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November 28, 2018

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

Re: Concept Release on Compensatory Securities Offerings and Sales; File Number S7-18-18

Dear Mr. Fields:

This letter is submitted on behalf of the Subcommittee on Employee Benefits, Executive Compensation, and Section 16 of the Federal Regulation of Securities Committee (the "Subcommittee") of the Section of Business Law of the American Bar Association (the "ABA") with respect to the concept release and request for comment of the Securities and Exchange Commission (the "Commission") on possible ways to modernize Securities Act Rule 701, the exemption from registration under the Securities Act of 1933 (the "Securities Act") for securities issued by non-reporting companies pursuant to compensatory arrangements, and Form S-8, the simplified form for the registration under the Securities Act of securities to be offered under any employee benefit plan to a registrant's employees or employees of its subsidiaries or parents, and the relationship between Rule 701 and Form S-8, consistent with investor protection (the "Concept Release").

The comments set forth in this letter represent the views of the Subcommittee only and have not been approved by the ABA's House of Delegates or Board of Governors and should not be construed as representing the policy of the ABA. In addition, this letter does not represent the official position of the ABA Section of Business Law, nor does it necessarily reflect the views of all members of the Subcommittee.

The Subcommittee thanks the Commission for this opportunity to comment on the Concept Release. Set out below is a general summary of the Subcommittee's views, followed by specific comments related to the Concept Release.[1]

I. Introduction

The Commission has long recognized that offers and sales of securities in compensatory transactions present different issues than offers and sales in capital-raising transactions and justify a lighter regulatory touch. The use of equity

[1] Please note that in ordering our responses we have used the same numbering system set forth in the Concept Release. If a numbered question has been omitted, we are not intending to provide a response to that question.

compensation has been an important component in new business development and job creation. The rules and forms for offers and sales of equity securities under employee benefit plans have not been revised in almost 20 years and we applaud the Commission's efforts to look into this area. Recent developments in the global economy, which reflect new ways of doing business, warrant a re-assessment of whether the existing regulatory scheme needs to adapt to a changing economy.

We acknowledge the actions the Commission has taken in the past to adapt the Rule 701 exemption to changes in the design and use of compensatory offerings of equity securities by privately-held issuers and to streamline Form S-8 to reduce the costs and burdens associated to the registration of equity securities issued pursuant to the employee benefit plans of Exchange Act reporting issuers. We believe the Commission can take additional steps as set forth in this letter to continue to facilitate the use of equity securities in compensatory transactions with service providers and others in similar relationships consistent with the overarching objectives of the Securities Act.

II. Specific Recommendations – Rule 701

A. Rule 701(c) – Eligible Plan Participants

a) Question 1: <u>To what extent should definitions of "employee" under other regulatory regimes guide our thinking on eligible participants in compensatory securities offerings?</u>

We support the Commission's initiative to consider the application of Rule 701 to individuals who work in non-traditional relationships, including so-called "gig economy" workers. We believe that, for purposes of Rule 701, the traditional definitions of "employee" should be adapted to accommodate the new types of work arrangements that characterize the "gig economy."

As acknowledged in the Concept Release, historically the Commission has recognized the different considerations that exist related to the offer and sale of securities in "compensatory" transactions, as opposed to "capital-raising" transactions.[2] Traditionally, issuers have used equity awards to attract, motivate, and retain individuals who can contribute to the success of the enterprise in the long-term, and these equity awards have enabled those individuals to share in the long-term appreciation in the value of the issuer. As a result, Rule 701 has been an important exemption for both issuers and those individuals who contribute to their success.

We do not believe that the definitions of "employee" under other regulatory regimes should determine which individuals are eligible to receive compensatory equity under the Rule 701 exemption. The questions that should be answered for that purpose are twofold:

- does the individual have a relationship with, and contribute to the success of, the issuer; and
- is the transaction compensatory in nature?

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[2] See, for example, Release No. 33-3469-X (Apr. 10, 1953), 18 Fed. Reg. 2,182 (Apr. 17, 1953) and Registration of Securities Offered Pursuant to Employee Stock Purchase Plans, Release No. 33-3480 (Jun. 16, 1953), 18 Fed. Reg. 3,688 (Jun. 27, 1953).

The contribution made can be as a result of providing services through an issuer's platform under the issuer's brand (such as with a ride-sharing service) or contributing content on an issuer's media platform in exchange for a portion of the revenue generated from the content. In both cases, the individual must be providing *bona fide* services or content in a *bona fide* compensatory arrangement. In those instances, if an issuer wishes to provide an equity incentive to align the individual's interest with those of the issuer's shareholders, Rule 701 should be available. However, in neither of those cases would the individuals be considered "employees," "consultants," or "advisors" under the traditional definitions of those terms and may not meet the definition of "*de facto* employees" as defined in previous SEC releases or no-action letters.[3] In short, the rule needs to be updated.

We believe that the Commission should expand the application of Rule 701 to "platform contributors" to the extent that the equity award granted to such an individual is for *bona fide* compensatory services. For this purpose, a "platform contributor" should include any individual who provides the services or content pursuant to an agreement (including terms of service) with or for the benefit of the company granting the equity award. If the Commission is concerned that it may be too easy to become a platform contributor and that individuals may do so for the sole purpose of obtaining an equity award from a company, it could specify that the exemption would only be available for awards the fair value of which was not more than a specified percentage of the cash compensation that the individual receives with respect to his or her services or content.

b) Question 2: Would the application of Rule 701 to consultants and advisors in any circumstances cover the alternative work arrangements described above?

We do not believe that the platform relationships described in our response to Question 1 fit within the current application of the terms "consultants" and "advisors" under Rule 701. Accordingly, we recommend that the Commission reformulate Rule 701 to specifically permit its application to the service providers and contributors of the type (and to other similar platforms or arrangements) described in our response to Question 1.

c) Question 3: What, if any, services should an individual participating in the "gig economy" need to provide to the issuer to be eligible under Rule 701?

Please see our response to Question 1. In any event, we believe that eligibility for Rule 701 should be based on any *bona fide* services provided to the issuer, so long as the services do not involve raising capital. We do not believe it is helpful to attempt exhaustively to list the types of services or contributions that would make an individual eligible under Rule 701. In our view, the important points are that the services or contributions are *bona fide* and they do not involve capital-raising.

d) Question 4: 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?

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[3] *See, for example*, Registration of Securities on Form S-8, Release Nos. 33-7506, 34-39669 (Feb. 17, 1998), 63 Fed. Reg. 9,648; *Herff-Jones* no-action letter (available Mar. 13, 2000, reconsidered Aug. 1, 2000; *LPL Holdings, Inc.* (available Apr. 18,2001).

Please see our response to Questions 1 through Question 3. We believe the only test should be whether the individual is providing *bona fide* services or contributions in a compensatory arrangement with or for the benefit of the issuer that does not involve capital-raising.

a. Are any other factors necessary to establish any level of control by the issuer, such as requiring the work to be assigned by the issuer? Or is it necessary that the issuer control what the individual charges end users for services, such as by setting hourly rates or ride fares? Should a written contractual relationship between the issuer and individual be necessary?

We do not believe that having the Commission specify the elements of the work or service relationship necessary for purposes of Rule 701 will result in a more effective exemption or better investor protection. It should be sufficient that the individual receiving the equity award provides *bona fide* services or contributions in a compensatory arrangement with or for the benefit of the issuer and that the services or contributions do not involve capital-raising.

b. Does it matter whether the individual goes through a vetting or screening process by the issuer to use the platform?

We do not believe that such a specific Rule 701 requirement would add anything meaningful to the exemption. It is our understanding, however, that such vetting and screening processes occur in almost all of the platforms that are within the "gig economy."

c. Does it matter whether the issuer controls when and how the individual receives monetary compensation for the services provided?

We believe that so long as the arrangement is a *bona fide* compensatory arrangement with or for the benefit of the issuer, the details of the arrangement should not be relevant to the availability of the exemption.

e) Question 5: Would it be sufficient for an individual to use the issuer's platform to sell goods, to earn money from leasing real estate or personal property, or to conduct a business activity? Would the individual be considered to be providing a service to either or both the company and its end-users or customers? Does it matter whether that business activity provides a service typically provided by an employee or is of a more entrepreneurial nature?

Given the dramatic changes in the nature of work relationships in the "gig economy," we believe that the exemption should be sufficiently flexible to permit the types of platforms (or similar arrangements) described in our response to Question 1, as well as platforms or models where there is a service provider or contributor that is providing a company platform as long as the activities do not include capital-raising of the type currently prohibited by Rule 701.

f) Question 6: Should it make a difference whether the end user pays the issuer for the goods or leased property, and the issuer then provides a monetary payment to the individual, or the end user pays the individual directly, who then pays a fee to the issuer?

Please see our response to Question 1.

g) Question 7: For example, 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?

Please see our response to Question 1. Alternatives such as those described in Question 7 could be used to limit the value of the equity awards that may be granted under Rule 701 relative to the cash compensation received by the individual performing the *bona fide* services or contributions. In any case, any such limitations should not be so complex that they cannot be effectively administered by "gig economy" issuers.

We do not believe that specific verification should be required. However, "gig economy" issuers should be required to retain records as is currently the case with respect to Rule 701 in order to verify compliance with the exemption. Nor do we believe that providing services to multiple issuers should be a factor in fashioning a rule that applies to individuals in the "gig economy" workplace. In our view, the limitations on the value of the equity awards that may be granted by a "gig economy" issuer to service providers or contributors as suggested in our response to this Question 7 should be sufficient.

h) Question 8: Alternatively, where the individual provides services, should eligibility be based on information objectively verifiable by the issuer, such as amount of income earned, or percentage of time or number of hours worked?

Please see our response to Question 7.

i) Question 9: Where use of the platform relates to leasing a property, should the test focus on how frequently the property is available, how often it actually is leased, the revenues generated by the property, or other factors?

Please see our response to Question 7.

j) Question 10: Should the test focus on the extent to which the individual uses the issuer's platform to obtain business on a regular basis? Should it consider the duration of time over which the individual has so used the issuer's platform?

Please see our response to Question 7.

k) Question 11: Should the test instead focus on the extent to which the issuer's business is dependent on individuals' use of the issuer's platform? If so, why, and how should that dependence be measured?

Please see our response to Question 7.

l) Question 13: Would revising the rule have an effect on a company's decision to become a reporting company? Would such revisions encourage companies to stay private longer?

As discussed below, we believe that the changes made to Form S-8 should conform to the changes made to Rule 701, thus we expect that any changes would be neutral to a company's decision to become a reporting company. Reducing the eligibility uncertainty of Rule 701 and addressing other compliance burdens, while positive developments, are unlikely to have any significant effect on a company's decision to stay private.

m) Question 14: 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?

We do not believe that expanding the Rule 701 exemption to include individuals participating in the "gig economy" is likely to harm investors. The revisions to Section 12(g)(5) of the Exchange Act[4] resulting from the JOBS Act (and the subsequent revisions to Exchange Act Rule 12g5-1) reflect Congressional intent to exempt persons who receive securities pursuant to an employee compensation plan in transactions exempted from the registration requirements of Section 5 of the Securities Act from the count when determining whether Exchange Act registration and reporting is required. Assuming that the addition of individuals participating in the "gig economy" to the class of individuals eligible for Rule 701 is accompanied by the protections described elsewhere herein, investors should not be harmed by the higher levels of equity ownership in the hands of persons who would not be shareholders of record.

n) Question 15: Should the amount of securities issuable pursuant to Rule 701 to individuals participating in the "gig economy" in a 12-month period be subject to a separate ceiling rather than the current Rule 701(d) ceilings?

We recommend that any ceiling on the amount of securities issuable pursuant to Rule 701 should apply to all awards made to individuals eligible under the rule. We do not see any basis for distinguishing between different categories of workers in determining the amount of securities they may receive. Moreover, the introduction of separate limits would increase the compliance burdens of Rule 701 for "gig economy" issuers without any demonstrable benefit.

o) Question 16: Should additional disclosures be provided?

We do not believe that it would serve any useful purpose to create separate categories of individuals for whom compliance with Rule 701 would vary. As set forth in our response to Question 15, if anything, the addition of such disclosures would just create additional costs and burdens for "gig economy" issuers.

[4] 15 U.S.C. § 78l(g)(5).

B. Rule 701(e) Disclosure Requirements

General

a) Question 22: Should Rule 701(e) continue to require more disclosure for a period that precedes the threshold amount being exceeded? If so, should the consequence for failure to deliver continue to be loss of the exemption for the entire offering?

We believe the current requirement in Rule 701(e) that issuers provide the required information for the entire offering period, including for offers and sales before the threshold was exceeded is largely unworkable and has become a trap for the unwary. Assuming that the $10 million exemption threshold authorized in 2018 remains the appropriate disclosure trigger, we recommend that Rule 701 provide that such disclosure be made only with respect to the period following the threshold amount being exceeded and that Rule 701 provide a "grace period" where, if the threshold is exceeded, an issuer would be required to provide disclosure only for future offers or sales after such "grace period." We believe that failure to deliver the required information with respect to offers or sales made prior to exceeding the threshold should not result in the loss of the exemption for such transactions. Currently, issuers must anticipate whether (and when) the threshold will be exceeded, leading to accidental noncompliance if a large award is granted at the end of any 12-month period. In any event, we recommend that only the failure to provide disclosure for offers or sales taking place following a specified "grace period" after the threshold has been exceeded should result in the loss of the exemption.

b) Question 23: To what extent are non-reporting companies that issue securities in an amount that would exceed the new threshold already preparing forms of financial disclosure, such as in connection with 17 CFR 230.500 through 230.508 (Regulation D) or Regulation A?

Although in our experience all non-reporting issuers prepare some form of financial information for their investors, we do not have any data on whether non-reporting issuers currently prepare financial information that complies with the requirements of Regulations D or Regulation A. However, our sense is that many issuers do not prepare the same type of financial information that would be included in a filing under Regulation A.

c) Question 24: Alternatively, should the consequence for failing to provide the disclosure be loss of the exemption only for transactions in offerings that occur after the threshold is crossed and for which disclosure was not provided?

We believe that the consequence for failing to provide the required disclosure should be prospective only and should result in the loss of the exemption only for the exercise of stock options and sales of other equity securities that occur after the threshold is crossed and for which disclosure was not provided. Please see our response to Question 22.

a. If disclosure is required only for transactions that occur after the $10 million threshold is crossed, should disclosure be required for all transactions immediately following that event, or should an interval of time be provided to permit the disclosure to be prepared before it must be delivered? If so, how long should that time interval be?

Please see our response to Question 22. Many issuers, especially when they are initially subject to providing the required disclosure, often struggle and incur significant expense complying with the disclosure requirement. As set forth in our response to Question 22, an appropriate "grace period" following the time that the $10 million exemption threshold has been exceeded should be provided to permit the required disclosure to be prepared before it must be delivered. There does not appear to be a compelling reason to exacerbate the failure to deliver the information by requiring the disclosure to be made immediately. For this purpose, we believe that an appropriate "grace period" would be 30 days following the date the threshold is exceeded.

b. Should the disclosure subsequently also be made available to investors in transactions that occurred before the $10 million threshold is crossed?

If the theory for requiring the information is to assist the recipient in making an investment decision, providing for "after-the-fact" delivery of information would not further that goal.

d) Question 25: Alternatively, should there instead be a grace period, such that if the threshold is crossed, the issuer has an opportunity to provide the required disclosure before losing the exemption for the entire offering?

While we are in favor of a "grace period," as discussed in our response to Question 22, we recommend that such a period be for future offers or sales only, and that there should be no loss of the exemption for prior offers or sales. We believe our response to Question 24 is the preferable alternative to the question posed for the reasons set forth above.

e) Question 26: Should we provide a regulatory option whereby all Rule 701(e) information would be disclosed to all investors, so that all would receive equal information and there would be no risk of losing the exemption in the manner there is today?

We do not believe that this alternative is appropriate, as it would create additional costs and burdens for issuers.

f) Question 27: Should the type of information provided depend on who is the recipient of the securities? For example, should more disclosure be provided to the types of recipients described in Section II.B. above?

Please see our response to Question 26.

g) Question 28: Should this disclosure be updated less frequently than currently required? For example, should we require updates once a year unless an event results in a material change to the company's enterprise value or value of the securities issued?

Although Rule 701 requires financial disclosure to be dated as of a date no more than 180 days before the sale of the securities, because Rule 701 offerings are generally continuous offerings, the practical result is that the financial disclosure must be updated quarterly. In our experience, the current requirement is burdensome and costly for most issuers and would be burdensome even if the recommendations in our responses to Questions 22 and 23 are implemented. Thus, it would be most helpful to issuers to be permitted to use financial information that may be dated as of a date that is more than 180 days before the sale of the securities to be issued.

Accordingly, we recommend that the financial disclosure be required to be updated and provided only once per fiscal year unless a material event results in a material change to the enterprise value of the issuer or the value of the securities being awarded. We note that this recommendation generally conforms to the Internal Revenue Service ("IRS") regulations under Section 409A of the Internal Revenue Code[5] that generally permits companies to value private company stock once every 12 months for purposes of pricing stock option grants (that is, determining the option exercise price), which we believe strikes a reasonable balance between ensuring disclosure is appropriate and the costs and burdens imposed on privately-held issuers to prepare such disclosure

h) Question 29: <u>Should we consider other alternatives to the Regulation A financial statements, such as the issuer's most recent balance sheet and income statement as of a date no more than 180 days before the sale of securities?</u>

We recommend simplifying the financial disclosure required under Rule 701(e) by de-coupling it from Regulation A and, instead, requiring that an issuer provide a current balance sheet and income statement. We also recommend specifically eliminating any requirement for footnotes to such financial documents.

i) Question 30: <u>Should we provide a regulatory option that would provide valuation information regarding the securities in lieu of, or in addition to, financial statements? If so, what valuation method should be used? Would ASC Topic 718 grant date fair value information be informative? Would Internal Revenue Code Section 409A valuation information be informative? If so, would issuers be able to determine Section 409A valuations regardless of whether the offering involves securities other than options?</u>

We agree with the recommendation of Sullivan & Cromwell[6] that issuers should be permitted to provide valuation information regarding their securities that conforms to the requirements of Section 409A of the Internal Revenue Code in lieu of GAAP financial statements. As is noted in support of that recommendation, such information is subject to an existing regulatory scheme and has independent economic significance. It is, therefore, a practical alternative to providing GAAP financial statements, which require greater effort and cost to produce.

j) Question 31: <u>Because foreign private issuers that are subject to the Exchange Act reporting requirements generally are not required to submit quarterly financial statements, should non-reporting foreign private issuers that rely on Rule 701 be subject to the condition to provide quarterly financial statements if they are continuing to sell securities throughout the year?</u>

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[5] Treas. Reg. § 1.409A-1(b)(5)(iv)(B) (2017).

[6] *See* the comment letter of Sullivan & Cromwell LLP (Sept. 24, 2018).

Rule 701(e)(4) provides that, if the aggregate sales price or amount of securities sold during any consecutive 12-month period exceeds $10 million, issuers must deliver to investors, among other things, certain financial statements that must be as of a date no more than 180 days before the sale of the securities. As we noted in our response to Question 28, to satisfy this requirement on a continuing basis, an issuer must prepare and publicly disseminate financial statements on a quarterly basis. We do not believe that non-reporting foreign private issuers should be subject to this condition to provide quarterly financial statements. Instead, we recommend that the provision of financial statements by a non-reporting foreign private issuer should conform to the requirements for the provision of annual financial statements in connection with Form 20-F and that semi-annual financial statements be provided within the time frame required by home country rules.[7]

k) Question 32: Should we amend any other aspect of the Rule 701 financial statement requirements that apply to foreign private issuers?

Please see our response to Question 31.

Timing and Manner of Rule 701(e) Disclosure

a) Question 33: Do we need to clarify what it means to deliver disclosure "a reasonable period of time before the date of sale"? Should that mean any time before sale such that the recipient has an opportunity to review the disclosure?

We urge the Commission to clarify what it means to deliver disclosure "a reasonable period of time before the date of sale." Specifically, we recommend that Rule 701 be amended to clarify that any disclosure delivered to an eligible recipient at least two business days before the purchase or receipt of the shares of stock subject to an equity award or the exercise of a stock option satisfies the disclosure obligation of the exemption. Further, as discussed in our responses to Questions 37 through 39 below, we recommend that Rule 701 be amended to provide that disclosure with respect to the grant of RSU awards must be made within a reasonable time prior to settlement (rather than the date of grant).

b) Question 34: Should we specify a different time for providing disclosure?

Please see our response to Question 33.

c) Question 35: Should we also specify the manner or medium in which disclosure should be delivered? Should we specify how to deliver information electronically?

We welcome guidance from the Commission on the manner or medium in which the disclosure required by Rule 701 should be delivered. We recommend that Rule 701 be amended to provide that disclosure to an eligible recipient in a manner consistent with the Commission's electronic disclosure rules[8] (for example, via an online data site that is accessible to the individual) satisfies the information

[7] *See* the comment letter of Sherman & Sterling LLP (Sept. 21, 2018).

[8] *See, for example,* Exchange Act Rule 14a-16 (17 C.F.R. 240.14a-16).

delivery requirement. In addition, we recommend revising the exemption to provide specific guidance permitting safeguards to avoid unauthorized disclosure in the context of making the disclosure available in a physical location accessible to the individual during ordinary business hours upon reasonable notice as set forth in Compliance and Disclosure Interpretation No. 271.25 (November 6, 2017). Further, we believe that there should be no requirement for an issuer to confirm actual receipt or review of the disclosure.

d) Question 36: Should the rule specify that confidentiality safeguards should not be so burdensome that intended recipients cannot effectively access the required disclosures?

We agree that the confidentiality safeguards should not be so burdensome that intended recipients cannot effectively access the required disclosures. Specifying that standard in the rule, however, could be troublesome unless issuers have clear guidance on what is considered burdensome. For example, we believe that making the disclosure available in a physical location accessible to eligible recipients during ordinary business hours upon reasonable notice satisfies the obligation to provide disclosure.

Options and Other Derivative Securities/RSUs

a) Question 37: Should Rule 701 be amended to specifically address when disclosure is required for RSUs? If so, when should Rule 701(e) disclosure be required for an RSU? Should we revisit the concept of "convert or exercise" as providing the relevant date for disclosure?

We believe that Rule 701 should be amended to address the unique issues with which issuers are confronted when attempting to make use of the current version of the exemption to grant restricted stock unit ("RSU") awards to their employees. Currently, we understand the Commission staff's position to be that the date of sale for an RSU award claiming the exemption under Rule 701 is the date the award is granted. Consequently, an issuer that has exceeded the $10 million threshold set forth in Rule 701(e) must provide the information contemplated by Rule 701(e)(1) through (4) a reasonable time before the award is granted – a requirement that is for all purposes a practical impossibility for most new hires. For the reasons set forth hereafter, we believe that the expanded disclosure required by Rule 701(e)(1) through (4) should be provided to the recipient of a RSU award within a reasonable period of time prior to the settlement – rather than the grant – of the award.

An RSU award represents a contractual right to receive shares of stock of the issuer in the future. An RSU award is a derivative security and we believe that Rule 701 should recognize an RSU award as a derivative security for all purposes under the exemption and provide that the disclosure delivery requirements should apply as they do to other derivative securities, including Rule 701(e)(6), which provides that an issuer must deliver disclosure a reasonable period of time before the date of exercise or conversion of a derivative security. We believe that Rule 701 should provide that the settlement of an RSU award is a conversion within the meaning of Rule 701(e)(6) on the date of settlement. Therefore, it is logical and internally consistent that issuers should be required to deliver disclosure a reasonable period of time before the date of settlement of an RSU award.

RSU awards are frequently made broadly available and often are provided to a newly-hired employee as part of his or her new hire compensation package. A requirement that, in connection with granting an RSU award, financial information about an issuer must be provided to an individual who is considering joining the issuer would result in an obligation to provide sensitive financial and operation risk information to individuals who receive offers of employment that contemplate the grant of an RSU award.

As a practical matter, the actual date of grant of an RSU award often follows the date an employee decides to join an issuer. Under the terms of virtually every equity compensation plan, equity awards may not be granted to individuals before they become an employee of the granting corporation. Thus, in such cases, even if the required disclosure can be made available to the recipient of an RSU award within 30 days after commencement of employment, such disclosure is effectively irrelevant to the individual's decision to accept and commence employment. Such disclosure would provide no benefit to the recipient relative to the decision to accept and commence an employment relationship or to continue in such relationship, but puts an undue burden on the issuer to provide sensitive information about its financial condition.

We understand that, from the Commission's perspective, the relevant investment decision for an RSU award, if there is one, likely takes place at the date of grant. However, an individual's decision to accept an offer of employment or enter into a service relationship does not constitute the specific consideration needed to form an "investment contract." In *International Brotherhood of Teamsters v. Daniel*, the Supreme Court held that an investment of money requires the exchange of a specific consideration in return for an identifiable financial interest. 439 U.S. 551 (1979) (citing *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946)). The Court stated that Daniel's labor was not a specific consideration because the labor he exchanged for his salary could not be separated from the labor he exchanged for an interest in the pension fund. In the same vein, an employee or service provider's decision to accept an offer of employment or enter into a service relationship does not constitute specific consideration for his or her receipt of an RSU award, which is but one component of his or her overall compensation package.

Finally, we note that previously the Commission has acknowledged that some compensatory transactions are conducted without registration under Section 5 of the Securities Act pursuant to the "no sale" theory.[9] Under this theory, an employer's award of equity to an employee is not considered an "offer" or "sale" of securities if (i) the awards are made pursuant to an established plan, (ii) the awards are not specifically bargained for by the employee, and (iii) the awards are granted for no consideration other than the employee's previously-agreed services. For many typical RSU awards, these conditions are each satisfied:

- the awards are typically made pursuant to an established plan, reflected in a formal plan document that has been adopted by the issuer's board of directors and approved by its shareholders or are materially consistent with the terms of such a plan even if granted

[9] The "no sale" theory was recognized in Employee Benefit Plans; Interpretation of Statute, Release No. 33-6188 (Feb. 1, 1980), 45 Fed. Reg. 8,960 (Feb. 11, 1980), at Section II.A.5.d, and Employee Benefit Plans, Release No. 33-6281 (Jan. 15, 1981), 46 Fed. Reg. 8,446 (Jan. 27, 1981), at Section III.

outside the established plan;

- the awards are not specifically bargained for by the recipients, in the sense that the individuals do not have any say in the form or amount of the award; and

- the awards are granted for no consideration other than the recipient's previously-agreed upon or ongoing services to the issuer.

Further, such awards are generally made available to a relatively broad class of employees and the number of shares granted, in the aggregate, is relatively small compared to the issuer's total outstanding shares. The recipients of the RSU awards are not making an investment decision (since, in almost all instances, an employee would choose to participate if given the opportunity) and, therefore, registration would serve little purpose.

b) Question 38: Should we clarify that RSU awards should be valued for Rule 701 purposes based on the value of the underlying securities on the date of grant?

We recommend that the grant date fair value of an RSU award granted in reliance on the Rule 701 exemption should continue to be used for purposes of calculating whether "offers" and "sales" are within the permissible limits. However, for the reasons set forth in our response to Question 37, we believe that the timing of the disclosure required pursuant to Rule 701(e) should be tied to the settlement date of such awards, similar to the current treatment of stock options.

c) Question 39: Are there any other instruments that should be specifically addressed in the rule?

We do not believe that any such action is necessary at this time.

C. Rule 701(d) Exemptive Conditions

a) Question 40: Is there a continuing need for any annual regulatory ceiling for Rule 701 transactions?

We do not believe that there is a continuing need for an annual regulatory ceiling for Rule 701 transactions. After 30 years' experience with the exemption, we believe that compliance with an annual regulatory ceiling imposes costly ongoing analysis and monitoring on issuers without any clear benefit to either them or their employees. Perhaps most importantly, in our view, it does not serve as an effective curb on non-compensatory sales ostensibly made in reliance on Rule 701.

The National Securities Market Improvement Act of 1996 ("NSMIA")[10] enacted Section 28 of the Securities Act,[11] giving the Commission the general authority to exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or

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[10] Pub. L. No. 104-290 (1996).

[11] *See* 15 U.S.C. § 77z-3.

provisions of the Securities Act or of any rule or regulation issued under the Securities Act, to the extent that such exemption is found to be necessary or appropriate in the public interest, and is consistent with the protection of investors. Pursuant to this authority, the Commission acted to provide that the $5 million absolute limit of Section 3(b) of the Securities Act[12] does not apply to Rule 701.[13]

Further, compliance with either Rule 701(d)(2)(ii) (the "15% of total assets" test) or Rule 701(d)(2)(iii) (the "15% of total outstanding securities of the class being offered and sold" test) is difficult for most issuers, particularly for smaller issuers. As a practical matter, the compliance and administration challenges posed by these tests limit their utility for many issuers, which, at best, monitor compliance in a less than rigorous manner. Further, the $1 million limitation of Rule 701(d)(2)(i) makes little sense in the current business environment, particularly given the broad use of equity awards by most privately-held issuers.

c) Question 41: <u>If a ceiling is retained, should it be raised? If so, what threshold would be appropriate, and why? Would compliance be easier if issuers are permitted to measure the 15% alternatives as of last fiscal year-end, rather than at the issuer's most recent balance sheet date?</u>

Please see our response to Question 40, which recommends that the annual regulatory ceiling requirement be rescinded. However, if an annual regulatory ceiling is retained, we recommend clarifying that material amendments to any awards previously granted pursuant to Rule 701 do not result in a new "offer" or "sale" of the same securities for purposes of the exemption and determining compliance with the applicable ceiling. While such a clarification would be most helpful in the case of stock option repricings, we believe that it would also be useful when other materials amendments are made to outstanding equity awards that do not result in the issuance of additional securities. Further, as noted in our response to Question 38, we recommend clarifying to that to the extent the "no-sale" theory does not apply, RSU awards should be valued at their grant date fair value for purposes of Rule 701(d).

III. Specific Recommendations – Form S-8

A. Form S-8 Eligible Plan Participants

a) Question 42: <u>Should the eligibility standards for Form S-8 be conformed to any changes made to Rule 701?</u>

We recommend that the scope of individuals eligible for compensatory offerings for purposes of Rule 701 and Form S-8 should be consistent. Thus, we support any action by the Commission to conform the eligibility standards of Form S-8 with any expansion of the eligibility standards of Rule 701, including those related to "gig economy" issuers. Issuers have come to rely on Rule 701 for compensating their employees with equity when they are privately-held, and then switching to reliance on registered offering using Form S-8 for the continuing issuance of equity awards to their employees following their initial public offering. We note that, historically, whenever the Commission has adopted amendments to

[12] *See* 15 U.S.C. §77c(b).

[13] *See* Rule 701 – Exempt Offerings Pursuant to Compensatory Arrangements, Release No. 33-7645 (Feb. 25, 1999), 64 Fed. Reg. 11,095 (March 8, 1999), at Section 2.A.

Rule 701 and/or Form S-8, it has generally sought to harmonize the scope of the provisions whenever reasonable.[14] We see no reason not to continue this practice, particularly in view of the possible extension of Rule 701 to categories of individuals, such as service providers and platform contributors, who do not fall within the traditional definition of the term "employee."

b) Question 43: Would maintaining different eligibility standards create problems?

We believe that creating or maintaining different eligibility standards for Rule 701 and Form S-8 would be counter-productive and create unnecessary compliance burdens for issuers. Perhaps most importantly, however, doing so would impede the ability of issuers to implement consistent and beneficial equity strategies without regard to their reporting status under the federal securities laws. In other words, we do not believe that it is in the best interest of issuers and the individuals who are either service providers or platform contributors to such issuers to have a broad eligibility standard (potentially encompassing a variety of categories of workers) when they are privately-held and a different standard once they become a public reporting company. Not only would such an approach create difficult administrative burdens, it would ignore the effectiveness of the equity strategy that may have been a key factor in driving the business results that enabled an issuer to become a public reporting company in the first place.

B. Administrative Burdens

a) Question 44: Would revising Form S-8 to reduce the compliance burdens encourage more companies to become reporting companies?

In our experience, the ease or difficulty of compliance with Form S-8 is not one of the key factors that influence the decision of an issuer to become a public reporting company. Consequently, while we believe that issuers would welcome changes to Form S-8 to reduce compliance burdens, such changes alone are unlikely to encourage issuers to become public reporting companies. Nonetheless, to the extent that streamlining the process by which issuers are able to grant equity awards to their service providers or platform contributors reduces compliance burdens without sacrificing investor protection, this would create a net positive for issuers contemplating a public listing.

b) Question 45: Should the registration requirements of Form S-8 be further simplified?

As a general matter, we believe that simplification is always a desirable goal if it can be accomplished consistent with investor protection. One area where such simplification would be welcome involves the registration of additional equity securities for issuance pursuant to the various employee benefits plans that an issuer sponsors. For example, "well-known seasoned issuers"[15] could be permitted to use a modified "pay-as-you-go" system for their registered offerings of equity securities to their employees, using an approach currently permitted for such issuers with "off-the-shelf" registration statements. Since typically these offerings are conducted on a continuous basis, the Commission could

[14] *See*, for example, Adoption of Amendments to Form S-8-related Rules under the Securities Act, and Regulations S-K and S-B, Release Nos. 33-7646, 34-411099 (Feb. 26, 1999), 64 Fed. Reg. 11,103 (Mar. 8, 1999).

[15] For the definition of a "well-known seasoned issuer," see Securities Act Rule 405 (17 C.F.R. 230.405).

require that at the time of filing of its annual report on Form 10-K an issuer would total up the sales that occurred during the prior fiscal year (using the same calculation methodology as under Rule 701) and pay the fee based on actual numbers of shares offered and/or sold.

In addition, we recommend that the Commission consider extending the principle underlying the staff's response in Compliance and Disclosure Interpretation Question No. 126.41 (Sept. 22, 2016) to provide that an offering of securities through an employer securities fund in which employee contributions may be invested, such as a Section 401(k) plan, where the plan trustee purchases the shares for employee accounts on the open market and the issuer does not promote the stock fund in any manner, is not considered an offer or sale of securities by the issuer requiring registration under the Securities Act. In our view, consistent with the reasoning articulated in Securities Act Release 33-4790[16] with respect to stock purchase plans, where all communications of a soliciting character are furnished by or in the name of the trustee, and the issuer does not engage in any activities that exceed those set forth in the Release, such an arrangement does not involve any meaningful participation by an issuer in the program and, therefore, the issuer should not be considered to be offering its securities to its employees for purposes of Securities Act registration.

We note that, in view of the decision of the IRS to generally discontinue the issuance of determination letters that a plan is qualified under Section 401 of the Internal Revenue Code for individually-designed plans, it is no longer practical for many issuers to provide the undertaking contemplated by Item 8(b) of Part II of Form S-8. Accordingly, we request that the Commission consider reformulating this accommodation to eliminate the requirement of an opinion letter or determination letter. In the interim, it would be helpful to provide guidance that those issuers which have adopted a prototype or volume submitter plan may satisfy the IRS determination letter requirement by providing a copy of the IRS letter regarding the prototype or volume submitter plan that was issued to the sponsor of the prototype or volume submitter plan that was adopted. Alternatively, the undertaking in Item 8 could be revised to recognize the IRS correction program with respect to qualification of plans and have the registrant undertake to make corrections in order to maintain the qualification of the plan as required by the IRS.

We also recommend simplification by eliminating the requirement of filing Form 11-K with respect to employee benefit plan interests that have been registered. In general, the Form 11-K doesn't provide useful information to employees that isn't already available through other means. Many employee benefit plans already file and make available information on their IRS Form 5500.

c) Question 46: <u>Should Form S-8 allow an issuer to register on a single form the offers and sales pursuant to all the employee benefit plans that it sponsors?</u>

We do not believe that there is currently an explicit requirement under Form S-8 that only shares under a single employee benefit plan may be registered on a specific registration statement. Nonetheless, we recommend that the Commission clarify this point in any amendments to the form. We know of no benefit that comes from restricting the form to separate employee benefits plans.

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[16] (July 13, 1965).

In support of our recommendation, we note the following:

- The only plan-specific information included in the registration statement is the name of the plan, which must appear on the front cover.
- As long as the issuer equity securities being registered are of a class that is described in the registration statement, there is no additional information that should be necessary when more shares are authorized for issuance pursuant to the registered plan or plans.[17]
- Under the current requirements, material changes to an employee benefit plan are reflected in the prospectus, which is not filed as part of the registration statement.

Thus, in our view, there are no practical impediments to permitting an issuer to register on a single Form S-8 the offers and sales of its equity securities pursuant to all employee benefit plans that it sponsors. Not only would such an enhancement to the current requirements reduce costs, as noted in our response to Question 48, it would also alleviate the current administrative burdens associated with maintaining multiple registration statements simultaneously.

d) Question 47: <u>If we were to move to a single registration statement for all employee benefit plan securities, what is the best approach for determining the number of shares to be registered?</u>

Please see our response to Question 45 where we endorse a modified "pay-as-you-go" system that would entail the calculation of the number of shares of issuer equity securities to be registered and the payment of the associated fees on an annual basis in connection with the filing of the annual report on Form 10-K. In addition, such a streamlined system could provide that an issuer would not be required to initially specify the total number of its equity securities to be registered, but, instead, would provide for the issuer to "pay-as-you-go" each year in conjunction with the filing of its annual report on Form 10-K.

e) Question 48: <u>With respect to either alternative above, would the use of a single Form S-8 reduce administrative burdens and be practicable given issuers' use of different types of plans?</u>

We believe that a single "omnibus" registration statement on Form S-8 would reduce the administrative burdens of registering offers and sales of issuer equity securities for multiple employee benefit plans and can be easily accommodated by issuers. The fact that the securities may be issued from different plans is irrelevant from the standpoint of Form S-8, as the form does not include any plan specific information (all of this information is "Part I information" that is not required in the registration statement). Further, even employee benefit plans involving the issuance of "plan interests" can be easily accommodated by this approach because, under the current system, no separate fee is payable for the registration of plan interests. Finally, the source of the securities – that is, from which issuer plan they came – is purely an accounting matter and irrelevant from the standpoint of the registration statement. In our view, the most important point is that the issuer equity securities were offered and sold pursuant

[17] *See* Part I, *Information Required in the Section 10(a) Prospectus*, of Form S-8 (17 C.F.R. 239.16b).

to an effective registration statement filed under the Securities Act and, thus, the employee-purchaser has all of the protections of the Securities Act.

f) Question 49: Should we adopt a "pay-as-you-go" system for paying filing fees similar to that available to "well-known seasoned issuers" and, if so, (i) what variations would be needed to adapt it to employee benefit plan registration statements and (ii) should we adopt a similar cure provision?

Please see our response to Question 45 where we endorse a modified "pay-as-you-go" system that would entail the calculation of the number of shares of issuer equity securities to be registered and the payment of the associated fees on an annual basis in connection with the filing of the annual report on Form 10-K. Consistent with this approach, we also recommend that the Commission adopt a similar "cure" provision to remedy any inadvertent or nominal errors. This would enable such issuers to pay the registration fee after the original payment due date if an issuer makes a good faith effort to pay the fee on a timely basis and then pays the fee within four business days of the original due date.

g) Question 50: Alternatively, should we require the payment of registration fees on a periodic basis with respect to the securities, the offer and sale of which were registered on Form S-8, during the prior period and, if so, how would such a system best be implemented?

Please see our response to Question 45. While we recognize that the proposed system for the payment of registration fees is not consistent with Section 6(c) of the Securities Act, we recommend that the Commission use its authority under Section 28 of the Securities Act to exempt these offerings from such a requirement, consistent with the protection of investors.

h) Question 51: Are there any other ways to reduce the administrative burdens associated with filing and updating Form S-8?

Over the years, the Commission has done an admirable job of streamlining the process of preparing and filing Form S-8 to eliminate many of the administrative burdens otherwise associated with registration under the Securities Act. There are, however, some tasks that are difficult, if not impossible, to eliminate. For example, a filing must be made, filing fees must be calculated and paid, legality opinions must be prepared and filed, auditor consents must be obtained, the issuer must identify which of its employee benefit plan materials constitute part of the prospectus under the Securities Act, and the issuer must comply with the delivery obligations set forth in Securities Act Rule 428.[18]

We believe that the question is more appropriately framed as follows: what benefits do the employee-purchasers of compensatory equity securities receive from the registration process and do these benefits outweigh the compliance costs? We address these questions in the next section.

[18] 17 C.F.R. 230.428. Perhaps in regard to this latter delivery requirement, it would be beneficial to make clear with respect to Rule 428(b)(1) and (2) that the documents required to be delivered pursuant to these provisions may be made electronically.

C. Form S-8 Generally

a) Question 52: Does the current operation of Form S-8 present significant challenges to the use of employee benefit plans?

While, over the years, issuers have found the registration process for their employee benefits plans to be cumbersome and costly, it would be overstating the compliance burden to suggest that there are "significant" challenges to the use of Form S-8. In our view, the current challenges are all manageable. Nonetheless, the process does represent, at times, a significant compliance cost, and, what is perceived by many issuers as, a "busy work" compliance task. In our view, the more relevant question is whether there is a commensurate benefit to the employee-purchasers who are receiving the offer, and ultimately acquiring, the issuer equity securities.

b) Question 53: What would be the advantages and disadvantages of allowing Exchange Act reporting companies to use Rule 701 and, in turn, eliminating Form S-8?

We welcome the Commission's willingness to consider the possible "merging" of Rule 701 and Form S-8 into a single, multi-faceted provision regulating the offer and sale of equity securities pursuant to employee benefit plans without regard to the Exchange Act status of the issuer. As the requirements of Rule 701 and Form S-8 have been modified and streamlined over the years, and as the design and use of various vehicles to deliver issuer equity securities to employees and service providers have evolved, we believe that such an examination is both timely and appropriate, particularly given the advances in technology that have reshaped possible means for complying with the federal securities laws.

In our view, the principal advantage of allowing Exchange Act reporting companies to rely on Rule 701 to comply with their Securities Act obligations is the elimination of the compliance costs associated with filing and maintaining Form S-8, including the more than $30 million issuers pay each year in registration fees. In our view, the most obvious disadvantages of such an approach would be:

- employee-purchasers would not be entitled to the specific information required in Part I of Form S-8 that is to be part of the prospectus;
- they would not be entitled to the protections of Section 11 and Section 12(a)(2) of the Securities Act in the case of any material misstatements or omissions in the documents used in the offer and sale of issuer equity securities; and
- they would receive "restricted" securities that would potentially be subject to resale restrictions in the secondary market, rather than freely tradeable securities.

We believe that these "disadvantages" are largely illusory, however. The information constituting a prospectus for purposes of Part I of Form S-8 is the material that issuers use regularly to administer their employee benefit plans. This includes such information as the purpose and operation of the plan, the nature, design, and operation of the vehicle (that is, stock option, stock appreciation right, full value share award, shares offered for investment through a Section 401(k) plan or similar plan, etc.) being used to provide the opportunity to purchase, earn, or receive the issuer equity securities, the process for converting the equity vehicle into issuer securities, and attendant income tax and other legal information related to the equity opportunity. In our experience, issuers are unlikely to omit information necessary to make their compensatory arrangements pursuant to their employee benefit plans accessible and understandable for the participants. In fact, if anything, many issuers provide information and access to information that goes much farther than what is currently required under Part I to ensure that plan participants are able to understand and take advantage of their equity award opportunities.

As for Exchange Act filings that are incorporated by reference into the Form S-8 prospectus, these filings are readily available on EDGAR to anyone seeking this information. This is far more information than what is available to employees of privately-held issuers to whom securities are sold under Rule 701. Indeed, as recently authorized by Congress, privately-held issuers may sell up to $10 million of employer securities without providing any information to the employee-recipients of their equity awards.

Further, the protections of Section 11 and Section 12(a)(2) under the Securities Act are also largely illusory. To our knowledge, the number of such claims brought in connection with offerings on Form S-8 is in the single digits. And, as a practical matter, issuers would still be subject to Exchange Act Rule 10b-5 liability in the offer and sale of employer securities. If the Commission has the authority to continue to define as a "prospectus" the materials that currently constitute the prospectus under Form S-8, we doubt that many issuers would be concerned about the application of Section 12(a)(2) to these documents.

As for the "restricted securities" status of the securities received in an offering conducted pursuant to an extension of the Rule 701 exemption, Rule 701(g) permits resales in accordance with the specified provisions of Securities Act Rule 144 if the issuer has been subject to the Exchange Act reporting requirements for a period of 90 days. In addition, the Commission could retain Form S-8 as an alternative available to issuers that conclude that it is in the best interests of its employees to issue equity securities pursuant to an employee benefits plan through a registered, rather than a private, offering.

c) Question 54: Would the elimination of Form S-8 reduce an incentive for public companies to remain current in their Exchange Act reporting obligations?

Currently, Exchange Act reporting companies have adequate incentive to remain current in their Exchange Act reporting requirements. First, Commission rules require that they file Exchange Act reports, with the very real risk of enforcement action if they fail to do so. Second, most listed issuers want to retain their listing and they risk being delisted if they fail to file Exchange Act reports. Third, failure to remain current in Exchange Act reporting results in two immediate consequences for a non-compliant issuer – they become ineligible to use Form S-3 and Exchange Act Rule 144 is no available for affiliate resales of issuer equity securities. Nonetheless, if the Commission were to allow Exchange Act reporting companies to use Rule 701, possibly in connection with the elimination of Form S-8, we would not oppose a requirement that any such reporting company must be current in its filing of its Exchange Act reports to be able to rely on the exemption.

d) Question 55: Since Exchange Act reports are automatically incorporated by reference into Form S-8, would the lack of a filed registration statement for employee benefit plans result in reduced scrutiny of Exchange Act filings by issuers and their representatives?

We do not believe that the absence of a filed registration statement for an employee benefit plan or plans would result in reduced scrutiny of Exchange Act filings by issuers and their representatives. As a practical matter, issuers fear the securities class action bar far more than they fear claims brought by their employees for having issued them securities in non-compliant compensatory transactions. We believe that, even without Form S-8, issuers would continue to have sufficient incentive to ensure that their Exchange Act filings are complete and accurate.

e) Question 56: If Form S-8 were rescinded, how would issuers be likely to register the resale of restricted securities issued pursuant to employee benefit plans? Would Form S-8 remain necessary as a method of registering resales of control securities or restricted securities acquired pursuant to an employee benefit plan?

We do not believe that issuers would need to register the resale of "restricted" securities issued under employee benefit plans. Currently, under Rule 701, once an issuer has been subject to Exchange Act reporting for 90 days, resales of restricted securities can be made by essentially complying with the volume limitations and manner-of-sale requirements of Rule 144(e) and (f), respectively, which should be sufficient in most instances to address resale objectives. With respect to "control" securities, if an issuer desired to conduct a resale registration available for its affiliates, Form S-8 could be retained as a means for doing so.

IV. Additional Recommendations

However the Commission decides to handle offers and sales of employer securities under Form S-8, we believe that it is impractical to require issuers to register the offer and sale of shares that can be obtained under a qualified employee benefit plan (for example, a Section 401(k) plan) that is subject to the Employment Retirement Income Security Act of 1974 ("ERISA"). We understand that, historically, issuers register shares under a Section 401(k) plan because their activities in setting up the plan and making a tax-advantaged vehicle available in which to purchase its shares exceeds the permissible activities for stock purchase plans set out in Securities Act Release 33-4790.

We believe that ERISA provides a comprehensive body of regulation for activities under a qualified employee benefit plan and the additional Securities Act compliance provides no needed protection for employees who wish to purchase employer stock. The one concern that is raised about the purchase of employer stock under qualified employee benefit plans – that employees could potentially invest too much of their retirement funds in employer stock – is not even a concern addressed by the protections under the Securities Act.[19] We believe that ERISA is far better equipped to provide protection to employee-participants in such plans who invest in employee stock.

[19] Although perhaps a failure to warn about employer security concentration could be considered a material omission.

V. Conclusion.

We believe that our recommendations, which are predicated on a "principles-based" approach, rather than prescriptive rule-making by the Commission, would appropriately enhance the efficient use of Rule 701 and Form S-8 in today's digital economy, ensure that workers are treated equitably without regard to their employment status as long as they have a meaningful relationship with the issuer, and further the objectives of the Securities Act to facilitate appropriate offerings of securities in the context of investor protection. Coupled with the recent amendment to Rule 701 increasing the aggregate sales price or amount of securities that may be sold in any consecutive 12-month period before an issuer is required to deliver significant additional information to workers, the additional amendments we recommend will eliminate many of the current artificial impediments that issuers must routinely navigate, reduce compliance costs, and re-invigorate the regulatory framework governing the offer and sale of equity to an issuer's service providers and contributors.

We appreciate the opportunity to comment on the Concept Release, and respectfully request that the Commission and the Staff consider our recommendations and suggestions. We are available to meet and discuss these matters with the Commission and/or the Staff and to respond to any questions.

Very truly yours,

Robert E. Buckholz
Chair, Federal Regulation of Securities Committee
ABA Business Law Section

Drafting Committee:
Subcommittee on Employee Benefits, Executive Compensation, and Section 16

Mark A. Borges
Scott P. Spector

Special Thanks to:

Susan J. Daley
J. Sue Morgan
Anne G. Plimpton
Kelly C. Simoneaux
Hope M. Spencer