# SEC Proposes Amendments to Modernize Compensatory Offerings and Temporary Rules to Allow for "Platform Worker" Participation Under Rule 701 and Form S-8

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On November 24, 2020, the Securities and Exchange Commission (SEC) released **proposed amendments** and **proposed temporary rules** relating to the federal securities laws that govern the issuance of equity securities to service providers pursuant to compensatory arrangements.[1] Each proposal will be subject to a 60-day public comment period following publication in the Federal Register.

- First, the SEC **proposed amendments** to modernize the framework for securities offerings and sales to workers under Rule 701 of the Securities Act of 1933 and registration statements on Form S-8.
- Second, the SEC **proposed temporary rules** to facilitate limited participation by "platform workers," or workers who provide services through the company's internet-based marketplace platform or through another widespread, technology-based marketplace platform or system, in compensatory offerings under Rule 701 and Form S-8.

These amendments and temporary rules come following the SEC's unanimous vote in July 2018 to solicit public comment on possible ways to modernize Rule 701 and Form S-8 in light of developments in compensation offerings and the labor markets, including the expansion of the "gig economy." Our **client memorandum** describes the SEC's 2018 concept release in further detail.

This memorandum provides:

- An overview of Rule 701 and Form S-8;
- A summary of the proposed amendments to modernize Rule 701 and Form S-8 and of the proposed temporary rules for platform workers; and
- A series of Q&As relating to key topics addressed by the two proposals.

Appendix A and Appendix B also offer a complete list of the SEC's requests for additional comments.

## 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. Rule 701 and Form S-8 provide a framework under the federal securities laws for companies to make offers and sales of securities to employees and other service providers under equity compensation plans, given the different issues that arise when securities are issued for compensatory, and not capital-raising, purposes.

***Rule 701.*** Rule 701 provides the most commonly used exemption for the issuance 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) pursuant to compensatory

[1] The SEC also released a **video**, which highlights the key proposed changes to Rule 701 and Form S-8.

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benefit plans (including equity compensation plans). This exemption is only available for primary issuances of securities by non-reporting companies, such as privately held U.S. companies and foreign private issuers that may be listed in their home countries but not in the United States.

If the aggregate sales price of securities sold by a company in reliance on Rule 701 exceeds $10 million[2] during any consecutive 12-month period, the company must deliver additional disclosure to plan participants, including a summary of the material terms of the plan, information about the risks associated with investing in the company's securities and financial statements. Offerings exempted from federal registration requirements under Rule 701 remain subject to state securities laws, and thus may be subject to registration and/or notice requirements depending on the states in which the securities are offered.

***Form S-8.*** For public reporting 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 is consistent with Rule 701, and includes employees, directors, certain consultants and advisors and 'de facto' employees. While Form S-8 still requires specified company disclosures, it was adopted primarily to reduce the costs and burdens of securities registration 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.

## Proposed Amendments to Modernize Rule 701 and Form S-8

Informed by comment letters received in response to the SEC's 2018 concept release (the "**2018 Concept Release**"), the SEC proposed amendments (the "**Proposed Amendments**") to Rule 701 and Form S-8 to modernize and simplify many administrative requirements, in a manner consistent with investor protection.

### Rule 701 Disclosure Requirements

- *Rule 701(e) additional disclosure requirements.* The Proposed Amendments:
  - Limit the additional Rule 701(e) disclosure that companies must deliver to plan participants to only those sales after the $10 million threshold is exceeded, eliminating the look-back requirement;
  - Require the delivery of financial statements on at least a semi-annual basis (rather than quarterly), completed within three months after the end of the second and fourth quarters; and
  - Permit companies to provide alternative valuation information in lieu of financial statements, in the form of an independent valuation report or other valuation information, as applicable, that is generally consistent with the rules and regulations under Internal Revenue Code Section 409A (Section 409A).

[2] Note that the SEC raised the Rule 701(e) threshold from $5 million to $10 million in 2018. Our July 2018 **client memorandum** discusses this **rulemaking**.

- *Revised timing of disclosure for equity awards that constitute derivative securities.* The Proposed Amendments clarify the distinction between derivative securities that involve a decision to exercise or convert (*e.g.*, stock options) and those that do not (*e.g.*, restricted stock units (RSUs)). For purposes of Rule 701, companies would continue to be required to deliver disclosure a reasonable period of time before the date of exercise or conversion for the former and the date of grant for the latter.

  However, when a company grants RSUs or similar equity-based awards to a new hire, the Proposed Amendments permit the company to provide the required disclosure no later than 14 calendar days after the person begins employment.

**Rule 701 Issuance Thresholds**

- *Higher caps on securities that may be sold during any 12-month period.* Currently, Rule 701 caps the overall amount of securities that may be sold pursuant to the exemption during any 12-month period at the greatest of: (i) $1 million; (ii) 15% of total company assets; or (iii) 15% of the outstanding amount of the class of securities being offered and sold in reliance on Rule 701. The Proposed Amendments raise the total dollar threshold to $2 million, raise the asset threshold to 25% and retain the percentage threshold for the class of securities being offered with no changes.

**Form S-8 Administration**

- *Improvements and clarifications to simplify Form S-8.* The Proposed Amendments:
  - *Clarify the ability to add multiple plans to a single Form S-8.* Companies may file an automatically effective post-effective amendment to a previously filed Form S-8 to add employee benefit plans if the new plan does not require the authorization and registration of additional securities for offer and sale*;*
  - *Clarify the ability to allocate securities among multiple incentive plans on a single Form S-8.* Companies may use a single Form S-8 for multiple plans to create a pool of registered shares that may be used under the company's various incentive plans. Companies should make sure to provide information specific to each plan as required by Form S-8*;* and
  - *Permit the addition of securities or classes of securities by automatically effective post-effective amendment.* A company that has an effective registration statement for a previous incentive plan can file an automatically effective post-effective amendment to the existing Form S-8 instead of filing a new Form S-8 to register the offering of additional shares.
- *Removal of requirement to describe the tax effects of plan participation.* The Proposed Amendments eliminate the Form S-8 requirement to briefly describe the tax effects of plan participation on the company. However, the SEC declined to eliminate the requirement to describe tax consequences to the employees.

**Rule 701 and Form S-8 Eligibility**

- *Extended consultant and advisor eligibility.* The Proposed Amendments extend consultant and advisor eligibility from only natural persons to certain entities, subject to the following conditions:
  - Substantially all activities of the entity involve the performance of services; and
  - Substantially all of the ownership interests in the entity are held directly by no more than 25 natural persons (at least 50% of whom perform services for the company through the entity) or their estates or beneficiaries.

- *Expanded former employee eligibility.* The Proposed Amendments extend the exemption for offers and sales to former employees and other service providers beyond only those persons who were providing services to the company at the time of the offer. The Proposed Amendments expand the exemption to include:
  - Post-termination grants, when issued as compensation for services rendered during a period that ended within 12 months of termination (*i.e.,* severance awarded in the form of equity compensation); and
  - Issuances to former employees of acquired entities (*i.e.*, so-called “rollovers” of outstanding equity awards held by former employees). This will be particularly beneficial for companies because it will relieve companies of the effort and expense currently associated with registering these rolled-over equity awards on a Form S-3 registration statement.
- *Extended exemption to offers and sales by companies’ non-majority-owned subsidiaries.* In an effort to harmonize Rule 701 and Form S-8, the Proposed Amendments make the Rule 701 exemption available for offers and sales of securities under a written compensatory benefit plan established by the company’s subsidiaries, whether or not majority-owned.

**Defined Contribution Plans**

- *Improvements to simplify share counting and fee payments for defined contribution plans.* The Proposed Amendments (i) require registration based on the aggregate offering price of all securities registered and (ii) implement a new fee payment method that requires companies to pay the fee for all sales made pursuant to defined contribution plans during a given fiscal year no later than 90 days after the fiscal year end.

  The Proposed Amendments also take into account the IRS’s changed practices for plan amendments by (i) eliminating the requirement that companies undertake to submit any amendment to the plan to the IRS and (ii) removing the requirement to file a copy of the IRS determination letter when an amended plan is qualified under Section 401 of the Internal Revenue Code. Instead, companies generally can include an undertaking that the company will maintain the plan’s compliance with ERISA.

## Temporary Rules for “Platform Workers”

In response to the 2018 Concept Release, several commenters noted that “platform workers” (*i.e.*, individuals who use a company’s internet platform to find a particular type of work or “gig”) might not qualify as employees, consultants, advisors or de-facto employees eligible to receive securities in compensatory arrangements under Rule 701 or on Form S-8. Recognizing the evolution in workforce composition, particularly the development of the “gig economy,” the SEC separately proposed temporary rules that expand the scope of eligibility under Rule 701 and Form S-8. Under the proposed rule amendments (the “**Proposed Platform Worker Rule**”), on a temporary (five-year) basis and subject to limitations described further below, companies may provide equity compensation to certain platform workers who provide services available through the company’s technology-based platform or other widespread, technology-based platform or system.[3]

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[3] Commissioners Pierce and Roisman issued a **statement in support** of the proposal, while Commissioners Lee and Crenshaw released a **statement opposing** the proposal due to its limited applicability to only companies that provide services through internet platforms.

The SEC is clear that it is only addressing platform workers' eligibility under Rule 701 and Form S-8 and not opining on whether platform workers would be considered "employees" for purposes of other laws or regulations.

**Platform Worker Eligibility**

The Proposed Platform Worker Rule provides that a non-listed issuer may rely on Rule 701 to issue compensatory securities to, and Exchange Act reporting companies may make registered securities offerings under Form S-8 to, platform workers unaffiliated with the company who, pursuant to a written contract or agreement provide *bona fide* services by means of an internet-based platform so long as:

- The company operates and controls the platform, as demonstrated by its ability to:
  - Provide access to the platform;
  - Establish the principal terms of service for using the platform and terms and conditions by which the platform worker receives payment for the services provided through the platform; and
  - Accept and remove platform workers participating in the platform;
- The issuance of securities to participating platform workers is pursuant to a written compensatory plan, contract or agreement and is not for services that are in connection with the offer or sale of securities in a capital-raising transaction, or services that directly or indirectly promote or maintain a market for the company's securities;
- No more than 15% of the value of compensation received by a participating worker from the company for services provided by means of the platform during a 12-month period, and no more than $75,000 of such compensation received from the company during a 36-month period, consists of securities, with such value determined at the time the securities are granted;
- The amount and terms of any securities issued to a platform worker may not be subject to individual bargaining or the worker's ability to elect between payment in securities or cash; and
- For securities issued to platform workers under Rule 701 (but not Form S-8), the company must take reasonable steps to prohibit the transfer of the securities, other than a transfer to the company or by operation of law.

The limitations described above are intended to limit the possibility that the Proposed Platform Worker Rule would result in offers and sales for capital-raising, and not compensatory, purposes.

**Information Furnishing Requirements**

Finally, the Proposed Platform Worker Rule also requires companies that sell securities to platform workers to furnish the following information to the SEC at six-month intervals to help the SEC decide whether the rule changes should expire, be extended or be made permanent at the end of the five-year period.

- The criteria used to determine eligibility for awards, whether those criteria are the same as for other compensatory transactions and whether those criteria (and any revisions) are communicated to platform workers in advance as an incentive;
- The type and terms of securities issued and whether they are the same as for other compensatory transactions by the company during the applicable interval;
- If pursuant to Rule 701, the reasonable steps taken to prohibit the transfer of the securities sold pursuant to the Proposed Platform Worker Rule;

- The percentage of overall outstanding securities that the amount issued cumulatively under the Proposed Platform Worker Rule represents;
- The number of platform workers, the number of non-platform workers, the number of platform workers who received securities pursuant to the Proposed Platform Worker Rule and the number of non-platform workers who received securities pursuant to Rule 701 or Form S-8 issuances during the applicable interval; and
- Both in absolute amounts and as a percentage of the company's total Rule 701 or Form S-8 issuances during the applicable interval:
  - The aggregate number of securities issued to platform workers; and
  - The aggregate dollar amount of securities issued to platform workers.

## Key Questions & Answers – Proposed Amendments

**Q1: Do the Proposed Amendments reflect permanent changes to Rule 701 and Form S-8?**

*A1: Yes, subject to the Proposed Amendments being finalized.*

The Proposed Amendments will first be open for comments until 60 days following publication in the Federal Register. The SEC will then need to consider the comments submitted and prepare a final rule. Once the final rule is published and becomes effective, the Proposed Amendments will permanently amend Rule 701 and Form S-8 (as opposed to the Proposed Platform Worker Rule, which is temporary in nature).

**Q2: Would Rule 701 and Form S-8 eligibility be extended to entities and no longer limited to natural persons?**

*A2: Yes, but only certain entities.*

Consultants or advisors who provide services to a company would be eligible to participate in Rule 701 and Form S-8 offerings only if they are natural persons or an entity substantially all of the activities of which involve the performance of services; and substantially all of the ownership interests of which are held directly by (i) no more than 25 natural persons, of whom at least 50% perform such services for the company through the entity; (ii) the estate of a natural person specified in (i); and (iii) any natural person who acquired ownership interests in the entity by reason of the death of a natural person specified in (i).

An entity that satisfies the above conditions would still, like a natural person, need to satisfy the existing requirements for consultants and advisors by providing *bona fide* services that are not in connection with the offer or sale of securities in a capital-raising transaction and do not promote or maintain a market for the company's securities.

**Q3: Does the change to how the Rule 701(e) disclosure threshold applies mean that companies would no longer need to anticipate in advance whether their compensatory sales could exceed $10 million during a 12-month period?**

*A3: Correct.*

The SEC recognizes that the "lookback" aspect of the current rule makes it difficult for companies to plan their compensation programs or respond to unexpected situations (*e.g.*, unexpected awards to new hires). The Proposed Amendments require that the Rule 701(e) disclosure be delivered to plan participants only with respect to sales after the $10 million threshold is exceeded. That is, after-the-fact disclosure is not required for any sales made in reliance on the Rule 701 exemption during the 12-month period before crossing the $10 million threshold.

**Q4: Would companies, including foreign private issuers, no longer be required to prepare quarterly financials to rely on Rule 701(e)?**

*A4: Correct.*

The Proposed Amendments require companies to prepare financial statements on a semi-annual (not quarterly) basis to make sales continuously pursuant to Rule 701. Many commenters in response to the 2018 Concept Release identified that quarterly financials are burdensome for the companies that tend to rely on Rule 701, particularly many foreign private issuers. The SEC appeared to appreciate these concerns and noted that the Proposed Amendments should eliminate any disadvantage for foreign private issuers, because the proposed timing is consistent with foreign private issuers' financial statement updating requirements for registered offerings on Form 20-F.

**Q5: Would foreign private issuers still need to provide a GAAP reconciliation to satisfy Rule 701(e)'s financial statement disclosure requirements?**

*A5: Some foreign private issuers would remain subject to the requirement, and others would not.*

Foreign private issuers that are eligible for the exemption from registration provided by **Rule 12g3-2(b)**[4] of the Securities Exchange Act of 1934 would be permitted to prepare their financial statements in accordance with home country accounting standards, if financial statements prepared in accordance with U.S. GAAP or IFRS are not available. All other foreign private issuers would continue to be subject to the requirement to provide a GAAP reconciliation.

The SEC declined, however, to permit foreign private issuers to provide financial statements audited under the International Standards on Auditing. Therefore, the Proposed Amendments continue to recognize only those audits prepared in accordance with U.S. generally accepted auditing standards or PCAOB auditing standards.

**Q6: Would all companies be able to provide a Section 409A independent valuation report in lieu of financial statements to satisfy Rule 701(e)'s disclosure requirements?**

*A6: Yes, except for certain foreign private issuers, which may instead provide alternative valuation disclosure consistent with Section 409A's rules relating to the fair market value of stock readily tradable on an established market.*

The SEC notes that most companies should be well-suited to provide the proposed Section 409A independent valuation report, which may be less costly for companies and as useful (or potentially more useful) to plan participants than financial statements. Section 409A independent valuations, however, may not be appropriate for certain foreign private issuers eligible for the Rule 12g3-2(b) exemption, given that these companies may instead meet the criteria for Section 409A's standard for stock readily traded on an established securities market. Therefore, these foreign private issuers would be permitted to provide alternative valuation disclosure consistent with Section 409A's rules and regulations applicable to determining the fair market value of stock readily tradeable on an established market—generally, disclosure of the fair market value of the stock on the most recent trading day preceding the date of sale.

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[4] Rule 12g3-2(b) exempts foreign private issuers from the requirement to register a class of equity securities under section 12(g) (*i.e.*, due to having 500 or more holders of record and assets which exceed $1 million) if: (i) the issuer maintains a listing of the subject class of securities on one or more exchanges in a non-U.S. jurisdiction that constitutes a primary trading market for such securities; (ii) the issuer is not subject to the reporting obligations of Section 13(a) or 15(d) of the Exchange Act, and (iii) the issuer has published electronically in English specific disclosure documents dating back to the first day of its most recently completed fiscal year.

**Q7: If a company wished to provide a Section 409A independent valuation report in lieu of financial statements, how current would the valuation report need to be?**

*A7: Generally, a report as of a date no more than six months before the sale.*

The Proposed Amendments require the Section 409A independent valuation report to be as of a date that is no more than six months before the sale of securities in reliance on the Rule 701 exemption (while Section 409A permits an independent valuation report to be used for up to one year if no material facts have changed with respect to the issuer). The SEC notes that this updating scheduling would be consistent with the proposed semi-annual age of financial statement requirements for Rule 701(e).

**Q8: Do the Proposed Amendments clarify whether companies should provide the required disclosure to plan participants prior to the date of grant, the vesting date or, if applicable, the exercise or conversion date of equity awards?**

*A8: Yes, and the required timing of disclosure will depend on the form of the equity award.*

The Proposed Amendments state that for derivative securities that involve a decision to exercise or convert (*e.g.*, stock options), companies are required to deliver the Rule 701 disclosure a reasonable period of time before the date of exercise or conversion. However, for other forms of derivative securities, such as RSUs, companies are required to deliver disclosure a reasonable period of time before the date of grant (as opposed to a reasonable period of time before the applicable vesting or settlement date).

**Q9: Do the Proposed Amendments provide any relief for companies that recently undertook business combination transactions?**

*A9: Yes, relating to Rule 701(e)'s additional disclosure requirements, Rule 701's overall cap on offerings pursuant to the rule and former employee eligibility.*

The Proposed Amendments generally separate a target company's usage of Rule 701 from an acquiring company's usage of Rule 701 so that the target company's usage does not affect the acquirer's usage.

- When determining whether the amount of securities sold during any consecutive 12-month period exceeds $10 million following a business combination transaction, acquiring companies would only need to consider the securities that the company sold in reliance on Rule 701 and not any securities sold by the acquired company.
- When considering the application of Rule 701's overall cap on sales during any consecutive 12-month period following a merger or acquisition, acquiring companies may use a pro forma balance sheet that reflects the transaction or a balance sheet for a date after the completion of the transaction. The acquiring company also need not include the aggregate sales price and amount of securities for which the acquired company relied on Rule 701 during the applicable 12-month period.

The Proposed Amendments also extend Rule 701 eligibility to include former employees and specified service providers of an acquired entity if securities are issued in substitution or exchange for securities that were issued to the former employees or service providers on a compensatory basis while such persons were employed by or providing services to the acquired entity. In other words, equity awards held by former employees of a target company could be "rolled over" and companies would no longer need to register the rolled-over equity awards on a Form S-3.

**Q10: Would companies be required to include all employee benefit plans on a single Form S-8?**

*A10: No, the Proposed Amendments are permissive and not mandatory in this regard.*

The Proposed Amendments are intended to facilitate the use of a single Form S-8 for all employee benefit plans if the company chooses to do so. The SEC also notes that a single Form S-8 could help to reduce problems associated with fee transfers between multiple registration statements. However, the SEC acknowledges that some companies may prefer to maintain separate forms—for example, a company may choose to use a single Form S-8 for all incentive plans, but another for its defined contribution plan given the differences between the two types of plans.

**Q11: Would it be easier for companies to add securities or classes of securities to existing Form S-8 registration statements?**

*A11: Yes.*

Instead of filing a new Form S-8 to register the offering of additional securities or classes of securities, the Proposed Amendments permit companies to file an automatically effective post-effective amendment. A company that has an effective registration statement for a previous incentive plan could file an automatically effective post-effective amendment to the existing Form S-8 to register the offer and sale of additional shares. If a company adopted a new employee benefit plan, it could file an automatically effective post-effective amendment to its existing Form S-8 to add the new plan and the new class of security to the registration fee table and include the additional disclosure required by Form S-8.

**Q12: How and when would companies determine their registration fees for defined contribution plans?**

*A12: Companies would register an indeterminate amount of securities on an initial Form S-8 and then pay the registration fee on a delayed basis, in arrears.*

The Proposed Amendments provide for the registration on Form S-8 of offers and sales of an indeterminate amount of the company's securities to be issued pursuant to defined contribution plans. The company would then later pay the securities registration fees on an annual basis within 90 calendar days after the plan's fiscal year end by filing an automatically effective post-effective amendment to the existing Form S-8 registration statement.

**Q13: Do the Proposed Amendments address how to measure offers and sales under a defined contribution plan such as a 401(k) plan?**

*A13: Yes, the SEC offers some preliminary guidance, but is seeking additional comment on this topic.*

The Proposed Amendments' inclusion of provisions to (i) permit the calculation of the registration fee for defined contribution plans using an aggregate offering price and (ii) allow for a new annual fee payment method are meant to alleviate some concerns associated with counting securities to be offered and sold pursuant to a registration statement on Form S-8 for defined contribution plans. Still, the SEC notes that additional challenges exist.

In response to the 2018 Concept Release, at least one commenter requested clarification about how sales and purchases should be tracked and the impact of any netting of shares. For employees who participate in an employer stock fund, the SEC considered how to analyze the transactions when employees participating in a defined contribution plan divest their holdings in the company stock fund and the divested shares are used to satisfy another employee's investment in the fund. The SEC's preliminary view, and the outcome of the currently proposed changes to the fee payment calculation rules, is that a company may not "net" or "offset" these plan transactions against each other when determining the number of shares to deduct from the registered share capacity under the company's Form S-8. The Proposed Amendments, however, do include additional requests for comment as to whether share counting for defined contribution plans on a gross basis is the appropriate result.

**Q14: Do the Proposed Amendments address the challenges that IPOing companies face when attempting to register shares under an employee stock purchase plan (ESPP)?**

*A14: Not really.*

The SEC acknowledges several commenters that cited the difficulty of implementing an ESPP prior to an IPO. To avoid registration issues, companies end up automatically enrolling all eligible employees in their ESPPs and then having employees withdraw from or confirm enrollment before the first purchase is made under the ESPP. The SEC did not propose specific amendments, but is soliciting additional comments on how to best address this issue.

## Key Questions & Answers – Proposed Platform Worker Rule

**Q15: Exactly what types of gig workers are treated as qualifying “platform workers” under the Proposed Platform Worker Rule?**

*A15: Only those who provide bona fide services by means of a company’s internet-based or other technology-based platform.*

As currently proposed, companies could issue securities to those who provide services (*e.g.*, ride-sharing, food delivery, household repairs, dog-sitting, tech support, etc.), but not to those who perform activities relating to the sale or transfer of permanent ownership of discrete tangible goods (*e.g.*, a platform that provided for the permanent transfer of real estate versus the temporary rental of real estate). Workers providing services to third-party end-users would also qualify as long as the company benefits from the services (*e.g.*, by receiving a fee for use of the platform or some percentage of compensation received from the end-user).

**Q16: Could an entity qualify as a “platform worker”?**

*A16: Possibly.*

The Proposed Platform Worker Rule permits an eligible platform worker to be a natural person or an entity if (i) substantially all of the entity’s activities involve the performance of *bona fide* services and (ii) the ownership interest of the entity is wholly and directly held by the natural person performing the services.

**Q17: What type of written contract or agreement would suffice?**

*A17: A compensatory arrangement pursuant to a written compensation plan, contract or agreement between the company and the platform worker.*

The SEC notes that a “written contract or agreement” would also include an electronic, internet-based contract or agreement. The compensatory arrangement, however, must be for services other than those provided in connection with capital-raising transactions or those that promote or maintain a market for the company’s securities. For example, an arrangement to compensate a platform worker for performing services analogous to those of an underwriter or promoter would not be permissible.

**Q18: What valuation method would companies be required to use to determine compliance with the 15% and $75,000 compensation limits?**

*A18: Generally, any reasonable, recognized valuation methodology.*

The SEC would generally permit companies to use any reasonable, recognized valuation methodology as long as the methodology is consistently applied during the 12-month or 36-month period, as applicable. Note, though, that the SEC indicates that it would expect companies to use the same valuation methods that they currently use to make valuations for compensatory issuances under Rule 701 and the use of multiple different valuation methodologies during the same period could raise concerns.

**Q19: What types of "reasonable steps" would need to be taken to prohibit the transfer of securities issued to a platform worker pursuant to Rule 701?**

*A19: Generally, documentary precautions or instructions to transfer agents should be sufficient.*

The SEC indicates that "reasonable steps" could include, for example, the placement of special legends on the securities to be issued or instructions to transfer agents that provide adequate notice of the transfer prohibition applicable for platform workers.

The SEC notes that enhanced transfer restrictions are appropriate for platform workers versus employees given the more remote contractual relationship between a company and its platform workers. Currently, all securities issued pursuant to Rule 701 are "restricted securities," but the Proposed Platform Worker Rule introduces additional transfer restrictions, which effectively would preclude any transfers of securities, except transfers back to the company or by operation of law (*i.e.*, employees or other service providers who receive securities pursuant to Rule 701 could not sell the shares into a secondary market).

**Q20: Is the Proposed Platform Worker Rule a permanent rule?**

*A20: No. If finalized, the rule would only be effective for five years.*

The Proposed Platform Worker Rule will first be open for comment for 60 days following publication in the Federal Register. The SEC will then need to consider comments and prepare the final rule. However, <u>even if the rule is finalized</u>, the Proposed Platform Worker Rule by its terms would only be effective for five years following the effective date of a final rule. During this five-year period, the SEC would assess whether issuances of securities to platform workers under Rule 701 or on Form S-8 are for legitimate compensatory purposes and not for capital-raising purposes. In the event that the SEC did decide to let the rule expire by its terms, any transition or related issues would be addressed at that time.

**Q21: Will the SEC expand the scope of companies and/or workers covered by the Proposed Platform Worker Rule?**

*A21: Possibly.*

Depending on the results of the initial expanded use of Rule 701 and Form S-8, if adopted, the SEC could consider expanding eligibility to other activities, such as selling goods, or other non-service providing activities in the future.

**Q22: Would the Proposed Amendments' expansion of former employee eligibility extend to platform workers as well?**

*A22: Yes.*

Post-termination grants of securities to platform workers, when awarded as compensation for services rendered during a period that ended within 12 months of termination (*i.e.,* severance awarded in the form of equity compensation), and issuances of securities to former platform workers of an acquired entity, when in substitution or exchange for securities issued to the former platform worker on a compensatory basis while providing *bona fide* services to the acquired entity (*i.e.,* "rollover" awards), would each be permitted for platform workers as well.

**Q23: Does the Proposed Platform Worker Rule create a separate ceiling on the amount of securities that could be offered or sold under Rule 701?**

*A23: No, platform workers would remain subject to Rule 701's existing overall caps and disclosure requirements, as modified by the Proposed Amendments.*

Under the Proposed Platform Worker Rule, platform workers would be an additional class of persons temporarily eligible to participate in Rule 701 offers and sales and subject to the same Rule 701 limitations on the total amount of securities that may be sold during any 12-month period. Securities sold to platform workers would be aggregated with all other securities sold pursuant to Rule 701 for purposes of applying the rule's overall ceiling.[5]

Similarly, issuances to platform workers would also need to be considered when determining Rule 701(e)'s $10 million threshold, which triggers the additional disclosure requirements described above.

**Q24: Would the accommodations available to companies offering securities to employees and other covered persons pursuant to Form S-8, including those set forth in the Proposed Amendments, be available to companies offering securities to platform workers as well?**

*A24: Generally, yes, except for the provisions of Form S-8 and the Proposed Amendments that relate to defined contribution plans.*

The Form S-8 accommodations, including abbreviated prospectus requirements and the ability to incorporate Exchange Act reports by reference, would also apply for securities issuances to platform workers under Form S-8. The SEC believes, however, that companies that choose to register issuances to platform workers on Form S-8 would do so for short-term incentive purposes (*e.g.*, stock option or RSU grants), rather than issuances pursuant to a defined contribution plan for retirement savings purposes. Therefore, the Proposed Platform Worker Rule does not amend the items of Form S-8 that pertain to defined contribution plans to include platform workers.

**Q25: Would a company still be able to rely on the Proposed Platform Worker Rule if it failed to furnish the requested information to the SEC at six-month intervals?**

*A25: Yes.*

The Proposed Platform Worker Rule would require companies to furnish the information specified above; however, furnishing this information would not be a condition to rely on Rule 701 or Form S-8 and failure to provide the information would not result in the loss of the proposed exemption for issuances to platform workers. The SEC notes, though, that the information will be important for determining whether the temporary rule will expire, be extended or be made permanent at the end of the five-year period.

The SEC also notes that some companies may view information relating to compensation practices as privileged and confidential. If so, the company may submit a confidential treatment request for the furnished information.

**Q26: Would platform workers who receive shares pursuant to a compensation plan be considered record holders for purposes of determining registration obligations under Section 12(g) of the Exchange Act?**

*A26: No.*

The Proposed Platform Worker Rule would exclude issuances to platform workers consistent with Section 12(g)'s existing exclusion of securities held by persons who received the securities pursuant to certain employee compensation plans. The SEC notes that this treatment is appropriate both to remove a potential disincentive to offer and sell securities as compensation to platform workers and to avoid favoring companies that do not have platform workers.

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[5] The Proposed Amendments would modify two prongs of the Rule 701 ceiling and cap the overall amount of securities that may be sold pursuant to the exemption during any 12-month period at the greatest of: (i) $2 million; (ii) 25% of total company assets; or (iii) 15% of the outstanding amount of the class of securities being offered and sold in reliance on Rule 701.

## What’s Next?

Each proposal is subject to a 60-day comment period from the rules’ publication in the Federal Register. Companies that wish to comment on the proposed rule may wish to consult Appendix A and Appendix B for a complete list of the SEC’s requests for comment on the Proposed Amendments and the Proposed Platform Worker Rule.

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


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Appendix A

## Requests for Comment – Proposed Amendments

**Rule 701: Disclosure Requirements**

**The Disclosure Requirement for the Period Preceding the Threshold Amount Being Exceeded**

1. Should the rule be amended, as proposed, to require additional disclosure only for those sales during the 12-month period that exceed the $10 million threshold? Are there circumstances in which issuers may have trouble providing the information upon exceeding the threshold? If so, how could those difficulties be addressed?
2. Should there be a “grace period” between crossing the $10 million threshold and the requirement to provide additional disclosure with respect to the sales exceeding the $10 million threshold? If so, how long a period is appropriate? Would the other amendments proposed in this release that make it easier for issuers to comply with Rule 701’s disclosure delivery requirement mitigate the need for a grace period?
3. Alternatively, upon crossing the $10 million threshold, should the issuer be required to provide the additional Rule 701(e) disclosure on a retrospective basis to all investors who had previously been granted or purchased securities during the 12-month period? Would such after-the fact disclosure mitigate informational asymmetry between investors who purchase before and investors who purchase after crossing the $10 million threshold? If we impose such a requirement, should the issuer lose the exemption for those earlier transactions if it fails to retrospectively provide the disclosure? Should there be a “grace period” between crossing the $10 million threshold and the requirement to retrospectively provide the disclosure? If so, how long a period is appropriate?

**Age of Financial Statements**

4. Would the proposed amendment to the age of financial statement requirements ease the burden of compliance with Rule 701(e) in a manner consistent with investor protection, both for domestic issuers and foreign private issuers? Would a different age of financial statement requirement better promote this objective? For example, should issuers be required to update financial statements only once per fiscal year, unless there is a material change to the issuer’s enterprise value or the value of the securities? Should issuers be permitted to rely on either Tier 1 or Tier 2 financial statement requirements regardless of the size of the offering, as proposed?
5. Subsequent to the adoption of Exchange Act Rule 12g5-1(a)(8), to what extent do nonreporting issuers rely on the Rule 12h-1(f) exemption? If we amend Rule 701(e), should we also make conforming amendments to the age of financial statement requirement under Rule 12h-1(f), assuming non-reporting issuers continue to rely on the rule? If nonreporting issuers no longer rely on the exemption it provides, should we rescind Rule 12h-1(f)?

**Financial Statement Content Requirements for Foreign Private Issuers**

6. Should we permit foreign private issuers that are eligible for the exemption from Exchange Act registration provided by Exchange Act Rule 12g3-2(b) to provide financial statements prepared in accordance with home country accounting standards without reconciliation to U.S. GAAP, as proposed? Would such an accommodation provide financial information that is consistent with investor protection?
7. Should the proposal be expanded to apply to any foreign private issuer with securities that are listed and traded in its home country, without regard to Exchange Act Rule 12g3- 2(b) eligibility? Alternatively, if we do not expand the proposal to all foreign private issuers with securities listed and traded in its home country, should we amend Rule 701(e)(4) to allow issuers to present their financial statements in accordance with other international financial reporting standards, such as

International Financial Reporting Standards as adopted by the European Union, without requiring such issuers to provide a reconciliation to U.S. GAAP?

**Alternative Valuation Disclosure**

8. Should we permit a Section 409A independent valuation report to be provided in lieu of financial statement disclosures, as proposed? Would the IRC Section 409A regulations for determining the fair market value of stock not readily tradable on an established securities market generate valuation information that is easy to understand and appropriate to the financial disclosure needs of investors receiving securities under Rule 701? Would such disclosure be an acceptable alternative to financial statements prepared in accordance with U.S. GAAP or IFRS, as applicable? Would this proposal provide meaningful information to securities recipients while avoiding competitive risks from unauthorized financial statement disclosure?
9. Should we require, as proposed, that Section 409A independent valuation reports be prepared pursuant to an independent appraisal for Rule 701(e) disclosure purposes? Taken together, would the related Treasury Regulations defining the terms “independent appraiser,” “qualified appraiser,” and “qualified appraisal” provide adequate guidance for purposes of satisfying this proposed requirement? If not, should we provide further guidance? Would the proposed independence requirement add significantly to preparation costs? How would those costs compare to the costs of preparing the financial statements required by the proposed amendments?
10. As proposed, the Section 409A independent valuation reports would need to be updated at six-month intervals. Would a different interval be more appropriate to ensure that such valuation disclosures provide appropriate information? If so, what interval should we prescribe? Would the proposed updating schedule impose significant costs? Would a less frequent updating schedule raise investor protection concerns?
11. More specifically, would the Section 409A updating schedule imposed for tax purposes, calling for an independent valuation report to be updated if it fails to reflect information that may materially affect the value of the issuer and otherwise only once per fiscal year, result in more frequently updated information than if the issuer provides financial statement disclosure only on a semi-annual basis as proposed? Would using the tax updating schedule for Rule 701(e) purposes provide adequate investor protection?
12. Should we require disclosure of the entire Section 409A independent valuation report, as proposed? Would requiring disclosure of the entire Section 409A independent valuation report result in disclosure of competitively sensitive information? If so, how could we modify the proposal to avoid this result while still providing investors with appropriate disclosure? Are there particular contents of the report that would be competitively sensitive and not meaningful to investors?
13. Is the proposed alternative valuation information based on IRC Section 409A valuation standards for stock readily tradable on an established securities market appropriate for Rule 12g3-2(b) eligible foreign private issuers? From an investor protection standpoint, would disclosure of the securities’ fair market value alone be a sufficient alternative to financial statement disclosure? Would disclosure of the securities’ fair market value provide any benefit considering the securities are traded in an established trading market?
14. Are there any other circumstances in which an issuer should be able to provide the alternative valuation information based on market price in accordance with the IRC Section 409A valuation standards for stock readily tradable on an established securities market?
15. Are there any other aspects of the Section 409A valuation regulations that would be useful for purposes of Rule 701(e) disclosure?

16. Other than the independent valuation prescribed with respect to IRC Section 409A, are there any other securities valuation methods that would be appropriate to import into the Rule 701(e) disclosure requirements?

**Disclosure Requirements for Derivative Securities**

17. Does the proposal sufficiently clarify the distinction between derivative securities that involve a decision to exercise or convert and those that do not with respect to the timing of the obligation to deliver Rule 701(e) disclosure?
18. Is there any basis for treating settlement of an RSU or PSU as a conversion under the current rule, given that the holder does not make any investment decision at the time of settlement? For example, should the decision whether to settle tax obligations arising at settlement by withholding shares be viewed as an investment decision?
19. For new hires, is it appropriate to require delivery of Rule 701(e) disclosures within 14 calendar days after a recipient's commencement of employment, as proposed? Would a shorter period, such as seven calendar days, or longer period, such as 30 calendar days, be more appropriate?
20. Does the proposal adequately address issuer confidentiality concerns in the context of new hires, in a manner consistent with investor protection?
21. Are there any circumstances in which the proposed new hire accommodation should not apply, such as where the grant of securities is individually negotiated?
22. Should the proposed accommodation for new hires be available only if the financial disclosure that will be provided consists of financial statements, rather than the alternative proposed Section 409A valuation disclosure? Does a Section 409A independent valuation report raise the same concerns about disclosure of sensitive financial and operational risk information?
23. Are there any other categories of Rule 701 eligible participants for whom the proposed accommodations should apply?
24. Would it be helpful to amend Rule 701(e) to specify that disclosure may be made either by physical or electronic delivery or by written notice of the availability of the information on a website that may be password-protected and of any password needed to access the information? Would it be helpful for the rule to specifically permit use of dedicated physical disclosure rooms that house the medium used to convey the information required to be disclosed?

**Disclosure Requirements Following Business Combination Transactions**

25. Would the proposal addressing acquired entity derivative securities assumed by an acquiring issuer sufficiently clarify the exempt status of and disclosure obligations applicable to exercises and conversions of those securities after completion of the business combination transaction? Are any additional clarifications needed? For example, is guidance needed to clarify who is the acquiring issuer in a business combination transaction where the acquirer is not the same entity for legal and accounting purposes?
26. Following completion of a business combination transaction, in determining whether the amount of securities the acquiring issuer sold pursuant to Rule 701 during any consecutive 12-month period exceeds $10 million, should the acquiring entity be permitted to disregard the securities that the acquired entity sold pursuant to the rule during the same 12-month period, as proposed? Are there any circumstances in which the acquiring entity should be required to take those acquired entity securities into account for purposes of the $10 million disclosure threshold, and how do these circumstances relate to investor protection?

**Rule 701: Rule 701(d)**

27. Do the two proposed sales cap increases appropriately adjust the ceilings in a manner that benefits both issuers and securities recipients, consistent with investor protection? Should either cap be raised by a higher or lower amount? If so, what amount would be more appropriate? Should either cap remain unchanged?
28. Should we retain the current structure of Rule 701(d) with three alternative sales caps? If not, how should the structure be changed? In particular, do the caps further the goal of facilitating only compensatory transactions in reliance on Rule 701? Are there alternative provisions that would serve this purpose?
29. Does the cap based on 15% of the outstanding amount of the class of securities being offered and sold continue to play a useful and effective role in Rule 701? Does it prevent issuers from improperly relying on the rule to raise capital from employees? Have there been changes in the marketplace, as discussed above for the two other alternative caps, which suggest that this cap may inhibit beneficial compensatory transactions? Should this cap be raised? If so, what would be a more appropriate percentage?
30. Does the proposal to permit use of a pro forma balance sheet, or a balance sheet for a date after the completion of the business combination transaction that reflects the total assets and outstanding securities of the combined entity, meaningfully facilitate the operation of compensatory plans following a business combination transaction? Are any other changes necessary to achieve this objective?
31. Should we amend Rule 701(d), as proposed, to provide that following a business combination transaction, in determining the amount of securities that it may offer pursuant to Rule 701, the acquiring issuer need not include the aggregate sales price and amount of securities for which the acquired entity claimed the exemption during the same 12-month period?

**Rule 701: Eligible Recipients**

**Consultants and Advisors**

32. Should we extend consultant and advisor eligibility to entities meeting specified ownership criteria designed to link the securities to the performance of services for the issuer, as proposed?
33. Does the proposed standard for consultant and advisor entity eligibility appropriately balance a consultant's needs to obtain the legal benefits of entity organization with the rule's purpose to exempt from Securities Act registration offerings of securities issued in compensatory circumstances?
34. The proposed standard would require that substantially all of the ownership interests of the entity be held by no more than 25 natural persons, of whom at least 50 percent perform services for the issuer through the entity, their estates, and natural persons who acquired ownership interests due to their death. Are the proposed conditions appropriate? Are there different or additional conditions we should consider? Should the rule specify criteria defining what "substantially all" would mean for this purpose? For example, should 95 percent ownership be required to establish "substantially all"?
35. To ensure that securities are issued to compensate persons who provide services to the issuer and not to passive investors, is it necessary to specify a maximum number of natural person owners for an entity to be eligible, as proposed? Should the number be larger or smaller? Should the entity's eligibility to receive securities be conditioned on at least 50 percent of those natural person owners performing services for the issuer, as proposed? Should that percentage be larger or smaller?

36. To assure that a compensatory purpose is maintained, would it be necessary to further restrict ownership by persons who acquire the securities by reason of the death of a current or former service provider to a two-year period beginning on the date of death, as in the Internal Revenue Code definition of a qualified personal service corporation?

37. As noted above, a person who receives securities pursuant to the plan and participant conditions of Rule 701(c) is not considered a holder of record for purposes of Exchange Act Section 12(g) registration. How should this provision influence the limitations we place on those persons eligible to receive Rule 701 securities? Are any other restrictions or conditions needed to ensure that Rule 12g5-1(a)(8) excludes from the definition of held of record securities received as compensation for services that the recipients provided to the issuer?

**Former Employees**

38. Should we make Rule 701 available for new offers and sales to former employees as compensation for their service while employed by the issuer in the preceding 12 months, as proposed? Would expanding the exemption in this way facilitate compensatory transactions consistent with the purpose of the rule? To what extent do issuers grant awards on such a retrospective basis? Does “following resignation, retirement, or other termination” clearly describe the relationship of the award to former employment? Should the rule specifically address any other scenarios, such as expiration of the term of employment?

39. Should Rule 701 be available to a former employee of an acquired entity for securities substituted or exchanged for acquired entity securities issued as compensation for the former employee’s work for the acquired entity, as proposed? Would this be consistent with the underlying rationale that the Rule 701 exemption is available based on the compensatory relationship with the issuer?

40. Would amending the rule, as proposed, to extend eligibility to executors, administrators, and beneficiaries of employees’ estates and others duly authorized by law to administer the estates or assets of former employees facilitate the administration of compensatory plans relying on the exemption? If not, how should this proposal be modified to facilitate that objective?

**Employees of Subsidiaries**

41. Should we harmonize the Rule 701 and Form S-8 eligibility requirements by broadening the Rule 701 exemption to include all subsidiaries, as proposed? Would the proposal facilitate a non-reporting issuer’s transition to reporting issuer status and its subsequent registration of compensatory offerings on Form S-8?

42. Unlike Form S-8, the Rule 701 exemption currently is available to majority-owned subsidiaries of the issuer’s parent rather than only subsidiaries of the issuer itself. Should we amend Form S-8 to further harmonize the scope of Rule 701 and Form S-8 by making Form S-8 available to employees of all subsidiaries of the issuer’s parent? Are there any other harmonizing amendments we should consider?

43. Are there any reasons not to extend Rule 701 eligibility to persons employed by subsidiaries that are consolidated by the issuer as variable interest entities? For example, are there any reasons not to extend Rule 701 eligibility to physicians employed by medical practices controlled by the issuer, based on their employment by a subsidiary of the issuer?

**Form S-8: Generally**

44. Should we eliminate Form S-8? If so, what exemption or other registration statement should the Commission replace it with? What should the requirements and conditions of such exemption or registration statement be? If such an approach were adopted, what other steps should the Commission take to preserve companies’ ability to offer equity-based compensation to employees (*e.g.*, preemption of state blue sky laws) and to protect investors?

## Form S-8: Addition of Plans and Securities or Classes of Securities to Form S-8

### Addition of Plans to Form S-8

45. Is the clarification regarding the ability of issuers to register offers and sales of securities pursuant to multiple plans on a single Form S-8 sufficient, or is additional guidance needed? Should we instead amend Form S-8 to prohibit issuers from adding plans to an existing Form S-8?
46. Would registering multiple plans on a single Form S-8 work well in practice? For example, would registering incentive plans on the same Form S-8 as a 401(k) plan or other defined contribution plan cause administrative difficulties or investor confusion? Would issuers use this feature principally to update and refresh their incentive compensation plans?
47. Are there additional or different disclosures that should be required when a plan is added to an existing Form S-8?

### Securities Allocation Among Incentive Plans

48. Is the clarification regarding the ability of issuers to allocate securities among incentive plans on a single Form S-8 sufficient, or is additional guidance needed? Should we instead adopt amendments to prohibit allocation of securities among incentive plans?
49. Would allocation of securities among incentive plans on a single Form S-8 result in a more efficient process of registration?
50. Would allocation of securities among incentive plans result in disclosure that is confusing to investors?
51. Are there additional or different amendments (other than the proposed changes to the cover page of Form S-8) that we should make to facilitate the allocation of securities among various incentive plans?

### Addition of Securities or Classes of Securities to Form S-8

52. Should we permit issuers to add securities to an existing Form S-8 registration statement by means of automatically effective post-effective amendments, as proposed?
53. Are there concerns associated with allowing issuers to register the offer and sale of additional securities or classes of securities by post-effective amendment to an existing Form S-8 instead of on a new registration statement?
54. Would the interplay between adding new plans and registering the offer and sale of new securities by post-effective amendment to Form S-8 cause problems for particular types of issuers or plans? If so, please explain how.
55. If we adopt proposed Rule 413(c) for the registration of the offer and sale of additional securities on Form S-8, should we rescind current General Instruction E, which permits the filing of a new, abbreviated registration statement to register the offer and sale of additional securities of the same class relating to a plan for which a Form S-8 registration statement is already effective?

## Form S-8: Fee Calculation and Fee Payments on Form S-8 for Defined Contribution Plans

56. As proposed, would the definition of “defined contribution plan” properly encompass the types of plans that would benefit from the fee calculation and payment methods outlined below? Should the definition be revised? If so, should it be broader or narrower?

### Calculation of the Registration Fee using the Aggregate Offering Price

57. Should we amend Rule 457 and Form S-8 to require registration based on the aggregate offering price of all the securities registered pursuant to defined contribution plans, as proposed?

58. For defined contribution plans, would registration of the offer and sale of an aggregate amount of securities mitigate difficulties in counting registered offers and sales?
59. Should the proposed fee calculation method be optional for issuers registering the offer and sale of shares to be issued pursuant to defined contribution plans?
60. Should we adopt a transition period for the proposed amendments to Rule 457 and Form S-8? If so, how long should the transition period be?
61. Should the proposed requirement to calculate registration fees based on an aggregate offering amount of securities be required only for defined contribution plans? Are there other types of plans whose administration would be simplified by a similar fee calculation?
62. Would there be difficulties in using separate registration and fee instructions (*e.g.*, Rule 457(h)(1) and proposed Rules 416(d) and 456(e)) on a single Form S-8? If so, would additional guidance on how the instructions apply be helpful?
63. Would issuers register the offer and sale of shares for defined contribution plans on the same registration statement as that used for other types of plans?
64. If an issuer wishes to use a single Form S-8 for all plans, would the proposed rules create difficulties for issuers that seek to register and pay fees for sales pursuant to incentive plans on the same form for which defined contribution plans are registered?

**New Fee Payment Method for Sales Pursuant to Defined Contribution Plans**

65. Should we adopt a new registration fee payment method that would require issuers to pay the fee for all sales made pursuant to defined contribution plan offerings during a given fiscal year no later than 90 days after the plan’s fiscal year-end, as proposed?
66. Would the proposed registration fee payment method help to address administrative issues regarding the difficulty of keeping track of offers and sales registered pursuant to defined contribution plans?
67. Would the proposed fee payment method be workable in practice? If not, what changes should we make to render it more workable?
68. Is 90 days after the plan’s fiscal year-end an appropriate period of time in which to calculate the required fee payment? If not, would a shorter or longer period be more appropriate?
69. Instead of paying the fee 90 days after the plan’s fiscal year-end, should the rule be revised to require payment 90 days after the issuer’s fiscal year-end? Should the payment due date be tied to some other date?
70. Given that these proposed rules are designed to prevent inaccuracies in estimating the amounts to be offered and sold under, and the calculation of registration fees for, defined contribution plans, should we consider adopting an “insignificant deviations” provision for immaterial or unintentional failures to comply with the proposed rules?
71. Should the proposed fee payment method be optional rather than mandatory?
72. Should the new registration fee payment method be limited to certain classes of issuers (*e.g.*, WKSIs or issuers with a proven compliance record)?
73. Are there other types of plans for which the new fee payment method would be beneficial? For example, should this payment method apply to nonqualified deferred compensation plans?
74. Instead of requiring the registration fees for defined contribution plans to be paid on an annual basis, as proposed, should we permit all issuers registering securities for defined contribution plans on Form S-8 to make registration fee payments on a pay-as-you-go basis, as WKSIs are

permitted to do for capital-raising offerings today? Should we adopt a pay-as-you-go fee payment procedure for other types of plans?

75. As proposed, the payment of the fee would require the filing of an automatically effective post-effective amendment to Form S-8 not later than 90 days after the plan's fiscal year-end. Are there any problems with using this existing form type for the fee payment? In the alternative, should we instead require the fee payment with a different form or should we adopt a new form dedicated to the payment of the fees? If so, what information should that form require?
76. If we were to require that filing fee information be tagged, is there a reason fee-tagging should not be required in the proposed post-effective amendments to Form S-8?
77. In the case of a merger, liquidation, or sale of substantially all of an issuer's assets, would the proposal to deem the closing of the plan's fiscal year to be the date of such transaction work well in practice? Are there better ways to ensure correct payment of fees in these situations?
78. Is a transition period needed to implement the proposed fee payment method? If so, what would be an appropriate transition period? For example, should we delay the effective date of the new fee payment method by one year?
79. If the new fee payment method is adopted as proposed, are there any other rules or guidance we should adopt to ensure the fee payment rules work effectively?

**Additional Requests for Comment on Counting the Shares Registered on Form S-8 for Defined Contribution Plans**

80. Does counting the sales of securities pursuant to a defined contribution plan on a gross basis, as described above, cause difficulty in administering defined contribution plans? Would Commission guidance indicating that "netting" or "offsetting" is not permitted eliminate or further mitigate this difficulty?
81. Should we permit the netting or offsetting of sales made within the defined contribution plan so that securities that were made available due to employee divestment from the issuer stock fund and sold pursuant to employee investment elections would not be counted against the number of securities for which sales were registered on Form S-8?
82. Should we adopt the new fee payment method described above without netting or offsetting as proposed? Alternatively, if we adopt the new fee payment method, should we permit the netting or offsetting of sales made within the defined contribution plan to apply to the payment of fees for defined contribution plans?
83. Should we provide additional guidance on this topic in the adopting release or elsewhere?

**Form S-8: Conforming Form S-8 to Rule 701**

**Scope of "Former Employee"**

84. Should we conform the "former employee" eligibility provisions of Rule 701 and Form S-8, as proposed? Are there any unique considerations with respect to including former employees in compensatory offerings registered on Form S-8?

**Consultants and Advisors**

85. Should we adopt the same treatment of consultants and advisors under Rule 701 and Form S-8? Are there any unique considerations with respect to including consultants or advisors organized as entities in compensatory offerings registered on Form S-8?

**Form S-8: Conforming Form S-8 Instructions with Current IRS Plan Review Practices**

86. Should we adopt the proposed amendments to conform the Form S-8 requirements to current IRS practices?
87. Do the proposed amendments provide investors adequate assurance of the plan's qualified status?
88. Do the proposed amendments ease administrative burdens for adopters of pre-approved plans? Are there any changes to the requirements for adopters of these types of plans that we should consider?
89. Is the undertaking for plan amendments with respect to maintaining ERISA qualification necessary? Are there alternative approaches to ensuring plan qualification under ERISA that would protect investors?

**Form S-8: Revisions to Item 1(f) of Form S-8; Tax Effects of Plan Participation**

90. Should we revise the disclosure requirements in Form S-8 to eliminate the description of the tax effects, if any, on the issuer, as proposed?
91. Are disclosures regarding the tax effects of plan participation useful to investors in the context of a Form S-8 registration statement? If so, how?
92. Are there other ways, outside of the registration statement, that investors receive the same information regarding the tax consequences to them of plan participation, such that disclosure from the issuer would not provide additional or material information?
93. Are disclosures regarding the description of tax effects of plan participation that may accrue to employees helpful? If not, how should we address this concern?

**Form S-8: Additional Requests for Comment About Form S-8**

**Plan Trustee Signatures on Form S-8**

94. Assuming that having the employer sign on behalf of the plan would be legally sufficient to meet the requirements in Section 11, such that liability would attach for plan disclosures included in the registration statement, could a plan legally authorize the employer to sign on its behalf? If so, how would this be done?

**Bridging the IPO Gap for Employee Stock Purchase Plans**

95. Would extending Rule 701 to offers to participate in an ESPP made before the IPO and sales pursuant to ESPPs made after the IPO facilitate the use of ESPPs? If so, how could we limit such exempt sales to IPO employee stock purchase plans?
96. If Rule 701 were extended to reporting issuers for this purpose, would we also need to address the resale limitations set forth in Rule 701(g)? If so, how should we do so?
97. Aside from the Rule 701 exemption, are there alternative solutions that we could adopt that would allow employees to participate in ESPPs during an IPO?
98. Would the ability to communicate about the ESPP prior to the IPO without pre-IPO plan enrollment be sufficient to allow employee participation at the IPO price? If so, what types of communications should we exempt and for how long a time period prior to the IPO?

**Appendix B**

## Requests for Comment – Proposed Platform Worker Rule

**Proposed Inclusion and Definition of "Platform Worker" under Rule 701 and Form S-8**

1. Should we expand the scope of Rule 701 and Form S-8 to include offers and sales of securities to platform workers unaffiliated with the issuer who provide bona fide services to an issuer by means of the issuer's internet-based platform, or through other widespread technology-based marketplace platforms, as proposed? Should the expansion of Rule 701 and Form S-8 also include services provided by such workers to the issuer's parents, majority-owned subsidiaries, or majority-owned subsidiaries of the issuer's parent, as proposed?
2. Is there a basis for treating platform workers differently than any other non-employees not covered under the current exemption? Does the use of an internet-based platform establish a sufficient basis for treating those workers differently than non-employees in a different context?
3. Should we also expand the scope of Rule 701 and Form S-8 to include offers and sales of securities to platform workers unaffiliated with the issuer who provide bona fide services to third-party end-users by means of the issuer's internet-based marketplace platform, or through other widespread technology-based marketplace platforms or systems, and from which the issuer benefits, as proposed?
4. Should we define or provide examples of a "widespread, technology-based marketplace platform or system" (other than an internet-based marketplace platform) that would fall within the scope of the proposed amendments? If so, how should we define that term, or what examples should we include?
5. Is the term "services" sufficiently clear? Should we define it differently? If so, what should the definition be? Should we provide additional specific guidance concerning what activities constitute "services" for purposes of the proposed expansion of Rule 701 and Form S-8?
6. Should we limit issuances under Rule 701(h) or an expanded Form S-8 to platform workers who are unaffiliated with the issuer, as proposed? If so, should we provide a definition of or additional guidance concerning the meaning of "unaffiliated with the issuer"? For example, should we define "unaffiliated" as a person who is not an "affiliate" as defined by 17 CFR 230.405? Should we instead specify the types of persons that would satisfy the "unaffiliated" provision? For example, should "unaffiliated" mean persons who are not an issuer's employees, officers, directors, advisors, or consultants, or certain family members of such persons? If so, which family members would be treated as affiliates of the issuer and therefore be ineligible to receive securities under the proposed amendments to Rule 701 and Form S-8?
7. Should we limit the use of the expanded Rule 701 and Form S-8 only to workers who provide bona fide services through an issuer's marketplace platform, as proposed? Or should we consider other alternatives? For example:
    a. Should we permit an issuer to offer or sell securities to workers who engage in other platform-based activities, such as selling goods? If so, should we limit the types of goods? For example, should we only permit an issuer to offer or sell securities to workers who engage in selling of unique or value-added goods and not workers who merely use a platform to resell goods?
    b. If we were to permit an issuer to offer or sell securities to workers who engage in other platform-based activities, such as selling goods, what characteristics or factors would help ensure that the nexus between the issuer and worker is compensatory and the issuance of securities is not in connection with capital-raising or for speculative purposes? For example, should we require that the worker meets minimum annual or

aggregate sales thresholds or that the worker has been engaged in performing platform-based activities for the issuer for a minimum period of time before she is eligible to receive shares under expanded Rule 701 and Form S-8. Should we only permit securities that do not have capital-raising features, such as restricted stock units, to be issued to platform workers for platform-based activities that involve the sale of goods?

c. Should we include offers and sales of securities to workers having other types of new work relationships? If so, which types of new work relationships should we include, and what characteristics or factors would help ensure that the nexus between the issuer and worker is compensatory and the issuance of securities is not in connection with capital raising? Are there new work relationships that are not provided through an internet-based or other widespread, technology-based marketplace platform or system that we should include in the exemption?

8. Should we require that a platform worker be a natural person or an entity meeting specified criteria to be able to receive securities pursuant to an expanded Rule 701 or Form S-8, as proposed? Should we instead require a platform worker to be a natural person? Do a significant number of platform workers currently operate through a business entity? If so, would a natural person requirement impact the extent to which they would continue to perform as platform workers or continue to do so through a business entity? Should we limit the types of business entities through which a platform worker would be able to operate? Should we permit an entity to be a platform worker, as proposed, if substantially all of its activities involve the performance of bona fide services that meet the requirements of proposed Rule 701(h), and the ownership interest of the entity is wholly and directly held by the natural person performing the services pursuant to the proposed rule? Are there different or additional eligibility conditions that we should adopt to allow platform workers to perform services as entities pursuant to the temporary rules? For example, should we permit more than one natural person to own the entity through which the services are being performed by the platform worker? If so, should we limit the number of natural persons that may own the entity or require that a co-owner be the spouse or other family member? Should we condition allowing more than one natural person to own the entity by requiring each owner to perform the services of a platform worker?

9. Should we require that an issuer operating a platform control the platform as a condition to using the Rule 701 exemption and Form S-8 registration for issuances of securities to workers providing services through the platform, as proposed? Should we permit the use of the exemption for issuances to such workers if an issuer's affiliate controls the platform?

10. Should we require that services be provided pursuant to a written contract or agreement, as proposed? If so, should we include an express provision that the term "written contract or agreement" includes an electronic, internet-based contract or agreement? Should we provide the same provision for the term "written compensation contract" in Rule 701(c)?

11. Are the proposed conditions demonstrating control of the platform appropriate? Should we require that an issuer satisfy all of the specified conditions? Should we only require that an issuer have the ability to determine terms of use, including payment terms? Should we instead only require that an issuer have the ability to accept and remove the workers providing services through its platform?

12. Are there other conditions, in addition to or in lieu of the proposed conditions, that we should adopt?

13. Instead of, or in addition to, an issuer control requirement, are there other issuer eligibility conditions that we should adopt to help ensure that the issuance of securities to platform workers is for a compensatory purpose? For example, when the issuer's platform is used to provide services to end-users, should we require that an issuer earn a substantial amount of its annual

revenues from fees or other payments resulting from platform workers using the issuer's platform? Would such a condition make it less likely that the issuance of securities to those workers would be for a capital-raising purpose?

14. Should we expand the scope of Rule 701 and Form S-8 to include offers and sales of securities to former platform workers, including former platform workers of an entity acquired by an issuer, as proposed? Should such expansion include securities issued to former platform workers, including post-termination grants made in respect of prior service during the 12 months following the cessation of service, as proposed? Should we include under Form S-8 issuances to executors, administrators, or beneficiaries of the estates of deceased platform workers, or other persons similar to those included for deceased or incompetent former employees, as proposed? Should we amend Rule 701 to include a similar provision for the estates of deceased employees or deceased platform workers and representatives of incompetent former employees or incompetent former platform workers, as proposed?
15. Would state blue-sky laws affect the operation of the proposed temporary platform worker exemption? If so, how? Are there changes we should consider to address state law issues? For example, should we provide for the preemption of state securities law registration requirements for offers made pursuant to Rule 701(h)? Are there other state law implications that would be relevant to consider in connection with the proposed amendments? For example, would the proposed temporary platform worker exemption have any implications regarding the enforceability of state laws pertaining to noncompetition arrangements? Would the proposed exemption result in an increase in the use of non-compete provisions regarding issuers' arrangements with platform workers? Would the proposed exemption affect the ability of issuers under state law to provide additional benefits to platform workers, such as minimum wage guarantees, healthcare stipends, and occupational auto insurance?

**Additional Requirements for Issuances to Platform Workers Under Rule 701 and Form S-8**

16. Would the proposed conditions for issuances to platform workers under Rule 701 or Form S-8 help ensure that the issuances are for a compensatory purpose? Should we adopt only some of the conditions? If so, which ones? For example, should we require only that the issuance be pursuant to a compensatory arrangement for services not in connection with the offer or sale of securities in a capital-raising transaction?
17. Should we impose a cap on the amount of compensation that a platform worker may receive as securities from the issuer on an annual basis under Rule 701 and Form S-8 to limit the potential that the issuance to platform workers would be used for capital-raising or speculative purposes, as proposed? If so, should we require that no more than 15 percent of the value of compensation received by a platform worker from the issuer for services provided during a 12-month period be in securities, as proposed? Should the annual cap be less than or greater than 15 percent of the compensation received by the platform worker during a 12-month period? Should the annual cap apply only to issuances under Rule 701 rather than both Rule 701 and Form S-8? Should the annual cap apply only to issuances under Form S-8?
18. Should we impose a cap on the amount of compensation that a platform worker may receive as securities from the issuer during a 36-month period (under Rule 701 and registered on Form S-8) to limit the potential that the issuance to platform workers would be used for capital-raising or speculative purposes, as proposed? Should we require that no more than $75,000 of such compensation received from the issuer during a 36-month period may consist of securities, as proposed? Should this cap be less than or greater than $75,000, and/or apply to a shorter or longer period than 36 months? For example, should we limit the amount of securities a platform worker may receive as compensation from an issuer to no more than $50,000 for a consecutive 24-month period? Instead of, or in addition to, the 36-month cap, should there be an aggregate

limit on the dollar amount of securities that a platform worker may ever receive from an issuer? If so, what should that cap be? Should the $75,000 cap apply only to issuances under Rule 701? Should the $75,000 limitation apply only for as long as the issuer is not subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act? Should the $75,000 cap apply only to issuances registered on Form S-8?

19. Should we impose only the proposed 12-month cap or only the proposed 36-month cap, but not both? Should we not impose any cap on the amount of compensation that a platform worker may receive as securities in light of other proposed conditions? Should either cap apply to limit the total amount of compensation issued as securities to platform workers by an issuer as well as an issuer's affiliates, or should either cap apply individually to each issuer or issuer's affiliate?

20. For purposes of the 12- and 36-month caps on the amount of compensation that a platform worker may receive as securities from the issuer, should the value of compensation be measured at the time the securities are granted, as proposed? For the same purposes, should an issuer be able to use any reasonable, recognized valuation methodology for purposes of determining the fair market value of the securities issued to platform workers under Rule 701? Should an issuer be able to change the valuation methodology used for purposes of the proposed caps as long as the change is motivated by bona fide reasons unrelated to the proposed exemption for platform workers?

21. Should we specify in Rule 701 and Form S-8 that the issuer must use the same valuation method that it currently uses to make valuations for compensatory issuances under Rule 701(c), if applicable, and apply the methodology consistently during the same period?

22. Should we require that the amount and terms of any securities issued to a platform worker may not be subject to individual bargaining or the worker's ability to elect between payment in securities or cash, as proposed? If a platform worker is unable to negotiate the amount and terms of securities to be issued as compensation, should that worker be able to elect to receive payment only in cash?

23. For issuances pursuant to the Rule 701 exemption, should we require the issuer to take reasonable steps to prohibit the transfer of securities issued to platform workers, other than to the issuer or by operation of law, as proposed? Should we limit the prohibition on transferability to a specific period, *e.g.*, for two or three years? Should we mandate the specific steps that an issuer must take to prohibit the transfer of such securities? If so, what should those steps be? For example, should we require that issuers put special legends on the securities issued to platform workers, or should we require that issuers provide appropriate instructions to transfer agents concerning the transfer prohibition on shares issued to platform workers? Are there other reasonable steps that we should require an issuer to take in connection with the proposed prohibition on transferability to help ensure that the shares issued to platform workers are for compensatory and not speculative purposes?

24. Instead of requiring an issuer to take reasonable steps to prohibit the transfer of securities issued to platform workers, should we instead allow platform workers to resell their securities using an applicable exemption or safe harbor? For example, should platform workers be allowed to resell their securities pursuant to Rule 144? Alternatively, in Rule 701(h), should we require a different holding period than is in Rule 144, such as a two-year holding period, or is any holding period insufficient to mitigate concerns about misuse of the temporary exemption? Are there other transfer restrictions that would be more appropriate in this context?

25. Should we apply the proposed conditions only to securities that have capital-raising features (*e.g.*, stock options) and not to securities that do not have such features (*e.g.*, restricted stock units)? If so, which of the proposed conditions should not apply to such securities?

26. Should we limit the type of securities that can be issued to platform workers under Rule 701 or on Form S-8? For example, should we limit issuances to equity securities and securities convertible into or exchangeable for equity securities?
27. Are there other conditions in addition to, or instead of, the proposed conditions that we should adopt to help ensure that issuances to platform workers under Rule 701 or registered on Form S-8 are undertaken for compensatory and not capital-raising or speculative purposes? For example, should we require that a platform worker provide services through an issuer's platform (or other widespread, technology-based marketplace platform or system) for a certain period of time before the worker is eligible to receive securities from the issuer? If so, should the minimum period be six months, one year, or some other period? Should we require that the platform worker provide services for a continuous period of time? Should we require that the securities issued to a platform worker not vest until after a particular period of time? If so, should the vesting period be six months, one year, or some other period after the grant of securities?
28. Do the additional conditions for issuances to platform workers provide adequate investor protections for platform workers who receive shares pursuant to Rule 701 or registered on Form S-8? If not, what additional conditions or measures would be appropriate to provide an acceptable level of investor protection?

**Integration of Proposed Rule 701(h) with the Existing Rule 701 Exemption**

29. Should we require that the securities sold to platform workers be aggregated with all other securities sold by the issuer to persons meeting existing Rule 701(c) eligibility conditions for purposes of applying the Rule 701(d) ceiling, as proposed? Should we instead impose a separate and independent ceiling on the amount of securities that an issuer could sell to platform workers during any consecutive 12-month period? If so, what should the ceiling be?
30. Should we require that the securities issued to platform workers be aggregated with all other securities sold by the issuer to persons meeting existing Rule 701(c) eligibility conditions for purposes of applying the Rule 701(e) disclosure threshold, as proposed? Should we instead impose a separate disclosure threshold for issuances to platform workers? If so, what should that threshold be?

**Integration with Exchange Act Rule 12g5-1**

31. Should we permit an issuer to exclude platform workers to which it has issued securities under Rule 701(h) from the definition of "holders of record" for the purpose of determining its registration obligations under Section 12(g), as proposed?
32. Should we extend the Rule 12g5-1 safe harbor to cover issuances to platform workers under Rule 701(h) pursuant to a compensation plan, as proposed?
33. Should we leave "compensation plan" for platform workers undefined, as proposed? If not, how should we define a "compensation plan" for platform workers?

**Considerations Specific to Form S-8**

34. Platform workers may not be as familiar with the registrant's operations as employees and other persons currently eligible to receive securities under Form S-8 may be. As such, should registrants offering securities to platform workers be subject to different information content, prospectus delivery, or other procedural requirements than those applicable to current Form S-8 registrants? If so, what additional requirements under Form S-8 or Rule 428 or what different or additional disclosure requirements should apply to offerings to platform workers?

35. Are there circumstances in which registrants would issue securities to platform workers pursuant to defined contribution plans? If so, should we amend those items of Form S-8 that pertain to defined contribution plans to include platform workers?

**Requirement to Furnish Certain Information**

36. Should the temporary rules require an issuer to furnish certain information to the Commission if it seeks to register issuances to platform workers on Form S-8, as proposed? If so, should an issuer be required to furnish the information at six-month intervals, as proposed? Should the issuer be required to furnish the information annually or on another periodic basis? If so, which periodic basis would be appropriate?
37. Should the same reporting interval apply to issuances of securities both under Rule 701 and pursuant to a registration statement on Form S-8?
38. Is the proposed information appropriate for the purpose for which it is being sought? Should issuers be required to furnish less information or other information in addition to, or instead of, the proposed information?
39. What method should the Commission require issuers to use to furnish the information required? For example, should the information be furnished electronically via email for this purpose? Should the Commission provide a form for this purpose? Are there other steps that the Commission should take to facilitate the reporting requirement?
40. Should we require that an issuer notify the Commission that it intends to make offers or sales to platform workers pursuant to the exemption in proposed Rule 701(h)? If so, when and how should issuers be required to provide such notice?

**Expiration of the Temporary Rules Authorizing Issuances to Platform Workers Under Rule 701 and Form S-8**

41. Should we adopt each of proposed Rule 701(h), the proposed amendment to Form S-8 (17 CFR 239.16b(c)), and proposed Rule 428(d) as temporary rules, as proposed? If we do, should the rules expire five years from the date of their effectiveness, as proposed? Should the rules expire on a different date (*e.g.*, one, two, three, or four years from the date of effectiveness)?
42. Should we permit an issuer, following expiration of Rule 701(h), to issue securities underlying options, warrants, or rights that were previously issued to platform workers in an exempt transaction pursuant to Rule 701(h), as proposed?
43. Should we make the expiration date for the temporary Form S-8 provisions different from the expiration date for issuances under Rule 701(h)? If so, should the effective period of the Form S-8 provisions be longer or shorter than the effective period of Rule 701(h)?
44. Should the proposed extension of Rule 701 and Form S-8 to platform workers expire absent further Commission action, as proposed? Are there any transition or related issues (*e.g.*, related to transfer restrictions) that we should address in connection with the proposed expiration of the temporary rules?
45. Rather than making the rules temporary, should we adopt any of the proposed rules on a permanent basis? If so, which ones?