



## **IIUSA RECOMMENDED BEST PRACTICES FOR EB-5 REGIONAL CENTERS**

### **I. Introduction**

The IIUSA Best Practices Committee was charged with developing a list of best practices to provide guidance to regional centers seeking to conduct business in a manner that will foster the growth and success of the EB-5 program. IIUSA believes that a set of best practices would be useful both because of the relative youth of the regional center EB-5 program and because of the complexity of the concepts and principles that govern regional center activity under the auspices of multiple government agencies and under the laws and practices of multiple countries.

As a preliminary matter, it is important to make clear what the Committee considers a “best practice” to be and not to be.

- (1) A best practice is not meant to be a minimum legal or ethical standard of conduct by which every regional center must abide. To put it another way, failure to abide by a best practice is not meant to be considered a legal or ethical breach or failure of the regional center. Furthermore, the list of best practices is not meant to be a list of legal requirements. Rather, it is meant to provide guidance to regional centers seeking to enhance their operations and provide protection to themselves, associated entities, investors and other involved parties.
- (2) A best practice is not specific to structures in which the regional center acts as (or is related to) the manager of the new commercial enterprise. Best practices also apply to service agreement structures. USCIS makes no distinction between the two structures, and neither does the Committee when it comes to recommending best practices.

We view this document as a start to an evolving process to which additions and refinements will be made as we benefit from time and experience.

Throughout this process, we benefited from the active and tireless involvement of many committed professionals, including regional center owners/operators; project developers; immigration lawyers; securities attorneys; economists; insurance advisor; and others. It was truly an extraordinary group making an extraordinarily committed effort. The end result contains those best practices, which achieved consensus or near consensus within the group.

We all hope that this exercise will prove to be a valuable resource and guiding light for many regional centers and for the EB-5 industry as a whole.

## **IIUSA RECOMMENDED BEST PRACTICES**

### **II. General**

1. No regional center or related commercial enterprise can express or imply endorsement or affiliation by or with IIUSA or the U.S. or the U.S. government (including USCIS). Ways in which affiliation or endorsement may be insinuated includes but is not limited to the utilization of:
  - the words “United States,” “U.S.,” “US,” “United States,” and “Federal” in the names or DBA’s of a regional center or related commercial enterprise;
  - logos affiliated with the U.S. Government.

A regional center should seek approval from any non-federal governmental entities prior to utilizing the name of a city, county or state which may be interpreted in a way which could convey affiliation (for example, “The City of Beachwood Regional Center”).

2. A regional center should budget a sufficient amount of funds to hire necessary staff and/or outside consultants and to purchase or adapt software and/or systems necessary to monitor job creation, complete annual reporting requirements, and communicate with investors. A regional center should have sufficient staff (in house or outsourced) to be able to handle the matters that may be the obligation of the RC (depending on the allocation of responsibilities with project developers, broker- dealers, etc.), such as (but not limited to) seeking and reviewing potential projects, investor relations, reviewing and preparing agreements between the regional center and associated EB-5 projects who service the regional center to ensure EB-5 compliance by the EB-5 projects and to outline the legal EB-5 responsibilities of the EB-5 project, accrediting investors, keeping securities records (including escrow), preparing project I-526 template packages, dealing with I-526 RFEs, distributing materials, updating investors, tracking condition removal dates, preparing I-829 template packages, tracking use of funds and job creation, coordinating I-829 RFEs, discussing project delay and change implications, and of course obtaining and presenting annual data for I-924A. Regional centers have an obligation to do ongoing monitoring of job creation.
3. A regional center should develop recordkeeping policies and procedures. At a minimum, the following should be tracked and compiled: information for I-924A filings; dates of I-526 filings/receipts, RFEs, NOIDs, denials, appeals, and approvals; admission and conditional residence end dates of all investors; I-829 filings/receipts, RFEs and other notices, and approvals; expenditure and job data. All recordkeeping can be in house or outsourced to a reliable third party.

4. A regional center should consider insurance against investor claims and actions of regulatory bodies. The insurance is a combination of directors and officers insurance and errors and omissions insurance.
5. Regional centers and project developers should be guided by USCIS approval standards, which often require impartial third party experts to provide appraisal of the value of contributed land, market conditions in a specific industry, and project budgets and timeline and projections of future revenues and expenses.
6. Preparation of the template for project issues in I-526s, I-829s, RFEs, and NOIDs is the responsibility of the regional center and/or the new commercial enterprise based on the division of responsibility agreed to between those entities.
7. A general partner should not waive its fiduciary responsibility even if it is acceptable according to state law.

### **III. Regional Center Oversight/Project Selection**

8. A regional center should perform due diligence with respect to the project developer, and its key persons (any person that directly, or indirectly through one or more intermediaries, possesses the power to direct or cause the direction of the management or operation of the project developer) before it agrees to host, service or sponsor a project. The due diligence should include reasonable searches for criminal, governmental and bankruptcy records, as well as all forms of civil litigation. A regional center should require the securities issuers in sponsored projects to prepare and make available to investors independently verified basic financial information, transparent entity structure, actual statements, and analyses used to support the issuer's project costs and projections of future revenues and expenses.
9. Reasonable and good faith underwriting standards should be applied by regional centers in project selection. Project assumptions should be communicated in offering documents or made available upon request. Regional centers should require the project developer to certify that the offering documents contain no misstatements on project information, including the principals and key officers and personnel, and that securities counsel has reviewed and determined them to be in compliance before the offering documents are distributed. Documents should indicate clearly that projections are based on assumptions reasonably and consistently applied.

Where the regional center (or affiliated entity) is the issuer, then the regional center makes sure offering documents are compliant and not the Borrower or Project developer. But the project developer should have an opportunity to review offering documents and included representations.

10. A regional center should require that a project developer provide the information necessary for the regional center to perform all of its reporting functions required under state and federal law, including where a project developer must obtain the information from its investors or the investors' authorized representatives in order to assist the regional center.

11. A regional center may request agreement for full indemnity from the developer and any marketing agent.
12. If a developer, acting as the issuer, puts together the professional team that will be preparing the EB-5 project and/or offering documents, the regional center should insist on a right to have its own or an independent third-party professional team review and provide comment on all documents. The regional center as an issuer will usually have its own team of professionals to prepare the EB-5 project and offering documents. If the EB-5 project wants to have its own team of professionals to review and comment, this may not be enough.
  - A Regional Center should utilize a fund administrator that is independent of the job creating enterprise to implement due diligence fund control measures in order to track the lawful source, transfer, use and disbursement of funds.
  - A Regional Center should obtain at least reviewed and ideally audited financial statements for all NCE's and JCE's.
  - The regional center should actively monitor, or by written agreement, cause others to actively monitor, the ongoing activities of the project during the conditional residency period. This monitoring can include, but not be limited to the following:
    - Tracking of construction expenditures through recording of invoices and canceled checks on a quarterly basis,
    - If the project includes an operational phase of a business which is expected to create jobs, then the tracking of business-generated revenues, if the expenditure approach was used to estimate job creation at the I-526 stage, or the tracking of direct employee hiring through I-9s, E-Verify records and/or quarterly payroll records.

#### **IV. Conflicts**

12. A regional center should require that conflicts of interest be clearly identified or avoided.
13. When the new commercial enterprise is managed by a manager, managing member or a general partner that is affiliated with the developer (project company/ borrower), especially where such manager equivalent is also affiliated with the applicable regional center, there should be disclosure of the potential conflicts in sufficient detail to be comprehensible and meaningful to the investor and a disclaimer made regarding the conflict of interest. All payments made by the capital recipient to the general partner/regional center should be disclosed. It is recommended that in the event of conflicts of interest, the new commercial enterprise should have a co-manager/general partner, third party administrator, registered broker dealer, or other "fund control agent" who is unaffiliated with the developer/business

and also with any other interested participant (such as migration broker) for the purposes of:

- Co-signing checks related to loan or equity disbursements by the NCE; and
  - Oversight control over the administration of the financing disbursement and dealings with the financing recipient under the applicable documents, including having the authority to declare a default and pursue remedies under a loan.
15. The purpose of the above-referenced policy is to guarantee some level of independence in the financing disbursement and administration process. This will also avoid an obvious conflict of interest between the manager/general partner of the NCE and the developer/borrower if there is no such independent control imposed on the NCE. Independent agents to provide these services should include professionals such as attorneys, accountants, broker dealers, fund administrators, or other organizations familiar with the financing process for the applicable industry for which the loan is being made. All fund administration costs should be clearly paid by funds other than minimum capital contributions of EB-5 investors.
16. The owner of a regional center should not represent investors in legal matters of the regional center because of actual and potential conflicts of interest.

## V. **Securities Issues**

17. Every regional center and project developer involved in the marketing of an EB-5 project is advised to seek the counsel of an experienced securities lawyer. Securities issuers and regional centers should consult with an experienced securities lawyer regarding whether and how to promote information using the Internet and web sites, under what conditions to accept certain investors, or how to structure investment transactions.
18. The offeror is responsible for dissemination of document to investors. This responsibility cannot be delegated. The offeror must take reasonable steps to control the process and to ensure the integrity of the agents. There should be document control mechanisms for offering documents, ideally including numbered and signed versions for hard copy documents. Electronic tracking of offering documents using standard methodologies (e.g. email logs, controlled-access data rooms) is also acceptable. Agents should be educated on the importance and challenges of properly disseminating drafts. Any non-final document should be clearly marked “draft”. It is vital that the investor signs the final version in person by his own hand (or electronically in person) and that the offeror make best efforts to accomplish that goal (actively assisted by its agents). The offeror must maintain copies of all signed offering documents.
19. Either the offeror or a trusted source should provide enough information in a translated version of a PPM that would enable a reasonable investor to decide whether to request a fully translated PPM or analysis by his or her professional advisors. Offerors should notify investors that they may request a translated version or that they should obtain their own translated version. If offering documents presented to investors are translated, the offeror should specify which version (typically the English language version) of the offering

documents is the official version and should clearly mark any translated version with a disclaimer to this effect in both languages.

20. Offering documents should disclose the nature and amounts of compensation of to the regional center, broker(s), and agent(s) and the relationships between or among them, sufficient to inform the investor of the existence and nature of conflicts of interest that may affect the judgment of such party in its participation in or sponsorship of the offering. Although it is a best practice to disclose all compensation to all parties, there may be reasons why this is not feasible. It is best to inquire of agents regarding all sources of compensation that the agent will receive from the transaction and, to the extent that the offeror learns information regarding sources of compensation, it should be disclosed in the offering documents. At a minimum, there should be disclosure that some or all of the administrative fees or interest payments will be used to compensate migration agents, consultants, lawyers or third parties; and the gross amount of compensation going to third parties should be disclosed with a range of compensation for each recipient. The more disclosure that is provided, the less chance of any securities violation.
21. Every regional center should have a reasonable basis for determining that the material stated in the offering documents for every EB-5 offering sponsors are true and not misleading.
22. If there is a material change to offering documents after an investor subscribes, a disclosure should be circulated to all investors. Securities counsel should be consulted as to whether a change is material. The best practice is to have the investor sign the final version, and thereafter to clearly disclose all subsequent material revisions. If the change is material, and occurs after subscription, the investor must be given rescission (reaffirmation) rights. Ideally, wherever possible no material changes should be entertained post-execution.
23. Given the SEC's interest relating to overseas marketing of EB-5 projects by non-registered broker dealers (in particular using instrumentalities of US commerce),
  - Before agreeing to pay sales or marketing compensation in connection with the sale of any securities, offerors and affiliated regional centers should verify, with the help of securities counsel that the recipient is registered with the proper licenses with The Financial Institutions Regulatory Authority (FINRA) or not required to have such a license.
  - Persons involved in recommending the purchase of securities should determine with the assistance of an experienced securities lawyer, whether they should be registered as broker dealers or investment advisors.
  - Persons that manage securities should determine with assistance of an experienced EB- 5 securities attorney whether they must register: (i) as an investment company under the Investment Company Act of 1940; and (ii) as an investment advisor under State law when the level of such securities reaches \$25MM and under the Investment Advisors Act of 1940 when such level reaches \$100MM.

- Entities that have more than \$10MM in assets and either (a) 500 investors who are not “accredited investors” or (b) more than 2,000 investors generally must register as a reporting company under the US Securities Exchange Act of 1934. Assistance of securities counsel should be sought in advance of reaching these levels for planning & compliance purposes.
- Anti -Money Laundering (AML) (including Know Your Customer ) best practices are such an important topic that IIUSA has a separate document focused on this specifically and brings EB-5 best practices around this increasingly important issue up to par with the latest U.S. policy and international standards.
- Each issuer of securities should in consultation with an experienced securities attorney, use reasonable efforts under the circumstances, to avoid having “Bad Actors” and “Disqualifying Events” (as such terms are defined in Rule 506(d) of Regulation D) associated with it or its investors.

## **VI. Escrow**

24. Administrative fees should be identified as escrowed until the conditions for refund are eliminated, or it should be agreed by investors that refund is dependent on clearly identified written conditions.
25. An escrow agent or escrow holder and any third party escrow administrator should be based in the United States or its territories competent, unaffiliated with the regional center and developer, and familiar with EB-5 processes where relevant., with the financial wherewithal sufficient to satisfy its obligations under the escrow agreement, and licensed or allowed to act as an escrow agent under applicable law.

## **VII. Jobs Issues**

26. An economic report should make clear the expenditures, revenues, occupancy rates, etc. that must occur in order for the required job creation to take place.
27. A regional center should not sponsor a project that relies on direct construction job creation unless a projected construction timeline of greater than 2 years is realistic, consistent with industry standards, and well documented.
28. A regional center should recommend that a sponsored project have some identified job cushion (job projection above the minimum necessary) or disclose the lack of cushion.
29. A job allocation agreement should be included in the agreement among investors and the PPM. This agreement should make clear to investors the order in which jobs will be allocated in the event that there is a shortage of jobs to cover every investor.

30. If a regional center EB-5 project will be commencing prior to the infusion of EB-5 investment money, the record should be well documented that EB-5 money is a necessary or anticipated part of the capital stack prior to the commencement of the project and prior to the infusion of any source of financing that will be replaced by EB-5 capital.
31. The economic report predicting indirect job creation should be made available to investors and/or accurately summarized for investors in the offering documents.
  - Every effort should be made to ensure that the job creation timeline lines up with the investor's timeline or as otherwise required to be compliant with the EB-5 program.
  - The regional center should be mindful of the vintage of the Targeted Employment Letter, if one applies. New county-level data is released each April by the Bureau of Labor Statistics. If fund raising will span this date a new updated TEA letter may be needed for investors filing in June or later.

### **VIII. Agents/Marketing**

32. Regional centers should strive to insure that issuers instruct in writing all representatives of the requirement to act in accordance with U.S. laws and the laws of their country and each jurisdiction in which any solicitation occurs.

The regional center should require that issuers' counsel must review and approve all marketing materials, translations, licenses of agents and websites, both for accuracy and for consistency with offering documents. Marketing materials should make specific reference to the offering documents and should state that the offering documents (and not the marketing materials) are the official documents on which investors should rely.

### **IX. Data Security**

Regional centers should make reasonable efforts to safeguard all confidential, sensitive and/or personally identifiable information (collectively referred to as "sensitive information") which is collected, transmitted or stored by the Regional Center. Such efforts should include:

1. Engagement of a third party data security specialist to regularly assess data security from a technical and procedural standpoint.
2. Creation of written data security policy and data breach identification and response procedure. Assistance from data security professionals and counsel is recommended.
3. Use of encryption for sensitive information while in the possession of the regional center or transmittal by or to the regional center.
4. Requirement of those providing or receiving sensitive information from or to the regional center to adhere to security protocols established by the regional center.



## **X. Immigration Attorney**

33. Offering documents should not be made available to investors until the business plan and economic report have undergone final review by immigration counsel.
34. An investor should be free to choose their immigration attorney. However, it is acceptable for the regional center to provide a recommended list of attorneys, which could include the regional center's attorney, with appropriate conflict waiver. It is also permissible for a regional center to not permit its counsel to also represent its investors. A regional center may require that investors' counsel cooperate with a regional center to ensure that filings about the projects and offering are consistent among investors.

## **XI. Investor Relations**

35. The issuer should have at least semiannual (quarterly is better) communication with investors. The MOU between the regional center and the issuer should include this. Regional centers should notify investors promptly of materials problems and issues. The standard in deciding whether the issue must be disclosed is whether it would have a material adverse effect on the investor. Issues that should be disclosed timely include:
  - Material change in the business plan;
  - I-526 project denial;
  - Job creation deficiency;
  - I-829 denial based on project issues;
  - Significant change in the inputs that would affect the job output under economic report.
  - Rejection, late filing, or non-filing of I-924A.
36. For purposes of I-829 filings, regional centers should take every action possible to determine the conditional permanent residence date of each investor. Regional centers should seek to provide, directly or indirectly, notice to investors thirty days before the ninety-day window for filing the I-829.