

**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR Part 230**

**[Release No. 33-10521; File No. S7-18-18]**

**RIN 3235-AM38**

**Concept Release on Compensatory Securities Offerings and Sales**

**AGENCY:** Securities and Exchange Commission

**ACTION:** Concept release; request for comment.

**SUMMARY:** The Securities and Exchange Commission (“Commission”) is publishing this release to solicit comment on the exemption from registration under the Securities Act of 1933 (the “Securities Act”) for securities issued by non-reporting companies pursuant to compensatory arrangements, and Form S-8, the registration statement for compensatory offerings by reporting companies. Significant evolution has taken place both in the types of compensatory offerings issuers make and the composition of the workforce since the Commission last substantively amended these regulations. Therefore, as we amend the exemption as mandated by the Economic Growth, Regulatory Relief, and Consumer Protection Act (the “Act”), we seek comment on possible ways to modernize the exemption and the relationship between it and Form S-8, consistent with investor protection.

**DATES:** Comments should be received on or before September 24, 2018.

**ADDRESSES:** Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission’s Internet comment form (<http://www.sec.gov/rules/concept.shtml>);
- or

- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number S7-18-18 on the subject line.

Paper comments:

- Send paper comments to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-18-18. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's website (<http://www.sec.gov/rules/concept.shtml>). Comments are also available for website viewing and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m.

All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

**FOR FURTHER INFORMATION CONTACT:** Anne M. Krauskopf, Senior Special Counsel, and Adam F. Turk, Special Counsel, Office of Chief Counsel, Division of Corporation Finance, at (202) 551-3500.

## **SUPPLEMENTARY INFORMATION:**

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## I. Overview

Under the Securities Act, every offer and sale of securities must be registered or subject to an exemption from registration. The Commission has long recognized that offers and sales of securities as compensation present different issues than offers and sales that raise capital for the issuer of the securities.<sup>1</sup> Among other considerations, the Commission has recognized that the relationship between the issuer and recipient of securities is often different in a compensatory rather than capital raising transaction. The Commission has thus provided a limited exemption from registration – 17 CFR 230.701 (Rule 701) – for certain compensatory securities transactions as well as a specialized form – Form S-8 – for registering certain compensatory transactions. Both Rule 701 and Form S-8 require the issuer to make specific disclosures. However, depending on the circumstances, compensatory transactions also may be conducted under the Securities Act Section 4(a)(2) exemption from registration or under a “no sale” theory,<sup>2</sup> which would not require specific disclosures.

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<sup>1</sup> See, e.g., Release No. 33-3469-X (Apr. 10, 1953) [18 FR 2182 (Apr. 17, 1953)] and Registration of Securities Offered Pursuant to Employees Stock Purchase Plans, Release No. 33-3480 (Jun. 16, 1953) [18 FR 3688 (Jun. 27, 1953)], each observing that the investment decision to be made by the employee is of a different character than when securities are offered for the purpose of raising capital.

<sup>2</sup> See Changes to Exchange Act Registration Requirements to Implement Title V and Title VI of the JOBS Act, Release No. 33-10075 (May 3, 2016) [81 FR 28689 (May 10, 2016)] at n. 82, stating “The “no sale” theory relates to the issuance of compensatory grants made by employers to broad groups of employees pursuant to broad-based stock bonus plans without Securities Act registration under the theory that the awards are not an offer or sale of securities under Section 2(a)(3) of the Securities Act [15 U.S.C. 77b(a)(3)].” Where securities are awarded to employees at no direct cost through broad based bonus plans, the staff has taken the position generally that there has been no sale since employees do not individually bargain to contribute cash or other tangible or definable consideration to such plans. Where securities are awarded to or acquired by employees pursuant to individual employment arrangements, however the staff has expressed the view that such arrangements involve separately bargained consideration, and a sale of the securities has occurred. See Employee Benefit Plans: Interpretations of Statute, Release No. 33-6188 (Jan. 15, 1981) [29 FR 8960 (Feb. 11, 1980)] at Section II.A.5.d and n. 84.

Equity compensation can be an important component of the employment relationship. Using equity for compensation can align the incentives of employees with the success of the enterprise, facilitate recruitment and retention, and preserve cash for the company's operations.<sup>3</sup>

Since Rule 701 and Form S-8<sup>4</sup> were last amended, forms of equity compensation have continued to evolve, and new types of contractual relationships between companies and the individuals who work for them have emerged. In light of these developments, as well as the Act's mandate to increase to \$10 million the Rule 701(e) threshold in excess of which the issuer is required to deliver additional disclosure to investors, which we are implementing in a separate release,<sup>5</sup> we believe this is an appropriate time to revisit the Commission's regulatory regime for compensatory securities transactions. We therefore solicit comment on possible ways to update the requirements of Rule 701 and Form S-8, consistent with investor protection. We also solicit comment on what effects any revised rule or form may have on a company's decision to become a reporting company.

## **II. Rule 701**

### **A. Background**

In 1988, the Commission adopted Rule 701 under the Securities Act<sup>6</sup> to allow non-reporting companies to sell securities to their employees without the need to register the offer and sale of such securities.<sup>7</sup> Only issuers that are not subject to the reporting requirements of

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<sup>3</sup> See Executive Compensation and Related Person Disclosure, Release No. 33-8732A (Aug. 29, 2006) [71 FR53158 (Sept. 6, 2006)] at Section II.A.1.

<sup>4</sup> 17 CFR 239.16b.

<sup>5</sup> Section 507 of the Act directs the Commission, not later than 60 days after the date of enactment, to amend Rule 701(e) to increase this threshold. See Pub. L. 115-174, sec. 507, 132 Stat. 1296 (2018). In Release 33-10520, we adopt an amendment to Rule 701(e) to implement this change.

<sup>6</sup> 15 U.S.C. 77a et seq.

<sup>7</sup> See Compensatory Benefit Plans and Contracts, Release No. 33-6768 (Apr. 14, 1988) [53 FR 12918 (Apr. 20, 1988)] ("1988 Adopting Release").

Section 13<sup>8</sup> or 15(d)<sup>9</sup> of the Securities Exchange Act of 1934 (“Exchange Act”) and are not investment companies registered or required to be registered under the Investment Company Act of 1940<sup>10</sup> are eligible to use Rule 701. The rule provides an exemption from the registration requirements of Section 5 of the Securities Act<sup>11</sup> for offers and sales of securities under compensatory benefit plans<sup>12</sup> or written agreements relating to compensation. In adopting the rule, the Commission determined that it would be an unreasonable burden to require these non-reporting companies, many of which are small businesses, to incur the expenses and disclosure obligations of public companies where their sales of securities were to employees.<sup>13</sup> In addition to domestic non-reporting companies, Rule 701 is also available for foreign private issuers.<sup>14</sup>

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<sup>8</sup> 15 U.S.C. 78m.

<sup>9</sup> 15 U.S.C. 78o(d).

<sup>10</sup> 15 U.S.C. 80a-1 et seq.

<sup>11</sup> 15 U.S.C. 77e.

<sup>12</sup> A “compensatory benefit plan” is defined in Rule 701(c)(2) [17 CFR 230.701(c)(2)] as “any purchase, savings, option, bonus, stock appreciation, profit sharing, thrift, incentive, deferred compensation, pension or similar plan.”

<sup>13</sup> As the Commission stated in re-proposing Rule 701, “The essential concern [...] remains the same – many privately-held companies have found the costs of complying with the registration requirements of the Securities Act and the subsequent reporting obligations under section 15(d) of the Exchange Act so burdensome that employee incentive arrangements are not being provided by them. As a consequence, employees must forego [*sic*] potentially valuable means of compensation. The Commission historically has recognized that when transactions of this nature are primarily compensatory and incentive oriented, some accommodation should be made under the Securities Act.” See Employee Benefit and Compensation Contracts Release No. 33-6726 (Jul. 30, 1987) [52 FR 29033 (Aug. 5, 1987)] (“Rule 701 Proposing Release”) at Section I.

<sup>14</sup> A “foreign private issuer” is defined in 17 CFR 230.405 (Securities Act Rule 405) as a foreign issuer other than a foreign government, except an issuer meeting the following conditions as of the last business day of its most recently completed second fiscal quarter:

- (i) More than 50 percent of the outstanding voting securities of which are directly or indirectly owned of record by residents of the United States; and
- (ii) Any of the following:
  - (A) The majority of the executive officers or directors are United States citizens or residents;
  - (B) More than 50 percent of the assets of the issuer are located in the United States; or
  - (C) The business of the issuer is administered principally in the United States.

The rule provides an exemption from registration only for securities issued in compensatory circumstances and is not available for plans or schemes inconsistent with this purpose, such as to raise capital.<sup>15</sup> The exemption is available only to the issuer of the securities, not to its affiliates, and does not cover resales of securities by any person.<sup>16</sup> The rule exempts only the transactions in which the securities are offered or sold, and not the securities themselves.<sup>17</sup> In addition to complying with Rule 701, the issuer also must comply with any applicable state law relating to the offer and sale of securities.<sup>18</sup>

Since 1999,<sup>19</sup> the rule has provided that the amount of securities that may be sold in reliance on the exemption during any consecutive 12-month period is limited to the greatest of:<sup>20</sup>

- \$1 million;
- 15% of the total assets of the issuer,<sup>21</sup> measured at the issuer's most recent balance sheet date; or
- 15% of the outstanding amount of the class of securities being offered and sold in reliance on the rule, measured at the issuer's most recent balance sheet date.

These measures apply on an aggregate basis, not plan-by-plan. For securities underlying options, the aggregate sales price is determined when the option grant is made, without regard to when it

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<sup>15</sup> Preliminary Note 5 to Rule 701 provides “This section also is not available to exempt any transaction that is in technical compliance with this section but is part of a plan or scheme to evade the registration provisions of the [Securities] Act. In any of these cases, registration under the [Securities] Act is required unless another exemption is available.”

<sup>16</sup> Preliminary Note 4 to Rule 701.

<sup>17</sup> Id.

<sup>18</sup> Preliminary Note 2 to Rule 701.

<sup>19</sup> See Rule 701 – Exempt Offerings Pursuant to Compensatory Arrangements, Release No. 33-7645 (Feb. 25, 1999) [64 FR 11095 (Mar. 8, 1999)] (“1999 Adopting Release”).

<sup>20</sup> Rule 701(d) [17 CFR 230.701(d)].

<sup>21</sup> The relevant limit applies to the total assets of the issuer's parent if the issuer is a wholly-owned subsidiary and the securities represent obligations that the parent fully and unconditionally guarantees.

becomes exercisable.<sup>22</sup> For deferred compensation plans, the calculation is made at the time of the participant's irrevocable election to defer.<sup>23</sup> There is no separate limitation on the amount of securities that may be offered.

In all cases, the issuer must deliver to investors a copy of the compensatory benefit plan or contract. Further, Rule 701 transactions are subject to the antifraud provisions of the federal securities laws.<sup>24</sup>

In addition, if the aggregate sales price or amount of securities sold during the 12-month period exceeds \$5 million,<sup>25</sup> the issuer must deliver to investors a reasonable period of time before the date of sale:<sup>26</sup>

- A copy of the summary plan description required by ERISA,<sup>27</sup> or a summary of the plan's material terms, if it is not subject to ERISA;
- Information about the risks associated with investment in the securities sold under the plan or contract; and
- Financial statements required to be furnished by Part F/S of Form 1-A<sup>28</sup> under 17 CFR 230.251 through 230.263 (Regulation A). These financial statements must be as of a date no more than 180 days before the sale of securities relying on Rule 701.<sup>29</sup>

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<sup>22</sup> See Rule 701(d)(3)(ii) [17 CFR 230.701(d)(3)(ii)] .

<sup>23</sup> Id.

<sup>24</sup> Preliminary Note 1 to Rule 701 (“Issuers and persons acting on their behalf have an obligation to provide investors with disclosure adequate to satisfy the antifraud provisions of the federal securities laws.”).

<sup>25</sup> Rule 701(e) [17 CFR 230.701(e)].

<sup>26</sup> Rule 701(e). This amount will change to \$10 million upon effectiveness of the final rule amendment that raises this threshold. See n. 5, above, See also n. 49 and Section II.C.1, below.

<sup>27</sup> The Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.).

<sup>28</sup> Regulation A Offering Statement [17 CFR 239.90].

<sup>29</sup> Rule 701(e)(4) [17 CFR 230.701(e)(4)].



This disclosure should be provided to all investors before sale. For options and other derivative securities, the issuer must deliver disclosure a reasonable period of time before the date of exercise or conversion.<sup>30</sup> If disclosure has not been provided to all investors before sale, the issuer will lose the exemption for the entire offering when sales exceed the \$5 million threshold during the 12-month period.<sup>31</sup>

The exemption covers securities offered or sold under a plan or agreement between a non-reporting company (or its parents, majority-owned subsidiaries or majority-owned subsidiaries of its parent) and the company's employees, officers, directors, partners, trustees, consultants and advisors.<sup>32</sup> Rule 701 is also available for sales, such as option exercises, to their family members<sup>33</sup> who acquire such securities through gifts or domestic relations orders.

Consultants and advisors may participate in Rule 701 offerings only if:

- They are natural persons;
- They provide bona fide services to the issuer, its parents, its majority-owned subsidiaries or majority-owned subsidiaries of the issuer's parent; and

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<sup>30</sup> Rule 701(e)(6) [17 CFR 230.701(e)(6)]. As described in Section II.C.3, below, for options and other derivative securities, whether the issuer is obligated to deliver Rule 701(e) disclosure is determined based on whether the option or other derivative security was granted during a 12-month period in which the disclosure threshold is exceeded. If the grant occurred during such a period, the issuer must deliver the Rule 701(e) disclosure a reasonable period of time before the date of exercise or conversion.

<sup>31</sup> See 1999 Adopting Release at Section II.B.

<sup>32</sup> Rule 701(c) [17 CFR 230.701(c)]. The rule also exempts offers and sales to former employees, directors, general partners, trustees, officers, consultants and advisors only if such persons were employed by or providing services to the issuer at the time the securities were offered.

<sup>33</sup> Rule 701(c)(3) [17 CFR 230.701(c)(3)] defines "family member" for this purpose.

- The services are not in connection with the offer or sale of securities in a capital-raising transaction, and do not directly or indirectly promote or maintain a market for the issuer’s securities.<sup>34</sup>

In adopting these restrictions on the range of eligible consultants and advisors, the Commission also provided that a person in a de facto employment relationship with the issuer, such as a non-employee providing services that traditionally are performed by an employee, with compensation paid for those services being the primary source of the person’s earned income, would qualify as an eligible person under the exemption.<sup>35</sup> Such services, however, must not be in connection with the offer or sale of securities in a capital-raising transaction, and must not directly or indirectly promote or maintain a market for the issuer’s securities.<sup>36</sup>

Offers and sales under Rule 701 are deemed part of a single discrete offering and are not subject to integration with any other offers or sales, whether registered under the Securities Act or exempt from registration.<sup>37</sup> An issuer that attempts to comply with Rule 701, but fails to do so, may claim any other exemption that is available.<sup>38</sup> Securities issued under Rule 701 are deemed to be “restricted securities,”<sup>39</sup> as defined in 17 CFR 230.144 (Securities Act Rule 144).

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<sup>34</sup> Rule 701(c)(1) [17 CFR 230.701(c)(1)]. Where the consultant or advisor performs services for the issuer through a wholly-owned corporate alter ego, the issuer may contract with, and issue securities as compensation to, that corporate entity. Cf., Registration of Securities on Form S-8, Release No. 33-7646 (Feb. 25, 1999) [64 FR 11103 (Mar. 8, 1999)] at n. 20, (“1999 S-8 Adopting Release”) addressing such a corporate alter ego in the Form S-8 context.

<sup>35</sup> 1999 Adopting Release at Section II.D.

<sup>36</sup> 1999 Adopting Release at n. 39. See also 1988 Adopting Release (“Consequently, the rule has been modified to extend to consultants and advisers who provide *bona fide* services to a company, its parents or majority-owned subsidiaries.”).

<sup>37</sup> Rule 701(f) [17 CFR 230.701(f)].

<sup>38</sup> Preliminary Note 3 to Rule 701.

<sup>39</sup> Rule 701(g) [17 CFR 230.701(g)]. Ninety days after the issuer becomes subject to the reporting requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934 [15 U.S.C. 78m or 78o(d)], securities issued under Rule 701 may be resold by non-affiliates in reliance on Rule 144 without compliance with Rules 144(c) and (d), and by affiliates without compliance with Rule 144(d).

Section 502 of the Jumpstart Our Business Startups Act<sup>40</sup> (“JOBS Act”) amended Exchange Act Section 12(g)(5)<sup>41</sup> to exclude from the definition of “held of record,” for the purposes of determining whether an issuer is required to register a class of equity securities, securities that are held by persons who received them pursuant to an “employee compensation plan” in transactions exempted from the registration requirements of Section 5 of the Securities Act. This statutory exclusion applies solely for purposes of determining whether an issuer is required to register a class of equity securities under the Exchange Act and does not apply to a determination of whether such registration may be terminated or suspended. The Commission amended the definition of “held of record” in 17 CFR 240.12g5-1 (Exchange Act Rule 12g5-1) to exclude certain securities held by persons who received them pursuant to employee compensation plans in a transaction exempt from, or not subject to, the registration requirements of Section 5.<sup>42</sup> This amendment also established a non-exclusive safe harbor for determining whether securities are “held of record” for purposes of registration under Exchange Act Section 12(g), providing that an issuer may deem a person to have received securities pursuant to an employee compensation plan if the plan and the person who received the securities pursuant to it met the plan and participant conditions of Rule 701(c). These provisions help enable private

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<sup>40</sup> Sec. 502, 126 Stat. at 326. Section 501 of the JOBS Act [Sec. 601, 126 Stat. at 325] amended Section 12(g)(1) of the Exchange Act to require an issuer to register a class of equity securities (other than exempted securities) within 120 days after its fiscal year-end if, on the last day of its fiscal year, the issuer has total assets of more than \$10 million and the class of equity securities is “held of record” by either (i) 2,000 persons, or (ii) 500 persons who are not accredited investors. Section 601 of the JOBS Act [Sec. 601, 126 Stat. at 326] further amended Exchange Act Section 12(g)(1) to require an issuer that is a bank or bank holding company, as defined in Section 2 of the Bank Holding Company Act of 1956 [12 U.S.C. 1841], to register a class of equity securities (other than exempted securities) within 120 days after the last day of its first fiscal year ended after the effective date of the JOBS Act, on which the issuer has total assets of more than \$10 million and the class of equity securities is “held of record” by 2,000 or more persons.

<sup>41</sup> 15 U.S.C. 78j(g)(5).

<sup>42</sup> See Changes to Exchange Act Registration Requirements to Implement Title V and Title VI of the JOBS Act, Release No. 33-10075; (May 3, 2016) [81 FR 28689 (May 10, 2016)].

companies to offer securities to their employees under Rule 701 without triggering the obligation to register the class of securities and file periodic reports with the Commission.

Questions have arisen about whether the current requirements of Rule 701 would benefit from updates in light of developments since the Commission last substantively revised the rule. Forms of equity compensation that were not typically used at that time, particularly restricted stock units (“RSUs”), have become common, and new types of contractual relationships between companies and individuals involving alternative work arrangements have emerged in the so-called “gig economy.”<sup>43</sup> In this release, we solicit comment on various aspects of Rule 701 to determine whether and if so, how, the rule should be amended to address these concerns and developments. Our evaluation of any potential changes will focus on retaining the compensatory purpose of Rule 701 and avoiding potential abuse of the rule for capital-raising purposes, consistent with the Commission’s investor protection mandate. Comments are of greatest assistance if accompanied by supporting data and analysis of the issues addressed in those comments.

## **B. Rule 701(c) Eligible Plan Participants**

Due in large part to the Internet, new types of contractual relationships are arising between companies and individuals in the labor markets and the workplace economy. These can involve short-term, part-time or freelance arrangements, where the individual – rather than the company – may set the work schedule. Typically, this involves the individual’s use of the company’s Internet “platform” for a fee to find business, whether that involves the individual providing services to end users, or using the platform to sell goods or lease property. Platforms

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<sup>43</sup> See The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015, Lawrence F. Katz and Alan B. Krueger, National Bureau of Economic Research, available at <http://www.nber.org/papers/w22667> (defining alternative work arrangements as temporary help agency workers, on-call workers, contract workers, and independent contractors or freelancers).

are available that offer end users such services as ride-sharing, food delivery, household repairs, dog-sitting, and tech support. Other platforms offer hand-made craft objects, lodging, or car rentals. An individual who provides services or goods through these platforms may have similar relationships with multiple companies, through which the individual may engage in the same or different business activities.

Individuals participating in these arrangements do not enter into traditional employment relationships, and thus may not be “employees” eligible to receive securities in compensatory arrangements under Rule 701.<sup>44</sup> Similarly, they also may not be consultants or advisors, or de facto employees under Rule 701. As with traditional employees, however, companies may have the same compensatory and incentive motivations to offer equity compensation to these individuals. Accordingly, we solicit comment regarding these “gig economy” relationships to better understand how they work and determine what attributes of these relationships potentially may provide a basis for extending eligibility for the Rule 701 exemption.

Our comment requests focus on what activities an individual should need to engage in to be eligible to participate in exempt compensatory offerings:

1. 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?
2. Would the application of Rule 701 to consultants and advisors in any circumstances cover the alternative work arrangements described above?

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<sup>44</sup> They may also not be “employees” for purposes of labor, tax and other regulatory regimes.

3. 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?
4. 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?
  - a. 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?
  - b. Does it matter whether the individual goes through a vetting or screening process by the issuer to use the platform?
  - c. Does it matter whether the issuer controls when and how the individual receives monetary compensation for the services provided?
5. Would it be sufficient for an individual to use the issuer’s platform to sell goods, to earn money from leasing real estate or personal property, or to conduct a business activity? Would the individual be considered to be providing a service to either or both the company and its end-users or customers? Does it matter whether that business activity provides a service typically provided by an employee or is of a more entrepreneurial nature? How do the answers to these questions affect whether there is a sufficient nexus between the individual and the issuer to justify application of the exemption for compensatory transactions?

6. Should it make a difference whether the end user pays the issuer for the goods or leased property, and the issuer then provides a monetary payment to the individual, or the end user pays the individual directly, who then pays a fee to the issuer?

Our comment requests also focus on whether a potential eligibility test should consider the individual's level of dependence on the issuer, or, conversely, the issuer's degree of dependence on the individuals:

7. For example, should it matter what percentage of the individual's earned income is derived from using the issuer's platform? If so, should this be based on earned income during the last year, a series of consecutive years, or current expectations? Should there be a minimum percentage? How should this be verified? How should such a test be applied where the individual provides services to multiple companies? How would the issuer be able to determine how much of an individual's income is derived from using the issuer's platform?
8. Alternatively, where the individual provides services, should eligibility be based on information objectively verifiable by the issuer, such as amount of income earned, or percentage of time or number of hours worked?
9. Where use of the platform relates to leasing a property, should the test focus on how frequently the property is available, how often it actually is leased, the revenues generated by the property, or other factors?
10. Should the test focus on the extent to which the individual uses the issuer's platform to obtain business on a regular basis? Should it consider the duration of time over which the individual has so used the issuer's platform?

11. Should the test instead focus on the extent to which the issuer's business is dependent on individuals' use of the issuer's platform? If so, why, and how should that dependence be measured?
12. What test or tests would leave an issuer best positioned to determine whether it could rely on Rule 701?

We are mindful that extending eligibility to individuals participating in the "gig economy" could increase the volume of Rule 701 issuances. In this regard:

13. Would revising the rule have an effect on a company's decision to become a reporting company? Would such revisions encourage companies to stay private longer?
14. Would investors be harmed if the exemption is expanded to individuals participating in the "gig economy," potentially resulting in higher levels of equity ownership in the hands of persons who would not be shareholders of record for purposes of triggering Exchange Act registration and reporting?
15. Should the amount of securities issuable pursuant to Rule 701 to individuals participating in the "gig economy" in a 12-month period be subject to a separate ceiling rather than the current Rule 701(d) ceilings? If so, how should that ceiling be designed and measured?
16. Should additional disclosures be provided? If so, what and when?

Employers have many reasons for compensating employees with securities. These can include aligning the company's interests with those of employees', retaining staff, and offering higher compensation than the company may be able to pay in cash or other benefits.

17. Do companies utilizing "gig economy" workers issue securities as compensation to those individuals? If so, how prevalent is this practice?



18. How might companies benefit from the ability to offer securities to a broader range of individuals by expanding Rule 701 eligibility to individuals participating in the “gig economy”?
19. What effect would the use of Rule 701 for “gig economy” companies have on competition among those companies and newer companies and more established companies vying for the same talent?

The “gig economy” has enabled even very small companies to conduct cross-border operations.

20. Do existing regulations affect the ability of employers to use Rule 701 to compensate overseas employees through securities?
21. To the extent that U.S. companies would seek to use Rule 701 to compensate non-U.S. based workers in a “gig economy” model, would there be any competitive effects?

## **C. Rule 701(e) Disclosure Requirements**

### **1. General**

When Rule 701 was originally adopted in 1988,<sup>45</sup> the Commission relied on Section 3(b) of the Securities Act<sup>46</sup> to exempt offers and sales of up to \$5 million per year. In 1999, the Commission amended Rule 701 to reflect that the National Securities Markets Improvement Act of 1996 (“NSMIA”)<sup>47</sup> had given the Commission authority to provide exemptive relief in excess of \$5 million for transactions such as these.<sup>48</sup>

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<sup>45</sup> See 1988 Adopting Release.

<sup>46</sup> 15 U.S.C. 77c(b).

<sup>47</sup> Pub. L. 104-290, 110 Stat. 3416 (1996).

<sup>48</sup> 1999 Adopting Release at Section II.A.

The 1999 adoption of the \$5 million disclosure threshold reflected concern that eliminating the overall \$5 million ceiling on the annual amount of securities sold during a 12-month period “could result in some very large offerings of securities without the protections of registration, even though made pursuant to compensatory arrangements.”<sup>49</sup> Because the Commission had not witnessed abuse of Rule 701 in offerings below the prior \$5 million ceiling, it did not believe imposing the burdens of preparing and disseminating additional disclosure for these smaller offerings would justify potential benefits to employee-investors. In contrast, large non-reporting companies could issue substantial amounts of securities exceeding \$5 million. Based on comments received, the Commission believed that many of these companies already prepared the same types of disclosure in their normal course of business, such as for using other exemptions, so that the disclosure requirement generally would be less burdensome for them. If these companies did not want to provide the new disclosures, the Commission noted that they could keep the amount sold below \$5 million in the 12-month period.<sup>50</sup>

Inflation since 1999<sup>51</sup> has made it more likely for non-reporting issuers, regardless of size, to cross this threshold in a 12-month period. In circumstances where the required disclosure is inadvertently not provided to all investors before the \$5 million threshold is crossed, issuers may not rely on the exemption. Accordingly, the current structure of the rule results in issuers needing to anticipate, up to 12 months before exceeding the \$5 million

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<sup>49</sup> 1999 Adopting Release at Section II.B. In adopting this requirement, the Commission stated it would have investor protection concerns in the context of offerings of securities with an aggregate sales price or amount of securities sold during the 12-month period exceeding \$5 million without imposing specific disclosure requirements. The Commission noted that, “[m]oreover, we believe that many of these companies already have prepared the type of disclosure required in their normal course of business, either for using other exemptions, such as Regulation D or for other purposes.”

<sup>50</sup> Id.

<sup>51</sup> Based on data provided by the U.S. Department of Labor, Bureau of Labor Statistics, \$5 million in 1999 dollars would be approximately \$7.5 million in 2018.

threshold, the possibility that they may do so, and to supply plan participants with the additional disclosures for that period.

As noted above, in a separate release, the Commission is amending Rule 701(e) to implement the Act's mandate to increase from \$5 million to \$10 million the aggregate sales price or amount of securities sold during any consecutive 12-month period in excess of which the issuer is required to deliver additional disclosures to investors.<sup>52</sup> Because the amendment does not otherwise revise Rule 701(e), the rule will continue to operate in the same manner as it has under the previous \$5 million threshold.

While the adopted amendment may provide non-reporting issuers flexibility in further utilizing the exemption, it does not address some of the concerns we have heard regarding Rule 701(e). In particular, although the threshold is higher, the need to anticipate the consequences of crossing it remains.<sup>53</sup> Concern also has been expressed that some non-reporting companies are not necessarily familiar with Regulation A financial disclosure and that compliance can be burdensome, especially for companies first utilizing Rule 701.<sup>54</sup>

In light of these concerns, we request comment:

22. Should Rule 701(e) continue to require more disclosure for a period that precedes the threshold amount being exceeded? If so, should the consequence for failure to deliver continue to be loss of the exemption for the entire offering?

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<sup>52</sup> See n. 5, above.

<sup>53</sup> U.S. Securities and Exchange Commission Advisory Committee on Small and Emerging Companies, Recommendation Regarding Securities Act Rule 701 (Sept. 21, 2017) ("Advisory Committee Recommendation"), available at: <https://www.sec.gov/info/smallbus/acsec/acsec-rule-701-recommendation-2017-09-21.pdf>. Among other things, the Advisory Committee Recommendation expresses concern that crossing the disclosure threshold could result in the loss of the exemption for earlier Rule 701 transactions in the same 12-month period for which the Rule 701(e) disclosure was not provided a reasonable time before sale.

<sup>54</sup> Advisory Committee Recommendation.

23. To what extent are non-reporting companies that issue securities in an amount that would exceed the new threshold already preparing forms of financial disclosure, such as in connection with 17 CFR 230.500 through 230.508 (Regulation D) or Regulation A?
24. Alternatively, should the consequence for failing to provide the disclosure be loss of the exemption only for transactions in offerings that occur after the threshold is crossed and for which disclosure was not provided?
  - a. If disclosure is required only for transactions that occur after the \$10 million threshold is crossed, should disclosure be required for all transactions immediately following that event, or should an interval of time be provided to permit the disclosure to be prepared before it must be delivered? If so, how long should that time interval be?
  - b. Should the disclosure subsequently also be made available to investors in transactions that occurred before the \$10 million threshold is crossed?
25. Alternatively, should there instead be a grace period, such that if the threshold is crossed, the issuer has an opportunity to provide the required disclosure before losing the exemption for the entire offering?
26. Should we provide a regulatory option whereby all Rule 701(e) information would be disclosed to all investors, so that all would receive equal information and there would be no risk of losing the exemption in the manner there is today? Should we provide a different regulatory alternative that would provide all investors all Rule 701(e) information other than the financial statement disclosure?

Part F/S of Form 1-A prescribes that financial statements are required for Regulation A Tier 1 and Tier 2 offerings. In Regulation A offerings, companies include two years of consolidated balance sheets, statements of income, cash flows, and changes in stockholders' equity.<sup>55</sup> Issuers relying on Rule 701 may choose to provide financial statements that comply with the requirements of either Tier. This information must be provided as of a date no more than 180 days before the date of sale. As a result, for issuers seeking to maintain current information, this has the effect of requiring financial statements to be available on at least a quarterly basis, and to be completed within three months after the end of each quarter, for sales to be permitted continuously. The Commission, in adopting the current version of Rule 701, stated that because of the pre-existing relationship a compensated individual has with the issuer, the disclosures provided in Rule 701(e) are appropriate.<sup>56</sup> It also noted that the "amount and type of disclosure required for this person is not the same as for the typical investor with no particular connection with the issuer."<sup>57</sup>

27. Should the type of information provided depend on who is the recipient of the securities? For example, should more disclosure be provided to the types of recipients described in Section II.B. above? Why or why not? If so, what, specifically, should be added to the disclosures and why?
28. Should this disclosure be updated less frequently than currently required? For example, should we require updates once a year unless an event results in a material change to the company's enterprise value or value of the securities issued?<sup>58</sup> Should the

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<sup>55</sup> 17 CFR 210.1-01 through 201.12-29. Tier 2 offerings require audited financial statements. See Part F/S of Form 1-A [17 CFR 239.90].

<sup>56</sup> 1999 Adopting Release at Section II.B.

<sup>57</sup> Id.

<sup>58</sup> Advisory Committee Recommendation.

frequency of disclosure depend on who is the recipient of the securities? For example, should the frequency be greater for recipients described in Section II.B, above? Why or why not? If so, what is the appropriate frequency and why?

29. Should we consider other alternatives to the Regulation A financial statements, such as the issuer's most recent balance sheet and income statement as of a date no more than 180 days before the sale of securities?
30. Should we provide a regulatory option that would provide valuation information regarding the securities in lieu of, or in addition to, financial statements? If so, what valuation method should be used? Would ASC Topic 718<sup>59</sup> grant date fair value information be informative? Would Internal Revenue Code Section 409A<sup>60</sup> valuation information be informative? If so, would issuers be able to determine Section 409A valuations regardless of whether the offering involves securities other than options?

Under existing Rule 701, foreign private issuers are required to provide financial information on the same schedule as domestic issuers.<sup>61</sup> Foreign private issuers may issue securities in reliance on Rule 701 throughout the year, which could lead them to update their financial statements more frequently than required under Form 20-F.<sup>62</sup>

31. Because foreign private issuers that are subject to the Exchange Act reporting requirements generally are not required to submit quarterly financial statements, should non-reporting foreign private issuers that rely on Rule 701 be subject to the condition to

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<sup>59</sup> FASB ASC Topic 718.

<sup>60</sup> 26 U.S.C. 409A.

<sup>61</sup> 1999 Adopting Release at Section II.C.

<sup>62</sup> 17 CFR 249.220f. See Item 8A.5 of Form 20-F.

provide quarterly financial statements if they are continuing to sell securities throughout the year? Why or why not?

32. Should we amend any other aspect of the Rule 701 financial statement requirements that apply to foreign private issuers? If so, what should we amend and why?

## **2. Timing and Manner of Rule 701(e) Disclosure**

Rule 701(e) requires the prescribed disclosure to be delivered “a reasonable period of time before the date of sale.” However, the rule does not prescribe the manner or medium in which disclosure should be delivered. We are aware that non-reporting companies are sensitive to maintaining the confidentiality of financial information so that it does not fall into the hands of competitors.

To determine if the rule needs further clarification, we request comment:

33. Do we need to clarify what it means to deliver disclosure “a reasonable period of time before the date of sale”? Should that mean any time before sale such that the recipient has an opportunity to review the disclosure? Should any new standard further clarify that the disclosure provided to the recipient must remain current during that time?
34. Should we specify a different time for providing disclosure? If so, when should that be and why?
35. Should we also specify the manner or medium in which disclosure should be delivered? Should we specify how to deliver information electronically? Should we require a method for confirming receipt of the information? If so, what vehicles would best give effect to the purpose of disclosure without undermining issuers’ confidentiality concerns?

36. Should the rule specify that confidentiality safeguards should not be so burdensome that intended recipients cannot effectively access the required disclosures?

### **3. Options and Other Derivative Securities/RSUs**

For options and other derivative securities, whether the issuer is obligated to deliver Rule 701(e) disclosure is based on whether the option or other derivative security was granted during a 12-month period during which the disclosure threshold is exceeded.<sup>63</sup> If so, the issuer must deliver Rule 701(e) disclosure a reasonable period of time before the date of exercise or conversion.<sup>64</sup>

This approach simplifies the operation of Rule 701 for options and other derivative securities for which the recipient must make an investment decision to exercise or convert. However, because instruments such as RSUs settle by their terms without the recipient taking such an action, the relevant investment decision for the RSU, if there is one, likely takes place at the date of grant. Consequently, the issuer's obligation to provide Rule 701(e) disclosure would apply a reasonable period of time before the date the RSU award is granted. Concern has been expressed, however, that disclosure of financial information before an RSU is granted could compel disclosure to recipients at a time when they are negotiating their employment contracts before joining the company.

In light of this concern, we request comment:

37. Should Rule 701 be amended to specifically address when disclosure is required for RSUs? If so, when should Rule 701(e) disclosure be required for an RSU? Should we revisit the concept of "convert or exercise" as providing the relevant date for

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<sup>63</sup> Rule 701(d)(3)(ii) provides that the aggregate sales price for options is determined when an option grant is made (without regard to when it becomes exercisable). Use of this measure for both Rule 701(d) and (e) simplifies the operation of the rule.

<sup>64</sup> Rule 701(e)(6).



disclosure? For new hires who receive RSUs, should we require that disclosure be provided within 30 days after commencing employment? If not, when should Rule 701(e) disclosure be required for RSUs issued to new hires?

38. Should we clarify that RSUs should be valued for Rule 701 purposes based on the value of the underlying securities on the date of grant? If not, how should they be valued?
39. Are there any other instruments that should be specifically addressed in the rule?

#### **D. Rule 701(d) Exemptive Conditions**

Questions have arisen whether the current 12-month sales cap of the greater of 15% of the total assets of the issuer or 15% of the total outstanding amount of the class of securities being offered and sold in reliance on the rule, subject to the annual availability of a \$1 million cap if greater than either of these tests, is unduly restrictive, particularly for smaller and start-up companies that may be more dependent on equity compensation to attract and retain necessary talent.<sup>65</sup> Each of the 15% amounts is measured as of the issuer's most recent balance sheet date, if no older than its last fiscal year end.<sup>66</sup> In proposing the original version of the rule, the Commission explained that the purpose of a 12-month cap is to "assur[e] that the exemption does not provide a threshold that small issuers could use to raise substantial capital from employees."<sup>67</sup> The alternatives based on 15% of total assets or 15% of the outstanding amount

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<sup>65</sup> Advisory Committee Recommendation. But see, e.g., Edward M. Zimmerman, Late Stage Startups Trip SEC Rule 701 Long Before IPO, FORBES (Aug. 2, 2016) (stating that "[b]ecause the test [provided in Rule 701(d)] is analyzed on the basis of a 12-month period, because the test excludes Exempt Issuances and because founders and investors have significant business reasons for limiting the dilutive impact of compensatory equity awards, startups rarely come near the Rule 701(d) thresholds.").

<sup>66</sup> Rules 701(d)(2)(ii) and (iii).

<sup>67</sup> See Rule 701 Proposing Release. As originally adopted, the rule permitted the amounts of securities offered and sold annually to be the greatest of \$500,000, 15% of total assets of the issuer, or 15% of the outstanding securities of the class, subject to an absolute limit of \$5,000,000 derived from Securities Act Section 3(b). See 1988 Adopting Release.

of the class of securities were intended to increase the flexibility and utility of the exemption.<sup>68</sup> The \$1 million alternative provides an amount that any issuer can use, regardless of size.

Recently, however, concern has been expressed that because there is no longer any statutorily imposed ceiling on the exemption,<sup>69</sup> compliance with an annual regulatory ceiling requires an on-going analysis with no clear benefit.<sup>70</sup> At the same time, the implications of qualifying for the Rule 701 exemption have expanded, as securities held by persons who receive them in transactions exempted by Rule 701 are excluded from the definition of “held of record,” for the purposes of determining whether an issuer is required to register a class of equity securities under the Exchange Act.

In light of these factors, we request comment:

40. Is there a continuing need for any annual regulatory ceiling for Rule 701 transactions? Why or why not? Would investors be harmed if the ceiling is eliminated or raised significantly? Does an annual ceiling provide benefits in curbing potential abuse of the rule for non-compensatory sales? If so, how?
41. If a ceiling is retained, should it be raised? If so, what threshold would be appropriate, and why? Would compliance be easier if issuers are permitted to measure the 15% alternatives as of last fiscal year-end, rather than at the issuer’s most recent balance sheet date?

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<sup>68</sup> See 1988 Adopting Release at Section I.A.(2).

<sup>69</sup> NSMIA enacted Securities Act Section 28 [15 U.S.C. 77z-3], giving the Commission general exemptive authority. Because the Commission relied on this authority in the 1999 Adopting Release, the Securities Act Section 3(b) absolute limit of \$5,000,000 no longer applies to Rule 701.

<sup>70</sup> Advisory Committee Recommendation.

### III. Form S-8

#### A. Background

Form S-8 was originally adopted in 1953, as a simplified form for the registration of securities to be issued pursuant to employee stock purchase plans.<sup>71</sup> It retains certain disclosure obligations. For example, it requires that employees receiving securities as compensation receive public company disclosure to which the full spectrum of Securities Act protections apply. In addition, reporting company securities received pursuant to Form S-8 registration are generally not restricted.<sup>72</sup> As described below, from time to time the Commission has amended Form S-8 to streamline its operations, such as by providing immediate effectiveness upon filing and updating of the registration statement through incorporation by reference.<sup>73</sup> Form S-8 is available solely to register compensatory sales of securities to “employees,” including consultants and advisors and de facto employees. The form is not available for the registration of securities offered for the purpose of raising capital.<sup>74</sup>

Form S-8 is available for the registration of securities to be offered under any employee benefit plan<sup>75</sup> to a registrant’s employees or employees of its subsidiaries or parents. Form S-8 registration is utilized for many different types of employee benefit plans, including Internal

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<sup>71</sup> Registration of Securities Offered Pursuant to Employees Stock Purchase Plans, Release No. 33-3480 (Jun. 16, 1953) [18 FR 3688 (Jun. 27, 1953)].

<sup>72</sup> In addition, General Instruction C to Form S-8 permits registrants to file a resale prospectus for control securities, and restricted securities issued under any employee benefit plan of the issuer that were acquired by the selling security holder prior to the filing of the Form S-8.

<sup>73</sup> See e.g., Registration and Reporting Requirements for Employee Benefit Plans, Release No. 33-6867 (June 6, 1990) [55 FR 23909 (June 13, 1990)] (“1990 Adopting Release”).

<sup>74</sup> The abbreviated disclosure format of Form S-8 reflects the Commission's historic distinction between offerings made to employees for compensatory and incentive purposes and offerings made for capital-raising purposes. See 1990 Adopting Release.

<sup>75</sup> “Employee benefit plan” is defined in Securities Act Rule 405 and includes the same restrictions on the scope of eligible consultants and advisors as set forth in Rule 701.

Revenue Code Section 401(k)<sup>76</sup> plans and similar defined contribution retirement savings plans, employee stock purchase plans, nonqualified deferred compensation plans, and incentive plans that issue options, restricted stock, or RSUs. The form may be used by any issuer that is subject, at the time of filing, to the periodic reporting requirements of Section 13 or 15(d) of the Exchange Act and has filed all reports required during the preceding 12 months or such shorter period that it was subject to those requirements.<sup>77</sup> Form S-8 is not available for shell companies.<sup>78</sup>

Form S-8 does not require that a form of prospectus be filed with the registration statement for employee benefit plan offerings. Instead, 17 CFR 230.428 (Rule 428) specifies the documents that, together, constitute a prospectus that meets the requirements of Securities Act Section 10(a):<sup>79</sup>

- certain documents containing the employee benefit plan information required by Item 1 of the Form;
- the statement of availability of company information, employee benefit plan annual reports and other information required by Item 2 of the Form; and
- the documents containing registrant information and employee benefit plan annual reports that are incorporated by reference in the registration statement pursuant to Item 3 of the Form.

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<sup>76</sup> 26 U.S.C. 401(k).

<sup>77</sup> See General Instruction A.1 to Form S-8.

<sup>78</sup> “Shell company” is defined in Securities Act Rule 405. When a company ceases to be a shell company, by combining with a formerly private operating business, it is required to file Form 10 equivalent information with the Commission. General Instruction A.1 to Form S-8 provides that it then becomes eligible to use Form S-8 60 days following that filing.

<sup>79</sup> 15 U.S.C. 77j(a).

Companies are also permitted to file a resale prospectus covering only control securities or restricted securities acquired pursuant to an employee benefit plan.<sup>80</sup>

## **B. Form S-8 Eligible Plan Participants**

To prevent abuse of Form S-8 to register securities issued in capital-raising transactions, in 1999 the Commission revised the eligibility standards for “consultants and advisors” for the purposes of Form S-8.<sup>81</sup> In so doing the Commission sought to preclude the issuance of securities on Form S-8 to consultants either (i) as compensation for any service that directly or indirectly promotes or maintains a market for the registrant's securities, or (ii) as conduits for a distribution to the general public.<sup>82</sup> At the same time, the Commission revised the Rule 701 “consultants and advisors” definition to be consistent with Form S-8.<sup>83</sup> In adopting the changes, the Commission also noted that issuers may continue to use securities registered on Form S-8, or issued under the Rule 701 exemption, to compensate persons with whom they have a de facto employment relationship.<sup>84</sup> We are soliciting comment regarding the continued harmonization

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<sup>80</sup> The resale prospectus is prepared in accordance with the requirement of Part I of Form S-3 (or, if the registrant is a foreign private issuer, in accordance with Part I of Form F-3) and filed with the registration statement on Form S-8 or, in the case of control securities, a post-effective amendment thereto. Restricted securities must have been acquired by the holder before the Form S-8 is filed and the resale prospectus for them must be filed with the initial Form S-8. See General Instruction C to Form S-8.

<sup>81</sup> See 1999 S-8 Adopting Release.

<sup>82</sup> Since the adoption of the 1999 amendments, the Commission has brought enforcement actions related to Form S-8 abuse, particularly the misuse of the form for capital-raising activities involving coordinated unregistered resales into the public market by the purported “consultants” or employees acting as underwriters, funding the company with the proceeds and denying Securities Act protection to the genuine public purchasers. See, e.g., SEC v. Phan, 500 F.3d 895 (9th Cir. 2007)(holding the resale of publicly traded stock, which had the effect of supplying the company with capital from the public at the company's behest, could not be covered by a Form S-8 registration statement); SEC v. East Delta Resources Corp., No. 10-CV-0310 (SJF/wdw) 2012 WL 10975938 (E.D.N.Y. 2012)(finding violations of Sections 5 notwithstanding the existence of a Form S-8 registration statement and consulting agreement where the defendant's consulting role was capital-raising and promotional and thus contrary to the eligibility requirements for effective Form S-8 registration); and SEC v. Esposito, No. 8:08-CV-494-T-26EAJ, 2011 WL 13186000 (M.D. Fla. June 24, 2011)(finding defendants violated Section 5 where Form S-8 was used to register shares received by consultant as compensation for arranging a reverse merger).

<sup>83</sup> 1999 Adopting Release at Section II.D.

<sup>84</sup> See Section II.A, above.

of the scope of “consultants and advisors” between Form S-8 and Rule 701, and more broadly whether the scope of eligible individuals should be the same under both the form and the exemption. Specifically:

42. To the extent we change the application of Rule 701 by changing the scope of individuals eligible for compensatory offerings, such as to include individuals participating in the “gig economy,”<sup>85</sup> should we make corresponding changes to Form S-8? Why or why not? If the scope of individuals who are eligible for Form S-8 offerings were expanded, would there be concerns about misuse of the form for capital-raising activities? If so, how could we safeguard against those concerns?
43. Would differences between the eligibility standards of Rule 701 and Form S-8 cause problems for issuers or recipients?

### **C. Administrative Burdens**

Issuers register a specified number of company shares on Form S-8. For registration fee purposes, if the offering price is not known, the fee is computed based on the price of securities of the same class, in the same manner as for other offerings at fluctuating market prices.<sup>86</sup> No additional fee is assessed for securities offered for resale.<sup>87</sup>

The Commission has sought to reduce the costs and burdens incident to registration of securities issued through such plans, where consistent with investor protection,<sup>88</sup> for example by:

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<sup>85</sup> See Section II.B, above.

<sup>86</sup> 17 CFR 230.457(h) and (c).

<sup>87</sup> 17 CFR 230.457(h)(3).

<sup>88</sup> See, e.g., Release No. 33-5767 (November 22, 1976) [41 FR 52701 (Dec. 1, 1976)], Amendments to Registration Statement Form S-8 and Related New and Amended Rules Under the Securities Act of 1933, Release No. 33-6190 (February 22, 1980) [45 FR 13438 (Feb. 29, 1980)] (“1980 S-8 Adopting Release”) and 1990 Adopting Release.

- allowing Form S-8 to go effective automatically without review by the staff or other action by the Commission;<sup>89</sup>
- allowing the incorporation by reference of certain past and future reports required to be filed by the issuer under Section 13 or 15(d) under the Exchange Act;<sup>90</sup>
- adopting an abbreviated disclosure format that eliminated the need to file a separate prospectus and permitting the delivery of regularly prepared materials to advise employees about benefit plans to satisfy prospectus delivery requirements;<sup>91</sup>
- providing for registration of an indeterminate amount of plan interests and providing that there is no separate fee calculation for registration of plan interests;<sup>92</sup> and
- providing a procedure for the filing of a simplified registration statement covering additional securities of the same class to be issued pursuant to the same employee benefit plan.<sup>93</sup>

We remain interested in simplifying the requirements of Form S-8 and reducing the complexity and cost of compliance to issuers for securities issuances to employees and other eligible employee benefit plan participants while retaining appropriate investor protections. We therefore seek comment on ways we could further reduce the burdens associated with registration on Form S-8:

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<sup>89</sup> In the 1980 S-8 Adopting Release the Commission initially provided that automatic effectiveness for Form S-8 occurred 20 days after filing, while post-effective amendments became effective upon filing. Now, all registration statements on Form S-8 become effective upon filing with the Commission. See 17 CFR 230.462(a) and 1990 Adopting Release.

<sup>90</sup> See Item 3 and General Instruction G of Form S-8.

<sup>91</sup> 17 CFR 230.428(a)(1).

<sup>92</sup> 17 CFR 230.416(c) and 17 CFR 230.457(h)(2), respectively.

<sup>93</sup> See General Instruction E to Form S-8.

44. What effects would stem from revising the form in this way? Would such revisions encourage more companies to become reporting companies?
45. Should we further simplify the registration requirements of Form S-8? For example, does registering a specific number of shares result in Section 5 compliance problems when plan sales exceed the number of shares registered, such as for Section 401(k) plans and similar defined contribution retirement savings plans? If so, how should we address this issue?
46. Should Form S-8 allow an issuer to register on a single form the offers and sales pursuant to all employee benefit plans that it sponsors?<sup>94</sup> When shares are authorized for issuance by a given plan what information would need to be disclosed that would have been previously omitted from the effective registration statement?<sup>95</sup>
47. If we facilitate a single registration statement for all employee benefit plan securities, should the number of shares to be registered continue to be specified in the initial registration statement? Alternatively, should issuers be able to add securities to the existing Form S-8 by an automatically effective post-effective amendment?<sup>96</sup> If so, what would be the best way to implement such a system?

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<sup>94</sup> Cf. Simplification of Registration Procedures for Primary Securities Offerings, Release No. 33-6964 (October 22, 1992) [57 FR 48970 (Oct. 29, 1992)] (adopting the unallocated shelf procedure). See also Securities Offering Reform, Release No. 33-8591 (December 1, 2005) [70 FR 44722 (Aug. 3, 2005)] (“Securities Offering Reform Adopting Release”).

<sup>95</sup> For example, in unallocated shelf offerings conducted under 17 CFR 203.415(a)(1)(x) (Rule 415(a)(1)(x)) and 17 CFR 230.430B (Rule 430B), prospectus supplements are filed to disclose information that would have been previously omitted from a prospectus filed as part of the effective registration statement. See 17 CFR 230.424(b)(2) and Rule 430B.

<sup>96</sup> This would be analogous to how well-known seasoned issuers are currently permitted to add other securities or even new classes of securities at any time by post-effective amendment to an existing automatic shelf registration statement on Form S-3. See 17 CFR 230.413(b)(1). See also, Securities Offering Reform Adopting Release.



48. With respect to either alternative above, would the ability to have a single Form S-8 reduce administrative burdens given that many issuers currently monitor and track multiple registration statements on Form S-8?<sup>97</sup> Would this be practicable where the securities to be registered relate to different forms of plans, such as Section 401(k) plans and incentive plans? Would it be practicable if some of the plans involved the issuance of plan interests, which trigger the individual plan's obligation to file an Exchange Act annual report on Form 11-K?<sup>98</sup> Would the offer and sale of shares pursuant to multiple plans registered on the same Form S-8 create difficulties keeping track of which registered shares are being issued pursuant to which plan? For example, upon the expiration of a plan, would there be difficulties transferring shares between plans?
49. Well-known seasoned issuers are permitted, at their option, to pay filing fees on a "pay-as-you-go" basis at the time of each takedown off the shelf registration statement in an amount calculated for that takedown.<sup>99</sup> Should we adopt a similar "pay-as-you-go" fee structure for Form S-8 pursuant to which all issuers eligible to use Form S-8 could, at their option, pay filing fees on Form S-8 on an as needed basis rather than when the

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<sup>97</sup> For example, Form S-8 filers update their registration statement through the incorporation by reference of Exchange Act reports. Such updates require the consent of an auditor where the auditor's report is contained in the Exchange Act report which is automatically incorporated by reference into a previously filed Securities Act filing, such as a Form S-3 or Form S-8. See 17 CFR 229.601(b)(23) (Item 601(b)(23) of Regulation S-K) and 17 CFR 229.601, footnote 5 of the exhibit table (Footnote 5 of the Item 601 Exhibit Table). The primary purpose of obtaining a consent or acknowledgement letter is to assure that the auditor is aware of the use of its report and the context in which it is used. Where such consents are required in an update to a registration statement, the auditor frequently refers to all active Securities Act registration statements. The ability to file a single Form S-8 for all securities to be issued pursuant to employee benefit plans would mean that the auditor's consent would refer to a single Form S-8.

<sup>98</sup> 17 CFR 249.311.

<sup>99</sup> See 17 CFR 230.456(b) and 17 CFR 230.457(r).

form is originally filed? What, if any, variations from the pay-as-you-go fee structure would be needed to adapt it to employee benefit plan registration statements?

a. For well-known seasoned issuers using the pay-as-you-go fee structure, a cure is available that allows such issuers to pay required filing fees after the original payment due date if the issuer makes a good faith effort to pay the fee timely and then pays the fee within four business days of the original fee due date.<sup>100</sup> If we adopted a pay-as-you-go fee structure for Form S-8, should we adopt a similar cure provision? What, if any, variations from the cure provision for well-known seasoned issuers would be needed to adapt it to employee benefit plan registration statements?

50. Alternatively, should we require the payment of registration fees on a periodic basis with respect to the securities, the offer and sale of which were registered on Form S-8, during the prior period? How would such a system best be implemented? How could we structure such a system consistent with the requirements of Securities Act Section 6(c)?<sup>101</sup>

51. Are there any other ways to reduce the administrative burdens associated with filing and updating Form S-8? If so, please explain.

#### **D. Form S-8 Generally**

We also are soliciting comment more broadly on Form S-8 itself:

52. Does the current operation of Form S-8 present significant challenges to the use of employee benefit plans? If so, please explain how.

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<sup>100</sup> 17 CFR 230.456(b)(1)(i).

<sup>101</sup> 15 U.S.C. 77f(c).

53. It has been suggested that Form S-8 registration would no longer be necessary if the Commission were to extend the Rule 701 exemption to Exchange Act reporting companies.<sup>102</sup> What would be the advantages and disadvantages of allowing Exchange Act reporting companies to use Rule 701 and, in turn, eliminating Form S-8? Would permitting Exchange Act reporting companies to use Rule 701 raise any investor protection concerns or be inconsistent with the purposes underlying Rule 701?
54. Form S-8 requires issuers to remain current in their Exchange Act reports in order to be eligible to use the form,<sup>103</sup> and Form S-8 disclosure relies upon incorporation by reference<sup>104</sup> and delivery<sup>105</sup> of these Exchange Act reports. Would the elimination of Form S-8 reduce an incentive for public companies to remain current in their Exchange Act reporting obligations? If we permit reporting companies to use Rule 701, should we require these companies to be current in their Exchange Act reports in order to rely on the exemption?
55. Since Exchange Act reports are automatically incorporated by reference into Form S-8, would the lack of a filed registration statement for employee benefit plans result in reduced scrutiny of Exchange Act filings by issuers and their representatives?<sup>106</sup> Would the potential lack of Securities Act Section 11<sup>107</sup> and Section 12(a)(2)<sup>108</sup> liability

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<sup>102</sup> Keith F. Higgins, Is It Time to Retire Form S-8?, INSIGHTS: CORPORATE AND SECURITIES LAW ADVISOR, September 2017 at 16.

<sup>103</sup> Item 3 of Form S-8.

<sup>104</sup> Item 3 of Form S-8.

<sup>105</sup> Rule 428(b)(2).

<sup>106</sup> Part II, Item 3 to Form S-8.

<sup>107</sup> 15 U.S.C. 77k.

<sup>108</sup> 15 U.S.C. 77l(a)(2).

for these filings as a result of the elimination of Form S-8 have a meaningful impact on the quality of disclosure?

56. If Form S-8 were rescinded, how would issuers be likely to register the resale of restricted securities issued pursuant to employee benefit plans? Would Form S-8 remain necessary as a method of registering resales of control securities or restricted securities acquired pursuant to an employee benefit plan? Alternatively, should the provisions of General Instruction C to Form S-8 be moved to Securities Act Form S-3?<sup>109</sup> If so, should Form S-3 eligibility requirements be revised for this purpose?

#### **IV. Conclusion**

We are interested in the public's opinions regarding the matters discussed in this concept release. We encourage all interested parties to submit comments on these topics. In addition, we solicit comment on any other aspect of Rule 701 and Form S-8 that commenters believe may be improved upon.

By the Commission,

Dated: July 18, 2018

Brent J. Fields,  
Secretary.

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<sup>109</sup> 17 CFR 239.33.