

SEC Issues Guidance on Accredited Investor Status

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On July 3, 2014, the SEC's Division of Corporation Finance issued six new compliance and disclosure interpretations (C&DIs) regarding determination of accredited investor status for purposes of Rule 506(c). C&DI 255.48 provides that, for purposes of determining whether the investor meets the income threshold, where annual income is not reported in U.S. dollars, the issuer may use either (a) the exchange rate in effect on the last day of the year or (b) the average exchange rate for that year. C&DI 255.49 clarifies that, for determination of whether the investor meets the net worth threshold, assets held jointly with a non-spouse may be included in the calculation to the extent of the investor's percentage ownership of the assets. The remaining C&DIs clarify two issuer safe harbors for taking reasonable steps to verify an investor's status as an accredited investor. **The C&DIs make clear that the safe harbors' requirements for specified documentation are to be narrowly construed. Nevertheless, they also state that issuers may still be able to rely on the alternative documentation described therein to conclude that a purchaser is an accredited investor, using a principles-based approach to verification.** Rule 506(c)(2)(ii)(A) provides a safe harbor for an issuer to verify that an individual investor is an accredited investor on the basis of annual income by reviewing any IRS form that reports the investor's income for the "two most recent years." C&DI 260.35 clarifies that an issuer cannot rely on this safe harbor if the IRS form for the most recently ended year is unavailable. Further, C&DI 260.36 explains that comparable foreign tax forms for the required years do not satisfy the safe harbor's requirements. Rule 506(c)(2)(ii)(B) provides a safe harbor for an issuer to verify that an investor is an accredited investor on the basis of net worth by reviewing specified documentation of the investor's assets and liabilities, including property tax assessments dated "within the prior three months." C&DI 260.37 clarifies that, for purposes of the safe harbor, an issuer would be unable to rely on a tax assessment that is dated more than three months earlier. Rule 506(c)(2)(ii)(B) also permits an issuer to rely on a consumer report from one of the "nationwide consumer reporting agencies" to verify a potential investor's liabilities. Pursuant to C&DI 260.38, however, an issuer could not rely on a consumer report from a non-U.S. consumer reporting agency for purposes of this safe harbor.

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