Compliance Risks and Practical Considerations for Foreign Intermediaries Engaging in U.S.-Directed and U.S.-based EB-5 Solicitation

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Purpose and scope: This article provides general informational and educational discussion focused on U.S. broker-dealer registration and foreign finders (Hereinafter: **Foreign Intermediaries**) issues in the EB-5 context. This article does not constitute legal, tax, immigration, investment, or compliance advice. Readers should consult qualified U.S. securities counsel and their compliance department for fact-specific guidance.

Introduction: Cross-Border EB-5 Compliance Questions

In recent months, there has been a noticeable increase in inquiries from Foreign Intermediaries, including foreign migration agencies, seeking clarification on permissible compliance pathways for **sourcing** and **being compensated** for EB-5 investors who are physically present in the United States. These inquiries consistently center on a core question: whether a Foreign Intermediary's involvement in **U.S. Directed** investor introductions, communications, or transaction facilitation and **U.S.-based EB-5 investors** may present U.S. securities regulatory considerations, including potential broker-dealer registration implications, and whether such considerations can be addressed through affiliation with a **U.S.-registered broker-dealer.**[1]

These questions reflect continuing uncertainty in some parts of the market regarding the compliance boundaries applicable to Foreign Intermediaries in cross-border EB-5 offerings, as well as a growing awareness of the legal consequences associated with U.S.-directed and U.S.-based solicitation by Foreign Intermediaries.

EB-5 Offerings Are Governed by General Securities Law Principles

At the outset, it must be emphasized that EB-5 offerings do not occupy a special regulatory category or "gray area" under U.S. securities laws. EB-5 investments are treated as private placement securities, and their issuance, marketing, and distribution, together with the activities of intermediaries, are subject to the same foundational regulatory principles that apply to other private securities offerings.[2]

Offshore Solicitation in Reliance on Regulation S

Where a Foreign Intermediary conducts its activities entirely outside the United States and limits investor solicitation to individuals residing abroad, such conduct generally does not implicate broker-dealer registration requirements. Properly structured offshore solicitation of non-U.S. investors, including offerings conducted in reliance on Regulation S, has long been recognized as permissible when implemented in accordance with applicable conditions and does not, by itself, raise broker-dealer registration concerns.[3]

U.S.-Directed Solicitation and Its Regulatory Implications

In reality, a substantial portion of EB-5 investors or prospective investors are already physically present in the United States, commonly holding F-1, B-1/B-2, H-1B, and L-1 visas, as well as 'failed EB-5 investors' who invested in previously failed EB-5 projects, are physically residing in the United States. The widespread adoption of digital communication tools and online marketing channels has made it increasingly easy for Foreign Intermediaries, through professional networks or personal relationships, to establish contact with such U.S.-based investors. This evolution has given rise to a growing number of fact patterns that warrant careful compliance analysis.

Examples include outreach to investors physically present in the United States through webinars, social media platforms, messaging applications, or targeted online and offline advertising conducted within or directed toward the United States. Such outreach may also occur through indirect channels, including introductions made by friends or family members, such as parents of international students, where communications ultimately reach U.S.-based investors.

In these circumstances, regulatory analysis does not depend on the intermediary's jurisdiction of incorporation or the contractual labels used to describe its role. Rather, the analysis focuses on the substance of the intermediary's activities and the location from which those activities are conducted or directed. Where EB-5 investment introductions or communications are directed toward U.S.-based investors, such conduct may affect the exempt status of the security traditionally being relied upon and may trigger broker-dealer registration obligations for the Foreign Intermediary.[4]

Unregistered Broker-Dealer Activity: Legal Standards and Risk Indicators

In enforcement and compliance practice, unregistered broker-dealer activity generally refers to engaging in broker-dealer-type functions without completing the required registration. No single factor is determinative. Regulators evaluate each situation based on the totality of the facts and circumstances.[5]

Factors that regulators commonly consider when assessing risk include:

1. Solicitation activities occurring in the United States, directed from the United States, or clearly targeting U.S.-based investors;
2. Advising U.S.-based investors on private placement securities;
3. Receipt of commissions, referral fees, or other compensation contingent upon a successful investment;[7]
4. Providing investment analysis, recommendations, or comparative assessments;
5. Participating in discussions and negotiations regarding investment terms or transaction structure;
6. Providing source-of-funds services to the U.S.-based investors;
7. Assisting U.S.-based investors with international fund transfers;
8. Organizing project presentations, roadshows, online marketing efforts, or targeted promotions within the United States, including on U.S. university campuses; and
9. Sending subscription documents or assisting with their execution.

Even where an intermediary does not directly participate in document execution, substantial involvement in solicitation, negotiation, or transaction-related communications may be relevant to a broker-dealer registration analysis. Regulatory review focuses on **actual conduct** and **economic substance**; formal structuring or labeling alone is not determinative.

Enforcement Exposure Associated with U.S.-Based Transactions with Success-Based Compensation

Regulatory actions in this area indicate that where Foreign Intermediaries receive compensation tied directly to the investment outcomes of U.S.-based investors without appropriate registration or supervision, regulatory scrutiny has historically increased. Depending on the facts and circumstances, such scrutiny may extend beyond the intermediary to include issuers, regional centers, and other involved parties. Outcomes in prior matters have included disgorgement of fees, civil monetary penalties, and cease-and-desist orders. Where issuers or Regional Centers were aware, or reasonably should have been aware, of potential compliance deficiencies, regulators have also examined potential aiding-and-abetting or facilitation considerations.[8] [9]

Offshore Execution itself does Not Eliminate U.S. Regulatory Risk

Care should be exercised when relying on prior practice or perceived industry norms when evaluating compliance risk, as most applicable regulatory standards have been in place for many years. Increased regulatory attention in recent years reflects heightened enforcement activity, improved investigative tools, the USCIS Form I-956K filing requirement, interagency information sharing, and greater traceability of

communications and payments, rather than fundamental changes in the underlying legal framework.

Should regulators such as the SEC elect to scrutinize the factual predicates underlying a claimed Regulation S exemption, multiple pathways may exist through which the investor profile could be identified or reconstructed. These may include formal disclosure mechanisms such as USCIS Form I-956K registrations for direct and third-party promoters, heightened interagency coordination among the SEC, FINRA, USCIS, and the Department of Justice, as well as review of digital transactional footprints and cross-border wire transfer data.

For example, Foreign Intermediaries may introduce U.S.-based F-1 students to regional centers and attempt to manage compliance considerations by arranging for execution of subscription documents outside the United States. Regulators generally do not view execution location as determinative. Where investment introductions, communications, and relationship development occurred while the investor was physically present in the United States, and transaction-based compensation is paid to a Foreign Intermediary, offshore execution alone has not historically been sufficient to address broker-dealer regulatory considerations.[10]

Digital communications leave a lasting record, and jurisdictional considerations may arise when solicitation reaches U.S. investors or originates from within the United States. Emails, wire records, messaging applications, and marketing materials frequently become part of the compliance record. Foreign Intermediaries who conduct seminars on U.S. university campuses, hold meetings, communicate with individuals located in the United States, or travel to the United States to meet prospective investors may be engaging in U.S.-directed solicitation. Such activities may trigger U.S. securities regulatory considerations, including potential broker-dealer registration requirements, regardless of where offering documents are executed or how compensation is characterized.[11]

In these circumstances, regulatory scrutiny has historically focused on the transaction as a whole rather than isolated mechanics. Even where offshore execution is practicable, a greater portion of the transaction lifecycle may occur within the United States, often involving multiple participants, which can narrow the availability of offshore-based compliance rationales. Consistent with longstanding enforcement practice, regulatory review typically examines how the investor was solicited, where solicitation activities occurred, the nature and extent of each party's role in effecting the transaction, whether investment-related input was provided, and the structure and recipient of any transaction-based compensation. As reflected in prior SEC actions, including SEC v. Hansen, SEC v. Hui Feng, and SEC v. Ireeco, this analysis emphasizes **conduct** and **economic substance** rather than formal labels or document-execution mechanics.[12]

Totality-of-the-Circumstances Analysis in Cross-Border Solicitation Risk

Regulatory examinations and enforcement actions in the EB-5 market reflect a consistent analytical approach. Where U.S.-based investors are solicited through Foreign Intermediaries lacking appropriate registration, compliance risk considerations may arise, and regulatory review has frequently followed. Whether particular conduct raises broker-dealer registration concerns depends on the totality of the circumstances, not on any single factor.[13]

Affiliation with U.S.-Registered Broker-Dealers and Its Limitations

In limited circumstances, foreign individuals may affiliate with a U.S.-registered broker-dealer under applicable Foreign Associate frameworks. Such arrangements are rarely used in the EB-5 context and are available only under narrow conditions. In general, these frameworks contemplate that securities-related activities will be conducted outside the United States, and they **do not provide a basis** for engaging in U.S.-directed solicitation or marketing activities. Where activities involve investors located in the United States or otherwise create a U.S. nexus, additional broker-dealer registration considerations may arise.[14]

This type of affiliation is available only to individuals and does not extend to foreign entities acting as intermediaries, such as foreign migration agencies or companies. Under FINRA supervisory obligations, a U.S. broker-dealer that associates with a foreign individual must supervise that individual's communications, solicitation activities, and compensation arrangements, and retains ultimate responsibility for compliance with applicable U.S. securities laws.[15]

Foreign individual Registration obligations are determined by function

Foreign individuals associated with a FINRA member firm are subject to registration requirements based on the nature of their activities, consistent with FINRA Rule 1210. Individuals who engage in functions requiring registration must be properly registered, regardless of their physical location. Certain legacy or limited-function categories have been eliminated under FINRA Rule 1220.06 (Eliminated Registration Categories), and individuals who do not perform activities requiring registration may not be subject to registration requirements. In practice, foreign-associated individuals operating outside the United States may, depending on their specific functions, not be required to obtain qualification licenses; however, this determination is activity-based and subject to firm supervision under FINRA Rule 3110.

The Foreign Associate Concept, Create an Entity-Level Pathway

Where affiliation is contemplated, it must occur at the individual level and remains subject to strict limitations, including the prohibition on U.S.-directed solicitation. Attempts to rely on the Foreign Associate framework as a means of addressing entity-level intermediary activity are generally inconsistent with how U.S. broker-dealer regulation is applied in practice.[16]

The Foreign Associate concept under FINRA applies to individuals who are foreign associates of a U.S. broker-dealer, authorizing limited securities activities outside the United States under conditions set forth in Rule 15a-6(a)(3). It does not create an entity-level registration pathway that allows a foreign migration agency or intermediary firm to become an associated person of a U.S.-registered broker-dealer solely by virtue of the Foreign Associate rule. Nor does U.S. securities law provide a mechanism for a foreign corporate intermediary to rely on a Foreign Associate relationship as a regulatory compliance solution in lieu of Rule 15a-6 or broker-dealer registration.

A foreign migration agency that wishes to engage U.S. investors beyond the limited exemptions of SEC Rule 15a-6 must register as a U.S. broker-dealer.[17] **This requires filing Form BD with the SEC, obtaining FINRA membership through the New Member Application process, establishing supervisory and compliance systems, meeting net capital requirements, and registering qualified principals and representatives. The firm would also become subject to ongoing SEC, FINRA, and state regulatory oversight.** In the context of the EB-5 industry, however, this pathway is rarely pursued, as the regulatory burden, capital requirements, and operational costs often make full U.S. broker-dealer registration impractical and economically inefficient for foreign migration agencies or intermediaries.[18]

Proactively contacting U.S.-based EB-5 investors through U.S.-Directed online seminars with the aim of generating investment interest, or actively contacting the relatives or friends of EB-5 investors, would likely be viewed as solicitation, not an unsolicited transaction, and therefore would not permit a Foreign Intermediary to provide EB-5 investment solicitation or related services without registration.[20]

Moving Forward

In recent years, U.S. regulators have taken steps that materially increase transparency and compliance oversight of EB-5 activities and financial markets more broadly. Under the EB-5 Reform and Integrity Act of 2022, USCIS introduced Form I-956K, requiring all direct and third-party promoters, including migration agents, brokers, and consultants, to register with USCIS before engaging in EB-5 promotional activities. This expands the universe of entities subject to U.S. government compliance review and enhances visibility into promoter networks and compensation structures.[21]

At the same time, the SEC has signaled that advanced technologies such as artificial intelligence (AI) will play a growing internal role in compliance planning and

enforcement. Together with digital footprints and ongoing interagency collaboration, these developments make retrospective visibility into offering structures, intermediary relationships, and investor-related conduct more likely than in prior cycles, reinforcing the need for disciplined exemption analyses and robust, contemporaneously documented compliance controls.[22]

Footnotes

1. Securities Exchange Act of 1934, Section 3(a)(4).
2. SEC v. W.J. Howey Co., 328 U.S. 293 (1946).
3. Regulation S under the Securities Act of 1933.
4. SEC Rule 15a-6.
5. SEC v. Kramer, No. 8:11-cv-01258 (M.D. Fla. 2011).
6. SEC Staff Statement of David W. Blass, Chief Counsel, Division of Trading and Markets.
7. FINRA Rule 2040(c).
8. Exchange Act Section 20(e).
9. SEC Press Release No. 2015-127.
10. SEC v. Hui Feng, 935 F.3d 721 (9th Cir. 2019).
11. SEC v. Hansen, 1984 WL 2413 (S.D.N.Y. Apr. 6, 1984).
12. SEC v. Hansen; SEC v. Hui Feng; SEC v. Ireeco LLC.
13. SEC v. Collyard, 861 F.3d 760 (8th Cir. 2017).
14. FINRA Rule 1210 and applicable FINRA By-Laws governing associated persons and foreign associates.
15. FINRA Rule 3110.
16. SEC Rule 15a-6(a)(3).
17. Securities Exchange Act of 1934, Section 3(a)(4).
18. FINRA Rule 3110; FINRA Rule 1210.
19. SEC Rule 15a-6.
20. SEC v. Hui Feng; SEC v. Collyard.
21. USCIS Form I-956K; interagency compliance coordination framework.
22. SEC Press Release regarding creation of AI Task Force (Aug. 1, 2025).

Important Disclaimer & Disclosure

EB-5 investments are securities offerings subject to U.S. federal securities laws and involve significant risks, including the potential loss of invested capital, changes in immigration policy, project-related risks, market volatility, and evolving regulatory conditions. Always consult qualified professionals before making any investment or compliance-related decisions.

For Firm and Registered Representative information, visit BrokerCheck at brokercheck.finra.org.

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