

Checklist of Contents for Regional Center Compliance Policies and Procedures Manual Under the EB-5 Reform & Integrity Act

BY THE EB-5 SECURITIES ROUNDTABLE



¹ The EB-5 Securities Roundtable was initially organized by Kurt Reuss, the founder of eb5Marketplace, in 2014 and is an informal, independent group of EB-5 securities attorneys organized to facilitate best practices in the offerings of EB-5 securities. The EB5 Securities Roundtable is not affiliated with any EB-5 industry organization, regional center, offeror of EB-5 securities or job-creating recipient of EB-5 funds, and it receives no outside financial contributions. The following industry leading securities attorneys are its current members: Robert Cornish, Ronald Fieldstone, Lulu Gordon, Douglass Hauer, Catherine DeBono Holmes, Michael Homeier, Mark Katzoff, Charles Kaufman, Mariza McKee, Jay Rosen, Bruce Rosetto, John Tishler and Osvaldo F. Torres.

The EB-5 Securities Roundtable¹, a group of securities law practitioners with extensive experience in EB-5 securities offerings (the “Roundtable”), has developed the following checklist (“Checklist”) of the major categories of policies and procedures that should be included in a regional center’s Compliance Policies and Procedures Manual to conform to the requirements of the recently-codified EB-5 Reform and Integrity Act of 2022 (the “EB-5 Reform Act”). Each regional center (“Regional Center”) may have their own policies and procedures for addressing these issues, but each Regional Center should address all of these categories in order to fully comply with the integrity provisions of the EB-5 Reform Act. Some Regional Centers

may already have their own written standard operating procedures (“SOPs”), which may include some of the policies that would address these issues. In those cases, the Regional Center should review its existing SOPs to determine if all of the issues described in this Checklist are covered, and add in any issues that have not been covered. Alternatively, a Regional Center could adopt a separate Compliance Manual that addresses the additional issues, with the caveat that the SOP and Compliance Manual must be consistent.

The Checklist provided below is based on the Roundtable members’ collective review and analysis of the issues that should be included in a comprehensive regional center compliance manual to

maximize compliance with the EB-5 Reform Act. As of the date of this article, USCIS has not issued any detailed regulations or other guidance regarding the contents of the written policies and procedures required by the EB-5 Reform Act. It is possible that USCIS may include additional requirements, items that are not included in this Checklist. This Checklist is not intended to serve as legal advice, and is not a substitute for each regional center’s review of its own internal policies and procedures with its own legal counsel. However, the Roundtable hopes that this Checklist will provide a helpful start for each Regional Center seeking to comply with the new requirements of the EB-5 Reform Act.

Continued On Page 45

Checklist of Contents for Regional Center Compliance Policies and Procedures
Manual Under the EB-5 Reform & Integrity Act



Continued From Page 44

I. COMPLIANCE WITH SECURITIES LAWS

A. Securities Act of 1933 – describe policies for confirming exemption from registration of offering of securities of “New Commercial Enterprises” (“NCEs”) and compliance with anti-fraud protections.

1. Regulation D

- a. “Bad Actor” questionnaires from all executive officers, directors, promoters and control persons of Regional Center, “Job Creating Entity” (“JCE”), and NCE
- b. Form D filing with SEC
- c. Accredited Investor questionnaires (for SEC Rule 506(b) offerings)
- d. Verification of Accredited Investor status (for SEC Rule 506(c) offerings)
- e. Internal controls to confirm that offerings are made in accordance with the applicable Reg D exemption (e.g. Rule 506(b) versus Rule 506(c)).

2. Regulation S

- a. Legend regarding restrictions on resale in US in Private Placement Memorandum (“PPM”) and governing document of NCE (Operating Agreement if an LLC, Limited Partnership Agreement if an LP).

- b. Internal controls to confirm that offerings are made in accordance with the applicable Reg S exemption.

3. Anti-fraud protections

- a. Describe due diligence procedures used by Regional Center to assure that offering documents do not contain material misstatements or omit to state material information, including:
 - i. Background checks on individuals and entities, including ownership of real property
 - ii. Site Visit
 - iii. Interviews with key management of NCE and JCE
 - iv. Reviews of project budget, project capital structure, development and construction timelines, projections, and any feasibility studies
- v. Review of intended use of EB-5 funds
- vi. Review of all fees and compensation payable to management and affiliates of NCE and JCE
- vii. Review of all material contracts (loan agreements, employment contracts, construction contracts, etc.)

- viii. Review of governing documents of all entities in chain of ownership of both JCE and NCE to determine ultimate ownership and control

- ix. Verification of participation of legal, accounting, and economic professionals, and if not, why not.

- x. Internal controls on disposition of funds, including authorized check signers, escrow agents, etc.

- b. Describe certifications required from management of each NCE and JCE confirming accuracy of statements made in PPM and disclosure of all related party compensation, conflicts of interest, and project-specific risk factors.

B. Securities Exchange Act of 1934 – describe procedures to confirm legality of payment of compensation to brokers, agents, and finders.

1. Describe procedures to determine whether all persons to be paid compensation are exempt from registration as a securities broker-dealer.
2. Describe requirement that every NCE has a written agreement with all persons who will be paid compensation for introducing

Continued On Page 46



Checklist of Contents for Regional Center Compliance Policies and Procedures Manual Under the EB-5 Reform & Integrity Act

Continued From Page 45

investors to NCE that includes necessary representations to establish that such persons are either registered broker-dealers or exempt from registration.

3. Describe requirements for officers, directors, and employees of the NCE or its control persons to be exempt from registration under the “issuer exemption” provided in SEC Rule 3a4-1.

C. Investment Company Act of 1940 – exemption of NCE from registration as investment company.

1. Describe required procedure that determines the NCE is exempt under Section 3(c)(1), 3(c)(5), or 3(c)(7), or per the affiliate financing subsidiary definition.
2. Describe required certification by NCE that it meets a required exemption.

D. Investment Advisers Act of 1940 – exemption from registration of NCE Manager as investment adviser.

1. Describe required confirmation that NCE Manager does not have “assets under management” of more than \$100 million under SEC definition.
2. Describe required filing by each NCE manager, if necessary, of Part 1 of Form ADV to claim “exempt reporting adviser” status.
3. Include clear disclosure of conflicts of interest between and among all entities involved in deal.

E. State Securities Laws – exemptions from registration of NCE offering and of NCE manager as investment adviser under applicable state laws.

1. Describe requirement of each NCE to provide evidence of compliance

with applicable state securities registration exemption of NCE offering (addressing both, if applicable):

- a. Regulation D notice filings; and
 - b. Regulation S compatible exemptions.
2. Describe requirement that each NCE Manager provide documentation of state investment adviser registration exemption of that NCE manager.

II. COMPLIANCE WITH EB-5 PROGRAM REQUIREMENTS

A. Policies and Procedures Manual

1. Address the requirement that Regional Center will maintain and regularly review and update written Compliance Policies and Procedures Manual.
2. Provide for a Chief Compliance Officer (if desired), or else specify who is responsible for preparing, reviewing, approving, and (if appropriate) updating required procedures in Compliance Manual.
3. Describe procedures for detecting and correcting violations of Compliance Manual requirements.

B. Records Retention

1. Describe records maintenance and retention policies for all records required under the EB-5 Reform Act, including but not limited to electronic communications such as WeChat, e-mail, and other media.
2. Retain files holding copies of all marketing and advertising materials, including logs of distribution of PPMs.

C. Annual Reports

1. Describe policy for filing annual reports with USCIS.

2. Describe policies for obtaining annual certifications from each NCE and JCE sponsored by Regional Center.
3. Describe policies for providing annual certifications required to be provided by Regional Center to USCIS.

D. Fund Administration or Annual Audits

1. Describe policies for requiring third party fund administrator or annual audits of JCE or NCE.

E. Notification of Changes in Regional Center

1. Describe policies for notification of USCIS of changes in ownership or management of Regional Center.

F. Integrity Fund

1. Describe how payments will be set up to with the EB-5 integrity fund.

III. COMPLIANCE WITH FEDERAL LABOR LAWS

1. Describe policies and procedures for compliance with federal labor laws.

