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“What TEA Projects Might Look Like Under EB-5 2.0: Alternatives Illustrated with Maps and Data”

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“What TEA Projects Might Look Like Under EB-5 2.0: Alternatives Illustrated with Maps and Data”¹

INTRODUCTION

New York City developers and regional centers are breathing a collective sigh of relief that Congress extended the EB-5 Regional Center Program (the “Program”) for “one year,” until September 30, 2016, without any change.² Since June 2015, when Senate Judiciary Chairman Grassley and ranking Democratic Senator Leahy introduced the EB-5 reform bill, the development community had braced for the worst while Congress debated behind closed doors the controversial provisions of the proposed law.³ The battle between senators of rural and urban states reflected the voices of a select few, powerful constituents. Despite broad-based support for EB-5 reform, three senators and one congressman were successful in preventing the enactment of this legislation.⁴

Background

Under the EB-5 Program,⁵ enacted in 1990, an immigrant who invests at least \$500,000 or \$1,000,000 in a specific U.S. business project is eligible for permanent residency, if the investment creates at least 10 American jobs.⁶

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² The [Consolidated Appropriations Act, 2016](#), includes a single sentence authorizing the EB-5 Regional Center program through September 30, 2016 (in Section 575 on PDF page 285). The Regional Center Program is the Immigrant Investor Program. <http://www.uscis.gov/eb-5>

³ S.1501. If enacted, the law’s title would have been “American Job Creation and Investment Promotion Reform Act of 2015.” <https://www.congress.gov/bill/114th-congress/senate-bill/1501/text>. The amended law, with Program changes, would likely have been referred to as “EB-5 2.0”, using the nomenclature that has been applied in recent year to other laws or programs that have been overhauled or reformed. See generally CMBS 2.0. Over the last year, five bills seeking to reform the EB-5 program have been introduced in both the House and the Senate, including S. 1501. The other four bills are: H.R. 616; H.R. 3370; S. 2122; and S. 2115.

⁴ <http://www.wsj.com/articles/congress-set-to-extend-foreign-investor-green-card-program-1450292199?tesla=y>; <http://therealdeal.com/blog/2015/12/21/eb-5-champions-in-congress-show-strong-financial-ties-to-real-estate-industry/>

⁵ INA 203(b)(5)(C). The Program that is subject to reauthorization relates only to the Regional Center Program, and not direct investments. .

⁶ INA Sec. 203(b)(5). We assume that readers have a basic understanding of the Program. For background on some of the topics discussed in this paper, see “A Roadmap to the Use of EB-5 Capital: An Alternative Financing Tool for Commercial Real Estate Projects” by Professor Jeanne Calderon, Esq. and Scholar-in-Residence Gary Friedland, Esq., NYU Stern School of Business, Center for Real Estate Finance Research (May 2015) (referred to as “Roadmap.”) <http://www.stern.nyu.edu/sites/default/files/assets/documents/EB5%20paper%20final%205.24.2015.pdf> .

These invested funds became an inexpensive source of patient, flexible capital for real estate development projects after the Great Recession in 2008.⁷ More recently, EB-5 capital has blossomed into a mainstream source of capital for real estate development projects. The immigrants' pooled equity capital is contributed to an entity (known under the EB-5 law as a "New Commercial Enterprise" or "NCE") typically created by an affiliated government-approved regional center. The proceeds are most commonly deployed as a mezzanine loan to a real estate project development entity (known under the EB-5 law as a "Job Creating Entity" or "JCE").⁸ The immigrant's motivation to make the investment is to qualify for the visa, and thus, he accepts interest rates well below market.⁹

The original purpose of the EB-5 law was to create investments and jobs in rural areas, as well as high unemployment areas, referred to as "Targeted Employment Areas" ("TEA").¹⁰ To encourage investments in these areas, the minimum investment in a project located in a TEA was set at a discounted level of \$500,000, compared to \$1,000,000 for a project not located in a TEA. Developers strive to have the location of their projects qualify as a TEA because immigrants seeking the EB-5 visa strongly prefer to invest in areas where the lesser minimum investment level applies, especially if they believe the investment will result in their receipt of a visa and a return of their capital investment.¹¹

Some members of Congress and other critics had become outraged by the growing trend of projects qualifying as TEAs that are located in thriving urban areas and commanding the lion's share of EB-5 investment dollars.¹² With the approval delegated to individual states, each of which was authorized to set its own rules and motivated to retain economic development within its own borders, projects in even the most affluent parts of the country were able to routinely qualify for the discounted investment level by combining contiguous census tracts (starting with the project site and often extending in unnatural configurations to remote sites miles away) until the weighted average met or exceeded the high unemployment

⁷ Although EB-5 investment is available to any US business that meets the law's requirements, real estate development projects have become the most common recipient of deployed EB-5 proceeds. See Roadmap.

⁸ The definitions of NCE and JCE would have been amended by the Act. See INA Sec. 203(b)(5)(D)(viii) and (vi), respectively.

⁹ See Roadmap, footnote 6.

¹⁰ <http://www.leahy.senate.gov/press/statement-of-senator-patrick-leahy-d-vt-ranking-member-senate-judiciary-committee-on-the-need-to-reform-the-eb-5-regional-center-program->

¹¹ See Roadmap. Also see http://www.brookings.edu/~media/research/files/reports/2014/02/05-eb5/eb5_report.pdf.

¹² <https://www.leahy.senate.gov/press/statement-of-senator-patrick-leahy-d-vt-ranking-member-senate-judiciary-committee-on-the-need-to-reform-the-eb-5-regional-center-program;>
[http://www.latimes.com/opinion/editorials/la-ed-adv-investor-visas-20151127-story.html;](http://www.latimes.com/opinion/editorials/la-ed-adv-investor-visas-20151127-story.html)

threshold required by the law.¹³ This census tract aggregation is referred to pejoratively as “gerrymandering.” Thus, gerrymandering rendered the two level investment threshold meaningless and immigrants flocked to invest in luxury projects by major developers in urban areas.

While the use of EB-5 capital has exploded in recent years, reports of fraud and other abuses have injured the Program’s reputation. Fortune Magazine and ABC News have published exposes describing instances of Program abuses.¹⁴ Since 2013, when the SEC filed its first enforcement actions in the EB-5 arena, it has been vigorously pursuing and investigating abuses.¹⁵ Recently, a flurry of enforcement actions have been filed alleging fraud by regional centers and developers, as well as the illegal payment of brokers’ fees to immigration attorneys, in connection with EB-5 transactions.¹⁶ Pursuant to a request by the Senate Judiciary Committee, in August 2015 the Government Accounting Office (“GAO”) filed a report to Congress addressing the additional actions needed to better assess the fraud risks in the EB-5 Program.¹⁷ In recent months, the Washington Post’s editorial board, California’s Senator Feinstein, as well as many other critics, have urged Congress to repeal the Program.¹⁸

Summary of EB-5 2.0 failed legislative process

The Regional Center Program was scheduled to sunset on September 30, 2015, as it is a temporary program that has been extended multiple times since 1993, typically for successive 3 year terms.¹⁹ However, rather than simply extend the Program as Congress had done each time it came up for reauthorization in past years, Congress decided to seize the opportunity to address much needed reforms. The EB-5 community realized reform was necessary to improve the Program’s

¹³ <http://www.wsj.com/articles/how-immigrants-cash-funds-luxury-towers-in-the-u-s-1441848965>;
<http://www.wsj.com/articles/posh-tower-proposed-for-struggling-new-york-neighborhood-central-park-south-1444728781?tesla=y>;

¹⁴ <http://fortune.com/2014/07/24/immigration-eb-5-visa-for-sale/>;
<http://abcnews.go.com/Nightline/fullpage/500000-green-card-eb-visa-program-28662457>

¹⁵ <https://www.sec.gov/litigation/litreleases/2013/lr22615.htm>

¹⁶ Path America: <https://www.sec.gov/litigation/complaints/2015/comp-pr2015-173.pdf>

Yang: <https://www.sec.gov/litigation/complaints/2015/comp23414.pdf>

Zhong: <http://www.sec.gov/news/pressrelease/2015-263.html>

Feng: <http://www.sec.gov/news/pressrelease/2015-274.html>

¹⁷ August 2015 GAO Report to Congressional Requesters, “Immigrant Investor Program: Additional Actions Needed to Better Assess Fraud Risks and Report Economic Benefits” <http://www.gao.gov/assets/680/671940.pdf>.

¹⁸ https://www.washingtonpost.com/opinions/its-time-for-the-corporate-visa-giveaway-to-go-away/2015/09/06/72b78ea0-50d3-11e5-9812-92d5948a40f8_story.html;
<http://www.sfgate.com/business/networth/article/Feinstein-calls-for-end-to-controversial-EB-5-6610957.php>

¹⁹ See for example, <https://www.congress.gov/bill/112th-congress/senate-bill/3245>

integrity and transparency, as well as to reduce the dominance by major real estate developers in New York City and other cities that have thrived in the aftermath of the Great Recession.

Accordingly, Senators Grassley and Leahy co-sponsored the original Senate bill, S. 1501, on June 4, 2015 (the “June Bill”). This bill contained many provisions that were controversial, such as a very restrictive TEA definition for projects in urban areas, and job creation rules that would reduce the amount of EB-5 capital that could be raised for projects. Other provisions, such as the integrity and transparency provisions, were generally recognized as necessary to improve the Program’s reputation and a condition to obtain reauthorization of the Program. One provision was surprisingly generous, the “grandfather” provision relating to TEA and minimum investment amounts.

Between the bill’s introduction and the September 30, 2015 sunset date, surprisingly little progress was made. The Senate did not solicit comments from stakeholders or the public. Little, if any, debate was evident. Apparently, no revised or discussion drafts of the June Bill were circulated. The September 30th deadline was extended through a temporary Federal government budget bill, a “Continuing Resolution,” until December 11, 2015, which was later extended to December 16, 2015.²⁰

At least four discussion drafts were produced by the House and Senate Judiciary Committees and circulated among a limited group in the Senate and House. However, the first of these was not circulated until more than one month after the Continuing Resolution was adopted. Three of the discussion drafts were circulated in the final days leading up to the extended deadline of December 16, 2015. These drafts evidence the apparent deals that were made, unwound, resurrected in different forms, but which ultimately died.²¹

The discussion drafts were circulated on or about November 7, 2015 (the “November Draft”), on or about December 2, 2015 (the “December 2nd Draft”), on or about December 9, 2015 (the “December 9th Draft”) and on or about December 12, 2015 (the “December 12th Draft”). These drafts are collectively referred to as the “Drafts.” The December 2nd, 9th and 12th Draft are sometimes referred to as the “December Drafts.” These Drafts were not publicly released during the period that these Drafts were being negotiated by Congress. Public input was limited to a select few stakeholders.

²⁰ <https://www.congress.gov/bill/114th-congress/house-bill/719>;

²¹ We were not personally involved with negotiations surrounding the proposed legislation. <https://iiousa.org/blog/wp-content/uploads/2015/12/EB-5-recap-article-12-15-15.pdf>

The Federal budget bill was further extended until December 16, 2015. Apparently, key Congressional leaders were close to reaching a deal on the EB-5 reforms. However, on December 15, 2015, one day prior to the expiration of the EB-5 program, House and Senate leadership recommended that the EB-5 program be extended until September 30, 2016. The extension was included as part of the omnibus appropriations bill that was passed by Congress and signed by the President on December 18, 2015.²² This simple and clean extension means that the Program will not change in any respect.

On December 17th, the day after the bill for a clean extension was filed, Senator Grassley appeared on the floor of Senate to express his deep disappointment and frustration that a powerful lobby representing a select few prevented the bill's passage. He vowed to spend the next 10 months "exposing the realities of this program" and exercising more oversight of the Program than ever before. He complained that TEA designations "have been gerrymandered to include the most lavish of developments in the richest neighborhoods." He railed against the abuses of gerrymandering: "How many more media reports will it take to understand the extent of EB-5 gerrymandering? Have the senators who helped table our reforms ever read those reports in the Wall Street Journal? I can say with certainty that the status quo will not benefit Middle America. It benefits New York City and other affluent areas at the expense of areas in Iowa, Kentucky, Wisconsin, and Vermont."²³

We assume that the December 9th Draft and December 12th Draft will serve as the starting point for the negotiations when resumed in early 2016, as presumably these reflected the legislative representatives' refinements from prior Drafts.²⁴ Undoubtedly, the TEA definitions for urban area projects will be at the center of the debate.

Paper's focus

In the interest of releasing this working draft paper as soon as possible, the paper's immediate focus will relate to the proposed changes to the TEA definition and minimum investment amounts. We intend to prepare a second paper to focus on the other key provisions addressed in the various Drafts.

²² The [Consolidated Appropriations Act, 2016](#), includes a single sentence authorizing the EB-5 Regional Center program through September 30, 2016 (in Section 575 on PDF page 285).

²³ <http://www.youtube.com/embed/k-E13k-hhnc?width=425&height=350&iframe=true;>
<http://www.grassley.senate.gov/news/news-releases/grassley-vows-continued-push-reform-eb-5-after-fixes-ignored-omnibus-spending>

²⁴ We recognize that, given Senator Grassley's recent statements, the starting point for defining a TEA in an urban area might differ from those considered in the December Drafts.

This paper reviews and explains the evolution of the key provisions in the Drafts pertaining to TEA status and related changes, including visa reserves. The paper also describes how these provisions would have applied if EB-5 2.0 were enacted. Then, we consider the potential impact of these provisions on New York City (“NYC”) projects – existing, those in the pipeline and future projects. Maps and support data illustrate the applicability of the proposed TEA definitions to NYC census tracts, including projects. In addition, we analyze and illustrate how the proposed TEA changes might have applied to the two major EB-5 projects in Manhattan - Hudson Yards and 1 Park Lane - that were the subject of front page articles in the Wall Street Journal. These articles criticized the controversial practice of luxury projects in thriving areas qualifying for TEA status by gerrymandering census tracts.²⁵

Based on the relevant data, it appears that fewer projects in Manhattan (and other parts of NYC) would have been able to qualify under the new TEA definitions available to projects in urban areas under the Drafts.

As explained below, whether a project location in an urban area would qualify as a TEA under the definitions introduced in the December Drafts (Modified Gerrymandering, Cluster and Extend, and Good Neighbor described below) depend upon the project’s census tract or permitted combined area of tracts meeting applicable thresholds (high unemployment, high poverty or area median income (“AMI”).

The more restrictive TEA definition in urban areas would relate to poverty rate or AMI level. One new definition that incorporates the high unemployment threshold would limit the number of census tracts that could be combined to 12.²⁶ However, a review of the data relating to these thresholds reveals that few tracts in prime Manhattan locations (i.e., below 96th Street) meet these thresholds. Thus, few projects would qualify under the urban area TEA definitions in the December Drafts, even under the broadest of definitions contained in these Drafts.

We are unable to construct an alternative definition based on the existing data that would permit a significant number of additional projects to qualify. We realize it is extremely unlikely that Congress would permit many more tracts to be combined because this would start to resemble the gerrymandering, which is the abuse that Congress is seeking to eliminate.

²⁵ <http://www.wsj.com/articles/how-immigrants-cash-funds-luxury-towers-in-the-u-s-1441848965>;

²⁶ Census tracts are small statistical subdivisions of counties used by the US Census Bureau. In New York City, there are 2,168 census tracts, which typically have a population of about 3,000-4,000 each, and an average land area of about 90 acres. Each decade, the Census Bureau updates this geography, attempting to keep changes to a minimum. http://www.nyc.gov/html/dcp/html/census/nyc_cff_faqs.shtml

We assume if Congress considers other factors to define a TEA in an urban area, it will test the potential effectiveness of this new definition by applying it to existing EB-5 projects that qualified for TEA status under the gerrymandering rules. If the same projects would continue to qualify under the new standards, then obviously Congress' efforts would not accomplish its objectives. The perceived gerrymandering abuse would continue. Similarly, investment and job creation would not be directed to the rural and distressed areas that Congress apparently believes is appropriate.

EB-5 Integrity Bill

On December 17, 2015, the same day that Senator Grassley appeared on the floor of the Senate to express his vehement disappointment and frustration with the failed legislative process, the three Senators (Flake, Cornyn and Schumer) who were instrumental in killing the proposed EB-5 2.0 bill, co-sponsored S.2415, to be known as the "EB-5 Integrity Act of 2015." This paper will refer to this bill as the "Integrity Bill."²⁷ The Integrity Bill includes significant integrity, oversight and transparency reforms. Many of the provisions reflect the June Bill, as modified by the series of Drafts. Some provisions that appeared in the last Draft were revised or eliminated by this Integrity Bill.²⁸

We will discuss the provisions of the Integrity Bill relevant to the TEA focus of this paper. However, the Integrity Bill does not address TEA definitions, minimum investment amounts and related topics because these were included in sections of the June Bill separate from the integrity provisions.²⁹ Undoubtedly, those provisions will be incorporated in a separate bill to be introduced by Senator Grassley and/or Leahy in 2016.³⁰

We assume that the three senators introduced the Integrity Bill so that they could frame the terms of bill that will serve as the starting point for legislative discussions, rather than revert to the last Draft that obviously contained provisions that their key constituents found objectionable.

²⁷ <https://www.congress.gov/bill/114th-congress/senate-bill/2415/text>

²⁸ A few examples include: (1) eliminating site visits of the JCE project site; (2) limiting the scope of provisions regulating migration agents; (3) substantially reducing job creation rules that would require more actual jobs be created; (4) limiting the scope of many provisions that would have regulated third-party developers and/or exposed them to liability; and (5) reducing limits on gifts as a source of immigrant's funds.

²⁹ Section 4 of the June Bill and subsequent Drafts.

³⁰ Although technically the Integrity Bill could be passed separately from, and prior to, the bill that will address TEA and related issues, separate passage of the Integrity Bill faces difficult legislative hurdles based on Congressional rules. See, for example, http://www.senate.gov/legislative/common/briefing/Senate_legislative_process.htm.

2016 suggested legislative approach

If Congress expects to pass major substantive changes to the law during the 2016 legislative session, it will have to resume the negotiation process as early as possible after the holiday recess because the program will expire in less than 9 months. The 2016 Presidential election year adds a layer of complexity to resolving the controversial deal points that prevented the bill from being passed in the 2015 session. Any substantive bill would face that challenge in 2016. Furthermore, a bill that relates to the nation's controversial immigration program faces an even higher hurdle.

The reform measures contained in the June Bill are laudable from trying to stimulate EB-5 investment and job creation in rural and economically distressed areas by improving the integrity and transparency aspects of the Program. However, certain provisions of the June Bill created divisiveness within the EB-5 community. It limited urban area TEAs to a single census tract, a standard that many in the EB-5 community perceived as an extreme overreaction to gerrymandering. The generous "grandfather" provisions in the June Bill invited a flood of exemplar (project preapprovals) applications to be filed with USCIS, the Federal government agency that administers the Program, by developers and individual immigration petitions (Form I-526) to be filed by investors.³¹

Furthermore, Congress did not provide a process or forum by which stakeholders could comment. Not until five months after the June Bill's introduction, approximately one month before the Program's scheduled sunset, did Congress circulate a revised draft – the November Draft – to the June Bill. Apparently in response to the flood of applications and petitions filed with USCIS between June and October, the November Draft essentially reversed the June Bill's grandfather clause. As the EB-5 extension deadline neared, over a 10 day period in December, from December 2 to December 12, three more Drafts were considered by a select group of Congress members.

We hope that when Congress reconsiders EB-5 reform legislation in early 2016 that it will provide a more open process, with a greater opportunity for stakeholders to voice their views and participate in the process, and that any drafts modifying the bill will be circulated publicly and well in advance of the September

³¹ See the discussion in the "Other TEA Considerations" section of this paper.

30th deadline.³² At the outset, Congress should articulate its objectives and the factors that it will consider in making its determinations, particularly about the key legislative provisions.

I TEA CHANGES UNDER PROPOSED 2015 SENATE BILL (“EB-5 2.0”)

Minimum Investment Amount

The June Bill and each of the 4 Drafts would have raised the minimum investment for projects located in a TEA from \$500,000 to \$800,000. This was not controversial because the dollar amount has not been raised since the law was enacted in 1990.³³ However, for projects not located in a TEA, the minimum amount would have remained at \$1,000,000 under the December Drafts.

Thus, the spread between the minimum investment levels that would have been required for a project located in a TEA compared to one not located in a TEA would have been only \$200,000 (or a 25% differential). This new spread would have been relatively insignificant compared to the \$500,000 spread (a 100% investment differential) provided under the existing law.³⁴

If the spread were reduced to merely \$200,000, the December Drafts would have reduced the importance of a project being located in a TEA. This would have significantly softened the consequences for those new projects that would not have qualified under the new TEA definitions. Especially with the narrowed dollar differential, we would have expected that, in some cases, the high net worth immigrant investor who is attracted to the Program would nevertheless invest in major projects in prime, non-TEA locations with major developers that demonstrate an impressive track record. Immigrant investors believe these developers are more likely to successfully complete the project, create the jobs needed to support the investor’s visa petition and repay the investor’s capital contribution.

Recent SEC enforcement actions against small or inexperienced developers might result in even more investors leaning towards investment in major projects by major developers, even if located in a non-TEA so long as the investment involves only a small premium, such as \$200,000. Those SEC actions involve blatant fraud perpetrated by regional centers, NCEs and developers (JCEs) under the

³² <http://www.klaskolaw.com/eb-5-investor-visas/eb-5-program-will-be-extended-until-93016-without-reform-the-work-begins/>

³³ INA Sec. 203(b)(5)(C)(i).

³⁴ \$200,000 spread/\$800,000 minimum = 25%, compared with \$500,000 spread/\$500,000 minimum = 100%

common control of one or two individuals with little or no experience in real estate development. These individuals have allegedly diverted EB-5 funds to unauthorized projects and for personal gain, thereby jeopardizing the investors' visa eligibility and return of capital.³⁵

The June Bill and November Draft would have increased the minimum investment amount to \$1,200,000.³⁶ The resulting \$400,000 differential would have likely motivated more investors to select a project located in a TEA, such as in a rural area which automatically would have qualified, but it is difficult to assess the importance that a particular immigrant investor would place on the \$200,000 versus \$400,000 differential in the minimum amount. Since virtually all projects qualify as a TEA based on the favorable interpretations made by state officials, no benchmark exists to make a comparison³⁷. It is obvious that the wider the differential, the greater the likelihood that investors would be attracted to projects that qualify for the lower threshold.

Targeted Employment Area (“TEA”)

Each of the December Drafts proposed 5 TEA definitions. If the immigrant invests in a project that is physically located in one of these TEAs, then the investment would have qualified for the \$800,000 amount.

Background

The June Bill proposed a simple solution. It focused solely on the census tract in which the project is located.

An urban area project would have been able to qualify as a TEA only if the project were located in a census tract with an unemployment rate equal to at least 150% of the national average unemployment rate.³⁸ This high unemployment threshold is the same as the applicable level under the existing law.

This proposal met immediate and stiff opposition from developers and regional centers. They argued that the single census tract approach was not appropriate because a project location that borders an obvious high

³⁵ Path America: <https://www.sec.gov/litigation/complaints/2015/comp-pr2015-173.pdf>

Yang: <https://www.sec.gov/litigation/complaints/2015/comp23414.pdf>

Zhong: <http://www.sec.gov/news/pressrelease/2015-263.html>

³⁶ H.R. 3370 proposed the minimum investment at \$1,000,000 for a TEA project and \$2,000,000 for a non-TEA project. This proposal received no meaningful support. Among other reasons, it would have rendered the Program non-competitive with visa for investment programs offered by other countries.

³⁷ Under the Drafts, the national office of USCIS would make all determinations with respect to TEA status, rather than the individual states.

³⁸ S.150, PDF page 62 of 79.

unemployment area would not qualify; and it did not take into account the job creation based on workers who commute to a project from more distant areas.³⁹ As a result, this would have eliminated TEA qualification for virtually all project locations in thriving urban areas.

The subsequent Drafts substantially broadened the TEA definition for urban area projects. Two alternative urban area TEA definitions were introduced. These TEA definitions were labeled in the Drafts as a “Special Investment Zone”⁴⁰ and a “Priority Urban Investment Area.”⁴¹ We sometimes will refer to both of these definitions together as “Urban Area TEA Definitions.” For purposes of all of the Urban Area TEA Definitions discussed in this paper, we refer to the census tract in which the project is located as the “Project Tract.”

TEA - Special Investment Zone (“SIZ”)

The “Special Investment Zone” TEA definition used one of two approaches that differed considerably. The selected approach varied from draft to draft. Either approach would have tightened the TEA definition in urban areas, but still would have allowed modified forms of gerrymandering – combining the project tract with multiple contiguous tracts to reach the high unemployment threshold. [For purposes of all of the Urban Area TEA Definitions, the unemployment rate for the Project Tract or combined area must be at least 150% of the national average unemployment rate (“High Unemployment Threshold”)].

We explain the two different approaches, as the methodology might not be obvious from a quick reading of the proposed statutory language. We label one as “Modified Gerrymandering” and the other as “Cluster and Extend.” We believe these labels are more descriptive and reader friendly than the acronym “SIZ,” and make it easier to distinguish between the approaches used in the various Drafts.

As explained below, the main difference between the two approaches is that Cluster and Extend requires that all tracts bordering the Project Tract be included in the combined area. This increases the likelihood that low unemployment tracts must be included to determine whether the combined area meets the High

³⁹ <http://discuss.ilw.com/content.php?5030-Article-Some-Ideas-for-Resolving-the-Controversial-Issues-in-the-EB-5-Legislation-By-H-Ronald-Klasko>. For an opposing perspective, see <http://discuss.ilw.com/content.php?5038-Article-EB-5-TEA%92s-A-policy-Perspective-By-Matthew-Gordon>.

⁴⁰ See Appendix A for the proposed statutory language contained in the December 12th Draft. INA Sec. 203(b)(5)(D)(xi). The statutory references in the balance of the footnotes of this paper generally refer to the new sections of the Immigration and Nationality Act (“INA”) that would have been added by the December 12th Draft if it had passed and been enacted.

⁴¹ See Appendix A. INA Sec. 203(b)(5)(D)(ix).

Unemployment Threshold. Thus, Cluster and Extend is likely to reduce the chance that a project location will qualify as a SIZ TEA under this TEA definition.

This conclusion assumes that the other terms of the definition are the same. As pointed out below, the section of the December 12th Draft regarding Cluster and Extend broadened the exclusions from the December 9th definition of Modified Gerrymandering. This change would have created opportunities that might not have been intended by Congress.⁴² If Congress were to revisit Modified Gerrymandering, we assume it would apply the December 12th Draft exclusions because this reflects the latest version of the proposed bill, before the legislative effort failed.

SIZ – “Modified Gerrymandering”

The December 9th Draft introduced this approach, which we refer to as “Modified Gerrymandering.” This new approach would have replaced the SIZ – Cluster and Extend that was introduced in the December 2nd Draft, which is discussed further below.⁴³

Modified Gerrymandering would allow tracts to be combined with the Project Tract.⁴⁴ The maximum number of tracts that may be combined is 12. The weighted average of the unemployment rate of the tracts must meet the High Unemployment Threshold. Only one of the tracts in the combined area must border the Project Tract. The December 9th Draft did not limit the location of the tracts in the combined area to the same county.

Under the December 9th Draft, the combined tract area could not include a tract delineated by the U.S. Census Bureau (“Census Bureau”) specially to cover a “body of water”⁴⁵ or a “special land use census tract encompassing a public park.”⁴⁶

⁴² As discussed in the next subsections of this SIZ section, entitled “Modified Gerrymandering” and “Cluster and Extend.”

We assume that during deliberations in 2016, Congress will revisit the December 12th Draft exclusion (re parks and bodies of water) to make sure it reflects the concepts sought to be excluded.

⁴³ The December 9th and December 12th SIZ definition included one alternative way to meet the TEA definition. A project location qualifies as a TEA location if it is located within a city or county that, on a weighted basis, meets the High Unemployment Threshold. For example, every project location in Detroit, Michigan would qualify as a TEA under this definition because the weighted unemployment rate in Wayne County, the county in which Detroit is located, meets the High Unemployment Threshold.

⁴⁴ INA Sec. 203(b)(5)(D)(xi)(II). This adopts the maximum number of tracts to be combined under the TEA approach implemented by the State of California. <http://business.ca.gov/International/EB5Program.aspx>

⁴⁵ INA Sec. 203(b)(5)(D)(xi)(II)(dd).

⁴⁶ INA Sec. 203(b)(5)(D)(xi)(II)(bb)(AA).

However, as further discussed below, the “body of water exclusion” would have no applicability to NYC projects. The “parks” exclusion might not have applied depending on how USCIS were to interpret the relevant terms. A limitation of 12 tracts would have been the only meaningful limitation on the gerrymandering of most projects in New York City.

For these purposes, a “body of water” was defined by reference to the U.S. Census Bureau’s delineation.⁴⁷ Based on these delineations, none of the 2,168 census tracts in New York City⁴⁸ constitutes a “body of water.” No water body in the vicinity of Manhattan constitutes a “body of water” by official delineation.⁴⁹ Census tracts with rivers or other common bodies of water in the NYC area could have been included in the combined gerrymandered area of this type of TEA. For example, a tract that includes the East River could serve to connect tracts on either side of the River.⁵⁰ Theoretically, a Project Tract on the west side of Manhattan could have been connected by the Hudson River to a tract in New Jersey.

However, the December 9th Draft is unclear about gerrymandering limitations that would have applied to public parks that might be part of a combined area. The exclusion refers to “special use land census tract encompassing a public park.”⁵¹ The meaning of a public park is clear. However, unlike the body of water exclusion, the section did not define “special use land census tract” by reference to the Census Bureau or otherwise. Arguably, the official delineation would nevertheless apply because there is no plain meaning of this term. On the other hand, it may be argued that the lack of a definition in the proposed law would have vested USCIS with the flexibility to apply a different interpretation based on the context.

The Census Bureau defines a “special land use census tract” as one that “encompass[es] a large area with little or no residential population with special characteristics, such as large parks”.⁵² The Bureau specifically assigns a code to identify these tracts. Despite the significant number of parks throughout NYC, none of the census tracts in New York City is identified by the Census Bureau as a “special

⁴⁷ INA Sec. 203(b)(5)(D)(xi)(II)(dd). See also the Census Tract Codes and Numbers discussion in https://www.census.gov/geo/reference/gtc/gtc_ct.html

⁴⁸ See question 3: http://www.nyc.gov/html/dcp/html/census/nyc_cff_faqs.shtml

⁴⁹ For US Census Bureau purposes, tracts that are considered a body of water have no habitable land and generally run parallel to the shoreline.

⁵⁰ The SIZ definition does not appear to limit the area of combined tracts to a single county or state. It appears that the tracts that include the Hudson River can connect a project with tracts in Manhattan to New Jersey.

⁵¹ INA Sec. 203(b)(5)(D)(xi)(II)(bb)(AA)

⁵² https://www.census.gov/geo/reference/gtc/gtc_ct.html

land use census tract.”⁵³ Thus, it could be argued that even though a particular tract consists largely or entirely of a park, the tract nevertheless does not fit within the definition of “special land use census tract encompassing a public park.”

Based on the above, it appears that this definition would have allowed a public park in New York City to continue to connect tracts on any sides of the park. The ability to use the tract that includes the park as a tract that could connect a Project Tract on one side of the park to a remote site contiguous to another side of the park was the key to the 1 Park Lane project in Manhattan qualifying as a TEA. That project was the subject of a front page article in the Wall Street Journal critical of the widespread use of gerrymandering to qualify a tract as a TEA.⁵⁴

As discussed in the next section, it appears that in the December 12th Draft Congress addressed the “exclusion of tracts” issues of the SIZ TEA definition, even though this definition applied a different approach to determine whether a gerrymandered area qualifies as a TEA location. If Congress were to revert to the SIZ – Modified Gerrymander definition described in this section, we assume it would adopt similar exclusion standards as those contained in the Cluster and Extend Approach of the December 12th Draft. Subject to our comments in the Cluster and Extend section below, these exclusions would close many of the opportunities created by this Modified Gerrymandering approach.

SIZ - “Cluster and Extend”

The Cluster and Extend approach was introduced in the December 2nd Draft, removed from the December 9th Draft and reappeared in a modified form in the December 12th Draft. We will focus on the December 12th Draft as this constitutes the latest version of the proposed legislation.

Under this approach to the SIZ TEA definition, the maximum number of tracts that could be combined is 12, all tracts must be in the same county and all tracts bordering the Project Tract must be included in the combined area.⁵⁵ To determine the TEA under this approach, follow these steps:

1. Cluster all the census tracts bordering the census tract in which the project is located.

⁵³ The closest special land use census tract to New York City is in Jericho, in Nassau County, according to ReinID.com, based on the tract data provided by the US Census Bureau.

⁵⁴ <http://www.wsj.com/articles/posh-tower-proposed-for-struggling-new-york-neighborhood-central-park-south-1444728781?tesla=y>

⁵⁵ <http://business.ca.gov/International/EB5Program.aspx>

2. Count the number of tracts in step 1 including the Project Tract. If the weighted average unemployment rate for these tracts meets the High Unemployment Threshold, then the project meets this TEA requirement. If not, then proceed to step 3.
3. Subtract the total number of tracts in step 2 from 12. The difference represents the number of tracts to which the combined area may be extended. The goal is to connect the clustered tracts above to high unemployment tracts in the nearby area, with the result that the weighted unemployment rate is at least 150% of the national average. To perform this task, connect the closest tract in the cluster to the tracts that meet the High Unemployment Threshold. Depending on the location of the high unemployment tracts in relationship to the cluster, intervening tracts may have to be included to ensure contiguity. A project will qualify only if the weighted average unemployment rate meets the High Unemployment Threshold.

Tract exclusion: The December 12th Draft limits the type of census tracts that may be included in the combined area. Although this exclusion refers to parks and bodies of water, it avoids the potentially confusing, technical Census Bureau jargon contained in the December 9th Draft of the SIZ – Modified Gerrymandering definition.⁵⁶ Instead, it simply and succinctly provides, in pertinent part, that a census tract that “encompasses an area with special characteristics and little or no residential population, such as a public park, public forest, or a large body of water...” may not be included (emphasis added).⁵⁷ We emphasize that this straightforward definition of park and water body exclusion was included only in the December 12th Draft for the TEA SIZ definition under Cluster and Extend.

Even though this revised definition seems clear, it raises an issue. The italicized language above seems to be derived from the definition of a “special land use census tract” under the US Census Bureau rules.⁵⁸ The Census Bureau uses code 9800 to specifically identify “special land-use census tracts; that is, census tracts defined to encompass a large area with little or no residential population with special characteristics, such as large parks or employment areas...”. It uses a

⁵⁶ See the discussion above relating to the exclusion of certain tracts under Modified Gerrymandering.

⁵⁷ Two technical exceptions apply to this exclusion. The Project Tract may encompass this type of area. The combined area may include one tract that encompasses an area with special characteristics and little or no residential population that “contains primarily business, industrial or other commercial uses.”

⁵⁸ https://www.census.gov/geo/reference/gtc/gtc_ct.html

different code, in the range of 9900, to “represent census tracts delineated specifically to cover large bodies of water.”⁵⁹

At a glance, it would appear that the exclusion is intended to cover tracts that include large public parks like Central Park. However, it should be noted that the census code for Central Park is not 9800. Even though the exclusion tracks the language of the Census Bureau for these purposes, we assume that Congress intended to exclude parks, like Central Park, from comprising part of the combined area that may qualify a Project Tract as a TEA. This would curtail the ability of the many potential project sites that border, or are located near, Central Park to use it to connect with the fewest tracts possible on one side of the park to another side of the park.

Similarly, as discussed in the Modified Gerrymandering section above, the body of water exclusion would arguably not apply to any tracts in New York City. The large bodies of water in New York City comprise part of a tract with a significant population. Thus, these tracts would not meet the “little or no population” requirement of the exclusion.

The exclusion is more significant when applied to Modified Gerrymandering because that approach allows more remote tracts to be included, thereby increasing the chance that one of the tracts might reach a park or water body. If Congress were to revive Modified Gerrymandering (rather than employ Cluster and Extend), we assume it would use the exclusions from this December 12th Draft rather than those listed in the December 9th Draft.

We assume when Congress resumes its discussion of TEA reforms it will revisit the SIZ definition under both approaches: Modified Gerrymandering and Cluster and Extend.

Based on the December 9th and December 12th Drafts, we believe that the following concepts would apply to the combined area under either approach:

1. Maximum of 12 tracts;
2. All tracts must be located in the same county based on the limitation that was included in the December 12th Draft relating to Cluster and Extend, even though the December 9th Draft relating to Modified Gerrymandering did not contain this limitation; and
3. The “park” and “body of water” exclusions contained in the December 12th Draft.

⁵⁹ https://www.census.gov/geo/reference/gtc/gtc_ct.html

The main difference between these two SIZ approaches is whether all tracts bordering the Project Tract must be included in the combined area. Obviously many projects that were able to qualify as a TEA under the current standards, including the use of gerrymandering which is permitted by many states, would not be able to qualify under this new definition because the extended reach of the combined tracts would be severely limited.

Both approaches would follow the TEA qualification methodology implemented by the state of California that limits aggregation to 12 tracts. No other state limits aggregation to 12 tracts. Furthermore, both approaches would impose additional limitations: the park and water body exclusion and single county requirement. Not even California imposes these additional limitations.⁶⁰ The impact of these limitations on the ability of a particular project tract to qualify as a TEA would depend on the location of the property in relationship to parks, water bodies and other counties.

In addition, all of the tracts not contiguous to the project site's census tract, must be included under Cluster and Extend. The typical combined area under the current rules includes only one tract bordering the Project Tract to provide contiguity to more distant tracts. It is likely that in many, if not in most, cases the tracts bordering the project site will include multiple low unemployment level tracts. Thus, under Cluster and Extend the weighted average of the combined area will be severely reduced. Under the current law, one could avoid low unemployment census tracts contiguous to the Project Tract, except for the one tract needed to extend the area towards more remote areas to meet the High Unemployment Threshold.

Modified Gerrymandering is much more flexible than Cluster and Extend. Under the Cluster and Extend approach, all of the tracts contiguous to the Project Tract would have been required to be included, which would likely have reduced the weighted unemployment average of the combined area. Consequently, this approach would more severely limit the number of remote tracts with potentially High Unemployment Thresholds that could be included within the web of the combined area. In contrast, the Modified Gerrymandering definition permits only one tract to be contiguous to the Project Tract, and thus allows the combined area to bypass the other low unemployment census tracts contiguous to the Project Tract.

⁶⁰ <http://business.ca.gov/International/EB5Program.aspx>

TEA - Priority Urban Investment Area (the “Good Neighbor Approach”)

Not only do the December Drafts permit the combination of up to 12 census tracts to qualify as a TEA, each provides an additional avenue for an urban area project location to qualify – Priority Urban Investment Area (“PUIA”).⁶¹ However, these Drafts all follow the same approach, unlike the TEA SIZ definition that flipped between Modified Gerrymandering and Cluster and Extend. The main difference from draft to draft under PUIA is technical language. We will explain the subtle differences in definitions among the various drafts.

The Priority Urban Investment Area definition allows a project to qualify based on the standards of its own census tract (i.e., the Project Tract), or with the help of any of its bordering (neighboring) census tracts (“good neighbors”) or certain neighboring tracts of those tracts (the “good neighbor #2”). We refer to this type of TEA as a “Good Neighbor” because it is more descriptive and reader friendly than “Priority Urban Investment Area” or its acronym, “PUIA.”⁶² Thus, “Good Neighbor Approach” includes either a Project Tract that alone qualifies or qualifies with the help of a neighboring tract.

As further described below, unlike the SIZ TEA (Cluster and Extend or Modified Gerrymandering), this TEA definition is not limited to meeting the High Unemployment Threshold. Instead, it can be met based on meeting either the High Unemployment Threshold, or one of two thresholds which appears to be based on the threshold used to qualify a project in a “New Markets Tax Credit” program standard under the Internal Revenue Code.⁶³ Those two thresholds are explained below.⁶⁴

If the Project Tract on its own meets any of the thresholds, it would qualify. This is similar to a single census tract TEA under the current law, except the TEA definition under the Good Neighbor Approach could be met by meeting any one of three thresholds, rather than only the High Unemployment Threshold pursuant to the current law. The various drafts include the single census tract TEA under the

⁶¹ INA Sec. 203(b)(5)(D)(ix).

⁶² The Drafts do not use the term “Good Neighbor” or “Good Neighbor Approach.”

⁶³ The New Markets Tax Credit Program (“NMTC”) is not referenced in the proposed law. However, this standard seems to be based on the definition of Low-Income Community in IRC Sec. 45D(e) relating to NMTC. However, NMTC is based solely on the project’s census tract and does not allow contiguous tracts to be taken into account.

⁶⁴ Perhaps Congress added this classification for TEA qualification in recognition that the unemployment rate for a census tract may not be a fair reflection of the opportunity for job creation in that tract. For example, a census tract that does not qualify could have many more unemployed in absolute terms than a tract with higher unemployment rates based on a lower population. Alternatively, this may have been added at the request of urban developers as discussed further towards the end of this subsection.

PUIA definition. To be consistent with that classification system, we include the single census tract TEA under the Good Neighbor approach.

Good Neighbor Approach - High Unemployment

The December Drafts allow this high unemployment version of the Good Neighbor Approach to be met under any one of three alternative tests.

1. If the Project Tract on its own meets the High Unemployment Threshold⁶⁵; or
2. Based on the unemployment rate of the Project Tract and/or the unemployment rate of one or more bordering tracts that meets the High Unemployment Threshold (a “good neighbor”) – as explained below, the most recent drafts were unclear about how the High Unemployment Threshold is to be applied for purposes of this second test; or
3. Based on the unemployment rate of the Project Tract, the good neighbor tracts that meet the High Unemployment Threshold or a tract bordering that good neighbor (the neighbor of the good neighbor) – again, as explained below, the most recent drafts, including the December 12th Draft, were unclear about how the High Unemployment Threshold is to be applied for the purpose of this third test under this TEA.
As explained in this section below, it is unclear whether the neighbor of a good neighbor is permitted.

The relevant language for the second and third tests under this approach set forth in the December 12th Draft is less confusing than that set forth in the previous Drafts, but still raises some questions. In pertinent part, it states:

“The term ‘priority urban investment area’ means an **area consisting of a census tract or bordering census** tracts, each of which is in a **metropolitan statistical area** and, using the most recent census data available, **each of which** has—

“(I) an **unemployment rate that is at least 150 percent** of the national average unemployment rate, **which may also include a census tract bordering the tract with the requisite [high] unemployment rate.**”

⁶⁵ As discussed, single census tracts method does not need to rely on the status of a neighboring tract to qualify as a TEA, but for consistency with the December Drafts we include this under the Good Neighbor Approach.

The phrase “each of which” raises questions. If the combined area method of test 2 or test 3 above required that the Project Tract also meet the High Unemployment Threshold, then this would seem to render these tests meaningless because the Project Tract could have qualified on its own in accordance with test 1, independent of the contiguous tract’s high unemployment rate. In other words, if the Project Tract meets the High Unemployment Threshold then it would have qualified under test 1, as a single census tract type TEA under this definition.

In a project that meets the single census tract TEA standard, there would be no need to test bordering tracts. A project would examine its bordering tracts only if it did not meet the High Unemployment Threshold. If the Project Tract does not meet the High Unemployment Threshold, and if the “each of which” clause means that each of the Project Tract and the bordering tract must meet the Threshold, this standard could never be met.

This provision would seem to make more sense if “each of which” is interpreted to mean, or replaced with, “either of which”. That is, the project qualifies under this TEA if either the Project Tract or bordering tract meets the High Unemployment Threshold. If this interpretation is correct, then test 3 would not apply – a bordering tract of a bordering tract (the neighbor of the good neighbor). Such interpretation would make it easier to reconcile this with the point that the Project Tract may qualify on its own.

It is unclear whether, if tracts are combined to attempt to meet this standard, each tract must meet the High Unemployment Threshold or whether instead, the weighted average of the combined area must meet this standard. If each tract – i.e., the Project Tract and the good neighbor tract must meet the High Unemployment Threshold, then obviously the average would meet the High Unemployment Threshold.

The December 9th Draft suggested that under test 2 or test 3, the average of the Project Tract and the good neighbor tract must meet the High Unemployment Threshold. Under that Draft, the language was not clear, but seemed to indicate that the combined area could meet the test even if the Project Tract did not meet the High Unemployment Threshold, so long as the good neighbor tract’s unemployment rate was sufficiently high to result in the combined area meeting the High Unemployment Threshold.

The more important point is that if each of the Project Tract and the good neighbor tract would have had to meet the High Unemployment Threshold, fewer projects would have qualified under this TEA definition.

Good Neighbor Approach – High Poverty or 80% AMI

Alternatively, the project's location can meet the TEA definition under the Good Neighbor Approach if the Project Tract on its own, or a combined area including bordering tracts, meets a threshold based on a variation of a New Markets Tax Credit type standard.⁶⁶ The applicable threshold is either (1) a poverty rate of at least 20% ("High Poverty Threshold"), or (2) a median family income that is not more than 80% of the applicable Area Median Income ("80% AMI Threshold").⁶⁷ Unlike the High Unemployment version discussed above, this test does not permit other contiguous tracts to be combined (i.e., a neighboring tract of a good neighbor tract.) This standard raises the same issue discussed above, relating to whether in the case of a combined tract test, the Project Tract must also meet the High Poverty Threshold or 80% AMI Threshold. (The High Unemployment Threshold, the High Poverty Threshold and the 80% AMI Threshold are sometimes individually referred to as a "Threshold" and sometimes collectively referred to as the "Thresholds".)

The Good Neighbor Approach introduces a TEA definition with Thresholds that are not incorporated in the current law – that is, High Poverty and AMI. Perhaps this TEA definition was added at the request of urban developers who recognized that EB-5 High Unemployment Threshold would become more difficult to meet as the local economy improves (i.e., unemployment rate declines) at a greater rate than the national average.⁶⁸ This reflects the trend in many thriving urban areas, such as Manhattan. Some may argue if Congress does not revise the current TEA definitions, many new project locations that would have qualified in the past based on gerrymandering, no longer will qualify as TEAs even with the use of gerrymandering. Thus, developers or Congress may have been searching for an approach that relies upon valid factors other than unemployment rates that would support TEA status.⁶⁹

The maps in "NYC Data, Tables and Maps" (Section II) reflect the High Unemployment Threshold separate from the High Poverty and 80% AMI Threshold (the "NMTC Thresholds"). The maps reveal that more tracts in Manhattan meet

⁶⁶ As stated earlier, the New Markets Tax Credit Program ("NMTC") is not referenced in the proposed law. However, this standard seems to be based on the definition of Low-Income Community in IRC Sec. 45D(e) relating to NMTC. However, NMTC is based solely on the project's census tract and does not allow any other tracts, contiguous or not, to be taken into account.

⁶⁷ Technically, the High Poverty and the 80% AMI standards are listed as separate tests under the Good Neighbor Approach.

⁶⁸ See <http://beta.bls.gov/dataViewer/view/timeseries/LAUCN360610000000003>

⁶⁹ As discussed in the "TEA under EB-5 2.0 applied to NYC census tracts section," the High Poverty and 80% AMI data does not reflect the current economy.

the NMTC Thresholds than the Unemployment Thresholds. As explained in that section, this is partly attributable to the fact that the NMTC eligibility relies upon 2010 census data, a period when the economy was much weaker than today. Presumably, Congress will designate the more appropriate data to be used for purposes of calculating these thresholds.⁷⁰

In contrast to the SIZ TEA proposals, the PUIA proposals do not exclude “parks” or “bodies of water.” The statutory language gives no indication whether this is intentional or an oversight. There is no obvious justification for a difference in treatment of parks under the SIZ TEA compared to the PUIA TEA. That is, whether the tract encompassing a park may be a bordering tract of a Project Tract.

If tracts encompassing a park with little population can qualify as a Good Neighbor, then the results may be surprising. For example, consider the tract that includes Central Park, the largest park in New York City. For 2015, the tract had one resident and that resident was unemployed.⁷¹ Thus, the tract’s unemployment rate is 100% and it meets the High Unemployment Threshold.⁷² As a result, every tract that borders Central Park – to the north, south, east or west - would qualify as a Good Neighbor TEA because the Project Tract borders a tract that meets the Threshold.⁷³ Those tracts include some of the most valuable properties in Manhattan, if not in the entire United States. Thus, Congress should consider clarifying whether the park exclusion that would apply to a SIZ TEA should also apply to the PUIA (Good Neighbor) TEA.

Suitability of using PUIA as a TEA definition

As previously discussed, the High Poverty Threshold and 80% AMI Threshold were apparently derived from the New Markets Tax Credit (“NMTC”) program governed by Section 45D of the Internal Revenue Code. This section of the paper considers the appropriateness of utilizing these thresholds. (This section was added as part of the January 19, 2016 revision of this paper.)

⁷⁰ This is discussed in more detail in the next section entitled “Suitability of using PUIA as a TEA definition.”

⁷¹ See the discussion on pages 27 and 28 entitled “Unemployment Data.”

⁷² For these purposes, the applicable employment rate for a census tract with a small population, such as Central Park’s tract, is dramatically affected by the number of residents who are employed versus unemployed in the County. If the number of unemployed in New York County were lower by a certain amount, even though the same one resident was unemployed, the applicable employment rate would have been 0% rather than 100%. This arbitrary result might be the reason that the December Drafts contain the exclusion for tracts with little or no population.

⁷³ This assumes that the “each of which” language in the PUIA is interpreted to mean “either of which”, so that the bordering tract alone can meet the Threshold.

The NMTC and EB-5 programs are both commonly used to incentivize the development of real estate projects. The objectives of the two programs are similar even though the NMTC program is a tax credit program entitling the qualified investor to a tax credit, and the EB-5 program is an immigration program entitling the immigrant investor to an EB-5 visa.⁷⁴

The NMTC was created to stimulate investment and economic growth in low income urban neighborhoods and rural communities that lack access to the patient capital needed to support and grow businesses, create jobs, and sustain healthy local economies.⁷⁵ The NMTC program attracts capital to these communities by providing private investors (generally, widely-held corporations and other entities) with a federal income tax credit for investments made in businesses or economic development projects located in some of the most distressed communities in the nation – census tracts where the individual poverty rate is at least 20 percent or where median family income does not exceed 80 percent of the area median income.⁷⁶

The investment structures are also similar. Like the Regional Center designation process, the Federal government (the CDFI Fund under the U.S. Treasury Department) approves and authorizes entities (qualified Community Development Entities, “CDEs”) that may receive equity contributions (Qualified Equity Investment, “QEI”) from investors.⁷⁷

This is analogous to a Regional Center designation that allows it to sponsor an EB-5 project and thereby count indirect jobs for job creation purposes. Technically, the CDE is the investment vehicle, whereas in the EB-5 context, the New Commercial Enterprise (“NCE”), typically formed by the Regional Center, is the investment vehicle.

Of course, the benefit provided to the NMTC investor differs dramatically from that available to the EB-5 immigrant investor. The investor in a CDE obtains a federal income tax credit of 39% of the QEI over a 7 year period, and is generally not allocated any cash flow generated by the project. In contrast, the EB-5 investor’s primary motivation is to obtain a visa.

Like the NCE in an EB-5 investment, the CDE may use the investor’s Qualified Equity Investment proceeds to make a loan or equity investment. The investment

⁷⁴ Although the NMTC program is unrelated to the immigration process, NMTC and EB-5 are often used in tandem as financing tools or capital sources for the same project.

⁷⁵ <https://www.cdfifund.gov/about/Pages/default.aspx>

⁷⁶ https://www.cdfifund.gov/Documents/CDE_Cert_FAQ_Rev_March_2014.pdf

⁷⁷ All of the terms used in the New Markets Tax Credit program are defined in Section 45D of the IRC.

is made in a Qualified Active Low Income Business (similar to an EB-5 Job-Creating Entity, “JCE”).

The proceeds in a NMTC project are often used to construct or rehabilitate real estate projects. Similar to the NCE in an EB-5 transaction, albeit for different reasons, a CDE is often required to offer financing with non-traditional or more flexible terms than conventional financing. As a result, borrowers benefit from below- market interest rates and underwriting terms. Many CDEs will only fund transactions that either could not qualify for any conventional financing, or could not qualify for enough conventional financing to cover the entire cost of the project. Similarly, EB-5 capital is often used to provide gap financing, but is sometimes used to serve as a senior mortgage loan.

The project (the Qualified Active Low Income Business) must be located in a Low Income Community (a “LIC” or Qualified LIC “QLIC”). For NMTC purposes, the LIC is the equivalent of a TEA. A project qualifies for the tax credit only if it is located in a census tract that qualifies as a LIC. Thus, it is generally similar to a single census tract TEA, without taking into account any bordering tracts and not allowing aggregation with any other tracts. However, the consequence of a project’s census tract not qualifying as a LIC is much harsher than an EB-5 project not qualifying as a TEA. If a project tract is not located in a LIC, it is generally not eligible for any tax credits under IRC section 45D. In contrast, even though virtually all existing EB-5 projects are located in a TEA, this is not a statutory requirement. The benefits of EB-5 are not dependent on whether a project is located in a TEA. The TEA status merely determines the minimum amount of the investment threshold that applies to an EB-5 immigrant’s investment.

In urban areas, a project qualifies as a LIC if it meets either of the following standards: (1) poverty rate of at least 20% (High Poverty Rate), or (2) median income of at least 80% of the area’s median income (80% AMI).⁷⁸ Arguably, the High Poverty Threshold and 80% AMI Threshold applicable to NMTC projects might be better indicators of economically distressed areas than the High Unemployment Threshold applicable to EB-5 projects.

The NMTC Thresholds consider more factors (such as, unemployment level, low wage employment and income level) than the single factor High Unemployment Threshold used to determine whether a project qualifies as a TEA. High poverty recognizes that even if the employment level of residents in a tract is

⁷⁸ As a practical matter, most projects that are awarded CDE authorization have been located in “distressed” census tracts – those with higher poverty rates and/or lower AMI than the basic thresholds under Section 45D. See page 6 of <http://www.mycdfi.cdfifund.gov/docs/nmtc/2014/2014%20NMTC%20Program%20Award%20Book.pdf>.

less than the national average, the salary or income level of those employed might be so low that, nevertheless, the area is economically depressed.

Generally, more census tracts are likely to meet the NMTC Thresholds than the EB-5 High Unemployment Thresholds because more factors are taken into account as stated above. In addition, more tracts are likely to qualify for NMTC status due to the static nature of the NMTC data as discussed below. Consistent with this, see the NMTC eligible tracts compared with the TEA eligible sites, depicted in the “Manhattan and Brooklyn – Maps of Census Tracts” section below.

Although a tract location in a LIC can be a good indicator of a tract’s economic distress status, it must be recognized that the NMTC data is static and can quickly become outdated. The December Drafts of the proposed EB-5 reform legislation requires that the “most recent census data” be utilized.⁷⁹

The CDFI Fund of the U.S. Treasury Department bases its data on the US Census that is conducted every 10 years and not updated during its 10 year duration. The data set relating to the 2010 census is the ACS 5 Year Survey 2006-2010.⁸⁰ Thus, it generally does not reflect changes in the local economy since 2010. Although CDFI has suggested that periodic adjustments during the 10 year period might be made, these are not performed on an annual basis.⁸¹

Obviously, economic conditions in 2016 differ dramatically from those in effect in 2010 as market conditions have generally improved. Under improving economic conditions, NMTC data from 2010 would tend to overstate poverty levels and unemployment levels, and understate AMI level. This tendency would be even more likely for urban areas that have been gentrified or otherwise developed since the census was taken in 2010.

Furthermore, potential project sites qualifying for NMTC benefits (LICs) are targets for potential development by developers who seek to take advantage of the economic benefits available under the program. The developments and other improvements made by developers in LICs are not reflected in the data until the next census, which could be 10 years in the future. Thus, many communities that were economically distressed in 2010, and thus eligible for NMTCs, were targeted for development by developers who seized the opportunity to qualify for the tax credit. In many cases, these communities have benefited from the improvements

⁷⁹ We assume this is intended to include the relevant unemployment levels, poverty rates and tract level median family income.

⁸⁰ See the discussion of data sources in the “TEA under EB-5 2.0 applied to NYC census tracts” section of this paper. Also see Questions 2 and 3 of

https://www.cdfifund.gov/Documents/NMTC_Census_Data_Transition_FAQs_07162015.pdf

⁸¹ <https://www.cdfifund.gov/Lists/CDFI%20News/DispForm.aspx?ID=145>. We have also communicated with a representative of the CDFI Fund.

generated by the program. If the NMTC criteria were applied today, some of these census tracts would presumably no longer qualify as a LIC under the NMTC program. Moreover, the economic development in one part of the census tract often spurs development in adjacent areas, with the result that the entire area benefits by reduced unemployment and poverty levels, and higher income levels.

Given this data limitation, if Congress determines that the PUIA (Good Neighbor) TEA definition should be incorporated into the amended EB-5 statute, it should consider the method by which more current data will be reflected. The CDFI Fund that currently publishes this tract eligibility list for the NMTC program would be the most logical independent entity to make this determination because it already performs a similar service for the US Treasury Department. However, since the Treasury Department does not require annual updates, we assume it is unlikely that the Fund would be retained to perform this service for EB-5 purposes. Although private economists retained by a regional center or a developer can make this calculation, this approach would seem to be ripe for abuse. USCIS would seem to be the appropriate government agency to make this determination because it is independent and its staff includes economists who presumably have the ability to make such determinations.

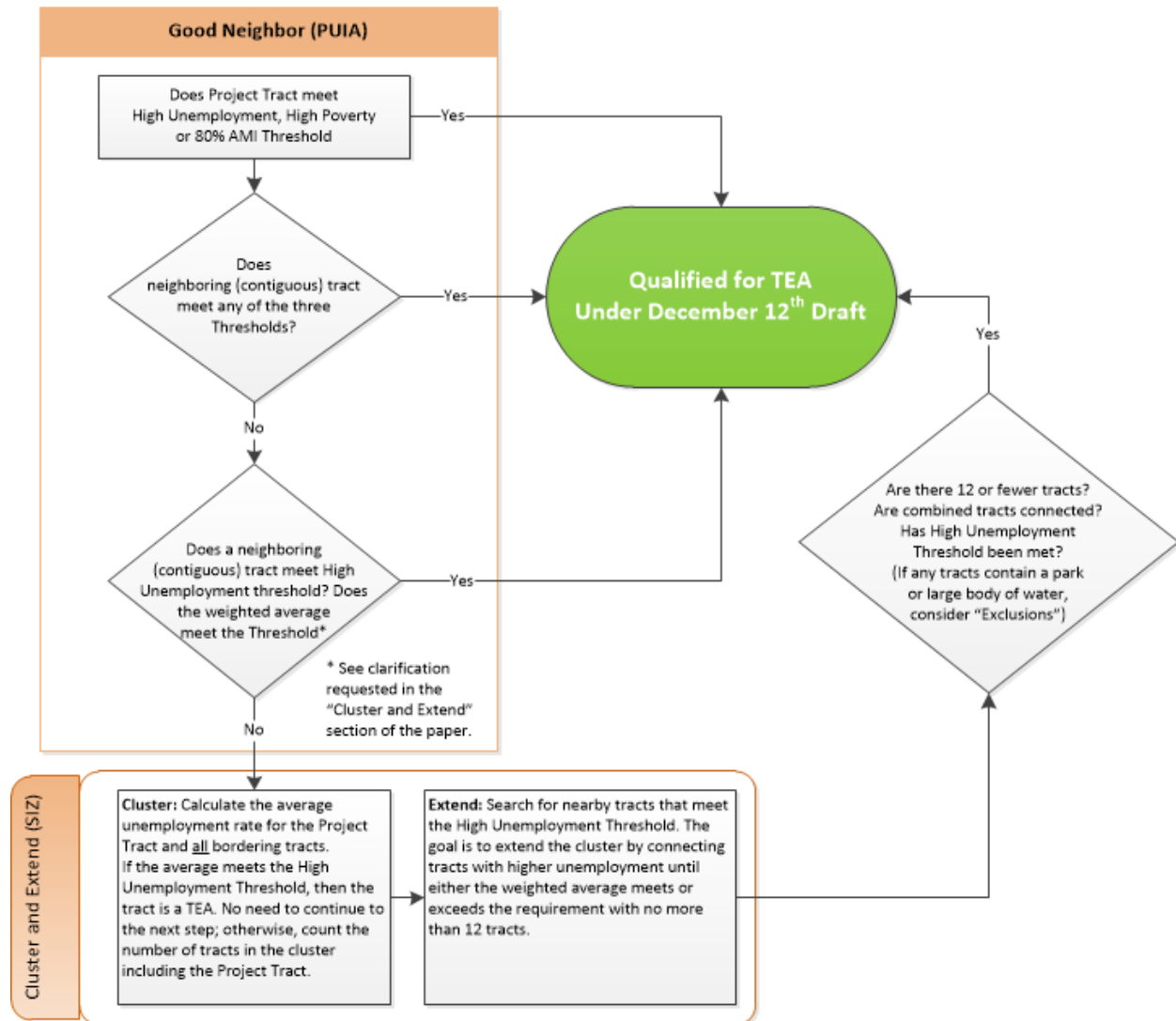
[Proposed methodology – Project Tract as Urban Area TEA](#)

If the SIZ TEA and PUIA (“Good Neighbor”) TEA were to become part of EB-5 2.0, in the case of a new project seeking to qualify its location as a TEA, the suggested methodology would be to initially determine if the project qualifies under the Good Neighbor Approach (i.e., the High Unemployment, High Poverty or 80% AMI type) because it is easier to isolate the potential tracts that may qualify under this type of TEA than a SIZ TEA. The only tracts that would be considered under the Good Neighbor Approach would be the Project Tract and a good neighbor. In contrast, the SIZ TEA (either Modified Gerrymandering or Cluster and Extend) extends to as many as 12 tracts. This requires an analysis of which alternate combination of tracts, including remote tracts, results in a weighted average that meets the applicable Thresholds.

Below is a flow chart that reflects the recommended methodology for analyzing whether a project qualifies as an urban area TEA, based on the December Drafts.

Urban Area TEA Decision Tree

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Note that the Dec. 12th draft substituted the term "bordering" tracts for "contiguous" tracts. This distinction should be clarified.

II TEA UNDER EB-5 2.0 APPLIED TO NYC CENSUS TRACTS

SIZ and Good Neighbor Approach Applied to NYC Data⁸²

As explained above, a project can qualify as a SIZ TEA – Modified Gerrymandering or Cluster and Extend – if the combined area meets the High Unemployment Threshold, subject to the constraints described above.

A project can qualify as a TEA under the PUIA TEA - Good Neighbor Approach if the Project Tract alone meets the High Unemployment Threshold, High Poverty Threshold or 80% AMI Threshold. Alternatively, it can qualify if the Project Tract and one of its neighboring tracts meet any one of these Thresholds.

Accordingly, to assess the likelihood of whether many project sites in New York City would qualify under any of the Urban Area TEA Definitions (SIZ or PUIA) depends on how many tracts in NYC meet the High Unemployment Threshold, High Poverty Threshold or 80% AMI Threshold. As indicated earlier, the High Poverty Rate or 80% AMI thresholds are essentially the same as those standards under the New Markets Tax Credit (“NMTC”) program.⁸³

Data Sources

The SIZ and Good Neighbor Approach TEA definitions set forth in the December 12th Draft require that the “most recent census data available” be used.

Unemployment Data

The USCIS Policy Memorandum dated May 30, 2013 relating to EB-5 Adjudications Policy⁸⁴ states at page 18 that: “[A]cceptable data sources for purposes of calculating unemployment include U.S. Census Bureau data (including data from the American Community Survey) and data from the Bureau of Labor Statistics (including data from the Local Area Unemployment Statistics.)”

We used a combination of the American Community Study (ACS) 5-Year Survey (2009-2013) and the 2014 BLS method, commonly referred to the “Handbook Method” or the “Census Share Disaggregation Method”, to obtain the data necessary for determination of whether the High Unemployment Threshold is

⁸² We are grateful for the assistance of Mike McWilliams of Reinid.com in our analysis set forth in this section.

⁸³ See the earlier discussion of the NMTC Program in the “Good Neighbor Approach” section of this paper, as well as the discussion in the section entitled “Suitability of using PUIA as a TEA definition.”

⁸⁴ May 30, 2013 USCIS Policy Memorandum:

<http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20%28Approved%20as%20final%205-30-13%29.pdf>

met by a particular census tract.⁸⁵ For the period from April 21, 2015 through December 3, 2015, the applicable datasets are the ACS 5-year survey 2009-2013, BLS 2014 county employment data (published April 21, 2015)⁸⁶, and the national average unemployment rate for 2014 published by the BLS in 2015. We used the ReinID.com EB-5 mapping feature that utilizes this combined methodology. The ACS and BLS data are used to determine the average unemployment for a particular tract, which is compared to the national average unemployment rate published by BLS to determine whether the high unemployment threshold has been met for that tract.

Note that under the current system, for purposes of determining a project's eligibility for TEA status, some individual states choose to rely solely on the ACS 5-year survey, without taking into account the BLS county data. Arguably that would comply with the USCIS May 2013 Policy Memorandum referenced earlier in this section. However, that method might result in the state using less recent data than it would if it instead used the Handbook or Census-Share Method. The ACS survey data relates to a 5-year period that ends in the year prior to the year that the BLS method measures. For example, if the relevant date for determining a TEA is as of June 2015, the ACS alone would use the data for January 2009 through December 2013. The relevant BLS data would relate to the year ended 2014. For 2015, the ACS alone would result in more census tracts that meet the High Unemployment Threshold, then would result if the BLS county data was also taken into account.⁸⁷

The ACS and BLS data updates are released on different dates. The ACS 5 year study is updated in December of each year. For example, on December 3, 2015, ACS released its most recent 5 year study, for 2010-2014. The BLS county data is released in April of each year with respect to the preceding calendar year. Thus, for the period from the December 2015 release of the ACS 5 year study for the period 2010-2014, until the April 2016 release of the BLS data, the ACS data alone would be used because the older BLS data might distort the calculation of the high unemployment threshold. However, as pointed out above, the ACS data alone might result in more census tracts meeting the High Unemployment Threshold, thereby qualifying for TEA status. Congress should consider whether the census

⁸⁵ <http://www.bls.gov/lau/laumthd.htm>

⁸⁶ The BLS data for 2015 will be updated in April 2016.

⁸⁷ Our preliminary analysis, subject to verification, shows that 106 census tracts in Manhattan (NY County) meet the High Unemployment Threshold based on ACS 2009-2013 alone (without BLS) compared to 48 tracts based on the Handbook Method (including BLS 2014). The Below 96th Street Map on page 34 shows 10 High Unemployment tracts. Based on the ACS 2009-2013 alone, approximately 30 High Unemployment tracts are located south of 96th Street, or 20 additional tracts.

determination should not be made until April of each year so that the most recent BLS data could be taken into account.

In the interest of time, we did not update our analysis to reflect the most recent ACS 5 year study because this was not released until December 2015. If Congress intends to revive the TEA alternatives used in the December Drafts, then the maps should be updated to reflect the most recent data available to enable it to make a more current assessment of the potential impact of the TEA definitions on future TEA projects in NYC, and on any other areas of potential concern.

The use of both the ACS and BLS methods together should provide the most accurate unemployment rate estimates. The ACS 5 year study is the most accurate at the tract level. The BLS method is the most accurate at the county level. Both are used to calculate the latest unemployment rate.

High Poverty and 80% AMI Data

This section supplements the previous discussion in the section entitled “Suitability of PUIA as a TEA definition.” The High Poverty and 80% AMI standards are not applicable to EB-5 projects under the current law because the High Unemployment Threshold is the determining factor as to whether a project tract or a combined area constitutes a TEA. The High Poverty and 80% AMI Threshold are similar to the NMTC standards set forth in Section 45D of the Internal Revenue Code.

The CDFI Fund,⁸⁸ an agency of the U.S. Department of Treasury which administers the NMTC Program, uses decennial census data for determining tracts that qualify for that program. The 2010 census data is used for current projects. ReinID.com has developed a mapping tool to display the poverty rate or AMI level under the NMTC standard.

Based on the USCIS May 30, 2013 Policy Memorandum referenced in the “Unemployment Data” section above, we recognize that this might not be viewed as the most current data available. We realize that USCIS may require the use of the ACS 5-year study to determine the poverty rate and 80% AMI. However, for simplicity sake, we used the NMTC information that was readily available on the ReinID.com incentives map. We believe this should give the reader a reasonable estimate of tracts in New York City that would meet this standard.

Obviously, the New York City economy has improved since 2010. It is likely that some of the tracts that qualified in 2010 may no longer qualify in 2015. We assume that generally census tracts in New York City that did not qualify as high

⁸⁸ <http://www.cdfifund.gov>

poverty or 80% AMI in 2010 are still not likely to qualify in 2015. Nevertheless, for purposes of the table below, we use the 2010 data. Based on the above, the number of tracts that qualify based on a standard that would use the most current data may differ from the number reflected in the table.

The ReinID.com mapping tool does not isolate whether a census tract meets the High Poverty Threshold or 80% AMI Threshold. It simply indicates whether a tract qualifies under the NMTC program. Thus, we did not distinguish between these two Thresholds. However, we note that the PUIA (Good Neighbor) TEA proposal treats these two Thresholds as independent standards which would become relevant if a Project Tract is relying on the Threshold status of a bordering (good neighbor) tract, especially if the standard is interpreted to mean that the average of the two tracts count.

[NYC Data, Tables and Maps](#)

We analyzed the supporting data for census tracts in New York City. However, we focused primarily on Manhattan, and to a lesser extent on Brooklyn, because the greatest development activity is centered in these two boroughs.

Below is a series of tables and maps that show the number of tracts in Manhattan and other boroughs that may meet one or more of the Urban Area TEA thresholds (these tracts are referred to as “Threshold Tracts”). Each of the Threshold Tracts would qualify as a Single Census Tract TEA.

Furthermore, each of the Threshold Tracts may serve as an essential part of a combined area that would enable a Project Tract to meet one of the urban area TEA definitions. Whether or not a Threshold Tract would so enable a Project Tract to meet an Urban Area TEA definition (other than Single Census Tract) would depend on the rules that apply for the specific Urban Area TEA Definition (i.e., Modified Gerrymandering, Cluster and Extend or the Good Neighbor Approach, as described in the sections above) that may pertain to the particular Project Tract.

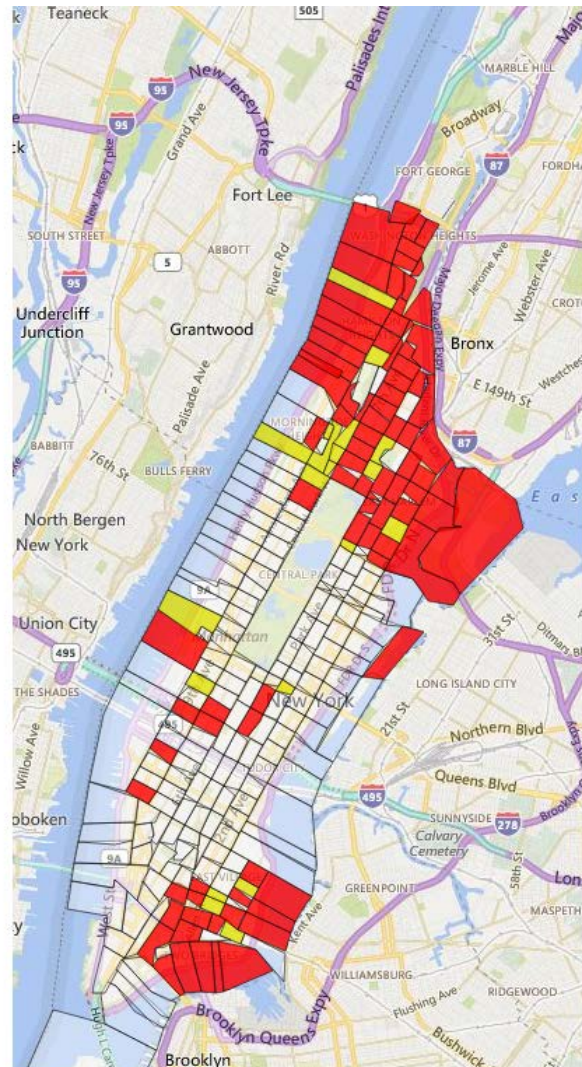
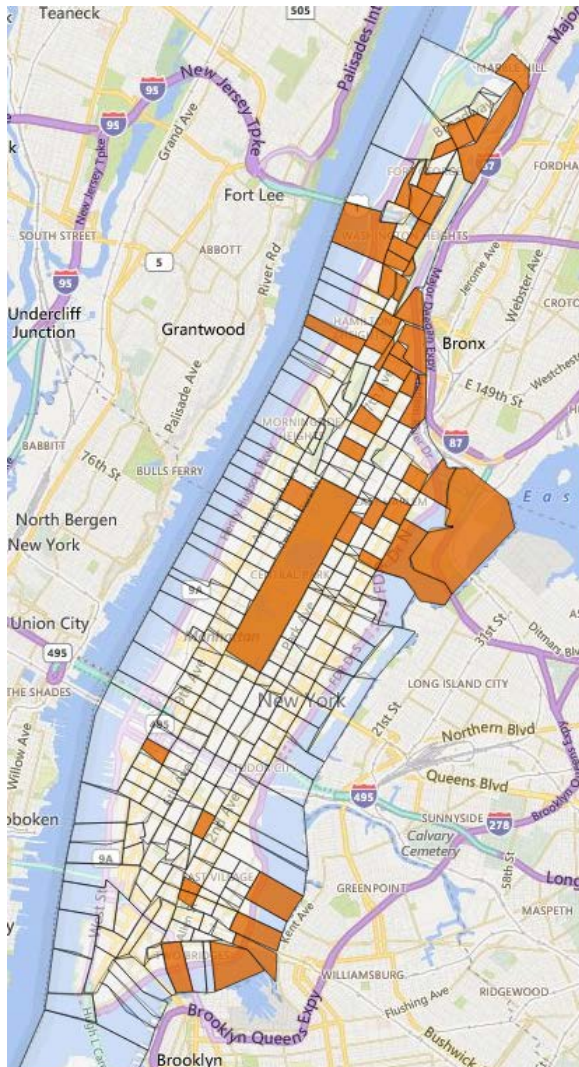
[New York City High Unemployment \(HU\), High Poverty \(20%\) or 80% AMI](#)

Below is a schedule that we created demonstrating the total number of census tracts in each borough, the number of tracts that meets the High Unemployment Threshold, the High Poverty Threshold and/or 80% AMI Threshold. As stated above, we included High Poverty and 80% AMI in the same category because the same mapping tool under NMTC reveals tracts that meet either Threshold. This should not be construed to mean that these tracts qualify as a TEA; qualification depends upon the applicable TEA definition.

Borough	County	Tracts	HU	High- Poverty/ 80% AMI	Meet Both Reqs
Manhattan	New York	288	48	124	42
Brooklyn	Kings	761	204	512	172
Queens	Queens	669	113	291	63
Bronx	Bronx	339	183	264	169
Staten Island	Richmond	111	16	23	10
Total		2168	564	1214	456

Manhattan – Map of Threshold Tracts

The map below shows tracts in Manhattan that meet any of the Thresholds. The map on the left shows the High Unemployment Threshold Tracts and the map on the right shows the High Poverty and 80% AMI Threshold Tracts.



Brown (orange) tracts depict High Unemployment Threshold Tracts.

Red and yellow tracts depict High Poverty and/or 80% AMI Threshold Tracts.

Note: the long rectangular tract towards the center of each map depicts Central Park.

Manhattan and Brooklyn – Threshold Table

The table below indicates the percentage of tracts in Manhattan and Brooklyn that meet the TEA Thresholds as a percentage of total tracts. Some of the tracts meet both Thresholds. Thus, the total number of qualifying Thresholds is fewer than the total of the tracts under each Threshold.

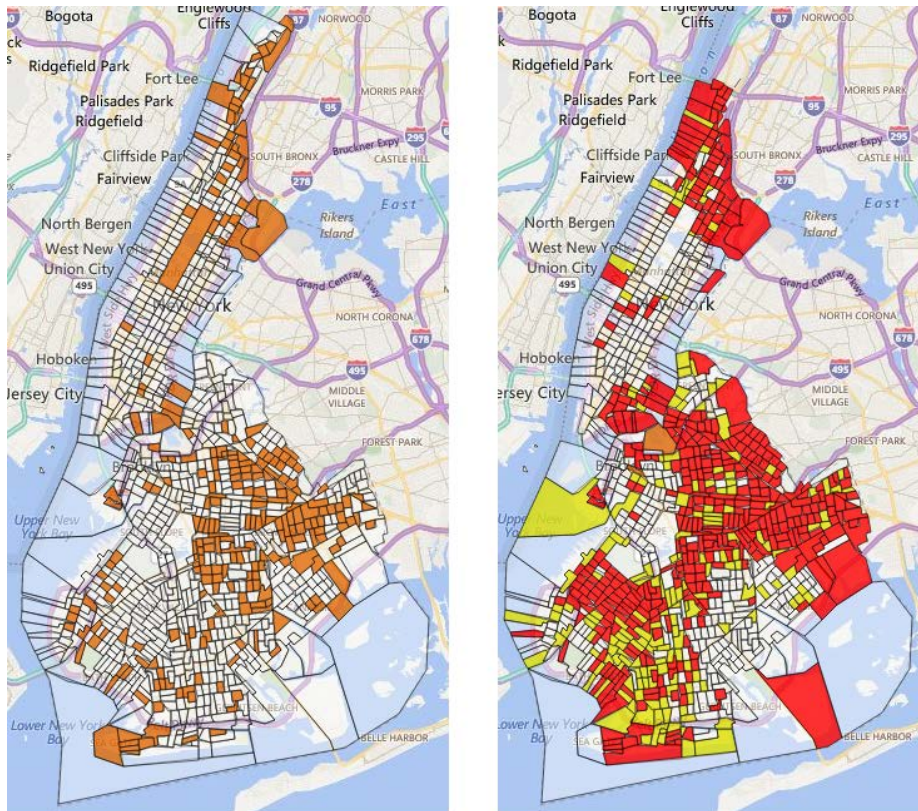
Note the significant number of tracts in Brooklyn that meet the High Poverty or 80% AMI Threshold. However, as indicated above, this is based on 2010 census data acceptable to the CDFI Fund. It is likely that this data would not be viewed as the most current data available for EB-5 purposes. Given that the NYC economy has improved since the census was taken in 2010, it is likely that fewer tracts would qualify based on the “most current data available.” Also note that most of the Threshold Tracts in Manhattan are located north of Central Park, or towards the northern end of the Park.

Manhattan and Brooklyn:
Thresholds as % of total tracts

Borough	Tracts	HU	HU % of Total	High-Poverty/ 80% AMI	High-Poverty/ 80% AMI % of Total	Meet Both Reqs
Manhattan	288	48	16%	124	43%	42
Brooklyn	761	204	27%	512	67%	172

Manhattan and Brooklyn – Maps of Threshold Tracts

The maps below show tracts in Manhattan and Brooklyn that meet any of the Thresholds. The map on the left shows the High Unemployment Threshold Tracts and the map on the right shows the High Poverty and 80% AMI Threshold Tracts.



Brown (orange) tracts depict High Unemployment Threshold Tracts.

Red and yellow tracts depict High Poverty and/or 80% AMI Threshold Tracts.

Manhattan and Brooklyn:

Thresholds as % of total tracts (note: table repeated for ease of reference)

Borough	Tracts	HU	HU % of Total	High-Poverty/ 80% AMI	High-Poverty/ 80% AMI % of Total	Meet Both Reqs
Manhattan	288	48	16%	124	43%	42
Brooklyn	761	204	27%	512	67%	172

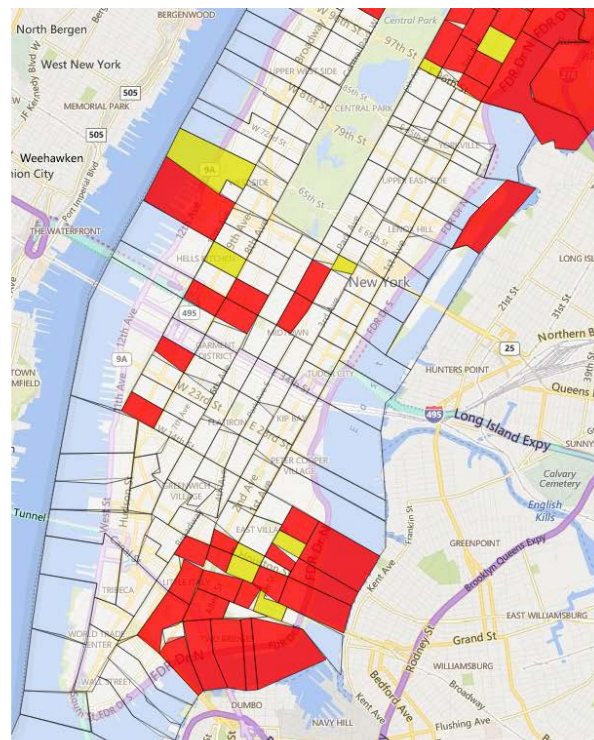
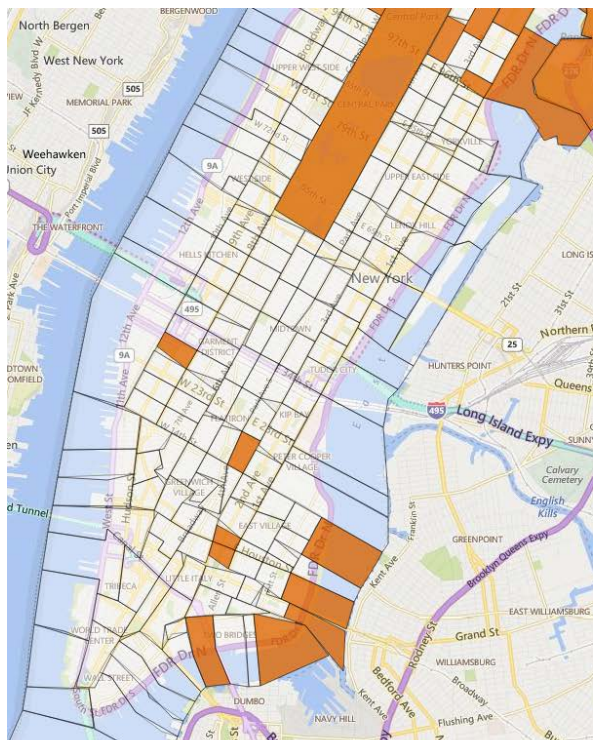
Below 96th Street (Manhattan) – Threshold Tables and Maps

We focused on the area in Manhattan below 96th Street because it is generally considered the prime development area in New York City. The table below indicates the number of tracts in Manhattan below 96th Street that meet the Threshold by West Side or East Side.

The table and maps below demonstrate that very few Threshold Tracts are located below 96th Street in Manhattan. Thus, few project locations would qualify as a Single Census Tract TEA. Similarly, there are few Threshold Tracts available to enable projects located below 96th Street to meet one of the Urban Area TEA definitions.

Threshold	Total	Westside	Eastside
High Unemployment	10	2*	8
High Poverty or 80% AMI	33	10	23

*Central Park is counted as Westside for purposes of this table



Brown (orange) tracts depict High Unemployment Threshold Tracts.

Red and yellow tracts depict High Poverty and/or 80% AMI Threshold Tracts.

Application of Urban Area TEA Definitions to two examples of major TEA projects in NYC

Ironically, two New York City projects that were the subject of front page Wall Street Journal articles⁸⁹ as illustrations of gerrymandered projects – 1 Park Lane and Hudson Yards - would apparently continue to qualify as TEAs under the December Drafts' standards. We realize that this is theoretical because it is likely that these projects are already fully subscribed and thus, all investors in these projects have filed their Form I-526 petitions before any changes to the law will be made.⁹⁰ However, we assume it is likely that future development at Hudson Yards will seek additional EB-5 financing, in which case the new law's TEA standards would apply.⁹¹

We analyzed whether these two projects and another major EB-5 project, 101 Murray Street in Manhattan, would still qualify as a TEA location under EB-5 2.0's proposed, new standards as set forth in the December Drafts.

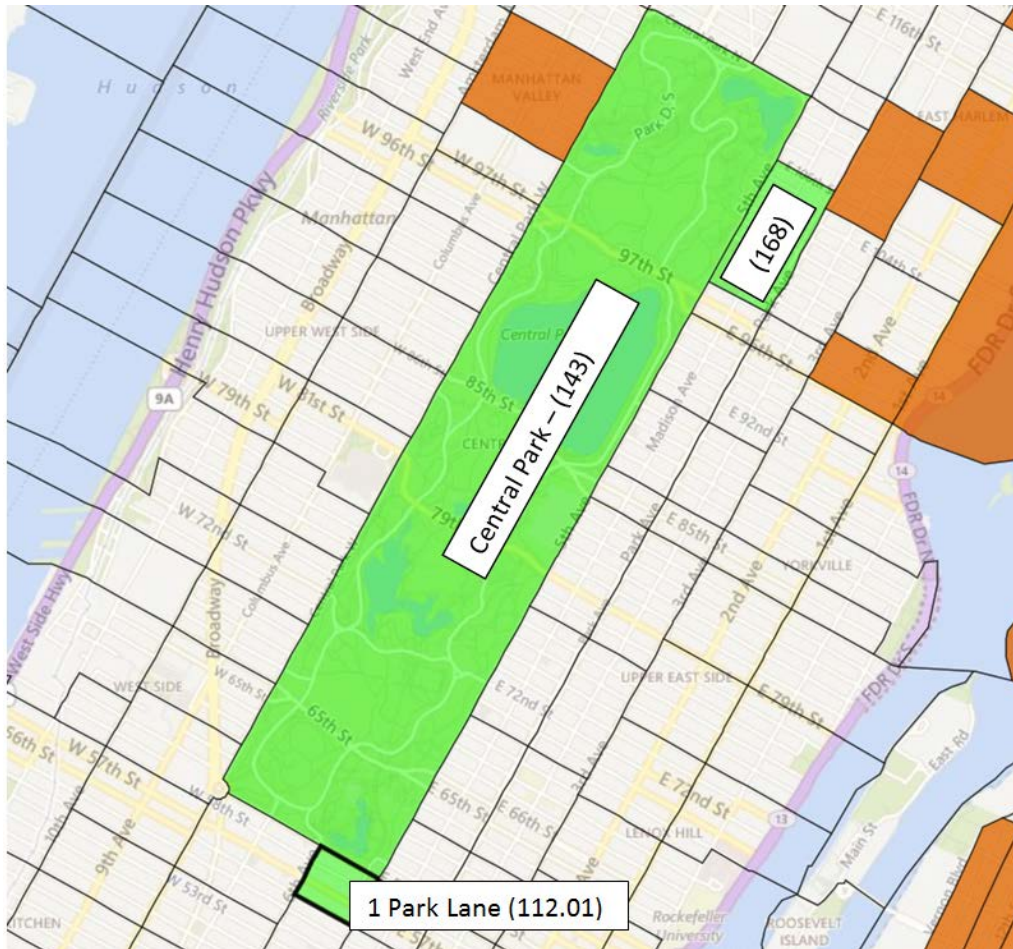
⁸⁹ 1 Park Lane: <http://www.wsj.com/articles/posh-tower-proposed-for-struggling-new-york-neighborhood-central-park-south-1444728781?tesla=y>; Hudson Yards: <http://www.wsj.com/articles/how-immigrants-cash-funds-luxury-towers-in-the-u-s-1441848965>

⁹⁰ See the discussion below re TEA and Minimum Investment Effective Dates.

⁹¹ In contrast, 1 Park Lane, an isolated project, presumably involves a single tranche of EB-5 financing.

1 Park Lane – existing, approved TEA

Below is a map illustrating how 1 Park Lane qualified as a TEA



All map images were created using Microsoft® Bing® Maps and ReinID.com Geospatial Platform.

Color codes: Green=TEA, Brown=High Unemployment Tracts outside TEA.

Map: <http://reinid.com/map/36061011201,36061014300,36061016800/#eb-5>

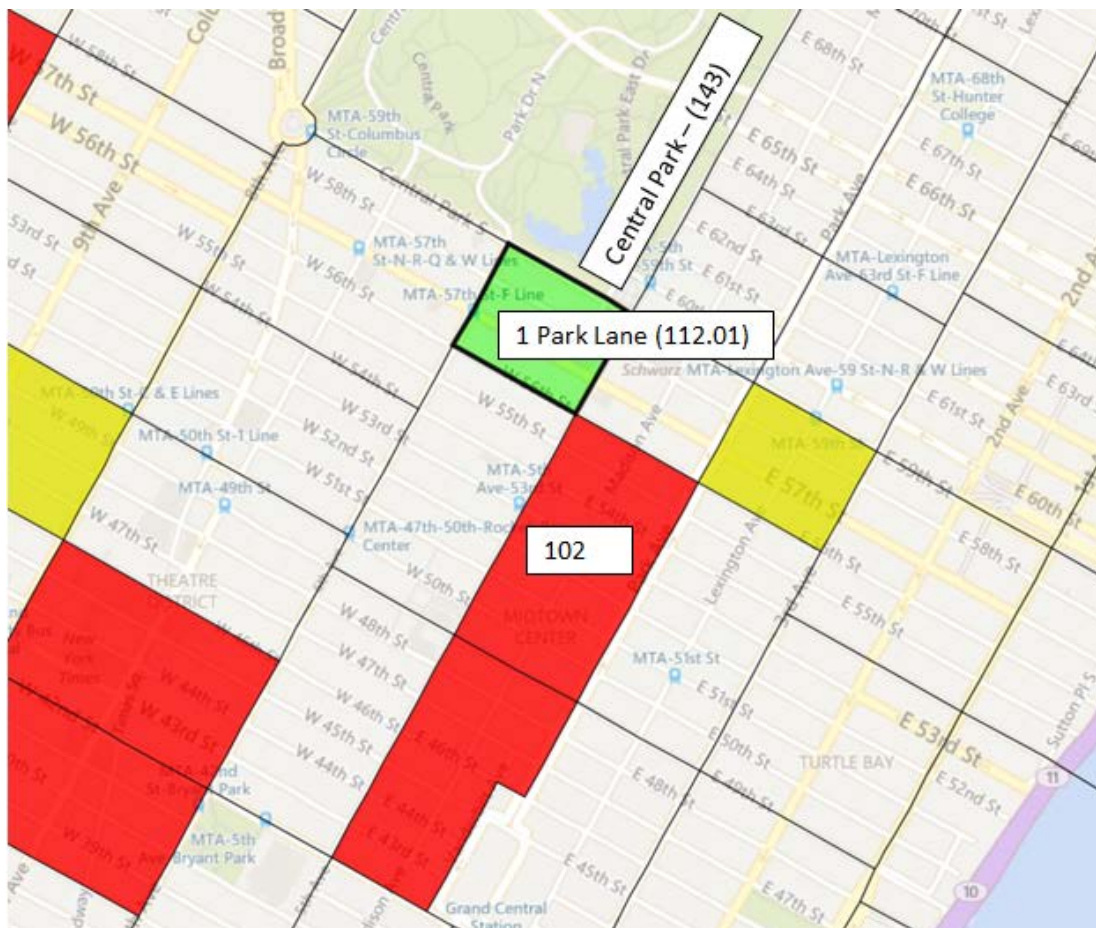
EB-5 Report: <http://reinid.com/eb-5/36061011201,36061014300,36061016800>

Tract 112.01 is the project tract (black outline). Three census tracts make up this TEA. Current rules allow tracts that include a park to be part of the combined area. Tract 168 is a high unemployment tract in Harlem.

1 Park Lane would appear to still qualify under “Good Neighbor”

The project qualifies as a TEA location under the Good Neighbor Approach. Tract 102 meets the High Poverty Thresholds and/or 80% AMI Threshold. Click on the link below the map to see the report detail including the poverty rate and AMI level.

This assumes that Tract 102 would qualify as a “bordering” tract even though it only has a single point in common with the project tract. We did not check whether the average of the two tracts would meet either of the Thresholds. We assume that the relevant test would be interpreted to mean “either of which”, rather than “each of which”, as explained in the Good Neighbor section above.



Color codes: Green=Project Tract, Red/Yellow=Poverty and/or AMI.

Map: <http://reinid.com/map/36061011201,36061014300,36061016800/#nmtc>

EB-5 Report: <http://reinid.com/eb-5/36061011201,36061014300,36061016800>

1 Park Lane would not qualify as a TEA under SIZ – Modified Gerrymandering or Cluster and Extend

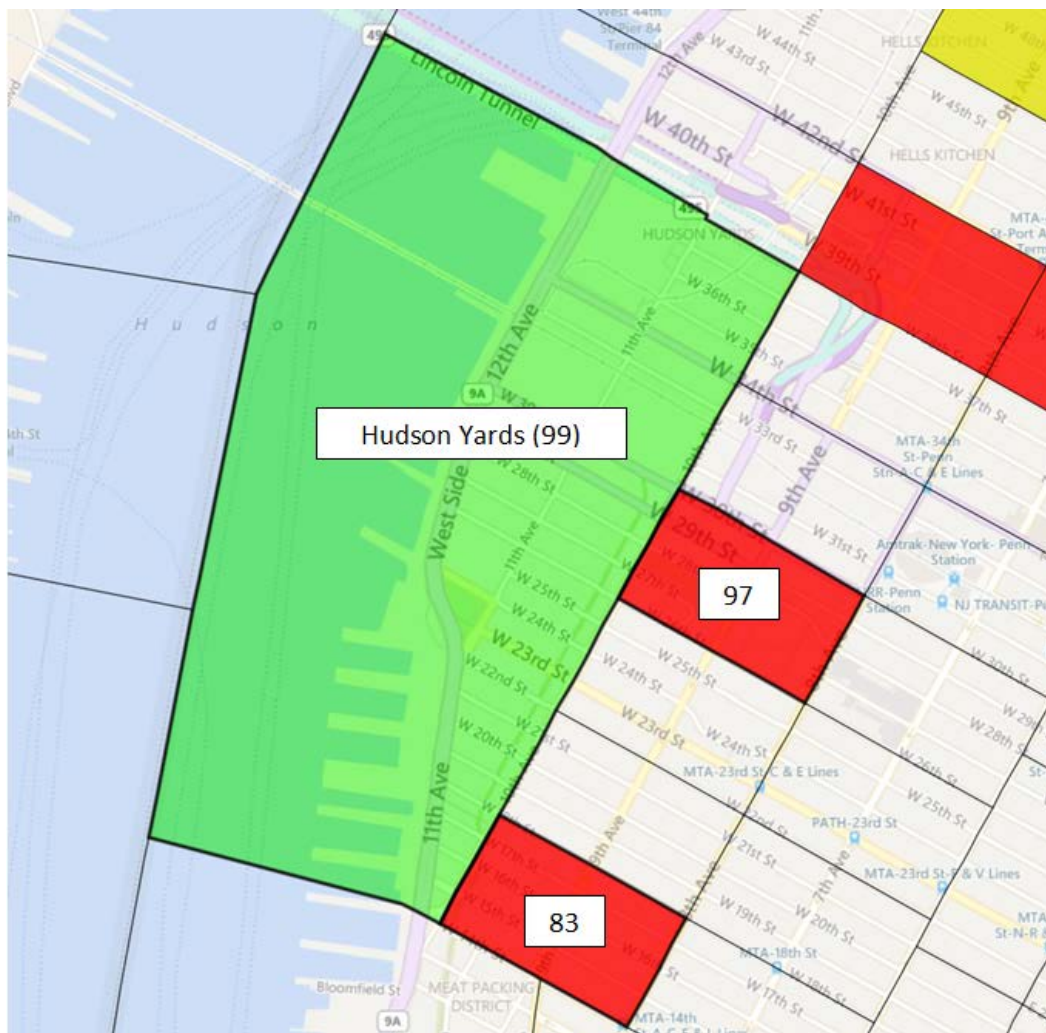
Under the SIZ approach, the pivotal determination would be whether the census tract in which Central Park is located is permitted to connect the project tract to the remote high unemployment tract. See our analysis of the park exclusion above in the SIZ section.

If the new law were to adopt the exclusions in the December 12th Draft regarding public parks, then Central Park could not be included in the combined area. In that case, the combined area would include the tracts along the east side of Central Park, none of which meets the High Unemployment Threshold. To reach the high unemployment tract, Tract 168, would require that more than 12 tracts be combined. Thus, this would not qualify as a Modified Gerrymandering. A greater number of tracts would be required to reach the tract under Cluster and Extend because all of the tracts bordering the Project Tract would have to be included. Thus, the project would not qualify as a TEA location under Cluster and Extend.

If the December 9th Draft approach were followed instead, then Central Park might be eligible for inclusion in the combined area. If it were eligible, then the combined area would qualify as a TEA under Modified Gerrymandering.

Hudson Yards would appear to still qualify under Good Neighbor Approach

Below is a map that illustrates how Hudson Yards would qualify as a TEA under the Good Neighbor Approach, based on either the High Poverty Threshold or 80% AMI Threshold.⁹² We assume that the relevant test would be interpreted to mean “either of which”, rather than “each of which”, as explained in the Good Neighbor section above.



Color codes: Green=Project Tract, Red=Poverty and/or AMI

Map: <http://reinid.com/map/36061011201,36061014300,36061016800/#nmtc>

Hudson Yards Census Tract #99

Contiguous Tract #83: Poverty Rate - 34.2%; AMI: 36.6% <http://reinid.com/nmtc/36061008300>

Contiguous Tract #97: Poverty Rate - 21.5%; AMI: 60.1% <http://reinid.com/nmtc/36061009700>

⁹² We have not calculated the Threshold based on the average of the Project Tract and the good neighbor.

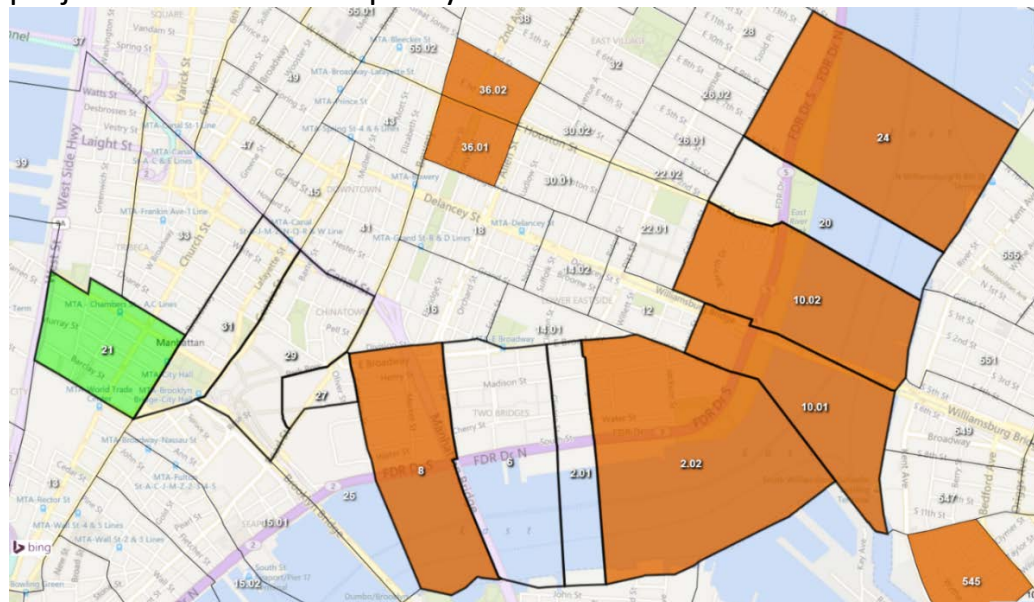
Hudson Yards would not qualify under the SIZ TEA

Hudson Yards would not seem to qualify under the SIZ TEA due to the 12 tract limitation, under either Modified Gerrymandering or Cluster and Extend.⁹³ The combined area using solely the Project Tract and the bordering tracts absorbs 10 tracts. In contrast, in order to qualify as a TEA for its current EB-5 tranches, the Hudson Yards project gerrymandered numerous tracts extending several miles north into the upper reaches of Manhattan, as depicted in the sketch that appeared in the Wall Street Journal article.⁹⁴

Other projects

However, many projects that qualified as a TEA under the existing law would no longer qualify under the proposed TEA definitions. For example, 101 Murray Street in Manhattan would not qualify under either the SIZ or Good Neighbor Approach.

Below is a map that illustrates one combination of 12 tracts relating to 101 Murray Street that would not qualify under the SIZ Modified Gerrymandering. The project also would not qualify under the more restrictive Cluster and Extend.



III OTHER TEA CONSIDERATIONS

Other new categories that qualify for \$800,000 minimum investment

Under the Drafts, the minimum investment amount for public infrastructure projects and manufacturing projects is each set at \$800,000, irrespective of the project's location.⁹⁵ Thus, these types of projects are not technically included in the TEA definition because the location is irrelevant. However, the minimum investment amount is set at the same level as an investment relating to a TEA project.

TEA and Minimum Investment Effective Dates ("Grandfathering")

The June Bill's generous proposed effective dates and grandfathering provisions invited a flood of applications to be filed with USCIS by investors and developers.

The original Senate bill proposed that if a project exemplar was pending with USCIS before the enactment date (at that point anticipated to be September 30, 2015), then the old law's TEA definitions (including gerrymandering) and minimum investment amount (\$500,000) would continue to apply to future investors in that project, irrespective of the dates they filed their individual I-526 petitions.⁹⁶ Encouraged by this, regional centers filed exemplar applications for project preapproval with the hope of being grandfathered. Reportedly, applications were prematurely submitted to USCIS for some projects that were not shovel ready and lacked required information.

As rumors spread that the grandfather clause in the final bill might instead focus on the date that the investor files his individual immigration petition, investors were counseled by their migration agents and immigration attorneys to rush to finalize their investment in a project so they could file their I-526 petition as soon as possible. USCIS filings in the quarter ended September 30, 2015 represented 50% of the petitions filed for the entire fiscal year.⁹⁷ Applications for project preapproval and investor petitions continued to be submitted at a feverish pace after the September 30th deadline hoping that the new law's enactment date would be the cutoff. However, developers, regional centers and investors were

⁹⁵ INA Sec. 203(b)(5)(D)(iv) and (vi).

⁹⁶ Sec. 4(g) of S.1501. Technically, an "application for business plan approval" was required to be filed to qualify for this exception to the effective dates under the proposed law, even though an exemplar typically is accompanied by a sample I-526 petition.

⁹⁷http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526_performancedata_fy2015_qtr4.pdf

disappointed when they reviewed the December 2nd Draft proposing the effective date be based solely on whether the investor files his I-526 petition before or after the enactment date.

That spike in filings resulted in more than 17,000 visa applications (Form I-526 petitions) pending before USCIS as of October 1, 2015.⁹⁸ This does not reflect the additional filings submitted over the past two months, and the likely surge in applications that will be filed until September 30, 2016, or at least until Congress releases its revised EB-5 reform bill. Based on the historical average of approximately 2.7 visas per investor (because immediate family members also qualify), the visa petitions outstanding as of October 1, 2015 are expected to absorb the EB-5 visa quota for at least the next 4 years.⁹⁹ Despite this backlog, the annual visa quota will not limit the number of new investors who may subscribe to projects each year; however, these investors will have a longer waiting period to obtain their green cards. At some point the rise in the backlog for visa issuance might influence the investors' decision to invest in EB-5 projects.

In light of the unexpected reprieve extended to investors and developers as a result of the Program's blanket extension, it would not be surprising if Congress takes a harsh position on effective dates under the 2016 reforms.

Visa reserves

Although visa reserves – the special allocation of visas to investors in certain types of projects - have not generated much attention in connection with the pending reforms, this topic deserves more attention by Congress. Before we discuss the visa reserves proposed in the June Bill and subsequent Drafts, a brief background is appropriate.

The mounting backlogs in I-526 petitions and subsequent applications for visas may dramatically affect the importance of this issue. If immigrant investors in a particular project or type of project are given a priority allocation of visas, this might influence an investor's decision as much or more than the TEA status of that particular project.

Obviously, the investor's primary goal is to obtain the visa in the shortest period of time. In recent years, the backlog in I-526 petitions and visa issuance has started to mount. This issue has greatest impact on investors from mainland China

⁹⁸http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526_performancedata_fy2015_qtr4.pdf

⁹⁹ $(17,367 \text{ visa petitions} \times 2.7)/4 = 46,890/10,000 > 4 \text{ years}$. As further explained in this section the number of pending visa petitions as of December 31, 2015 is probably at least 20,000.

who face backlogs due to retrogression.¹⁰⁰ However, the problem is becoming widespread. As the Program continues to gain popularity, more investors are subscribing to EB-5 projects and filing petitions. The annual visa quota remains at 10,000¹⁰¹, while the number of immigrant investors seeking to subscribe reaches record levels.¹⁰²

As stated above in the “TEA and Minimum Investment Effective Dates (Grandfathering)” section, the visa petitions pending as of September 30, 2015 translates to more than 45,000 visas, or a 4-1/2 year supply. This supply does not take into account the thousands of Chinese investors who, due to retrogression, must wait at least an additional 2 years.¹⁰³ In addition, it would not be surprising if the fiscal year ending September 30, 2016 will be a record year for subscriptions by investors in EB-5 projects, and filing of I-526 visas petitions.¹⁰⁴

First, prospective investors realize they will likely face a change in TEA definitions and minimum investment amounts after September 30, 2016 and, based on the latest Drafts, might believe that their minimum investment will be based on the date that they file their I-526 petitions with USCIS.

Second, developers will be motivated to encourage, and perhaps even incentivize, migration agents to favor their project with the hope of rapidly filling available subscriptions before new TEA definitions and higher minimum investment levels apply. This is compounded by the supposed record number of projects that filed exemplars before, and especially after, the introduction of the June Bill proposing a liberal grandfather clause for exemplar approved projects.

¹⁰⁰ <http://www.eb5investors.com/magazine/article/eb-5-retrogression-roadblock>;
<http://www.bakerdonelson.com/files/Uploads/Documents/Divine%20The%20Realities.pdf>

¹⁰¹ As expected, the Drafts retained the visa quota under the EB-5 Program at 10,000 per year. The investor’s immediate family members would continue to count towards the visa cap.

¹⁰² The number of I-526 petitions has skyrocketed from 1,125 at FYE 2010 to 12,453 at FYE 2014 to 17,367 at FYE 2015.
http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526_performancedata_fy2015_qtr4.pdf.

¹⁰³ The estimated number of immigrants with approved visa petitions (including derivative family members) who are waiting for a visa number exceeds 20,000. For a discussion of the estimated waiting periods and potential impacts, see <http://www.klaskolaw.com/eb-5-investor-visas/winning-the-numbers-game/>;
<http://www.bakerdonelson.com/files/Uploads/Documents/Divine%20The%20Realities.pdf>;
<http://blog.lucidtext.com/2016/01/12/eb-5-timing-issues-not-a-fast-track/>; and
<http://www.wolfsdorf.com/articles/eb-5%20China%20Quota%20BERNIE%20ARTICLE%206.2014.pdf>.

¹⁰⁴ USCIS’ report for EB-5 petitions filed during the first quarter of FYE 2016 (October 1 through December 31, 2015) will probably not be released until February or March, 2016, based on its normal delay in compiling and releasing the data. <http://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-form-i-526-immigrant-petition-alien-entrepreneur>. However, the experts in the preceding footnote estimate that the number of I-526 petitions pending as of December 31, 2015 is in the range of 20,000. Again, this excludes family members who will seek visa approval, and the immigrants from mainland China who are already waiting on line.

Megaprojects are becoming increasingly common, as evidenced by pending raises, such as Hudson Yards' second tranche of \$600M, 2 World Trade Center's raise of \$500M, and China Construction Company's raise of \$350M in Miami.¹⁰⁵ EB-5 capital raises of \$100M or more are becoming more prevalent.¹⁰⁶ If investors subscribe to these projects, file I-526 petitions within the same time frame as each other, and the petitions are approved in the same year or time frame, these handful of projects will absorb at least a year's worth of annual visa quota, and probably much more. This will be mitigated in the future after minimum investment levels are increased because, as discussed above in the Minimum Investment section, fewer investors will be required to raise the same amount of capital as required under today's rules. Nevertheless, petitions should be expected to surge during 2016, and continue for the foreseeable future.

As waiting periods for visas exceed 5 years and approach 10 years, a project with a visa reserve that provides for a visa priority entitling the investors to move towards the front of the visa line should be particularly desirable. The extensive waiting periods can frustrate the investor's goal of obtaining a visa for his children who may age out or may not be able to remain in the US after they graduate from college, especially if H-1B visas are not available. In addition, the investor cannot recover his EB-5 capital investment that bears a minimal return until after the unconditional visa petition (I-829) is approved, which will be more than 2 years after the visa is approved and the temporary green card is issued.

The December 12th Draft would have specifically reserved for each fiscal year, visas to 2,000 immigrants in each of the following categories: (1) those who invest \$1,000,000 in a non-TEA project; (2) those who invest in rural area projects (which by definition qualify as a TEA); and (3) those who invest in a Priority Urban Investment Area project (the type of TEA we refer to as the Good Neighbor Approach).¹⁰⁷ In the aggregate, these 6,000 visas would represent 60% of the annual 10,000 visa quota, without taking into account the investor's dependent family members who apply for a visa. Some immigration experts believe this would

¹⁰⁵ <https://commercialobserver.com/2015/10/bank-of-china-and-deutsche-bank-to-lead-1-5b-hudson-yards-retail-construction-loan/>; <http://therealdeal.com/blog/2015/11/04/silverstein-seeks-500m-in-eb-5-funding-for-2-wtc/>; <http://www.bizjournals.com/southflorida/news/2015/11/09/chinese-developers-will-seek-350m-in-eb-5-funds-to.html>.

¹⁰⁶ A few examples include: <http://golden1center.com/home/>; <http://therealdeal.com/blog/2015/07/10/shvo-witkoff-look-to-get-800m-in-eb-5-funding/>; <http://therealdeal.com/miami/blog/2015/02/05/skyrise-miami-targets-eb-5-investors-for-funding/>

¹⁰⁷ INA Sec. 203(b)(5)(B)(i)

have resulted in waiting lists of 10 to 15 years for some investors who invest in projects that would not qualify for the special allocation.¹⁰⁸

This provision was obviously aimed to stimulate investment in these three categories. However, Congress' rationale for proposing to include investors in non-TEA projects in this special visa allocation is dubious. Favored treatment for investors in non-TEA projects, which was added by the December Drafts, seems to offset the favorable treatment accorded by that provision to rural area projects. This is another example of the December Drafts attempting to minimize the significance of TEA qualification. It is also interesting to note that the proposed visa reserves for investors in PUJA (Good Neighbor) relates to a category with Thresholds that does not exist under current law, yet favors this over urban area TEA projects that qualify based on meeting the High Unemployment Threshold.

Furthermore, and perhaps more importantly, this special visa allocation obviously would not be available to investors in other project locations and types not listed, such as SIZ TEAs, public infrastructure or manufacturing projects. Again, Congress' rationale for favoring urban area projects that do not qualify for TEA treatment over these types of projects is questionable. Perhaps this provision was a concession to the large number of urban area projects that would no longer be able to qualify as a TEA. Undoubtedly, Congress will revisit the issue of visa reserves in connection with its reconsideration of appropriate TEA definitions.

The December 12th Draft would have delayed the effective date for the proposed visa reserves. The reserve for non-TEA projects would not have started until the government's fiscal year beginning October 1, 2019; and the reserve for the other two categories would have been delayed until the fiscal year beginning October 1, 2016. If Congress decides to incorporate visa reserves in its new legislative reforms, presumably the earliest effective date for these reserves would be October 1, 2017 for projects that are not defined under current law (such as the new Urban Area TEA type projects) because the investors in those projects would not realistically be able to file and obtain approval of their I-526 petitions during the first fiscal year – ending in 2017 – that the project became covered by the EB-5 law.

Again, we assume that Congress will take a fresh look at visa reserves when it resumes its deliberations in early 2016. It should consider the potential impact of granting visa reserves to certain types of projects. How will this impact investment in those projects, and investments in those for which the reserves are not granted?

¹⁰⁸ <http://therealdeal.com/blog/2015/12/16/developers-1-congress-0-as-eb-5-is-extended-again-with-no-changes/>

This may influence Congress' determination as to the type of projects that deserve any priority, as well as the number of visas reserved for those projects.

Regional centers and developers will need to address the mounting visa backlog, whether or not Congress incorporates visa reserves into the reform legislation. In the course of formulating the reforms in the June Bill and subsequent Drafts, Congress rejected the idea of not counting family members towards the 10,000 cap.¹⁰⁹ Thus, for the foreseeable future, substantial backlogs may become a greater challenge for projects seeking to attract immigrant investors. At some point, more of the potential investors might seek alternative investments in countries that offer visa programs for a lesser minimum investment amount and with a quicker processing period.¹¹⁰

Job creation methodology

Under the December Drafts, the number of new jobs generated by a project would have continued to determine the maximum amount of EB-5 capital that could be raised for a project. Most EB-5 real estate projects qualify based on indirect jobs, substantially all of which relate to construction activity. In an effort to ensure that a certain percentage of the jobs would be direct jobs, the Drafts would have limited indirect jobs to 90%.¹¹¹ Thus, direct jobs would be required to constitute at least 10% of the jobs. However, the December Drafts rendered this requirement relatively meaningless because it would have counted direct jobs based on economic impact model methodology, rather than on actual jobs.¹¹² Apparently to eliminate any doubt, the Integrity Bill deletes the reference to the 90% requirement and direct jobs.¹¹³

Furthermore, even though the minimum investment amount would have been raised as stated above, the number of jobs required to support each investor's petition would have remained at 10. Thus, the leverage provided by the jobs created by a new project would have been substantially increased as a result of the proposed law. The same 10 jobs would have supported \$800,000 or \$1,000,000, rather than \$500,000, of EB-5 capital.

¹⁰⁹ For a discussion of proposed alternative actions – legislative and executive – to solve this problem, see <http://www.klaskolaw.com/eb-5-investor-visas/winning-the-numbers-game/>.

¹¹⁰ See http://www.americanbar.org/publications/international_law_news/2014/fall/immigrant_investor_visas_emergent_trends_around_world.html; <https://iiousa.org/blog/government-affairs/uscis-government-affairs/member-perspective-eb5-visas-chinese-waiting-line/>.

¹¹¹ INA Sections 203(b)(5)(E)(iv) and (v)(I)(aa).

¹¹² For example, compare S. 1501 to the December 12th Draft.

¹¹³ INA 203(b)(5)(E)(iv).

For example, consider a project that creates 100 jobs. Under the current law, these 100 jobs would support 10 investors in a TEA project for a \$5,000,000 capital raise. Under the Drafts, the same number of jobs would support a capital raise of \$8,000,000 or \$10,000,000, depending on whether the project is located in a TEA.

Version	Jobs	Number of Investors	Min Investment	Maximum Capital Raise
	100			
Current: TEA		10	\$500K	\$5M
Draft: TEA		10	\$800K	\$8M
Draft: Non-TEA		10	\$1M	\$10M

Similarly, under the December Drafts, contributions by substantially fewer investors would result in a substantially higher capital raise – 60% to 100% more. Thus, substantially fewer jobs would be required to be created to raise the same amount of capital.

For example, under the current law, if a TEA project sought to raise \$10,000,000 of EB-5 capital, 20 investors or 200 jobs would be required. Under the Drafts, the same project would have required only 10 investors (100 jobs) or 13 investors (130 jobs),¹¹⁴ depending on whether it were located in a TEA. (These examples do not take into account the additional jobs provided by most projects to satisfy the investors' demand for a "job cushion," in case some of the jobs are not actually created.¹¹⁵)

Version	Proposed Capital Raise	Min Investment	Number of Investors	Min Number Jobs Required
	\$10M			
Current: TEA		\$500K	20	200
Draft: TEA		\$800K	13	130
Draft: Non-TEA		\$1M	10	100

¹¹⁴ Technically, 12.5 investors would be required (\$10M/\$800K). Thus, the number of investors is rounded up to 13 and the number of jobs required to be created equals 130 (13 x 10).

¹¹⁵ See the discussion of this topic in Roadmap.

<http://www.stern.nyu.edu/sites/default/files/assets/documents/EB5%20paper%20final%205.24.2015.pdf>

CONCLUSION

When Congress resumes its EB-5 reform deliberations, undoubtedly urban area TEA definitions will be a major focus of EB-5 2.0. The new bill might be based on the latest drafts of the 2015 EB-5 reform bill that failed.

However, we recognize that alternatively, Congress might choose to formulate a new TEA standard. Based on the data for New York City, and Manhattan in particular, it is likely that few projects will qualify as a TEA unless very different standards are considered.

A review of the legislative process surrounding the EB-5 reforms considered by Congress during the last session reveals that the proposed urban area TEA definitions evolved over a relatively short period of time, with the most significant changes occurring over a two week span leading up to the extended December 2015 deadline. We are unable to determine the factors that influenced Congress in proposing the alternative methodologies because the process was closed to the public. Similarly, it is unclear whether Congress carefully weighed how the definitions would have applied in operation, particularly in the urban areas of greatest concern to Congress. The change in TEA definitions from draft to draft over this short period suggests that Congress may not have had the opportunity to carefully consider this as the deadline loomed.

Our review and analysis indicates that the methodology reflected in the latest draft, the December 12th Draft, would have been effective to substantially limit the number of new projects in Manhattan that would qualify as a TEA. Presumably similar results would have applied in other Gateway cities. If that was Congress' objective, apparently it would have succeeded. We pointed out that a dramatic reduction in TEA status in Manhattan might have occurred in the absence of any new legislation, based simply on the improving employment data relative to the national average.

The most liberal of the urban area TEA definitions considered in the December Drafts is the SIZ – Modified Gerrymandering. The SIZ – Cluster and Extend approach is much more restrictive and arguably more representative of the surrounding neighborhood because it takes into account all tracts bordering the project tract, whereas Modified Gerrymandering may take into account only one bordering tract. PUIA – the Good Neighbor approach – is arguably more restrictive. However, as illustrated by the Hudson Yards and Park Lane examples, some projects would qualify under the PUIA - Good Neighbor definition, even though they would not qualify under the SIZ TEA definition that allows more tracts to be taken into account. This might be a consequence of the use of 2010 census data to

determine the applicable High Poverty, 80% AMI Thresholds, as permitted by the New Markets Tax Credit program.

The proposals would have reduced the importance of a project being located in a TEA. The minimum investment differential between a TEA project and a non-TEA project would have been reduced to \$200,000, rather than the \$500,000 differential under current law. Of potentially greater importance, the same number of visas reserved for investors in rural projects would have been reserved for investors in non-TEA projects. Furthermore, some urban area TEA projects would not qualify for the visa reserves.

In the upcoming debate, Congress should focus more attention on visa reserves and the types of projects that merit any special visa priority. As explained in the visa reserves section of this paper, immigrant investors are likely to place increasing importance on this issue in the near future as visa waiting periods rise. A project's qualification for visa reserves might become as important a factor in the immigrant's investment decision as the TEA status of a particular project.

In any event, we encourage Congress to provide a more open forum for EB-5 stakeholders and the general public to react to Congress' new EB-5 reforms and to suggest alternatives.

(As noted at the beginning of this paper, we intend to continue updating this working draft.)

APPENDIX A - URBAN AREA TEA DEFINITIONS

Urban Area TEA Definitions from Senate Legislative Counsel Draft of December 12, 2015 (the “December 12th Draft”)

Priority Urban Investment Area (“PUIA”) – we refer to this as the “Good Neighbor Approach”:

“(ix) **PRIORITY URBAN INVESTMENT AREA.**—The term ‘priority urban investment area’ means an area consisting of a census tract or bordering census tracts, each of which is in a metropolitan statistical area and, using the most recent census data available, each of which has—

- (I) an unemployment rate that is at least 150 percent of the national average unemployment rate, which may also include a census tract bordering the tract with the requisite unemployment rate;
- (II) a poverty rate that is at least 20 percent; or
- (III) a median family income that is not more than 80 percent of the greater of the statewide median family income or the metropolitan statistical area median family income.”

Special Investment Zone (“SIZ”) – we refer to this version as “Cluster and Extend”:

“(xi) **SPECIAL INVESTMENT ZONE.**—The term ‘special investment zone’ means an area, using the most recent census data available,

- (I) a city or county that has an unemployment rate that is at least 150 percent of the national average; or
- (II) an area consisting of not more than 12 contiguous census tracts contained within the boundary of a single county, which
 - (aa) includes each census tract that is bordering the tract where the project is primarily physically located, unless such tract is located in a different county;
 - (bb) has an unemployment rate that is at least 150 percent of the national average unemployment rate; and
 - (bb) may not include a census tract in which the project is not primarily physically located that encompasses an area with special characteristics and little or no residential population, such as a public park, public forest, or a large body of water, except that such area may include one tract that encompasses an area with special characteristics and little or no residential population that contains primarily business, industrial, or other commercial uses.”

Urban Area TEA Definition from Senate Legislative Counsel Draft of December 9, 2015 (the “December 9th Draft”)

SIZ - we refer to this version as “Modified Gerrymandering”. As noted above, December 12th Draft replaced this SIZ TEA definition with Cluster and Extend.

“(xi) **SPECIAL INVESTMENT ZONE.**—The term ‘special investment zone’ means an area, using the most recent census data available, consisting of—

- (I) a city or county that has an unemployment rate that is at least 150 percent of the national average; or
- (II) a census tract or not more than 12 contiguous census tracts that—
 - (aa) has an unemployment rate that is at least 150 percent of the national average unemployment rate;
 - (bb) may not include a census tract in which the project is not primarily physically located that is—
 - (AA) a special land use census tract encompassing a public park or public forest; or
 - (BB) a special land use census tract with a primarily non-commercial or non-industrial use;and with respect to tracts described in sub-item (BB), the Secretary shall consider the local land use designation, the basis for the designation by the U.S. Census Bureau, the actual use of the tract, and any other factors the Secretary deems appropriate, when determining, in the Secretary’s discretion, whether such a tract has a primarily non-commercial or non-industrial use;
- (cc) subject to item (bb), may not include more than one census tract in which the project is not primarily physically located that is a special land-use census tract; and
- (dd) may not include a census tract in which the project is not primarily physically located that is delineated by the U.S. Census Bureau specifically to cover a body of water unless—
 - (AA) such census tract is contiguous to two of the census tracts described in this subclause (except that the two census tracts may not include census tracts delineated by the U.S. Census Bureau specifically to cover a body of water or be described in item (bb)); and
 - (BB) a line perpendicular to the shore of each of the two census tracts described in sub-item (AA) must be able to be drawn through the census tract delineated by the U.S. Census Bureau specifically to cover a body of water (and it may not cross any other census tract).”