

# Accredited Investor Representation Letter for Rule 506(c) Offering

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An accredited investor (AI) representation letter for a Rule 506(c) offering designed to help the issuer satisfy the requirement that it take reasonable steps to verify that each purchaser is an AI. The letter includes a template third-party verification letter that can be used by broker-dealers, licensed attorneys, investment advisers and certified public accountants to confirm a purchaser's AI status. This Standard Document has integrated notes with important explanations and drafting tips.

## DRAFTING NOTE

### Read This Before Using Document

This is an accredited investor representation letter to be used by an issuer and its placement agent (if any) in an unregistered offering of securities under Rule 506(c) of Regulation D of the Securities Act.

Historically, the Rule 506 safe harbor from the registration requirements of the Securities Act prohibited the use of general solicitation and general advertising in private placements undertaken in reliance on that rule. However, effective September 23, 2013, the SEC amended Rule 506 to create a new subsection (c) that permits the use of general solicitation in a Rule 506(c) offering if:

- Each purchaser in the offering is an accredited investor (AI).
- The issuer takes reasonable steps to verify that each purchaser is an AI.
- All other terms and conditions of Rules 501, 502(a) and 502(d) are satisfied.

For more on these rule amendments, see *Practice Note, JOBS Act: Regulation D and Rule 144A General Solicitation Summary* (<http://us.practicallaw.com/1-518-7172>).

This accredited investor representation letter is designed to help an issuer satisfy the requirement in Rule 506(c) that it take reasonable steps to verify that each purchaser is an AI.



## The Reasonable Steps Verification Requirement under Rule 506(c)

To clarify the reasonable steps requirement, Rule 506(c) lists non-mandatory, non-exclusive verification methods for natural person purchasers. Under the rule, an issuer is deemed to have taken reasonable steps in verifying the AI status of a natural person if it uses one of these four methods:

- **Income.** If basing the determination of AI status on a purchaser's income:
  - review Internal Revenue Service (IRS) forms that report the purchaser's income for the past two years; and
  - obtain a written representation from the purchaser that it reasonably expects to reach the income level required to qualify as an AI in the current year.
- **Net worth.** If basing the determination of AI status on a purchaser's net worth:
  - review one or more specified documents dated within the past three months, including bank statements, brokerage statements and tax assessments (to confirm assets) and a report from one of the national consumer reporting agencies (to confirm liabilities); and
  - obtain a written representation from the purchaser that it has disclosed all liabilities necessary to make a net worth determination.
- **Third-party verification.** Obtain a written representation from an acceptable third party designated by the purchaser that the third party has taken reasonable steps to verify the purchaser's AI status within the past three months and has determined that the purchaser is an AI. Acceptable third parties for these purposes are limited to:
  - registered broker-dealers;
  - registered investment advisers;
  - licensed attorneys; and
  - certified public accountants.
- **Investor from an earlier Rule 506(b) offering of the issuer completed before September 23, 2013.** Permit an existing securityholder who had acquired the

issuer's securities in a Rule 506 offering before September 23, 2013 (which would necessarily be a Rule 506(b) offering), and who had qualified as an AI at that time, to participate in the Rule 506(c) offering if that securityholder affirmatively certifies its AI status at the time of sale in the Rule 506(c) offering.

*(Rule 506(c)(2)(ii).)*

In finalizing Rule 506(c), the SEC rejected a suggestion by some commentators that a purchaser's so-called "check the box" self-certification of AI status should, by itself, be sufficient to satisfy the AI verification requirement. While this type of self-certification is generally considered sufficient to confirm AI status in a Rule 506(b) offering, the SEC clearly rejected simple self-certification for Rule 506(c) offerings. In its release adopting the final rule amendments, the SEC stated:

"We do not believe that an issuer will have taken reasonable steps to verify accredited investor status if it, or those acting on its behalf, required only that a person check a box in a questionnaire or sign a form, absent other information about the purchaser indicating accredited investor status."

*(SEC Release No. 33-9415 (July 10, 2013) (Adopting Release).)*

### The Reasonable Steps Specified in Rule 506(c)(2)(ii) are Non-exclusive and Non-mandatory

While this Standard Document is designed to help an issuer satisfy the reasonable steps requirement under Rule 506(c)(2)(ii), practitioners should keep in mind that the specific steps set out in that provision are not **mandatory** and **not exclusive**.

The Adopting Release stated that whether an issuer's steps are reasonable under Rule 506(c) is a principles-based determination and that what is reasonable depends on the particular facts and circumstances of each purchaser and transaction. An issuer can still satisfy the reasonable steps requirement even if it does not use any of the specified safe harbor measures set out in Rule 506(c)(2)(ii).

For more information on the reasonable steps verification requirement, including the three factors an issuer should consider when weighing whether particular measures constitute reasonable steps, see *Practice Note, Section 4(a)(2) and Regulation D Private Placements: Guidance on Reasonable Steps to Verify Accredited Investor Status* (<http://us.practicallaw.com/8-382-6259#a666666>).

### Using this Accredited Investor Representation Letter

This Standard Document has three parts:

- **Cover letter.** The cover letter generically addresses prospective purchasers of the issuer's securities and explains:
  - the role of the accredited investor representation letter; and
  - that each purchaser must deliver a signed letter, together with any required supporting documentation.
- **Accredited investor representation letter.** The representation letter itself, which must be completed, signed by each prospective purchaser (whether natural person or legal entity) and delivered to the issuer or placement agent with the supporting documentation.
- **Third-party verification letter.** A form of third-party verification letter attached to the accredited investor representation letter as Annex A. The verification letter should be sent by the issuer or placement agent to a third party named by the purchaser (for example, a registered broker-dealer or licensed attorney) if that purchaser elects to rely on a third party to verify its status as an AI.

Once the issuer and its counsel have revised all three parts of this Standard Document to reflect the particular circumstances of the issuer and the offering, the letter (all three parts, as a package) should be sent to prospective purchasers as part of the full package of disclosure and subscription documents.

Where an accredited investor representation letter like this one is being used, the subscription agreement should make

clear that the issuer's acceptance of the prospective purchaser's subscription is conditioned upon, among other things, the issuer's review and acceptance of the purchaser's signed representation letter and all required supporting documentation.

### Use of a Placement Agent

This Standard Document includes bracketed optional references to a placement agent.

The role of a placement agent is to help the issuer structure an offering and find potential investors that are willing and able to invest in the issuer. The placement agent acts as an agent on behalf of the issuer but does not purchase the offered securities directly, either for its own account or for its clients. There is no requirement that an issuer use a placement agent.

If the issuer does intend to use a placement agent, the parties should decide up front which party will collect and review the signed investor representation letters and related supporting documentation to confirm each prospective purchaser's AI status. While the obligation to confirm AI status rests with the issuer, it may rely on other parties, including its placement agent, to assist with or perform the reasonable steps to verify. (However, because the obligation to take reasonable steps under Rule 506(c) is the issuer's, the issuer and its counsel should carefully supervise and review all AI verification work done by a placement agent.)

The issuer and its counsel should ensure that the bracketed optional language in this form is revised to reflect:

- The presence or absence of a placement agent.
- If a placement agent is present, whether it or the issuer is responsible for collecting and reviewing the investor representation letters and related supporting documentation.

Even if the placement agent is the party that collects and reviews the documents, the issuer should maintain (or arrange for the placement agent to maintain) records of the verification steps taken in case the

issuer is later asked to show that the offering satisfied all the requirements of the Rule 506(c) safe harbor. For a discussion of related privacy issues, see *Drafting Note, Compliance with Privacy Laws*.

### Other Resources for Regulation D Offerings

For additional resources for Regulation D offerings, see the *Regulation D Private Placement Toolkit* (<http://us.practicallaw.com/4-543-3925>), which includes:

- Practice Notes that provide an overview of Regulation D offerings, including the use of general solicitation.
- Standard Documents including a form engagement letter, a "bad actor" questionnaire, subscription agreements and a blue sky filing cover letter.
- Standard Clauses for issuer board resolutions and for form representations and covenants relating to general solicitation and bad actor disqualification.

### [COMPANY NAME]

To: Prospective purchasers of [NAME OF SECURITIES] (the "**Securities**") offered by [COMPANY NAME] (the "**Company**")

Re: **Requirement to Submit an Accredited Investor Representation Letter**

### DRAFTING NOTE

#### Cover Letter to the Accredited Investor Representation Letter

The main purpose of this cover letter is to briefly explain to prospective purchasers:

- The role of the accredited investor representation letter.

- That each purchaser must deliver a signed letter, together with any required supporting documentation, before it may invest in the offered securities.

The Securities are being sold only to "accredited investors" ("**Accredited Investors**") as defined in Rule 501(a) of Regulation D of the Securities Act of 1933, as amended (the "**Securities Act**"). The purpose of the attached Accredited Investor Representation Letter (the "**Letter**") is to collect information from you to determine whether you are an Accredited Investor and otherwise meet the suitability criteria established by the Company for investing in the Securities.

As part of verifying your status as an Accredited Investor, you may be asked to submit supporting documentation as described in the Letter. [It is possible that you were not required to submit this type of information in past offerings in which you have participated. However, the nature of this offering, together with changes made to Regulation D in September 2013, impose additional obligations on the Company to verify that each investor is in fact an Accredited Investor. Accordingly, you/You] must fully complete and sign the Letter, and deliver all required supporting documentation, before the Company will consider your proposed investment.

**DRAFTING NOTE****Prospective Investors Who May Have Participated in Rule 506 Offerings before September 23, 2013**

If any of the prospective investors may have participated in Rule 506 offerings that were completed before the September 23, 2013 effective date of new Rule 506(c), consider

including the two bracketed sentences in the second paragraph beginning "It is possible that you . . ." This language is meant to clarify that Rule 506(c) introduced new verification requirements for AI status that are more onerous than the check-the-box self-certifications historically used in traditional Rule 506(b) offerings.

**By submitting the Letter, you agree to provide all required supporting documentation within [NUMBER] days after the date that you submit the Letter.**

**DRAFTING NOTE****Deadline for Purchasers to Submit Their Supporting Documentation**

The issuer and its counsel should discuss and agree on the appropriate amount of time to give purchasers to submit all supporting documentation required under the investor representation letter. The number of days cited in this sentence must be the same as the number of days cited in the body of the representation letter (see *Drafting Note, Supporting Documentation*).

Factors to consider when setting this deadline include:

- **Number of days until the targeted closing date.** Because the issuer must ensure it will have enough time to review all supporting documentation, the sooner the targeted closing date, the shorter the amount of time that prospective purchasers should be given to submit that documentation. On the other hand, the more time until the anticipated

closing, the greater the risk that supporting documentation may become impermissibly outdated. For example, purchaser documents provided in support of the net worth test and independent third-party verification letters must be provided as of a date no more than three months before the closing (see *Drafting Note, Net Worth Documentation; Calculating Total Liabilities and Net Worth and Drafting Note, Date of Determination*).

- **Planned closing mechanics.** If the offering will have only one closing, the issuer should consider setting a relatively short deadline for supporting documentation to help avoid a situation in which one or more tardy investors could cause a delay in the scheduled closing. On the other hand, if the issuer is planning multiple closings, then there should be no harm in giving prospective investors more time to provide their supporting documentation.

All of your statements in the Letter and all required supporting documentation delivered by you or on your behalf in connection with the Letter (collectively, the "**Investor Information**") will be treated confidentially. However, you understand and agree that[, upon giving prior notice to you,] the Company [and [PLACEMENT AGENT NAME] (the "**Placement Agent**") may present the

Investor Information to such parties as [it/they] deem[s] appropriate to establish that the issuance and sale of the Securities (a) is exempt from the registration requirements of the Securities Act or (b) meets the requirements of applicable state securities laws[; **provided, however,** that the Company [and the Placement Agent] need not give prior notice before presenting the Investor Information to [its/their] legal, accounting and financial advisors].

## DRAFTING NOTE

### Confidentiality of Purchasers' Supporting Documentation; Blue Sky Laws

The bracketed language in the paragraph above and throughout the rest of this Standard Document must be revised to reflect whether the issuer is using a placement agent in the transaction.

### Confidentiality of Purchasers' Supporting Documentation

The second sentence in the paragraph above includes two optional bracketed phrases that would apply a prior notice requirement whenever the issuer (or the placement agent) shares Investor Information with anyone except its legal, accounting and financial advisors.

While retaining these two bracketed phrases would be purchaser-friendly, deleting them would give the issuer and the placement agent greater freedom to share Investor Information without having to provide purchasers with prior notice, as long as the purpose of that sharing is to establish that the offering "is exempt from the registration requirements of the Securities Act" or "meets the requirements of applicable state securities laws" (blue sky laws). In drafting this paragraph, the parties should take into account how sensitive they expect

prospective purchasers to be about the privacy of the Investor Information they provide.

The wording of this paragraph must be the same as the corresponding paragraph in the body of the representation letter (see *Drafting Note, Sharing of Investor Information; Compliance with Privacy Laws*).

For a discussion of related privacy issues, see *Drafting Note, Compliance with Privacy Laws*.

### Blue Sky Laws

The reference in clause (b) to "the requirements of applicable state securities laws" is meant to provide the issuer with the flexibility to coordinate with state securities regulators, if necessary, to establish the availability of applicable state-level securities law exemptions.

For more on the blue sky treatment of securities sold in a Rule 506 offering, see *Standard Document, Blue Sky Filing Cover Letter, Regulation D Rule 506 Offering: Drafting Note, NSMIA Preempts State Blue Sky Laws for Covered Securities* (<http://us.practicallaw.com/5-526-6228#a136170>) and *Drafting Note, Offering Exemptions under Individual States' Blue Sky Laws* (<http://us.practicallaw.com/5-526-6228#a833046>).

You understand that the Company [and the Placement Agent] will rely on your representations and other statements and documents included in the Investor Information in determining your status as an Accredited Investor, your suitability for investing in the Securities and whether to accept your subscription for the Securities.

The Company [and the Placement Agent] reserve[s] the right, in [its/their] sole discretion, to verify your status as an Accredited Investor using any other methods that [it/they] may deem acceptable from time to time. However, you should not expect that the Company [and the Placement Agent] will accept any other such method. The Company [and the Placement Agent] may refuse to accept your request for investment in the Securities for any reason or for no reason.

**DRAFTING NOTE****Investor Verification under Rule 506(c) is a Principles-based Determination**

The first paragraph above provides the issuer with the flexibility to verify prospective purchasers' AI status through methods other than those set out in this accredited investor representation letter.

As explained in the Adopting Release and in Rule 506(c) itself, the verification steps specified in Rule 506(c)(2)(ii) are neither mandatory nor exclusive. Instead, whether the steps an issuer takes are reasonable under Rule 506(c) is an objective, principles-based determination (see *Drafting Note, The Reasonable Steps Specified in Rule 506(c)(2)(ii) are Non-exclusive and Non-mandatory*).

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**Page Break to Set Off the Cover Letter**

A page break should be manually entered into the document immediately below the bracketed note above, "remainder of this page intentionally left blank."

## ACCREDITED INVESTOR REPRESENTATION LETTER

**DRAFTING NOTE****Accredited Investor Representation Letter**

The second and main part of this Standard Document is the accredited investor representation letter itself.

Before it may purchase securities in the Rule 506(c) offering, a prospective purchaser must complete the representation letter by:

- Choosing Part A or B of the letter and checking all required boxes and filling in all required information in that Part.
- Where appropriate, filling in the information required under the heading "Independent Third-Party Verification" (for purchasers who will rely on a third-party broker-dealer, licensed attorney or other party to verify their AI status).
- Signing the letter and filling in the

investor contact information (and, in certain cases, having the investor's spouse sign the letter (see *Drafting Note, Spouse's Signature and Contact Information*)).

- Delivering to the issuer or placement agent all required supporting documentation referred to in the representation letter.

The representation letter includes several italicized parenthetical notes to prospective purchasers with brief instructions on how to correctly fill out the letter.

In preparing this part of the Standard Document, the issuer and its counsel must properly tailor the letter's language to the circumstances of the proposed offering, including the bracketed optional and alternative language.

[COMPANY NAME/PLACEMENT AGENT NAME]

Attn: [NAME], [TITLE]

[ADDRESS]

**DRAFTING NOTE****Use of a Placement Agent**

If the issuer is using a placement agent, then the parties must decide whether the issuer and its counsel or the placement agent and its counsel will be responsible for collecting

and reviewing the investor representation letters and supporting documentation to confirm each purchaser's AI status. Once a decision is made, the address block and salutation of the representation letter should be revised accordingly.

Dear [COMPANY NAME] [and [PLACEMENT AGENT NAME]]:

I am submitting this Accredited Investor Representation Letter (the "**Letter**") in connection with the offering of [NAME OF SECURITIES] (the "**Securities**") of [COMPANY NAME] (the "**Company**"). I understand that the Securities are being sold only to accredited investors ("**Accredited Investors**") as defined in Rule 501(a) of Regulation D of the Securities Act of 1933, as amended (the "**Securities Act**").

I hereby represent and warrant to the Company [and [PLACEMENT AGENT NAME] (the "**Placement Agent**") that I qualify as an Accredited Investor on the basis that:

(You **must** choose Part A or B below and check the applicable boxes.)

A. I am a **NATURAL PERSON** and:

(An investor using this Part A must check box (1), (2), (3) or (4).)

- (1) **Income Test:** My individual income exceeded \$200,000 in each of the two most recent years or my joint income together with my spouse exceeded \$300,000 in each of those years;  
**and**  
 I reasonably expect to earn individual income of at least \$200,000 this year or joint income with my spouse of at least \$300,000 this year.

To support the representation in A(1) above:

(You **must** check box (a), (b) or (c).)

- (a) I will deliver to the [Company/Placement Agent] copies of Form W-2, Form 1099, Schedule K-1 of Form 1065 or a filed Form 1040 for each of the two most recent years showing my income or my joint income with my spouse as reported to the IRS for each of those years. I understand that I may redact such documents to avoid disclosing personally identifiable information, such as Social Security numbers, that is not necessary to confirm annual income.

**OR**

- (b) My salary or my joint salary with my spouse is publicly available information that has been reported in a document made available by the U.S. government or any state or political subdivision thereof (for example, reported in a filing with the Securities and Exchange Commission) and I will deliver to the [Company/Placement Agent] copies of such publicly available materials identifying me or me and my spouse by name and disclosing the relevant salary information for each of the two most recent years.

**OR**

- (c) In accordance with the procedures described below under the heading "Independent Third-Party Verification," I will assist in arranging for a registered broker-dealer, SEC-registered investment adviser, licensed attorney, or certified public accountant to deliver to the [Company/Placement Agent] written confirmation of my status as an Accredited Investor based on my individual income or my joint income together with my spouse.

**DRAFTING NOTE****Natural Person Income Test; Independent Third-Party Verification**

The representation in Part A(1)(a) tracks the requirements of Rule 506(c)(2)(ii)(A) and the income test in the definition of accredited investor at Rule 501(a)(6).

The representation in Part A(1)(b) is based on a statement in the Adopting Release that an issuer's review of a purchaser's compensation information included in a public filing (for example, an SEC filing) may,

in and of itself, constitute reasonable steps to verify the AI status of a natural person purchaser under Rule 506(c).

The representation in Part A(1)(c), together with the steps required under the heading "Independent Third-Party Verification" and in the Independent Third-Party Verification Letter at Annex A, track the requirements of Rule 506(c)(2)(ii)(C) (see *Drafting Note, Independent Third-Party Verification*). A parallel representation relating to the net worth test appears below in Part A(2)(b).

- [ ] (2) **Net Worth Test:** My individual net worth, or my joint net worth together with my spouse, exceeds \$1,000,000.

For these purposes, "net worth" means the excess of:

- total assets at fair market value (including all personal and real property, but excluding the estimated fair market value of my primary residence)
- minus**
- total liabilities.

For these purposes, "liabilities":

- exclude any mortgage or other debt secured by my primary residence in an amount of up to the estimated fair market value of that residence; but
- include any mortgage or other debt secured by my primary residence in an amount in excess of the estimated fair market value of that residence.

**DRAFTING NOTE****Natural Person Net Worth Test; Definitions of "Net Worth" and "Liabilities"**

The definition of net worth and the definition of liabilities used in this letter track the language set out in the definition of

accredited investor in Rule 501(a)(5). For more information, see *Practice Note, Section 4(a)(2) and Regulation D Private Placements: Accredited Investors* (<http://us.practicallaw.com/8-382-6259#a272559>).

I confirm that my total individual liabilities, or my total joint liabilities together with my spouse, do not exceed \$\_\_\_\_\_. I represent that all liabilities necessary to determine my individual net worth, or my joint net worth together with my spouse, for the purpose of determining my status as an Accredited Investor are reflected in the dollar amount in the preceding sentence.

**DRAFTING NOTE****Self-reporting of Purchaser's Total Liabilities**

When preparing this representation letter for distribution to prospective purchasers, the issuer and its counsel should ensure that the dollar amount in the first sentence of the preceding paragraph is left blank. This blank must be filled in by the prospective purchaser delivering the representation letter (assuming it fills out this Part A(2)).

The representation letter requires self-reporting of total individual or joint liabilities because the method prescribed in Rule 506(c) for measuring a purchaser's liabilities is likely to be under-inclusive. Specifically, though Rule 506(c)(2)(ii)(B)(2) provides that reviewing a consumer credit report is a reasonable means of confirming a

purchaser's total liabilities, there is a good chance the purchaser has liabilities that do not show up on its credit report (which may happen when a creditor does not report a debt to the consumer credit agencies, as in the case of debts owed to individuals or small businesses and some medical bills).

For these reasons, best practice is to require the purchaser to both:

- Deliver a copy of its consumer credit report (see Part A(2)(a)(ii) of the letter).
- Self-report its total liabilities, as required in the preceding paragraph of the letter.

The representation required of the purchaser in the second sentence of this paragraph tracks the language of Rule 506(c)(2)(ii)(B).

In addition, I confirm that I have not incurred any incremental mortgage or other debt secured by my primary residence in the 60 days preceding the date of this Letter, and I will not incur any incremental mortgage or other debt secured by my primary residence prior to the date of the closing for the sale of the Securities. I agree to promptly notify the [Company/Placement Agent] if, between the date of this Letter and the date of the closing for the sale of the Securities, I incur any incremental mortgage or other debt secured by my primary residence. **(NOTE: If the representation in the first sentence of this paragraph is untrue or becomes untrue prior to the date of the closing for the sale of the Securities, you may still be able to invest in the Securities. However, you must first contact the [Company/Placement Agent] for additional instructions on how to calculate your net worth for purposes of this offering.)**

**DRAFTING NOTE****Incremental Mortgage or Other Debt Secured by Primary Residence**

The purchaser representations in these two sentences reflect the method for calculating liabilities under the net worth test as described in the definition of accredited investor in Rule 501(a)(5)(i).

Under Rule 501(a)(5)(i), any incremental mortgage or other debt secured by the purchaser's primary residence that is incurred during the period beginning 60 days before the date of the sale of the securities is **included** in calculating the purchaser's liabilities (even though all other indebtedness secured by the primary residence, up to the fair market

value of that residence, is excluded). This provision is meant to prevent purchasers from borrowing against their homes for the purpose of investing in the offering.

While it is possible that a purchaser incurring this type of incremental debt could still satisfy the \$1 million net worth requirement, the representation letter applies a ban on any purchaser that incurs this type of debt. The ban is qualified, however, by the italicized parenthetical note, which instructs any purchaser in this situation to contact the issuer or placement agent for additional instructions. The effect of these two sentences taken together with the parenthetical is to simplify the liabilities calculation for the vast majority of investors without completely excluding investors who

may have incurred a mortgage in the past 60 days.

The issuer and its counsel should note that the provisions of Rule 501(a)(5)(i) that require the inclusion of any incremental mortgage or other debt secured by the purchaser's primary residence incurred during the period beginning 60 days before the date of the sale of the securities apply to **incremental** debt but not to debt resulting from the purchaser's initial acquisition of its primary residence during that 60-day period.

For more on the net worth test, including special provisions under Rule 501(a)(5)(ii) for rights offerings, see *Practice Note, Section 4(a)(2) and Regulation D Private Placements: Accredited Investors* (<http://us.practicallaw.com/8-382-6259#a272559>).

To support the representations in A(2) above:  
(You **must** check box (a) or (b).)

(a) I will deliver to the [Company/Placement Agent]:

(i) Copies of bank statements, brokerage statements, other statements of securities holdings, certificates of deposit, tax assessments and/or appraisal reports issued by independent third parties that show my individual assets or my joint assets together with my spouse;

**and**

(ii) A copy of a consumer credit report for me (or copies of consumer credit reports for me and my spouse) issued by TransUnion, EquiFax or Experian.

I understand that each document described in paragraphs (i) and (ii) above must be dated no earlier than three months prior to the date of the closing for the sale of the Securities. I understand that I may redact any of these documents to avoid disclosing personally identifiable information, such as Social Security numbers, that is not necessary to confirm net worth.

#### DRAFTING NOTE

##### Net Worth Documentation; Calculating Total Liabilities and Net Worth

The representation in Part A(2)(a) tracks the requirements of Rule 506(c)(2)(ii)(B) and the net worth test set out in the definition of accredited investor in Rule 501(a)(5).

Rule 506(c)(2)(ii)(B) requires that the net

worth-related documentation be dated "within the prior three months." This Part A(2)(a) tracks that requirement.

##### Calculating Total Liabilities and Net Worth

Even though this representation letter requires purchasers to self-report total

liabilities because of the risk that consumer credit agencies under-report liabilities, the letter still requires purchasers to deliver a credit report in line with Rule 506(c)(2)(ii)(B)(2) (see *Drafting Note, Self-reporting of Purchaser's Total Liabilities*).

When reviewing a purchaser's completed representation letter and supporting documentation to calculate net worth, the issuer must ensure that the purchaser's total assets exceed its total liabilities by no less than \$1 million. Total assets should be calculated as the sum of the fair market value of all assets shown in the supporting documentation provided by the purchaser under Part A(2)(a)(i). Total liabilities should be calculated as the **greater** of:

- The specific dollar amount of total liabilities self-reported by the purchaser in the paragraph immediately following the definition of liabilities.
- The sum of the liabilities shown in the consumer credit report provided by the purchaser under Part A(2)(a)(ii).

**However**, if a purchaser's self-reported total liabilities are lower than the sum of its liabilities shown on its credit report, the issuer should interpret this as a potential red flag. In that case, the issuer should discuss directly with the purchaser and probe the issuer further instead of simply accepting the credit report as an accurate portrayal of total liabilities.

#### OR

- (b) In accordance with the procedures described below under the heading "Independent Third-Party Verification," I will assist in arranging for a registered broker-dealer, SEC-registered investment adviser, licensed attorney, or certified public accountant to deliver to the [Company/ Placement Agent] written confirmation of my status as an Accredited Investor based on my individual net worth or my joint net worth together with my spouse.
- (3) **Company Insider:** I am a director[, / or] executive officer [or general partner] of the Company [or a director[, / or] executive officer [or general partner] of the general partner of the Company].

#### DRAFTING NOTE

##### Natural Person Company Insider

The representation in Part A(3) tracks the definition of accredited investor in Rule 501(a)(4), which describes the categories of insiders at a company who qualify as AIs for purposes of a Regulation D offering by

that company. The alternative bracketed language in Part A(3) should be revised to reflect the issuer's organizational structure and the particular circumstances of the Rule 506(c) offering.

- (4) **Existing securityholder from Rule 506(b) offering before September 23, 2013.** I am an existing securityholder of the Company and each of the following statements is true:

(An investor using this Part A(4) **must** check all four of the boxes (a) through (d) below.)

- (a) I have previously purchased securities issued by the Company in a Rule 506 offering as an Accredited Investor, and that offering was consummated before September 23, 2013;
- (b) I continue to hold the Company securities purchased in that Rule 506 offering;
- (c) I certify that I qualify as an Accredited Investor as of the date of this Letter; and
- (d) I undertake to promptly notify the [Company/Placement Agent] if I cease to qualify as an Accredited Investor at any time between the date of this Letter and the date of the closing for the sale of the Securities.

#### DRAFTING NOTE

##### Existing Securityholders from Rule 506(b) Offerings before September 23, 2013

The representations required of the prospective purchaser in boxes (a) through (c) in this Part A(4) track the requirements of Rule 506(c)(2)(ii)(D).

The undertaking required of the purchaser in box (d) is meant to give the issuer comfort that it may continue to rely on the

purchaser's Part A(4) representations up to the date the securities are sold to the purchaser, even if that sale is unexpectedly delayed.

However, because Rule 506(c)(2)(ii)(D) requires a natural person in this category to certify its AI status at the **time of sale** of the securities, the issuer and its counsel should always ensure that the subscription agreement includes a representation by the purchaser certifying its AI status.

B. I am a **LEGAL ENTITY** that is:

*(An investor using this Part B **must** check at least one box below. **NOTE:** An investor that checks any of boxes B(1) through B(12) must contact the [Company/Placement Agent] for additional instructions.)*

- (1) A bank as defined in Section 3(a)(2) of the Securities Act, or any savings and loan association or other institution as defined in Section 3(a)(5)(A) of the Securities Act, whether acting in its individual or fiduciary capacity.
- (2) A broker or dealer registered pursuant to Section 15 of the Securities Exchange Act of 1934, as amended.
- (3) An insurance company as defined in the Securities Act.
- (4) An investment company registered under the Investment Company Act of 1940 (the "**Investment Company Act**").
- (5) A business development company as defined in Section 2(a)(48) of the Investment Company Act.

- (6) A private business development company as defined in the Investment Advisors Act of 1940.
- (7) A Small Business Investment Company licensed by the U.S. Small Business Administration under Section 301(c) or 301(d) of the Small Business Investment Act of 1958.
- (8) An organization described in Section 501(c)(3) of the Internal Revenue Code, corporation, Massachusetts or similar business trust, or partnership, not formed for the specific purpose of acquiring the Securities, with total assets in excess of \$5,000,000.
- (9) A plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees, if such plan has total assets in excess of \$5,000,000.
- (10) An employee benefit plan within the meaning of Title I of the Employment Retirement Income Security Act of 1974, if the investment decision is made by a plan fiduciary, as defined in such Act, which is either a bank, savings and loan association, insurance company, or registered investment advisor, or if the employee benefit plan has total assets in excess of \$5,000,000, or if a self-directed plan, the investment decisions are made solely by persons that are accredited investors.
- (11) A trust with total assets in excess of \$5,000,000, not formed for the specific purpose of acquiring the Securities, whose purchase is directed by a "sophisticated" person.
- (12) An entity in which all of the equity owners are Accredited Investors.

**(NOTE:** *If box (12) is checked, each equity owner of the entity must individually complete and submit to the [Company/Placement Agent] its own copy of this Letter.*)

## DRAFTING NOTE

### Legal Entities

The representations in Part B track the categories of legal entities listed in the definition of accredited investor at Rule 501(a)(1), (2), (3), (7) and (8).

When evaluating a representation letter in which the purchaser has filled in Part B, the issuer and its counsel should keep in mind that the principles-based reasonable steps verification requirement of Rule 506(c) applies not only to natural persons but also to legal entities. For this reason, Part B includes an italicized parenthetical note at the beginning instructing a purchaser that checks any of the boxes in Part B to contact

the issuer or placement agent for additional guidance.

As explained in the Adopting Release, however, the issuer and its counsel should also recognize that the steps that will be deemed reasonable under Rule 506(c) will vary depending on the type of AI that the purchaser claims to be. The steps that may be reasonable to verify that an entity is an AI because it is a registered broker-dealer (for example, confirming the entity is listed on FINRA's BrokerCheck website) will necessarily differ from the steps that may be reasonable to verify whether a natural person qualifies as an AI.

**INDEPENDENT THIRD-PARTY VERIFICATION**

**(NOTE:** An investor should only complete this section if, in Part A(1)(c) or A(2)(b) above, you have agreed to arrange for a third party to deliver written confirmation of your status as an Accredited Investor.)

To verify my status as an Accredited Investor, I hereby request that the [Company/Placement Agent] or its agent contact:

Name: \_\_\_\_\_

Firm name: \_\_\_\_\_

Email: \_\_\_\_\_

Telephone: \_\_\_\_\_

Address: \_\_\_\_\_

- registered broker-dealer
- SEC-registered investment adviser
- licensed attorney
- certified public accountant

**(NOTE:** You must check one of the boxes above. If none are applicable, then you may not rely on independent third-party verification and you must instead directly submit to the [Company/Placement Agent] copies of the other supporting documentation described in Part A(1)(a), A(1)(b) or A(2)(a) above.)

I understand that the [Company/Placement Agent] will send to the person or firm named above a Verification Letter substantially in the form attached as Annex A. I have informed the person named above that the [Company/Placement Agent] will contact him or her to verify my status as an Accredited Investor and I hereby authorize the [Company/Placement Agent] and its agents to communicate with the person or firm named above to obtain such verification.

**I understand that I am solely responsible for paying any fees charged by the person or firm named above in connection with verifying my status as an Accredited Investor.**

**DRAFTING NOTE****Independent Third-Party Verification**

The issuer can satisfy Rule 506(c)(2)(ii)(C) for any purchaser who elects to rely on a third party to verify his or her status as an AI by requiring that purchaser to:

- Make the undertaking set out in Part A(1)(c) or A(2)(b).
- Fill in the required information under

the "Independent Third-Party Verification" heading.

- Have a qualified third party deliver to the issuer or placement agent a completed Independent Third-Party Verification Letter substantially in the form set out at Annex A to this letter.

For more information, see *Drafting Note, Form of Independent Third-Party Verification Letter*.

**SUPPORTING DOCUMENTATION**

Within [NUMBER] days after the date that I submit this Letter to the [Company/Placement Agent], I will deliver to the [Company/Placement Agent], or arrange to have delivered to the [Company/Placement Agent] on my behalf, all required supporting documentation.

All supporting documentation must be submitted to the [Company/Placement Agent] either electronically, in PDF form, to [EMAIL ADDRESS] or by mail or overnight service to [MAILING ADDRESS].

I understand that the Company [and the Placement Agent] may request additional supporting documentation from me in order to verify my status as an Accredited Investor and I hereby agree to promptly provide any such additional supporting documentation.

I further understand that, even if I complete and execute this Letter and provide all additional supporting documentation requested by the Company [and the Placement Agent], the Company [and the Placement Agent] may in [its/their] sole discretion refuse to accept my subscription for the Securities for any reason or for no reason.

#### DRAFTING NOTE

##### Supporting Documentation

The issuer and its counsel should discuss and agree on the appropriate amount of time purchasers will be given to submit all required supporting documentation. The number of days cited in this sentence must be the same as the number of days cited in the body of the cover letter. For a discussion of factors the issuer and its counsel should

consider when setting this time period, see *Drafting Note, Deadline for Purchasers to Submit Their Supporting Documentation*.

Counsel preparing this representation letter should also remember to fill in the email address and mailing address in the bracketed placeholders included above.

#### RELIANCE ON REPRESENTATIONS; INDEMNITY

I understand that the Company and its counsel [and the Placement Agent and its counsel] are relying upon my representations in the Letter and upon the supporting documentation to be delivered by me or on my behalf in connection with the Letter (collectively, the "**Investor Information**"). I agree to indemnify and hold harmless [the Company, its/the Company, the Placement Agent, their respective] directors, officers, [shareholders/members,] representatives and agents, and any person who controls any of the foregoing, against any and all loss, liability, claim, damage and expense (including [reasonable] attorneys' fees) arising out of or based upon any misstatement or omission in the Investor Information or any failure by me to comply with any covenant or agreement made by me in the Investor Information.

#### DRAFTING NOTE

##### Reliance on Purchaser Representations; Indemnity

Counsel preparing this letter must revise the bracketed alternative language in this paragraph relating to the presence of a placement agent and the organizational structure of the issuer and any placement agent.

The following parties will rely on each purchaser's representations and supporting documentation:

- The issuer, as part of the verification process it undertakes under Rule 506(c).
- The placement agent, if it is appointed by the issuer to assist with the verification process.

- Issuer's counsel and placement agent's counsel, in advising their clients on the availability of the Rule 506(c) exemption (regardless of whether they deliver a formal legal opinion (see *Practice Note, Legal Opinions in Securities Offerings: General Solicitation and Reasonable Verification* (<http://us.practicallaw.com/9-384-6469#a267934>))).

An issuer that launches a Rule 506(c) offering with general solicitation may not, if it ultimately fails to meet all the requirements of Rule 506(c), rely instead on the Section 4(a)(2) private placement exemption (a fall-back option that may be available for a more traditional private placement conducted under Rule 506(b)). This is because Section 4(a)(2) does not permit the use of general solicitation. Accordingly, a Rule 506(c) offering with general solicitation that fails to satisfy all requirements for the Rule 506(c) exemption will result in a violation of Section 5 of the Securities Act unless the issuer finds another available exemption or registers the offering with the SEC (see *Practice Note, Section 4(a)(2) and Regulation D Private Placements: Regulation D Safe Harbor Requirements* (<http://us.practicallaw.com/8-382-6259#a73659>)).

In light of the parties' reliance on the

purchasers' representations and supporting documentation, and given the serious implications of a non-compliant Rule 506(c) offering, each purchaser agrees to indemnify the issuer, placement agent and their respective control persons and agents for losses arising out of any:

- Misstatement or omission in its representation letter or supporting documentation.
- Failure by it to comply with any agreement or covenant in its letter or supporting documentation.

Though a non-compliant Rule 506(c) offering could have serious consequences, practitioners should note that the SEC clarified in the Adopting Release that the Rule 506(c) reasonable steps standard **does not** have any effect on the "reasonable belief" standard built in to the initial clause of the definition of accredited investor in Rule 501(a). In other words, as long as an issuer relying on Rule 506(c) takes reasonable steps to verify AI status and has a **reasonable belief** that a purchaser is an AI at the time it sells securities to the purchaser, the Rule 506(c) exemption would not be lost if in fact the purchaser ultimately is found not to be an AI (see *Question 260.06, Compliance and Disclosure Interpretations: Securities Act Rules*).

## **SHARING OF INVESTOR INFORMATION**

I understand and agree that[, upon giving prior notice to me,] the Company [and the Placement Agent] may present the Investor Information to such parties as [it/they] deem[s] appropriate to establish that the issuance and sale of the Securities (a) is exempt from the registration requirements of the Securities Act or (b) meets the requirements of applicable state securities laws[; **provided, however,** that the Company [and the Placement Agent] need not give prior notice before presenting the Investor Information to [its/their] legal, accounting and financial advisors].

### **DRAFTING NOTE**

#### **Sharing of Investor Information; Compliance with Privacy Laws**

This sentence includes two bracketed optional phrases that would apply a prior

notice requirement whenever the issuer or the placement agent shares Investor Information with anyone except their legal, accounting and financial advisors. The wording of this paragraph must be the same

as the corresponding paragraph in the cover letter (see *Drafting Note, Confidentiality of Purchasers' Supporting Documentation; Blue Sky Laws*).

### Compliance with Privacy Laws

Issuers and placement agents that collect supporting documentation from purchasers during a Rule 506(c) offering should ensure their compliance with state and federal restrictions governing the use and storage of personal information. Failure to maintain the privacy and security of purchasers' personal information could lead to monetary penalties, civil suits and reputational damage for the issuer, the placement agent or both.

Before collecting supporting documentation from prospective purchasers in a Rule 506(c) offering, issuers and placement agents should adopt privacy and data security policies that, among other things:

- Establish encryption and other requirements designed to ensure the security of all personal information.
- Identify and limit the employees who may access purchasers' supporting documentation.
- Restrict the sharing of purchasers' supporting documentation to specified parties necessary to help confirm that the offering is exempt from Securities Act registration and, if applicable, meets the requirements of individual blue sky law exemptions.
- Clarify the document retention policies that apply to purchasers' supporting documentation.

For resources to assist counsel in creating and implementing privacy and data security compliance programs, see *Practical Law Intellectual Property & Technology, Privacy and Data Security Toolkit* (<http://us.practicallaw.com/8-500-3810>).

### **INVESTOR'S SIGNATURE AND CONTACT INFORMATION**

Date: \_\_\_\_\_

Name: \_\_\_\_\_

Signature: \_\_\_\_\_

Email address: \_\_\_\_\_

Mailing address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Telephone number: \_\_\_\_\_

### **SPOUSE'S SIGNATURE AND CONTACT INFORMATION**

**(NOTE:** The investor's spouse need only sign this letter if the investor is a natural person proving its accredited investor status based on **joint income** or **joint net worth** with the spouse under Part A(1)(a) or Part A(2)(a). A spouse who signs this letter makes all representations set out in this letter, including those relating to joint income or joint net worth, as applicable.)

Date: \_\_\_\_\_

Name: \_\_\_\_\_

Signature: \_\_\_\_\_

Email address: \_\_\_\_\_

Mailing address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Telephone number: \_\_\_\_\_

#### DRAFTING NOTE

##### Spouse's Signature and Contact Information

The requirement to have the spouse sign the accredited investor representation letter tracks Instructions 2 and 3 to paragraph (c)(2)(ii)(A) through (D) of Rule 506. Those instructions require written representations

from both the investor and his or her spouse where the investor is proving its AI status based on either:

- Joint income under Rule 506(c)(2)(ii)(A).
- Joint net worth under Rule 506(c)(2)(ii)(B).

**Annex A: Form of Independent Third-Party Verification Letter**

[COMPANY LETTERHEAD/PLACEMENT AGENT LETTERHEAD]

**DRAFTING NOTE****Form of Independent Third-Party Verification Letter**

Where a purchaser opts to have a designated third party verify its status as an AI, that third party can do so by either:

- Completing, counter-signing and submitting to the issuer or placement agent an independent third-party verification letter in the form set out in this Annex A. (In this case, a necessary intermediate step is for the issuer to prepare, sign and send a verification letter to the designated third party for it to counter-sign.)
- Completing, signing and submitting its own form of verification letter that includes substantially the same content as the form set out in this Annex A (see the italicized parenthetical note at the end of Annex A and *Drafting Note, Alternative Forms of Third-Party Verification*).

When preparing the full accredited investor representation letter package (that is, the cover letter, the representation letter and this form of third-party verification letter) for initial distribution to prospective purchasers, the issuer and its counsel should keep in mind that this Annex A is only a form. The person preparing Annex A must therefore be careful to distinguish between bracketed language that must be revised by the issuer and its counsel:

- Before distributing this form to prospective purchasers, including the placeholders for:
  - the issuer's or placement agent's letterhead;
  - the issuer's legal name at the end of the first paragraph;
  - "the Company" or the placement agent's name, the appropriate email address and appropriate mailing address in the last full paragraph before the signature block;
  - the issuer's or placement agent's name in the signature block; and
  - "the Company" or the placements agent's name in the italicized parenthetical note at the end.
- At a later stage, when this form is used as a template to create multiple individualized verification letters to be sent to each designated third-party verifier. At that stage, the issuer and its counsel must revise the remaining bracketed language to correctly reflect the specific details of each relevant purchaser and its designated third-party verifier (for example, the name and address of the independent third-party verifier in the address block, the name of the prospective investor and other bracketed items).

[FIRM NAME OR INDIVIDUAL NAME OF INDEPENDENT THIRD-PARTY]

[ADDRESS FOR INDEPENDENT THIRD-PARTY]

Dear [Mr./Mrs.] [NAME]:

Your client, [NAME OF PROSPECTIVE INVESTOR] (the "**Prospective Investor**"), has asked us to contact you directly to request that you verify the Prospective Investor's status as an "accredited investor" as that term is defined in Rule 501(a) of Regulation D of the Securities Act of 1933, as amended (an "**Accredited Investor**"). We are requesting this verification to ensure that the Prospective Investor is eligible to participate in a placement of securities (the "**Offering**") by [COMPANY NAME] (the "**Company**") that is only open to Accredited Investors.

Based on representations made to us by the Prospective Investor, we understand that you are [a registered broker-dealer/an SEC-registered investment adviser/a licensed attorney/a certified public accountant]. We further understand that the Prospective Investor qualifies as an Accredited Investor based on [his/her] [income/net worth] (calculated pursuant to Rule 501(a) of Regulation D), and that you have undertaken an independent analysis of the Prospective Investor's status as an Accredited Investor at least once during the three-month period preceding the date of this letter.

Kindly check box (a) or (b) below and complete the blank, as applicable:

(a) I am [a registered broker-dealer/an SEC-registered investment adviser/a licensed attorney in good standing under the laws of the jurisdictions in which I am admitted to practice/a certified public accountant duly registered and in good standing under the laws of the jurisdiction of my residence or principal office]. I have taken reasonable steps to verify that the Prospective Investor is an Accredited Investor based on [his/her] [income/net worth] (whether individual or together with [his/her] spouse) and, based on those steps, I have determined that the Prospective Investor is an Accredited Investor. The most recent date as of which I have made such determination is \_\_\_\_\_. To my knowledge after reasonable investigation, no facts, circumstances or events have arisen after that date that lead me to believe that the Prospective Investor has ceased to be an Accredited Investor. I acknowledge that the Company will rely on this letter in determining the Prospective Investor's eligibility to participate in the Offering and I consent to such reliance.

#### DRAFTING NOTE

##### Date of Determination

The issuer and its counsel should keep in mind the timing aspect of Rule 506(c)(2)(ii) (C) when:

- Deciding when to send verification letters to designated third-party verifiers.
- Reviewing a counter-signed verification letter to confirm a specific purchaser's AI status.

Specifically, the rule requires that the third party confirm that it has taken reasonable steps to verify the purchaser's AI status

"within the prior three months." This is reflected in the representation letter by the purchaser's statement that its designated third party has reviewed or will review the purchaser's financial status during the three-month period ending on the date of the closing for the sale of the securities.

When reviewing a counter-signed verification letter, the issuer should ensure that the date of determination in the second-to-last sentence in this paragraph falls within the required three-month window.

(b) I cannot confirm the Prospective Investor's status as an Accredited Investor.

Once completed, please sign below and submit a copy of the countersigned letter to [the Company/[PLACEMENT AGENT NAME]] by (a) emailing it in PDF form to [EMAIL ADDRESS] or (b) mailing it to [MAILING ADDRESS].

Sincerely,

[COMPANY NAME/PLACEMENT AGENT NAME]

By: \_\_\_\_\_

Name:

Title:

Date:

Countersigned:

[FIRM NAME]

By: \_\_\_\_\_

Name:

Title:

Date:

cc: [NAME OF PROSPECTIVE INVESTOR]

**(NOTE:** *If you prefer to use a different form of documentation to confirm the Prospective Investor's status as an Accredited Investor, please submit your alternative form of verification to [the Company/[PLACEMENT AGENT NAME]] using one of the methods listed in the last full paragraph above. Note that if you use a different form of verification, it must be signed and dated and include, at a minimum: (a) confirmation of your status as [a registered broker-dealer/an SEC-registered investment adviser/a licensed attorney in good standing under the laws of the jurisdictions in which you are admitted to practice/a certified public accountant duly registered and in good standing under the laws of the jurisdiction of your residence or principal office]; (b) a statement that you have taken reasonable steps to verify that the Prospective Investor qualifies as an Accredited Investor based on [his/her] [income/net worth]; (c) a statement that, based on those steps, you have determined that the Prospective Investor is an Accredited Investor; (d) the date as of which you most recently made that determination; (e) a statement that, to your knowledge after reasonable investigation, no facts, circumstances or events have arisen after that date that lead you to believe that the Prospective Investor has ceased to be an Accredited Investor; and (f) an acknowledgement that the Company will rely on your letter in determining the Prospective Investor's eligibility to participate in the Offering and your consent to such reliance.*)

## DRAFTING NOTE

### Alternative Forms of Third-Party Verification

As market practice for Rule 506(c) offerings develops, third-party service providers may prefer to use their own standard form verification letters. The italicized parenthetical note to third-party verifiers simultaneously:

- Affirms that a verifier may submit an alternative form of verification instead of using the verification letter exemplified by the form in Annex A.
- Puts verifiers on notice that minimum substantive requirements apply to any alternative forms of verification they may submit.

The minimum substantive requirements listed in clauses (a) through (f) track the requirements of Rule 506(c)(2)(ii)(C).

Issuers should not accept any alternative form of verification that does not satisfy each of the requirements listed in clauses (a) through (f).

### SIFMA Guidance for Broker-dealers and Investment Advisers on Third-Party Verification under Rule 506(c)

On June 23, 2014, the Securities Industry and Financial Markets Association (SIFMA) published guidance to assist registered broker-dealers and investment advisors in satisfying the reasonable steps requirement under the third-party verification safe harbor in Rule 506(c)(2)(ii)(C).

The guidance describes specific verification methods that SIFMA believes can constitute reasonable steps to verify AI status under Rule 506(c)(2)(ii)(C) and includes:

- A form of questionnaire that a natural person can complete and submit to a broker-dealer or investment adviser when requesting third-party verification of his or her AI status.
- A form of written confirmation that the broker-dealer or investment adviser can deliver to the issuer to verify the natural person's AI status.

SIFMA's guidance has not been approved by the SEC. Accordingly, compliance with the verification methods described in SIFMA's guidance will not necessarily be deemed "reasonable steps" under the Rule 506(c)(2)(ii)(C) safe harbor.

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