

COUNSELOR'S CORNER

Banks and the EB-5 Program: Look Before You Leap

By Barry A. Abbott and Diane M. Butler, Lane Powell PC



Many Washington banks have been asked to serve either as lender for an EB-5 project or as escrow holder to receive EB-5 customer deposits. While the benefits of serving in such roles, especially for a large real estate development project, may appear obvious, bankers should exercise caution before proceeding.

Most bankers have become familiar with EB-5 visas, which were created by Section 203(b)(5) of the Immigration Act of 1990. EB-5 visas afford a foreign national the opportunity to seek permanent residence in the United States if the foreign national invests at least \$1 million into a new enterprise (or at least \$500,000 into a designated "Targeted Employment Area"/Regional Center) that creates at least 10 new jobs. As the program has expanded, banks are being

called upon more frequently to finance the projects (often involving real estate development) and to serve as escrow holder for the funds received from the foreign investors.

Know Your Customer and Know the Investor

In virtually all of these projects, a promoter presents a local investment program to foreigners, who may be more interested in getting a green card than in maximizing return on investment. This desire can pose the risk of exploitation. In fact, the U.S. Securities and Exchange Commission on October 1, 2013, issued an Investor Alert entitled "Investment Scams Exploit Immigrant Investor Program" dealing specifically with that subject. The possibility for such fraud necessitates that banks exercise special care in following their standard procedures before taking on new customers, including

Know Your Customer (KYC), Anti-money Laundering (AML), and U.S. Treasury Department's Office of Foreign Assets Control (OFAC) guidance. Even if the promoter of the project is a current bank customer, when financing the project or serving as escrow agent the bank should:

- Understand and remain up-to-date on the fundamental aspects of the project, including:
 - o Reviewing all disclosure documents provided to potential investors;
 - o Understanding the proposed use of funds and the interplay of all accounts;
 - o Being aware of the numbers of investors and the countries from which the investors will come; and
 - o Monitoring the ongoing status of the investors' application process.
- Ensure that funds are appropriately used, especially if the bank is financing the project, including having the right to independently confirm the use of proceeds and auditing the project books.

Moreover, even a bank only serving as the escrow agent should perform the reviews noted above and, in addition, follow best procedures in connection with KYC, AML and OFAC with the foreign investors.

Understanding the EB-5 Escrow Process

For foreign investors to qualify for an EB-5 visa, the capital must be "invested" or contributed to the EB-5 enterprise. EB-5 investors traditionally have preferred to place their funds into a bank escrow that would not be released until the application is approved. However, over the last few years, and because government processing times have lengthened to over a year, developers and EB-5 project operators have convinced investors to release funds sooner. Tying up significant capital for such a long period of time can delay the project, impact financing opportunities and financial commitments, and potentially impact the ability to show that a project will succeed and create the required jobs. While these delays have led to



additional bank financing opportunities for the projects, promoters recently have convinced the investors to release the funds before approval, including by:

- Releasing all funds from escrow when the application is filed;
- Releasing some funds from escrow when the application is filed and releasing the remaining funds once the application is approved; or
- Not using an escrow at all, with the foreigners remitting their funds *directly* to the developer, even before the application is filed.


Obviously, to better ensure that the promoter is not engaging in a scam, the bank (whether serving as only escrow holder or as financing bank) should engage in sufficient due diligence and should place adequate controls on the fund disbursements.

Implications of Only Receiving EB-5 Deposits

Without escrow, the EB-5 investor remits funds directly into the project account at the bank, as if paying an invoice. In this case, and if the depository bank is using a correspondent international bank as an intermediary in receiving the funds, the local bank would act as little more than the “catcher” recipient of the EB-5 funds. How-

ever, even in this case, although the bank should have only a limited obligation to conduct due diligence about the source of funds, the recipient bank still will have obligations to file a Suspicious Activity Report (SAR) when appropriate.

Opportunities and Risk with the EB-5 Program

While Washington banks may service their entrepreneurial customers both as a financing source and an escrow holder for their EB-5 programs, bankers should exercise particular care when helping to facilitate the programs' operations. 



Barry A. Abbott is Counsel to the Firm at Lane Powell who concentrates his practice on financial services, general corporate, payments and e-commerce law. Barry has represented numerous international and domestic institutions and has extensive experience in corporate law and financial services, including bank regulatory (and payment) issues, insurance law, and non-profit law. He can be reached at abbottb@lanepowell.com or 206.223.7988.



Diane M. Butler is a Shareholder at Lane Powell, where she is Chair of the Firm's Canada Practice Group and Immigration Practice Group. She focuses her practice on business immigration and manages the Firm's immigration and Canada practices. Diane holds a Yellow Belt certification in Legal Lean Sigma® and Project Management. She can be reached at butlerd@lanepowell.com or 206.223.7715.