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February 23, 2021

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

RE: File Number S7-18-20
Modernization of Rules and Forms for Compensatory Securities Offerings and Sales
Release No. 33-10891

Ladies and Gentlemen,

I am writing on behalf of the National Association of Stock Plan Professionals (NASPP) to comment on the proposed rule Modernization of Rules and Forms for Compensatory Securities Offerings and Sales (File Number S7-18-20). The NASPP is a professional association representing approximately 6,000 members. Our members are directly involved in the design, oversight, and administration of stock compensation programs and include stock plan administrators; human resource professionals; corporate secretaries; financial and accounting professionals; securities, tax, and employee benefits attorneys; and compensation consultants. Our membership includes corporate issuers of all sizes from all regions of the United States and from a wide spectrum of industries.

We appreciate the opportunity to comment on the proposed rules. Because our members are directly involved with stock compensation programs, specifically, stock options, stock awards, and employee stock purchase plans, we believe that we can offer a useful perspective on how the proposed rules will affect these plans.

Rule 701

A. Disclosure Requirements

1. The Disclosure Requirement for the Period Preceding the Threshold Amount Being Exceeded

We support the proposal to require additional disclosure only for those sales during a 12-month period that exceed the $10 million threshold. We believe that this proposal will be helpful to issuers who are relying on Rule 701.

We also support implementing a grace period that would allow issuers additional time to provide the required disclosures after the $10 million threshold has been exceeded. Issuers can sometimes find it challenging to forecast share issuances under Rule 701 and thus may unexpectedly exceed the threshold. We think that a grace period of four months would be helpful. For example, if an issuer unexpectedly exceeds the $10 million threshold when more than six months have passed since their last Section 409A valuation, they may need time to obtain a new valuation or to prepare alternative disclosures.

We do not think that retroactive disclosure for sales above the $10 million threshold should be required or would be helpful to employees and other service providers who have previously acquired the issuer's securities, as it would be too late for them to unwind that decision. Given the confidential nature of the information that must be disclosed, we also think that issuers may be unwilling to make the disclosures retroactively, and that requiring retroactive disclosure would be an obstacle to relying on Rule 701.

2. Age of Financial Statements
We support extending the permissible age of financial statements to six months and believe that this extension would be helpful to issuers without materially impairing the information that employees and other service providers receive. For example, foreign private issuers that are publicly traded on the London Stock Exchange issue financial statements only twice a year. Imposing blackout periods for issuance or exercise of awards results in a hardship for US employees.

We also support requiring issuers to update their financial information only once per fiscal year unless there is a material change to the issuer's enterprise value or the value of the securities. We believe that this approach would be preferable to requiring that statements be available on at least a semiannual basis and completed within three months after the end of the second and fourth quarters. Requiring annual updates except in the event of a material change would be less onerous for issuers, especially when issuers are relying on an alternative valuation disclosure, and would further ensure that the financial information is updated for material events on a more current basis. Further, this approach would comply with the annual timing of independent valuations that many of our members already undertake, easing the burden of tracking various timing requirements.

4. Alternative Valuation Disclosure
We support permitting a Section 409A independent valuation report to be provided in lieu of financial statement disclosures. We believe that this approach will be preferable for many issuers. However, we suggest that issuers be permitted to exclude the financial statement exhibits from the report distributed to employees. We believe that the summary of the valuation provider's findings without the financial statement exhibits will provide employees with sufficient information about the issuer's financial condition, and we expect that some issuers will be reluctant to distribute the financial statement exhibits due to the sensitive and confidential nature of this information.

As noted above, we believe that requiring issuers to update this valuation only once per year, unless there is a material change to the issuer's enterprise value or the value of the securities, is preferable to requiring the valuation to be updated every six months. When issuers have not experienced a material change in enterprise value or the value of their securities, they often will not obtain a Section 409A valuation more than once per year. Obtaining a valuation solely for purposes of Rule 701 may be a significant cost for the issuer and would not conform to the general timing requirements under Section 409A.

5. Disclosure Requirements for Derivative Securities
With respect to the disclosures required for grants of RSUs or similar securities, we would like to suggest an alternative approach to that in the proposed rules. In most cases, when RSUs and similar instruments are granted to employees, the employees are given a period of time, typically ranging from 30 to 90 days but sometimes longer, to accept or decline the grants. Where this is the case, the employee arguably is not making an investment decision until the end of this period.

Thus, we propose that when employees are given at least 30 days (measured from the date when the grant paperwork is distributed to them) to accept or decline a grant, it could be acceptable for issuers to provide the disclosures upon delivery of the grant paperwork to the employee. This change would address the concerns related to grants issued to newly hired employees by permitting grants of RSUs and similar awards to new hires as of their start date without requiring that confidential information be provided to prospective employees. In addition, it would offer issuers greater flexibility in providing the required disclosures for all RSU grants.

Where issuers do not provide employees with at least 30 days to accept or decline their grants, the approach suggested in the proposed rules could be available to them (i.e., the disclosures must be provided in advance of grant or, for newly hired employees, within 14 days of hire).

6. Foreign Private Issuers

We support the proposed changes to permit foreign private issuers eligible for exemption from registration under Section 12(g) of the Exchange Act contained in Rule 12g3-2(b) to provide financial statements prepared in accordance with home country reporting standards without reconciliation to US GAAP. Under the rule changes as proposed, foreign private issuers will not be able to invoke the Section 409A valuation disclosure alternative. Assuming the Commission adopts the proposed changes, we support permitting foreign private issuers that issue financial statements in accordance with IFRS as promulgated by the EU (not IFRS as promulgated by the IASB) to use their home country accounting standards without GAAP reconciliation as well.

B. Rule 701(d)

We support increasing the sales caps as suggested in the proposed rules. We also suggest indexing the $2 million cap to inflation in a similar manner that the $10 million threshold is indexed to inflation. We suggest that the $2 million cap be updated every five years to reflect the change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics, rounding to the nearest $200,000.

We support retaining the current structure of Rule 701(d) with three alternative sales caps; we believe that the three alternative caps are helpful and accommodate a variety of business models.

C. Eligible Recipients

We support extending consultant and advisor eligibility to entities meeting the ownership criteria specified in the proposed rules as well as to former employees and employees of all subsidiaries of the issuer.

We also request that the Commission consider expanding Rule 701 to cover securities issued to venture capital, private equity, family offices, and other investment firms as compensation for a firm member's service on the board. Major investors in private companies commonly receive a seat on the board in exchange for their investment. These board members would typically be eligible for the same compensation as other board members. Because these board members represent the investment firm, it may be desirable for the compensation they receive in exchange for their board service to be paid to the firm.

We acknowledge that the issuer can issue securities directly to the director in reliance on Rule 701, and the investment firm, which employs the director, can then require the director to pay any proceeds realized or securities acquired under the arrangement to the firm. However, this arrangement is unnecessarily complicated and can have adverse tax consequences for the director.

We encourage the Commission to consider relaxing any requirement that 50% of the owners of the entity perform services for the issuer. It is common for principals of investment firms to divide responsibilities for their various portfolio companies with the result that a small number of owners (less than 50%) may provide services to a given portfolio company.

We understand the Commission's concern that expanding Rule 701 to cover securities issued to entities without restriction could enable issuers to circumvent the Section 12(g) registration requirements, and we agree with these concerns. We are asking that the Commission expand Rule 701 only to cover this narrow fact pattern. The Commission could stipulate that Rule 701 is available only to cover securities issued in compensation arrangements that are commensurate with those offered to other nonemployee directors.

Form S-8
We agree that Form S-8 is a useful and effective means of registering securities to be issued in compensatory offerings under the Securities Act and should not be eliminated in favor of allowing public issuers to rely on Rule 701. As noted in our comment letter on the concept release, we have several concerns about allowing public issuers to rely on Rule 701:

- Resale restrictions: Shares issued in reliance on Rule 701 are currently considered restricted securities and are therefore subject to restrictions on resale. Public companies are likely to view these resale restrictions as a significant disadvantage of relying on Rule 701 in lieu of filing Form S-8.
- $10 million limit: The requirement to furnish additional disclosures related to risk factors and financial information, which is imposed when companies issue shares having a value in excess of $10 million during a one-year period, would be problematic for reporting companies (except for certain smaller reporting companies that might not exceed this limit) unless the disclosure requirements are deemed satisfied by compliance with general Exchange Act reporting obligations.
- Blue sky laws: We are concerned that failure to file Form S-8 might cause shares issued under employee benefit plans to be subject to registration under state securities laws. If so, public companies would also likely find this to be a significant disadvantage of relying on Rule 701.

A. Addition of Plans and Securities or Classes of Securities to Form S-8

1. Addition of Plans to Form S-8
We support clarifying that Form S-8 can be used to register multiple plans and think that this will be helpful to issuers. We do not think that allowing issuers to register multiple plans on a single Form S-8 will be disadvantageous or confusing to investors. On the contrary, as users of Form S-8 filings ourselves, we think it would be helpful for investors to be able to reference several, or even all, of an issuer's compensatory plans in a single filing. We find the current process of having to search through multiple Form S-8 filings to understand an issuer's compensation programs unnecessarily cumbersome with no obvious advantage.

2. Securities Allocation among Incentive Plans
We support clarifying that issuers are not required to allocate registered securities among incentive plans and may use a single Form S-8 for multiple incentive plans. We think that this clarification will be helpful for issuers, and many will take advantage of the flexibility to transfer shares between plans. However, we do not think that issuers should be prohibited from allocating securities among incentive plans should they desire to do so.

3. Addition of Securities or Classes of Securities to Form S-8
We support permitting issuers to add securities to an existing Form S-8 registration statement by means of automatically effective post-effective amendments. Without this, we think that the clarification that multiple plans can be registered on a single Form S-8 will be significantly less helpful.

When adopting a new plan, most issuers authorize additional shares to be issued under the plan, even if shares remain available in an older plan that could be allocated to the new plan. If the new plan and the newly authorized shares cannot both be registered pursuant to an immediately effective post-effective amendment of an existing Form S-8, the issuer would have to file a new Form S-8 for the plan. Because issuers typically adopt only one plan at a time, this would effectively force issuers to file a separate Form S-8 for each plan.

C. Conforming Form S-8 to Rule 701

We support conforming the Form S-8 and Rule 701 eligibility provisions.

E. Revisions to Item 1(f) of Form S-8; Tax Effects of Plan Participation

We support revising the disclosure requirements in Form S-8 to eliminate the description of the tax effects on the issuer. We do not believe that this information is helpful to plan participants.

We do not support eliminating the requirement to disclose the tax effects of plan participation that may accrue to employees. This information is helpful to employees, and to our knowledge, this is the only legal obligation imposed upon issuers to disclose this information to plan participants.

F. Additional Requests for Comment about Form S-8

2. Bridging the IPO Gap for Employee Stock Purchase Plans

We are pleased that the Commission has requested comments on how to assist issuers who want to implement an ESPP to be effective at the time of the IPO. We believe that the current process in which employees do not learn about the plan until after the IPO, are automatically enrolled in the plan, and must confirm their participation or withdraw from the plan shortly thereafter is unnecessarily detrimental to employees and forces them to rush an important financial decision.

Under some state laws, issuers cannot deduct amounts from employee wages without the consent of employees except in limited circumstances (e.g., tax withholding, 401(k) contributions, wage garnishments) that typically do not include ESPP contributions. To comply with these state laws, employees must confirm their enrollment or withdraw from the plan before any amounts are deducted from their wages (i.e., before the end of the first pay period subsequent to their enrollment).

Thus, under the current process, the period between when employees first learn about the ESPP (i.e., after the IPO date and after the Form S-8 is filed) and the date when they must make a decision about participating (the end of the first pay period subsequent to the IPO) is often very short, typically no longer than two weeks. In addition, the ESPP is just one item on a long list of important information that must be communicated to employees at the time of the IPO. Other topics for which employees require education around the time of an IPO include vesting of pre-IPO awards, friends and family shares, brokerage accounts, resale restrictions and the lock-up period, insider trading laws, and other benefit programs (not to mention, in some cases, new job responsibilities as a result of the issuer's new status as a public company). It is a time of excitement but also of confusion, during which employees have many important decisions to make.

Allowing issuers to communicate about an ESPP to employees in advance of an IPO would benefit employees by enabling the issuer to provide a more orderly and less hurried explanation of the plan. Likewise, employees would have more time to understand and evaluate the plan, complete their own research, and consult with their spouse/partner or a financial advisor about their decision. For issuers, a barrier that unnecessarily complicates the IPO process would be removed.

Rule 701 Approach

We are concerned that extending Rule 701 to offers to participate in an ESPP made before an IPO and sales pursuant to ESPPs made after the IPO will not be sufficient to bridge the IPO gap for ESPPs. We believe that this approach is already available to issuers. Rule 701 can currently be used to exempt offers of securities made prior to the IPO and, when relied on for such offers, also covers sales pursuant to these offers after the IPO. The right to participate in an ESPP is essentially the grant of an option to purchase stock; as such, we don't think there is anything unique about an ESPP that would currently prevent privately held issuers from relying on Rule 701 to exempt offers pursuant to this type of plan.

Despite the availability of the Rule 701 exemption, most issuers do not choose to rely on it for ESPPs implemented in connection with IPOs. We believe that one reason for this is because of the resale restrictions that apply when Rule 701 is relied on. Even with the special resale provisions provided for under Rule 701, the administrative burden necessary to demonstrate compliance to the brokers facilitating sales would be onerous for a broad-based plan such as an ESPP. For this to be a solution for the IPO gap, the Commission would need to address the resale restrictions. We think this could best be accomplished by permitting issuers to file a Form S-8 to register the plan and outstanding purchase rights under it after the IPO, as can be done for other stock options that are granted but not exercised in advance of the IPO.

The Rule 701(d) cap on the number of shares that an issuer may sell under Rule 701 further presents an obstacle to relying on Rule 701 for ESPP participation effective upon an IPO. Stock options and other equity awards generally count against this cap at the time that they are granted. Counting purchase rights under an ESPP against the Rule 701(d) cap at the time of grant (i.e., enrollment) may cause the issuer's equity plans to exceed this cap, especially in light of other equity awards that the issuer may have granted during the past twelve months. An issuer that exceeds the caps in Rule 701(d) would not be able to rely on Rule 701 to allow employees to enroll in the ESPP.

This is further complicated because the issuer does not know how many shares will be purchased under the ESPP at the time of grant/enrollment. When an issuer implements an ESPP at the time of an IPO, the purchase price is invariably a percentage of the lower of (i) the IPO price or (ii) the stock price on the date the purchase occurs. If the purchase date price is lower, employees will be able to purchase more shares than if the purchase price is a percentage of the IPO price. Other factors affecting the number of shares purchased and that are unknown at the time of enrollment include the number of employees who will remain enrolled through the purchase date, the rates at which they choose to contribute to the plan (which typically can change over the course of the offering), and whether purchases will be capped due to statutory or plan limitations.

Thus, estimating the number of shares to be counted against the Rule 701(d) cap at the time when the purchase rights are granted (i.e., enrollment in the plan) is an impossibility.

For Rule 701 to be a solution for implementing an ESPP at an IPO, issuers would need to be able to do both of the following:

- Register both the plan and any outstanding purchase rights on Form S-8 after the IPO, so as to eliminate any resale restrictions for nonaffiliates.
- Count the shares that will be purchased under the plan against the Rule 701 limits at the time of purchase (instead of at grant/enrollment), by which time the shares will have been registered on Form S-8, and reliance on Rule 701 will no longer be necessary.

Pre-Form S-8 Communication Approach

Allowing issuers to communicate with employees about an ESPP prior to Form S-8 filing would help alleviate some of the challenges that issuers face in implementing an ESPP in conjunction with their IPO, but for this method to be fully effective, issuers would also ideally be able to collect enrollment forms from employees in advance of the IPO such that employees could be enrolled on the IPO date.

If employees participating the ESPP are to benefit from the IPO price, they must be enrolled as of the IPO date. For this to happen, they either have to complete their enrollment materials in advance of the IPO or they have to be automatically enrolled in the plan and asked to confirm their participation or withdraw afterwards. Allowing issuers to communicate the plan in advance of filing the Form S-8 for the plan will give issuers more time to communicate the plan and employees more time to evaluate it but will not eliminate the need to automatically enroll employees unless employees can also be permitted to complete their enrollment materials in advance of the IPO.

Automatically enrolling employees is problematic because it is cumbersome, complex, and burdensome to account for under US GAAP and can cause the issuer to have to recognize more compensation expense for the plan than would otherwise be necessary. We also do not believe that automatic enrollment should be necessary; we believe there can be a solution that accomplishes all of the following objectives: allows employees to complete their enrollment paperwork in advance of the Form S-8 filing such that they can be immediately enrolled once the Form S-8 is filed, ensures that employees have sufficient information to make an informed decision about their participation in the plan at the time they submit their enrollment form, and enables them to reverse their decision after the Form S-8 is filed but before they have contributed any funds to the plan.

We recommend that issuers be allowed to communicate with employees about the ESPP and collect enrollments in advance of filing the Form S-8 for the plan if the following conditions are met:

- The issuer provides the disclosures required under Part I of Form S-8.
- The issuer provides employees with the IPO prospectus once it is available.
- No funds will be contributed to the plan, nor will shares be purchased under the plan, until after the Form S-8 is filed. If the Commission is concerned that employees may not have sufficient time to make an informed decision after the Form S-8 is filed, the Form S-8 instructions could stipulate that, in the context of an ESPP implemented in conjunction with

an issuer's IPO, no funds can be contributed to the plan, nor can shares be purchased under the plan, until a specified period—we suggest 10 days—after the Form S-8 is filed.

- The plan permits employees to reduce their participation rate or withdraw their enrollment without penalty in advance of their first contribution to the plan. Employees are informed in writing that they have the right to reduce their participation rate or withdraw and are also informed in writing of the last date on which they can reduce their participation rate or withdraw before their contributions will begin as well as the mechanism by which to submit their change/withdrawal request.

We believe that this will provide employees with sufficient information to make an informed investment decision while also providing them with the opportunity to reverse this decision after the issuer's Form S-1 and Form S-8 have been filed. Furthermore, this approach would provide employees with more information than they would receive under the Rule 701 approach that we discussed above, as it would ensure that they receive both financial information about the issuer as well as a summary of the key provisions of the plan.

Conclusion

We appreciate the Commission's efforts to modernize Rule 701 and Form S-8 and the opportunity to comment on the proposals. We understand that the deadline for comments has passed and apologize for our delay in submitting this letter. We hope that you will consider our comments despite our delay, and we thank you for your consideration. If you have any questions about our comments, please contact me at [redacted].

Sincerely,

Barbara A. Baksa, CEP
Executive Director

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