

SEC Implements \$10 Million Disclosure Threshold For Compensatory Securities Offerings Under Rule 701; Adopts Concept Release On Potential Changes To Rule 701 And Form S-8

I. Background

At its open meeting on July 18, 2018, the Securities and Exchange Commission (“SEC”) adopted an amendment (the “Amendment”) to increase from \$5 million to \$10 million the amount of securities triggering enhanced disclosure requirements for compensatory offerings made in reliance on the exemption under Rule 701 under the Securities Act of 1933, as amended (the “Securities Act”).¹ The amendment is mandated by Section 507 of the Economic Growth, Regulatory Relief, and Consumer Protection Act.²

At the July 18, 2018 meeting, the SEC also adopted a concept release (the “Concept Release”) requesting comments on potential further revisions seeking to modernize and to expand the availability of Rule 701, as well as comments concerning the registration of compensatory securities offerings, including potential modifications to the short-form registration statement for offerings pursuant to employee benefit plans on Form S-8.³

II. The Amendment

Rule 701 provides an exemption from registration under the Securities Act for offers and sales of securities under compensatory benefit plans. Generally, the exemption is not available for issuers subject to the reporting requirements under the Securities and Exchange Act of 1934, as amended (the “Exchange Act”),⁴ and is subject to an overall limit on the amount of securities that may be sold during any twelve-month period equal to the greatest of 15% of the total assets of the issuer, 15% of the outstanding class of securities, or \$1 million.⁵

Issuers relying on the exemption are required to deliver to investors participating in the offering a copy of the compensatory benefit plan and, if the aggregate sales price or amount of securities sold during a twelve-month period exceeds the threshold specified in Rule 701(e), a summary plan description, risk factor disclosure and financial statements meeting the requirements of Regulation A under the Securities Act.⁶ Effective July 23, 2018, the Amendment increased from \$5 million to \$10 million the threshold above which the specified disclosure requirements apply.

III. The Concept Release

The Concept Release outlines and requests comments on potential further revisions to Rule 701 and revisions impacting registration of employee benefit plan offerings on Form S-8. The Rule 701 requests relate

¹ Exempt Offerings Pursuant to Compensatory Arrangements, Release No. 33-10520, available at <https://www.sec.gov/rules/final/2018/33-10520.pdf> (Jul. 18, 2018), 83 FR 34940 (Jul. 24, 2018).

² Pub. L. 115-174, § 507, 132 Stat. 1296 (2018).

³ Concept Release on Compensatory Securities Offerings and Sales, Release No. 33-10521, available at <https://www.sec.gov/rules/concept/2018/33-10521.pdf> (Jul. 18, 2018), 83 FR 34958 (Jul. 24, 2018).

⁴ See 17 CFR 230.701(b).

⁵ See 17 CFR 230.701(d).

⁶ See 17 CFR 230.701(e). The financial statements must be of a date not more than 180 days before (and the disclosure generally must be delivered a reasonable period before) the date of the applicable sale. *Id.*

primarily to expanding the availability of the exemption to cover offerings to workers engaged in “gig economy” relationships with the issuer.⁷ Specifically, the Concept Release requests comments in the following areas relating to participant eligibility:

- The costs and benefits of expanding eligibility to cover “gig economy” relationships, and the appropriate attributes of the relationships, including the nature and extent of the worker’s activity and its relationships with the issuer and the issuer’s end users;
- Whether the existing eligibility criteria for consultants and advisors in Rule 701 would in any circumstances cover “gig economy” and alternative work arrangements;
- Whether expanding eligibility would affect companies’ decisions to become reporting companies, encourage companies to remain private longer, or result in investor harm; and
- Whether separate offering limits should apply for offerings covering “gig economy” participants, or whether delivery of additional financial disclosure should be required.

The Concept Release also seeks comments on the following other general topics relating to potential modifications or clarifications to Rule 701:

- The application of the additional disclosure requirements in offerings exceeding the Rule 701(e) threshold to sales of securities occurring before the threshold is reached;
- The age and content of the required financial information, and the required timing and the manner and medium of delivery of the additional disclosures under Rule 701(e);
- The appropriateness and application of the overall offering limit in Rule 701(d); and
- The timing of required disclosure for awards of restricted stock units (“RSUs”), valuation of RSUs for purposes of the overall limit and disclosure threshold, and whether there are other forms of award that should be specifically addressed under Rule 701.

Finally, the Concept Release requests comments on whether any changes in the persons who may participate in offerings under Rule 701 should be adopted for offerings eligible for registration on Form S-8, and whether, as a general matter, the standards for participation in offerings under Rule 701 and Form S-8 should be harmonized, as has historically been the case. More broadly, the Concept Release seeks comment on whether the SEC should adopt measures to reduce the burdens to issuers associated with registration on Form S-8, as well as the types of measures that it could adopt.

The mechanisms identified in the Concept Release for potential changes to Form S-8 include the adoption of a “universal” Form S-8 covering all of an issuer’s employee benefit plan offerings on a single registration statement, permitting issuers to pay Form S-8 filing fees on a “pay-as-you” go basis (rather than at the initial

⁷ As described in the Concept Release, these relationships include individuals using companies’ internet platforms to provide services, lease property or sell goods to the end users of the companies’ platforms. Generally, current Rule 701 offerings may extend to employees, officers, directors, general partners or trustees of the issuer, its parents or any of their majority-owned subsidiaries, or to their consultants or advisors who provide *bona fide* services to the issuer, parent or subsidiaries. See 17 CFR 230.701(c).

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filing of the Form S-8), and extending Rule 701 eligibility to Exchange Act reporting companies (potentially eliminating the need for registration of securities otherwise eligible for registration on Form S-8).

Comments on the matters discussed in the Concept Release should be received by the SEC on or before September 24, 2018.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Helene R. Banks at 212.701.3439 or hbanks@cahill.com; Bradley J. Bondi at 202.862.8910 or 212.701.3403 or bbondi@cahill.com; Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Geoffrey E. Liebmann at 212.701.3313 or gliebmann@cahill.com; Glenn J. Waldrip, Jr. at 212.701.3110 or gwaldrip@cahill.com; or Mark J. Gelman at 212.701.3061 or mgelman@cahill.com.

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