



Via Email: rule-comments@sec.gov

May 25, 2012

U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Attention: Ms. Elizabeth M. Murphy, Secretary

Ladies and Gentlemen:

This letter is submitted in response to the U.S. Securities and Exchange Commission's (the "Commission") request for public comments relating to the rules that the Commission is required to adopt pursuant to Section 201 of the Jumpstart Our Business Startups Act of 2012 (the "JOBS Act") relating to general solicitation and general advertising.

Section 201 of the JOBS Act requires the Commission, not later than July 4, 2012 (90 days after enactment of the JOBS Act), to revise Regulation D under the Securities Act of 1933 (the "Securities Act") to "provide that prohibitions against general solicitation or general advertising contained in [Rule 502(c) of Regulation D] shall not apply to offers and sales of securities made pursuant to [Rule 506], provided that all purchasers of the securities are accredited investors. Such rules shall require the issuer to take reasonable steps to verify that purchasers of the securities are accredited investors, using such methods as determined by the Commission."

SecondMarket Holdings, Inc. ("SecondMarket" or "we") recommends that the Commission adopt rules with respect to verification of accreditation that provide that 1) where an issuer relies on Rule 506 without generally soliciting or generally advertising in connection with the offering, the issuer need only have a reasonable basis to believe that investors satisfy the "accredited investor" definition set out in Rule 501(a) without taking additional steps to verify that status, and 2) where an issuer relies on Rule 506 and generally solicits or generally advertises in connection with the offering, the issuer must take reasonable steps to verify the accreditation status of its investors, which will be deemed satisfied if such issuer a) imposes a minimum investment size sufficient to create a presumption of accreditation, or b) obtains documentary proof, either directly or through an approved registered broker-dealer intermediary, that such investor satisfies the income test set forth in Rule 501(a)(7). Providing issuers with this level of flexibility will encourage private capital formation while ensuring the integrity of the accreditation status of participating investors.



SecondMarket Background

SecondMarket was founded in 2004 as a marketplace for illiquid assets. Today, SecondMarket is the largest secondary market dedicated to creating liquidity for alternative investments, including private company stock, fixed income securities, and bankruptcy claims. SecondMarket has over 100,000 participants registered on our online platform and has conducted billions of dollars in transactions across all of our asset classes.

SecondMarket is registered as a broker-dealer with Financial Industry Regulatory Authority (“FINRA”), the SEC and in all 50 states. In 2011, SecondMarket also registered its electronic trading platform with the SEC as an alternative trading system (“ATS”) for trading in private company securities. In the context of private company transactions, we act as an intermediary agency broker-dealer facilitating transactions between sellers and pre-qualified accredited investors, within the meaning of Rule 501(a) of the Securities Act of 1933 (the “Securities Act”).

SecondMarket has designed its electronic platform to ensure that transactions that take place through our platform comply with the provisions of the U.S. Securities Act of 1933 and the rules and regulations promulgated thereunder. Specifically, our interactions with potential buyers are governed by the guidance provided in the SEC’s no-action letter response to IPONET, dated July 26, 1996¹ and in the SEC’s Use of Electronic Media Interpretive Release dated April 28, 2000.² In that guidance, the SEC took the position that qualification of accredited investors using the procedures specified in the IPONET letter, and offers and sales to accredited investors on a password-protected website of securities posted after their qualification, would not be viewed as a form of general solicitation or general advertising within the meaning of Rule 502(c) of the Securities Act. According to the SEC’s guidance, completion of an online questionnaire certifying to a potential investors accreditation status was sufficient to allow a broker-dealer to form a reasonable belief that a prospective investor was “accredited” within the meaning of Regulation D.

SecondMarket’s prospective buyer verification process goes beyond the standard questionnaire approach inasmuch as it directs prospective individual buyers to provide specific details on investment experience, historical and current income, net worth, and total investments, as well as to state that they have such knowledge and experience in financial and business matters that they are capable of evaluating the merits and risks of investing in illiquid assets.³ The questions are designed to elicit sufficient specific information to enable SecondMarket to determine the prospective buyer’s status as an accredited investor and also provide a basis for understanding each prospective buyer’s suitability with respect to investing in illiquid assets. Upon completion of these fields, each prospective buyer is required to electronically execute an

¹ Divisions of Corporation Finance and Market Regulation interpretive letter IPONET (July 26, 1996).

² Release Nos. 33-7856, 34-42728 SEC Interpretation: Use of Electronic Media dated April 28, 2000.

³ SecondMarket has a parallel process for institutional investors.

agreement representing that the information that they have provided is true and correct. We require that each accredited investor recertify their accreditation on an annual basis. To date, more than 20,000 individual and institutional participants have certified themselves as accredited investors through the SecondMarket platform.

Legislative Mandate

In proposing rules to implement Section 201 of the JOBS Act, we encourage the Commission to be mindful of the need for flexibility with respect to the requirement that issuers take reasonable steps to verify that purchasers of the securities are accredited investors. Placing too heavy a burden on issuers and investors could have the undesired effect of inhibiting private capital formation. For example, issuers are likely to be unwilling or unable to assume the liability and cost that would arise from a significant documentary verification requirement. In addition, legitimate privacy concerns may result in potential investors being unwilling to provide highly sensitive personal information outside of a clearly protective framework, which may cause such investors to avoid participating in Rule 506 offerings.

In order to avoid these potential pitfalls, SecondMarket recommends that the SEC propose a non-exclusive safe harbor that provides issuers flexibility while still satisfying the legislative mandate of Section 201, as follows:

1. Ability to Rely on Current Rule 506

The proposed rules should provide that an issuer who does not generally solicit or generally advertise in the context of a Rule 506 offering is able to operate under the current requirements of Rule 506 of Regulation D and would not be subject to additional requirements to verify the accreditation of potential investors. As is currently the case, a reasonable belief as to the accredited status of an investor would be sufficient in this circumstance.

2. Minimum Investment Size as an Indication of Accreditation Status

For issuers that choose to take advantage of the ability to generally solicit or generally advertise, the proposed rules should provide an alternative for a minimum dollar investment amount that would create a presumption of accreditation. Setting a substantial minimum investment requirement, coupled with standard legal representations in the purchase and sale or subscription agreement that the buyer is an accredited investor, should be deemed sufficient evidence to allow an issuer and intermediaries acting on the issuer's behalf to presume that an individual who invests at least that minimum dollar amount is accredited without requiring additional verification of that individual's status

3. Documentary Verification of Accredited Investor Status Under the Income Test

For transactions below the specified minimum dollar amount, we believe that it would be reasonable for the SEC to require that issuers who choose to generally solicit in the context of a

Rule 506 offering take additional steps, either directly or through a registered broker-dealer, in order to determine whether potential investors are accredited by obtaining documentary proof of their status, in addition to obtaining the standard legal accredited investor representations in the purchase and sale or subscription agreement.

As you are aware, the definition of “accredited investor” for natural persons set out in Rule 501(a)(6) and (7) of Regulation D provides that an individual will be deemed to be an accredited investor to the extent that they can demonstrate requisite net worth and/or income. It has been our experience that the majority of accredited individual investors who certify their accredited investor status satisfy the requirements of Rule 501(a)(7), the income test. In that case, the verification process could include a requirement that the issuer, or its broker-dealer intermediary, obtain copies of a potential investor’s tax returns, W-2, Form 1099 or other income verification documentation for the past two fiscal years, in addition to a pay stub from the current year, in order to verify whether the individual satisfies the requirements of Rule 501(a)(7). This would be a fairly simple process on an electronic platform such as SecondMarket’s, where accredited investors are already required to upload copies of personal identification in the context of our anti-money laundering review, and we, as a broker-dealer, are required to safeguard information and deal fairly with each customer.

We believe that it is critical that any intermediary engaged in verifying accreditation be a registered broker-dealer for a number of important reasons, including that registered broker-dealers are subject to:

- SEC and FINRA oversight and review,
- FINRA’s rules, including with respect to record keeping, fair-dealing, and suitability,
- The PATRIOT Act, and
- Regulation S-P, which sets out requirements for keeping customer information confidential.

As a result of these rules and regulations, SecondMarket, for example, is required to have and maintain robust internal compliance processes and guidelines designed to maintain the confidentiality of the personal information of our participants.

We also believe that the SEC should establish specific guidelines that registered broker-dealers must satisfy with respect to the accredited investor verification process in order to be deemed an approved accreditation verification provider or “AVP” that can be relied upon by issuers or broker-dealer intermediaries who choose to outsource the accreditation verification process. Once an SEC-approved AVP has verified an individual’s accredited investor status, issuers and other broker-dealer intermediaries would be able to rely on that certification for a 12 month period without additional obligation.

We believe that permitting issuers and intermediaries to rely on an SEC-approved AVP to verify accreditation will assuage potential investor's potential legitimate privacy concerns around providing highly confidential personal information directly to issuers, who would not be subject to the regulatory safeguards and requirements noted above, or to multiple broker-dealer intermediaries. Additionally, issuers and intermediaries, as well as the SEC, would have certainty that the verification process is being carried out in strict adherence to the guidelines established by the SEC.⁴

4. Verification of Accredited Investor Status Under the Net Worth Test

With respect to verifying net worth, we believe that it may prove very difficult for an issuer or intermediary to conclude with any certainty that an individual satisfies this test, since net assets and net liabilities can and do include a wide range of factors beyond the standard brokerage and 401(k) account statements on the asset side and credit card debt on the liability side. For example, net assets could include esoteric items such as art or jewelry that would prove difficult to value absent a recent third party appraisal. In addition, potential investors could easily "game the system" with regard to demonstrating requisite net worth, providing only proof of true assets, while failing to disclose true liabilities. As a result of this uncertainty, to the extent that an individual does not meet the requisite income levels specified in Rule 501 (a)(7), we believe that the SEC should consider requiring that such investors satisfy the minimum investment threshold discussed above.

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We greatly appreciate the opportunity to provide our comments on Section 201 of the JOBS Act in advance of the SEC's rulemaking on the subject. We would be happy to provide any additional information or answer any questions that you might have.

Sincerely,

A handwritten signature in black ink, appearing to read "Annemarie Tierney".

Annemarie Tierney
General Counsel and Corporate Secretary
SecondMarket Holdings, Inc.

⁴ We also believe that creating a process for designation of broker-dealers as SEC-approved AVPs that can be relied upon by third parties with respect to accreditation verification would prove extremely helpful to non-public companies that are required to monitor their total number of non-accredited investors under the thresholds of Section 12(g)(1) of the Securities Exchange Act of 1933 as amended by the JOBS Act. For example, a non-public company could engage an SEC-approved AVP to verify their individual investors on an annual basis. To the extent that an individual does not complete the process, such shareholder would be presumed to be a non-accredited investor.