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**“EB-5 Proposed Regulations:
A Missed Opportunity, Next Steps for Reform”**

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“EB-5 Proposed Regulations: A Missed Opportunity, Next Steps for Reform”¹

I Introduction

It is not surprising that the long and winding road to EB-5 reform once again took a detour. Since February 2, 2016, when the Senate Judiciary Committee held its first hearing on EB-5 reform, Chairman Charles Grassley (R-IA) and Ranking Member Patrick Leahy (D-VT)² of the Senate Judiciary Committee had been pressing the U.S. Department of Homeland Security (“DHS”) to issue regulations addressing Target Employment Area (“TEA”) reform and other important aspects of the EB-5 Program.³ In response, USCIS announced in April 2016 that it would be issuing proposed regulations.⁴ After repeated delays, USCIS finally issued proposed regulations on January 13, 2017 (the “Proposed Regulations,” also sometimes referred to as “these regulations”), nearly one year after the first Senate hearing and merely 7 days before the beginning of the Trump administration.⁵

Key Program participants swiftly criticized the portion of these regulations that would increase the minimum investment amounts to levels that far exceed those that have been proposed by Congressional reformers, and would narrow the TEA definition.⁶ Based on recent precedent, USCIS should have anticipated⁷ that the new administration would impose an order to freeze all new or pending regulations, as was done within hours of President Trump taking the oath of office.⁸ As we will discuss in this article, we believe USCIS’ delay represents a missed

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² In January 2017, Senator Feinstein (D-CA) replaced Senator Leahy as the ranking member when he became the ranking member of the Senate Appropriations Committee.

³ February 2, 2016 hearing: <https://www.judiciary.senate.gov/meetings/the-failures-and-future-of-the-eb-5-regional-center-program-can-it-be-fixed>; and April 13, 2016 hearing: <https://www.judiciary.senate.gov/meetings/the-distortion-of-eb-5-targeted-employment-areas-time-to-end-the-abuse>. See various exchanges with Chief Nicholas Colucci of the Office of Immigrant Investor Program of USCIS. Also see the House Judiciary Committee hearing held on February 11, 2016: <https://judiciary.house.gov/hearing/is-the-investor-visa-program-an-underperforming-asset/>. The House Judiciary Committee members echoed these sentiments and continued to press USCIS to issue regulations.

⁴ <https://www.uscis.gov/outreach/eb-5-immigrant-investor-program>

⁵ <https://www.federalregister.gov/documents/2017/01/13/2017-00447/eb-5-immigrant-investor-program-modernization>. (the “Proposed Regulations”). The Proposed Regulations are not limited in scope to the TEA definition and the minimum investment levels. However, this article focuses only on these topics.

⁶ See <https://iiusa.org/blog/submit-comments-draft-legislation-regulations/>; <https://therealdeal.com/2017/01/12/obama-administrations-new-eb-5-bill-could-cool-use-of-program-by-developers/>; <https://wolfsdorf.com/blog/uscis-drops-the-hammer-on-the-eb-5-program/>; and <https://commercialobserver.com/2017/01/eb-5-faces-uncertain-fate-with-new-bill-trump-presidency/>

⁷ The executive action was consistent with the action taken by other recent Presidents upon assuming office, including Presidents Obama and Bush. <http://thehill.com/regulation/administration/310284-trump-freeze-expected-on-regs>; <http://www.wsj.com/articles/donald-trump-is-expected-to-move-quickly-to-start-regulatory-rollback-1484874243>

⁸ Technically, the executive action took the form of a memorandum dated January 20, 2017 and was issued by Chief of Staff Reince Priebus, on behalf of the President, to the head of all federal agencies (the “Regulatory Freeze

opportunity that if handled differently could have accelerated the passage of comprehensive legislative reform of the EB-5 Program. More importantly, assuming the controversial portions of these regulations are withdrawn or substantially revised by the Trump administration at some point before the final regulations become effective, the burning question becomes whether a comprehensive EB-5 reform bill, such as the pending H.R. 5992⁹, will be passed by the rapidly approaching April 28, 2017 reauthorization deadline.

In this paper we explain why we believe the administration will withdraw or substantially reduce the minimum investment amount levels and possibly revise the TEA definition. We will also discuss a simple regulation that might have resulted in prompt EB-5 reform.

On the assumption that the proposed TEA definition might survive, we apply this definition to some of the largest EB-5 projects to determine which, if any, of these project locations would still qualify as a TEA under the Proposed Regulations. We discuss the impact that the TEA definition might have on visa priority under H.R. 5992 and the likelihood for an increase in the EB-5 quota. Finally, we explain why we are hopeful that EB-5 reform legislation will be enacted during 2017.

A note: We believe that USCIS has been unfairly criticized for delay in processing EB-5 visa petitions and regional center applications.¹⁰ At least until recently, its Immigrant Investor Program Office has been severely understaffed at levels that did not reflect the exponential growth in EB-5 visa and regional center filings since 2010. The number of filings far exceeds the level that one might reasonably expect given the quota of 10,000 EB-5 visas per year, especially since that translates to approximately 3,500 investor petitions.¹¹ This shortage forces the office to change its manpower priorities on a frequent basis and may have contributed to its inability to issue the regulations in a more expeditious manner.

II Existing Framework

A. Brief discussion of TEA significance

We assume the reader is familiar with the controversy regarding the TEA definition and required minimum investment amounts. Thus, we provide only a brief discussion of the significance of TEA status, the TEA definition and required minimum investment amounts.¹²

TEA status for an EB-5 project entitles an immigrant to be eligible to secure a visa (an “EB-5 investor”) by investing the TEA discounted minimum investment amount of \$500,000,

Memorandum”). <https://www.whitehouse.gov/the-press-office/2017/01/20/memorandum-heads-executive-departments-and-agencies>

⁹ <https://www.congress.gov/bill/114th-congress/house-bill/5992/cosponsors>

¹⁰ Similarly, we believe USCIS was justified in not issuing regulations before 2016 because, like most observers, it assumed that S. 1501 would be passed by the end of 2015.

¹¹ See <http://www.stern.nyu.edu/sites/default/files/assets/documents/EB5%20paper%20final%2005.24.2015.pdf> (“Roadmap”).

¹² These issues have been exhaustively examined during the Congressional hearings in 2016 referenced in fn. 3 supra, as well as analyzed in many articles and other written materials, such as: <https://www.judiciary.senate.gov/imo/media/doc/04-13-16%20Friedland%20Testimony.pdf> (“Friedland Congressional Testimony”); Pages 2 through 9 of <http://www.stern.nyu.edu/sites/default/files/assets/documents/EB-5%20TEA%20Reform%2004.24.2016.pdf> (“Reflections on Senate Judiciary Committee Hearing”).

rather than the \$1,000,000 standard minimum investment amount. This difference is alternatively referred to as the TEA “differential”, “spread” or “discount”. This is perceived as a major advantage because EB-5 investors seek to minimize their investment amount since they accept a minimal return on the investment (often as low as 0.25%) as the visa serves as the main consideration.

The statutory language established \$1,000,000 minimum as the general rule, with the “TEA discount” intended as a limited exception.¹³ The legislative history illuminates that TEA status was intended to be limited to areas that are unable to attract conventional capital – particularly rural areas and economically distressed inner cities, to incentivize investment in those areas.¹⁴ However, in practice, today virtually every project qualifies as a TEA, even those located in affluent areas, such as Beverly Hills. Consequently, immigrant investors tend to invest in projects located in affluent areas sponsored by megadevelopers, and are not incentivized to invest in the areas that Congress originally intended.¹⁵

B. H.R. 5992, pending EB-5 reform bill

HR 5992, a comprehensive EB-5 reform bill, introduced by Chairman Goodlatte (R-VA) and co-sponsored by Ranking Member Conyers (D-MI) on September 12, 2016, addresses the minimum investment amounts and TEA definition (two of the three major proposals contained in the Proposed Regulations, and the focus of this paper) as well as numerous other aspects relating to economic and integrity matters. The Senate EB-5 reform bill upon which H.R. 5992 is based, S. 1501, was introduced by Senators Grassley and Leahy in 2015, but that bill failed. S. 1501 was officially pronounced dead on January 24, 2017 when Chairman Grassley co-sponsored S. 232, a bill introduced by Ranking Member Dianne Feinstein (D-CA) of the Senate Judiciary Committee to terminate the EB-5 Program.¹⁶ We assume that the introduction of the bill will not influence continued discussion of H.R. 5992. We also realize that Senator Grassley may alter his position and entertain EB-5 reform if a meaningful EB-5 reform bill gains sufficient support to be passed.¹⁷

On December 2, 2016, a “Senate Legislative Counsel Draft” (the “December 2016 Staff Draft”), presumably intended as a compromise to several major issues in H.R. 5992, was circulated to key stakeholders.¹⁸ However, H.R. 5992 did not even reach a House Judiciary Committee vote, as the session ended with an extension of the reauthorization deadline to April 28, 2017.¹⁹

¹³ INA §203(b)(5)(C)

¹⁴ For a detailed discussion of the original intent, see pages 3 through 6 of Friedland Congressional Testimony. Supra at fn. 12..

¹⁵ Friedland Congressional Testimony footnote. Supra at fn. 12.

¹⁶ <https://www.congress.gov/bill/115th-congress/senate-bill/232/cosponsors>;
<http://www.grassley.senate.gov/news/news-releases/feinstein-grassley-introduce-legislation-eliminate-troubled-eb-5-investor-visa>

¹⁷ See discussion in Section III of this paper describing Senator Grassley’s meeting with Secretary Kelly of DHS.

¹⁸ That draft is unofficial and is not pending in Congress.

¹⁹ <https://www.congress.gov/bill/114th-congress/house-bill/2028/text/pl?overview=closed>

According to a recent Wall Street Journal article, reform efforts have failed because a few powerful EB-5 stakeholders successfully lobbied key Senators to oppose reform.²⁰

During 2016, Congressional members and industry finally reached widespread agreement that TEA status has been rendered meaningless because virtually all projects in locations throughout the nation qualify for the TEA discount.²¹ However, agreement has not been reached on the precise method to make TEA status meaningful.

This lack of agreement reflects a misunderstanding about TEA status. Although the subsidized, inexpensive EB-5 capital is accessible to all developers who participate in the EB-5 program, the reduced investment amount (\$500,000) is limited to those projects that are located in a TEA. The purpose of the EB-5 program generally is to promote jobs and capital investment by immigrant investors.

However, the purpose of the TEA is unrelated to job creation. Instead, the TEA discount is reserved for only those immigrants who invest in projects that meet the TEA definition – located in rural areas and economically distressed inner cities. Yet, over time, the Program’s purpose and the TEA’s purpose - to identify those locations that deserve a special incentive - have become intertwined.²²

The two essential ingredients to make TEA status meaningful are: (1) a narrow definition that limits the number of project areas that may qualify for the TEA discount, and (2) a wide difference between the minimum investment amount required in a project located in a TEA compared to a non-TEA location. Increasing the minimum investment amounts is justified to account for inflation because the amounts have not been increased since the EB-5 Program was established more than 25 years ago, despite the statutory authority granted to USCIS.²³ However, the increases are not critical to making TEA status meaningful, except only to the extent that the increases create the resulting spread between the two amounts.

Furthermore, these matters addressed by the Proposed Regulations must be considered in the context of the political reality – H.R. 5992, the reform bill that is pending in Congress and apparently under serious consideration. Although the bill’s sponsors, as well as the sponsors of the Senate’s version introduced in 2015, favor significant increases in the minimum investment amounts, the December 2016 Staff Draft²⁴ indicates a willingness to accept a more modest TEA differential of only \$200,000 under H.R. 5992.

The December 2016 Staff Draft provides that the minimum investment amount for a non-TEA project would be \$1,000,000 (the same as the current statute) and would be \$800,000 (an increase of \$300,000) for a TEA project.²⁵ This compromise recognizes that, in the real world, the differential is zero dollars (\$0) because currently virtually all projects qualify as a TEA based on the distorted manner in which the states designate TEAs. The December 2016 Staff Draft retains the narrow TEA definition contained in H.R. 5992 that would limit TEA status. Urban area TEAs

²⁰ <https://www.wsj.com/articles/new-york-developer-lobbies-against-changes-to-immigrant-investor-program-1484058703?tesla=y>

²¹ See <http://www.gao.gov/assets/680/679859.pdf>

²² See page 6 of Friedland Congressional Testimony. Supra at fn. 12.

²³ INA § 203(b)(5). See <http://www.ilw.com/articles/2016.0608-Gresser.pdf>.

²⁴ Section 4(b) of the December 2016 Staff Draft.

²⁵ These amounts would be phased-in over a three-year period. See the chart in fn. 31 infra.

are generally limited to a single census tract, thereby eliminating gerrymandering and making TEA determination objective and easily verifiable. H.R. 5992 sensibly expands the economic criteria to include the poverty rate and area median income of the tract, factors that are better indicators of the ability of a tract to attract capital and reflect affluence than the unemployment rate, the sole indicator under the current statute.²⁶ The December 2016 Staff Draft requires that two of the three economic criteria (high unemployment, high poverty rate and low area median income) be met for an urban area to qualify as a TEA.²⁷

C. Proposed Regulations

In contrast, the Proposed Regulations would raise the minimum investment amount to \$1,800,000 in non-TEA projects, and \$1,350,000 in TEA projects. It is not surprising that this increase has ignited a heated reaction from the EB-5 community.²⁸ \$1,800,000 represents an \$800,000 increase over the current law's \$1,000,000 level. Perhaps more importantly, virtually all projects that would be subject to the higher level currently qualify as TEAs, based on the distorted ways the rules are applied by the individual states. Therefore, for those projects, the effective increase is \$1,300,000. The proposed minimum for TEA projects, \$1,350,000, represents an increase of \$850,000. These increased amounts under the Proposed Regulations result in a TEA differential of \$450,000, which represents a \$50,000 reduction from the current statutory TEA differential, \$250,000 more than the December 2016 Staff Draft and \$450,000 more than the spread under the current system where virtually every project qualifies.

USCIS advanced strong arguments in the Proposed Regulations that these increased investment levels and wide TEA differential are theoretically justified. However, as recently as December 2, 2016, Congressional staff members had already indicated a willingness to accept much lower investment thresholds - \$1,000,000 and \$800,000.²⁹ We believe that a \$200,000 differential is probably insufficient to motivate many investors to choose to invest in a project in either rural Iowa or in many parts of Cleveland, rather than in a large project in the affluent areas of New York City, especially those offered by the well-known, well-capitalized megadevelopers that dominate the Program today.³⁰ Nevertheless, we realize this is preferable to the current system, and presumably the strictest that is feasible in the current political environment.

It appears that the negative reaction to the Proposed Regulations primarily relates to the dramatic increases in the minimum investment amounts. We expect that at some point before the Proposed Regulations become final – in the unlikely event they reach that stage - USCIS will substantially reduce the proposed investment amounts to levels more in the range proposed by the

²⁶ Section 4(c)(ix) of H.R. 5992. See pages 7 through 9 of Reflections on Senate Judiciary Committee. Supra fn. 12.

²⁷ Like the Proposed Regulations, H.R. 5992 vests the USCIS national office with the authority to make the TEA designation, removing the delegation from the individual states that are motivated to create TEA areas within the state's borders, especially in the absence of guidelines or oversight by USCIS. See fn. 38 at page 4747 of the Proposed Regulations. Supra at fn. 5.

²⁸ See articles in footnote 6 supra.

²⁹ This is consistent with the unofficial December 2016 discussion drafts to S. 1501.

³⁰ See pages 1 through 5 of Reflections on Senate Judiciary Committee Hearing. Supra at fn. 12.

December 2016 Staff Draft. In that case, the ultimate focus would likely be centered on: (1) the geographical limits of an urban area TEA, and (2) the amount of the TEA discount.

Below is a summary comparison of the minimum investment amounts and TEA differential under the various legislative and administrative scenarios.

Summary Comparison Minimum Investment Amount and Differential ³¹						
	Existing Statute (Unchanged since Enactment in 1990) ³²	Current Market: All Projects Qualify as a TEA	December 2015 Discussion Draft: S. 1501	H.R. 5992	December 2016 Staff Draft Revision of H.R. 5992	USCIS Proposed Regulations 1/13/2017
Non-TEA	1,000,000	500,000	1,000,000	1,200,000	1,000,000	1,800,000
TEA	500,000	500,000	800,000	800,000	800,000	1,350,000
Differential	500,000	-	200,000	400,000	200,000	450,000

III Freeze and Likely Trump Administration Position

The Proposed Regulations are covered by a 60-day temporary freeze that ends on or about March 21, 2017.³³ During this period, the Proposed Regulations will be presented for review and approval by the Secretary of DHS, presumably in consultation with USCIS, before these regulations may proceed.

On January 13, 2017 Senator Grassley met privately with General John Kelly, who was then the nominee for, and now is, Secretary of DHS. Senator Grassley expressed his strong desire that these regulations become effective, emphasizing that regulations would have the effect of

³¹ For ease of illustration and in recognition that the Proposed Regulations and H.R. 5992 are likely to be revised, this summary does not reflect all of the relevant details of these proposals.

For example, the December 2016 Staff Draft provides for a phase-in of the minimum investment amounts over a three-year period. The lower minimum amount (the TEA amount) applies to certain other project types or locations.

Year beginning October 1	Standard Amount	TEA Amount
2017	\$ 700,000	\$650,000
2018	\$ 850,000	\$750,000
2019	\$1,000,000	\$800,000

³² Technically, the statute provides that the TEA amount must be no less than one-half of the standard amount. The Regulations set the minimum investment amount for investments in projects located in a TEA. 8 C.F.R. §204.6(f).

³³ This is slightly more than one month before the EB-5 Regional Center Program reauthorization expires. Presumably the comment period will be extended to reflect the freeze. In addition, Paragraph 3 of the Regulatory Freeze Memorandum includes “regulations that have been published in the OFR but have not taken effect...[to] temporarily postpone their effective date for 60 days from the date of this memorandum....for the purpose of reviewing questions of fact, law, and policy they raise.” It appears that the Proposed Regulations constitute “regulations” for purposes of the Memorandum based on the definition of “regulations” by reference to Executive Order 12866. We note that the Memorandum is couched as a request (by use of the word “ask” in the opening paragraph), but we assume it will be treated by the agencies as the equivalent of an order. Supra at fn. 8.

restoring the “program to the way Congress intended it to be used: to help bring much-needed jobs and capital to rural and economically distressed areas.”³⁴

Similarly, although President Trump has not announced a position on the EB-5 Program, the administration is likely to focus on job creation as the basis for its opposition, but from a broader perspective than Senator Grassley’s focus on job creation in rural and distressed areas. The actions taken by the President during his initial weeks in office focusing on immigration and job creation, coupled with his real estate development background (real estate development being the dominant use for EB-5 capital), leaves little doubt that he will seek to weigh in on these regulations.

A summary of the USCIS cost-benefit analysis for each of the major proposed changes is set forth in the Proposed Regulations as Table I “Summary of Changes and Impacts of the Proposed Provisions” (the “Summary”).³⁵ The Trump administration might simply rely upon this impact assessment to reach the opposite conclusion than reached implicitly by USCIS in proposing these regulations. Unlike USCIS, the administration might determine that the costs outweigh the benefits. In that case, the increase in minimum investment amounts would be limited or the wisdom of any increase would be reconsidered.

The Summary identifies the principal costs of raising the minimum investment amounts as follows: (1) some investors may be unable or unwilling to invest at the higher levels, resulting in the creation of fewer jobs nationwide, not limited to TEAs; and (2) this could prevent projects from moving forward.³⁶

The Summary identifies the benefits to include the following: (1) increase to keep pace with inflation since the inception of the program; (2) raise the total amount invested in the program; and (3) fewer investors would have to be recruited to pool the requisite capital for a project. Furthermore, the Summary identifies as the sole cost for the new TEA definition the potential to cause some projects and investments to fail to qualify. It identifies the benefits as the potential to better stimulate job growth in areas where unemployment rates are highest and to effectively eliminate gerrymandering.³⁷

However, DHS acknowledges in the Cost-Benefit section of the Proposed Regulations that it “has no way to assess the potential reduction in investments either in terms of past activity or forecasted activity, and cannot therefore estimate any impacts concerning job creation, losses or other downstream economic impacts driven by the proposed investment amount increases.”³⁸

Furthermore, no studies demonstrate the degree to which these types of changes would adversely impact the program. The job creation contention is debatable.³⁹ Nevertheless, we expect

³⁴ <http://www.grassley.senate.gov/news/news-releases/grassley-meets-dhs-nominee-general-john-kelly>

³⁵ See Proposed Regulations at pages 4740 and 4741.

³⁶ Id.

³⁷ Id.

³⁸ Page 4740 of the Proposed Regulations.

³⁹ We concede that the number of jobs credited to EB-5 capital under the Program administered by USCIS is a moot point. However, an academic discussion of the actual economic benefits of EB-5 capital is relevant to the cost-benefit analysis. The existing USCIS regulations allocate 100% of the jobs created by a project to the EB-5 investors, even if the EB-5 capital represents only 1% of the total capital provided to a project. 8 CFR 204(g). (The statute does not mandate this approach.) We agree with Senators Grassley and Leahy that this allocation does not reflect economic reality. In most cases, it would be more economically accurate to credit the EB-5 capital with jobs proportionate to the EB-5 capital relative to the total capital provided. In some cases, the project could have been fully funded without EB-5 capital, in which case the project would have been built and all of the jobs would have been created without EB-

DHS, based on its required review, to conclude that the impact of the Proposed Regulations would promote job creation to a lesser extent than the Program does as currently administered

Undoubtedly, the same powerful lobbyists who have repeatedly repelled legislative reform efforts will vigorously oppose these regulations, and seek to have them withdrawn or, if their efforts are unsuccessful, to be substantially revised.⁴⁰ This effort is likely to attract a much broader industry coalition than those that opposed the reform bill's increases of the minimum investment amounts to \$800,000 and \$1,200,000 (or even \$1,000,000).⁴¹

Given Secretary Kelly's lack of experience with the EB-5 Program, he might be inclined to defer to the likely Trump administration's views in arriving at a decision to approve or disapprove this portion of the Proposed Regulations.⁴² We predict that the most probable outcome is that this portion of the regulations will be withdrawn or substantially revised.

As discussed, the Proposed Regulations are unlikely to withstand the scrutiny by the new administration. Even if the investment amounts were raised beyond the levels in the pending EB-5 reform bill, rather than risk the regulations becoming final, it is extremely likely that this would prompt industry to return to the negotiating table with Congress. Although Congress obviously reserves the right to withdraw the bill at any time, our sense is that it would reluctantly accept a compromise that results in comprehensive EB-5 reform.

5 capital. Nevertheless, we recognize that the 100% allocation is necessary to support the vast sums of capital raised by EB-5 because the size of the EB-5 capital raise is dependent upon the creation of 10 jobs per investor.

We also note that the Commerce Department released a study on January 10, 2017 to estimate the job creation impact of the EB5 program based on limited data from 2012 and 2013. http://www.esa.doc.gov/sites/default/files/estimating-the-investment-and-job-creation-impact-of-the-eb-5-program_0.pdf. This study concluded that the number of expected jobs created by the projects studied, based on data supplied by the regional centers, exceeded the number of jobs required by the EB-5 law of 10 jobs per investor. This result is consistent with the practical requirement that the market demands a job cushion for a project in order to attract EB-5 capital to assure investors that the project completion will ensure that a sufficient number of visas will be issued. The Proposed Regulations did not address the report presumably because the Commerce Department Study was issued only a few days before these regulations were released. More importantly, the Commerce Department study does not address the issue of whether there is a causal link between EB-5 capital and job creation – a point raised numerous times by GAO in its report dated August 2015, <http://www.gao.gov/assets/680/671940.pdf> (see, for example, pages 40 to 44 thereof). However, even though Chairman Grassley questioned the appropriateness of the job creation allocation, this issue was not addressed in S. 1501, and the pending H.R. 5992 likewise does not address this. Again, we recognize this is a moot point and we are not advocating that job credit be revisited.

⁴⁰ See <http://www.wsj.com/articles/new-york-developer-lobbies-against-changes-to-immigrant-investor-program-1484058703?tesla=y#livefyre-toggle-SB12051942542359674776004582549102148673664>

⁴¹ <https://www.regulations.gov/document?D=USCIS-2016-0006-0012> (Joint letter from IIUSA, EB-5 Coalition and the Real Estate Roundtable); see also <https://iiusa.org/blog/submit-comments-draft-legislation-regulations/>.

⁴² Some might argue that an underlying reason for the Trump administration's likely position will relate to the President's ties to real estate and his friends in the industry, particularly to large New York City real estate developers. Mr. Kushner has utilized EB-5 capital to fund at least one existing real estate project branded with the Trump name. <https://www.theguardian.com/us-news/2016/dec/03/trump-bay-street-new-jersey-relied-on-immigrant-visa-funds>. We note that the EB-5 capital raise for this project probably has been fully funded, and in any event, would likely not be affected by the Proposed Regulations. Thus, the Proposed Regulations would presumably not pose a conflict to his current activities.

IV USCIS Approach to the Proposed Regulations

USCIS knew, or at least should have known, when it announced in the spring of 2016 that it would be issuing regulations, that if the regulations were not promptly issued they would be captured in the web of review by any new administration. In recent times, new administrations have frozen and scrutinized administrative regulations that were released towards the end of the previous administration.⁴³ The release of the Proposed Regulations is merely the first step in the lengthy administrative process by which regulations become effective.⁴⁴ Thus, unless release of these regulations were expedited in the spring or summer of 2016, they would have been in jeopardy of being withdrawn, or if they were to survive, they might have been subject to substantial revision. Certainly, USCIS realized when it released these regulations on January 13, 2017, they would be delayed by review, and in jeopardy of being withdrawn, or substantially altered, by the Trump administration.⁴⁵

The consensus at the Senate Judiciary Committee Hearings in February 2016 was that the EB-5 Program is broken and it should be “mended rather than ended.”⁴⁶ The main concerns expressed at the three EB-5 Congressional hearings held between February and April of 2016 were the minimum investment amounts and distorted nature of TEA status.⁴⁷ At the Senate and House Judiciary Committee hearings in February, USCIS IPO Chief Nicolas Colucci was repeatedly pressed to cause USCIS to issue regulations, particularly with respect to minimum investment amounts and the TEA definition. However, Committee members did not expressly limit the scope of the matters that USCIS should address by regulation.

Presumably, in response to the grilling by Congress, USCIS announced at its April 25, 2016 “Listening Session” that it was considering potential regulatory changes on a range of topics including, but not limited to: (1) minimum investment amounts; and (2) TEA designation process.⁴⁸

USCIS embarked on an extended process before rule making – extremely responsive to industry feedback that included meetings with stakeholders and use of an innovative website to solicit comments.⁴⁹ In ordinary circumstances, USCIS’ regulatory development process was justified and deserving of praise. But its delayed action was inappropriate in a presidential election year when it is traditionally difficult for Congress to pass major legislation, combined with the precedent of impending freezing of regulations.

⁴³ See articles referenced in fn. 7 supra.

⁴⁴ See point 6 of <http://www.klaskolaw.com/eb-5-investor-visas/changes-eb-5-world-need-know-need/>.

⁴⁵ See articles referenced in fn. 7 supra.

⁴⁶ Senator Feinstein (D-CA), who recently replaced Senator Leahy as the Ranking Member of the Senate Judiciary Committee, was the sole member at the Hearing to favor termination of the Program. Supra at fn. 3.

⁴⁷ We believe USCIS was justified in not taking action before the February 2016 hearings because virtually all observers and participants believed S. 1501 would be passed and become law by the end of 2015. In that event, the new statute would have addressed and superseded most, if not all, of the matters that might have been covered by the regulations.

⁴⁸ Supra at fn. 4.

⁴⁹ See, for example, footnote 49 to the Proposed Regulations. USCIS launched “Idea Community,” an innovative online crowdsourcing platform to seek public feedback about these potential areas of regulation.

<https://www.uscis.gov/outreach/uscis-idea-community>

Again, with hindsight, we believe that the agency should have approached the regulatory route as merely a stop-gap measure until the longer term solution, the congressional reform bill, could become law. But we recognize that USCIS might not have been in a position to make that type of assessment because there was a risk that the legislation might not be passed, in which case the regulation would be in effect for an extended period of time.

V Alternative USCIS Approach that Might Have Led to Prompt Legislative Reform Even Before Regulations Were Finalized:

A. A simple approach

We believe that a simpler and potentially more effective route to TEA reform was available. Rather than tackle all of the potential regulatory matters at the same time, USCIS could have initially focused on TEA reform. Then, after that simple fix was addressed, the agency could have proceeded to consider the other topics.

USCIS could have simply revoked delegation of TEA designation to the individual states. TEA determination would be vested in USCIS, as the statute prescribes. USCIS would then be able to apply the high unemployment standard to an area limited to a single census tract.⁵⁰ This would have eliminated gerrymandering, the principal cause of TEA proliferation. Under the new criteria, most projects would not qualify.

Consequently, the statutory and regulatory scheme would have been triggered, thereby causing the \$1,000,000 standard to apply to most projects. The \$500,000 TEA discounted amount would apply only to a very limited number of qualified projects. Thus, TEA status would finally be meaningful. The spread would be \$500,000, presumably enough to incentivize investment in projects located in truly deserving areas of the country. This would have resulted in a wider spread than that proposed in pending House bill or its discussion draft and, in an even wider spread than in the Proposed Regulations.⁵¹

It is likely that mere issuance of the Proposed Regulation covering this single topic during the summer or fall of 2016 would have brought the parties to the table to negotiate reform in good faith. Delay has become a strategy for certain large developers and regional centers – the longer reform discussions continue without a resolution, the status quo is maintained enabling them to raise capital on a tilted playing field.⁵² A more complicated legislative proposal creates the opportunity to raise more issues to challenge and to further delay the legislative process. The simple alternative to make TEA status meaningful would have shifted the leverage to the Congressional reformers.

We recognize that this approach would have embroiled the agency in a political battle. However, that involvement reflects the political reality that USCIS faces by issuance of the

⁵⁰ Presumably, USCIS would be able to apply this without issuance of a regulation. If a regulation were needed to define the area, the agency could have simply expanded the scope of the regulation to provide for a single census tract.

⁵¹ Furthermore, the net effective increase in investment amount for non-TEA projects would have been doubled from \$500,000 to \$1M. Consequently, minimum investments from the same number of EB-5 investors would have raised double the amount of capital for a project.

⁵² See also <https://www.wsj.com/articles/how-immigrants-cash-funds-luxury-towers-in-the-u-s-1441848965>

Proposed Regulations. If USCIS had issued a simple proposed regulation soon after its April 2016 announcement, or even during the summer, it is possible the proposed regulation would have been able to complete the required Administrative Procedure Act process and become effective. More importantly, before it would have had an opportunity to reach that stage, it is extremely likely that key industry players would have pressured their Congressional representatives to seek to negotiate a compromise of EB-5 reform issues rather than face a meaningful spread of \$500,000.

B. Prime example of state delegation flaws

One of the fundamental flaws in the current system by which the individual states determine the TEA status of a project is illustrated by a TEA designation letter issued with respect to one of the largest EB-5 projects in the program's history: the Related Companies' Hudson Yards in New York City. A reporter recently filed a FOIA request with respect to the census tract in which Hudson Yards is located.⁵³ The Empire State Development agency produced a TEA designation letter dated November 5, 2012, in reliance on the determination by the New York State Department of Labor.⁵⁴

This designation letter contains egregious errors. The agency determined that the area that included the project census tract comprised a TEA. The letter list 4 tracts, each in New York County (Manhattan), that constitute the TEA. The letter did not include a census tract map.

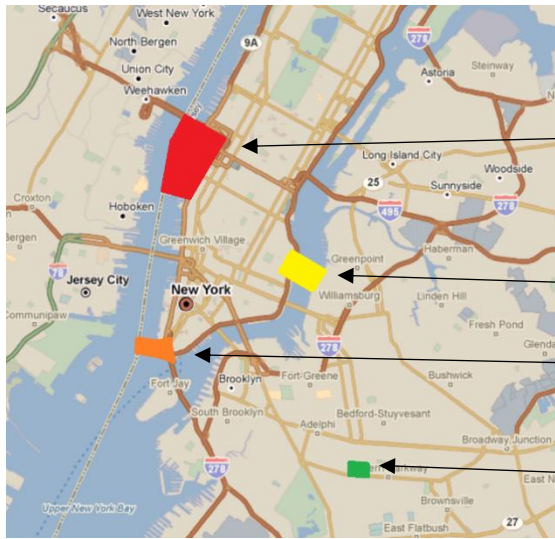
However, a simple review of a census tract map reveals that these 4 tracts are not contiguous to each other. In fact, none of the tracts are contiguous to any of the other tracts that supposedly constitute the TEA. Moreover, one of the tracts is not even in New York County. Also, the designation letter points out that the unemployment rate for the Hudson Yards tract was 4.8%, when the then minimum threshold to qualify for TEA status was 13.4%. The letter omits the unemployment rate for each of the other tracts.

The Hudson Yards census tract, tract 99, is located on the far west side of Manhattan along the Hudson River. Each of the other 3 tracts are several census tracts separated from any other tract in the supposed TEA. The other tracts are: tract 24 on the east side of Manhattan stretching from the Lower East Side across the East River to Williamsburg, Brooklyn, (2) tract 319, along the southern tip of Manhattan near Battery Park, and (3) tract 317.02 which is not even located in Manhattan. The nearest census tract with that number is located in a distant section of Brooklyn.

⁵³ <http://www.citylab.com/politics/2017/01/how-to-fix-the-broken-eb5-cash-for-visas-immigration-program-trump/511265/>.

⁵⁴ https://cdn.theatlantic.com/assets/media/files/hudson_yards_2012.pdf.

See the map inset below that we prepared to illustrate the location of the 4 tracts.



Tract 99 – Hudson Yards Project (west side of Hudson River, near the Hudson River)

Tract 24 – Lower east side to Williamsburg

Tract 319 - southern tip of Manhattan, near Battery Park

Tract 317.02 – Crown Heights section of Brooklyn

We have no reason to believe that this designation letter was relied upon by the Related Companies or actually submitted to USCIS to support either an immigrant investor’s visa petition or a project exemplar approval.⁵⁵ Furthermore, we recognize that it is likely that the Hudson Yards address would have qualified as a TEA for the year 2012 by the New York state agency applying the same generous criteria that it applied in its TEA determination letter issued in 2013 (according to a Wall Street Journal article that described the 2013 letter).⁵⁶

But that is not the point. It is impossible to estimate how many TEA designations errors have been made by state agencies throughout the country over the past several years. Given the high volume of EB-5 projects located in New York State, it would be reasonable to assume that its agency that issues TEA determinations has reviewed among the highest volume of TEA applications of any other state, and reasonable to expect that this state agency has developed a greater expertise than those in many other states. Thus, this reflects the type of mistakes that might have occurred in many other states and gone undetected—especially with no guidelines or oversight by USCIS.

Note that this type of flaw is different than the typical TEA gerrymandering abuse committed by state agencies whereby tracts are stitched together to expand the area of TEA to include remote tracts with high unemployment conditions that do not reflect the economic conditions of the census tract in which the project is located. Again, these flaws provide additional rationale for eliminating TEA designation by the states and, in any event, not permitting the combination of multiple census tracts to form a TEA.

⁵⁵ The 2012 TEA designation letter was addressed to the New York City Regional Center. Supra at fn. 54.

⁵⁶ <https://www.wsj.com/articles/how-immigrants-cash-funds-luxury-towers-in-the-u-s-1441848965>

VI EB-5 Visa Priority and Expanded EB-5 Visa Quota

A. Visa priority and visa quota

The most pressing concern of most EB-5 participants (developers, regional centers, immigrant investors and migration agents) has become the insufficient number of EB-5 visas available under the annual quota of 10,000 visas.⁵⁷ The soaring popularity of the program has created long visa waiting lines that particularly impacts investors from mainland China who represent approximately 85% of the investors under the program and are subject to an annual per-country visa limit.⁵⁸ The estimated wait time for a Chinese national making an investment today is approximately 8 years.⁵⁹ Increasing the EB-5 quota would shorten the waiting line, and thereby enable investors to meet their goal of securing a visa in a relatively short time frame. Thus, for many EB-5 participants increasing the quota would be the most important Program change.

EB-5 participants' repeated requests to Congress to insert a provision in the reform bill for an increase in the EB-5 quota have been consistently rejected. The power to change the nation's immigration quota is reserved solely to Congress, but Congressional reformers have insisted that any change to the EB-5 quota must be considered as part of comprehensive immigration reform, and not limited to EB-5 reform.

Seizing on the importance of expedited visa processing to EB-5 investors, H.R. 5992 added an incentive for immigrants to invest in a TEA: A visa priority (or set aside) would be reserved to a limited number of those immigrants who invest in a TEA, with the result that they would move towards the front of the long visa waiting line.⁶⁰ This added incentive implicitly recognizes that the spread alone might not be sufficient to incentivize investment in a TEA.

The December 2016 Staff Draft creates an annual visa set aside of approximately 750 visas for rural investors and 750 visas for investors in urban TEAs for fiscal year 2018, and increases to approximately 1500 visas for fiscal year 2019 and ensuing years. Unused visa priority at the end of any year would rollover within the same category for only the following year. Thereafter, the unused visas would be eliminated from the priority and made generally available to any investors, not limited to TEA investors.⁶¹

Visa priority has generated fierce opposition by many in industry who are concerned that this priority will further extend the visa waiting lines for investors in the many projects that will not qualify for this priority. Some believe that the visa priority will not be fully absorbed each year because the TEA projects, even with the added incentives, will still be unable to attract many EB-5 investors. The resolution of this issue in the reform bill is likely to focus on whether any of the unused visa priority should rollover to the following year or be reallocated to the overall EB-5 pool.

The Proposed Regulations could not create a new visa priority because, as stated above, that authority is reserved to Congress. Thus, these regulations do not address the issue.

⁵⁷ See <http://www.klaskolaw.com/eb-5-investor-visas/winning-the-numbers-game/>; see also <https://www.bakerdonelson.com/files/Uploads/Documents/Divine%20The%20Realities.pdf>

⁵⁸ In contrast to the annual quota on the issuance of EB-5 visas, there is no legal limit, annual or otherwise, on the number of immigrants who may invest in projects that utilize EB-5 capital.

⁵⁹ <https://blog.lucidtext.com/2016/12/26/q4-2016-eb-5-petition-statistics-visa-backlog/>

⁶⁰ Section 4(a)(1) of H.R. 5992. This concept was originally introduced in S. 1501.

⁶¹ Section 4(a)(1) of the December 2016 Staff Draft.

B. Likelihood of expanded EB-5 visa quota under the Trump administration

Many believe that comprehensive immigration reform is not politically viable in the current political climate. Thus, the likelihood for an increase in the EB-5 quota in the near term would seem to be slim. However, it would not be surprising if President Trump led an effort towards “limited” comprehensive reform.

The reform might be limited to reallocating visas from categories that are disfavored to categories that are favored. It would seem that EB-5 might fit in the category favored by the administration. The Program creates jobs. The investors are wealthy and thus would not impose an economic burden. Moreover, once the investors secure their visas, they are likely to invest additional capital, pay income taxes based on their worldwide income, and provide other benefits to the local and national economy. Furthermore, some in industry have speculated that the Trump Organization and/or the Kushner Company might consider the use of EB-5 capital for future development projects, and that EB-5 investors would be particularly attracted to these projects.

Alternatively, a bill that has been recently introduced by two U.S. senators to reduce the annual overall quota by 50%. If this bill gains traction, this could become the vehicle for an increase in the EB-5 quota since many visas would be eliminated.⁶² If the EB-5 quota were increased, then the width of the TEA spread would become increasingly important as the visa priority would not be as valuable.

VII TEA Definition Applied to Large EB-5 Real Estate Projects

A. Applying the TEA definition to projects in our databases

In 2015 and supplemented in 2016, we released two databases comprising a total of 52 large-scale real estate projects that have raised or sought to raise substantial amounts of EB-5 capital.⁶³ All or virtually all of these project locations qualified as a TEA at the time the capital was invested by the immigrant investors.⁶⁴

We applied the TEA definition in the Proposed Regulations to these projects to determine whether each project location would still qualify as a TEA.⁶⁵ This would be one method to evaluate whether the TEA definition in the Proposed Regulations would achieve its objective of severely limiting the number of project areas that qualify. Although this approach is anecdotal and the definition would not apply to those projects that have already completed their capital raise, we believe it is meaningful to focus on these areas that have already attracted substantial amounts of EB-5 capital. These areas are in the path of development and are likely to seek to attract more

⁶² See the Senate bill entitled “Reforming American Immigration for Strong Employment” (“Raise”) introduced by Senators Tom Cotton (R-AK) and David Perdue (R-GA). https://www.cotton.senate.gov/?p=press_release&id=603

⁶³ Roadmap. Supra at fn. 11. <http://www.stern.nyu.edu/sites/default/files/assets/documents/EB-5%20Capital%20Project%20Database%20-%20Revised%20and%20Expanded.pdf>

⁶⁴ We did not independently research whether each project achieved TEA status. Generally, we divided the total capital raise by the number of investors to verify the TEA status of the project. If the result was \$500,000, we assumed the project qualified as a TEA.

⁶⁵ Obviously, we are evaluating these projects under two different time periods. As explained further in footnote 70 below, for purposes of the definition under the Proposed Regulations, we applied the ACS 2011-2015 dataset to the projects, the most current ACS 5-year estimate as of February 2017. The TEA status for most of the projects in our databases was achieved in years prior to 2017.

projects that may utilize EB-5 capital given that immigrant investors have already endorsed these areas as evidenced by the willingness of many immigrants to invest in the existing projects.⁶⁶

For example, Extell Development, one of the nation's largest private developers, is in the process of raising \$200M of EB-5 capital to finance One Manhattan Square, a luxury condominium development in the Lower East Side of Manhattan and that is one of the projects in our database.⁶⁷ Three other major real estate projects sponsored by large developers are in the pipeline in the same tract.⁶⁸ We would expect that given the apparent success of One Manhattan Square, those developers might also seek to raise EB5 capital.

Under the Proposed Regulations, an urban area TEA could consist of either the project census tract ("Single Census Tract") or the project census tract and one or more contiguous tracts ("Combined Tracts"). The project tract would qualify as a TEA if either (i) the unemployment rate of the Single Census Tract is at least 150 percent of the national average or (ii) if the weighted average of the unemployment rate for the project census tract and contiguous tract(s) is at least 150 percent of the national average.⁶⁹ We applied the two alternative TEA definitions to the 52 projects in our database.⁷⁰

Only two of the 52 projects would qualify as a TEA based on a Single Census Tract. An additional four projects would qualify under the Combined Tracts method, but only if this method allows the applicant to select one or more, and not necessarily all, of the contiguous tracts.⁷¹ Each

⁶⁶ An approach that considers the number and location of qualifying sites in major cities would also be a valuable tool to measure the effectiveness of this TEA definition. This would follow the approach we used to test the impact of the proposed TEA definitions in S. 1501 and its related Discussion Drafts. See

<http://www.stern.nyu.edu/sites/default/files/assets/documents/What%20TEA%20Projects%20Might%20Look%20Like%20under%20EB5%202.0%20Alternatives%20with%20Maps%20and%20Data%202%206%2016.pdf>

⁶⁷ <http://bbs.fcgvsa.com/t/eb-5-one-manhattan-square-250-south-street-enyc/17912>;

⁶⁸ <http://www.thelodownny.com/leslog/2016/07/pre-applications-show-2100-apartments-1-7-million-sf-coming-to-two-bridges-area.html>

⁶⁹ This explanation overly simplifies the definition in the Proposed Regulations. Proposed Regulations § 204.6(i). We believe a more precise analysis is not justified since we expect the Proposed Regulations to be withdrawn or substantially revised.

⁷⁰ Methodology: We determined the unemployment rate by generally applying the methodology prescribed on page 4748 of the Proposed Regulations, including the calculation of the weighted average unemployment rate. We manually calculated the weighted average of combined tracts by reference to data available through Policy Map, rather than using an electronic mapping tool to combine tracts. <https://www.policymap.com/> We used only the Census Bureau's American Community Survey ("ACS") dataset because ACS was the only data referenced in the Proposed Regulations (see, for example, page 4749). In particular, we used the five year-estimate, ACS 2011-2015, because that is the most current ACS data available for projects located in cities. See <http://www.census.gov/programs-surveys/acs/guidance/estimates.html>. It is our understanding that the census share method is the most accurate method to estimate unemployment rates.

<https://www.bls.gov/opub/hom/pdf/homch4.pdf>. That method requires the use of ACS unemployment rate at the individual census tract level and the Bureau of Labor Statistics unemployment rate at the county level. If the census share method were applied to the projects in our database, it is possible that different results about TEA status would have been obtained. We assume that the final regulations will require that the census share method be used. Finally, we excluded active duty military from the labor force calculation because it is our understanding that that category is generally excluded from unemployment rate estimates.

⁷¹ The number of contiguous tracts for each project ranged from 3 to 15 contiguous tracts. The number vary due to geometry of the tracts and whether the project tract border a county line or a water body. Also see Appendix A of this paper.

of these four projects require only one contiguous tract. If, instead, the Proposed Regulations are revised such that all contiguous tracts must be counted, then none of those projects would have qualified based on the Combined Tracts.

Attached as Appendix A is a summary of our analysis.⁷² In any case, based on this analysis it appears that the TEA definition in the Proposed Regulations would achieve the purpose of significantly reducing the number of projects (at least large-scale real estate projects) that qualify as a TEA.

Obviously, the Proposed Regulations focus solely on high unemployment criteria because that is the sole criteria under the existing statute.⁷³ However, the reform bill proposes two additional criteria that provides more opportunities for a project tract to qualify as a TEA. Each of these criteria – based on poverty rate and a percentage of the average median income for the relevant area – are derived from the New Markets Tax Credit program, a federal income tax program in which eligibility is based only on a single census tract.⁷⁴

We recommend that the reform bill retain the single census tract approach as the only approach for urban area TEAs. It is difficult to justify expansion, especially since the presumed aim is to limit the number of tracts that qualify. Obviously, the permissible inclusion of contiguous tracts increases the likelihood that a project will qualify. Furthermore, many developers and regional centers supported the single census tract approach in H.R. 5992 towards the end of 2016 because they concluded that a single census tract method makes TEA qualification more difficult, thereby creating a level playing field.⁷⁵

B. Scope of TEA under H.R. 5992

We hope the Proposed Regulations do not have the unintended effect of prompting industry to seek to negotiate an expanded TEA definition under H.R. 5992. If the TEA definition were expanded to include adjacent tracts similar to the Combined Tracts method based on one or more contiguous tracts and retains the additional two categories of economic criteria (as methods to qualify), it is likely that some large-scale real estate projects by megadevelopers would still qualify as a TEA. In that case, many investors may be attracted to invest in those projects, rather than the deserving projects that presumably Congress would intend to benefit by inclusion of a visa priority. In that case visa priority might be absorbed by the same type of projects that currently dominate the Program.

Obviously, that would frustrate the objective of visa priority. To reduce the likelihood of that possibility, we suggest that a cap be imposed on the maximum number of visa priorities that may be allocated to a particular project (or perhaps projects within a particular census tract) per year or for even a longer period. The cap would be triggered only if the total number of visas sought nationwide for urban area or rural projects exceeded the applicable visa priority for a given year.

⁷² We will post the summary sheet for each project on the NYU Stern Center for Research Estate Finance Research: <http://www.stern.nyu.edu/experience-stern/about/departments-centers-initiatives/centers-of-research/center-real-estate-finance-research/research/eb-5-research>.

⁷³ INA § 203(b)(5)(B)

⁷⁴ I.R.C § 45D

⁷⁵ A narrow definition will also streamline and expedite the designation process by providing an objective and simple method.

A related point that industry may seek to negotiate under H.R. 5992 is the number of economic criteria that must be satisfied to qualify for TEA status. H.R. 5992 required that one of three criteria be met. The December 2016 Staff Draft required that two of three criteria be met, as well as requiring that severely distressed thresholds be met.⁷⁶ Industry is studying whether it prefers that each of the three criteria be met. This would result in fewer projects qualifying for TEA status, further leveling the playing field for market (non-distressed) projects. However, presumably Congress would consider whether this stricter standard might eliminate too many deserving projects, and not leave a sufficient number of projects to qualify for TEA status, an ironic situation that would be the inverse of the current TEA market condition.

VIII What's Next

We remain hopeful that an EB-5 reform bill will be passed during the current Congressional session. H.R. 5992, particularly as modified by the December 2016 Staff Draft, seems to represent an extremely fair compromise. It is much more favorable to industry than reasonably could have been expected in December 2015 when S. 1501 negotiations ceased.

One obvious benefit of this reform bill is the certainty that its lengthy reauthorization period would provide to EB-5 participants. Presumably, the series of short-term extensions have a chilling effect on both the willingness of some immigrants to invest in an EB-5 project and some regional centers to sponsor projects. Thus, an extension until September 30, 2022 would provide welcome relief.

Industry appears to be satisfied with the minimum investment amount for non-TEA projects that would phase-in under the December 2016 Staff Draft, that is: \$700,000 in 2018, \$850,000 in 2019 and \$1,000,000 in 2020. Furthermore, the TEA defined area also seems to be acceptable to industry.

Moreover, H.R. 5992 appropriately introduces a new fund administration provision which is protective of industry, the investors and most importantly, the viability of the Program.⁷⁷ However, some of the integrity measures in the pending reform bill are not as strict as those originally contained in S. 1501 when introduced in June 2015. For example, some of the integrity measures have been narrowed to apply only to “Affiliated Job Creating Entities” (those that have a limited, prescribed relationship with the regional center or new commercial enterprises), rather than to all “Job Creating Entities” (generally the development and borrower entity).⁷⁸

Finally, as elaborated upon in our recent paper on “Account Transparency” released in October 2016, continued short-term extensions increase the risk that a major fraud involving an EB-5 project might surface and undermine the integrity of the entire Program before a long-term extension is granted. EB-5 fraud continues to spread throughout the country. In our recent paper,

⁷⁶ Section 4(c)(1)(D)(ix) of the December 2016 Staff Draft required a poverty rate of at least 30% and an AMI of no more than 60% for the applicable area, rather than 20% and 80% respectively as set forth in H.R. 5992.

⁷⁷ Proposed INA section 203(b)(5)(Q).

⁷⁸ See section 4(c)(1)(D)(i) of H.R. 5992.

we discussed the growing number of lawsuits alleging EB-5 fraud.⁷⁹ Since then, the SEC and others have commenced several new fraud actions involving regional centers or developers in major cities, such as in Miami, Los Angeles and San Francisco.⁸⁰ The number of fraud actions is likely to mount, especially as more investor visa petitions reach the I-829 stage. It is at this late stage of the immigration process that USCIS for the first time focuses on the actual flow of funds.⁸¹

As discussed, we believe that the Proposed Regulations will have little impact, if any, on the reform bill negotiations. The minor differences between reformers and industry should be able to be resolved.

⁷⁹ <http://www.stern.nyu.edu/sites/default/files/assets/documents/EB-5%202.0%20%20Can%20Account%20Transparency%20Save%20the%20Program.pdf>

⁸⁰ <https://www.sec.gov/litigation/litreleases/2016/lr23712.htm>; <https://www.sec.gov/litigation/litreleases/2017/lr23721.htm>; <https://www.sec.gov/news/pressrelease/2016-282.html>; http://realestate.cleveland.com/realestate-news/2017/01/lender_claims_misappropriation.html; <https://therealdeal.com/miami/2017/01/12/troubled-palm-beach-condo-hotel-project-gets-one-year-extension-could-sell/>;

⁸¹ USCIS may conduct an audit of the regional center and/or a site visit to the job creating entity at any time. See https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_EB5NatStakeholderEng072816_ColucciRemarks.pdf

Appendix A: Hypothetical TEA Qualification of EB-5 Projects under Proposed USCIS Regulations

Dataset	ACS 2011-2015*	
National Avg. Unemployment Rate	8.28%	
Minimum TEA Unemployment Rate	12.42%	150%

*Does not reflect BLS dataset

Project #	Project Name	City	State	Qualifies as a TEA?	Project Census Tract (P-CT)	P-CT Unemployment Rate (UER)	Contiguous CTs	# Contiguous CTs with UER > 12.42%	# CTs in TEA
1	Resorts World Las Vegas	Las Vegas	NV	Yes	32003002302	10.31%	9	1	2
2	Hudson Yards Tranche II	New York	NY	No	36061009900	5.77%	9	0	N/A
3	2 World Trade Center	New York	NY	No	36061001300	3.28%	9	0	N/A
4	Century Plaza	Los Angeles	CA	No	06037267901	5.92%	7	0	N/A
5	Miami CCC Tower	Miami	FL	No	12086006702	5.22%	15	1	N/A
6	Skyrise Miami	Miami	FL	Yes	12086002100	10.17%	8	1	2
7	76 11th Avenue	New York	NY	No	36061009900	5.77%	9	0	N/A
8	1 Park Lane	New York	NY	No	36061011201	2.14%	6	0	N/A
9	1 Wall Street	New York	NY	No	36061000700	4.38%	3	0	N/A
10	Hollywood Park	Inglewood	CA	Yes	06037600702	13.20%	11	N/A	1
11	Empire Outlets	New York	NY	No	36085000300	11.73%	5	0	N/A
12	125 Greenwich Street	New York	NY	No	36061001300	3.28%	9	0	N/A
13	Beverly Hills Waldorf Astoria	Beverly Hills	CA	No	06037700700	4.90%	10	0	N/A
14	Gotham Center	New York	NY	No	36059410800	7.52%	7	2	N/A
15	Brooklyn Public Library	New York	NY	No	36047000502	7.87%	6	0	N/A
16	One Manhattan Square	New York	NY	No	36061000600	8.72%	4	0	N/A
17	Virgin Hotel	New York	NY	No	36061007600	3.55%	8	0	N/A
18	Wharf	Washington	DC	No	11001010200	5.16%	3	0	N/A
19	Macy Downtown Brooklyn	New York	NY	No	36047003700	5.43%	8	0	N/A
20	Liberty Gardens Phase II	New York	NY	No	36047007700	5.10%	4	0	N/A
21	Oosten	New York	NY	No	36047054700	6.68%	5	0	N/A
22	Pierce Boston	Boston	MA	No	25025010203	4.06%	8	1	N/A
23	147 E 86th Street	New York	NY	No	36061014802	1.45%	8	0	N/A
24	Panorama City	Miami	FL	No	12086006711	1.01%	4	0	N/A
25	Columbia Place	Washington	DC	No	11001004902	5.03%	6	0	N/A
26	Victoria Theatre	New York	NY	No	36061022200	6.77%	6	0	N/A

Project #	Project Name	City	State	Qualifies as a TEA?	Project Census Tract (P-CT)	P-CT Unemployment Rate (UER)	Contiguous CTs	# Contiguous CTs with UER > 12.42%	# CTs in TEA
27	75 Park Lane	Newport	NJ	No	34017007700	6.18%	6	0	N/A
28	SLS Las Vegas	Las Vegas	NV	No	32003002303	1.71%	4	1	N/A
29	855 Avenue of the Americas	New York	NY	No	36061010100	5.67%	6	0	N/A
30	W57	New York	NY	No	36061013500	5.70%	7	0	N/A
31	Bryant Park	New York	NY	No	36061008400	7.29%	8	0	N/A
32	101 TriBeCa	New York	NY	No	36061002100	1.56%	6	1	N/A
33	701 TSQ	New York	NY	No	36061012500	3.10%	7	1	N/A
34	The Charles	New York	NY	No	36061012600	2.27%	7	0	N/A
35	222 E 40th	New York	NY	No	36061008800	4.10%	6	0	N/A
36	88 Kushner-KABR	Jersey City	NJ	No	34017007600	2.66%	6	0	N/A
37	Pacific Park	New York	NY	No	36047012902	6.17%	6	0	N/A
38	Shipyards	San Francisco	CA	Yes	06075980600	20.53%	5	N/A	1
39	City Point	New York	NY	Yes	36047001500	11.02%	8	1	2
40	Knickerbocker	New York	NY	No	36061011300	0.00%	7	1	N/A
41	Brooklyn Navy Yard	New York	NY	Yes	36047054300	10.32%	9	1	2
42	All Aboard Florida	Orlando	FL	No	12095016802	3.78%	8	1	N/A
43	New York Wheel	New York	NY	No	36085000300	11.73%	5	0	N/A
44	International Gem Tower	New York	NY	No	36061009600	4.13%	8	1	N/A
45	555 Tenth	New York	NY	No	36061007900	4.70%	5	0	N/A
46	Liberty Gardens Phase I	New York	NY	No	36047007700	5.10%	4	0	N/A
47	Pearl Street Plaza Hotel	New York	NY	No	36061001502	3.45%	3	0	N/A
48	Renaissance Midtown Hotel	New York	NY	No	36061009100	5.87%	6	0	N/A
49	30 Park Place	New York	NY	No	36061002100	1.56%	6	0	N/A
50	Hudson Yards Tranche I	New York	NY	No	36061009900	5.77%	9	0	N/A
51	LA Marriott	Los Angeles	CA	No	06037207710	8.32%	8	1	N/A
52	Embassy Suites Hotel	Seattle	WA	No	53033009300	7.50%	11	0	N/A
Average						5.9%	6.9	0.3	
Count		TEA	6			Min	3	0	1
		Non-TEA	0			Max	15	2	2

Notes:

- 1 Contiguous CTs does not includes CT in a different county than the county in which the P-CT is located
- 2 Civilian labor force was determined by dividing the numbe of unemployed civilians in a tract divided by the unemployment rate for that tract.
- 3 2 of the 6 TEA projects consist of a single census tract - Shipyards and Hollywood Park.
- 4 Of the 4 TEA projects that rely on contiguous census tracts , each rely on only 1 contiguous CT.