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*Carlton Fields practices law in California through Carlton Fields Jorden Burt, LLP*

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**SUBSCRIPTION AGREEMENT[[1]](#footnote-1)**

**Subscription and Sale Agreement** (this “*Agreement*”) dated as of the date set forth on the signature page hereto, by and between ***[insert company name]***, a ***[state]*** ***[insert form of entity]*** (the “*Company*”), and the undersigned (the “*Investor*”). [Unless specifically defined in this Agreement, all capitalized terms used herein shall have the same meanings as are ascribed to them in the Company’s Confidential Private Placement Memorandum, dated **\_\_\_\_\_\_\_** (the “*Offering Memorandum*”).[[2]](#footnote-2)]

# **Subscription**. Subject to the terms and conditions of this Agreement [and as stated in the Offering Memorandum], the Investor hereby subscribes and agrees to purchase that number of [shares of common stock, par value ***\_\_\_*** per share, of the Company (the “*Common Stock*”)][units of membership interests of the Company (“Units”)][[3]](#footnote-3) set forth on the signature page of this Agreement at a purchase price of $\_\_\_\_ per [share][Unit] (“*Purchase Price*”). Payment for the [Common Stock][Units] [shall accompany] this Agreement and shall be made in cash, by wire transfer, or by certified bank or cashier’s check payable in immediately available funds in the amount of the Purchase Price made payable to the order of [the Company].[[4]](#footnote-4) In addition to this Agreement, the Investor is delivering to the Company the following (collectively, the “*Subscription Documents*”)[[5]](#footnote-5): (a) a completed and duly executed Investor Questionnaire, [and] (b) a completed and duly executed Purchaser Representative’s Questionnaire for each Purchaser Representative, if any, named in the undersigned’s Investor Questionnaire [and (c) a counterpart signature page to the limited liability company operating agreement of the Company (“*Operating Agreement*”)][and (c) counterpart signature page to the Company’s stockholder agreement, dated as of \_\_\_, by and between the Company and its stockholders (“*Stockholders Agreement*”)].

# **Terms of Subscription**. The Investor acknowledges and agrees that this Agreement is made subject to the following terms and conditions:

## The Investor hereby intends that his signature hereon shall constitute a subscription to the Company for the number of [shares of Common Stock][Units] specified on the signature page of this Agreement.

## The [Common Stock is][Units are] being offered on a “best efforts” basis on behalf of the Company through certain officers and directors of the Company [specified in the Offering Memorandum]. No minimum number of [shares of Common Stock][Units] need to be sold by the Company as a condition to the sale of the [Common Stock][Units] [offered for sale pursuant to the Offering Memorandum]. If a subscription is accepted by the Company, the Purchase Price will be made available immediately to the Company for its use.[[6]](#footnote-6)

## This subscription for the purchase of [shares of Common Stock][Units] is subject to acceptance by the Company and does not, prior to acceptance, bind the Company to sell the [Common Stock][Units] to the Investor. The Company shall have the right to accept or reject this subscription, in whole or in part, in its sole and absolute discretion for any reason.

## The Company will determine whether to accept or reject a subscription, in its sole discretion, promptly after receipt of the Agreement, the Subscription Documents, and payment of the Purchase Price. The Company may reject a subscription, in whole or in part, at its discretion. To the extent the Company rejects a subscription, in whole or in part, it will promptly return all funds paid by the Investor[, together with any interest earned thereon]. Acceptance of this subscription by the Company shall be deemed to occur without necessity of prior notice to the Investor upon execution of the acceptance set forth on the signature page hereof. To the extent the Company accepts this subscription, it will promptly furnish the Investor with a copy of the signature page of the Agreement duly executed by a representative of the Company within a reasonable time after the closing of this subscription.

## This subscription is and shall be irrevocable unless and until (i) this subscription is for any reason rejected, or (ii) this Agreement is terminated.

# **Representations, Warranties, and Covenants of Investor**. As a condition to, and in consideration of, the Company’s agreement to accept an Investor as a holder of the [Common Stock][Units] upon the terms and conditions set forth herein [and as further set forth in the Offering Memorandum], the Investor hereby represents, warrants, and covenants to the Company as follows:

## The Investor:

is an “Accredited Investor” as defined in Regulation D for the following reasons (initial all that apply):

The Investor is a natural person whose net worth on the date of this Agreement (i.e., excess of total assets over total liabilities) exceeds $1,000,000.

The Investor is a natural person and had Income in excess of $200,000 in each of the two most recent years and reasonably expects to have Income in excess of $200,000 in the current year.

The Investor, together with the Investor’s spouse, had joint Income in excess of $300,000 in each of the two most recent years and reasonably expects to have joint Income in excess of $300,000 in the current year.

The Investor, if not an individual, is a corporation, business trust, or partnership with total assets in excess of $5 million, not formed for the specific purpose of acquiring the [Common Stock][Units].

The Investor is otherwise an Accredited Investor, as defined in Regulation D promulgated under the Securities Act of 1933, as amended (the “*Securities Act*”)[, and as summarized in the “Suitability Standards – Offering Conditions” section of the Offering Memorandum].[[7]](#footnote-7)

For the purposes of this Agreement, “*Income*” is computed by adding the following items to adjusted gross income as computed for federal income tax purposes (but not including any amounts attributable to a spouse or property owned by a spouse): any deductions for long-term capital gain or depletion, any exclusion of interest earned on tax-exempt bonds, any losses allocated from a limited partnership, amounts contributed to an IRA, 401(k) or retirement plan, and alimony payments.

For purposes of this Agreement, the calculation of “*Net Worth*,” which is the amount that the Investor’s assets exceed his or her liabilities, excluding from such calculation (i) the estimated fair market value of the Investor’s primary residence, and (ii) the amount of any indebtedness secured by the Investor’s primary residence, in an amount up to the estimated fair market value of such residence, shall not be included as a liability. If the indebtedness secured by the Investor’s primary residence exceeds the estimated fair market value of such residence, such excess shall be treated as liability. Notwithstanding clause (ii) above, any increase in the amount of debt secured by the Investor’s primary residence that is incurred within 60 days prior to the issuance of the [Common Stock][Units] to the Investor shall be included as a liability, even where the estimated fair market value of such residence continues exceed the total debt secured by the residence.

The Investor agrees that the Investor will furnish, upon request of the Company, a copy of the Investor’s financial statement to the Company for purposes of verifying the Accredited Investor status of the Investor.

although not an Accredited Investor, has such knowledge and experience in financial and business matters that it is are capable of evaluating the merits and risks of an investment in the [Common Stock][Units] on the basis of its investment experience, business experience, professional experience, and/or education.

is not an Accredited Investor, but it has discussed with its Purchaser Representative who is knowledgeable and experienced in such matters whether an investment by the Investor in the [Common Stock][Units] is appropriate in light of the Investor’s financial circumstances and have received the advice of such Purchaser Representative with respect to the merits and risks of such an investment. Together with such Purchaser Representative, and with the benefit of his advice, the Investor has such knowledge and experience in financial and business matters that he or she is capable of evaluating the merits and risks of an investment in the [Common Stock][Units].

## The Investor has received, reviewed, completed and returned to the Company, the Investor Questionnaire relating to the Investor’s general ability to bear the risks of and to sustain a complete loss of an investment in the Company and the Investor’s suitability as an investor in this offering, and the Investor hereby confirms that the information provided in the Investor Questionnaire is true, complete, and correct as of the date of this Agreement.

## The Investor acknowledges that if the Investor used a Purchaser Representative (as defined in Regulation D): (i) that this has been indicated in the Investor Questionnaire, (ii) in evaluating the Investor’s investment as contemplated hereby, the Investor has been advised by the Purchaser Representative of the merits and risks of the investment in general and, in particular, the suitability of the investment for the Investor in light of the Investor’s financial circumstances, and (iii) such Purchaser Representative has completed, executed and delivered to the Company, the Purchaser Representative’s Questionnaire. The person, if any, executing the Purchaser Representative’s Questionnaire, a copy of which has been delivered to the Investor, is acting, and is hereby designated to act, as the Investor’s Purchaser Representative in connection with the sale of the [Common Stock][Units] to the Investor. The Investor’s designation of the Purchaser Representative was made with the knowledge of the representations and disclosures made in the Purchaser Representative’s Questionnaire and related materials.

## The Investor further acknowledges that the Investor has, alone or together with the Investor’s Purchaser Representative, if any, sufficient knowledge and experience in financial and business matters so as to be capable of evaluating the merits and risks of the prospective investment in the Units on the basis of the Investor’s investment experience, business experience, professional experience, and/or education.

## The Investor confirms that prior to the sale of the [Common Stock][Units] to the Investor pursuant to this Agreement, the Investor and the Investor’s Purchaser Representative, if any: (i) [hereby acknowledges receipt of a copy of the Offering Memorandum and all the appendices and exhibits referenced therein and has carefully reviewed with the Investor’s Purchaser Representative, if any, the Offering Memorandum and the Subscription Documents (collectively, the “*Disclosure Materials*”)][has been given access to all material books and records of the Company and all material contracts and documents relating to the sale of the [Common Stock][Units] pursuant to this Agreement][[8]](#footnote-8); (ii) has had the opportunity to ask questions of, and receive answers from, representatives of the Company concerning the terms and conditions of the sale of the [Common Stock][Units] by the Company, and (iii) has had and has been given the opportunity to obtain any additional information which it deems necessary to verify the accuracy of the information [contained in the Disclosure Materials][supplied to the Investor]. The Investor further confirms that he or she has been furnished with all such requested information and all questions asked by the Investor have been answered to his or her satisfaction. The Investor is acquiring the [Common Stock][Units] without being furnished any offering literature, circular, or prospectus[, other than the Offering Memorandum] and any documents or answers to questions so furnished to the Investor in writing by the Company.[[9]](#footnote-9)

## The Investor understands and acknowledges that it has been advised that the [Common Stock][Units] to be acquired pursuant to this Agreement have not been registered under the Securities Act of 1933, as amended (the “*Securities Act*”), or the securities laws of any other jurisdiction and are being sold in reliance upon an exemption from such registration requirements. Accordingly, the Investor further understands that it may not sell, pledge, hypothecate, dispose of, or otherwise transfer (a “*Transfer*”) the [Common Stock][Units] unless they are subsequently registered under such laws or an exemption from such registration is available.[[10]](#footnote-10)

## The Investor is acquiring the [Common Stock][Units] solely for its own account, not as a nominee or agent, for investment purposes only, and not with an intent or a view to the sale or distribution of any part thereof within the meaning of Section 2(a)(11) of the Securities Act. By executing this Agreement, the Investor further represents that it does not have any present intent of making a Transfer of, granting a participation in, or otherwise distributing the [Common Stock][Units] in a manner contrary to the Securities Act or the securities laws of any other applicable jurisdictions, nor does the Investor have any contract, undertaking, agreement, or arrangement with any person to Transfer, grant any participation in, or otherwise distribute any of the [Common Stock][Units] to such person.

## The Investor understands and acknowledges that only the Company can register the [Common Stock][Units] under applicable securities laws; the Company does not intend to register the [Common Stock][Units] under the Securities Act or the securities laws of any other jurisdiction; no public market for the [Common Stock][Units] is expected to develop; and, as a result an investment in the [Common Stock][Units] may not be liquid and that the Investor must bear the economic risk of the investment indefinitely. In this regard, the Investor further represents that it has adequate means of providing for its current needs and possible personal contingencies, it can afford to bear the economic risk of holding the [Common Stock][Units] for an indefinite period of time, and has no need for liquidity in its investment in the [Common Stock][Units]. The Investor further represents and confirms that the address set forth on the signature page is true and correct, and that the Investor has no present intention of becoming a resident of any other state or jurisdiction.

## The Investor hereby agrees that it will not, directly or indirectly, offer to Transfer or to Transfer any [Common Stock][Units] (or solicit any offers to buy, purchase, or otherwise acquire or take a pledge of any [Common Stock][Units]), except in compliance with this Agreement, [the Operating Agreement,][the Stockholders Agreement,][[11]](#footnote-11)[ the transfer restrictions described in the Offering Memorandum,] the Securities Act, the securities laws of all other applicable jurisdictions, and the rules and regulations promulgated thereunder.

## The Investor recognizes that in the future the Company may not satisfy the requirements which would permit the undersigned to sell the [Common Stock][Units] pursuant to Rule 144 promulgated under the Securities Act.

## The Investor recognizes that an investment in the [Common Stock][Units] and the Company involves certain risks, and the Investor has taken full cognizance of, understands, and is willing to bear the risks related to the purchase of the [Common Stock][Units], including, among others, those set forth [under the caption “Risk Factors” in the Offering Memorandum][ in Appendix I to this Agreement. The Investor has carefully received Appendix I of this Agreement and has taken full cognizance of, understands, and is willing to bear the risks related to the purchase of the [Common Stock][Units]][[12]](#footnote-12). [Among other things, the Investor understands and acknowledges that (i) the [Common Stock][Units] are not readily marketable, (ii) the Company has a limited financial history and cannot give any assurance that it will operate profitably, and (iii) there is a significant degree of risk in investing in the [Common Stock][Units]. The Investor is able to bear the economic risk of the loss of his or her entire investment in the [Common Stock][Units]][[13]](#footnote-13).

## The Investor has received, read, and is familiar with the [Operating Agreement][Stockholders Agreement], as amended, and confirms that the Investor agrees to be bound by the terms and conditions of the [Operating Agreement][Stockholders Agreement].[[14]](#footnote-14) [**The Investor understands that if he or she does not provide a countersignature page to the Operating Agreement herewith, one of the managers of the Company (the “Manager”) will sign the Operating Agreement on behalf of the Investor, as attorney-in-fact for the Investor under the authority granted by Section 7 of this Agreement.][[15]](#footnote-15)**

## No commission, fee, or other remuneration has been, or will be paid or given, directly or indirectly, to any person for soliciting in any state for the purchase of the [Common Stock][Units] unless such person is appropriately registered under the laws of such state and with the Securities and Exchange Commission under the Securities Exchange Act of 1934, if necessary.

## The Investor acknowledges and understands that the representations, warranties, and covenants contained in this Agreement are being furnished, in part, and will be relied on by the Company in determining whether this offering of its [Common Stock][Units] is exempt from registration under the Securities Act and the securities laws of all other applicable jurisdictions and, accordingly, confirms that all such statements contained herein are true, complete, and accurate as of the date hereof, and shall be true, accurate, and complete as of the date that this Agreement is accepted, and shall survive such acceptance. If any events occur or circumstances exist prior to the issuance of the [Common Stock][Units] to the Investor which would make any of the representations, warranties, agreements, or other information set forth herein untrue or inaccurate, the Investor agrees to immediately notify the Company in writing of such fact specifying which representations, warranties, or covenants are not true, correct, or accurate, and the reasons therefor.

# **Confidentiality.** The Investor understands that the [Offering Memorandum and all exhibits and attachments thereto are][information supplied to you pursuant to Section 3(e) is] confidential, and hereby represents, warrants, and covenants to the Company that the Investor has not and will not reproduce or distribute them, in whole or in part, or divulge any of their contents without the prior written consent of the Company. The Investor further agrees that if no [Common Stock][Units] are purchased or this subscription is rejected, the [Offering Memorandum and all] other information so tendered to the Investor will be promptly returned to the Company.

# **Indemnification.** The Investor acknowledges and understands the meaning and legal consequences of the representations, warranties, and covenants contained in this Agreement, and agrees to indemnify and hold harmless the Company and its agents, employees, and representatives from and against any and all losses, damages, costs, expenses (including attorney’s fees), and liabilities due to or arising out of any misrepresentations, misstatements, or omissions with respect to, any of the representations or warranties, or a breach of any of the covenants or agreements, contained in this Agreement by the Investor.

# **Authority.**

## The Investor: (i) if an individual, has full legal capacity to make the representations, warranties and agreements contained herein, to enter into and execute this Agreement [and the Operating Agreement][and the Stockholders Agreement], and to purchase the [Common Stock][Units] subscribed for hereunder, or (ii) if acting in a representative or fiduciary capacity for a corporation, partnership, limited liability company, limited partnership, trust, or other entity, has the full power and authority to make such representations, warranties, and agreements contained herein, to enter into and execute this Agreement [and the Operating Agreement][and in the Stockholders Agreement] in such capacity on behalf of such corporation, partnership, limited liability company, limited partnership, trust or other entity, and to purchase the [Common Stock][Units] subscribed for hereunder.

## The Investor, if a corporation, partnership, limited liability company, limited partnership, trust, or other entity, was duly organized or formed, is validly existing and is in good standing or active status under, the laws of its jurisdiction of organization or formation.

# **Power of Attorney.** The Investor hereby constitutes and appoints the Manager as the undersigned’s true and lawful attorney-in-fact and agent, with the full power of substitution and re-substitution, to act in the undersigned’s name, place and stead in any and all capacities, with full power to act alone, granting unto such attorney-in-fact and agent full power and authority to execute and deliver the Operating Agreement to the Company on behalf of the undersigned and confirming that the attorney-in-fact and agent or his substitute may lawfully do or cause such things to be done.][[16]](#footnote-16)

# **Transferability.** Neither this Agreement, nor any of the Investor’s rights, obligations, duties or benefits hereunder may be transferred without the written consent of the Company. Any purported transfer hereof in violation of the foregoing restriction shall be null and void.

# **Revocation.** The Investor agrees that the Investor will not cancel, terminate, or revoke this Agreement or any agreement the Investor has made under this Agreement, and that this Agreement shall survive the Investor’s death or disability, except as provided in Section [10] of this Agreement.

# **Termination.** This Agreement may be terminated: (a) at any time by the Company if, in its sole discretion, it determines to terminate or cancel this offering of the [Common Stock][Units] prior to the closing of their sale to the Investor; or (b) by the Company if the representations or warranties of the Investor shall not be true, complete, and accurate prior to the acceptance of this subscription by the Company. In the event of any such termination of this Agreement, except for Section 4, 5, 6, [7], [8], [10], and [11] of this Agreement which shall survive any such termination, this Agreement shall be null and void and of no further force or effect.

# **Legends.** The Investor confers full authority upon the Company to affix appropriate legends to the face of the certificate or certificate representing the Units, if any or on any other document representing the [Common Stock][Units], including, without limitation, the following:

“THE [COMMON STOCK][UNITS] REPRESENTED HEREBY HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE “SECURITIES ACT”), OR THE SECURITIES LAWS OF ANY OTHER JURISDICTION AND MAY NOT BE OFFERED FOR SALE, SOLD, ASSIGNED, PLEDGED, HYPOTHECATED, OR OTHERWISE TRANSFERRED EXCEPT PURSUANT TO AN EFFECTIVE REGISTRATION STATEMENT UNDER THE SECURITIES ACT AND THE SECURITIES LAWS OF ALL OTHER APPLICABLE JURISDICTIONS UNLESS, IN THE OPINION OF COUNSEL TO THE COMPANY, SUCH REGISTRATION IS NOT REQUIRED.”

[“THE [COMMON STOCK][UNITS] REPRESENTED HEREBY ARE SUBJECT TO CERTAIN TRANSFER RESTRICTIONS AND OTHER PROVISIONS AS SET FORTH IN THE [OPERATING AGREEMENT OF THE COMPANY][THE STOCKHOLDERS AGREEMENT, DATED AS OF \_\_\_, BY AND BETWEEN THE COMPANY AND CERTAIN SPECIFIED STOCKHOLDER], AS AMENDED FROM TIME TO TIME, AND AGREED TO BY EACH MEMBER THEREOF (COPIES OF WHICH ARE ON FILE AND MAY BE REVIEWED BY THE LAWFUL AND REGISTERED HOLDER HEREOF AT THE COMPANY’S PRINCIPAL OFFICE DURING NORMAL BUSINESS HOURS UPON ADVANCE WRITTEN REQUEST TO THE COMPANY AND PURSUANT TO SUCH OTHER PROCEDURES AS MAY BE REQUIRED BY THE COMPANY TO ENSURE THE SECURITY OF THE COMPANY AND ITS ASSETS, AFFAIRS, AND PERSONNEL)”.]

# **General Provisions.**

## ***Notices*.** All notices and other communications given or made under this Agreement shall be in writing and shall be deemed to be sufficiently given when personally delivered or when sent by registered or certified mail, return receipt requested, postage prepaid, to the other party at the address of such other party set forth in this Agreement.

## ***No Waiver*.** The failure of the Company to exercise any right or remedy under this Agreement, or any delay by the Company in exercising same, will not operate as a waiver thereof. No waiver by the Company is effective unless and until it is in writing and signed on behalf of the Company.

## ***Entire Agreement*.** This Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and may be amended only by a writing executed by all parties.

## ***Governing Law*.** This Agreement shall be governed and construed in accordance with the laws of the State of \_\_\_\_\_\_\_\_\_\_\_\_\_. This Agreement and the rights, powers, and duties set forth herein shall be binding upon the Investor, and the Investor’s heirs, estate, legal representatives, successors, and permitted assigns, and shall inure to the benefit of the Company, its successors, and assigns. In the event that any provision of this Agreement is invalid or unenforceable under any applicable statute or rule of law, then such provision shall be deemed inoperative to the extent that it may conflict therewith and shall be deemed modified to conform to such statute or rule of law. Any provision hereof which invalid or unenforceable under any law shall not affect the validity or enforceability of any other provision hereof.

## ***Construction of Terms*.** All provisions and any variations thereof used herein shall be deemed to refer to the masculine, feminine, neuter, singular, or plural as the identity of such person or persons shall require.

**[The rest of this page is intentionally left blank. Signatures are on the following page.]**

**IN WITNESS WHEREOF**, I have executed this Agreement this \_\_\_ day of \_\_\_\_\_\_\_\_\_\_, 201\_\_.

Number of [shares of Common Stock] [Units] subscribed for: (Please insert the number of [shares of Common Stock] [Units] you wish to subscribe for).

Aggregate Purchase Price of shares subscribed for: $ (Please insert the total purchase price for all [shares of Common Stock] [Units] subscribed for).

The [shares of Common Stock] [Units] subscribed for hereby are being purchased as follows:

|  |  |  |
| --- | --- | --- |
| (Check one)  \_\_\_\_\_\_ Individually  \_\_\_\_\_\_ Joint tenants with  rights of survivorship  \_\_\_\_\_\_ Tenant in Common  \_\_\_\_\_\_ In partnership\*  \_\_\_\_\_\_ As custodian, trustee  or agent for  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\*\*  \_\_\_\_\_\_ Corporation \*\*\*  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  \* If a partnership, please include a copy of partnership agreement and certificate authorizing investment.  \*\* If a custodian, trustee or agent, please include trust, agency or other agreement and certificate authorizing investment.  \*\*\* If a corporation, please include articles of incorporation; certificate that investment was duly authorized, with corporate resolution or other document authorizing investment attached; and certificate of incumbency of officers. | Signature of Investor    Print Name    Title, if applicable    Mailing Address    City, State, Zip    Social Security Number or  Taxpayer Identification  Number | Signature of Co-Investor  If any    Print Name    Title, if applicable    Mailing Address    City, State, Zip    Social Security Number or  Taxpayer Identification  Number |

Approved and accepted the \_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_, 201\_\_.

***[Insert Company Name]***

By:

Title:

1. It is important to understand that the terms of any Subscription Agreement will depend to a substantial degree on the exemption from registration requirements of the Securities Act of 1933 (the “Securities Act”) that the Company is relying upon, the nature of the proposed investors, and the manner by which the offering will be made. This is a form of Subscription Agreement designed for use in connection with initial round offerings that are not undertaken or assisted by a placement agent where an exemption from the registration requirements of the Securities Act is to be based on Rule 506 of Regulation D (“Regulation D”). This is not intended for use in connection with the initial issuance to founders upon formation of the Company, to a venture capital or private equity firm (which covers these issues in the securities purchase agreement), or to employees, advisors and consultants under Rule 701 promulgated under the Securities Act. [↑](#footnote-ref-1)
2. This form of Subscription Agreement also assumes that an Offering Memorandum will be prepared and distributed to potential investors. [However, to the extent that an Offering Memorandum is not used and a Risk Factors Attachment alternative is used in lieu thereof, this form has bracketed the text relating to the Offering Memorandum for easy deletion]. [↑](#footnote-ref-2)
3. The type of equity interest offered will depend on the form of the Company and whether the equity interests will be common (with basic rights available to all non-preferential holders) or preferred rights. [↑](#footnote-ref-3)
4. If the offering is made on a “minimum offering” basis (e.g., a minimum amount must be raised as a condition to closing the offering and selling the shares or Units), the subscription proceeds will need to be held in escrow until the minimum offering has been fully subscribed. If an escrow is used, (a) delete the bracketed text “[shall accompany]” and replace with “shall be made concurrently with the delivery of” and (b) replace the bracketed text “[the Company]” with the following: “[***insert name of escrow agent***] - Escrowed Agent for [***insert name of Company***] (“*Escrow Agent*”)]”. [↑](#footnote-ref-4)
5. If Units of a limited liability company are being offered and sold, the Subscription Agreement should also require the Investor to submit a counterpart signature page to the operating agreement of the Company or provide a limited power of attorney to the manager of the Company to execute the signature page on behalf of the Investor upon acceptance of the subscription. If Common Stock (or preferred stock) is being offered and the company requires investors to execute a Stockholders Agreement which regulates the rights and duties of such stockholders, this should be include as a Subscription Document. Select the clause (c) that applies, if at all. [↑](#footnote-ref-5)
6. If the offering is instead made on a minimum offering basis, replace paragraph 2(b) with the following provision which establishes the time frame for achieving the minimum offering: “The [Common Stock][Units] will be offered on a “best efforts” basis and the Purchase Price tendered herewith will be held in escrow with Escrow Agent for disbursement to the Company on the terms and conditions set forth in this Agreement [and in the Offering Memorandum]. If the minimum offering amount of $\_\_\_\_\_ (the “*Minimum Offering Condition*”) is subscribed for and fully paid on or before ***[insert date]***, unless extended by the Manager to a date no later than ***[insert date]*** (the “*Initial Termination Date*”), then a closing will take place and the [shares][Units] will be sold (the “*Closing*”). If the Closing shall take place on or prior to ***[insert date]***, the offering may continue until ***[insert date]***, unless extended by the [Board of Directors][Manager] to a date no later than ***[insert date]***.” [↑](#footnote-ref-6)
7. Pursuant to Rule 506(b) of Regulation D, the sale of securities may not be made to more than 35 non-accredited purchasers, the offer and sale of such securities may not be made by means of any general solicitation or advertising, and certain disclosures are required to be made to any non-accredited purchasers. Rule 506(c) of Regulation D does permit general solicitations and advertising in the offer and sale of securities to accredited investors only, but establishes a more robust procedure to verify that all of the investors are accredited investors. [↑](#footnote-ref-7)
8. If an Offering Memorandum is used, insert the first bracketed clause as clause (i); if not, use the second bracketed clause. [↑](#footnote-ref-8)
9. The purpose of this Section 3(e) is to demonstrate compliance with Rule 502(b)(iv) and (v) of Regulation D relating to the information to be made available to non-accredited investors. [↑](#footnote-ref-9)
10. The purpose of Sections 3(f), 3(g), portions of Section 3(h), 3(i), and Section [11] are to demonstrate compliance with Rules 502(b)(vii) and 502(d)(2) of Regulation D relating to the limitation on the resale of the securities being acquired by the Investor. [↑](#footnote-ref-10)
11. Include the Operating Agreement or the Stockholder Agreement, as applicable. [↑](#footnote-ref-11)
12. For many reasons, all of which are obvious, it is preferable to have an Offering Memorandum prepared that discloses all of the material information relating to the company and the offering to provide to proposed investors prior to making any investment decision. Depending on the size of the offering, the nature of the investors, and other factors that can be explored with your legal counsel, there may be circumstances where it may not be cost effective to prepare a formal Offering Memorandum and, instead, provide the necessary information in an alternative manner. In such instances, we recommend attaching the Risk Factors to the Subscription Agreement as an Appendix to clearly demonstrate that these risks have been brought to the attention of the prospective investor prior to making the decision to invest. [↑](#footnote-ref-12)
13. If Risk Factors are presented in another format, identification of certain specified risks are sometimes highlighted in the Subscription Agreement. [↑](#footnote-ref-13)
14. Include the Operating Agreement or the Stockholder Agreement, as applicable. [↑](#footnote-ref-14)
15. This applies only if the Investor is acquiring Units of a limited liability company. The power of attorney granted to the manager to sign the Operating Agreement simplifies the execution of the Operating Agreement upon acceptance of a subscription and sale of the Units, but is not required. [↑](#footnote-ref-15)
16. As indicated in footnote 15, this applies only if the Investor is acquiring Units of a limited liability company and, although useful, it is not required. [↑](#footnote-ref-16)