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United States Senate

WASHINGTON, DC 20510 - 3505

March 7, 2019

The Honorable Jay Clayton
Chair
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Dear Chair Clayton:

I am writing in response to the Securities and Exchange Commission's (the Commission) concept release and request for comment (File No. S7-18-18; RIN 3235-AM38) on potential modifications to Rule 701 under the Securities Act of 1933 to accommodate changes in forms of equity compensation due to developments in the gig economy. I am concerned that the Commission does not have the expertise to assess accurately changes in the labor market and is considering regulatory changes that would further encourage companies to misclassify employees and undermine American workers.

Though it is true that internet-based methods of delivering and procuring goods and services are a recent development, the gig economy is not a new phenomenon. For decades, employers have pursued nontraditional employer-employee relationships, including by misclassifying workers as independent contractors, to reduce their labor costs.¹ Furthermore, data released last summer by the Bureau of Labor Statistics debunked the myth that the so-called gig economy is large and growing at a fast rate.² That analysis found that gig work declined slightly from 2005 to 2017. Regardless of its size, the status of workers in the gig economy is being hotly contested³ in the courts and the results are not uniform.⁴ What is clear, however, is that employers are using alternative work arrangements, including independent contractor status, to reduce their labor costs by not having to comply with workers' rights laws.⁵ As a result, workers in these different employer-employee relationships experience significant economic insecurity.⁶

There are important policies that must be advanced to ensure all workers, including those in the so-called gig economy, are classified appropriately, earn decent wages and benefits, and are covered by the important health and safety and labor protections that apply to traditional employees. The Department of Labor under President Obama took important steps to address the misclassification of workers as independent contractors, as did the National Labor Relations

¹ <https://s27147.pcdn.co/wp-content/uploads/Rights-On-Demand-Report.pdf>

² <https://www.nytimes.com/2018/06/07/business/economy/work-gig-economy.html>

³ <https://www.nytimes.com/2018/04/30/business/economy/gig-economy-ruling.html>

⁴ <https://www.theatlantic.com/technology/archive/2018/09/gig-economy-independent-contractors/570307/>

⁵ <https://qz.com/work/1240997/handy-is-trying-to-change-labor-law-in-eight-states/>

⁶ <https://tcf.org/content/commentary/new-data-contingent-alternative-employment-hides-mounting-job-quality-issues/?agreed=1>

Board.⁷ Unfortunately, President Trump's Administration has rolled back these protections⁸ at the insistence of large companies whose bottom lines benefit from depriving their workers of the minimum wage and overtime pay, safety and health protections, and collective bargaining rights, not to mention saddling workers with payroll tax obligations that are rightfully the companies' obligation.

The Commission's question about whether to loosen the rules to allow some companies to provide equity compensation to nontraditional employee is not only ancillary to the fundamental issue of workers' basic economic security but could also serve as a gateway policy that legitimizes these anti-worker business decisions with potentially zero benefit to the workers themselves.⁹ Given its lack of experience on labor matters, I urge the Commission to avoid making any regulatory modifications based on a misinformed understanding of the labor market and that could have significant workers' rights implications and economic consequences for millions of workers.

Instead of focusing on how to adapt current laws and regulations to accommodate the so-called gig economy, the appropriate policy focus for this Administration and Congress is to ensure workers in all work arrangements are able to achieve economic security through their employment. Legitimizing company decisions to marginalize their workers by assigning them independent contractor or other status will only further erode the middle class and economic strength of the country overall.

Sincerely,



Sherrod Brown
United States Senator

⁷ <https://www.nelp.org/wp-content/uploads/AI-IndependentContractor.pdf>
<https://apps.nlr.gov/link/document.aspx/09031d45818e44c8>

⁸ <https://www.dol.gov/newsroom/releases/opa/opa20170607>
<https://www.nlr.gov/news-outreach/news-story/nlr-returns-long-standing-independent-contractor-standard?page=4>

⁹ <https://www.nytimes.com/2018/11/06/business/dealbook/gig-economy-equity-sec-rule-701-uber-airbnb.html>