

December 2, 2020

## **SEC Proposes to Permit Offerings of Equity Compensation to Gig Economy Workers**

The SEC has proposed amendments that would permit, for a temporary five-year trial period, companies to offer equity compensation to “platform workers” (gig economy workers who provide services by means of an internet or other technology based marketplace platform) under the same regulatory framework available for offerings to employees (available [here](#)). The amendments would expand Rule 701 (by which non-reporting companies may issue equity-based compensation without a registration statement) by adding a new subsection, Rule 701(h), and Form S-8 (by which reporting companies issue equity-based compensation) by adding a new General Instruction A.1.(b), to permit these offerings.

The proposed changes would be effective for five years, in order to allow the SEC to assess the impact of these changes in light of the evolving gig economy and to assess whether the issuances are being made for appropriate compensatory purposes rather than capital raising purposes. The proposed amendments take into account comment letters received in response to the SEC’s July 2018 Concept Release, in which it sought input on the ways to modernize Rule 701 and Form S-8. The proposed changes are particularly timely, as the COVID-19 pandemic, shutdowns and “work at home” orders continue to cause a re-thinking of, and evolution away from, the traditional model of a brick and mortar office-based work place.

The SEC noted that these proposed amendments are meant to address solely “considerations relevant to the U.S. Federal securities laws.” To that end, the SEC stated that it is not expressing any opinion on whether platform workers should or would be considered “employees” for the purposes of other laws or regulations.<sup>1</sup>

In a separate but simultaneous release, the SEC proposed amendments to more generally modernize and simplify the requirements of Rule 701 and Form S-8. For our summary of these proposed changes, please see our separate client alert, “[SEC Proposes Amendments to Rule 701 and Form S-8.](#)”

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<sup>1</sup> Guidance on determining independent contractor status for employment law purposes continues to develop. Please see our prior client alert, “[U.S. Department of Labor Proposes Independent Contractor Regulation](#)” for our analysis of the Department of Labor’s recent proposal. Additionally, in November, California voters approved Proposition 22, named “Exempts Apps-Based Transportation and Delivery Companies from Providing Employee Benefits to Certain Drivers,” which provides that companies can treat certain gig economy workers as independent contractors in California.

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### **Eligible Workers**

Under the proposed changes, to be eligible, platform workers must provide *bona fide* services through or by means of the issuer's internet-based or other widespread, technology-based marketplace platform or system (a "platform"). Additionally:

- workers must be unaffiliated with the issuer;
- workers providing services to third-party end users would qualify, so long as the issuer benefits (*e.g.*, by receiving a fee or percentage of compensation);
- consistent with the existing provisions of Rule 701 and Form S-8, platform workers providing services to the issuer, its subsidiaries, its parents and subsidiaries of its parent would be eligible;
- issuances may be made to an entity, if (i) substantially all of the entity's activities involve the performance of *bona fide* services provided through a platform, and (ii) it is wholly and directly owned by the natural person actually performing the services; and
- consistent with the separately proposed amendments to Rule 701 and Form S-8, former employees and former employees of acquired entities would be eligible for issuances under certain circumstances.

### **Eligible Services**

The provision of certain services would not be eligible for issuances under these expanded rules – services in connection with capital-raising or with promoting or maintaining a market for the issuer's securities would not qualify, nor would the use of a platform for the sale or transfer of permanent ownership of discrete, tangible goods (*e.g.*, a platform that provided for the permanent transfer of real estate would not be eligible, whereas a platform that provided for the temporary rental of real estate would be).

The services would need to be provided pursuant to a written contract or agreement between the issuer and the platform worker and must be provided through a platform that the issuer operates and controls. In order to demonstrate that it controls the platform, an issuer would need to be able to show that it: (i) provides access and establishes the principal terms of service, (ii) establishes the terms and conditions by which the platform worker receives payment for services and (iii) has the authority to accept and remove platform workers providing services.

### **Conditions for Issuances**

Any issuances would need to be made pursuant to a compensatory arrangement that is evidenced by a written compensation plan, contract or agreement between the issuer and the platform worker. To ensure that the securities are issued/received for compensatory and not speculative purposes, the SEC has additionally proposed that:

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- the amount and terms of securities issued to platform workers could not be subject to individual bargaining, nor could platform workers be permitted to elect between payment in securities or cash;
  - a platform worker could receive no more than 15% of their compensation in any 12-month period, and no more than \$75,000 in any 36-month period, in securities issued pursuant to Rule 701 or registered on Form S-8; and
  - any issuances made under Rule 701 would be subject to enhanced transfer restrictions – issuers would need to take steps to ensure that these securities would be transferrable only to the issuer or by operation of law.

In order to enable the SEC to assess the use and impact of this temporary expansion, the SEC would require issuers who elect to issue securities to platform workers under Rule 701 or Form S-8 to furnish to the SEC, in a non-public manner (*i.e.*, this information would not be filed or furnished publicly via EDGAR), the following information regarding these issuances at six-month intervals (commencing six-months after the first issuance):

- the criteria used to determine eligibility for securities awards to platform workers, whether they are the same as for other compensatory transactions, and whether those criteria are communicated to workers in advance as an incentive;
- the type and terms of securities issued to platform workers during the prior six months, and whether they are the same as for other compensatory issuances in that interval;
- if issued pursuant to Rule 701, the steps taken to ensure that the securities are non-transferable;
- the percentage of overall outstanding securities that issuances to platform workers represents;
- during the interval, the number of platform workers and the number of non-platform workers the issuer has, and the number of platform workers and non-platform workers who received securities; and
- the number and dollar amount of securities issued to platform workers, both in absolute amounts and as a percentage of total sales under Rule 701 and/or Form S-8, as applicable.

#### **Issuances Treated Like Other Rule 701 Issuances**

Similar to other issuances pursuant to Rule 701, these issuances would be excluded from the calculation of outstanding securities under Rule 12g5-1 (*i.e.*, to calculate whether an issuer must register a class of equity securities under Section 12(g)(1)).

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Securities sold to platform workers would be included when calculating the amount of securities offered by the issuer, both for determining the maximum threshold amount issuable under Rule 701 and for determining the applicable disclosure requirements of Rule 701(e).

**Comment Period**

The SEC has requested comments on the proposal within 60 days of the date of its publication in the *Federal Register*.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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