

Borrowers in EB-5 Deals Not Insulated from Securities Litigation by the SEC

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While issuers and regional centers are the focus of EB-5 litigation right now and into the foreseeable future, if you are taking direct proceeds as a borrower in a transaction facilitated by an EB-5 regional center or issuer you need to have legal advice on the scope of your liability in a deal. Many large-scale EB-5 transactions are driven by a regional center that is facilitating a loan to a project or EB-5 borrower. Borrowers in such transactions often operate under the misconception that they are insulated from liability because they are not an issuer, and that this "insulation" means no accountability to the SEC or to investors.

Nothing could be further from the truth.

The SEC may name an EB-5 borrower in a transaction as a relief defendant in a civil action against a regional center or issuer. An asset freeze, disgorgement and reputational harm, among others, are all possible outcomes if a borrower receives direct proceeds of a toxic EB-5 deal that lands in litigation. The SEC also has the power to sue persons who aid and abet a violation of the securities laws. In the EB-5 context, where borrowers may accompany a regional center on a roadshow or participate in marketing efforts, caution is warranted.

Borrowers in EB-5 transactions should have protective indemnification agreements in place before receiving EB-5 proceeds; review offering materials to ensure the accuracy of any facts represented to investors about their projects; know the background and experience of the EB-5 regional center before closing a deal; and have separate counsel from the EB-5 regional center controlling the offering process.

Authors



Douglas Hauer