

## [Securities Regulation Daily Wrap Up, SECURITIES OFFERINGS—SEC proposals address compensation of gig economy workers, \(Nov. 30, 2020\)](#)

Securities Regulation Daily Wrap Up

[Click to open document in a browser](#)

By [John Filar Atwood](#)

Commission would amend the framework for compensatory securities offerings and would permit an issuer to give equity compensation to certain "platform workers" who provide services available through a company's technology-based platform.

The SEC issued companion releases that would allow companies, on a trial basis, to provide equity compensation to their gig economy workers. The proposals seek to recognize the evolution of the nation's economy and workforce and the desire of companies that receive services for their Internet-based platforms to offer equity compensation to individuals providing those services.

Specifically, the SEC [proposed amendments](#) to Securities Act Rule 701, which provides an exemption from registration for the issuance of compensatory securities by non-reporting issuers, and Form S-8, which is the Securities Act registration statement for compensatory offerings by reporting issuers. The Commission also [proposed rules](#) that, on a temporary basis and subject to percentage limits, dollar limits and other conditions, would permit an issuer provide equity compensation to certain "platform workers" who provide services available through the issuer's technology-based platform or system.

Rule 701 currently requires that recipients of stock compensation must be "employees," a designation that the SEC historically was not willing to give to contract workers. The agency began to soften its stance on the issue in March 2019 at the time of Lyft's IPO. In connection with that offering, the SEC allowed the rideshare company to let certain qualifying drivers participate in the purchase of IPO shares. Uber Technologies used a similar plan when it went public in May 2019.

The SEC's proposals come in the same week as Airbnb filed its preliminary IPO registration statement. Airbnb has been among the strongest supporters of relaxing Rule 701 to accommodate contract workers in the new economy. According to Airbnb's filing, the company plans to provide equity compensation to certain eligible property hosts by allowing them to buy shares at the IPO price.

**Support on Capitol Hill.** Patrick McHenry (R-NC), the Ranking Member of the House Financial Services Committee, [praised](#) the SEC's moves, noting that in his view Rule 701 currently does not support the flexibility of the modern workforce's needs. In September, McHenry [introduced](#) the [Gig Worker Equity Compensation Act](#), which encouraged the SEC to treat gig workers similarly to company employees for the purposes of Rule 701. Although his bill would go further than the SEC's proposals, McHenry applauded the step forward.

**Temporary rules.** The SEC proposed 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.

An issuer would be able avail itself of the rule change only under these conditions:

- 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 by its ability to accept and remove platform workers participating in the platform;

- 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, will 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.

The proposed amendments would also permit an Exchange Act reporting company to make registered securities offerings to its platform workers using Form S-8. The SEC [noted](#) that the same conditions proposed for Rule 701 issuances would apply to issuances to platform workers on Form S-8, except for the proposed transferability restriction.

**Not applicable to sale of goods.** The proposed amendments would not permit the issuance of securities for platform worker activities relating to the sale or transfer of permanent ownership of discrete, tangible goods. Depending on the results of the initial expanded use of Rule 701 and Form S-8, if adopted, the Commission said that it may consider expanding eligibility to other activities, such as selling goods or other non-service providing activities in the future.

The SEC said that it proposed the amendments on a temporary basis to allow it to assess whether issuances of securities to platform workers under Rule 701 or Form S-8 are being made for legitimate compensatory purposes, and not for capital-raising purposes. It would give the agency the opportunity to assess whether such issuances have the expected beneficial effects for issuers in the gig economy and their investors, and whether the issuances resulted in any unintended consequences.

**Changes to rules and forms.** In a separate release, the Commission proposed amendments to Rule 701 and Form S-8. The SEC [noted](#) that move follows through on its July 2018 [concept release](#) on possible ways to modernize the Rule 701 exemption and the relationship between the exemption and Form S-8.

With respect to Rule 701, the proposed amendments would revise the additional disclosure requirements for Rule 701 exempt transactions exceeding \$10 million, including how the disclosure threshold applies, the type of financial disclosure required, and the frequency with which it must be updated. They also would revise the time at which such disclosure is required to be delivered for derivative securities that do not involve a decision by the recipient to exercise or convert in specified circumstances where such derivative securities are granted to new hires.

The amendments would raise two of the three alternative regulatory ceilings that cap the overall amount of securities that a non-reporting issuer may sell pursuant to the exemption during any consecutive 12-month period, and would make the exemption available for offers and sales of securities under a written compensatory benefit plan established by the issuer's subsidiaries, whether or not majority-owned.

With regard to Form S-8, the proposed amendments would implement improvements and clarifications to simplify registration on the form. These include clarifying the ability to add multiple plans to a single Form S-8, clarifying the ability to allocate securities among multiple incentive plans on a single Form S-8, and permitting the addition of securities or classes of securities by automatically effective post-effective amendment.

The amendments also would implement improvements to simplify share counting and fee payments on the form, including requiring the registration of an aggregate offering amount of securities for defined contribution plans, implementing a new fee payment method for registration of offers and sales pursuant to defined contribution

plans, and conforming Form S-8 instructions with current IRS plan review practices. Item 1(f) of Form S-8 would be revised to eliminate the requirement to describe the tax effects of plan participation on the issuer.

With respect to both Rule 701 and Form S-8, the proposals would extend consultant and adviser eligibility to entities meeting specified ownership criteria designed to link the securities to the performance of services. They also would expand eligibility for former employees to specified post-termination grants and former employees of acquired entities.

**Commissioner support.** SEC Commissioners Hester Peirce and Elad Roisman issued a [joint statement](#) in support of the proposals. In their view, the proposals demonstrate the Commission's willingness to experiment with changes to its regulations that mirror changes in the economy and marketplace. The proposals would tweak the securities laws to give platform workers a much-needed source of current income while also allowing them to build longer-term investments, they said.

**Commissioner dissent.** Commissioners Allison Herren Lee and Caroline Crenshaw [dissented](#), saying that the proposals single out one narrowly-defined subset of companies who depend on gig workers—companies that provide services through internet platforms. Whatever the potential merits of equity compensation for alternative workers, in their opinion the proposals do not establish a basis for selectively conferring a benefit on one particular business model without giving consideration to many other categories of alternative workers.

RegulatoryActivity: ExchangesMarketRegulation FedTracker Securities FormsFilings IPOs SECNewsSpeeches SecuritiesOfferings