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CONCURRENT REGULATION D AND REGULATION S OFFERINGS IN EB-5 FINANCINGS

Compliance considerations for issuers of concurrent offshore and domestic offerings in EB-5 programs are important to avoid integration and preserve exemptions from SEC registration. The authors discuss SEC guidance on integration and then focus on “pertinent precautionary measures” in the issuer’s website used for the offerings. These encompass use of restricted portals, questionnaires, password protection, disclaimers, hyperlinks, and type of information appearing on the website.

By Mariza McKee and Robert Ahrenholz *

Securities issuers seeking to avail themselves of more than one exemption from registration under the Securities Act of 1933 often conduct concurrent securities offerings or serial offerings. In the context of EB-5 financings, concurrent Regulation D and Regulation S offerings have become the preferred structure for many issuers.¹ EB-5 financings are undertaken in connection with a federal immigrant entrepreneurial investment program known as the EB-5 Program, which is administered by the U.S. Citizenship

and Immigration Services (USCIS). Under the EB-5 Program, immigrant investors who make the required minimum investment in a new commercial enterprise that creates 10 jobs per investment may become lawful permanent residents of the United States. In EB-5 financings, structuring concurrent offerings is generally contemplated because EB-5 securities offerings is often made both on-shore and off-shore to non-U.S. persons.² However, a majority of investors in EB-5 offerings are

¹ Together, unless the context otherwise requires, concurrent Regulation D and Regulation S offerings are referred to in this article as “concurrent offerings.”

² The on-shore offerings generally rely on the exemptions provided in Rule 506 of Regulation D of the Securities Act and the off-shore offerings generally rely upon the Regulation S exemption under the Securities Act.

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IN THIS ISSUE

● **CONCURRENT REGULATION D AND REGULATION S OFFERINGS IN EB-5 FINANCINGS**