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A PROFESSIONAL LAW CORPORATION

Utilize EB5 to Finance US Projects and Create US Jobs  
October 23, 2012


**EB-5 Securities & Corporate  
Legal Considerations**

Presented by:  
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Disclaimer

*This presentation is designed to provide practical and useful information on the subject matter covered. However, it is provided with the understanding that no legal, tax, accounting, or other professional services are being rendered or provided. If legal advice or other expert assistance is required, the services of a competent professional should be sought.*



Agenda

- ▶ Is EB-5 right for you?
- ▶ Structure
- ▶ Term Sheets and Letters of Intent
- ▶ Diligence
- ▶ Investment Agreement
- ▶ Other Documents
- ▶ Securities/Offering Documents
- ▶ Securities Compliance
- ▶ Costs & Professionals




To EB-5 or not to EB-5 ?

- ▶ That is the question...
- ▶ Explore the pros, but don't forget the cons.


Pros	Cons
Available capital	Cost
Lower ROI required	Timing
Green card	Project considerations

- ▶ Debunking the myth that EB-5 investors are bad investors
- ▶ Don't forget big picture strategic considerations.



Equity or Loan or  
Equity & Loan Model?

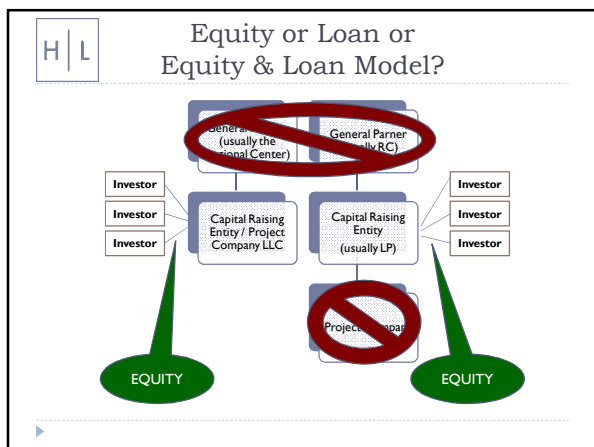
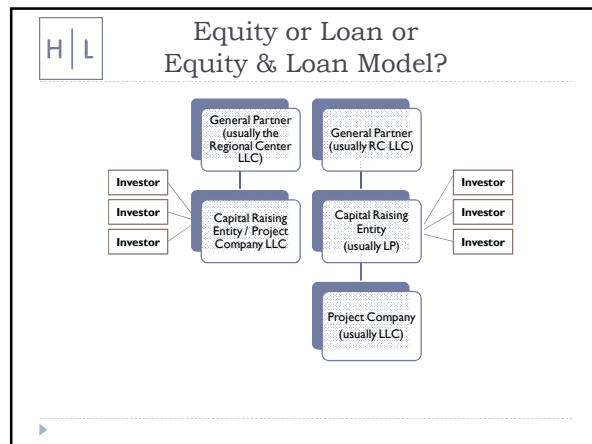
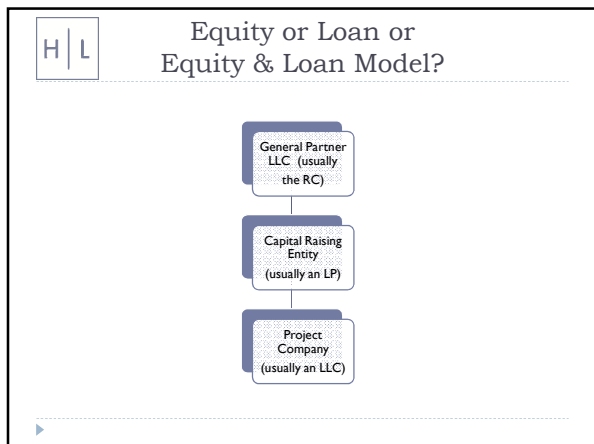
General Partner or  
Managing Member  
(usually the RC)  
in  
Capital Raising Entity /  
Project Company



Equity or Loan or  
Equity & Loan Model?

General Partner  
(usually the RC)  
Itself usually an LLC

Capital Raising  
Entity / Project  
Company  
(usually an LP)



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- ### Term Sheets & Letters of Intent
- ▶ LOI (RC-LP) –vs- Term Sheet (LP-PC)
  - ▶ Project Company –vs- Investors
  - ▶ Same terms, different definitions
 

Money	Collateral
Use of Proceeds	3rd Party Security
Exit Strategy	Penalties
Duration	Records & Monitoring
Return	Job Creation
  - ▶ Watch the interplay for timing and contradictions
  - ▶ Recognize differences between entities

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- ### Due Diligence
- ▶ By RC of Project/PC
    - ▶ Consents, restrictions, etc.
    - ▶ Authorized shares
    - ▶ Negative covenants
    - ▶ Proper authority
    - ▶ Right of ownership
    - ▶ Access to necessary parties and information
  - ▶ DO YOUR DUE DILIGENCE EARLY AND KEEP IT CURRENT!

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- ### Investment Agreement
- ▶ The agreement between the Capital Raising Entity (LP) and Project Company (PC)
  - ▶ Transforms term sheet and/or LOI into definitive documents
    - ▶ Length considerations: complexity –vs- simplicity
    - ▶ Equity purchase agreement –or- Loan –or- operating agreement
    - ▶ Credit support
    - ▶ Guarantee –vs- Security Agreement
    - ▶ Put/Call rights?
    - ▶ Certificated interests or not?

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### Common Provisions – Equity Agreements

- ▶ Identification of interests
- ▶ Price
- ▶ Voting
- ▶ Manager/board
- ▶ Records/reports
- ▶ Transfer rights/restrictions
- ▶ Use of proceeds

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### Common Provisions – Loan Agreements

- ▶ Amount
- ▶ Disbursement
- ▶ Use of Proceeds
- ▶ Interest & other fees
- ▶ Payment dates
- ▶ Term – extensions?
- ▶ Collateral & Credit Support
- ▶ Covenants & Reporting
- ▶ Default & remedies

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### Common Provisions – Guarantees

- ▶ Identification of guarantor
- ▶ Joint/several liability
- ▶ Obligations
- ▶ Maximum exposure
- ▶ Payment vs collection
- ▶ Waivers
- ▶ Security

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### Common Provisions – Security Agreement

- ▶ Stand-alone -vs- incorporated
- ▶ Connection to transaction or underlying obligation
- ▶ Grant
- ▶ Perfection
- ▶ Priority

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### Other Documents

- ▶ Subordination agreement
- ▶ Call/put
- ▶ Side letters
- ▶ Construction loan agreements
- ▶ Leases
- ▶ Management Agreement
- ▶ Consulting Agreements
- ▶ Resolutions
- ▶ Joint venture

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### Securities Offering Documents

- ▶ Investor Questionnaire
  - ▶ recommended
  - ▶ 30-45 days “cooling off”
- ▶ Subscription Agreement
- ▶ Offering Circular (PPM)
- ▶ Limited Partnership Agreement / LLC Operating Agreement / Articles of Incorporation & Bylaws & Shareholders Agreement
- ▶ Escrow Agreement(s)

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### How does EB-5 involve securities law?

*It's just like a domestic money raise:*

Financing secured from passive investors  
+  
Success dependent on management by others  
=  
**A security**

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### So, the usual EB-5 project ("indirect") involves a security

Financing secured from foreign immigrant investors  
at \$500K / investor  
+  
Success of project dependent on management  
exclusively by principals  
=  
What the investor receives in return for his investment  
(a limited partner interest or LLC membership interest)  
is a security

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### Objectives of the Securities Laws

- ▶ **Two goals of Securities Laws**
  - ▶ adequate disclosure (tell the truth)
  - ▶ prevent fraud (don't lie)
  - ▶ Means to goal – full disclosure of all material facts
- ▶ **Laws**
  - ▶ Securities Act of 1933 – main ("primary transactions" by issuer)
  - ▶ Exchange Act of 1934 – for "secondary transactions" (resales by shareholders)
  - ▶ Blue Sky
  - ▶ Foreign
  - ▶ Don't forget... the 1940 Acts [ICA... IAA]

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### Securities law requirements

- ▶ **The offering of a security must be registered or exempt**
  - ▶ Registration – IPO; expensive (time and \$)
  - ▶ Exemption – must fit within, or lost
    - ▶ Primary FEDERAL exemptions: Reg D and Reg S
    - ▶ Example requirements:
      - Private offering (Reg D) as modified by the JOBS Act
      - Non-U.S. persons (Reg S)
    - ▶ Don't forget STATE exemptions
    - ▶ Don't forget exemptions for large complex raises
      - ▶ Investment Company Act: < 100 s/h ... "qualified purchasers"
      - ▶ Section 12(g) Exchange Act: < 500 s/h
  - ▶ \* Need to tread carefully – i's & t's – CAN be done

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### Broker-Dealers

- ▶ **Securities Exchange Act of 1934 & Blue Sky reqts:**
  - ▶ Broker-Dealers (brokering vs. dealing)
    - Register with SEC
    - Join Self Regulating Organization (SRO) (i.e. FINRA)
  - ▶ Brokers
    - ▶ Participate in important parts of securities transactions
    - ▶ Transaction-based compensation
    - ▶ In business of effecting/facilitation securities transactions
    - ▶ Handle securities/funds of others in connection with securities transactions

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### Finders

- ▶ **Broker-dealers –vs- Finders**
  - ▶ Broker-dealers are usually finders;
  - ▶ Not all finders are broker-dealers
- ▶ **Finders do not**
  - ▶ Solicit investors
  - ▶ Participate in securities offering
  - ▶ Regularly introduce investors
  - ▶ Receive compensation based on success
- ▶ **Finder issues – extremely fact specific so case-by-case**

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### Are any documents *required* for an exempt offering?

No!

- ▶ So, why bother? CYA !
- ▶ Liable for what you say – and don't say
- ▶ Documents ...
  - ▶ provide written substantiation that exemption requirements satisfied
  - ▶ Control disputes over what said about offering
    - ▶ "Merger" section – this document supersedes prior
    - ▶ If it isn't included, the offeror never said it
    - ▶ "Unring the bell" – wipe out prior statements

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### Three stages when securities docs are needed

- ▶ **Generic doc set** – accompany Regional Center application filing with USCIS
  - ▶ Most general, least specific – still needs to address anticipated project types
- ▶ **Offering doc set** – used to solicit investors
  - ▶ Most detailed - disclose all specific terms of actual project being sold
- ▶ **Exemplar doc set** – for USCIS to use as template for measuring all I-526s
  - ▶ "In between" generic and offering-specific sets
  - ▶ *Caution:* no material changes after submission to USCIS or start review anew

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### Are all docs needed at each stage?

- ▶ No! At least not full versions. (*Whew!*)
- ▶ **Generic doc set**
  - ▶ Need general securities docs
- ▶ **Exemplar doc set**
  - ▶ Need more specific securities docs + corp docs
- ▶ **Offering doc set**
  - ▶ Full securities + corp + transaction ( + more...)

→ *Caution: don't get lazy – generic docs WON'T work for offerings!*

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### Who writes these docs? The document-writing team:

- ▶ **Primary authorship responsibility (with assists):**
  - ▶ Immigration documents – immigration lawyer
  - ▶ Securities documents – securities lawyer
  - ▶ Corporate documents – corporate lawyer
  - ▶ Transaction documents – transactional lawyer
  - ▶ Business plan – *experienced* plan writer
  - ▶ Pro forma financials – accountants
  - ▶ Economic analysis (jobs) – economist
  - ▶ Big-picture ("bird's-eye view") – EB-5 consultant(s)
- ▶ **All of the above, with management's extensive involvement**

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### Working with Professionals

- ▶ **Experience**
  - ▶ Hire EB-5 – anything else will probably cause delays & higher costs
    - ▶ How much? What type? How long ago?
    - ▶ Accolades
    - ▶ Client attention
- ▶ **Cost**
  - ▶ Go for value
    - ▶ You get what you pay for
    - ▶ But don't over hire


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### Quick Stats

- ▶ **Lots of lawyers; many types of law**
  - ▶ Roughly **231,800** lawyers in CA, (current as of Jan 30, 2011, 11pm - CA State Bar)
  - ▶ Bar exams test on 15-30 subjects
  - ▶ Practically, hundreds of different types of law
- ▶ **Few business lawyers** (2006, CA State Bar Member Survey)
  - ▶ 14% business and contracts
  - ▶ 6% intellectual property
- ▶ **Legal fees range between \$0 - \$1,260/hr** (December 2008, NLI)

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## Firm Biography

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Homeier & Law, P.C. is a law firm devoted exclusively to corporate and business transactional law, including securities, for clients ranging from established and publicly traded companies, to startup businesses and entrepreneurs in a wide range of industries. The firm's practice includes finance, secured lending, mergers and acquisitions, licensing, securities, venture capital, new media, technology, e-commerce, and other general transactions. Homeier & Law, P.C., is a leader in EB-5 related corporate and securities transactions, and represents a number of regional centers as well as private EB-5 clients.

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## Speaker Biography - Jor

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- ▶ Jor Law practices corporate and business transactional law in Los Angeles and is a founding shareholder of Homeier & Law, P.C. In addition to his regular practice of representing companies of all sizes and individuals in the areas of finance, secured and unsecured lending, mergers and acquisitions, licensing, securities, venture capital, internet and new media, technology, e-commerce, and other corporate transactions, Jor routinely advises on corporate and securities aspects of EB-5 related transactions. In that capacity, Jor represents both investors looking to invest through the EB-5 program as well as businesses seeking capital through the EB-5 program including through regional centers. Jor frequently presents at EB-5 industry events, including those held by the American Immigration Lawyers Association, State Bar of California, and Los Angeles County Bar Association. Previously, Jor worked at some of the world's largest and most prestigious law firms and ran a division within one such firm. Jor received his J.D. from Columbia University's School of Law in 2001 and his B.A. in Rhetoric from The University of California, Berkeley in 1998. Jor is a member of the State Bar of California and the State Bar of New York. In December 2008, Mr. Law was named a "Best Lawyer" by LegalForce. For two years in a row, in each of 2009 and 2010, Jor was recognized by Super Lawyers magazine as one of "Southern California's Super Lawyers – Rising Stars," placing him among the top 2.5 percent of the best up-and-coming attorneys in Southern California who are 40 years old or younger, or who have been practicing for 10 years or less.

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## Contact

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