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**T**he EB-5 Reform and Integrity Act of 2022 (the “Reform Act”) added new requirements that apply to a broad category of persons designated as “promoters” under the Reform Act, and imposes a number of regulatory responsibilities on all such persons. This article discusses the scope of the term “promoter” under the Reform Act, and the general regulatory requirements that apply to those persons. As of the date of this article, US Citizenship and Immigration Services (“USCIS”) has not issued any regulations with respect to promoters and the specific requirements that will apply to such persons.

### Who are promoters?

#### Section K of the Reform Act refers to:

*“Direct and third party promoters (including migration agents) of a regional center, any new commercial enterprise, an affiliated job-creating entity, or an issuer of securities intended to be offered to alien investors....”*

## Who Are “Promoters” And What Requirements Apply To Them Under The EB-5 Reform And Integrity Act?

However, there is no specific definition of the term “promoter” in the Reform Act, beyond the clear inclusion of “migration agents,” a term itself not defined in the legislation. Since the intent of the Reform Act is, among other things, to incorporate compliance with securities laws, it would be expected that USCIS would interpret the term “promoter” in a manner similar to that of the Securities and Exchange Commission (“SEC”). Nonetheless, a closer review of the requirements that apply to promoters under the Reform Act indicate that it is likely the term promoter was intended by Congress to have a different meaning than that used by the SEC, and that under the Reform Act, a promoter is intended to mean any person who receives compensation in connection with soliciting persons to invest in offerings of securities subject to the Reform Act.

### How is “promoter” defined by the SEC?

**SEC Rule 501(a), which is part of SEC Regulation D (“Regulation D”) under the Securities Act of 1933, as amended (the “Securities Act”), defines the term “promoter” as follows:**

*“ ‘Promoter’ includes:*

*“(i) Any person who, acting alone or in conjunction with one or more other persons, directly or indirectly takes initiative in founding and organizing*

*the business or enterprise of an issuer; or*

*“(ii) Any person who, in connection with the founding and organizing of the business or enterprise of an issuer, directly or indirectly receives in consideration of services or property, or both services and property, 10 percent or more of any class of securities of the issuer or 10 percent or more of the proceeds from the sale of any class of such securities. However, a person who receives such securities or proceeds either solely as underwriting commissions or solely in consideration of property shall not be deemed a promoter within the meaning of this paragraph if such person does not otherwise take part in founding and organizing the enterprise” (emphasis added).*

### Who would be a promoter if the SEC definition was followed?

Based on the definition of “promoter” under SEC Rule 501(a), the term promoter under the Reform Act would include any person who receives consideration equal to or ownership of 10 percent (or more) of a class of securities of an

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issuer in connection with founding or organizing the business or enterprise of an issuer of securities. However, the Reform Act refers to a “promoter of a regional center, any new commercial enterprise, an affiliated job-creating entity, or an issuer of securities intended to be offered to alien investors.” Read literally, that would mean that “promoters” under the Reform Act include any person who receives compensation equal in value to or ownership of more than 10% of the securities of any of the regional center, the new commercial enterprise, or an affiliated job-creating entity. That would include potentially the founders, officers, directors, and managers who receive enough compensation from the regional center, new commercial enterprise, or affiliated job-creating entity, as well as the 10% owners of any of the regional center, new commercial enterprise, or affiliated job-creating entity. (Note: it is unclear under the Reform Act whether the new commercial enterprise is the same as the “issuer of securities intended to be offered to alien investors,” or this is just a duplicate reference to new commercial enterprise, since the new commercial enterprise is the entity that offers securities to alien investors under the EB-5 Program, and the term “issuer” is frequently cited in the Reform Act in addition to but distinct from the term “new commercial enterprise” including (but not only) in the Section K reference to “promoters.”)

#### Would an independent foreign agent, finder, or migration agent be excluded from the definition of promoter under the SEC definition?

According to SEC Rule 501(a), the definition of promoter excludes persons who receive underwriting commissions if they do not also take part in founding or organizing the enterprise. This would exclude foreign agents, finders, and migration agents (mentioned in Section K of the Reform Act but not Rule 501(a)) who are not also owners or do not also take part in the founding or organizing any of the regional center, new commercial enterprise, or affiliated job-creating entity (or any other issuer of securities offered to

alien investors – whatever that may mean).

#### How can this definition of promoter be clarified under the Reform Act?

Since the Reform Act refers to “Direct and third party promoters (including migration agents)....”, one would expect that Congress intended to include independent (non-founding or -organizing) migration agents, finders, and broker-dealers in the definition of promoter. However, until more specific rules and standards are issued, it is unclear what the definition of promoter is under the Reform Act.

#### What are the requirements that apply to promoters under the Reform Act?

According to Section K of the Reform Act, the Secretary of Homeland Security is required to prescribe rules and standards to oversee promotion of any offering of securities relating to the EB-5 Regional Center Program, including: (i) registration with USCIS; (ii) certification by each promoter that it is not ineligible to participate as a promoter under Section H(i) of the Reform Act (the disqualification provisions); (iii) guidance for accurately representing the visa process to foreign investors; and (iv) guidelines describing permissible fee arrangements under applicable securities and immigration laws. No such rules or standards have been proposed as of the date of this article. However, the Reform Act does require that

*“Each petition filed under section 204(a)(1)(H) shall include a disclosure, signed by the investor, that reflects all fees, ongoing interest, and other compensation paid to any person that the regional center or new commercial enterprise knows has received, or will receive, in connection with the investment, including compensation to agents, finders, or broker dealers involved in the offering, to the extent not already specifically identified in the business plan filed under subparagraph (F).”*

In addition, the Reform Act also requires that:

*“Each regional center, new commercial enterprise, and affiliated job-creating entity shall maintain a written*

*agreement between or among such entities and each direct or third-party promoter operating on behalf of such entities that outlines the rules and standards prescribed under clause (i).” (Section K(iii); emphasis added.)*

This means that the regional center, new commercial enterprise, and job-creating entity are required to have an agreement with each promoter that outlines all of the rules and standards that the Secretary of Homeland Security is required to prescribe – but which have not been prescribed as of the date of this article.

#### How can regional centers, NCEs and JCEs comply with the Reform Act before the Secretary of Homeland Security issues any regulations allowing registration of promoters or guidance on compliance requirements?

Until the Secretary of Homeland Security provides a definition of the term promoter, it would be wise to assume that all persons who receive any form of compensation in connection with an EB-5 offering will be considered promoters. This will require that the regional center, new commercial enterprise, and affiliated job-creating entity have a written agreement with each such person that includes: (i) the amount of compensation to be paid to such person, by whom, and when; (ii) a representation that the person is not prohibited from acting as a promoter under Section H(i) of the Reform Act; (iii) a requirement that the promoter’s compensation be specifically described to each investor for whom the promoter is paid; (iv) a requirement that the promoter will comply with the rules and standards that are prescribed by the Secretary of Homeland Security, including that the promoter will register with USCIS promptly following the date that USCIS provides a form for registration; and (v) a right of the regional center, NCE or JCE to terminate the agreement, without payment of any compensation, if the promoter does not fulfill its obligations as required under the applicable rules and standards as those may be clarified, modified, or expanded in the future. This is admittedly an imperfect solution, but until rules are prescribed for promoters, there are no other means of attempting to comply with the requirements of the Reform Act with respect to promoters. ■