
EB-5 Capital Markets

Legal perspectives on EB-5 project finance

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Affiliating with a Broker-Dealer

By John Tishler on June 24, 2013

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We frequently speak with our clients about whether their participation in an EB-5 program requires registration as a broker-dealer. Joseph Furey, Assistant Chief Counsel at the SEC Division of Trading and Markets, addressed this topic on the joint USCIS/SEC stakeholder call held on April 3, 2013. The SEC staff takes a broad view of the broker-dealer registration requirements — broad both as to activities that require registration and as to applicability to extraterritorial activities. (Readers should note that an SEC staff view does not necessarily mean that the SEC would be successful in an administrative or litigation enforcement action brought against an unlicensed participant. However, the SEC may bring such an action, and any company not registering would face the possibility of the cost of defending itself in any such action.)

Registration as a broker-dealer is a time-consuming process and once registered, a broker-dealer has robust ongoing compliance requirements, including being subject to regulation by FINRA. For many EB-5 participants, registering as a broker-dealer would require a significant increase in their costs of doing business.

An alternative for EB-5 participants is to affiliate with a registered broker-dealer. The simplest way to understand this arrangement is to think about a traditional company which wishes to raise money in an initial public offering. In an IPO, the issuer engages a broker-dealer (more often, a syndicate of broker-dealers) to offer and sell the securities. The IPO remains the issuer's offering. The issuer continues to be an active participant in the offering, including drafting the disclosure document and putting on "road show" presentations to potential investors coordinated by the broker-dealers.

Similarly, a full service regional center offering securities (an issuer) can conduct the offering through a third-party registered broker-dealer, still playing an active role itself, and compensate such broker-dealer based on success of the offering.

Until recently, there were few, if any, registered broker-dealers active in the EB-5 space. Several firms have now entered this marketplace. We are compiling a list of these firms.

For those EB-5 participants coming to the reluctant conclusion that their activities fall within the purview of the SEC's position on broker-dealer activities, affiliation represents an attractive alternative to full registration.