

EB-5 Capital Markets

Legal perspectives on EB-5 project finance

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SEC Freezes Assets and Brings Civil Charges against EB-5 Investor Visa Project

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In the first SEC enforcement action of its kind, the SEC announced on February 8, 2013 that it had filed civil charges against, and received an emergency order to freeze assets of, the Intercontinental Regional Center Trust of Chicago, a designated Regional Center under the EB-5 Immigrant Investor Program administered by U.S. Citizenship and Immigration Services (USCIS), and the Regional Center's principal. See full complaint [here](#).

What is the EB-5 Immigrant Investor Program?

The Immigrant Investor Program, commonly known as EB-5, was created by Congress in 1990 to stimulate the U.S. economy through job creation and capital investment by foreign investors. Under the pilot immigration program, first enacted in 1992 and rolled out in 1993, certain EB-5 visas are set aside for investments in Regional Center projects. The pilot program is currently authorized until September of 2015. Foreign nationals investing the required funds who demonstrate creation of the requisite number of jobs will receive conditional permanent residency, or a conditional "green card," in the United States for himself/herself, his/her spouse and all dependent, unmarried children under age 21.

Are EB-5 investments exempt from federal or state securities laws?

No. There is no EB-5 specific exemption to any U.S. securities laws. Despite the investor pool consisting entirely of foreign nationals, individuals and entities raising money in these offerings must comply with (or find an applicable exemption from) the Securities Act of 1933 and state "blue sky" laws concerning the offer and sale of securities, the broker-dealer registration requirements of the Securities Exchange Act of 1934, the Investment Advisers Act of 1940 and state equivalents, and the Investment Company Act of 1940, as well as all applicable foreign securities laws.

Who are the defendants in the SEC litigation?

Intercontinental Regional Center Trust of Chicago (Intercontinental) is a Regional Center that was designated by USCIS in June 2011. A Regional Center is an economic entity, public or private, which is involved with the promotion of economic growth, improved regional productivity, job creation and increased domestic capital investment. The other defendants are the special purpose fund that received the investors'

proceeds and the principal of Intercontinental, who is alleged to have directed all of the illegal activities and misappropriated investor funds to a personal account.

Intercontinental has been raising funds since late 2011 for a proposed hotel and convention center located close to Chicago's O'Hare Airport. The special purpose fund offered 499 limited liability company membership interests for \$500,000 each, plus a \$41,500 administrative fee, and was one of the largest EB-5 projects in the history of the program. At the time of the SEC's receipt of the emergency order, the fund had taken in \$145 million of job-creating capital and over \$11 million in administrative fees.

What are the SEC's allegations?

The allegations relate to misrepresentations or omissions in the offering documents and in documents filed with USCIS in connection with the applications for conditional permanent residency. According to the complaint filed by the SEC in U.S. District Court for the Northern District of Illinois, the offering documents made numerous false claims, including the receipt of all necessary building permits, franchise agreements with several major hotel chains, the availability of a state-sponsored bond facility, the value of the underlying land, the financial potential for the project to provide a return to investors and the refundability of administrative fees if visa approvals were not granted. The SEC's complaint also alleges that the sponsors provided falsified documents to USCIS in an attempt to secure conditional visa approvals for investors, which approvals were a precondition to release of each investor's \$500,000 investment to the issuer. Finally, the complaint alleges that more than \$2.5 million of \$11 million in administrative fees were directed to the principal's personal bank account in Hong Kong and most of the balance spent rather than available for refund.

Why is this case important?

While there have been allegations of fraud around other regional center projects, this is the first EB-5 enforcement action filed by the SEC. Press reports from September 2012 indicate that an internal memorandum prepared by the USCIS noted that Regional Centers "are not even making good-faith attempts to conform their offering documents to basic securities regulations." Press reports also indicate that the Department of Homeland Security's Office of Inspector General has launched an investigation into fraud in the EB-5 program. The SEC notes in its press release for this action there was close coordination with USCIS in bringing the case.

This case confirms that both the SEC and USCIS are paying attention to compliance with securities laws, and USCIS is now monitoring for securities law compliance in its review of visa applications.

Should I consider participating in the EB-5 program?

This case should not discourage anyone from considering or participating in the EB-5 program. Rather, it should be considered a strong message that these investment programs, like any other investment program, must comply with all applicable laws, including securities laws.

The EB-5 program is not right for every project that needs capital, but it can be very attractive for project sponsors, local communities and foreign investors alike.

If I am an investor considering an EB-5 investment, what can I do to better protect my investment and my ability to obtain U.S. permanent residence?

Due diligence is extremely important. Every investor should ensure he/she has an understanding, at a

minimum, of the Regional Center, the investment opportunity and risks, the job counting methodology and projections, any aspects of the project that introduce risk into the visa process, and the background and experience of the project's sponsor and the principals of the sponsor and the Regional Center.

The SEC's allegations in the Intercontinental case suggest a failure of due diligence, as many of the allegedly false representations in the offering documents could easily have been confirmed as questionable through the same simple investigation of verifiable facts that the SEC describes in its complaint.

Effective due diligence usually requires hiring experienced professionals. Many overseas investors rely on intermediaries, such as finders and marketing firms, but many of these intermediaries have historically lacked the experience or incentive to perform effective due diligence.

We speculate that in order to be competitive in the marketplace, some Regional Centers will begin facilitating verifiable due diligence for potential investors and their professionals.

What if I have further questions?

Sheppard Mullin has substantial experience representing Regional Centers, individual project sponsors and foreign nationals considering EB-5 investment. The firm has assembled an experienced interdisciplinary team to assist with all aspects of the EB-5 program with a focus on immigration and securities compliance. Key members of our team have two decades of experience in the EB-5 program. We have prepared FAQs on the EB-5 program available [here](#).