



September 21, 2018

VIA EMAIL: RULE-COMMENTS@SEC.GOV

Brent J. Fields, Secretary
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549-1090

Re: Request for Comment on Concept Release on Compensatory Securities Offerings and Sales; Release No. 33-10521; File No. S7-18-18

Ladies and Gentlemen,

Airbnb, Inc. (“Airbnb”, “we”, or “our”) appreciates the opportunity to submit this comment letter in response to the request by the Securities and Exchange Commission (the “Commission”) for comment on its release entitled “*Concept Release on Compensatory Securities Offerings and Sales*” (the “Release”) published on July 18, 2018. We do not comment on every item contained in the Release, however, we wished to respond to certain of the questions posed by the Release, as set forth below.

We applaud the Commission’s recognition of the importance of the sharing economy and the emergence of new types of contractual relationships between companies and the individuals who work with them that have emerged as a result. Millions of individuals are now earning income as sharing economy participants and we support the Commission’s efforts to update certain of its rules as described in the Release in light of these developments.

Founded in 2008, Airbnb is a global travel community that offers end-to-end trips, including where you stay, what you do and the people you meet. Airbnb uniquely leverages technology to economically empower millions of people around the world to unlock and monetize their spaces, passions and talents to become hospitality entrepreneurs. Airbnb’s accommodation marketplace offers access to millions of places to stay in more than 191 countries, from apartments and villas to castles, treehouses, boutique hotels, and traditional B&Bs.

1. Benefits to Expanding Eligibility to Receive Equity Pursuant to Rule 701(c)

We believe that an update to 17 CFR 230.701 (“Rule 701”) is necessary to reflect the evolving nature of how individuals earn income. These updates should expand the categories of persons pursuant to Rule 701(c) to include additional persons with substantial, but non-traditional relationships with the issuer. We believe that these changes would be consistent with the goals of the Jumpstart Our Business Startups Act to spur entrepreneurship and support

business startups and the private companies that are vital to the American economy. As the Commission is aware, Rule 701, as currently written and generally interpreted, does not allow companies to grant equity to sharing economy participants who are not otherwise affiliated with the issuer. Increasing eligibility for Rule 701 grants would help democratize share ownership and wealth by allowing more ordinary Americans who participate in the sharing economy the opportunity to experience stock ownership and potential to benefit when a private company goes public. The increased alignment of incentives between sharing economy companies and participants would benefit both.

Airbnb believes that twenty-first century companies are most successful when the interests of all stakeholders are aligned. For sharing economy companies like Airbnb, this includes our employees and investors, but also the hosts who use our marketplace to list unique accommodations and experiences. As a sharing economy marketplace, Airbnb succeeds when these hosts succeed. We believe that enabling private companies to grant hosts and other sharing economy participants equity in the company from an earlier stage would further align incentives between such companies and their sharing economy participants to the benefit of both.

We further believe that revisions to Rule 701 could serve the beneficial goal of incentivizing individuals to leverage their existing fixed assets (such as their home) to supplement their income and participate in the sharing economy. In addition, such revisions would allow smaller or newer private sharing economy companies to better compete with established public companies, which may benefit marketplace participants, including end users, generally.

2. *Sharing Economy Participants Who Receive Equity Pursuant to Rule 701 Should not be Considered “Holders of Record” for the Purposes of Exchange Act Rule 12g5-1.*

In order to have a meaningful impact and benefit sharing economy companies and their participants, any change to Rule 701 should allow recipients of qualifying equity awards to be excluded as “holders of record” for the purposes of Section 12(g) (“Section 12(g)”) of the Securities and Exchange Act of 1934, as amended (the “Exchange Act”). We note that 17 CFR 240.12g5-1 (“Rule 12g5-1”) contains a safe harbor permitting issuers to exclude individuals who received their shares pursuant to Rule 701(c) from the definition of “held of record” for the purposes of determining whether an issuer is required to register a class of equity securities. Broadly, we believe that sharing economy participants issued qualifying equity under an equity award plan pursuant to an amended Rule 701(c) should also be excluded from this definition.

If issuers are not permitted to exclude sharing economy participants who receive qualifying equity pursuant to a revised Rule 701(c) from their number of “holders of record” for the purposes of Section 12(g) then few, if any, sharing economy companies, including Airbnb, would find the proposed revisions to Rule 701 useful. Airbnb listings, which are just one part of the sharing economy, total over five million and are found in more than 81,000 cities and 191 countries around the world. Section 12(g) requires that companies register under the Exchange Act after they have more than 2,000 “holders of record” or 500 “holders of record” who are not accredited investors. Effectively, this would mean that, unless the Section 12(g) implications are addressed, the proposed revisions to Rule 701 would have no practical effect for us and many

other sharing economy companies because we would not be able to offer equity to a meaningful number of participants.

3. Sharing Economy Participants Play a Vital Role in the Modern Marketplace.

We believe there are strong rationales for excluding sharing economy participants who are recipients of qualifying equity awards from the definition of “holders of record” for the purposes of Section 12(g). First, we note that like many persons who currently receive equity under Rule 701, receipt of qualifying equity awards by sharing economy participants would not involve an investment decision. As described further below, our proposal includes a number of features that would support the analysis that such recipients would not be making an investment decision. Second, due to their ongoing relationship with the issuer, sharing economy participants would generally be more knowledgeable about the issuer and its business than outside investors and, therefore, would be less in need of disclosure materials. Airbnb hosts have earned over \$40 billion in income since Airbnb was founded. Finally, the purpose of offering equity awards to sharing economy participants would not be to raise capital, but rather to align the interests of sharing economy participants with those of the company and incentivize and motivate active participation in the marketplace.

4. Proposed Changes Would Have Negligible Impact on Initial Public Offerings.

We do not believe that amending Rule 701 as outlined below would discourage companies from pursuing offerings registered under the Securities Act of 1933, as amended (the “Securities Act”), any more than Rule 701 currently does. Equity issuances to sharing economy participants would not replace the capital raising functions of an initial public offering or other traditional securities offerings. Such issuances would not provide liquidity to issuers and they would still need to seek access to the public capital markets to fund acquisitions or significant capital expenditures.

Companies who issue equity pursuant to Rule 701, such as ours, generally face pressure from employees and investors to access the public markets in order to provide liquidity of their equity. This dynamic would continue to exist if sharing economy participants are permitted to take advantage of Rule 701 and, if anything, adding sharing economy participants as equity holders would increase the pressure on companies to eventually go public in order to satisfy the liquidity needs of this group. Furthermore, we believe companies will continue to seek the reputational advantages and increased public awareness associated with being a public company. Becoming a public company provides an opportunity to increase transparency in the eyes of employees, users and other stakeholders. In addition, we believe it promotes the societal good of giving stakeholders a greater voice in the issuer’s operations.

5. Proposed Revisions to Rule 701

We would propose that the exemption provided by Rule 701 remains largely unchanged, but that a new subtype of this exemption be created under Rule 701(c) that would apply specifically to sharing economy companies and their participants. Awards granted under this new sub-exemption would be more restricted than those currently available under Rule 701 and only

companies meeting certain additional criteria could qualify to grant such awards. We refer to this proposed new sub-type of exemption as the “Sharing Economy Award Exemption.”

A. Limitations on the Nature of Sharing Economy Participants or the Number of Recipients Would Largely be Counterproductive.

We do not believe that it would be useful to impose arbitrary demarcation lines on what sharing economy participants should be required to perform or for whom they should be performed in order to earn equity awards. We note that sharing economy companies tend to be highly innovative and the nature of their relationships with participants are continuously evolving. Any “bright line” tests (such as specifying classes of qualifying services/goods or a minimum threshold for earnings) would likely quickly become outdated and require frequent adjustment to keep pace with the changes in the sharing economy. For example, Airbnb recently expanded into the business of allowing individuals to provide experiences to users through the Airbnb platform, which was not originally part of our platform. Other sharing economy companies have similarly adapted and branched out into new areas and we would urge the Commission to avoid putting rules in place that could stifle or inhibit these innovations. We would suggest instead that any revisions to Rule 701 focus on the nature of the companies that could use the Sharing Economy Award Exemption, the nature of their payments to sharing economy participants and the transferability of the equity awarded.

B. On the Nature of the Companies who Could use this Expanded Version of Rule 701.

We believe that it is important to limit the types of businesses who could access the Sharing Economy Award Exemption in order to prevent it from being exploited by companies whose primary purpose in engaging with individuals is to sell them securities or circumvent the securities laws. We believe that in order to qualify for the Sharing Economy Award Exemption, companies must issue equity to individuals in order to further the companies’ operating objectives and that no company whose primary objective is the issuance of securities should be able to avail themselves of the exemption. In furtherance of that aim, issuers should meet the following criteria in order to qualify for the Sharing Economy Award Exemption:

- I. Issuers should provide a marketplace platform the primary objective of which is to allow unaffiliated third-parties to provide lawful goods or services to users.
- II. The issuer should derive a significant amount of its annual revenue from commissions or fees related to the purchase of goods or services from sharing economy participants through its marketplace.
- III. The issuer should control the marketplace platform. Control of the marketplace could be established by demonstrating one of the following:
 - a. The issuer is able and entitled to remove any person or listing from the marketplace either at the issuer’s discretion or upon

violation of the issuer's terms of service or other contractual agreement; or

- b. The issuer establishes the amount of user fees for using the platform and sets the terms and conditions by which participants receive payment for the goods or services sold through the marketplace.

We believe that acceptance of the terms and conditions established by the company evidences a meaningful relationship between the issuer and the sharing economy participant using their marketplace.

C. On the Nature of the Equity Awarded to the Sharing Economy Participant.

In order to prevent harm to investors or abuse of the Sharing Economy Award Exemption we believe that the equity issued pursuant to this sub-exemption should be more limited than that currently available under Rule 701. In furtherance of that aim we propose that in order to qualify for the Sharing Economy Award Exemption:

- I. The amount and other terms of the equity awarded should not be subject to individual bargaining and recipients should not be permitted to elect between such equity awards and another type of payment (e.g., cash). These limitations should prevent the transaction from involving an investment decision by the recipient.
- II. No more than 50% of the value received by the recipient in connection with transactions that occurred on the issuer's platform during any 24-month period should consist of equity, as determined at the time the equity is granted to such individual.
 - a. For the purposes of this test, the value of the equity granted should be the fair value of such equity on the date it is allocated by the issuer's board, or a committee thereof, to the pool of equity available for distribution to sharing economy participants.
 - b. We note that this test would be significantly simpler to administer than the current test under Rule 701, which requires an issuer to know whether more than 50% of the recipient's total earned income is coming from the issuer. Rule 701, as currently written and interpreted, requires an issuer to know its recipients' other sources of income. This would be impracticable to apply in the case of sharing economy participants, who frequently have multiple sources of income unknown to the issuer.
 - c. By contrast, our proposed approach allows the issuer to easily determine whether the intended recipient is eligible for receipt of an equity award since it is based on the issuer's own payments, while at the same time preventing any misuse of the rules by

companies potentially focused on selling stock rather than goods and services to users.

- III. The sharing economy participant's receipt of a qualifying equity award should not be contingent upon receipt by the issuer or its affiliates of any capital contribution from such person at the time of issuance. This would prevent the Sharing Economy Award Exemption from being exploited by persons wishing to use it to raise capital.

D. On the Transferability of the Equity.

We believe that equity acquired pursuant to the Sharing Economy Award Exemption should be subject to enhanced transfer restrictions. Recipients of equity from sharing economy companies should not be permitted to make unlimited transfers of their securities to unaffiliated third parties while the issuer remains exempt from the reporting requirements of the Exchange Act. We believe that, given the third-party contractual relationship between sharing economy participants and sharing economy companies, it may be appropriate to consider restrictions beyond those typically applicable to the equity currently issuable pursuant to Rule 701.

Among other limitations, it could be appropriate for the amended Rule 701 to specify that equity acquired pursuant to the Sharing Economy Award Exemption be non-transferable, except by operation of law (e.g., through a will or divorce order) prior to an initial public offering registered under the Securities Act or a change in control of the issuer. To provide additional flexibility over time, the Commission could issue no action relief should other categories of transfer be deemed appropriate in the future. We believe companies should be permitted to issue equity pursuant to the Sharing Economy Award Exemption with or without performance or time vesting conditions at the issuer's discretion and in the form of restricted stock, options, restricted stock units or other securities.

If transferability limitations are imposed, we do not believe it would be necessary or appropriate to limit the number of sharing economy participants to whom a company can issue equity awards to using the Sharing Economy Award Exemption. We note that such a limitation would make the revisions of Rule 701 of limited use to the larger sharing economy companies, many of whom provide a marketplace for tens of thousands or even hundreds of thousands of participants. Airbnb's hosts, for example, have welcomed over 300 million guests at Airbnb listings around the world.

We believe that equity issued pursuant to the Sharing Economy Award Exemption should qualify for registration on a registration statement on Form S-8 so that it can be registered under the Securities Act once the issuer becomes a public reporting company.

E. Disclosure to Sharing Economy Equity Recipients.

Rule 701(e) currently requires that issuers providing more than \$10 million in equity under Rule 701 provide recipients with the same financial statements required to be furnished by Part F/S of Form 1-A28 under 17 CFR 230.251 through 230.263 as of a date no more than 180 days before the offer. As a result, companies wishing to issue equity on a continuous basis must prepare such financial statements on at least a quarterly basis and have them complete within

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three months after the end of each quarter. The time, money and expertise required to produce such financial statements is a significant burden on small companies, many of whom would not otherwise be obligated to produce such statements. We believe that requiring such disclosure could act a significant deterrent to smaller companies' use of the Sharing Economy Award Exemption.

We believe that the obligation to provide disclosure to persons receiving equity pursuant to the Sharing Economy Award Exemption should be minimal if the criteria for qualifying awards that we have proposed are adopted. Due to the transfer restrictions we have proposed and the fact that such equity would be acquired without requiring any payment or election by the recipient, sharing economy participants would not be making any investment decision with respect to such equity. As a result, recipients of such awards would not require the protection of the type of disclosure required by persons determining whether to acquire, hold or sell a security.

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Generally speaking, we believe except as outlined below, that the structure of Rule 701, including the existing limitations on the value of equity that can be issued, do not require amendment beyond those mandated changes contained in the Economic Growth, Regulatory Relief and Consumer Protection Act.

We appreciate the opportunity to submit, and the Commission's consideration of, our comments on the Release. We would be pleased to discuss our comments with you or provide any additional information you would find useful. If you have any questions regarding this letter, please do not hesitate to contact Rob Chesnut at [REDACTED] or Kevin Kennedy of Simpson Thacher & Bartlett LLP at [REDACTED] or [REDACTED].

Very truly yours,



Rob Chesnut

Airbnb, Inc.

General Counsel