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SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 229, 230, and 239

[Release No. 33-10891; File No. S7-18-20]

RIN 3235-AM38

Modernization of Rules and Forms for Compensatory Securities Offerings and Sales

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is proposing for public comment amendments to Rule 701 under the Securities Act of 1933 (the "Securities Act"), which provides an exemption from registration for securities issued by non-reporting issuers pursuant to compensatory arrangements, and Form S-8, the Securities Act registration statement for compensatory offerings by reporting issuers. The amendments are designed to modernize the exemption and registration statement in light of the significant evolution in compensatory offerings since the Commission last substantively amended these regulations, consistent with investor protection.

DATES: Comments should be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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/proposed.shtml).

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 S7-18-20. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's website (http://www.sec.gov/rules/proposed.shtml). Comments are also available for website viewing and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 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: Anne M. Krauskopf, Senior Special Counsel, or Lisa Krestynick, Special Counsel, Office of Chief Counsel, Division of Corporation Finance, at (202) 551-3500.

SUPPLEMENTARY INFORMATION: We are proposing to amend 17 CFR 230.405 ("Rule 405"), 17 CFR 230.413 ("Rule 413"), 17 CFR 230.416 ("Rule 416"), 17 CFR 230.456 ("Rule 456"), 17 CFR 230.457 ("Rule 457"), 17 CFR 230.701 ("Rule 701"), and 17 CFR 239.16b ("Form S-8") under the Securities Act of 1933[1] (the "Securities Act"), and 17 CFR 229.601 ("Item 601") of Regulation S-K.

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I. OVERVIEW

We are proposing amendments to Rule 701 and Form S-8 to modernize the two principal means by which issuers grant securities to employees in compensatory transactions.[2] Every offer

[2] Rule 701 is available for compensatory transactions with employees, directors, general partners, trustees (where the issuer is a business trust), officers, or consultants and advisors, and their family members who acquire such securities from such persons through gifts or domestic relations orders. Offers and sales to former employees, directors, general partners, trustees, officers, consultants and advisors are exempted from registration by the rule subject to specified conditions. Form S-8 is available for compensatory transactions with "employees," with the form defining "employee" as any employee, director, general partner, trustee (where the registrant is a business trust), or officer. "Employee" also includes consultants and advisors, former employees, executors, administrators

and sale of securities must be registered, or rely on an exemption from the registration requirements of Section 5 of the Securities Act.[3] The Commission has long recognized that offers and sales of securities as compensation present different issues than offers and sales of securities by issuers that seek to raise capital.[4] Among other considerations, the Commission has recognized that the relationship between the issuer and recipient of securities is often different in a compensatory, rather than capital raising, transaction. The Commission has thus provided a limited exemption from registration – Rule 701 – for certain compensatory securities transactions by non-reporting issuers[5] and a specialized form – Form S-8 – for registering certain compensatory securities transactions by reporting issuers. The proposed amendments reflect changes in compensatory practices, including the types of securities offered, and are intended to modernize and simplify administrative requirements.

In July 2018, in connection with amending Rule 701,[6] as mandated by the Economic Growth, Regulatory Relief, and Consumer Protection Act,[7] the Commission sought comment on ways to modernize the Rule 701 exemption from registration, the Form S-8 registration

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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, subject to specified conditions. For purposes of both Rule 701 and Form S-8, "employee" includes insurance agents who are exclusive agents of the issuer, its subsidiaries or parents, or derive more than 50% of their annual income from those entities. *See* Rule 701(c) and General Instructions A.1(a)(1)-(3) to Form S-8.

[3] 15 U.S.C. 77e.

[4] *See*, *e.g.*, *Notice of Proposed Form S-8*, Release No. 33-3469-X (Apr. 12, 1953) [18 FR 2182 (Apr. 17, 1953)] and *Adoption of Form S-8,* Release No. 33-3480 (Jun. 16, 1953) [18 FR 3688 (Jun. 27, 1953)], each observing that the investment decision to be made by the employee is of a different character than when securities are offered for the purpose of raising capital.

[5] Only issuers that are not subject to the reporting requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934 (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* Rule 701(b). As such, the use of the term "non-reporting issuer" in this release means issuers that are not subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act, and includes issuers subject to Rule 257 of Regulation A [17 CFR 230.257].

[6] *Exempt Offerings Pursuant to Compensatory Arrangements,* Release No. 33-10520 (Jul.18, 2018) [83 FR 34940] ("2018 Rule 701 Adopting Release").

[7] Pub. L. 115-174, 132 Stat. 1296 (2018). Section 507 of the Act mandated that the Commission amend Rule 701 to increase from $5 million to $10 million the aggregate sales price or amount of securities sold during any consecutive 12-month period in excess of which the issuer is required to deliver additional disclosures to investors.

statement, and the relationship between these two regulations, consistent with investor protection.[8] In doing so, the Commission noted that significant evolution has taken place in both the types of compensatory offerings issuers make and the composition of the workforce since it last substantively amended these regulations and sought to determine whether and, if so, how the rules should be amended to address these developments. The Concept Release stated that the Commission's evaluation of any potential changes would focus on retaining the compensatory purpose of Rule 701 and Form S-8 and preventing them from being used for capital-raising purposes, consistent with the Commission's investor protection mandate. The Concept Release also solicited comment on how any possible rule or form amendments may affect an issuer's decision to become a reporting issuer. The Commission received many comment letters in response to the Concept Release.[9]

Among the Rule 701 topics covered by the Concept Release were the Rule 701(d) exemptive conditions, including the 12-month sales caps, and the Rule 701(e) disclosure requirements, including the timing and manner of disclosure, and how those disclosure requirements apply to derivative securities. Form S-8 topics covered by the Concept Release included ways to reduce administrative burdens, such as by permitting multiple plans to be registered on a single Form S-8, permitting fee payment on a "pay-as-you-go" basis, and registering tax-qualified plans based on a dollar amount rather than the number of shares issued.

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[8] *Concept Release on Compensatory Securities Offerings and Sales,* Release No. 33-10521 (Jul. 18, 2018) [83 FR 34958] ("Concept Release"). Unless otherwise noted, comments cited are to the Concept Release and may be found at the following link: https://www.sec.gov/comments/s7-18-18/s71818.htm.

[9] *See, e.g.*, letters from Airbnb, Inc. ("Airbnb"); American Bar Association, Business Law Section, Federal Regulation of Securities Committee ("ABA"); American Benefits Council ("Council"); Sen. Sherrod Brown, United States Senator ("Senator Brown"); Center for Capital Markets Competitiveness, U.S. Chamber of Commerce ("Chamber"); Davis Polk & Wardwell ("Davis Polk"); Ernest & Young LLP ("EY"); Indigo Ag, Inc. ("Indigo"); Rep. Patrick McHenry, United States Representative ("Representative McHenry"); National Association of Stock Plan Professionals ("NASPP"); National Employment Law Project ("NELP"); Marie P. Petion ("Petion"); Postmates ("Postmates"); Nick Reyes ("Reyes"); Brian Sament ("Sament"); Shearman & Sterling LLP ("Shearman"); John P. Stoelting ("Stoelting"); Sullivan & Cromwell LLP ("Sullivan"); Uber Technologies, Inc. ("Uber"); Rep. Maxine Waters, United States Representative ("Representative Waters"); Zachor Legal Institute ("Zachor"); and Zionist Advocacy Center ("Zionist").

The comments received on those topics and the Commission's related proposed rule amendments are discussed in this release.

Based, in part, on the consideration of feedback from commenters, with respect to Rule 701 we propose to:[10]

- 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;
- 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;
- 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
- Make the exemption available for offers and sales of securities under a written compensatory benefit plan (or written compensation contract) established by the issuer's subsidiaries, whether or not majority-owned.

With respect to Form S-8, we propose to:

- Implement improvements and clarifications to simplify registration on the form, including:
    - 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;

[10] The current version of Rule 701 was adopted pursuant to the Commission's general exemptive authority under Section 28 of the Securities Act. *See Rule 701 – Exempt Offerings Pursuant to Compensatory Arrangements*, Release No. 33-7645 (Feb. 25, 1999) [64 FR 11095 (Mar. 8, 1999)] ("1999 Adopting Release"). We believe the proposed amendments to Rule 701 would modernize the exemption in light of the significant evolution in compensatory offerings since the Commission last substantively amended the rule, while maintaining important investor protections. For this reason and the reasons discussed below, we believe the proposed amendments to Rule 701, if adopted, would be necessary and appropriate in the public interest and consistent with investor protections.

  - Permitting the addition of securities or classes of securities by automatically effective post-effective amendment;
- 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;
  - Conforming Form S-8 instructions with current IRS plan review practices; and
- Revise Item 1(f) of Form S-8 to eliminate the requirement to describe the tax effects of plan participation on the issuer.

With respect to both the Rule 701 exemption and the Form S-8 registration statement, we propose to:

- Extend consultant and advisor eligibility to entities meeting specified ownership criteria designed to link the securities to the performance of services; and
- Expand eligibility for former employees to specified post-termination grants and former employees of acquired entities.

To comply with current Federal Register formatting requirements, we also propose a ministerial amendment to Rule 701 to remove the Preliminary Notes and move their provisions without change to Rule 701(a). This change does not affect the purpose or effect of these provisions.

The Concept Release also discussed the scope of eligible plan participants, including whether persons providing services in the so-called "gig economy" should be eligible to receive

securities pursuant to Rule 701 and Form S-8. We are addressing these issues and the comments received on these topics in a separate companion release.[11]

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

II. RULE 701

A. Disclosure Requirements

We are proposing to amend Rule 701(e) to revise the disclosure requirements for transactions exceeding $10 million, including the age of financial statements, and to allow issuers to provide alternative valuation information in lieu of financial statements. In addition, we are proposing to allow certain foreign private issuers[12] to provide financial statements using home country accounting standards if financial statements prepared in accordance with generally accepted accounting principles in the United States ("U.S. GAAP") or International Financial Reporting Standards as issued by the International Accounting Standards Board ("IFRS") are not otherwise available. Finally, we propose to modify the timing requirement for providing disclosure for certain derivative securities granted to new hires in specified circumstances.

Rule 701(e) currently provides that an issuer must deliver to investors a copy of the compensatory benefit plan or contract, as applicable. In addition, if the aggregate sales price or amount of securities sold during any consecutive 12-month period exceeds $10 million, the

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[11] *Temporary Rules to Include Certain "Platform Workers" in Compensatory Offerings Under Rule 701 and Form S-8*, Release No. 33-10892 (Nov. 24, 2020).

[12] A "foreign private issuer" is defined in Rule 405 and 17 CFR 240.3b-4(c) [Exchange Act Rule 3b-4(c)] as a foreign issuer other than a foreign government, except an issuer meeting the following conditions as of the last business day of its most recently completed second fiscal quarter: (i) more than 50 percent of the outstanding voting securities of which are directly or indirectly owned of record by residents of the United States; and (ii) any of the following: (A) the majority of the executive officers or directors are United States citizens or residents; (B) more than 50 percent of the assets of the issuer are located in the United States; or (C) the business of the issuer is administered principally in the United States.

issuer must deliver the following additional disclosure to investors a reasonable period of time before the date of sale:[13]

- A copy of the summary plan description required by ERISA[14] or a summary of the plan's material terms if it is not subject to ERISA;
- Information about the risks associated with investment in the securities sold pursuant to the compensatory plan or compensation contract; and
- Financial statements required to be furnished by Part F/S of Form 1-A[15] under 17 CFR 230.251 through 230.263 ("Regulation A"). These financial statements must be as of a date no more than 180 days before the sale of securities relying on Rule 701.[16]
- Foreign private issuers must provide a reconciliation to U.S. GAAP if their financial statements are not prepared in accordance with U.S. GAAP or IFRS.

This disclosure must be provided to investors a reasonable period of time before the date of sale. For options and other derivative securities, this requires the issuer to deliver disclosure a reasonable period of time before the date of exercise or conversion.[17] In adopting Rule 701(e), the Commission made clear that if the required disclosure has not been provided to all investors on a timely basis, the issuer will lose the exemption for the entire offering.[18]

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[13] Rule 701(e).

[14] The Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 *et seq*.).

[15] Form 1-A [17 CFR 239.90].

[16] Rule 701(e)(4).

[17] Rule 701(e)(6). As described in Section II.A.5, *infra*, for options and other derivative securities, the issuer's obligation to deliver Rule 701(e) disclosure is determined based on whether the option or other derivative security was granted during a 12-month period in which the disclosure threshold is exceeded. If the grant occurred during such a period, the issuer must deliver the Rule 701(e) disclosure a reasonable period of time before the date of exercise or conversion.

[18] In the 1999 Adopting Release at Section II.B, the Commission, referencing the $5 million threshold that applied at the time, stated: "Where the formula permits sales in excess of $5 million during a 12-month period, and the issuer chooses to take advantage of this increased amount, the new disclosure should be provided to all investors before sale. This requirement will obligate issuers to provide disclosure to all investors if the issuer believes that sales will exceed the $5 million threshold in the coming 12-month period. If disclosure has not been provided to all investors before sale, the issuer will lose the exemption for the entire offering when sales exceed the $5 million threshold."

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

We are proposing to revise Rule 701(e) to provide that, if the aggregate sales price or amount of securities sold during any consecutive 12-month period exceeds $10 million, the issuer must deliver to investors the additional disclosure required by the rule only with respect to those sales that exceed the rule's $10 million threshold. One commenter who addressed the current rule characterized the requirement that the disclosure be provided for all sales, including those occurring before the threshold is exceeded, as "largely unworkable" and "a trap for the unwary."[19] The same commenter recommended that there be a thirty-day "grace period" following the date when the threshold is exceeded, so that the issuer would be required to provide disclosure only for future offers or sales after the "grace period." Another commenter suggested that crossing the threshold should impact the exemption's availability only for: (1) the securities issued that caused the threshold to be breached and for which disclosure was not provided; and (2) any subsequent offerings in the same 12-month period for which sufficient disclosure was not provided.[20] This commenter further expressed the view that treating sales over $10 million separately from earlier sales would be consistent with the current operation of Rule 504 of Regulation D.[21]

Currently, for issuers to be able to rely on Rule 701, they must anticipate whether their compensatory sales could exceed $10 million at the outset of a 12-month period. If an issuer does not anticipate exceeding the $10 million threshold and, as a result, does not provide disclosures to all investors, then that issuer cannot exceed the $10 million threshold without

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[19] *See* letter from ABA.

[20] *See* letter from Sullivan.

[21] *See* Instruction to paragraph (b)(2) of Rule 504 ("If a transaction under § 230.504 fails to meet the limitation on the aggregate offering price, it does not affect the availability of this § 230.504 for the other transactions considered in applying such limitation. For example, if an issuer sold $10,000,000 of its securities on June 1, 2021 under this § 230.504 and an additional $500,000 of its securities on December 1, 2021, this § 230.504 would not be available for the later sale, but would still be applicable to the June 1, 2021 sale.").

losing the exemption for all of the sales in that 12-month period. We understand that the "lookback" aspect of the requirement may make it unduly difficult for issuers to plan their compensatory programs or respond efficiently to unforeseen situations, such as where an issuer wants to offer equity compensation in connection with an unanticipated opportunity to hire new employees.

We are proposing to amend the rule to provide that the disclosure required by Rule 701(e) be delivered to investors only with respect to sales after the $10 million threshold is exceeded and not to require after-the-fact disclosure for sales made in reliance on the rule during the 12-month period before the threshold was exceeded.[22] The exemption would remain available for all sales that exceed the $10 million threshold during the 12-month period if the issuer provides the required disclosure for those sales. We are not proposing to include a "grace period" between the point at which the $10 million threshold is exceeded and the requirement to deliver the Rule 701(e) disclosure, given that other amendments to Rule 701(e) proposed in this release should make it easier for issuers to comply with the disclosure delivery requirement.[23]

Request for Comment:

1. Should the rule be amended, as proposed, to require additional disclosure only for those sales during the 12-month period that exceed the $10 million threshold? Are there circumstances in which issuers may have trouble providing the information upon exceeding the threshold? If so, how could those difficulties be addressed?
2. Should there be a "grace period" between crossing the $10 million threshold and the requirement to provide additional disclosure with respect to the sales exceeding the $10 million threshold? If so, how long a period is appropriate? Would the other amendments

[22] Proposed Rule 701(e).

[23] *See* Sections II.A.2-6, *infra*.

proposed in this release that make it easier for issuers to comply with Rule 701's disclosure delivery requirement mitigate the need for a grace period?

3. Alternatively, upon crossing the $10 million threshold, should the issuer be required to provide the additional Rule 701(e) disclosure on a retrospective basis to all investors who had previously been granted or purchased securities during the 12-month period? Would such after-the fact disclosure mitigate informational asymmetry between investors who purchase before and investors who purchase after crossing the $10 million threshold? If we impose such a requirement, should the issuer lose the exemption for those earlier transactions if it fails to retrospectively provide the disclosure? Should there be a "grace period" between crossing the $10 million threshold and the requirement to retrospectively provide the disclosure? If so, how long a period is appropriate?

2. Age of Financial Statements

We propose to conform the age of financial statement requirement set forth in Rule 701(e) to the corresponding requirement in Part F/S of Form 1-A. Rule 701(e) requires delivery of financial statements required to be furnished by Part F/S of Form 1-A, which prescribes the financial statements required for Regulation A Tier 1 and Tier 2 offerings. In Regulation A offerings, issuers generally must include two years of consolidated balance sheets, statements of comprehensive income, cash flows, and changes in stockholders' equity.[24] Issuers relying on Rule 701 may choose to provide financial statements that comply with the requirements of either tier.[25]

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[24] Tier 2 offerings require audited financial statements. *See* Part F/S of Form 1-A [17 CFR 239.90].

[25] Specifically, an issuer may elect to provide financial statements that follow the requirements of either Tier 1 or Tier 2 Regulation A offerings without regard to whether the amount of sales that occurred pursuant to Rule 701 during the time period contemplated in Rule 701(e) would have required the issuer to follow the Tier 2 financial statement requirements in a Regulation A offering of the same amount. Rule 701 does not, and the proposals would not, require an issuer utilizing Rule 701 that would be subject to Tier 2 financial statement requirements to file with the Commission the current and periodic reports required by Rule 257(b) [17 CFR 230.257(b)].

Currently, the age of the financial statements must be as of a date no more than 180 days before the date of sale of securities relying on the Rule 701 exemption.[26] This requirement, in effect, necessitates financial statements to be prepared on a quarterly basis, and to be completed within three months after the end of each quarter, in order to keep current information available for delivery a reasonable time before the date of sale so that sales may occur on an uninterrupted basis. One commenter[27] recommended requiring the financial statement disclosure to be updated and provided only once per fiscal year, unless a material event results in a material change to the issuer's enterprise value or the value of the securities.[28]

Moreover, under existing Rule 701, foreign private issuers are required to provide financial information on the same schedule as domestic issuers.[29] Foreign private issuers, like domestic issuers, may issue securities in reliance on Rule 701 throughout the year, which could require them to update their financial statements more frequently than required for registered offerings under Form 20-F.[30] Commenters expressed the view that non-reporting foreign private issuers should not be obligated to prepare quarterly financial statements solely to rely on Rule 701, but instead should be able to satisfy the requirements of Rule 701 by providing investors financial statements conforming to the requirements for annual financial statements in reports on Form 20-F and interim financial statements within the timeframe required by home country rules.[31]

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[26] *See* Rule 701(e)(4).

[27] *See* letter from ABA.

[28] This is generally the same timing that applies to updating valuation disclosures under the IRS Section 409A regulations. *See* Treas. Reg. § l.409A-l(b)(5)(iv)(B) (2017).

[29] *See* Rule 701(e). *See also* 1999 Adopting Release at Section II.C.

[30] 17 CFR 249.220f. *See* Item 8.A.5 of Form 20-F.

[31] *See* letters from ABA, Davis Polk, and Shearman. In particular, one commenter noted that foreign private issuers subject to Exchange Act reporting requirements can use Form S-8 for compensatory offerings without providing financial statements more frequently than required by their home jurisdiction, which puts U.S. employees of non-registered foreign private issuers at a disadvantage compared to U.S. employees of registered foreign private issuers. *See* letter from Davis Polk.

We propose to amend Rule 701(e) to apply the age of financial statement requirements of Form 1-A, Part F/S, paragraphs (b)(3) and (4) at the time of sale.[32] This proposal, which would apply to both domestic and foreign issuers, would conform the Rule 701(e) financial statement age requirements with those of Regulation A.[33] Under the proposal, financial statements must be available on at least a semi-annual basis and completed within three months after the end of the second and fourth quarters. Issuers would no longer be required to prepare financial statements quarterly in order for sales to be made continuously pursuant to Rule 701. We believe the financial statement updating requirements for Rule 701 compensatory offerings need not be more stringent than those applicable to capital raising transactions under Regulation A, which may be used by the same issuers. The proposal also would be consistent with foreign private issuers' financial statement updating requirements for registered offerings on Form 20-F, thereby eliminating any disadvantage for non-reporting foreign private issuers.

Rule 12h-1(f)[34] under the Securities Exchange Act of 1934[35] ("Exchange Act"), which exempts from Exchange Act Section 12(g)'s registration requirements stock options issued under written compensatory stock option plans by non-reporting issuers, includes, as a condition to the exemption, the delivery of Rule 701(e) information every six months with the financial statements that are not more than 180 days old. For ease of plan administration, we considered proposing to amend the age of financial statements requirements of this rule to remain consistent with those of Rule 701(e). However, it is unclear to what extent non-reporting companies continue to rely on Rule 12h-1(f) after the adoption of Exchange Act Rule 12g5-1(a)(8),[36] which

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[32] Proposed Rule 701(e)(4)(i).

[33] *See* Part F/S of Form 1-A.

[34] 17 CFR 240.12h-1(f).

[35] 15 U.S.C 78a *et seq.*

[36] 17 CFR 240.12g5-1(a)(8). *See* discussion in Section II.C.1, *infra*.

excludes from the definition of "held of record" for purposes of Section 12(g) certain securities held by persons who received them pursuant to employee compensation plans. Accordingly, we request comment below on whether we should rescind or adopt a conforming amendment to Rule 12h-1(f).

Request for Comment:

4. Would the proposed amendment to the age of financial statement requirements ease the burden of compliance with Rule 701(e) in a manner consistent with investor protection, both for domestic issuers and foreign private issuers? Would a different age of financial statement requirement better promote this objective? For example, should issuers be required to update financial statements only once per fiscal year, unless there is a material change to the issuer's enterprise value or the value of the securities? Should issuers be permitted to rely on either Tier 1 or Tier 2 financial statement requirements regardless of the size of the offering, as proposed?
5. Subsequent to the adoption of Exchange Act Rule 12g5-1(a)(8), to what extent do non-reporting issuers rely on the Rule 12h-1(f) exemption? If we amend Rule 701(e), should we also make conforming amendments to the age of financial statement requirement under Rule 12h-1(f), assuming non-reporting issuers continue to rely on the rule? If non-reporting issuers no longer rely on the exemption it provides, should we rescind Rule 12h-1(f)?

3. Financial Statement Content Requirements for Foreign Private Issuers

We propose to allow foreign private issuers that are eligible for the exemption from Exchange Act registration provided by Exchange Act Rule 12g3-2(b)[37] to provide financial statements prepared in accordance with home country accounting standards for purposes of Rule

[37] 17 CFR 230.12g3-2(b).

701(e) disclosure without reconciliation to U.S. GAAP in certain circumstances. Currently, all foreign private issuers relying on the Rule 701 exemption must provide a reconciliation to U.S. GAAP if their financial statements are not prepared in accordance with U.S. GAAP or IFRS to satisfy their financial statement disclosure requirements under Rule 701(e).[38]

The Concept Release requested comment on whether we should amend any aspect of the Rule 701 financial statement requirements that apply to foreign private issuers other than the timing requirements.[39] A few commenters addressed this topic. One commenter[40] stated that the financial statement reconciliation and the need to keep it current for an ongoing plan is unduly costly and burdensome. Another commenter[41] stated that Rule 701 should allow foreign private issuers to provide financial statements audited under the International Standards on Auditing ("ISAs").

After consideration of the comments received, we propose to permit foreign private issuers that are eligible for the exemption from registration under Section 12(g)[42] of the Exchange Act provided by Exchange Act Rule 12g3-2(b) to provide financial statements prepared in accordance with home country accounting standards to satisfy the financial statement disclosure requirements of Rule 701(e) if financial statements prepared in accordance with U.S. GAAP or IFRS are not otherwise available.[43] Consistent with the current requirements, all other foreign private issuers would continue to be required to provide a reconciliation to U.S. GAAP if their financial statements are not prepared in accordance with U.S. GAAP or IFRS.

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[38] *See* Rule 701(e)(4).

[39] *See* Concept Release at Section II.C.1.

[40] *See* letter from Shearman.

[41] *See* letter from EY.

[42] 15 U.S.C. 78*l*(g).

[43] Proposed Rule 701(e)(4)(i).

We believe it is appropriate to extend this relief to foreign private issuers that are eligible for the exemption from registration under Section 12(g) because, in other contexts, those issuers are currently not required to provide a reconciliation to U.S. GAAP if financial statements prepared in accordance with U.S. GAAP or IFRS are not otherwise available. Specifically, to be eligible for the exemption from registration under Rule 12g3-2(b), a foreign private issuer that is not otherwise subject to Exchange Act reporting must maintain a securities listing on one or more exchanges in a foreign jurisdiction that constitutes the primary trading market for its securities and must publish in English, on its website or through an electronic information delivery system generally available to the public in its primary trading market, information that satisfies specified public dissemination and shareholder distribution requirements.[44] The Rule 12g3-2(b) exemption allows a foreign private issuer to exceed the registration thresholds of Section 12(g) and effectively have its equity securities traded on a limited basis in the over-the-counter market in the United States. The Commission determined that such Section 12(g) exemptive relief was appropriate for a foreign private issuer that has not sought a public market in the United States and that makes available its non-U.S. disclosure documents.[45] As a foreign private issuer eligible for the exemption under Rule 12g3-2(b) would not be seeking to create a public market for its securities in the United States through its reliance on Rule 701, we believe that the same level of disclosure would be appropriate.

The proposal would not modify the disclosure requirements of Rule 701(e) to permit foreign private issuers to provide financial statements audited under ISAs, as suggested by one commenter, because such an approach would require us to conduct a thorough evaluation of issuer financial statements audited in accordance with ISAs, which is beyond the scope of this rulemaking. Instead, the rule would continue to recognize only audits prepared in accordance

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[44] *See* the specific requirements of Exchange Act Rule 12g3-2(b).

[45] *See Exemption from Registration Under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers*, Release No. 34-57350 (Feb. 19, 2008), citing *Adoption of Rules Relating to Foreign Securities*, Release No. 34-8066 (Apr. 28, 1967).

with U.S. generally accepted auditing standards or Public Company Accounting Oversight Board auditing standards.

Request for Comment:

6. Should we permit foreign private issuers that are eligible for the exemption from Exchange Act registration provided by Exchange Act Rule 12g3-2(b) to provide financial statements prepared in accordance with home country accounting standards without reconciliation to U.S. GAAP, as proposed? Would such an accommodation provide financial information that is consistent with investor protection?
7. Should the proposal be expanded to apply to any foreign private issuer with securities that are listed and traded in its home country, without regard to Exchange Act Rule 12g3-2(b) eligibility? Alternatively, if we do not expand the proposal to all foreign private issuers with securities listed and traded in its home country, should we amend Rule 701(e)(4) to allow issuers to present their financial statements in accordance with other international financial reporting standards, such as International Financial Reporting Standards as adopted by the European Union, without requiring such issuers to provide a reconciliation to U.S. GAAP?

4. Alternative Valuation Disclosure

We propose to allow issuers to provide alternative valuation information, specifically an independent valuation report of the securities' fair market value as determined by an independent appraisal consistent with the rules and regulations under Internal Revenue Code Section 409A[46] (a "Section 409A independent valuation report"), in lieu of financial statements, for purposes of Rule 701(e) disclosure. The Concept Release solicited comment on whether we should allow valuation information regarding the securities in lieu of, or in addition to, financial statements. In particular, the Concept Release asked what valuation method should be used for this purpose,

[46] 26 U.S.C. 409A ("IRC Section 409A").

and whether ASC Topic 718[47] grant date fair value information or IRC Section 409A valuation information would be informative.

A few commenters recommended allowing issuers to provide valuation information prepared for purposes of IRC Section 409A in lieu of U.S. GAAP financials.[48] These commenters stated that this information would be a practical alternative to financial statement disclosure, as it is subject to an existing regulatory scheme and has independent economic significance. One of the commenters stated that it is less costly to comply with IRC Section 409A than to produce than U.S. GAAP financials.[49] Another commenter stated that valuation information would be more useful for an employee in evaluating an equity award than early stage financial information and that many issuers already prepare IRC Section 409A valuations to determine option exercise prices and tax withholding.[50] This commenter also stated that non-reporting issuers would be more willing to disclose valuation information than U.S. GAAP financial statements and observed that some issuers choose not to rely on Rule 701 to avoid facing competitive risks from unauthorized release of sensitive financial information.

We propose amending Rule 701(e)(4) to permit, as an alternative to financial statement disclosure, the use of a Section 409A independent valuation report prepared in accordance with the rules and regulations applicable to determining the fair market value of service recipient stock for stock not readily tradable on an established securities market.[51] The proposed

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[47] FASB ASC Topic 718.

[48] *See* letters from ABA and Sullivan.

[49] *See* letter from ABA.

[50] *See* letter from Sullivan.

[51] Proposed Rule 701(e)(4)(ii). As provided in Treasury Reg. 1.409A-1(b)(5)(iv)(B)(*1*), in the case of service recipient stock that is not readily tradable on an established securities market, the fair market value of the stock as of a valuation date means a value determined by the reasonable application of a reasonable valuation method. For this purpose, a valuation is presumed to be a reasonable valuation if the valuation is determined by an independent appraisal that meets certain requirements. *See* Treasury Reg. 1.409A-1(b)(5)(iv)(B)(*2*)(i). The determination whether a valuation method is reasonable, or whether an application of a valuation method is reasonable, is made based on the facts and circumstances as of the valuation date. Factors to be considered under a reasonable valuation method include, as applicable, the value of tangible and intangible assets of the corporation, the present value of

alternative would apply to all issuers other than foreign private issuers eligible for the Rule 12g3-2(b) exemption. We believe that permitting this alternative is appropriate because the disclosure would be particularly helpful to employee investors in non-reporting issuers, which typically do not have a significant trading market from which to readily derive valuation information. To provide employee investors with meaningful information that they can use to assess the manner in which fair market value was derived, the amendments would require the issuer to provide employees the entire Section 409A independent valuation report provided to the issuer.[52] As noted above,[53] the applicable rules and regulations under IRC Section 409A specify numerous factors to be taken into account in determining the fair market value of securities not readily tradeable on an established securities market, including but not limited to recent arm's length transactions involving the sale or transfer of such securities, and specifically provide that use of a valuation method is not reasonable if such valuation method does not take into consideration all available information material to the value of the company. These rules are widely-used and have independent legal significance under Federal tax law. We believe that a Section 409A independent valuation report containing a rigorous analysis of the factors considered in such a valuation would provide employee investors with appropriate financial disclosure.

To ensure appropriate investor protections, we are proposing certain conditions on the use of a Section 409A independent valuation report. First, the proposed amendments require an

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anticipated future cash-flows of the corporation, the market value of stock or equity interests in similar corporations and other entities engaged in trades or businesses substantially similar to those engaged in by the corporation the stock of which is to be valued, the value of which can be readily determined through nondiscretionary, objective means (such as through trading prices on an established securities market or an amount paid in an arm's length private transaction), recent arm's length transactions involving the sale or transfer of such stock or equity interests, and other relevant factors such as control premiums or discounts for lack of marketability and whether the valuation method is used for other purposes that have a material economic effect on the service recipient, its stockholders, or its creditors. The use of a valuation method is not reasonable if such valuation method does not take into consideration in applying its methodology all available information material to the value of the corporation. Under the Treasury Regulation, the use of a value previously calculated under a valuation method is not reasonable as of a later date if such calculation fails to reflect information available after the date of the calculation that may materially affect the value of the corporation (for example, the resolution of material litigation or the issuance of a patent).

[52] Proposed Rule 701(e)(4)(ii)(B).

[53] *See* n. 51, *supra*.

independent appraisal that is consistent with the rules and regulations under Section 409A applicable to determination of the fair market value of service recipient stock for stock not readily tradable on an established securities market. Those rules and regulations call for an independent appraisal. The proposed amendments would not permit reliance on other aspects of the Section 409A rules that permit determination of fair value for tax purposes by other means. This condition would have the effect of requiring an independent party to prepare the appraisal and report to reduce potential risks that may arise from an issuer providing its own valuation.[54] Further, in order to keep valuation information current, similar to Rule 701(e) financial statement disclosure, the proposed amendments would require the Section 409A independent valuation report to be as of a date that is no more than six months before the sale of securities in reliance on this exemption.[55] This updating schedule would be comparable to the proposed age of financial statement requirements for Rule 701(e).

We anticipate that providing the proposed valuation disclosure may be less costly, particularly because it is likely the issuer is already preparing such reports for purposes of complying with IRC Section 409A. At the same time, as commenters suggested, valuation disclosure may be as useful to an investor, if not more so, than financial statements in the particular context of evaluating the value of an equity award granted pursuant to Rule 701.

Although most non-reporting issuers relying on Rule 701 are unlikely to have a trading market of the necessary depth and liquidity to justify using the IRC Section 409A valuation

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[54] To meet the requirements of Treasury Reg. 1.409A-1(b)(5)(iv)(B)(2)(i), the valuation must be determined by an independent appraisal that meets the requirements of IRC Section 401(a)(28)(C) and the Treasury Regulations thereunder. For purposes of IRC Section 401(a)(28)(C), the term "independent appraiser" means any appraiser meeting requirements similar to the requirements of the Treasury Regulations prescribed under IRC Section 170(a)(1). IRC Section 170(f)(11)(E) and Treasury Reg. 1.170A-17 define the terms "qualified appraisal" and "qualified appraiser." In order to be a "qualified appraisal," a valuation of property must be made by a "qualified appraiser." *See* IRS Publication 561, which generally describes a "qualified appraiser" as a disinterested person who has earned an appraisal designation from a generally recognized professional appraiser organization or met specified minimum educational requirements, and regularly prepare appraisals for which he or she is paid.

[55] In contrast, the applicable Treasury Regulations provide that use of a previously calculated valuation is not reasonable if the value was calculated more than 12 months earlier than the date for which the valuation is being used, or if the valuation fails to reflect information available after the date of the calculation that may materially affect the value of the corporation. Treasury Reg. 1.409A-1(b)(5)(iv)(B).

standard for stock readily traded on an established securities market, foreign private issuers eligible for the Rule 12g3-2(b) exemption may meet this criterion. In particular, such an issuer must maintain a listing of a class of securities on one or more exchanges in a foreign jurisdiction that, either singly or together with the trading of the same class of the issuer's securities in another foreign jurisdiction, constitutes the primary trading market for those securities.[56] For this reason, the proposed amendments would allow Rule 12g3-2(b) eligible foreign private issuers to provide alternative valuation disclosure prepared consistent with the IRC Section 409A rules and regulations applicable to determining the fair market value of stock readily tradeable on an established securities market.[57] To comply with this alternative disclosure requirement, the eligible issuer would simply disclose the fair market value of the stock on the most recent trading day preceding the date of sale.[58]

Request for Comment:

8. Should we permit a Section 409A independent valuation report to be provided in lieu of financial statement disclosures, as proposed? Would the IRC Section 409A regulations for determining the fair market value of stock not readily tradable on an established securities market generate valuation information that is easy to understand and appropriate to the financial disclosure needs of investors receiving securities under Rule

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[56] Exchange Act Rule 12g3-2(b)(1)(ii).

[57] Proposed Rule 701(e)(4)(ii)(A).

[58] For stock readily tradable on an established securities market, the fair market value of the stock must be determined "based upon the last sale before or the first sale after the grant, the closing price on the trading day before or the trading day of the grant, the arithmetic mean of the high and low prices on the trading day before or the trading day of the grant, or any other reasonable method using actual transactions in such stock as reported by such market." *See* Treasury Reg. 1.409A-1(b)(5)(iv)(A). For this purpose, stock is treated as "readily tradable" if it is regularly quoted by brokers or dealers making a market in such stock, and the term "established securities market" means an established securities market within the meaning of Treasury Reg. 1.897-1(m). *See* Treasury Reg. 1.409A-1(b)(5)(vi)(G) and 1.409A-1(k). Treasury Reg. 1.897-1(m) provides that the term "established securities market" means "(1) A national securities exchange which is registered under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f), (2) A foreign national securities exchange which is officially recognized, sanctioned, or supervised by governmental authority, and (3) Any over-the-counter market. An over-the-counter market is any market reflected by the existence of an interdealer quotation system. An interdealer quotation system is any system of general circulation to brokers and dealers which regularly disseminates quotations of stocks and securities by identified brokers or dealers, other than by quotation sheets which are prepared and distributed by a broker or dealer in the regular course of business and which contain only quotations of such broker or dealer."

701? Would such disclosure be an acceptable alternative to financial statements prepared in accordance with U.S. GAAP or IFRS, as applicable? Would this proposal provide meaningful information to securities recipients while avoiding competitive risks from unauthorized financial statement disclosure?

9. Should we require, as proposed, that Section 409A independent valuation reports be prepared pursuant to an independent appraisal for Rule 701(e) disclosure purposes? Taken together, would the related Treasury Regulations defining the terms "independent appraiser," "qualified appraiser," and "qualified appraisal" provide adequate guidance for purposes of satisfying this proposed requirement? If not, should we provide further guidance? Would the proposed independence requirement add significantly to preparation costs? How would those costs compare to the costs of preparing the financial statements required by the proposed amendments?
10. As proposed, the Section 409A independent valuation reports would need to be updated at six-month intervals. Would a different interval be more appropriate to ensure that such valuation disclosures provide appropriate information? If so, what interval should we prescribe? Would the proposed updating schedule impose significant costs? Would a less frequent updating schedule raise investor protection concerns?
11. More specifically, would the Section 409A updating schedule imposed for tax purposes, calling for an independent valuation report to be updated if it fails to reflect information that may materially affect the value of the issuer and otherwise only once per fiscal year, result in more frequently updated information than if the issuer provides financial statement disclosure only on a semi-annual basis as proposed? Would using the tax updating schedule for Rule 701(e) purposes provide adequate investor protection?
12. Should we require disclosure of the entire Section 409A independent valuation report, as proposed? Would requiring disclosure of the entire Section 409A independent valuation report result in disclosure of competitively sensitive information? If so, how could we

modify the proposal to avoid this result while still providing investors with appropriate disclosure? Are there particular contents of the report that would be competitively sensitive and not meaningful to investors?

13. Is the proposed alternative valuation information based on IRC Section 409A valuation standards for stock readily tradable on an established securities market appropriate for Rule 12g3-2(b) eligible foreign private issuers? From an investor protection standpoint, would disclosure of the securities' fair market value alone be a sufficient alternative to financial statement disclosure? Would disclosure of the securities' fair market value provide any benefit considering the securities are traded in an established trading market?
14. Are there any other circumstances in which an issuer should be able to provide the alternative valuation information based on market price in accordance with the IRC Section 409A valuation standards for stock readily tradable on an established securities market?
15. Are there any other aspects of the Section 409A valuation regulations that would be useful for purposes of Rule 701(e) disclosure?
16. Other than the independent valuation prescribed with respect to IRC Section 409A, are there any other securities valuation methods that would be appropriate to import into the Rule 701(e) disclosure requirements?

5. Disclosure Requirements for Derivative Securities

We propose to amend the date by which Rule 701(e) disclosure must be provided for certain derivative securities. Specifically, for derivative securities that do not involve a decision by the recipient to exercise or convert, we propose to modify the date by which Rule 701(e) disclosure must be delivered for grants to new hires in specified circumstances.

Rule 701(e)(6) currently provides that if a sale involves a stock option or another derivative security, the issuer must deliver disclosure a reasonable period of time before the date of exercise or conversion. Adopted in 1999, this rule contemplates derivative securities where

the sale of the underlying shares involves an investment decision at the time of exercise or conversion.[59]

Since Rule 701(e) was initially adopted, compensatory programs have developed that use derivative securities–such as restricted stock units ("RSUs") and performance stock units ("PSUs")–that do not require a decision to exercise or convert. Instead, when held to maturity, these instruments settle automatically in the underlying shares without need for any investment decision by the holder. In the Concept Release, the Commission observed that, because such instruments settle by their terms without action by the holder, the relevant investment decision, if there is one, likely takes place at the date of grant. Consequently, the issuer's obligation to provide Rule 701(e) disclosure would apply a reasonable period of time before the date the RSU or PSU award is granted.[60]

Commenters did not raise any concerns regarding the application of the existing rule to options, stock appreciation rights, or convertible securities. While commenters did not dispute the logic of the Commission's date of sale analysis for RSUs and PSUs,[61] they questioned its practicability in the context of grants to new hires.[62] In particular, one commenter stated that providing financial information to an individual who is considering whether to join the issuer would result in an obligation to provide sensitive financial and operational risk information before the individual starts employment.[63]

To address these practical challenges, commenters suggested several alternative approaches. One commenter suggested permitting issuers to provide the required disclosure

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[59] *See* 1999 Release, which predates issuers' utilization of restricted stock units and similar instruments for compensatory awards.

[60] *See* Concept Release at Section II.C.3.

[61] *See* letters from Chamber and Davis Polk.

[62] *See* letters from ABA and Chamber.

[63] *See* letter from ABA.

within 30 days after employment commences.[64] Another commenter recommended treating RSU settlement as a conversion within the meaning of Rule 701(e)(6) on the date of settlement, so that disclosure delivery would be required a reasonable period of time before settlement.[65]

We propose revising Rule 701(e)(6) to clarify the distinction between derivative securities that involve a decision to exercise or convert, and those that do not.[66] If the sale involves a stock option or other derivative security that involves a decision to exercise or convert, the issuer would continue to be required to deliver disclosure a reasonable period of time before the date of exercise or conversion. If the sale involves an RSU or other derivative security that does not involve a decision to exercise or convert, the issuer generally would continue to be required to deliver disclosure a reasonable period of time before the date the RSU or similar derivative security is granted.

We also propose to amend the rule's application to the grant of an RSU or similar derivative security made in connection with the hire of new employees. In such circumstances, the disclosure would be considered delivered a reasonable period of time before the date of sale if it is provided no later than 14 calendar days after the date the person begins employment. In our view, providing an accommodation for delivery 14 calendar days after commencing employment would provide the issuer an opportunity to address confidentiality concerns while providing the employee disclosure within an appropriate time period. In any other circumstances, the issuer would be required to deliver the disclosure a reasonable period of time before the date the RSU or similar derivative security is granted. In any case, however, the disclosure may be provided subject to appropriate confidentiality conditions. We do not propose to treat RSU settlement the same as a conversion because, unlike conversion, RSU

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[64] *See* letter from Chamber.

[65] *See* letter from ABA.

[66] Proposed Rule 701(e)(6)(i).

settlement does not involve an investment decision, and, as discussed above, the requirements of Rule 701 contemplate disclosure delivery as part of an investment decision.

Request for Comment:

17. Does the proposal sufficiently clarify the distinction between derivative securities that involve a decision to exercise or convert and those that do not with respect to the timing of the obligation to deliver Rule 701(e) disclosure?
18. Is there any basis for treating settlement of an RSU or PSU as a conversion under the current rule, given that the holder does not make any investment decision at the time of settlement? For example, should the decision whether to settle tax obligations arising at settlement by withholding shares be viewed as an investment decision?
19. For new hires, is it appropriate to require delivery of Rule 701(e) disclosures within 14 calendar days after a recipient's commencement of employment, as proposed? Would a shorter period, such as seven calendar days, or longer period, such as 30 calendar days, be more appropriate?
20. Does the proposal adequately address issuer confidentiality concerns in the context of new hires, in a manner consistent with investor protection?
21. Are there any circumstances in which the proposed new hire accommodation should not apply, such as where the grant of securities is individually negotiated?
22. Should the proposed accommodation for new hires be available only if the financial disclosure that will be provided consists of financial statements, rather than the alternative proposed Section 409A valuation disclosure? Does a Section 409A independent valuation report raise the same concerns about disclosure of sensitive financial and operational risk information?
23. Are there any other categories of Rule 701 eligible participants for whom the proposed accommodations should apply?

24. Would it be helpful to amend Rule 701(e) to specify that disclosure may be made either by physical or electronic delivery or by written notice of the availability of the information on a website that may be password-protected and of any password needed to access the information? Would it be helpful for the rule to specifically permit use of dedicated physical disclosure rooms that house the medium used to convey the information required to be disclosed?

6. Disclosure Requirements Following Business Combination Transactions

To clarify the application of Rule 701 to merged entities, we propose to amend Rule 701(e) to address the application of the exemption and its disclosure delivery obligations to acquired entity derivative securities that the acquiring issuer assumes in a business combination transaction.[67]

In some business combination transactions, outstanding derivative securities issued by the acquired entity in compensatory transactions will not be accelerated, but will instead be assumed by the acquiring issuer. In these circumstances, shares of the acquiring issuer will be issued upon the exercise or conversion of the derivative securities, instead of those of the acquired entity. Under the proposal, as long as the acquired entity complied with Rule 701 at the time it originally granted the derivative securities, the exercise or conversion of those derivative securities that are assumed by the acquiring issuer would be exempt from registration, subject to the acquiring issuer's compliance, where applicable, with Rule 701(e). For assumed derivative securities for which the acquired entity was required to provide disclosure pursuant to Rule 701(e) and where the derivative securities are exercised or converted after completion of the business combination transaction, the acquiring issuer would satisfy that disclosure obligation by providing information meeting the requirements of Rule 701(e) consistent with the timing

[67] Proposed Rule 701(e)(7).

requirements of Rule 701(e)(6).[68] In other words, if the acquired entity would have been required to provide Rule 701(e) disclosure upon exercise or conversion of its derivative securities, the acquiring issuer that assumes those derivative securities would assume the obligation to provide Rule 701(e) disclosure upon their exercise or conversion.

Following completion of a business combination transaction, in determining whether the amount of securities the acquiring issuer sold during any consecutive 12-month period exceeds $10 million, 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.[69] Because the acquiring issuer presumably did not consider the acquired entity's Rule 701 sales preceding the business combination transaction in planning its own Rule 701 transactions, taking them into account after the business combination transaction could in some cases result in retroactive loss of the exemption if the combined Rule 701 transactions exceed the $10 million threshold. We believe that this result would be unduly restrictive and could create hurdles to potentially value-enhancing business combinations.

Request for Comment:

25. Would the proposal addressing acquired entity derivative securities assumed by an acquiring issuer sufficiently clarify the exempt status of and disclosure obligations applicable to exercises and conversions of those securities after completion of the business combination transaction? Are any additional clarifications needed? For example, is guidance needed to clarify who is the acquiring issuer in a business combination transaction where the acquirer is not the same entity for legal and accounting purposes?

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[68] Proposed Rule 701(e)(7)(ii).

[69] Proposed Rule 701(e)(7)(i).

26. Following completion of a business combination transaction, in determining whether the amount of securities the acquiring issuer sold pursuant to Rule 701 during any consecutive 12-month period exceeds $10 million, should the acquiring entity be permitted to disregard the securities that the acquired entity sold pursuant to the rule during the same 12-month period, as proposed? Are there any circumstances in which the acquiring entity should be required to take those acquired entity securities into account for purposes of the $10 million disclosure threshold, and how do these circumstances relate to investor protection?

B. Rule 701(d)

We propose to raise two of the three alternative regulatory ceilings that cap the overall amount of securities that a non-reporting issuer may sell pursuant to Rule 701 during any consecutive 12-month period. Since 1999,[70] the rule has provided that the amount of securities that may be sold in reliance on the exemption during any consecutive 12-month period is limited to the greatest of:[71]

- $1 million;
- 15% of the total assets of the issuer,[72] measured at the issuer's most recent balance sheet date; or
- 15% of the outstanding amount of the class of securities being offered and sold in reliance on the rule, measured at the issuer's most recent balance sheet date.

These measures apply on an aggregate basis, not plan-by-plan. For securities underlying options, the aggregate sales price is determined when the option grant is made, using the

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[70] *See* 1999 Adopting Release.

[71] Rule 701(d).

[72] The relevant limit applies to the total assets of the issuer's parent if the issuer is a wholly-owned subsidiary and the securities represent obligations that the parent fully and unconditionally guarantees.

exercise price of the option, without regard to when it becomes exercisable.[73] For deferred compensation plans, the calculation is made at the time of the participant's irrevocable election to defer.[74] There is no separate limitation on the amount of securities that may be offered.

In proposing the current rule, the Commission explained that the purpose of a 12-month cap is to "assur[e] that the exemption does not provide a threshold that small issuers could use to raise substantial capital from employees."[75] The alternatives based on 15% of total assets or 15% of the outstanding amount of the class of securities were intended to increase the flexibility and utility of the exemption.[76] The $1 million alternative provides an amount that any issuer can use, regardless of size.

The Concept Release solicited comment on whether there is a continuing need for any annual regulatory ceiling for Rule 701 transactions, and whether investors would be harmed if the Commission eliminated or raised the ceiling. One commenter stated that compliance with Rule 701(d) imposes costly ongoing analysis and monitoring on issuers without any clear benefit to them or their employees.[77] A different commenter recommended raising the $1 million limit to $2 million, to retain its utility for start-up issuers that have few assets and may want to issue a large percentage of current equity to first round employees.[78] This commenter also recommended raising the 15% asset cap to 25%, as modern issuers rely increasingly on human capital and are less asset-intensive. Another commenter recommended providing relief

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[73] *See* Rule 701(d)(3)(i)-(ii).

[74] *See* Rule 701(d)(3)(ii).

[75] *See Employee Benefit and Compensation Contracts*, Release No. 33-6726 (July 30, 1987) [52 FR 29033 (Aug. 5, 1987)] ("Rule 701 Reproposing Release"). As originally adopted, the rule permitted the amounts of securities offered and sold annually to be the greatest of $500,000, 15% of total assets of the issuer, or 15% of the outstanding securities of the class, subject to an absolute limit of $5,000,000 derived from Securities Act Section 3(b). *See Compensatory Benefit Plans and Contracts*, Release No. 33-6768 (Apr. 14, 1988) [53 FR 12918 (Apr. 20, 1988)] ("Rule 701 Adopting Release").

[76] *See* Rule 701 Adopting Release at Section I.A.(2).

[77] *See* letter from ABA.

[78] *See* letter from Sullivan.

in business combination transactions where the acquirer assumes the target's employee benefit plans, resulting in the combined enterprise exceeding the aggregate offering limitations in Rule 701(d)(2), particularly in the first year following closing of the transaction.[79]

We continue to believe that the Rule 701(d) caps are useful in curbing non-compensatory sales in reliance on the rule. Accordingly, the proposal retains the general structure of Rule 701(d)(2), providing that the aggregate sales price or amount of securities sold in reliance on Rule 701 during any consecutive 12-month period must not exceed the greatest of the three alternative ceilings. In light of the less asset-intensive nature of contemporary businesses and the effects of inflation since the adoption of these alternatives in 1999, we believe that it could be beneficial to issuers and securities recipients to raise two of the ceilings. As proposed, the asset cap would be raised from 15% to 25% of the total assets of the issuer (or of the issuer's parent if the issuer is a wholly-owned subsidiary and the securities represent obligations that the parent fully and unconditionally guarantees) measured at the issuer's most recent balance sheet date (if no older than its last fiscal year end).[80] The alternative $1 million cap available to any issuer would be raised to $2 million.[81] The third alternative cap – 15% of the outstanding amount of the class of securities being offered and sold – would be retained with no changes. The considerations that motivate us to propose raising the alternative percentage of assets cap and the $1 million cap do not apply to the percentage of outstanding securities cap, and we continue to believe this cap is appropriate to prevent misuse of the exemption for capital-raising purposes.

To facilitate the operation of compensatory plans following a merger or acquisition, we propose an amendment to provide that after completion of a business combination transaction, to calculate compliance with paragraph (d)(2) of this section, the acquiring issuer may use a pro forma balance sheet that reflects the transaction or a balance sheet for a date after the completion

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[79] *See* letter from Chamber.

[80] Proposed Rule 701(d)(2)(ii).

[81] Proposed Rule 701(d)(2)(i).

of the transaction that reflects the total assets and outstanding securities of the combined entity.[82] Furthermore, in determining the amount of securities that it may offer pursuant to Rule 701 following a business combination transaction, as proposed, the acquiring issuer would not be required to include the aggregate sales price and amount of securities for which the acquired entity claimed the exemption during the same 12-month period. We believe that these changes would remove hurdles to potentially value-enhancing business combination transactions, consistent with investor protection.

Request for Comment:

27. Do the two proposed sales cap increases appropriately adjust the ceilings in a manner that benefits both issuers and securities recipients, consistent with investor protection? Should either cap be raised by a higher or lower amount? If so, what amount would be more appropriate? Should either cap remain unchanged?
28. Should we retain the current structure of Rule 701(d) with three alternative sales caps? If not, how should the structure be changed? In particular, do the caps further the goal of facilitating only compensatory transactions in reliance on Rule 701? Are there alternative provisions that would serve this purpose?
29. Does the cap based on 15% of the outstanding amount of the class of securities being offered and sold continue to play a useful and effective role in Rule 701? Does it prevent issuers from improperly relying on the rule to raise capital from employees? Have there been changes in the marketplace, as discussed above for the two other alternative caps, which suggest that this cap may inhibit beneficial compensatory transactions? Should this cap be raised? If so, what would be a more appropriate percentage?
30. Does the proposal to permit use of a pro forma balance sheet, or a balance sheet for a date after the completion of the business combination transaction that reflects the total assets

[82] Proposed Rule 701(d)(3)(v).

and outstanding securities of the combined entity, meaningfully facilitate the operation of compensatory plans following a business combination transaction? Are any other changes necessary to achieve this objective?

31. Should we amend Rule 701(d), as proposed, to provide that following a business combination transaction, in determining the amount of securities that it may offer pursuant to Rule 701, the acquiring issuer need not include the aggregate sales price and amount of securities for which the acquired entity claimed the exemption during the same 12-month period?

C. Eligible Recipients

1. Consultants and Advisors

We propose to extend Rule 701 consultant and advisor eligibility to entities meeting specified ownership criteria designed to assure that the securities compensate the performance of services. Currently, consultants and advisors may participate in Rule 701 offerings only if:

- They are natural persons;
- They provide bona fide services to the issuer, its parents, its majority-owned subsidiaries or majority-owned subsidiaries of the issuer's parent; and
- The services are not in connection with the offer or sale of securities in a capital-raising transaction, and do not directly or indirectly promote or maintain a market for the issuer's securities.[83]

Some commenters on the Concept Release addressed whether participation should be limited to natural persons and corporate alter egos, as currently permitted, or expanded to include entities. One commenter noted that staff has not objected to treating personal services businesses

[83] Rule 701(c)(1). Where the consultant or advisor performs services for the issuer through a wholly-owned corporate alter ego, the issuer may contract with, and issue securities as compensation to, that corporate entity. *Cf.*, *Registration of Securities on Form S-8*, Release No. 33-7646 (Feb. 25, 1999) [64 FR 11103 (Mar. 8, 1999)] at n. 20, ("1999 Form S-8 Adopting Release") addressing such a corporate alter ego in the Form S-8 context.

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.[84] The commenter suggested that we expand eligible corporate alter egos to include entities wholly-owned by multiple natural person service providers or the management of the entities. Other commenters noted that service providers may be organized as entities in order to provide legal benefits such as tax and estate planning and stated that these providers should not have to choose between such benefits and receiving equity compensation.[85]

While we acknowledge these points, we are concerned that opening up Rule 701 eligibility to entities that are more broadly held than the corporate alter ego of an individual consultant could undermine the compensatory nature of the exemption by permitting securities to be issued to passive investment vehicles rather than individuals who perform services for the issuer. This concern is amplified by the fact that a person who receives securities pursuant to the plan and participant conditions of Rule 701(c) is not considered a holder of record for purposes of Exchange Act Section 12(g) registration. Specifically, Section 502 of the Jumpstart Our Business Startups Act[86] ("JOBS Act") amended Exchange Act Section 12(g)(5)[87] to exclude from the definition of "held of record," for purposes of determining whether an issuer is required

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[84] *See* letter from Davis Polk.

[85] *See* letters from Chamber and Indigo.

[86] Sec. 502, 126 Stat. at 326. Section 501 of the JOBS Act [Sec. 601, 126 Stat. at 325] amended Section 12(g)(1) of the Exchange Act to require an issuer to register a class of equity securities (other than exempted securities) within 120 days after its fiscal year-end if, on the last day of its fiscal year, the issuer has total assets of more than $10 million and the class of equity securities is "held of record" by either (i) 2,000 persons, or (ii) 500 persons who are not accredited investors. Section 601 of the JOBS Act [Sec. 601, 126 Stat. at 326] further amended Exchange Act Section 12(g)(1) to require an issuer that is a bank or bank holding company, as defined in Section 2 of the Bank Holding Company Act of 1956 [12 U.S.C. 1841], to register a class of equity securities (other than exempted securities) within 120 days after the last day of its first fiscal year ended after the effective date of the JOBS Act, on which the issuer has total assets of more than $10 million and the class of equity securities is "held of record" by 2,000 or more persons.

[87] 15 U.S.C. 78*l*(g)(5).

to register a class of equity securities, securities that are 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.[88] To implement this statutory amendment, the Commission amended the definition of "held of record" in Exchange Act Rule 12g5-1[89] to exclude certain securities held by persons who received them pursuant to employee compensation plans in a transaction exempt from, or not subject to, the registration requirements of Section 5.[90] This amendment also established a non-exclusive safe harbor for determining whether securities are "held of record" for purposes of registration under Exchange Act Section 12(g), providing that an issuer may deem a person to have received securities pursuant to an employee compensation plan if the plan and the person who received the securities pursuant to it met the plan and participant conditions of Rule 701(c). It is therefore important in expanding eligible participants under Rule 701(c) not to include passive investment vehicles that properly should be record holders for purposes of triggering Section 12(g) registration and the protections of Exchange Act reporting.

The proposed amendments seek to strike a balance between, on the one hand, allowing service providers flexibility to obtain the legal benefits of organizing as entities and, on the other hand, preventing Rule 701 securities from being issued to passive investment vehicles that would not be record holders, by expanding consultant or advisor eligibility to an entity, subject to the following conditions:

- Substantially all of the activities of the entity involve the performance of services; and

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[88] This statutory exclusion applies solely for purposes of determining whether an issuer is required to register a class of equity securities under the Exchange Act and does not apply to a determination of whether such registration may be terminated or suspended.

[89] 17 CFR 240.12g5-1.

[90] *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)] ("JOBS Act Release"), adopting Exchange Act Rule 12g5-1(a)(8).

- Substantially all of the ownership interests in the entity are held directly by:
    - No more than 25 natural persons, of whom at least 50 percent perform such services for the issuer through the entity;
    - The estate of a natural person specified above; and
    - Any natural person who acquired ownership interests in the entity by reason of the death of a natural person specified above.[91]

The proposal seeks to expand eligibility for consultant entities while helping to ensure that compensatory securities are issued only to entities through which services are provided that are owned by those service providers. We believe that the proposed conditions are appropriate to help achieve this objective. In particular, substantially all of the ownership interests would need to be held directly by no more than 25 natural persons, at least 50 percent of whom provide services to the issuer, and by the estates and heirs of those natural persons. An entity that satisfies these conditions would also–like a natural person–need to satisfy the existing requirements for consultant and advisory eligibility by providing bona fide services that are not in connection with the offer or sale of securities in a capital-raising transaction and do not directly or indirectly promote or maintain a market for the issuer's securities.[92]

Request for Comment:

32. Should we extend consultant and advisor eligibility to entities meeting specified ownership criteria designed to link the securities to the performance of services for the issuer, as proposed?
33. Does the proposed standard for consultant and advisor entity eligibility appropriately balance a consultant's needs to obtain the legal benefits of entity organization with the

[91] Proposed Rule 701(c)(1)(iii). These conditions are loosely modeled on, but have a different focus than, the Internal Revenue Code definition of a "qualified personal service corporation. *See* 26 U.S.C. 448(d)(2).

[92] Rule 701(c)(1)(ii) and (iii), proposed to be re-designated as Rule 701(c)(1)(i) and (ii), respectively.

rule's purpose to exempt from Securities Act registration offerings of securities issued in compensatory circumstances?[93]

34. The proposed standard would require that substantially all of the ownership interests of the entity be held by no more than 25 natural persons, of whom at least 50 percent perform services for the issuer through the entity, their estates, and natural persons who acquired ownership interests due to their death. Are the proposed conditions appropriate? Are there different or additional conditions we should consider? Should the rule specify criteria defining what "substantially all" would mean for this purpose? For example, should 95 percent ownership be required to establish "substantially all"?[94]

35. To ensure that securities are issued to compensate persons who provide services to the issuer and not to passive investors, is it necessary to specify a maximum number of natural person owners for an entity to be eligible, as proposed? Should the number be larger or smaller?[95] Should the entity's eligibility to receive securities be conditioned on at least 50 percent of those natural person owners performing services for the issuer, as proposed? Should that percentage be larger or smaller?

36. To assure that a compensatory purpose is maintained, would it be necessary to further restrict ownership by persons who acquire the securities by reason of the death of a current or former service provider to a two-year period beginning on the date of death, as in the Internal Revenue Code definition of a qualified personal service corporation?

37. As noted above, a person who receives securities pursuant to the plan and participant conditions of Rule 701(c) is not considered a holder of record for purposes of Exchange Act Section 12(g) registration. How should this provision influence the limitations we

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[93] *See* Proposed Rule 701(a)(5), formerly Preliminary Note 5 to Rule 701.

[94] Regulation Reg. Sec. 1.448-1T(e)(5)(i)(D) defines "substantially all" as 95% or more for purposes of a "personal service corporation" as defined in IRC Section 448(d)(2).

[95] In this regard, we note that to qualify for S corporation status, a corporation may have no more than 100 shareholders. *See generally* IRC Sections 1361(a)(2) and 1361(b).

place on those persons eligible to receive Rule 701 securities? Are any other restrictions or conditions needed to ensure that Rule 12g5-1(a)(8) excludes from the definition of held of record securities received as compensation for services that the recipients provided to the issuer?

2. Former Employees

We are proposing to expand Rule 701 eligibility for former employees to specified post-termination grants and to former employees of acquired entities. Rule 701 currently exempts offers and sales to former employees, directors, general partners, trustees, officers, or consultants and advisors only if such persons were employed by or providing services to the issuer at the time the securities were offered.

In response to the Concept Release, one commenter stated that Form S-8 should be available to register new grants to former employees that are made as compensation for prior service during the 12-month period after retirement or termination.[96] Another commenter suggested expanding eligible participants to include former employees of an acquired issuer that were granted equity awards in an acquisition in exchange for securities issued as compensation while such former employees were still employed by the acquired issuer.[97]

We believe that expanding Form S-8 eligibility to encompass former employees as suggested by commenters could benefit both issuers and securities recipients by facilitating compensatory transactions consistent with the purposes of the form.[98] We believe that this rationale applies equally to Rule 701 and Form S-8. Accordingly, we propose to expand the eligibility of former employees under Rule 701 to include offers and sales to:

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[96] *See* letter from Sullivan.

[97] *See* letter from Davis Polk.

[98] *See* Section III.C.1, *infra.*

- persons who were employed by or providing services to the issuer, its parents, its subsidiaries, or subsidiaries of the issuer's parent and who are issued securities after resignation, retirement, or other termination as compensation for services rendered during a performance period that ended within 12 months preceding such termination; and
- former employees of an entity that was acquired by the issuer if the securities are issued in substitution or exchange for[99] 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.

The proposal also would define "employee" for purposes of Rule 701 to include executors, administrators, and 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. This amendment would conform to the corresponding provision relating to former employee eligibility in Form S-8.[100]

Request for Comment:

38. Should we make Rule 701 available for new offers and sales to former employees as compensation for their service while employed by the issuer in the preceding 12 months, as proposed? Would expanding the exemption in this way facilitate compensatory transactions consistent with the purpose of the rule? To what extent do issuers grant awards on such a retrospective basis? Does "following resignation, retirement, or other termination" clearly describe the relationship of the award to former employment?

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[99] Consistent with Exchange Act Rule 12g5-1(a)(8)(i)(B), we are using the language "in substitution or exchange for" to cover the various methods by which issuer securities may be received in place of acquired entity securities that were issued in compensatory transactions, such as upon exercise or conversion of those securities. *See* JOBS Act Release at Section III.B.3.

[100] General Instruction A.1(a)(3) to Form S-8, which as discussed in Section III.C.1, *infra,* would similarly be amended to expand eligibility for former employees and former employees of an entity acquired by the issuer.

Should the rule specifically address any other scenarios, such as expiration of the term of employment?

39. Should Rule 701 be available to a former employee of an acquired entity for securities substituted or exchanged for acquired entity securities issued as compensation for the former employee's work for the acquired entity, as proposed? Would this be consistent with the underlying rationale that the Rule 701 exemption is available based on the compensatory relationship with the issuer?

40. Would amending the rule, as proposed, to extend eligibility to executors, administrators, and beneficiaries of employees' estates and others duly authorized by law to administer the estates or assets of former employees facilitate the administration of compensatory plans relying on the exemption? If not, how should this proposal be modified to facilitate that objective?

3. Employees of Subsidiaries

In an effort to harmonize Rule 701 and Form S-8, we also propose to amend Rule 701(c) by substituting the term "subsidiaries"[101] for "majority-owned subsidiaries." The proposed amendment would make the exemption available for offers and sales of securities 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.[102] Like Form S-8, Rule 701 would be available for the issuance of issuer securities to employees of its subsidiaries, without regard to whether those subsidiaries are majority-owned.[103] We are not aware of any reason to

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[101] Rule 405 defines "subsidiary" for purposes of the Securities Act as an affiliate controlled by such person directly, or indirectly through one or more intermediaries. Rule 405 defines "control" as the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

[102] Under the proposal, "subsidiary" would replace "majority-owned subsidiary" in each place in Rule 701(c) where "majority-owned subsidiary" currently appears.

[103] The term "majority-owned subsidiary" is defined as a subsidiary more than 50 percent of whose outstanding securities representing the right, other than as affected by events of default, to vote for the election of directors, is

limit Rule 701 to employees of majority-owned subsidiaries. Expanding Rule 701 eligibility in this manner could facilitate the continued operation of compensation programs when non-reporting issuers transition to reporting status and are only eligible to use Form S-8 rather than Rule 701.

By broadening the exemption to include all subsidiaries, as defined, rather than only those that are majority-owned, the proposal would, among other things, expand eligibility to subsidiaries consolidated by the issuer as variable interest entities, such as physicians employed by medical practices controlled by the issuer.[104]

Request for Comment:

41. Should we harmonize the Rule 701 and Form S-8 eligibility requirements by broadening the Rule 701 exemption to include all subsidiaries, as proposed? Would the proposal facilitate a non-reporting issuer's transition to reporting issuer status and its subsequent registration of compensatory offerings on Form S-8?
42. Unlike Form S-8, the Rule 701 exemption currently is available to majority-owned subsidiaries of the issuer's parent rather than only subsidiaries of the issuer itself.[105] Should we amend Form S-8 to further harmonize the scope of Rule 701 and Form S-8 by making Form S-8 available to employees of all subsidiaries of the issuer's parent? Are there any other harmonizing amendments we should consider?
43. Are there any reasons not to extend Rule 701 eligibility to persons employed by subsidiaries that are consolidated by the issuer as variable interest entities? For example,

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owned by the subsidiary's parent and/or one or more of the parent's other majority-owned subsidiaries. *See* Rule 405.

[104] In the 1999 Adopting Release at Section at Section II.D, n. 41, the Commission rejected a view expressed by the staff in certain no-action letters that such physicians were eligible as consultants or advisors in light of the narrower definition of consultant or advisor adopted in that release. Under Financial Accounting Standards Board Accounting Standards Codification Subtopic 810-10, *Consolidation – Overall,* a medical practice is often a variable interest entity. An issuer that has a controlling financial interest in such a medical practice generally would consolidate it. As a result, physicians employed by the medical practice would become eligible as employees of the issuer's subsidiary.

[105] *See* Form S-8, General Instruction A.1.(a).

are there any reasons not to extend Rule 701 eligibility to physicians employed by medical practices controlled by the issuer, based on their employment by a subsidiary of the issuer?

III. FORM S-8

Form S-8 was originally adopted in 1953, as a simplified form for the Securities Act registration of securities to be issued pursuant to employee stock purchase plans.[106] Form S-8 is available for the registration of securities to be offered under any employee benefit plan to an issuer's employees or employees of its subsidiaries or parents.[107] Registration on Form S-8 is used for many different types of employee benefit plans, including Internal Revenue Code Section 401(k) plans and similar defined contribution retirement savings plans, employee stock purchase plans, nonqualified deferred compensation plans, and incentive plans that provide for issuance of options, restricted stock, or RSUs. The form may be used by any issuer that is subject, at the time of filing, to the reporting requirements of Section 13 or 15(d) of the Exchange Act and has filed all reports required during the preceding 12 months or such shorter period that it was subject to those requirements.[108] Form S-8 is not available for shell companies.[109]

Over time, the Commission has made revisions to the Form S-8 requirements to simplify the use of the form and streamline the form's requirements where such simplification is

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[106] *See generally Registration of Securities Offered Pursuant to Employees Stock Purchase Plans*, Release No. 33-3480 (June 16, 1953) [18 FR 3688 (June 27, 1953)].

[107] "Employee benefit plan" is defined in Securities Act Rule 405.

[108] *See* Form S-8, General Instruction A.1.

[109] "Shell company" is defined in Securities Act Rule 405. When a company ceases to be a shell company, by combining with a formerly private operating business, General Instruction A.1 to Form S-8 provides that it then becomes eligible to use Form S-8 60 days following the filing of Form 10-equivalent information with the Commission.

consistent with investor protection.[110] In the Concept Release, the Commission asked whether Form S-8 registration is still necessary, and if so, how the Commission could further streamline Form S-8 registration. Among other things, the Concept Release solicited comment on the potential elimination of Form S-8 in favor of allowing Exchange Act reporting issuers to use the Rule 701 exemption and whether Form S-8 incentivized issuers to remain current in their Exchange Act reporting obligations. Commenters who addressed this issue generally supported eliminating the form, while expressing some reservations.[111] One commenter stated that the principal advantage of such an approach would be the elimination of compliance costs associated with filing and maintaining an effective Form S-8.[112] A few other commenters indicated that keeping Form S-8 is not necessary to provide an incentive for reporting issuers to remain current in their Exchange Act reporting obligations.[113]

At the same time, commenters noted a number of potential disadvantages with eliminating Form S-8. One commenter stated that reporting issuers would find it a significant disadvantage if failure to register on Form S-8 would subject an issuance of employee benefit plan shares to registration under state blue sky laws.[114] A different commenter stated that reporting issuers would not migrate to Rule 701 if securities issued under the exemption would be restricted securities, as defined in Rule 144, and observed that, unlike Rule 701 offerings,

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[110] *See*, *e.g.*, 17 CFR 230.462(a) (allowing Form S-8 to go effective automatically without review by the staff or other action by the Commission); Item 3 and General Instruction G of Form S-8 (allowing the incorporation by reference of certain past and future reports required to be filed by the issuer under Section 13 or 15(d) under the Exchange Act); 17 CFR 230.428(a)(1) (providing an abbreviated disclosure format that eliminated the need to file a separate prospectus and permitting the delivery of regularly prepared materials to advise employees about benefit plans to satisfy prospectus delivery requirements); Rule 416(c) and Rule 457(h)(2) (providing for registration of an indeterminate amount of plan interests and providing that there is no separate fee calculation for registration of plan interests, respectively); and General Instruction E to Form S-8 (providing a procedure for the filing of a simplified registration statement covering additional securities of the same class to be issued pursuant to the same employee benefit plan).

[111] *See* letters from ABA, Davis Polk, and NASPP.

[112] *See* letter from ABA.

[113] *See* letters from NASPP and ABA.

[114] *See* letter from NASPP.

securities issued as part of an offering registered on Form S-8 are not "restricted securities" as defined in Rule 144.[115]

In evaluating this potential change, we considered these and other disadvantages that would result from eliminating Form S-8 and allowing reporting issuers to use Rule 701, such as:

- Employees' loss of the information required in Part I of Form S-8 that is part of the prospectus that must be provided to them; and
- Employees' potential loss of the protections provided by Section 11 and, in some cases, Section 12(a)(2) liability in the case of material misstatements or omissions.[116]

On balance, we believe that Form S-8 continues to provide a useful and effective means of registering securities to be issued in compensatory offerings under the Securities Act. Accordingly, we are proposing amendments to the form and related rules that maintain the current non-reporting issuer-reporting issuer distinction between Rule 701 and Form S-8, but we are proposing amendments to simplify the use of Form S-8. The proposed amendments should significantly reduce the compliance burdens of filing and maintaining an effective Form S-8, while retaining the protection that registration under the Securities Act provides to investors. Finally, we are proposing amendments that would harmonize the requirements of Rule 701 and Form S-8.

Request for Comment:

44. Should we eliminate Form S-8? If so, what exemption or other registration statement should the Commission replace it with? What should the requirements and conditions of such exemption or registration statement be? If such an approach were adopted, what other steps should the Commission take to preserve companies' ability to offer equity-

[115] *See* 17 CFR 230.144(a)(3)(ii) and letter from Chamber.

[116] *See* 15 U.S.C. 77k and 77*l*(a)(2).

based compensation to employees (*e.g.*, preemption of state blue sky laws) and to protect investors?

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

1. Addition of Plans to Form S-8

To maximize the utility of Form S-8 for legitimate compensatory purposes, we are clarifying and proposing changes to our rules and to Form S-8 to provide additional flexibility for compensatory offerings, similar to provisions available to issuers in capital raising shelf offerings. The Concept Release solicited comment on whether we should permit an issuer to register on a single form the offers and sales pursuant to all employee benefit plans that it sponsors. One commenter stated that there is not currently an explicit requirement under Form S-8 that only shares under a single employee benefit plan may be registered on a specific registration statement but nonetheless recommended that the Commission clarify this point in any amendments to the form.[117] Other commenters were generally supportive of permitting offers and sales of securities pursuant to multiple plans to be registered on a single Form S-8.[118]

We are clarifying that issuers may add additional plans to an existing Form S-8. Specifically, issuers may file an automatically effective post-effective amendment to a previously filed Form S-8 to add employee benefit plans where the new plan does not require the authorization and registration of additional securities for offer and sale.[119] For example, assume an issuer has an effective Form S-8 that registers sales of common stock to be issued under the issuer's 2010 equity compensation plan and has recently adopted a new 2020 equity compensation plan to replace the 2010 plan that does not authorize additional securities. Upon effectiveness of the 2020 plan, no further awards may be granted pursuant to the 2010 plan and

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[117] *See* letter from ABA.

[118] *See* letters from Council, Davis Polk and NASPP.

[119] After discussing these clarifications, we discuss the proposed amendments regarding plans that authorize additional securities in Section III.A.2, *infra*.

any shares covered by an award under the 2010 plan are now duly authorized for issuance under the 2020 plan. In order to sell under the 2020 plan, the issuer may register the securities to be offered and sold pursuant to the new plan on a new Form S-8. Alternatively, under the current requirements of Form S-8 or Rule 428,[120] the issuer could file an automatically effective post-effective amendment to the previously filed Form S-8 to add employee benefit plans, such as the 2020 plan in the example. The post-effective amendment to include the additional plan would be required to disclose any material change in the plan of distribution, including that a new plan is being added to an existing Form S-8.[121] This post-effective amendment would need to describe how shares that will not be issued under the previous plans may become authorized for issuance under the current plans. The post-effective amendment also must identify all covered plans on the cover page and describe, if applicable, how the shares that were registered for previous offerings on the Form S-8 pursuant to other plans have instead become authorized for issuance under the newly added plan.[122]

At the time of the filing of any post-effective amendment to Form S-8, the issuer must continue to meet the requirements of the form.[123] The issuer would also add the signatures and file the required opinions of counsel with the post-effective amendment. The issuer would thereafter deliver or cause to be delivered in accordance with Rule 428(b)(2)(i) the documents identified in Rule 428(a) as part of the prospectus that describes the new plan.

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[120] 17 CFR 230.428.

[121] *See* 17 CFR 230.464 and Rule 456. Item 9 of Form S-8 requires an issuer to make the undertaking set forth in Item 512(a)(1)(iii) of Regulation S-K in a post-effective amendment. The undertaking in Item 512(a)(1)(iii) states that the registrant will include any material information with respect to the plan of distribution not previously disclosed in the registration statement or any material change to such information in the registration statement to disclose a material change in the plan of distribution. For example, in certain circumstances, a material change may be the identification on the registration statement cover page of a new plan that is being added to an already existing Form S-8.

[122] *Id.* This would include, for example, if the 2010 plan included outstanding options that expired unexercised and the underlying shares became authorized for issuance under the 2020 plan. Using other aspects of the proposed amendments, if necessary, issuers would also be able to add securities to an existing Form S-8 as described below. *See* Section III.A.3, *infra*.

[123] *See* 17 CFR 230.464.

We believe that clarifying the ability to add plans to an existing Form S-8 via an automatically effective post-effective amendment will reduce the administrative burdens to the extent issuers previously believed that the filing an entirely new Form S-8 for each new plan was required. This approach also will help facilitate the use of a single Form S-8 for all employee benefit plans, if the issuer chooses to do so. In addition, it will reduce the problems associated with fee transfers between multiple registration statements that have registered ongoing offers and sales that cannot be terminated (*e.g.*, outstanding options that require continuous ongoing registration of the underlying shares).[124] Similar to permitting the allocation of securities between plans on Form S-8, which we discuss below, we do not believe that amendments to the current disclosure requirements of Form S-8 or Rule 428 are required to implement the proposed clarification. We are proposing, however, a minor modification to the cover page of Form S-8 to clarify that the full title of multiple plans may be listed.[125]

Request for Comment:

45. Is the clarification regarding the ability of issuers to register offers and sales of securities pursuant to multiple plans on a single Form S-8 sufficient, or is additional guidance needed? Should we instead amend Form S-8 to prohibit issuers from adding plans to an existing Form S-8?
46. Would registering multiple plans on a single Form S-8 work well in practice? For example, would registering incentive plans on the same Form S-8 as a 401(k) plan or other defined contribution plan cause administrative difficulties or investor confusion? Would issuers use this feature principally to update and refresh their incentive compensation plans?

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[124] *See* Rule 457(p). Under current rules, the issuer may be unable to avail itself of Rule 457(p) to transfer the fees previously paid for plans on other Forms S-8 because Rule 457(p) permits filing fees to be transferred only after the registered offering has been completed or terminated or the registration statement has been withdrawn. As a result, in our example, the issuer would not be able to transfer the fees associated with any remaining shares under the 2010 plan until it completes or terminates the 2010 plan offering registered on the existing Form S-8.

[125] *See* proposed amendments to the Cover Page of Form S-8.

47. Are there additional or different disclosures that should be required when a plan is added to an existing Form S-8?

2. Securities Allocation among Incentive Plans

In addition to clarifying the ability to add additional plans using a post-effective amendment, as discussed in Section III.A.1 above, we are clarifying that issuers are not required to allocate registered securities among incentive plans and may use a single Form S-8 for multiple incentive plans.[126] Although we do not believe that amendments to the current disclosure requirements of Form S-8 or Rule 428 are necessary to permit an issuer's use of a single Form S-8, we are proposing several related clarifying amendments.[127]

For issuers utilizing this flexibility, the initial registration statement would be required to list the types of securities covered by the registration statement and identify the plan or plans pursuant to which the issuer intended to issue securities as of that date.[128] The full title of each plan would be required to be listed on the face of the registration statement on the appropriate line.[129] The Part I information delivered pursuant to Rule 428 with respect to each plan would be required to be specific to that plan. If any Part II information relates specifically to one plan, the issuer would be required to disclose that relationship clearly. The registration statement would not need to assign or allocate the securities to particular incentive plans. In this way, the form may be used to create a pool of registered shares that may be issued under the issuer's various incentive plans as necessary. However, issuers would need to track their offers and sales of

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[126] We note that this clarification regarding allocation of securities will not apply to defined contribution plans if the amendments are adopted as proposed. Forms S-8 registering securities to be offered and sold pursuant to defined contribution plans will be deemed to have registered an indeterminate amount of securities to be offered and sold pursuant to those plans. *See* Section III.B.1, *infra* and Proposed Rule 416(d).

[127] *See* proposed changes to the Cover Page of Form S-8.

[128] *See id.*

[129] *Id*.

securities to ensure they have sufficient capacity registered in order to fulfill the needs of the various incentive plans identified on the form.

In the Concept Release, the Commission solicited comment on whether the ability to file a single Form S-8 with respect to multiple plans and pay filing fees based on the aggregate dollar amount of securities to be registered would effectively reduce administrative burdens. Commenters were generally supportive of the Commission permitting the use of a single Form S-8 to register securities to be issued under multiple plans.[130] One commenter stated that a single "omnibus" Form S-8 registration statement would reduce administrative burdens of registering transactions for multiple plans.[131] According to another commenter, issuers find it to be a "frustrating limitation" that currently the pools of securities registered for offer and sale pursuant to separate plans on separate Forms S-8 cannot be used interchangeably.[132] Other commenters stated that while it may not be practicable for issuers to include all plans in a single Form S-8, they would benefit from combining at least some with similar characteristics,[133] with one of these commenters noting that 401(k) plans are administered separately from long-term incentive plans.[134]

We believe that clarifying the ability to use Form S-8 to create a pool of registered shares that may be issued under the issuer's various incentive plans will promote efficiency and flexibility because it will eliminate any doubt about whether authorized but unissued shares under a plan that expires would be immediately available for issuance under another authorized

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[130] *See* letters from ABA, Council, Davis Polk, NASPP and Shearman.

[131] *See* letter from ABA.

[132] *See* letter from NASPP

[133] *See* letter from Davis Polk.

[134] *See* letter from NASPP.

plan.[135] In addition, this clarification will reduce administrative burdens for those issuers that now believe they must use a separate Form S-8 for each plan. Specifically, issuers using a single Form S-8 to register the offer and sale of shares issuable pursuant to multiple plans simultaneously could avoid collecting signatures for multiple, independent Form S-8 filings and multiple consents of auditors and other experts whose reports are incorporated by reference.[136] In addition, issuers are required to file the consent of auditors with respect to audit opinions appearing in Exchange Act reports that are incorporated into Securities Act registration statements.[137] In such a situation, issuers using a single Form S-8 registration statement would only need to inform the auditors that there is a single Form S-8 into which the auditor's opinion is being incorporated by reference (along with any other outstanding registration statements on other forms).

Furthermore, we note that when shares are offered pursuant to a plan previously identified on the Form S-8, issuers must continue to prepare and deliver a plan-specific prospectus, according to current requirements, and thus investors would continue to receive the same information as is currently required for any Form S-8 offering.[138] Issuers also retain the option to register securities to be issued pursuant to individual incentive plans on separate Forms S-8.

Request for Comment:

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[135] Exchange listing rules generally require shareholder approval of incentive plans. *See* NYSE Listed Company Manual Section 303A.08 (Shareholder Approval of Equity Compensation Plans), and NASDAQ Listing Rule 5635(c) (Equity Compensation).

[136] *See* Item 17 CFR 229.601(b)(23) of Regulation S-K Footnote 5 to the Item 601 Exhibit Table.

[137] General Instruction G.2 to Form S-8 provides that registrant information shall be updated by the filing of Exchange Act reports, which are incorporated by reference in the registration statement and the Section 10(a) prospectus. *See also* Footnote 5 to the Exhibit Table in Item 601 of Regulation S-K, and the Note to the Required Information in Form 11-K. Auditor consents typically make reference to each registration statement into which the consent is incorporated.

[138] *See* 17 CFR 230.428 and Part I of Form S-8.

48. Is the clarification regarding the ability of issuers to allocate securities among incentive plans on a single Form S-8 sufficient, or is additional guidance needed? Should we instead adopt amendments to prohibit allocation of securities among incentive plans?
49. Would allocation of securities among incentive plans on a single Form S-8 result in a more efficient process of registration?
50. Would allocation of securities among incentive plans result in disclosure that is confusing to investors?
51. Are there additional or different amendments (other than the proposed changes to the cover page of Form S-8) that we should make to facilitate the allocation of securities among various incentive plans?

3. Addition of Securities or Classes of Securities to Form S-8

In addition to adding plans to a Form S-8, from time-to-time, issuers may find that they need to add additional securities to the registration statement as well. Accordingly, after considering the comments received on the Concept Release, we are proposing amendments to Rule 413 that would permit issuers to add securities to an existing Form S-8 by filing an automatically effective post-effective amendment.

The Concept Release solicited comment on whether issuers should be able to add securities to an existing Form S-8 by automatically effective post-effective amendment. As certain commenters noted, Rule 413 currently does not permit an issuer to register the offer and sale of additional securities by means of a post-effective amendment, and therefore an issuer must instead file a new Form S-8 to register the offer and sale of those securities.[139] A few commenters supported enabling an issuer to add securities to its existing Form S-8 by automatically effective post-effective amendment.[140] One of these commenters stated that this

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[139] *See* letter from Sullivan; Rule 413; and Form S-8, General Instruction E.

[140] *See* letters from Davis Polk and NASPP.

would be necessary in order to allow a single Form S-8 to cover securities offered under new plans established by the issuer and new authorizations of shares under then-existing plans.[141] Another commenter supported this approach noting that it would create a pool of shares that could be issued under the issuer's various benefit plans as necessary.[142]

We are proposing to amend Rule 413 to permit issuers to register the offer and sale of additional securities or classes of securities on Form S-8 by post-effective amendment.[143] Under the proposed amendments, an issuer that has an effective registration statement for a previous incentive plan, would no longer be required to file a new Form S-8 to register the offering of additional shares under an existing or new incentive plan.[144] Instead, the issuer could file an automatically effective post-effective amendment to the existing Form S-8 to register the offer and sale of the additional securities.[145] Similarly, if an issuer were to adopt a new employee benefit plan which made available a new class of security on a compensatory basis,[146] the issuer would only be required to file an automatically effective post-effective amendment to its existing Form S-8 to add the new plan and the new class of security to the registration fee table and any additional disclosure[147] that would be required to inform investors about the new class of

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[141] *See* letter from Davis Polk.

[142] *See* letter from NASPP.

[143] *See* Proposed Rule 413(c).

[144] The registration of the offer and sale of additional securities pursuant to proposed Rule 413(c) could be accomplished in the same automatically effective post-effective amendment used to add a new plan to a registration statement, as described in Section III.A.1, *supra*.

[145] As proposed, the current method of registering additional shares of the same class on Form S-8 by filing a new registration statement pursuant to General Instruction E of the form also would remain available for use in registering additional securities.

[146] An issuer adopting a new plan that did not include a new class of security may be able to amend the registration statement in the manner described in Section III.A.1, *supra,* to the extent that the new plan did not require the addition of new securities.

[147] As discussed in Section III.A.1, *supra*, adoption of a new plan to be included in the registration statement would require disclosure of a material change in the existing plan of distribution, as well as other information.

securities.[148] However, issuers adding new classes of securities in this manner would be required to satisfy all of the requirements of the form upon filing the post-effective amendment. This would include either filing the information required by Item 4. Description of Securities in the post-effective amendment to Form S-8 or incorporating such information by reference if the class has already been registered pursuant to Section 12 of the Exchange Act.[149]

Proposed Rule 413(c) would provide additional flexibility in that issuers registering compensatory offerings on Form S-8 would not need to predict how many securities would be required to fulfill obligations under each individual plan or even the types of securities that might be authorized for issuance pursuant to a plan in the future. For example, assume an issuer has an existing Form S-8 on file and intends to adopt a new incentive plan that would include awards in the form of issuer stock, stock options, restricted stock, stock appreciation rights or other share-based awards. Upon taking the necessary steps to approve the incentive plan and obtaining any necessary approvals to register the offer and sale of shares to be issued pursuant to the plan, the issuer could file an automatically effective post-effective amendment to its existing registration statement to name the newly authorized incentive plan on the cover page and provide all of the disclosures required by Rule 428 and Form S-8 for the new plan.[150] In the same post-effective amendment, the issuer could add the securities associated with the plan to the registration statement by listing the securities in the Calculation of Registration Fee table and checking the proposed new checkbox on the cover page of the amended Form S-8 to indicate that the sale of the newly included securities is registered pursuant to proposed Rule 413(c).[151] If this issuer later takes the necessary steps to increase the number of shares issuable under the plan, a new post-effective amendment could be filed that would register the offer and sale of the additional

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[148] *See, e.g.*, Item 4 Form of Form S-8, Description of Securities.

[149] *See* Item 3(c) of Form S-8.

[150] *See* Section III.A.1, *supra*.

[151] *See* Proposed Rule 413(c) and the proposed checkbox on Form S-8.

securities.[152] Similarly, if an issuer takes the necessary steps to adopt a new plan to include a new class of securities such as preferred stock, the issuer could file a post-effective amendment to the existing Form S-8 to add both the new class of securities and new plan to the registration statement simultaneously.[153]

Alternatively, assume an issuer that has maintained a 401(k) employee savings plan for several years decides to add its common stock as an investment option for employee contributions to the plan. As a result, both the 401(k) plan interests and the employer stock to be offered as an investment option would become subject to Securities Act registration requirements.[154] The ability to add new plans to an existing Form S-8 used in combination with proposed Rule 413(c), would permit both the plan interests and the issuer's stock to be added to the issuer's existing Form S-8 for an already-existing plan.[155] The issuer would be required to file a post-effective amendment, which would include the offer and sale of any shares of employer stock and plan interests required to be registered,[156] and the types of information described in the previous example.

Request for Comment:

52. Should we permit issuers to add securities to an existing Form S-8 registration statement by means of automatically effective post-effective amendments, as proposed?

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[152] *Id.*

[153] *See* Section III.A.1, *supra,* and Proposed Rule 413(c).

[154] The proposed amendments would not eliminate the requirement to register plan interests as separate securities. Nevertheless, where a registration statement on Form S-8 relates to securities to be offered pursuant to an employee benefit plan, including interests in such plan that constitute separate securities required to be registered under the Securities Act, such registration statement is deemed to register an indeterminate amount of such plan interests. No separate fee is required with respect to the registered plan interests. *See* Rule 416(c) and Rule 457(h)(2). Furthermore, the proposed amendments would not eliminate the requirement to file an Exchange Act annual report on Form 11-K [17 CFR 249.311] with respect to those plan interests.

[155] *See* Proposed Rule 413(c).

[156] If all of the amendments proposed today are adopted, in this circumstance, for the 401(k) plan, the issuer would be deemed to register an indeterminate amount of defined contribution plan securities on the registration statement. *See* Section III.B.1, *supra,* and Proposed Rule 416(d).

53. Are there concerns associated with allowing issuers to register the offer and sale of additional securities or classes of securities by post-effective amendment to an existing Form S-8 instead of on a new registration statement?

54. Would the interplay between adding new plans and registering the offer and sale of new securities by post-effective amendment to Form S-8 cause problems for particular types of issuers or plans? If so, please explain how.

55. If we adopt proposed Rule 413(c) for the registration of the offer and sale of additional securities on Form S-8, should we rescind current General Instruction E, which permits the filing of a new, abbreviated registration statement to register the offer and sale of additional securities of the same class relating to a plan for which a Form S-8 registration statement is already effective?

B. Fee Calculation and Fee Payments on Form S-8 for Defined Contribution Plans

As described below, we are proposing changes that we believe should ease potential challenges for issuers with respect to timing and calculation of fees for offerings of securities pursuant to defined contribution plans on Form S-8. First, we propose to amend Rule 457 to require registration based on the aggregate offering price of all the securities registered. Second, we are proposing a new fee payment method that would require issuers to pay the fee for all sales made pursuant to defined contribution plan offerings during a given fiscal year no later than 90 days after the issuer's fiscal year end. We are also soliciting additional comments on the topic of fee calculation to determine whether we should clarify how issuers should count shares or amounts offered and sold pursuant to defined contribution plans.

Several commenters noted difficulties currently involved with administering the registration of offers and sales pursuant to defined contribution plans and offered solutions that the commenters believed would reduce complexity and cost of compliance while retaining

investor protection.[157] For defined contribution plans, when employees elect to invest in issuer securities, the plan may acquire additional shares from the issuer, buy shares on the open market, or allocate shares divested by other plan participants to fulfill the purchase.[158] As securities are sold to employees pursuant to the plan, issuers are required to account for the number of shares sold against the specified number of shares registered on the Form S-8. As described by one commenter, the issuer must estimate the number of shares to register on the original Form S-8, balancing the costs of registering a potentially excess number of securities for which fees have been paid,[159] but that may go unsold against the possibility that the issuer could inadvertently violate Section 5 if the number of shares sold exceeds the number registered under the plan.[160]

We believe the proposed rules should help resolve many of the share-counting difficulties that arise when registering shares to be offered and sold pursuant to defined contribution plans such as 401(k) plans. For this purpose, we propose to define a "defined contribution plan" as "an employee benefit plan (as defined in §230.405) that provides for specified or determinable contributions by the employee, employer, or both to an individual account for each employee participant where the amount of benefits paid depends, in addition to the level of contributions, on the return on the investment."[161]

Request for Comment:

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[157] *See* letters from ABA, Davis Polk, Shearman and Sullivan.

[158] For a discussion of sales and registration of securities to be issued pursuant to employee benefit plans, *see generally Employee Benefit Plans: Interpretations of Statute*, Release No. 33-6188 (Feb. 1, 1980) [45 FR 8960 (Feb. 11, 1980)] ("1980 Employee Benefit Plans Release"), and *Employee Benefit Plans*, Release No. 33-6281 (Jan. 15, 1981) [46 FR 8446 (Jan. 27, 1981)] .

[159] We note that registration fee payments pursuant to Section 6(b)(1) of the Securities Act [15 U.S.C. 77f(b)(1)] are not refundable. *See* 17 CFR 230.111.

[160] *See* letter from Sullivan.

[161] Proposed amendment to Rule 405.

56. As proposed, would the definition of "defined contribution plan" properly encompass the types of plans that would benefit from the fee calculation and payment methods outlined below? Should the definition be revised? If so, should it be broader or narrower?

1. Calculation of the Registration Fee using the Aggregate Offering Price

One commenter recommended that the Commission permit registration of a dollar amount corresponding to an indeterminate number of shares because tracking dollar inflows to issuer stock funds would be less onerous than tracking the number of shares that remain available.[162] The commenter noted that because defined contribution plans are unitized plans whose participants own units of a fund that holds issuer stock, plan administrators frequently experience difficulty tracking the number of shares of issuer stock that have been offered and sold under a Form S-8.[163] As proposed, issuers relying on the new rules would be deemed to register an offering amount corresponding to an indeterminate number of securities that would be available for offer and sale through the issuer's defined contribution plans. Currently, issuers may be calculating the registration fee based on the maximum aggregate offering price of all the securities (*e.g.*, common stock, debt securities, convertible debt securities, preferred stock, and warrants) listed in the "Calculation of Registration Fee" table.[164] We are proposing amendments to Rule 457 and Form S-8 to require that the registration fee for a defined contribution plan be calculated in a similar way, based on the aggregate offering price of all the securities sold.[165]

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[162] *See* letter from Shearman.

[163] *Id*.

[164] *See* Rule 457(o).

[165] *See* Proposed Rule 457(h)(4) and proposed Note 3 under Calculation of Registration Fee. We understand that issuers may have previously used existing Rule 457(o) to calculate registration fees based on the maximum aggregate offering price of the securities registered on Form S-8 for defined contribution plans. If these amendments are adopted, all issuers registering shares to be offered and sold pursuant to defined contribution plans, including issuers previously using 457(o) to calculate registration fees, would thereafter make use of Rule 416(d) to register an indeterminate amount of securities to be offered and sold pursuant to defined contribution plans and Rules 457(h)(4) and 456(e) to calculate and pay the required fee, respectively. Where necessary, issuers should

Upon the yearly calculation and payment of the registration fee within 90 days of the issuer's fiscal year end, as described below,[166] issuers that had registered an indeterminate number of securities on the Form S-8 for defined contribution plans would need to calculate their registration fee in accordance with proposed Rule 457(h)(4) by multiplying the aggregate offering price of securities sold during the fiscal year by the fee payment rate in effect on the date of the fee payment, and then pay such fee in accordance with the proposed requirements of Rule 456(e).

Under the proposed amendments, an issuer would calculate the fee based, in part, on the funds that plan participants have allocated via their payroll deductions to the purchase of issuer stock. Similarly, if an issuer contributes shares of issuer stock to satisfy its obligation to make matching contributions, the dollar amount of the matching obligation satisfied would be aggregated with the overall offering amount for the purpose of calculating the fees owed.

We believe that a fee calculation based on the aggregate offering amount of securities sold pursuant to defined contribution plans could simplify plan administration by eliminating the need to track offers and sales of individual shares of issuer stock within unitized plans and should reduce the risks of violating Section 5 by allowing offers and sales to be accounted for and paid for based on a known aggregate offering dollar amount after contributions are made to the issuer stock fund. For plans that are not defined contribution plans, such as incentive plans, we believe that issuers will continue to register a maximum number of securities issuable under the plan that are covered by the registration statement as is currently contemplated by Rule 457(h)(1). An issuer may rely on these provisions on the same registration statement if the fee table clearly explains how the registration fees are being calculated. For example, the proposed

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refer to such fee calculation in the "Calculation of Registration Fee Table" in the Form S-8 registration statement or post-effective amendment to Form S-8 filed to pay the required fee.

[166] *See* Section III.B.2, *infra*.

amendments would permit an issuer to use Rule 457(h)(1) to register the offer and sale of a specific number of securities that will be allocated to incentive plans and also to use proposed Rule 457(h)(4) to register the offer and sale of an indeterminate amount of securities pursuant to defined contribution plans on a single Form S-8. Alternatively, issuers may continue to file separate Forms S-8 for plans of different types.

Request for Comment:

57. Should we amend Rule 457 and Form S-8 to require registration based on the aggregate offering price of all the securities registered pursuant to defined contribution plans, as proposed?
58. For defined contribution plans, would registration of the offer and sale of an aggregate amount of securities mitigate difficulties in counting registered offers and sales?
59. Should the proposed fee calculation method be optional for issuers registering the offer and sale of shares to be issued pursuant to defined contribution plans?
60. Should we adopt a transition period for the proposed amendments to Rule 457 and Form S-8? If so, how long should the transition period be?
61. Should the proposed requirement to calculate registration fees based on an aggregate offering amount of securities be required only for defined contribution plans? Are there other types of plans whose administration would be simplified by a similar fee calculation?
62. Would there be difficulties in using separate registration and fee instructions (*e.g.*, Rule 457(h)(1) and proposed Rules 416(d) and 456(e)) on a single Form S-8? If so, would additional guidance on how the instructions apply be helpful?
63. Would issuers register the offer and sale of shares for defined contribution plans on the same registration statement as that used for other types of plans?

64. If an issuer wishes to use a single Form S-8 for all plans, would the proposed rules create difficulties for issuers that seek to register and pay fees for sales pursuant to incentive plans on the same form for which defined contribution plans are registered?

2. New Fee Payment Method for Sales Pursuant to Defined Contribution Plans

As discussed in the previous section, issuers may face difficulties with respect to calculating the number of securities that have been sold pursuant to defined contribution plans. In addition to the new fee calculation method described above, we are proposing a modernized approach to registration fee payment that would provide for the registration on Form S-8 of offers and sales of an indeterminate amount of securities of the issuer to be issued pursuant to defined contribution plans.[167] As proposed, the issuer would subsequently pay the securities registration fees on a delayed basis, in arrears.

In general, Form S-8 issuers today are required under the Securities Act to pay a registration fee to the Commission at the time of filing a registration statement, which is not refunded if the issuer does not sell the related securities.[168] As noted by one commenter, for defined contribution plans, the current fee payment method results in issuers estimating the potential number of future sales off the registration statement, both with respect to the initial employee deferrals and subsequent investment elections, based on historical usage and expected future participation and election rates.[169] Because this calculation and fee payment must occur at the time the registration statement is filed, issuers may over- or underestimate the number of securities to be offered and sold pursuant to the registration statement.

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[167] *See* Proposed Rules 416(d) and 456(e).

[168] Section 6(b)(1) of the Securities Act [15 U.S.C. 77f(b)(1)]. In some cases, unused filing fees may be carried forward to a new registration statement. *See* Rule 457(p) and the limitations described in note 124, *supra*.

[169] *See* letter from Sullivan.

In order to alleviate these difficulties, several commenters suggested that for securities to be issued pursuant to a plan, issuers should be permitted to register the offer and sale of an indeterminate amount of securities initially and then pay a periodic fee based on the total sales over a given period.[170] Commenters that supported the registration of the offer and sale of an indeterminate amount of shares suggested different methods of calculating the fee owed for registration. One suggested a fee payment based on the size of the issuer (*e.g.*, market capitalization).[171] Some commenters suggested an issuer should measure usage by totaling the sales that occurred during the prior fiscal year and pay the fee based on the amount of shares offered and/or sold on an annual basis,[172] such as at the time of the filing of the Form 10-K.[173] Other commenters supported a pay-as-you-go fee payment system similar to that which currently exists for well-known seasoned issuers ("WKSIs") by which WKSIs are able to pay filing fees on an as-needed basis rather than when the registration statement is initially filed.[174] Several commenters recommended a cure provision to remedy inadvertent or nominal errors, enabling issuers to pay the registration fee after the original due date if the issuer makes a good faith effort to pay the fee on a timely basis and then pays the fee within a certain number of business days after the original due date.[175] One commenter suggested that this type of fee payment method could be optional for issuers that have difficulty estimating the amount of securities to be offered and sold pursuant to the registration statement and calculating the fee under the current system.[176]

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[170] *See* letters from ABA, Chamber, Davis Polk, Postmates, and Sullivan.

[171] *See* letter from Davis Polk.

[172] *See* letters from ABA and Sullivan.

[173] *See* letter from ABA.

[174] *See* letters from Chamber and Council. *See also* the definition of well-known seasoned issuer in Rule 405.

[175] *See* letters from ABA, Council and Davis Polk.

[176] *See* letter from Sullivan.

Consistent with our goal of further simplifying registration on Form S-8 and in order to help alleviate the difficulties that currently exist when registering the offer and sale of securities pursuant to defined contribution plans, we are proposing a new fee payment method for defined contribution plans. We have proposed the annual fee payment method because we believe it would permit issuers to accurately determine how many shares were sold pursuant to defined contribution plans in the covered period after-the-fact, and therefore should eliminate the problem of inadvertently registering the offer and sale of too many or too few shares in these offerings. Under the new method, when registering the offer and sale of shares pursuant to defined contribution plans, issuers would be deemed to have registered the offer and sale of an indeterminate amount of securities pursuant to the plan.[177] We believe the proposed amendments would therefore eliminate the need for issuers to estimate the number of shares that will be sold pursuant to the registration statement and avoid the possibility that an issuer would inadvertently sell more shares than it had estimated. The amendments also would eliminate the need for issuers to register additional offers and sales under these plans either by using a new registration statement or proposed Rule 413(c).

Under the proposed annual fee payment method, any fees associated with sales made pursuant to a defined contribution plan in a given fiscal year would be required to be paid within 90 calendar days after the plan's fiscal year end.[178] We believe 90 days after the closing of the plan's fiscal year should provide issuers ample opportunity to calculate the total amount of the shares sold and the associated fee. An issuer would pay the fee by filing an automatically effective post-effective amendment to the Form S-8 registration statement. This post-effective amendment need only contain the cover page of the registration statement, including the calculation of the registration fee table, and the required signatures. In any such post-effective

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[177] *See supra* note 165.

[178] *See* Proposed Rule 456(e).

amendment, an issuer would also be required to check a newly proposed box on the post-effective amendment cover page to indicate that the amendment is being filed to pay filing fees using the method required by Rule 456(e).[179] This post-effective amendment would only be used for the purpose of the payment of fees and not for any other purpose such as adding plans or securities to the registration statement as proposed elsewhere in this release.[180]

Issuers would continue to rely on the applicable provision of Rule 457 to calculate the fee to be paid. As described earlier, if the proposed amendments are adopted, the applicable provision for defined contribution plans would be Rule 457(h)(4). Consistent with current requirements, issuers would be required to clarify their fee calculation by providing specific details relating to the fee calculation in notes to the Calculation of the Registration Fee table, including references to the applicable provisions of Rule 457, if the basis of the calculation is not otherwise evident from the information presented in the table.[181] If necessary, this would include specifying whether the issuer is relying on existing Rule 457(h)(1) or is otherwise registering the offer and sale of an indeterminate number of securities pursuant to a defined contribution plan and will pay the fees after fiscal year-end using proposed 457(h)(4) and Rules 456(e) for the calculation and payment of the fees, respectively.

In addition, proposed Rule 456(e) would include provisions designed to clarify the status of defined contribution plan securities where the fee is paid in accordance with the proposed rule

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[179] The Commission has recently proposed amendments that would modernize filing fee disclosure and payment methods. The proposed amendments would revise most fee-bearing forms, schedules, statements, and related rules to require each fee table and accompanying disclosure to include all required information for fee calculation in a structured (i.e., tagged) format. As proposed, the amendments would add the option for fee payment via Automated Clearing House ("ACH") and eliminate the option for fee payment via checks and money orders. We expect that improvements in the payment validation process made possible by the proposed tagging of the fee table and accompanying information with pre-submission validation by the filer would provide more certainty to issuers that the proper filing fee has been paid. *See Filing Fee Disclosure and Payment Methods Modernization*, Release No. 33-10720 (Oct. 24, 2019) [84 FR 71580]. To the extent these changes are adopted, we expect that technical changes may be required to conform the new method proposed here to the other changes being proposed.

[180] *See* Proposed Rule 456(e)(1).

[181] *See* Note 2 to the Calculation of Registration Fee Table.

as well as other provisions designed to ease the administration of the fee payments in certain circumstances. These proposed provisions include:

- Instruction 1 to Rule 456(e) – on how to count the 90-day period after the end of a fiscal year;
- Rules 456(e)(2) and (e)(3) – addressing the treatment of the offerings for purposes of Securities Act Sections 5 and 6(a).
- Rule 456(e)(4) – addressing when an issuer ceases operations or enters into a merger or other transaction between the sale of securities on Form S-8 and when the registration fees are due; and
- Rule 456(e)(5) – on the amount of interest due for late payments.

As proposed in Rule 456(e)(4), if an issuer ceases operations whether upon the merger, liquidation, or sale of substantially all issuer's assets, the plan's fiscal year would be deemed to end on the date of the merger, liquidation, or sale of substantially all issuer's assets for the purposes of Rule 456(e). Ninety days after such date, the issuer would be required to make a final payment for its securities that were sold pursuant to the defined contribution plan as of the plan's last fiscal year-end.

The fee payment method we are proposing today would be mandatory for issuers that register the offer and sale of shares pursuant to defined contribution plans, as we believe the after-fiscal year-end fee calculation would be easier for both issuers and the staff to administer. The proposed rule would not affect the amount of fees owed by issuers for previously registered defined contribution plan offerings on Form S-8 that paid the fee upon filing. If the rule is adopted as proposed, when the rule becomes effective, all newly filed registration statements on Form S-8 for offerings pursuant to defined contribution plans would be deemed to register the offer and sale of an indeterminate amount of employer securities, and the filing fee for those registration statements would be paid not later than 90 days after the plan's fiscal year end.

Request for Comment:

65. Should we adopt a new registration fee payment method that would require issuers to pay the fee for all sales made pursuant to defined contribution plan offerings during a given fiscal year no later than 90 days after the plan's fiscal year-end, as proposed?
66. Would the proposed registration fee payment method help to address administrative issues regarding the difficulty of keeping track of offers and sales registered pursuant to defined contribution plans?
67. Would the proposed fee payment method be workable in practice? If not, what changes should we make to render it more workable?
68. Is 90 days after the plan's fiscal year-end an appropriate period of time in which to calculate the required fee payment? If not, would a shorter or longer period be more appropriate?
69. Instead of paying the fee 90 days after the plan's fiscal year-end, should the rule be revised to require payment 90 days after the issuer's fiscal year-end? Should the payment due date be tied to some other date?
70. Given that these proposed rules are designed to prevent inaccuracies in estimating the amounts to be offered and sold under, and the calculation of registration fees for, defined contribution plans, should we consider adopting an "insignificant deviations" provision for immaterial or unintentional failures to comply with the proposed rules?
71. Should the proposed fee payment method be optional rather than mandatory?
72. Should the new registration fee payment method be limited to certain classes of issuers (*e.g.*, WKSIs or issuers with a proven compliance record)?
73. Are there other types of plans for which the new fee payment method would be beneficial? For example, should this payment method apply to nonqualified deferred compensation plans?
74. Instead of requiring the registration fees for defined contribution plans to be paid on an annual basis, as proposed, should we permit all issuers registering securities for defined

contribution plans on Form S-8 to make registration fee payments on a pay-as-you-go basis, as WKSIs are permitted to do for capital-raising offerings today? Should we adopt a pay-as-you-go fee payment procedure for other types of plans?

75. As proposed, the payment of the fee would require the filing of an automatically effective post-effective amendment to Form S-8 not later than 90 days after the plan's fiscal year-end. Are there any problems with using this existing form type for the fee payment? In the alternative, should we instead require the fee payment with a different form or should we adopt a new form dedicated to the payment of the fees? If so, what information should that form require?
76. If we were to require that filing fee information be tagged, is there a reason fee-tagging should not be required in the proposed post-effective amendments to Form S-8?
77. In the case of a merger, liquidation, or sale of substantially all of an issuer's assets, would the proposal to deem the closing of the plan's fiscal year to be the date of such transaction work well in practice? Are there better ways to ensure correct payment of fees in these situations?
78. Is a transition period needed to implement the proposed fee payment method? If so, what would be an appropriate transition period? For example, should we delay the effective date of the new fee payment method by one year?
79. If the new fee payment method is adopted as proposed, are there any other rules or guidance we should adopt to ensure the fee payment rules work effectively?

3. Additional Requests for Comment on Counting the Shares Registered on Form S-8 for Defined Contribution Plans

We believe that the rules proposed today will aid issuers in paying accurate and timely fees when registering the offer and sale of securities pursuant to defined contribution plans. Below, we address some of the additional challenges associated with counting securities to be offered and sold pursuant to a registration statement on Form S-8 for defined contribution plans.

One commenter requested clarification of how sales and purchases should be tracked and how any netting of shares affects the amount of offers and sales that should be registered.[182] Difficulties in estimating the number of shares to be offered and sold may arise, for example, when employees participating in a defined contribution plan divest their holdings in the issuer stock fund, and the divested shares are used to satisfy another employee's investment in the issuer stock fund pursuant to the plan.

Currently, Section 5 of the Securities Act requires registration of the offer and sale of the securities to the investing employee under the plan because it is a separate transaction from the initial offer and sale of the securities to the divesting employee. Although current practice may vary, because each offer and sale of a security needs to be registered or exempt from registration,[183] we preliminarily believe that when employees divest and other employees invest in issuer securities within the plan, an issuer should not "net" or "offset" these plan transactions against each other in determining the number of shares to deduct from the total number of shares to be offered and sold pursuant to the Form S-8. If such securities become available for a subsequent sale, after their earlier sale pursuant to a registration statement, we preliminarily believe the fact that those shares may be the "same" shares that were part of a previous, registered transaction does not negate the fact that the subsequent sale involves a different transaction by the issuer and the plan.

We are requesting additional input from commenters that would help us clarify how sales of shares pursuant to defined contribution plans should be counted for purposes of the Securities Act. In addition, if we adopt the changes to the fee payment calculation rules[184] described above, as proposed, issuers will not be able to "net" or "offset" employee investments against employee

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[182] *See* letter from Council.

[183] *See* Sections 5(a) and 5(c) of the Securities Act of 1933 [15 U.S.C. 77e(a) and (c)].

[184] *See* Proposed Rules 456(e) and 457(h)(4).

divestments when calculating the fees owed for sales made pursuant to the defined contribution plan. We are requesting additional comments on whether this would be an appropriate result.

Request for Comment:

80. Does counting the sales of securities pursuant to a defined contribution plan on a gross basis, as described above, cause difficulty in administering defined contribution plans? Would Commission guidance indicating that "netting" or "offsetting" is not permitted eliminate or further mitigate this difficulty?
81. Should we permit the netting or offsetting of sales made within the defined contribution plan so that securities that were made available due to employee divestment from the issuer stock fund and sold pursuant to employee investment elections would not be counted against the number of securities for which sales were registered on Form S-8?
82. Should we adopt the new fee payment method described above without netting or offsetting as proposed? Alternatively, if we adopt the new fee payment method, should we permit the netting or offsetting of sales made within the defined contribution plan to apply to the payment of fees for defined contribution plans?
83. Should we provide additional guidance on this topic in the adopting release or elsewhere?

C. Conforming Form S-8 to Rule 701

The proposed amendments to Rule 701 include, among other things, changes to the scope of individuals eligible to receive shares pursuant to the exemption.[185] Several commenters indicated the scope of eligible individuals should remain consistent for Rule 701 and Form S-8 and recommended that, to the extent the Commission changes the scope of individuals eligible to receive securities under Rule 701, similar changes should be made to the scope of individuals eligible to receive securities where the offer and sale is registered on Form S-8.[186] For example,

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[185] *See* Sections II.C. 1 and 2, *supra*.

[186] *See* letters from ABA, Chamber, Davis Polk, NASPP and Sullivan.

one commenter stated that different eligibility standards would create unnecessary compliance burdens and impede the ability of issuers to implement consistent and beneficial equity compensation strategies without regard to reporting status.[187] A different commenter noted that Rule 701 and Form S-8 promote the same goals (including recognizing the difference in the relationship between issuer and recipient in compensatory offerings compared to capital-raising transactions), and given the fact that issuers transition from non-reporting to reporting (or vice versa), suggested the two regimes should be aligned to the extent practicable.[188] In view of the amendments we are proposing to Rule 701, we are also proposing amendments to harmonize the scope of persons who are eligible to receive securities pursuant to the Rule 701 exemption with those eligible to receive securities where the offer and sale is registered on Form S-8.

1. Scope of "Former Employee"

As discussed above, we are proposing to expand Rule 701 eligibility for former employees to specified post-termination grants and to former employees of acquired entities.[189] We believe that expanding Form S-8 eligibility to encompass former employees in these ways could benefit both issuers and securities recipients by facilitating compensatory transactions consistent with the purposes of the form.

Accordingly, we propose to amend Form S-8 such that it may be used to register acquisitions of issuer securities by former employees as compensation for such a former employee's service to the issuer during a performance period ending within 12 months preceding the former employee's resignation, retirement or other termination.[190] We are also proposing that former employees of an acquired entity would be eligible to receive securities the offer and

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[187] *See* letter from NASPP.

[188] *See* letter from Sullivan.

[189] *See* Section II.C.2, *supra*.

[190] *See* proposed General Instruction A.1(a)(3) of Form S-8.

sale of which is registered on the form.[191] These individuals would be able to participate in an acquiring issuer's employee benefit plan with respect to equity awards granted in connection with the acquisition to replace awards issued by the target while employed there.

Request for Comment:

84. Should we conform the "former employee" eligibility provisions of Rule 701 and Form S-8, as proposed? Are there any unique considerations with respect to including former employees in compensatory offerings registered on Form S-8?

2. Consultants and Advisors

As discussed above, we are proposing to amend Rule 701 to expand eligibility to certain consultants and advisors that have chosen to organize their business as an entity.[192] Form S-8 may not be used by issuers offering securities to consultants who set up passive investment vehicles for a non-compensatory or capital raising purpose.[193] Therefore, consistent with the compensatory purpose of Form S-8, we propose to make conforming amendments to the form with the same conditions as Rule 701, which we believe would prevent issuers from using Form S-8 to offer and sell securities to third-party investors who did not actually perform services for the issuer. We also are proposing conforming changes to the definition of "employee benefit plan" in Rule 405[194] to ensure that the scope of consultants or advisors that are eligible to participate in an employee benefit plan is consistent with our changes to Form S-8.[195]

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[191] *Id.*

[192] *See* Section II.C.1, *supra*.

[193] *See* Release 33-7646 (Feb. 25, 1999) [64 FR 11103 (Mar. 8, 1999)] (describing the requirements adopted in Securities Act Release No. 6867 (June 6, 1990) [55 FR 23909]: "To be eligible, a consultant must provide the issuer bona fide services not in connection with the offer or sale of securities in a capital-raising transaction" (emphasis in original)).

[194] Rule 405.

[195] *See* the proposed revised definition of "employee benefit plan" in Rule 405.

We believe the proposed limitations on the use of Form S-8 to offer and sell securities to consultants and advisors that organize as entities would mitigate the risk that the form would be used to compensate investors that do not provide bona fide services to the issuer or for capital-raising transactions. As is currently the case, the instruction would continue to condition consultant and advisor eligibility on the provision of bona fide services to the issuer that are not in connection with the offer or sale of securities in a capital-raising transaction and do not directly or indirectly promote or maintain a market for the issuer's securities. In addition, the instruction would permit use of Form S-8 to compensate those entities that are owned by the individuals who are actually performing services for the issuer.

Request for Comment:

85. Should we adopt the same treatment of consultants and advisors under Rule 701 and Form S-8? Are there any unique considerations with respect to including consultants or advisors organized as entities in compensatory offerings registered on Form S-8?

D. Conforming Form S-8 Instructions with Current IRS Plan Review Practices

Item 8(b) of Form S-8 currently specifies that in lieu of providing an opinion of counsel regarding compliance with the requirements of ERISA or an Internal Revenue Service determination letter, as required by Item 601(b)(5)(ii) and (iii) of Regulation S-K,[196] the issuer may undertake to submit the plan and any amendments to the plan to the IRS in a timely manner and to make all changes required by the IRS in order to qualify the plan. The IRS, however, is only issuing determination letters for amendments to previously qualified plans under very limited circumstances.[197]

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[196] 17 CFR 229.601(b)(5)(ii) and (iii).

[197] *See* Rev. Proc. 2016-37, 2016-29 I.R.B. 136.

Given the IRS's changed practice, several commenters supported modifying or eliminating this requirement in Form S-8.[198] A few commenters stated that requiring the determination letter or legal opinion for plan modifications is overly burdensome on issuers and should be eliminated.[199] One commenter stated that it would be helpful to provide guidance that those issuers that have adopted a prototype or volume submitter plan may satisfy the IRS determination letter requirement by providing a copy of the IRS letter regarding the prototype or volume submitter plan that was issued to the sponsor of the plan that the issuer adopted.[200] The same commenter stated that the Item 8 undertaking should recognize the IRS correction program with respect to qualification of plans by having the issuer undertake to make corrections in order to maintain the qualification of the plan as required by the IRS.[201]

We are proposing amendments that take into account the IRS's changed practices for plan amendments, while continuing to protect investors with respect to the plan's compliance with ERISA. We propose to amend Item 8(b) to eliminate the requirement that issuers undertake to submit any amendment to the plan to the Internal Revenue Service.[202] We are likewise amending Item 601(b)(5)(iii) of Regulation S-K to remove the requirement to file a copy of the IRS determination letter that the amended plan is qualified under Section 401 of the Internal Revenue Code.[203] The proposal would revise Item 8(b) to permit an undertaking that issuers will maintain the plan's compliance with ERISA and will make all changes required to maintain such compliance in a timely manner. However, if the issuer does not provide the undertaking required by Item 8(b), as proposed to be revised, the requirements of Regulation S-K Item 601(b)(5)(iii)

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[198] *See* letters from ABA, Council, Davis Polk and Shearman.

[199] *See* letters from ABA and Council.

[200] *See* letter from ABA.

[201] *Id*.

[202] *See* proposed Item 8(b) of Form S-8.

[203] *See* proposed Item 601(b)(5)(iii) of Regulation S-K.

would continue to apply with regard to plan amendments and therefore require the issuer to file with respect to any amendment a legal opinion confirming compliance of the amended provisions of the plan with the requirements of ERISA.[204]

In addition, in lieu of compliance with Item 601(b)(5) and notwithstanding the undertaking required by Item 8(b) of Form S-8, the proposed amendments would eliminate the issuer-specific determination letter or opinion requirements in Item 601(b)(5)(ii) and the opinion requirement in Item 601(b)(5)(iii) for those issuers that adopt a third-party pre-approved plan[205] that has been approved by the IRS if such issuers file the IRS opinion letter[206] issued to the pre-approved plan's provider.[207] Issuers relying on proposed Item 8(c) would not need to obtain their own determination letter from the IRS or otherwise provide an opinion of counsel unless the issuer makes revisions to the pre-approved plan that may call into question whether the revised plan is still qualified.

Request for Comment:

86. Should we adopt the proposed amendments to conform the Form S-8 requirements to current IRS practices?
87. Do the proposed amendments provide investors adequate assurance of the plan's qualified status?
88. Do the proposed amendments ease administrative burdens for adopters of pre-approved plans? Are there any changes to the requirements for adopters of these types of plans that we should consider?

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[204] *Id*.

[205] We note that the pre-approved program, as described in Rev. Proc. 2015-36, 2015-27 I.R.B. 20 provided for two types of pre-approved plan programs: master & prototype ("M&P") and volume submitter. Those programs were merged into a single pre-approved program in Rev. Proc. 2017-41, 2017-29 I.R.B. 92 ("Rev. Proc. 2017-41").

[206] *See* Section 4.06 of Rev. Proc. 2017-41.

[207] *See* proposed Item 8(c) of Form S-8.

89. Is the undertaking for plan amendments with respect to maintaining ERISA qualification necessary? Are there alternative approaches to ensuring plan qualification under ERISA that would protect investors?

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

We are proposing revisions to the disclosure requirements in Form S-8 to eliminate the description of the tax effects, if any, on the issuer.[208] One commenter asked us to reconsider the Item 1(f) requirement to describe the tax effect that may accrue to employees as a result of participating in a plan, and the tax effects, if any, on the issuer.[209] In a Form S-8, investors are not making a decision whether to approve or disapprove a plan; rather, the investment decision is whether to participate in an existing plan. We are therefore proposing revisions to Form S-8 that would remove the requirement to briefly describe the tax consequences of the plan for the issuer.

With respect to the requirement to disclose the tax consequences for employees, the same commenter stated that tax effects depend on individual circumstances, which can vary among participants, especially for consultants in light of the new deduction for qualified business income under IRC Section 199A.[210] Nevertheless, we are not proposing to eliminate the requirement in Form S-8 to describe the tax consequences to employees[211] and to state whether or not the plan is qualified under Section 401(a) of the Internal Revenue Code. We continue to believe such disclosure could provide relevant information for investors as they assess the tax consequences of their participation in the plan. We are soliciting further comments, however, about the usefulness of this disclosure for investors.

Request for Comment:

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[208] *See* proposed revisions to Item 1(f) of Form S-8.

[209] *See* letter from Davis Polk.

[210] *See* letter from Davis Polk, referencing IRC Section 199A.

[211] General Instruction A.1(a)(1) defines "employee" to include certain consultants and advisors.

90. Should we revise the disclosure requirements in Form S-8 to eliminate the description of the tax effects, if any, on the issuer, as proposed?

91. Are disclosures regarding the tax effects of plan participation useful to investors in the context of a Form S-8 registration statement? If so, how?

92. Are there other ways, outside of the registration statement, that investors receive the same information regarding the tax consequences to them of plan participation, such that disclosure from the issuer would not provide additional or material information?

93. Are disclosures regarding the description of tax effects of plan participation that may accrue to employees helpful? If not, how should we address this concern?

F. Additional Requests for Comment about Form S-8

1. Plan Trustee Signatures on Form S-8

Where interests in a plan are being registered, Form S-8 requires the registration statement to be signed by the plan. For the plan signature, Form S-8 indicates that it may be signed by the trustees or other persons who administer the employee benefit plan. Some commenters stated that it is unnecessary and burdensome to require the plan trustee to sign the Form S-8.[212] Instead, the commenters suggested the employer/sponsor of the plan whose interests are being registered should be able to sign Form S-8 on behalf of the plan.[213]

As noted above, we continue to believe that Form S-8 plays a useful and effective role in registering the offer and sale of securities issued in compensatory offerings under the Securities Act. This is true, in part, because the Securities Act registration statement provides employees with the liability protections of Section 11 and Section 12(a)(2) in the case of material misstatements or omissions of information contained in the registration statement or prospectus,

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[212] *See* letters from Council and Davis Polk.

[213] *See* letters from Council and Davis Polk.

respectively.[214] Securities Act Section 11 imposes liability on every person who signs the registration statement.[215] Furthermore, the plan and its administrators are responsible for a portion of the disclosure investors will receive in connection with the registered offering,[216] and the signature of the plan trustee or other persons who administer the employee benefit plan acknowledges that responsibility. As a result, we are not proposing changes to the signature requirements of Form S-8 at this time. We are, however, soliciting additional comment about the legal and practical consequences of the commenters' recommended approach.

Request for Comment:

94. Assuming that having the employer sign on behalf of the plan would be legally sufficient to meet the requirements in Section 11, such that liability would attach for plan disclosures included in the registration statement, could a plan legally authorize the employer to sign on its behalf? If so, how would this be done?

2. Bridging the IPO Gap for Employee Stock Purchase Plans

It is common for issuers that are completing an initial public offering ("IPO") to also implement an employee stock purchase plan ("ESPP"). Such stock purchase plans permit employees to purchase stock of their employer through payroll deductions or otherwise, typically at a discount to market.[217] The stock may be acquired either directly from the employer or in open market purchases effected by the plan.

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[214] *See* the signature block of Form S-8, which requires the trustees or other persons who administer the employee benefit plan to have duly caused the registration statement to be signed on its behalf. *See also* 15 U.S.C. 77k and 77*l*(a)(2).

[215] *See* Section 11(a)(1) of the Securities Act [15 U.S.C. 77k(a)(1)].

[216] Where plan interests are being registered, Form S-8 requires the plan, at the time of filing, either to (a) have been subject to Exchange Act Section 15(d) for at least 90 days and be current in its filings thereunder; or (b) file, concurrently with the filing of the Form S-8 registration statement, an annual report on Form 11-K for its latest fiscal year (or, if the plan has not yet completed its first fiscal year, for a period ending not more than 90 days prior to the filing date). However, the requirement to file an annual report on Form 11-K does not apply if the plan was established less than 90 days prior to the Form S-8 filing date. Therefore, the form may be used for the initial registration of interests in a newly established plan.

[217] The offer and sale of securities pursuant to ESPPs, when not exempt from registration, are typically registered on Form S-8. *See* 1980 Employee Benefit Plans Release at Section II.A.5.a.

A few commenters cited difficulty in implementing ESPPs for issuers that plan to conduct an IPO.[218] According to one of these commenters, most issuers want employees to be enrolled in the ESPP on the IPO date to give employees the benefit of the IPO price for the first offering under the plan.[219] Commenters indicated that the registration requirement is a "significant obstacle" in this process because when employees authorize contributions to an ESPP to be made via payroll deductions, such authorization is viewed as an investment decision on the part of the employee, even if the employee retains the right to withdraw contributions prior to the purchase.[220]

Where employees elect to participate in the ESPP, the pre-IPO enrollment of employees would constitute an offer and sale of securities to the participant employees, which would need to be either registered or exempt. One commenter noted that, without a valid exemption, the employer would be unable to solicit employees for participation in the plans prior to the IPO.[221] Consequently, for the offer and sale of shares purchased under the ESPP to be covered by a Form S-8 registration, the Form S-8 must be effective prior to the date that employees authorize the payroll deductions, which cannot occur because the issuer is not yet a reporting company, and therefore does not meet the requirements to use Form S-8.[222]

Commenters stated that to avoid the communication and registration issues, issuers implementing an ESPP that starts at the time of the IPO automatically enroll all of their eligible employees in their ESPPs, and then have employees withdraw from or confirm their enrollment before the first purchase is made under the ESPPs.[223] According to these commenters, this is an

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[218] *See* letters from Davis Polk and NASPP

[219] *See* letter from NASPP.

[220] *See* letters from Davis Polk and NASPP.

[221] *See* letter from Davis Polk. *See also* Section 5(c) of the Securities Act.

[222] *See* General Instruction A.1. of Form S-8 requiring that Form S-8 eligible issuers be subject to the requirement to file reports pursuant to Section 13 (15 U.S.C. 78m) or 15(d) (15 U.S.C. 78o(d)) of the Exchange Act.

[223] *See* letters from Davis Polk and NASPP.

awkward solution because it requires them to enroll all the employees before they can communicate about the plan.[224] One commenter further stated that solving the issue of planning for an ESPP around the time of an IPO would remove a barrier that issuers face when undertaking an IPO.[225] We are not proposing specific amendments at this time but are soliciting additional comments on how to best address this issue.

Request for Comment:

95. Would extending Rule 701 to offers to participate in an ESPP made before the IPO and sales pursuant to ESPPs made after the IPO facilitate the use of ESPPs? If so, how could we limit such exempt sales to IPO employee stock purchase plans?
96. If Rule 701 were extended to reporting issuers for this purpose, would we also need to address the resale limitations set forth in Rule 701(g)? If so, how should we do so?
97. Aside from the Rule 701 exemption, are there alternative solutions that we could adopt that would allow employees to participate in ESPPs during an IPO?
98. Would the ability to communicate about the ESPP prior to the IPO without pre-IPO plan enrollment be sufficient to allow employee participation at the IPO price? If so, what types of communications should we exempt and for how long a time period prior to the IPO?

IV. GENERAL REQUEST FOR COMMENTS

We request and encourage any interested person to submit comments on any aspect of our proposals, 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.

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[224] *Id.*

[225] *See* letter from NASPP.

V. ECONOMIC ANALYSIS

Compensatory practices, and the composition of the workforce have evolved significantly since the Commission last amended the Rule 701 exemption and the Form S-8 registration statement. For example, businesses have become less asset-intensive, and there have been non-trivial inflationary effects over the last 20 years. Under the current Rule 701 provisions, start-up non-reporting issuers may not be able to offer the amount of compensatory securities[226] that would attract and retain human capital and provide incentives to employees. The proposed amendments to Rule 701 are in response to such changes in the business environment and intended to update the rule's provisions to current business environment conditions.

We are proposing several amendments to Rule 701, Form S-8, and related rules to modernize the requirements for compensatory transactions. We are mindful of the costs imposed by and the benefits obtained from our rules and the proposed amendments.[227] The discussion below addresses the potential economic effects of the proposed amendments. These include the likely benefits and costs of the proposed amendments and reasonable alternatives thereto, as well as the potential effects on efficiency, competition, and capital formation. We attempt to quantify these economic effects whenever possible; however, due to data limitations, in many cases we are unable to do so. Particularly for Rule 701, we are unable to quantify the economic effects due to lack of data on non-reporting issuers. Where we are unable to provide a quantitative assessment, we provide a qualitative discussion of the economic effects instead.

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[226] We believe that most, if not all, issuances under Rule 701 will be equity-based securities, although the scope of the proposed rules is broader than "equity-based" compensation.

[227] Section 2(b) of the Securities Act [15 U.S.C. 77b(b)], Section 3(f) of the Exchange Act [15 U.S.C. 78c(f)], and Section 2(c) of the Investment Company Act of 1940 [15 U.S.C. 80a-2(c)] require us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in (or, with respect to the Investment Company Act, consistent with) the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation. In addition, Section 23(a)(2) of the Exchange Act [15 U.S.C. 78w(a)(2)] requires us to consider the effects on competition of any rules that the Commission adopts under the Exchange Act and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

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. Reporting issuers are able to register compensatory securities offerings to their employees on Form S-8.

1. Rule 701

The proposed amendments to Rule 701 would affect many of the requirements associated with the exemption, including the timing and content of disclosure for certain offerings, the overall ceiling applicable to offerings under the exemption, and the eligible recipients of compensatory securities under Rule 701.

We can approximate the number of growth companies with external financing needs using data on companies conducting exempt securities offerings under Regulation D, Regulation A, and Regulation Crowdfunding. This group may be likely to rely on Rule 701 for the purpose of offering competitive compensation packages to attract and retain individuals. Based on filings in 2019, we estimate there are approximately 17,837 non-reporting companies conducting exempt offerings of unregistered securities under the aforementioned exemptions.[228] However, we do not have any data regarding the current utilization of the Rule 701 exemption that would allow us to quantify the effect of the proposed amendments. Accordingly, in the discussion below, we provide a qualitative assessment of the potential effects and encourage commenters to provide data and information that would help quantify the benefits, costs, and the potential impacts of the proposed amendments on efficiency, competition, and capital formation.

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[228] Based on staff analysis of EDGAR filings in calendar year 2019, there were approximately 17,071 non-reporting operating companies conducting Regulation D offerings. In addition, there were 73 Regulation A issuers that were not Exchange Act reporting companies and that did not file a Form D or amendment to it. Finally, 693 non-reporting companies conducted offerings solely under Regulation Crowdfunding in 2019 (companies conducting both Regulation D and Regulation Crowdfunding offerings or both Regulation A and Regulation Crowdfunding offerings in 2019 are included in the number for Regulation Crowdfunding offerings).

2. Form S-8

The proposed amendments to Form S-8 would affect reporting issuers that currently offer, or seek to offer, securities pursuant to employee benefit plans. We estimate that 1,753 unique issuers filed 2,006 Forms S-8 with the Commission during calendar year 2019. The majority of these issuers filed one Form S-8 during 2019. There were 1,522 issuers filing one, 201 issuers filing two, and 30 issuers filing three or more Forms S-8 during 2019. Among the issuers that filed at least one Form S-8 during 2019, 1,610 were domestic reporting issuers and 143 were FPIs. Among the domestic Form S-8 filers, approximately 41% were large accelerated filers, 27% were accelerated filers, and 32% were non-accelerated filers.[229] In addition, we estimate that 40% of domestic Form S-8 filers were smaller reporting companies ("SRCs"), and 28% were emerging growth companies ("EGCs").[230] Approximately 20% of domestic Form S-8 filers were both EGCs and SRCs. Among the FPIs that filed at least one Form S-8 during 2019, approximately 23% were large accelerated filers, 15% were accelerated filers, and 46% were non-accelerated filers. Among these FPIs, 48% were EGCs. We further estimate that of the 1,753 unique issuers filing at least one Form S-8 during 2019, at least 85% (1,523 companies) filed a Form S-8 to register the sale of compensatory securities for a non-retirement related plan.[231]

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[229] Although Rule 12b-2 [17 CFR 240.12b-2] defines the terms "accelerated filer" and "large accelerated filer," it does not define the term "non-accelerated filer." If an issuer does not meet the definition of accelerated filer or large accelerated filer, it is considered a non-accelerated filer.

[230] An "emerging growth company" is defined, in part, as an issuer that had total annual gross revenues of less than $1.07 billion during its most recently completed fiscal year. *See* Rule 405 and 17 CFR 240.12b-2. *See also* Rule 405; 15 U.S.C. 77b(a)(19); 15 U.S.C. 78c(a)(80); and *Inflation Adjustments and Other Technical Amendments under Titles I and II of the JOBS Act*, Release No. 33-10332 (Mar. 31, 2017) [82 FR 17545 (Apr. 12, 2017)].

"Smaller reporting company" is defined in 17 CFR 229.10(f) as an issuer that is not an investment company, an asset-backed issuer (as defined in 17 CFR 229.1101), or a majority-owned subsidiary of a parent that is not a smaller reporting company and that: (i) had a public float of less than $250 million; or (ii) had annual revenues of less than $100 million and either: (A) no public float; or (B) a public float of less than $700 million.

[231] We estimate that 712 issuers filed a form 11-K for fiscal year 2019. Of these issuers, 230 also filed a Form S-8 during 2019. We assume that Forms S-8 filed by these 230 issuers are in regard to a retirement related plan.

B. Benefits and Costs to Proposed Amendments to Rule 701 and Form S-8

1. Proposed Amendments to Rule 701(e)

Rule 701(e) specifies the disclosure requirements for non-reporting issuers relying on the Rule 701 exemption to offer securities as compensation to employees if the aggregate sales price or amount of securities sold during any consecutive 12-month period exceeds $10 million. For non-reporting issuers that exceed this threshold, the required disclosure includes: a copy of the summary plan description required by ERISA or a summary of the plan's material terms if it is not subject to ERISA; information about the risks associated with investment in the securities sold under the plan or contract; and financial statements required to be furnished by Part F/S of Form 1-A[232] under Regulation A.[233] Such financial statements must be as of a date no more than 180 days before the sale of securities relying on Rule 701. Moreover, the rule requires that the associated disclosures be delivered to all investors if the $10 million threshold is surpassed, and not only for the sales that exceed the $10 million threshold. For FPIs, Rule 701(e) requires financial statements that are not prepared in accordance with U.S. GAAP or IFRS to be reconciled to U.S. GAAP. We are proposing multiple amendments to Rule 701(e).

The proposed amendments would change various aspects of the disclosure required if the aggregate sales price or amount of securities sold during a consecutive 12-month period under Rule 701 exceeds $10 million. The proposed amendments would affect these disclosure requirements for all non-reporting issuers relying on the exemption, both domestic and FPIs. As proposed, such issuers would be required to provide financial statements that are no more than 270 days old (as compared to the current 180-day requirement), similar to the Regulation A disclosure requirement. FPIs that are eligible for the Rule 12g3-2(b) exemption would be able to provide such financial statements prepared in accordance with home country accounting standards without reconciliation to U.S. GAAP if financial statements prepared in accordance

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[232] 17 CFR 239.90.

[233] 17 CFR 230.251 through 230.263.

with U.S. GAAP or IFRS are not otherwise available. In lieu of financial statements, non-reporting issuers would be able to disclose a Section 409A independent valuation report, as described in more detail below.

In general, these proposed amendments would lower the cost to non-reporting issuers that rely on, or seek to rely on, the Rule 701 exemption, particularly the associated disclosure burden. Lower costs related to the use of the exemption may lead to an increase in the use of the exemption by non-reporting issuers, to the extent that the current disclosure costs discourage non-reporting issuers from relying on it. In the context of securities-based compensation, we expect that the information contained in financial statements assists employees in valuing their compensation packages. However, we lack information as to how employees use the existing financial statement disclosures to interpret the value of offered securities-based compensation or to make investment decisions. To the extent that the proposed disclosure requirement leads to less information about the value of the non-reporting issuer being available to employees, economic theory suggests that increased uncertainty about such value may weaken the expected benefits associated with the use of equity-based pay.[234]

Below, we discuss the costs and benefits of each proposed amendment to Rule 701(e) individually.

a) Disclosure Requirement for the Period Preceding the Threshold Amount Being Exceeded

The first proposed amendment to Rule 701(e) would limit the transactions that are subject to the rule's additional disclosure requirements when sales of securities under Rule 701 exceed $10 million in a 12-month period. Currently, disclosure must be provided a reasonable period of time before the date of sale to all investors to whom securities are sold during any consecutive

[234] Non-reporting issuers have more opaque information environments, and with few exceptions their securities are not traded in an active market. As such, there is more inherent uncertainty about their value due to elevated liquidity and valuation risks, as compared to reporting companies. Such uncertainty is likely to exist for the value of compensatory securities offered and may potentially attenuate the incentive effects of equity-based pay for non-management employees.

12-month period in which the $10 million threshold is exceeded. If disclosure has not been provided to all such investors before sale, the non-reporting issuer will lose its ability to rely on the exemption for the entire offering. The proposed amendment would require disclosure to only those investors receiving securities that exceed the $10 million threshold. The proposal would thus eliminate the "look-back" aspect of the disclosure requirement, which may facilitate non-reporting issuers' efforts to plan their compensatory programs or respond efficiently to unforeseen situations.

This proposed amendment is likely to provide more certainty to non-reporting issuers regarding their compliance with disclosure obligations under the rule. The proposed amendment also would allow non-reporting issuers the flexibility to offer compensatory securities as needed throughout the year to take advantage of opportunities to attract human capital, without the risk of retroactively losing the exemption if the required disclosure was not provided to investors involved in sales below the $10 million threshold. To the extent that the current disclosure requirement constrains non-reporting issuers from fully utilizing the exemption and the potential benefits that may accrue from the use of employee securities-based pay, the proposed amendment would likely loosen such constraint and allow for more efficient use of securities-based pay. We also expect employees to benefit from the proposed amendment as they would be able to further participate in a securities-based compensation program that might be currently constrained due to the existing disclosure requirements.

We do not expect this proposed amendment to generate any costs for employees and issuers. However, the proposed revision could create an information asymmetry among employees receiving compensatory securities, with some employees being provided more information about the non-reporting issuer's value than others. This asymmetry could affect the value that employees with different information assign to such compensation (higher value generally being associated with greater disclosure). Consequently, the benefits from using such compensation, such as the alignment of incentives between employees and other investors, could

be weaker for the group of employees that do not receive the prescribed disclosure. Non-reporting issuers could choose to voluntarily provide the disclosure to all employees, if it is net beneficial for the non-reporting issuer.

b) Age of Financial Statements

Another proposed amendment to Rule 701(e) would increase the maximum permissible age of the financial statements required to be provided to investors to harmonize the requirement with the corresponding requirements for capital-raising transactions under Regulation A. Currently, non-reporting issuers subject to the Rule 701(e) disclosure requirement must provide financial statements that are dated no more than 180 days before the securities' date of sale. As a practical matter, such a requirement compels non-reporting issuers to update their financial statements on a quarterly basis in order to make continuous offerings in compliance with the rule. The proposed revision would require non-reporting issuers to provide financial statements that are dated less than 270 days before the securities' date of sale, which would permit issuers to satisfy the disclosure requirement through semi-annual updating of their financial statements. For non-reporting issuers that would otherwise not prepare quarterly financial statements, increasing the maximum age of the financial statements to be provided to investors would lower the compliance costs associated with the rule. Such a decrease in the costs of complying with the rule's disclosure requirement could lead to an increase in the number of non-reporting issuers that rely on the exemption to compensate their employees or other eligible parties with securities to the extent such non-reporting issuers anticipate exceeding Rule 701's $10 million threshold for additional disclosure.

As mentioned above, more flexibility in the use of securities-based compensation may increase the ability of non-reporting issuers that are eligible to use the exemption to attract and retain employees, among other potential benefits. The proposed amendment would lower compliance costs for non-reporting issuers that do not otherwise prepare financial statements more frequently than semi-annually. For example, the proposed amendments would lower

compliance costs relative to current Rule 701 for Tier 2 Regulation A issuers that are not Exchange Act reporting companies that utilize Rule 701 to offer compensatory securities and thus already are required to provide financial statement disclosure on a semi-annual basis.

We do not expect this proposed amendment to generate any costs for employees and issuers. We lack information as to how or the extent to which employees use these disclosures to make investment decisions, but to the extent that less frequent disclosure leads to less timely information about the value of the non-reporting issuer, increased uncertainty about such value may weaken the expected benefits associated with the use of equity-based pay.

c) Financial Statement Content Requirements for FPIs

A third proposed amendment would permit FPIs that are eligible for the exemption from Exchange Act registration provided by Exchange Act Rule 12g3-2(b) to provide financial statements prepared in accordance with home country accounting standards, if financial statements prepared in accordance with U.S. GAAP or IFRS are not otherwise available. Such FPIs would experience lower compliance costs under the proposed amendment because they would not incur the cost of reconciling their financial statements in order to offer more than $10 million in securities in a 12-month period. Also, to the extent that the cost of the required reconciliation to U.S. GAAP discourages Rule 12g3-2(b)-eligible FPIs from relying on the exemption, we expect that the proposed amendment would likely increase the number of such FPIs that may rely on the exemption in the future. Lowering the costs of compliance for such FPIs may increase their ability to attract and retain human capital through offering securities-based pay.

With respect to costs, the proposed amendment could generate some uncertainty for employees or increase their cost of processing the information disclosed in financial statements if those employees are less familiar with the home country's accounting standards than U.S. GAAP or IFRS, or if those accounting standards do not require the disclosure of as much material

information.[235] However, to the extent that employees are more familiar with the home country's accounting standards, we do not expect the proposed amendment to increase their cost of processing the related information.

d) Alternative Valuation Disclosure

A fourth proposed amendment to Rule 701(e) would permit non-reporting issuers to provide valuation disclosure using a Section 409 independent valuation report. The proposal would require the Section 409A independent valuation report to be prepared pursuant to an independent appraisal to reduce potential risks that may arise from an issuer providing its own valuation. The proposal also would require the Section 409A independent valuation report to be updated at six-month intervals. Rule 12g3-2(b)-eligible FPIs would be permitted to disclose the fair market value of the securities to be sold consistent with the Section 409A rules applicable to stock readily tradeable on an established securities market.[236]

To the extent that the proposed valuation disclosure is a less costly alternative to the applicable financial statement requirements, the proposed amendment is likely to lower compliance costs for at least some non-reporting issuers that issue securities under the Rule 701 exemption.[237] A decrease in compliance costs could lead to more non-reporting issuers relying on the exemption, or to an increase in the amount of compensatory securities issued by non-reporting issuers that were discouraged to offer compensatory securities in excess of $10 million so as to not trigger the disclosure requirement. Moreover, if the requirement for disclosure of financial statements presents a potential risk of unauthorized release of competitively sensitive

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[235] It is also possible that the requirement to reconcile local/country GAAP financial statements to U.S. GAAP or IFRS may have resulted in financial statements with increased reliability, if an independent third party performed such exercise.

[236] *See* Treasury Reg. 1.409A-1(b)(5)(iv)(A).

[237] The frequency of the proposed valuation disclosure is less than the current financial statement disclosure requirement, which would lower compliance costs for non-reporting issuers. The requirement that such valuation reports be prepared by an independent party would increase the cost of the proposed disclosure option, to the extent that non-reporting issuers do not currently use an independent party to prepare such valuations for tax purposes.

information, the proposed alternative could reduce such risks (to the extent that valuation disclosure is less likely to have that consequence).

One difference in the information content of a Section 409A independent valuation report versus the information content of financial statements is that financial statements mostly provide information about past economic transactions as captured by applicable accounting standards, whereas Section 409A valuations are based on assumptions about future performance. It is possible that a Section 409A independent valuation report could simplify or enhance an employee's understanding of the value of his or her compensation as the report would provide valuation information that could be more practical for such purpose and, depending on the valuation method applied, does not necessarily need to be derived from the financial statements.[238] However, valuations rely on multiple assumptions, which could introduce some uncertainty with regard to the perceived value of compensatory securities. The proposed requirement that such a valuation report be prepared pursuant to an independent appraisal should lower the risk that valuation assumptions are inaccurate or opportunistic, and increase the reliability of such valuations.

Under the proposed amendment, Rule 12g3-2(b)-eligible FPIs that have stock readily tradeable on an established securities market would disclose the stock price on the most recent trading day preceding the date of sale to satisfy the rule's disclosure requirements. Because the stock price for these FPIs is readily observable and available, we expect the proposed amendment to lower compliance costs for these FPIs. Moreover, a valuation derived from the value of tradable stock on an established securities market is likely to represent a fair and objective value of the securities offered as compensation. To the extent that the market conditions for these FPIs lead to a fair and objective value, then disclosure of the stock price

[238] There are multiple ways a valuation could be derived, based on facts and circumstances specific to the issuer. Estimation of the sum of present value of anticipated future cash-flows is one method to derive a valuation, which could be based on information from existing financial statements and projections about anticipated future cash flows.

could increase the reliability of such valuation. The foreign listing of a Rule 12g3-2(b)-eligible FPI helps assure that there is a foreign jurisdiction that principally regulates and oversees the trading of the issuer's securities and its disclosure obligations to investors, and increases the likelihood that the issuer's pricing determinants are located outside the United States. While stock price alone does not provide the same level of analysis as an independent valuation report, the combination of the home country disclosure required in connection with the foreign listing and the stock price typically provides a significant amount of information that is available for recipients of compensatory securities under Rule 701.

e) Disclosure Requirements for Derivative Securities

A fifth proposed amendment to Rule 701(e) would distinguish between derivative securities that involve a decision to exercise or convert, and those that do not, such as RSUs, for purposes of determining when disclosure is required to be delivered. As discussed in Section II.A.5, the timing of an investment decision, if any, is not universal for the various compensatory instruments that are derivative securities. Consistent with the rule's general requirement that disclosure be provided a reasonable period of time before the date of sale, the proposal would generally require delivery of disclosure to recipients of derivative securities under the rule at the time most relevant to making an investment decision.

A stock option or similar instrument may expire without being exercised or converted, and accordingly, does not result in delivery of the underlying shares to the holder absent an affirmative investment decision to exercise or convert. In contrast, a restricted stock unit or similar instrument settles automatically in the underlying shares at maturity, without need for any investment decision by the holder. Because such instruments settle by their terms without action by the holder, the relevant investment decision, if any, likely takes place at the date of grant.

As proposed, if the sale involves a stock option or other derivative security that involves a decision to exercise or convert, the non-reporting issuer would continue to be required to

deliver Item 701(e) disclosure a reasonable period of time before the date of exercise or conversion. If the sale involves a restricted stock unit or other derivative security that does not involve a decision to exercise or convert, the proposal would require the non-reporting issuer to deliver disclosure a reasonable period of time before the date the restricted stock unit or similar derivative security is granted. However, if the sale involves a restricted stock unit or other derivative security that does not involve a decision to exercise or convert and is in connection with the hire of a new employee, the disclosure would be considered timely delivered if provided within 14 calendar days after the date the person begins employment. The proposed amendment could benefit non-reporting issuers by limiting potential leaks of competitively sensitive information by individuals who seek, but do not accept, employment with the non-reporting issuer. If securities-based compensation is a significant component of the compensation offered to new hires, not providing the disclosure required by Rule 701(e) before such grants are awarded could limit the ability of securities-based compensation to attract talent. However, we expect non-reporting issuers to weigh this potential effect and choose the timing of the required disclosure in a way that maximizes their expected net benefit.

f) Disclosure Requirements Following Business Combination Transactions

A sixth proposed amendment to Rule 701(e) would clarify disclosure delivery obligations for the derivative securities of an acquired entity that the acquiring non-reporting issuer assumed in a business combination transaction. Where an acquired entity complied with Rule 701 at the time it originally granted the derivative securities, the exercise or conversion of acquired entity derivative securities assumed by the acquiring non-reporting issuer would be exempt from registration, subject to the acquiring non-reporting issuer's compliance with Rule 701(e), where applicable. If the acquired entity was required to provide disclosure pursuant to Rule 701(e) and the derivative securities are exercised or converted after completion of the business combination transaction, the acquiring non-reporting issuer would assume that disclosure obligation, and

would be required to provide information meeting the requirements of Rule 701(e) about itself, consistent with the timing requirements of Rule 701(e)(6), as amended. Further, in determining whether the amount of securities the acquiring non-reporting issuer sold during any consecutive 12-month period exceeds $10 million for purposes of triggering Rule 701(e) disclosure, the acquiring non-reporting issuer would need to 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. This proposal would clarify disclosure delivery obligations following a business combination transaction, and permit affected non-reporting issuers to plan their compensation programs with more certainty as to how a potential future business combination transaction would affect the non-reporting issuer's Rule 701(e) disclosure obligations.

2. Proposed Amendments to Rule 701(d)

Currently, for a non-reporting issuer to be eligible to rely on Rule 701, total sales of securities over a consecutive 12-month period may not exceed the greatest of three alternatives: (i) $1,000,000 ("dollar cap"), (ii) 15% of the issuer's total assets ("asset cap"), or (iii) 15% of the outstanding amount of securities of the class. We are proposing to amend two of these three alternative caps: the dollar cap would be raised to $2,000,000, and the asset cap would be raised to 25% of an issuer's total assets.

The proposed increases in the dollar and asset caps would provide non-reporting issuers with more flexibility to structure employee compensation contracts. We anticipate that non-reporting issuers would benefit from this increased flexibility as it would allow them to design compensatory arrangements that may better fit their individual circumstances. For example, the increased flexibility would permit a non-reporting issuer entering a market to grant larger individual awards in an effort to attract talent from competitors.

There is academic literature studying the use of forms of non-executive employee compensation.[239] Most of these studies focus on non-executive employee stock options. In general, there is evidence that the use of stock options in employee compensation contracts correlates to increases in future operating performance, higher levels of innovation, and firm value.[240] The studies also find that employee stock options are more likely to be used by issuers that are capital-constrained and by issuers that need to attract certain types of human capital.[241] In addition, one study finds that employee stock options are more effective in younger and high growth issuers and when such plans are implemented more broadly within issuers.[242] Other forms of securities-based compensation could provide different incentives and lead to different outcomes. For example, a study that examines the effects of non-executive employee stock

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[239] These academic studies examine the effects of compensatory benefit plans for publicly traded companies. The findings may not fully generalize to non-reporting issuers that rely on the Rule 701 exemption to provide equity-based pay. For example, as discussed earlier, the value of non-reporting companies is likely to be more uncertain relative to the value of reporting companies due to differences such as the information environment. This may increase the risk that equity-based pay for non-reporting companies imposes for employees receiving such compensation and thereby affect the strength of the incentives provided.

[240] *See* Xin Chang et al., *Non-Executive Employee Stock Options and Corporate Innovation*, 115 J. FIN. ECON. 168 (2015) ("Chang et al. (2015)"), which uses a sample of S&P1500 companies over the 1998-2003 period to examine the effect of stock options 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 V. Hochberg & Laura Lindsey, *Incentives, Targeting, and Firm Performance: An Analysis of Non-Executive Stock Options*, 23 REV. FIN. STUD. 4148 (2010) ("Hochberg & Lindsey (2010)"), which uses a sample of S&P1500 companies over the 1997-2004 period to examine the effect of employee stock options on company 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.

[241] *See* John E. Core & Wayne R. Guay, *Stock Option Plans for Non-Executive Employees*, 61 J. FIN. ECON. 253 (2001) ("Core & Guay (2001)"), which 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) ("Babenko et al. (2011)"), which studies a sample of 1,773 companies over the period 2000 to 2005 with regard to their broad-based employee stock option programs. The study finds evidence consistent with the idea that stock options can relax 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.

[242] *See* Hochberg & Lindsey (2010), *supra note* 240.

ownership in retirement savings vehicles finds an inverse relationship between employee stock ownership levels and risk-taking.[243]

Relatedly, the proposed amendments may affect non-reporting issuers' ability to attract and retain talent. For example, a non-reporting issuer would likely benefit if it is competing for talent with reporting companies that are relatively less constrained in their ability to offer securities-based incentives to attract talent. Moreover, such benefit would likely be particularly important for non-reporting issuers that are capital constrained. On a similar note, the increased ability to offer securities-based compensation may provide non-reporting issuers with an additional tool to achieve higher employee retention. An academic study finds that the use of broad based employee stock options leads to increased retention rates after the grant, but such increased retention is followed by higher turnover when the options vest.[244]

The proposed increases in the dollar cap and the asset cap may also allow non-reporting issuers to reallocate relatively limited cash resources to other productive uses. This expected benefit may be particularly important for non-reporting issuers that are resource-constrained and for non-reporting issuers whose business models rely on human capital (and are less asset-intensive). We expect the proposed increase to both caps to provide additional flexibility to non-reporting issuers in terms of allocating scarce resources.

While we expect the proposed amendments to Rule 701(d) to benefit non-reporting issuers as described above, there is some uncertainty as to the extent of the expected benefits from the proposed amendments. Specifically, securities-based compensation carries liquidity

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[243] *See* Francesco Bova et al., *Non-Executive Employee Ownership and Corporate Risk*, 90 ACCT. REV. 115 (2015), which uses U.S. Department of Labor Form 5500 filings to construct stockholdings which include employee stock ownership plans (ESOPs), 401(k) plans, deferred profit sharing plans invested in company stock, and employer stock bonus plans. It finds that a higher level of such employee stock ownership is related to lower risk-taking by employees. The study emphasizes the difference in employee incentives created by the various forms of equity-based pay and their interaction.

[244] *See* Serdar Aldatmaz, Paige Ouimet, & Edward D. Van Wesep, *The Option to Quit: The Effect of Employee Stock Options on Turnover*, 127 J. FIN. ECON. 136 (2018), which examines the effect of broad based stock option plans on employee retention. The study finds decreased employee turnover following the initiation of the plan and increased employee turnover in the third year of the grant.

and valuation risks, and these risks are likely to be relatively higher for compensatory securities of non-reporting issuers.[245] Higher liquidity and valuation risks may blunt the anticipated economic effects of proposed amendments to Rule 701(d) on employee attraction, retention, and incentive alignment.[246]

The proposed amendments also would provide that after completion of a business combination transaction, to calculate compliance with paragraph (d)(2) of Rule 701, the acquiring non-reporting issuer may use a pro forma balance sheet that reflects the transaction or a balance sheet for a date after the completion of the transaction that reflects the total assets and outstanding securities of the combined entity. In addition, in determining the amount of securities that it may offer pursuant to Rule 701 following a business combination transaction, the acquiring non-reporting issuer would not be required to include the aggregate sales price and amount of securities for which the acquired entity claimed the exemption during the same 12-month period. These proposed changes would allow non-reporting issuers to plan their compensation programs without uncertainty as to the effect of a potential future business combination transaction. Further, permitting an acquiring issuer to compute the asset cap based on the combined entity may result in an increase in the maximum dollar amount of securities that may be sold over a 12-month period under the exemption.

3. Proposed Amendments to Rule 701(c) Eligible Participants

a) Consultants and Advisors

We are proposing to extend the eligibility of consultants and advisors to receive Rule 701 compensatory securities to entities meeting specified ownership criteria designed to link the

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[245] The absence of an active market for securities of non-reporting issuers introduces uncertainty as to their fair value. Holders of compensatory securities of non-reporting issuers also have to bear liquidity risk that arises from the absence of an active market for these securities.

[246] *See* Brian J. Hall & Kevin J. Murphy, *Stock Options for Undiversified Executives*, 33 J. ACCT. & ECON. 3 (2002), which shows that there is a difference between the value of a stock option to an executive versus the cost of the option to the company, due to the executive's risk aversion and undiversified portfolio. *See* Core & Guay (2001), *supra* note 241.

securities compensation to the performance of services and to prevent such securities from being issued to passive investment vehicles. Currently, only natural persons are eligible to receive securities pursuant to Rule 701 for providing services to the non-reporting issuer. The proposed amendment would expand the scope of eligible consultants or advisors to whom non-reporting issuers may issue securities as compensation for services. The proposed extension of consultant and advisor eligibility would allow non-reporting issuers to use securities-based compensation to engage a wider spectrum of service providers, which could enable these non-reporting issuers to gain access to potentially higher quality and/or lower cost outside expertise and services. These expected benefits likely would be greater for non-reporting issuers that are capital-constrained, and non-reporting issuers whose business models rely on such outside expertise. We do not anticipate any significant costs related to this proposal.

b) Former Employees

The proposed amendments would extend eligibility to receive securities under Rule 701 to former employees of the non-reporting issuer who are issued specified post-termination grants and former employees of an entity that was acquired by the non-reporting issuer who are issued securities in substitution or exchange for securities issued as compensation while such persons were still employed by or providing services to the acquired issuer. We expect these amendments would benefit non-reporting issuers by making compensation planning and structure more efficient, as there would be less uncertainty and lower administrative costs in cases of employee turnover or business combination transactions. We do not anticipate any significant costs related to this proposal.

c) Employees of Subsidiaries

Further, the proposed amendments would expand availability of the Rule 701 exemption to securities offered to employees of any subsidiary of the non-reporting issuer, consistent with the scope of eligibility for Form S-8, rather than only employees of majority-owned subsidiaries. This proposed amendment likely would lower administrative burdens for non-reporting issuers

relying on the Rule 701 exemption when they transition to reporting status and become eligible to use Form S-8. We also expect the proposed amendment to benefit non-reporting issuers and their employees by providing certainty for this expanded group of eligible employees about their securities-based compensation awards when business combination transactions occur. We do not anticipate any significant costs to issuers or eligible participants related to this proposed amendment.

4. Benefits and Costs to Proposed Amendments to Form S-8

We are proposing multiple amendments regarding the use of Form S-8 by reporting issuers. The proposed amendments would expand the scope of participants that are eligible to receive compensatory securities issued pursuant to a Form S-8 registration statement and conform that scope with the corresponding proposed amendments to Rule 701. Moreover, the proposed amendments would reduce both the complexities associated with registration on Form S-8 and the risk of inadvertent non-compliance by reporting issuers using the form.

a) Benefits and Costs from changes to the scope of eligible participants

The proposed amendments would expand the scope of participants eligible to receive compensatory securities issued pursuant to a Form S-8 registration statement to include former employees of the reporting issuer for specified post-termination grants and former employees of an entity that was acquired by the reporting issuer in exchange for securities issued as compensation while such former employees were still with the acquired issuer. We expect these proposed amendments would benefit reporting issuers by reducing uncertainty and administrative costs for these issuers' compensation programs in cases of employee turnover, or business combination transactions, which may make compensation planning and structuring more efficient.

The proposed amendments would permit reporting issuers to offer compensatory securities to consultants and advisors that have chosen to organize their business as an entity,

provided that the entity meets specified ownership criteria designed to link the securities compensation with services performed for the issuer, and not issued to passive investment vehicles. We expect the proposed expansion of consultant and advisor eligibility would benefit reporting issuers as the ability to use securities-based compensation to engage a wider spectrum of service providers could enable these companies to gain access to potentially higher quality and/or lower cost outside expertise and services. The expected benefits likely would be greater for reporting issuers that are resource constrained and whose business models rely on such outside expertise. We do not expect any significant costs to issuers or eligible participants associated with the proposed amendments.

b) Benefits and Costs from other amendments to Form S-8

We also are providing clarifications and proposing amendments to Form S-8 that are intended to simplify registration and to reduce compliance and administrative costs while increasing the utility of Form S-8 for reporting issuers.

We expect the main economic effect of these clarifications and proposed amendments to Form S-8 to be the reduction of compliance costs for issuers. For example, we are clarifying that reporting issuers may allocate securities among multiple incentive plans on a single Form S-8 and proposing amendments that would permit the addition of securities to an existing Form S-8 by an automatically effective post-effective amendment. These clarifications and proposed amendments should reduce the number of Form S-8 filings, thus reducing reporting issuers' compliance costs. Reporting issuers would still have to file post-effective amendments, which means they would incur some compliance costs associated with those filings, but we expect the costs of filing an amendment to Form S-8 to be less than those of filing the initial form. Likewise, we expect that the proposed amendments to Rule 457 and Form S-8 to require the registration of the offer and sale of a maximum aggregate offering price of securities pursuant to defined contribution plans would reduce compliance costs for reporting issuers by eliminating the need to track offers and sales of individual shares of issuer stock. For PRA purposes, we

estimate the reduction in compliance costs associated with the proposed amendments to be approximately $46,000.[247] We note that the PRA costs relate to paperwork burdens and thus may not encompass all compliance costs. Accordingly, the PRA estimate may underestimate the reduction in compliance costs due to the proposed amendments.

We also expect that the clarifications and proposed amendments to Form S-8 would provide reporting issuers with flexibility to adjust their compensatory benefit plans and should eliminate the risks of over- or underestimating the number of securities required for compensatory offerings, thereby also reducing the associated risk of inadvertent noncompliance. For example, under proposed Rule 413(c), reporting issuers would not need to anticipate how many securities will be needed to fulfill obligations under each individual plan or even the types of securities that might be authorized for issuance pursuant to a plan in the future. Additionally, clarifying the ability to file a single Form S-8 for multiple plans will facilitate its use, especially in connection with incentive plans, because to the extent a plan expires with authorized but unissued shares, those shares would be immediately available for issuance under another authorized plan. By requiring registration of the offer and sale of a maximum aggregate offering price of securities pursuant to defined contribution plans, the proposed amendment would simplify administration of defined contribution plans and avoid inadvertent non-compliance with Section 5 of the Securities Act.

The proposed amendments would implement several improvements to simplify fee payments. Revised Form S-8 would include a new fee payment method for registration of offers and sales pursuant to defined contribution plans. The proposed amendment to the fee payment method would require reporting issuers to pay the registration fee for all sales made pursuant to a defined contribution plan during a fiscal year in arrears, based on the aggregate offering amount, no later than 90 days after the plan's fiscal year end. The proposed fee payment method would

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[247] *See* Section VII.C, *infra*. We monetize the internal burden hours by multiplying them by $400, the cost per burden hour for outside professional help. Thus, the value of the internal burden hours is 115 * $400 = $46,000.

simplify administration of defined contribution plans and potentially eliminate the problem of inadvertently over- or underestimating the number of securities to be sold. As a result, it could create savings for issuers because instead of paying a registration fee to the Commission at the time of filing a registration statement, reporting issuers would pay the fee after the end of the fiscal year, when the number of transactions will have been definitively determined.

Finally, the proposed amendments would align Form S-8 instructions with current IRS plan review practices. This proposed amendment would eliminate the requirement that issuers undertake to submit any amendment to the plan to the IRS and file a copy of the IRS determination letter confirming that the amended plan is qualified under Section 401 of the IRC with the Commission. We are also proposing to revise Item 1(f) of Form S-8 to eliminate the requirement to describe the tax effects of plan participation on the issuer but are proposing to retain the requirement to describe the tax consequences to employees. These proposed amendments would align Form S-8 to current IRS review practices and streamline the content of Form S-8 without sacrificing potentially useful disclosure regarding the tax effects of participation in the plan for plan participants. We also expect these amendments to reduce the compliance costs for participants, but we are unable to quantify the cost reduction.

Overall, we expect that the economic impact to reporting issuers from the proposed technical amendments to be limited to reducing administrative burdens and complexity associated with registering offerings of compensatory securities. We do not anticipate any significant costs related to the proposed technical amendments.

C. Anticipated Effects on Efficiency, Competition, and Capital Formation

As described above, we believe that the proposed amendments could have positive effects on efficiency, competition, and capital formation. The proposed amendments to Rule 701 would enable non-reporting issuers to expand the use of securities as compensation for a wider range of outside expertise and services. We expect this to lead to improvements in the operational efficiency of these issuers. We expect a similar result from the proposed

amendments to the scope of eligible participants who may receive compensatory securities for reporting issuers in offerings registered on Form S-8. We expect the proposed increase to two of the three alternative Rule 701(d) offering caps to improve affected issuers' ability to compete for talent by increasing their ability to provide equity-based pay packages. The proposed amendments to Rule 701(d) also may allow non-reporting issuers that are cash-constrained to re-allocate scarce resources to other productive uses and, as a result, lead to increased efficiency. Increased efficiency may be achieved because non-reporting issuers could further the use of securities-based compensation for incentive alignment at a lower cost compared to cash. Although offerings made pursuant to Rule 701(d) may not be used for capital-raising purposes, the proposed amendments could lead to improved utilization of limited resources by cash-constrained non-reporting issuers, which would enhance overall capital formation.

The proposed technical amendments to Form S-8 also may enhance efficiency as they are likely to lower administrative burdens and compliance uncertainty for reporting issuers offering securities-based compensation to employees. For example, the proposed amendments are likely to increase the ability of reporting issuers to react to changing conditions by adjusting their compensatory offerings by adding new securities or plans to an existing registration statement, and to pay fees for securities sold pursuant to defined contribution plans without the risk of inadvertent non-compliance.

D. Reasonable Alternatives

In broad terms, the proposed amendments to Rule 701 are likely to have three main effects:

(i) Increase the amount of securities-based compensation non-reporting issuers may provide pursuant to the Rule 701 exemption by increasing the rule's dollar amount and asset caps (Rule 701(d));

(ii) Expand the scope of eligible consultants, advisors and employees that may receive securities-based compensation under Rule 701 in exchange for services provided (Rule 701(c)); and

(iii) Lower the compliance and disclosure costs for non-reporting issuers relying on, or seeking to rely on, the exemption to provide exempt securities-based compensation (Rule 701(e)).

As an alternative to the proposed amendments, we could use different caps on the amount of annual securities-based compensation that a non-reporting issuer could provide under the Rule 701 exemption and/or adjust the third alternative cap (currently set at 15% of the maximum number of shares outstanding). Higher caps would allow non-reporting issuers more flexibility in using the Rule 701 exemption as a tool to compensate, attract, and retain employees (and vice versa for lower caps). However, due to the fact that non-reporting issuers are more opaque and their securities are less liquid, further increasing Rule 701(d) caps could lead to diminishing marginal benefits.

As another alternative, we could choose not to expand Rule 701 and Form S-8 eligibility to consultants or advisors organized as entities with prescribed characteristics, or to expand Rule 701 and Form S-8 to consultant and advisor entities that do not conform to the proposed ownership requirements. Given the tax and legal incentives that such consultants or advisors have to organize as entities, not including such entities under the exemption would result in a limited set of choices for non-reporting issuers to seek such services from third parties. In seeking the highest quality services at the lowest cost, cash-constrained issuers could be at a disadvantage to more established issuers facing fewer resource constraints. We also could expand Rule 701 and Form S-8 eligibility to any consultant or advisor, regardless of ownership structure. Such an alternative may provide an even wider range of options to issuers to engage outside expertise but would increase the risk that such compensatory securities would be issued to passive investment vehicles rather than individuals who perform services for the issuer.

Another alternative that we could have pursued is to extend the Rule 701 exemption to offers to participate in an ESPP made before the IPO and sales pursuant to ESPPs made after the IPO. This would facilitate employees' participation in the ESPP to obtain shares at the IPO price, which could be lower than the subsequent trading price. Such a proposal could present disadvantages, such as employees' loss of the information in the prospectus they receive pursuant to Part I of Form S-8, employees' loss of the legal protections provided by Securities Act liability in the case of material misstatements or omissions, and employees' receipt of restricted stock pursuant to Rule 701. However, as such an alternative could facilitate the use of ESPPs and allow issuers to better align incentives of their employees, the release requests comment on this alternative.

Finally, we could make different amendments to the Rule 701(e) disclosure requirements. For example, instead of harmonizing the Rule 701(e) disclosure requirements with those of Regulation A offerings in terms of age of financial statements, we could require less frequent updating of this disclosure, for example on an annual basis. Less frequent updating would provide less certainty to holders of these securities regarding their value and potentially weaken incentive effects from the provision of securities-based compensation. However, less frequent disclosure of financial statements would be less costly for non-reporting issuers and could lead to increased use of compensatory securities by non-reporting issuers.

As another alternative, we could permit the use of a Section 409A valuation report in lieu of financial statement disclosure but without requiring it to be independently prepared. Such an alternative could provide a lower cost option for affected non-reporting issuers to satisfy the disclosure requirement of Rule 701(e). However, such alternative could give rise to conflicts of interest that would undermine the reliability of the valuation report. A lower quality valuation report would increase uncertainty about the value of the non-reporting issuer and the offered compensatory securities, and as a result, would attenuate the expected benefits from the provision of equity-based compensation.

Finally, we could eliminate Form S-8 and allow reporting issuers to rely on the Rule 701 exemption instead. Such alternative would lower compliance costs for reporting issuers and could promote further use of securities-based compensation by reporting issuers. However, such alternative could cause employees to receive less information than would be required to be provided pursuant to Part I of Form S-8, which could lead to more uncertainty about their compensation and potentially weaken the expected benefits from the provision of equity-based compensation. Eliminating Form S-8 also would cause employees to lose the protections provided by Section 11 and, in some cases, Section 12(a)(2) liability in the case of material misstatements or omissions.[248]

Request for Comment

We request comments 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 affect investor protection. In addition, we also seek comment on alternative approaches to the proposed amendments and the associated costs and benefits of these approaches. Commenters are requested to provide data, estimation methodologies, and other factual support for their views, in particular, costs and benefits estimates.

Specifically, we seek comment with respect to the following questions: Are there any costs and benefits to any entity that are not identified or 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 amendments? If so, which approach and why? Are there any other potential alternative approaches we should consider that would promote the ability of companies to compete in the market for talent consistent with investor protection?

VI. PAPERWORK REDUCTION ACT

[248] *See* 15 U.S.C. 77k and 77*l*(a)(2).

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").[249] The Commission is submitting the proposal to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[250] 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:

"Rule 701" (OMB Control No. 3235-0522); and

"Form S-8" (OMB Control No. 3235-0066).

The Commission 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 reporting issuer 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 exemption from registration for offers and sales of securities pursuant to certain compensatory benefit plans and contracts relating to compensation by non-reporting issuers. 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

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[249] *See* 44 U.S.C. 3501 *et seq*.

[250] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

certain disclosures, including financial statement disclosures.[251] 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 Sections II and III 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 Change in No. of Average Annual Respondents
Form S-8	• Clarify that registrants may add multiple plans and allocate securities among multiple plans on a single Form S-8; permit addition of securities or classes of securities by automatically effective-post effective amendment; permit registration of an indeterminate amount of securities for Defined Contribution Plans; implement a new fee calculation and payment method for Defined Contribution Plan.	• These proposed amendments are expected to reduce the number of initial Forms S-8 filed annually, and correspondingly increase the number of post-effective amendments to Form S-8 filed annually. We expect the net effect to be no change in the PRA burden per response and no change in the number of responses.	2,140	0
	• Conform Form S-8 instructions to current IRS plan review practices and eliminate the requirement to describe the tax effects of plan participation on the registrant.	• Decrease PRA burden per response by 1 hour.		
	• Expand eligibility to specified consultant entities and specified former employees of the registrant and acquired companies.	• No change in PRA burden per response or number of responses.		
Rule 701	• Require Rule 701(e) disclosure to be delivered to investors only for sales that exceed the $10 million threshold.	• Elimination of the requirement to provide Rule 701(e) disclosure to investors who purchase before the $10 million threshold is crossed would permit issuers who did not	800	40

[251] *See* Rule 701(e).

		provide such disclosure to continue relying on the exemption after crossing the $10 million threshold. It would also allow issuers to avoid providing such disclosure as a precautionary measure in offerings where it is unclear whether the threshold will be crossed. We expect the net effect on the number of responses to be 40 additional responses with no change in the PRA burden per response.		
	• Reduce the frequency of Rule 701(e) financial statement updates; allow Rule 12g3-2(b) eligible foreign private issuers to disclose financial statements that are not reconciled to U.S. GAAP; and allow issuers to disclose valuation information consistent with IRC Section 409A rather than financial statements.	• Decrease PRA burden per response by 0.5 hours.		
	• Increase the assets cap to 25% and increase dollar cap to $2 million and expand eligibility to specified consultant entities, employees of all subsidiaries, and specified former employees of issuer and acquired companies.	• No change in PRA burden per response or number of responses.		

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

Below we estimate the incremental and aggregate change in paperwork burden as a result of the proposed amendments. These estimates represent the average burden for all registrants, 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.[252]

[252] 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.

PRA Table 2. Standard Estimated Burden Allocation for Specified Collections of Information

Collection of Information	Internal	Outside Professionals
Form S-8	50%	50%
Rule 701	25%	75%

For Rule 701, 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. We believe that increasing the Rule 701 asset and dollar caps and making the exemption available for additional participants would increase the number of securities to be issued and expand eligibility to receive securities but would not increase the number of responses. For Form S-8 we believe the amendments would change only the burden hours. The revised burden estimates were calculated by multiplying the revised estimated number of responses by the revised 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.[253]

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 (A)	Burden Hour Annual Decrease Per Affected Respondent (B)	Decrease in Burden Hours For Affected Respondents (C) = (A) x (B)	Decrease in Internal Burden Hours for Affected Respondents (D) = (C) x 0.5 or 0.25	Decrease in Professional Hours for Affected Respondents (E) = (C) x 0.5 or 0.75	Decrease in Professional Costs for Affected Respondents (F) = (E) x $400
Form S-8	230	(1)	(230)	(115)	(115)	($46,000)
Rule 701	840	(0.5)	(420)	(105)	(315)	($126,000)

[253] In both PRA Table 3 and PRA Table 4, the estimated number of Form S-8 responses is 230, reflecting the number of Forms S-8 filed during 2019 in regards to retirement related plans. *See* n. 231, *supra*.

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

Form	Current Burden			Program Change			Requested Change in Burden		
	Current Annual Responses (A)	Current Burden Hours (B)	Current Cost Burden (C)	Number of Affected Responses (D)	Change in Company Hours (E)	Change in Professional Costs (F)	Requested Annual Responses (G)	Requested Burden Hours (H)	Cost Burden (I)
Form S-8	2,140	28,890	$11,556,000	230	(115)	($46,000)	2,140	28,775[1]	$11,510,000[2]
Rule 701	800	400	$480,000	840	(85)[3]	($102,000)[4]	840	315[5]	$378,000[6]

1. This equals the sum of (or difference between) Form S-8 current burden hours and the change in company hours.

2. This equals the sum of (or difference between) the current cost burden and the change in professional costs.

3. This represents a reduction of (.25 X 400) in the burden hours of the existing 800 respondents, as the PRA burden per response declines from 2 to 1.5 hours, plus (40 X 1.5 X .25) for the additional burden hours attributable to 40 additional responses.

4. This represents $120,000 reduction in existing cost for existing 800 respondents, plus $18,000 additional cost from adding 40 responses.

5. This equals 840 issuers X 1.5 hours X 25%.

6. This equals 840 issuers X 1.5 hours X 75% X $400 per hour.

D. Request for Comment

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.[254]

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--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--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.

VII. 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").[255] It

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

[255] 5 U.S.C. 601 *et seq*.

relates to the proposed amendments to Securities Act Rule 701 and Form S-8 to modernize the two principal means by which issuers grant securities to employees in compensatory transactions. As required by the RFA, this IRFA describes the impact of these proposed amendments on small entities.[256]

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

The proposed amendments are designed to modernize Rule 701, an exemption from Securities Act registration for certain compensatory securities transactions by non-reporting issuers, and Form S-8, a form for registering certain compensatory securities transactions by reporting companies. The Commission has recognized that the relationship between the issuer and recipient of securities is often different in compensatory, rather than capital raising, transactions. The proposed amendments reflect changes in compensatory practices, including the types of securities offered, and are intended to modernize and simplify administrative requirements.

B. Legal Basis

We are proposing the amendments contained in this release under the authority set forth in Sections 3(b), 6, 7, 8, 10, 19(a) and 28 of the Securities Act, as amended, and Sections 3(b), 12, 13, 15, 23(a), and 36 of the Exchange Act.

C. Small Entities Subject to the Proposed Amendments

The proposed amendments would affect some issuers that are small entities. The RFA defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction."[257] 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

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[256] 5 U.S.C. 603(a).

[257] 5 U.S.C. 601(6).

engaged or proposing to engage in an offering of securities that does not exceed $5 million. Under 17 CFR 230.157 and 17 CFR 240.0-10(a), an investment company is considered to be a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.

The proposed amendments would affect both reporting and non-reporting issuers. We estimate that approximately 52 currently reporting issuers that filed a Form S-8 in 2019 qualify as small entities that would be eligible to rely on the proposed amendments, but lack sufficient data to similarly estimate the number of small, non-reporting issuers who may be affected.[258] 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

The proposed amendments to Rule 701 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; and
- 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.

Because these two proposals affect only Rule 701 offerings that exceed $10 million, it is unlikely that they would affect small entities that are small businesses or small organizations, which, as defined for purposes of the RFA, are subject to a $5 million offering limit.

The remaining proposed amendments would apply to small entities to the same extent as other issuers, irrespective of size. The remaining proposed amendments to Rule 701 would:

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[258] This estimate is based on staff analysis of issuers, excluding co-registrants, with EDGAR filings of Form 10-K, 20-F and 40-F, or amendments, and an S-8 registration filed during the calendar year of January 1, 2019 to December 31, 2019. This analysis is based on data from XBRL filings, Compustat, and Ives Group Audit Analytics.

- Raise two of the three alternative regulatory ceilings that cap the overall amount of securities that a non-reporting company may sell pursuant to the exemption during any consecutive 12-month period; and
- Make the exemption available for offers and sales of securities under a written compensatory benefit plan (or written compensation contract) established by the issuer's subsidiaries, whether or not majority-owned.

With respect to Form S-8, the proposals would:

- Implement improvements and clarifications to simplify registration on the form, including:
  - Clarify the ability to add multiple plans to a single Form S-8; and
  - Clarify the ability to allocate securities among multiple incentive plans on a single Form S-8;
  - Permit the addition of securities or classes of securities by automatically effective post-effective amendment;
- Implement improvements to simplify share counting and fee payments on the form, including:
  - Permit the registration of an aggregate dollar amount of securities; and
  - Implement a new fee payment method for registration of offers and sales pursuant to Defined Contribution Plans;
  - Conform Form S-8's instructions with current IRS plan review practices; and
- Revise Item 1(f) of Form S-8 to eliminate the requirement that the tax effects of plan participation on the registrant be described.

Finally, for both the Rule 701 and Form S-8, the proposals would:

- Extend consultant and advisor eligibility to entities meeting specified ownership criteria designed to link the securities to the performance of services; and

- Expand eligibility for former employees to specified post-termination grants and former employees of acquired entities.

The proposed amendments are expected to modernize and simplify compensatory securities offerings for all issuers. As a result, we expect that the impact of the proposed amendments would be a reduction in the paperwork burden for all issuers, including small entities.[259] We expect that the nature of any benefits and costs imposed by the proposed amendments to be similar for large and small entities.[260]

The proposed amendments would not impose any new reporting or recordkeeping requirement, except that the new fee payment method for registration of offers and sales pursuant to Defined Contribution Plans would require such plans to file a post-effective amendment annually within 90 days after the end of the plan's fiscal year to pay the registration fee, in arrears, based on aggregate sales by the plan during the fiscal year. Currently, Defined Contribution Plans are required to keep track of the number of shares sold, so that they can maintain registration of sufficient shares to continue compensatory offers and sales without violating Section 5 of the Securities Act. The proposed fee payment method would simplify plan administration by eliminating the need to track individual offers and sales of shares and permit fees to be paid based on a known aggregate dollar amount after contributions are allocated to company stock. This should significantly simplify plan administration and reduce related costs for all reporting companies sponsoring Defined Contribution Plans that offer company stock, regardless of size.

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[259] For purposes of the Paperwork Reduction Act, we estimate a decrease of 0.5 burden hour per response for Rule 701 and a decrease of 1 burden hour per response for Form S-8. *See* Section VI, *supra.*

[260] *See* the discussion of the proposed amendments' economic effects on all affected parties, including small entities, in Section V, *supra.*

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.

We considered establishing different compliance or reporting requirements or further clarifying, consolidating, or simplifying compliance and reporting requirements for small entities. We have not proposed such alternatives, however, because we believe that investor protection is better served by the proposals we have chosen. In addition, some of the proposals, such as the proposed amendment to Rule 701(e), are unlikely to affect small entities due to the offering size involved.

With respect to performance versus design standards, the proposed amendments generally apply performance standards. For example, the proposed amendments provide issuers with discretion in crafting disclosures that meet broad principles and standards. We believe that it is not appropriate to apply design standards or different performance standards to small entities given that compensatory relationship between the issuer and employees and related investor protection concerns would be the same for small entities and other issuers. The proposed amendments generally would simplify, harmonize and improve the framework for compensatory

securities offerings, including for the offering exemption used by small entities. With respect to Rule 701, we believe that the proposed amendments would provide small entities greater flexibility to make compensatory securities offerings at lower costs. With respect to Form S-8, the proposed amendments would not establish any significant new reporting, recordkeeping, or compliance requirements for small entities, and would relieve them of burdens currently associated with registration of compensatory offerings. Accordingly, we do not believe it is necessary to exempt small entities from all or part of the proposed amendments.

G. Request for Comments

Request for Comment

We encourage the submission of comments with respect to any aspect of this IFRA. 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 the proposed amendments would duplicate, overlap or conflict with other federal rules.

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

VIII. SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),[261] the Commission must advise OMB as to whether the proposed amendments constitute a "major" rule if it results in, or is likely to result in:

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

We request comment on whether our proposal would be a "major rule" for purposes of the 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.

IX. STATUTORY AUTHORITY

The amendments contained in this release are being proposed under the authority set forth in Sections 3(b), 6, 7, 8, 10, 19(a) and 28 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 229, 230, and 239

Administrative practice and procedure, Reporting and recordkeeping requirements, Securities.

TEXT OF PROPOSED RULE AND FORM AMENDMENTS

In accordance with the foregoing, we are proposing to amend title 17, chapter II of the Code of Federal Regulations as follows:

PART 229 - STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S-K

[261] 5 U.S.C. 801 *et seq*.

1. The authority citation for part 229 continues to read in part as follows:

AUTHORITY: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78j-3, 78l, 78m, 78n, 78n-1, 78o, 78u-5, 78w, 78ll, 78 mm, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11 and 7201 et seq.; 18 U.S.C. 1350; sec. 953(b), Pub. L. 111-203, 124 Stat. 1904 (2010); and sec. 102(c), Pub. L. 112-106, 126 Stat. 310 (2012).

* * * * *

2. Amend § 229.601 by revising paragraph (b)(5)(iii) to read as follows:

§ 229.601 (Item 601) Exhibits.

* * * * *

(b) * * *

(5) * * *

(iii) If the securities being registered are issued under a plan that is subject to the requirements of the Employment Retirement Income Security Act of 1974, as amended, (29 U.S.C. 1001 *et seq.*) ("ERISA") and the plan has been amended subsequent to the filing of the documents required by paragraph (b)(5)(ii)(A) or (B) of this section, furnish an opinion of counsel that confirms the compliance of the amended provisions of the plan with the requirements of ERISA pertaining to such provisions.

* * * * *

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

3. The authority citation for part 230 continues to read as follows:

AUTHORITY: 15 U.S.C. 77b, 77b note, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78*l*, 78m, 78n, 78*o*, 78*o*-7 note, 78t, 78w, 78*ll*(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.

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4. Amend § 230.405 by adding in alphabetical order a definition for "*Defined contribution plan"* and revising the definition of "*Employee benefit plan"* to read as follows:

§230.405 Definitions of terms.

* * * * *

Defined contribution plan. The term *defined contribution plan* means an employee benefit plan (as defined in §230.405) that provides for specified or determinable contributions by the employee, employer or both to an individual account for each employee participant where the amount of benefits paid depends, in addition to the level of contributions, on the degree of investment success.

* * * * *

Employee benefit plan. The term *employee benefit plan* means any written purchase, savings, option, bonus, appreciation, profit sharing, thrift, incentive, pension or similar plan or written compensation contract solely for employees, directors, general partners, trustees (where the registrant is a business trust), officers, or consultants or advisors. However, consultants or advisors may participate in an employee benefit plan only if:

(1) They are:

(i) Natural persons; or

(ii) An entity, substantially all of the activities of which involve the performance of services; and substantially all of the ownership interests of which are held directly by:

(A) No more than 25 natural persons, of whom at least 50 percent perform such services for the issuer through the entity;

(B) The estate of a natural person specified in paragraph (1)(ii)(A) of this definition; and

(C) Any natural person who acquired ownership interests in the entity by reason of the death of a natural person specified in paragraph (1)(ii) (A) of this definition.

(2) They provide bona fide services to the registrant; and

(3) The services are not in connection with the offer or sale of securities in a capital-raising transaction, and do not directly or indirectly promote or maintain a market for the registrant's securities.

* * * * *

5. Amend § 230.413 by revising paragraph (a) and adding paragraph (c) to read as follows:

§230.413 Registration of additional securities and additional classes of securities.

(a) Except as provided in section 24(f) of the Investment Company Act of 1940 (15 U.S.C. 80a-24(f)) and in paragraphs (b) and (c) of this section, where a registration statement is already in effect, the registration of additional securities shall only be effected through a separate registration statement relating to the additional securities.

* * * * *

(c) Notwithstanding paragraph (a) of this section, the following additional securities or additional classes of securities may be added to a Form S-8 registration statement already in effect by filing a post-effective amendment to that Form S-8 registration statement:

(1) Securities of the same class as those already registered on a previously effective Form S-8 registration statement; and

(2) Securities of a class different than those registered on the effective Form S-8 registration statement.

6. Amend § 230.416 by adding paragraph (d) to read as follows:

§230.416 Securities to be issued as a result of stock splits, stock dividends and anti-dilution provisions and interests to be issued pursuant to certain employee benefit plans.

* * * * *

(d) Where a registration statement on Form S-8 relates to securities to be offered pursuant to a defined contribution plan, such registration statement shall be deemed to register an indeterminate amount of such securities.

7. Amend § 230.456 by adding paragraph (e) to read as follows:

§230.456 Date of filing; timing of fee payment.

* * * * *

(e)(1) Notwithstanding paragraph (a) of this section, an issuer that registers securities on Form S-8 to be offered pursuant to a defined contribution plan is not required to pay a registration fee at the time of filing but instead must pay a registration fee to the Commission not later than 90 days after the end of the defined contribution plan's fiscal year. The registration fee must be calculated in the manner specified in section 6(b) of the Act and § 230.457(h)(4) (Rule 457), based on the aggregate offering price for which the issuer's securities were sold pursuant to registration of an indeterminate amount of securities under this subsection during the plan's previous fiscal year , provided that: Not later than 90 days after the end of the relevant plan fiscal year during which it has publicly offered such securities, the issuer files a post-effective amendment to the Form S-8 with the Commission. Such post-effective amendment must be filed for the sole purpose of paying the fees owed by the issuer for sales pursuant to a defined contribution plan, and not for any other purpose. The post-effective amendment is required to contain only the registration statement cover page including the calculation of the registration fee table and the required signatures. The post-effective amendment also must be accompanied by the payment by the issuer of a registration fee with respect to the offering amount of the securities sold during the plan's previous fiscal year as required in this section.

(2) Where an issuer is registering an offering of an indeterminate amount of securities pursuant to a defined contribution plan under paragraph (e)(1) of this section, the securities sold will be considered registered, for purposes of section 6(a) of the Act, if the registration fee has been paid and a post-effective amendment is filed pursuant to paragraph (e)(1) of this section not later than the end of the 90-day period.

(3) A registration statement filed relying on the registration fee payment provisions of paragraph (e)(1) of this section will be considered filed as to the securities identified in the registration statement for purposes of this section and section 5 of the Act when it is received by the Commission, if it complies with all other requirements under the Act, including this part.

(4) For purposes of this section, if an issuer ceases operations, the date the issuer ceases operations will be deemed to be the end of the plan's fiscal year for the purpose of this Rule 456. In the case of a liquidation, merger, or sale of all or substantially all of the assets ("merger") of the issuer, the plan will be deemed to have ceased operations for the purposes of this section on the date the liquidation, merger or sale is consummated.

(5) An issuer paying the fee required by paragraph (e)(1) of this section or any portion thereof more than 90 days after the end of the fiscal year of the issuer shall pay to the Commission interest on unpaid amounts, calculated based on the interest rate in effect at the time of the interest payment by reference to the "current value of funds rate" on the Treasury Department's Financial Management Service Internet site at http://www.fms.treas.gov, or by calling (202) 874-6995, and using the following formula: $I = (X)(Y)(Z/365)$, where: I = Amount of interest due; X = Amount of registration fee due; Y = Applicable interest rate, expressed as a fraction; Z = Number of days by which the registration fee payment is late. The payment of interest pursuant to this paragraph (e)(5) shall not preclude the Commission from bringing an action to enforce the requirements of paragraph (e) of this section.

Instruction 1 to paragraph (e): To determine the date on which the registration fee must be paid, the first day of the 90-day period is the first calendar day of the fiscal year following the fiscal

year for which the registration fee is to be paid. If the last day of the 90-day period falls on a Saturday, Sunday, or Federal holiday, the registration fee is due on the first business day thereafter.

Instruction 2 to paragraph (e): For the purposes of this paragraph, the term "issuer" refers to the registrant who is offering shares to be purchased as part of a defined contribution plan. The term does not refer to the defined contribution plan as issuer of plan interests.

8. Amend §230.457 by adding paragraph (h)(4) to read as follows:

§230.457 Computation of fee.

* * * * *

(h) * * *

(4) If an issuer is registering an offering of an indeterminate amount of securities to be issued pursuant to a defined contribution plan in accordance with paragraph (e)(1) of § 230.456(e) (Rule 456(e)), the registration fee is calculated by multiplying the aggregate offering price of securities sold during the fiscal year by the fee payment rate in effect on the date of the fee payment.

9. Amend §230.701 by removing the Preliminary Notes, and revising paragraphs (a), and (c) through (e) to read as follows:

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

(a) *Exemption*. Offers and sales made in compliance with all of the conditions of this section are exempt from section 5 of the Act (15 U.S.C. 77e).

(1) This section relates to transactions exempted from the registration requirements of section 5 of the Act (15 U.S.C. 77e). These transactions are not exempt from the antifraud, civil liability, or other provisions of the federal securities laws. Issuers and persons acting on their behalf have an obligation to provide investors with disclosure adequate to satisfy the antifraud provisions of the federal securities laws.

(2) In addition to complying with this section, the issuer also must comply with any applicable state law relating to the offer and sale of securities.

(3) An issuer that attempts to comply with this section, but fails to do so, may claim any other exemption that is available.

(4) This section is available only to the issuer of the securities. Affiliates of the issuer may not use this section to offer or sell securities. This section also does not cover resales of securities by any person. This section provides an exemption only for the transactions in which the securities are offered or sold by the issuer, not for the securities themselves.

(5) The purpose of this section is to provide an exemption from the registration requirements of the Act for securities issued in compensatory circumstances. 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 exempt any transaction that is in technical compliance with this section but is part of a plan or scheme to evade the registration provisions of the Act. In any of these cases, registration under the Act is required unless another exemption is available.

* * * * *

(c) *Transactions exempted by 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 their employees, directors, general partners, trustees (where the issuer is a business trust), officers, or consultants and advisors, and their family members who acquire such securities from such persons through gifts or domestic relations orders. This section exempts offers and sales to former employees, directors, general partners, trustees, officers, consultants and advisors only if such persons were employed by or providing services to the issuer, its parents, its subsidiaries or

subsidiaries of the issuer's parent at the time the securities were offered or during a performance period for which the securities are issued as compensation that ended within 12 months preceding the employee's resignation, retirement or other termination. This section also exempts offers and sales to former employees of an acquired entity of securities issued in substitution or exchange for securities issued to such employees on a compensatory basis while such persons were employed by or providing services to the acquired entity. In addition, the term "employee" includes insurance agents who are exclusive agents of the issuer, its subsidiaries, parents, or subsidiaries of the issuer's parent, or derive more than 50% of their annual income from those entities. The term "employee" also includes executors, administrators and 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.

(1) *Special requirements for consultants and advisors*. This section is available to consultants and advisors only if:

(i) They provide bona fide services to the issuer, its parents, its subsidiaries or subsidiaries of the issuer's parent;

(ii) The services are not in connection with the offer or sale of securities in a capital-raising transaction, and do not directly or indirectly promote or maintain a market for the issuer's securities; and

(iii) They are:

(A) Natural persons; or

(B) An entity, substantially all of the activities of which involve the performance of services; and substantially all of the ownership interests of which are held directly by:

(1) No more than 25 natural persons, of whom at least 50 percent perform such services for the issuer through the entity;

(2) The estate of a natural person specified in paragraph (c)(1)(iii)(B)*(1)* of this section; and

(3) Any natural person who acquired ownership interests in the entity by reason of the death of a natural person specified in paragraph (c)(1)(iii)(B)*(1)* of this section.

(d) *Amounts that may be sold*—(1) *Offers.* Any amount of securities may be offered in reliance on this section. However, for purposes of this section, sales of securities underlying options must be counted as sales on the date of the option grant.

(2) *Sales*. The aggregate sales price or amount of securities sold in reliance on this section during any consecutive 12-month period must not exceed the greatest of the following:

(i) $2,000,000;

(ii) 25% of the total assets of the issuer (or of the issuer's parent if the issuer is a wholly-owned subsidiary and the securities represent obligations that the parent fully and unconditionally guarantees) measured at the issuer's most recent balance sheet date (if no older than its last fiscal year end); or

(iii) 15% of the outstanding amount of the class of securities being offered and sold in reliance on this section, measured at the issuer's most recent balance sheet date (if no older than its last fiscal year end).

(3) *Rules for calculating prices and amounts*—(i) *Aggregate sales price.* The term *aggregate sales price* means the sum of all cash, property, notes, cancellation of debt or other consideration received or to be received by the issuer for the sale of the securities. Non-cash consideration must be valued by reference to bona fide sales of that consideration made within a reasonable time or, in the absence of such sales, on the fair value as determined by an accepted standard. The value of services exchanged for

securities issued must be measured by reference to the value of the securities issued. Options must be valued based on the exercise price of the option.

(ii) *Time of the calculation.* With respect to options to purchase securities, the aggregate sales price is determined when an option grant is made (without regard to when the option becomes exercisable). With respect to other securities, the calculation is made on the date of sale. With respect to deferred compensation or similar plans, the calculation is made when the irrevocable election to defer is made.

(iii) *Derivative securities.* In calculating outstanding securities for purposes of paragraph (d)(2)(iii) of this section, treat the securities underlying all currently exercisable or convertible options, warrants, rights or other securities, other than those issued under this exemption, as outstanding. In calculating the amount of securities sold for other purposes of paragraph (d)(2) of this section, count the amount of securities that would be acquired upon exercise or conversion in connection with sales of options, warrants, rights or other exercisable or convertible securities, including those to be issued under this exemption.

(iv) *Other exemptions*. Amounts of securities sold in reliance on this section do not affect "aggregate offering prices" in other exemptions, and amounts of securities sold in reliance on other exemptions do not affect the amount that may be sold in reliance on this section.

(v) *Merged entities*. After completion of a business combination transaction, to calculate compliance with paragraph (d)(2) of this section, the acquiring issuer may use a *pro forma* balance sheet that reflects the business combination transaction or a balance sheet for a date after the completion of the business combination transaction that reflects the total assets and outstanding securities of the combined entity.

(e) *Disclosure that must be provided*. The issuer must deliver to investors a copy of the compensatory benefit plan or the contract, as applicable. In addition, if the aggregate sales price or amount of securities sold during any consecutive 12-month period exceeds $10 million, the issuer must deliver to investors, for sales after the $10 million threshold is exceeded, the following disclosure a reasonable period of time before the date of sale:

(1) If the plan is subject to the Employee Retirement Income Security Act of 1974 ("ERISA") (29 U.S.C. 1104-1107), a copy of the summary plan description required by ERISA;

(2) If the plan is not subject to ERISA, a summary of the material terms of the plan;

(3) Information about the risks associated with investment in the securities sold pursuant to the compensatory benefit plan or compensation contract; and

(4)(i) Financial statements required to be furnished by Part F/S of Form 1-A (Regulation A Offering Statement) (§§230.251 through 230.263), for either a Tier 1 or Tier 2 offering. Issuers must apply the age of financial statements requirements of Part F/S paragraphs (b)(3) and (4) at the time of sale. Foreign private issuers as defined in Rule 405 must provide a reconciliation to generally accepted accounting principles in the United States (U.S. GAAP) if their financial statements are not prepared in accordance with U.S. GAAP or International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB) (Item 17 of Form 20-F (§249.220f of this chapter)), provided that foreign private issuers that are eligible for the exemption from Exchange Act registration provided by Exchange Act Rule 12g3-2(b) (§240.12g3-2(b) of this chapter) may provide financial statements that are prepared in accordance with home country accounting standards without reconciliation to U.S. GAAP if financial statements prepared in accordance with U.S. GAAP or IFRS as issued by the IASB are not otherwise available.

(ii) In lieu of the financial statements required by paragraph (e)(4)(i) of this section:

(A) A foreign private issuer that is eligible for the exemption from Exchange Act registration provided by Exchange Act Rule 12g3-2(b) (§240.12g3-2(b) of this chapter) may provide the fair market value of the securities to be sold as determined consistent with the rules and regulations under Section 409A of the Internal Revenue Code (26 U.S.C. 409A) applicable to stock readily tradeable on an established securities market; and

(B) Any other issuer may provide an independent valuation report of the fair market value of the securities to be sold as determined by an independent appraisal consistent with the rules and regulations under Section 409A of the Internal Revenue Code (26 U.S.C. 409A) applicable to determination of the fair market value of service recipient stock for stock not readily tradable on an established securities market, as of a date that is no more than 6 months before the sale of securities in reliance on this exemption.

(5) If the issuer is relying on paragraph (d)(2)(ii) of this section to use its parent's total assets to determine the amount of securities that may be sold, the parent's financial statements must be delivered. If the parent is subject to the reporting requirements of section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)), the financial statements of the parent required by Rule 10-01 of Regulation S-X (§ 210.10-01 of this chapter) and Item 310 of Regulation D-B (§ 228.310 of this chapter), as applicable, must be delivered.

(6) If the sale involves a stock option or other derivative security that involves a decision to exercise or convert, the issuer must deliver disclosure a reasonable period of time before the date of exercise or conversion. If the sale involves a restricted stock unit or other derivative security that does not involve a decision to exercise or convert, the issuer must deliver disclosure a reasonable period of time before the date the restricted stock unit or similar derivative security is granted; *provided that,* if the sale is in connection

with the hire of a new employee, the disclosure must be delivered no later than 14 calendar days after the date the person begins employment. For deferred compensation or similar plans, the issuer must deliver disclosure to investors a reasonable period of time before the date the irrevocable election to defer is made.

(7) *Merged entities*. (i) In determining whether the amount of securities the acquiring issuer sold during any consecutive 12-month period exceeds $10 million, the acquiring issuer would not be required to include any securities sold by the acquired entity pursuant to the rule during the same 12-month period.

(ii) As long as the acquired entity complied with Rule 701 at the time it originally granted the derivative securities assumed by the acquiring issuer in the business combination transaction, the exercise or conversion of the derivative securities would be exempted by this section, subject to compliance, where applicable, with Rule 701(e). For assumed derivative securities for which the acquired entity was required to provide disclosure pursuant to Rule 701(e) that are exercised or converted after completion of the business combination transaction, the acquiring issuer would satisfy that obligation by providing information meeting the requirements of Rule 701(e) consistent with the timing requirements of Rule 701(e)(6).

* * * * *

PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

10. The authority citation for part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78*l*, 78m, 78n, 78o(d), 78o-7 note, 78u-5, 78w(a), 78*ll*, 78mm, 80a-2(a), 80a-3, 80a-8, 80a-9, 80a-10, 80a-13, 80a-24, 80a-26, 80a-29, 80a-30, 80a-37, and Sec. 71003 and Sec. 84001, Pub. L. 114-94, 129 Stat. 1312, unless otherwise noted.

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

a. Revising the cover page;

b. Adding Note 3 under Calculation of Registration Fee;

c. Revising General Instruction A.1(a)(1)

d. Revising General Instruction A.1(a)(3);

e. Re-designating the existing text of General Instruction E to be paragraph 1;

f. Amending General Instruction E to include paragraph 2

g. Revising paragraph (f) of Item 1;

h. Revising paragraph (b) of Item 8; and

i. Adding paragraph (c) to Item 8.

The revisions and additions read as follows:

Note: The text of Form S-8 does not, and these amendments 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

* * * * *

(Full title of the plan(s))

* * *

If this Form is a post-effective amendment to a registration statement filed pursuant to General Instruction E.2, filed to register additional securities or additional classes of securities pursuant to Rule 413(c) under the Securities Act, check the following box. [checkbox]

If this Form is a post-effective amendment to a registration statement filed pursuant to Rule 456(e)(1) solely to pay fees with respect to securities sold under defined contribution plans in the previous fiscal year, check the following box. [checkbox]

* * * * *

CALCULATION OF REGISTRATION FEE

* * * * *

Notes:

* * *

3. If the filing fee is calculated pursuant to Rule 457(h)(4) (§230.457(h)(4) of this chapter) under the Securities Act in a post-effective amendment filed pursuant to Rule 456(e) (§230.456(e) of this chapter) for defined contribution plans, only the title of the class of securities to be registered, the aggregate offering price for that class of securities, and the amount of registration fee need to appear in the Fee Table.

* * * * *

GENERAL INSTRUCTIONS

A. Rule as to Use of Form S-8

1. * * *

a. * * *

(1) For purposes of this form, the term "employee" is defined as any employee, director, general partner, trustee (where the registrant is a business trust), officer, or consultant or advisor. Form S-8 is available for the issuance of securities to consultants or advisors only if:

(i) They provide bona fide services to the registrant;

(ii) The services are not in connection with the offer or sale of securities in a capital-raising transaction, and do not directly or indirectly promote or maintain a market for the issuer's securities; and

(iii) They are:

(A) Natural persons; or

(B) An entity, substantially all of the activities of which involve the performance of services; and substantially all of the ownership interests of which are held directly by:

(1) No more than 25 natural persons, of whom at least 50 percent perform such services for the issuer through the entity;

(2) The estate of a natural person specified in paragraph *(1)*; and

(3) Any natural person who acquired ownership interests in the entity by reason of the death of a natural person specified in paragraph *(1)*.

(2) * * *

(3) The term "employee" also includes former employees of the issuer, former employees of an entity acquired by the issuer, as well as executors, administrators or beneficiaries of the estates of deceased employees, guardians or members of a committee for incompetent former employees of the issuer or an entity acquired by the issuer, or similar persons duly authorized by law to administer the estate or assets of former employees of the issuer or an entity acquired by the issuer. The inclusion of all individuals described in the preceding sentence in the term "employee" is only to permit registration on Form S-8 of:

(i) the exercise of employee benefit plan stock options and the subsequent sale of the securities, if these exercises and sales are permitted under the terms of the plan;

(ii) the acquisition of registrant securities pursuant to intra-plan transfers among plan funds, if these transfers are permitted under the terms of the plan;

(iii) the acquisition of registrant securities as compensation for a former employee's service to the issuer during a performance period ending within the 12 months preceding the former employee's resignation, retirement or other termination; and

(iv) with respect to former employees of an entity acquired by the issuer, the acquisition of securities issued in substitution or exchange for securities issued to such persons by the acquired entity on a compensatory basis while such persons were employed by the acquired entity.

* * * * *

E. Registration of Additional Securities

1. With respect to the registration of additional securities of the same class as other securities for which a registration statement filed on this Form relating to an employee benefit plan is effective, the registrant may file a registration statement consisting only of the following: the facing page; a statement that the contents of the earlier registration statement, identified by file number, are incorporated by reference; required opinions and consents; the signature page; and any information required in the new registration statement that is not in the earlier registration statement. If the new registration statement covers restricted securities being offered for resale, it shall include the required reoffer prospectus. If the earlier registration statement included a reoffer prospectus, the new registration statement shall be deemed to include that reoffer prospectus; provided, however, that a revised reoffer prospectus shall be filed, if the reoffer prospectus is substantively different from that filed in the earlier registration statement. The filing fee required by the Act and Rule 457 (§230.457) shall be paid with respect to the additional securities only.

2. An issuer may register additional securities or classes of securities, pursuant to Rule 413(c) by filing a post-effective amendment to the effective registration statement. The issuer may add subsidiaries as additional registrants, whose securities are eligible to be sold as part of the Form S-8 by filing a post-effective amendment identifying the additional registrants, and the registrant and the additional registrants and other persons required to sign the registration statement must sign the post-effective amendment. The post-effective amendment must consist of the facing page; any disclosure required by this Form that is necessary to update the registration statement

to reflect the additional securities, additional classes of securities, any required opinions and consents; and the signature page. Required information, consents, or opinions may be included in the prospectus and the registration statement through a post-effective amendment or may be provided through a document incorporated or deemed incorporated by reference into the registration statement and the prospectus that is part of the registration statement.

* * * * *

Item 1. Plan Information.

* * * * *

(f) Tax Effects of Plan Participation

Describe briefly the tax effect that may accrue to employees as a result of plan participation and whether or not the plan is qualified under Section 401(a) of the Internal Revenue Code.

Note: If the plan is not qualified under Section 401 of the Internal Revenue Code of 1986, as amended, consideration should be given to the applicability of the Investment Company Act of 1940. *See* Securities Act Release No. 4790 (July 13, 1965).

* * * * *

Item 8. Exhibits.

* * * * *

(b) Neither an opinion of counsel concerning compliance with the requirements of ERISA nor an Internal Revenue Service determination letter that the plan is qualified under Section 401 of the Internal Revenue Code shall be required for any plan amendment if, in lieu thereof, the response to this Item 8 includes an undertaking that the registrant will maintain the plan's compliance with the requirements of ERISA and will make all changes required to maintain such compliance in a timely manner.

(c) Provided that if the plan adopted is a pre-approved plan that previously received an opinion letter from the Internal Revenue Service, neither an opinion of counsel concerning compliance

with the requirements of ERISA nor an company-specific Internal Revenue Service opinion letter that the plan is qualified under Section 401 of the Internal Revenue Code shall be required

if, in lieu thereof, the registrant files a copy of the IRS opinion letter approving the pre-approved plan that was issued to the provider of the plan, unless the company makes revisions to the pre-approved plan that may call into question whether the plan, as so revised, is still qualified.

* * * * *

By the Commission.

Dated: November 24, 2020

Vanessa A. Countryman
Secretary

[FR Doc. 2020-26390 Filed: 12/10/2020 8:45 am; Publication Date: 12/11/2020]