



NEW DOCUMENTATION REQUIREMENTS FOR DEBT UNDER SEC. 385

New documentation is required in order to treat certain related-party interests in a corporation as indebtedness rather than equity. The documentation does not guarantee debt treatment, but failure to have it will result in equity treatment. The expanded group instrument (EGI) rules apply only if:

1. The stock of any member of the group is traded on an established financial market; or
2. The total assets of the group exceed \$100 million on any applicable financial statement; or
3. The total revenue of the group exceeds \$50 million.

The documentation must include complete and (if relevant) executed copies of all instruments, agreements and other documents evidencing the material rights and obligations of the issuer and the holder of the debt. Any associated rights and obligations of other parties, such as guarantees and subordination agreements, must also be documented.

Debt Instrument

Written Document (within 30 Days)

- Unconditional Obligation to Pay
- A Sum Certain on Demand or at One or More Fixed Dates
- Creditor's Right to Enforce the Obligation (Default)
- Superior Rights to Shareholders

Reasonable Expectation of Ability to Repay (within 30 Days)

- Written Documentation
- Consider Other Obligations of the Issuer
- Financial Position of the Issuer
- Schedule Showing Ability of Issuer to Repay Obligation
 - Cash Flow Projections
 - Business Forecasts
 - Asset Appraisals
 - Financial Ratios Analysis and Comparison with Others

Actions Evidencing the Debtor-Creditor Relationship (within 120 Days)

- Documentation of Payment of Principal and Interest
- Actions in Event of Default and Similar Events

[Contact Moore Doeren Mayhew](#) to review your situation and discuss ways to strengthen your defenses in this growing area of review by the IRS. We believe the information in this fact sheet to be correct at the time of going to press, but we cannot accept any responsibility for any loss occasioned to any person as a result of action or refraining from action as a result of any item herein.