



SEC Provides New C&DIs on Verifying Accredited Investor Status

Jul 8, 2014

Reading Time : **2 min**

The other four C&DIs explore the nonexclusive, nonmandatory safe harbors provided in Rule 506(c) for verifying accredited investor status by way of income or net worth and the “principles-based approach” for extrapolating these safe harbors when the specified criteria are not met. With respect to satisfying the income test (\$200,000 annual income for two years or \$300,000 with a spouse), the new guidance provides that:

- If filed IRS forms indicating a purchaser’s income are not yet available for the most recently completed fiscal year, the safe harbor relying on such IRS forms is not available. However, the issuer could still satisfy the “reasonable steps” by reviewing forms for the two years preceding the recently completed year **and** obtaining written representations from the purchaser regarding the information for the missing year.
- Tax documents filed in foreign jurisdictions cannot satisfy this safe harbor. However, tax returns from jurisdictions that impose penalties on false statements on tax returns similar to those imposed in the U.S. could be relied upon to satisfy the “reasonable steps” absent any red flags in such documents.

With respect to satisfying the net worth test (individual net worth, or joint with a spouse, of \$1 million, excluding the value of the purchaser’s primary residence), the new guidance provides that:

- Tax assessments, one of the suggested types of supporting documentation, older than three months will not satisfy the safe harbor, even though such documents are prepared only annually. However, the issuer could still satisfy the “reasonable steps” by relying on the tax assessment so long as it shows assets, after deducting liabilities, in excess of \$1 million absent any red flags in such tax assessment.

- A report from a foreign consumer credit reporting agency performing similar functions as a U.S. nationwide consumer reporting agency will not satisfy the safe harbor. However, an issuer could still rely on a foreign consumer credit report if, absent any red flags, it takes other reasonable steps to determine the purchaser's liabilities (such as a written representation) in determining net worth.

These interpretations demonstrate that the safe harbors were devised so that issuers would have the flexibility to adopt different approaches by requiring only that “reasonable steps” be taken, even outside the black letter of the safe harbors. What is reasonable will depend on the nature of the purchaser, the information that the issuer already has about the purchaser and the nature of the offering. Issuers should be reminded that having a person check a box or sign a form will not constitute “reasonable steps” absent other supporting information.

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