



Center for  
Real Estate  
Finance Research

**“SEC Whistleblower Program as a Valuable EB-5  
Securities Anti-Fraud Enforcement Tool”**

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**June 21, 2018 (revised June 27, 2018)**

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# “SEC Whistleblower Program as a Valuable EB-5 Securities Anti-Fraud Enforcement Tool”<sup>1</sup>

## I Introduction

EB-5 immigrant investors have few protections against fraud and other bad acts committed by regional center operators and related parties.<sup>2</sup> Since 2015, the EB-5 industry has successfully repelled various legislative reform proposals by Congress that would have imposed integrity measures, if enacted into law. The most important of these measures, third-party fund administration and account transparency, were aimed at detecting and curbing these abuses much earlier than might otherwise be possible.<sup>3</sup> Fortunately, the SEC Whistleblower Program (sometimes referred to as the “Program”) has proven to be a powerful weapon in the SEC’s toolbox to combat securities fraud in the EB-5 arena and to provide an avenue for EB-5 investors to obtain relief. The Program authorizes the SEC (sometimes referred to as the “Commission”) to make monetary awards to eligible individuals who voluntarily provide original information that leads to successful judicial enforcement or administrative actions<sup>4</sup> brought by the SEC resulting in monetary sanctions over \$1 million.<sup>5</sup>

In March 2018, the SEC paid nearly \$83 million in awards to three whistleblowers who provided tips leading to a SEC administrative order against Merrill Lynch for violations of the federal securities laws in which the SEC collected \$415 million.<sup>6</sup> These awards represented the largest awards in the history of the Program. We expect that in the coming months the SEC will pay another large award to one or more whistleblowers who provided the tips that led to the uncovering of the massive EB-5 securities fraud in connection with the Jay Peak ski resort and related projects. In February 2018, monetary sanctions totaling almost \$84 million were imposed upon Ariel Quiros, the chairman of Jay Peak.<sup>7</sup>

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<sup>2</sup>See <http://www.stern.nyu.edu/sites/default/files/assets/documents/EB-5%202.0%20Can%20Account%20Transparency%20Save%20the%20Program.pdf>

<sup>3</sup>See <http://www.stern.nyu.edu/sites/default/files/assets/documents/EB-5%20Fix%20the%20Broken%20Program%204.5.2018.pdf>

<sup>4</sup> The whistleblower is also entitled to an award where sanctions are obtained in “related actions,” such as an order of restitution in a parallel or related criminal action brought by the Office of the US Attorney against the securities violators. Rule 21-F(3)(b) of the Exchange Act of 1934;

<https://www.sec.gov/about/offices/owb/reg-21f.pdf#nameddest=21F-4>

<sup>5</sup> <https://www.sec.gov/about/offices/owb/dodd-frank-sec-922.pdf>; Also, see <https://www.sec.gov/whistleblower>

<sup>6</sup><https://www.sec.gov/news/press-release/2018-44>;<https://www.sec.gov/news/pressrelease/2016-128.html>;  
<https://www.sec.gov/litigation/admin/2016/34-78141.pdf>

<sup>7</sup><https://www.sec.gov/news/press-release/2018-10>;[https://jaypeakreceivership.com/wp-content/uploads/2018/02/DE\\_450\\_-\\_Final\\_Judgment\\_Quiros\\_2-6-18-1.pdf](https://jaypeakreceivership.com/wp-content/uploads/2018/02/DE_450_-_Final_Judgment_Quiros_2-6-18-1.pdf);

<https://www.sec.gov/whistleblower/nocas> re Notice No. 2018-24.

For a whistleblower to receive an award, several conditions must be met. The diagram below prepared by the SEC provides a snapshot of the sequence of steps, from the filing of the whistleblower's tip to payment of the whistleblower award.<sup>8</sup>



The diagram simply describes the steps as follows, as each icon is clicked:

1. Whistleblowers Submit Tips to SEC: Submit original, credible information online or by mail/fax. Submissions can be anonymous with attorney representation. By law, the SEC protects the identity of all whistleblowers.
2. Tip Analysis/Investigation: Among thousands of tips received annually, every submission is thoroughly evaluated by SEC enforcement staff for high-quality information that warrants deeper investigation.
3. Cases Filed/Penalties Ordered: SEC enforcement staff determine laws have been broken. Enforcement action is filed publicly against the wrongdoer. Penalties ordered upon settlement or completion of successful litigation.
4. Notice of Covered Actions Posted: The SEC website alerts the public about cases in which sanctions exceed \$1 million so everyone has the opportunity to apply for an award.
5. Whistleblower Files Claims: Individuals have 90 days after notice is posted to apply for an award by completing and submitting a simple form.

<sup>8</sup> Reprinted from: <https://www.sec.gov/page/whistleblower-100million>

6. Awards Determined: Commission weighs various factors about a whistleblower's contribution and assistance. Awards range from 10 to 30 percent of money collected in a case.
7. Investor Protection Fund: Payments come from a special fund established by Congress with sanctions collected from securities law violators. No money is withheld from harmed investors to pay awards.

This article provides a more in-depth overview of the SEC Whistleblower Program, with particular emphasis on how the Program applies to EB-5 securities. The Program provides an avenue for insiders or immigrant investors who suspect securities law violations by EB-5 regional centers and other bad actors to report the tip to the SEC to prompt an investigation that may lead to an award paid to the whistleblower, as well as to provide monetary relief to all EB-5 investors. In addition, the article discusses how the recent decision by the U.S. Supreme Court in *Kokesh v. SEC* adversely affects the EB-5 investor in ways that might not be apparent.

## II Background

An immigrant's investment through the EB-5 Regional Center Program constitutes a security for purposes of the federal securities laws (sometimes referred to as an "EB-5 security").<sup>9</sup> This classification as a security triggers the applicability of the federal securities laws.

In recognition that the SEC has limited resources to combat securities violations and to encourage individuals to voluntarily report information to the SEC, the Dodd-Frank Act<sup>10</sup> established the SEC Whistleblower Program in the wake of the financial crisis.<sup>11</sup>

Since 2011, more than 22,000 whistleblower tips have been submitted to the SEC,<sup>12</sup> and the SEC has paid over \$250 million in awards to 55 individual whistleblowers. Wrongdoers in SEC enforcement actions involving whistleblowers

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<sup>9</sup> For a more in-depth discussion of the applicability of the federal securities law to EB-5 investments, see pages 8 through 12 of <http://www.stern.nyu.edu/sites/default/files/assets/documents/Understanding%20EB-5%20Securities%20-%20NYU%20Stern%20Database%20of%20SEC%20EB-5%20Securities%20Enforcement%20Actions.pdf>.

<sup>10</sup> The Dodd-Frank Wall Street Reform and Consumer Protection Act is commonly referred to as the "Dodd-Frank Act," Pub. L. No. 111-203, § 922(a), 124 Stat. 1841 (2010). The provisions of the SEC Whistleblower Program are contained in Section 21F of the Securities Exchange Act of 1934 ("Exchange Act") entitled "Securities Whistleblower Incentives and Protection" found at <https://www.sec.gov/about/offices/owb/dodd-frank-sec-922.pdf>. The rules issued by the SEC to implement the statutory provisions are contained in <https://www.sec.gov/about/offices/owb/reg-21f.pdf#nameddest=21F-4>.

<sup>11</sup> <https://www.sec.gov/news/speech/ceresney-sec-whistleblower-program.html>;  
<https://www.sec.gov/about/offices/owb/dodd-frank-sec-922.pdf>;

<sup>12</sup> <https://www.sec.gov/files/sec-2017-annual-report-whistleblower-program.pdf>

have been ordered to pay almost \$1.5 billion, a significant portion of which has been paid to the victims.<sup>13</sup>

Yet it is difficult to accurately measure the effectiveness of the Program in combatting securities law violations relating to EB-5 securities because the law requires that the SEC preserve the confidentiality of a whistleblower, even after the case is closed and an award is paid.<sup>14</sup> The law does not permit the SEC to disclose a whistleblower's identity in response to requests under the Freedom of Information Act.<sup>15</sup> The SEC does not even disclose the name of the violating company or enforcement action with respect to which a whistleblower award is paid.<sup>16</sup> Thus, it cannot be determined with any certainty the number of awards that relate to EB-5 projects, or which awards relate to a specific project. Nevertheless, as discussed in the "EB-5 Cases" section below, based on the SEC's publication of the list of successful SEC actions and limited information about whistleblower awards granted, one can obtain a sense about the awards already granted and those that may be granted to EB-5 whistleblowers in the future.

### III SEC Whistleblower Process

Prior to a discussion of the Whistleblower Program in the context of EB-5 securities, we provide an overview of the SEC Whistleblower Program process.

#### 1. Eligibility for a whistleblower award

To be eligible for an award, whistleblowers must voluntarily provide the SEC with original information about a possible violation of the federal securities laws that leads to a successful enforcement or administrative action brought by the SEC resulting in a monetary sanction of more than \$1 million paid by the wrongdoer.

Virtually any individual or group of individuals can be a whistleblower.<sup>17</sup> The citizenship or residency of the whistleblower is irrelevant. Individuals from 114 countries outside the United States have submitted whistleblower tips to the SEC.<sup>18</sup> Whistleblower award recipients have included current employees, former

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<sup>13</sup> This data is based on SEC releases as of April 2018. See <https://www.sec.gov/news/press-release/2018-64>.

<sup>14</sup> Rule 21F-7 of the Exchange Act

<sup>15</sup> <https://www.sec.gov/about/offices/owb/reg-21f.pdf#nameddest=21F-4>

<sup>16</sup> The SEC publishes a list of whistleblower awards by amount and date but does not reference the defendants or company or project or informant. <https://www.sec.gov/whistleblower/final-orders-of-the-commission>. The SEC does publish a list giving notice of all judgments and orders issued with respect to enforcement and administrative actions, but it does not indicate whether a whistleblower tip provided information in that action. <https://www.sec.gov/whistleblower/nocas?aId=edit-year&year=All>

<sup>17</sup> A company or other entity is not eligible to be a whistleblower. Rule F-2 of the Exchange Act.

<sup>18</sup> Page 26 of <https://www.sec.gov/files/sec-2017-annual-report-whistleblower-program.pdf>

employees, other types of insiders, industry professionals, harmed investors and others unrelated to the violating entity.<sup>19</sup>

Although in many cases an employee or insider of the entity wrongdoer is likely to be in the best position to have access to information that can give rise to a tip, the whistleblower need not have any relationship to the wrongdoer. For example, the first EB-5 enforcement action was brought by the SEC as a result of a tip provided by a whistleblower who was knowledgeable about the EB-5 industry, but totally unrelated to the EB-5 offering that became the subject of the enforcement action.<sup>20</sup> Thus, EB-5 immigrant investors are eligible to receive a whistleblower award.

## 2. Possible indicators of EB-5 securities fraud

EB-5 investors as a group might be the most vulnerable type of investors to the commission of securities fraud.<sup>21</sup> Since 2013, the SEC, with the assistance of USCIS and other federal agencies, has stepped up its investigation of EB-5 fraud, and brought several enforcement actions in federal court against EB-5 regional centers and related parties for the misappropriation of funds, Ponzi schemes and other abuses perpetrated upon EB-5 investors.<sup>22</sup>

A review of these SEC enforcement actions presents a snapshot of several indicators that an EB-5 regional center or related party might be engaged in securities fraud. However, we emphasize that legitimate business reasons might exist for the presence of any of these indicators.

These factors include: (1) the release of funds from escrow before the escrow conditions specified in the offering documents are satisfied; (2) the failure to deploy the EB-5 capital to the project developer and the diversion to others; (3) no construction activity at the project site for an extended period after the EB-5 capital was funded by the investors; (4) the failure of the project developer to fund its required equity contribution without explanation; (5) the failure to obtain a construction loan from a bank or other lender; (6) the lack of periodic reports from the regional center or manager detailing (a) the amount of EB-5 capital raised from all investors compared to the amount sought to be raised pursuant to the offering documents, (b) the use of the funds to date, and (c) the demonstrated status of construction activity. As discussed in our previous writings, we believe independent, third-party fund administration and compliance with account

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<sup>19</sup> See the chart on page 17 of <https://www.sec.gov/files/sec-2017-annual-report-whistleblower-program.pdf>

<sup>20</sup> <https://www.sec.gov/news/press-release/2013-2013-70htm>

<sup>21</sup> See page 56 and 57 of <http://www.stern.nyu.edu/sites/default/files/assets/documents/Understanding%20EB-5%20Securities%20-%20NYU%20Stern%20Database%20of%20SEC%20EB-5%20Securities%20Enforcement%20Actions.pdf>

<sup>22</sup> See <http://www.stern.nyu.edu/sites/default/files/assets/documents/Understanding%20EB-5%20Securities%20-%20NYU%20Stern%20Database%20of%20SEC%20EB-5%20Securities%20Enforcement%20Actions.pdf>

transparency requirements contained in previous reform legislative proposals would deter potential abuses and aid the detection as well as prompt recovery of misappropriated funds.<sup>23</sup>

### 3. How to submit tips to the SEC

To initiate the process and to become eligible for an award, whistleblowers are required to submit to the SEC Office of the Whistleblower tips, complaints and referrals (sometimes referred to as “information”) regarding possible securities law violations.<sup>24</sup>

The SEC treats all tips, complaints and referrals as confidential and nonpublic, and does not disclose such information to third parties. The law allows a whistleblower to submit the information anonymously, without providing his or her identity or contact information, so long as the information is provided by the whistleblower’s attorney, based on information provided by the whistleblower.<sup>25</sup>

The number of whistleblower tips received by the SEC Office of the Whistleblower has steadily increased over the history of the Program, with more than 4,400 tips received in fiscal year 2017.<sup>26</sup> The SEC’s limited resources and its substantial workload dictate that its investigative staff selectively pursue those tips that are most likely to lead to recovery. The SEC points out that the “more specific, credible, and timely a whistleblower tip, the more likely it is that the tip will be forwarded to investigative staff for further follow-up or investigation. For instance, if the tip identifies individuals involved in the scheme, provides examples of particular fraudulent transactions, or points to non-public materials evidencing the fraud, the tip is more likely to be assigned to Enforcement staff for investigation.”<sup>27</sup> As a result, successful SEC whistleblowers often file comprehensive submissions that provide more information than the bare minimum required.

An attorney can provide valuable assistance to the whistleblower by assisting in the preparation of a more comprehensive submission that theoretically should increase the likelihood that the SEC will take the complaint seriously and decide to investigate, assisting in prompt investigation and resolution, and filing a claim with rationale that supports a higher award.

Although a whistleblower can submit the information to the SEC without being represented by counsel, many individuals choose to be represented. For

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<sup>23</sup> See, for example, <http://www.stern.nyu.edu/sites/default/files/assets/documents/EB-5%202.0%20Can%20Account%20Transparency%20Save%20the%20Program.pdf>

<sup>24</sup> The whistleblower can submit the information electronically online through the SEC’s Tip, Complaint or Referral Portal or by mailing or faxing an SEC Form TCR to the SEC Office of the Whistleblower. <https://www.sec.gov/whistleblower/submit-a-tip>; Rules <https://www.sec.gov/rules/final/2011/34-64545.pdf>

<sup>25</sup> Section 21F(d)(2) of the Exchange Act. See also <https://www.sec.gov/whistleblower/submit-a-tip>.

<sup>26</sup> Page 23 of <https://www.sec.gov/files/sec-2017-annual-report-whistleblower-program.pdf>.

<sup>27</sup> Page 27 of <https://www.sec.gov/files/sec-2017-annual-report-whistleblower-program.pdf>.

example, the SEC reported that in 2017, 54 percent of whistleblowers who submitted tips were represented by counsel, 19 percent of whom filed anonymously.<sup>28</sup>

#### 4. Suitability of Program to typical EB-5 fraud claims

An SEC whistleblower may report any violation of the federal securities laws that has occurred, is ongoing, or is about to occur, whether by a public or private company.<sup>29</sup> The Whistleblower Program is particularly suitable for investors who suspect a misappropriation of funds. Misappropriation of funds and Ponzi schemes, two of the most common types of EB-5 securities violations, are at the top of the list of violations that interests the SEC under this Program. As of the end of fiscal year 2017, 50% of the whistleblower award recipients reported information to the SEC concerning offering fraud, such as Ponzi schemes, and/or misleading statements in offering memorandum or marketing materials.<sup>30</sup>

#### 5. Next step after whistleblower submits a tip

Initially, the Office of Market Intelligence reviews all tips for reliability, detail and potential violations of the federal securities laws.<sup>31</sup> The tips most likely to lead to recovery are assigned to investigative staff in the Enforcement Division, who conduct a more detailed review and determine whether the alleged misconduct warrants a formal investigation. Our paper “Understanding EB-5 Securities – NYU Stern Database of SEC EB-5 Securities Enforcement Actions” describes the investigation and litigation process.<sup>32</sup>

#### 6. Importance of promptly submitting a tip

Although a whistleblower can report possible securities violations regardless of when they occur, the Whistleblower Program and the securities laws encourage reporting as soon as the individual reasonably suspects a violation.<sup>33</sup>

Only the first whistleblower to report a securities violation will be eligible to receive an award, unless other whistleblowers are found to provide additional information that significantly contributed to the success of the SEC’s action. Also,

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<sup>28</sup> Page 17 of <https://www.sec.gov/files/sec-2017-annual-report-whistleblower-program.pdf>.

<sup>29</sup> See Rule 21F-4(b) of the Exchange Act.

<sup>30</sup> See the chart of primary securities violations for covered actions at page 18 (page 22 of 38 in pdf) of <https://www.sec.gov/files/sec-2017-annual-report-whistleblower-program.pdf>. Also See FAQ #3 of <https://www.sec.gov/whistleblower/frequently-asked-questions#faq-1>.

<sup>31</sup> See pages 27 and 28 (pages 31 and 32 of 38 in pdf) of <https://www.sec.gov/files/sec-2017-annual-report-whistleblower-program.pdf>.

<sup>32</sup> See pages 14 to 17 of <http://www.stern.nyu.edu/sites/default/files/assets/documents/Understanding%20EB-5%20Securities%20-%20NYU%20Stern%20Database%20of%20SEC%20EB-5%20Securities%20Enforcement%20Actions.pdf>

<sup>33</sup> See [Rule 21F-4\(b\)\(1\)](#) of the Exchange Act. The SEC rules seek to incentivize individuals who are “aware of the relevant facts” to promptly report “possible violation[s] of the federal securities laws.” Rules 21F-6(b)(2)(i) and 2(a)(1) of the Exchange Act. See also FAQ #5 of <https://www.sec.gov/whistleblower/frequently-asked-questions#faq-5>

the Commission often reduces monetary awards to whistleblowers for delay in reporting.<sup>34</sup>

## 7. Impact of Kokesh decision

The United States Supreme Court's 2017 decision in *Kokesh v. SEC* encourages the SEC to promptly bring enforcement actions.<sup>35</sup> That case held that the statute of limitations for disgorgement of ill-gotten gains, the primary monetary sanction that the SEC seeks in enforcement actions,<sup>36</sup> is 5 years. Thus, it is essential that the SEC act expeditiously to preserve the maximum disgorgement remedy. However, some of the recent EB-5 securities enforcement actions include allegations of wrongdoing that started more than 5 years from the date of the filing of the action.<sup>37</sup>

The *Kokesh* decision might have the most devastating impact on enforcement claims involving securities acquired by EB-5 investors from mainland China. For example, at an EB-5 trade group conference in April 2018, Charlie Oppenheim, Chief of the Visa Controls Office at the U.S. Department of State, estimated that, due to retrogression, the time frame for a new Chinese investor filing an I-526 visa petition to obtain a conditional visa approval is approximately 15 years.<sup>38</sup> Thus, the filing of the investor's I-829 petition, and USCIS scrutiny of the actual flow of the immigrant investor's funds would occur even later.

Although the I-829 review is the point at which USCIS is most likely to discover a misappropriation, the securities laws' statute of limitations might have long expired and bar the filing of an action. Due to these extraordinarily long delays, we continue to vigorously support fund administration and account transparency protections of the type that were contained in various reform bills introduced by Senators Grassley and Leahy as well as Representative Goodlatte, aimed to detect EB-5 abuses at an early stage. Unfortunately, no EB-5 reform bills are currently pending, and none appear to be on the horizon.<sup>39</sup>

On May 16, 2018, Steven Peikin, co-director of the SEC's Enforcement Division, testified before the House Financial Services Committee at a hearing

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<sup>34</sup> See, for example, the reduced awards in the SEC Award Order in the Merrill Lynch case.

<https://www.sec.gov/rules/other/2018/34-82897.pdf>

<sup>35</sup> *Kokesh v. SEC*, 137 S. Ct. 1635 (2017); [https://www.supremecourt.gov/opinions/16pdf/16-529\\_i426.pdf](https://www.supremecourt.gov/opinions/16pdf/16-529_i426.pdf)

<sup>36</sup> See page 7 of <https://www.sec.gov/files/enforcement-annual-report-2017.pdf>

<sup>37</sup> See page DS-1 of Appendix A of

<http://www.stern.nyu.edu/sites/default/files/assets/documents/Understanding%20EB-5%20Securities%20-%20NYU%20Stern%20Database%20of%20SEC%20EB-5%20Securities%20Enforcement%20Actions.pdf>

<sup>38</sup> <https://blog.lucidtext.com/2018/04/>; Also see pages 4 through 8 of

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

<sup>39</sup> <http://www.stern.nyu.edu/sites/default/files/assets/documents/EB-5%20Fix%20the%20Broken%20Program%204.5.2018.pdf>

entitled “Oversight of the SEC’s Division of Enforcement.”<sup>40</sup> He advised the Committee members that the Kokesh decision will result in a significant reduction in the amount of monetary sanctions that the SEC will be able to collect on behalf of harmed investors. Director Peikin estimated that the SEC has not been able to seek \$800 million in the disgorgement of ill-gotten gains since the Supreme Court issued its decision in Kokesh, based on pending cases in litigation or cases that have since been settled. He pointed out that “there will be cases where there is ongoing fraud for years and we don’t discover it until some of that money is out of our reach.”

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The following month, on June 20, 2018, SEC Chairman Jay Clayton testified before the U.S. House of Representatives Committee on Financial Services. He also cited the devastating impact that Kokesh has had, and will continue to have, upon the SEC’s ability to return funds to the investing public. Chairman Clayton’s written testimony stated that he is “troubled by the substantial amount of losses that we may not be able to recover for...investors. Said simply, if the fraud is well-concealed and stretches beyond the five-year limitations period..., it is likely that we will not have the ability to recover funds invested.”<sup>42</sup> In his testimony before the Committee, he reiterated the concerns expressed by Director Peikin, and requested that Congress give the SEC the authority to seek restitution for investors’ losses where the investors were defrauded, but the investigators discovered the abuse too late to compensate the victims. Restitution could result in greater financial recovery for the SEC and hence, the investors, than disgorgement because restitution reflects the losses suffered by the investors which could far exceed the ill-gotten gain of the bad actor.<sup>43</sup> Although some of the House members on the two committees seemed persuaded by Director Peikin’s and Chairman Clayton’s testimony and expressed a willingness to propose legislation to extend the statute or expand the remedies available to the SEC, it remains to be seen whether any legislation will be proposed, let alone enacted, in the foreseeable future due to the current political climate in Washington, D.C.<sup>44</sup>

In light of the Kokesh decision, the SEC must commence an enforcement action within 5 years after the fraud occurs in order to seek disgorgement as a remedy. The Kokesh decision might prompt the Enforcement Division to accelerate

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<sup>40</sup><https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=403383>;  
[https://financialservices.house.gov/uploadedfiles/051618\\_cm\\_memo.pdf](https://financialservices.house.gov/uploadedfiles/051618_cm_memo.pdf)

<sup>41</sup><https://www.wsj.com/articles/supreme-court-2017-decision-has-cost-investors-over-800-million-sec-says-1526487555>

<sup>42</sup> <https://www.sec.gov/news/testimony/testimony-oversight-us-securities-and-exchange-commission>

<sup>43</sup> <https://www.c-span.org/video/?447253-1/sec-chair-jay-clayton-testifies-house-oversight-hearing>;  
<https://www.wsj.com/articles/sec-wants-more-power-to-get-funds-back-for-bilked-investors-1529622404>

<sup>44</sup> See, for example, 29:57 of <https://www.c-span.org/video/?447253-1/sec-chair-jay-clayton-testifies-house-oversight-hearing>

investigations, or otherwise jeopardize its ability to collect monetary sanctions in many cases. One would expect that the SEC's staff will more routinely require individuals and entities under investigation to enter into tolling agreements to prevent the expiration of the statute of limitations.<sup>45</sup> Staff might pursue this approach at an earlier stage of the investigation than has been customary in the past.<sup>46</sup> Nevertheless, the Kokesh decision is likely to have a profound impact on SEC enforcement actions because many claims will be barred by the applicable statute of limitations.

## 8. Awards procedure

A whistleblower is not eligible to claim an award unless he or she applies for the award in strict accordance with the prescribed SEC procedure after a judgment or order is issued. The SEC posts on its website "Notices of Covered Action"<sup>47</sup> a notice for each SEC action where the final judgment or order results in monetary sanctions exceeding \$1 million (a "Notice"), to ensure that any whistleblower who believes he may be eligible will have an opportunity to apply for an award. However, the mere posting of a Notice does not mean that the SEC has determined either that any whistleblower was involved in the action or that a whistleblower award will be paid in connection with that action. SEC whistleblowers are solely responsible for monitoring the SEC's Notices of Covered Actions, to avoid missing the award application deadline.

If a whistleblower believes his tip led to the judgment or order, he must file an application on Form WB-APP with the SEC within 90 calendar days of the date the SEC posted the NOCA.<sup>48</sup> The Commission then decides whether an award should be paid to the whistleblower who filed the claim and the amount of the award, based on many factors.<sup>49</sup>

Many SEC whistleblowers' applications for awards are denied. Some of the most common reasons for denial are: the information did not lead to a successful enforcement action; the information submitted was not "original" within the meaning of the Program rules; and the award application was not timely filed within the required 90-day period.<sup>50</sup>

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<sup>45</sup> See Section 3.1.2 of the "Enforcement Manual" of the SEC Division of Enforcement concerning the Statute of Limitations and Tolling Agreements. <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>

<sup>46</sup> See, for example, paragraph 79 of the complaint filed in the SEC enforcement action in SEC v. Aero Space Port International Group, <https://www.sec.gov/litigation/complaints/2017/comp23778.pdf>

<sup>47</sup> <https://www.sec.gov/whistleblower/claim-award>

<sup>48</sup> <https://www.sec.gov/about/forms/formwb-app.pdf>

<sup>49</sup> Section 21F(c) of the Exchange Act.

<sup>50</sup> See the numerous denial orders listed on <https://www.sec.gov/whistleblower/final-orders-of-the-commission>.

## 9. Amount of the award paid to whistleblower

As stated above, a whistleblower award is available only in a successful SEC action where the monetary sanctions collected from the wrongdoers exceed the minimum statutory threshold - \$1 million.<sup>51</sup> The amount of the award is based upon the total monetary sanctions collected.<sup>52</sup> Eligible whistleblowers are entitled to a minimum of 10% and a maximum of 30% of the monetary sanctions collected.<sup>53</sup> Multiple whistleblowers might be entitled to an award in the same action. However, the maximum amount that may be awarded to all whistleblowers in the aggregate cannot exceed 30% of the monetary sanctions collected.<sup>54</sup>

The Commission considers several factors to determine the precise amount of the award to be paid to a whistleblower. Certain factors may increase an award, such as the significance of the information provided by the whistleblower, the assistance provided by the whistleblower, and the law enforcement interest in making an award. Other factors may decrease an award, such as the culpability of the whistleblower, delay in reporting the violation to the SEC and interference with the violator's internal compliance and reporting system.<sup>55</sup> The application form requires that the whistleblower explain his or her basis for entitlement to the award, and provides the whistleblower with the opportunity to justify the amount of the award by applying the above factors.<sup>56</sup>

The Commission issues an order determining the disposition of applications for a whistleblower award. The order is posted on an SEC website<sup>57</sup> and redacts the name of the whistleblower, and the name of the securities wrongdoer.<sup>58</sup> If multiple whistleblowers claim an award in an action, the Commission must determine which of the claimants, if any, are entitled to the award, and how to divide the award amongst the successful claimants.<sup>59</sup>

## 10. Source of the payments to fund the award

The whistleblower award is paid from a fund established by Congress for this purpose – the “Securities and Exchange Investor Protection Fund.” All payments

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<sup>51</sup> As previously noted an action includes a judicial enforcement action or administrative action brought by the SEC, or a related action such as an action brought by the Office of the US Attorney.

<sup>52</sup> For purposes of the SEC Whistleblower law, “monetary sanctions” means any monies, including disgorgement, penalties and, ordered to be paid, as a result of the action or settlement of the action. Section 21F(a)(4) of the Exchange Act.

<sup>53</sup> Section 21F(b)(1) of the Exchange Act.

<sup>54</sup> Rule 21F-5(c) of the Exchange Act.

<sup>55</sup> Rule 21F-6 of the Exchange Act

<sup>56</sup> Section G of Form WB-AP.

<sup>57</sup> <https://www.sec.gov/whistleblower/final-orders-of-the-commission>

<sup>58</sup> See, for example, <https://www.sec.gov/rules/other/2017/34-79853.pdf>

<sup>59</sup> In one case, 16 whistleblowers applied for an award in a single matter. <https://www.sec.gov/news/speech/ceresney-sec-whistleblower-program.html>. Also, a whistleblower may appeal the SEC's decision to deny an award or to challenge the amount of an award. Rule 21F-10 of the Exchange Act.

are made from this fund, which is financed entirely through monetary sanctions paid to the SEC by securities law violators. The funds are not withheld or deducted from the monetary sanctions paid by the violator and do not reduce the amounts distributed to harmed investors.<sup>60</sup>

In enforcement or administrative actions, the wrongdoers are often ordered to pay disgorgement – a measure of the “ill-gotten gains” from the fraud. Where disgorgement is ordered, the judge or the SEC may also order that any money collected be placed in a “Fair Fund” for distribution to investors who were the victims of the violation.<sup>61</sup> If the whistleblower is an investor who was harmed, he or she can also share in the distribution from that Fund.<sup>62</sup>

The opportunity to claim an award could be valuable motivation for an EB-5 investor to submit a tip of possible wrongdoing by a regional center, manager, developer or other bad actor. In most cases, USCIS is not in a position to detect fraud at an early stage.<sup>63</sup> The enforcement actions in the EB-5 securities area demonstrate that USCIS and the SEC are not likely to detect a misappropriation of funds or other securities violations until several years after the wrongdoing starts. As stated above, USCIS does not track or scrutinize the flow of funds until the review of the I-829 petition, which generally occurs several years after the EB-5 investment is funded by the immigrant. It is anticipated that the USCIS’s new compliance review procedure and site visit program will prove to be effective in combatting fraud. However, it will take considerable time for these programs to be implemented. Thus, it is premature to evaluate them.

### 11. Largest awards in the history of the Program

The largest whistleblower awards in the history of the Program were paid in March 2018 to three whistleblowers who provided tips that led to the \$415 Million order issued against Merrill Lynch.<sup>64</sup> The SEC administrative order was issued on June 23, 2016<sup>65</sup> and the Notice was published on the NOCA website on July 29, 2016.<sup>66</sup> The SEC issued the Order Determining Whistleblower Claims Awards (“Awards Order”) on March 19, 2018.<sup>67</sup> The Commission determined that three of

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<sup>60</sup> Section 21F(g) of the Exchange Act.

<sup>61</sup> <https://www.sec.gov/about/rules/prac2006>. Also see <https://www.sec.gov/divisions/enforce/claims.htm>; <https://www.investor.gov/protect-your-investments/fraud/resources-victims-securities-law-violations>

<sup>62</sup> See <https://www.sec.gov/files/owb-annual-report-2016.pdf>

<sup>63</sup> See <http://www.stern.nyu.edu/sites/default/files/assets/documents/Understanding%20EB-5%20Securities%20-%20NYU%20Stern%20Database%20of%20SEC%20EB-5%20Securities%20Enforcement%20Actions.pdf>

<sup>64</sup> Merrill Lynch was acquired by Bank of America in January 2009.

<http://investor.bankofamerica.com/phoenix.zhtml?c=71595&p=irol-newsArticle&ID=1240029#fbid=mvESpE9jwhq>

<sup>65</sup> <https://www.sec.gov/litigation/admin/2016/34-78141.pdf>; <https://www.sec.gov/news/pressrelease/2016-128.html>

<sup>66</sup> Notice no. 2016-94 on <https://www.sec.gov/whistleblower/nocas?aId=edit-year&year=2016>

<sup>67</sup> <https://www.sec.gov/rules/other/2018/34-82897.pdf>

the six whistleblower claimants were entitled to awards and the other three were denied.

The Whistleblower law does not impose a timeframe within which the SEC must reach its determination as to whether an individual claimant is entitled to a whistleblower award. Presumably, part of the delay in issuing the Awards Order was attributable to the SEC deliberations in considering which of the claimants were entitled to an award, and how to allocate the awards amongst the three successful whistleblowers. Two of the whistleblowers shared the award of nearly \$50 million, and the third whistleblower was awarded \$33 million. These awards in the aggregate represented approximately 20% of the monetary sanctions collected by the SEC.

The SEC redacts from the Awards Order the identity of the whistleblower award claimants and the violating company. However, on the day that the award was announced by the SEC, the law firm representing the successful whistleblowers publicized its representation of them by issuing a press release that also identified the target of the whistleblower tips as Merrill Lynch.<sup>68</sup> The press release did not disclose the names of the whistleblowers, as the attorney filed the tips anonymously on their behalf.<sup>69</sup>

## IV EB-5 Cases

### 1. Chicago Convention Center

One of the largest awards in the Whistleblower Program's history was paid to a whistleblower in the first SEC enforcement action in the EB-5 space, commonly known as the Chicago Convention Center case.<sup>70</sup> In that case, the informant was awarded \$14.7 million, which, as of June 14, 2018, represented the seventh largest award since the inception of the Whistleblower Program.<sup>71</sup> The whistleblower was neither an insider or investor; he was the promoter of an unrelated EB-5 project who upon learning about the project was skeptical as to its viability and submitted a tip to the SEC. His award only became public because his business partners filed a lawsuit against him seeking a share of the award. The whistleblower filed a request for the court to seal the order and preserve his confidentiality. The court did seal the order. However, Fortune Magazine printed a story about the award based on information available prior to the sealing of the record.<sup>72</sup>

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<sup>68</sup> <https://www.prnewswire.com/news-releases/labaton-whistleblowers-earn-largest-sec-whistleblower-awards-in-history-300616037.html>

<sup>69</sup> <https://www.wsj.com/articles/whistleblowers-helped-sec-bring-415-million-settlement-against-bank-of-america-1521479445>

<sup>70</sup> <https://www.sec.gov/news/press-release/2013-2013-70htm>; <https://www.sec.gov/news/press/2013/2013-70-order.pdf>

<sup>71</sup> <https://www.sec.gov/page/whistleblower-100million>

<sup>72</sup> <http://fortune.com/2014/07/23/whistleblower-unmasked/>; also see <https://www.wsj.com/articles/the-fraudbehind-a-14-million-whistleblower-award-1393457426>

In the Chicago Convention Center case, the entire process - from the filing of the tip to payment of the award to the whistleblower - proceeded very quickly. The tip was submitted in late 2012 and soon thereafter, the SEC initiated an investigation. The SEC filed the enforcement action on February 6, 2013. The judge's order directing the return of more than \$147 million was issued on April 19, 2013. The Notice was posted on April 23, 2013, and the SEC's Award Order was issued on September 30, 2013, slightly more than five months after the judgment. Collection of the funds in this case was particularly easy because the funds were still retained in the bank escrow when the SEC discovered the fraud. The amount of the award represented 10% of the amount of the monetary sanctions collected.<sup>73</sup>

## 2. Jay Peak

On February 6, 2018, a federal district court judge ordered Ariel Quiros, the Chairman of Jay Peak and related projects, to pay almost \$84 million in monetary sanctions pursuant to the settlement agreement between Quiros and the SEC in connection with the enforcement action commonly known as "Jay Peak."<sup>74</sup>

It is likely that tips provided to the SEC by one or more whistleblowers led to the investigation and monetary sanctions imposed in this case. Reportedly, in 2012, Douglas Hulme complained to the State of Vermont about the misuse of EB-5 funds, as well as other abuses.<sup>75</sup> He was a key consultant to the principals in Jay Peak - Ariel Quiros and William Stenger. In 2014, Antony Sutton, one of the EB-5 investors, filed documents with the State claiming that Quiros and Stenger had perpetrated a fraud upon the investors.<sup>76</sup> Thus, it would not be surprising if Mr. Hulme or Mr. Sutton, or each of them, also submitted a whistleblower tip to the SEC.<sup>77</sup>

The enforcement action was filed on April 12, 2016.<sup>78</sup> The judgment entering the settlement order was filed on February 6, 2018, and the Notice Date posted on the NOCA website was March 30, 2018, with June 28, 2018 as the 90-day deadline for filing an application for an award.<sup>79</sup> If one or more whistleblower claims are filed and the SEC determines that awards are appropriate, the minimum and

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<sup>73</sup> <https://www.sec.gov/rules/other/2013/34-70554.pdf>

<sup>74</sup> The monetary sanctions included disgorgement, penalties and prejudgment interest totaling \$83,859,964. [https://jaypeakreceivership.com/wp-content/uploads/2018/02/DE\\_450 - Final Judgment Quiros 2-6-18-1.pdf](https://jaypeakreceivership.com/wp-content/uploads/2018/02/DE_450_-_Final_Judgment_Quiros_2-6-18-1.pdf). William Stenger, the other principal of Jay Peak, was ordered to pay \$75,000.

<sup>75</sup> <https://vtdigger.org/2016/07/25/documents-suggest-state-ignored-warnings-about-jay-peak-in-/#.WhXV43lrzIU>; <https://vtdigger.org/2017/08/06/judge-quashes-whistleblower-deposition-eb-5-investorcase-state/#.WfZrYnZrzIU>

<sup>76</sup> <http://digital.vpr.net/post/meet-london-car-dealer-who-broke-jay-peak-eb-5-fraud-case#stream/0>

<sup>77</sup> Michael Gibson, the Managing Director of USAdivisors.org, was the first to raise serious questions about the integrity and viability of the Jay Peak EB-5 projects, as detailed in his in-depth article found at: <https://www.linkedin.com/pulse/jay-peak-autopsy-eb-5-visa-fraud-greed-ignorance-michael-gibson/>

<sup>78</sup> <https://www.sec.gov/litigation/litreleases/2016/lr23520.htm>

<sup>79</sup> See Notice No. 2018-24 listed in Notice of Covered Actions found at: <https://www.sec.gov/whistleblower/nocas>.

maximum awards, in the aggregate, would range from approximately \$8.4 million to \$25.2 million.<sup>80</sup>

### 3. Other recent EB-5 actions that might involve whistleblowers

A cursory review of the SEC's NOCA website reveals that, in addition to the Quiros settlement, several of the Notices posted since April 2017 relate to actions involving EB-5 securities:<sup>81</sup> the enforcement actions in the Zhong case,<sup>82</sup> Proton case,<sup>83</sup> Muroff case,<sup>84</sup> Ramirez (USA Now) case,<sup>85</sup> Path America case,<sup>86</sup> and Feng case.<sup>87</sup> The latter case involved the immigration attorney who was sanctioned for acting as an unregistered broker-dealer.

In the Zhong case, the SEC's complaint identified an individual as an "attorney" who served as the immigration attorney of record for the filing of all immigrant investor petitions.<sup>88</sup> She also performed substantial legal services for Zhong and was apparently aware of, if not involved in, Zhong's scheme to defraud the EB-5 investors. The attorney also owned three Regional Centers with Zhong, including the centers that solicited the investors. Yet the attorney was not charged or even referred to by name in the body of the complaint. It is possible the attorney negotiated a grant of immunity with the SEC and Office of US Attorney.<sup>89</sup> This suggests that the attorney cooperated with the SEC investigation and enforcement action. It is possible that she is a whistleblower who brought the fraud to the SEC's attention. However, we have no information that confirms our suspicion.

Again, the posting in the NOCA website simply provides notice to give a whistleblower the opportunity to file a claim for an award. The SEC posts Notices of Covered Action for every SEC action "where a final judgment or order, by itself

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<sup>80</sup> A court order was also entered against Quiros' partner in Jay Peak, William Stenger, imposing monetary sanctions of \$75,000. <https://www.sec.gov/files/Judg16-cv-21301Stenger.pdf>. Also see Stenger's settlement with the SEC in 2016, which provided that the amount of the monetary sanctions to be imposed would be based on his level of cooperation. <https://jaypeakreceivership.com/wp-content/uploads/2016/09/DE-215-Judgment-of-Permanent-Injunctionand-Other-Relief-Against-Defendant-William-Stenger-1.pdf>

<sup>81</sup> The website does not identify these cases as related to EB-5 securities.

<https://www.sec.gov/whistleblower/nocas?aId=edit-year&year=2018>

<sup>82</sup> Zhong: <https://www.sec.gov/litigation/litreleases/2015/lr23409.htm>; NOCA Filing No: 20817, Notice Date: 2/28/2018

<sup>83</sup> Proton: <https://www.sec.gov/litigation/litreleases/2016/lr23556.htm>; NOCA Filing No.: 2017-156; Notice Date: 10/31/2017

<sup>84</sup> Muroff: <https://www.sec.gov/litigation/litreleases/2017/lr23818.htm>; NOCA Filing No.: 2017-109; Notice Date: 6/30/2017

<sup>85</sup> Ramirez: <https://www.sec.gov/news/press-release/2013-210>; NOCA Filing No. 2017-82; Notice Date: 5/31/2017

<sup>86</sup> Path America: <https://www.sec.gov/litigation/litreleases/2015/lr23326.htm>; NOCA Filing No.: 2017-78; Notice Date: 4/28/2017.

<sup>87</sup> Feng: <https://www.sec.gov/litigation/litreleases/2015/lr23420.htm>; NOCA Filing No.: 2017-142; Notice Date: 9/29/2017.

<sup>88</sup> See allegation number 20 in <https://www.sec.gov/litigation/complaints/2015/comp-pr2015-263.pdf>

<sup>89</sup> See Sections 6.2.3 and 6.2.4 of the Enforcement Manual.

<https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>

or together with other prior judgments or orders in the same action...results in monetary sanctions exceeding \$1 million.” Thus, every SEC enforcement or administrative action that meets this criteria will ultimately be posted on the NOCA website, after the entry of the final judgment or order. It does not mean that the SEC has determined that a whistleblower provided a tip that led to the monetary sanction imposed in the action (enforcement or administrative actions) or that a whistleblower will be entitled to an award.<sup>90</sup> The requirement that the SEC maintain the confidentiality of the identity of the whistleblower will make it nearly impossible to determine the identity of a whistleblower or the action with respect to which a whistleblower award relates unless the whistleblower or his or her attorney chooses to disclose it. Note that even in the case of the recent Merrill Lynch awards, the attorney representing the whistleblowers merely identified the name of the violating company, and/but not the name of the whistleblowers.

Furthermore, in light of the increasing number of SEC actions involving EB-5 securities, whistleblowers might have submitted, and presumably will continue to submit, tips with respect to other EB-5 projects. Although several of the SEC actions have resulted in a final judgment or order with monetary sanctions exceeding \$1 million, it is likely that some were issued so recently that the SEC has not yet rendered a decision on a whistleblower award. Many of the enforcement actions filed to date have not yet reached the stage where an order has been issued. Thus, it is premature for an award claim to have been filed by a whistleblower. Moreover, one cannot determine how many of the other tips that have been reported are currently under investigation by the SEC or will result in actions being brought by the SEC or the Office of the US Attorney.

#### 4. Anti-Retaliation

To encourage voluntary reporting, the Whistleblower law protects against retaliation by employers against employees who report possible wrongdoing based on a reasonable belief that a possible violation of the federal securities law has occurred or is likely to occur.<sup>91</sup> Immigrant investors who file a tip do not face the risk of the same type of retaliation by the company since they are not employed by the company. Nevertheless, these investors might be reluctant to file a tip due to their concern that the investigation and action by the SEC might lead to government action, such as termination of the regional center, that might adversely impact their visa petition, especially if they have not yet received visa approval and the issuance of a green card.<sup>92</sup>

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<sup>90</sup> <https://www.sec.gov/whistleblower/claim-award>

<sup>91</sup> Rule 21F-2 of the Exchange Act

<sup>92</sup> See pages 49-56 of <http://www.stern.nyu.edu/sites/default/files/assets/documents/Understanding%20EB-5%20Securities%20-%20NYU%20Stern%20Database%20of%20SEC%20EB-5%20Securities%20Enforcement%20Actions.pdf>

## V Conclusion

The SEC Whistleblower Program has proven to be a valuable weapon by the SEC to pursue securities law violators. Although recent SEC actions have resulted in the largest awards in the history of the program, the United States Supreme Court's decision in *Kokesh* will limit future recoveries, and thus, whistleblower awards, unless Congress acts. The *Kokesh* decision might serve to motivate suspecting investors and insiders to promptly file a whistleblower claim.

If Congress were to enact EB-5 reform legislation with integrity measures, including fund administration and account transparency, this would likely lead to earlier detection of securities law violations involving EB-5 securities. However, the EB-5 hearing held by the Senate Judiciary Committee on June 19, 2018 made it increasingly clear that legislative reform will not be forthcoming for the foreseeable future. In the interim, the SEC Whistleblower Program takes on added importance as one of the most effective tools to combat EB-5 securities fraud.