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Senate Leaders Propose Significant Changes to the EB-5 Program: Big City Developers Are Likely to Rejoice

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On November 5, 2019, Senators Rounds (R-SD), Graham (R-SC) and Cornyn (R-TX) introduced the Immigrant Investor Program Relief Act (S. 2778) (“Relief Act”). The Relief Act would extend the Immigrant Investor Program (known as “EB-5”) to 2026, create visa set-asides for rural and targeted employment areas (TEA) but decrease the monetary incentive to invest in TEAs, which would bring much relief for projects in major cities. The Relief Act contains several provisions from the proposed bill by Senators Chuck Grassley (R-IA) and Patrick Leahy (D-VT), *The Act EB-5 Reform and Integrity Act of 2019* (S. 2540) introduced on September 24, 2019 (“Integrity Act”). The Relief Act would take effect 90 days after date of enactment and grandfather all I-526 petitions filed before the date of enactment; any refiled I-526 petitions after the date would be subject to new investment amounts.

The following summarizes the Relief Act and touches on its potential effect on the viability of the EB-5 Program and its stakeholders.

30% Visa Set Asides – The Relief Act would require, from the gross number of visas allocated annually, 30 percent to be reserved each year through 2026 for investors in a new commercial enterprise in a TEA, of which 50 percent shall be reserved for rural areas. Thus, 15% of visas are set aside projects in non-rural TEAs and 15 percent of visas for projects located in rural areas. This set aside regime would apply to new I-526 petitions submitted to USCIS after enactment of the Relief Act.

Unused Visas – At the end of each fiscal year, any unused visas from the new 30% set aside shall roll over at yearend for issuance in the immediately following year. This rollover regime could benefit some of the visa backlog to date.

Increase to Minimum Investment Amount – The Relief Act would increase the minimum investment in projects in a TEA to $1,000,000 and to $1,100,000 for projects not in a TEA. Many EB-5 stakeholders held out hope that Congress would intervene to decrease the minimum investment effective November 21, 2019 by USCIS, as previously reported in our July Update . However, for projects not in a TEA, the news is most welcome; USCIS’ EB-5 Modernization Rule increased the minimum investment in non-TEA projects to $1,800,000 effective November 21, 2019 and curtailed discretion to determine TEA status.

Particularly, projects in metropolitan areas are at risk of no longer qualifying as a TEA under the USCIS' new rules; by decreasing the delta between TEA and non-TEA based projects, the Relief Actwould diminish the severity of USCIS' rules in cities like New York. In addition, the Relief Act provides for adjustment to the minimum investment amounts in accordance with the Consumer Price Index (rounded to the nearest $100,000).

Changes to TEA Definition – The Relief Act would amend the definition of TEAs to these three categories:

1. A qualified opportunity zone, as designated under section 1400Z–1 of the Internal Revenue Code of 1986, as amended, thereby aligning the EB-5 Program with the highly popular opportunity zone investments;

2. a rural area (with a new definition as an area outside a city or town with a population of 20,000 or more and is outside a metropolitan statistical area or within a census tract with an area that is greater than 100 square miles with a population density therein of fewer than 100 residents per square mile); or

3. an area within the geographic boundaries of any military installation that was closed based upon a recommendation by a Defense Base Closure and Realignment Commission.

Additional Per Investor Fee – The Relief Act would implement a one-time non-refundable program improvement fee of $50,000 in conjunction with each I–526 petition submitted after the date of the enactment.

Premium Processing Available – Upon the payment of a $50,000 premium-processing fee, the Relief Act would institute expedited 120-day processing for investors and projects. USCIS will refund the premium-processing fee if it does not render a final decision on the application or petition, as evidenced by an approval notice or denial notice. Moreover, petitions relating to a project in a TEA, including individual investor petitions, will be subject to expedited review without payment of an additional premium-processing fee.

Compelling Relief for those Effected by Backlog – Tucked back on the penultimate pages of the proposed Relief Act is authority for USCIS to admit, temporarily into the United States with work authorization, an investor (and spouse and child) if such I-526 petition has been pending for at least three (3) years or has been approved and no immigrant visa is immediately available because the total number of visas has reached the maximum number of visas. The proposed Relief Act would allow for the assessment of a fee for providing this employment authorization an amount equal to not more than the average cost incurred by the Secretary in adjudicating applications for such endorsement.

Advance Project Approval Required – The Relief Act would require preapproval of all projects before investors may file corresponding I-526 petitions. The preapproval occurs through an I-924 exemplar application by the applicable regional center for each investment offering through an associated commercial enterprise. The submission should include the business plan, economic analysis, private placement memorandum, material agreements, subscription documents and so forth as per past practice of voluntary exemplar applications. However, the Relief Act includes the requirements of disclosure of all fees to be paid and received as well as any ongoing interest, other compensation paid, or to be paid by regional center or new commercial enterprise to agents,

finders or broker dealers involved in the offering; plus the securities details and broker/dealer etc.

Bad Boys Stay Away; Related Parties, Affiliates and Third-Party Promoters – The Relief Act has several provisions directed at affiliates, promotors and third parties connected with regional centers. The Relief Act prohibits regional centers from affiliating with persons who are guilty of a (i) criminal or civil offense involving fraud or deceit within the previous ten (10) years, (ii) a civil offense involving fraud or deceit that resulted in a liability in excess of $1,000,000, or (iii) crime for which the person was convicted and was sentenced to a prison term of more than one (1) year or violating any federal act that prohibits fraud, manipulative, deceptive or negligent conduct or trafficking or terrorism.

In an attempt to create greater transparency and supervision of parties who operate on the periphery of EB-5 projects, all arrangements must in writing submitted to USCIS with the preapproval application. Violations of these provisions could lead to suspension or a permanent bar of such individual from participation in the EB-5 Program. In an attempt to avoid patent conflicts of interest, the Relief act would prohibit services as a loan monitor for a business or project with individuals who are or were associated with regional center.

Formation of an EB–5 Integrity Fund – As proposed by Senators Leahy and Grassley's Integrity Act, the Relief Act contains support of an EB-5 Integrity Fund which will collect the myriad of new fees (i) the premium-processing fees, (ii) the new one-time per investor $50,000 fee for new I-526 filings, and (iii) the new annual fee commencing April 1, 2020 and payable each January 1 thereafter, of $20,000 from each regional (or a lesser fee of $10,000 from not-for-profit regional centers or those with 20 or fewer investors). The EB-5 Integrity Fund will fund three primary purposes (receiving one-third each of the funds) (i) site visits and audits of new commercial enterprise or affiliated job-creating entity; (ii) investigations and monitoring of projects, investor compliance and promotional activities (which promotional activities means securities offering and broker-dealer activity) and (iii) monitor general compliance with the EB-5 Program. The Relief Act provides for at least one (1) site visit to each new commercial enterprise or affiliated job-creating entity, which shall include a review for evidence of direct job creation in accordance with the offering documents.

Measures Regarding Threats to National Interests – The Relief Act provides for the denial or revocation of a petition, application, certification or benefit that is contrary to the national interest ofthe United States for reasons relating to threats to public safety or national security. In case of denials due to national security or public safety, no court shall have jurisdiction to review a denial or revocation under this subparagraph (though review of constitutional claims or questions of law with an appropriate court is permitted). USCIS director would provide an opportunity for an administrative appellate review by USCIS Administrative Appeals Office.

Restrictions of Foreign Participation to Enhance National Security – The Relief Act would require that participants operating regional centers and raising funds in the United States must be a national of the United States or lawfully admitted for permanent residence (and not subject to removal proceedings). In connection with participation of foreign persons, the Relief Act would require more detailed information, including the submission of fingerprints or other biometrics to the Federal Bureau of Investigation and criminal record checks and other background and database checks with respect to a regional center, new commercial enterprise and any affiliated job-creating entity. The Relief Act would contain an exception for ownership, but not the administration, of a job-creating entity that is not an affiliated job-creating entity for foreign or domestic investment fund or other investment vehicle that is wholly or partially owned by a foreign sovereign wealth fund or a foreign state-owned enterprise.

Related thereto, the Relief Act would require, in connection with foreign participation, that all "covered transactions" are reviewed by Committee on Foreign Investment in the United States (CFIUS) as per the Foreign Investment Risk Review Modernization Act (FIRRMA).

Annual Reporting; Accounting and Compliance – In addition to the requirements discussed elsewhere herein, the Relief Act would require greater reporting duties annual accounting of money invested in and out, of jobs created, of fees received and paid. Regional Centers would be required to hold such records for five (5) years subject to audit. In connection with compliance with securities laws, regional centers would be required to recertify annually about their compliance with U.S. securities laws and USCIS rules. If non-compliance with securities laws is discovered, the certifier shall describe the activities that led to noncompliance, the actions taken to remedy the noncompliance and certify that the regional center is now compliant. In short, regional centers would be required to have greater oversight of fundraising, deployment of funds, job creation and fees paid and received. The language of the Relief Act suggests that in the case of regional center "rental" or "affiliation" arrangements, regional centers' principals can be far less passive.

Implementation of Sanctions – Not later than 90 days after the date of the enactment of the Relief Act, the DHS would be required to establish, in addition to any criminal or civil penalties that may be imposed, a graduated set of sanctions for persons who intentionally violates the prohibition on preferential treatment under this section or intentionally violates the reporting requirements under subsection based on the severity of the violation referred to in paragraph (1), which may include written reprimand, suspension, demotion or removal

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