



CENTER FOR CAPITAL MARKETS
C O M P E T I T I V E N E S S

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September 24, 2018

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

Re: **Concept Release on Compensatory Securities Offerings and Sales;
17 CFR Part 230; Release No. 33-10521; File No. S7-18-18;
RIN 3235-AM38**

Dear Mr. Fields:

The Center for Capital Markets Competitiveness (CCMC) welcomes the opportunity to comment on the Concept Release issued by the Securities and Exchange Commission (the “SEC” or “Commission”).

The Chamber commends the Commission for reviewing regulations that affect capital formation in the United States. This issue is especially important in light of the fact that the number of public companies in the U.S. has decreased by half over the past 20 years. While no single rule change is likely to reverse this trend, we are confident that a careful reassessment of the SEC’s approach to the burdens on companies to go public and stay public will make an impact over time.

Overall, we support targeted reforms to Rule 701 and Form S-8 that are intended to provide more flexibility to companies issuing stock and other securities as executive compensation while maintaining a reasonable level of investor protection. An overview of our comments is as follows:

- We support expanding the class of eligible participants under Rule 701(c) and Form S-8 to include workers in the “gig” economy and other nontraditional working relationships.
- We urge the Commission to provide more flexibility under Rule 701 and Form S-8 for issuances to entities, rather than natural persons, when those entities are established for the benefit of an eligible worker.
- We favor modifying the timing of required disclosure under Rule 701(e) to recipients of RSUs and similar securities.
- We request that the Commission modify Rule 701(e) to permit greater flexibility for shares issued under plans assumed during a merger or other acquisition.
- We recommend that the Commission permit issuers under Form S-8 to satisfy the statutory prospectus requirement for ERISA plans by delivering an ERISA plan summary in lieu of a separate written prospectus.
- We request that the Commission permit an issuer to register an indeterminate number of shares under a particular plan or plans on Form S-8, then use a “pay as you go” method for calculating the applicable registration fee as shares are sold down off the registration statement.
- We support further study of whether to extend Rule 701 to public companies as long as such issuers also retain the right to offer shares, in the alternative and at their option, under Form S-8.

Rule 701

Expanding the Class of Eligible Participants under Rule 701(c)

To keep pace with evolutions in the economy and the labor market, we support expanding eligible recipients under Rule 701(c) to include independent contractors and other personnel working under alternative or contingent relationships with issuers, including so-called “gig” workers. While we agree that such persons are generally not “employees” under traditional definitions of the term, we also believe

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that there is some ambiguity as to whether such persons would qualify as “consultants” or “advisors” for purposes of Rule 701. We do not believe the terminology for describing gig and other nontraditional workers is as important the type of services they provide to an issuer.

In this respect, Rule 701(c) provides two important limitations. First, the worker must provide bona fide services to the issuer or its affiliates. Second, the worker’s services must not be part of capital raising or market making activities. The SEC should expand the scope of Rule 701 to any person who meets these two criteria for a given issuer, irrespective of whether the person is an independent contractor or is considered an employee, director, general partner, trustee, officer, consultant or advisor.

We do not believe it is necessary for a revised Rule 701 to micromanage the level of control, vetting or screening asserted over the worker, nor do we believe that a revised rule should try to scope out every possible type of “service” that may be rendered. Any attempt to do so would be underinclusive because it would not foresee every future development in technology and labor relations.

Additionally, we believe the SEC should eliminate the requirement under Rule 701(c)(1) that awards must be made to natural persons. It is common for consultants, advisors and other non-employee workers to organize themselves through entities such as LLCs, and many individuals may prefer that awards be made to an estate planning vehicle such as a trust or limited partnership.

Although the definition of “family member” in Rule 701(c)(3) contemplates some transfers for estate planning and similar purposes, the rules require that enumerated persons retain more than fifty percent voting control, which is not always feasible under many estate planning arrangements. We do not see a policy reason that compels this limitation. So long as the recipient’s designee (e.g., an LLC or trust) is not acquiring the securities with a view towards a distribution to persons other than family members, we believe investor protection concerns would be satisfied.

Options and Other Derivatives/RSUs

The Concept Release notes that issuers provide Rule 701(e) disclosure for options and other derivative securities a reasonable period before the date of exercise

or conversion. Conversely, the Concept Release also posits that Restricted Stock Units (RSUs) and similar securities may require immediate disclosure because there is no investment decision to exercise or convert. The Concept Release then indicates there is concern that disclosure of financial information before an RSU is granted could compel disclosure to recipients at a time when they are negotiating their employment contracts.

While we do not dispute the logic of the Commission's analysis, few issuers provide disclosure of this type during employment negotiations before a new hire commences employment. We suspect many issuers are unaware of the Commission's position on the issue. In any event, we believe the Commission should provide some leeway to issuers and permit disclosure after a new hire's employment commences. The Concept Release asks whether issuers should disclose within 30 days after commencing employment, and we believe such a grace period appropriately conform the rules to market practice.

We also recommend that the Commission give further attention to the use of security tokens as a form of employee compensation. Outright grants of security tokens, options to purchase tokens, restricted token units, and other forms of token compensation are growing in popularity, and these mirror the attributes of more traditional equity compensation plans. While Rule 701 is broad enough in many cases to cover grants of token-based compensation, we believe any future rulemaking should consider this relatively new form of compensation.

Mergers and Acquisitions

A potential difficulty with M&A transactions concerns the application of Rule 701 to an acquired business's benefit plans when the acquiror assumes (and does not cancel) those plans. Although the acquiror may be eligible to rely on Rule 701, the integration of the acquired business's plans may in certain situations make the combined enterprise exceed the aggregate offering limitations found in Rule 701(d)(2). This problem is usually most acute in the first year following closing of the acquisition. We recommend that the Commission address this situation in future rulemaking by providing a grandfathering or transition exemption for M&A activity.

Form S-8

Statutory Prospectus

Although Form S-8's instructions do not require filing the Section 10(a) prospectus with the Commission and permit streamlined disclosure, we believe few investors read Form S-8 prospectuses. In our members' experience, investors instead typically focus on their particular award agreement, any underlying plan document, and - in the case of compensatory plans subject to ERISA's summary plan description requirements - that plan is prepared in compliance with the statute.

The Department of Labor requires the summary plan description to contain much of the same information that Part I of Form S-8 requires. The summary plan description is one of the informational documents that Rule 701(e) may require. In lieu of an abbreviated prospectus, the Commission could accommodate public companies by granting issuers the option of furnishing recipients with ERISA-required summary plan descriptions (in the case of plans subject to that statute).¹

Consultants and Advisors

We believe that Form S-8's eligibility standards for consultants and advisors are unduly restrictive. To encompass "gig" workers and others with nontraditional working relationships, we believe the Commission should make the same changes it will make to Rule 701, to the eligibility criteria of Form S-8. We urge the Commission to grant greater flexibility for the certain natural person limitation under Form S-8.

Administrative Burdens

Some of our members report difficulty in tracking the number of shares issued under Form S-8, particularly (though not exclusively) for shares issued in connection with 401(k) and similar plans. This condition could lead registrants to issue more shares than have been registered on Form S-8. In other cases, registrants must amend

¹ While Part I of Form S-8 provides that required disclosure "may be in one or several documents, provided that it is presented in a clear, concise and understandable manner," many companies continue to produce both a statutory prospectus and a summary plan description.

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Form S-8 or file a new statement to register the offer and sale of additional shares when an issuer reaches the number of shares on a prior registration statement.

We urge the Commission to consider a more streamlined approach to Form S-8 registration. One such approach would be to permit an issuer to register an indeterminate number of shares under a particular plan on Form S-8, and then use a “pay as you go” method for calculating the applicable registration fee as shares are sold down off the registration statement.

This suggestion would reduce administrative burdens, particularly for small issuers who would have more flexibility under a “pay as you go” method. Because Form S-8 is not available for general capital raising purposes outside the compensation context, we do not believe that this approach presents any risk to investors.

Extending Rule 701 to Public Companies

We are intrigued by the possibility of extending the Rule 701 exemption to public companies, which is currently prohibited under the existing rule. We believe this area is worthy of further analysis and we would be in favor of liberalizing use of Rule 701 while at the same time preserving the ability to use Form S-8, should an issuer prefer to make a registered offering rather than a private one. However, we see at least two significant issues with this approach.

First, securities issued under Rule 701 are considered restricted securities under Rule 144. That status provides a significant disincentive compared to offerings that provide the holder with freely tradeable securities. Even if the Commission were to provide more leeway on the total amount raised per year under Rule 701(d) for public companies, we do not expect that many public companies will migrate to Rule 701 in lieu of Form S-8 if securities issued under the exemption are restricted.

Second, Rule 701 is only available for primary offers and sales by an issuer, and award recipients cannot use the rule for resales. Form S-8, however, expressly contemplates its use for resales by selling security holders. Any revision to Rule 701 for the benefit of public companies should permit resales under the rule as well.

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Conclusion

We applaud the Commission for seeking comment on these important issues. We are optimistic that targeted reform to Rule 701 and Form S-8 can improve capital formation without any harm to investors.

We thank you for your consideration of these comments and are ready to discuss them further with the Commissioners or Staff at your convenience.

Sincerely,

A handwritten signature in black ink, appearing to read 'TK' followed by a long, sweeping horizontal stroke.

Tom Quaadman

cc: The Honorable Jay Clayton
The Honorable Kara M. Stein
The Honorable Robert J. Jackson, Jr.
The Honorable Hester M. Peirce
The Honorable Elad L. Roisman