September 24, 2018

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

RE: File Number S7-18-18
Concept Release on Compensatory Securities Offerings and Sales
Release No. 33-10521

Ladies and Gentlemen,

I am writing on behalf of the National Association of Stock Plan Professionals (NASPP) to comment on the Concept Release on Compensatory Securities Offerings and Sales (File Number S7-18-18). The NASPP is a professional association representing approximately 6,000 members. Our members are directly involved in the design, oversight, and administration of stock compensation programs and include stock plan administrators; human resource professionals; corporate secretaries; financial and accounting professionals; securities, tax, and benefits attorneys; and compensation consultants. Our membership includes corporate issuers of all sizes, from all regions of the United States, and from a wide spectrum of industries.

We appreciate the opportunity to comment on the concept release. Because our members are directly involved in the design, oversight, and administration of stock compensation programs, specifically stock options, stock awards, and employee stock purchase plans, we believe we can offer a useful perspective on how the proposals discussed in the concept release will impact these plans. Our comments focus on Part III of the release, which relates to Form S-8.

We are supportive of the Commission's efforts to simplify Form S-8. Simplification of Form S-8 will reduce or eliminate one burden among the many that public companies face and will remove one potential barrier to becoming an Exchange Act reporting company.

Moreover, we note that investors have access to a wealth of information about reporting companies and their stock compensation plans through the public filings these companies make with the Commission, which include their financial statements. Under US GAAP, companies are required to provide a description of their stock plans and information on plan activity in the notes to their financial statements. Public companies must provide a summary of their plan when asking shareholders to vote to approve the plan, typically include a copy of the plan as an exhibit to their proxy statement in years in which

shareholders are asked to vote on the plan, and must publicly file the forms of grant agreement used for awards that are issued to officers under the plan. Pursuant to stock exchange listing requirements, public companies generally must obtain shareholder approval for any compensatory stock plans they seek to implement.

Part III, B. Form S-8 Eligible Plan Participants

To the extent that the Commission changes the scope of individuals eligible for compensatory offerings under Rule 701, such as to include gig economy workers, we encourage the Commission to make corresponding changes to Form S-8. We believe it is important that Form S-8 remain aligned with Rule 701 with respect to eligible plan participants.

If Rule 701 eligibility is expanded without a corresponding expansion of Form S-8, issuers would be faced with a difficult decision when deciding to become reporting companies with respect to those workers who are eligible plan participants under Rule 701 but not under Form S-8. Issuers would be forced to either cease granting awards to these participants or find another registration statement that could be utilized to continue granting to them, which would likely be more burdensome than Form S-8, even in its current iteration. We expect that this would be a significant barrier to becoming a reporting company.

Part III, C. Administrative Burdens

We support the suggestion to allow issuers to register all employee benefit plans on a single Form S-8. We think this would address a number of challenges issuers currently face with respect to registering plans on Form S-8.

In particular, this approach would create a pool of registered shares that could be issued under the company's various benefit plans as necessary. Under current Form S-8, issuers are forced to register a separate pool of shares for each plan, and these pools cannot be used interchangeably. This is a frustrating limitation for issuers that would be eliminated if one Form S-8 could cover all benefit plans.

If a single Form S-8 were used to register all benefit plans, we do not think any additional information would need to be disclosed when shares are authorized for issuance under a given plan. We note that under the listing requirements of the major exchanges, shareholders will have voted to approve the plan, with only limited exceptions, such as for inducement awards (which must be separately disclosed via press release) or statutory stock options (which are subject to shareholder approval under the tax code). Issuers should continue to be required to prepare a plan prospectus that must be distributed to eligible plan participants, per the current requirements of Form S-8.

We encourage the Commission to allow new shares to be registered by an automatically effective post-effective amendment to Form S-8. We believe this would be a workable solution for issuers that would eliminate the need to consider alternative filing fee structures, such as on a pay-as-you-go or periodic basis.

Although we are open to requiring Form S-8 registration fees to be paid on a pay-as-you-go or periodic basis, we note that this may not be as helpful in the context of employee benefit plans as it is in the context of capital raising efforts. Issuers do not have as much control over when shares are issued under employee benefit plans as they do when raising capital,

and they may find it more challenging to forecast when the filing fees would need to be paid. We think issuers would prefer to register the shares (via a post-effective amendment) at the time that a new plan is adopted or new shares are allocated to an existing plan, and pay the fees at that time.

We expect that, in most cases, allowing issuers to file one Form S-8 covering all employee benefit plans will reduce administrative burdens. In some cases, however, issuers may find it administratively burdensome to register certain plans on the same Form S-8. For example, 401(k) plans are often administered separately from a company's long-term incentive plans, and thus some companies may find it challenging to monitor and track both types of plans under a single Form S-8 filing. We think it would be helpful if the Commission were to allow companies the alternative of filing separate Forms S-8 for separate plans and to decide which plans to include under each Form S-8 filing.

Part III, D. Form S-8 Generally

We are supportive of extending the Rule 701 exemption to Exchange Act reporting companies and rescinding Form S-8, provided the following concerns are addressed:

- Resale restrictions: Shares issued in reliance on Rule 701 are currently considered restricted securities, and, as such, are subject to restrictions on resale. Public companies are likely to view these resale restrictions as a significant disadvantage of relying on Rule 701 in lieu of Filing Form S-8.
- $10 million limit: The requirement to furnish additional disclosures related to risk factors and financial information, which is imposed when companies issue shares having a value in excess of $10 million during a one-year period, would be problematic for reporting companies (except for certain smaller reporting companies that might not exceed this limit) unless the disclosure requirements are deemed satisfied by compliance with general Exchange Act reporting obligations.
- Blue sky laws: We are concerned that failure to file a Form S-8 might cause shares issued under employee benefit plans to be subject to registration under state securities laws. If so, public companies would also likely find this to be a significant disadvantage of relying on Rule 701.

We do not think that Form S-8 is necessary to provide an incentive for public companies to remain current in their Exchange Act reporting obligations. We think there are numerous other incentives that address this concern, not the least of which is the threat of delisting. Likewise, we do not think that the lack of a registration statement for employee benefit plans will decrease the care issuers or their representatives use in preparing Exchange Act filings. There are many other reasons for giving proper attention to Exchange Act filings, including the threat of litigation over misstatements or omissions.

However, we believe that reporting companies should be required to be current in their Exchange Act reports in order to rely on the Rule 701 exemption.

Other Matters

<u>Corrections Program</u>

We note that it would be helpful for reporting companies to have a method to correct for issuances that exceed the number of shares registered on Form S-8. Although companies

are generally careful about monitoring and tracking issuance under employee benefit plans, it is difficult to predict the number of shares that will be issued under some arrangements (such as in the case of performance awards where the number of shares to be issued varies based on performance) or employee stock purchase plans (where the number of shares to be issued varies based on the stock price and employee contributions at the time of issuance).

Despite careful planning, companies sometimes find that their share issuances have exceeded the number of shares registered on their Form S-8. Currently, the only viable recourse in this situation is a rescission offer.[1] It would be helpful if there were another solution; perhaps a grace period during which the additional shares could be registered provided that the company is current in its Exchange Act reporting and has not had any other such occurrences within a specified time period.

We note that the changes the Commission is currently considering, particularly allowing additional shares to be registered via an immediately effective post-effective amendment, alternative payment structures (such as pay-as-you-go or periodic payments), or extending Rule 701 to reporting companies would alleviate this concern. If, however, these changes are not adopted, we hope the Commission will consider another method of correction.

ESPPs at IPO

It is common for companies that are completing an initial public offering to implement an employee stock purchase plan (ESPP) in conjunction with the IPO. Currently, the Form S-8 registration requirement is a significant obstacle in this process. It is our understanding that 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. Consequently, for the 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 company is not yet public.

Most companies 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. In addition, companies universally want shares purchased pursuant to their ESPPs to be covered under a Form S-8 registration to avoid the resale restrictions that apply when shares are exempted from registration. For most companies, this entails a cumbersome process under which employees are automatically enrolled in the plan before the company can communicate with them about it. Employees are then given a short period of time after the IPO (at which time the Form S-8 for the plan is effective) to confirm their participation or withdraw from the ESPP.

It would be helpful if the Commission could provide some relief on this issue; it would certainly remove a barrier companies face when undertaking an initial public offering. Preventing companies from communicating about the plan to employees and preventing them from allowing employees to enroll in the until the Form S-8 is effective on the IPO date puts considerable pressure on companies to educate employees about the plan and

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[1] There are other possible solutions, such as applying the no-sale doctrine for awards that do not require payment of consideration and invoking the use of Rule 506 for accredited investors, but these are not sure fixes and involve a number of drawbacks.

collect enrollments in a very short window of time after the IPO. In addition, we expect that most employees would appreciate having information about the plan in advance and having a longer period of time in which to evaluate their decision to participate than is generally afforded to them under the current process.

We suggest that any of the following approaches would alleviate this barrier for companies:

- Extend Rule 701 to public companies, which would eliminate entirely the need for a Form S-8 filing for the plan.
- View the purchase as the investment decision, provided that employees are permitted to withdraw prior to the purchase (which is the case for the majority of ESPPs). We note that employees are not fully committed to purchasing the shares until they are no longer able to withdraw from the plan and receive a refund of their contributions. This would allow the company to file the Form S-8 after communicating with employees about the plan and enrolling them.
- Allow companies to communicate about the plan to employees and enroll them prior to the effective date of the Form S-8, provided that the Form S-8 is effective by the date that contributions under the plan begin. Contributions generally do not begin until the first pay period after employees are enrolled in the plan. Until this date, employees have not made any investment and can withdraw without consequences. This approach ensures that the Form S-8 is effective before employees have made any contributions to the plan but would allow the company to communicate with employees in advance of the IPO.

I am grateful for this opportunity to comment on the Concept Release, and I appreciate your time and consideration. I would be happy to answer any questions you might have or meet with you to discuss my comments.

Sincerely,

Barbara A. Baksa
Executive Director

Working Group Drafting Committee:

Art Meyers
Mike Melbinger
Wells Miller
Ben Gibbons
Thomas Welk