

An Early Holiday for Gig Workers: SEC Proposes to Expand Ability of Companies to Grant Equity Compensation to Gig Economy

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Introduction

On 24 November 2020, the Securities and Exchange Commission (SEC) proposed rules that would meaningfully expand the ability of companies involved in the “gig economy” to grant equity compensation to their workers under Rule 701 of the Securities Act of 1933 (Rule 701) and on the Form S-8 Registration Statement (Form S-8).

The proposed rules summarized here were issued in tandem with a second set of proposed rules, issued by the SEC on the same date, that would significantly modernize and simplify the ability of companies to grant equity compensation to their workers under Rule 701 and on Form S-8. Our client alert summarizing those proposed rules may be found [here](#).

Background

By way of background, for companies that are not required to file reports under the Securities Exchange Act of 1934 (i.e., “private” companies), Rule 701 provides a broad exemption from registration for equity compensation granted to employees, consultants, and certain other service providers. For companies required to file such reports (i.e., “public” companies), equity compensation granted to employees, consultants, and certain other service providers may be registered on the Form S-8, a simplified registration form.

Rule 701 is the most prevalent exemption from registration used by private companies for equity compensation granted to their employees and consultants. Similarly, the Form S-8 is the most common registration statement used by public companies for equity compensation granted to their employees and consultants.

Proposed Rules

In recent years, practitioners have raised concerns that, by their terms, Rule 701 and the Form S-8 are not available for equity compensation granted to “platform workers”—individual workers who use a company’s internet or other technological platform to provide work to end users other than the

company. One common example of a platform worker is an individual worker who uses an app to provide riding services to third-party riders. Platform workers are also prevalent in businesses involving food delivery, household repairs, dog-sitting, and tech support.

In response to these concerns, the proposed rules would amend Rule 701 by adding a temporary rule, effective for five years, allowing private companies to use Rule 701 for equity compensation granted to platform workers. In order for a private company to avail itself of this proposed rule, the following conditions must be met:

- The private company must operate and control the platform (i.e., provide access to the platform, establish the terms of service for using the platform, establish the terms for paying workers, and retain discretion to accept and remove workers from the platform);
- The equity compensation must be under a written compensation plan and not paid in exchange for capital-raising or market-maintaining services;
- No more than 15 percent of a worker's platform-related compensation during a 12-month period, and no more than US\$75,000 of such compensation during a 36-month period, may consist of equity compensation from the private company;
- Such equity compensation may not be subject to individual bargaining or the ability of the worker to elect to receive it in cash; and
- The private company must take reasonable steps to prohibit the transfer of any equity received pursuant to the equity compensation, other than a transfer to the private company or by operation of law (i.e., pursuant to the laws of descent and distribution and domestic relations orders in divorces).¹

The proposed rules would also permit public companies to use the Form S-8 to grant equity compensation to platform workers. The same conditions described above would apply to public company equity compensation registered on the Form S-8 (other than the proposed transferability restriction).

It is important to note that the proposed rules do not extend to platform worker activities relating to the sale of tangible goods (for example, a seller of books on an online marketplace), though the SEC note that it may in the future consider extending the proposed rules to such activities.

In order to help the SEC evaluate whether the proposed rules are being used for legitimate compensatory purposes (e.g., not for capital-raising purposes) and having their intended beneficial effect, the proposed rules would expire five years from the date of their effectiveness and would require a company that grants equity compensation to platform workers to furnish certain information to the SEC at six-month intervals.

The proposed rules are subject to a 60-day public comment period following their publication in the Federal Register.

Conclusion

The proposed revisions to Rule 701 and the Form S-8 are welcome news for companies engaged in

the “gig economy,” and will enable them to provide equity compensation to individuals who do not fit within traditional categories of “employee” and “consultant.” Companies are encouraged to contact our executive compensation attorneys to learn more about the proposed rules.

¹The SEC noted that such transfer restrictions would “help ensure that the shares are obtained for compensatory and not speculative purposes” and “would prevent the development of a market in such securities until after the issuer becomes” a public company.

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