court appointment of a receiver. Since injunctive relief has been granted and a receiver appointed in virtually every case but one (discussed in the "Database – Trends and Observations" section below), we did not list the injunction and receivership in the Case Status category. In some cases, the injunction or receivership was in place before the SEC filed the enforcement action. In some of the cases, the SEC sought the debarment of the bad actors, including suspension from the EB-5 program. We did not include debarments in our Database.
19. Case Status: This indicates whether the case is still pending or has been resolved. Resolved means any one of the following: the case has been dismissed, settled or a judgment has been entered.
20. Case Outcome: If a judgment has been entered, the dollar amount of the judgment, if any, is listed. If the case is still pending, TBD is indicated.
21. Related Actions - Private Right of Action by Immigrant Investors – Yes or No: This indicates whether the investors have filed a lawsuit against one or more of the defendants under the federal securities laws.
22. Related Actions - Criminal Actions Filed by the Office of the US Attorney - Yes or No: This indicates whether the Office of the US Attorney has pursued criminal action against one or more of the defendants. If it has, this category indicates whether a guilty plea was entered by, or a grand jury indictment

⁶⁵ The institutional lender is typically the senior lender and thus, in a more secure position than the EB-5 investors through the protections afforded to the NCE based on the capital it provides to the JCE.

was issued against, one or more defendants. This also indicates whether the court ordered that the defendant pay restitution to the victims. A link to the Department of Justice press release is included in the “Criminal Prosecution” discussion of the “Database – Trends and Observation” section.

B. Database - Trends and Observations

The trends and observations below do not merely reflect the data listed in the Database categories.⁶⁶ Our observations are also based on a review of the complaint and subsequent court filings, as well as media reports. The trends and observations are not listed in the same sequence as the categories in the Database. Instead, they are listed in the order of importance.

1. Criminal Prosecution:

The criminal action can be brought by the Office of the US Attorney before, at the same time as, or after the SEC commences a civil action. In only 4 of the 16 cases listed in the Database has a criminal prosecution been brought.

On November 27, 2017, the key defendant in the CIIF case entered a guilty plea. The criminal prosecution was preceded by a civil forfeiture action brought by the Office of the US Attorney to recover nine parcels of real estate purchased by the Regional Center’s related entities and principals. Sentencing is scheduled to occur in July 2018, with a 45-year maximum prison term. The Department of Justice press release was silent as to the imposition of any monetary sanctions.⁶⁷

The recent SEC civil action in Green Box is the only case that has involved a “parallel action” brought by the US Attorney’s Office.⁶⁸ The US Attorney’s Office commenced the criminal action contemporaneously with the SEC’s filing of the civil action. In Green Box, a grand jury indicted the key defendant.⁶⁹ No guilty plea has been entered yet.

In two of the civil actions – the Chicago Convention Center case and Path America case – the key individual defendant entered a guilty plea well

⁶⁶Suzanne Lazicki, business plan writer and EB-5 expert, maintains a “Log of SEC Actions Involving Fraud in EB-5 Offerings” at <https://www.dropbox.com/s/sgfc06bwx3chc04/SECActionLog.xlsx?dl=0>.

⁶⁷ <https://www.justice.gov/usao-cdca/pr/attorney-pleads-guilty-federal-charges-stemming-50-million-scheme-defrauded-eb-5-visa>

⁶⁸ See the discussion of “Parallel Investigations” in Section 5.2.1 of the Enforcement Manual. <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>

⁶⁹ <https://www.justice.gov/usao-edwi/pr/de-pere-businessman-indicted-9-million-green-energy-fraud>

after the SEC's civil action was commenced. Anshoo Sethi, the key defendant in the Chicago Convention Center case received a three-year prison sentence,⁷⁰ and Lobster Dargey, the key defendant in the Path America case received a four-year prison sentence.⁷¹

Interestingly, in the highly publicized Jay Peak case, neither of the key operators – Ariel Quiros or William Stenger – has been criminally prosecuted yet. It is possible that the Office of the US Attorney is conducting a criminal investigation in this and in other matters where an SEC enforcement action has been filed.⁷²

In addition to the order to pay disgorgement and other monetary sanctions in the SEC enforcement actions, in the criminal case, Sethi and Dargey were ordered to pay restitution.

As more SEC enforcement actions are resolved against the principals, more criminal prosecutions should be expected.

2. Civil Forfeiture Action filed by Office of the US Attorney:

The massive fraud perpetrated by the CIIF Regional Center operators received widespread publicity in early 2017.⁷³ The 113-page affidavit filed under seal by an FBI agent on April 4, 2017 details actions that takes EB-5 fraud to a new level of egregiousness.⁷⁴ For example, instead of investing the immigrants' funds into real estate projects pursuant to the EB-5 business plan, CIIF either refunded the money to many of the EB-5 investors who somehow were able to continue to pursue their EB-5 petitions, or misappropriated millions of dollars to use for the Regional Center operators' personal use. Nevertheless, many of the investors were able to improperly obtain green cards, including fugitives whose names appear on the Chinese government's 100 most wanted list.

A few days after the FBI affidavit was filed, on April 20, 2017, Senator Grassley wrote a scathing letter to then-Secretary John Kelly of the Department of Homeland Security citing news reports about the CIIF matter,

⁷⁰ <https://www.justice.gov/usao-ndil/pr/hotel-developer-sentenced-three-years-prison-exploiting-us-visa-program>

⁷¹ <https://www.justice.gov/usao-wdwa/pr/developer-pleads-guilty-defrauding-investors-seeking-citizenship-under-federal>

⁷² See Section 5.6.1 of the Enforcement Manual. <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>

⁷³ <http://www.latimes.com/local/lanow/la-me-ln-green-card-fraud-20170405-story.html>

⁷⁴ https://eb5projects.com/system/uploads/document/file/375/Visa_Fraud_-_Investor_Visa_Scam_SW_Affidavit_4-17_.pdf

and demanding answers to several questions about the apparent lack of oversight, investigation and enforcement activity in this matter.⁷⁵

Approximately a month after Senator Grassley’s letter, on May 24, 2017, the Office of the US Attorney filed nine complaints seeking the forfeiture of nine real properties across Southern California allegedly purchased with EB-5 investor funds for the benefit of the Bad Actors.⁷⁶ Eight of the nine parcels have been seized.

It appears that none of the SEC enforcement actions in the Database involved the commencement of a civil forfeiture action by the US Attorney.⁷⁷ The SEC has not initiated an enforcement action in CIIF.

3. Cooperation Tools:

Section 6.2 of the Enforcement Manual describes “cooperation tools” available to the SEC to encourage insiders with knowledge to report potential securities violations. These tools include the grant of immunity and non-prosecution agreements.⁷⁸ The use of these tools in specific cases is kept private by the SEC. Nevertheless, the court filings in two of the actions suggest that the SEC might have utilized these tools in those cases.

In the Zhong complaint, an individual was identified as an “attorney.” She served as the immigration attorney of record for the filing of all immigrant investor petitions. She also performed substantial legal services for Zhong and was apparently aware of, if not involved in, Zhong’s scheme to defraud the EB-5 investors. The attorney also owned three Regional Centers with Zhong, including the centers which solicited the investors. Yet the attorney was not charged or even referred to by name in the body of the complaint. It is possible the attorney negotiated a grant of immunity with the SEC and Office of US Attorney.⁷⁹

Similarly, in one of the most recent enforcement actions, Green Box, the JCE developer entity and its principal were named in the SEC filing, but the unrelated NCE issuer and Regional Center were not named even though

⁷⁵ <https://www.grassley.senate.gov/news/news-releases/newly-discovered-eb-5-scam-highlights-fraud-national-security-weaknesses-need>

⁷⁶ <https://www.justice.gov/usao-cdca/pr/us-files-9-lawsuits-seeking-forfeiture-properties-worth-over-30-million-allegedly>

⁷⁷ The DOJ Asset Forfeiture and Seizure Manual explains the process for Department of Justice civil and criminal asset forfeiture and seizure of assets. <https://www.justice.gov/criminal-afmls/file/839521/download>. Chapter 13 of that Manual describes the seizure of real property.

⁷⁸ See Sections 6.2.3 and 6.2.4 of the Enforcement Manual. <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>

⁷⁹ Id.

the Regional Center (Green Detroit) and its principal were involved in the solicitation and marketing of the EB-5 securities to the investors.⁸⁰ The complaint refers to the manager of the NCE and the owner of the Regional Center by the initials “S.A.”⁸¹ This might indicate that the individual cooperated and provided information to the SEC in exchange for a grant of immunity or other relief. We assume that if the individual were a whistleblower, the complaint would not identify the individual, even by initials.

4. Misappropriation by Unrelated Entities: The “EB-5 Misappropriation Cases Not Limited to Related Party Structures” section of this paper discusses the recent cases brought against unrelated entities, in contrast to the earlier cases.
5. SEC Whistleblower Program: The SEC credits whistleblowers for providing valuable information that enables the SEC to quickly initiate enforcement actions against wrongdoers before they are able to squander their ill-gotten funds.⁸² In the “SEC Whistleblower Program” section, we provide an overview of that Program and a discussion of how it has been utilized to uncover one major EB-5 fraud action, and could be used to identify securities law violations involving other EB-5 projects.
6. Recent US Supreme Court Decision Impact on Ability of Chinese Investors to Recover Misappropriated Funds:

The SEC investigation and subsequent enforcement action are time-consuming, deliberative processes. Furthermore, the diversion of funds takes considerable time to be detected, whether by USCIS, investor tips, or other sources. USCIS does not track the actual flow of immigrant investor funds until the adjudication of the I-829 petition, which occurs several years after the investment of the funds. In many of the cases, at least two years, and, in some cases, more than five years have elapsed from the alleged original violation to the SEC’s filing of an action.

A 2017 US Supreme Court decision, Kokesh v. SEC, held that the statute of limitations for the disgorgement of profits is 5 years.⁸³ Thus, it is

⁸⁰ See paragraph 91 of the complaint which alleges that the Regional Center and NCE disseminated the misleading information to the investors but points out that the source of the information was the JCE developer.

⁸¹ See paragraphs 73 through 93 of the complaint filed in Green Box. The designation letter was addressed to Simon Ah.

⁸² <http://www.whistleblowers.org/storage/docs/sec-2017-annual.pdf>

⁸³ SEC v. Kokesh, 581 U.S. ____ (2017); https://www.supremecourt.gov/opinions/16pdf/16-529_i426.pdf

essential that the SEC act promptly to preserve the maximum disgorgement remedy. Some of the recent cases allege wrongdoing that dates back to more than 5 years from the date of the filing of the action.⁸⁴

This decision is likely to have the most negative impact on investors from mainland China. The USCIS Ombudsman estimates that, due to retrogression, the time frame for new Chinese investors to obtain their visa may be 10 years or longer.⁸⁵ Thus, their I-829 petitions and the actual flow of funds will likely not be scrutinized for at least 10 years. Although the I-829 review is the point at which USCIS is most likely to discover a misappropriation, the statute of limitations will have long expired.

The Kokesh decision might prompt the Enforcement Division to accelerate investigations. One would expect that the Staff will more routinely seek individuals and entities under investigation to enter into tolling agreements to prevent the expiration of the statute of limitations, and will pursue that at an earlier stage of the investigation than has been customary in the past.⁸⁶

7. Regional Center Termination:

In seven of the first nine actions listed in the Database, USCIS has terminated the Regional Center status of the relevant Regional Center,⁸⁷ but has not terminated any of the Regional Centers that sponsored projects that were the subject of the more recent actions. Termination of the Regional Center is likely to have a fatal impact on the pursuit of the EB-5 visa by some of the investors.

In the “Regional Center Termination” section we provide an overview of the termination process. We also discuss alternative remedies proposed in the regulations proposed by DHS, and in H.R. 5992, the EB-5 reform bill introduced in September 2017, as well as arguments advanced by two major

⁸⁴ See, for example, the enforcement action in Jay Peak and the civil forfeiture action in the CIIF case.

⁸⁵ See page vii of https://www.dhs.gov/sites/default/files/publications/DHS%20Annual%20Report%202017_0.pdf

⁸⁶ In Aero Space International Group case, the defendants signed tolling agreements as required by the SEC. See paragraph 79 of the complaint. Also see Section 3.1.2 of the Enforcement Manual concerning the Statute of Limitations and Tolling Agreements. <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>

⁸⁷ Jay Peak and Suncor were the other two enforcement actions. Re Jay Peak, USCIS issued A Notice of Intent to Terminate the designation status of the Vermont Regional Center, and that Notice has been appealed. The Regional Center involved with Suncor was not specified in the complaint. The name of each of the NCEs in that case included the name “Suncor.” A search of the USCIS website listing of Regional Centers does not reveal a Regional Center starting with the name Suncor in its title. Path America involved two Regional Centers, both of which were terminated by USCIS.

Regional Centers in opposition to USCIS’s proposed termination of such Regional Centers.

8. Amount of EB-5 Capital Raise:

A relatively small amount of capital was actually raised in some of the projects that were the subject of an enforcement action. For example, in each of Green Box, Zhong, Luca and Ramirez, the actual EB-5 capital raise was less than \$10 Million.

However, in several cases, the amount of EB-5 capital raised for one or more projects has been substantial. Here are some examples:

<u>Project Name</u>	<u>Approx. Amount of EB-5 Capital Raised</u> ⁸⁸
Jay Peak	\$418.5 Million ⁸⁹
Path America	\$150.0 Million
Chicago Convention Center	\$145.0 Million
Muroff	\$140.5 Million
Henderson	\$107.5 Million
Kameli	\$ 88.7 Million ⁹⁰
Caffe Primo	\$ 65.5 Million

The two projects specified in the enforcement action involving the Home Paradise Investment Center Regional Center (“HPIC”) involves two relatively small capital raises. However, the Regional Center is also the sponsor of two megaprojects located in downtown Los Angeles; these projects were not named in the enforcement action. The total capital (not limited to EB-5) sought to be raised for each of these projects exceeded \$1 Billion.⁹¹

9. Multiple Projects:

⁸⁸ This amount excludes the administrative fees charged to the investors by the Regional Center.

⁸⁹ This is based on Per Declaration of Michael I. Goldberg (the Jay Peak receiver), Daccache et al., v. Raymond James, People’s United Bank et al., S.D. FLA court on October 30, 2017 in Case # 1:16-cv-21575-FAM, Document 262-1. This is higher than the amounts reported by some media accounts. It appears that the discrepancy might be due to which of the eight projects sponsored by the Vermont Regional Center are taken into account.

⁹⁰ The complaint states that \$25,000 was held in escrow. It is unclear whether this means that these were the only investor funds ever placed in escrow or the only funds held in escrow as of the date of the filing of the complaint.

⁹¹ See pages 7, DS-13 and DS-14 of <http://www.stern.nyu.edu/sites/default/files/assets/documents/2017%20EB-5%20Project%20Database%20with%20Trends%208.16.2017.pdf>

Most of the actions relate to EB-5 capital to be deployed to fund a single project. However, in some cases, several NCEs were created over time with the stated purpose of deploying funds to multiple projects or to multiple phases of the same project. For example, in the Caffe Primo case, the operator raised capital in 19 separate offerings. Eight tranches of EB-5 capital were deployed in Jay Peak; Q Burke Hotel, Resort and Convention Center; and the biomedical facility. Each of Henderson and Aero Space International involved seven EB-5 projects. Path America involved two related Regional Centers, each to fund a separate project in the Seattle-Tacoma-Bellevue Metropolitan Statistical Area. CIIF involves the use of EB-5 investor funds to acquire 9 parcels, but not in accordance with the EB-5 business plan.

Most of the actions involve all outstanding projects sponsored by the Regional Center. However, as stated above, in HPIC, the enforcement action was limited to two projects developed by a JCE that was owned by the principals as the NCE and Regional Center. However, the Regional Center sponsored two other projects, each of which was a megaproject created by an unrelated developer.

10. Injunction and Receivers:

The SEC routinely seeks to have the court grant an injunction to stop the illegal activity and to appoint a receiver to oversee and administer the operation of the defendants' businesses, if one was not appointed before the SEC action was filed. In each enforcement action in the Database, the court has granted the SEC's motion for injunctive relief and the appointment of a receiver, except in the Kameli case.⁹² Presumably, the Kameli case will proceed to trial on the antifraud claims and other substantive issues regarding the alleged misuse of funds, diversion and misrepresentation.

Note that a receiver is not always appointed to oversee the operations of a Regional Center. For example, the SEC did not seek to appoint a receiver to oversee the Vermont Regional Center to which Jay Peak is associated. However, some of the Jay Peak investors have filed a lawsuit against the State and others, which includes a request for the appointment of a receiver to oversee the Regional Center.⁹³

⁹² https://eb5projects.com/system/uploads/document/file/482/Order_denying_Preliminary_Injunction.pdf

⁹³ https://eb5projects.com/system/uploads/document/file/489/17-9-22_Third_Amended_Class_Action_Complaint_Sutton_et_al._v._VRC_et_al..pdf

11. Receiver:

Michael Goldberg, the receiver for various entities in the Jay Peak case, and Michael Grassmueck, the receiver for various entities in the Path America case, should serve as the model for future receivers in the EB-5 space.

Both receivers demonstrate the active role a receiver can play in protecting the rights of the EB-5 investors, and trying to preserve the investors' eligibility to obtain visa approval and a permanent green card.⁹⁴ They each maintain a comprehensive website with information about the status of the projects and operations, the efforts to recover funds for the investors, as well as a link to documents and reports filed with the court and government agencies.⁹⁵

Mr. Goldberg played a major role in the filing of lawsuits leading to recovery of investor funds. For example, on behalf of the investors, he successfully negotiated a Settlement Agreement with Raymond James that will result in the payment of \$150 million.⁹⁶ Mr. Grassmueck successfully negotiated a restructuring of the Path America Tower project to enable it to be completed. The receivers' efforts on behalf of the immigrant investors in Jay Peak and Path America in the context of the termination of the Regional Centers is discussed in the "Termination of Regional Center" section of this paper.

12. Sources of information: In several of the SEC Litigation Releases announcing the enforcement actions, the SEC expressed its appreciation for the substantial assistance of the USCIS. In the SEC Litigation Release announcing the Luca enforcement action, the SEC expressed its appreciation to foreign government regulators – the Hong Kong Securities and Futures Commission and the China Securities Regulatory Commission – for their assistance. In the Jay Peak announcement, the SEC acknowledged the assistance of the Office of the Vermont Attorney General,

⁹⁴ Here is a link to the description of the receiver's role in an SEC enforcement action: <https://jaypeakreceivership.com/>

⁹⁵ See for example, <https://jaypeakreceivership.com/receivers-letters-reports/>; and <http://www.grassmueckgroup.com/pathamerica.php>

⁹⁶ <https://jaypeakreceivership.com/wp-content/uploads/2017/04/SIGNED-Settlement-Agreement-with-Exhibits-12.pdf>

13. Independent Fund Administration: Obviously, fraud cannot be eliminated. However, an examination of the cases indicates that Independent Fund Administration, as proposed in the Senate Legislative Counsel drafts subsequent to the introduction of H.R. 5992, would likely deter some of the fraud actions and result in early detection of many of the others, as well as enhance recovery of the misappropriated funds. However, recent developments indicate this type of provision might be eliminated from, or watered down, in the reform bill if and when passed. This provision and its application to misappropriation cases is discussed in the “Independent Fund Administration” section of the paper.

14. Escrow – Release of Funds:

The Database category describes the escrow provision contained in the offering materials based on the information contained in the SEC complaint. In a few cases, the complaint does not mention the escrow. In many cases, the complaint details the premature release of funds, earlier than permitted by the escrow documents.

In a few cases, some or all of the investors’ funds were released immediately upon receipt in escrow or never reached escrow and went directly either to the NCE, to the personal accounts of the operators or to others. Examples include the Zhong case and Ramirez case.

Some of the cases involve a permissible early release of the funds from escrow, even as soon as the investor filed the I-526 petition, which in most cases could be a few weeks or a couple of months from the date the investment was funded. This might not pose a danger where the NCE retains substantial funds or demonstrates the financial wherewithal to refund the investors’ capital if investors’ I-526 petitions are denied. However, in other cases, this arrangement poses a major risk. These cases illustrate the risk.

In the Jay Peak case, over a ten-year period, the investor contributions for phases 1 through 8 were deposited in escrow accounts at People’s United Bank. Contrary to the escrow agreements, People’s Bank permitted the transfer and commingling of funds to other projects and persons.⁹⁷ Some of the investors have commenced a class action against the Bank for breaching

⁹⁷ Per Declaration of Michael I. Goldberg (receiver), Daccache et al., v. Raymond James, People’s United Bank et al., S.D. FLA court on October 30, 2017 in Case # 1:16-cv-21575-FAM, Document 262-1.

its fiduciary duty and aiding and abetting the Jay Peak operator-developers' misuse of the funds.⁹⁸

Depending on the outcome of the People's Bank lawsuit, the lawsuit might cause other banks to reevaluate the risks associated with the establishment of EB-5 escrow accounts at the bank, and to upgrade their oversight and compliance relating to the maintenance of EB-5 escrow accounts.

15. Developer JCE's Failure to Fund Equity Contribution: In at least one case, the developer failed to fund any of its equity contribution to the JCE. In Path America, Lobster Dargey, the developer, agreed in the offering plan to fund equity contributions to the JCE of \$32.5 Million but failed to make the contribution. In Jay Peak, the developers, Quiros and Stenger, failed to fund at least \$28 Million of the equity required by the offering plans.⁹⁹
16. Construction Status: Most cases involve projects that were not completed, some of which had just started construction. In some cases, no construction had commenced. Examples include Zhong and CIIF. In the case of Path America, the Farmer's Market project was substantially completed and occupied, while the Tower project was merely at the preliminary earth excavation stage. The first few phases of Jay Peak were completed, but the later phases were not.
17. Inexperienced operators: Many of the operators had little or no experience in the operation of the business that was the subject of the EB-5 investment. See for example, the operators in the Zhong, CIIF, HPIC, Ramirez, and Chicago Convention Center case.
18. Loan vs Equity: The EB-5 capital was structured to be deployed as a loan to fund construction in most of the projects. The complaints generally contain insufficient information to determine whether it was structured as a mezzanine loan or senior mortgage loan. It appears that EB-5 capital was deployed as equity in Jay Peak, Zhong, and Caffe Primo. This does not suggest that the loan or equity structure is more vulnerable to misappropriation than the other.

⁹⁸ The investors who filed the lawsuit are seeking certification of the class. The Bank is not the only defendant in this lawsuit. The complaint includes other causes of actions. <https://vtdigger.org/2017/11/02/eb-5-investors-pursue-lawsuit-peoples-united-bank/>

⁹⁹ Per Declaration of Michael I. Goldberg (receiver), Daccache et al., v. Raymond James, People's United Bank et al., S.D. FLA court on October 30, 2017 in Case # 1:16-cv-21575-FAM, Document 262-1.

19. EB-5 Capital as a Percentage of Total Project Costs: We were generally unable to glean from each complaint the total project costs for the project that was the subject of the offering. It would be interesting to evaluate the maximum amount of EB-5 capital sought as a percentage of total project costs. A higher percentage of EB-5 capital generally poses a greater risk to the investors.

20. Urban vs Local: The project location category in the Database reflects that EB-5 projects involving the misappropriation of investor funds stretch to all parts of the nation - on the west coast from Los Angeles to Seattle, on the east coast from Miami to rural Vermont, and in the midsection from Chicago to rural Texas.

21. Relatively Few SEC Enforcement Actions:

A variety of factors might explain the few SEC enforcement actions that have been filed in the EB-5 area. First, the SEC has limited resources - a limited budget and staff - to investigate and enforce securities violations.¹⁰⁰ It was not until 2013 that the SEC brought its first enforcement action in the EB-5 space, even though the program came into existence in the early 1990's. EB-5 did not appear on the SEC priority list until 2016.¹⁰¹

Second, the USCIS's top priority is to reduce the backlog of immigration petitions waiting to be processed. Third, the USCIS has limited resources allocated to, and limited experience in, investigating fraudulent transactions.¹⁰² The agency is not likely to detect a misappropriation of funds until it reviews the investor's I-829 petition, a very late stage in the immigration process.

22. Settlements: A few of the cases have settled before the court rendered a judgment. In Muroff, the case settled on the same date the SEC Litigation Release was issued; thus, presumably it was prearranged without the need to pursue the court action. In Jay Peak, Stenger settled with the SEC in September 2016.¹⁰³ It was recently announced that Quiros and the SEC Staff

¹⁰⁰ <https://www.sec.gov/files/secfy18congbudgjust.pdf>

¹⁰¹ <https://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2016.pdf>

¹⁰² <https://www.judiciary.senate.gov/imo/media/doc/02-02-16%20Colucci%20Testimony.pdf>

¹⁰³ <https://jaypeakreceivership.com/wp-content/uploads/2016/09/DE-215-Judgment-of-Permanent-Injunction-and-Other-Relief-Against-Defendant-William-Stenger-1.pdf>

had reached a tentative settlement, subject to approval by the Commission.¹⁰⁴

23. Diversion or misuse of funds:

In virtually all of the cases, the investor funds have been allegedly diverted or misused.¹⁰⁵ The amounts are listed in the Database category.

In some cases, we were unable to reconcile the amounts of the diverted or misused funds with the amounts stated in the SEC complaint. For example, the SEC Litigation Release announcing the Zhong enforcement action cites as the only diversion \$1 Million to purchase luxury items and approximately \$900,000 for unrelated personal uses. However, the complaint also reveals that the Bad Actor used \$5 Million of the EB-5 investor funds to collateralize a loan for the purchase of a home for Lily Zhong's personal benefit. Similarly, the Green Box SEC Litigation Release states that \$7.6 Million was raised from 10 EB-5 investors, but the SEC complaint states that approximately \$4.475 Million was raised from 9 EB-5 investors. Accordingly, we realize that the amounts listed in the Database might not be accurate. However, the precise monetary amounts are not important for analysis and understanding of the issues discussed in this paper.

The Jay Peak spaghetti diagram prepared by the Vermont financial regulator provides the most vivid illustration of the illegal flow of EB-5 capital that has taken place in some projects.¹⁰⁶ However, the egregious diversion and misuse of funds are commonplace in many of the enforcement actions, including those that have received less media attention.

24. Ponzi Scheme: The elaborate Ponzi scheme employed by the Jay Peak operators has received considerable publicity. However, an earlier action brought in Luca also involved a Ponzi scheme. The Henderson case is one example of cases filed subsequent to Jay Peak that involved a Ponzi scheme.

25. Immigrants: Given that investors from mainland China represent a large share of the total number of EB-5 investors in recent years, it is not surprising that mainland China was the country of origin for most of the investors. However, some of the cases include investors from other countries as

¹⁰⁴ <https://vtdigger.org/2017/11/16/quiros-sec-lawyers-agree-damages-details-still-secret/>

¹⁰⁵ Fortunately, in the Chicago Convention Center case, the investors' capital contributions (\$145 Million) were still retained in escrow as of the date the SEC filed the complaint, enabling the investors' funds to be recovered. However, the administration fees paid were prematurely released.

¹⁰⁶ See page 7 of <http://www.stern.nyu.edu/sites/default/files/assets/documents/EB-5%202.0%20Can%20Account%20Transparency%20Save%20the%20Program.pdf>

indicated in the Database category. In contrast, the 8 phases of EB-5 financing at Jay Peak involved a total of 837 investors from 74 different countries.

VI Private Rights of Actions by Investors against the Bad Actors

A. A few recent cases

Independent of any enforcement action filed by the SEC and any criminal prosecution sought by the Office of the US Attorney, one or more of the EB-5 investors can privately sue the bad actors for fraud, including for violations of the federal securities laws. The relief sought typically includes the imposition of an injunction, the appointment of a receiver and the collection of monetary damages. As will be explained, EB-5 investors are more reluctant than conventional (non-EB-5 investors) to sue the issuer of the securities if they suspect fraud. However, in at least four major EB-5 projects, multiple investors have joined together to file a lawsuit against the NCE and other Bad Actors alleging fraud.

Two of the four private actions involve projects included in the Database — Jay Peak (by the SEC)¹⁰⁷ and the CIIF project (by the Office of the US Attorney).¹⁰⁸ Given that these two enforcement actions have received extensive media attention, this paper focuses instead on the two lawsuits brought by investors involving major projects which are not the subject of a pending federal action — Palm Hotel sponsored by the South Atlantic Regional Center (SARC)¹⁰⁹ and the Battery Maritime Terminal sponsored by the New York City Regional Center (NYCRC).¹¹⁰ It is possible that an SEC or Office of US Attorney investigation is pending in these matters. As discussed earlier, the agencies keep these investigations private. As explained below, the NYCRC case is noteworthy even though the investors' complaint did not allege any federal securities law violations.

¹⁰⁷ One of the Jay Peak investor lawsuits was filed against the Jay Peak owner-operators, Ariel Quiros and William Stenger, as well as others. <https://vtdigger.org/2017/11/02/eb-5-investors-pursue-lawsuit-peoples-united-bank/> The other Jay Peak investor lawsuit was filed against the Vermont Regional Center, state agencies and officials, rather than against the developers, for failed oversight and a cover-up. <https://vtdigger.org/2017/06/14/jay-peak-investor-sues-vermont-eb-5-regional-center/>.

¹⁰⁸ CIIF: Yeging Xia et al. v. California Investment Immigration Fund LLC, Superior Court of the State of California, County of Los Angeles, (5/19/2017), case number BC661793.

¹⁰⁹ Palm Hotel: Lan Li, et al, v. Joseph Walsh, et al, SD FLA (11/14/2016), Case No. 9:16-cv-81871-KAM; https://eb5projects.com/system/uploads/document/file/325/Palm_House_Complaint_with_exhibits.pdf

¹¹⁰ NYCRC case: Chen Dongwu et al. v. New York City Regional Center et al., Sup Ct, NY County, (May 5,2017), Index No. 652024/2017. This can be accessed by visiting: <http://iapps.courts.state.ny.us/iscroll/>

At the outset, we emphasize that our summary in Palm Hotel is based solely on the allegations set forth in the investors' complaint and the state court order in response to the motion of some of the defendants to dismiss the complaint. Likewise, in the NYCRC case, our summary is based solely on the allegations set forth in the investors' complaint and the Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint.

As detailed in the 450-page complaint filed by the investors, Palm Hotel involves a third party Regional Center in which the NCE made an EB-5 loan to an unrelated JCE. The Regional Center and the NCE are owned by the same individual. The business plan described in the offering documents states that the EB-5 capital would fund the construction of a luxury hotel in Palm Beach, Florida on a site of an existing abandoned hotel to be entirely refurbished. Between 2012 and 2015, the NCE raised more than \$40 Million, from mostly Chinese nationals. Sales materials misrepresented that construction was ongoing, and that various celebrities including Tony Bennett, Eric Schmidt and Celine Dion had committed to club membership. Notably the sales material stated that Donald Trump and Bill Clinton were members of the hotel's advisory board. The funds were prematurely released from escrow, almost immediately upon receipt from the investors, rather than delayed in accordance with the escrow terms, which restricted release of the funds until after approval of each I-526 petition. The developer did not fund any of its required equity contribution.

Substantially all of the money was misappropriated. The investors contend that some of the funds were misappropriated by the NCE, and \$25 Million was misappropriated by the JCE after the funds were advanced to it by the unrelated NCE. No construction activity has occurred, and no jobs have been created. USCIS denied the I-526 petitions of all investors and also denied their appeal. The land that was purportedly owned by the JCE was never acquired and the property is in foreclosure. A further description of the array of alleged abuses that occurred in this complicated fact pattern is beyond the scope of this paper. In addition, the actual owner of the land, the NCE, the JCE and other related parties have been embroiled in litigation in state court and a receiver has been appointed.

More than 50 of the EB-5 investors joined in the filing of a lawsuit against 34 defendants including the NCE, JCE, Regional Center and their respective owners.

Causes of action include antifraud violations under Section 10(b) of the 1934 Act.¹¹¹ Other causes of action include numerous state law claims, such as fraud and breach of fiduciary duty.

The Battery Maritime Terminal project also involves a third party Regional Center – the NYCRC. The same principals own the Regional Center and are the managers of the NCE lender, which entities are unrelated to the JCE. This Regional Center is one of the largest and most successful in the country, and the first to have been designated in New York City.¹¹²

The \$77 million raised from the 154 Chinese investors was fully deployed to the JCE in a series of construction loan advances, but only 60% of the construction was completed. The offering brochure contemplated that the developer JCE would contribute \$17M of equity to the project. However, the JCE defaulted under the EB-5 loan without funding any of the equity, and the guarantor was a shell company with no available assets. Millions of dollars in funding is necessary to complete the project.

Multiple investors joined in bringing a lawsuit against the Regional Center, NCE and JCE, as well as the principals in state court in New York, under various state law theories, including fraud, gross negligence and breach of a fiduciary duty.¹¹³ The investors contend that the NCE should not have advanced the funds when it knew or should have known that the loan was out of balance and insufficient funds remained to complete the project. Even though the project has not been completed, construction had reached the stage to create sufficient jobs to support I-829 approval and the issuance of permanent green cards for substantially all of the investors seeking permanent green cards. Nevertheless, the investors might lose substantially all of their capital investment unless the project is completed, and the EB- 5 loan is repaid. Fortunately, for the investors and the NYCRC, a new developer has recently emerged to replace the JCE developer.¹¹⁴ The terms of any

¹¹¹ Presumably, the complaint does not include a count for antifraud violations under Section 17 of the 1933 Act because the 11th Circuit, the circuit in which the District Court is located, does not recognize a private right of action for violations of that Section. See *Currie v. Cayman Res. Corp.*, 835 F.2d 780, 784 (11th Cir. 1988).

¹¹² The NYCRC's track record of successful projects was detailed in our list of some of the nation's most successful Regional Centers in <http://www.stern.nyu.edu/sites/default/files/assets/documents/EB5%20paper%20final%205.24.2015.pdf>; Also see, <http://nycrc.com/press/91/new-york-city-regional-center-reaches-1-000th-i-829-petition-approval-milestone.html>

¹¹³ The complaint does not allege any federal securities law violations.

¹¹⁴ <https://ny.curbed.com/2017/10/16/16481570/battery-maritime-building-redevelopment-restart>

restructuring of the immigrants' investment has not been reported or otherwise made public. However, the lawsuit is still pending.

As stated, both lawsuits involve third party Regional Centers. In each case, the developer did not fund any of the equity contemplated by the offering plan and this was not disclosed to the investors. An institutional lender did not provide capital to either project.

However, the similarities end there. If the allegations in the Palm Hotel case are accurate, the fraud would rank among the most egregious of those committed in any of the enforcement actions. In contrast, even if true, the abuses in the NYCRC situation would be of a much lesser magnitude. The investors did not allege misappropriation or misuse of the investor funds. The escrow terms were observed. All of the investor funds were deployed to the project. Most importantly, substantially all of the investors achieved their immigration goal. At issue is the potential financial loss to the investors. In contrast, the investors in Palm Hotel face the dual possibility of neither recovering their capital contributions nor obtaining their green cards.

The NYCRC and its managers contend that the representations in the Offering Brochure about the developer's obligations to make equity contributions are not binding. Instead, they rely on the strict terms of the Offering Memorandum and other contract documents. For example, these documents merely provide that the JCE was "expected" to fund \$17M and that it was "currently contemplated" that funds would be provided by its owners or other sources.

However, the NYCRC's response does not demonstrate how it met its fiduciary duty by funding the loan and continuing to make advances when it knew that the developer's equity would not be funded and as a result a funding gap would occur. Certainly, a Regional Center strives to create jobs to support the investors' visa petitions. But this does not explain the alternative sources that would fill this gap, and the cost of that capital. Presumably, capital providers other than the developer would require a higher priority than the NCE, and this would reduce the EB-5 investors' security. Thus, on the surface, it appears that the NCE funded the loan under conditions that a conventional lender would not. Perhaps the court will rely on strict contract construction to decide the case on its merits. However, the case raises questions whether the loan administration standards were applied in the best interests of the investors.

In contrast to the Palm Hotel case, in the NYCRC case, the investors do not contend that the Regional Center was engaged in a preconceived plan to deceive the investor and misappropriate their funds. Instead, they challenge the administration of the loan, the failure to require contributions from the developer, as well as the concealment of the loan default and the lack of funds to complete the project. Nevertheless, if a Regional Center as large, experienced and well capitalized as the NYCRC, in fact, mismanaged the loan and committed other serious violations as alleged, it would raise questions as to how pervasive these types of abuses might be throughout the industry.

It is obvious that a project is safer if the developer demonstrates a financial stake in the project by making a substantial equity contribution. The EB-5 Investment Scam Alert jointly issued by the SEC and USCIS in 2013 emphasizes that the EB-5 investor should consider the developer's incentives. Specifically, it warns the investor: "Recognize that if principals and developers [in EB-5 projects] do not make an equity investment in the project, their financial incentives may not be linked to the success of the project."¹¹⁵ Thus, it is surprising that the NYCRC did not take measures to ensure that the funds were in place before it advanced funds to the JCE borrower.

B. Investors' reluctance to file a lawsuit

This section explains the apparent reasons that very few EB-5 investor lawsuits have been filed against Regional Centers or other Bad Actors. Even if an EB-5 investor strongly suspects that his funds have been misappropriated or are likely to be misappropriated, he will be reluctant to file a claim with the USCIS or the SEC or to file a lawsuit against the Bad Actors. The investor is concerned that, based on USCIS policy, the pursuit of either alternative might cause him to become ineligible to pursue the visa based on his original investment.

For example, as explained in the "Regional Center Termination" section and based on the several terminations referenced in the Database, the misappropriation of funds is likely to serve as a basis for the termination of the Regional Center by USCIS.¹¹⁶ At a minimum, those investors who had not yet

¹¹⁵ https://www.sec.gov/oiea/investor-alerts-bulletins/investor-alerts-ia_immigranhtml

¹¹⁶ The investor might also be concerned that if he takes action this might result in construction delays with resulting delays in job creation. For example, in many of the enforcement actions, the judge has granted a motion to impose an injunction. Obviously, this would adversely impact I-829 petition approval. However, in many of the enforcement actions, at the time of the government filing of the action, construction had ground to a halt or had

achieved conditional residency status would be ineligible to pursue the visa. If they seek to still pursue the visa, they would have to make a new investment, and lose their place on the long visa waiting line, a devastating blow to EB-5 investors who seek to obtain the visa as quickly as possible.

The EB-5 investor faces a dilemma that the conventional investor does not. The immigration risk might cause some EB-5 investors to delay reporting a claim or filing a lawsuit. The delay affords the Bad Actor additional time to divert more investor capital to distant locations, increasing the chance that the investor funds will be lost, or at least jeopardizing recovery of the funds.

The investors in the Palm Hotel case and the NYCRC case did not face the dilemma posed by the potential impact of the lawsuit upon the processing of their visa petitions. In each case, the lawsuit would not impact their immigration status, but for different reasons. In the NYCRC case, all but 19 of the investors had completed the immigration process and obtained their permanent green cards.¹¹⁷ In the Palm Hotel case, the immigration process had effectively ended. Every I-526 petition had been denied based on the project (rather than the source of investor funds), and the appeal was likewise denied.

However, unlike the Palm Hotel and NYCRC cases, in many projects, the EB-5 investors who suspect misappropriation are likely to still have immigration petitions in process. As discussed in the “Regional Center Termination” section, a provision in HR 5992, the reform bill introduced in September 2016, includes a provision that would provide substantial protections to the investor who is not involved in the fraud. An incidental effect of this provision might be to embolden investors to file a lawsuit against a Bad Actor.

The Palm Hotel situation provides an example of the threats Bad Actors might make to discourage the investors from taking legal action. In the Palm Hotel complaint, the investors allege that the Regional Center operator had previously discouraged them from reporting a claim to the government because it would adversely impact their immigration petitions and cause their children who had then

never started. On the other hand, delay in processing of the I-829 petition might allow more time for the jobs to be created within the requisite time period. Furthermore, even if the Regional Center is not terminated, misappropriation might jeopardize the investor’s ability to demonstrate that his investment was sustained and used in accordance with the business plan.

¹¹⁷ All of the investors had been issued temporary green cards.

attained age 21 to “age out” so that a new investment by the parents would not result in a visa for the children .”¹¹⁸

Presumably, the investors whose funds have been misappropriated would prefer that the SEC file the lawsuit, if one is to be initiated. The investors are likely to perceive the SEC to be more skilled and experienced. In addition, the investors would prefer to avoid the litigation expenses. The investors might also have difficulty in assembling a group of unrelated individuals to join in a lawsuit and agree upon a course of action.

The investors will generally be unaware of whether the SEC is investigating the project or contemplating the filing of an enforcement action because, as previously indicated, the SEC does not publicize its investigation. However, in some instances, the investors might become aware of SEC interest in the matter because as part of its investigation process, the SEC often contacts some of the investors for questioning.

VII EB-5 Misappropriation Cases Not Limited to Related Party Structures

Until recently, the typical case involving the misappropriation of EB-5 investor funds followed a predictable pattern: one or two individuals owned and controlled the Regional Center, the NCE and JCE; the same individuals were the sole signatories on the escrow accounts and bank accounts of the various entities. Under the offering documents, the in-house Regional Center formed an NCE in which the principals proposed to deploy the capital to a JCE development entity controlled by them. Instead, the funds were quickly released to the NCE, which in turn transferred the funds to the principals for their personal purposes or other purposes unrelated to the business plan, and the project was not completed, and in some cases, never even started.

H.R. 5992, the EB-5 reform bill introduced in September 2016, and the subsequent informal legislative counsel drafts, limited several of the important integrity provisions to an “affiliated” JCE, rather than apply the provisions to all JCEs.¹¹⁹ Thus, these provisions would apply only if the JCE were affiliated with the NCE or Regional Center based on the definition in the reform bill.¹²⁰ Presumably

¹¹⁸ See paragraphs 12(e) and 12(f) of the complaint in the Palm Hotel case.

¹¹⁹ See proposed Sections H, I, J, K, L, M and P of HR 5992.

¹²⁰ See the definitions of “affiliated job-creating entity” in proposed Section 203(b)(5)(Q)(i) and “involved persons” in proposed Section 203(b)(5)(H)(5)

the supporters of this limitation cited the SEC enforcement actions which to that point involved only projects where the NCE and JCE were related.

However, several of the most recent cases challenge the assumption that misappropriation is limited to structures where the Regional Center and NCE are related to the JCE. In these recent cases, the structures do not have any overlap in ownership or management of the Regional Center and NCE lender, on the one hand, and the JCE borrower on the other. In fact, the two most recent SEC enforcement actions involving the misappropriation of EB-5 investor funds deviate from the predictable pattern.

A casual reading of the Securities Litigation Release announcing the filing of a complaint on September 19, 2017 in the Green Box case would not alert the reader that the JCE and its owner are unrelated to the NCE or Regional Center. However, a careful review of the complaint reveals the lack of any overlap of ownership or control between the JCE and the other entities.¹²¹ The developer met with the Regional Center several times before the center agreed to sponsor the developer's projects. As mentioned in the "Trends and Observations" section, the NCE and Regional Center were not named as defendants. The SEC alleges that only the JCE misappropriated the EB-5 investor funds and was the source of the misinformation that attracted the investors.

On September 20, 2017, the SEC filed an enforcement action against Home Paradise Investment Center (sometimes referred to as "HPIC" or "HPIC Regional Center") and its principals. The projects sponsored by the HPIC Regional Center reflect an unusual mix. This Regional Center served as in-house Regional Center for some projects, and also served as a third-party Regional Center for others. The SEC's complaint focused on only the two projects involving related entities - that is, the projects to be developed by the JCE that was owned and controlled by the same individuals as the Regional Center and NCE.

However, HPIC also served as the third-party Regional Center for two megaprojects located in downtown Los Angeles, each of which is being developed by two of the largest Chinese developers. Presumably, these developers have no cross ownership or control with the Regional Center and NCE.¹²² Although these

¹²¹ See paragraphs 73 through 94 of the complaint filed in Green Box.

¹²² See pages 7 and DS-13 of <http://www.stern.nyu.edu/sites/default/files/assets/documents/2017%20EB-5%20Project%20Database%20with%20Trends%208.16.2017.pdf>.

megaprojects were not the subject of the SEC's enforcement action, the arrangement raises questions considering the Regional Center-NCE principals' participation.¹²³ These megaprojects represent two of the largest EB-5 transactions to be funded in the past year.¹²⁴

In addition, the major lawsuits filed by multiple investors in the Palm Hotel case involve a Regional Center and NCE unrelated to the JCE. The NCE and JCE in the NYCRC case were also not related, although that complaint, while alleging fraud, does not allege securities law violations.

Thus, these recent cases illustrate that EB-5 investors in projects where the NCE and JCE are unrelated are also vulnerable to the misappropriation of their funds, whether by the NCE or JCE. Certainly, the in-house regional structure or other structure where there is an overlap in ownership or management between the Regional Center-NCE and the JCE pose greater inherent structural risk to the EB-5 investors.¹²⁵

A few examples of the potential for abuse in related party EB-5 loan transactions include: the loan terms and conditions might not be arm's-length and comparable to those negotiated by an unrelated NCE/Regional Center and JCE; the loan terms might be waived or otherwise not strictly enforced by the NCE lender, such as not exercising remedies in the case of a loan default by the JCE borrower; not requiring that the JCE borrower fund the equity contribution required by the loan documents in a timely manner or not at all; the disinclination of the JCE borrower to complain about substantial delays in the funding of the loan advances, thereby providing an extended opportunity for the investors' funds to be misappropriated to personal or other purposes unrelated to the JCE's business plan; and the NCE not monitoring the use and application of the loan proceeds by the JCE. In these situations, one or more of the same individuals are typically the signatories on the bank accounts of the EB-5 escrow, the NCE funds and the JCE funds.

¹²³ We have no information that indicates that the two megaprojects are being investigated.

¹²⁴ The two megaprojects are known as the Metropolis and Oceanwide Plaza. See pages DS-13 and DS-14 of <http://www.stern.nyu.edu/sites/default/files/assets/documents/2017%20EB-5%20Project%20Database%20with%20Trends%208.16.2017.pdf>. As of September 25, 2017, the migration agent was still advertising HPIC as the RC of the Metropolis project in Los Angeles.

¹²⁵ <http://www.stern.nyu.edu/sites/default/files/assets/documents/EB-5%202.0%20Can%20Account%20Transparency%20Save%20the%20Program.pdf>

Whether or not the NCE and JCE are related, the risk of misappropriation of investor funds and other mismanagement can be substantially reduced if the NCE and/or Regional Center retains independent, third parties to provide fund administration, loan administration and other services to protect the investors.¹²⁶

Furthermore, any EB-5 reform bill considered by Congress should include integrity provisions that apply to all JCEs, rather than be limited to those with an affiliated JCE. If the affiliated JCE limitation is retained, then consideration should be given to expanding the definition of the “affiliated JCE” to include structures where there is any cross ownership or control between the NCE and JCE.¹²⁷ However, the recent cases suggest that the integrity rules should not be limited to only those JCEs that are affiliated with a Regional Center or NCE. If the integrity rules are so limited, some potential abuses might escape coverage.

VIII SEC Whistleblower Program as Valuable EB-5 Securities Tool

In recognition that the SEC has limited resources to combat securities violations and to encourage individuals to voluntarily report information to the SEC, the Dodd-Frank Act¹²⁸ added the SEC Whistleblower Program.¹²⁹ Since 2011, more than 22,000 whistleblower tips have been submitted to the SEC, and the SEC has paid over \$160 million in awards to 46 whistleblowers in 37 cases.¹³⁰ Wrongdoers in enforcement actions involving whistleblowers have been ordered to pay over \$975 million, most of which has been paid to the victims.

Yet it is difficult to accurately measure the effectiveness of the Program in combatting securities law violations relating to EB-5 securities because the law requires that the SEC preserve the confidentiality of a whistleblower, even after the case is closed and an award is paid.¹³¹ The law does not permit the SEC to disclose a whistleblower’s identity in response to requests under the Freedom of Information Act.¹³² The SEC does not even disclose the name of the violating

¹²⁶ See <http://www.stern.nyu.edu/sites/default/files/assets/documents/EB-5%202.0%20Can%20Account%20Transparency%20Save%20the%20Program.pdf>

¹²⁷ See the definition of an Affiliated Job Creating Entity in H.R. 5992.

¹²⁸ Pub . L . No . 111-203, § 922(a), 124 Stat . 1841 (2010)

¹²⁹ <https://www.sec.gov/about/offices/owb/dodd-frank-sec-922.pdf>; <https://www.sec.gov/about/offices/owb/reg-21f.pdf>

¹³⁰ <https://www.sec.gov/files/sec-2017-annual-report-whistleblower-program.pdf>

¹³¹ The whistleblower can even file the tip anonymously without providing identity or contact information, so long as the tip is filed by an attorney. <https://www.sec.gov/whistleblower/submit-a-tip>

¹³² <https://www.sec.gov/about/offices/owb/reg-21f.pdf#nameddest=21F-4>

company with respect to which a whistleblower is entitled to an award.¹³³ Thus, one cannot determine how many of the awards relate to EB-5 projects overall, or which awards relate to a specific project.

However, as discussed below, one of the largest awards in the program's history was paid to a whistleblower in the first SEC enforcement action in the EB-5 space, the Chicago Convention Center case. Furthermore, whistleblowers have come forward to claim credit for providing the tips that led to the state investigation of another major EB-5 project.¹³⁴ Also, as discussed, due to the nature of the EB-5 Program it is likely that whistleblowers have submitted, and will continue to submit, tips with respect to other EB-5 projects.

Prior to a discussion of the Whistleblower Program in the context of EB-5 securities, here is an overview of how the SEC Whistleblower Program works. The law directs the SEC to make monetary awards to eligible individuals who voluntarily provide original information that leads to successful SEC enforcement actions resulting in monetary sanctions exceeding \$1 million.¹³⁵ The whistleblower is entitled to an award of between 10% and 30% of the monetary sanctions collected in the action.¹³⁶

A whistleblower is a person who voluntarily provides the SEC with original information about a possible violation of the federal securities laws that has occurred, is ongoing, or is about to occur. Approximately 65% of all whistleblowers are insiders of the violating company, including employees. Investors, including foreign investors, are eligible whistleblowers.¹³⁷

A whistleblower must follow a prescribed procedure after a judgment or order is issued to perfect its claim to an award. The SEC posts on its website "Notices of Covered Action"¹³⁸ ("NOCA") for each SEC action where the final judgment or order results in monetary sanctions exceeding \$1 million, to ensure that a whistleblower who believes he may be eligible will have an opportunity to

¹³³ The SEC publishes a list of whistleblower awards by amount and date but does not reference the defendants or company or project or informant. The SEC does publish a list of all judgments and orders issued with respect to enforcement actions, but it does not indicate whether a whistleblower tip provided information in that action.

¹³⁴ See the discussion about Jay Peak.

¹³⁵ <https://www.sec.gov/whistleblower>

¹³⁶ The whistleblower is entitled to an award for sanctions obtained in related actions, such as an order of restitution in a parallel criminal action brought by the Office of the US Attorney against the individual defendants.

¹³⁷ Individuals from 114 countries outside the US have submitted whistleblower tips to the SEC.

<https://www.sec.gov/files/sec-2017-annual-report-whistleblower-program.pdf>

¹³⁸ <https://www.sec.gov/whistleblower/claim-award>

apply for an award. However, the mere posting of a Notice does not mean that a whistleblower was involved in the matter or that a whistleblower award will be paid in connection with that action. A cursory review of the SEC's NOCA website reveals that the two most recent Notices of Covered Action of EB-5 cases¹³⁹ relate to the enforcement action in Proton, one of the cases in the Database and the Feng case involving the immigration attorney who was sanctioned for acting as an unregistered broker-dealer.¹⁴⁰ Again, this simply provides notice to give a whistleblower the opportunity to file a claim for an award.

If a whistleblower believes his tip led to the judgment or order, he must file a claim with the SEC within 90 calendar days. The SEC then decides whether an award should be paid to the whistleblower who files the claim and the amount of the award, based on many factors. The Commission's order determining the disposition of applications for a Whistleblower Award is posted on an SEC website¹⁴¹ and redacts the name of the whistleblower, the amount of the award and the name of the violating company.¹⁴² The award is paid from a fund established by Congress for this purpose – the Investor Protection Fund - rather than withheld or deducted from the monetary sanctions paid by the violator.¹⁴³

The award opportunity could be valuable motivation for an EB-5 investor to submit a tip of possible wrongdoing in the context of EB-5 securities fraud. In most cases, USCIS is not in a position to detect fraud at an early stage. The enforcement actions in the EB-5 securities area demonstrates that USCIS is not likely to detect a misappropriation of funds or other securities violations until several years after the wrongdoing starts. The USCIS does not track or monitor the flow of funds until the review of the I-829 petition, which generally occurs several years after the EB-5 investment is funded by the immigrant. We are hopeful that the USCIS's new compliance review procedure and site visit program will prove to be effective in combatting fraud. However, it will take considerable time for this program to be implemented.

The Whistleblower Program could be particularly suitable for investors who suspect a misappropriation of funds. The first two types of violations cited by the

¹³⁹ The website does not identify these cases as related to EB-5.

¹⁴⁰ <https://www.sec.gov/whistleblower/claim-award> Notice in Proton: 10/31/2017; Notice in Feng: 9/29/2017

¹⁴¹ <https://www.sec.gov/whistleblower/final-orders-of-the-commission>

¹⁴² See, for example, <https://www.sec.gov/rules/other/2017/34-79853.pdf>

¹⁴³ See <https://www.sec.gov/files/owb-annual-report-2016.pdf>

FAQ section of the Whistleblower Program website gives examples of conduct which is appropriate to file a whistleblower tip. Misappropriation of funds and Ponzi schemes, two of the most common types of EB-5 securities violations, are at the top of the list of violations that interests the SEC under this Program.¹⁴⁴

In the Chicago Convention Center case, the informant was awarded \$14.7 Million, which represents the fifth largest award since the inception of the Whistleblower Program.¹⁴⁵ The whistleblower was neither an insider or investor; he was the promoter of an unrelated EB-5 project who upon learning about the project was skeptical as to its viability and submitted a tip to the SEC. His award only became public because his business partners filed a lawsuit against him seeking a share of the whistleblower award. The whistleblower filed a request for the court to seal the order and preserve his confidentiality. The court sealed the order. However, Fortune Magazine printed a story about the award based on information available prior to the sealing of the record.¹⁴⁶

In at least one other major EB-5 action, it is likely that a whistleblower submitted a tip to the SEC. Reportedly, in 2012, Douglas Hulme complained to the State of Vermont about the misuse of EB-5 funds as well as other abuses.¹⁴⁷ He was a key consultant to the principals in Jay Peak, Quiros and Stenger. In 2014, Antony Sutton, one of the EB-5 investors, filed documents with the State claiming that Quiros and Stenger had perpetrated a fraud upon the investors.¹⁴⁸ Thus, it would not be surprising if Mr. Hulme or Mr. Sutton has submitted a whistleblower tip to the SEC.

A whistleblower relating to the Jay Peak case would not be eligible to receive an award (or even file a claim for an award) until after the final judgment or order is issued. Stenger settled with the SEC in 2016; however, the order did not impose monetary sanctions. Instead, the order provided that a monetary sanction may be

¹⁴⁴ See FAQ #3 of <https://www.sec.gov/whistleblower/frequently-asked-questions#faq-1>

¹⁴⁵ <https://www.sec.gov/files/sec-2017-annual-report-whistleblower-program.pdf>;
<https://www.sec.gov/page/whistleblower-100million>;

¹⁴⁶ <http://fortune.com/2014/07/23/whistleblower-unmasked/> also see <https://www.wsj.com/articles/the-fraud-behind-a-14-million-whistleblower-award-1393457426>

¹⁴⁷ <https://vtdigger.org/2016/07/25/documents-suggest-state-ignored-warnings-about-jay-peak-in-2012/#.WhXV43lrzIU>; <https://vtdigger.org/2017/08/06/judge-quashes-whistleblower-deposition-eb-5-investor-case-state/#.WfZrYnZrzIU>

¹⁴⁸ <http://digital.vpr.net/post/meet-london-car-dealer-who-broke-jay-peak-eb-5-fraud-case#stream/0>

levied in the future based on his level of cooperation.¹⁴⁹ Reportedly, on November 16, 2017, Mr. Quiros reached a tentative settlement, including monetary sanctions, with the SEC Staff, pending review by the Commission.¹⁵⁰

Thus, the SEC case against these Bad Actors has not reached the stage where a whistleblower would be entitled to file a claim. The entering of the judgment or order and the subsequent posting on the NOCA website would start the 90-day period within which a whistleblower must file a claim for an award. Then the Commission would evaluate the claim and reach a decision as to whether the whistleblower is entitled to an award and, if so, the amount of the award. Given the amount of media attention devoted to this case, it would not be surprising if a whistleblower who ultimately receives an award in this case, would publicly disclose it.¹⁵¹

To encourage voluntary reporting, the Whistleblower law protects against retaliation by employers against employees who report possible wrongdoing based on a reasonable belief that a possible violation of the federal securities law has occurred or is likely to occur.¹⁵² Immigrant investors who file a report do not face retaliation. However, these investors might be reluctant to file a tip due to concern that the investigation by the SEC might lead to government action that would adversely impact their visa petition, as explained in the section about the Termination of a Regional Center.

IX Termination of Regional Center as a Result of Misappropriation

A. Regional Center termination

Apparently in response to SEC enforcement actions alleging misappropriation of investor funds, USCIS has terminated the associated Regional Centers in seven of the enforcement actions included in the Database. The SEC enforcement action is still pending in some of these cases before a federal district court. In none of these terminations did the USCIS terminate the designation before the SEC action was filed with the court.

¹⁴⁹ <https://jaypeakreceivership.com/wp-content/uploads/2016/09/DE-215-Judgment-of-Permanent-Injunction-and-Other-Relief-Against-Defendant-William-Stenger-1.pdf>

¹⁵⁰ <https://vtdigger.org/2017/11/16/quiros-sec-lawyers-agree-damages-details-still-secret/#.WhXcsHlrzIU>

¹⁵¹ Michael Gibson, the Managing Director of USAdvisors.org, a FINRA Registered Investment Advisor, was the first to raise serious questions about the integrity and viability of the Jay Peak EB-5 projects.

<https://www.linkedin.com/pulse/jay-peak-autopsy-eb-5-visa-fraud-greed-ignorance-michael-gibson/>

¹⁵² 15 U.S.C. § 78u-6(h)(1)

As indicated in the Database, the USCIS has not terminated a Regional Center that was the subject of an SEC enforcement action since May 2017, when it terminated the Regional Center that sponsored the projects in the Caffe Primo case. Presumably, this does not reflect a shift in USCIS policy towards terminating Regional Centers that are the subject of enforcement actions alleging the diversion of funds by the Regional Center or other bad actors. Instead, it more likely reflects the process by which the USCIS terminates a Regional Center.

This section provides an overview of the Regional Center termination process and the consequences of such termination to the innocent immigrant investors.

The regulations authorize USCIS to terminate a Regional Center's participation in the EB-5 Program if the Regional Center fails to submit required information or no longer serves the purpose of promoting economic growth, including job creation.¹⁵³ The regulations do not specify that a misappropriation of funds or any other circumstances automatically trigger a termination.

If the USCIS proposes to terminate a Regional Center's participation in the EB-5 Program, it first issues a Notice of Intent to Terminate (a "NOIT") citing the grounds for the proposed termination. The Regional Center is given the opportunity to file a challenge to oppose the termination. If USCIS seeks to proceed with the termination, it issues a Notice of Termination to the Regional Center.¹⁵⁴ The Regional Center may appeal the Notice of Termination.¹⁵⁵

The 27-page NOIT issued to the Vermont Regional Center in August 2017 provides insight as to how USCIS applies the regulation's standards for termination to determine whether to terminate a Regional Center involved with the misappropriation of investors' funds.¹⁵⁶ There, the main reasons cited by USCIS as grounds for termination were: inadequate monitoring, oversight and management of the Regional Center (pages 18 to 20 of the NOIT); diversion of funds and use for purposes other than job-creating activities (pages 18 to 24 of the NOIT); and failure to comply with material representations in the offering plan, including the failure

¹⁵³ 8 CFR 204.6(m)(6). <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-11261/0-0-0-12632/0-0-0-13789.html> . Many of the 151 terminations (as of November 14, 2017) relate to the Regional Center's failure to file the annual Form I-924A, pay the annual filing fee or general inactivity of the Regional Center, including the failure to sponsor any projects.

¹⁵⁴ If USCIS decides not to terminate the Regional Center and allows the Regional Center to continue as an approved Regional Center, it will issue a Notice of Reaffirmation,

¹⁵⁵ <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-immigrant-investor-process/regional-center-terminations>

¹⁵⁶ Technically, the NOIT was issued to the Vermont Agency of Commerce and Community Development Regional Center. This Regional Center is also known as the Vermont Regional Center.

<https://www.documentcloud.org/documents/3936313-Review-of-EB5-Program-in-Vermont-Addendum-and.html>

of the developer to make required equity contributions to the projects (pages 24 to 25 of the NOIT).

B. Consequences of termination upon the innocent investor

A terminated Regional Center may not solicit, generate or promote investors or investments. At first blush, these consequences make perfect sense. Investors and future investors must be protected from further abuses by the bad actor. These seem to be fair penalties to impose upon the Regional Center that has engaged in this type of wrongdoing. This discourages further abuses by the Regional Center and sends a message to other Regional Centers. More importantly, it also protects future, potential investors from suffering a similar fate as the existing investors.

However, the termination of the Regional Center is likely to have a devastating impact on the immigration goals of many investors. USCIS' position is that if the investor has not achieved conditional permanent residency¹⁵⁷, the termination constitutes a "material change" to the investor's petition.¹⁵⁸ This results in the investor's ineligibility to obtain an EB-5 visa based on the original investment. The I-526 petition will either be denied or if it has been previously approved, it will be revoked.

If the ineligible investor still wishes to pursue an EB-5 visa, he must select a new investment offered by another Regional Center, contribute the required capital without a credit for the amount originally invested, and a new I-526 petition must be filed with USCIS to reinitiate the immigration process. The investor loses the visa priority date issued by USCIS when the petition for the original investment was filed. The loss of the visa priority date pushes the investor's new petition to the back of the long visa waiting line for visa numbers opportunity, which continues to lengthen as the demand for EB-5 visas far exceeds the annual quota.

The investor is ineligible to proceed through the immigration process based on his original investment even if the reason for the Regional Center's termination is unrelated to the actions of the immigrant or the immigrant's petition. For example, the reason for termination might relate to a different project that the

¹⁵⁷ The investor does not achieve conditional residency until after the (1) I-526 petition is approved, and (2) either the USCIS adjusts the investor's status based on the Form I-485 or admits the investor to the US, based on the DS-260. <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-investors>. A temporary green card is issued to the investor who has achieved conditional residency. <https://www.uscis.gov/green-card/after-green-card-granted/conditional-permanent-residence>

¹⁵⁸ Section C of <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartG-Chapter4.html>

Regional Center sponsored rather than to the project associated with the immigrant's investment.

C. Potential solutions for the innocent investor

USCIS seems to recognize that this is a harsh result. The proposed regulations issued by DHS on January 13, 2017, which focus on the minimum investment amounts, also proposes a change that is relevant to this discussion.¹⁵⁹

The proposed regulations provide for visa priority date retention.¹⁶⁰ The Executive Summary in the proposed regulations recognizes that an investor might need to file a new petition due to circumstances beyond his control, such as termination of the Regional Center associated with the original petition. However, the proposed regulations limit visa priority date retention to circumstances where the I-526 petition has been approved.¹⁶¹ At a minimum, the proposal should be expanded to apply to any investor who is defrauded by any person involved with the Regional Center, NCE or JCE, even if the I-526 petition has not yet been approved. Furthermore, this proposal does not provide relief for the investor who prefers to continue his investment in the original project because the proposed regulation does not address the USCIS's position that termination constitutes a material change.

A section in the H.R. 5992 reform bill, aptly titled "Treatment of Good Faith Investors Following Program Noncompliance,"¹⁶² would offer additional alternatives to the innocent investor.¹⁶³ A full discussion is beyond the scope of this paper, given that the bill is subject to change. Broadly speaking, the termination of the Regional Center or the debarment of the NCE or JCE would not make the investor's petition ineligible, whether his petition is pending or approved, or if he has received conditional permanent residency. It prescribes three alternative means for the investor to proceed if the Regional Center is terminated.

Of special relevance to this paper's focus, the section contains a separate provision that specifically addresses SEC enforcement actions alleging that the

¹⁵⁹ <https://www.federalregister.gov/documents/2017/01/13/2017-00447/eb-5-immigrant-investor-program-modernization>

¹⁶⁰ Proposed Regulations Section 204.6(d) at page 4766;
<https://www.federalregister.gov/documents/2017/01/13/2017-00447/eb-5-immigrant-investor-program-modernization>

¹⁶¹ *Id.*

¹⁶² Paragraph O of <https://www.congress.gov/bill/114th-congress/house-bill/5992/text>

¹⁶³ Reportedly, Michael Goldberg, the receiver in the Jay Peak case, played a role in the drafting of this provision.

Regional Center, NCE or JCE has committed or is committing fraud which affected the investor's capital. Among other things, it allows the investor to amend his petition without that being deemed a material change, and to retain the visa priority date associated with the original petition. The provision also allows any funds recovered by the investor to be deemed the investor's capital enabling him to qualify for visa approval.

Based on recent history, one cannot safely assume that EB-5 reform legislation will be enacted soon. If it is not quickly enacted, then USCIS should consider following the approach suggested by the receiver in the Path America Regional Center termination or the approach suggested by the State of Vermont and the receiver in the proposed termination of the Vermont Regional Center. As discussed below, Path America involves a restructure of management and ownership of the Regional Center and JCE developer. The Vermont Regional Center's approach seeks an orderly winding down of the Regional Center's operations over time.

When the SEC brought an enforcement action in the Path America case, only a minimal amount of the EB-5 investors' capital had been deployed to Lobster Dargey's EB-5 project located in Seattle, sufficient only to complete the foundation work on the mixed-use Tower project. None of the investors' I-526 petitions had received approval.¹⁶⁴

The receiver arranged a restructuring transaction approved by the federal district court. The key terms were as follows: the bad actor manager of the NCE and developer of the JCE were replaced by an experienced unrelated developer; an existing, unrelated Regional Center became the owner and operator of the Regional Center; additional capital was provided by an equity infusion by the existing equity holders and a new construction loan was obtained in an amount estimated to restore the diverted funds and complete the project consistent with the business plan.¹⁶⁵ The EB-5 investors were given the choice of (a) opting into the restructuring deal, in which case the investor would continue as a member of the NCE, and potentially preserve his opportunity to become eligible to obtain an

¹⁶⁴ Some of the investors in Dargey's Farmer's Project had received I-526 petition approval.

<http://www.grassmueckgroup.com/cases.php>

¹⁶⁵ <http://www.grassmueckgroup.com/cases/pathamerica/GrassmueckDeclExA.PDF>

EB-5 visa, or (b) opting out, in which case the investor would receive \$250,000, but lose his opportunity to obtain a visa based on the original investment.

USCIS issued a NOIT, followed by a Notice of Termination, citing the inability of the Regional Center to administer its ongoing responsibilities and the diversion of funds indicating a lack of management and oversight by the Regional Center. The receiver filed an appeal of the Notice and supplemented this with a brief to explain the restructuring transaction.¹⁶⁶ In essence, the receiver argued that the restructure would provide for new management, the injection of new capital to complete the project and the installation of new controls designed to prevent diversion of funds in the future. The receiver argued that the bad acts performed by the previous operators should not permanently taint the ability of the Regional Center to promote economic growth. Thus, the receiver requested that USCIS reverse its decision to terminate, or alternatively not rush to terminate the Regional Center but instead consider whether the Regional Center as restructured would promote economic growth.

USCIS summarily dismissed the appeal without explanation.¹⁶⁷ We believe that given the devastating impact termination will have upon the investors, at the least, the investors deserved an explanation from USCIS to justify the rejection of the receiver's position. An explanation would have served as an excellent opportunity for USCIS to provide clear guidance to other Regional Centers with investors who have not received conditional permanent residency who might seek to challenge a Regional Center termination.

The State of Vermont and the receiver in the Jay Peak case take a slightly different approach in their response to the NOIT issued by USCIS to the State-owned Vermont Regional Center.¹⁶⁸ By letter dated September 14, 2017, the State indicated that it is agreeable to ultimately closing the Regional Center because it has no intention of sponsoring new projects.¹⁶⁹ The letter provides:

¹⁶⁶ <http://grassmueckgroup.com/cases/pathamerica/NoticeofAppealUSCISScan.pdf> Pursuant to the restructuring agreement, the new Regional Center operator agreed to prosecute the appeal.

¹⁶⁷ http://grassmueckgroup.com/pathamerica/USCIS_Response_to_Appeal.pdf

¹⁶⁸ The facts in the two terminations are different. The Vermont Regional Center sponsored several projects, including projects that were not tainted by fraud. Also, the Vermont Regional Center has not lined up a replacement regional center operator or replacement developer.

¹⁶⁹ Robert Devine, Esq. of Baker Donelson, Esq. wrote the letter of opposition in response to the Vermont Regional Center NOIT.

<http://www.dfr.vermont.gov/sites/default/files/jaypeak/20170914%20NOIT%20response%20with%20exhibits.pdf>. He also drafted the appeal, on behalf of the Path America Regional Center, to the Notice of Termination.

“The State and USCIS have a common goal in winding down the operations of the [Vermont Regional Center]. The only difference is in timing and approach.”

The State proposed that USCIS permit the Regional Center to wind down in an orderly manner that would protect the rights of the innocent investors to complete the immigration process. It appears that the proposal would be limited to completing its “untainted” projects – those in which there was no allegation of fraud.¹⁷⁰ The letter also provides a detailed analysis to support the State’s contention the NOIT bases termination on standards that are not set forth in the statute or regulations. The letter closes by requesting a meeting with USCIS to discuss implementation of the wind-down plan.

The legal and policy arguments raised in response to the Path America and the Vermont Regional Center notices deserve careful consideration by USCIS.¹⁷¹ Of course, the evaluation of whether each proposal offers sufficient safeguards to the investors and is likely to comply with the EB-5 visa requirements requires a more in-depth analysis that is well beyond the scope of this paper.

Unfortunately, the USCIS’s decision to terminate the Path America Regional Center appears to be final. It will be interesting to observe how USCIS responds to the Vermont Regional Center’s wind-down proposal. Given the high profile of, and controversy surrounding, the Jay Peak case, as well as the recent litigation brought by the investors against the Regional Center and the State,¹⁷² one would expect USCIS to respond to the State’s request with a detailed explanation. That response might provide informal guidance for other Regional Centers with innocent investors. However, in light of the terms of the wind-down proposal, USCIS presumably will not address the policy as it relates to innocent investors in projects which are the subject of fraud allegations. The USCIS response might also depend on whether EB-5 reform legislation with innocent investor protections is enacted in the next few months.

The current policy leaves many open questions. For example, if fraud allegedly occurs with respect to only one of the projects that a Regional Center sponsors, does that automatically require termination of the Regional Center? Under what circumstances, if any, may a Regional Center that sponsors a project in

¹⁷⁰ Id. at page 2 of 10.

¹⁷¹ The issues are complicated and beyond the scope of this paper.

¹⁷² <https://vtdigger.org/2017/06/14/jay-peak-investor-sues-vermont-eb-5-regional-center/>

which the misappropriation of investor funds is alleged continue to operate and not face a notice of termination? Similarly, under what circumstances, if any, will USCIS allow the innocent investors to proceed with their original immigration petitions especially if they have not yet achieved conditional residence?

X Special Vulnerability of EB-5 Investors

EB-5 investors are particularly vulnerable to securities fraud. As a group, they arguably are more vulnerable than any other type of investor. The EB-5 investment structure presents many opportunities for the NCE to divert and otherwise misuse investor funds. The fact patterns of the actions in the Database suggest that some operators apparently view the Program as an easy opportunity to obtain immigrant investor proceeds, rather than invest the funds in a bona fide project for the investors' benefit.

Generally, EB-5 investors are not sophisticated. They typically lack experience in making an investment in a US business, an essential requirement to qualify for an EB-5 visa. All investors are foreign individuals, most of whom live outside of this country. Furthermore, unlike most investment categories, none of the investors are institutional investors. Regulation of the Regional Center is very limited based on an EB-5 law that was enacted more than 25 years ago and did not contemplate that EB-5 capital would become primarily a tool for funding real estate development projects.

Real estate development projects present entitlement risk, construction risk and market risk that are difficult for a foreigner located overseas to evaluate. In selecting a project to serve as their avenue to an EB-5 investment, many EB-5 investors rely primarily, if not exclusively, on the advice of the migration agent based in their country of origin, even though the typical agent is paid substantial fees by the NCE or Regional Center. Some investors realize the conflict, some may not.

The investor makes the investment solely to qualify for the EB-5 visa. Thus, he accepts a minimal financial return (as low as ½ of 1% or less per year) because the visa, rather than a financial return, serves as his true return on the investment. The investor does not have an early exit alternative because under the immigration law, the investor must sustain his investment throughout the investor's period of

conditional residency.¹⁷³ Thus, the EB-5 investor has less incentive to monitor the progress of the investment.

Even if the investor wishes to monitor the investment's progress, many EB-5 investors do not have the opportunity to do so. Unlike most traditional investment funds, many Regional Centers and NCEs do not provide monthly or periodic reports to investors about the progress of the construction and flow of investor funds. Furthermore, the EB-5 investor cannot typically check his EB-5 investment account status online to see the project's status in real time or at all.

Increasingly Regional Centers or NCEs, especially for larger EB-5 projects, are offering these services, directly or through third parties, such as third-party administrators or a broker-dealer or registered investment advisor. However, this is not required by the EB-5 law and is not nearly as prevalent as in the case of hedge funds or 401k investments where the marketplace demands, or the SEC requires, these types of controls.¹⁷⁴

The typical EB-5 investment structure creates an opportunity for the Bad Actor to commit fraud. The construction loan funded by a series of payments to the JCE as the project progresses allows millions of dollars to be available for a substantial period without any watchdog monitoring the use of the funds, unless an independent fund manager or broker-dealer is in place.

Even if a misappropriation of investor funds occurs, USCIS is unlikely to discover the abuse at an early stage. USCIS does not track the actual flow of funds - from the investor to the escrow to the NCE to the JCE - until the I-829 petition stage, a very late stage in the immigration process, usually long after the diversion of funds has occurred.¹⁷⁵

Finally, as explained in the "Regional Center Termination" section of this paper, the Regional Center and NCE realize that EB-5 investors are reluctant to report an alleged violation to USCIS or the SEC, or to bring an action against the Bad Actors even if the investors suspect misappropriation or other abuses, out of fear

¹⁷³ <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartG-Chapter5.html#S-A>;
<https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartG-Chapter2.html>

¹⁷⁴ See e.g., SEC Rule 206(4)-2 under the Investment Advisers Act of 1940 (known as the "Custody Rule").

¹⁷⁵ See <http://www.stern.nyu.edu/sites/default/files/assets/documents/EB-5%202.0%20Can%20Account%20Transparency%20Save%20the%20Program.pdf>

of adverse consequences upon their immigration petition. Thus, the EB-5 investor faces many challenges that do not confront the conventional investor.

XI Elimination of Independent Fund Administration in Reform Bill?

The diversions and misuse of funds have occurred in an environment in which no independent watchdog is required to monitor the flow of investor funds. The current USCIS procedure does not effectively deter the Bad Actor from committing fraud, does not promote the early detection of fraud and does not enhance the prompt recovery of the misappropriated funds once the fraud is discovered. In many cases, the investor's protection is limited to relying on the good faith and fiduciary duty of the Regional Center and NCE to protect the investor's funds. Some Regional Centers and NCEs retain independent, third-party administrators to control the flow of funds and provide periodic reports to the investors. Unfortunately, many do not.

Obviously, no controls can eliminate the misappropriation and misuse of investor funds. However, a review of the cases demonstrates that independent fund administration of the type proposed by HR 5992 would likely result in a significant reduction in the type of misappropriations and misuse of funds that have occurred.¹⁷⁶

In a recent paper, we applauded HR 5992, introduced in September 2016, as the first reform bill to contain a provision aimed specifically at curbing the type of misappropriation and misuse of funds that occurred in the Jay Peak line of cases.¹⁷⁷ This type of provision was probably not inserted in S. 1501, the original, major EB-5 reform bill, introduced by Senators Grassley and Leahy in June 2015, because the misappropriation of investor funds was not widely recognized as a problem until after the Jay Peak complaint was filed in April 2016 and subsequent SEC enforcement actions were initiated.

Subsequent drafts by Senate Legislative Counsel replaced the account transparency provision with one that would require an independent third-party administrator be retained to monitor and approve the flow of funds from the

¹⁷⁶ Paragraph O of HR 5992 contains an Account Transparency Section. The subsequent drafts by legislative counsel contains an alternative provision with the same objective, independent third-party fund administration.

¹⁷⁷ <http://www.stern.nyu.edu/sites/default/files/assets/documents/EB-5%202.0%20Can%20Account%20Transparency%20Save%20the%20Program.pdf>

investor to the escrow¹⁷⁸ through the deployment of the funds to the project, as well as other requirements, such as to provide periodic reports to the investors and to not permit the commingling of investor funds with the funds of others.¹⁷⁹

However, the political climate has changed during 2017. We believe there is a strong possibility that if and when the reform bill is passed, it will not contain any provision aimed to address the misappropriation line of cases. Senate and House leadership have informally appointed Senator Cornyn (R-TX), the Senate majority whip, to shepherd the bill and help resolve differences between Congressional reformers and industry. Apparently, an informal, draft bill circulated by Senator Cornyn in the spring of 2017 indicates that he does not support a provision aimed at curbing the misappropriation of investor funds. The draft bill surprisingly omitted the fund administration and account transparency concepts, without offering any alternative.

In October 2017, Senator Grassley and Representative Goodlatte, the chairman of the Judiciary Committee in the Senate and House, respectively, have indicated that the reform bill will be revised only after there is a consensus that their “final offer” outlining some of the key points of reform is acceptable to industry. The final offer focused on minimum investment amounts, visa reserves and the definition of a targeted employment. It does not mention the integrity provisions presumably because these have not been as controversial as the TEA provisions and minimum investment levels.

It remains to be seen whether the reform bill as ultimately passed will include an account transparency or independent fund administration provision. Even if it does, it would not be surprising if the bill waters down the provision. For example, some have suggested that the fund administration should be required only if the NCE and JCE are related. This ignores the recent cases discussed in this paper in which the misappropriation has occurred even where the Regional Center and NCE on the one hand, and the JCE, on the other hand, are unrelated.

We believe that the law should allow a Regional Center/NCE to satisfy the standard if it provides comparable protections to the investors. Comparable protections might be offered by a broker-dealer or an independent third-party fund

¹⁷⁸ The provision would not alter existing law which does not require that the investor funds be placed in escrow at all. The offering documents might permit the funds to be paid directly by the NCE.

¹⁷⁹ See Paragraph Q of Senate Legislative Counsel drafts EB-5 reform bills dated December 2, 2016 and dated March 15, 2017, respectively.

administrator that offers services in accordance with standards to be set forth by USCIS.¹⁸⁰ In addition, the Annual Statement (I-924A) should include a section that identifies the third-party administrator or comparable alternatives.¹⁸¹ USCIS should take steps to minimize the likelihood that Bad Actors will have the opportunity to take the position that their arrangement meets the alternative, even where it obviously does not, and take the risk that USCIS will not discover this for an extended period of time.

We assume that the new USCIS Regional Center compliance review procedure and the Site Visit program will help combat fraud, although it is premature to judge the extent of their effectiveness. In any event, these audit-type measures are not intended to be as comprehensive as independent fund administration. In addition, in many cases the USCIS visits will occur after the diversion has occurred. Thus, it is preferable to utilize these procedures as a complement to independent fund administration.

It seems inevitable that the reform bill's amendments in one form or another will at some point be passed. If the reform bill excludes the fund administration provision or waters it down, it would be a misnomer to refer to the bill as an "integrity" measure.

XII Administrative Proceedings – Unregistered Broker-Dealers

For many years, some Regional Centers¹⁸² offered to pay a commission or referral fee to professionals, predominantly immigration attorneys, for each immigrant client who invested in an NCE associated with that Regional Center, based on the advice of that attorney. These fees were paid in addition to any legal fees paid by the investor for legal services rendered in connection with the filing for an EB-5 visa with the USCIS. Presumably, the Regional Center and the attorneys

¹⁸⁰ The procedure to determine compliance with this alternative could require approval in advance by USCIS for any Regional Center or NCE seeking to qualify under this alternative. For example, it could be included in the project exemplar application or in the original Regional Center application.

¹⁸¹ The EB-5 Investment Scam Alert issued in 2013 strongly encourages investors to obtain copies of documents provided by the Regional Center to USCIS. Specifically, the Alert refers to the initial application (Form I-924) filed to obtain USCIS approval and designation, and the annual statement (Form I-924A). However, our informal checking indicates that many Regional Centers do not routinely provide these forms to the investors. USCIS should require that all Regional Centers furnish these forms to the investors before they subscribe to the project and also furnish them with the annual statements each year.

¹⁸² Sometimes the payments were made by affiliated individuals or entities, including the NCE, JCE and their principals.

did not realize that this transaction based-fee arrangement violates the securities laws. However, two actions taken by the SEC during 2015 made it clear that the SEC views the recipient of such a fee as an unregistered broker-dealer in violation of Section 15(a)(1) of the 1934 Act.

On June 23, 2015, the first unregistered broker-dealer action in the EB-5 context charged two related firms involved in handling investments for 158 EB-5 investors.¹⁸³ While the firms agreed to help investors select the most appropriate Regional Center with which to invest, they allegedly directed most EB-5 investors to the same Regional Centers: those that paid the firms commissions on average of about \$35,000 per investor. The firms and their key principals readily agreed to submit to an administrative proceeding to determine whether they should be required to disgorge any of the fees or pay penalties and interest. On March 24, 2016, the administrative law judge entered a decision ordering that the principals of the two firms pay approximately \$3.2 Million in disgorgement plus prejudgment interest.¹⁸⁴

On December 7, 2015, the SEC announced 10 settled administrative proceedings against seven individuals (six of whom were immigration attorneys) and 3 law firms for acting as unregistered broker-dealers. These 10 cases were the first in which lawyers and law firms were charged for acting as unregistered broker-dealers in the context of EB-5 offerings.

On the same day, the SEC also announced a litigated district court action against the one lawyer who refused to settle, Hui Feng, and his law firm, alleging he acted as an unregistered broker-dealer and committed fraud.¹⁸⁵ Feng allegedly received \$1.1 Million in commissions and was entitled by contract to at least an additional \$3.1 Million. The SEC's complaint alleged fraud in addition to the unregistered broker-dealer claim. The court held that Mr. Feng acted as an unregistered broker dealer and rendered a judgment of approximately \$2.7 Million against Mr. Feng and his firm.¹⁸⁶

¹⁸³ <https://www.sec.gov/litigation/admin/2015/34-75268.pdf>

¹⁸⁴ <https://www.sec.gov/alj/aljdec/2016/id986jsp.pdf>

¹⁸⁵ <https://www.sec.gov/litigation/litreleases/2015/lr23420.htm>;
<https://www.sec.gov/litigation/complaints/2015/comp23420.pdf>

¹⁸⁶ <https://eb5projects.com/system/uploads/document/file/405/96 - Order on MSJ 1 .pdf>; SEC v. Hui Feng et al., C.D. Cal. 6/29/2017, Case 2:15-cv-09420-CBM-SS,

On December 8, 2017, the SEC filed a civil action against Steve Qi another immigration attorney, under circumstances strikingly similar to attorney Feng.¹⁸⁷ Like Feng, when attorney Qi realized that the transaction-based fees paid by the Regional Centers might violate the securities laws, he arranged for the Regional Centers to pay future commissions to relatives overseas who served as the attorney's nominee. The total commissions paid to attorney Qi and his nominee exceeded \$2.6 Million for the period from 2008 until February 2015. The SEC alleges fraud for Qi's failure to disclose the commission arrangement to several of his immigration clients. The SEC seeks disgorgement of the commissions paid to Qi, as well as those paid to his relative as nominee. The complaint states that Qi entered into tolling agreements with the SEC in 2016 and 2017 to extend the statute of limitations.¹⁸⁸

We do not expect many violations of this type to be committed in the future given that the SEC has clearly articulated its position and has imposed substantial sanctions. However, in addition to the recent Qi case, the SEC continues to announce administrative proceedings filed against attorneys and others for accepting fees that relate back to recommendations made prior to December 7, 2015. Some of these settlements involve prominent immigration attorneys and impose substantial monetary sanctions.¹⁸⁹ Despite the Feng and Qi cases, generally the SEC does not allege fraud in these administrative proceedings. Also, the orders do not mention the Regional Center or affiliated persons that paid the fee.

Nevertheless, we do expect another wave of enforcement actions to be announced based on revelations in recent lawsuits filed by investors in EB-5 projects. Various Jay Peak investors have recently sued their immigration attorney after discovering that the NCE operators paid him a fee of \$25,000 for each immigrant who invested in Jay Peak based on his recommendation.¹⁹⁰ The

¹⁸⁷ <https://www.sec.gov/litigation/litreleases/2017/lr24006.htm>

¹⁸⁸ <https://www.sec.gov/litigation/complaints/2017/comp24006.pdf>

¹⁸⁹ See <https://www.sec.gov/litigation/admin/2016/34-78658.pdf>; <https://www.sec.gov/litigation/admin/2016/34-78657.pdf>; <https://www.sec.gov/litigation/admin/2017/34-81447.pdf>; <https://www.sec.gov/litigation/admin/2016/34-77459.pdf>;

¹⁹⁰ <https://vtdigger.org/2017/09/25/lawsuit-jay-peak-attorneys-got-25000-kickbacks-for-each-new-investor/#.WhLCVXlrzIU>; <https://vtdigger.org/2017/09/07/jay-peak-investor-sues-immigration-attorney/#.WiCtp3lrzIU>

investors' lawsuits are based on the attorney's failure to disclose the payments and his conflicts of interest.

In addition, Ali Herischi, the EB-5 immigration attorney for several of the Iranian investors in the Palm Hotel project, allegedly acknowledged that the NCE paid to him a referral fee of \$40,000 per investor which he previously failed to disclose to his clients, and offered to repay that amount to at least one of them, as evidenced by a letter dated August 29, 2016.¹⁹¹

Separate from the investors' lawsuits, it remains to be seen whether the SEC will take action against any or all of these immigration attorneys for acting as an unregistered broker-dealer, if it has not done so already. Some of the actions relating to the Jay Peak attorneys might be barred by the statute of limitations given that reportedly the payments were made in 2010 or earlier. Although the SEC alleged fraud in the Feng case and the Qi case, in most of the administrative hearings to date, the SEC claims have focused only on the broker-dealer status of the attorney. Presumably, in many cases, the immigration attorney who is paid transaction-based fees has not disclosed the arrangement to his client. Given that the SEC alleged fraud in Qi, the most recent unregistered broker-dealer case, this might indicate that it will allege fraud in future cases where the attorney has not disclosed the arrangement. However, the SEC's position in Qi might have been influenced by the substantial number of transactions and fees paid, Qi's refusal to settle the case and his blatant misrepresentations to the SEC during the course of the investigation.¹⁹²

In at least one case, the SEC has expanded its reach by claiming that the entity that pays the referral fee – typically the Regional Center or the NCE – is also liable for a violation of the securities laws. American Life, Inc., manager of one of the largest and most successful Regional Center networks in the nation and its principal, Henry Liebman, were sanctioned for paying transaction-based compensation that caused the immigration attorneys who received the commissions to be unregistered broker-dealers.¹⁹³ The order did not specify the

¹⁹¹ See Exhibit N to the complaint in Palm Hotel, the complaint that relates to the alleged securities fraud and other bad acts committed by the 34 defendants, including the Regional Center, NCE and JCE.

https://eb5projects.com/system/uploads/document/file/325/Palm_House_Complaint_with_exhibits.pdf

¹⁹² <https://www.sec.gov/litigation/complaints/2017/comp24006.pdf>

¹⁹³ See <http://www.stern.nyu.edu/sites/default/files/assets/documents/EB5%20paper%20final%2005.24.2015> at page 112.

legal basis for holding American Life liable for making the payment to the unregistered broker-dealer. Presumably it relied on causation liability under the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, or one of the forms of secondary liability, such as aiding and abetting, under Section 20 of the 1934 Act.¹⁹⁴ Under the settlement obligation, American Life and Mr. Liebman were ordered to pay \$1.24 Million.¹⁹⁵

It appears that American Life, Inc. is the only resolved enforcement action that holds the party that paid the commission liable for committing a securities law violation. The American Life settlement raises the question of whether the SEC is actively pursuing other Regional Centers or operators under the same theory for the payment of the transaction-based compensation that would cause the recipient to be an unregistered broker dealer.

Undoubtedly, immigration attorneys who have been “sanctioned” were paid a fee by a Regional Center or affiliated entity or individual. Yet, apparently the company or individual making the payment has not been named as the subject of an SEC administrative proceeding. Perhaps investigations or enforcement actions are pending against one or more of the Regional Centers that made the payments to the attorneys named in the enforcement actions that were the subject of the December 2015 announcement.¹⁹⁶ It is possible that some of these potential actions would be barred by the statute of limitations, depending on when the payments were made.

¹⁹⁴ See Section 20 of the 1934 Act; Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931; <https://www.congress.gov/bill/101st-congress/senate-bill/647/text>; Also see <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1229&context=wlu>

¹⁹⁵ <https://www.sec.gov/litigation/admin/2016/34-78042.pdf> The order contains a stipulation that we did not commonly find in the other orders imposing sanctions for attorneys acting as unregistered broker-dealers. It stipulates that American Life or Liebman will not be entitled to offset the amount of this civil penalty against any future award of compensatory damages to the investors in the event they sue. We are not aware of any cases filed by the investors against American Life or Liebman, or whether the statute of limitations for such action may have expired. Also note that in the various unregistered broker-dealer cases, the terms of the Order specify that the monetary penalties are paid to the general fund of the US Treasury rather than to the victims.

¹⁹⁶ Even if the SEC files enforcement actions against the immigration attorneys for acting as unregistered broker-dealers, it is unlikely to file enforcement actions against the Regional Centers and their principals under the same theory that it applied to the American Life payments because the defendants, especially the entities, will not have any assets to pay monetary sanctions.

XIII Developments to Watch During 2018

The SEC pursued a record number of enforcement actions during fiscal year 2016, of which EB-5 related actions comprise a very small portion. A central policy goal of the Trump administration is reducing government regulation with a concomitant reduction in the budget of government agencies. The Commission led by Trump appointee Jay Clayton has already announced a shift from some of the policies followed by the SEC during the Obama administration.¹⁹⁷

Recently appointed Steven Piwowar, co-director of the SEC's Enforcement Division, announced that the Division will be more selective and bring fewer cases.¹⁹⁸ He forecasted that the Enforcement staff will have 100 fewer investigators and supervisors by September 2018.¹⁹⁹ Moreover, Mr. Piwowar is narrowing the scope of investigative powers that had been granted to senior enforcement attorneys during the Obama administration.²⁰⁰

Thus, this policy shift raises questions as to whether the Clayton-led SEC will continue to aggressively pursue securities law violations, and, in particular, in the EB-5 arena. Similar questions apply to criminal investigations to be conducted by the Department of Justice and prosecutions to be brought by the Office of the US Attorney. If the facts as alleged in the Palm Hotel complaint are true, whether the Commission elects to file an enforcement action there could signal the Commission's new approach on enforcement actions involving the misappropriation of EB-5 securities.

However, the recent SEC enforcement actions brought in Green Box and HPIC could be viewed as strong signals that the SEC plans to continue to aggressively pursue misappropriations in the EB-5 arena. Similarly, the recent prosecution by the Office of the US Attorney of the key operator in the CIIF Regional Center signals tough action, although this action was apparently prompted by Senator Grassley's harsh criticism of the lack of action by the agencies.²⁰¹

Furthermore, we expect an increase in the number of misappropriations detected by USCIS in the coming year because of the I-829 bubble. Due to the surge

¹⁹⁷ <https://www.wsj.com/articles/sec-signals-pullback-from-prosecutorial-approach-to-enforcement-1509055200>

¹⁹⁸ <https://www.wsj.com/articles/sec-signals-pullback-from-prosecutorial-approach-to-enforcement-1509055200>

¹⁹⁹ <https://www.wsj.com/articles/sec-signals-pullback-from-prosecutorial-approach-to-enforcement-1509055200>

²⁰⁰ <https://www.wsj.com/articles/sec-chief-scales-back-powers-of-enforcement-staff-1487199642>

²⁰¹ <https://www.grassley.senate.gov/sites/default/files/judiciary/upload/2017-04-20%20CEG%20to%20DHS%20%28California%20Investment%20Immigration%20Fund%20EB-5%29.pdf>

in EB-5 investor petitions filings in 2012 and 2013, more petitions involve projects that are reaching the I-829 stage when the USCIS scrutinizes the actual flow of funds for the first time. One would expect that more misappropriations and misuse of funds will be revealed. Presumably, this would trigger the USCIS's referral of these matters to the SEC for investigation.

XIV Conclusion

As discussed in this paper, some basic safeguards are essential to ensure that the integrity of the EB-5 Program will be preserved. This will become especially important if the USCIS continues to permit redeployment of the investor funds into another project after the loan or equity is repaid to the NCE.²⁰² The subsequent deployment of funds is likely to be subject to even less due diligence and vetting by the investors than the original investment. The funds might be outstanding long after the investor obtains his visa, in which case USCIS might no longer be involved in regulating the funds or conducting compliance review or site visits.

The EB-5 Investment Scam Alert jointly issued by the SEC and USCIS in 2013 concludes by pointing out that if an EB-5 investment turns out to be in a fraudulent securities offering, the investor not only loses his money but also the path to lawful permanent residency in the US. Thus, the SEC urges the investors to “carefully vet any EB-5 offering before investing his money and hope of becoming a lawful resident.”²⁰³ It is apparent that some investors did not heed this warning.

We expect that the media attention surrounding the EB-5 enforcement actions and the proposed EB-5 reform legislation will heighten the sensitivity of future investors to the importance of retaining experts to perform extensive due diligence before they select a project and cause them to demand that appropriate fund and loan administration controls be in place throughout the life cycle of their investment.

²⁰² <https://www.uscis.gov/policymanual/Updates/20170614-EB5JobsAndCapitalAtRisk.pdf>; Paragraph C of <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartG-Chapter4.html>

²⁰³ https://www.sec.gov/oiea/investor-alerts-bulletins/investor-alerts-ia_immigranhtml.html

Appendix A Database of SEC EB-5 Securities Enforcement Actions

#	Case Reference Commonly Referred to Case Name (Regional Center, Location or Key Defendant)	SEC Filing						Project Location and Type Project Location: City or County and State
		Date of SEC Filing of Complaint with Court	SEC Release Link including Link at bottom of Release to SEC Complaint filed in US District Court	EB-5 Role of Named Defendants	Does Securities Law Wrongdoing include Diversion of Funds (Yes or No)	Years of Alleged Wrongdoing	Time Frame of Initial Wrongdoing to SEC Filing	
15	Home Paradise Investment Center (HPIC)	9/20/2017	https://www.sec.gov/litigation/litreleases/2017/lr23944.htm	GP, NCE, JCE, RC	Yes	2014 to 2017	2014 to 2017	Ontario & Los Angeles, California
14	Green Box	9/19/2017	https://www.sec.gov/litigation/litreleases/2017/lr23938.htm	GP, NCE, JCE	Yes	2014 to 2015	2012 to 2017	Detroit, Michigan
13	Kameli	6/22/2017	https://www.sec.gov/litigation/litreleases/2017/lr23866.htm	GP, NCE, JCE, RC	Yes	2009 to 2016	2009 to 2017	Various locations in Illinois and Florida
12	Muroff	4/28/2017	https://www.sec.gov/litigation/litreleases/2017/lr23818.htm	GP, NCE, JCE	Yes	2010 to 2013	2010 to 2017	Boise, Idaho
11	Aero Space International Group	3/15/2017	https://www.sec.gov/litigation/litreleases/2017/lr23778.htm	GP, NCE, JCE, RC	Yes	2011 to 2015	2011 to 2017	Grant County, Washington
10	Henderson	1/17/2017	https://www.sec.gov/litigation/litreleases/2017/lr23721.htm	GP, NCE, JCE, RC	Yes	2010 to 2017	2010 to 2017	San Francisco, California
9	Caffe Primo (Emilio Francisco)	12/27/2016	https://www.sec.gov/news/pressrelease/2016-281.html	GP, NCE, JCE	Yes	2013 to 2016	2013 to 2016	Multiple locations in Southern California
8	Proton (Liu and Wang)	5/26/2016	https://www.sec.gov/litigation/litreleases/2016/lr23556.htm	GP, NCE, JCE, RC	Yes	2014 to 2016	2014 to 2016	Laguna Niguel, California
7	Jay Peak	4/12/2016	https://www.sec.gov/news/pressrelease/2016-69.html	GP, NCE, JCE	Yes	2008 to 2016	2008 to 2016	Jay, Vermont
6	Suncor	11/19/2015	https://www.sec.gov/litigation/litreleases/2015/lr23414.htm	GP, NCE, JCE	Yes	2012 to 2014	2012 to 2015	San Bernadino, California
5	EB-5 Asset Manager (Zhong)	11/3/2015	https://www.sec.gov/litigation/litreleases/2015/lr23409.htm	GP, NCE, JCE	Yes	2011 to 2015	2011 to 2015	Port St. Lucie and other locations along east coast of Florida
4	Path America (Dargey)	8/24/2015	https://www.sec.gov/litigation/litreleases/2015/lr23326.htm	GP, NCE, JCE, RC	Yes	2012 to 2015	2012 to 2015	Seattle and Everett, Washington
3	Luca	7/6/2015	https://www.sec.gov/news/pressrelease/2015-141.html	GP, NCE, and JCE	Yes	2007 to 2014	2007 to 2015	Drilling: Texas, Louisiana
2	USA Now (Ramirez)	9/30/2013	https://www.sec.gov/news/press-release/2013-210	GP, NCE, JCE, RC	Yes	2010 to 2013	2010 to 2013	McAllen, TX
1	Chicago Convention Center	2/6/2013	https://www.sec.gov/litigation/litreleases/2013/lr22615.htm	GP, NCE, JCE, RC	Yes (Admin fee only; investors' capital contributions held in escrow)	2011 to 2013	2011 to 2013	Chicago, Illinois
Not an SEC action; Filed by Office of US Attorney	CIIF (Chan)	US Attorney filed 5/24/2017	https://www.justice.gov/usao-cdca/pr/us-files-9-lawsuits-seeking-forfeiture-properties-worth-over-30-million-allegedly	RC, NCE, JCE, principals	Yes	2008 to 2017	2008 to 2017	Southern California

<u>Case Reference</u>		<u>Project Location and Type</u>		<u>Regional Center and Relationships</u>			<u>EB-5 Capital</u>	
#	Commonly Referred to Case Name (Regional Center, Location or Key Defendant)	Urban or Rural	Type of Project	RC Date of USCIS Designation If Terminated, Date of Termination	RC Name	Related Party: NCE and JCE (Yes or No)	Actual EB-5 Capital Raised (excluding Admin Fees)	Alleged Amount of Diversion or Other Misuse of Investor Funds
15	Home Paradise Investment Center (HPIC)	Urban	2 projects: Interior design center; Residential condo. (2 other major hotel/condo projects in downtown LA not included in the SEC action)	Designated 9/23/2011	Home Paradise Investment Center	Yes (Note that RC and NCE are apparently unrelated to JCE in two EB-5 megaprojects unrelated to this SEC action.)	\$22,500,000	\$12,100,000
14	Green Box	Urban	Environmental friendly recycling center	Designated 8/30/2010	Green Detroit Regional Center	No	\$4,475,000 (\$25,000 was held in escrow)	\$3,900,000
13	Kameli	Some urban, some rental	Senior living facilities	Designated 3/5/2009	Chicagoland Foreign Investment Group Regional Center	Yes	\$88,700,000 (some investors didn't fully fund their investment)	\$10,270,000
12	Muroff	Rural	Luxury real estate; gold mining operations	Designated 9/13/2011	Idaho State Regional Center	Yes	\$140,500,000	\$31,000,000
11	Aero Space International Group	Rural	Industrial park development (7 projects)	Designated 3/1/1994	Aero Space Port International (ASPI) Group Regional Center	Yes	\$14,500,000	\$14,500,000
10	Henderson	Urban	Nursing facility and retail center; call centers; and dairy operations. (7 projects)	Designated 11/1/2011	San Francisco (EB-5) Regional Center	Yes	\$107,500,000	\$17,100,000
9	Caffe Primo (Emilio Francisco)	Urban	Assisted living facilities; Caffe Primo restaurants. (19 projects)	Terminated 5/16/2017	Z Global Regional Center (as per SEC Memo of Law)	Yes	\$65,500,000	\$9,500,000
8	Proton (Liu and Wang)	Urban	Cancer treatment center	Terminated 1/26/2017	Pacific Proton Therapy Regional Center	Yes	\$27,000,000	\$20,000,000
7	Jay Peak	Rural	Ski resort facilities; hotel; and biomedical research facility. 8 phases.	Designated 6/26/1997; Notice of Intent to Terminate issued by USCIS in 2017	State of Vermont Agency of Commerce & Community Development (aka "Vermont EB-5 Regional Center"); Notice of Intent to Terminate issued by USCIS	Yes	\$418,500,000	\$200,000,000
6	Suncor	Urban	Nursing care facilities (3 projects)	RC not referenced in complaint	RC not referenced in complaint	Yes	\$20,000,000	\$10,000,000
5	EB-5 Asset Manager (Zhong)	Urban and rural	Commercial real estate development	Terminated 5/9/2016	US EB5 Florida Regional Center	Yes	\$8,500,000	\$8,000,000
4	Path America (Dargey)	Urban	Mixed use hotel and residential, and retail and residential. (2 projects)	Terminations (1) Sunoco (11/23/2016); (2) KingCo (3/23/2016). Appeal denied.	Path America Sunoco & Path America KingCo	Yes	\$150,000,000	\$17,600,000
3	Luca	Rural	Oil and gas drilling projects (8 projects)	Terminated 2/2/2016	Luca Energy Fund Regional Center	Yes	\$8,000,000	\$5,400,000 (of entire \$68 million amount, including \$8 million EB-5)
2	USA Now (Ramirez)	Rural	Energy and restaurant grill. (2 projects)	Terminated 3/28/2014	USA Now	Yes	\$5,000,000	\$2,000,000
1	Chicago Convention Center	Urban	Hotel and conference center	Terminated 11/20/2013	InterContinental Regional Center Trust of Chicago	Yes	\$145,000,000	All held in escrow
Not an SEC action; Filed by Office of US Attorney	CIIF (Chan)	Urban and rural	Real estate development	Designated 1/7/2010	California Investment Immigration Fund (CIIF)	Yes	\$50,000,000	\$30,000,000

<u>Case Reference</u>		<u>EB-5 Capital</u>	<u>Constructon and Funds</u>			<u>EB-5 Investment Structure</u>		<u>Information about Immigrant Investors</u>
#	Commonly Referred to Case Name (Regional Center, Location or Key Defendant)	Max. EB-5 Capital Raise sought	Project construction status at time of SEC filing	Location of funds immediately prior to the diversion	Escrowed funds - early release (Yes or No)	Loan or Equity Model	Bank or Other Institutional Lender as senior lender (not merely as escrow) Yes or No	# Immigrant (or EB-5) Investors
15	Home Paradise Investment Center (HPIC)	NA	Virtually no work done	At NCE, after released from escrow	Escrow not mentioned in the complaint	Loan (interior design project) & equity (condo project)	No	45
14	Green Box	\$35,000,000	Made only down payment on equipment	At the JCE (unrelated to the NCE)	Complaint's only reference to escrow is \$25,000 held in escrow for one investor	Loan	No	9
13	Kameli	NA	Constructed only one of several planned senior living facilities. Construction not commenced on most of the others.	Escrow not referenced in complaint	Escrow: Hold until I-526 approval	Loan	No	226
12	Muroff	NA	Construction in Process	Unclear if funds were ever held in escrow	Escrow not mentioned in the complaint. Unclear if escrow arrangement was utilized.	NA	No	281
11	Aero Space International Group	NA	None	Unclear if funds were ever held in escrow	Escrow not mentioned in the complaint. Complaint suggests that offering materials did not contemplate escrow.	Loan	No	29
10	Henderson	\$144,000,000		Escrow not referenced in complaint	Escrow not mentioned in the complaint. Unclear if escrow arrangement was contemplated by offering materials.	Some was deployed as loan, some was deployed as equity.	No	215
9	Caffe Primo (Emilio Francisco)	NA	No construction on assisted living facilities project; some Caffe Primo restaurants are operating	Released from Escrow to NCE	Escrow: 80% released on NCE approval of investor. 20% on I-526 approval. In fact, commingled escrow of multiple projects	Loan	No	131
8	Proton (Liu and Wang)	\$150,000,000	None	Released from Escrow to NCE	Escrow per USCIS I-924 filing: Hold until I-526 approval; But escrow per offering materials given to investors: Hold until I-526 filing	Loan	No	54
7	Jay Peak	NA	First 5 phases completed	Released from Escrow to NCE	People's United Bank as escrow transferred EB-5 investor escrow funds to projects or persons other than the NCE	Equity		837
6	Suncor	\$20,000,000	Under construction, not completed	Released from Escrow to NCE	In fact, entire amount was released upon I-526 filing. Complaint unclear whether this complied with escrow terms.	Loan	Construction loan referenced, but no lender named	40
5	EB-5 Asset Manager (Zhong)	NA	Mixed use or residential real estate	Released from Escrow to NCE	Escrow: Hold until I-526 approval. In fact: most immediately released on receipt, and some might not have been deposited in escrow	Equity	No	17
4	Path America (Dargey)	\$240,000,000	Farmer's Market substantially completed; Tower at excavation stage	Released from Escrow to NCE	Escrow: \$400,000 held until I-526 filing; \$100,000 retained until approval	Loan	Voya Financial; and Binjiang	282
3	Luca	\$37,000,000	Work in process; on verge of bankruptcy	Released from Escrow	Escrow: not mentioned in SEC complaint	Loan	No	16
2	USA Now (Ramirez)	\$15,000,000	None	Released from Escrow to NCE	Escrow: Hold until I-526 approval. In fact: immediately released on date of receipt.	Loan	No	11
1	Chicago Convention Center	\$249,500,000	No construction activity	Investor Contributions Held in Escrow	Escrow: Hold until I-526 approval. This led to full recovery of investor capital contribution.	NA	(State of Illinois bond financing - never obtained)	290
	Not an SEC action; Filed by Office of US Attorney	NA	Virtually none				No	100

<u>Case Reference</u>		<u>Information about Immigrant Investors</u>		<u>Case Status</u>			<u>Related Actions</u>	
#	Commonly Referred to Case Name (Regional Center, Location or Key Defendant)	Investors' Country of Origin	Immigration - Petition Status	Relief Sought	Case Status	Case Outcome	Private Cause of Action filed by Immigrant Investors (Yes or No)	Criminal Action filed by US Attorney (DOJ): Yes or No
15	Home Paradise Investment Center (HPIIC)	China	NA	Disgorgement; Penalties; Injunction; Receivership	Pending	TBD	No	No
14	Green Box	China	NA	Disgorgement; Penalties; Injunction	Pending	TBD	No	Yes - Indictment, 9/20/2017; no complaint filed yet
13	Kameli	China, Iran	Majority of I-526s approved for one of the funds	Disgorgement; Penalties; Injunction; Receivership	SEC's motion for preliminary injunction and appointment of receiver denied. Disgorgement and other remedies to be determined at trial.	TBD	No	No
12	Muroff	China	NA	Disgorgement; Penalties; Injunction; Permanent Bar	Settled (same day as complaint "filed")	Disgorgement: \$6.5 million; Penalties: \$2.1 million	No	No
11	Aero Space International Group	China	NA	Disgorgement; Penalties; Injunction	Pending	TBD	No	No
10	Henderson	China	NA	Disgorgement; Penalties; Injunction; Receivership	Pending	TBD	No	No
9	Caffe Primo (Emilio Francisco)	China	NA	Disgorgement; Penalties; Injunction; Receivership	Pending	TBD	No	No
8	Proton (Liu and Wang)	China	I-526 Stage; 8 were approved	Disgorgement; Penalties; Injunction; Receivership	Decided 4/20/2017	Disgorgement: \$26.7M; Penalty: \$8.2M	No	No
7	Jay Peak	74 different countries	364 permanent green cards, 347 permanent green cards, 126 not conditional residents	Disgorgement; Penalties; Injunction; Retention of Equity; Receivership	Settled - Stenger, civil penalty to be determined; Quiros settlement pending Commission review	Settlement with Quiros pending SEC approval as of 11/17/2017. Stenger settlement TBD based on cooperation	Yes	No
6	Suncor	China	NA	Disgorgement; Penalties; Injunction.	Pending	TBD	No	No
5	EB-5 Asset Manager (Zhong)	China	NA	Disgorgement; Penalties; Injunction; Receivership; Repatriation	Pending	TBD	No	No
4	Path America (Dargey)	China	I-526 approvals: 69; I-526 denials: 192	Disgorgement; Penalties; Injunction; Receivership; Repatriation	Settled	Disgorgement: \$18.4 million.	No	Yes- Guilty plea 1/4/2017; 4 year sentence; Restitution: \$24 million
3	Luca	China	NA	Disgorgement; Penalties; Injunction; Receivership	Decided 7/26/2016	Disgorgement: \$68.3 million (includes EB-5 portion)	No	No
2	USA Now (Ramirez)	Mexico, Egypt, Nigeria	I-526s Denied	Disgorgement; Penalties; Injunction; Receivership	Decided (Final judgment 3/31/2017)	Disgorgement: \$12+ million; Civil Penalty: \$10 million	No	No
1	Chicago Convention Center	China	I-526s did not reach decision stage	Disgorgement; Penalties; Injunction; Repatriation	Settled (consent judgment): 3/7/2014	Disgorgement: \$11.5 million; Penalties: \$3.9 million; Refund of Escrow: \$147 million	No	Yes - Guilty plea 1/3/2014; 3 year sentence; Restitution: \$8.85 million
Not an SEC action; Filed by Office of US Attorney	CIIF (Chan)	China	Some received temporary green cards	Seizure of real estate	8 of 9 properties seized		Yes - filed 9/20/2017	Yes - Victoria Chan plead guilty on 11/27/2017. Sentencing scheduled 7/19/2018. 45 year maximum term.