



Davis Polk & Wardwell LLP 212 450 4000 tel
450 Lexington Avenue 212 701 5800 fax
New York, NY 10017

Re: Comments on Compensatory Securities Offerings and Sales; File Number S7-18-18

September 24, 2018

VIA E-MAIL: rule-comments@sec.gov

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Dear Mr. Fields:

We are submitting this letter in response to the solicitation by the Securities and Exchange Commission (the "**Commission**") for comments on the Rule 701 exemption from registration under the Securities Act of 1933, as amended (the "**Securities Act**") for securities issued by non-reporting companies pursuant to compensatory arrangements; and Form S-8, the simplified registration statement for compensatory offerings by reporting companies. On July 18, 2018, the Commission issued a concept release (the "**Concept Release**") that was published in the Federal Register on July 24, 2018 to solicit comments on (i) ways to modernize the regulatory regime for compensatory securities offerings and sales to address recent developments such as changes to equity compensation, and the rise of "gig economy" alternative work arrangements; (ii) whether the Commission should further revise the disclosure content and timing requirements of Rule 701(e); and (iii) whether the use of Form S-8 should be further streamlined.¹

We appreciate the Commission's interest in reducing the burden of compliance and providing flexibility to companies by updating the eligibility, disclosure and timing requirements of Rule 701 and considering further streamlining of Form S-8. In response to the questions posed by the Commission, we respectfully request that the Commission consider the following recommendations for changes to Rule 701 and Form S-8.

Rule 701(c) Eligible Plan Participants

To what extent should definitions of "employee" under other regulatory regimes guide our thinking on eligible participants in compensatory securities offerings? Which regulatory regimes should we consider for this purpose? Should any new test apply equally to all companies, or would there be a reason to apply different tests based on the nature of the working relationship? (Question 1)

Would the application of Rule 701 to consultants and advisors in any circumstances cover the alternative work arrangements described above? (Question 2)

¹ Concept Release on Compensatory Securities Offerings and Sales, Release No. 33-10521 (Jul. 18, 2018) [83 FR 34958 (July 24, 2018)].

What, if any, services should an individual participating in the "gig economy" need to provide to the issuer to be eligible under Rule 701? Do these individuals in fact provide services to the issuer, or instead to the issuer's customers or end users? Should this fact make any difference for purposes of Rule 701 eligibility? (Question 3)

Should we consider a test that identifies Rule 701 eligible participants as individuals who use the issuer's platform to secure work providing lawful services to end users? (Question 4)

Are any other factors necessary to establish any level of control by the issuer, such as requiring the work to be assigned by the issuer? Or is it necessary that the issuer control what the individual charges end users for services, such as by setting hourly rates or ride fares? Should a written contractual relationship between the issuer and individual be necessary? Why or why not? (Question 4(a))

Does it matter whether the issuer controls when and how the individual receives monetary compensation for the services provided? (Question 4(c))

We support extending eligibility for the Rule 701 exemption to offers and sales to service providers of all forms, including gig economy workers as well as corporate entities that provide services, including personal services businesses. We agree, as the Commission noted in the Concept Release, that gig economy workers may not necessarily be "employees", "consultants", "advisors" or "de facto employees" who are currently eligible to receive securities in compensatory arrangements under Rule 701.² As discussed later in this letter, we recommend conforming Form S-8 eligibility to any expansion of Rule 701 eligibility.

Gig Economy Relationships Should Be Treated as a New and Distinct Category for Purposes of Rule 701.

In order to avoid eroding the established scopes of the current categories of persons eligible to receive securities under Rule 701, we believe that gig economy alternative work arrangements should be treated for purposes of Rule 701 as a new and distinct category of relationship between issuers and workers. This relationship may, in certain cases, include services that constitute or resemble service as an employee, consultant or advisor, but would also encompass services outside the scope of those categories, including services to or transactions with the end users of an issuer's platform. We believe that neither particular definitions of employee nor the concept of employment generally should constrain the availability of Rule 701 to gig economy workers. If anything, recent and ongoing developments suggest that, while the employment relationship remains predominant, service relationships are evolving in ways that have shifted large numbers of service providers into alternative work arrangements that do not necessarily involve a classic employer-employee relationship.³

² Concept Release at Section II.B.

³ See, e.g., *Freelancing in America 2017*, UPWORK (Oct. 17, 2017), <https://www.upwork.com/freelancing-in-america/2017/> (finding 36 percent of U.S. workforce was freelancing in 2017 and annually contributing approximately \$1.4 trillion to the economy; and predicting 50 percent of U.S. workforce would be freelancers by 2027); Emilia Istrate & Jonathan Harris, National Association of Counties, *The Future of Work: The Rise of the Gig Economy* (Nov. 2017), available at <http://www.naco.org/featured-resources/future-work-rise-gig-economy> (citing 19 percent growth in the number of self-employed workers (many of whom were gig economy workers) and the nearly 21 percent growth in such workers' gross receipts, between 2005 and 2015); McKinsey Global Institute, *Independent work: Choice, necessity and the gig economy* (Oct. 2016), available at <https://www.mckinsey.com/~media/McKinsey/Featured%20Insights/Employment%20and%20Growth/Independent%20work%20Choice%20necessity%20and%20the%20gig%20economy/Independent-Work-Choice-necessity-and-the-gig-economy-Full-report.ashx> (observing rapid evolution of independent (i.e., gig economy) work due to evolution of digital platforms, worker interest in becoming independent, large population of people who want to work and increased demand for independent services; citing benefits of independent work, including lower unemployment, higher demand, productivity and availability of services and more autonomy and flexibility for workers); Abdullahi Muhammed, *4 Reasons Why The Gig Economy Will Only Keep Growing in Numbers*, FORBES (Jun. 28, 2018), <https://www.forbes.com/sites/abdullahimuhammed/2018/06/28/4-reasons-why-the-gig-economy-will-only-keep-growing-in-numbers/#4b5305c411eb> (citing gap between supply and demand for educated workers, changing attitudes towards