

SECURITIES AND EXCHANGE COMMISSION

17 CFR 230, 239, and 240

[Release Nos. 33-10892; 34-90948; File No. S7-19-20]

RIN 3235-AM79

**Temporary Rules to Include Certain “Platform Workers” in Compensatory Offerings
under Rule 701 and Form S-8**

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (“Commission”) is proposing for public comment amendments to the exemption from registration under the rules of the Securities Act of 1933 (“Securities Act”) for securities issued by non-reporting companies pursuant to compensatory arrangements and to Form S-8, the registration statement for offerings by reporting companies pursuant to employee benefit plans. The amendments would establish a temporary provision under Securities Act rules that, on a trial basis, would permit a non-reporting issuer to offer and sell securities for a compensatory purpose to an expanded group of workers without having to register the offers and sales under the Securities Act, as long as certain conditions are met. Specifically, the proposed amendments would permit the issuer to offer and sell securities to those workers who provide services available through the issuer’s internet-based marketplace platform or through another widespread, technology-based marketplace platform or system (“platform workers”). The amendments would similarly, on a trial basis, permit a reporting issuer to include such workers in compensatory offerings registered on Form S-8. These proposed rule amendments would expire, absent further action by the Commission, five years from the date of their effectiveness. We are also proposing to amend the rules under the Securities Exchange Act of 1934 (“Exchange Act”). The amendment would extend the exclusion from the definition of “held of record” and corresponding safe harbor,

which currently applies to securities held by persons who received them pursuant to an employee compensation plan, to securities held by persons who received them pursuant to a compensation plan for platform workers under the proposed Securities Act rule amendment. The proposed exclusion and safe harbor for securities issued to platform workers under Exchange Act rules would not be temporary.

DATES: Comments should be received on or before February 9, 2021.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's internet comment form (<https://www.sec.gov/rules/submitcomments.htm>).

Paper comments:

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

All submissions should refer to File Number S7-19-20. To help us process and review your comments more efficiently, please use only one method. We will post all comments on our internet website (<https://www.sec.gov/rules/proposed.shtml>). Comments are also available for website viewing and printing in our Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

We or the staff may add studies, memoranda, or other substantive items to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on our website. To ensure direct electronic receipt of such

notifications, sign up through the “Stay Connected” option at www.sec.gov to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: Elliot Staffin, Office of Rulemaking, at (202) 551-3430, in the Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are proposing to amend 17 CFR 230.428 (“Rule 428”), 17 CFR 230.701 (“Rule 701”), and 17 CFR 239.16b (“Form S-8”) under the Securities Act,¹ and 17 CFR 240.12g5-1 (“Rule 12g5-1”) under the Exchange Act.²

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¹ 15 U.S.C. 77a et seq.

² 15 U.S.C. 78a et seq.

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Title 17, section 230.701 (“Rule 701”) provides an exemption from the registration requirements of Securities Act Section 5³ for offers and sales of securities by non-reporting companies⁴ to their employees, officers, directors, trustees, consultants, or advisors⁵ under written compensatory benefit plans⁶ or written agreements relating to compensation.⁷ The rule reflects the Commission’s long-standing position that offers and sales of securities for compensatory purposes raise different issues, and therefore should be treated differently, from offers and sales that raise capital for the issuer of the securities.⁸

For example, when first proposing Rule 701, the Commission recognized that employee equity incentive arrangements are “a potentially important tool to attract, compensate and motivate employees.”⁹ It further expressed the concern that private, smaller companies were

³ 15 U.S.C. 77e.

⁴ Only issuers that are not subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m and 78o(d)) and are not investment companies registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*) are eligible to use Rule 701. *See* 17 CFR 230.701(b).

⁵ When the Commission first proposed Rule 701, it initially limited the exemption to the issuer’s employees, directors, trustees or officers (or those of its parents or subsidiaries). *See Regulation D Revisions: Exemption for Certain Employee Benefit Plans*, Release No. 33-6683 [52 FR 3015 (Jan. 30, 1987)] (“Rule 701 Proposing Release”). The Commission specifically excluded consultants and “independent agents” due to a concern that including them could lead to an exemption broader than the intended compensatory purpose. *See, e.g., Employee Benefit Plans and Compensation Contracts*, Release No. 33-6726 (July 24, 1987) [52 FR 29033 (Aug. 5, 1987)] (“Rule 701 Reproposing Release”). Eventually, however, when adopting Rule 701, the Commission included issuances to consultants and advisors within the rule’s scope. The Commission noted comments pointing out that securities issuances to such persons could be for compensatory and non-capital-raising purposes and determined that there was no meaningful basis for distinguishing issuances to them and to employees. *See Compensatory Benefit Plans and Contracts*, Release No. 33-6768 [53 FR 12918-02 (Apr. 20, 1988)] (“Rule 701 Adopting Release”). In 1999, the Commission amended Rule 701, consistent with amendments to Form S-8, to prevent the misuse of that form for capital-raising transactions. *See Rule 701—Exempt Offerings Pursuant to Compensatory Arrangements*, Release No. 33-7645 (Feb. 25, 1999) [64 FR 11095 (Mar. 8, 1999)] (“1999 Rule 701 Adopting Release”). Specifically, the Commission modified the definition of consultants and advisors to require that they be natural persons, provide *bona fide* services, and the services not be in connection with the offer or sale of securities in a capital-raising transaction and not directly or indirectly promote or maintain a market for the issuer’s securities. *See id.*

⁶ 17 CFR 230.701(c)(2) defines a “compensatory benefit plan” as “any purchase, savings, option, bonus, stock appreciation, profit sharing, thrift, incentive, deferred compensation, pension or similar plan.”

⁷ *See* 17 CFR 230.701(c). The exemption also extends to offers and sales of securities under written compensatory plans or contracts established by the issuer’s parent or the issuer’s or parent’s majority-owned subsidiaries. *See id.* The Commission has also indicated that a person in a *de facto* employment relationship with the issuer, such as a nonemployee providing services that traditionally are performed by an employee, with compensation paid for those services being the primary source of the person’s earned income, would qualify as an eligible person under the exemption. *See* 1999 Rule 701 Adopting Release, *supra* note 5.

⁸ *See* Rule 701 Reproposing Release, *supra* note 5, at 29033 (stating that “[t]he Commission historically has recognized that when transactions of this nature are primarily compensatory and incentive oriented, some accommodation should be made under the Securities Act”).

⁹ *See* Rule 701 Proposing Release, *supra* note 5, at 3020.

forgoing this potentially valuable means of compensation because of the costs of complying with Securities Act registration requirements.¹⁰ The Commission also has expressly addressed the role that equity compensation may play in the employment relationship by indicating that using equity as a component of compensation may align the incentives of employees with the success of the enterprise, facilitate recruitment and retention, and preserve cash for the issuer's operations.¹¹

Form S-8 is the simplified form for the registration of securities transactions involving an issuance to a registrant's employees in a compensatory or incentive context and for a non-capital-raising purpose.¹² For purposes of Form S-8, the term "employee" includes consultants and advisors as long as they are natural persons and provide *bona fide* services to the registrant not in connection with a capital-raising transaction or promoting or maintaining a market for the registrant's securities.¹³ Form S-8 provides for an abbreviated disclosure format, allows for updating through forward incorporation by reference of Exchange Act reports, and is effective immediately upon filing.¹⁴ It also requires the issuer to provide disclosure to employees and

¹⁰ *See id.*; *see also* 1999 Rule 701 Adopting Release, *supra* note 5, at 11095 (stating that when adopting Rule 701, "we determined that it would be an unreasonable burden to require these private companies, many of which are small businesses, to incur the expenses and disclosure obligations of public companies when their only public securities sales were to employees," and further noting that "these sales are for compensatory and incentive purposes, rather than for capital-raising").

¹¹ *See Executive Compensation and Related Person Disclosure*, Release No. 33-8732A (Aug. 29, 2006) [71 FR 53158 (Sept. 6, 2006)] ("2006 Executive Compensation Adopting Release") (stating that unlike salary and bonus compensation, stock option compensation does not require the payment of cash by the registrant, and therefore can be particularly attractive to registrants for which cash is a scarce resource; noting that stock option compensation may also provide an incentive for employees to work to increase the registrant's stock price; and additionally indicating that some registrants may be able to use stock option compensation to help retain employees, because an employee with unvested in-the-money options forfeits his potential value if he leaves the registrant's employ.).

¹² *See Registration of Securities on Form S-8*, Release No. 33-7646 (Feb. 25, 1999) [64 FR 11103 (Mar. 8, 1999)] ("1999 Form S-8 Adopting Release").

¹³ *See* Form S-8, General Instruction A.1.(a)(1). *See also* 1999 Form S-8 Adopting Release (stating that issuers may continue to use securities registered on Form S-8 to compensate persons who have a de facto employment relationship with them. Such a relationship may exist where a person not employed by a registrant provides the registrant with *bona fide* services that traditionally are performed by an employee, and the compensation paid by the registrant for those services is the primary source of the person's earned income.).

¹⁴ *See Registration and Reporting Requirements for Employee Benefit Plans*, Release No. 33-6867 (June 6, 1990) [55 FR 23909 (June 13, 1990)] ("1990 Form S-8 Adopting Release").

others receiving securities in the offering. In addition, the full spectrum of investor protections associated with registration under the Securities Act applies to the transaction.

In July 2018, the Commission published a concept release to solicit comment on whether and how best to modernize the exemption under Rule 701 and to update Form S-8.¹⁵ In the release, the Commission requested comment on how to address, consistent with investor protection, the significant evolution that has taken place in the types of compensatory offerings issuers make and the composition of the workforce since the Commission last substantively amended this rule and form.¹⁶ Regarding workforce changes, the Commission focused on the new types of work relationships between companies and individuals that have emerged in the so-called “gig economy.”¹⁷

These new types of work relationships have arisen in large part due to the internet and reductions in the costs of communication and information processing. They typically involve an individual’s use of an internet “platform” provided by a company (the “platform provider”) to find a particular type of work, or “gig” (*i.e.*, task or job). The work could involve the individual providing services to end users, such as ride-sharing, food delivery, household repairs, dog-

¹⁵ See *Concept Release on Compensatory Securities Offerings and Sales*, Release No. 33-10521 (July 18, 2018) [83 FR 34958 (July 24, 2018)] (“Concept Release”). Unless otherwise indicated, comments cited in this release are to the public comments on the Concept Release, which are available at <https://www.sec.gov/comments/s7-18-18/s71818.htm>.

¹⁶ See *id.* While the Commission amended Rule 701 in 2018 to implement the Congressional mandate to raise the Rule 701(e) disclosure threshold from \$5 million to \$10 million, see Release No. 33-10520 (Jul. 18, 2018) [83 FR 34940 (Jul. 24, 2018)], the last substantive amendment of Rule 701 prior to then was in 1999. See 1999 Rule 701 Adopting Release *supra* note 5. The Commission last substantively amended Form S-8 in 2005. See Release No. 33-8587 (Jul. 15, 2005) [70 FR 42234 (Jul. 21, 2005)].¹⁷ See *id.*, at Section I.B. Other names for the “gig economy” include the “on-demand economy” and the “sharing economy.” See, e.g., Alex Kirven, “Comment: *Whose Gig Is It Anyway? Technological Change, Workplace Control and Supervision, and Workers’ Rights in the Gig Economy*,” 89 U. Colo. L. Rev. 249, 253 (Winter 2018), available at <http://lawreview.colorado.edu/wp-content/uploads/2018/05/Kirven-Whose-Gig-Is-It-Anyway-Technological-Change-Workplace-Control-and-Supervision-and-Workers-Rights-in-the-Gig-Economy.pdf>.

¹⁷ See *id.*, at Section I.B. Other names for the “gig economy” include the “on-demand economy” and the “sharing economy.” See, e.g., Alex Kirven, “Comment: *Whose Gig Is It Anyway? Technological Change, Workplace Control and Supervision, and Workers’ Rights in the Gig Economy*,” 89 U. Colo. L. Rev. 249, 253 (Winter 2018), available at <http://lawreview.colorado.edu/wp-content/uploads/2018/05/Kirven-Whose-Gig-Is-It-Anyway-Technological-Change-Workplace-Control-and-Supervision-and-Workers-Rights-in-the-Gig-Economy.pdf>.

sitting, or tech support, or using the platform to sell goods or lease property to third parties.¹⁸

Other new work relationships may involve individuals using the platform to perform tasks or services for the platform provider itself.¹⁹

A significant characteristic of these new work relationships is that the individual worker may have greater flexibility in determining when and how much he or she works than in a traditional employment relationship where those determinations are typically made by the issuer. In addition, these new work relationships can be, and often are, on a short-term, part-time, or freelance basis. Another significant characteristic is that an individual who provides services or goods through these platforms may have similar relationships with multiple companies through which the individual may engage in the same or different business activities. Given the characteristics of these new work relationships, the individual workers might not be employees, consultants, advisors, or de-facto employees²⁰ eligible to receive securities in compensatory arrangements under Rule 701.

Numerous commenters on the Concept Release who addressed issues relating to “gig economy” workers supported including them within the scope of Rule 701 and Form S-8.²¹ Several noted that they did not believe or were uncertain that “gig economy” workers would fall within Rule 701’s current categories of employees, consultants, or advisors, and recommended adding a new category of worker to include them.²²

¹⁸ *See id.*

¹⁹ *See, e.g., Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry*, 32 Berkeley J. Emp. & Lab. L. 143 (2011) (providing examples of crowdsourcing, such as a platform provider’s use of multiple workers to tag photographs according to their content, or to build the back-end of a platform provider’s interactive web site).

²⁰ *See supra* note 7.

²¹ *See* the letters from Airbnb, Inc. (Sept. 21, 2018) (“Airbnb”), the American Bar Association, Business Law Section (Nov. 28, 2018) (“ABA”), Center for Capital Markets Competitiveness, U.S. Chamber of Commerce (Sept. 24, 2018) (“Chamber”), Davis Polk & Wardwell, LLP (“Davis Polk”), Indigo Ag, Inc. (Jul. 8, 2019) (“Indigo”), Postmates (Oct. 17, 2018), Brian Sament (Oct. 14, 2018) (“Sament”), Sullivan & Cromwell LLP (Sept. 24, 2018) (“Sullivan”), and Uber Technologies, Inc. (Oct. 11, 2018) (“Uber”).

²² *See, e.g.,* letters from ABA, Chamber, Indigo, and Postmates.

The new work relationships of the gig economy have become increasingly significant to the broader U.S. economy.²³ They also raise some of the same considerations that led the Commission to adopt Rule 701. For example, “gig economy” issuers may have the same compensatory and incentive motivations to offer equity compensation to individuals participating in the companies’ platform-based businesses. Permitting gig economy issuers to utilize the Rule 701 exemption on a temporary basis would allow the Commission to assess the appropriateness of the exemption for these new work relationships and thus should help inform the Commission’s ongoing efforts to modernize its rules in light of changing economic and market conditions.

For the above reasons, we propose to include a new category of worker, the “platform worker,” within the scope of Rule 701 and Form S-8.²⁴ As we stated in the Concept Release, any such expansion of Rule 701 and Form S-8 must be consistent with the Commission’s mandate to protect investors.²⁵ It should not facilitate offers and sales of unregistered securities under the guise of being compensatory when in fact they are undertaken for capital-raising purposes. Therefore, we are proposing to expand Rule 701 and the use of Form S-8 to facilitate compensatory transactions with platform workers while also proposing conditions designed to limit the possibility that the rule changes could result in offers and sales for capital-raising purposes.²⁶

²³ See, e.g., *The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015*, Lawrence F. Katz and Alan B. Krueger, National Bureau of Economic Research, available at <http://www.nber.org/papers/w22667> (finding a substantial rise in the incidence of alternative work arrangements for U.S. workers from 2005 to 2015, and defining alternative work arrangements as including temporary help agency workers, on-call workers, contract workers, and independent contractors or freelancers); see also *Contingent Workforce*, U.S. Government Accountability Office, GAO-15-168R (2015), available at <https://www.gao.gov/assets/670/669766.pdf> (finding that, while the size of the U.S. contingent workforce varies by definition and data source, using an expansive definition of alternative work arrangements, 40.4% of the U.S. employed labor force in 2010 was in an alternative work arrangement).

²⁴ See proposed Rule 701(h) and proposed 17 CFR 239.16b(c). As explained below, the proposed expanded scope of Rule 701 and Form S-8 would be temporary while we examine whether to adopt the rules or similar rules on a more permanent basis.

²⁵ See Concept Release, *supra* note 15, at Section II.A.

²⁶ See, e.g., proposed Rule 701(h)(3) and proposed 17 CFR 239.16b(c)(1).

We are also proposing these changes on a temporary basis²⁷ to allow us to assess whether unregistered issuances of securities to platform workers under expanded Rule 701, or issuances registered on expanded Form S-8, are being made for appropriate compensatory purposes and not for capital-raising purposes. Similarly, we intend to assess whether such issuances have the expected beneficial effects for issuers in the “gig economy,” their platform workers, and ultimately their investors and whether such issuances have resulted in any unintended consequences. This assessment, in turn, should help us determine whether to modify or expand the scope of Rule 701 and Form S-8 on a permanent basis.

We welcome feedback and encourage interested parties to submit comments on any or all aspects of the proposed rule amendments. When commenting, it would be most helpful if you include the reasoning behind your position or recommendation.

B. Summary of the Proposed Amendments

We propose to amend Rule 701 by adding a temporary rule provision that, for five years, would enable issuers to use Rule 701 to compensate certain “platform workers,” subject to specified conditions. Under the amendments, an issuer would be able to use the Rule 701 exemption to offer and sell its securities on a compensatory basis to platform workers who, pursuant to a written contract or agreement, provide *bona fide* services by means of an internet-based platform or other widespread, technology-based marketplace platform or system provided by the issuer if:

- The issuer operates and controls the platform, as demonstrated by its ability to provide access to the platform, to establish the principal terms of service for using the platform and terms and conditions by which the platform worker receives payment for the services provided through the platform, and to accept and remove platform workers participating in the platform;

²⁷ See *infra* Section II.G.

- The issuance of securities to participating platform workers is pursuant to a compensatory arrangement, as evidenced by a written compensation plan, contract, or agreement, and is not for services that are in connection with the offer or sale of securities in a capital-raising transaction, or services that directly or indirectly promote or maintain a market for the issuer's securities;
- No more than 15 percent of the value of compensation received by a participating worker from the issuer for services provided by means of the platform during a 12-month period, and no more than \$75,000 of such compensation received from the issuer during a 36-month period, shall consist of securities, with such value determined at the time the securities are granted;
- The amount and terms of any securities issued to a platform worker may not be subject to individual bargaining or the worker's ability to elect between payment in securities or cash; and
- The issuer must take reasonable steps to prohibit the transfer of the securities issued to a platform worker pursuant to this exemption, other than a transfer to the issuer or by operation of law.²⁸

The proposed amendments also would permit an Exchange Act reporting issuer to register the offer and sale of its securities to its platform workers using Form S-8. The same conditions proposed for Rule 701 issuances would apply to issuances to platform workers that are registered on Form S-8, except for the proposed transferability restriction. Like the proposed amendments to Rule 701, the proposed Form S-8 amendments would be temporary and would expire, absent further Commission action, on the same date as the Rule 701 amendments.

In order to help in our evaluation of the proposed expanded scope of Rule 701 and Form S-8, we are also proposing that any issuer that issues securities to platform workers would be

²⁸ An issuer using proposed Rule 701(h) would also be able to continue to use Rule 701 for transactions to persons eligible under 17 CFR 230.701(c).

required to furnish information to the Commission at six-month intervals (each, an “interval”), regarding:

1. The criteria used to determine eligibility for awards, whether those criteria are the same as for other compensatory transactions, and whether those criteria, including any revisions to the criteria, are communicated to platform workers in advance as an incentive;
2. The type and terms of securities issued and whether they are the same as for other compensatory transactions by the issuer during that interval;
3. If pursuant to Rule 701, the reasonable steps taken to prohibit the transfer of the securities sold pursuant to this temporary rule;
4. The percentage of overall outstanding securities that the amount issued cumulatively under this temporary rule represents;
5. During the interval, the number of platform workers, the number of non-platform workers, the number of platform workers who received securities pursuant to the temporary rule, and the number of non-platform workers who received securities pursuant to the issuer’s Rule 701 or Form S-8 issuances;
6. Both in absolute amounts and as a percentage of the issuer’s total Rule 701 or Form S-8 issuances during the interval:
 - a. The aggregate number of securities issued to platform workers; and
 - b. The aggregate dollar amount of securities issued to platform workers.

II. DESCRIPTION OF THE PROPOSED AMENDMENTS

A. Proposed Inclusion and Definition of “Platform Worker” under Rule 701 and Form S-8

We propose to amend Rule 701 and Form S-8 to permit an issuer on a temporary basis to offer and sell securities to certain platform workers. Under the proposed definition of “platform

worker,”²⁹ eligible workers would be those persons unaffiliated with the issuer who meet two conditions. First, the worker must provide *bona fide* services through or by means of the issuer’s internet-based or other widespread, technology-based marketplace platform or system (“platform”). Workers providing services to third-party end-users would qualify, as long as the issuer benefits from such services (*e.g.*, by receiving a fee for the worker’s use of the platform or a percentage of the compensation received from the end-user for the worker’s services).³⁰ Consistent with the treatment of persons eligible for the current exemption under 17 CFR 230.701(c) (“Rule 701(c)”), platform workers providing services to the issuer, or the issuer’s parents, subsidiaries,³¹ or subsidiaries of the issuer’s parent, would also qualify.³² Second, the services must be provided pursuant to a written contract or agreement between the issuer and the platform worker³³ and must be provided through a platform-based marketplace (or other widespread, technology-based marketplace platform or system) that the issuer operates and controls.³⁴

Commenters who supported expanding the scope of Rule 701 and Form S-8 to include offers and sales of securities to platform workers stated that updating Rule 701 and Form S-8 to

²⁹ See proposed Rule 701(h)(1); see also proposed 17 CFR 239.16b(c) and proposed amended General Instruction A.1.(b)(1) to Form S-8, which reference the proposed definition of “platform worker” under proposed Rule 701(h)(1).

³⁰ See proposed new Rule 701(h)(2)(i) (the first prong of the proposed definition of platform worker); see also proposed 17 CFR 239.16b(c)(1) and proposed amended General Instruction A.1.(b)(1) to Form S-8. As explained below in Section II.B., the services may not be in connection with the offer or sale of securities in a capital-raising transaction.

³¹ In a companion rulemaking, we are proposing to expand the scope of coverage of the Rule 701 exemption, which currently includes compensatory issuances to employees of an issuer’s or its parent’s majority-owned subsidiaries, to include compensatory issuances to employees of all of an issuer’s or its parent’s subsidiaries. See Release No. 33-10891 (Nov. 24, 2020), at Section II.C.3 (proposing to amend Rule 701(c)). Our proposed inclusion of platform workers of an issuer’s subsidiaries, without regard to whether they are majority-owned, would be consistent with the proposed amendment of Rule 701(c). Like this proposed amendment, the meaning of “subsidiary” under Rule 701(h) would be governed by the general definition of subsidiary for purposes of the Securities Act. Under that definition, a “subsidiary” of a specified person is an affiliate controlled by such person directly or indirectly through one or more intermediaries. See 17 CFR 230.405.

³² See proposed Rule 701(h)(2)(i).

³³ For the purpose of Rule 701(h), the term “written contract or agreement” would include an electronic, internet-based contract or agreement. We believe that a similar interpretation applies to the term “written compensation contract” in Rule 701(c). Because the proposed Rule 701(h) definition of “platform worker” would also be used in Form S-8, the same meaning of “written contract or agreement” would apply in that context. See proposed General Instruction A.1.(b)(1) of Form S-8; see also proposed 17 CFR 239.16b(c)(1).

³⁴ See proposed Rule 701(h)(2)(ii).

include such workers is necessary to keep pace with evolutions in the economy and the labor market.³⁵ One commenter indicated that such an update would be consistent with the goals of the Jumpstart Our Business Startups Act (“JOBS” Act) to spur entrepreneurship and support the business startups and private companies that are vital to the U.S. economy, and that increased alignment of incentives between gig economy companies and participating platform workers would benefit both.³⁶

Some commenters emphasized the potential benefits to platform workers of expanding Rule 701. Commenters stated that expanding eligibility for Rule 701 issuances would help democratize share ownership and wealth by allowing the many ordinary Americans participating in the gig economy to make significant strides toward greater wealth and financial security.³⁷

Other commenters noted the potential benefits to the platform providers of expanding Rule 701. One commenter indicated that enabling privately held companies to grant equity compensation to platform workers performing services would enable those platforms to attract and retain talent.³⁸ Another commenter stated that the ability to grant equity compensation to platform workers would significantly enhance the growth and expansion of new economy companies and help level the playing field between private companies and public companies participating in the new economy.³⁹

Some commenters, however, opposed the expansion of the scope of Rule 701 and Form S-8 to include offers and sales of securities to platform workers because of their belief that the Commission lacks the expertise to assess accurately changes in the labor market, and due to their

³⁵ See, e.g., letter from Chamber; see also letter from Airbnb.

³⁶ See letter from Airbnb.

³⁷ See letter from Sament; see also letter from Airbnb.

³⁸ See letter from Postmates.

³⁹ See letter from Indigo.

concern that such regulatory changes to Rule 701 and Form S-8 would encourage companies to misclassify employees and undermine American workers.⁴⁰

We agree with commenters that expanding the scope of Rule 701 and Form S-8 to include offers and sales of securities to platform workers participating in an issuer's platform-based marketplace could benefit the issuer and its investors, including those platform workers that are new equity holders. We are mindful, however, that the gig economy is evolving. We are therefore making the rule amendments temporary so that we can reassess their impact as these markets develop.⁴¹

Although we understand that the development of the gig economy raises a number of issues under labor, tax, and other regulatory regimes, our proposed amendments to Rule 701 and Form S-8 to include these workers solely reflect considerations relevant to the U.S. Federal securities laws. The proposed amendments are not meant, and should not be construed, to address issues raised under any other regulatory regimes. We express no opinion on whether or not these "gig economy" or platform workers would be considered "employees" for purposes of other laws or regulations.

The proposed amendments would require an eligible platform worker to be a natural person or an entity meeting specified conditions. We recognize that the "gig economy" is a

⁴⁰ See letter from Sen. Sherrod Brown (Mar. 7, 2019); see also letter from National Employment Law Project (Mar. 4, 2019) ("NELP") ("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."); and letter from Chairwoman Maxine Waters (Apr. 1, 2020) (opposing "weakening Rule 701 of the Securities Act of 1933 to allow companies to compensate certain non-traditional employees with equity compensation in lieu of a traditional paycheck and without important investor protections"). *But see, e.g., infra* Section II.B for a discussion of certain investor protection conditions; and letter from Rep. Patrick McHenry (Mar. 30, 2020) (requesting that any recipient of funds under the Coronavirus, Aid, Relief, and Economic Security (CARES) Act be encouraged to provide equity compensation to its entire workforce, including non-traditional workers).

⁴¹ The proposed amendments provide, however, that, following the expiration of temporary Rule 701(h), an issuer may continue to rely on the Rule 701(h) exemption for the sale of securities underlying options, warrants, or rights previously issued in an exempt transaction pursuant to Rule 701(h). See proposed Rule 701(h)(1)(ii) and *infra* Section II.G. We believe this provision is necessary in order to remove a potential disincentive to the use of the proposed exemption to issue options to platform workers. The Commission has taken a similar approach regarding securities sold by an issuer after it has become public that were initially offered pursuant to Rule 701. See 17 CFR 230.701(b)(2).

fluid, developing market in which participating workers may be organized in various ways. In this regard, we note that some commenters recommended that platform workers should not be subject to a natural person requirement to participate in Rule 701 offerings.⁴² We recognize that some platform workers may form limited liability companies or similar legal entities for a variety of reasons, such as tax planning and personal liability protection. In order to accommodate such workers and provide additional flexibility for an evolving market, the proposed rules provide that a platform worker may be an entity as long as substantially all of its activities involve the performance of *bona fide* services that meet the requirements of proposed Rule 701(h), and the ownership interest of the entity is wholly and directly held by the natural person performing the services pursuant to the proposed rule. This proposed approach would be similar to the Commission’s recognition of personal services businesses as corporate alter egos of natural persons with respect to the ability to participate in Form S-8 offerings under existing employee, consultant, and advisor categories, where such businesses are wholly-owned by (or jointly owned with the spouse of) the natural person who provides services to the issuer.⁴³

We also recognize that the “gig economy” is a multi-faceted economic phenomenon and that, in some cases, participants may sell goods or conduct other activities—beyond providing services—by means of platforms. Some commenters recommended expanding the Rule 701 exemption to include any activity where there is an issuer providing a technology-based

⁴² See letters from Chamber and Davis Polk. In the companion rulemaking, we are proposing to eliminate the “natural person” requirement in connection with Rule 701 eligibility for consultants and advisors by extending such eligibility to service-providing entities meeting specified conditions (*e.g.*, limits on the number of persons owning an entity and requiring a certain percentage of those persons to provide services). See Release No. 33-10891 at Section II.C.1. We are also proposing a similar change regarding consultant and advisor eligibility under Form S-8. See Release No. 33-10891 at Section II.C.2.

⁴³ See 1999 Form S-8 Adopting Release at Section II.A.1 (“We agree with commenters that it should not matter if the consulting contract is with an entity or a natural person, as long as the securities registered are issued to the natural persons working for the consulting entity who provide bona fide services to the issuer. Where the securities are issued to these persons, contracting with a consulting entity would not abuse Form S-8. We have revised the amendments to eliminate the proposed requirement that issuers contract only with natural persons, while retaining the requirement that the securities must be issued to natural persons.”); see also letter from Davis Polk.

marketplace platform as long as the activity does not include capital-raising of the type currently prohibited by Rule 701.⁴⁴ Nevertheless, we are limiting this initial expansion of Rule 701 and Form S-8 eligibility to participants who provide *bona fide* services not in connection with capital-raising or with promoting or maintaining a market for the issuer’s securities. The proposed expansion would not cover the use of a platform for the sale or transfer of permanent ownership of discrete, tangible goods.⁴⁵ We view the expansion of Rule 701 and Form S-8 to include platform workers who provide services, subject to the above limitations, as an incremental evolutionary step that is consistent with the compensatory function of Rule 701 and Form S-8 while limiting the potential for abuse. Depending on the results of the initial expanded use of Rule 701 and Form S-8, if adopted, the Commission could consider expanding eligibility to other activities, such as selling goods or other non-service-providing activities in the future.

The proposed definition of platform worker would also include the condition that the issuer operates the platform for the provision of services pursuant to a written contract or agreement⁴⁶ between the issuer and the platform worker under which the issuer controls the use of the internet platform. We believe that this “issuer control” condition would help maintain an appropriate compensatory nexus between the issuer and participating platform workers.⁴⁷

The appropriate nexus would be demonstrated by meeting three express requirements. First, the issuer must be able to provide access to the platform and establish the principal terms

⁴⁴ See, e.g., letter from ABA; see also letter from Sullivan (stating that to encompass the new types of alternative work arrangements, Rule 701 (and Form S-8) should encompass those individuals providing services to or on behalf of an issuer or making or distributing the products sold or provided to the issuer’s consumers).

⁴⁵ See proposed Rule 701(h)(2)(i). For example, a platform that provided for the permanent transfer of real estate in fee simple, as opposed to the temporary rental of real estate, would not constitute bona fide services within the meaning of the rule.

⁴⁶ The Commission has similarly included a “written contract or agreement” requirement as a condition of using the Rule 701 exemption to help ensure that an issuance of securities is being undertaken for a compensatory purpose. See the Rule 701 Adopting Release, *supra* note 5, at 12919 (justifying the inclusion of issuances to consultants or advisors under Rule 701 in part because of the condition requiring a written plan or contract).

⁴⁷ Although one commenter stated that “it is not necessary for a revised Rule 701 to micromanage the level of control” over a worker, see letter from Chamber, we agree with another commenter that indicated that some level of control by an issuer over the use of its platform would help ensure that the issuance of securities to workers participating in its marketplace platform under an expanded Rule 701 is compensatory only. See letter from Airbnb.

of service for using the platform. Second, the issuer must be able to establish terms and conditions by which the platform worker receives payment for the services provided through the platform. This could include an ability to establish the amount of the fees charged for using the platform. Such fees may include any fee charged to the participating worker for the use of the platform as well as any fee or percentage of payment charged to an end-user for the services provided by the worker. If there are no end-users, and multiple workers provide services directly to the issuer via the platform, the issuer must be able to determine the amount and method of payment for such services. Third, the issuer must have the authority to accept and remove the platform workers providing services through the platform.

We believe that these three requirements are necessary and appropriate to demonstrate the requisite nexus for purposes of an expanded Rule 701 and Form S-8. A written contract or agreement providing the issuer with control over the platform's terms of use, including payment terms, would evidence that the issuance of securities to the worker is for compensatory and incentive purposes relating to the services being provided. In addition, requiring that the issuer control who may provide services through its platform would help prevent participating workers from using the platform primarily for non-compensatory purposes. The proposed conditions would not, however, limit what services an issuer could facilitate through its platform or how participating workers could provide the services.

Rule 701 currently exempts offers and sales of securities to former employees, directors, general partners, trustees, officers, consultants, and advisors only if such persons were employed by or providing services to the issuer at the time the securities were offered.⁴⁸ The proposed amendment to Rule 701 would similarly exempt offers and sales to former platform workers if such workers met the conditions of § 230.701(h) at the time the securities were offered.⁴⁹

⁴⁸ See Rule 701(c).

⁴⁹ See proposed Rule 701(h)(1)(i).

In a companion rulemaking, at the suggestion of commenters, we are proposing to expand the eligibility of former employees under Rule 701 to include post-resignation or termination offers and sales to:

- Persons who were employed by or providing services to an issuer during a performance period ending within 12 months preceding resignation or termination of their employment or service for which the securities were issued; and
- Former employees of an acquired entity, as long as the securities are being issued in substitution or exchange for securities that were issued to the former employees of the acquired entity on a compensatory basis while such persons were employed by or providing services to the acquired entity.⁵⁰

In the interest of providing consistent treatment, we are similarly proposing to include under Rule 701 offers and sales to former platform workers who met the conditions of § 230.701(h) during a period of service ending within 12 months preceding the termination of service for which the securities were issued.⁵¹ We believe that exempting post-termination grants of securities to former platform workers that are made in respect of prior service during the specified 12-month period would benefit both issuers and platform workers by facilitating compensatory transactions. Moreover, because we believe that expanding the use of Form S-8 to former platform workers would be consistent with the compensatory purposes of Form S-8, we are similarly proposing to amend Form S-8 to include securities issued to former platform workers, including post-termination grants made in respect of prior service during the 12 months preceding the cessation of service.⁵²

For similar reasons, we also are proposing to include in the exemption under Rule 701(h), and to allow the registration on Form S-8 of, securities issued to former platform workers of an

⁵⁰ See Release No. 33-10891 at Section II.C.2.

⁵¹ See proposed Rule 701(h)(1)(i).

⁵² See proposed General Instruction A.1.(b)(4)(i) of Form S-8.

acquired entity in substitution or exchange for securities that were issued to the former platform workers of the acquired entity on a compensatory basis while such workers were providing *bona fide* services to the acquired entity.⁵³ Those persons would be able to participate in the acquiring issuer's plan with respect to equity awards granted in connection with the acquisition to replace awards issued by the acquired entity while such workers provided services to the acquired entity.⁵⁴

In addition to former employees, Form S-8 currently includes under its scope executors, administrators, or beneficiaries of the estates of deceased employees, guardians or members of a committee for incompetent former employees, or similar persons duly authorized by law to administer the estate or assets of former employees.⁵⁵ We are proposing a similar provision under Rule 701 and Form S-8 for the estates of deceased platform workers and the representatives of incompetent former platform workers.⁵⁶ Although the proposed changes to Rule 701 to include platform workers would be temporary rules, we believe that this proposed provision could prove useful to the administration of the estate of a deceased platform worker or the representation of an incompetent former platform worker, particularly because, under the proposed rules, sales of securities underlying options issued pursuant to the temporary rules may occur following the rules' expiration.

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⁵³ See proposed Rule 701(h)(1)(i); see also proposed General Instruction A.1.(b)(4)(ii) of Form S-8. Such treatment would be consistent with the expanded scope of Form S-8 proposed in the companion rulemaking. See Release No. 33-10891 at Section III.D.1.

⁵⁴ The companion release includes other proposed amendments pertaining to business combinations that could be applicable to issuances to platform workers if adopted. For example, we are proposing to amend Rule 701(e) to address the disclosure delivery obligations regarding acquired entity derivative securities that the acquiring issuer assumes in a business combination transaction. Another proposed amendment would clarify that, in determining whether the amount of securities the acquiring issuer sold during any consecutive 12-month period exceeds \$10 million under Rule 701(e) [17 CFR 230.701(e)], the acquiring issuer would consider only the securities that it sold in reliance on Rule 701 during that period, and would not be required to include any securities sold by the acquired entity pursuant to the rule during the same 12-month period. See Release No. 33-10891 at Section II.A.6.

⁵⁵ See General Instruction A.1.(a)(3) of Form S-8. In the companion release, we are proposing to amend Rule 701 to include a similar provision for the executors, administrators, or beneficiaries of the estates of deceased employees who may receive securities underlying options previously issued to former employees pursuant to Rule 701. See Release No. 33-10891 at Section II.C.2.

⁵⁶ See proposed General Instruction A.1.(b)(4)(iii) to Form S-8 and proposed Rule 701(h)(1)(i).

1. Should we expand the scope of Rule 701 and Form S-8 to include offers and sales of securities to platform workers unaffiliated with the issuer who provide *bona fide* services to an issuer by means of the issuer’s internet-based platform, or through other widespread technology-based marketplace platforms, as proposed? Should the expansion of Rule 701 and Form S-8 also include services provided by such workers to the issuer’s parents, majority-owned subsidiaries, or majority-owned subsidiaries of the issuer’s parent, as proposed?
2. Is there a basis for treating platform workers differently than any other non-employees not covered under the current exemption? Does the use of an internet-based platform establish a sufficient basis for treating those workers differently than non-employees in a different context?
3. Should we also expand the scope of Rule 701 and Form S-8 to include offers and sales of securities to platform workers unaffiliated with the issuer who provide *bona fide* services to third-party end-users by means of the issuer’s internet-based marketplace platform, or through other widespread technology-based marketplace platforms or systems, and from which the issuer benefits, as proposed?
4. Should we define or provide examples of a “widespread, technology-based marketplace platform or system” (other than an internet-based marketplace platform) that would fall within the scope of the proposed amendments? If so, how should we define that term, or what examples should we include?
5. Is the term “services” sufficiently clear? Should we define it differently? If so, what should the definition be? Should we provide additional specific guidance concerning what activities constitute “services” for purposes of the proposed expansion of Rule 701 and Form S-8?
6. Should we limit issuances under Rule 701(h) or an expanded Form S-8 to platform workers who are unaffiliated with the issuer, as proposed? If so, should we provide a

definition of or additional guidance concerning the meaning of “unaffiliated with the issuer”? For example, should we define “unaffiliated” as a person who is not an “affiliate” as defined by 17 CFR 230.405? Should we instead specify the types of persons that would satisfy the “unaffiliated” provision? For example, should “unaffiliated” mean persons who are not an issuer’s employees, officers, directors, advisors, or consultants, or certain family members of such persons? If so, which family members would be treated as affiliates of the issuer and therefore be ineligible to receive securities under the proposed amendments to Rule 701 and Form S-8?

7. Should we limit the use of the expanded Rule 701 and Form S-8 only to workers who provide *bona fide* services through an issuer’s marketplace platform, as proposed? Or should we consider other alternatives? For example:
 - a. Should we permit an issuer to offer or sell securities to workers who engage in other platform-based activities, such as selling goods? If so, should we limit the types of goods? For example, should we only permit an issuer to offer or sell securities to workers who engage in selling of unique or value-added goods and not workers who merely use a platform to resell goods?
 - b. If we were to permit an issuer to offer or sell securities to workers who engage in other platform-based activities, such as selling goods, what characteristics or factors would help ensure that the nexus between the issuer and worker is compensatory and the issuance of securities is not in connection with capital-raising or for speculative purposes? For example, should we require that the worker meets minimum annual or aggregate sales thresholds or that the worker has been engaged in performing platform-based activities for the issuer for a minimum period of time before she is eligible to receive shares under expanded Rule 701 and Form S-8. Should we only permit securities that do not have capital-raising features, such as restricted stock

- units, to be issued to platform workers for platform-based activities that involve the sale of goods?
- c. Should we include offers and sales of securities to workers having other types of new work relationships? If so, which types of new work relationships should we include, and what characteristics or factors would help ensure that the nexus between the issuer and worker is compensatory and the issuance of securities is not in connection with capital-raising? Are there new work relationships that are not provided through an internet-based or other widespread, technology-based marketplace platform or system that we should include in the exemption?
8. Should we require that a platform worker be a natural person or an entity meeting specified criteria to be able to receive securities pursuant to an expanded Rule 701 or Form S-8, as proposed? Should we instead require a platform worker to be a natural person? Do a significant number of platform workers currently operate through a business entity? If so, would a natural person requirement impact the extent to which they would continue to perform as platform workers or continue to do so through a business entity? Should we limit the types of business entities through which a platform worker would be able to operate? Should we permit an entity to be a platform worker, as proposed, if substantially all of its activities involve the performance of *bona fide* services that meet the requirements of proposed Rule 701(h), and the ownership interest of the entity is wholly and directly held by the natural person performing the services pursuant to the proposed rule? Are there different or additional eligibility conditions that we should adopt to allow platform workers to perform services as entities pursuant to the temporary rules? For example, should we permit more than one natural person to own the entity through which the services are being performed by the platform worker? If so, should we limit the number of natural persons that may own the entity or require that a co-owner be the spouse or other family member? Should we condition allowing more

than one natural person to own the entity by requiring each owner to perform the services of a platform worker?

9. Should we require that an issuer operating a platform control the platform as a condition to using the Rule 701 exemption and Form S-8 registration for issuances of securities to workers providing services through the platform, as proposed? Should we permit the use of the exemption for issuances to such workers if an issuer's affiliate controls the platform?
10. Should we require that services be provided pursuant to a written contract or agreement, as proposed? If so, should we include an express provision that the term "written contract or agreement" includes an electronic, internet-based contract or agreement? Should we provide the same provision for the term "written compensation contract" in Rule 701(c)?
11. Are the proposed conditions demonstrating control of the platform appropriate? Should we require that an issuer satisfy all of the specified conditions? Should we only require that an issuer have the ability to determine terms of use, including payment terms? Should we instead only require that an issuer have the ability to accept and remove the workers providing services through its platform?
12. Are there other conditions, in addition to or in lieu of the proposed conditions, that we should adopt?
13. Instead of, or in addition to, an issuer control requirement, are there other issuer eligibility conditions that we should adopt to help ensure that the issuance of securities to platform workers is for a compensatory purpose? For example, when the issuer's platform is used to provide services to end-users, should we require that an issuer earn a substantial amount of its annual revenues from fees or other payments resulting from platform workers using the issuer's platform? Would such a condition make it less likely that the issuance of securities to those workers would be for a capital-raising purpose?

14. Should we expand the scope of Rule 701 and Form S-8 to include offers and sales of securities to former platform workers, including former platform workers of an entity acquired by an issuer, as proposed? Should such expansion include securities issued to former platform workers, including post-termination grants made in respect of prior service during the 12 months following the cessation of service, as proposed? Should we include under Form S-8 issuances to executors, administrators, or beneficiaries of the estates of deceased platform workers, or other persons similar to those included for deceased or incompetent former employees, as proposed? Should we amend Rule 701 to include a similar provision for the estates of deceased employees or deceased platform workers and representatives of incompetent former employees or incompetent former platform workers, as proposed?
15. Would state blue-sky laws affect the operation of the proposed temporary platform worker exemption? If so, how? Are there changes we should consider to address state law issues? For example, should we provide for the preemption of state securities law registration requirements for offers made pursuant to Rule 701(h)? Are there other state law implications that would be relevant to consider in connection with the proposed amendments? For example, would the proposed temporary platform worker exemption have any implications regarding the enforceability of state laws pertaining to non-competition arrangements? Would the proposed exemption result in an increase in the use of non-compete provisions regarding issuers' arrangements with platform workers? Would the proposed exemption affect the ability of issuers under state law to provide additional benefits to platform workers, such as minimum wage guarantees, healthcare stipends, and occupational auto insurance?

B. Additional Requirements for Issuances to Platform Workers under Rule 701 and Form S-8

We are proposing four additional requirements with which an issuer must comply in order to use the exemption for issuances to platform workers under Rule 701.⁵⁷ In addition, we are proposing that the first three of these conditions would also apply to issuances to platform workers registered on Form S-8.⁵⁸

Because of certain structural differences between platform-based work relationships and traditional employer-employee relationships, we are mindful that compensatory offerings in this context may be more susceptible to misuse. For example, a traditional employer-employee work relationship will involve some degree of interpersonal interactions between the issuer and the employee by which the former supervises and monitors the work and conduct of the latter. In contrast, there may be no or very few interpersonal interactions in the issuer-platform worker relationship. In addition, platform workers frequently work for multiple companies and may have exclusive control over their work schedules, including how often and for how long they will work. These short-term and/or intermittent work relationships across multiple issuers may increase the likelihood that workers would establish a work relationship with a platform as a means of realizing an investment opportunity with the issuer or that issuers would use the proposed provisions to engage in capital-raising activities. The additional requirements we are proposing are designed to work together to help ensure that issuances made to platform workers pursuant to revised Rule 701 are for compensatory purposes while reducing any opportunity for a platform worker to use her relationship with the issuer to engage in speculative activity.⁵⁹

The first condition is that the issuance must be pursuant to a compensatory arrangement that is evidenced by a written compensation plan, contract, or agreement between the issuer and the platform worker.⁶⁰ The compensatory arrangement may not be for services in connection

⁵⁷ See proposed Rule 701(h)(3).

⁵⁸ See proposed 17 CFR 239.16b(c)(1) and proposed General Instruction A.1(b)(2)(i) through (iii) to Form S-8.

⁵⁹ One commenter specifically recommended imposing additional restrictions regarding the issuance of securities to platform workers beyond those typically applicable to equity issuances under Rule 701 because of the third-party, contractual relationship between the issuer and platform worker. See letter from Airbnb.

⁶⁰ See proposed Rule 701(h)(3)(i).

with the offer or sale of securities in a capital-raising transaction or services that directly or indirectly promote or maintain a market for the issuer’s securities. Thus, an issuer may not rely on the exemption to issue securities to a platform worker for compensation for performing services analogous to those of an underwriter or promoter or otherwise made in connection with a capital-raising transaction. An issuer also may not rely on the exemption to issue securities to a platform worker as part of a plan or scheme to evade the compensatory purpose of Rule 701 or otherwise evade the registration requirements of the Securities Act.⁶¹ This condition is based on the requirements under Rule 701 and Form S-8 currently applicable to consultants and advisors,⁶² which were designed to prevent abuse of the rules as conduits for unregistered securities distributions to the general public and for securities issuances to stock promoters.⁶³

Second, as proposed, no more than 15 percent of the value of compensation received by a platform worker from the issuer for services provided during a consecutive 12-month period, and no more than \$75,000 of such compensation received from the issuer during a consecutive 36-month period, may consist of securities issued pursuant to Rule 701 or a registration statement on Form S-8.⁶⁴ The issuer would be required to determine the value of such securities as of the time the securities are granted.⁶⁵ For the purpose of assessing compliance with these limits, an issuer

⁶¹ See Preliminary Note 5 to Rule 701, which would remain applicable to issuances under proposed Rule 701(h). We are also proposing to add a similar note in proposed General Instruction A.1(b)(2) to Form S-8.

⁶² See Rule 701(c)(1)(ii) and (iii) [17 CFR 230.701(c)(1)(ii) and (iii)], and General Instruction A.1(a)(1)(ii) and (iii) to Form S-8.

⁶³ See 1999 Rule 701 Adopting Release, *supra* note 5, at Section II.D., and 1999 Form S-8 Adopting Release (“ at Sections I.A. and II.A. A number of commenters that addressed expanding our rules to encompass “gig economy” workers generally supported such a condition. See, e.g., letters from ABA, Airbnb, Chamber, and Uber.

⁶⁴ For example, if a platform worker received \$1,000 in total compensation during a 12-month period from Issuer X for services provided to or for the benefit of Issuer X, no more than \$150 of that compensation could consist of securities. These proposed annual limits on the amount of securities a platform worker could receive as compensation from an issuer are in addition to the limits on the aggregate sales price or amount of securities that an issuer can sell in reliance on Rule 701 during any consecutive 12-month period. See 17 CFR 230.701(d). As discussed below, the Rule 701(d) limits would continue to apply, and an issuer would be required to aggregate issuances to platform workers with all other issuances under Rule 701 during a 12-month period for the purpose of complying with Rule 701(d). See *infra* Section II.C.

⁶⁵ See proposed Rule 701(h)(3)(ii).

would be able to use any reasonable, recognized valuation methodology⁶⁶ as long as the methodology is consistently applied during the same 12-month or 36-month period.⁶⁷

This proposed cap on the amount of compensation that a platform worker may receive as securities from the issuer is designed to limit an issuer's incentive and ability to use the new exemptive rule as a conduit for a public distribution of its securities, contrary to the compensatory purpose of Rule 701 and Form S-8.⁶⁸ In addition, we believe the proposed cap would reduce any incentive for platform workers to use the exemption primarily for realizing speculative investment opportunities and would limit the risk that issuances would be for capital-raising or other non-compensatory purposes.⁶⁹

Third, we are proposing that the amount and terms of any securities issued to a platform worker may not be subject to individual bargaining. Similarly, as proposed, platform workers would not be permitted to elect between payment in securities or cash.⁷⁰ We believe this proposed requirement would also reduce any incentive for platform workers to use the exemption as a means of realizing speculative investment opportunities rather than receiving the securities as a compensatory grant.⁷¹

⁶⁶ We expect that issuers would use the same valuation methods that they currently use to make valuations for compensatory issuances under Rule 701(c).

⁶⁷ In this regard, an issuer's use of multiple, different valuation methodologies during the same period could raise concerns that the issuer was doing so as part of a plan or scheme to evade the compensatory purpose of Rule 701.

⁶⁸ Some commenters supported imposing a limitation on the amount of equity compensation a "gig economy" worker could receive to prevent abuses under an expanded Rule 701 and Form S-8. *See* letters from ABA and Airbnb.

⁶⁹ The Commission has historically expressed concern about the potential for abuse in the area of issuances of securities for compensation. *See, e.g.*, 1999 Rule 701 Adopting Release, 64 FR at 11098; *see also* Rule 701 Reproposing Release, 52 FR at 29034.

⁷⁰ *See* proposed Rule 701(h)(3)(iii).

⁷¹ One commenter recommended the adoption of this type of condition in order to prevent abuses from occurring under any expanded rules. *See* letter from Airbnb. This proposed condition is also consistent with the "no sale" position taken by the staff that, where securities are awarded to employees at no direct cost through broad-based bonus plans, there has been no sale, and therefore no public distribution of the securities, since employees do not individually bargain to contribute cash or other tangible or definable consideration to such plans. *See Changes to Exchange Act Registration Requirements to Implement Title V and Title VI of the JOBS Act*, Release No. 33-10075 (May 3, 2016) [81 FR 28689 (May 10, 2016)].

The preceding three conditions would apply equally to securities issuances to platform workers under both Rule 701 and Form S-8.⁷² For purposes of Rule 701, however, we are proposing a fourth condition that would require the issuer to take reasonable steps to prohibit the transferability of securities issued to platform workers pursuant to the exemption except for transfers to the issuer or by operation of law.⁷³ Such reasonable steps could include the placement of special legends on the securities to be issued to platform workers or appropriate instructions to transfer agents that would provide adequate notice of the transfer prohibition to platform workers. The purpose of this provision is to help ensure that the shares are obtained for compensatory and not speculative purposes. Specifically, it would prevent the development of a market in such securities until after the issuer becomes subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act, which would in turn greatly reduce, if not eliminate, any incentive for a worker to seek out securities issued pursuant to Rule 701 for speculative purposes.

Currently, all securities issued pursuant to Rule 701 are “restricted securities,” and any resales must comply with Securities Act registration requirements or qualify for an exemption therefrom.⁷⁴ As proposed, the additional transferability prohibition on Rule 701 securities issued to platform workers would preclude any transfers, except transfers back to the issuer or by operation of law.⁷⁵ Transfers by operation of law would include, for example, transfers pursuant to the laws of descent and distribution and domestic relations orders in divorces. One commenter recommended the adoption of enhanced transfer restrictions for securities issued to gig economy workers beyond those applicable to equity currently issuable pursuant to Rule 701 because of the third-party contractual relationship between gig economy participants and gig

⁷² See proposed 17 CFR 239.16b(c)(1) and proposed General Instruction A.1.(a)(3) to Form S-8.

⁷³ See proposed Rule 701(h)(3)(iv).

⁷⁴ See 17 CFR 230.701(g)(1) and (2).

⁷⁵ See proposed Rule 701(h)(3)(iv).

economy companies.⁷⁶ As noted earlier, we agree that applying enhanced transfer restrictions is appropriate in light of the more remote contractual relationship between an issuer and its platform workers, compared to the relationship with its employees.⁷⁷ As with other securities issued pursuant to Rule 701, however, ninety days after the issuer becomes subject to Exchange Act reporting requirements, securities issued to platform workers would become available for resale under 17 CFR 230.701(g)(3).⁷⁸

We are not proposing similar transfer restrictions for securities issued to platform workers pursuant to a Form S-8 registration statement. Securities Act and Exchange Act protections for such securities would already exist, making the use of the issued securities for speculative purposes by a platform worker less likely.⁷⁹

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16. Would the proposed conditions for issuances to platform workers under Rule 701 or Form S-8 help ensure that the issuances are for a compensatory purpose? Should we adopt only some of the conditions? If so, which ones? For example, should we require only that the issuance be pursuant to a compensatory arrangement for services not in connection with the offer or sale of securities in a capital-raising transaction?
17. Should we impose a cap on the amount of compensation that a platform worker may receive as securities from the issuer on an annual basis under Rule 701 and Form S-8 to limit the potential that the issuance to platform workers would be used for capital-raising or speculative purposes, as proposed? If so, should we require that no more than 15 percent of the value of compensation received by a platform worker from the issuer for

⁷⁶ Letter from Airbnb.

⁷⁷ See *supra* note 59 and accompanying text.

⁷⁸ See proposed Rule 701(h)(3)(iv). Following that 90-day period, persons who are not affiliates may resell Rule 701 securities in reliance on 17 CFR 230.144 without compliance with the current public information requirements under 17 CFR 230.144(c) and holding period requirements under 17 CFR 230.144(d), and affiliates may resell such securities without compliance with the holding period requirements.

⁷⁹ For example, to be eligible to use Form S-8, the issuer must be a reporting issuer and must have filed all reports and other materials required to be filed during the preceding 12 months (or for such shorter period that the registrant was required to file such reports and materials).

services provided during a 12-month period be in securities, as proposed? Should the annual cap be less than or greater than 15 percent of the compensation received by the platform worker during a 12-month period? Should the annual cap apply only to issuances under Rule 701 rather than both Rule 701 and Form S-8? Should the annual cap apply only to issuances under Form S-8?

18. Should we impose a cap on the amount of compensation that a platform worker may receive as securities from the issuer during a 36-month period (under Rule 701 and registered on Form S-8) to limit the potential that the issuance to platform workers would be used for capital-raising or speculative purposes, as proposed? Should we require that no more than \$75,000 of such compensation received from the issuer during a 36-month period may consist of securities, as proposed? Should this cap be less than or greater than \$75,000, and/or apply to a shorter or longer period than 36 months? For example, should we limit the amount of securities a platform worker may receive as compensation from an issuer to no more than \$50,000 for a consecutive 24-month period? Instead of, or in addition to, the 36-month cap, should there be an aggregate limit on the dollar amount of securities that a platform worker may ever receive from an issuer? If so, what should that cap be? Should the \$75,000 cap apply only to issuances under Rule 701? Should the \$75,000 limitation apply only for as long as the issuer is not subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act? Should the \$75,000 cap apply only to issuances registered on Form S-8?
19. Should we impose only the proposed 12-month cap or only the proposed 36-month cap, but not both? Should we not impose any cap on the amount of compensation that a platform worker may receive as securities in light of other proposed conditions? Should either cap apply to limit the total amount of compensation issued as securities to platform workers by an issuer as well as an issuer's affiliates, or should either cap apply individually to each issuer or issuer's affiliate?

20. For purposes of the 12- and 36-month caps on the amount of compensation that a platform worker may receive as securities from the issuer, should the value of compensation be measured at the time the securities are granted, as proposed? For the same purposes, should an issuer be able to use any reasonable, recognized valuation methodology for purposes of determining the fair market value of the securities issued to platform workers under Rule 701? Should an issuer be able to change the valuation methodology used for purposes of the proposed caps as long as the change is motivated by bona fide reasons unrelated to the proposed exemption for platform workers?
21. Should we specify in Rule 701 and Form S-8 that the issuer must use the same valuation method that it currently uses to make valuations for compensatory issuances under Rule 701(c), if applicable, and apply the methodology consistently during the same period?
22. Should we require that the amount and terms of any securities issued to a platform worker may not be subject to individual bargaining or the worker's ability to elect between payment in securities or cash, as proposed? If a platform worker is unable to negotiate the amount and terms of securities to be issued as compensation, should that worker be able to elect to receive payment only in cash?
23. For issuances pursuant to the Rule 701 exemption, should we require the issuer to take reasonable steps to prohibit the transfer of securities issued to platform workers, other than to the issuer or by operation of law, as proposed? Should we limit the prohibition on transferability to a specific period, *e.g.*, for two or three years? Should we mandate the specific steps that an issuer must take to prohibit the transfer of such securities? If so, what should those steps be? For example, should we require that issuers put special legends on the securities issued to platform workers, or should we require that issuers provide appropriate instructions to transfer agents concerning the transfer prohibition on shares issued to platform workers? Are there other reasonable steps that we should require an issuer to take in connection with the proposed prohibition on transferability to

help ensure that the shares issued to platform workers are for compensatory and not speculative purposes?

24. Instead of requiring an issuer to take reasonable steps to prohibit the transfer of securities issued to platform workers, should we instead allow platform workers to resell their securities using an applicable exemption or safe harbor? For example, should platform workers be allowed to resell their securities pursuant to Rule 144? Alternatively, in Rule 701(h), should we require a different holding period than is in Rule 144, such as a two-year holding period, or is any holding period insufficient to mitigate concerns about misuse of the temporary exemption? Are there other transfer restrictions that would be more appropriate in this context?
25. Should we apply the proposed conditions only to securities that have capital-raising features (*e.g.*, stock options) and not to securities that do not have such features (*e.g.*, restricted stock units)? If so, which of the proposed conditions should not apply to such securities?
26. Should we limit the type of securities that can be issued to platform workers under Rule 701 or on Form S-8? For example, should we limit issuances to equity securities and securities convertible into or exchangeable for equity securities?
27. Are there other conditions in addition to, or instead of, the proposed conditions that we should adopt to help ensure that issuances to platform workers under Rule 701 or registered on Form S-8 are undertaken for compensatory and not capital-raising or speculative purposes? For example, should we require that a platform worker provide services through an issuer's platform (or other widespread, technology-based marketplace platform or system) for a certain period of time before the worker is eligible to receive securities from the issuer? If so, should the minimum period be six months, one year, or some other period? Should we require that the platform worker provide services for a continuous period of time? Should we require that the securities issued to a platform

worker not vest until after a particular period of time? If so, should the vesting period be six months, one year, or some other period after the grant of securities?

28. Do the additional conditions for issuances to platform workers provide adequate investor protections for platform workers who receive shares pursuant to Rule 701 or registered on Form S-8? If not, what additional conditions or measures would be appropriate to provide an acceptable level of investor protection?

C. Integration of Proposed Rule 701(h) With the Existing Rule 701 Exemption

Title 17, section 230.701(d) (“Rule 701(d)”) imposes limits on the aggregate sales price or amount of securities that an issuer can sell in reliance on the rule during any consecutive 12-month period.⁸⁰ In addition, 17 CFR 230.701(e) (“Rule 701(e)”) provides that if the aggregate sales price or amount of securities sold during any consecutive 12-month period exceeds \$10 million, the issuer must deliver certain disclosure to investors a reasonable period of time before the date of sale.⁸¹

Proposed Rule 701(h) would not create a separate and independent ceiling on the amount of securities that could be offered or sold under Rule 701. Rather, platform workers would be an additional class of persons temporarily eligible under Rule 701(c) to participate in the issuer’s Rule 701 offers and sales, and would be subject to the same Rule 701(d) limitations on the total amount of securities that an issuer may sell. In this regard, the securities sold to platform workers would be aggregated with all other securities sold by the issuer to persons meeting existing Rule 701(c) eligibility conditions for purposes of applying the Rule 701(d) ceiling.

⁸⁰ See 17 CFR 230.701(d)(2), which imposes alternative caps on the aggregate sales price or amount of securities sold under the rule during a consecutive 12-month period. In the companion Rule 701/Form S-8 release, we are proposing to raise: the cap under 17 CFR 230.701(d)(2)(i) permitting issuance from \$1 million to \$2 million, to reflect inflation; and the cap under 17 CFR 230.701(d)(2)(ii) from 15% to 25% of the issuer’s total assets, to reflect that start-up companies may be more dependent upon human capital than fixed assets. See Release No. 33-10891 at Section II.B.

⁸¹ In the companion release, we are proposing to require that Rule 701(e) enhanced disclosure be provided only for those sales that exceed the rule’s \$10 million threshold. See Release No. 33-10891 at Section II.A.1. If adopted, this provision would be applicable to all Rule 701-exempt issuances, including those granted to platform workers.

We believe that it is appropriate to apply the same ceiling to all Rule 701 exempt offerings rather than to provide a separate ceiling for offers to persons eligible to receive securities under the temporary provision. If we were to provide separate ceilings, issuers with technology-based marketplace platforms would be able to sell securities in excess of the amount they are permitted to sell to traditional workers, while issuers that rely only on traditional employment would be limited to the ceiling imposed under Rule 701(d). We believe it is better to propose an approach that treats all issuers equally, rather than one that favors issuers conducting their businesses through platforms as defined by the proposed rule.

Similarly, an issuer that offered and sold securities to platform workers pursuant to proposed Rule 701(h) would be subject to the same Rule 701(e) disclosure requirements. Those securities would be aggregated with all other securities offered and sold by the issuer to persons meeting existing Rule 701(c) eligibility conditions for purposes of applying the \$10 million disclosure threshold in Rule 701(e).⁸²

Request for Comment

29. Should we require that the securities sold to platform workers be aggregated with all other securities sold by the issuer to persons meeting existing Rule 701(c) eligibility conditions for purposes of applying the Rule 701(d) ceiling, as proposed? Should we instead impose a separate and independent ceiling on the amount of securities that an issuer could sell to platform workers during any consecutive 12-month period? If so, what should the ceiling be?

30. Should we require that the securities issued to platform workers be aggregated with all other securities sold by the issuer to persons meeting existing Rule 701(c) eligibility

⁸² In the companion release, we are proposing amendments to the disclosure requirements under Rule 701(e) that, if adopted, would be applicable to issuances to platform workers under proposed Rule 701(h). For example, we are proposing to conform the age of financial statement requirement in Rule 701(e) to the corresponding requirement in Part F/S of Form 1-A. *See* Release No. 33-10891 at Section II.A.2. In addition, we are proposing to allow issuers to provide alternative valuation information, similar to that required under Internal Revenue Code Section 409A, in lieu of financial statements, for purposes of Rule 701(e) disclosure. *See id.* at Section II.A.4.

conditions for purposes of applying the Rule 701(e) disclosure threshold, as proposed?

Should we instead impose a separate disclosure threshold for issuances to platform workers? If so, what should that threshold be?

D. Integration with Exchange Act Rule 12g5-1

For purposes of determining whether an issuer is required to register a class of equity securities with the Commission pursuant to Section 12(g)(1) of the Exchange Act,⁸³ 17 CFR 240.12g5-1 (“Rule 12g5-1”) permits the exclusion of certain securities.⁸⁴ Specifically, 17 CFR 240.12g5-1(a)(8)(i)(A) permits the exclusion of securities held by persons who received the securities pursuant to an employee compensation plan in transactions exempt from, or not subject to, the registration requirements of Securities Act Section 5. Title 17, section 240.12g5-1(a)(8)(i)(B) permits the exclusion of securities held by persons who received the securities in a transaction exempt from, or not subject to, the registration requirements of Securities Act Section 5 from the issuer, a predecessor of the issuer or an acquired company in substitution or exchange for securities received pursuant to a compensatory plan in transactions exempt from, or not subject to, the registration requirements of Securities Act Section 5, as long as the persons were eligible to receive securities pursuant to Rule 701(c) at the time the excludable securities were originally issued to them. In addition, Rule 12g5-1 provides a non-exclusive safe harbor by which an issuer may deem a person to have received the securities pursuant to an employee

⁸³ 15 U.S.C. 78l(g)(1). Section 12(g)(1) requires, among other things, that an issuer with assets exceeding \$10,000,000 and a class of equity securities held of record by either 2,000 persons, or 500 persons who are not accredited investors, register such class of securities with the Commission.

⁸⁴ See 17 CFR 240.12g5-1(a)(8). The Commission adopted this provision of Rule 12g5-1 pursuant to Section 503 of the JOBS Act, which instructed the Commission to amend the definition of “held of record” to exclude securities held by persons who received them pursuant to an “employee compensation plan” in transactions exempted from the registration requirements of Section 5 of the Securities Act. Section 503 also instructed the Commission to adopt a safe harbor that issuers can use when determining whether holders of their securities received them pursuant to an employee compensation plan in transactions exempted from the registration requirements of Section 5 of the Securities Act. The Commission adopted the term “employee compensation plan” and left it undefined so that “issuers will have appropriate flexibility to make a principles based determination about securities received as employee compensation when determining their holders of record under Section 12(g)(5).” See Release No. 33-10075.

compensation plan if such plan and the person who received the securities pursuant to the plan met the plan and participant conditions of Rule 701(c).⁸⁵

We are proposing similar treatment for issuances to platform workers under proposed Rule 701(h).⁸⁶ We believe that these proposed amendments to Rule 12g5-1 are appropriate because they would remove a potential disincentive to an issuer's offer and sale of securities as compensation to platform workers and would avoid favoring companies that do not have platform workers over companies that have them. Specifically, the proposed revisions would eliminate the requirement for an issuer to count platform workers who receive shares pursuant to a compensation plan⁸⁷ under Rule 701(h) as record holders for the purpose of determining its Section 12(g) registration obligations.⁸⁸ In addition, similar to the existing exclusion in 17 CFR 240.12g5-1(a)(8)(i)(B), the proposed amendment would exclude securities received in a transaction exempt from, or not subject to, the registration requirements of Securities Act Section 5 in substitution or exchange for securities received pursuant to Rule 701, as long as the persons were eligible to receive the securities when they were originally issued to them.⁸⁹ Finally, the proposed amendments would extend the safe harbor in 17 CFR 240.12g5-1(a)(8)(ii), for securities received in a Rule 701(c) offering, to compensatory issuances to platform workers pursuant to Rule 701(h).⁹⁰

⁸⁵ See 17 CFR 240.12g5-1(a)(8)(ii)(A).

⁸⁶ Two commenters supported excluding platform workers from the definition of record holder under Rule 12g5-1. See letters from Airbnb and Davis Polk.

⁸⁷ Similar to the current Rule 12g5-1 exclusion for securities issued pursuant to an employee compensation plan, we propose to use and leave undefined the term "compensation plan" to provide issuers with the appropriate flexibility to make a principles based determination about securities issued as compensation to their platform workers when determining their holders of record under Section 12(g)(5). Not defining a "compensation plan" for platform workers would also avoid unnecessary complexity and potential conflict with existing terms, such as "compensatory benefit plan." See Release No. 33-10075, 81 FR at 28694.

⁸⁸ See proposed Exchange Act Rule 12g5-1(a)(8)(i)(A).

⁸⁹ See proposed Exchange Act Rule 12g5-1(a)(8)(i)(B).

⁹⁰ See proposed Exchange Act Rule 12g5-1(a)(8)(ii)(A)(2). The Rule 12g5-1 safe harbor would continue to provide that an issuer may, solely for the purposes of Exchange Act Section 12(g), deem the securities to have been issued in a transaction exempt from, or not subject to, the registration requirements of Securities Act Section 5 if the issuer had a reasonable belief at the time of the issuance that the securities were issued in such a transaction. See 17 CFR 240.12g5-1(a)(8)(ii)(B).

The proposed amendments to Rule 12g5-1 would also include a note to remind issuers of the temporary nature of Rule 701(h).⁹¹ Upon expiration of Rule 701(h), without further Commission action, an issuer would no longer be able to issue additional Rule 701-exempt securities to its platform workers. Importantly, however, we are not proposing the Rule 12g5-1 exclusion and safe harbor for securities issued to platform workers on a temporary basis. Therefore, an issuer could continue to rely on the exclusion and safe harbor subsequent to Rule 701(h)'s expiration date.

Request for Comment

31. Should we permit an issuer to exclude platform workers to which it has issued securities under Rule 701(h) from the definition of “holders of record” for the purpose of determining its registration obligations under Section 12(g), as proposed?
32. Should we extend the Rule 12g5-1 safe harbor to cover issuances to platform workers under Rule 701(h) pursuant to a compensation plan, as proposed?
33. Should we leave “compensation plan” for platform workers undefined, as proposed? If not, how should we define a “compensation plan” for platform workers?

E. Considerations Specific to Form S-8

Form S-8 provides a number of accommodations to registrants that seek to register the offer and sale of securities to their employees, consultants, and advisors.⁹² For example, to satisfy the Securities Act prospectus delivery requirements set forth in Rule 428, the form requires only abbreviated disclosure and permits the delivery of regularly prepared materials advising employees and other eligible persons about employee benefit plans, together with a statement of availability of documents containing registrant information.⁹³ Form S-8 also permits the incorporation by reference of a registrant's Exchange Act reports without regard to

⁹¹ See proposed Note 1 to paragraph (a)(8)(ii) of Rule 12g5-1.

⁹² See 1999 Form S-8 Adopting Release, *supra* note 12, at 11103; see also 1990 Form S-8 Adopting Release, *supra* n. 14.

⁹³ See Form S-8, Part I, Item 2.

the length of the issuer’s reporting history or the aggregate market value of its securities held by the non-affiliated public (its “public float”).⁹⁴ The Commission has justified this differing treatment for Form S-8 offerings because of their compensatory, incentivizing, and non-capital-raising purpose.⁹⁵

We propose to amend Form S-8 so that the accommodations available to registrants currently offering securities on that form to employees and other covered persons would generally be available to registrants offering securities to platform workers. We also propose to amend Rule 428 so that its prospectus content, delivery, updating, and related procedural requirements are applicable to offerings to platform workers pursuant to a written compensation plan, contract, or agreement. Thus, a registrant registering an offering of securities to platform workers on Form S-8 would be able to deliver a Section 10(a) prospectus consisting of plan or compensation contract information, a statement of availability of registrant information, and other documents required of current Form S-8 registrants, and follow the same Form S-8 procedural requirements.⁹⁶ We believe that the proposed conditions designed to help ensure that an offering to such workers is for a compensatory purpose justify extending the same treatment to issuers seeking to register an offering of securities to platform workers on Form S-8.

Many of the substantive plan disclosure requirements for Form S-8 pertain to tax qualified defined contribution plans. We believe, however, that issuers that elect to register an offering of securities on Form S-8 for issuance to platform workers would do so to incentivize those workers in the short-term by offering options and restricted stock units, rather than pursuant to a defined contribution plan for the purpose of retirement savings. Accordingly, we are not proposing amendments to those items of Form S-8 that pertain to defined contribution plans to include platform workers.

⁹⁴ See Form S-8, Part II, Item 3.

⁹⁵ See, e.g., 1999 Form S-8 Adopting Release, *supra* note 12, at 11103. The Commission has also justified the abbreviated disclosure format of Form S-8 because of “employees’ familiarity with the issuer’s business through the employment relationship.” *Id.*

⁹⁶ See proposed Rule 428(d).

Request for Comment

34. Platform workers may not be as familiar with the registrant's operations as employees and other persons currently eligible to receive securities under Form S-8 may be. As such, should registrants offering securities to platform workers be subject to different information content, prospectus delivery, or other procedural requirements than those applicable to current Form S-8 registrants? If so, what additional requirements under Form S-8 or Rule 428 or what different or additional disclosure requirements should apply to offerings to platform workers?

35. Are there circumstances in which registrants would issue securities to platform workers pursuant to defined contribution plans? If so, should we amend those items of Form S-8 that pertain to defined contribution plans to include platform workers?

F. Requirement to Furnish Certain Information

As explained in detail below, the proposed expansion of Rule 701 and Form S-8 to include securities issuances to platform workers would be temporary.⁹⁷ Related to this, we are also proposing a requirement that an issuer furnish certain information to the Commission. If the proposed amendments are adopted, we plan to use this information to assist us in evaluating the expanded use of Rule 701 and Form S-8, in order to help determine whether to permit such use on a permanent basis and under the same or different conditions. The information should provide insight into how, and to what extent, the exemptions are being used, as well as the extent and type of benefits provided to issuers, platform workers, and other investors. This would enable us to assess the utility of the issuances of securities to platform workers under Rule 701 or Form S-8 and to assess whether the proposed conditions have achieved their purpose of helping to prevent non-compensatory issuances. Although the proposed rule would require issuers to furnish certain information, furnishing the identified information would not be a condition to rely

⁹⁷ See *infra* Section II.G.

on Rule 701 or Form S-8. Thus, a failure to furnish the information would not result in the loss of the proposed exemption in Rule 701 or Form S-8 eligibility for issuances to platform employees. The information would, however, be important for determining whether the exemptions should expire, be extended, or be made permanent.

The required information would be furnished, rather than filed, and therefore would not be subject to potential liability under Section 18 of the Exchange Act.⁹⁸ The information would be intended only for the Commission's use and would be non-public. It would not be furnished through the Commission's Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system. Rather, it would be furnished in a non-public manner designated by the Division of Corporation Finance for this purpose, for example, electronically by email or by some other means of electronic communication.

As proposed, the issuer would be required to provide the following information concerning its issuances to platform workers to the Commission at six-month intervals commencing six months after the first such issuance:

1. The criteria used to determine eligibility for securities awards to platform workers, whether they are the same as for other compensatory transactions, and whether those criteria, including any revisions to such criteria, are communicated to workers in advance as an incentive;
2. The type and terms of securities issued to platform workers during the prior six months, and whether they are the same as for other securities issued in compensatory transactions by the issuer during that interval;
3. If issuing securities pursuant to Rule 701(h), the steps taken to ensure that the securities sold are non-transferable;

⁹⁸ 15 U.S.C. 78r.

4. The percentage of overall outstanding securities that the amount issued to platform workers cumulatively under Rule 701(h) or pursuant to a registration statement on Form S-8 (pursuant to § 239.16b(c)), as applicable, represents;
5. During the interval, the number of platform workers, the number of non-platform workers, the number of platform workers receiving securities pursuant to the temporary rule, and the number of non-platform workers who received securities pursuant to the issuer's Rule 701 or Form S-8 sales; and
6. The number and dollar amount of securities issued to platform workers under Rule 701 or pursuant to a registration statement on Form S-8, both in absolute amounts and as a percentage of the issuer's total sales under Rule 701 or total sales pursuant to a registration statement on Form S-8, as applicable during the interval.⁹⁹

We recognize that some non-reporting issuers may view certain information concerning compensation practices for platform workers as privileged or confidential. For that reason, the proposed rules would provide that to the extent that the issuer treats such information as privileged or confidential, it may submit a confidential treatment request pursuant to 17 CFR 200.83¹⁰⁰ for the furnished information.¹⁰¹

Request for Comment

36. Should the temporary rules require an issuer to furnish certain information to the Commission if it seeks to register issuances to platform workers on Form S-8, as proposed? If so, should an issuer be required to furnish the information at six-month

⁹⁹ See proposed Rule 701(h)(4) and proposed 17 CFR 239.16b(c)(3). The amounts calculated as a percentage should compare the amount of securities issued to platform workers under Rule 701 or Form S-8 with the total amount of securities issued to all workers (both platform and non-platform) and other covered persons under Rule 701 or on Form S-8.

¹⁰⁰ Under Rule 83, an issuer can request that the non-public information not be disclosed pursuant to a request under the Freedom of Information Act ("FOIA"). Written requests for confidential treatment under Rule 83 relating to the furnished materials may be submitted either in paper format or electronically. If there are no FOIA requests, the information will remain non-public for 10 years. After 10 years, the confidential treatment request will expire unless an issuer requests and is granted an extension. In the event of a FOIA request, the Commission may require the issuer to provide substantiation of its confidential treatment request.

¹⁰¹ See proposed Rule 701(h)(5) and proposed 17 CFR 239.16b(c)(4).

intervals, as proposed? Should the issuer be required to furnish the information annually or on another periodic basis? If so, which periodic basis would be appropriate?

37. Should the same reporting interval apply to issuances of securities both under Rule 701 and pursuant to a registration statement on Form S-8?

38. Is the proposed information appropriate for the purpose for which it is being sought? Should issuers be required to furnish less information or other information in addition to, or instead of, the proposed information?

39. What method should the Commission require issuers to use to furnish the information required? For example, should the information be furnished electronically via email for this purpose? Should the Commission provide a form for this purpose?

Are there other steps that the Commission should take to facilitate the reporting requirement?

40. Should we require that an issuer notify the Commission that it intends to make offers or sales to platform workers pursuant to the exemption in proposed Rule 701(h)? If so, when and how should issuers be required to provide such notice?

G. Expiration of the Temporary Rules Authorizing Issuances to Platform Workers Under Rule 701 and Form S-8

With limited exceptions, we propose to make this exemptive rule temporary in order to have an opportunity to evaluate the appropriateness of extending the Rule 701 exemption to issuances to workers in this relatively new type of work arrangement, including whether such issuances are being made for compensatory, incentive, and non-capital-raising purposes.¹⁰²

Moreover, given the rapid pace of technological change, particularly in the area of the internet and platform software, and the evolving nature of the platform worker labor market, making the

¹⁰² As previously discussed, the exemption would continue to be available to issuers for the post-expiration issuance of securities underlying options previously issued in an exempt transaction pursuant to Rule 701(h). *See supra* note 41 and accompanying text. In addition, as previously noted, an issuer could continue to rely on the Rule 12g5-1 exclusion and safe harbor for securities issued to its platform workers prior to the expiration of Rule 701(h) and continue to exclude those workers as record holders subsequent to Rule 701(h)'s expiration date. *See supra* Section II.D.

expanded Rule 701 exemption temporary would also provide us with the opportunity, subject to public notice and comment, to implement amendments to this area of the exemptive framework in light of such technological and labor market changes.

As proposed, Rule 701(h) would apply only to offers and sales of securities occurring within five years following the date of the rule's effectiveness. On that date, Rule 701(h) would expire and no longer be effective.¹⁰³ Prior to the expiration date, the Commission may decide to let the exemption expire, extend the temporary exemption, or adopt the exemption on a permanent basis. If the Commission extends the exemption or adopts it on a permanent basis, it may also consider whether any revisions to the rule are appropriate. We believe that five years is an appropriate period for the temporary exemption. On the one hand, it would provide issuers with sufficient time to develop and conduct successful securities offerings to platform workers, the demand for which initially may not be readily apparent. On the other hand, the limited period would allow the Commission to evaluate the temporary exemption and make necessary adjustments in response to technological, labor market, or other changes.

The rule authorizing the temporary use of Form S-8 for issuances to platform workers (17 CFR 239.16b(c)) would also expire five years from the date of that rule's effectiveness, which we expect would be the same date as the expiration date for Rule 701(h). Rule 428(d), the temporary rule authorizing the application of the same streamlined disclosure, prospectus delivery, and related procedural requirements to issuances to platform workers as those currently applicable to other Form S-8 issuances, would expire on the same date as 17 CFR 239.16b(c).

Request for Comment

41. Should we adopt each of proposed Rule 701(h), the proposed amendment to Form S-8 (17 CFR 239.16b(c)), and proposed Rule 428(d) as temporary rules, as proposed? If we do, should the rules expire five years from the date of their effectiveness, as proposed?

¹⁰³ In the event that the Commission determines to let the exemption expire, we anticipate addressing any transition or related issues at that time.

Should the rules expire on a different date (*e.g.*, one, two, three, or four years from the date of effectiveness)?

42. Should we permit an issuer, following expiration of Rule 701(h), to issue securities underlying options, warrants, or rights that were previously issued to platform workers in an exempt transaction pursuant to Rule 701(h), as proposed?
43. Should we make the expiration date for the temporary Form S-8 provisions different from the expiration date for issuances under Rule 701(h)? If so, should the effective period of the Form S-8 provisions be longer or shorter than the effective period of Rule 701(h)?
44. Should the proposed extension of Rule 701 and Form S-8 to platform workers expire absent further Commission action, as proposed? Are there any transition or related issues (*e.g.*, related to transfer restrictions) that we should address in connection with the proposed expiration of the temporary rules?
45. Rather than making the rules temporary,¹⁰⁴ should we adopt any of the proposed rules on a permanent basis? If so, which ones?

III. GENERAL REQUEST FOR COMMENTS

We request and encourage any interested person to submit comments on any aspect of the proposed amendments, other matters that might have an impact on the proposed amendments, and any suggestions for additional changes. With respect to any comments, we note that they are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments and by alternatives to our proposals where appropriate.

IV. ECONOMIC ANALYSIS

The Commission is proposing amendments to Rule 701 to establish a temporary provision that, on a trial basis, would expand the scope of the rule to include a new category of worker, the platform worker, to whom an issuer would offer and sell securities, under certain

¹⁰⁴ *But see supra* note 102.

conditions, without registration under the Securities Act. Similarly, the Commission is proposing amendments to permit an Exchange Act reporting issuer to register offers and sales to platform workers on Form S-8.¹⁰⁵ The Commission is proposing these amendments on a temporary basis for a five-year period. Permitting gig economy issuers to utilize the Rule 701 exemption on a temporary basis would allow the Commission to assess the appropriateness of the exemption for these new work relationships and thus should help inform the Commission’s ongoing efforts to modernize its rules in light of changing economic and market conditions. In connection with the proposed amendments, issuers that offer and sell securities to platform workers would be required to furnish certain information to the Commission at six-month intervals to assist in evaluating the proposed expanded scope of Rule 701 and Form S-8. The Commission also is proposing to amend Rule 12g5-1 under the Exchange Act to extend the exclusion from the definition of “held of record” and corresponding safe harbor, for securities issued to platform workers.

We are mindful of the costs imposed by and the benefits obtained from our rules and amendments.¹⁰⁶ The discussion below summarizes information about the gig economy in general, various attributes of platform workers and specific information about the online platform economy. We then discuss the potential economic effects of the proposed amendments. These include the likely benefits and costs, effects on efficiency, competition, and capital formation, and reasonable alternatives. We attempt to quantify these economic effects whenever

¹⁰⁵ Unlike the proposed amendment to Rule 701, the proposed amendment to Form S-8 does not include a transfer prohibition. We discuss the anticipated economic effects of this difference below.

¹⁰⁶ Section 2(b) of the Securities Act [15 U.S.C. 77b(b)] and Section 3(f) of the Exchange Act [15 U.S.C. 78c(f)] requires the Commission, when engaging in rulemaking where it is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation. Further, Section 23(a)(2) of the Exchange Act [15 U.S.C. 78w(a)(2)] requires the Commission, when making rules under the Exchange Act, to consider the impact that the rules would have on competition, and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the Exchange Act.

possible; however, due to data limitations, we are not able to quantify many of the economic effects.

A. Economic Baseline

The baseline for the economic analysis consists of the current regulatory requirements applicable to issuers issuing securities to their employees as part of their compensation arrangements. Non-reporting issuers are able to rely on Rule 701 to offer compensatory securities to their employees. Registrants are able to register the offer and sale of compensatory securities to their employees on Form S-8. As discussed above, these provisions currently are not available for platform workers because of their non-traditional employment status. Thus, the affected parties for the proposed amendments would consist of online platform-based businesses wishing to offer securities as compensation, their platform workers, and any companies with which these businesses compete in the labor market.

1. Overview of the Gig Economy

Numerous recent studies document an evolution and expansion of the gig economy over time. These studies examine various aspects of the nature of non-traditional (or alternative) work arrangements and corresponding trends in this area. The findings across these studies may vary for multiple reasons. For example, there is no general consensus on the definition/scope of the gig economy, or its various constituents.¹⁰⁷ Consequently, the results of these studies may vary because they use different definitions of the gig economy. Moreover, various sources of data are utilized to study the field. The three main sources of data used in these studies are government surveys such as the Current Population Survey,¹⁰⁸ administrative data such as IRS

¹⁰⁷ Katherine Abraham, John Haltiwanger, Kristin Sandusky, and James Spletzer, *The Rise of the Gig Economy: Fact or Fiction*, 109 AEA PAPERS & PROCEEDINGS 357 (2019) (the “2019 Abraham Study”).

¹⁰⁸ The Current Population Survey (CPS) is conducted on a monthly basis by the United States Census Bureau on behalf of the Bureau of Labor and Statistics. The CPS may include supplementary questions/topics on a non-periodic basis. In 2005 and again in 2017 the supplementary questions focused on contingent workers. *See, e.g.*, U.S. Bureau of Labor Statistics, *Electronically mediated work: new questions in the Contingent Worker Supplement*, MONTHLY LAB. REV. (Sept. 2018) (the “2017 Contingent Worker Supplement”), <https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-the-contingent-worker-supplement.htm>.

filings, and private sector data. Due to the differing nature of the data analyzed, different types of errors or biases in the data may affect the findings of these studies.¹⁰⁹ We discuss some of the main findings of this literature below and then focus on data and statistics from studies using definitions of gig economy that are more likely to be relevant to the scope of the proposed amendments to Rule 701 and Form S-8.

A 2019 study,¹¹⁰ using a broad definition of alternative work arrangements,¹¹¹ finds a significant increase in alternative work arrangements over the 2005–2015 period. It estimates that about 15.8 percent of survey participants engaged in some form of alternative work arrangement in 2015 as compared to 10.7 percent in 2005.¹¹² It also finds that workers providing services through an online intermediary accounted for 0.5 percent of all workers in 2015.¹¹³

The 2019 Abraham Study reports self-employment rates increasing from 13 percent in 2004 to 15 percent in 2016, based on published Census Bureau statistics on non-employer businesses.¹¹⁴ The largest increase in non-employers between 2010 and 2016 took place in the Ground Passenger Transportation sector,¹¹⁵ which grew by almost 300 percent (651,000 drivers)

¹⁰⁹ See, e.g., Katherine Abraham, John Haltiwagner, Kristin Sandusky, and James Spletzer, *Measuring the gig economy: Current Knowledge and Open Issues* (Nat'l Bureau of Econ. Research Working Paper 24950, 2018) (the “2018 Abraham Study”). The 2018 Abraham Study finds that there has been a growing discrepancy between the level of self-employment as measured in core household surveys versus the level of self-employment as measured in administrative data. The study concludes that examining integrated data sets that combine survey, administrative, and private data are likely to improve the measurement of self-employment activity.

¹¹⁰ Lawrence Katz & Alan Krueger, *The Rise and Nature Of Alternative Work Arrangements in the United States, 1995-2015*, 72 ILR REV. 382 (2019) (the “Katz Study”).

¹¹¹ The definition of alternative work arrangements used in the Katz Study includes temporary help agency workers, on-call workers, contract workers, and independent contractors or freelancers.

¹¹² The 2005 results in the Katz Study were based on data from the 2005 Contingent Worker Supplement and the 2015 results in the Katz Study were based on a survey conducted by RAND-Princeton as part of the RAND American Life Panel (the “Rand-Princeton Survey”).

¹¹³ The Katz Study does not discuss 2005 online platform participation rates.

¹¹⁴ A non-employer business is defined by the Census Bureau as one that has no paid employees, has annual business receipts of \$1,000 or more (\$1 or more in the construction industries), and is subject to federal income taxes. Most non-employers are self-employed individuals operating very small, unincorporated businesses, which may or may not be the owner’s principal source of income.
<https://www.census.gov/quickfacts/fact/note/US/NES010217>

¹¹⁵ This sector corresponds to North American Industry Classification System (NAICS) code 485.

during the period.¹¹⁶ The study also finds positive growth in non-employers for the following sectors: NAICS 488 (Support Activities for Transportation), NAICS 611 (Educational Services), NAICS 448 (Clothing and Clothing Accessories Stores), and NAICS 446 (Health and Personal Care Stores), although to a much less extent as compared to the growth observed in the Ground Passenger Transportation sector.

The 2017 Contingent Worker Supplement estimated that there were about 1.6 million electronically mediated workers in the United States,¹¹⁷ accounting for one percent of total employment.

The Federal Reserve 2018 Survey of Household Economics and Decision Making (the “2018 SHED Survey”)¹¹⁸ finds that 30 percent of adults engaged in gig economy related work, including both the provision of services and the sale of goods, and using both online and offline methods, in 2018. The survey also finds that three percent of adults surveyed participated in gig economy work enabled by the internet or a mobile app to connect to customers.

Another study uses private data to examine various characteristics and trends of a subsection of the gig economy, namely the online platform economy and its participants.¹¹⁹ It analyzed a sample comprised of 39 million unique checking accounts over the October 2012 – March 2018 period¹²⁰ and found a significant increase in the number of families receiving

¹¹⁶ See also Jonathan Hall & Alan Krueger, *An Analysis of the Labor Market for Uber’s Driver-Partners in the United States*, 71 ILR Review 705 (2018) (the “Hall Study”). The Hall Study finds that the number of Uber drivers increased from a base of zero in 2012 to 460,000 active drivers by the end of 2015.

¹¹⁷ The 2017 Contingent Worker Supplement defines electronically mediated work as an employment arrangement where workers: (1) use a platform provider’s website or mobile app to connect to clients or customers and obtain short jobs, projects, or tasks; (2) are paid by or through the platform provider that owns the website or mobile app, (3) choose when and whether to work, (4) may do these short jobs, projects, or tasks in person or online.

¹¹⁸ The Federal Reserve has conducted the Survey of Household Economics and Decision Making on an annual basis starting in 2013.

¹¹⁹ Diana Farrell, Fiona Greig & Amar Hamoudi, *The Online Platform Economy in 2018: Drivers, Workers, Sellers, and Lessors*, JPMorgan Chase Institute, (2018) (the “Farrell Study”).

¹²⁰ The study applies multiple filters to select the accounts in the final sample. These filters are described in the Appendix of the study.

income from providing goods and services using online platforms.¹²¹ For example, in 2013, less than 0.5 percent of the sample checking accounts received income from work performed through an online platform, whereas that number increased to 1.6 percent in 2018.¹²² The study further breaks down income sources from online platform utilization into four categories: (1) transportation, (2) non-transport work (includes services such as dog walking and home repair), (3) selling of goods, and (4) leasing.¹²³ As of March 2018, online platform workers in categories (1) and (2) constituted approximately 65 percent of the workers in all four categories. Over the 2013–2018 period, the transportation services category has shown the most significant growth, increasing from less than 10 percent of online platform workers in 2013 to approximately 60 percent of online platform workers in 2018.

2. Characteristics of Gig Economy Workers

In this section, we summarize findings from studies and surveys on the gig economy with respect to the characteristics of participants in such work arrangements. In general, multiple sources lead to the conclusion that, although the frequency of participation varies, the average gig economy worker engages in such work periodically throughout the year. In addition, the average gig economy worker seems to participate in such work in order to supplement her basic source of income and is relatively younger in age than traditional employees.

The 2018 SHED Survey finds that the majority of gig economy workers tend to engage in such work to generate income in addition to their primary source of income. For example, the

¹²¹ In order for an online platform to be included in the Farrell Study, it had to meet the following criteria: (1) the platform connects independent suppliers to customers, (2) the platform mediates the flow of payment from customer to supplier, (3) the platform empowers participants to enter and leave the market whenever they want. The study identified 128 online platforms based on the three criteria above. We believe the definition of gig economy applied in this study most closely resembles the definition of online platform workers used in the proposed amendments to Rule 701 and Form S-8.

¹²² The Farrell Study also notes that as of March 2018, about 4.5% of accounts examined received income from an online platform at some point over the prior year.

¹²³ Companies identified in categories (1) and (2) in the Farrell Study are likely to have a significant overlap with the companies that are likely to be included in the proposed expansion of Rule 701 and Form S-8, given the overlap between the provided definition of these categories and the scope of the proposed amendments. Specifically, categories (1) and (2) represent companies that are online platforms specializing in connecting customers with independent suppliers for the provision of services. Some of the companies in the Farrell Study's leasing category may also fall within our proposed definition of services.

survey finds that about 37 percent of gig economy workers indicated that they engage in such work to supplement their income, whereas 18 percent indicated that their primary source of income comes from gig-related work. In addition, only 30 percent of gig economy workers responded that they earn income from such activities in all or most months of the year. With respect to participation rates involving the use of a website or mobile app to connect to customers, the survey documents five percent of individuals between the ages of 18 and 29 using such methods to find customers, whereas one percent of individuals aged 60 or older used such method to find work. The 2018 SHED Survey also documents that individuals younger in age tend to be more active in gig-related work. Overall participation rates ranged from 37 percent for individuals between the ages of 18 and 29 to 21 percent for individuals 60 year old or older.

The Farrell Study finds that among individuals or families participating in the gig economy through online platforms, more than 60 percent derived earnings from online platform related work between one and three months out of the year. About 10 percent of workers received payments due to online platform related work between 10 and 12 months of the year. For transportation platforms specifically, 12.5 percent of individuals generated income between 10 and 12 months of the year. These statistics indicate that the majority of online platform workers generated income from the use of these online platforms periodically throughout the year.

The Hall Study analyzes the labor market for Uber drivers in the United States based on a survey of Uber drivers in 2014 and 2015. Among other findings, the study documents that more than half of Uber drivers who started on the platform in the first half of 2013 remained active a year after starting, and one-third were still active two years after starting. In general, the study finds that the majority of Uber drivers use the platform because they value the flexibility to choose when to work and the ability to generate additional income when needed.

3. The Online Platform Economy

As discussed above, we observe that there is a trend of increased activity under all definitions of the “gig economy,” although the extent of that increase varies across the data analyzed in various studies. Concerning online platform work specifically, the trends are relatively clear in that there has been a significant expansion of both online platforms and individuals using these online platforms to generate income in the last few years. Moreover, the majority of users of such platforms use them to supplement their income when needed and value the flexibility of the working hours that the platform work offers.

The Rand-Princeton Survey estimates that about 0.5 percent of the workforce in 2015 used an online platform to connect to customers. The 2017 Contingent Worker Supplement estimates that 1.6 million workers, or approximately one percent of the workforce, used an online platform to connect to customers and provide services. The Farrell Study estimates that about one percent of the 37 million checking accounts examined received income from the use of an online platform to connect with customers to provide services, with a growth rate from 2016 to 2018 of 100 percent. Finally, the 2018 SHED Survey documents that three percent of adults surveyed participated in gig work enabled by the internet or a mobile app to connect to customers, a percentage that includes both the provision of services and the sale of goods. Among all sectors examined, the passenger transportation services sector is the only sector where all available evidence suggests a dramatic increase in the use of online platforms as an intermediary for such work.¹²⁴

B. Broad Economic Considerations

Below, we discuss broad economic considerations derived from the academic literature focusing on non-executive employee incentive-based pay and identify certain limitations of the applicability of such literature to platform providers and platform workers due to their differing characteristics relative to traditional employees.

¹²⁴ See 2019 Abraham Study, *supra* note 107.

In general, economic theory suggests that variable pay, including equity-based pay,¹²⁵ can serve as a mechanism to align the incentives of agents with those of principals and can lead to enhanced agent performance.¹²⁶ Academic literature that examines compensation arrangements of Chief Executive Officers (CEOs), in general, finds a positive correlation between various forms of variable pay and future outcomes, such as issuer performance, when such forms of variable pay are used appropriately.¹²⁷ There is also academic literature that examines non-executive employee compensation arrangements. Although this stream of literature highlights the potential incentive alignment effect that equity-based pay may have on employees, it also highlights other important considerations that may drive issuers to use such compensatory benefit plans. Specifically, it finds that issuers may use non-executive employee compensation arrangements to attract and retain talent. Thus, we expect that the proposed amendments likely would enhance the ability of affected issuers to compete in the labor market. This benefit likely would be more important if these issuers compete with traditional issuers for the same pool of workers, particularly for workers with specialized skills.

Academic literature also finds that issuers with non-executive employee option plans use funds that would otherwise be used to compensate employees in other areas of the issuer. We expect affected issuers would be able to improve their allocation of capital as a consequence of the proposed rules. The latter may be particularly important for issuers that are financially constrained.

Although academic theory and findings concerning the economic effects of the use of equity-based pay may apply to both traditional employees and platform workers up to a certain

¹²⁵ Although the scope of the proposed rules is broader than “equity-based” compensation, we believe that most, if not all, issuances under Rule 701(h) will be equity-based securities.

¹²⁶ Academic literature usually considers the agency relationship between investors or issuer owners (principals) and issuer management (agents). Within the issuer, agency relationships can also exist between management (principal) and non-management employees (agents). See, e.g., Michael Jensen & William Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

¹²⁷ Under certain circumstances, inappropriate structures of compensation contracts may lead to undesirable outcomes, such as inappropriate risk taking.

extent, there could be differences due to the differences between online platform workers and traditional employees. Specifically, platform workers may have different motives for undertaking such work and different employment horizons.¹²⁸ As such, online platform workers might respond differently to equity-based pay as compared to traditional employees, making the economic effects of equity-based pay for these workers difficult to predict. Moreover, the economic effects of the proposed amendments will be affected by the restrictions on the use of equity-based pay under the proposed amendments and will depend on how affected issuers structure compensation arrangements based on each issuer's facts and circumstances.

Equity-based pay also will introduce liquidity and valuation risks to the compensation of platform workers. Such risks are likely to be more significant for compensation offered by non-reporting issuers. For example, the transferability prohibition in the proposed amendments to Rule 701 will introduce illiquidity in the compensation of non-reporting issuers' platform workers. Further, the relatively more opaque information environment of non-reporting issuers is likely to lead to increased valuation risk in the equity-based compensation offered. These increased risks are likely to reduce the expected benefits of the proposed amendments for non-reporting issuers and their platform workers.

Below we discuss the expected benefits and costs from the proposed rules in more detail.

C. Expected Economic Benefits and Costs

In this section, we discuss the expected economic benefits from the proposed amendments, including potential factors that are likely to introduce some uncertainty as to the expected benefits from the proposed amendments. We then discuss how the furnished information concerning how platform providers use the provisions in the proposed amendments may serve to inform the Commission about whether to undertake further action. Finally, we discuss potential costs related to the proposed amendments.

¹²⁸ For example, the majority of gig economy workers appear to engage in such work to supplement their basic income, and may engage in such work on a more sporadic basis, relative to traditional employees. *See supra* Section IV.A.2.

1. Expected Economic Benefits

Providing issuers greater flexibility in the use of equity-based compensation may allow issuers to design compensation contracts or arrangements that are more efficient in aligning employee incentives with those of investors. Improved incentives could lead to increased effort and improved decision-making by platform workers.¹²⁹ Evidence in the academic literature shows a positive correlation between the use of non-executive stock option compensation and measures of operating performance and issuer innovation, but that such effect varies depending on facts and circumstances.¹³⁰ Evidence also shows that the effect of non-executive stock options tends to be stronger when such plans are broadly implemented within the issuer.¹³¹

The proposed amendments may provide affected companies with additional resources, which may particularly benefit issuers that face capital constraints. Permitting issuers to use securities to compensate online platform workers may free up resources. This would permit issuers to reallocate resources towards other productive uses. Academic literature that examines the use of non-executive employee stock options finds that such compensatory plans are more

¹²⁹ It should be noted that the efficiency of variable pay may be higher when the metric/signal used to determine the variable component of pay accurately reflects the agent's effort and performance. Due in part to the business model of online platforms, and in part due to technological advances, online platform workers' effort and performance may be measured with higher accuracy than in traditional business models. For example, Uber drivers have an individual rating that is based on direct inputs from multiple customers receiving the service. This characteristic of the online platform business model may facilitate more efficient contracting between the issuer and workers.

¹³⁰ See Xin Chang, Kangkang Fu, Angie Low & Wenrui Zhang, *Non-executive employee stock options and corporate innovation*, 115 J. FIN. ECON. 168 (2015). The study uses a sample of S&P 1500 companies over the 1998-2003 period to examine the effect of stock options granted to non-executive employees on corporate innovation, as measured by patent applications and patent citations. The study documents a positive relation between the use of stock options to compensate non-executive employees and proxies for corporate innovation. The study also finds that the effect of employee stock options on innovation is due mostly to the risk-taking incentive that stock options provide to employees rather than the incentive to exert effort. See also Yael Hochberg & Laura Lindsey, *Incentives, Targeting, and Firm Performance: An Analysis of Non-executive Stock Options*, 23 REV. FIN. STUD. 4148 (2010) (the "Hochberg Study"). The study uses a sample of S&P 1500 companies over the 1997-2004 period to examine the effect of employee stock options on issuer performance. The study documents a positive relation between implied incentives from employee stock options and future operating performance, on average. The study also documents that the positive relation between employee stock options and firm performance is concentrated in smaller firms and firms with significant growth options. Moreover, the study shows that such effect is stronger for broad-based option plans as they induce a mutual monitoring effect within employees.

¹³¹ See Hochberg Study, *supra* note 130.

frequently used by issuers facing capital requirements and financing constraints.¹³² We expect that capital constraints are more likely to be a concern for at least a subset of non-reporting issuers. We thus expect the proposed amendments to provide these issuers with increased flexibility in terms of available resources.

The proposed amendments would permit affected issuers to offer compensatory securities to, in addition to natural persons, entities meeting specified conditions. As stated above, the gig economy is an evolving market in which participating workers may be organized in various ways. We expect this proposed amendment to expand the set of affected issuers that would be eligible to use securities to compensate platform workers. Also, the proposed amendment may benefit platform workers as it would allow them to optimize their preferred organizational structure while being eligible to receive compensatory securities for services provided through the online platform.

Finally, to the extent that issuers that use platform workers – *i.e.*, “platform providers” – compete for labor with issuers that offer traditional employment, the use of equity-based compensation could permit platform providers to be more competitive in the labor market. Currently, platform providers cannot rely on Rule 701 or use Form S-8 to issue securities as compensation to their platform workers. They are thus at a disadvantage in terms of offering compensation contracts that are likely to attract and retain platform workers. Facilitating

¹³² See John Core & Wayne Guay, *Stock Option Plans for Non-Executive Employees*, 61 J. FIN. ECON. 253 (2001). The study examines detailed information about non-executive employee stock option holdings, grants, and exercises for 756 companies during the 1994-1997 period. Among other findings, the study’s results support the hypothesis that options are granted to non-executives more intensively when firms have greater financing needs and face financing constraints. See also Ilona Babenko, Michael Lemmon & Yuri Tserlukevich, *Employee Stock Options and Investment*, 66 J. FIN. 981 (2011). The study examines a sample of 1,773 companies over the period 2000 to 2005 with regards to their broad-based employee stock option programs. The study finds evidence consistent with the idea that stock options can mitigate financing constraints by substituting for cash wages at the time of the grant, and by providing significant cash inflows at the time of exercise, conditional on a high stock price. The study further estimates that \$0.34 of each dollar of cash inflow received by the firm from the exercise of stock options is allocated to increasing capital and R&D expenditures.

platform providers' efforts to attract and retain platform workers could increase their competitiveness.

To the extent that platform providers require platform workers with specialized skills, the academic literature provides evidence that issuers are more likely to use employee stock option plans when they need to attract employees with skills that may be critical for an issuer's success.¹³³ Relatedly, to the extent that platform providers benefit from having exclusive access to platform workers, we expect the proposed amendments to facilitate such efforts.

There are, however, potential factors that likely introduce some uncertainty as to the expected benefits from the proposed amendments. First, issuing securities as compensation would introduce liquidity and valuation risks. These risks are likely to create uncertainty in the value of platform workers' compensation. This may partially offset benefits arising from greater incentive alignment. Specifically, depending on the facts and circumstances, this uncertainty could lead platform workers to discount the value of such pay to varying extents. We expect the liquidity and valuation risks to be relatively more pronounced for non-reporting issuers, as their information environment is more opaque and the compensatory securities would not be sellable. If platform workers demand additional pay as compensation for bearing these risks, equity-based pay would be a more costly form of compensation for the issuer (relative to cash).¹³⁴ Thus, issuers may need to provide increased amounts of equity-based pay to be able to offer an overall compensation value that would attract and retain employees.¹³⁵

¹³³ *See id.*

¹³⁴ *See* Brian Hall & Kevin Murphy, *Stock Options for Undiversified Executives*, 33 J. ACCT. & ECON. 3 (2002). The study analyzes the value of non-tradeable options held by undiversified and risk-averse executives. The study distinguishes between the value of the option to the executive, and the cost of the option to the issuer. Intuitively, the paper provides evidence that risk-aversion and non-diversification create a difference between the issuer cost and the executive value of stock options. *See also* Lisa Meulbroek, *The Efficiency of Equity-Linked Compensation: Understanding the Full Cost of Awarding Executive Stock Options*, 30 FIN. MGMT. 2 (2001). The study argues that undiversified managers will value stock or option-based compensation at less than its market value and derives a method to measure such deadweight costs, ultimately concluding that undiversified managers at rapidly growing, entrepreneurial-based firms heavily discount the value of these options.

¹³⁵ In economic theory, this is referred to as the reservation wage of the agent/employee. The expected value of the compensation offered must meet the minimum required compensation that the employee requires to participate in a specific job or task.

In addition, the motives of workers that choose to engage in platform work differs from those of workers that engage in traditional forms of employment. As discussed above, surveys of the online platform economy show that the majority of online platform workers (1) earn secondary income from such work and (2) tend to participate selectively in such work during times when their demand for immediate income is high. As such, it may be reasonable to assume that the majority of online platform workers place particular value on the ability to generate immediate income from platform-based work. Therefore, the transfer prohibitions in the proposed amendments¹³⁶ may limit the benefit of the amendments in terms of platform worker attraction and retention, and platform worker incentive alignment.¹³⁷

Platform workers may benefit from the proposed amendments, depending on how affected issuers structure compensation contracts under the proposed amendment. For example, the proposed amendments would provide an opportunity for platform workers to own equity in the platform provider, possibly at an earlier stage of development. If the platform provider's value increases in the future, platform workers holding its securities would experience an increase in their wealth.

Under the proposed amendments, issuers that issue securities to platform workers would be required to furnish certain information to the Commission on a periodic basis.¹³⁸ We believe that this information would provide insight into how affected companies are using these compensatory securities. We also believe it could help inform our assessment of the potential benefits of broadening the scope of work relationships for which issuers may issue securities as

¹³⁶ Specifically, the proposed amendments to Rule 701 require the issuer to take reasonable steps to prohibit the transfer of securities issued to platform workers pursuant to the exemption, other than a transfer to the issuer or by operation of law.

¹³⁷ Transfer restrictions reduce the liquidity of equity-based compensation, leading recipients of such compensation to discount the value of the equity-based pay they are offered. Companies thus may need to provide additional pay to compensate online platform workers for the possible lack of liquidity in their compensation arrangements.

¹³⁸ Although the proposed rule would require issuers to furnish certain information, furnishing the identified information would not be a condition to rely on Rule 701 or Form S-8. *See supra* Section II.F.

compensation.¹³⁹ If, however, not all of the issuers furnish the required information, the collected information would be incomplete and could be biased, which could weaken the magnitude of this benefit.

The proposed amendments to Rule 12g5-1 would extend the exclusion from the definition of securities “held of record,” and the corresponding safe harbor, to securities held by platform workers who received them under the proposed amendment to Rule 701. This would allow non-reporting issuers that issue compensatory securities to platform workers to control how and when they become subject to reporting requirements. The proposed amendment to Rule 12g5-1 could be particularly beneficial for cash-constrained issuers, which would be able to issue compensatory securities to their platform workers without being subject to the compliance costs associated with the Exchange Act reporting requirements. The proposed amendment to Rule 12g5-1 would not be temporary. We expect that issuers will benefit from the non-temporary nature of this proposed amendment because it will allow them to weigh the costs and benefits of using the exemption without it causing them to become subject to Exchange Act reporting requirements and the associated compliance costs, if the exemption is not extended.

The proposed amendments would ensure that estates of deceased employees and representatives of incompetent former employees would receive securities underlying options, warrants, or rights issued to a former employee pursuant to Rule 701. Given that such options, warrants, or rights typically include a vesting period, the proposed amendment would benefit issuers and platform workers as it would provide certainty to platform workers that securities related to options, warrants, or rights would be received by executors, administrators, or beneficiaries in the future. We expect the proposed amendment to strengthen the anticipated benefits described above.

2. Expected Economic Costs

¹³⁹ Relatedly, while it is too early to assess the long-term effects of the COVID-19 pandemic on the gig economy, we intend to monitor developments in this area.

To the extent that the proposed amendments result in an expanded use of Rule 701 and Form S-8 to issue compensatory securities, there would be a corresponding increase in the overall burden estimates associated with these provisions for purposes of the Paperwork Reduction Act. We discuss these increased burden estimates in Section V.C below.

Under the proposed amendments, any issuer that grants compensatory securities to platform workers would be required to furnish certain information to the Commission at six-month intervals. Furnishing this required information would impose certain costs on affected issuers to compile and submit the specified information. As discussed in Section V.C below, for purposes of the Paperwork Reduction Act, we estimate that this aspect of the proposed amendments would result in an additional 1.5 burden hours per semi-annual response for non-reporting issuers and 1 additional burden hour per semi-annual response for registrants.

Affected issuers may incur costs in establishing and administering a compensation program for platform workers. We expect such costs (including but not limited to accounting and legal costs, and costs related to preparing and filing a registration statement, if applicable) to vary based on facts and circumstances. If an affected issuer already has an established compensation plan for employees, then the incremental cost to administer a similar program for, or amend the plan to include, platform workers is likely to be relatively low. Such costs are likely to be relatively higher for issuers that do not have an existing employee compensation plan in place.¹⁴⁰ Similarly, the incremental costs incurred by registrants that already register offers and sales of securities on Form S-8 under their employee compensation plans would be lower than those for registrants registering securities on Form S-8 for the first time. We are not able to quantify these potential costs due to lack of data.

¹⁴⁰ We expect that platform providers would incur legal costs to create the equity-based compensation contract. We do not expect plan administration costs to be material, however, as it is our understanding that most plans are not tax-qualified plans and therefore are not required to adhere to ERISA requirements, which can be costly.

Affected workers could incur costs that could vary based on how issuers structure compensation packages and to the extent awards under compensation plans are substituted for cash or other compensation. As discussed above, any illiquidity and valuation risks associated with these securities could lower their value to the holder. If affected companies offer securities in lieu of cash compensation, the overall value of the compensation to the platform worker may decline. We expect such potential costs to be mitigated by the limit on the amount of compensatory securities that may be offered by affected issuers, as well as by competition for platform workers in labor markets.

D. Effects on Efficiency, Competition, and Capital Formation

The proposed amendments are expected to increase the competitiveness of affected issuers in their efforts to attract and retain workers, to the extent that the affected issuers compete with one another and with traditional issuers for the same workers. As discussed above, however, the extent of any increase in their competitiveness would depend on how affected issuers use the increased flexibility offered by the proposed amendments in designing compensation arrangements for online platform workers.

To the extent that the proposed amendments enable affected issuers to improve the quality and the incentive alignment of their workforce, it could improve these issuers' overall operational efficiency and thus enhance their ability to attract capital. Similarly, the additional flexibility to issue securities as compensation for platform workers may free up resources, particularly for capital-constrained issuers, permitting these issuers to reallocate resources to other productive uses.

E. Reasonable Alternatives

The amendments are proposed primarily on a five-year temporary basis. We could have proposed all of the amendments on a permanent basis. A permanent rule would provide more certainty to issuers and might encourage additional use of the proposed amendments, particularly if the initial set-up costs for such compensation programs are high. As noted above, however,

there are uncertainties surrounding the nature of these companies' business models, and the gig economy continues to evolve. Moreover, data shows that platform workers, on average, may have different motivations than traditional employees for undertaking work. Specifically, as discussed above, platform workers appear to be driven mainly by an effort to supplement basic sources of income when additional income is needed. As such, platform workers are likely to differ from traditional employees in their time horizon for such work. Due to these uncertainties, it is challenging to predict how issuers affected by the rule would use securities for compensatory purposes and how platform workers receiving such compensation would perceive its value.

Adopting the amendments on a temporary basis would allow the Commission to assess their effectiveness and make any necessary adjustments before implementing a permanent rule. Specifically, the information furnished by issuers that choose to rely on the proposed amendments would serve to inform the Commission on any potential future adjustments. For example, information collected would inform the Commission on the extent to which gig economy companies issue compensatory securities and how they structure such compensation across the various online platforms based on their facts and circumstances. Such information could be used to assess whether and how the proposed amendments should be extended or made permanent.

The proposed amendments' scope is limited to a part of the gig economy. We could have proposed amendments that apply to all gig economy issuers and corresponding workers. Such an alternative would have allowed additional gig economy companies, for example online platforms that facilitate the sale of goods, to compensate their platform workers with securities. Under such alternative, a broader set of gig economy companies would be able to issue securities as compensation to platform workers, with the expected benefits as described above for gig economy companies with platform workers who provide services. The different nature of platform workers as compared to traditional employees introduces some uncertainty as to the

effects of the proposed amendments, as discussed above. Thus, proposing the amendments with an expanded scope would likely carry increased uncertainty as to the amendments' economic impact.

Further, we could have proposed different limits, including no limits, on the amount of compensatory securities that may be offered to individual platform workers. The proposed rule would limit equity-based compensation to 15 percent of the total compensation provided on a 12-month basis and no more than \$75,000 over a 36-month period. The proposed limits could have been higher or lower, or could apply to longer or shorter periods, allowing affected issuers to include different amounts of securities in compensation arrangements. We are unable to evaluate with precision whether a higher or lower cap or a longer or shorter period would be preferable in comparison to the proposed amendments' requirements, due mostly to the lack of data and also due to uncertainty as to how affected issuers may use the new form of compensation available to them. In general, allowing for greater amounts of equity-based compensation would provide companies with additional flexibility to structure compensation arrangements that might provide stronger incentives, a potentially increased ability to compete for talent, and more flexibility in terms of internal capital-allocation options. Going further, we could have proposed no individual limit on the amount of compensatory securities that may be offered to individual platform workers. However, as discussed above, due in part to the nature of equity-based compensation and in part due to the characteristics of platform workers, equity-based compensation may be a more costly way to compensate and provide incentives. Accordingly, it is unclear to what extent issuers would take advantage of the ability to issue greater amounts of securities-based compensation. Limiting issuers to lower amounts of securities-based compensation, on the other hand, may not provide adequate flexibility to affected issuers to incorporate equity-based compensation into compensation arrangements, thus limiting the potential benefits of the proposed amendments.

The proposed changes to Rule 701 would require the issuer to take reasonable steps to prohibit the transferability of securities issued to platform workers pursuant to the exemption, except for transfers to the issuer or by operation of law, while the proposed changes to Form S-8 would not include such a requirement. As discussed above, the transferability restriction is likely to affect the perceived value of compensatory securities offered pursuant to revised Rule 701 and as a consequence weaken the magnitude of expected benefits from the proposed amendments to Rule 701. We could have proposed an extended holding period in lieu of an outright restriction on transfer, or eliminate the transfer restrictions altogether. Eliminating the transfer restriction would provide issuers issuing shares pursuant to Rule 701 and registrants registering the issuance of shares on Form S-8 with the same expected benefits in terms of their ability to attract and retain platform workers. Introducing a defined holding period would provide some certainty as to when these securities become transferable and potentially increase their value for platform workers. However, doing so could increase the risk of an informal market developing for such securities, which given the opaque information environment of non-reporting issuers, could lead to adverse consequences for platform workers and other investors.

Securities offered to platform workers under the proposed amendment to Rule 701 would be aggregated with securities offered to employees under the current Rule 701 exemption in order to determine whether the issuer is required to deliver certain disclosure under Rule 701(e), and whether the overall cap on compensatory securities offerings has been met under Rule 701(d). Alternatively, we could have proposed a separate cap for compensatory securities offered to platform workers. Such alternative would increase the amount of securities that could be issued to platform workers for issuers with a mix of traditional employees and platform workers, leading to potentially greater benefits for these issuers. However, it is possible that such an alternative could adversely affect issuers that employ traditional workers as compared to issuers that employ both traditional and platform workers.

The proposed amendments to Rule 12g5-1 would extend the exclusion from the definition of securities “held of record,” and corresponding safe harbor, to securities held by platform workers who receive them pursuant to a compensation plan under the proposed amendments to Rule 701. Absent such proposed amendments, platform workers holding compensatory securities of non-reporting issuers would be considered holders of record. We believe that this would weaken the expected economic benefits from the proposed amendments to Rule 701. Under such an alternative, gig economy issuers may be disinclined to issue compensatory securities to their platform workers to avoid being subject to Exchange Act reporting requirements and the associated compliance costs. The proposed amendments to Rule 12g5-1 are not temporary. We could have proposed these amendments on a five-year temporary basis. Such alternative would result in platform workers holding compensatory securities becoming holders of record at the end of the five-year period if the exemption were not extended. We believe that under such alternative, gig economy issuers would be disinclined to issue compensatory securities to their platform workers to avoid being subject to Exchange Act reporting requirements and the associated compliance costs, at the expiration of the five-year period.

Request for Comment

We request comment on all aspects of our economic analysis, including the potential costs and benefits of the proposed amendments and alternatives thereto, and whether the proposed amendments, if adopted, would promote efficiency, competition, and capital formation or have an impact or burden on competition. Commenters are requested to provide empirical data, estimation methodologies, and other factual support for their views, in particular, on costs and benefits estimates.

In particular, we seek comment with respect to the following questions: Are there any costs and benefits that are not identified or are misidentified in the above analysis? Are there any effects on efficiency, competition, and capital formation that are not identified or are

misidentified in the above analysis? Should we consider any of the alternative approaches outlined above instead of the proposed rules? Which approach and why? Are there any other alternative approaches that we should consider? If so, what are they and what would be the associated costs or benefits of these alternative approaches?

V. PAPERWORK REDUCTION ACT

A. Summary of the Collection of Information

Certain provisions of our rules and forms that would be affected by the proposed amendments contain “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995 (“PRA”).¹⁴¹ The Commission is submitting the proposal to the Office of Management and Budget (“OMB”) for review in accordance with the PRA.¹⁴² The hours and costs associated with preparing and filing the forms and reports constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information requirement unless it displays a currently valid OMB control number. Compliance with the information collections is mandatory. Responses to the information collections are not kept confidential and there is no mandatory retention period for the information disclosed. The titles for the affected collections of information are:

- “Form S-8” (OMB Control No. 3235-0066); and
- “Rule 701” (OMB Control No. 3235-0522).

We adopted Form S-8 and Rule 701 pursuant to the Securities Act. Form S-8 sets forth the disclosure requirements for a registration statement for securities to be offered by a registrant under an employee benefit plan to its employees, or employees of a subsidiary or parent company, to help such investors make informed investment decisions. Rule 701 provides an

¹⁴¹ See 44 U.S.C. 3501 et seq.

¹⁴² 44 U.S.C. 3507(d) and 5 CFR 1320.11.

exemption from registration for offers and sales of securities pursuant to certain compensatory benefit plans and contracts relating to compensation. Issuers conducting compensatory benefit plan offerings in excess of \$10 million in reliance on Rule 701 during any consecutive 12-month period are required to provide plan participants with certain disclosures, including financial statement disclosures.¹⁴³ This disclosure constitutes a collection of information. A description of the proposed rule amendments, including the need for the information and its proposed use, as well as a description of the likely respondents, can be found in Section II above, and a discussion of the economic effects of the proposed amendments can be found in Section IV above.

B. Summary of the Proposed Amendments’ Effects on the Collections of Information

The following table summarizes the estimated effects of the proposed amendments on the paperwork burdens associated with the affected collections of information.

PRA Table 1. Estimated Paperwork Burden Effects of the Proposed Amendments

Collection of Information	Proposed Amendment	Expected Estimated PRA Effect of Proposed Amendment	Current No. of Average Annual Responses	Estimated Increase in No. of Average Annual Respondents ¹
Form S-8	<ul style="list-style-type: none"> • Would temporarily expand the scope of Form S-8 to include issuances to a registrant’s platform workers in addition to its employees. • Issuers would be required to furnish certain information every six months. 	<ul style="list-style-type: none"> • Expected to increase the average annual number of Form S-8s filed during the temporary 4-year period. • Expected to increase PRA burden by 2 hours per affected respondent annually (<i>i.e.</i>, 1 hour for each semi-annual response). 	<ul style="list-style-type: none"> • 2,140 • 0 	<ul style="list-style-type: none"> • 17 • 17
Rule 701	<ul style="list-style-type: none"> • Would temporarily expand the scope of Rule 701 to exempt issuances to an issuer’s platform workers in addition to its employees. 	<ul style="list-style-type: none"> • Expected to increase average annual number of issuers required to provide Rule 701(e) disclosure because offers and sales to platform workers would be integrated with offers and sales to employees for 	<ul style="list-style-type: none"> • 800 	<ul style="list-style-type: none"> • 6

¹⁴³ See 17 CFR 230.701(e).

	<ul style="list-style-type: none"> • Issuers would be required to furnish certain information every six months. 	<p>purpose of determining whether an issuer has exceeded the \$10 million threshold under Rule 701(e).</p> <ul style="list-style-type: none"> • Expected to increase PRA burden by 3 hours per affected respondent annually (<i>i.e.</i>, 1.5 hours for each semi-annual response).² 	<ul style="list-style-type: none"> • 0 	<ul style="list-style-type: none"> • 105
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¹ These estimates are based on the Farrell study, which identified 106 companies making payments to online platform workers providing services during 2012-2018. *See supra* Section IV.A, note 119 and accompanying text. The staff updated this study’s findings using an assumed growth rate of 15 percent for such companies in 2019, which yielded an estimate of 122 companies making payments to platform workers as of calendar year-end 2019. Upon a review of Commission filings, the staff estimated that 17 of those companies are public, and 105 private. The staff further estimated that 5 percent of those private companies (six companies) would likely exceed the \$10,000,000 threshold for aggregate annual securities offerings to its employees and platform workers and would be required to provide the disclosure pursuant to Rule 701(e). In making this estimate, the staff relied on the PRA estimates in Release No. 33-10520, which increased the Rule 701(e) disclosure threshold from \$5,000,000 to \$10,000,000.

² We estimate a greater increase in the PRA burden for Rule 701(h)’s furnished disclosure provision because it would solicit more information compared to the similar proposed provision for Form S-8.

C. Incremental and Aggregate Burden and Cost Estimates for the Proposed Amendments

Below we estimate the incremental and aggregate increase in paperwork burden as a result of the proposed amendments. These estimates represent the average burden for all issuers, both large and small. In deriving our estimates, we recognize that the burdens will likely vary among individual issuers based on a number of factors, including the nature of their business. For purposes of the PRA, the burden is to be allocated between internal burden hours and outside professional costs. The table below sets forth the percentage estimates we typically use for the burden allocation for each affected collection of information. We also estimate that the average cost of retaining outside professionals is \$400 per hour.¹⁴⁴

Collection of Information	Internal	Outside Professionals
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¹⁴⁴ We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of this PRA analysis, we estimate that such costs would be an average of \$400 per hour. This estimate is based on consultations with several registrants, law firms, and other persons who regularly assist registrants in preparing and filing reports with the Commission.

Form S-8	50%	50%
Rule 701	25%	75%

**PRA
Table
2.**

Standard Estimated Burden Allocation for Specified Collections of Information

We estimate that the proposed amendments would change both the frequency of responses to, and the burden per response of, the existing collections of information. The burden increase estimates were calculated by multiplying the estimated increased number of responses by the increased estimated average amount of time it would take to prepare and review the disclosure required under the affected collection of information. The table below illustrates the incremental change to the annual compliance burden of the affected collection of information, in hours and in costs.

PRA Table 3. Calculation of the Incremental Change in Burden Estimates of Current Responses Resulting from the Proposed Amendments

Collection of Information	Number of Estimated Affected Respondents	Burden Hour Annual Increase per Affected Respondent	Increase in Burden Hours for Affected Respondents	Increase in Internal Burden Hours for Affected Respondents	Increase in Professional Hours for Affected Respondents	Increase in Professional Costs for Affected Respondents
	(A)	(B)	(C) = (A) x (B)	(D) = (C) x 0.5 or 0.25	(E) = (C) x 0.5 or 0.75	(F) = (E) x \$400
S-8 (including furnished disclosure)	17	29 ¹	493	246.5	246.5	\$98,600
Rule 701(e) + Rule 701(h) furnished disclosure	6	5 ²	30	7.5	22.5	\$9,000
Rule 701 (only furnished disclosure)	99	3	297	74.25	222.75	\$89,100
Rule 701 (total)	105		327	81.75	245.25	\$98,100

¹ Based on the current OMB inventory of 27 annual burden hours per response + 1 burden hour for each semi-annual required furnished disclosure (2 additional annual burden hours) = an increase of 29 burden hours per response.

² Based on the current OMB inventory of 2 annual burden hours per response + 1.5 burden hours for each semi-annual required furnished disclosure (3 additional annual burden hours) = an increase of 5 burden hours per response.

The table below illustrates the program change expected to result from the proposed rule amendments together with the total requested change in reporting burden and costs.

PRA Table 4. Requested Paperwork Burden under the Proposed Amendments

Collection of Information	Current Burden			Program Change			Requested Change in Burden		
	Current Annual Responses	Current Burden Hours	Current Cost Burden	Number of Affected Responses	Change in Issuer Hours	Change in Professional Costs	Requested Annual Responses	Requested Burden Hours ¹	Cost Burden
	(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H) = (B) + (E)	(I) = (C) + (F)
S-8	2,140	28,890	\$11,556,000	17	246.5	\$98,600	2,157	29,137	\$11,654,600
Rule 701	800	400	\$480,000	105	81.75	\$98,100	905	482 ²	\$578,100

¹ Rounded to nearest whole number.

² Thus, the estimated change in internal burden would result in an annual internal burden per response of 2.13 hours, which is a slight increase in the current annual internal burden of 2 hours. $482/.25 = 1,928$; $1,928/905 = 2.13$.

D. Request for Comment

We request comment in order to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information would have practical utility;
- Evaluate the accuracy of our estimate of the burden of the proposed collection of information;

- Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected;
- Evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology; and
- Evaluate whether the proposed amendments would have any effects on any other collections of information not previously identified in this section.¹⁴⁵

Any member of the public may direct to us any comments about the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090, with reference to File No. S7-19-20. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-19-20, and be submitted to the Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549-2736. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

VI. INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS

This Initial Regulatory Flexibility Act Analysis (“IRFA”) has been prepared, and made available for public comment, in accordance with the Regulatory Flexibility Act (“RFA”).¹⁴⁶ It relates to the proposed amendments to Securities Act Rule 701 and Form S-8 to permit the offer

¹⁴⁵ We request comment pursuant to 44 U.S.C. 3506(c)(2)(B).

¹⁴⁶ 5 U.S.C. 601 et seq.

and sale of securities to internet platform workers, subject to specified conditions, for a temporary, five-year period. The Commission also is proposing to amend Exchange Act Rule 12g5-1 to exclude from the definition of “held of record” securities held by platform workers who received them pursuant to a compensation plan under proposed Rule 701(h) and to provide a safe harbor for issuers in connection with such exclusion. Neither the proposed exclusion nor the corresponding safe harbor would be temporary. As required by the RFA, this IRFA describes the impact of these proposed amendments on small entities.¹⁴⁷

A. Reasons for, and Objectives of, the Proposed Action

The proposed amendments would expand the scope of Rule 701 and Form S-8 to address recent changes in the workforce caused by the rise of the “gig economy” by permitting the issuance of securities to an issuer’s platform workers, in addition to its employees, for compensatory purposes. The proposed amendments would include conditions designed to limit the possibility of the changes to Rule 701 and Form S-8 resulting in offers and sales for capital-raising purposes. The proposed amendments to Rule 701 and Form S-8 would be temporary to enable the Commission to assess whether issuances of securities to platform workers are being made for legitimate compensatory purposes, and not for capital-raising purposes, and whether such issuances have the expected beneficial effects for issuers in the “gig economy” and their investors.

The proposed amendments to Exchange Act Rule 12g5-1 would extend the exclusion from the definition of “held of record” and safe harbor, for purposes of Section 12(g), which currently applies to securities held by persons who received them pursuant to an employee compensation plan, to securities held by platform workers pursuant to a compensation plan under proposed Rule 701(h). The proposed amendments to Rule 12g5-1, which would not be temporary, are intended to remove a potential disincentive to the issuance of securities as

¹⁴⁷ 5 U.S.C. 603(a).

compensation to platform workers and to avoid favoring issuers that do not have platform workers over issuers that have them. The reasons for, and objectives of, all of the proposed amendments are discussed in more detail in Sections II.A. through II.F., above.

B. Legal Basis

We are proposing the amendments contained in this release under the authority set forth in Sections 7, 10, and 19(a) of the Securities Act, as amended, and Sections 3(b), 12, 13, 15, 23(a), and 36 of the Exchange Act, as amended.

C. Small Entities Subject to the Proposed Rules

The proposed changes would affect some issuers that are small entities. The RFA defines “small entity” to mean “small business,” “small organization,” or “small governmental jurisdiction.”¹⁴⁸ For purposes of the RFA, under 17 CFR 240.0-10(a), an issuer, other than an investment company, is a “small business” or “small organization” if it had total assets of \$5 million or less on the last day of its most recent fiscal year and, under 17 CFR 230.157, is also engaged or proposing to engage in an offering of securities that does not exceed \$5 million.

The proposed amendments would apply only to issuers whose platform workers provide services; they would not apply to issuers whose platform workers are providing goods. We estimate that there are only a limited number of companies with platforms providing services that would be affected by the proposed rules.¹⁴⁹ Although it is possible that the proposed amendment to Form S-8 could cause a small entity to file a Form S-8 for the issuance of securities to its platform workers, based upon staff review of Commission filings during 2018-2019, and due to the resulting burden and expense, we do not believe that this outcome is likely.¹⁵⁰ There is, however, a lack of information concerning the assets of potentially affected private companies, and as such, it is difficult to estimate with certainty the number of private issuers that qualify as

¹⁴⁸ 5 U.S.C. 601(6).

¹⁴⁹ Based upon a review of Commission filings and other relevant data, the staff estimated that the proposed rules would affect 122 companies, 17 of which are public and 105 of which are private. *See supra* Section V.B.

¹⁵⁰ None of the 17 Forms S-8 filed by issuers with service-providing platforms were small entities.

small entities that would be eligible to rely on the proposed amendments to Rule 701 and Rule 12g5-1 or that would choose to become public companies and then rely on the proposed amendments to Form S-8. We therefore are soliciting comment on the number of small entities that would be affected by the proposed amendments.

D. Reporting, Recordkeeping, and Other Compliance Requirements

As noted above, the purpose of the proposed amendments is to permit the issuance of securities for compensatory purposes under Rule 701 and Form S-8 to a new category of worker, the “platform worker.” By expanding the scope of Rule 701 to include issuances of unregistered securities to a non-reporting issuer’s platform workers, the proposed amendments likely would result in cost savings for such an issuer, which would otherwise have to incur the costs of registering the securities, absent another exemption from registration, and thereby become an Exchange Act reporting issuer. In addition, by extending the current exclusion and safe harbor under Exchange Act Rule 12g5-1 to securities held by platform workers who received them pursuant to a compensation plan under the proposed Rule 701 amendment, a non-reporting issuer would benefit by not being required to count those platform workers as record holders for the purpose of determining its Section 12(g) registration obligations.

We believe that the proposed amendments to Rule 701 and Rule 12g5-1 could be of particular benefit to small entities, which may be financially constrained, by enabling them to issue securities as compensation, instead of cash, within the proposed limits. This could help small entities attract potential workers and enhance their competitive position.

In contrast, we do not believe that the compliance costs of the proposed Rule 701 amendment would be significant. The most significant compliance burden under current Rule 701 is the financial disclosure requirement under Rule 701(e) for issuers that exceed the \$10 million threshold during a 12-month period. Due to the \$10 million threshold, this requirement

would not apply to small entities.¹⁵¹ Moreover, although under the proposed rules, an issuer offering securities to its platform workers pursuant to the amended Rule 701 would be required to furnish certain information every six months, we do not expect the resulting compliance burden to be significant.¹⁵²

The proposed amendment to Form S-8 would benefit public companies with platforms offering services by permitting them to issue registered securities to their platform workers in addition to their employees, which could enhance their competitive position vis-à-vis companies that only have employees. The proposed amendments likely would result in the filing of additional Form S-8 registration statements to cover offers and sales to such workers. Those registrants would incur the compliance burden and costs typically associated with preparing and filing Form S-8. In addition, because we are proposing a requirement to furnish information every six months for Form S-8 issuers, similar to the proposal for Rule 701 issuers, those registrants would incur the compliance burden and costs associated with furnishing the required information, which we similarly estimate would not be significant.¹⁵³ Although it is possible that the proposed amendment to Form S-8 could cause a small entity to file a Form S-8 for the issuance of securities to its platform workers, based upon staff review of Commission filings during 2018-2019, and due to the resulting burden and expense, we do not believe that this outcome is likely.¹⁵⁴ Nevertheless, we are soliciting comment on the costs and benefits of the

¹⁵¹ See 17 CFR 230.701(d), which limits the aggregate sales price or amount of securities sold under Rule 701 during any consecutive 12-month period to the greatest of \$1,000,000, 15 percent of the total assets of the issuer, or 15 percent of the outstanding amount of the class of securities being offered and sold in reliance on Rule 701. The purpose of the Rule 701(d) caps is to help curb non-compensatory sales in reliance on the rule. For example, applying the asset cap, a small entity would only be able to offer 15 percent of \$5,000,000, or \$750,000 during a consecutive 12-month period. Although in a companion rulemaking, the Commission is proposing to increase the asset limitation to 25 percent, under this increased limit, if adopted, a small entity would still be able to offer only 25 percent of \$5,000,000, or \$1,250,000. While the Commission is also proposing to raise the dollar cap, the new cap would only increase to \$2,000,000. See Release No. 33-10891 at Section II.B.

¹⁵² We estimate that the compliance burden associated with furnishing the required information under the proposed Rule 701 amendment would be 1.5 hours for each semi-annual disclosure per issuer, or a total of 3 hours per issuer on an annual basis. See *supra* Section V.B.

¹⁵³ We estimate that the compliance burden associated with furnishing the required information under the proposed Form S-8 amendment would be 1.0 hours for each semi-annual disclosure per issuer, or a total of 2 hours per issuer on an annual basis. See *supra* Section V.B.

¹⁵⁴ See *supra* note 150.

proposed amendments for small entities.

Compliance with the proposed amendments would require the use of professional skills, including legal skills, both to help ensure that an issuer has met the proposed conditions under Rule 701 designed to prevent the issuance of securities for a capital-raising purpose, and to enable a registrant to meet the requirements of Form S-8. We discuss the economic impact, including the estimated compliance burdens and costs, of the proposed amendments to all issuers, including small entities, in greater detail in Sections IV and V above.

E. Duplicative, Overlapping, or Conflicting Federal Rules

We believe that the proposed amendments would not duplicate, overlap, or conflict with other Federal rules.

F. Significant Alternatives

The RFA directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant economic impact on small entities. In connection with the proposed amendments, we considered the following alternatives:

- Establishing different compliance or reporting requirements that take into account the resources available to small entities;
- Clarifying, consolidating, or simplifying compliance and reporting requirements under the rules for small entities;
- Using performance rather than design standards; and
- Exempting small entities from all or part of the requirements.

The proposed amendments to Rule 701 and Form S-8 would permit the issuance of securities to platform workers subject to specified conditions. Although an issuer, including a small entity, would incur some compliance costs to ensure that it has met those conditions, issuers proceeding under the proposed amendment to Rule 701 would largely benefit due to the savings derived from not having to register the securities. In addition, we expect the increase in Form S-8 compliance costs to be limited because, although the proposed amendment to Form S-

8 would likely result in more registration statements on that form being filed, we believe that the proposed amendment would only slightly increase the actual burden of preparing and filing each Form S-8. We also believe that it is unlikely that the proposed amendment would result in a small entity filing a Form S-8. We are not proposing an amendment to reduce the costs of preparing and filing a Form S-8 because we believe the requirements that result in those costs are necessary to protect investors. We also are not proposing to exempt small entities from the costs associated with the proposed requirement to furnish information on a semi-annual basis because we believe that requirement is necessary to assess fully the impact of the temporary rules. Accordingly, we do not believe it is necessary to establish different compliance or reporting requirements for small entities or to exempt small entities from all or part of the proposed amendments.

Finally, with respect to using performance rather than design standards, the proposed amendments generally contain elements similar to performance standards. For example, the proposed definition of platform worker would include the condition that the issuer operates the platform for the provision of services pursuant to a written contract or agreement between the issuer and the platform worker under which the issuer controls the use of the platform. Issuer control would be demonstrated by the issuer being able to establish the amount of the fees charged for using the platform and the terms and conditions by which the platform worker receives payment for the services provided through the platform. In addition, the issuer must have the authority to accept and remove the internet platform workers providing services through the platform. However, the proposed amendments would not require that a specific fee be charged or that a specific payment mechanism be utilized. The proposed amendments would also not limit what services an issuer could facilitate through its platform or how participating workers could provide the services.

Request for Comment

We encourage the submission of comments with respect to any aspect of this IRFA. In particular, we request comments regarding:

- How the proposed rule and form amendments can achieve their objective while lowering the burden on small entities;
- The number of small entity companies that may be affected by the proposed rule and form amendments;
- The existence or nature of the potential effects of the proposed amendments on small entity companies discussed in the analysis;
- How to quantify the effects of the proposed amendments; and
- Whether there are any federal rules that duplicate, overlap, or conflict with the proposed amendments.

Commenters are asked to describe the nature of any effect and provide empirical data supporting the extent of that effect. Comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed rules are adopted, and will be placed in the same public file as comments on the proposed rules themselves.

VII. SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”),¹⁵⁵ the Commission must advise OMB as to whether the proposed amendments constitute a “major” rule. Under SBREFA, a rule is considered “major” where, if adopted, it results in or is likely to result in:

- An annual effect on the U.S. economy of \$100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment, or innovation.

¹⁵⁵ 5 U.S.C. 801 et seq.

We request comment on whether our proposal would be a “major rule” for purposes of SBREFA. In particular, we request comment and empirical data on:

- The potential effect on the U.S. economy on an annual basis;
- Any potential increase in costs or prices for consumers or individual industries; and
- Any potential effect on competition, investment, or innovation.

VIII. STATUTORY AUTHORITY

The amendments contained in this release are being proposed under the authority set forth in Sections 7, 10, and 19(a) of the Securities Act, as amended, and Sections 3(b), 12, 13, 15, 23(a), and 36 of the Exchange Act.

List of Subjects in 17 CFR Parts 230, 239, and 240

Reporting and recordkeeping requirements, Securities.

TEXT OF THE PROPOSED AMENDMENTS

For the reasons set out in the preamble, the Commission is proposing to amend title 17, chapter II of the Code of Federal Regulations as follows:

PART 230 – GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. The authority citation for part 230 continues to read, in part, as follows:

Authority: 15 U.S.C. 77b, 77b note, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78o-7 note, 78t, 78w, 78ll(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, and Pub. L. 112-106, sec. 201(a), sec. 401, 126 Stat. 313 (2012), unless otherwise noted.

* * * * *

Sections 230.400 to 230.499 issued under secs. 6, 8, 10, 19, 48 Stat. 78, 79, 81, and 85, as amended (15 U.S.C. 77f, 77h, 77j, 77s).

* * * * *

2. Amend § 230.428 by adding paragraph (d) to read as follows:

§ 230.428 Documents constituting a section 10(a) prospectus for Form S-8 registration statement; requirements relating to offerings of securities registered on Form S-8.

* * * * *

(d)(1) Where securities are to be offered to platform workers pursuant to a registration statement on Form S-8 (§ 239.16b(c)), the documents and other information identified in paragraph (a) of this section shall, taken together, constitute a Section 10(a) prospectus for offerings to platform workers pursuant to a written compensation plan, contract, or agreement. The document retention requirements in paragraph (a)(2) of this section and the delivery, updating, and related procedural requirements in paragraph (b) of this section shall also apply to such offerings to platform workers.

(2) This paragraph (d) will expire on the same date that 17 CFR 239.16b(c) will expire pursuant to 17 CFR 239.16b(c)(4).

3. Amend § 230.701 by adding Note 1 to paragraph (c) and adding paragraph (h) to read as follows:

§ 230.701 Exemption for offers and sales of securities pursuant to certain compensatory benefit plans and contracts relating to compensation.

* * * * *

(c) * * *

Note 1 to paragraph (c): Refer to § 230.701(h) for the exemption under § 230.701 applicable to offers and sales of securities to platform workers. *Platform worker* is defined in § 230.701(h)(2).

* * * * *

(h)(1) *Transactions with platform workers.* (i) In addition to the transactions exempted by paragraph (c) of this section, this section exempts offers and sales of securities (including plan interests and guarantees pursuant to paragraph (d)(2)(ii) of this section) under a written compensatory benefit plan (or written compensation contract) established by the issuer, its

parents, its subsidiaries, or subsidiaries of the issuer's parent, for the participation of platform workers as defined in paragraph (h)(2) of this section. As used in this section, the term "platform worker" includes former platform workers, executors, administrators, or beneficiaries of the estates of deceased platform workers, guardians or members of a committee for incompetent former platform workers, or similar persons duly authorized by law to administer the estate or assets of former platform workers. This section exempts offers and sales to former platform workers only if such workers met the conditions of paragraph (h) of this section at the time the securities were offered or during a period of service ending within 12 months preceding the termination of service for which the securities were issued. This section also exempts offers and sales to former platform workers of an acquired entity of securities issued in substitution or exchange for securities issued to such workers by the acquired entity on a compensatory basis while such persons were providing services to the acquired entity.

(ii) The exemption for offers and sales of securities to platform workers under this section is temporary and will expire pursuant to paragraph (h)(6) of this section, except that, following the expiration date specified in paragraph (h)(6) of this section, an issuer may continue to rely on the exemption in this paragraph (h) for the sale of securities underlying options, warrants, or rights previously issued in an exempt transaction pursuant to this paragraph (h).

(2) *Definition of platform worker.* A platform worker is a natural person or an entity specified in paragraph (h)(2)(iii) of this section, who is unaffiliated with the issuer and meets the following conditions:

(i) The worker provides *bona fide* services to the issuer (or the issuer's parents, the issuer's subsidiaries or subsidiaries of the issuer's parent) or to third-party end-users, and such services benefit the issuer. Selling or transferring permanent ownership of discrete, tangible goods would not constitute services for purposes of this section;

(ii) The services are provided pursuant to a written contract or agreement between the issuer and the worker and are provided through an internet-based platform or other widespread,

technology-based marketplace platform or system that the issuer operates and controls, as demonstrated by the following:

(A) The issuer provides access to the platform and establishes the principal terms of service for using the platform;

(B) The issuer establishes the terms and conditions by which the platform worker receives payment for the services provided through the platform; and

(C) The issuer can accept and remove the platform worker.

(iii) A platform worker may be an entity if:

(A) Substantially all of its activities involve the performance of *bona fide* services that meet the requirements of paragraphs (h)(2) and (h)(3) of this section; and

(B) The ownership interest of the entity is wholly and directly held by the natural person performing the services pursuant to paragraph (h) of this section through the entity.

(3) *Additional requirements for issuances to platform workers.* Offers and sales of securities to platform workers are eligible for an exemption under this section if the following, additional requirements are met:

(i) The issuance is pursuant to a compensatory arrangement, as evidenced by a written compensation plan, contract, or agreement, and is not for services that are in connection with the offer or sale of securities in a capital-raising transaction, or services that directly or indirectly promote or maintain a market for the issuer's securities;

(ii) No more than 15 percent of the value of compensation received by a platform worker from the issuer for services provided during a consecutive 12-month period, and no more than \$75,000 of the value of compensation received by the platform worker from the issuer during a consecutive 36-month period, shall consist of securities, with such value determined at the time the securities are granted;

(iii) The amount and terms of any securities issued to a platform worker may not be subject to individual bargaining or the worker's ability to elect between payment in securities or cash; and

(iv) The issuer must take reasonable steps to prohibit the transfer of the securities issued to a platform worker pursuant to this exemption, other than a transfer to the issuer or by operation of law, except that 90 days after the issuer becomes subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)), securities issued under this section may be resold pursuant to paragraph (g)(3) of this section.

(4) *Requirement to furnish certain information.* An issuer using the exemption under this section for the issuance of securities to platform workers is required to furnish the following information to the Commission at six-month intervals commencing six months after the first such issuance:

(i) The criteria used to determine eligibility for securities awards to platform workers, whether they are the same as for other compensatory transactions and whether those criteria, including revisions to the criteria, are communicated to workers in advance as an incentive;

(ii) The type and terms of securities issued to platform workers during each six-month interval, and whether they are the same as for other compensatory transactions by the issuer during that interval;

(iii) The reasonable steps taken to prohibit the transfer of the securities sold pursuant to this paragraph (h);

(iv) The percentage of overall outstanding securities that the amount issued cumulatively under this paragraph (h) represents;

(v) During each six-month interval, the number of platform workers, the number of non-platform workers, the number of platform workers receiving securities pursuant to this paragraph (h), and the number of non-platform workers who received securities pursuant to § 230.701; and

(vi) The number and dollar amount of securities issued to platform workers in each six-month interval, both in absolute amounts and as a percentage of the issuer's total exempt sales under § 230.701.

Instruction to § 230.701(h)(4). An issuer should furnish the required information specified in this paragraph in the manner designated by the Division of Corporation Finance for this purpose.

(5) *Request for confidential treatment.* An issuer may request confidential treatment under § 200.83 for information furnished pursuant to paragraph (h)(3) of this section. Written requests for confidential treatment under § 200.83 relating to the furnished materials may be submitted either in paper format or electronically.

(6) *Expiration of temporary exemptive rule.* Except as provided in paragraph (h)(1)(ii) of this section, the exemption for the issuance of securities to platform workers pursuant to this paragraph (h) applies only to offers or sales of securities occurring prior to five years following the date of the section's effectiveness.

(7) This paragraph (h) will expire five years from the date of effectiveness of § 230.701(h).

PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

4. The general authority citation for part 239 continues to read as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78o-7 note, 78u-5, 78w(a), 78ll, 78mm, 80a-2(a), 80a-3, 80a-8, 80a-9, 80a-10, 80a-13, 80a-24, 80a-26, 80a-29, 80a-30, and 80a-37; and sec. 107, Pub. L. 112-106, 126 Stat. 312, unless otherwise noted.

* * * * *

5. Amend § 239.16b by adding “or other compensatory plans” at the end of the title and adding paragraphs (a)(3) and (c) to read as follows:

§ 239.16b Form S-8, for registration under the Securities Act of 1933 of securities to be offered to employees pursuant to employee benefit plans or other compensatory plans.

(a) * * *

(3) Securities of the registrant to be offered to marketplace platform workers pursuant to § 239.16b(c).

* * * * *

(c) *Issuances to platform workers.* (1) A registrant may register on Form S-8 securities to be offered or sold to platform workers, as defined by § 230.701(h), for the temporary period set forth in § 239.16b(c)(4), only if:

(i) The issuance is pursuant to a compensatory arrangement, as evidenced by a written compensation plan, contract or agreement, and is not for services that are in connection with the offer or sale of securities in a capital-raising transaction or that directly or indirectly promote or maintain a market for the issuer's securities;

(ii) No more than 15 percent of the value of compensation received by a platform worker from the issuer for services provided during a consecutive 12-month period shall consist of securities, with such value determined at the time the securities are granted, with the remainder of compensation received by the platform worker from the issuer paid in cash, and no more than \$75,000 of such compensation received from the issuer during a consecutive 36-month period shall consist of securities, with such value determined at the time the securities are granted; and

(iii) The amount and terms of any securities issued to a platform worker may not be subject to individual bargaining or the worker's ability to elect between payment in securities or cash.

(2) A registrant using Form S-8 for the issuance of securities to platform workers is required to furnish the following information in the manner designated by the Division of Corporation Finance for this purpose at six-month intervals commencing six months after the first such issuance:

(i) The criteria used to determine eligibility for securities awards to platform workers, whether they are the same as the criteria for other compensatory transactions, and whether those criteria, including revisions to the criteria, are communicated to workers in advance as an incentive;

(ii) The type and terms of securities issued to platform workers during each six-month interval and whether they are the same as for other compensatory transactions by the registrant during that interval;

(iii) The percentage of overall outstanding securities that the amount issued cumulatively to platform workers under this section represents;

(iv) During each six-month interval, the number of platform workers, the number of non-platform workers, the number of platform workers receiving securities registered on Form S-8, and the number of non-platform workers who received securities registered on Form S-8;

(v) The number of platform workers, in an absolute amount and as a percentage of the total number of platform workers, employees, and other persons eligible to receive securities on Form S-8; and

(vi) The number and dollar amount of securities issued to platform workers, both in absolute amounts and as a percentage of the issuer's total sales on Form S-8 during each six-month interval.

(3) A registrant may request confidential treatment under § 200.83 for information furnished pursuant to this section. Written requests for confidential treatment under § 200.83 relating to the furnished materials may be submitted either in paper format or electronically.

(4) This paragraph (c) applies only to offers or issuances of securities occurring prior to five years from the date of the section's effectiveness.

(5) This paragraph (c) will expire five years from the date of effectiveness of § 239.16b(c).

6. Amend Form S-8 (referenced in § 239.16b) by:

- a. Redesignating paragraph (b) of General Instruction A.1. as paragraph (c);
- b. Adding paragraph (b) of General Instruction A.1.;
- c. Revising paragraph 1 of General Instruction G. (“Updating”);
- d. Revising the Note immediately following the heading “Part I - INFORMATION REQUIRED IN THE SECTION 10(a) PROSPECTUS;”
- e. Revising Item 2 of Part I; and
- f. Revising the “Signatures” section for “the Plan” by replacing the parenthetical “or other persons who administer the employee benefit plan” with “or other persons who administer the plan” in the first sentence.

The additions and revisions read as follows:

Note: The text of Form S-8 does not, and this amendment will not, appear in the Code of Federal Regulations.

**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549**

**FORM S-8
REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933**

* * * * *

GENERAL INSTRUCTIONS

A. Rule as to Use of Form S-8

1. * * *

(a) * * *

(b)(1) Securities of the registrant to be offered to platform workers pursuant to a written compensation plan, contract, or agreement. The term “platform worker” is defined by Rule 701(h)(2) (§ 230.701(h)(2)). As used in this form, the term “plan” includes a written compensation plan, contract, or agreement for the issuance of securities to platform workers.

(2) Form S-8 is available for the issuance of securities to platform workers only if, pursuant to § 239.16b(c):

(i) The issuance is pursuant to a compensatory arrangement, as evidenced by a written compensation plan, contract, or agreement, and is not for services that are in connection with the offer or sale of securities in a capital-raising transaction, or services that directly or indirectly promote or maintain a market for the issuer's securities;

(ii) No more than 15 percent of the value of compensation received by a platform worker from the issuer for services provided during a consecutive 12-month period shall consist of securities, with such value determined at the time the securities are granted, with the remainder of compensation received by the platform worker from the issuer paid in cash, and no more than \$75,000 of such compensation received from the issuer during a consecutive 36-month period shall consist of securities, with such value determined at the time the securities are granted;

(iii) The amount and terms of any securities issued to a platform worker may not be subject to individual bargaining or the worker's ability to elect between payment in securities or cash; and

(iv) The offers or sales of securities occur prior to five years from the date of the effectiveness of § 239.16b(c)]. On that date, § 239.16b(c) will expire and will no longer be effective.

Note: The purpose of § 239.16b(c) is to permit the issuance of securities to platform workers for a compensatory purpose. This section is not available for plans or schemes to circumvent this purpose, such as to raise capital. This section also is not available to any transaction that is in technical compliance with § 239.16b(c) but is part of a plan or scheme to evade the compensatory purpose of this section.

(3) A registrant using Form S-8 for the issuance of securities to platform workers is required to furnish the information specified in § 239.16b(c)(3) in the manner designated by the Division

of Corporation Finance for this purpose at six-month intervals commencing six months after the first issuance of securities to platform workers on this form.

Note: A registrant may request confidential treatment under § 200.83 for information furnished pursuant to § 239.16b(c)(3). Written requests for confidential treatment under § 200.83 relating to the furnished materials may be submitted either in paper format or electronically.

(4) The term “platform worker” includes:

(i) Former platform workers, only if such workers provided services pursuant to § 239.16b(c) of this chapter at the time the securities were offered or during a period of service ending within 12 months preceding the termination of service for which the securities were issued;

(ii) Former platform workers of an entity acquired by the issuer who may receive securities registered on this form in substitution or exchange for securities issued to them by the acquired entity on a compensatory basis while such persons were providing services to the acquired entity; and

(iii) Executors, administrators, or beneficiaries of the estates of deceased platform workers, guardians or members of a committee for incompetent former platform workers, or similar persons duly authorized by law to administer the estate or assets of former platform workers.

(5) The inclusion of individuals described in paragraph (4) of General Instruction A.1.(b) in the term “platform worker” is only to permit registration on Form S-8 of the exercise of stock options issued to platform workers pursuant to a plan, and the subsequent sale of the securities, if these exercises and sales are permitted under the terms of the plan.

* * * * *

G. Updating

Updating of information constituting the Section 10(a) prospectus pursuant to Rule 428(a) (§230.428(a)) during the offering of the securities shall be accomplished as follows:

1. Plan information specified by Item 1 of Form S-8 required to be sent or given to employees or platform workers shall be updated as specified in Rule 428(b)(1) (§230.428(b)(1)) or Rule 428(d)(1) (§230.428(d)(1)). Such information need not be filed with the Commission.

* * * * *

Part I

INFORMATION REQUIRED IN THE SECTION 10(a) PROSPECTUS

***Note:* The document(s) containing the information specified in this Part I will be sent or given to employees or platform workers as specified by Rules 428(b)(1) and 428(d) (§§ 230.428(b)(1) and 428(d)). Such documents need not be filed with the Commission either as part of this registration statement or as prospectuses or prospectus supplements pursuant to Rule 424 (§230.424). These documents and the documents incorporated by reference in the registration statement pursuant to Item 3 of Part II of this Form, taken together, constitute a prospectus that meets the requirements of Section 10(a) of the Securities Act. See Rules 428(b)(1) and 428(d) (§§ 230.428(b)(1) and 428(d)).**

* * * * *

Item 2. Registrant Information and Participant Plan Annual Information

The registrant shall provide a written statement to participants advising them of the availability without charge, upon written or oral request, of the documents incorporated by reference in Item 3 of Part II of the registration statement, and stating that these documents are incorporated by reference in the Section 10(a) prospectus. The statement also shall indicate the availability without charge, upon written or oral request, of other documents required to be delivered to employees pursuant to Rule 428(b) (§230.428(b)), and to platform workers pursuant to Rule 428(d). The statement shall include the address (giving title or department) and telephone number to which the request is to be directed.

* * * * *

PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE

ACT OF 1934

7. The general authority citation for part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78dd, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 *et seq.*, and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111-203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112-106, secs. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

8. Amend § 240.12g5-1 by revising paragraph (a)(8) to read as follows:

§ 240.12g5-1 Definition of securities “held of record”.

(a) * * *

(8)(i) For purposes of determining whether an issuer is required to register a class of equity securities with the Commission pursuant to Section 12(g)(1) of the Act (15 U.S.C. 78l(g)(1)), an issuer may exclude securities:

(A) Held by persons who received the securities pursuant to an employee compensation plan, or a compensation plan for platform workers pursuant to § 230.701(h) of this chapter, in transactions exempt from, or not subject to, the registration requirements of Section 5 of the Securities Act of 1933 (15 U.S.C. 77e); and

(B) Held by persons who received the securities in a transaction exempt from, or not subject to, the registration requirements of Section 5 of the Securities Act (15 U.S.C. 77e) from the issuer, a predecessor of the issuer, or an acquired company in substitution or exchange for excludable securities under paragraph (a)(8)(i)(A) of this section, as long as the persons were eligible to receive securities pursuant to § 230.701 of this chapter at the time the excludable securities were originally issued to them.

(ii) As a non-exclusive safe harbor under this paragraph (a)(8):

(A) An issuer may deem a person to have received the securities:

(1) Pursuant to an employee compensation plan if such plan and the person who received the securities pursuant to the plan met the plan and participant conditions of § 230.701(c) of this chapter; or

(2) Pursuant to a compensation plan for platform workers if such plan and the person who received the securities pursuant to the plan met the plan and participant conditions of § 230.701(h) of this chapter.

(B) An issuer may, solely for the purposes of Section 12(g) of the Act (15 U.S.C. 78l(g)(1)), deem the securities to have been issued in a transaction exempt from, or not subject to, the registration requirements of Section 5 of the Securities Act (15 U.S.C. 77e) if the issuer had a reasonable belief at the time of the issuance that the securities were issued in such a transaction.

Note 1 to paragraph (a)(8)(ii): Section 230.701(h) applies only to offers or sales of securities occurring prior to five years following the date of effectiveness of § 230.701(h). On that date, § 230.701(h) will expire and will no longer be effective.

* * * * *

By the Commission.

Dated: November 24, 2020.

Vanessa A. Countryman,

Secretary.