NATIONAL EMPLOYMENT LAW PROJECT

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March 4, 2019

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

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

Dear Secretary Fields,

On behalf of the National Employment Law Project ("NELP"), I write to submit this comment letter in response to the request by the Securities and Exchange Commission (the "Commission") for comments on "Concept Release on Compensatory Securities Offerings and Sales" ("Concept Release") published on July 18, 2018. This comment letter addresses some of the policy implications of expanding eligible plan participants under Rule 701(c) to workers in the "gig" economy who are classified as independent contractors.

NELP is a non-profit legal organization with nearly 50 years of experience advocating for the employment and labor rights of workers. NELP seeks to ensure that all workers, and especially the most vulnerable ones, receive the full protection of labor standards laws, and that employers are not rewarded for skirting those basic rights.

The Concept Release proposes to expand Rule 701(c)—which currently allows non-reporting companies to sell their securities to their employees and consultants without registering those securities first—to individuals working for online platform companies and labelled as independent contractors. According to the Comment Release, Rule 701 should address changes in our economy, including the new types of contractual work arrangements that have arisen through companies' online platforms.

As an initial matter, although the use of online platforms to find work is a recent phenomenon, the work arrangement behind some platforms—namely, companies labelling their workers as independent contractors even though they control many aspects of the work—is nothing new. In low wage sectors like construction, janitorial services, and domestic work, it is a common practice for companies to require their workers to sign "independent contractor" agreements as a condition of getting work, even though these workers are not, by any stretch of the

imagination, in business for themselves.[1] Often these workers are sent to various clients of the "employer" company to work. These more traditional arrangements differ from the so-called "gig" or "sharing" economy only because they do not use an online platform to connect the workers to the end users of the work.

The classification of online platform "gig" workers is being debated in various forums throughout the country. Courts, arbitrators, and administrative agencies are grappling with the question of whether workers on some online platforms—such as Uber, Lyft and Postmates—should be classified as employees instead of independent contractors under wage laws and benefits programs like workers' compensation.[2] At the same time, online platform companies are lobbying for state legislation that would require all workers who find work through online platforms to be classified as independent contractors, regardless of the realities of the employment relationship.[3] This legislation would permanently carve out "gig" workers from the employer-employee relationship, giving online platform companies a competitive advantage over brick-and-mortar businesses and spurring a race to the bottom on worker standards.

Some online platform companies want all of the benefits of being an employer with none of the burdens. They want a loyal and committed workforce, which is why they seek a change to Rule 701(c) that would align their platform workers' compensation with the companies' stock price. Yet, by labeling their workers as independent contractors, they seek to deny them the many legal protections and benefits that attach to employees, such as the right to collectively bargain and to be paid a minimum wage, as well as unemployment insurance, workers' compensation and employer-sponsored health insurance and retirement benefits.

Moreover, unlike the highly paid executives and consultants who usually receive compensation in the form of stock options under Rule 701(c), many "gig" workers are scraping by. A 2017 report on app-based for-hire vehicle companies estimates that the median pay (after

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[1] *See* Sarah Leberstein & Cathy Ruckelshaus, National Employment Law Project, Independent Contractor vs. Employee: Why Independent Contractor Misclassification Matters and What We Can Do To Stop It, Policy Brief, May 2016, https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Independent-Contractor-vs-Employee.pdf;
National Employment Law Project, Independent Contractor Classification in Home Care, Fact Sheet, May 2015, https://s27147.pcdn.co/wp-content/uploads/Home-Care-Misclassification-Fact-Sheet.pdf.

[2] A number of state agencies have found "gig" workers to be employees under state law, but courts have not yet reached a decision on the issue because of the pervasiveness of mandatory arbitration clauses. National Employment Law Project, "Marketplace Platforms" and "Employers" Under State Law – Why We Should Reject Corporate Solutions and Support Worker-Led Innovation, Policy Brief, May 2018, end note ii, https://s27147.pcdn.co/wp-content/uploads/Why-We-Should-Reject-Marketplace-Platforms-Corporate-Solutions-and-Support-Worker-Innovation.pdf. Following a 2018 California Supreme Court decision that changed the standard for independent contractor classification, at least two putative class action lawsuits were filed against Lyft and Postmates claiming that they misclassified drivers and couriers as independent contractors. Because of the companies' mandatory arbitration clauses in their contracts with workers, these lawsuits were sent to arbitration. RJ Vogt, *Post-Dynamex, Workers Claim Lyft, Postmates Mislabel Them,* LAW360, May 10, 2018.

[3] National Employment Law Project, "Marketplace Platforms" and "Employers" Under State Law – Why We Should Reject Corporate Solutions and Support Worker-Led Innovation, Policy Brief, May 2018, https://s27147.pcdn.co/wp-content/uploads/Why-We-Should-Reject-Marketplace-Platforms-Corporate-Solutions-and-Support-Worker-Innovation.pdf.

accounting for expenses like fuel and car maintenance) for online platform drivers in New York City working for four companies—Lyft, Uber, Juno and Via—is $14.25 per hour,[4] which is less than New York City's minimum wage as of December 2018.[5] It is highly unlikely that these workers would want their meager earnings to be replaced, in whole or in part, with illiquid stock options.

The policy implications of expanding Rule 701(c)'s application to online platform independent contractors are significant. Expanding the rule has the potential to further muddy the waters on "gig" workers' employment status and even legitimize their independent contractor status at a time when this issue is being examined by legislatures, courts, and agencies with expertise on employment status. It could discourage "gig" workers from challenging their companies, such as pursuing litigation to be reclassified as employees and seeking backpay and benefits. It could also deter them from working for competitors—even though the ability to work for more than one company is frequently touted as a benefit by online platform companies. And it would give a competitive advantage to online platforms that can grant their independent contractors stock options over brick-and-mortar companies that can't.

Because the proposed expansion of Rule 701(c) could seriously impact "gig" workers' classification and their relationship with the online platforms for whom they work, we ask that the Commission not expand Rule 701(c)'s application to online platforms' independent contractors at this time.

Sincerely,

Laura Padin
Senior Staff Attorney

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[4] James A. Parrott and Michael Reich, *An Earnings Standard for New York City's App-Based Drivers*, Report for the New York City Taxi and Limousine Commission, July 2017, at 30-31, https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5b3a3aaa0e2e72ca74079142/1530542764109/Parrott-Reich+NYC+App+Drivers+TLC+Jul+2018jul1.pdf.

[5] As of December 2018, New York City's minimum wage for employers with more than eleven employees is $15 per hour.