

# A Broker-Dealer Perspective On How EB-5 Issuers Can Safely And Effectively Work With Sales Intermediaries



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**T**here are hundreds of active EB-5 offerings in the market today and nearly all of them are working or planning to work directly with sales intermediaries — both foreign and domestic — to help sell their offerings.

As someone who is associated with one of just a few registered U.S. broker-dealers who specialize in the sale of EB-5 investments, I take particular care in working with foreign migration agents.

Working in a firm and selling securities under broker-dealer supervision, I am held to an exacting standard of compliance with U.S. securities laws and regulations, as well as the regulations of the Financial Industry Regulatory Authority (“FINRA”), the self-regulatory organization of registered U.S. securities broker-dealers, and by state securities regulators.

Because of periodic audits by both the SEC and FINRA, U.S. registered broker-dealers must carefully manage the offerings they sell, their solicitation practices, and their

relationships with all intermediaries.

In working with foreign migration agents (intermediaries), a U.S. registered broker-dealer is required to engage in one of two categories of relationships: working with a Foreign Associate or working with a Foreign Finder.

## Foreign Associates

A Foreign Associate must not be a US person and is required to be registered as an associated person with a U.S. registered broker-dealer; however, a Foreign Associate is exempt from the FINRA requirement to pass qualification exams. All the securities activities conducted by a Foreign Associate must be conducted outside the U.S. and may not engage any US person as a customer.

A Foreign Associate can solicit an investor and make representations about an investment (as opposed to a Foreign Finder, who can do neither.) A Foreign Associate is required to be supervised by the U.S. broker-dealer with whom he or she is associated.

Bill Davis, principal of the broker-dealer Pinnacle Equity Group, says this about Foreign Associates:

“Supervision is key in sales practices. A Foreign Associate just can’t be properly supervised unless you have an office overseas with a supervisory principal in that jurisdiction. This level of supervision of Foreign Associates has such difficult requirements and standards that our broker-dealer simply does not engage in working with this type of foreign migration

agent and in our opinion could only be satisfied by one of the large broker dealer firms.”

## Foreign Finders

In my firm, our broker-dealer will only work with foreign migration agents in the role of Foreign Finders, who function simply to introduce potential EB-5 investor clients to our firm.

A Foreign Finder is restricted from making any representations or solicitations of an investment — which significantly curtails their ability to make any untrue statements about a project, or omit material facts and disclosures. A Foreign Finder is therefore a more limited relationship, while still enabling the foreign person or entity to receive transaction-based compensation for any resulting sale of the security.

## Why Work with U.S. Broker-Dealers

When an issuer works with a U.S. broker-dealer, the issuer has a licensed and experienced partner in selling securities, who is independently required to comply with the regulations enforced by the SEC, FINRA, state securities regulators, and the securities laws of the country where the sale is being conducted. Truth and transparency are core mandates of a broker-dealer and are at the forefront of the firm’s deliverables.

Additionally, issuers and their securities counsel benefit from securities-specific expertise. The broker-dealer should be advising on an offering’s marketability,

*Continued on Page 45*

## A Perspective on How Issuers Can Safely and Effectively Work with Intermediaries

*Continued From Page 44*

and may offer independent advice on disclosures — whether any are lacking or if any need to be more prominent.

By including the supervision of a broker-dealer, mistakes are less likely to happen.

A single investor complaint can cause reputational damage, SEC enforcement action, or a class action complaint — any one of which can potentially ruin the issuer and its principals and put them out of business.

### General Guidelines

When issuers are selecting sales intermediaries for their EB-5 offerings, whether those intermediaries are U.S. registered broker-dealers or foreign agents, issuers should follow the IIUSA Best Practices for Sales Intermediaries, which include the following:

When selecting sales agents, conduct proper diligence on key principals (including third-party verification of

competence and integrity); meet them in person where possible, and tour their office. Seek proof of qualifications and required licenses. Be sure to document all such investigations and retain records, and reduce all agreements to writing. When English is not an intermediary's primary language, use a qualified interpreter.

Always be sure to have independent legal advice to ensure compliance with both the U.S. as well as the country the intermediary is working in. Obtain necessary insurance — and fully understand what that policy covers with respect to the acts and omissions of intermediaries.

Enter into a written agreement with every sales intermediary that includes the following requirements: (i) a strong statement that agents are not authorized to make any claims about the offering that are inconsistent with the written offering materials approved by the issuer; (ii) a requirement that no offering materials be used without prior approval of the issuer; (iii) a requirement that the intermediary retain all required licenses under the

jurisdiction in which the intermediary conducts business; (iv) if the intermediary is not a registered U.S. broker-dealer or Foreign Associate or Foreign Finder of a U.S. broker-dealer, a requirement that the intermediary does no business in the U.S., has no U.S. offices, and will not solicit any persons in the U.S.; and (v) a right to terminate the agreement immediately if any of these requirements are violated.

### In Conclusion

Selection and supervision of sales intermediaries is one of the most important tasks of any EB-5 offering. I believe that working with a U.S. broker-dealer is one of best means of assuring compliance with U.S. securities broker-dealer laws, because of the additional supervisory requirements imposed on securities broker-dealers. But above all, issuers should observe best practices in selecting and engaging all sales intermediaries for their EB-5 offerings.

*Kurt Reuss is a registered representative with Pinnacle Capital Management, LLC, a broker-dealer. ■*

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