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APRIL 2013

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Customer Service and Public Engagement Directorate
Washington, DC 20529

U.S. Citizenship and Immigration Services

Meeting Invitation

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USCIS EB-5 Engagement with the Securities and Exchange Commission
Wednesday, April 3, 2013 @ 3 p.m. (Eastern)

U.S. Citizenship and Immigration Services (USCIS) and the Securities and Exchange Commission (SEC) invite interested individuals to participate in a stakeholder teleconference to discuss the EB-5 Immigrant Investor program. During the engagement, subject matter experts from the SEC will discuss securities law compliance in the context of EB-5 regional centers and investments. Stakeholders will have an opportunity to ask the SEC questions at the end of the teleconference.

To Register

Please click here to RSVP for this engagement. Be sure to complete and update your subscriber preferences. Once we receive your registration, we will send you a confirmation email with additional details.

If you have any questions regarding the registration process, please contact the Public Engagement Division at Public.Engagement@uscis.dhs.gov.

To Join the Session

On the day of, please use the information below to join the teleconference. We recommend that you call in 15 minutes before its start.

Call-in Number: 1-888-989-5161
Passcode: EB-5

Please note this call is intended for stakeholders only. Members of the media who have inquiries should contact the USCIS Office of Communications at 202-282-8010.

We look forward to engaging with you!

U.S. Citizenship and Immigration Services

SEC DISCUSSES EB-5

SEC and USCIS hold Intra-Agency Conference Call on Securities Issues Related to the EB-5 Investor Visa Program.

FOCUS

Group Holds Roundtable on Best Practices

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EB5Info.com is the source for news and information on the USCIS EB-5 Visa Immigrant Investor program and is powered by USAdvisors, a Registered Investment Advisory Firm, that performs independent Risk Analysis and Due Diligence on EB-5 Visa Regional Center projects to help clients make educated decisions based on facts related to the EB-5 Visa investment.

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EB-5 News

by MICHAEL GIBSON
Manging Director

The conference call with

the SEC, besides being unprecedented in the history of the EB-5 program, was revealing for many reasons, but I think most of all in that it highlights the change in perception for many in the EB-5 program from being a visa-focused one with a securities component to that of a securities transaction with a visa attached. The focus of immigration attorneys and Regional Centers since the inception of the program has been on the visa-related issues with little concern for U.S. securities laws which only with the very recent SEC action in Chicago has become a topic of conversation among practitioners. We have devoted this month's issue to releasing our transcript of the call and would like to thank both USCIS and the SEC officials for their guidance to help educate our community regarding these important laws and issues. We did follow that call with a small group of practitioners who met with officials from various agencies in D.C. (story on the back page) and would like to invite those in the community to contact us for more information on how to get involved in efforts to promote a greater understanding of how both state and federal laws can affect the capital raise process and forming a set of securities best practices for the industry.

Best wishes,
Michael Gibson
Managing Director
USAdvisors.org

by KRIS STELL
Editor-in-Chief

We have dedicated

almost the entire issue of this month's EB-5 News to the EB-5 information-filled presentation by the Securities & Exchange Commission (SEC) and the U.S. Citizens and Immigration Service (USCIS). Industry experts from four different departments of the SEC were on this conference call, and presented information on finance and investment, broker-dealer status and fraud.

The question and answer segment following the presentations provide additional insight into where the issues with the EB-5 program lie.

Additional EB-5 coverage follows with the latest EB-5 stakeholder meeting report that contains suggestions on how to improve the entire process.

Kris Stell
Editor-in-Chief
USAdvisors.org

What is the Purpose of the SEC?

Many immigration attorneys, Regional Center operators, developers and EB-5 service providers may be unfamiliar with the U.S. Securities and Exchange Commission (SEC) and what their duties and responsibilities are. The following should give a broad outline as they themselves describe.

The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation

The SEC is a federal regulatory agency who has several responsibilities but the primary focus is on enforcing the federal securities laws and regulating U.S. equity markets, exchanges (physical and electronic) and regulating the practices in the securities transactions. They describe their principal mission as one to "protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."

More from their website:

"The laws and rules that govern the securities industry in the United States derive from a simple and straightforward concept: all investors, whether large institutions or private individuals, should have access to certain basic facts about an investment prior to buying it, and so long as they hold it.

"The result of this information flow is a far more active, efficient, and transparent capital market that facilitates the capital formation so important to our nation's economy. To insure that this objective is always being met, the SEC continually works with all major market participants, including especially the investors in our securities markets, to listen to their concerns and to learn from their experience.

SEC headquarters, Washington D.C.

"The SEC oversees the key participants in the securities world, including securities exchanges, securities brokers and dealers, investment advisors, and mutual funds. Here the SEC is concerned primarily with promoting the disclosure of important market-related information, maintaining fair dealing, and protecting against fraud.

"Crucial to the SEC's effectiveness in each of these areas is its enforcement authority. Each year the SEC brings hundreds of civil enforcement actions against individuals and companies for violation of the securities laws. Typical infractions include insider trading, accounting fraud, and providing false or misleading information about securities and the companies that issue them.

"One of the major sources of information on which the SEC relies to bring enforcement action is investors themselves — another reason that educated and careful investors are so critical to the functioning of efficient markets."

Divisions:

Within the SEC, there are five divisions:

- Corporation Finance
- Trading and Markets
- Investment Management
- Enforcement Risk, Strategy, and Financial Innovation

Corporation Finance is the division that oversees the disclosure made by public companies, as well as the registration of transactions, such as mergers, made by companies. The division is also responsible for operating EDGAR.

The **Trading and Markets Division** oversees self-regulatory organizations such as FINRA and MSRB and all broker-dealer firms and investment houses. This division also interprets proposed changes to regulations and monitors operations of the industry.

The **Investment Management Division** oversees investment companies including mutual funds and investment advisors. This division administers federal securities laws, in particular the Investment Company Act of 1940 and Investment Advisers Act of 1940.

The **Enforcement Division** works with the other three divisions, and other commission offices, to investigate violations of the securities laws and regulations and to bring actions against alleged violators.

The SEC generally conducts investigations in private. The SEC's staff may seek voluntary production of documents and testimony, or may seek a formal order of investigation from the SEC, which allows the staff to compel the production of documents and witness testimony. ■

SEC DISCUSSES EB-5

USCIS & SEC Hold Intra-Agency Conference Call on Securities Issues Related to the EB-5 Investor Visa Program

Opening Remarks

by Rob Silvers of the USCIS

I'm at the California Service Center where we process our EB-5 caseloads. Director Alejandro Mayorkas has been very focused on enhancing our collaboration with enforcement and regulatory authorities whose jurisdiction reaches into certain aspects of EB-5 projects and investments, and the SEC is one such agency. We've built a valuable relationship with the SEC and we've engaged with them at a programmatic level as well as at a case-specific level of involving referral of cases and assistance in particular investigations.

At USCIS, we administer the INA and the implementing regulations, but we work to support the SEC in its mission of regulating compliance with the US securities laws. So today is really a very valuable opportunity for the SEC to address the EB-5 stakeholder community and conversely for the EB5 stakeholders to direct their questions regarding securities law compliance in the EB-5 arena to the SEC. We're very grateful to the SEC for their continued partnership, and for accepting our invitation to join today's engagement and look forward to their presentation.

U.S. Citizenship and Immigration Services

U.S. Citizenship and Immigration Services (USCIS) and the Securities and Exchange Commission (SEC) invited interested individuals to participate in a stakeholder teleconference to discuss the EB-5 Immigrant Investor Program. It was held April 3, 2013. During the engagement, subject matter experts from the SEC discussed securities law compliance in the context of EB-5 regional centers and investments. Stakeholders had an opportunity to ask the SEC questions at the end of the teleconference. Please find following the four presentations from each industry expert and the Q&A segment.

DISCLAIMER: This is an UN-OFFICIAL non-governmental transcript of the USCIS & SEC EB-5 stakeholder's conference call that was held on April 3, 2013 and is accurate to the best of our knowledge but cannot be interpreted or relied on as official guidance from the United States Citizenship and Immigration Service (USCIS) or the Securities and Exchange Commission (SEC). We are providing this transcript for those that were not able to listen to the call but in no way should the following be construed as official policy for either of the agencies, it is simply our interpretation of what we understood from the conversations but should not be relied on in any way for official guidance or policy.

Offers & Sales

Karen Wiedemann,
SEC, Division of Corporate Finance

Before I begin, I'd like to give our standard disclosure, both on my own behalf and behalf of all of my colleagues. The views we express today are our own, do not necessarily reflect the views of the commission or colleagues on the staff.

We've been asked to key up for you the principle issues that may arise under federal securities law in connection with activities by regional centers and other participants in the EB5 visa program. Just a cautionary note, this is obviously pretty high level discussion, and should not take the place of you getting you own legal advice, which we would very much urge that you consider doing.

When the Law Applies

To get things started, we'll put some basic building blocks in place. When should you worry that federal securities law may apply to what you're doing? To the subject of securities law, you obviously have to be transacting in securities, just be aware that the definition of 'securities' is very broad. It includes not just the things that immediately comes to mind like shares of stock in a corporation. It can include all kinds of investment – interest, limited partnership interest, member interest, LLCs, lots of other things that fall under a general rubric of investment contracts. And so as a general rule of thumb, you should just be sensitive to the likelihood that the investment opportunities that you're offering may well constitute securities and you should proceed as if they do, unless someone who's looked at it carefully reaches a different conclusion.

The other thing that you should be aware of in terms of offering and selling securities is that federal securities laws will apply to all offers and sales that are made using what we would refer to as the 'means of interstate commerce.' That includes things like the Internet, the telephone, U.S. Postal Service – again it is extremely unlikely that your activities do not involve the jurisdictional means and so as a general proposition, offers and sales of investment interest are very likely to implicate U.S. federal securities law. So you just have it in your mind, as you go about your business.

The next thing to make clear is that, as a general matter, offers and sales of securities – a huge system – have to be registered with the SEC unless there is an exemption available. SEC registration you will have heard of referred to as 'going public' or 'doing IPO.' There are a number of potential exemptions for securities offerings. We'll talk very quickly about a couple of the ones that are relied upon most frequently. But the thing for you to remember is that the exemptions that we'll talk about are exemptions from registration requirements – they are not exemptions from the whole of the federal securities law. So even if you're eligible to rely on an exemption, that means you don't have to register with the SEC, but it doesn't mean that federal securities law doesn't apply to what you're doing, and in particular, the anti-fraud provisions of the federal securities laws will apply, even to exempt offerings. We should be clear about that.

SEC Division of Corporate Finance

In support of the Commission's mission to protect investors, maintain fair, orderly and efficient markets, and facilitate capital formation, the Division of Corporation Finance seeks to ensure that investors are provided with material information in order to make informed investment decisions, both when a company initially offers its securities to the public and on an ongoing basis as it continues to give information to the marketplace. The Division also provides interpretive assistance to companies with respect to SEC rules and forms and makes recommendations to the Commission regarding new rules and revisions to existing rules. and look forward to their presentation.

Exemption Highlights

Some of the highlights for exemptions that people tend to rely upon most frequently – there are exemptions for private placements, there's an exemption under regulation D which is probably our most frequently relied upon private placement exemption, there are a number of conditions that attach to satisfying those exemptions, ***but the most important one for this purpose is a prohibition on the use of general solicitations and general advertising to find investors for those offerings.*** That general solicitation would include, for example, using newspaper publications, radio or television broadcast media, could include an unrestricted website, cold calling, anything that's sort of broadly reaching out to the public.

Under our interpretive guidance, there are circumstances in which registered broker-dealers are permitted to solicit a person with whom they have a pre-existing substantive relationship, but it's a general proposition for these exempt offerings and exempt private placements – general solicitation is prohibited. Some of you may know that the Jobs Act, which was signed into law about a year ago, requires the SEC to change its rules to permit general solicitation in offerings where securities are sold only to so-called 'accredited investors,' where the issuer has taken reasonable steps to verify that the investors are, in fact, accredited. Rules have been imposed to implement those provisions of the Jobs Act but they haven't yet been finalized, they're not in affect, and so that provision isn't offered as yet.

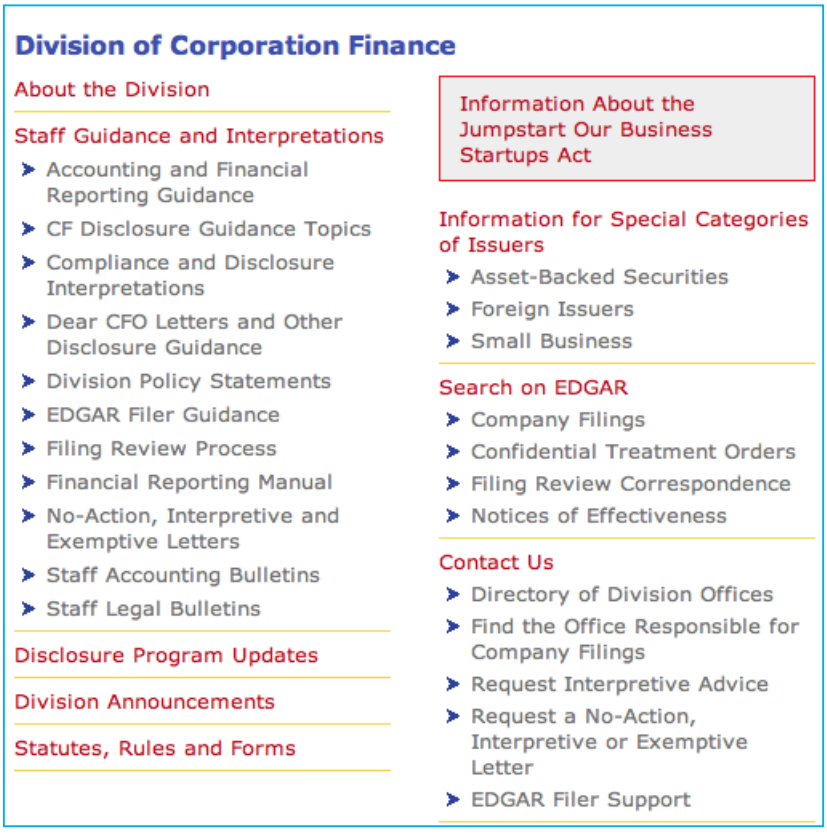
About Regulation S

United States Congress enacted the Securities Act of 1933 (Truth in Securities Act), in the aftermath of the stock market crash of 1929 and during the ensuing Great Depression. Legislated pursuant to the interstate commerce clause of the Constitution, it requires that any offer or sale of securities using the means and instrumentalities of interstate commerce be registered with the SEC pursuant to the 1933 Act, unless an exemption from registration exists under the law. "Means and instrumentalities of interstate commerce" is extremely broad, and it is virtually impossible to avoid the operation of this statute by attempting to offer or sell a security without using an "instrumentality" of interstate commerce. Any use of a telephone, for example, or the mails, would probably be enough to subject the transaction to the statute.

The other key exemption that I wanted to touch on was Regulation S, which is the exemption or the set of exemptive rules that are available for offshore offerings conducted outside the United States. Reg-S generally provides that offers and sales of securities that occur outside the U.S. are not subject to Securities Act registration requirements. ***As I said before, and I'll just underline it here, they remain subject to the anti-fraud provisions of the act – they're just exempt from SEC registration.***

Meeting the Conditions

To qualify for Reg-S there are two basic conditions that have to be met – the offer of sale has to be made in an offshore transaction with no directed selling efforts into the U.S. In offshore transactions, the standard that's likely to be relevant for you is that the offer is not made to a person in the U.S., and at the time that the buy order



originated, the buyer is in fact outside the U.S. or the issuer reasonably believes that they are.

No directed selling efforts, basically no conditioning of the market in the U.S. for the securities. As a practical matter it looks a lot like the prohibition on general solicitation. In addition to these two basic elements, there are additional requirements under Reg-S that vary depending on the domicile and SEC reporting status of the issuer, the entity that's issuing the securities that are being offered and sold, and the degree of U.S. market interest in that. I don't want to go into the fine detail here and you should take a look at that, but broadly, ***securities that are issued by a non-SEC reporting, U.S.-domiciled company are in category three, the most restrictive of the Reg-S categories with the most additional conditions around use of the exemption.*** If that's where you fall, that's what you would need to look at.

The other thing to note is that Reg-S is non-exclusive, so if you don't meet the conditions for that exemption, but do meet the conditions for Reg-D or any other exemptions, you can of course claim that. That's our quick walk through – offers and sales.

Broker-Dealer Status

Joseph Surey, SEC, Trading and Markets Division

At the Trading and Markets Division, we're principally responsible for administrating the Securities Exchange Act of 1934. Of particular interest to this group today will be the question of status of individuals involved in this investment activity and whether they generally need to be cognizant and aware of broker-dealer registration requirements. I think as Karen said on this dialogue – it's highly likely that there are investments that involve securities here, so if someone is engaged in the activity of facilitating foreign investors into an investment involving a U.S. business, it's highly likely that they're engaged in brokerage activity. So let's parse that a little more in detail.

Broker-Dealer Status Explained

So the question is – threshold status – are you a broker or a dealer? A broker is someone who is engaged in the business of affecting transactions and securities for the accounts of others. The dealer is similarly engaged in the business of affecting transactions for its own account. In the context of this program, the most relevant discussion focuses on brokerage activity. Now, the commission has approached broker-dealer status and registration on a territorial basis, and what I mean by that is if you are in the U.S. and you do the activity, regardless of what activity, regardless of whether it involves foreign investors and is done outside the country, that's within the territory, and therefore the registration hook is there.

SEC Trading and Markets Division

The Division of Trading and Markets establishes and maintains standards for fair, orderly, and efficient markets. The Division regulates the major securities market participants, including broker-dealers, self-regulatory organizations (such as stock exchanges, FINRA, and clearing agencies), and transfer agents.

Similarly, if you're outside the U.S. and you're soliciting into the U.S. seeking investments, you also would trigger the threshold hook and registration status would be implicated. So the question then is what are the threshold mechanics around brokerage activities? What are the activities that cause you typically to be considered a broker? The courts and the commission have addressed this over the course of years with identifying multiple activities that could cause you to be deemed to be a broker-dealer. So there's not a precise litmus test of if you do one, two, three, or four things, or two things in combination, you by definition are a broker. It's very fact-specific, so consequently if you engage in this kind of activity, it's very important for you to get counsel or advice from someone who's very familiar with how the securities regulatory structure works,

particularly the Broker-Dealer Act in 1934.

Potential Problems

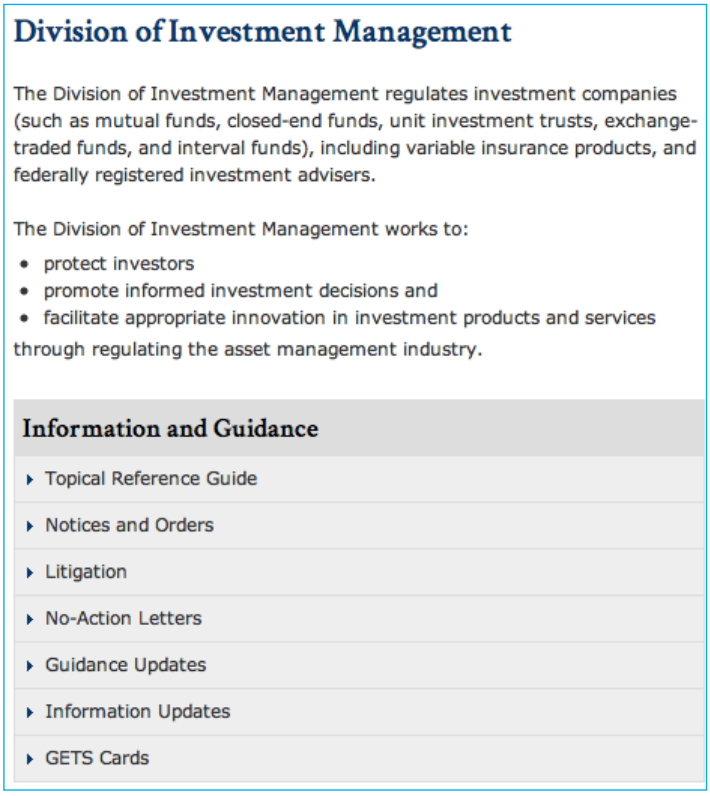
So what are the principle things that could get somebody in the context of this arrangement into potential problems? First and foremost is you're soliciting the investments – that obviously is square one in terms of you're not going to have an investment if there's no solicitation. Two – advertising indirectly would also fall into the solicitation area. But also, most importantly, is how you're being paid. ***If you're receiving compensation in connection with the investment into a securities product, you're almost inevitably going to be found to be engaged in the business of doing that activity, which means broker-dealer status.***

So if you're being paid for finding investors, there's a potential problem. If you're soliciting investors here or abroad, there is a potential problem. The key is that the compensation oftentimes is characterized – "oh, that's not transaction-based compensation" – is typically how we'll be told the scenario. That begs the question – what you have to do is look at the specific context of all the activity and what's going on. If, in fact, the person has the 'salesman stake' is the term we typically use in seeing that that investment is consummated and their payment is contingent on that activity, that in all likelihood is transaction-based compensation that would trigger broker-dealer registration.

A Safe Harbor

Now, there is one particular safe harbor for broker-dealer status – it's rule 3A4-1 under the Exchange Act, which basically allows natural persons who are associated with the issuer of a security not to be required to register as a broker-dealer if they meet certain requirements. Some of the requirements are, they can't receive transaction-based compensation. They can't, within the last 12 months, have been associated with a broker-dealer. They can't have had bad activities in the past, which we call 'statutory disqualifications,' which, among other things, would include felony convictions, being subject to an injunction by a court of competent jurisdiction, or being disciplined by the SEC, the CFTC, or a self-regulatory organization such as FINRA, or even a foreign securities regulator.

So the bottom line is ***if you're actively out soliciting investments in the context of this program, and you're getting paid for it – emphasis, again, on being paid for it – you inevitably have passed the threshold question*** and need to get detailed advice from someone who is experienced in the area to determine whether you have a broker-dealer registration issue – and that's the 50,000-foot view.



About the Securities Exchange Act of 1934

The Securities Exchange Act of 1934 (also called the Exchange Act, '34 Act, or Act of '34) is a law governing the secondary trading of securities (stocks, bonds, and debentures) in the United States of America. It was a sweeping piece of legislation. The Act and related statutes form the basis of regulation of the financial markets and their participants in the United States. The 1934 Act also established the Securities and Exchange Commission (SEC), the agency primarily responsible for enforcement of United States federal securities law.

Investment Advisors Act

Barbara Chretien-Dar, SEC, Division of Investment Management

I'm from the Division of Investment Management, and our division regulates two things. We have two statutes that might be of concern to this audience here. The first one is the Investment Advisors Act, which regulates investment advisors of all kinds. The other one is the Investment Company Act, which regulates registered investment companies, otherwise commonly known as 'mutual funds.' Both of those statutes are maybe of concern to the EB-5 types of transactions, depending on how they're structured. Joe talked a lot about compensation, and if you're not a broker-dealer because you're not compensated in the way that Joe was talking about, the likelihood is that you might be an investment advisor. It also tees off of compensation, to some extent.

The definition of 'investment advisor' is somebody who is in the business of providing investment advice for compensation. There is an exclusion under the Advisors Act that applies to broker-dealers, because broker-dealers typically give investment advice, but their advice is typically incidental to their brokerage activities, and usually it's transaction-based. ***So if you're not a broker-dealer, and you are providing advice to investors with respect to specific investments that they might make, you may fall into the definition of an investment advisor.***

Defining The Investment Company Act

The second issue that impinges on the Investment Company Act as relates to these regional centers, of which I know precious little, but from what little I know, they look like pooled investment vehicles run by a third party – that's the definition I keep seeing over and over again – and the third party typically assesses a fee for running the pool. Now, depending on how these things are structured, they may actually be investment companies that may or may not be required to register under the Investment Company Act. T***he Investment Company Act is very broad, and it is not unusual for pooled investment type vehicles to get tripped up into the definition and come within the regulatory purview of the Company Act.***

SEC Division of Investment Management

The Division of Investment Management regulates investment companies (such as mutual funds, closed-end funds, UITs, ETFs, and interval funds), including variable insurance products, and federally registered investment advisers.

Essentially the definition is – any pool, any issuer that holds securities, that invests in securities or trades in securities, triggers the definition of 'investment company.' So if a regional center is structured in a manner where multiple investors have a share in a pool or a regional center that in turn holds investments in whatever projects are being invested in, that is an investment company. At that point, you need to start worrying about getting competent 40-act counsel to guide you through either exclusions or exemptions or possible registration. ***It does get very complicated.***

Possible Exclusions

I'll talk a little bit about some of the exclusions that might be available for the regional centers, depending on how they're structured.

There are two exclusions that really are intended for hedge funds or venture capital funds, but that may or may not work for these regional centers, and the relevant sections under the Company Act, for anyone who's interested, are section 3C-1 or 3C-7 of the Company Act. The first one, section 3C-1 is for private funds with fewer than 100 investors that are not making a public offering. Those are basically for smaller type hedge funds. Section 3C-7 is basically for institutional hedge funds. So 3C-7 allows you to have an unlimited number of investors, but your investors all have to be qualified purchasers, which individuals may or may not meet.

If a pool, if a regional center, is operated by an outside third party that decides what investments to make, that third party meets the definition of an investment advisor. So there are two things going on – one you'd have to worry about registration of the pool itself, as an investment company, both under the 33 Act and the Investment Company Act, because issuers, if they can't rely on a 33 Act exclusion, will have to register their securities under the 33 Act, and separately, would have to register under the 40 Act, unless there's an exclusion available. And then, separately, the operator of the regional center might be an investment advisor that may be required to register unless there's an exclusion available. ***Even if an exclusion is available for an investment advisor from registration, just like under the 33 Act, the anti-fraud provisions still apply to that investment advisor,*** and I would just mention here that an operator of a pool that is an advisor to a regional center has a fiduciary obligation to the pool, because the pool is essentially an advisory client and there's a whole body of case law starting with the Supreme Court decision in the 1960s called 'capital gains' that says an advisor has a high fiduciary duty to its client, which means you must disclose conflicts of interest, and in addition to not defrauding your client, you have to disclose any self-interest or self-dealing that you might be engaged in to essentially the pool and the investors. So that's just on an aside.

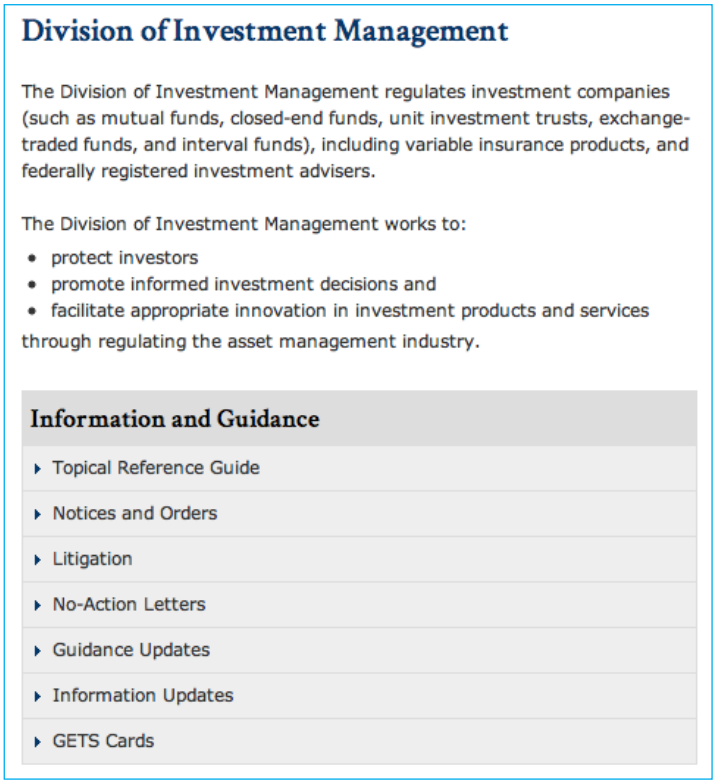
Professional Obligations

If you meet the definitions, there are certain obligations, common law obligations, that are imposed at the federal level now that accompany that. Possible exclusions for investment advisors, I already alluded to the broker-dealer exclusions that may apply, most of that will be driven by how you are compensated. There's also an exclusion for attorneys and accountants and teachers, which we call basically the professional exclusion. ***The key to that exclusion is that any investment advice that you provide must be incidental to your profession.*** So if somebody is engaged to a great extent in seeking out investment opportunities for a regional center, say – even if you're an attorney or an accountant, that doesn't give you an automatic out, because the advice, the investment advice, has to be incidental to your profession, which means your profession has to come first, and the advice secondary.

But if this is a business that somebody really is focusing on in terms of seeking out investment opportunities – those exclusions are not going to be available. The other exclusion that may or not apply – ***if the regional centers are, for example, sponsored by a state government or a municipality or has any type of public involvement, there may be an out for governmental entities.*** There are two exclusions available, both under the Company Act and the Advisors Act, that apply to governments. So in the U.S. government any state municipality or political subdivision there are – or of any agency thereof or instrumentality there are, is excluded both from the Advisors Act and the Company Act. So depending on the level of state involvement, there may be out there.

Advisors Action Not Applicable

Joe had talked a little bit as to territorial applications of the securities laws. We have similar things under the Advisors Act, but as I was thinking about it, I don't think any of them are going to necessarily work for the regional centers, which I understand are in the U.S. I think any possibility that somebody might be a foreign advisor or an exempt reporting advisor – the terminology I'm using is all Dodd-Frank related and really kind of relates to hedge fund advisor registration. I don't think it'll work because the regional centers are going to be in the U.S., so that kind of cuts off that avenue of possible exemption. That's it for my two statutes.



Anti-Fraud

Steve Cohen, SEC, Division of Enforcement

I'll be reasonably brief, because my best advice is for you all to listen to the advice and guidance of my colleagues here from the regulatory divisions. Looking to their guidance is likely the best path to avoid any interactions with the division of enforcement. But I am also here to provide a cautionary tale of one regional center and some players who from our perspective ran afoul of the federal securities laws.
I would note something that Barbara just said, and I think it's relevant to the other presentations, which is just because somebody has a valid, for example, Reg-S exemption, just because you may not be engaged improperly as an unregistered broker, or investment advisor, or investment company, just because you might otherwise engage in business such that they don't fall under the regulatory auspices of the Securities and Exchange Commission does not mean that a securities offering in conjunction with the EB-5 program doesn't fall under our anti-fraud jurisdiction.

SEC Division of Enforcement

The Division of Enforcement investigates possible violations of securities laws, recommends Commission action when appropriate, either in a federal court or before an administrative law judge, and negotiates settlements.

The Chicago CC Example

By and large, from my observations, almost by definition, I think, the investments related to the EB-5 program are, almost by definition, securities. As a consequence, making false or misleading statements in the offer or sale of those securities constitutes a violation of the federal securities laws, and could result in actions by the Securities and Exchange Commission or Department of Justice. On February 8th of this year, the United States District Court in the northern district of Illinois unsealed a complaint by the SEC against Anshoo Sethi and two of his entities, which included the Intercontinental Regional Center Trust of Chicago, in which we brought fraud action against Mr. Sethi and his two entities in an asset freeze over the accounts of him and those entities. I'll highlight a few things related to that action.

Our complaint alleged that Mr. Sethi and his entities fraudulently sold more than $145 million worth of securities and fraudulently attained over $11 million in administrative fees from more than 250 investors principally based in China in conjunction with the EB-5 program, as is, I can tell, not unusual. The investment at issue here involves a very large real estate project – in this case, the Chicago Convention Center, purported to be a real estate project that was to build a hotel and convention center near Chicago's O'Hare Airport. We brought this case under two theories that I think are worth briefly mentioning.

Recent CCC Events

One was the alleged false and misleading statements by Mr. Sethi and his companies regarding the investments of these companies and I'll highlight a couple – but the second I think is worth mentioning here as well. We alleged a scheme to defraud by the defendants in this case in conjunction with the manner in which these companies solicited investments by using the EB-5 visa program, making false statements to USCIS as part of a scheme to defraud the investors in the program. In our complaint, we alleged, for example, that the defendants falsely posted to investors that they had acquired all of the necessary building permits to begin building the investment center and hotel, and that several major hotel chains had signed onto the project, which we alleged was false.

They also provided falsified documents to USCIS – the federal agency, as you know, that administers the program – in an attempt to secure the agency's preliminary approval of the project, and investors' provisional visas. ***Swift coordination between the SEC and USCIS allowed us to move quickly enough***

to stop this fraud, and preserve most of the investors' assets. There was actually a court hearing today in which the court discussed the SEC's motion to swiftly return the $145 million that was frozen to the EB-5 investors, hopefully as quickly as possible. Our hope and our goal here, the goal of our motion, is to actually return these funds to investors in a somewhat unusual way, before the conclusion of our action, with the potential consent of the defendants, so these folks can get their generally speaking $500,000 per investor back within the next several weeks or few months.

Additional Complaints

A couple of other things I would highlight – we alleged in our complaint that in addition to the false statements about the status of the project, the false statements submitted to USCIS included a fraudulent or false comfort letter from Hyatt Hotels about the status of a potential franchise agreement and operating agreement, as well as in response to requests for evidence from USCIS providing a fraudulent financing letter from the Qatar Investment Authority about the nature of certain promises of funding for the program. ***Among other things, we allege that there were misstatements about the status of construction, when this construction would begin, building permits, ground breaking and other things.***

The SEC brought charges against Anshoo Sethi in February 2013 for fraudently selling more than $145 million worth of securities in the Chicago Convention Center project.

I'd also note, relevant to our scheme to defraud theory, because I know it's as I understand a central part of the EB-5 program, part of our scheme to defraud theory had to do with representations made by the defendants regarding their ability to secure jobs, or under the project, which, as I suspect you all know, is relevant to the investors' ability to ultimately secure the visas that they were seeking, which was of course part of the marketing of the investments into the program. The litigation is ongoing, but this is an example of, from our perspective, the EB-5 visa program and a regional center that ran afoul of the anti-fraud provisions of securities laws, and we appreciated the coordination with USCIS in our ability to bring this action.

Division of Enforcement

The Division of Enforcement investigates possible violations of securities laws, recommends Commission action when appropriate, either in a federal court or before an administrative law judge, and negotiates settlements.

- About the Division
- Enforcement Manual
- Enforcement Actions
  - Federal Court Actions
  - Administrative Proceedings
  - ALJ Initial Decisions & Orders
  - Commission Opinions
- Trading Suspensions
- Investors Claims Funds
- Data Delivery Standards
- Delinquent Filings Program
- Prime Bank Fraud Information Center
- Investor Alerts
- Accounting and Auditing Enforcement Releases
- Wells Release
- Tips & Complaints

EB-5 Engagement with the SEC – The Questions & Answers

Immediately following the four presentations, subject matter experts from the SEC were available to answer a wide range of questions from the callers.

Question: Let's think in terms of a non-regional center program for a moment. This is going to be a $4 million to $5 million investment. The people in the United States are using brokers in China or Korea or somewhere else to solicit for them. They do no solicitation inside the United States, nor will they accept anybody to apply who's a resident in the United States. They might have a webpage that describes their EB-5 investment. Is this webpage going to get them in trouble as soliciting from the United States? Especially if the webpage says that it is not an offer of solicitation, and that can only be made to a prospectus or a CIM locally – how much do they worry about that is my question?

Joe Surey, Trading and Markets Division: If I could get you to clarify a little bit, just so I make sure I understand, it's a person in the United States who is, through a webpage, doing exactly what? Soliciting investments for let's say Chinese residents to participate in the program?

Audience: I believe that might run afoul of law and regulations – but let's say that you're building an office building in downtown Chicago, and you're going to raise $20 million at $1 million apiece from 20 investors and all of the investors come from abroad. All of the offers are made by brokers abroad, and you don't do any solicitation or advertising inside the United States – I think you'd agree up to that point, they're probably exempt under Reg-S. But let's say they have a webpage that merely describes their project as an EB-5 program so that somebody outside the country can look at pictures of the building they're going to build and that sort of thing. Just a general notification about their project that is not an offer of solicitation to sell, but just makes the availability of it aware.

Karen Wiedemann, Division of Corporation Finance: It's a fair question, but not one that we can answer. We really have to confine ourselves to talking about the rules and regulations and how they work and we're not permitted to give legal advice or to express views on particular facts or particular transactions. Those are questions that might make sense to ask of your own counsel. The one thing that I would point out, though, is that in the context of the exemptions that I was talking about for private placements and Reg-S offshore placements, where in both cases solicitation activity in the U.S. would be problematic, you should be aware that the definition of 'offer' is a very broad one. So any medium that sort of is broadly available to the public very much risks being considered to be an offer of securities, because it is intended to solicit offers to buy securities.

That's sort of a technical answer. That's about as far as I can go. So, good questions to ask your own counsel, but you shouldn't assume that just because something says it isn't an offer that it wouldn't be considered to be an offer under the terms of the securities laws that apply.

Question: If you're a broker overseas, let's say a Chinese immigration agent – to what extent are you allowed to have an office or conduct any kind of marketing activities in the U.S.? Let's say there's no

marketing activities going on, but they simply maintain an office somewhere in New York for just routine operations. Is that something that could blow their Reg-S exemption? Maybe too specific a question, but I'd like to have some sense the extent to which an overseas broker covered by Regulation S can sort of drift away from its own shores, into the U.S., without blowing its Reg-S exemption.

Joe Surey, Trading and Markets Division: Before the Reg-S specific reference, I was thinking this is more directed towards me, and I would say that as I began my comments with the territorial approach, this would be a potential problem for broker-dealer status. And the way I would use an example is what we not infrequently see, not in the context of the EB-5 program, but elsewhere, in particular in the Miami area. There are entities that will have offices in Miami or Fort Lauderdale, so Florida, and its entire business is soliciting of non-U.S. investors to purchase non-U.S. securities. The mere fact that they have the territorial presence in the U.S., even though they're selling foreign securities to non-US residents, triggers the broker-dealer registration activity.

Audience: Can I follow with one example? Sort of the opposite. You have a U.S. citizen soliciting investors in China, goes home once a year to visit mom and dad, but otherwise, he's living in China. Would that person have a problem? Should that person be licensed as a broker-dealer or broker-dealer rep?

Surey: That's hard. You can't really answer that, just based on those facts. If in fact the person is not doing any activity in the United States, at all, and lives abroad, and is engaged in soliciting a transaction, he may or may not have an ability to rely on exemptions, but it's going to be very fact-specific. If it's somebody here who frequently goes abroad to solicit investors for EB-5 programs or whatever and the activity abroad is just one part of what he's doing, then the question changes significantly. It's more likely there would be a registration issue on the table. Obviously my assumption is first it's being paid in connection with his activity, if it's not being paid, then it's less of an issue.

Audience: Well, let's say that person is getting finder's fees overseas. U.S. citizen, lives almost entirely overseas. Let's say entirely overseas. Does U.S. citizenship by itself render that something that should be within Reg-D?

Surey: I think you're confusing the 33 and 34 Act Statutes. I'm speaking about the person's status as a potential broker-dealer, which would trigger registration under 15A of the 34 Act.

Audience: I'm basically – if I could boil it down to its simple terms – should that person, that U.S. citizen overseas, start thinking about taking the Series 7 or Series 79 exam and associating with a broker-dealer firm, or may they just regard themselves as a fonder like any Chinese broker over there, the immigration agency, and just think he doesn't really have to go through that?

Surey: I would caution to look at where the person really resides. I mean if the person is truly living outside the U.S. and all the activity is taking place outside the U.S., then it's less likely in that scenario, so I can't say with certainty that there wouldn't be a broker-dealer status question if he's being paid for putting together a foreign investor with a U.S. EB-5 investment.

Question: I'm also an immigration attorney and member of Investment USA. I'm not a securities attorney, so forgive me if my question is a little bit confusing. But I want to go back on what's happening now with the EB-5 regional center and EB-5 projects regarding broker-dealers and your definitions of what an investment advisor is. The reality, as I see it, is most of the investors are being pooled together by, as the gentleman before said, usually brokers that are in places like China. These brokers usually are not registered with the SEC, because most of their – not to say 99 percent of their activities – are in China and they might have an office in the U.S. for liaison only.

But I'd like to know that if the SEC is concerned about fraud, are they also – let's say in China and other countries, brokers are getting finder's fees. That's the reality of the EB-5 business. Does it need to

be, number one, a disclosure by the EB-5 project or EB-5 regional center project, as to the investors, as to their finder's fees are being paid to brokers? And, number two, if the brokers do not disclose the finder's fees to the investors, what are the repercussions either to the brokers, by the SEC, or to the EB-5 regional center because of, again, I understand it as an immigration attorney _ _ fiduciary duty by a broker-dealer to an investor, but it may be a fiduciary duty by the investment advisors, which you may interpret to be the EB-EB-55 regional center project? So I need a little bit of guidance generally on the fiduciary duties and the disclosure element. And then maybe that could go to Barbara.

Karen Wiedemann, Division of Corporation Finance: I'll try to respond to the disclosure question as best I can. This is also in the category of sort of very specific situations that we can only address in broad outline. But it connects to the comments you've heard already about the fact that even when transactions are exempt from SEC regulation, they're not exempt from the anti-fraud provisions of the federal securities laws, and so you need to ask yourself from the standpoint – have you provided the investors with all material information that they need to make a fully informed investment decision? And obviously things like use of proceeds and payment of fees and potential _ _ _ between promoters of investments and _ _ immediately to mind as potentially material elements that ought to be disclosed very plainly and clearly and prominently to any potential investor. So I can only answer it to that extent, but that seems pretty plain to me.

Steve Collins, Division of Enforcement: Just staying at the hypothetical level, I've seen examples in the EB-5 context where there are disclosures about such things as payment of fees and very clear disclosures about the use of the $500,000 or the $1 million and the use of the administrative fees, and what the administrative fees might be used for. So without opining on what is good and bad disclosure and what may or may not run afoul, I'm just thinking in terms of situations where I have seen clear disclosures around how funds are intended to be used, and I know that in this program, there's often a distinction in some investments between the $500,000.00 or $1 million and the use of the administrative fees, which is usually described in some detail. I just note that, to give an example where you might see that kind of disclosure, but to Karen's point, again, the inquiry from an anti-fraud perspective is simply under a Supreme Court precedent – what would be material to a reasonable investor, and that's a question you'll have to consult with counsel on that we couldn't tell you in a hypothetical way.

Audience: Just as a follow up, what do you think about the issue of the broker-dealer having no fiduciary duty to the investor, and if the investor says, oh, I did not know, for example, that the administration fee which could be classified as a marketing fee, is really a finder's fee to the broker – the broker did not disclose that to me, and that could be a broker in China or any other country. Then _ _ that material to maybe a misrepresentation would the SEC, could the SEC, go after the broker, or would the SEC go after the EB-5 regional center under those circumstances?

> "It's essentially a lie, from our perspective, if you make statements to investors that leave out material information."

Joe Furey, Trading and Markets Division: Well, I guess a couple things come to mind. First, I think is a flat _ _ statement of law an investment advisor has a fiduciary duty to his clients. A broker-dealer may have a fiduciary duty to his clients depending on the terms and conditions and the nature of the specific transaction in place. And as to – and Barbara can specifically comment on the advisor fiduciary duty aspect to it, but in terms of what would the commission do, it's going to depend on, as Steve articulated and Karen, it's ultimately the core here is going to be an anti-fraud analysis as to what's taken place and what the disclosure is. And the other issues, I would say, would be tangential, though not unimportant, but tangential to the anti-fraud issues.

Collins: I just want to make sure, I think between Karen's comments and mine, so that there's just maybe a little more clarity. There's a latent issue I think we're discussing and I want to be direct about it. We think often in terms of false or misleading statements when we can think about the anti-fraud jurisdiction and someone committing fraud, lying for example, to investors. The point you raised, sir, about things that may not be disclosed, can also be a basis for our anti-fraud jurisdic-

tion. So from our perspective, failing to disclose material things to investors can run afoul of the anti-fraud jurisdiction, so it doesn't have to be a lie. It's essentially a lie from our perspective if you make statements to investors that leave out material information. I think that's what you're getting at with your question, I just wanted to make sure that was clear to the folks on the call.

Audience: I think that even when we are talking about the USCIS draft policy memorandums, we're talking about changes, material changes. We're talking about the issue of what is material. I think that just as we would require and ask from the USCIS for clarity, which would lead to predictability, I think we definitely need to continue the dialogue with the SEC, because without the clarity from the SEC, we can't have a successful EB-5 program, and so when you talk about what is material filing to disclose material facts, again, we need to have some clarity as to what is 'material'. For example, if EB-5 regional center project says, well, we are using the administration fees for marketing efforts, is that enough to file a disclosure to encompass that, yes, we're going to be using – would that be enough if from the administration fees that the finder's fees are to be paid to the brokers? That's the clarity that we really need.

> "...people are going to have to engage securities lawyers that are skilled in these things (EB-5)."

Cohen: I think just from the SEC's perspective, while we have very much enjoyed and will continue to enjoy collaborating with USCIS with respect to this program as appropriate, and we appreciate the opportunity to share some general principles with you all, from our perspective, the EB-5 program – the investments in the EB-5 program are just one part of the very broad capital markets, potential investments in our capital markets, that people make. The investments themselves are unremarkable in the sense that people in the U.S. and outside the U.S. invest in our capital markets all the time, and just as a practical matter, we hate to keep going back to this refrain, but people are going to have to engage securities lawyers who are skilled in these things. We're unlikely to be the source of ongoing regular guidance with respect to the EB-5 program specifically, but we suggest you consider that there are lots of very experienced securities lawyers in the United States who are very well qualified to answer these questions on the areas that each of us have touched on.

Question: I have a question relating to the Chicago Convention Center that is currently ongoing, and that is whether or not _ _ _ _ _ too specific question, but whether something _ _ _ would direct the $500,000 investment to an escrow account that is located in the United States rather than sending the money back to the country in which it originally originated from?

Steve Cohen, Division of Enforcement: As the motion we filed recently is actually available publicly. It's filed with the court in Chicago. My general recollection is that we looked to the terms of the agreements by the investors, and the origin of the funds, and that our goal is to return monies to investors in most instances from the perspective that these funds were held in an escrow account, and our expectation is that the monies will be returned from to the origin from where the funds came from into the escrow account. I can't go any deeper than that but to tell you that our position is on record and filed with the court.

Audience: _ _ the investor request that they be _ _ _ located in the U.S. it would not be something that the SEC would consider?

Cohen: That, I believe, based on our request to the court, it's possible that those requests might be able to be taken up with the escrow agent. We are not intending that the commission administer the return of funds.

Audience: And what would be the escrow agent?

Cohen: The escrow agent is Sun Trust – I don't have the name or other information handy.

Question: I have a few questions that I think can be answered in a general manner, and they're pretty practical or pertinent to the regional centers that I've come in contact with. One is – with the investment company act of needing to register with funds that would be greater than 100 accredited investors, I'm wondering if there's a concern about that and especially if we're using Mr. Sethi as an example, it seems like he had 250 investors, and if you could speak to that?

Another would be with the safe harbor issue. I understand that there may be part of that under that exemption a limit of one offering per year as an under-

> "...the Investment Company Act will only be triggered if the investment vehicicle, the pooled investment vehicle, meets the definition of an investment company."

stand reasonable amount. Then I have a question as to whether Reg-S and Reg-D can actually be used as exemptions simultaneously with the flow of information from the U.S. easily around the world? And then my last one would be to clarify non-U.S. investors. And as an example, if there is a foreign student in the U.S. that is paying foreign tuition and has a visa just to come to school or to go to school, maybe they've been there two or three years, is that considered a U.S. person or not?

Barbara Chretien-Dar, Division of Investment Management: I will try to answer your first question. I think you've got a total of four different questions going on. With respect to the regional center and the enforcement action, the investment company act will only be triggered if the investment vehicle, the pooled investment vehicle, meets the definition of an investment company. I don't think that enforcement case it actually met the definition of 'investment company, i.e. the pool was not necessarily investing in securities. I think it was real estate. So there is an exclusion available for pooled investment vehicles that essentially invest in real estate or real estate-related interest. The Company Act I don't believe was triggered in that enforcement action. I think that answers your first question.

Audience: My second question had to do with the safe harbor from broker-dealer registration. And you correctly point out that 3A4-1, which is the rule, does have a limiting factor that you can do this engagement activity once in a 12-month period. The one thing I would point out, though, is that that is a non-exclusive safe harbor, and failure to meet the terms of 3A4-1 does not by definition mean you are a broker-dealer.

Karen Wiedemann, Division of Corporate Finance: I think your other two questions are for me. One of them was whether it would be possible to conduct a non-registered securities offering in the U.S. in reliance on Regulation D and offshore in reliance on Regulation S – the answer is yes you can. If you meet the conditions of both rules, then, in principle, that's certainly a route that you can go down. Your last question I think was about the nature of who is a U.S. person for purposes of Reg-S. Again, if you go back to the broad outline that I provided, one of the basic requirements for Reg-S is that the offer and sale be an offshore transaction. A U.S. person for that purpose is someone who is not in the U.S. – because what is keyed off of is this simple fact that the offering and sale are not occurring here. So if someone is in the United States, that's not offshore – that's here.

Audience: If I can continue with that question – if a student goes back on spring break or Christmas or whatever, then is that considered a non-U.S. person?

Wiedemann: I'm sorry that I can't give you a more satisfactory answer than to say that the focus is really where the offer and sale are occurring and that how you structure your transaction is going to be up to you, but the general principles are what they are.

Question: You mentioned something about the Jobs Act. Can you give me a little detail around how is EB-5 potentially going to be tied to that, or not subject to that?

Karen Wiedemann, Division of Corporate Finance: What I wanted to point out, because people may have followed this in the news, is that under the Jobs Act, the SEC is mandated to change some of the rules under rule 506 of regulation D to permit general solicitation in certain instances. I just wanted people who were broadly aware of that to know that although there are proposed rules out there, they haven't been finalized and adopted. There are no rules in effect and so the prohibition against general solicitation is still fully in force for all of Regulation-D.

Question: My question has to do with the attorney exclusions that we discussed earlier. Could you please clarify how someone like an immigration attorney like myself and our office who represents sometimes projects, sometimes regional centers, sometimes investors, how that would affect an immigration attorney like myself and our office, and how we'd be able to use that, or things we should avoid?

Barbara Chretien-Dar, Division of Investment Management: I can talk generally about the exclusions, but whether or not an exclusion is available in any particular case is going to be very, very fact-specific. So in general, an attorney or accountant can rely on the exclusion under the Advisors Act from the definition of 'investment advisor' if their investment advice is incidental to their professional practice. So if you are an

immigration attorney and you are being compensated for providing legal services to clients for immigration advice, if you are providing, along with that legal advice, advice about particular investments – say you recommend that the client invest in somebody who's raising funds for a hotel project – if that advice relates to securities, that advice must be incidental to your legal services.

So the key is that you want to avoid falling into the definition of 'investment advisor' which is somebody who is in the business of providing investment advice for compensation. So the way to view it I guess on – and I'm really oversimplifying it here – is you want to provide a lot of legal services and any investment advice you give is on the side and it's very little and you get no extra compensation for that, i.e. your compensation is for legal services. Once you start getting compensated for the investment advice you provide, you are on pretty thin ice in terms of the definition. Does that help at all?

> "Once you start getting compensated for the investment advice you provide, you are on pretty thing ice in terms of the definition."

Audience: I think what we normally do and actually I work for one of the previous callers in Orlando, and what we do is more along the lines of – of course, as I said earlier, the immigration for investors, providing their petitions or sometimes for projects to make sure their legal or financial infrastructures are in place for the EB-5 program. So it sounds like, of course, be careful, but I think we might be okay.

Chretien-Dar: Like I said, it's all facts and circumstances. There are a number of no-action letters – you might not know what a no-action letter is (laughter). The staff provides informal guidance very often on very close calls or interpretive questions, and if you go on the SEC's website and you click on the Division of Investment Management, we have no-action letters that are publically available, and you can search those for either by section or by topic. But the section you would want to search under is section 202-A-11, which is the definition of 'investment advisor'. You might want to just browse around the Division of Investment Management's segment of the website and see, and look for no-action letters under the definition of 'investment advisor'. They can be helpful in terms of providing specific fact-patterns and when the staff would view somebody as an investment advisor or not. Just keep in mind, those are staff views, and they are informal guidance.

> "You might want to just browse around the Division of Management's segment of the website and look for no action letters under the definition of 'investment advisor'."

Question: My question concerns the Supreme Court's Morrison decision and how – what _ _ decision on the Morrison's decision and for those many on the call won't know what that is, but that was a Supreme Court decision that held that Congress did not intend for the anti-fraud provisions of the 1934 to apply extra-territorially, and in particular, I think this question is suited for enforcement and for creating markets. The reason – magistrate judge decision just happened in Illinois that related to broker-dealer registration and the Morrison decision.

Steve Cohen, Division of Enforcement: I probably won't go too deep on this other than to say – suffice it to say, we didn't, in the Chicago case, for example, we didn't view Morrison remotely as an impediment to our ability under rule 10B-5 to bring a fraud action against these individuals. Of course, we're aware of the jurisprudence that's developing around Morrison. Obviously, to the extent that for some of the _ _ these are going to be facts and circumstances cases around the offerings. And obviously to the extent that these offer and sales take place post-Dodd-Frank, that they also provide some additional guidance, because Dodd-Frank has a provision for offer and sales post-Dodd-Frank that addresses some of the issues that arise under Morrison. But just at a 50,000 foot level, for the majority of circumstances that I've seen with regional centers and EB5 offerings out of the United States of foreign investors, our perspective is that Morrison would not be an impediment to us bringing an action under the federal securities laws.

Question: I'm a corporate securities partner that practices heavily in the 40-Acts as well as the 34 and 33 act. I'm going to ask about an issue that comes up frequently, and that is – looking at the interpretive guidance that the SECs provided as well as no-action letters, when you're dealing with broker-dealer activities and solicitation of investors, there's lots of material. What we see here is broker-dealer activity or activities that you

don't normally see in the initial securities offering space _ _ offshore broker-dealers that are soliciting issuers here in the United States. Everything is always focused on protect the investor, full disclosure, ensure that the investor is getting adequate disclosure.

And that's with a lot of the interpretive guidance and action letters speak to – in this situation we have offshore broker-dealers or finders or migration agents sending representatives to the United States or setting up offices in the United States not to solicit investors but to solicit issuers so they can then offer an offshore completely and raise capital from offshore investors through their offshore operations using only instrumentalities offshore, not interstate commerce, to fulfill the capital raising or capital formation needs of domestic issuers. So again, everything speaks to the side of the equation where you're soliciting investors.

But here, the focus is the activity of soliciting issuers. Does the presence of a representative in the United States, whether an office or infrequent travels to the United States to solicit issuers, or make issuers aware of the availability of offshore broker-dealers, trigger registration under the 34 act?

Joe Surey, Trading and Markets Division: One thing I would note here is that broker-dealer activity runs a wide gamut of various services. And one of the things that struck me as you were describing that is that investment banking firms very often go to U.S. issuers and solicit the issuer to structure a financing or a sale or a purchase and the longstanding view of the commission staff is that activity, investment banking activity, even if you're looking at only through the lens of focusing on the issuer, still gets into activity which generally speaking would probably trigger broker-dealer registration.

Question: I'm a real estate broker in New York. We're in the process of setting up an EB-5 regional center. Basically, I understand we're going to be investing in real estate, to stress real estate and so forth, creating jobs and whatnot, but we're also going to be investing with other types of investment such as bank notes and tax lien certificates. The question is since we're dealing with those two, we're buying the bank notes directly from the banks, not from a securities broker, and when we do the lizz-penances we're buying it directly from the municipality at a local government

> "If you're here with most of the activitity (broker-dealer) taking place abroad relating to an investment here, the status question squarely is presented, and if they're being paid in that context, depending on the facts and circumstances, may lead to the conclusion registration is appropriate."

that issues. The question is – do we need to register as a registered investment advisor? Do we have to set up the EB-5 center? Going to be a separate corporation than the limited partnership that's going to own these instruments _ _ the real estate?

And another question is if we're going to – if we have to go to this, do we just need one status for _ hedge fund or investment company to __ - is it okay to also set up a feeder fund outside the U.S. so we don't exceed the 100 investor rule as since none of those individuals are going to probably be U.S. investors except for the occasional institutional investor?

Karen Wiedemann, Division of Corporate Finance: I think those are all really good questions for you to ask your own lawyer.

Barbara Chretien-Dar, Division of Investment Management: I would echo that. It sounds like you are contemplating a fairly complicated structure that may implicate pooled vehicles, an investment advisor, and kind of a fund-to-fund structure. So I would highly recommend seeking out competent securities counsel.

Question: Understanding that anti-fraud provisions are going to apply in any and all events, if all of the promotion and sales of an investment is done overseas, nothing in the U.S., does a water's edge analysis of why as to whether a person conducting those activities is required to have a U.S. broker-dealer license, and to follow up on that, does the person's residence in the United States have any bearing on the analysis? Again, all the activities are conducted overseas.

Joe Surey, Trading and Markets Division: The framework is not going to change. It's going to be – what is the activity? Is it being done in the U.S.? So from your scenario, if someone's totally abroad, and has no

jurisdictional hook here, then it's difficult to see how the status questions are triggered. If you're here, with most of the activity – with a presence but most of the activity takes place abroad relating to an investment here, the status question squarely is presented, and if they're being paid in that context, then very clearly have a broker-dealer status question that will, depending on the facts and circumstances, may lead to the conclusion registration is appropriate.

Audience: And that's even if all the activities are taking place overseas and the U.S. person does no activities relating to the regional center in the United States?

Surey: Right, the thing I come back to is I think the clearest example that makes this point crystal clear and simple is that I rent an office in Miami. I spend 300 days a year traveling in South America and Central America soliciting rich potential clients to invest in foreign securities. All that activity takes place offshore involving non-U.S. persons, but because I have the territorial presence in the U.S., the status question is squarely raised, and there's guidance from the commission and releases that activity because of the presence requires registration status.

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Customer Service and Public Engagement Directorate
Washington, DC 20529

U.S. Citizenship and Immigration Services

Meeting Invitation

★ ★ ★ ★ ★ ★ ★ ★

USCIS EB-5 Engagement with the Securities and Exchange Commission
Wednesday, April 3, 2013 @ 3 p.m. (Eastern)

U.S. Citizenship and Immigration Services (USCIS) and the Securities and Exchange Commission (SEC) invite interested individuals to participate in a stakeholder teleconference to discuss the EB-5 Immigrant Investor program. During the engagement, subject matter experts from the SEC will discuss securities law compliance in the context of EB-5 regional centers and investments. Stakeholders will have an opportunity to ask the SEC questions at the end of the teleconference.

To Register

Please click here to RSVP for this engagement. Be sure to complete and update your subscriber preferences. Once we receive your registration, we will send you a confirmation email with additional details.

If you have any questions regarding the registration process, please contact the Public Engagement Division at Public.Engagement@uscis.dhs.gov.

To Join the Session

On the day of, please use the information below to join the teleconference. We recommend that you call in 15 minutes before its start.

Call-in Number: 1-888-989-5161
Passcode: EB-5

Please note this call is intended for stakeholders only. Members of the media who have inquiries should contact the USCIS Office of Communications at 202-282-8010.

We look forward to engaging with you!

Question: I'm really curious about the potential new regulations under the Jobs Act. I understand that they're in the works. Could you inform us about when they're going to be issued or when a proposed rule can be made available to the public? Seems like it would be a tremendous benefit, reducing the amount of paperwork and uncertainty.

Karen Wiedemann, Division of Corporate Finance: As I said, rules have been proposed. They're available on our website. You can look at the rules, you can look at the public comment that's come back in response to the rules. We're working on finalizing recommendations to the commission, but we don't have a timetable for when that process is going to be completed. ■

EB-5 Stakeholder Meeting
Executive Summary

The Office of the Citizenship and Immigration Services Ombudsman (Ombudsman's Office) held a stakeholder meeting on the EB-5 Immigrant Investor Program on March 5, 2013.

Opening Remarks

Ombudsman Maria Odom began her remarks by emphasizing that the purpose of the meeting was to discuss solutions to challenges in the EB-5 Immigrant Investor Program. She noted that the EB-5 program can be an engine of economic growth and spur job creation. Ms. Odom reported the following:

- Today, there are over 243 approved EB-5 Regional Centers in 40 states and two territories, compared to just 25 EB-5 Regional Centers in 2006;
- Investor interest in the program is spreading not just in Asia, but from all corners of the globe;
- EB-5 filings have surged year after year for the past three years; and
- In FY 2012, over 7,400 EB-5 visas were issued.

Ms. Odom recognized the leadership and efforts of U.S. Citizenship and Immigration Services (USCIS) Director Alejandaro Mayorkas and the agency over the past several years to make improvements to the EB-5 program, but noted that there is still work to be done. Since October 2012, the Ombudsman's Office has received nearly 400 requests for assistance on EB-5 cases, with the vast majority of the cases presented involving filings that are beyond posted processing times.

In concluding her opening remarks, Ms. Odom noted that many of the challenges that are with us today were previously identified in the Ombudsman's 2009 EB-5 program recommendations.

Panelists Remarks

A panel comprised of Peter Joseph, Association to Invest in the USA (IIUSA); Lincoln Stone, Stone & Grzegorek, LLP, and William Yates, W.R. Yates & Associates, provided the following perspectives:

- The EB-5 program faces stiff competition from countries with more predictable and speedy immigrant entrepreneur programs.
- To compete, the EB-5 program needs stability and predictability that allows for reasonable commercial risk taking.
- Fairness, due process, increased transparency in policy formation, and predictability in adjudications should be hallmarks of the EB-5 program.
- Future EB-5 policy development must be conducted in coordination with business realities and align with commercial reasonableness, but should not excessively intrude into business decision making.
- A clear and binding project pre-approval process followed by actual adjudication deference is key to EB-5 reform.
- Actual processing times that approach or exceed one year are undermining the program's success.
- Communication through multiple Requests for Evidence (RFE) is inefficient, causes delay, and damages the program.
- Program integrity is critical, and the agency should use existing USCIS Fraud Detection and National Security resources to identify and take action as warranted.
- The planned movement of the EB-5 adjudication unit to Washington, D.C. may, in the short-term, exacerbate adjudication inconsistencies and delays. Participants hope USCIS will publish its transition plan as soon as possible.
- In addition to Director Mayorkas' commitment to improving the EB-5 program, a program leader is needed to manage the new Washington, DC-based adjudication unit and ensure quality, timely adjudications in

accordance with the preponderance of evidence legal standard.

Open Forum Session

Communications

• Participants were critical of the dedicated EB-5 program email box, due to lack of responsiveness or personalized responses.

• Stakeholders seek more direct communications with adjudicators via telephone and email.

Processing Delays

• Many participants noted that posted processing times are unreliable. They also expressed frustration over receipt of multiple RFEs.

• It was emphasized that adjudication delays affect both investors and project developers.

Quality, Consistency, Predictability

• Participants suggested that the quality of USCIS decisions varies widely.

• Participants expressed concern that new policy guidance is regularly implemented retroactively without notice.

Other Comments

• One participant stated that the current administration of the EB-5 process is hurting "Brand USA," and foreign investors are taking advantage of immigrant investor programs offered by other countries.

• Another pointed out that many individuals who obtain EB-5 visas make significant investments over time in the U.S. economy and culture; the initial investment made under the EB-5 program is just the start.

• It was suggested that if USCIS had a predictable preapproval process, projects would be able to eliminate the current convention of placing funds in escrow during the adjudication process, thereby advancing project funding and speeding up job creation.

• Several participants urged that USCIS reevaluate the timing of the job creation requirements for EB-5 regional center program investors, and whether such requirements are needed or are practical.

• Another specific area of concern raised by several participants is a recent focus they believe is being wrongfully placed by USCIS adjudicators on North American Industry Classification System (NAICS) codes; they stated that the level of specificity currently required by adjudicators is impeding regional center growth.

Stakeholder Suggestions

• Several participants expressed a desire to know what information USCIS wants in EB-5 submissions, suggesting that the agency provide filing checklists.

• Several participants called for USCIS to convene a meeting between economists representing the government and those representing the regional centers to identify and discuss unresolved issues concerning job creation. Issues include tenant occupancy models and phased construction projects that span multiple years.

• A representative of the Small Business Administration, Office of Advocacy was in the audience and encouraged attendees to contact her office to discuss the impact of changes in USCIS policy guidance to small businesses. The representative also stated that the SBA is interested in hearing from stakeholders regarding USCIS's efforts to reform the EB5 program through policy guidance instead of rulemaking. ■

> "Fairness, due process, increased transparency in policy formation, and predictability in adjudications should be hallmarks of the EB-5 program."

Group Holds Roundtable Discussions on Securities Best Practices

with U.S. Regulatory Agencies & Dept. of Commerce

Following the IRCTC action and an increased concern about the practices of raising capital by unregistered firms and persons, fraud and misrepresentation in the EB-5 program, a group of securities attorneys, broker dealers and investment advisors met with officials and regulators with the Securities & Exchange Commission (SEC), Financial Industry Regulatory Authority (FINRA), North American Securities Administrators Association (NASAA) and the Department of Commerce to discuss transparency, compliance and oversight for the industry as well as engage in a discussion concerning education for those unfamiliar with U.S. securities laws and practices.

Vince Molinari, Sara Hanks, Doug Ellenoff, Adam Gale, Michael Gibson

EB-5 Day Itinerary
Tuesday, April 9, 2013
- Department of Commerce , 9 am - 10 am
- NASAA, 11 am – 12 pm
- FINRA, 1pm – 2:30 pm
- SEC, 4 pm – 5 pm

EB-5 Securities Attorneys and Registered Persons Presentations
Attendees: Michael Gibson, Adam Gale, Douglas Ellenoff, Sara Hanks, DJ Paul, Vincent Molinari

Agenda:
- An Overview of the Current EB-5 Transactional Environment: Practices of Regional Centers, Consultants & Finders
- The of Roles of Attorneys, Advisors, Broker Dealers, Registered and Unregistered Persons
- EB-5 Regional Centers & Regional Center Management Firms operating as Investment Companies, Finders, Advisors & Broker Dealers
- Regional Centers and Compensation of Agents, Consultants & Finders in the Marketing and Distribution of U.S. Securities to Investors
- Discussion of Suggested Securities Best Practices, State & Federal Regulatory Oversight for the Industry

The predominance of unregistered "consultants" and firms involved in raising of capital and the payment of fees to unregistered finders and agents as well as a lack of investor protections and transparency concerning the marketing and promotion of offerings to investors in the EB-5 program were a few of the many topics covered in the discussions.

The candid discussions involved suggestions on bringing in standards, procedures and best practices from other capital markets to improve the transparency and accountability for issuers and those who assist them in the capital raise, promotion and marketing of

these securities in a legally compliant manner. The purpose of the meetings was to engage with the regulators to see how private sector stakeholders could encourage compliance with securities laws through education and awareness to reduce the incidences of fraud and misrepresentation by unregistered persons and increase investor protections afforded to them under the law.

Bios

• **Michael Gibson** is the managing director of USAdvisors and publisher of EB5Info.com and EB5News.com and is a Registered Investment Advisor (CRD# 157403). He established USAdvisors.org as an organization to assist foreign nationals with their EB-5 investment decisions through risk analysis and due diligence.

• **Adam Gale** is co-chair of the firm's Investment Funds Group. He focuses his practice on counseling hedge funds, private equity funds, broker-dealers, banks, and registered investment companies on regulatory and compliance issues, as well as on formation and structuring.

• **Douglas Ellenoff**, a member of the firm since its founding in 1992, is a corporate and securities attorney with a specialty in business transactions and corporate financings.

• **Sara Hanks**, co-founder and CEO of CrowdCheck, is an attorney with over 30 years of experience in the corporate and securities field. CrowdCheck helps entrepreneurs through the disclosure and due diligence process. Sara's most recent position was General Counsel of the Congressional Oversight Panel, the overseer of the Troubled Asset Relief Program (TARP). Years prior, while at the SEC and as Chief of the Office of International Corporate Finance, she led the team drafting regulations that put into place a new generation of rules governing the capital-raising process.

• ***DJ Paul***, chief strategy officer with GATE Impact, develops solutions to facilitate and expand private and alternative asset transactions, including crowdfunding and 506/Regulation D securities. DJ is nationally known for his expertise in regulatory compliance and electronic infrastructures and is regarded as one of the pioneers of the crowdfund investing movement. His desire to find solutions that work for investors, issuers and federal policymakers during and immediately after passage of the JOBS Act led him to coordinate the first post-JOBS Act meeting between the Securities Exchange Commission and crowdfunding stakeholders.

• **Vincent Molinari**, founder and chief executive officer of GATE Technologies, has been the driving force behind GATE's mission to create new market infrastructure that brings transparency, efficiency, and liquidity to the unstructured global alternative asset markets. He is responsible for GATE's strategic planning and business initiatives, including corporate alliances and strategic partnerships.

He is a founding board member and co-chairman of the Crowdfund Intermediary Regulatory Advocates (CFIRA) which was established by the crowdfunding industry's leading platforms and experts to work with the SEC, FINRA, and other affected governmental and quasi-governmental entities on establishing industry standards and best practices. Molinari was named as one of the Top 10 Most Influential People in Business Crowdfunding in *Forbes Magazine*. ■

From left: Michael Gibson, DJ Paul, Adam Gale, Sara Hanks, Doug Ellenoff, and Vince Molinari.