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Global Reward Update – Wrap up

As we all start to think about a well- earned end of year rest, we thought a quick global tour, (virtual of course!) was in order. We've summarised key global tax & legal technical developments impacting global incentive plans. Some are an update on information provided in previous Global Reward Updates (GRUs) and others are new developments.

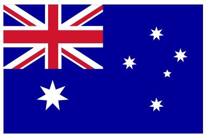
We hope this summary is useful, and if you have any questions please do get in touch.

Click the below links to view the relevant article:

Tax

Legal

Global tax updates



Australia: Changes to Deferred Income Tax Point for ESS

Our June 2021 GRU explained the Australian government's intention to remove cessation of employment as an early income tax point for employee share schemes (ESS). Click here to read our previous GRU.

Following the original proposal, Deloitte and other advisers provided feedback in consultations and we are pleased to see updates have been made ahead of publishing the Bill, which set out the final details of the change.

The change will now apply to both untaxed ESS awards and new ESS award grants (regardless of when the ESS award was granted). This is a welcome update because originally the change applied only to new ESS awards granted after the tax year the amended legislation took effect, which would have led to a delayed impact.

Should Royal Assent be given in this Australian tax year (i.e., 1 July 2021 – 30 June 2022), the revised tax treatment will apply to all ESS awards from 1 July 2022 onwards.

We recommend employers consider the impact of this change on the practical operation of their ESS plans, in particular the communication of cash or share delivery alternatives for Australian participants.

Canada: Notification requirement when granting employee share options

Our March 2021 GRU explained that, starting 1 July 2021, organisations which are subject to the new stock option rules are required to formally notify their Canadian tax resident employees if new stock options grants are "non-qualified" securities, (i.e., stock options that are not eligible to the preferential treatment, either because they exceed the $200,000 annual vesting limit, or because they are designated as such) for Canadian tax purposes, within 30 days of the date of grant. There is no such requirement with respect to options that are "qualified" securities, (i.e., stock options that will continue to benefit from the existing preferential tax treatment, up to a limit of $200,000 per employee). Click here to read our previous GRU.

The question of what counts as "notification" has been a grey area, and we are awaiting guidance from the Canada Revenue Agency ("CRA"). Until guidance is published, **we recommend** employers provide a formal notice (typically through the option grant agreement, or through a separate letter) to all participants indicating whether their options are qualified or non-qualified. We hope that the CRA will take a pragmatic approach in their guidance, for example indicating that it will be sufficient for awards to be separated in an administrator portal or similar.

The employer is also required to notify the CRA in a prescribed form, that the option is a non-qualified security, on or before the employer's filing due date for the taxation year in which the stock options are granted. Until we hear further guidance from the CRA on the "prescribed form", **we recommend** employers to attach a statement to their corporate tax return indicating the option grants that are non-qualified.

We will publish a further update where any additional guidance or commentary is received.

Canada: New hybrid sourcing for mobile employees

The CRA have proposed a new hybrid sourcing methodology for international mobile employees which would apply to RSUs, or other deferred share units and share appreciation rights, received from January 2021.

This new sourcing approach would consider (in the absence of other facts and circumstances indicating otherwise) that the full value of an award at grant should be sourced to the country where services are performed in the year of grant, and any increase in value between the time of grant and vesting should be sourced based on the location where services are performed.

This unusual sourcing methodology would be quite unique globally and could lead to some unintended tax results. For international mobile employees, allocating a value at grant to the services rendered in a period before the grant may directly impact the quantum of the employment benefit that will be subject to tax in all relevant jurisdictions and could trigger double taxation. This will also increase the complexity in properly assessing the corporate tax and employer implications related to such RSUs.

Our discussions with CRA on this point are ongoing and there is continuing uncertainty, but if implemented this would have a significant impact on internationally mobile employees. Employers may wish to prepare for this by reviewing existing RSU plans and considering the applicability of the new hybrid sourcing methodology. **We will keep this under review and keep you updated.**

China: New employer reporting requirements for employee incentive plans

We hope you have seen our recent GRU relating to China and the new national-wide requirements for tax registrations for employers offering equity-based incentive plans. This highlighted the need for some employers to file the relevant tax registration by 31 December 2021. Click here to read our previous GRU.

Due to the different interpretations of local tax authorities, **we recommend** employers work with their tax adviser to review the status of their plan registration and tax reporting and consider how the latest requirements may impact their plans.

Germany: Increase of annual tax exemption for share-based compensation

The annual tax exemption available for share-based compensation increased from €360 to €1,440 with effect from 1 July 2021 and applies to all share-based awards during the 2021 calendar year. This exemption is subject to specific conditions, including a requirement to offer the plan to all employees. This exemption may be useful for companies operating all employee plans, and it would be worth considering whether existing plans meet the conditions. **Please let us know** if you would like assistance considering whether your plans satisfy the relevant conditions or designing a new plan that would be qualifying.

Germany: New tax favorable treatment for start-up companies

A new preferential tax treatment has been introduced for share-based compensation granted by start-up companies and other small / medium-sized enterprises. Under this new tax regimes and subject to meeting certain conditions, the tax point for an award can be deferred until the earlier of:

i. sale of the relevant shares,
ii. the date employment ends, and
iii. 12 years after award vest/delivery.

At the deferred tax point, the fair market value of the shares awarded is generally taxed as employment income at normal income tax rates. Although, special beneficial provisions (the 1/5th rule) may apply where the sale takes place more than 3 years after awards vested and were delivered.

The key conditions to qualify for the new preferential tax treatment are that the company should have less than 250 employees, it must not be older than 12 years and should meet certain financial criteria (annual turnover ≤ €50 million and balance sheet value ≤ €43 million). **Please let us know** if you would like assistance considering whether your plans satisfy the relevant conditions or designing a new plan that would be qualifying.

Netherlands: Proposed change to tax point for options with sales restrictions

To make the Netherlands more attractive to start-up companies and other companies whose shares are not freely tradeable, the Dutch authorities have proposed a change in the point at which shares acquired from employee share options are taxed.

Under the proposal, where employees exercise an option and acquire shares that are not freely tradeable, they will be subject to tax on the earlier of:

i. when the employee can trade the shares (e.g., when sales restrictions are lifted), and
ii. five years after the share acquisition (for listed companies) or five years after the IPO (for companies that are unlisted on exercise).

This change should help employees who would otherwise be subject to a 'dry tax charge' at exercise.

Employees can opt out of this tax deferral and be subject to tax on their options at the exercise date. We are awaiting guidance on the format of this election.

Where the shares received can be sold immediately on exercise, the gain will continue to be taxable upon exercise.

The current proposal remains under discussion and is subject to change. **We will keep this under review and keep you updated.**

The Dutch authorities have also abolished the discount for companies with an R&D statement. Previously, under certain conditions, employees were subject to tax on 75% of the benefit received when exercising an option. This scheme had limited use in practice.

Global legal updates

Canada: Enforceability of 'bad leaver' provisions

The Ontario Court of Appeal has overturned a previous finding by the Ontario Superior Court of Justice that held that the termination provisions in a stock award were unenforceable as the employer did not bring them to the employee's attention when the employee accepted the terms and conditions of the award. Whilst this is a softening of approach, employers should of course continue to consider contractual enforceability in general. Active acceptance of negative terms will always mean there is less risk of the enforceability of a provision being questioned. Companies should remain aware of developing practice in this area and carefully consider how they communicate termination provisions in any awards. **We recommend** reviewing acceptance documents and processes and taking further advice in this area if in any doubt.

China: Changes to data protection legislation

A new data protection law (the Personal Information Protection Law ("PIPL") came into effect on 1 November, marking China's first set of comprehensive rules on data collection, processing, and protection. Whilst this is not a share plan specific issue, as share plans involve the use and transfer of data, **we recommend** that employers assess whether their existing data protection framework in China meet these new requirements.

China: Update to Beijing SAFE practice

We understand that Beijing State Administration of Foreign Exchange ("SAFE") will require additional information when any "alteration registration" is submitted, (i.e., filings in relation to changes to the operation of any SAFE-registered share plan). The specific information required will depend upon the type of plan operated but is substantial and may lead to delays in filings. Where issuers are registered in the Beijing province for SAFE, **we recommend** issuers liaise with SAFE as soon as possible should any alterations to their plans be anticipated.

China: Update to Shanghai SAFE practice

There have also been updates for companies registered with SAFE in Shanghai. These companies have previously had to make an annual update filing each year. This may no longer be required unless there has been a significant change to the plan.

For plan rules involving the transfer of money out of China, employers may no longer need to apply for a quota annually, (a cap on the amount of currency that can leave China under the SAFE registered plan). From January 2022, outbound remittance applications can instead be made to cover a 3-year period.

As SAFE provided these updates orally, **we recommend** employers assess and communicate with SAFE on a case-by-case basis, to consider how these updates apply to them. Some companies may have particular reporting requirements as part of the terms of their own SAFE registration.

Romania: Removal of additional disclosures

Previously, companies had to provide additional securities law disclosures in addition to those required under the EUPR. From 24 September 2021, the Romanian securities authorities have removed the need for companies to provide these additional disclosures.

United Kingdom: Considering data protection and prospectus rules following Brexit

Share plan rules and related communications should be reviewed and updated to reflect changes to the legislative framework following the UK's departure from the EU. Of particular note is the replacement of the GDPR with the UK GDPR and EUPR with the UK prospectus rules.

The UK data protection rules remain very similar to GDPR following Brexit and in June 2021 the EU recognized the UK's data protection rules as being equivalent to the GDPR for data protection purposes. In September 2021 the UK announced the launch of potential reforms of its data protection regime, which may have implications in future for the equivalence decision.

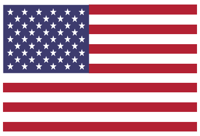
The UK prospectus rules are also under review and a consultation regarding potential amendments to the UK Prospectus Regulation closed in September 2021. The consultation includes a discussion on extending the employee share plan exemption to cover "workers" and offers made by employee benefit trusts. The government has stated that it is committed to "improving the prospectus regime inherited from the EU" and we expect a response to be published during 2022. **We will keep this under review and keep you updated.**

United Kingdom: Executive compensation: Latest FTSE reviews and updated investor guidance on executive remuneration

It has been a busy season for investor guidance. The Investment Association has published updated Principles of Remuneration for 2022 (more details available here) and Glass Lewis has published its revised 2022 proxy voting guidelines for the UK (more details available here).

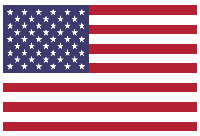
Deloitte's Guides on Directors remuneration in the FTSE 100, 250, Small Cap and AIM are now all available. These contain data on the latest trends on moves to RSU plans, the use of ESG targets in bonus and long-term incentive plans, and post-employment holding periods.

Please let us know if you would like to receive updates directly from our executive compensation team or if you would like to discuss the impact on your share plans.



United States: Proposal of clawback rules

The US are dusting off proposals to implement clawback rules, which were originally proposed in 2015. The SEC has proposed rules that would obligate the national securities exchanges to adopt listing standards requiring listed companies to adopt and disclose clawback policies. Clawback would apply where a company is required to prepare an accounting restatement to correct a material error, and would apply to incentive-based compensation received by current and former executive officers during the three fiscal years preceding such restatement. **We will keep this under review and keep you updated.**



United States: Proposed changes to Rule 701 and Form S-8

Updates have been proposed to US securities laws applying to incentive plans. Under the proposals Rule 701 (which usually applies for non-US reporting issuers) will have relaxed reporting and expanded eligibility. Form S-8 (which applies to US reporting issuers) will also be simplified with the aim of cost reduction.

The updates also contain proposals for "gig economy workers" to participate in share plan exemptions - a theme in need of consideration globally.

Finally, for companies relying on Reg D (another potential securities law exemption) in New York, the filing requirements have become simpler. Companies were previously required to file form 99 (which was cumbersome and required lots of information) but this has been replaced with a new, simpler electronic filing. **We will keep this under review and keep you updated.**

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