

Lawmakers May Not Spend Political Capital on Stand-Alone EB-5 Bill

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The chances of a stand-alone EB-5 bill gaining consensus with lawmakers on Capitol Hill are low. With the GOP failing to repeal the Affordable Care Act, lawmakers may be spending time readjusting priorities in unexpected ways for the remainder of 2017. The EB-5 Program is unlikely to be a priority. Also, stand-alone EB-5 legislation has not proven to be a successful way for lawmakers to achieve reforming the Program. As we approach 2018, odds are that lawmakers won't spend political capital on an EB-5 bill.

Where does this leave EB-5 reform efforts?

If lawmakers do not have a consensus on changes to the EB-5 Program by the end of 2017, the Program will in all likelihood be extended pursuant to a Continuing Resolution (CR) in December. This will continue EB-5 into next year. This is the expected outcome, at least at this time.

For years, there has been no consensus on changes to the EB-5 Program. Lawmakers may not find a consensus on how to reform the Program, which means that change would need to come from the Executive Branch through rulemaking authority.

What is the status of proposed EB-5 regulations?

On January 13, 2017, a proposed rule entitled [EB-5 Immigrant Investor Program Modernization](#) appeared in the *Federal Register*. However, like other proposed immigration rules published at the end of the Obama Administration, this rule is in limbo.

Based on our best information, the proposed EB-5 regulations from earlier this year are now in the process of being finalized by the current administration, and are going through the interagency clearance process that precedes approval for publication in the *Federal Register*. The White House has control over whether and when the final regulations are published. According to our most recent information, USCIS has completed its work on final EB-5 regulations, and the delay in implementation is related to political considerations and the regulatory clearance process at the Office of Management and Budget (OMB).

The final regulations, once published, will likely address investment amounts, definitions and procedures for determining targeted employment areas (TEAs) and integrity measures to weed out bad actors from the Program.

Lawmakers may see publication of final EB-5 regulations as the only way to change the Program, without having to negotiate away political capital on other pressing issues. In fact, as recently as May 7, 2017, Senate Judiciary Chairman Grassley (R-IA) wrote to Homeland Security Secretary John Kelly urging the Department to expedite proposed EB-5 regulations, "[targeting abuse and national security concerns](#)."

While no one can predict when or if the Trump Administration will act on EB-5 reform by approving final EB-5 regulations, those most engaged with EB-5 may wait for the White House to act before proposing another stand-alone EB-5 bill. We think that it is possible that Senator Grassley will



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allow time for the Trump Administration to publish final regulations before introducing any new legislation.

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Lawmakers may prefer to have the White House take the heat for controversial changes to the Program

Finalization of EB-5 regulations by the Trump Administration would allow lawmakers to focus on extending the Program (which only lawmakers have the authority to do), without getting delayed by differences on issues such as investment amounts.

Through the rulemaking process, DHS has the authority to adjust investment amounts and decide substantive and definitional issues regarding TEAs, alongside introducing compliance measures and obligations into the Program.

When EB-5 reform occurs, either through legislation or by new regulations, we don't expect business as usual for regional centers, recipients of EB-5 capital and other industry participants.

What do we foresee changing in EB-5?

If EB-5 reform comes through publication of final regulations, changes to the industry could be tectonic and immediate.

For one, we anticipate more attention to integrity or securities compliance measures in investment offerings. It is almost certain that final regulations will respond directly to concerns by Congress about fraud, corruption and money laundering in the EB-5 Program, by ramping up the stakes for regional centers and issuers of EB-5 investments to comply with the law. There will very likely be more attention to vetting investor source of funds.

We also expect DHS to become more nimble in ejecting regional centers from the Program that either cannot or do not comply with baseline integrity measures that protect investors, or that fail to foster real economic development and job creation.

We think there will be substantial increases in investment amounts, as well as a more narrow approach to how TEAs are defined. Those changes may not be in line with what the EB-5 industry expects, and minimum investment thresholds may be higher than those proposed by lawmakers.

Issuance of Final Regulations may be a game-changer in shifting lawmakers from reforming EB-5 to extending the Program

While any outcome has to be expected with EB-5 reform, it may be more likely that lawmakers will be able to find a consensus for extending the Program once new regulations are issued. This consensus to extend the Program might come when there is a push in the Senate to address other, more urgent immigration issues.

We think that a longer-term extension of the EB-5 Program could be bundled with efforts by lawmakers early next year to tackle relief for "Dreamers" impacted by a phasing-out of DACA ("Deferred Action for Childhood Arrivals"). In other words, we could see an extension of the Program as part of a broader effort to resolve DACA and to reform immigration. But there would need to be action first by the White House authorizing publication of final EB-5 regulations.

The latest example is the recent announcement of the [SUCCEED Act](#) (Solution for Undocumented Children through Careers Employment Education and Defending our nation), introduced by Senator Thom Tillis (R- NC), Senator James Lankford (R-OK) and Senator Orrin Hatch (R-UT) on September 25, 2017. The SUCCEED Act is not expected to be a stand-alone DACA bill, but has been conceived as a bill that will incorporate other immigration provisions. EB-5 provisions could be added to this bill or any similar, proposed legislation on immigration.

Tacking on EB-5 provisions to the SUCCEED Act (or similar proposed legislation) may be a way to extend the EB-5 Program, or even to make changes that are less controversial and that relate to enhanced integrity of the Program. EB-5 industry participants should be thinking now about how to frame advocacy efforts alongside broader efforts to address DACA and other immigration programs that lawmakers may find urgent.

For now, we need to watch DHS and the Federal Register, as well as lawmakers

We are not in a political climate where a stand-alone EB-5 bill will garner the bipartisan, bicameral support and consensus needed among lawmakers. The Program has been too riddled with controversy. The Securities and Exchange Commission (SEC) continues to pursue allegations of fraud against regional centers and EB-5 deal promoters. Just recently, the SEC obtained an [emergency court order](#) to freeze the assets of a husband and wife team in Arcadia, California, who allegedly defrauded investors in two EB-5 offerings. Such events may have an impact on lawmakers who may have otherwise taken an interest in supporting legislation on EB-5.

If any legislative efforts do materialize into a stand-alone draft bill before the end of 2017, we anticipate that lawmakers will consider carefully views expressed by DHS earlier this year in its Proposed Rule to modernize EB-5. This is particularly the case with respect to TEAs and investment amounts.

If final EB-5 regulations are in place before lawmakers reach a consensus on DACA, we might see an EB-5 extension bundled with other immigration provisions of a bill that would seek to include broader immigration issues. DACA is now bringing immigration into a sharper focus. This may create a new opening for an EB-5 extension, especially if the White House takes the cue from Senator Grassley to issue EB-5 regulations before the end of 2017.

If you have any questions about this topic, please contact the author(s) or your principal Mintz Levin attorney.
