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

Concept Release on Compensatory Securities Offerings and Sales (Release No. 10521; File No. S7-18-18)

Dear Mr. Fields:

We are pleased to submit this letter in response to the request of the U.S. Securities and Exchange Commission (the "Commission" or the "SEC") for comments on the above-referenced concept release (the "Release"). We applaud the Commission's willingness to consider suggestions to modernize Rule 701 under the Securities Act of 1933 (the "Securities Act") and Form S-8 and appreciate the opportunity to respond to questions that the Commission has posed in the Release. We have focused our comments on a few specific issues noted in the Release where we believe that revisions would be of greatest utility to public companies and foreign private issuers.

Rule 701

The ability of foreign private issuers, particularly those from the European Union, to rely on Rule 701 to include their U.S. employees in their international employee stock plans has, in practice, been hampered by two issues relating to the age and the method of presentation of the financial statements that must be provided to investors pursuant to Rule 701(e)(4) if the aggregate sales price or amount of securities sold during any consecutive 12-month period in reliance on Rule 701 exceeds $10 million. We describe these two issues below and propose possible amendments to Rule 701 that we believe would address these issues while still providing investors with financial statements necessary to make an investment decision.

Age of Financial Statements

Rule 701(e)(4) provides that the required financial statements "must be as of a date no more than 180 days before the sale of securities". In order to satisfy this requirement on a continuing basis, a company must prepare and publicly disseminate financial statements on a quarterly basis. Many foreign private issuers with shares listed on exchanges in the European Union prepare and publicly disseminate financial statements only on a semi-annual basis. The Rule 701(e)(4) financial statement aging requirement can have a real impact on the availability of Rule 701 for these companies. For example, a company with a December 31 fiscal year end that prepares financial statements only semi-annually would be subject to the following:

- A staleness period at the start of each calendar year as year-end December 31st financial statements are typically published no earlier than February of each year (and can be used under Rule 701 until late June of each year).

- A staleness period in July in each year as the June 30th half year financial statements are typically published in late July or August in each year (and can be used under Rule 701 until late December of each year).

In the absence of quarterly financial statements, a company is effectively obliged to suspend share sales to U.S. employees twice a year, each time for several weeks. Companies are not faced with this problem in their home countries or, in our experience, any other countries.

By way of comparison, foreign private issuers eligible to use Form S-8 (reporting companies) are not subject to the same requirement regarding the age of financial statements and in this respect are subject to financial statement requirements that are more onerous than those applicable to foreign private issuers that are reporting companies. We do not believe that was the intention of the Commission when Rule 701 was adopted. We believe the financial statement requirements in Rule 701(e)(4) could reasonably be relaxed to follow those of Form S-8 without sacrificing investor protection. One possible approach would be to require annual financial statements to be provided within the time frame required for filing of Form 20-F and semi-annual financial statements to be provided within the time frame required by home country rules. We note that foreign private issuers would remain subject to the general antifraud provisions of the U.S. securities laws in the event that they sold securities to U.S. employees on the basis of stale information.

International Financial Reporting Standards

The second issue to which we would like to draw your attention relates to the accounting standard applicable to the required financial statements. Rule 701(e)(4) provides that foreign private issuers must provide a reconciliation to U.S. GAAP if their financial statements are not prepared in accordance with U.S. GAAP or "International Financial Reporting Standards as issued by the International Accounting Standards Board".

The vast majority of foreign private issuers, and particularly those listed on an exchange in the European Union, do not prepare their financial statements in accordance with U.S. GAAP. For these companies, preparing a U.S. GAAP reconciliation and, in the case of an ongoing or recurring employee stock plan, keeping it current, would be unduly costly and burdensome.

Issuers listed on an exchange in the European Union are required to prepare their statutory financial statements using International Financial Reporting Standards ("IFRS") as adopted by the European Union. This version of IFRS is not identical to that adopted by the International Accounting Standards Board ("IASB"), and thus a company preparing financial statements in accordance with the version of IFRS adopted by the European Union can satisfy the disclosure requirements of Rule 701(e)(4) only if it concludes that there are no material differences between European Union IFRS and IFRS as issued by the IASB, as applied to its financial statements. In practice, we have found that for companies that are not in financial services businesses, the differences between European Union IFRS and IFRS as issued by the IASB are generally immaterial and have no impact on their reporting. Thus, these companies have indeed been able to satisfy the requirements of Rule 701(e)(4) without preparing a reconciliation. However, for companies in the financial services sector, we understand that the differences, particularly with respect to hedge accounting for certain financial instruments, have effectively prevented these companies from satisfying these requirements.

In 2007, when the Commission in the *Acceptance from Foreign Private Issuers of Financial Statements Prepared in Accordance with International Financial Reporting Standards without Reconciliation to U.S. GAAP* adopting release (the "IFRS Release")[1] adopted rules allowing foreign private issuers to submit in their SEC filings financial statements prepared in accordance with IFRS without reconciliation to U.S. GAAP, it considered but ultimately declined to accept proposals that it accept financial statements prepared in accordance with a jurisdictional variation of IFRS and, in particular, IFRS as adopted by the European Union.[2] The Commission's concern was that implementing such a proposal "would not as effectively foster the development and use of a single set of high-qualify global accounting standards." We note, however, that the Commission's focus in the IFRS Release was on reporting companies and, in particular, on foreign private issuers engaged in public offerings in the United States or applying to have their securities listed on an exchange in the United States. The modification of Rule 701(e)(4) was adopted as a conforming amendment and followed the more general standard of IFRS as issued by the IASB applicable in other contexts. We respectfully suggest that the unique context and purpose of Rule 701, which is limited to compensatory offerings that do not have a capital raising function, mitigates the concerns underlying the Commission's reluctance to accept jurisdictional variations. We propose, therefore, that the Commission revise Rule 701(e)(4) to allow foreign private issuers to provide financial statements prepared in accordance with IFRS as adopted by the European Union or other home country accounting authority, and we believe that this change could be made without sacrificing investor protection.[3] We note that foreign private issuers relying on Rule 701 would remain subject to the general antifraud provisions of the U.S. securities laws.

1 Release Nos. 33-8879; 34-57026; International Series Release No.1306; File No. S7-13-07.

2 See id., text accompanying note 75.

3 As part of this proposal, companies would be encouraged, or even required, to provide a non-quantified explanation of the differences between IFRS as adopted by the IASB and European Union or other applicable IFRS as applied to their financial statements.

Form S-8

Registration of Securities Offered under 401(k) and Similar Plans

As noted in the Release, Form S-8 is available to reporting companies (employers) for the registration of securities to be offered to their employees or employees of their subsidiaries under many types of employee benefit plans, including Internal Revenue Code §401(k) plans and similar defined contribution retirement savings plans. A registration requirement under Section 5 of the Securities Act is typically triggered, in the case of 401(k) and similar plans, when an employer includes as an investment alternative in the plan a fund that invests principally in the employer's securities (typically its common stock) and allows employee contributions, employer matching contributions or both to be invested in the fund.[4] In the Release, the Commission poses the question whether registering a specific number of shares to be offered to its employees or employees of its subsidiaries or parent companies under such plans results in Section 5 compliance problems and solicits suggestions on how this issue might be addressed.[5]

In our experience, issuers frequently experience difficulty tracking the number of shares of its common stock that have been offered and sold under a Form S-8 registration statement relating to the employer stock fund offered under a 401(k) or similar plan. Several factors contribute to these difficulties. Employer stock funds are typically administered by third parties, unrelated to the issuer, that provide general administrative, recordkeeping and, often, fiduciary services to the plan. The administrator, rather than the issuer, keeps records of contributions to, and transfers from, the employer stock fund and effects purchases and sales of the employer's common stock in the market on behalf of employee participants. Most importantly, many 401(k) plans are unitized plans whose participants own units of a fund that holds the employer's stock. Unitized plans allow faster processing of plan transactions by, among other things, allowing administrators to net movements of funds into the employer stock fund (e.g., from contributions and balance transfers) against outflows of funds (e.g., from distributions to participants and balance transfers), with the result that purchases (or sales) are effected in the market only to the extent that inflows exceed outflows (or vice versa). As a result of these administrative practices, employers generally do not have direct insight into share usage under the plan.

Additionally, employer stock funds often hold cash along with employer stock to ensure liquidity. The ratio of employer stock to cash will vary over time and, with it, the number of shares underlying an employee participant's fund balance will also vary. Even if an employee participant has no transactions in the employer stock fund, the number of shares corresponding to his or her account will increase or decrease as the ratio of stock to cash held by the fund

[4] See Compliance and Disclosure Interpretation 126.19 (Jan. 26, 2009). We assume for purposes of this letter that company contributions that are made without regard to employee contributions, such as so-called "profit sharing" contributions, generally would not trigger a registration obligation. See id.

[5] Release at 32, Q.45.

increases or decreases. It is not evident how such increases, in particular, should be analyzed under Section 5.

To address these concerns and facilitate Section 5 compliance, we suggest that issuers be permitted to register a specified *dollar amount* of securities corresponding to an indeterminate *number* of securities to be offered and sold through the employer stock fund of a 401(k) or similar plan. For example, an issuer might register $500 million of common stock to be offered under the plan; as contributions are made to the employer stock fund under the plan, the dollar amount of contributions would be charged against the dollar amount registered and reduce the amount available for future allocations to the fund. The precise number of shares corresponding to such dollar amount, however, would not need to be tracked.

We offer several considerations in support of this suggestion.

First, and most important, allowing registration of a dollar amount rather than a specified number of shares will not in any way compromise the interests of employee participants. Issuers will continue to be required to comply with the prospectus requirements of Rule 428 and with the undertakings and other requirements of Form S-8. As a result, employees will continue to receive the same information about the plan and the issuer's business, financial condition and risk factors that they currently receive in offerings registered using Form S-8. We believe that the suggested approach would be consistent with the investor protection goals underlying Section 5.

In addition, registration of a dollar amount of securities is the method currently used by issuers who register interests in nonqualified deferred compensation plans on Form S-8. Our proposal therefore breaks no new ground in the context of registration statements relating to employee compensation plans. Another useful reference point is the registration of plan interests. Under Rule 416(c), where a registration statement on Form S-8 relates to securities to be offered pursuant to an employee benefit plan, including interests in the plan that constitute separate securities required to be registered under the Securities Act, the registration statement is deemed to register an indeterminate amount of such plan interests. Thus, there is precedent in the employee context of allowing issuers to register an indeterminate amount of a particular type of security.

We note that some registrants contribute their own shares to a 401(k) or similar plan to satisfy their obligations under the plan to make matching contributions; in addition, some registrants may, subject to the restrictions imposed under ERISA, sell shares to a plan. While these situations do not present the same monitoring and administrative complications that arise when a third-party trustee or other plan administrator uses employee and/or employer cash contributions to purchase shares in the market,[6] we believe that they can be accommodated under the proposed framework. Where a registrant contributes shares to satisfy its obligation to make matching

[6] Complications attributable to unitized accounting in employer stock funds do, however, continue to apply in the case of in-kind matching contributions or sales by an issuer to a plan.

contributions, the dollar amount of the obligation so satisfied would be charged against the aggregate dollar amount registered on Form S-8. Similarly, where a registrant sells shares to a plan, the aggregate sales price would be charged against the aggregate dollar amount registered.

As is the case of Form S-8 registration statements relating to nonqualified deferred compensation plans, the registration fee under our proposed approach would be calculated in a straightforward manner based on the aggregate dollar amount of securities to be offered pursuant to the plan. While under our proposed approach issuers, and the parties responsible for administering the plan, would be required to track the dollar amount of inflows to the employer stock fund and charge such amounts against the aggregate dollar amount registered, we believe that the administrative complexities required would be considerably less onerous than those experienced by issuers today. Moreover, those registrants who sponsor nonqualified deferred compensation plans will already have experience in navigating comparable administrative challenges.

Item 8(b) Undertaking

Item 601(b)(5)(ii) of Regulation S-K states that when securities being registered are issued under a plan that is subject to the requirements of ERISA, either an opinion of counsel confirming compliance of the written plan documents with ERISA or an Internal Revenue Service ("IRS") determination letter that the plan is qualified under Section 401 of the Internal Revenue Code shall be filed as an exhibit. Item 8(b) of Form S-8 provides, however, that neither an opinion of counsel nor an IRS determination letter shall be required if the registrant "includes an undertaking that [it] will submit the plan and any amendment thereto to the [IRS] in a timely manner and has made or will make all changes required by the IRS in order to qualify the plan."

In IRS Revenue Procedure 2016-37, the IRS modified its procedures governing the issuance of favorable determination letters for tax-qualified retirement plans. [7] The IRS's current practice is to issue termination letters for individually designed plans only upon initial plan adoption and termination. The IRS has also eliminated the five-year cyclical determination letter and remedial amendment program previously in effect.

In view of these procedural changes, the undertaking in Item 8(b) can no longer be made with respect to a plan for which a determination letter has previously been obtained but which has subsequently been amended. In this situation, a registrant may be unwilling to rely on the previously issued determination letter as controlling, yet it will be unable to submit the amended plan to the IRS and consequently unable to make the Item 8(b) undertaking in good faith. While the registrant could satisfy the Item 8(b) requirement by providing an opinion of counsel concerning compliance of the amended plan with ERISA, in our experience such opinions are difficult and in many cases impossible to obtain.

We suggest that the current undertaking in Item 8(b) of Form S-8 be replaced with an undertaking by the registrant to take such actions, including amending the plan, as it in good

[7] Rulings and Determination Letters, 26 C.F.R. §601.201.

faith reasonably believes are necessary to ensure that the plan will qualify under Section 401 of the Internal Revenue Code.

* * *

We appreciate this opportunity to provide our views on issues arising under Rule 701 and Form S-8. We would be happy to discuss any questions the Staff may have with respect to our comments. Questions may be directed to Doreen Lilienfeld, Lona Nallengara, George Spera or Sami Toutounji at (212) 848-4000.

Very truly yours,

Shearman & Sterling LLP

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