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THE SEC EXPERIMENTS: PROPOSED AMENDMENTS TO INCLUDE CERTAIN GIG WORKERS IN COMPENSATORY OFFERINGS UNDER RULE 701 AND FORM S-8

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The SEC recently voted to approve proposed amendments to Rule 701 and Form S-8 governing the offer or sale of securities to employees through compensation programs. The proposed amendments provide for a temporary, five-year expansion of Rule 701 and Form S-8 to permit public and private companies to issue securities as compensation to certain “platform,” or “gig” workers, subject to various conditions.

Rule 701 provides an exemption from registration under the Securities Act of 1933, as amended, for the sale of securities by privately held companies to compensate employees, consultants, advisors and certain others under written compensatory benefit plans or written agreements. Form S-8 is used by SEC reporting companies to register the sale of public company securities to employees, consultants and advisors. Neither Rule 701 nor Form S-8 currently covers issuances to platform workers.

The proposed amendments to Rule 701 would allow a non-reporting company to offer and sell securities to “platform workers,” who are defined in the amended rules as workers who, pursuant to a written contract or agreement, provide *services* to an issuer or a third party through the issuer’s “internet-based marketplace platform or through another widespread, technology-based marketplace platform or system.” The proposed amendments to Form S-8 would permit a reporting issuer to include that same category of workers in compensatory offerings registered on Form S-8. The proposed amendments also include conditions that are designed to limit the possibility that the amended rules could result in offers and sales of securities for capital-raising, rather than compensatory, purposes.

As proposed, the amendments would apply only to platform workers who provide services through a company’s marketplace platform. The SEC has indicated, however, that if the amendments are adopted and depending on the results of the initial expanded use of Rule 701 and Form S-8, the SEC could in the future further expand Rule 701 and Form S-8 to cover platform workers engaged in the selling of goods or other non-service providing activities through a company’s marketplace platform.

The proposed amendments are in addition to the proposed amendments to Rule 701 and Form S-8 that, at the same time, were approved by the SEC and that are designed to modernize the framework for compensatory securities offerings in light of the significant evolution in compensatory offerings and composition of the workforce.

The public comment period for the proposed rule amendments will remain open for 60 days following publication of the release in the Federal Register.

Additional information regarding the proposed amendments is provided below:

Rule 701. The proposed amendments to Rule 701 would enable non-reporting companies, during the five-year trial period, to compensate platform workers who provide bona fide services by means of a company's internet- or technology-based platform or system, provided the following conditions are met:

- During any 12-month period, no more than 15% of the value of the compensation received by a platform worker from the company may be in the form of equity compensation, with value determined at the time the securities are granted;
- During any 36-month period, no more than $75,000 of such compensation may consist of securities issued pursuant to Rule 701 or Form S-8, with value determined at the time the securities are granted;
- The issuer operates and controls the platform, as demonstrated by its ability to (i) provide access to the platform, (ii) establish the principal terms of service for using the platform and terms and conditions by which the platform worker receives payment for services provided through the platform and (iii) accept and remove platform workers;
- The issuance of securities to platform workers is pursuant to a compensatory arrangement evidenced by a written plan or agreement and is not for services in connection with a capital-raising transaction or services that directly or indirectly promote or maintain a market for the company's securities;
- 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 the payment of compensation in securities or cash; and
- The company must take reasonable steps (e.g., special legends on securities and/ or appropriate instructions to the transfer agent) to prohibit the transfer of the securities issued to a platform worker under the Rule 701 exemption, other than a transfer to the company or by operation of law.

Form S-8. The proposed amendments would expand Form S-8 to cover issuances to platform workers during the trial period, subject to the same conditions (other than the restrictions on transferability) that apply to issuances under Rule 701 as discussed above.

Trial Period. The SEC is proposing the amendments on a temporary basis to provide the SEC with an opportunity to assess whether (1) issuances are being made for legitimate compensatory purposes and not for capital-raising purposes, (2) the issuances have the expected benefits for the platform workers who receive equity compensation, as well as the issuers that grant such compensation and their investors, and (3) there are any unintended consequences resulting from the issuances.

Periodic Reporting to the SEC. The proposed amendments would require that a company issuing securities to platform workers under amended Rule 701 or on Form S-8 furnish certain information to the SEC at six-month intervals. The required information is set out in the proposed amendments and would include, by way of example only, (i) the percentage of overall outstanding securities that the amount issued cumulatively under the temporary rules during the six-month period represents and (ii) the type and terms of those securities and whether they are the same as the type and terms of the issuer's other compensatory transactions during the period.

For additional information, please refer to the amendments as proposed by the SEC.

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