Via Email: rule-comments@sec.gov

September 18, 2013

Ms. Elizabeth M. Murphy, Secretary
U.S. Securities and Exchange Commission
100 F Street N.E.
Washington, DC 20549-1090

Re: **Amendments to Regulation D, Form D and Rule 156**
File No. S7-06-13

Dear Ms. Murphy:

This letter is submitted in response to the U.S. Securities and Exchange Commission's (the "Commission") request for public comment on its proposed amendments to Regulation D under the Securities Act of 1933 and to Form D.

Section 201 of the Jumpstart Our Business Startups Act (the "JOBS Act") required the Commission 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." Those rules were adopted by the Commission on July 10, 2013 and become effective on September 23, 2013.

At the same time that the Commission adopted the amendments to Regulation D mandated by the JOBS Act, it also proposed a number of ancillary changes to Regulation D and Form D that we believe will significantly impede the ability of issuers to take advantage of the flexibility that Congress sought to bring to private capital formation through the elimination of the prohibition on general solicitation.

SecondMarket Background

SecondMarket was founded in 2004 as a marketplace for illiquid assets. Today, SecondMarket is the leading provider of primary and secondary liquidity for alternative investments, including private issuer and fixed income securities. 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 fifty 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 placements, we have assisted a wide range of private investment funds and private startups seeking to raise primary capital under Rule 506 of the Securities Act of 1933 (the "Securities Act") and we also create secondary liquidity for private securities through private tender offers and other secondary liquidity transactions.

Our Thoughts on the Proposed Rules

While we support the underlying goals of minimizing investor fraud and enabling the Commission to evaluate market practices in Rule 506 offerings, we strongly believe that many of the proposed changes are completely unworkable for startups raising capital in today's electronic world.

Consider the reality of how most startup businesses actually raise capital. Early and mid-stage startup private companies are under constant pressure to raise capital in order to grow and expand their business. Capital is generally sought by the company's CEO on a continuous basis. The company seldom prepares a formal private placement memorandum, but, instead, uses an investor deck as a tool to explain the company to potential investors. SecondMarket works with many of these early and mid-stage startups, providing an overview of the issuer and the investor deck to our accredited investor base through our platform and then referring potential investors to the issuer for follow up diligence questions and transaction closing. As a general rule, these transactions do not follow the traditional "investment bank supported" capital raising model more suited to the proposed amendments.

Our most significant concerns are as follows:

1. Advance Filing of Form D

Under the current rules, an issuer offering securities under Rule 506 and broker-dealers offering securities on their behalf must file a Form D within 15 days of the date of the first sale of securities. The proposed rules would require that an "Advance Form D" be filed by the issuer with the Commission no later than 15 days before the commencement of general solicitation. We simply do not understand the benefit of the proposed filing requirement when weighed against the significant burdens that such a requirement would impose on issuers.

What amounts to imposing a 15-day cooling off period for startups seeking capital on a continuous basis is quite simply inconsistent with the intent of the JOBS Act and creates real issues for startups. The continuous offerings of startup businesses often lack a clear "commencement date" that can be relied upon to mark the start of the proposed15-day filing period, resulting in confusion for issuers trying to determine when the Advance Form D filing requirement would be triggered. In addition, many startups will be unaware of the legal technicalities and may unintentionally run afoul of the proposed rules. As a result, should the

proposed amendment be adopted, we would not support the imposition of any negative consequences for failure to file the Advance Form D and would certainly oppose the potential consequence of immediate loss of Rule 506(c) as an exemption for the offering at issue.

The Commission specifically notes that it "does not anticipate that the staff will review each Advance Form D as it is being made." Given the clearly limited additive benefit an advanced filing will provide to the Commission on top of the benefit already gained from Form Ds timely filed under the current regime, the burden it creates is unjustified. In addition, the Commission notes that requiring the filing of an Advance Form D would be helpful to its understanding of the market even if the issuer ultimately does not raise capital in reliance on Rule 506(c). The Commission does not, however, acknowledge or weigh the potential negative impact that a perceived "failed offering" could have on a startup's ability to raise capital in the future. If an issuer does not ultimately raise capital under Rule 506(c), there can be no true public policy served by requiring it to provide advance notice to the market that it is seeking to do so.

We also note that the while Commission's rules require that current Form D be filed with the Commission, state laws also require that the Form D be filed in every state where securities have been sold. We note that satisfying the current notice filing requirement exposes issuers and broker dealers to a myriad of differing filing requirements and varied state filing fees due to the current lack of uniformity in the Form D filing process across the states. Should the Commission adopt the Advance Form D requirements and the states then amend their rules to also require issuers to file the Advance Form D in every state where it might sell securities, compliance with the proposed amendment becomes even more unworkable, costly and burdensome for issuers.

We strongly believe that the imposition of the requirement for an Advance Form D would deter a wide range of private issuers from relying on Rule 506(c) for their offerings and respectfully request that the Commission not adopt the proposed Advance Form D requirement.

2. Filing of Final Form D

Again noting that we support the Commission's goal of better understanding the Rule 506 market, it seems incomprehensible that the Commission would need an issuer to potentially file three separate Form D variations in the context of each offering in order to do so. The cost of requiring three separate filings could prove enormous for startups and other issuers that would generally need to rely on external counsel to prepare and file these forms with the Commission and state regulators. In addition, requiring an issuer who abandons an offering and does not actually raise capital under Rule 506(c) to file such a form is overly burdensome when weighed against the potential negative impact that this information could have on the company's ability to raise capital in the future. As the lack of a clear commencement date may create compliance issues relating to the Advance Form D, issuers raising capital on a continuous basis might also

have trouble identifying an offering transaction end date that would serve as the basis for filing the Final Form D, which could cause confusion and the possible risk of noncompliance.[1]

With respect to the Commission's goal of better understanding the Rule 506 market, we note that FINRA Rule 5123 currently provides that: "Each member that sells a security in a non-public offering in reliance on an available exemption from registration under the Securities Act ("private placement") must: (i) submit to FINRA, or have submitted on its behalf by a designated member, a copy of any private placement memorandum, term sheet or other offering document, including any materially amended versions thereof, used in connection with such sale within 15 calendar days of the date of first sale; or (ii) notify FINRA that no such offering documents were used." We respectfully request that the Commission consider utilizing the information filed with FINRA as a means of understanding the Rule 506 market before moving to adopt rules that significantly and unnecessarily burden issuers in order to do so.

3. Proposed Amendments to the Content Requirements of Form D

In our view, imposing significant new disclosure requirements on Rule 506(c) private placements will have a chilling effect on that market. While we support several of the proposed additional information requirements, such as whether the issuer is relying on Rule 506(c) and the address of the issuer's website, the Commission's need to understand the market is not sufficient justification to outweigh the privacy issues and burdens that the majority of the proposed amendments would create for issuers.

Consider for example, the proposed amendment to Item 14. The proposal would require an issuer to provide a table that includes information on the number of accredited or non-accredited investors that have purchased in the offering, whether they are natural persons or entities and the amount raised from each category of investors. For an issuer raising capital on a continuous basis, this requirement would impose a parallel need to continuously amend the Form D to disclose additional new capital raised. In addition, public disclosure of the composition of a private company's shareholder base and how much was raised in each category triggers privacy concerns that are not adequately addressed by the Commission in its justification for the proposed disclosure.

Moreover, proposed new Items 17 to 22 also appear to assume that the requirement to file a Final Form D will be adopted. To the extent that it is not, many of these provisions will not be known to the issuer on the date of first sale. Thus, we would request clarification on whether

[1] As with the Advance Form D, we would again ask whether the proposed Final Form D would also need to be filed in every state in which securities were sold, and if so, would again note the additional cost and burden associated with such requirement.

issuers would be required to make multiple amendments to current Form D throughout the offering process should these new items be adopted.

4. Proposed Amendment to Rule 507

The proposed amendment to Rule 507 to disqualify an issuer who failed to comply with the Form D filing requirements within the past five years from relying on Rule 506 for any new offering for a one year period is clearly contrary to the intent of the JOBS Act and completely disproportionate to the impact that such failure would have on investors and the market. There is absolutely no basis for an amendment that would penalize an issuer for the failure to properly file the Form D by imposing a one year ban from reliance on the exemption for future offerings.

Putting aside that such a ban would serve as a death knell for many startups and other issuers that inadvertently fail to comply with highly technical legal filing requirements due to a lack of sophistication or lack of access to legal counsel, the Commission fails to provide adequate grounds for the severity of the proposed amendment. Surely, the need for the Commission and state regulators to better understand and analyze the market does not merit draconian penalties for non-compliance, especially since the participating investors will be verified as accredited and will have access to all of the information that they consider necessary to make an investment decision? Investors will surely suffer no harm if the issuer fails to properly file a Form D (or possibly multiple variations of Form D). Indeed, the Commission rightly notes that not every issuer chooses to file a Form D under the current rules, a fact that is not reflective of a pattern of problematic practices around Rule 506 offerings under the current rules.

If the Commission does amend the rules as proposed to require a Form D filing in order to rely on Rule 506, the Commission should provide an issuer with a reasonable period of time to cure the defect while still permitting reliance on the exemption. The proposed one-time cure period of 30 days during an offering may prove insufficient if issuers are required to file three variations of highly technical Form D filings plus potential amendments to those filings during the pendency of the offering.

We also do not understand the Commission's justification for extending the proposed disqualification to an issuer if its predecessors or affiliates failed to comply with the Form D filing requirement unless the issuer was somehow involved in the noncompliant offering. Issuers should not be held responsible for the actions of entities over which they may not have exercised control at the time of noncompliance, and we urge the Commission not to adopt this concept unless a nexus exists between the issuer and the failure to properly file Form D.

5. Material Legends and other Disclosures for Written General Solicitation Materials

We generally support the proposed requirement that written general solicitation materials include legends, but believe that the Commission's failure to define "written general solicitation materials" will cause widespread confusion and noncompliance. For example, as other commenters have noted, startups seeking capital will likely utilize social media as a means to solicit investor interest, a communication format that does not allow for long and complicated legal legends. We believe that requiring the legends be included on private placement memorandums, term sheets, investor decks, print ads, websites, emails or similar "hard copy" types of written communications would provide investors with the requisite disclosure protections. As a result, we propose that the Commission provide a clear list of the types of materials that would constitute "written general solicitation materials." Utilizing the definition of written materials in Rule 405 would also be unworkable as it would lead to imposition of the legending requirements on social media or other communication formats that cannot support such disclosure.

In addition, should the Commission adopt the proposed requirement, we support the adoption of a cure mechanism for issuers that fail to comply with the legend requirements. We believe a 30 day period to cure and redistribute written general solicitation materials that are capable of being redistributed would be appropriate. Alternatively, we support a requirement that all potential investors who respond to non-compliant written general solicitation be specifically informed about the risks outlined in the proposed legend before being allowed to close an investment.

We strongly oppose the concept that comparable disclosure be provided in oral communications used in Rule 506(c) offerings. As the general counsel of a private company, I can assure you that there is little likelihood that our CEO will read such disclaimers aloud every time he sits down with a potential investor, picks up an investor call, or appears on CNBC or Bloomberg, and such disclosures would provide potential investors with no additional protections as a general matter. There are multiple opportunities during the investment process where such investors can be provided written communications that include the proposed legends.

6. Mandatory Submission of Written Solicitation Materials

We strongly oppose proposed Rule 510T of Regulation D based on the significant expense and burden that it would impose on issuers. As previously discussed, many issuers that will utilize Rule 506(c) are startups in need of constant capital infusions. Many of these companies are run by individuals who have no knowledge of the securities laws and lack the resources to retain capable external counsel on an ongoing basis. Thus, these companies will try to navigate complicated obligations on their own.

Notwithstanding that it is difficult to know which communications would be subject to the disclosure requirement, many private issuers will be intimidated by an obligation to provide every written communication used when communicating with investors in the context of a Rule 506(c) offering to the Commission. And in response to the Commission's specific question, in no case should these materials be made available to the public via the Commission submission process should the proposed rule be adopted. There is no conceivable public interest that would be served by such disclosure and it would significantly deter reliance on Rule 506(c).

As a result, of all of the Commission's proposed changes to Regulation D, proposed Rule 510T would likely prove the greatest deterrent to an issuer considering whether to raise capital under Rule 506(c). We respectfully request that the Commission consider other means to monitor market practices – perhaps by having members of the Commission's staff conduct web searches around a sampling of companies who file Form D indicating reliance on Rule 506(c) as a threshold approach before deciding that a more formal process is warranted.

7. **Definition of Accredited Investor**

While we believe that the current net worth and net income tests provided in Rule 501(a)(5) are reasonable methods for determining whether a natural person has such knowledge and experience in financial matters that he or she is capable of evaluating the merits and risks of a prospective investment, we also believe that it would be beneficial to introduce an examination process, much like the examination that a potential registered representative takes in order to obtain a Series 7 license, to determine a natural person's investment sophistication regardless of financial status. We believe that testing investment experience and market knowledge would be a much better indicator of the ability to make sophisticated investment decisions that net worth or net income. We note that this approach was also recommended in the Kauffman Foundations' 2013 State of Entrepreneurship Address as follows: "A test to certify a certain level of knowledge and understanding (either an existing certification—perhaps an MBA or CFA certification—or a new, much less expensive test to be developed) would allow for knowledgeable investors with fewer assets to participate in private equity markets, without increasing the overall level of risk to investors."

* * *

We greatly appreciate the opportunity to provide our comments on the proposed Amendments to Regulation D and Form D. We would be happy to provide any additional information or answer any questions that you might have.

Sincerely,

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