DHS - Comments of EB5 Securities Roundtable

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VIA WEBSITE UPLOAD
Ms. Samantha Deshommes
Chief, Regulatory Coordination Division, Office of Policy and Strategy
U.S. Citizenship and Immigration Services,
Department of Homeland Security
20 Massachusetts Avenue NW
Washington, DC 20529

Re: DHS Docket No. USCIS-2016-0008

COMMENTS OF EB-5 SECURITIES ROUNDTABLE

Dear Ms. Deshommes:

In response to the Advance Notice of Proposed Rulemaking (ANPRM) above seeking comment from all interested stakeholders on several topics concerning the EB-5 Immigration Investor Visa Program ("EB-5 Program"), the EB-5 Securities Roundtable (the "Roundtable") herewith provides comments and suggestions from its members. Moderated by Kurt Reuss of EB-5 Diligence, the Roundtable is comprised of ten (10) prominent attorneys regularly engaged in the securities law aspects of the EB-5 Program. The Roundtable members have handled a substantial number of the securities offerings under the EB-5 Program ("Regional Centers") for several years. Members of the Roundtable have vast experience in private and public securities offerings in the United States and abroad, as well as in securities compliance and enforcement matters. To this end, a key objective of the Roundtable is to ensure that reforms to the EB-5 Program are harmonized with federal and state securities laws.

As a preliminary matter, the Roundtable is pleased that needed regulatory reforms are under consideration for the EB-5 Program. In the opinion of the Roundtable, the integrity of the EB-5 Program hinges squarely on whether its reforms are clearly in harmony with the existing securities laws that have protected investors for over 80 years. Regulatory or legislative reforms to the EB-5 Program without harmonization with the securities laws will only impede overall industry compliance or make it so uncertain as to provide little meaningful reform at all. As such, the Roundtable's comments are made with these considerations in mind. Where consensus or unanimity among members of the Roundtable is abundantly clear, it has been noted accordingly. Likewise, meaningful divergences in opinion or thought of members of the Roundtable are also noted.

COMMENTS TO PROPOSED RULES

Q1: How can USCIS improve the initial designation process?

The consensus of the Roundtable is that the initial designation process should be improved from its current state. The Roundtable is of the belief that USCIS should require each Regional Center to submit specific written policies and procedures with respect to:

(i) due diligence requirements for each sponsored project (which may include the hiring of third-party due diligence providers if appropriate);

(ii) fund administration for each sponsored project (which may include the hiring of third-party fund administrators if appropriate); and

(iii) financial reporting (which may include the engagement of independent accountants to review financial reporting if appropriate)

by the new commercial enterprise, the job creating entity and any other relevant entities in the chain of ownership of the sponsored project. It would be helpful for USCIS to include a guide as to what standards are expected to be followed by Regional Centers in this regard. At least one member of the Roundtable believes that any "check" on Regional Center applicants should be limited to their integrity, and not to their related experience. Likewise, one member of the Roundtable noted that any process where parties would be deemed "qualified" or "unqualified" would require clear definitions of those terms by DHS in regulations. The Roundtable is unanimous in agreeing that any parties who may be "bad actors" under federal and state securities laws should not be permitted by DHS and USCIS to be involved in the management or control of a Regional Center or NCE. Further, any requirements set out by DHS and USCIS through regulation in this regard should be harmonized with integrity measures adopted in reform legislation and those of existing securities laws.

Q2: How would requiring an entity to obtain initial designation as a Regional Center prior to, and separate from, filing for approval of an exemplar project impact entities seeking Regional Center designation and investors seeking to associate with designated Regional Centers?

Members are unanimous in their belief that most Regional Centers already file separately to obtain Regional Center designation using a hypothetical project. The primary basis for this belief is that it takes too long to obtain exemplar approval at the same time as filing for designation as a Regional Center. Once a Regional Center has an actual project, it wants to get to market as soon as possible. Members of the Roundtable unanimously agree that a Regional Center should not be required to wait 16 months or more (which is longer than even most initial public offerings) before it can market the project.

Q3: Would a bifurcated initial application process achieve the benefits discussed above—i.e., reduced overall paperwork burdens and improved processing times? Please provide specific data on how such changes would affect time or other burdens in initial documentation preparation.

Members of the Roundtable are unanimous in their belief that there is already in effect a bifurcated initial application process by virtue of Regional Centers filing for approval with hypothetical projects. A more formal bifurcated process could expedite the process.

Q4: What additional costs or benefits, if any, would occur as a result of adopting the suggested approach?

Members of the Roundtable are unanimous in their opinion that the while adoption of requirements for written policies and procedures addressing due diligence, control of investors' funds and financial reporting will likely increase the costs of operation of a Regional Center, such requirements will enhance the integrity of the EB-5 market and should significantly reduce the ability of market participants to commit fraud. These changes would result in a faster approval process and more certainty as to status of a project, as third party providers and others would likely have spotted potential issues before submissions of information to USCIS.

Q5: Would adopting the suggested approach impact small entities? If so, how? Please provide data to support your response. Please identify any alternative policy proposals or other recommendations that would accomplish some or all of the goals identified above, while mitigating impacts on small entities.

The Roundtable members are unanimous in their (a) support of EB-5 funds used by small, non-real estate businesses outside of the major markets and (b) belief that a bifurcated approach will likely not be a barrier to entry for these small entities. However, the additional costs required for Regional Centers to comply with procedures for due diligence, control of investor funds and financial reporting will impact small Regional Centers more because they may have fewer available resources. For that reason, there is general consensus that there should not be a "one size fits all" approach for such matters, but instead one tailored to the specific business and objectives of the Regional Center at issue. At least one Roundtable Member supports uniform procedures that apply to all Regional Centers, pointing out that the costs of these compliance requirements are not excessive and are paramount to instilling investor confidence in any EB-5 offering.

Q6: Would it benefit potential immigrant investors to know whether or not an entity has been designated as a Regional Center, if the initial designation decision notice is solely for designation and does not include any decisions on exemplar projects?

Members of the Roundtable are unanimous in their belief that Regional Center designation, or lack thereof, is a material fact for investors, and that more information about Regional Centers should be published by USCIS.

Q7: Would a streamlined exemplar filing process impact any Regional Center or investor costs?

Members of the Roundtable are unanimous in their belief that a streamlined exemplar filing process would be beneficial to investors and industry participants. There is consensus that this process should take no more than a maximum of 6 months to determine whether or not a project will be approved. If this "streamlining" requires an increased filing fee, a preponderance of the members of the Roundtable believe that the market can bear such costs. All members of the Roundtable also agree that the submission of an independent due diligence report should expedite the process much in the same way a market feasibility report provides insight on viability of the project. Whatever the case, due diligence on a project by an independent third-party should include at a minimum (a) background checks on principals and control persons of Regional Centers, EB-5 financing sponsors and project owners, (b) review of policies and procedures implemented by the Regional Center (c) a site visit and (d) a review of risk mitigation strategies implemented to protect investor funds.

Q8: Should exemplar approval be required prior to a Regional Center-associated investor submitting an EB-5 immigrant petition? Please support the response by providing information regarding the costs and benefits of alternatives (e.g., by permitting concurrent filing with EB-5 immigrant petitions).

Members of the Roundtable are unanimous in their view that exemplar approval should only be required (a) if the process is shortened to less than 6 months and (b) if that time period is expressly communicated to investors as a material disclosure. Parties in an EB-5 transaction generally have business objectives that become frustrated if required to wait longer than 6 months to start receiving EB-5 investment proceeds, and most issuers will not disburse funds until EB-5 investors have filed their I-526 petitions. If USCIS would commit to no more than 6 months for processing, the industry could support enhanced transparency and pre-screening because it would be practical. The Roundtable notes that DHS should be clear about what an "Exemplar Approval" precisely means because investors and their intermediaries overseas think it means a project is virtually 100% safe and may be promoted as such. This may well be a marketing and advertising issue that should be a subject of audits and inspections of Regional Centers and the marketing materials of promoters and agents in their possession.

Q9: What additional costs and benefits would Regional Centers or investors incur as a result of a required exemplar approval prior to submitting EB-5 immigrant petitions?

The Roundtable is unanimous in its belief that while an exemplar approval may reduce project denial risk, the approval process needs to be less than 6 months.

Q10: What documentation should be required to accompany an exemplar application?

The Roundtable is unanimous in its evaluation of this question. In addition to the documents currently required (PPM, Economic Report, Business Plan, NCE Agreement), each exemplar application should also include (1) a due diligence report on the project (including background checks on principals, a review of policies and procedures, a review of the business plan, projections and a site visit) performed by an independent party, (2) the fund control methods intended to be followed by the NCE and (3) the financial reports required to be provided by the NCE, JCE and other entities in the chain of ownership of the Project, with a potential exemption from the diligence requirement for offerings below a certain minimum offering amount. All members of the Roundtable agree that any documentation required by DHS rules for such an application needs to be consistent with those required by enacted legislation which may reform or revise the EB-5 Program.

Q11: In what circumstances should a Regional Center be required to file to amend a previously approved exemplar?

There is consensus among Roundtable members that a Regional Center should be required to amend a previously approved exemplar if there are changes that would be deemed to represent a "material change," which the members of the Roundtable feel should be more clearly defined, to the inputs in the economic report on anticipated job creation or a material change to a required element of approvability of a visa petition, such as the requirement that the invested funds be "at risk.". Examples would be a material change in the nature or size of the project or in the geographic location of the project. The concept of "material change" for purposes of deference being given to the exemplar approval, as well as for purposes of required re-submission of a new I-526 Petition, should be limited to these types of material changes that bear directly on qualifying an investor for EB-5 classification. For clarity, the term "material change" should not represent the same standard as "material " for securities law purposes. Under established case law, a matter is material for purposes of the securities laws when a reasonable investor would consider the matter important in the total mix of information available for making an investment decision. This standard encompasses many matters that bear on investment decisions but have no effect on the approvability of a visa petition. In other words, existing investors in a project should not be required to refile an I-526 Petition unless the underlying changes would require a new USCIS adjudication to determine EB-5 eligibility.

Q12: For what duration should an exemplar approval be valid, and why?

While there is some divergence of opinion among Roundtable members on this issue, the duration of the actual offering as noted in a PPM is a useful starting point. All but one member of the Roundtable, however, agree upon durations between 12 months and 24 months. The rationale for this range is based upon (a) general experience with industry participants in their money raising efforts, (b) the requirement for issuers to update Form Ds with the SEC on an annual basis and (c) the duration of time for completion of a project. On the other hand, one member of the Roundtable suggested that there should not be any duration limitation at all absent a material change in the offering.

Q13: Under what circumstances should USCIS seek to terminate a previously approved exemplar?

The Roundtable is unanimous in its belief that USCIS should terminate a previously approved exemplar for fraud, criminal conduct or gross negligence.

Q14: What effect, if any, should termination or expiration of an approved exemplar have on an investor whose immigrant visa petition has not yet been adjudicated?

The Roundtable believes that if an exemplar approval expires, it should have no effect on immigrants who have already filed their I-526 petitions and are awaiting adjudication. Only if the exemplar approval is terminated because the project will be unable to create the jobs should this have any impact on investors who have already filed their I-526 petitions. Investors should not be penalized if the exemplar application is terminated or expires for any other reason.

Q15: What concerns, if any, would be raised by the elimination of the "actual" project deference process, wherein Regional Centers seek approval of the business plan and economic impact analysis associated with an investment offering, but not the investment offering documents?

The consensus of the Roundtable is that this category of review by USCIS should be eliminated. One member of the Roundtable noted that if offering documents are to be meaningfully reviewed, the SEC should be the agency reviewing them.

Q16: Would some projects be deterred by a requirement to have an approved exemplar? DHS is particularly interested in how the exemplar requirement may affect the number of

projects that obtain EB-5 investment and associated parties. Additionally, DHS seeks input on how an exemplar requirement might affect costs related to project timelines, business plan fees, and Regional Center administrative fees.

Members of the Roundtable believe that exemplar approval is valuable for marketing and would be sought much more often if processed timely. Interaction with USCIS can improve an offering before going to market which benefits both issuers and investors. Again, if exemplar approval could be obtained within 6 months of filing, more projects would seek exemplar approval prior to marketing, and investors would seek out those projects because the risk of denial is reduced. In addition, members of the Roundtable believe while an exemplar approval requirement could deter projects that lack the requisite approval elements (e.g., financing in place, zoning and entitlements approved, plans approved, etc.) within the suggested 6-month time frame, it could also reduce the number of failed projects.

Q17: Would an exemplar requirement impact the financial structure of Regional Center investments? For example, would such a requirement decrease or increase the EB-5 capital portion of a project's total finance? Would it impact the overall financing costs and rates of return for investors, Regional Centers, and developers?

The Roundtable believes that there would be no effect if the process is timely. One Roundtable Member noted that only large projects that can obtain interim "bridge" financing would pursue financing under the EB-5 Program if the current process is not streamlined. Other members of the Roundtable noted that the timing delay would be a major marketing impediment, and that smaller projects would suffer.

Q18: How could USCIS define the term "material change" to account for the exemplar process, consistent with applicable regulations and case law, including regulations requiring petitioners to be eligible for the requested benefit at the time of filing and to remain eligible until the benefit is granted? Please discuss how a new material change definition would impact pending EB-5 immigrant petitions.

As previously noted in Question 11, a "material change" for immigration law purposes should be defined as a material change to the inputs in the economic report on anticipated job creation or a material change to a required element of approvability of a visa petition, such as the requirement that the invested funds be "at risk.". The concept of "material change" for purposes of required re-submission of a new I-526 Petition should be limited to these types of project-level material changes. A broader definition of "material change" causes an undue burden on the existing investors in a project with no offsetting benefits to the approval process.

Q19: What would be the most effective and efficient way to add monitoring and oversight requirements? Should such requirements be incorporated into the initial designation stage, the exemplar stage, or throughout the period of the Regional Center's designation?

The consensus of the Roundtable is that the written supervisory procedures of the Regional Center should be provided at the initial designation stage. These procedures should address how the Regional Center will provide due diligence, fund administration and financial reporting on each project. Each exemplar application should similarly address how the project will address each of these issues. The Regional Center should be required to annually certify that it has followed its written policies and procedures with respect to each project that it has sponsored for which investor funds are still outstanding during each calendar year.

The Roundtable believes this is necessary so that operators of Regional Centers conduct the necessary business planning not only to complete a project, but also to operate their venture in a commercially prudent manner.

Q20: What forms of monitoring and oversight of NCEs, JCEs, and investor funds are Regional Centers currently utilizing as part of their best practices?

In the collective experience of the Roundtable's members, some Regional Centers are resistant to change and added costs, while others seem to have a more holistic view of things. Relatively few Regional Centers are using third-party fund administrators or CPAs at the outset. Independent escrow agents are often used, but how escrow release is managed varies from entity to entity. Whatever the case, the Roundtable believes that there should be independent oversight of the flow of funds from initial investment through their expenditure by the JCE. In some cases, Regional Centers or NCEs that are managed independently from the JCE may be in a position to provide this independent oversight; in other cases, it may be more appropriate for a Regional Center to have policies and procedures requiring the engagement of third parties to administer various processes, including but not limited to funds oversight, job creation consistent with economic report and loans to the JCE (if loans are part of the project).

While some Regional Centers are highly organized and structured businesses that specifically delegate duties and have written procedures on supervision, there are many others that are not (which is why the requirement for the Regional Center's written supervisory procedures should be submitted at the outset of any project). The larger projects generally use an experienced general contractor to monitor the construction of the project itself, but there are others that undertake that role on their own. Further, the larger Regional Centers provide their own due diligence of independent projects they sponsor, and have internal staff that handle fund administration. Most Regional Centers do not have the capability of performing all of these tasks internally, and it would be appropriate for them to hire third parties to assist with these functions. USCIS may encourage this through clear regulation and streamlined approval of exemplars as previously discussed.

Q21: Do other entities associated with Regional Centers engage in monitoring and oversight?

If this question is asking whether affiliates of Regional Centers (meaning entities under common control) are engaging in monitoring and oversight of their affiliated Regional Centers, the Roundtable believes that this is not happening in any systematic way. There is an inherent conflict of interest and lack of independence when an entity affiliated with or controlled by the JCE is also engaging in oversight or monitoring of the funds deployed to the JCE. While common personnel may well be qualified and skilled to handle such matters, the inherent conflict of interest should be delineated and addressed at the outset in written supervisory procedures in a manner similar to that commonly used by investment managers subject to SEC or state securities regulation.

Q22: What benefits, if any, would additional monitoring and oversight offer to Regional Centers and to immigrant investors?

The Roundtable members are unanimous in the belief that additional monitoring and oversight procedures are essential to reducing the incidents of fraud in the EB-5 industry and restoring the integrity of the EB-5 market with foreign investors. Every Regional Center should have written policies and procedures that address due diligence, fund administration and financial reporting. Such checks and balances are the industry norm among hedge fund and private equity managers in the United States, all without regard to the investor's residency. We respectfully refer USCIS to the mark-ups made by the Roundtable (Goodlatte's bill) annexed hereto for illustration of how such matters may be addressed through legislation in the event that they are not addressed through regulation.

Q23: What measures, if any, have Regional Centers put in place to identify conflicts of interest by Regional Center participants? What requirements for identification and disclosure of conflicts of interest would be appropriate in the Regional Center context?

The consensus of the Roundtable is that some Regional Centers may have a limited understanding of the various facts and circumstances that may create actual or inherent conflicts of interest. Such conflicts of interest should be addressed both in written supervisory procedures of the Regional Center, as well as offering documents at the outset of a project. The Roundtable notes that federal and state securities laws already require disclosure of all conflicts of interest among a Regional Center, NCE, JCE and all other participants in an EB-5 offering.

Q24: What investment and other economic impacts could be expected from the establishment of new monitoring and oversight requirements?

In the collective experience of the Roundtable's members, establishment of monitoring and oversight requirements is common in the private investment fund business because they are demanded by institutional investors. While foreign investors in the EB-5 space are sometimes not as sophisticated as institutional investors in hedge funds (whether foreign or domestic), such foreign investors should receive the same types of protections as institutional investors when they invest through the EB-5 Program.

The economic impacts of monitoring and oversight in any business seeking investment funds from others is and always should be handled at the outset through deliberate business planning. While these costs may well be passed on to investors, these costs are relatively minimal vis-à-vis the amount of money being raised. As a business practice, managers of hedge funds or private equity funds address such costs when calculating the management fee to be charged to investors. A Regional Center managing an EB-5 project does not present any exception to this practice.

Q25: What data and information should USCIS consider affirmatively disclosing to increase transparency in the EB-5 program?

The Roundtable's members are unanimous in their belief that USCIS must publish not only the names of terminated Regional Centers, but also the cause(s) for such termination. Other Roundtable members suggest the following:

Background information on Regional Centers, including disclosure of their ownership and control, should be publicly available in a manner similar to BrokerCheck on www.finra.org. I-526 and I-829 approvals and denials should be publicly available.

Q26: What additional costs would stakeholders incur in setting up and maintaining a monitoring and oversight process?

If the goal is to allow smaller Regional Centers and projects to have access to the EB-5 market, the Roundtable believes that USCIS needs to allow Regional Centers flexibility in meeting the due diligence, fund administration and financial reporting and other requirements specific to their resources and business objectives. In the collective experience of the Roundtable's members, a full service third-party administrator can range anywhere from $12,000 - $100,000 a year, depending on the services being rendered. Auditing or accounting services vary widely in price depending on the nature of services requested. Written supervisory procedures prepared by a law firm or consultant are estimated to range between $7,500 - $25,000. Whatever the case, most Roundtable Members believe that a "one size fits all" regulatory approach to monitoring and oversight will be counterproductive in that it is likely to result in adherence to the rules at the

expense of the principles that motivated those rules. At least one Member feels that oversight obligations applied uniformly, such as background checks, policies and procedures review, risk mitigation to protect investor funds and a site visit are all reasonable responsibilities that should be taken on by every Regional Center and that relatively low-cost monitoring solutions will become available to smaller entities.

Q27: Would an additional filing fee or additional costs to Regional Centers in preparing documentation for separate filings be too burdensome to support or justify the suggested initial filing framework?

The consensus of the Roundtable is that if Regional Centers are provided with ample notice of increased fees or costs for business planning purposes, such fees can likely be passed on to the developers seeking the financing. Notwithstanding, the need for any additional fees must be balanced with potential "chilling effects" on potential participants and projects due to cost constraints.

Q28: Would any of the potential changes described above either deter or incentivize participation in the program, or directly affect the viability of certain types of investment projects? If so, how could USCIS best measure the likely effects?

The Roundtable believes that increased integrity of the EB-5 Program and reducing the risk of fraud will add credibility to its immigration and financial components. The Roundtable also believes that smaller Regional Centers raising amounts from $5 million - $50 million can meaningfully implement these suggested controls through prudent business planning. If costs and expenses are known at the outset and planning is undertaken to tailor an offering accordingly, there should not be problems. If these costs are known in advance, they can be built-in to the financing proposal with the developer receiving the financing.

Q29: Would any of the potential changes described above impact small entities? If so, how? Please provide data to support your response. Please identify any alternative policy proposals or other recommendations that would accomplish some or all of the goals identified above, while mitigating impacts on small entities.

The Roundtable believes that additional transparency and heightened integrity will help the smaller entities compete with the larger entities, because investors and migration agents overseas tend to rely on the reputations of larger Regional Centers as a known quantity. Increased transparency will provide a more accurate market picture for those considering participation in the EB-5 Program, thus providing for a more informed investment decision.

Q30: How would Regional Centers or immigrant investors benefit, if at all, from an explicit requirement that the Regional Center actively participate in the Regional Center Program?

The Roundtable believes that smaller markets, where there may not be a continual flow of projects, would require the Regional Center to reapply. If the Regional Center application process was less onerous and not tied to a specific project, then perhaps opening and closing a Regional Center would be less daunting (i.e., Active Status/ Inactive Status).

Q31: What activities demonstrate active participation in the Regional Center Program? What evidence should Regional Centers be required to provide to demonstrate active participation?

The Roundtable believes that Regional Centers actively pursuing projects in good faith should remain in good standing with USCIS. Several members of the Roundtable noted that bona fide fund raising efforts, annual compliance certifications, certifications of having an administrator, financials and submission to USCIS, could be required.

Q32: If DHS conditions a finding of active participation on evidence that the Regional Center is associated with an approved and valid exemplar, a pending exemplar application, or a pending Form I-526 or I-829 petition associated with the Regional Center, how long should the Regional Center be able to retain its designation in the absence of such approved or pending exemplar or pending petition? Why is such a timeframe appropriate?

Once the I-829s have been adjudicated, the Regional Center could easily 'deactivate.' Reactivating a Regional Center should be less costly and time consuming then an initial application. We should not force Regional Centers to sponsor projects to stay Active. An annual fee will serve as an incentive for inactive parties to wind down their Regional Centers.

Q33: How would a continual monitoring and oversight requirement impact currently designated Regional Centers?

The Roundtable believes that it should not impact currently designated Regional Centers. Continual monitoring and oversight would help provide transparency throughout the life of a project and would benefit all involved.

Q34: How would a monitoring and oversight requirement impact small entities? Please provide data to support your response. Please identify any alternative policy proposals or other recommendations that would accomplish some or all of the goals identified above, while mitigating impacts on small entities.

While smaller entities will likely have fewer resources to dedicate to compliance and oversight than larger ones, the Roundtable notes that provisions of the Investment Advisers Act and parallel broker-dealer regulations already impose supervisory obligations that are followed industry-wide regardless of size. The requirements themselves need not be onerous as long as the entity undertakes reasonable efforts to implement procedures to comply with the law and protect investors. To this end, Regional Centers should be able to sub-contract or require NCEs to subcontract for monitoring and oversight.

Q35: What should DHS do to more effectively regulate the Regional Centers participating in this program?

The consensus of the Roundtable is that Regional Centers need to be administratively reviewed and inspected on a regular basis. In addition, DHS should implement a "whistleblower" program for EB-5 akin to that in place at the CFTC and SEC.

CONCLUSION

Members of the Roundtable appreciate the opportunity to share their knowledge and insight on these important issues. The Roundtable remains at your disposal for further questions and comment.

Respectfully submitted,

Kurt Reuss
Group Moderator

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