ETHICAL CONSIDERATION FOR PRE-DESIGNATED INVESTORS' COUNSEL IN PRE-DOCUMENTED (Non-Rule 144A) PRIVATE PLACEMENTS

Introduction:

In 2006 the American College of Investment Counsel ("ACIC") formed an ad hoc committee to study the practices of Pre-Designated Counsel. The Committee developed a model, in the form of the *Guiding Principles*, to align the activities of Pre-Designated Counsel in the pre-documented (non-Rule 144A) private placement market with the business expectations of the participants and related ethical requirements. As counsel to the Committee, we endeavored to align their recommendations with the rules of professional conduct for lawyers. As a result of those efforts, in 2006 an ethics memorandum was prepared that addressed the principal issues and interests as we see them. In 2017, the ACIC sought an update to this memorandum in light of changes in the law and the evolution of the practices within the industry. This draft includes those updates.

In this memorandum: the Issuer and Investment Banker/Placement Agent are collectively referred to as "Issuer"; "Investor-Clients" refers to the prospective and actual investors after they become clients of the Pre-Designated Counsel. This topic is discussed further below.

The issues in this memorandum are primarily discussed in terms of the ABA Model Rules of Professional Conduct ("MRPC"), on which the New York Rules of Professional Conduct are based, and the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000) ("RESTATEMENT").

Preliminary Matters

Our recommendations to the Committee are based upon our work as professional responsibility lawyers. We do not, and have not been asked to, give recommendations as to the business aspects of these practices. Our recommendations are made in the interests of the lawyers acting as Pre-Designated Counsel and their clients but are necessarily general in nature and neither reflect nor create an attorney-client relationship between our firm and one or more Pre-Designated Counsel, Investor-Clients.

The *Guiding Principles* and any conflict disclosure and waiver letter ("**Engagement and Conflict Disclosure Letter**") are not without risk. As a general principle, the types of limitations that are proposed in this model are enforceable only where reasonable and necessary. Further, even for conflicts that can be waived (and not all can be), full disclosure must occur for any such waiver to become effective.

Finally, Pre-Designated Counsel should be advised not to place too much reliance on the sophistication of the parties. None of what is recommended in the *Guiding Principles* or this memorandum would be possible without an extremely high degree of client sophistication. *Cf.* N.Y. City Op. 2006-01 (2006). Nevertheless, it can be extremely unwise for lawyers to assume that even their most sophisticated clients fully understand the implications of all lawyer conflicts. In addition, no amount of sophistication wholly obviates a lawyer's duties of disclosure. *See, e.g.*, *Financial General Bankshares v. Metzger*, 523 F.Supp. 744, 760 (D. D.C. 1981) (attorney

PRELIMINARY DRAFT UPDATE

breached duty to highly sophisticated clients despite his claim that he "did everything but stand on the walls" to disclose the adverse representation when those disclosures omitted critical details about the representations).

A. TRIGGERING THE ATTORNEY-CLIENT RELATIONSHIP

The successful use of the Pre-Designated Counsel model turns in significant part on the clarity of the relationship between the parties. Pre-Designated Counsel's relationships with the Issuer and investors must be clearly defined at each stage.

A.1 Relevant Rules:

A.1.1 Restatement Third of the Law Governing Lawyers (2000) ("Restatement") Section 14 Introductory Note provides in relevant part:

> **A fundamental distinction is involved between clients, to whom lawyers owe many duties, and nonclients, to whom lawyers owe few duties. It therefore may be vital to know when someone is a client and when not.**
>
> *** * * * ***

A.1.2 Restatement Section 14 Formation of a Client-Lawyer Relationship provides in relevant part:

> **A relationship of client and lawyer arises when:**
>
> **(1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either**
>
> **(a) the lawyer manifests to the person consent to do so; or**
>
> **(b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services.**
>
> *** * * * ***

A.1.3 Restatement Section 16 A Lawyer's Duties to a Client—In General provides in relevant part:

> **[A] lawyer must * * ***
>
> **(1) proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation;**
>
> **(2) act with reasonable competence and diligence;**

PRELIMINARY DRAFT UPDATE

(3) comply with obligations concerning the client's confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client; and

(4) fulfill valid contractual obligations to the client.

A.2 The Issuer:

Pre-Designated Counsel will often discuss the proposed transaction and draft documents with the Issuer before Investor-Clients have been identified. Given that the Issuer pays Pre-Designated Counsel's legal fees, this presents a material risk that, in the absence of a clear statement to the contrary, a court or disciplinary body could infer an attorney-client relationship between the Issuer and Pre-Designated Counsel in the particular transaction. *See, e.g., Nelson v. Nationwide Mortgage Corporation*, 659 F.Supp 611 (DDC 1987) (attorney answered questions of a non-client party during a transaction without clarifying that he did not represent that party; the court inferred an attorney-client relationship and held the attorney liable for malpractice); *In re Baer*, 298 Or. 29, 688 P.2d 1324 (1984) (attorney disciplined where court found that attorney represented both buyer and seller to real estate transaction even though attorney only intended to represent buyer).

A.3 Presentation of the Issue in the Guiding Principles as to the Issuer:

Section 3.1 of the *Guiding Principles* provides that Pre-Designated Counsel should deliver a fee letter to the Issuer setting forth the terms of their fee arrangement but also stating that Pre-Designated Counsel will act solely on the behalf of the Investors. This disclosure need not take the form of a formal, separate letter, but should be in writing and available for review by Investor-Clients. Likewise, the sample form Engagement and Conflict Disclosure Letter that we have prepared and attached as Appendix B to the *Guiding Principles* clearly identifies Investor-Clients as clients and disclaims any representation of the Issuer in the transaction at issue.

Section 4.5 of the *Guiding Principles* confirms these roles in noting that the Issuer should never receive a copy of the "issues memorandum" and that information shared among Investor-Clients is treated as confidential vis a vis the Issuer.

A.4 The Investor:

A.4.1 Except as otherwise agreed through one or more waiver letters, full duties of diligence, confidentiality and undivided loyalty are owed to each Investor-Client as soon as an attorney-client relationship is formed. Any unwaived conflicts existing at that moment expose the lawyer to disciplinary and civil liability. It is therefore important to identify clearly the moment that Pre-Designated Counsel's representation of an Investor-Client begins. In order to satisfy the requirements of the respective conflict rules, an Engagement and Conflict Disclosure Letter must be delivered and its terms confirmed by the Investor-Client at the outset of the formation of this relationship.

A.4.2 Sections 5.1 and 5.2 of the Guiding Principles set out Pre-Designated Counsel's duty to inform Investor-Clients in the pre-circle period. In general, the attorney client relationship

PRELIMINARY DRAFT UPDATE

exists at the point an issues memorandum is delivered to the Investor-Client. Pre-Designated Counsel should transmit the Engagement and Conflict Disclosure Letter and receive confirmation of its terms prior to delivering the memorandum or other provide substantive legal advice.

A.4.3 As section 5.2 notes, Investor-Clients are competitors, but that does not alter Pre-Designated Counsel's duty to inform its clients of material issues (in other words, issues raised by more than one Investor-Client that are relevant to all Investor-Clients) relating to the transaction. If material events or information have developed that are not included in the issues memorandum, Pre-Designated Counsel must confirm that the Investor-Clients have been fully informed of that information. Pre-Designated Counsel who fails to inform Investor-Clients fully about important matters will be in breach of his or her ethical and fiduciary duties to the client. *See* Model Rule 1.4; *Spector v Mermelstein*, 361 F.Supp. 30 (SDNY 1972) (defendant attorney breached fiduciary duty owed to client in a loan transaction by failing to provide all necessary information in his possession and failing to inquire further when it appeared that his client was not being fully informed by others).

A.4.4 Sections 5.1 and 5.2 of the *Guiding Principles* describe how information should be handled among the Investor-Client group. Occasionally, a member of an Investor-Client group will raise a point regarding the deal that could or should be shared with others. Pre-Designated Counsel should exercise professional judgment on whether the point is of such significance that it should be raised with other Investor-Clients in the group or whether the point does not rise to a consequential level. In all cases, Pre-Designated Counsel should disclose non-competitive points raised by other Investor-Clients upon the request of others in the investor group. And whenever disclosure is called for, it should be made without attribution.

A.5 Presentation of the Issue in the *Guiding Principles* as it relates to the Investor-Client:

A.5.1 Section 2.3 of the *Guiding Principles* provides that an attorney-client relationship with respect to a particular transaction will generally come into existence (and in our opinion should only come into existence) at the point at which the prospective Investor-Client confirms, in writing, a willingness to be represented by Pre-Designated Counsel subject to terms and conditions acceptable to both Pre-Designated Counsel and the prospective Investor-Client. The attorney-client relationship may form either before or after circle, but typically will form pre-circle as the Investor-Client is evaluating and bidding on the deal.

We caution, however, that an attorney-client relationship may be found to exist even without a writing or before acceptance of the terms of an Engagement and Conflict Disclosure Letter if a lawyer provides legal advice to a party that subjectively and reasonably believes itself to be a client. *See Atlas Partners Limited II, v. Brumberg, Mackey & Wall, PLC* 2006 WL 42332 (W.D.Va 2006) (setting out analysis to determine the existence of an attorney client relationship in a transaction setting where lawyer denied representation of particular investor entity; court found relationship and allowed malpractice action against firm). *See also, Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 (7th Cir.), cert. denied, 439 WL U.S. 955, 99 S.Ct. 353, 58 L.Ed.2d 346 (1978); ("the fiduciary relationship existing between lawyer and client extends to preliminary consultation by a prospective client with a view to retention of the lawyer, even when actual employment does not result."); *Seeley v. Seeley*, 129 A.D.2d 625, 627, 514 N.Y.S.2d 110,

PRELIMINARY DRAFT UPDATE

112 (1987) (same). The expectation of many institutional investors (and therefore their subjective belief) as to the timing of the onset of the attorney-client relationship is noted in the introductory comments to the *Guiding Principles*. If an attorney-client relationship is formed with one or more Investor-Clients and without any agreed-upon conflicts waivers or other limitations on the scope of the representation, Pre-Designated Counsel would presumably owe that client the full range of attorney-client duties, including but not limited to, the duty of undivided loyalty.

The scope and terms of the attorney-client relationship will be decided in large part by the subjective beliefs of the Investor-Client. That is why we recommend in the strongest terms possible that Pre-Designated Counsel be diligent in requiring the acceptance of the terms of the Engagement and Conflict Disclosure Letter before privileged communication or work begins for an individual Investor-Client and that any material divergence from the Guiding Principles (upon which the Investor-Clients will rely) be clearly set out by Pre-Designated Counsel. [1] Diverging from the practices set out in this section exposes Pre-Designated Counsel to the risk of unintentionally creating a broad attorney-client relationship without the scope limitations and conflict disclosures that are required under the circumstances.

A.5.2 Section 4.5 of the *Guiding Principles* provides that Pre-Designated Counsel should prepare an issues memorandum regarding the key points in a transaction, including work that was done up to that point that is material to the transaction. Consistent with the careful definition of the attorney-client relationship, protection of the attorney-client privilege and proper clarification of the parties' respective rights and obligations, the issues memorandum should be provided to the Investor-Client only after an Engagement and Conflict Disclosure Letter has been transmitted and its terms accepted. In our opinion, the establishment of an attorney-client relationship without the use of an Engagement and Conflict Disclosure Letter or a similar letter with equivalent content poses grave potential risks for both attorneys and clients.

A.5.3 In each instance, an Engagement and Conflict Disclosure Letter should expressly set out when the attorney-client relationship begins and ends. Typically, Pre-Designated Counsel's engagement with each Investor-Client will end at closing. Occasionally an Issuer will present amendments after closing and request that Pre-Designated Counsel re-engage for the purpose of representing the Investors with respect to those amendments. Pre-Designated Counsel must evaluate the positions of each of the Investor-Clients to determine whether their interests remain aligned such that Pre-Designated Counsel may continue to represent them as a group. This conclusion will generally be based on whether the proposed amendment will effect each investor equally or whether the proposed amendment will benefit some to the detriment of others. If Pre-Designated Counsel concludes that the group is similarly situated in the amendment process and there is no conflict, they should then seek written confirmation from each Investor-Client that the terms of the original Engagement and Conflict Disclosure remain.

B. CONFLICTS OF INTEREST AMONG CO-CLIENTS

[1] Although exigent circumstances may sometimes make it necessary or appropriate to begin work before a conflicts waiver is obtained, exigency is unlikely to be found in most transactional circumstances. *Cf. In re Jeffrey*, 321 Or. 360, 371, 898 P.2d 752 (1995) ("consent" document signed by clients "fell short in form because the written consent was not obtained at the time the accused undertook the dual representation").

PRELIMINARY DRAFT TO DATE

B.1 Relevant Rules:

B.1.1 MRPC Rule 1.7: Conflict of Interest: Current Clients provides in pertinent part:

> **(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:**
>
> **(1) the representation of one client will be directly adverse to another client; or**
>
> **(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.**

B.1.2 MRPC 1.1 Competence provides:

> **A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.**

B.1.3 MRPC 1.2 Diligence Provides:

> **A lawyer shall act with reasonable diligence and promptness in representing a client.**

B.1.4 MRPC 1.6 Confidentiality of Information provides in relevant part:

> **(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).**

B.1.5 At Common Law (Confidentiality amongst co-clients):

> **Clients who are represented by a common lawyer in a common defense or shared interests may generally assert attorney-client privilege as against the outside world, but generally may not do so as between themselves. *In re Regents of University of California,* 101 F.3d 1386 (Fed. Cir. 1996).**

B.1.6 Pre-Designated Counsel represents the group of Investor-Clients insofar as they have a common interest in evaluating and deciding whether to make an investment in a particular private placement. The interests of the Investor-Clients may well be in conflict by the basic nature of competition, and this is almost certainly so when there is an oversubscribed offering or a dispute over potential terms. The rules of professional conduct prohibit a lawyer from undertaking such a

PRELIMINARY DRAFT UPDATE

group representation in the absence of waivers obtained after full disclosure. If, in fact, the dispute or disagreement becomes too serious, a lawyer may be required to withdraw.

B.1.7 Except as expressly and permissibly modified, a lawyer's duty of undivided loyalty or zealous advocacy runs fully to each client. A lawyer is required to keep each clients informed of all information relevant to the representation. Equally and at the same time, a lawyer must maintain the confidences of all clients. Where there is competition between Investor-Clients or any type of divergence of interests, the duties owed to each Investor-Client can be inconsistent. In order to advance the interests of one Investor-Client, the lawyer would normally be required to disclose the strategy of another Investor-Client either to the other Investor-Client or to the Issuer. In this event, non-waiveable conflicts of interest could arise, in which case the lawyer must withdraw from representation of all parties. Without a careful definition of their the relationships in an adequate Engagement and Conflict Disclosure Letter, it is not permissible for one lawyer or firm to represent competing Investors in a single offering. Insofar as material hereto, a conflict for one lawyer at a firm is a conflict for all lawyers at the firm. *See* MRPC 1.10.

B.1.8 A client may consent to a limitation of the attorney-client relationship if reasonable and necessary under the circumstances. *See* N.Y. City Op. 2004-02 (2004); ABA Formal Op. 93-372 (1993); RESTATEMENT Section 19. Based upon our understanding of the pre-documented (non-Rule 144A) private placement market and the *Guiding Principles*, this is or at least should be considered such a circumstance. Success of limitations as significant as those required here will require that a detailed Engagement and Conflict Disclosure Letter be provided and confirmed before the attorney-client relationship is formed and before Pre-Designated Counsel should do any work for an individual Investor-Client.

B.1.9 Pre-Designated Counsel may act as a conduit for questions and good faith negotiation for terms that are in the best interest of all of the Investor-Clients and upon which they concur. Investor-Clients must explicitly agree that Pre-Designated Counsel is under no obligation to assist them in competition with each other. Investor-Clients must further agree that Pre-Designated Counsel's duty of zealous advocacy and undivided loyalty is limited by the attorney's duties to other Investor-Clients.

B.2 Presentation of the Issue in the Guiding Principles:

B.2.1 Competition and Confidentiality: Section 1.9 of the *Guiding Principles* notes that Pre-Designated Counsel's clients are competitors and that the lawyer should take care not to pass on information specific to any other client. The footnote to this section further provides that insofar as this requirement is inconsistent with a lawyer's duty of zealous advocacy and duty to keep clients fully informed, the representation must be limited in an Engagement and Conflict Disclosure Letter.

B.2.2 Conflicts of Interest Between Investor-Clients Section 5.1 and 6.5 of the *Guiding Principles* describes how Pre-Designated Counsel should resolve conflicts between multiple Investor-Clients. In the event of a dispute or disagreement between Investor-Clients on a particular point, Pre-Designated Counsel should make reasonable efforts with the Investor-Clients to seek consensus. In the event that consensus is not reached, Pre-Designated Counsel must not advocate for the interests of one Investor-Client as against another but may close a transaction for those

PRELIMINARY DRAFT UPDATE

Investor-Clients willing to do so on mutually acceptable terms. This approach to multiple client conflicts must be set forth in the Engagement and Conflict Disclosure Letter and accepted by the Investor before the beginning of the representation

B.2.3 In the event Pre-Designated Counsel is re-engaged to represent an Investor-Client group on an amendment or other post-closing matter, the deal terms may govern how decision making is made by the Investor group. In this regard, the Investors may disagree among themselves in discussion, but the governance terms in the deal documents will determine voting rights on those issues and, in turn, the way in which consensus is reached and direction may ultimately be given to Pre-Designated Counsel's efforts on the group's behalf. In the event that an Investor nevertheless directs Pre-Designated Counsel to act contrary to the group's position, Pre-Designated counsel should identify that direction as a conflict and withdraw from the continued representation of the dissenting Investor.

C. CONFLICTS OF INTERESTS WITH THE ISSUER

C.1 Relevant Rules:

C.1.1 A lawyer is prohibited from representing a client in a matter adverse to a current client of the lawyer or the lawyer's firm.

MRPC 1.7 Conflict of Interest: Current Clients provides in relevant part:

> **(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:**
>
> > **(1) the representation of one client will be directly adverse to another client; or**
> >
> > **(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client * * *.**
>
> **(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:**
>
> > **(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;**
> >
> > **(2) the representation is not prohibited by law;**
> >
> > **(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and**

PRELIMINARY DRAFT UPDATE

> **(4) each affected client gives informed consent, confirmed in writing.**

Pursuant to MRPC 1.7, a lawyer may not, without a waiver, represent an Investor-Client if the lawyer or his or her firm simultaneously represents the Issuer in any matter. *See International Business Machines Corporation v. Levin*, 579 F.2d 271, 281-82 (3d. Cir. 1978) (even in a sophisticated business setting, compliance with the rule requires adequate disclosure and consent from clients who are represented by the same firm in unrelated matters).

C.1.2 A lawyer is prohibited from undertaking representation that might be influenced by the lawyer's or firm's own economic or business interests without full disclosure and consent of the client.

MRPC 1.7 Conflict of Interest: Current Clients further provides:

> **(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:**
>
> *** * ***
>
> **(2) there is a significant risk that the representation of one or more clients will be materially limited by * * * a personal interest of the lawyer.**

See also NC Eth. Op. RPC 9, 1986 WL 327912 (a lawyer receiving payment from a third party must disclose to the client this fact along with a statement of any regular relationship between the attorney and the paying corporation).

Pursuant to these rules, a law firm regularly employed by an Issuer as Pre-Designated Counsel, or any "side deals" that benefit the lawyer or law firm, must make full disclosure to, and obtain consent from, the Investor before representation may begin.

C.1.3 Absent consent based on full disclosure from the current and the former client, a lawyer is prohibited from representing a current client adversely to a former client if the present and former matters are substantially related.

MRPC 1.9 Duties to Former Clients provides in pertinent part:

> **(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.**
>
> **(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client**

PRELIMINARY DRAFT UPDATE

> **(1) whose interests are materially adverse to that person; and**
>
> **(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;**
>
> **unless the former client gives informed consent, confirmed in writing.**
>
> *** * * * *.**

Although this rule only speaks to the need for the former client's consent, ethics opinions and case law make clear that consent must also be obtained from the client to be represented. Consequently, Pre-Designated Counsel who has previously represented the Issuer, another Investor-Client or any other party in prior and substantially related matters must obtain conflicts waivers from both present and former clients if the interests of the present and former clients are adverse. Typically, a transaction matter will only be "substantially related" if the subsequent matter involves the same investment. Former client conflicts may be present in work on amendments, workouts or other post-closing concerns.

C.2 Presentation of the Issue in the Guiding Principles:

C.2.1 Section 2.4 of the *Guiding Principles* addresses the importance of an Engagement and Conflict Disclosure Letter for current or former client conflicts with the Issuer. We have prepared a sample draft letter for this purpose attached as Appendix B to the *Guiding Principles*. In the absence of an Investor-Client's review and acceptance of a conflicts waiver addressing current or former conflicts with the Issuer before undertaking representation of the Investor-Client, Pre-Designated Counsel acts at far greater risk, to themselves and their clients, than we believe to be appropriate.

C.2.2 Sections 2.1 and 2.3 of the *Guiding Principles* provide that Pre-Designated Counsel should make full disclosure of prior employment as Pre-Designated Counsel and any additional fee arrangements with the Issuer.

C.3 Related Issues:

C.3.1 The *Guiding Principles* are intended to resolve issues that are common to most Pre-Designated Counsel engagements but not all forms of conflicts. Pre-Designated Counsel must address additional conflicts of interest that are beyond the scope of the *Guiding Principles* on a case by case basis. For example, Pre-Designated Counsel must take steps to be aware of conflicts of interests between Investor-Clients that exist by virtue of other matters that Pre-Designated Counsel or its Firm are handling on behalf of one or more Investor-Clients, and conflicts that arise due to new matters taken on during the course of representation. *See* N.Y. City Op. 2004-02 (2004).

C.3.2 As discussed in more detail in A.4 *infra*, Pre-Designated Counsel should not perform individual legal services on the subject matter of the subject investment for any Investor-Client until the Engagement and Conflict Disclosure Letter is accepted in writing, whether by letter or by return email. Pursuant to Section 1.3 of the *Guiding Principles*, Pre-Designated Counsel will draft the Note Purchase Agreement in advance of an offering. At this stage the prospective

PRELIMINARY DRAFT UPDATE

investors are prospective Investor-Clients to whom some limited duties may be owed but are not Investor-Clients who are entitled to the full benefits of an attorney-client relationship. *See* MRPC 1.18 Comment 1; RESTATEMENT § 15(e). Some investors may be existing clients of Pre-Designated Counsel on other matters, in which case their relationship outside the initiation of the attorney client relationship on the subject investment will be governed by the existing relationship.

C.3.3 Current client conflicts and economic/business interest conflicts require waivers on both the Issuer and Investor-Client sides. These materials do not expressly address conflicts other than those created by the Pre-Designated Counsel relationship as such and do not contain a form of letter to be sent to the Issuer side.

D. THIRD PARTY PAYER

D.1 Relevant Rule:

D.1.1 A lawyer may not collect a legal fee from someone other than the client without the informed consent of the client.

MRPC 1.8 Current Clients: Specific Rules provides in relevant part:

> **(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:**
>
> **(1) the client gives informed consent;**
>
> **(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and**
>
> **(3) information relating to representation of a client is protected as required by Rule 1.6.**

See, e.g., In re: The Matter of Edgar Jordan III, 299 A.D.2d 34, 747 N.Y.S.2d 249 (2d Dept 2002)

(New York lawyer disbarred for repeated representation of buyers in real estate transactions while collecting legal fees from the brokers or sellers without informed client consent).

D.2 Presentation of issue in the Guiding Principles:

D.2.1 Section 3.1 of the Guiding Principles addresses the importance of written disclosure of the material elements of the fee arrangement between Pre-Designated Counsel and the Issuer. Section 4.7 and Section 15.1 of the existing ACIC Model Form Note Purchase Agreement version of April 15, 2006, affirms as part of the agreement that the Company has paid or agreed to pay the special counsel legal fees.

D.2.2 Section 3.2 of the Guiding Principles provides that the Engagement and Conflict Disclosure Letter should explain the nature of the fee arrangement between the Issuer on the one hand and counsel on the other. For Investors who are regular participants in the market, Pre-Designated Counsel and the Investor-Clients may choose to proceed without these detailed

PRELIMINARY DRAFT UPDATE

disclosures. This practice is acceptable when accompanied by an acknowledgment that Pre-Designated Counsel is conducting itself pursuant to the Guiding Principles. In the event any Investor-Client requests additional information about the financial relationship or history with the Issuer, Pre-Designated Counsel is obligated to provide the information. In the long form Engagement and Conflict Disclosure Letter, it is sufficient if the Engagement and Conflict Disclosure Letter explains the basic nature of the fee arrangement (hourly or flat fee), but if the Investor requests additional information, Pre-Designated Counsel must provide it. For instance, if the Investor-Client requests information provided to the Issuer about a fee estimate or a fee cap, Pre-Designated Counsel must share that with the Investor-Client.

D.2.3 As described in A.1.2, supra, in the event that the fee arrangement contains separate agreements or side deals that benefit Pre-Designated Counsel, there will be a personal or business interest conflict which must also be affirmatively disclosed and waived in all instances.

E. DISCLOSURE AND WAIVER OF CONFLICTS OF INTEREST

E.1 Mechanics of Disclosure and Waiver:

E.1.1 The substance of the conflicts disclosure and waiver process is essential. The precise means by which information is disclosed and consent obtained from Investor-Clients is a matter of applicable law and is subject to change.

E.1.2 We therefore recommend the use of a two part Engagement and Conflict Disclosure Letter such as in the form attached hereto as Appendix B in most matters (the "long form"). For regular market participants, it has become a common and acceptable practice is to prepare a short form Engagement and Conflict Disclosure Letter that cross references and incorporates the *Guiding Principles*. We recommend that a short form in the form attached hereto as Appendix C. Pre-Designated Counsel should exercise discretion on whether a long or short form engagement is appropriate.

E.1.3 Potential Investor-Clients that contact Pre-Designated Counsel expressing an interest in a deal should first be sent an email Engagement and Conflict Disclosure. Upon confirmation of receipt and acceptance of the terms, the attorney client relationship is formed and that Investor-Client may receive the Issues Memorandum and other legal advice.

E.1.4 In the event the Pre-Designated Counsel chooses not to use the form letter in Appendix B, we recommend that an Engagement and Conflict Disclosure Letter should contain, at minimum, the following features:

1. The letter should state that Pre-Designated Counsel is acting in accordance with the *Guiding Principles* or, if not, should note and clarify any material departures from the *Guiding Principles*.

2. The letter should clearly identify the Investor-Clients as clients and should disclaim any representation of the Issuer or Agent in the transaction at issue.

PRELIMINARY DRAFT UPDATE

3. The letter should clarify the beginning and end points of the attorney-client relationship.

4. The letter should describe the work performed prior to the point at which the prospective-investor-client became an Investor-Client.

5. The letter should describe the work to be performed during the attorney-client relationship, including any express limitations.

6. The letter should explain the nature of the fee arrangement between the Issuer on the one hand and Pre-Designated Counsel on the other.

7. The letter should make disclosures and seek appropriate conflict waivers relating to: (1) Pre-Designated Counsel's relationships with the Issuer; (2) the potential for conflicts resulting from the simultaneous representation of multiple Investor-Clients in a single transaction and the approaches to be taken if such a conflict arises; and (3) any other pertinent conflicts issues.

8. The letter should disclose and seek consent regarding the means by which Pre-Designated Counsel will protect the Investor-Client's confidences and secrets.

The best Engagement and Conflict Disclosure Letter will be inadequate to protect any party if it exists solely on paper and not in reality. "[I]t bears emphasis that both the lawyer and client must adhere scrupulously to [any] limitation. Indeed, it goes without saying that a lawyer may not circumvent the limitation by acting adversely 'behind the scenes.'" N.Y. City Bar Op 2001-03 (2003) (citing *Fund of Funds Ltd. v. Arthur Andersen &Co.*, 567 F.2d 225, 234 (2d Cir. 1977)).

F. TRANSACTIONS INVOLVING FOREIGN LAW

F.1 Relevant Rules:

F.1.1 MRPC 1.1 Competence provides in pertinent part

> **A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.**

F.1.2 Restatement Third of the Law Governing Lawyers (2000) ("Restatement") Section 52 provides in relevant part:

> **a lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances.**

F.1.3 Restatement Third of the Law Governing Lawyers (2000) ("Restatement") Section 52 comment b provides in relevant part:

PRELIMINARY DRAFT UPDATE

> **The duty of competence set forth in this Section is that generally applicable to practitioners of a profession, that is, "the skill and knowledge normally possessed by members of that profession or trade in good standing …" (Restatement Second, Torts § 299A). Informed clients expect services of this kind; it is practical for lawyers to provide them; and the practice of the profession will most often be evidence of what clients need. As is generally true for professions, the legal duty refers to normal professional practice to define the ordinary standard of care for lawyers, rather than referring to that standard as simply evidence of reasonableness.**

F.1.4 Restatement Third of the Law Governing Lawyers (2000) ("Restatement") Section 48 comment e provides in relevant part:

> **[A] lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances.**

F.1.5 The rule requiring competent representation obligates Pre-Designated Counsel to assure that it is providing the appropriate scope of services to the Investor-Clients or has limited the scope of representation to put the Investor-Client on notice that certain legal advice will not be provided. This is a common issue in matters of foreign law where Pre-Designated Counsel may lack the requisite local law experience or, even if it possesses the requisite experience, the Issuer has declined to include compensation for those services in the fee agreement. Investor-Clients must be informed of either circumstance.

F.2 Presentation of the Issue in the Guiding Principles:

F.2.1 Section 5.3 of the *Guiding Principles* recommends that in transactions in which it is necessary or advisable to analyze foreign or local law, Pre-Designated Counsel should recommend to the issuer and the placement agent that local counsel be retained on behalf of Investor-Clients. If the foreign or local law analysis does not occur pre-circle, the *Guiding Principles* go on to recommend that Pre-Designated Counsel should expressly reserve the Investor-Clients' right to have such an analysis post-circle, develop a plan to have the analysis completed, and should communicate that plan to the Investor-Clients in the Issues Memorandum. If the Issuer does not agree to pay the fees and expenses of foreign or local counsel, Pre-Designated counsel should communicate that fact to the Investor-Clients.

PRELIMINARY DRAFT UPDATE

APPENDIX B

ENGAGEMENT AND CONFLICT DISCLOSURE LETTER

PRELIMINARY DRAFT UPDATE

Web Based Engagement and Conflict Disclosure Letter

To [Prospective Investor]:

RE: Private Placement Transaction

Introduction

This Engagement and Conflict Disclosure Letter (this "Letter") is provided with the intention that it will be incorporated into a future Transaction Addendum Letter ("Transaction Addendum Letter") and pertains to the use of Pre-Designated Investors' Counsel ("Pre-Designated Counsel") in the pre-documented (non-Rule 144A) private placement market. This Letter is available on the American College of Investment Counsel ("ACIC") website at www.aciclaw.org.

This Letter will be referenced when a law firm (the "Firm") has been designated by an Issuer (the "Issuer") or by an Agent (the "Agent") to represent the legal interests of prospective or actual investors regarding a potential or actual investment (the "Matter"). The Matter will be described in a private placement memorandum ("PPM") and the Transaction Addendum Letter. This Letter and the Transaction Addendum Letter explain the circumstances under which the Firm is prepared to act as Pre-Designated Counsel for investors ("Investor-Clients") who consent to the Firm doing so.

The Role of the ACIC Guiding Principles

To the extent not in violation of rules of professional responsibility applicable to the Firm, the Firm has conducted and will conduct itself in accordance with the Guiding Principles for Pre-Designated Investors' Counsel promulgated by the ACIC (the "Guiding Principles") and the terms stated in this Letter and the Transaction Addendum Letter. The Guiding Principles were developed with the assistance of many participants in the private placement market and are intended to set forth the general expectations of the participants in transactions such as those described by the PPM. We encourage you to become familiar with both the Guiding Principles and the terms of these Letters. If you do not have a copy of the Guiding Principles, you can obtain one on the ACIC website referenced in first paragraph of this letter. Alternatively, we will be happy to send you a copy upon request.

When the Attorney-Client Relationship Begins and Ends

Due to the nature of the marketplace regarding pre-documented private placements, an attorney-client relationship created pursuant to this Letter and the Transaction Addendum Letter may differ in material respects from a traditional one lawyer-one client relationship. Consequently, the Guiding Principles recommend as one course of action, and the Firm is following such recommended course of action in the Matter and agrees it will only represent an Investor-Client upon the Firm's receipt of written confirmation (via fax, email or hand delivery) from the "Prospective Investor-Client"[1] to the effect that the Prospective Investor-Client understands and

[1] As used here, "Prospective" modifies the term "Client" and refers to any investor who is not yet a client of Pre-Designated Counsel, whether before or after circle.

PRELIMINARY DRAFT UPDATE

agrees to be bound by this Letter and the Transaction Addendum Letter and to become a client of the Firm in the Matter.

For your information, and in accordance with the Guiding Principles, the Firm has already performed certain legal services relating to the Matter. For example, the Firm drafted or reviewed and commented upon the draft Note Purchase Agreement ("NPA") included with the PPM following discussions with the Issuer and its counsel. The Firm will provide each Investor-Client a memorandum describing in reasonable detail the more significant issues that were discussed and will, of course, answer any questions about such discussions and the Matter. The results of these discussion are not binding upon any Investor-Client, and the Firm will endeavor to conduct negotiations consistent with the Guiding Principles and the terms of this Letter upon request. Once begun, the attorney-client relationship for the Matter will continue until completion of the Matter or until the relationship is expressly terminated by the Firm or by you. If the relationship between the Firm and you is terminated for any reason prior to completion of the Matter, the Firm may, to the extent permitted by the applicable rules of professional responsibility and as described more precisely below, continue to represent one or more other Investor-Clients in the Matter.

Third Party Payor

The Issuer and the Agent are not clients of the Firm in the Matter. It is customary for investors to require that issuers pay the legal fees incurred by their investors in connection with private placement and other types of financings. The Issuer has agreed to pay the Firm's legal fees in the Matter. However, each Investor-Client should consider whether it is concerned that the Issuer's payment of fees may adversely affect the advice that Investor-Clients are given or, in other words, whether the potential benefits of Issuer-paid counsel outweigh the potential risks.

The next two sections (*Fee Arrangement and Conflicts of Interest and Potential Conflicts of Interest—Issuer and Agent*) contain transaction specific disclosures and will be completed in the Transaction Addendum Letter or summarized in the Short Form Email (Appendix C). The Transaction Addendum Letter should address each of the following points, even if the answer is that there are no matters to disclose.

Fee Arrangement

[With respect to the Matter, the Issuer has agreed to pay the Firm **[on an hourly basis / for a flat fee of $_____; or _____.]** The Firm has no other fee arrangements or agreements with the Issuer or any other party involved in the Matter that relate to or arise from the Firm's retention as your counsel **[Except _____ (specify)]**. If you would like more information about the Firm's fee arrangement with the Issuer please let us know.

Conflicts of Interest and Potential Conflicts of Interest—Issuer and Agent

As a regular participant in financial markets, the Firm has recently had or may presently have existing professional relationships with the Issuer or the Agent.

In the past 24 months, the Firm has been selected by the Issuer or Agent **[specify]** as Pre-Designated Counsel on ____ separate occasions.

PRELIMINARY DRAFT

The Firm's present professional relationships with the Issuer include the following kinds of matters that, in the Firm's view, are factually and legally unrelated to the Matter:

[If none, state none. Otherwise, describe—*e.g.*: "The Firm presently provides labor and employment law advice to the Issuer and is presently representing the Issuer in intellectual property litigation."]

The Firm's present or past professional relationships with the Issuer include the following kinds of matters that are substantially related to the Matter:

[If none, state none. Otherwise, describe—*e.g.*: " The Firm is presently defending the Issuer in securities fraud litigation relating to _____."]

The Firm's present professional relationships with the Agent include the following kinds of matters that, in the Firm's view, are factually and legally unrelated to the Matter:

[If none, state none. Otherwise, describe—*e.g.*: "The Firm presently provides labor and employment law advice to the Agent and is presently representing the Agent in intellectual property litigation."]

The Firm's present or past professional relationships with the Agent include the following kinds of matters that are substantially related to the Matter:

[If none, state none. Otherwise, describe—*e.g.*: The Firm is presently defending the Agent in securities fraud litigation relating to _____."]

This Letter does not address whether, or under what circumstances, the Firm may or may not represent any other present or future clients adversely to the Investor-Client. Any such conflicts waivers must be the subject of one or more separate agreements between the Investor-Client and the Firm.

You should carefully consider whether the relationships, if any, with the Issuer or the Agent described above may either cause the Firm to be less zealous or eager in its representation on behalf of the Investor-Clients in the Matter than a firm with no such relationships or create a material risk that the Investor-Client's confidential information may somehow be compromised or disclosed notwithstanding the Firm's best efforts to prevent this. If we have disclosed any such relationships above, we have fully reviewed them and concluded that they will not cause us to be less zealous or eager in our representation in this Matter or create a material risk that the Investor-Client's confidential information will somehow be compromised or disclosed notwithstanding our best efforts to prevent same. We encourage you to review this matter carefully with in-house or outside counsel of your choice before deciding whether to proceed as an Investor-Client pursuant to the Guiding Principles, this Letter and the Transaction Addendum Letter. If you or your counsel would like additional information about the relationships described above, please let us know.

Conflicts of Interest—Multiple Investor-Clients

All Investor-Clients presumably share a common interest in the successful, timely, and favorable completion of the Matter. Nevertheless, one or more Investor-Clients may disagree on the

PRELIMINARY DRAFT/UPDATE

proposed terms of a transaction. In addition, the representation of the Investor-Clients is made more complex by the fact that the Investor-Clients are competitors who may not share pricing or other competitive information in a manner that violates antitrust or other trade regulation laws. The Firm's representation of the Investor-Clients is therefore subject to the following limitations:

- The Firm will not share with one Investor-Client any pricing information or other information identified to the Firm as being competitively sensitive provided by another Investor-Client. In other words, this information will be treated as confidential at the individual Investor-Client level.

- The Firm will share all other material information with all Investor-Clients except as described in the preceding bullet point. In other words, this shared information will be treated as confidential at the group level but not at the individual Investor-Client level.

- Since, as noted above, there is information the Firm cannot share with all the Investor-Clients, the Firm's obligation of confidentiality to a particular Investor-Client could conflict with the Firm's obligation to keep other Investor-Clients fully informed of all aspects of the Matter. If such a conflict of interest were to arise and to the extent permitted by the relevant rules of professional responsibility, by this Letter and the Transaction Addendum letter you are prospectively waiving this conflict.

- In the event of a dispute between the Investor-Clients, the Firm will not be able to advocate for the position of one Investor-Client and against the position of another Investor-Client. In fact, the best the Firm may be able to do would be to lay out the possible alternatives including alternative approaches of which it is aware, giving the Investor-Clients the meaningful merits and risks pertaining to each one and suggesting that Investor-Clients review the matter with separate counsel in order to look after their separate interests.

- The Firm will raise with the Issuer and/or the Agent any points for negotiation that one or more Investor-Clients wish to raise but will not disclose to the Issuer and/or the Agent the identity of the Investor-Client raising a point without the Investor-Client's consent. Any Investor-Client is also free to raise any additional point on its own with the Issuer and/or the Agent.

- If, after all negotiations are completed, the Issuer and one or more Investor-Clients, however selected, wish to proceed with the Matter on terms agreeable to them, the Firm will assist those Investor-Clients in closing that transaction. In other words, the Firm will proceed on behalf of Investor-Clients that wish to close the Matter even if one or more Investor-Clients would prefer that the Firm not do so or, in fact, object to the Firm doing so.

In short, the Firm's freedom of action or ability to act on behalf of any one Investor-Client, and the individual Investor-Client's ability to claim attorney-client privilege, will be less than they would be if the Firm had a single client. As with the other potential conflicts and limitations described in the Guiding Principles, this Letter and the Transaction Addendum Letter, each Investor-Client should carefully review this matter with in-house counsel or outside counsel of its

PRELIMINARY DRAFT / UPDATE

choice before deciding whether to proceed as an Investor-Client pursuant to the Guiding Principles, this Letter, and the Transaction Addendum Letter.

For the sake of completeness, we also note that the Firm may from time to time also represent the other Investor-Clients in other similar transactions or on other matters. Since the structure of the Firm's proposed relationship with its clients is intended to avoid the Firm taking sides between its clients, this may not be of material concern. If, however, you or your counsel would like additional information on this subject, please let us know.

Conclusion

The limitations described in the Guiding Principles, this Letter and the Transaction Addendum Letter are important. We therefore encourage you to review the terms of the Guiding Principles, this Letter, and the Transaction Addendum Letter with your counsel and only to agree to them if you not only understand them but also are satisfied that the terms are reasonable and appropriate under the circumstances. We have considered the matter in light of the Guiding Principles and the rules of professional responsibility that apply to the Firm, and have formed the professional judgment that we can appropriately represent you in the Matter in the manner contemplated by the Guiding Principles, this Letter and the Transaction Addendum Letter, assuming that you agree to the provisions of this Letter and the Transaction Addendum Letter and waive (by your signature to the Transaction Addendum Letter, by return email or in separate correspondence), to waive all conflicts of interest described in this Letter and the Transaction Addendum Letter. If you or your counsel have any questions that you would like us to address before you reach a decision on these matters, please let us know.

PRELIMINARY DRAFT / UPDATE

Draft Transaction Addendum Letter to Web Based Engagement and Conflict Disclosure Letter

Dear Prospective Investor

RE: [__Describe Proposed Private Placement__]

The law firm of _____ (the "Firm") has been designated by _____ (the "Issuer") or by _____ (the "Agent") to represent the legal interests of prospective or actual investors regarding the investment referenced above (the "Matter"). This letter (the "Transaction Addendum Letter") is provided to complete the Web Based Engagement and Conflict Disclosure Letter ("Web Based Letter") available at the American College of Investment Counsel website at www.aciclaw.org. This Transaction Addendum Letter should be read together with the Web Based Letter. The Firm will not be able to represent you in the Matter unless and until you have acknowledged acceptance of the terms of both letters. If you have difficulty accessing the Web Based Letter, please let one of us know immediately and we will provide you with a copy. Listed at the end of this letter are the names of the attorneys assigned to the Matter and their individual contact information. Do not sign this Transaction Addendum Letter if you have not received and reviewed the Web Based Letter.

The following two sections (Fee Arrangement and Conflicts of Interest and Potential Conflicts of Interest—Issuer and Agent) contain transaction specific disclosures that are necessarily incomplete in the Web Based Letter.

Pursuant to the terms of the Web Based Letter, the Firm wishes to disclose and discuss the following matters:

Fee Arrangement

With respect to this Matter, the Issuer has agreed to pay the Firm **[on an hourly basis/ for a flat fee of $_____; or _____.]** The Firm has no other fee arrangements or agreements with the Issuer or any other party involved in the Matter that relate to or arise from the Firm's retention as your counsel **[except _____ (specify)]**. If you would

like more information about the Firm's fee arrangement with the Issuer please let us know.

Conflicts of Interest and Potential Conflicts of Interest—Issuer and Agent

As a regular participant in financial markets, the Firm has recently had or may presently have existing professional relationships with the Issuer or the Agent.

In the past 24 months, the Firm has been selected by the Issuer or Agent [specify] as Pre-Designated Counsel on ____ separate occasions.

The Firm's present professional relationships with the Issuer include the following kinds of matters that, in the Firm's view, are factually and legally unrelated to the Matter:

PRELIMINARY DRAFT UPDATE

[If none, state none. Otherwise, describe—*e.g.*: "The Firm presently provides labor and employment law advice to the Issuer and is presently representing the Issuer in intellectual property litigation."]

The Firm's present or past professional relationships with the Issuer include the following kinds of matters that are substantially related to the Matter:

[If none, state none. Otherwise, describe—*e.g.*: " The Firm is presently defending the Issuer in securities fraud litigation relating to _____."]

The Firm's present professional relationships with the Agent include the following kinds of matters that, in the Firm's view, are factually and legally unrelated to the Matter:

[If none, state none. Otherwise, describe—*e.g.*: "The Firm presently provides labor and employment law advice to the Agent and is presently representing the Agent in intellectual property litigation."]

The Firm's present or past professional relationships with the Agent include the following kinds of matters that are substantially related to the Matter:

[If none, state none. Otherwise, describe—*e.g.*: The Firm is presently defending the Agent in securities fraud litigation relating to _____."]

We strongly encourage you to review these disclosures with your own counsel (either in-house or outside counsel). If after reviewing these disclosures in their entirety as well as all of the other disclosures, advisories and restrictions contained in the Web Based Letter you decide to consent to the Firm acting as your counsel in the Matter as Pre-Designated Counsel, we will require that you acknowledge and affirmatively waive the conflicts and restrictions described in both the Web Based Letter and this Transaction Addendum Letter by executing the Acknowledgement below and return such executed Acknowledgement to us (by fax, email, or hand delivery) at the address below. If you have any questions about either document, please contact _____ or _____ at the Firm before you return this Transaction Addendum.

VTY

_____
Signature Block of Firm

Acknowledgement

After reviewing the Web Based Letter located at www.aciclaw.org ***and*** the Transaction Addendum Letter, the undersigned consents to the representation by the Firm on the terms and conditions described and expressly waives the conflicts of interest described in ***both*** letters.

_____
Sign and Date.

I**nsert the contact information for each lawyer assigned to this Matter:**

PRELIMINARY DRAFT UPDATE

Name
Direct Phone
Email

Name
Direct Phone
Email

Name
Direct Phone
Email

PRELIMINARY DRAFT UPDATE

APPENDIX C

SHORT FORM ENGAGEMENT AND CONFLICT DISCLOSURE LETTER

Dear _____:

As you know, we have been asked to represent the institutional investors in the proposed [Issuer] private placement transaction (the "Transaction") as pre-designated counsel. Our representation will be conducted substantially in accordance with the Guiding Principles for Pre-Designated Investors' Counsel (which can be found at www.aciclaw.org) and the Web Based Engagement and Conflict Disclosure Letter attached as Appendix B to such Guiding Principles. With regard to the headings "Fee Arrangement" and "Conflicts of Interest," we disclose the following:

(1) the fee arrangement for this matter will be _____, there is [a/no] fee cap and [Issuer] is responsible for payment of our fees; and

(2) our conflicts check showed _____; otherwise we do not represent [Issuer] or its subsidiaries. [Issuer] has waived any conflict of interest created by our representation of the investors in the Transaction and our representation of it in _____. We ask that you waive that conflict as well. We do represent affiliates of [Issuer] in unrelated matters.

The issuer has agreed by email correspondence to pay our legal fees.

Please indicate that you accept our representation on the foregoing terms by responding "Accepted" to this email. Once we have received your acceptance, we will be able to forward to you our prepared materials for the Transaction and any other documents that you may request and respond to your questions.

We look forward to working with you on this matter.

PRELIMINARY DRAFT UPDATE