



Determining Whether a Potential Investor is a Resident or Non-Resident for Securities Law Purposes

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A fundamental tenet of the federal securities laws is that all purchases or sales of securities must either be registered under the Securities Act of 1933 (the “Securities Act”) or qualify for an exemption from registration. The primary exemption relied upon by issuers seeking investors pursuing a visa under the EB-5 Program is provided by Regulation S under the Securities Act.¹

Regulation S generally provides that the registration requirements of the Securities Act do not apply to offers and sales of securities if both the offer and sale occur outside the United States. Additionally, Regulation S requires that the issuer not offer or sell securities to U.S. citizens or residents even if those persons purchase the securities abroad. Determining whether an offer or sale occurs outside the United State is a rather simple test—namely, whether the investor is physically located outside of the U.S. both at the time he or she is first solicited to purchase the securities and at the time he or she executes the subscription agreement or other contract to purchase those securities. For example, if the investor is a student attending school in the U.S. on a F-1 Visa, the student may not be approached to make an investment while he or she is within the U.S. To do so would fail the above-described prohibition on offers within the U.S. Further, soliciting a student’s parents offshore who, then in turn, send the subscription material to their child for signature while he or she is in the U.S. also will not qualify because the offer (and sale to the extent the subscription agreement is also signed) to the actual investing person (the student) occurs when the student is physically located within the U.S. in contravention of Regulation S. It should be noted that if a parent signs the investment documents on behalf of his or her child while that child is physically located in the U.S., the parent would be doing so as the child’s agent (i.e. attorney-in-fact) and

the offer should be considered made to the student while in the U.S. In other words, the longstanding securities law tenant that you can't do indirectly what you can't do directly comes into play.

What has been a more difficult question for issuers is whether a natural person (such as a student holding an F-1 Visa to study in the U.S.) is a U.S. resident for Regulation S purposes. According to the Securities and Exchange Commission (the "SEC"), a natural person is a resident of the country in which he or she permanently (and not temporarily) resides. For example, in a no action letter issued by the SEC in the context of an offshore private equity fund desiring to comply with the Investment Company Act of 1940 when selling its limited partnership interests to U.S. citizens residing abroad, the SEC stated that "In our view, a distinction should be made . . . between persons permanently residing abroad, and U.S. residents who are temporality abroad. U.S. citizens and other persons permanently residing abroad who purchase securities may be deemed to have chosen foreign markets, and the laws and regulations applicable to those markets. U.S. residents who are temporarily abroad, however, should be treated differently because they continue to maintain a permanent presence in the United States that warrants full protection under the federal securities laws."

Whether a person temporarily or permanently resides in the U.S. is a factual question that depends on the circumstances surrounding that person's presence in the U.S. Fortunately, the current immigration laws are helpful in making this determination. Under applicable immigration laws, a non-resident alien for immigration purposes includes individuals that are not lawful permanent residents of the US and who have been admitted to the U.S. for a temporary stay that will end when the purpose of that stay has been met. Individuals in non-immigrant visa status have visas which begin with letters: B, F, J, TN, H, L, O, etc. On the other hand, an individual that has been granted a green card to live and work in the U.S. indefinitely is considered a lawful permanent resident under the immigration laws.

Based on the forgoing, issuers seeking invest dollars from students and other individuals residing temporarily in the U.S. should be able to rely on the exemption provided by Regulation S as long as potential investors are both offered and sold the applicable securities while they are physically located outside the U.S.

The views expressed in this publication are those of the author and not necessarily those of Greenberg Traurig LLP. The comments contained herein do not constitute legal opinion and should not be regarded as a substitute for legal advice.

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ⁱ A Regulation S offering only exempts the issuer from the registration requirements of the Securities Act. It does not exempt the issuer from complying with the anti-fraud provisions of both federal and state securities laws.