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Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: Concept Release on Compensatory Securities Offerings and Sales Release No. 33-10521 ("Proposed Plan"); Rule 701(c) Eligible Plan Participants

Dear Secretary Countryman,

I am the founder and venture lead of Rockridge Venture Law®, an intellectual property and technology firm with offices in North Carolina and Tennessee. As an attorney at Rockridge I help corporate clients with complex business and intellectual property matters. I also advise many scaling enterprises through affiliations with entrepreneur centers around the country, from Bethesda Green Hub on the east coast to Singularity University Ventures on the west. I am submitting this comment because from my vantage point Rule 701 is outdated and inadequate for today's gig-centered, entrepreneurship-focused, employment shedding, COVID-19 upended economy.

In the last year, I have seen a significant increase in the amount of service-for-equity arrangements among young companies with big aspirations. Often, these involve web designers, prototype engineers, app developers, and other product and positioning related service providers demanding - and receiving - equity for services. I think of it as the SharkTank / Kickstarter effect. Essentially, cashless startups are prioritizing their "look" over substantive business data and market metrics to score significant early investment; they are willing to part with equity to do so, usually in addition to cash, to savvy service providers who have caught on to their part in this equation. On several recent occasions, I have been presented with plans by opposing counsel to invoke Rule 701 for the issuance of equity by such service recipients to otherwise independent service providers.

Over the last few months, COVID-19 has reshaped our economy. One likely outcome stemming from COVID-19 will be the acceptance by corporate America of a virtual workforce. Comfort and familiarity with a virtual workforce, combined with economic insecurity and skepticism over legal, regulatory, and taxation concerns surrounding employees, will further lead to heightened

use of independent contractors in place of employees. Inevitably, Rule 701 will be used, irrespective of historical Commission intent, as a primary vehicle to provide equity to this emerging independent contractor workforce.

I. *How is Rule 701 Presently Articulated?*

- The Commission recommends Rule 701 for employee benefit plans.¹
- The Commission has noted that “independent agents” will ordinarily not be deemed consultants and advisors eligible for equity under the rule.²
- Agents who are “de facto” employees, however, will be eligible for equity.³
- Computer programmers, bookkeepers, and others similarly situated might be eligible as qualifying advisors and consultants, but only on a case-by-case basis.⁴
- Independent contractors eligible for equity under Rule 701 as service providers are typically those whose income paid by the equity issuers are their primary income sources.⁵
- Consultants and advisors who provide “limited” services for the issuers while taking equity have been identified as abusers of the privileges under Rule 701.⁶
- In issuing Securities Act Release No. 7645, the Commission was primarily concerned with abuse of downstream securities transactions (via underwriters) and compensated market manipulation (via promoters).⁷
- Independent researchers who primarily publish in academic literature may receive equity as qualifying consultants, but those who publish to a wider audience may not.⁸
- Product-oriented advertisers may receive equity as qualifying consultants, but those whose advertisements effectively heighten the market for their issuers’ securities may not.⁹
- Business and technology development consultants may be eligible, but financial agents whose services are related to capital raises may not.¹⁰

While Release No. 33-7646 provides useful categorical examples of the types of consultants and advisors that may be eligible for equity under Rule 701, it fails to provide practical guidance sufficient

¹ See “Securities Act Rules: Questions and Answers of General Applicability, Question 254.04,” <https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm>.

² See “Rule 701 – Exempt Offerings Pursuant to Compensatory Arrangements” <https://www.sec.gov/rules/final/33-7645.htm>.

³ *Id.*

⁴ *Id.*

⁵ See *Rule 701 – Exempt Offerings Pursuant to Compensatory Arrangements*, Release No. 33-7645 (Feb. 25, 1999) [64 FR 11095 (Mar. 8, 1999)].

⁶ See *Registration of Securities on Form S-8*, Release No. 33-7646 (Feb. 25, 1999) [64 FR 11103 (Mar. 8, 1999)].

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

for today's world around "bona fide" services, i.e. those that traditionally are "performed by an employee, and the compensation paid by the company for those services is the primary source of the person's earned income."¹¹ Consequently, the qualifying consultant and advisor examples offered by the Commission can

The Commission's Rule 701 illustrations are outdated, developed prior to the gig economy, social media, and smart phones. Even prior to COVID-19, much of 2020 America was, in a manner quite different from 1999: (a) constantly tuned into work and work matters, even at home, through their smartphones and related devices; (b) constantly, while working, tuned into their digital social networks and constantly conversing about the things they were doing, including consulting and employment; and, (c) constantly networking for better or additional work opportunities through platforms like Indeed, LinkedIn, and Fiverr. While the Commission in its Proposed Plan justifiably focuses on platform-related independent contractor agents, there are many gig economy relationships independent of proprietary platforms that must be addressed in any new guidance.

- II. *What, if any, services should an individual participating in the "gig economy" need to provide to the issuer to be eligible under Rule 701? Do these individuals in fact provide services to the issuer, or instead to the issuer's customers or end users? Should this fact make any difference for purposes of Rule 701 eligibility?*

The proposed lens for these questions should be through the view of the issuer, i.e. what value do gig economy agents provide to the issuer, irrespective of the nature of such services and whether such services are provided directly to the issuer or to issuer end-user customers. So long as the Commission's primary concerns – market manipulation and impermissible underwriting – are addressed, how an issuing company decides what independent agents are worthy of equity should be determined by the company and not on some arbitrary classification of services.

- III. *Should we consider a test that identifies Rule 701 eligible participants as individuals who use the issuer's platform to secure work providing lawful services to end users?*

Any restriction to use of a platform is problematic. Would the platform need to be proprietary to the issuer? For example, would use of a LinkedIn account affiliating an equity recipient with an equity issuer be sufficient? Would use of a Facebook business page, livestream account, or videoconferencing service suffice? If a proprietary platform is necessary, does its use need to be exclusive? For example, would equity issuance through use of a proprietary Uber platform preclude independent, side activity using the Lyft platform? What is the definition of a platform? Is a proprietary database a platform?

- IV. *Does it matter whether that business activity provides a service typically provided by an employee or is of a more entrepreneurial nature? How do the answers to these questions affect whether there is a sufficient nexus between the individual and the issuer to justify application of the exemption for compensatory transactions?*

¹¹ *Id.*

Companies are currently issuing equity to independent, arm's length, limited engagement services providers under Rule 701, in part because the rule and outdated illustrations are open to interpretation when considered in the present economy. Take for instance the 1999 illustration of a qualifying academic researcher who publishes in academic literature as opposed to one who publishes through mainstream channels. Many academics today publish on open source networks, data registries, and freely discuss their work and that of others via Twitter and other channels. The past framework is simply unworkable – or more appropriately, it is wholly workable to however counsel wants it to work today because of its imprecision.

I question the emphasis of nexus and the purpose it serves. Businesses today launch and operate virtually.¹² They conduct business virtually. The sell into markets virtually.¹³ For several years independent contractor growth among small businesses has far outpaced comparatively stagnant employee growth.¹⁴ Technology, entrepreneurship in education, employment regulation, taxation, and economic opportunity are all contributing factors to this trend. If anything, COVID-19 will force small businesses into a period of heightened dependence upon independent contractors as a means of doing more with less in order to survive the economic downturn.

- V. *Should it matter what percentage of the individual's earned income is derived from using the issuer's platform? If so, should this be based on earned income during the last year, a series of consecutive years, or current expectations? Should there be a minimum percentage? How should this be verified? How should such a test be applied where the individual provides services to multiple companies? How would the issuer be able to determine how much of an individual's income is derived from using the issuer's platform?*

The question of issuance should not turn on proportional income to the recipient, but rather on relevant value to the issuer. If an issuer reasonably decides to issue equity in lieu of or in addition to cash compensation for services to an independent, limited engagement contractor, it should be the right of the issuer to freely do so (within prescribed filing requirements). The Commission need not attach outdated employment standards to this rule. A generation ago an employee / company team member was one who daily reported to the office and had personal touchpoints with multiple peers and superiors. Now, personal touchpoints are being exchanged for communications platforms like Slack where communication and engagement is an ongoing, cloud based dynamic that may

¹² See "Coworking Market Growth," Jones Lang LaSalle IP, <https://www.us.jll.com/en/coworking-market-growth>; "How Coworking Spaces Affect Employees' Professional Identities," Harvard Business Review, <https://hbr.org/2019/04/how-coworking-spaces-affect-employees-professional-identities>;

¹³ See "Amazon is Hiring 100,000 Workers as Coronavirus Boosts E-Commerce," Motley Fool, <https://www.fool.com/investing/2020/03/18/amazon-is-hiring-100000-workers-as-coronavirus-boo.aspx>.; "Coronavirus Crisis Reveals Retail Haves and Have-Nots," Wall Street Journal, <https://www.wsj.com/articles/coronavirus-crisis-reveals-retail-haves-and-have-nots-11585047603>; "Reinventing the Direct-to-Consumer Business Model," Harvard Business Review, <https://hbr.org/2020/03/reinventing-the-direct-to-consumer-business-model>;

¹⁴ See "New Paychex Data Shows Independent Contractor Growth Outpaces Employee Hiring in Small Businesses," PR Newswire, <https://www.prnewswire.com/news-releases/new-paychex-data-shows-independent-contractor-growth-outpaces-employee-hiring-in-small-businesses-300775712.html>; "Freelanced: The Rise of the Independent Contractor Workforce," NPR, <https://www.npr.org/2018/01/22/578825135/rise-of-the-contract-workers-work-is-different-now>.

feature intermittent lags of multiple days; more importantly, this dynamic is often project and module based instead of role based. Companies are “employing” and valuing talent in different ways than in 1999, and questions of percentage income are largely irrelevant, especially when companies can utilize confidentiality and non-compete agreements and require security technologies to safeguard against harmful, concurrent competitive activities from independent contractors they wish to incentivize with equity.

- VI. *Would investors be harmed if the exemption is expanded to individuals participating in the “gig economy,” potentially resulting in higher levels of equity ownership in the hands of persons who would not be shareholders of record for purposes of triggering Exchange Act registration and reporting?*

This is an important question that should be addressed in any new rulemaking. My recommendation is to limit both the monetary amount and incidence of Rule 701 equity issuance to non-employees once investors have been solicited and investment accepted. Investment should provide the means by which small ventures can employ individuals for necessary services or fairly contract on a cash basis, whereas pre-seed companies have less to offer aside from equity in exchange for valuable services that will help position them for market introduction and future investment.

I sincerely appreciate the opportunity to comment on the Commission’s Proposed Plan, and thank you for reconsideration of this important topic.

Sincerely,

Kevin Christopher