

# EB 5 Escrow and Fund Administration Guide

A comprehensive guide from EB5 Attorneys

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EB 5 investment capital does not go directly from the investor's bank account to a construction site. It flows through a series of intermediary accounts governed by escrow agreements, subscription terms, and fund administration requirements. How your money is held, when it is released, and who oversees it are among the most consequential details of any EB 5 investment. The EB 5 Reform and Integrity Act of 2022 (P.L. 117 103) added new requirements for independent fund administration, strengthening investor protections.

## Contents

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1. How EB 5 Investment Capital Flows
2. The Role of Escrow Agents
3. RIA 2022 Fund Administration Requirements
4. Release Conditions: When Your Capital Leaves Escrow
5. What Happens to Funds if Your Petition Is Denied
6. Investor Protections Under Securities Law
7. What to Look for in Subscription Agreements
8. Red Flags in Escrow and Fund Administration Arrangements
9. Frequently Asked Questions

## How EB 5 Investment Capital Flows

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When you subscribe to an EB 5 regional center project, your investment capital follows a defined path. You wire funds from your personal or business account to an escrow account held by an independent escrow agent, typically a bank or title company. The capital remains in escrow until specific release conditions are satisfied. Once released, the funds flow to the new commercial enterprise (NCE), the legal entity that pools investor capital. From the NCE, the capital is deployed to the job creating entity (JCE), the actual project that generates the employment required for EB 5 eligibility.

For direct EB 5 investments, the flow is simpler: you invest directly into a business entity that you establish or acquire, and you manage the capital deployment yourself. There is no intermediary regional center, NCE, or JCE. However, you still need to document the full path of funds from source to investment for your I 526E petition.

Understanding this capital flow matters because each step involves distinct legal agreements, oversight mechanisms, and risk factors. Your EB 5 attorney should explain the entire chain of custody for your capital, identify who controls the funds at each stage, and flag any structural weaknesses in the arrangement.

## The Role of Escrow Agents

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An escrow agent is a neutral third party that holds investor funds in a segregated account until predetermined conditions are met. In the EB 5 context, the escrow agent's role is to protect the investor's capital during the period between subscription and release.

The escrow agent does not evaluate the merits of the investment, provide legal advice, or guarantee any outcome. Their obligation is limited to holding the funds securely and releasing them only when the conditions specified in the escrow agreement are satisfied. These conditions vary by project but commonly include: the regional center or NCE achieving a minimum number of investor subscriptions, the investor's I 526E petition being filed with USCIS, or the investor's I 526E petition being approved.

Reputable escrow agents are typically FDIC insured banks or established title companies with a track record of handling EB 5 transactions. FDIC insurance protects deposited funds up to \$250,000 per depositor, per insured institution. For investments of \$800,000 or \$1,050,000, the FDIC coverage may not extend to the full amount, though some escrow arrangements use multiple accounts or pass through insurance structures to provide additional coverage.

Your EB 5 attorney should review the escrow agreement before you sign the subscription documents. Key provisions to examine include the identity and reputation of the escrow agent, the specific release conditions, what happens to accrued interest (if any), and the process for returning funds if release conditions are not met.

## RIA 2022 Fund Administration Requirements

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The EB 5 Reform and Integrity Act of 2022 introduced a requirement for independent fund administration of regional center project capital (INA section 203(b)(5)(E)(ii)). Before the RIA, some regional centers managed investor funds internally, creating opportunities for misappropriation and insufficient oversight. The SEC brought enforcement actions against multiple EB 5 operators who diverted investor capital for personal use.

Under the RIA, every new commercial enterprise associated with a regional center must use an independent fund administrator. The fund administrator is responsible for verifying that investor capital is deployed in accordance with the project's offering documents and business plan. This is a structural safeguard: it interposes a neutral third party between the investor's capital and the project operator's discretion.

The fund administrator's duties typically include: verifying the amount of capital received from each investor, confirming that disbursements from the NCE to the JCE comply with the offering terms, monitoring capital deployment against the project budget, and reporting any discrepancies to the regional center and, if necessary, to USCIS.

This requirement is separate from the escrow function. Escrow governs the pre release period (before conditions are met and capital is released to the NCE). Fund administration governs the post release period (after capital is in the NCE and being deployed to the project). Together, they provide investor protection across the full capital lifecycle.

As of April 2026, USCIS reviews fund administration compliance as part of both the I 956F project approval process and the regional center's annual compliance statements.

## Release Conditions: When Your Capital Leaves Escrow

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The escrow agreement defines the conditions that must be satisfied before your investment capital is released from escrow to the new commercial enterprise. These conditions are negotiated between the project sponsor and the escrow agent and are disclosed in the offering documents you sign as an investor.

Common release conditions include: filing of the investor's I 526E petition (filing release), approval of the investor's I 526E petition (approval release), achievement of a minimum number of investor subscriptions (minimum raise), or a combination of these triggers. Some projects use a filing based release, meaning your capital is released once your I 526E is filed with USCIS. This approach provides the project with earlier access to funds but leaves the investor with less protection if the petition is later denied. Other projects use an approval based release, which keeps capital in escrow until the I 526E is approved, providing greater investor protection but delaying the project's access to capital.

The release mechanism has direct implications for what happens if your petition is denied or if the project fails to meet its subscription minimum. Under a filing release, your capital may already be deployed in the project when a denial occurs, making refund more difficult. Under an approval release, the capital remains in escrow and can typically be returned to you if the petition is denied.

Your EB 5 attorney should explain the release conditions and their implications for your specific situation. If you are risk averse, you may prefer projects with approval based release. If you prioritize filing speed and project maturity, a filing based release may be acceptable, provided the project has strong fundamentals.

## What Happens to Funds if Your Petition Is Denied

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Petition denial triggers different consequences depending on the escrow agreement and the release conditions in your subscription documents. Understanding these provisions before you invest is essential.

If your funds are still in escrow at the time of denial (common with approval based release), the escrow agreement should provide for a return of your investment capital, minus any applicable fees or costs that the agreement allows the escrow agent to deduct. Most well structured escrow agreements allow deduction of escrow agent fees but prohibit deduction of the project sponsor's costs.

If your funds have already been released from escrow and deployed in the project (common with filing based release), the path to recovering your capital depends on the subscription agreement and the project's financial condition. Most EB 5 subscription agreements include provisions requiring the NCE to return investor capital if the I 526E petition is denied and no appeal is pursued. However, this obligation is only as strong as the NCE's ability to pay. If the project has already spent or committed your capital, recovery may be delayed or incomplete.

The administrative fee, typically \$50,000 to \$75,000 and sometimes higher, is generally nonrefundable regardless of petition outcome. This fee is separate from the investment capital and is usually paid directly to the regional center or project sponsor to cover offering costs.

Before signing any subscription agreement, your EB 5 attorney should identify and explain: the escrow release conditions, the refund provisions upon denial, any deductions or fees that reduce the refund amount, and the timeline for receiving a refund. If the subscription agreement does not include clear refund provisions, or if the refund is conditioned on factors outside your control, this is a risk factor your attorney should flag.

## Investor Protections Under Securities Law

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EB 5 investments are securities under federal law. The interests investors purchase in regional center projects (typically limited partnership interests or LLC membership interests) meet the definition of an "investment contract" under the Supreme Court's test in *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946). This means EB 5 offerings must comply with the Securities Act of 1933 and the Securities Exchange Act of 1934, and investors are entitled to the protections those laws provide.

Most EB 5 offerings are made under exemptions from SEC registration, typically Regulation D (for U.S. based offerings to accredited investors) or Regulation S (for offshore offerings). These exemptions reduce the regulatory burden on the issuer but do not eliminate investor protections. Investors still receive a Private Placement Memorandum (PPM) that must disclose material risks, the use of proceeds, management background, and potential conflicts of interest.

Anti fraud provisions of the securities laws apply to all EB 5 offerings regardless of exemption status. Under Section 10(b) of the Exchange Act and Rule 10b 5, it is unlawful for any person to make untrue statements of material fact, omit material facts, or engage in fraud or deceit in connection with the purchase or sale of securities. Investors who are defrauded may bring private lawsuits for damages.

State securities laws (commonly called "blue sky laws") may impose additional requirements, including notice filings, fee payments, and suitability standards. The specific requirements vary by state.

Your EB 5 attorney should be able to identify which securities exemptions the offering relies on and confirm that the required filings have been made. If the attorney is not qualified to assess securities compliance, they should refer you to a securities attorney for an independent review of the offering documents.

## What to Look for in Subscription Agreements

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The subscription agreement is the contract between you and the new commercial enterprise. It governs the terms of your investment, including capital commitment, distribution rights, voting rights (if any), and exit provisions. It is a legally binding document, and signing it without understanding its terms can create problems that are difficult to unwind.

Key provisions to review with your attorney include: the amount of capital required and the payment schedule, the administrative fee amount and whether it is refundable, the escrow agent identity and release conditions, the refund mechanism if your I 526E petition is denied, the management structure of the NCE and JCE, any restrictions on transfer or withdrawal of your investment, the timeline for capital return after the EB 5 immigration purpose is fulfilled, and provisions addressing project delays, cost overruns, or failure to meet job creation targets.

Pay particular attention to the relationship between the subscription agreement and the PPM. These documents should be consistent. If the PPM discloses risks that the subscription agreement does not address, or if the subscription agreement contains terms not disclosed in the PPM, your attorney should raise these discrepancies with the project sponsor before you sign.

Do not sign a subscription agreement without having your EB 5 attorney review it independently. The regional center or project sponsor's counsel represents the sponsor, not you. Your attorney's role is to identify terms that are unfavorable, ambiguous, or inconsistent with your interests and to negotiate changes where possible.

## Red Flags in Escrow and Fund Administration Arrangements

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Certain patterns in escrow and fund administration arrangements should trigger concern. Your EB 5 attorney should flag the following:

The escrow agent is affiliated with the project sponsor or regional center. An escrow agent should be independent. If the entity holding your funds has a business relationship with the party that wants to spend your funds, the protective purpose of escrow is compromised.

No escrow at all. Some older projects or direct investments may not use escrow. While this is not automatically disqualifying, it removes a layer of investor protection. Ask why escrow is not being used and what alternative protections exist.

Release conditions that are too easily satisfied. If capital is released upon subscription signing rather than upon I 526E filing or approval, the investor has almost no protection period. The best practice is filing based or approval based release.

No independent fund administrator. Under the RIA, regional center projects must use independent fund administration. If a project claims to be post RIA but does not have an independent fund administrator, this is a compliance violation that should disqualify the investment.

Vague or missing refund provisions. If the subscription agreement does not clearly state what happens to your capital upon petition denial, or if the refund is conditioned on events the sponsor controls (such as "when the project is financially able"), the refund provision may be illusory.

Excessive fee deductions from escrowed funds. Some agreements allow the escrow agent or sponsor to deduct fees, costs, and expenses from escrowed capital before returning it. Your attorney should quantify these deductions and assess whether they are reasonable.

# Frequently Asked Questions

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## 1. What is an escrow agent in an EB 5 investment?

An escrow agent is an independent third party, typically an FDIC insured bank or title company, that holds your investment capital in a segregated account until specific release conditions are met. The escrow agent does not evaluate the investment or provide legal advice. Their role is to safeguard your funds and release them only when the conditions in the escrow agreement are satisfied.

## 2. When is my EB 5 investment capital released from escrow?

Release timing depends on the escrow agreement terms. Common triggers include filing of your I 526E petition (filing release), approval of your I 526E (approval release), or achievement of a minimum number of investor subscriptions. Review the escrow agreement with your EB 5 attorney before signing subscription documents. The release mechanism directly affects what happens to your capital if the petition is denied.

## 3. What does the RIA require regarding fund administration?

The EB 5 Reform and Integrity Act of 2022 requires regional center projects to use independent fund administrators to oversee the deployment of investor capital after it leaves escrow. The fund administrator verifies that disbursements comply with the offering documents and project budget (INA section 203(b)(5)(E)(ii)). This requirement does not apply to direct investments.

## 4. Can I get my money back if my I 526E is denied?

It depends on whether your funds are still in escrow or have been released and deployed. If the funds remain in escrow, most agreements provide for a refund minus escrow agent fees. If the funds have been released to the project, the refund depends on the subscription agreement terms and the project's financial condition. The administrative fee (typically \$50,000 to \$75,000) is usually nonrefundable. Review refund provisions with your attorney before investing.

## 5. Is my EB 5 escrow account FDIC insured?

FDIC insurance covers deposits up to \$250,000 per depositor, per insured institution. Since EB 5 investments are \$800,000 or \$1,050,000, the full amount may not be covered under a single FDIC insured account. Some escrow arrangements use multiple accounts or pass through structures to extend coverage. Confirm FDIC coverage details with your EB 5 attorney and the escrow agent.

## 6. What is the difference between escrow and fund administration?

Escrow governs the pre release period, holding your capital until conditions like I 526E filing or approval are met. Fund administration governs the post release period, overseeing how your capital is deployed by the new commercial enterprise into the job creating project. Together, they provide investor protection across the full investment lifecycle. The RIA requires independent fund administration for all regional center projects.

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**Disclaimer:** This guide is provided for general informational purposes only and does not constitute legal advice. Every immigration case is unique. Consult a qualified immigration attorney for advice specific to your circumstances.

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