SEC Revisits Equity Compensation Offerings by Amending Rule 701 and Seeking Comment on Further Changes to Rule 701 and Form S-8

July 23, 2018

On July 18, 2018, the Securities and Exchange Commission (SEC) voted unanimously both to issue a **final rule** and to **solicit public comment** relating to the federal securities rules that govern the issuance of employer stock pursuant to compensation arrangements.

- First, the SEC amended Rule 701 under the Securities Act of 1933 to increase the dollar threshold from $5 million to $10 million for sales of securities which require issuers to deliver additional disclosure to service providers.
- Second, the SEC is soliciting public comment through a related concept release on possible ways to modernize Rule 701 and the Securities Act's Form S-8 registration statement in light of developments in compensatory offerings and labor markets, particularly the proliferation of the so-called "gig economy."

Overview of Rule 701 and Form S-8

Under the federal securities laws, offers and sales of securities must be registered with the SEC, unless an exemption from registration is available. Because of the prevalence and importance of equity compensation, there are special rules that apply to offers and sales to employees under equity compensation plans.

Rule 701. Rule 701 provides an exemption from registration requirements for companies which are not listed, which include private domestic issuers and foreign private issuers that may be listed in their home countries but not in the United States. The exemption is available for the issuance of securities pursuant to compensatory benefit plans (including equity compensation plans), subject to a number of requirements, including a restriction on the aggregate value of securities that may be offered or sold during any consecutive 12-month period. Rule 701 is available for issuances of securities to employees, directors and certain consultants and advisors, as well as 'de facto' employees (such as non-employee workers who provide services traditionally performed by employees). Under current Rule 701(e), if the aggregate sales price of securities sold by an issuer in reliance on the rule exceeds $5 million during any consecutive 12-month period, the issuer must deliver additional disclosure to its investors, including a summary of the material terms of the plan, information about the risks associated with investing in the issuer's securities and financial statements as of a date that is no more than 180 days before the sale of the securities in question. Offerings exempted from federal registration requirements under Rule 701 remain subject to state securities laws, and thus may be subject to a mix of registration and notice requirements depending on the states in which the securities are offered.

Form S-8. For publicly listed companies, Form S-8 provides a simplified registration statement for the issuance of securities to employees pursuant to employee benefit plans. The definition of "employee" under Form S-8 operates the same as under Rule 701, and includes employees, directors, certain consultants and advisors and 'de facto' employees. While Form S-8 retains certain disclosure obligations, it was adopted primarily to reduce the costs and burdens of securities registrations for public companies that issue securities for compensatory, rather than capital-raising, purposes. Such accommodations include, for example, an abbreviated disclosure format and immediate effectiveness of the registration statement upon filing without review by SEC staff.

Amendment to Rule 701(e)

The amendment to Rule 701(e) to increase the threshold in excess of which private companies are subject to additional disclosure obligations from $5 million to $10 million is mandated by Section 507 of the recently enacted Economic Growth, Regulatory Relief, and Consumer Protection Act. The amendment will become effective immediately upon publication of the final rule in the Federal Register, meaning that private issuers that have commenced an offering in the current 12-month period will be able to rely on the increased threshold for that offering.

Concept Release Regarding Rule 701 and Form S-8

The concept release solicits public comment on ways in which Rule 701 and Form S-8 can be updated, consistent with investor protection, to adapt to modern developments in compensation practices, including the popularity of restricted stock units (RSUs), and the proliferation of the gig economy. Specifically, the SEC is soliciting comment in order to:

- Better understand how gig economy relationships work and what attributes of these relationships may provide a basis for extending Rule 701 eligibility;
- Address whether the SEC should further revise the disclosure content and timing requirements of Rule 701(e); and
- Address whether the use of Form S-8 should be further streamlined.

A complete list of the SEC's requests for comment is set forth on Appendix A. The questions posed by the SEC are broad-ranging and could lead to sweeping changes, including the possible elimination of Form S-8 altogether. The concept release will be open for public comment for a period of 60 days following publication in the Federal Register.

Commissioner Reactions

During the open meeting, SEC Chairman Jay Clayton expressed in his **remarks** that both the Rule 701 amendment and the concept release are responsive to the rapidly evolving American economy, including changes in compensatory arrangements and worker relationships. In supporting both recommendations, he asserted that these developments ought to be reflected in the regulatory framework under which employers compensate their workers.

The recommendations to modernize Rule 701 and Form S-8 were also supported unanimously by the other three SEC Commissioners. Commissioners Robert J. Jackson, Jr. and Hester Peirce noted the significant developments to the labor marketplace since the last time the rules were reviewed nearly 30 years ago. Both the impact of the Internet and the growth of the gig economy have expanded the ways in which workers are able to provide services to their employers. Commissioner Jackson believes that the rules should be revised so that the use of employer stock compensation reflects trends in employment relationships in order to most effectively incentivize employees to play a meaningful part in the growth of their companies. Commissioner Peirce **stated** that she believes the expansion of Rule 701 to cover a broader array of service providers will help companies hire and retain workers and will make growing companies more competitive in the marketplace.

Although she ultimately supported both proposals, Commissioner Kara M. Stein's **remarks** were more cautionary. Commissioner Stein acknowledged the significant accommodations that Rule 701 and Form S-8 already provide to employers, particularly in reducing costs, and noted the risks to investors associated with exempting larger offerings under Rule 701(e) without offering additional disclosure. Ultimately, Commissioner Stein stated that she supported the Rule 701 amendment because it had been mandated by Congress. In voting in favor of the concept release, Commissioner Stein questioned whether the benefits of allowing more companies to issue stock compensation to even more people without having to register the offering outweighed the costs of potentially creating adverse incentives. Commissioner Stein urged commenters to consider whether the definition of "employee" should be broadened in light of the gig economy to include more non-traditional worker relationships (e.g., short-term and freelance workers), whether broadening this definition would result in companies engaging more independent contractors rather than full-time employees and how the parameters should be set around these relationships. With respect to the concept release, Commissioner Stein asked to hear from commenters on what the costs of a Form S-8 offering relate to specifically (e.g., registration fees, auditors consents) and what they are in real numbers.

Practical Implications

Both the Rule 701 amendment and changes in response to the concept release have the potential to alter the ways in which companies compensate their service providers through stock compensation.

In the final rule regarding the disclosure threshold, the SEC identified the potential impact of the Rule 701 amendment on the ability of smaller, growing companies to compete with larger, more established companies. While the SEC acknowledged that companies already relying on Rule 701 may not benefit from the amendment, it asserted that, by reducing the regulatory burdens and costs of required disclosure obligations, smaller non-reporting companies that do not currently rely on Rule 701 may be encouraged to compensate their employees with company stock, better enabling them to compete with larger companies to recruit and retain talent. In fact, the increase of the disclosure threshold should benefit all private companies that desire to issue equity incentives to a broader group of employees. Because an offering under Rule 701 is not integrated with an offering under **Regulation D**, private companies will sometimes limit equity award programs to higher level employees who are more likely to be accredited investors. The increased threshold may allow companies to more comfortably issue equity awards deeper into the organization.

Significant beneficiaries of this rule include fast-growing private companies backed by private equity and venture capital firms in sectors such as technology and healthcare. The SEC attempted to quantify this impact by estimating the number of non-reporting companies that conducted exempt securities offerings during 2017 under other exemptions from the federal securities laws for small businesses, such as Regulation D, **Regulation A** and **Regulation Crowdfunding**. The SEC estimated that there are approximately 16,500 non-reporting growth companies in the United States that could potentially benefit from the amendment over the coming years.

The SEC's request for comment as to eligibility for offerings under Rule 701 could provide welcome relief to companies in light of changes to the labor markets. In its current form, Rule 701's eligibility requirements cover employees and individuals who provide services as consultants and advisers that are similar to the types of services that might be provided by an employee. The SEC's release seeks comment on whether Rule 701 should also cover individual service providers who work non-traditional hours or provide services over a company's Internet platforms whose employers might stand to benefit from revisions to Rule 701 that purport to embrace these gig economy relationships, recognizing that there may be similar compensatory and incentive motivations for companies to offer equity compensation to these workers as there are for traditional employees. The SEC is encouraging commenters to consider the benefits and costs of expanding the definition of "employee" under Rule 701, whether (and to what extent) the use of an issuer's Internet platform to provide services should entitle an individual who provides such services to receive issuer securities pursuant to the exemption and whether the individual's level of dependence on the issuer (e.g., percentage of earned income) should be a factor in making these determinations. The current regime under Rule 701 would arguably already cover some of the types of individuals named in the concept release, since many of these individuals could have been considered consultants to the issuer; however, the SEC seems interested in broadening the availability of Rule 701 to individuals whose relationship with the issuer is even more attenuated.

An important issue raised in the concept release is a request for comment on whether the Rule 701 disclosure rules should be tailored for foreign private issuers to conform with their home country practices. For companies that issue securities in excess of the dollar threshold in a 12-month period, there is a requirement that financial information be current within the past 180 days, which requires quarterly financial statements, while many foreign companies listed with the United States are only required to produce financial statements biannually. Relaxing these rules to permit offerings that comply with home country practices could help employers that otherwise may be subject to financial disclosure on grants or option exercises.

With respect to Form S-8, much of the SEC's release is aimed at harmonizing any changes that may be made under Rule 701 to the corresponding concepts in Form S-8; however, the SEC has noted that it is hesitant to permit issuances under Form S-8 to consultants and advisors who might promote a market for the issuer's securities or serve as a conduit for a distribution to the general public. In this light, it urges commenters to be mindful about whether expansions under Form S-8 to accommodate gig economy relationships might raise concerns about misuse of the form for capital-raising transactions.

In addition, the SEC seeks comment on ways that it might streamline the Form S-8 process. Form S-8 provides vital flexibility to publicly listed issuers to administer their equity compensation programs in a streamlined fashion; however, there are nuances in the rule that cause confusion and inadvertent noncompliance that could likely be improved. Companies should consider what aspects of the Form S-8 might benefit from clarification or amendment, as the SEC seems motivated to address these concerns.

Ultimately, the changes to Rule 701, and the proposals relating to Rule 701 and Form S-8, may not have a significant impact on company equity compensation policies, since most companies have been able to work within the current regulatory regime; however, most companies would welcome any changes that could ease the regulatory burden as it relates to equity compensation.

Davis Polk

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

Jeffrey P. Crandall	**212 450 4880**	**jeffrey.crandall@davispolk.com**
Edmond T. FitzGerald	**212 450 4644**	**edmond.fitzgerald@davispolk.com**
Sophia Hudson	**212 450 4762**	**sophia.hudson@davispolk.com**
Kyoko Takahashi Lin	**212 450 4706**	**kyoko.lin@davispolk.com**
Jean M. McLoughlin	**212 450 4416**	**jean.mcloughlin@davispolk.com**
Byron B. Rooney	**212 450 4658**	**byron.rooney@davispolk.com**
Sarah K. Solum	**650 752 2011**	**sarah.solum@davispolk.com**
Shane Tintle	**212 450 4526**	**shane.tintle@davispolk.com**
Veronica M. Wissel	**212 450 4794**	**veronica.wissel@davispolk.com**
Gregory D. Hughes	**650 752 2045**	**gregory.hughes@davispolk.com**

Appendix A

SEC Concept Release Requests for Comment

Employees and Other Workers, Including the Gig Economy

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?
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?
7. [S]hould 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?
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 [Securities] Exchange Act [of 1934] 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?
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?
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?

Enhanced Disclosure Under Rule 701(e)

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?
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 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?

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? Should the 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 grant date fair value information be informative? Would Internal Revenue Code Section 409A 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?

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 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?

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?

Additional Rule 701 Concerns – RSUs and the Rule 701(d) Ceiling

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 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?

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?

Form S-8 – Eligible Participants, Administrative Burdens and General Questions

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," 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?

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? 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?

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? If so, what would be the best way to implement such a system?

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? 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? 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. 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 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. 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)?

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

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

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. 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, and Form S-8 disclosure relies upon incorporation by reference and delivery 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? Would the potential lack of Securities Act Section 11 and Section 12(a)(2) liability 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? If so, should Form S-3 eligibility requirements be revised for this purpose?