Bret Hester
Senior Managing Director and
General Counsel, Head of
Regulatory Affairs & Banking Law

601 13th St., Suite 700 North
Washington, DC 20005

[redacted]

June 1, 2020

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Email: rule-comments@sec.gov

Re: Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, File No. S7-05-20

Dear Ms. Countryman:

Teachers Insurance and Annuity Association of America ("TIAA") appreciates the opportunity to submit this comment in response to the U.S. Securities and Exchange Commission's (the "SEC" or "Commission") proposed amendments to the current regulatory framework for exempt offerings (the "Proposal").[1] We commend the SEC's ongoing efforts to facilitate capital formation and increase opportunities for investors by simplifying, harmonizing, and improving the regulatory regime governing exempt offerings. We strongly support the Commission's goal of promoting capital formation – and it is in this spirit that we offer the comments below on how the Proposal might be improved to further the Commission's objectives while preserving and enhancing important investor protections.

The Proposal includes a number of questions on how various elements of the exempt offerings framework might be updated to address gaps and complexities that may impede investor access to investment opportunities and issuer access to capital. Questions 34-39[2] of the Proposal relate to Rule 506(c) of Regulation D ("Rule 506(c)" or the "Rule"), which permits issuers to generally solicit and advertise an exempt offering provided that all purchasers in the offering are accredited investors and the issuer has taken reasonable steps to verify each purchaser's accredited investor status. We believe issuers may not be taking advantage of Section 506(c) to the extent they could due to ambiguity under the current regulatory framework as to what "reasonable steps" an issuer must take to verify that all purchasers are accredited investors. In this letter, we offer our

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1 *Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets*, 85 Fed. Reg. 17956 (Mar. 31, 2020), *available at*: https://www.govinfo.gov/content/pkg/FR-2020-03-31/pdf/2020-04799.pdf.

2 *Id.* at 17981-82.

perspective on the difficulties Rule 506(c) currently poses for investors and issuers today, and we recommend guidance and certain changes the Commission might consider undertaking to provide issuers seeking to rely on Rule 506(c) greater clarity and comfort.

I. About TIAA and Nuveen.

Founded in 1918, TIAA is the leading provider of retirement services for those in academic, research, medical, and cultural fields. Over its century-long history, TIAA's mission has always been to aid and strengthen the institutions and participants it serves and to provide financial products that meet their needs. To carry out this mission, TIAA has evolved to include a range of financial services, including asset management and retail services. Today, TIAA's investment model and long-term approach serve more than five million retirement plan participants at more than 15,000 institutions. With its strong nonprofit heritage, TIAA remains committed to its mission of serving the financial needs of those who serve the greater good. To carry out this mission, we have evolved to include a range of financial services, including asset management and retail services. TIAA's wholly-owned asset management subsidiary Nuveen, LLC ("Nuveen") is comprised of investment advisers that collectively manage over $1 trillion in assets,[3] including in the Nuveen and TIAA-CREF registered fund complexes and in private funds and structured vehicles. Nuveen offers private funds and other products relying on Regulation D, managed and issued by Nuveen affiliates, both directly to eligible investors and through various third-party intermediaries including broker-dealers, registered investment advisers, and others.

II. The verification requirement in Rule 506(c) creates uncertainty for issuers, which may limit their reliance on the Rule.

Rule 506(c) allows a company to generally solicit and advertise a securities offering that is exempt from registration, provided that (a) the investors in the offering are all accredited investors and (b) the company takes "reasonable steps" to verify that that the investors are in fact accredited investors. As the SEC notes in the Proposal, Rule 506(c) provides a "principles-based method for verification of accredited investor status," which "requires an objective determination by the issuer…as to whether the steps taken are 'reasonable' in the context of the particular facts and circumstances of each purchaser and transaction."[4] The Rule also includes a "non-exclusive list of verification methods that issuers may use, but are not required to use, when seeking to satisfy the verification requirement with respect to natural person purchasers."[5]

In Question 34 of the Proposal, the SEC asks whether issuers are "hesitant to rely on Rule 506(c) . . . as compared to other exemptions," and whether "the requirement to take reasonable steps to verify accredited investor status [is] having an impact on the willingness of issuers to use Rule

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3 As of March 31, 2020.

4 85 Fed. Reg. at 17980.

5 *Id*.

506(c)."[6] We agree with the Commission's statement in the Proposal that "the structure of Rule 506(c)'s verification requirement, with its prominent description of several non-exclusive verification methods, may be creating uncertainty for issuers and inadvertently encouraging issuers (or those acting on their behalf) to rely only on the non-exclusive list."[7] We understand that the SEC included the non-exclusive list of possible verification methods in Rule 506(c) to give issuers greater clarity as to how they might reasonably verify an investor's status, while also providing them the flexibility to pursue alternative approaches. However, we believe many issuers may be wary of choosing a verification method that is not included in the SEC's list, as they would prefer to know with certainty that the steps they are taking will meet the Commission's reasonableness standard. Some issuers may choose not to take advantage of the flexibility the SEC intended to provide with its non-exclusive list and may instead restrict their verification methods to only those activities that are specifically listed. Other issuers, unwilling to grapple with the ambiguity inherent in Rule 506(c), may choose not to rely on the exemption provided under the Rule at all. Issuers may also have difficulty collecting the information necessary to verify investors' status due to privacy concerns, as investors may be reluctant to provide financially sensitive information to issuers, and issuers may be wary of taking on the challenges that come with collecting and properly storing sensitive investor information. These outcomes run contrary to the SEC's stated goal of providing issuers with "significant flexibility in deciding the steps needed to verify a person's accredited investor status and to avoid requiring them to follow uniform verification methods that may be ill-suited or unnecessary to a particular offering or purchaser in light of the facts and circumstances."[8]

We believe the SEC can address these unintended outcomes and encourage more issuers to rely on Rule 506(c) by expanding the verification methods included in the non-exclusive list and stating more clearly in guidance that the non-exclusive list is not prescriptive. Additionally, we recommend that the SEC eliminate the verification requirement altogether for issuers of private placements that involve a registered investment adviser, broker-dealer placement agent, or other third-party intermediary that can perform verification checks in the issuer's place. We discuss these recommendations in Section III below.

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6 *Id.* at 17981.

7 *Id.* at 17980.

8 *Id.* at 17981.

III. The SEC should expand its non-exclusive list of verification methods, provide clearer guidance that the list is not prescriptive, and eliminate the verification requirement for issuers of private placements that involve third-party intermediaries.

To encourage more issuers to rely on Rule 506(c) and provide greater certainty to issuers that already rely on the Rule, we recommend that the SEC take three steps. First, we urge the SEC to expand the non-exclusive list of verification methods it considers "reasonable." With respect to Question 35 of the Proposal,[9] we agree that the SEC should add its proposed new item to the list, allowing an issuer that previously took reasonable steps to verify an investor's accredited investor status to determine that such investor remains an accredited investor at the time of a subsequent sale, provided that the investor provides a written representation to that effect and the issuer is not aware of information to the contrary.[10] However, as contemplated in Question 38 of the Proposal,[11] we believe the Commission can and should expand its non-exclusive list of reasonable verification methods even further. The more items the SEC adds to its list, the more confirmed "reasonable" verification methods issuers will be able to choose from, while still enjoying the same flexibility they currently have to adopt unlisted methods that might be more appropriate in light of their individual circumstances. Accordingly, we encourage the SEC to make its non-exclusive list of verification methods as expansive as possible.

Second, we support the Commission's intention, as expressed in the Proposal, to "reaffirm and update [its] prior guidance with respect to the principles-based method for verification, and in particular what may be considered 'reasonable steps' to verify an investor's accredited investor status."[12] With respect to Question 36 of the Proposal,[13] we believe that additional guidance regarding the meaning of "reasonable steps" is necessary. We agree with the SEC that updating

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9 Question 35 asks the following: "Should [the SEC] provide an additional method of verification, as proposed, that would allow an issuer to establish that an investor that the issuer has previously verified remains an accredited investor as of the time of sale, so long as the investor provides a written representation to that effect to the issuer and the issuer is not aware of information to the contrary? If so, should [the SEC] impose a time limit on this method of verification, and if so, how long should that time limit be?" *Id*.

10 *Id.* at 17980-81.

11 Question 38 asks the following, in part: "Are there additional or alternative verification methods that we should include in the non-exclusive list of reasonable verification methods that would make issuers more willing to use Rule 506(c) or would better address investor protection?" *Id*. at 17981.

12 *Id.*

13 Question 36 asks the following: "Is additional guidance for reasonable steps needed? Would further guidance provide more clarity? Should [the SEC] eliminate the requirement to take reasonable steps to verify accredited investor status in specified circumstances? If so, which circumstances? Should the verification requirements be eliminated altogether, as suggested by some commenters? Would legislative changes be necessary or helpful?" *Id*.

past guidance to clarify the meaning of "reasonable steps" would "lessen concerns that an issuer's method of verification may be second guessed by regulators or other market participants without regard to the analysis performed by the issuer in making the determination, and encourage more issuers to rely on additional verification methods tailored to their specific facts and circumstances."[14] Such updated guidance should specify in no uncertain terms that the SEC's non-exclusive list of verification methods is not prescriptive, and that issuers are encouraged to explore methods outside the confines of that list according to each issuer's individual needs, facts, and circumstances. Without definitive reassurance from the SEC that a range of verification methods beyond those specifically listed can qualify as "reasonable," we believe many issuers may choose not to rely on Rule 506(c), even if they could benefit from the exemption provided under the Rule.

Finally, as the New York State Bar Association ("NYSBA") suggested in its comment[15] in response to the SEC's 2019 Concept Release on this same topic,[16] we respectfully recommend that the Commission eliminate the verification requirement for issuers of exempt offerings involving a third-party intermediary such as a registered investment adviser, broker-dealer, or placement agent that can verify investors' accredited investor status. In such offerings, it is generally the third-party intermediary, rather than the issuer, that has a direct relationship with the investors involved – meaning the intermediary is in the best position to verify the accredited investor status of investors. However, in our experience, these intermediaries are often reluctant to take on the responsibility of verifying the accredited investor status of investors in exempt offerings. We believe this reluctance is largely due to the uncertainty that currently exists around the types of verification methods that the SEC may deem "reasonable."

We are hopeful that if the SEC expands its non-exclusive list of "reasonable" verification methods and issues updated guidance providing reassurance that a wide range of verification methods may be deemed acceptable, these third-party intermediaries will be more comfortable performing their own verification checks or otherwise making independent determinations as to the accredited investor status of such investors through other means (*e.g.*, based on their pre-existing substantive relationship or otherwise). In such instances where a third-party intermediary is available to conduct these verifications, we believe issuers should not be required under Rule 506(c) to verify the status of their investors directly. This change would appropriately reflect the fact that the intermediary is the party best suited to establish whether all investors are accredited investors, and it would also relieve issuers of a regulatory burden they may not be well positioned to fulfill, while still maintaining necessary investor safeguards.

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[14] *Id*.

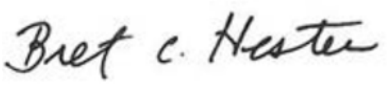
[15] *See* Letter from NYSBA to SEC re: Concept Release on Harmonization of Securities Offering Exemptions (Oct. 18, 2019), *available at:* https://www.sec.gov/comments/s7-08-19/s70819-6315608-193651.pdf.

[16] *Concept Release on Harmonization of Securities Offering Exemptions*, 84 Fed. Reg. 30460 (June 26, 2019), *available at*: https://www.govinfo.gov/content/pkg/FR-2019-06-26/pdf/2019-13255.pdf.

IV. Conclusion.

We appreciate the opportunity to comment on the SEC's proposed updates to the regulatory framework governing exempt offerings. We hope that our recommendations above will assist the SEC in its efforts to promote capital formation while preserving and strengthening critical investor protections. We welcome the opportunity to engage further on any aspect of this letter.

Sincerely,



Bret Hester
Senior Managing Director and General Counsel
TIAA

Cc: Daniel Carey
Associate General Counsel
Nuveen, LLC

Keith Atkinson
Managing Associate General Counsel
Nuveen, LLC