Best Practices for Engaging with Intermediaries

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Introduction

This document is intended to provide IIUSA members with guidance regarding best practices for engaging with intermediaries who will introduce such members' EB-5 investment products to individual foreign investors or otherwise assist in the offer and sale of these investment products. Such intermediaries can take many forms. At one end of the spectrum, some are sophisticated, professional sales organizations, such as U.S. broker-dealers. At the opposite end of the spectrum, an IIUSA member might work with an individual contact who simply refers a friend.

Given this wide range of potential roles, the IIUSA Best Practices Committee (the "Committee") has divided this document into three sections.

- The first covers general best practices that apply to all intermediaries, be they domestic or foreign, large or small.
- The second section covers best practices applicable to U.S. broker-dealers.
- The third section covers best practices applicable to foreign migration agents.

In drafting this document, Committee members discussed and incorporated certain provisions that the Committee believes are likely to apply generally – but not always –to IIUSA members.

Each of these is labeled as a **"Consideration."** The Committee encourages each IIUSA member to carefully evaluate the applicability of each Consideration to its business, with the assistance of counsel, if necessary.

I. General Best Practices Applicable to All Intermediaries

1. QUESTION: How should Regional Centers vet intermediaries involved in "finding" investors?

Answer: Given the important role intermediaries often play in marketing EB-5 investments, IIUSA members should take reasonable steps to ensure that such intermediaries with whom they engage are qualified. While the nature and scope of intermediaries' capabilities and services to be provided can vary widely, which may render some of the recommendations herein more or less applicable, these steps should include:

a. ***Ensure clear communication***. When English is not an intermediary's primary language, use a qualified interpreter for calls and meetings, and have key documents translated.

b. ***Obtain the resumes of key intermediary personnel.*** Evaluate their qualifications to act as an intermediary, taking into account the scope of the proposed engagement.

c. ***Conduct a formal background check on key principals and/or other key personnel affiliated with an intermediary***. This may be especially true (a) with respect to non-U.S. intermediaries, (b) for members with limited resources available for conducting diligence, be it in a foreign or domestic market, and (c) for members that are new to the EB-5 marketing process.

> Consideration: IIUSA can help members identify vendors that can conduct both domestic and foreign background checks.

d. ***Meet prospective intermediaries in person*** (while mindful of the Securities and Exchange Commission (the "SEC") territorial interpretation of broker-dealer laws described in Section III.2. below). Tour their office(s). Verify that they are who they say they are.

e. ***Seek independent verification of the intermediary's competence and integrity.*** Check references. Talk with current and/or former clients of the intermediary.

f. ***Obtain competent, independent legal advice*** regarding licensing and other legal requirements governing the services an intermediary will provide in each applicable jurisdiction, whether it be the United States or any foreign country. Require proof that the intermediary has obtained all required licenses, if any, and/or is otherwise capable of providing services in compliance with applicable law, domestic and foreign.

> Consideration: A given foreign jurisdiction's licensing or other requirements with respect to marketing securities or products related to immigration are not

always obvious or easily determined. IIUSA staff can help connect members with attorneys and other resources to address these questions. Members should not hesitate to contact IIUSA to ask questions about these important legal requirements.

g. ***Confirm the intermediary's financial and organizational capacity*** to perform its obligations pursuant to the applicable written agreement.

Consideration: This best practice may be more or less important depending on various factors, such as the nature and scope of the relationship between the IIUSA member or the project developer and the intermediary, the duties of each parties under their agreement, and the jurisdiction(s) in which each will operate.

h. ***Document due diligence performed on intermediaries.*** Create written notes or memoranda of any key conversations, such as reference checks. Retain such records and other documents in hard copy and/or electronic files. Take reasonable steps to back up such records.

Consideration: Depending on the legal structure of the Regional Center, project developer, and/or its affiliates (e.g., if any of them is an investment adviser or broker-dealer), if any, various U.S. laws, rules and regulations related to due diligence and recordkeeping may apply. In addition, depending on the jurisdictions in which the Regional Center, project developer, and/or the intermediary will operate, foreign laws, rules and regulations may also apply. Consult experienced legal counsel to determine the applicability of such laws, rules and regulations.

Reminder: The importance of compliance with securities laws

The offer and sale of securities, including to foreign nationals, is heavily regulated in the United States and other countries. The activities of intermediaries are often governed by U.S. (federal and state) laws requiring the registration of broker-dealers. U.S. registered broker-dealers are highly regulated by the SEC, state securities authorities and the Financial Industry Regulatory Authority ("FINRA"). Additionally, intermediaries may be considered agents of the issuer of the securities, and their activities may be attributed to the issuer of the securities for purposes of determining whether an exemption from laws requiring the registration (U.S. federal) or qualification (U.S. state) of securities is available. As discussed further below in Section III.2., false or misleading statements made by intermediaries to prospective investors may be attributed to the issuer of the securities and expose the issuer to SEC enforcement actions and claims by investors for rescission of their investments. Issuers and IIUSA members should always engage experienced U.S. securities counsel in connection with the engagement of intermediaries that introduce investors or assist in the marketing and sale of EB-5 securities.

2. Question: What safeguards should be in place to protect the integrity of your agreement with intermediaries?

Answer:

a. ***Reduce agreements to writing.*** In engaging the services of an intermediary, IIUSA members should enter into a detailed written agreement that specifies the duties of each party, compensation for the intermediary, and other key terms. If English is not the intermediary's first language, consider using a bilingual format, so that each English provision is mirrored in the intermediary's primary language. Any translated agreement should specify which language controls in the event of a conflict between versions.

   Consideration: Written agreements with intermediaries may be simple and straightforward or quite complex, depending on the circumstances. Aspects of such agreements that IIUSA members should consider and review with counsel include, but are not limited to:

   i. ***Termination provisions.*** Consider when, how, and by whom the agreement may be terminated, and whether any provisions or obligations survive termination.

   ii. ***Representations and warranties.*** Often, it is appropriate for one or both parties to provide certain representations and warranties upon which the other party will be entitled to rely. For example, an IIUSA member may insist that an intermediary represent and warrant that it is legally permitted to perform its obligations under the agreement, including holding all required governmental licenses or approvals, and will remain so during the term of the agreement. IIUSA members should consider whether this and other representations and warranties are appropriate in the context of an agreement with a given intermediary.

   iii. ***Reporting and information sharing.*** Depending on the nature of the relationship, the IIUSA member and/or the intermediary may have obligations with respect to reporting information to or otherwise sharing information with individual EB-5 investors or other parties. In such contexts, IIUSA members should carefully consider relevant provisions in the agreement with the intermediary.

   iv. ***Enforceability.*** IIUSA members should consider the enforceability of each intermediary agreement contemplated with an intermediary. Particularly with respect to intermediaries based or operating in non-U.S. jurisdictions, provisions of such agreements related to choice of law, venue and enforceability are important. Review such considerations and provisions carefully with counsel that is experienced in the relevant foreign jurisdiction.

b. ***Require approval of marketing materials and offering documents***. IIUSA members should require intermediaries to use marketing materials and securities offering documents (if applicable) prepared by the issuer of the securities, and/or should require prior written approval of all such materials prepared by the intermediary, regardless of language,

before their use. If the IIUSA member intends that a version of a marketing document in a particular language be the controlling version, the IIUSA member should ensure that this is clearly disclosed in all versions of each applicable document, in each applicable language. If a document is to be translated into a language other than English, the IIUSA member should approve the translator before engagement. IIUSA members should not rely solely on an intermediary for translation of documents.

c. ***Require approval of subagents***. IIUSA members should require that an intermediary disclose, in advance, any subagent relationship the intermediary intends to work through in connection with the engagement. IIUSA members should do the same level of diligence with subagents that they undertake with respect to primary intermediaries.

d. ***Carefully consider the qualifications of each lawyer or law firm required by an intermediary, as well as any potential conflicts***. If an intermediary requires its clients to engage a particular lawyer or law firm in connection with their visa process, IIUSA members should vet the qualifications of the lawyer or law firm and think about potential conflicts of interest that may arise as a result of these arrangements.

e. ***Develop written internal policies.*** IIUSA members and intermediaries both operate using a range of business models. Accordingly, the nature and scope of relationships between IIUSA members and intermediaries will vary. A best practice is for each IIUSA member is to develop a written internal policy governing how that IIUSA member will engage with intermediaries, if at all, and to ensure that such policy is adhered to by IIUSA member personnel. Review and update such policies regularly.

    i. Consideration: IIUSA staff can identify resources to help members develop and implement such policies. Do not hesitate to contact IIUSA staff on this topic.

f. ***Obtain adequate insurance***. IIUSA members should obtain liability, errors and omissions, directors' and officers' and/or other applicable insurance, and should understand and carefully consider the extent to which such insurance covers liability associated with the acts and omissions of agents and intermediaries.

II. Best Practices for Engaging with U.S. Broker-Dealers

Depending on the nature and scope of a IIUSA member's business, the IIUSA member might engage a U.S. broker-dealer to provide a variety of services. Such services might include, for example, research on securities, advice regarding a merger or acquisition, or investment banking services. The best practices set forth in this section relate specifically to the context of an IIUSA member engaging a broker-dealer to assist in the offer and sale of securities sponsored by or associated with the IIUSA member to individual EB-5 investors.

When considering hiring an SEC-registered broker-dealer to serve as a placement agent (exclusively or non-exclusively) to raise capital for an EB-5 offering and/or provide related services, issuers and IIUSA members should consider the following best practices:

1. **Question: Is there a standard scope of the broker-dealer engagement?**
   Answer:
   No, there is no standard scope. Depending on the structure of a particular EB-5 transaction, the IIUSA member may or may not be an issuer of securities. In addition, some IIUSA member members are likely to have more robust internal resources available to them than others, such that they may be able to perform some functions internally (e.g., suitability assessment) that a broker-dealer might also be hired to perform. Thus, the scope of an IIUSA member's and/or issuer's engagement of a broker-dealer may vary widely.
2. **Question: What should an IIUSA member and/or the issuer of the EB-5 securities consider when engaging a broker-dealer to provide one or more of the following services?**
   - ✓ ***Transactional and project due diligence*.** Broker-dealers are required by the guidelines of the regulatory agencies that monitor broker-dealers to adhere to a high standard of evaluation of all offerings that are solicited by broker-dealers;
   - ✓ ***Offering oversight and guidance*.** A broker-dealer can help an IIUSA member and/or issuer prepare for and conduct the solicitation of a private securities offering in compliance with U.S. securities laws and regulatory guidelines, policies and procedures;
   - ✓ ***Suitability assessment*.** A broker-dealer can assist with assessing whether each prospective investor in an EB-5 offering can bear the economic risk of a proposed EB-5 investment, and whether the investment is otherwise suitable. This may include evaluating and documenting the accredited investor status of each prospective investor;
   - ✓ ***Source of funds / anti-money laundering compliance*.** A broker-dealer can assist an IIUSA member with its review and evaluation of the source of invested funds from private investors in accordance with U.S. anti-money laundering guidelines and provisions; and/or
   - ✓ ***Investor identification and sales***. A broker-dealer can find private investors for EB-5 offerings. Importantly, a broker-dealer can be paid transaction-based compensation (i.e., commissions and other forms of compensation that is contingent on success), thereby allowing the IIUSA member to avoid the legal ambiguities associated with compensation paid to unregistered "finders" or other intermediaries.

Answer:

a. ***Evaluate the broker-dealer's capabilities*.** Determine if the broker-dealer has the capabilities that the EB-5 offering requires – regulatory and compliance services; due diligence; and/or capital raising. Ask for references from the broker-dealer's current and former clients, and follow up.

Consideration: As of this writing, relatively few broker-dealers have significant experience with EB-5 offerings specifically. If a broker-dealer lacks EB-5 experience, conduct an evaluation of the background and experience of the broker-dealer's management team by requesting references demonstrating prior experience with raising capital for private securities offerings in general, particularly those involving sales to non-U.S. investors.

b. ***Investigate the broker-dealer's regulatory history.*** All SEC-registered broker-dealers must be members of and are regulated by FINRA. FINRA provides anyone the opportunity to review the detailed regulatory history of both the broker-dealer firm and its individual registered representatives at a website called BrokerCheck Online. This site provides a wealth of information, including:

   a. the date of the broker-dealer's formation and timeline of registration;

   b. the securities-related activities the broker-dealer is approved to engage in (e.g., a broker-dealer must be approved to conduct sales of private placements to solicit investors for a typical EB-5 private offering);

   c. the number and types of securities registrations of each individual registered representative (i.e., broker), and whether such registrations are active, inactive or suspended;

   d. which U.S. states the firm and its registered representatives are registered in, which is important to verify that both the firm and the broker(s) representing the EB-5 offering are registered in the state(s) or territory(ies) in which the offering is to be conducted; and

   e. any disclosures for the firm or any of its registered representatives (e.g., regulatory sanctions, customer complaints, other reportable events) and the details associated with such disclosures.

c. ***Engage experienced securities counsel.*** Issuers and IIUSA members should engage experienced U.S. securities counsel in connection with the engagement of a broker-dealer. Hiring a broker-dealer provides certain regulatory protections and assistance to comply with U.S. securities laws for the preparation, solicitation and processing of private investments into EB-5 securities offerings. However, broker-dealers do not provide legal advice or any other legal services relative to U.S. securities laws.

d. ***Understand the broker-dealer's foreign relationships.*** Issuers and IIUSA members should determine whether and how a broker-dealer intends to engage with unregistered/unlicensed foreign agents and/or finders. This analysis should include determining how such foreign agents and/or finders will be compensated and, in cooperation with securities counsel, evaluating the nature and extent of the broker-dealer's supervisory practices with respect to the sales activity of such unregistered foreign agents and/or finders.

III. Best Practices for Engaging with Foreign Migration Agents

Migration agents play a prominent role in the marketing of EB-5 investments in many foreign countries. For example, IIUSA works closely with the Exit & Entry Associations with jurisdiction over different Chinese provinces to facilitate understanding of applicable Chinese law among IIUSA members and other EB-5 program stakeholders, and to exchange information and ideas. Based on this experience at the Association level, as well as the experience of Best Practices Committee members and IIUSA members generally, the Committee has approved the following best practices specifically related to interactions between IIUSA members and foreign migration agents. These best practices are intended to be in addition to and read in conjunction with the general best practices applicable to all intermediaries set forth above.

1. Question: What are the steps to verify required licensing in a foreign country?

Answer: In some countries, "immigration consulting" – which may include the marketing of EB-5 investments – is a regulated industry. For example, Chinese law requires firms that provide immigration consulting services obtain a license commonly referred to in English as an "Exit & Entry Service Agent Business Permit." The Chinese term for this license is 因私出入境中介机构经营许可证.

a. Such licenses are granted by municipal or provincial authorities, depending on where in China the agent maintains its office(s) and intends to provide immigration consulting services. Licensed migration agencies must obtain a separate license for each Chinese jurisdiction (i.e., the applicable provincial or municipal authority) in which it will conduct immigration consulting business, and to display the license in each applicable office. Before engaging the services of a migration agent, IIUSA members should verify that the agent is properly licensed in each jurisdiction in which services will be rendered.

b. Applicable regulations governing migration agents may require such agents to obtain a separate license for each foreign market in which the agent will be active. For example, to provide consulting services in connection with EB-5 immigration, an agent must be licensed by the relevant Chinese authority to provide migration consulting services with respect to the United States. Accordingly, it is important that IIUSA members confirm that each agent with which they engage has obtained this specific license.

c. Obtain a copy of each applicable license and retain it in your files. If a license is valid for a particular period of time, follow up to confirm the intermediary's renewal of the license as needed.

d. The regulations governing such licenses, issued by the PRC Ministry of Public Security, can be found online here (Chinese language only).

e. The laws of each country must be carefully reviewed to ensure local as well as US compliance.

Consideration The activities of migration agents in marketing securities are normally of a nature that, if conducted within the United States, would require registration as a broker-dealer.

2. Question: Do foreign migration agents need to register as broker-dealers?

Answer: The SEC follows a policy not to require broker-dealer registration of foreign firms that engage in activities related to the sale of U.S. securities exclusively to non-U.S. persons outside the United States. Foreign migration agents that have no U.S. presence (such as by maintaining an office in the United States) and who conduct no activities related to offerings of securities while physically present in the United States are not required to register as broker-dealers under this SEC policy. However, some migration agents conduct some level of activity in the United States. No definitive pronouncement from the SEC or any court has indicated which activities conducted while migration agents are physically in the United States are permissible and which would be sufficient to require broker-dealer registration.

Consideration: IIUSA members should always consult with legal counsel about compliance with securities laws, including the specific facts and circumstances surrounding the activities of foreign migration agents involved in the offer and sale of their sponsored projects.

3. Question: Does it matter if the foreign migration agent conducts business in the United States?

While no definitive pronouncement from the SEC or any court has evaluated the activities of foreign migration agents in the context of the requirement for broker-dealer registration, members of the SEC Staff have commented publicly about related questions. For example, during an April 3, 2013, EB-5 stakeholder meeting hosted by USCIS and the SEC, a staff member of the SEC's Division of Trading and Markets explained that the SEC has approached broker-dealer status and registration on a territorial basis. He then elaborated that if a person is physically in the United States and performs 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." These comments were made subject to the standard disclaimer always given when SEC staff members speak publicly that the views expressed were the personal views of the SEC staff members and did not necessarily reflect the views of the commission or colleagues on the SEC staff. Nonetheless, the Committee believes these comments should be taken seriously in evaluating securities law compliance when dealing with foreign migration agents.

4. Question: What should a Regional Center do to ensure compliance with U.S. securities laws when working with a foreign migration agent?

The Committee recommends that IIUSA members explain clearly to foreign migration agents what statements to potential investors are appropriate and inappropriate.

a. The starting point for this conversation is typically 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. U.S. securities laws make it unlawful, in connection with any offer or sale of securities, to make any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading.

b. As noted in Section I.2. above, the statements made by foreign migration agents to potential investors may be attributed to the issuer of the securities and expose the issuer to SEC enforcement actions and claims by investors for rescission of their investments.

c. The Committee reminds issuers of EB-5 securities and IIUSA members to speak with experienced U.S. securities counsel in connection with developing a program to help ensure that foreign migration agents make only accurate and measured claims concerning EB-5 investments and that such claims are consistent with the written offering materials.