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Client Alert

Global Equity Services | January 2017

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EU Agrees on Final Version of Prospectus Regulation; All EU Issuers Can Expect to Benefit From the Employee Share Plan Exemption Starting in 2019

In early December, the European Parliament, the EU Council and the EU Commission reached agreement on revisions to the EU Prospectus Regulation. The EU Prospectus Regulation will replace national the EU Prospectus Directive, which (as implemented by each EU Member State) governs the offer of securities in Europe.

On December 20, the Permanent Representatives Committee of the EU Council approved the revised EU Prospectus Regulation and it now awaits adoption by the EU Parliament (which should be a mere formality). once adopted, the new EU Prospectus Regulation will become effective 24 months after its publication in the Official Journal, which we expect will occur in early 2017 and which would mean that the new EU Prospectus Regulation would become operative during the first half of 2019.

Under the new EU Prospectus Regulation any issuers who offer share-based incentive programs to their European-based employees will be exempt from the prospectus obligations and no longer will need to file a prospectus with the regulatory authority of the issuer's home Member State. This will be the case regardless of the type of plan offered, the number of employees per Member State to whom participation is offered or the value of the offering. Furthermore, the exemption will now apply even if the issuer is not incorporated or headquartered in the EU or listed on an EU exchange.

Instead, in case the offer is otherwise deemed a public offer (usually if an ESPP is offered to more than 150 employees in any Member State), issuers simply will need to make available a document containing basic information regarding the offering and the issuer, including the number and nature of the securities being offered, the reasons for the offering and certain details regarding the offering. The issuer will not need to have this "offering document" approved by the regulatory authority of any Member State, and from a practical perspective, the document will be substantially shorter (normally less than 10 pages) when compared to a typical EU prospectus (typically over 100 pages) and substantially easier (and less costly) to prepare.

The EU Prospectus Regulation should result in the following consequences for issuers who currently have to file an EU prospectus for share-based offerings to employees in Europe:

- Issuers operating on a calendar year basis should be prepared to continue filing EU prospectuses for 2017, 2018 and possibly 2019 (if the new EU Prospectus Regulation is published during the second quarter of 2017)
- Issuers operating on the basis of fiscal years ending in other months should be prepared to continue filing EU prospectuses for 2017 and 2018.

We will provide additional information about the new EU Prospectus Regulation and what it will mean for non-European companies offering equity compensation awards to employees in Europe as further details become available. However, the new EU Prospectus Regulation represents welcome relief for companies that have needed to prepare EU prospectuses for employee share-based offerings in Europe and a new opportunity for companies that have excluded European employees from share-based plans due to the onerous and costly nature of EU prospectuses.

We would like to thank Manuel Lorenz, Baker McKenzie Frankfurt, for his assistance with drafting this alert.

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October 2016

GES Practice Group Update

Now Available Online! The Global Equity Services Annual Grant Questionnaire

To ease the burden on your stock administration team, Baker & McKenzie has developed a comprehensive e-questionnaire to allow you to organize and submit your annual grant data directly to your Global Equity Services team more efficiently.

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Belgium

Tightening View of Belgian Social Security Administration With Respect to Equity Awards

In a recent case, the Belgian Social Security Administration took the position that the remuneration was “borne” by the local Belgian employer due to the fact that the local Belgian employer made (non-binding) recommendations as to who should receive certain awards and for how many shares.

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Bulgaria

Withholding, Reporting and Social Tax Obligations on Equity Award Income Clarified in Bulgaria

In this Issue

Recent opinion letters issued by the Bulgarian tax authorities have clarified income tax withholding and reporting and social tax obligations for stock option and restricted stock unit income in Bulgaria.

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Costa Rica

Social Insurance Contributions No Longer Due on Equity Award Income in Costa Rica

The Costa Rican Social Security Agency has taken the position that social insurance contributions are not due on equity award income where the local entity is not taking a corporate tax deduction for the cost of the awards.

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European Union

EU Market Abuse Regulation

The EU Market Abuse Regulation came into force on July 3, 2016, replacing the previous Market Abuse Directive with immediate effect.

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EU General Data Protection Regulation

The new EU data protection framework entered into force on May 25, 2016 and organizations have two years from now to comply with the new rules.

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France

Loi Macron Further Clarified in New Tax Guidelines

On June 14, 2016, the French Tax Administration issued guidelines commenting on various changes to the qualified RSU regime under Loi Macron.

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Income Tax Withholding May

Proposed Dodd-Frank Rules Regulating Incentive Compensation at Certain Financial Institutions

Vietnam

Vietnam Clarifies Process for Obtaining Approval under new Exchange Control Regime

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- June Anne Burke
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Become Required Starting With Calendar Year 2018

The draft Finance Act contains provisions creating an obligation for the employer to withhold personal income on employment income, starting with calendar year 2018.

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Sweden

Proposal for Tax-Qualified Option Regime in Sweden

The Swedish government is considering the introduction of a tax-qualified option regime. Under the proposal, qualified stock options would not be subject to income tax at exercise.

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United States

IRS Eliminates Requirement to Include 83(b) Election with Annual Tax Return

The IRS issued final regulations eliminating the requirement for taxpayers making an "83(b) election" to enclose a copy of the election with their annual tax return.

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Shareholders Challenging Section 16 Exemption Availability Where Net Share Tax Withholding is Elective

Several companies have received letters from the plaintiff's bar seeking to recover "short-swing profits" from Section 16 officers.

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NYSE Issues Guidance Confirming that Equity Plan Amendments to Allow Maximum Tax Withholding Do Not Require Shareholder Approval

The NYSE issued guidance clarifying that an amendment to an equity compensation plan to provide that the tax withholding obligations may be calculated based on the participant's maximum tax rate will not require shareholder approval.

- Brian Wydajewski

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Proposed Dodd-Frank Rules Regulating Incentive Compensation at Certain Financial Institutions

In April 2016, six federal agencies regulating the financial sector issued proposed rules under Section 956 of the Dodd-Frank Act, superseding the initially proposed rules issued in April 2011.

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Vietnam

Vietnam Clarifies Process for Obtaining Approval Under New Exchange Control Regime

The State Bank of Vietnam has offered several clarifications regarding the practical considerations of Circular 10 for companies currently offering, or considering offering, equity awards in Vietnam.

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Baker & McKenzie Alert

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BREXIT

Impact On Your Global Share/Incentive Plans

In a referendum on June 23, 2016, the UK voted to exit from the European Union ("EU"), the so-called Brexit. The UK Government is now likely to commence the formal process of withdrawing from the EU, although the timing is unclear.

For companies offering awards under employee share and other incentive plans in the UK and elsewhere in Europe, Brexit has no immediate effect on such offerings. The vote yesterday was an advisory vote and has no direct effect on any legislation now in force. It could be up to two years, if not more, before any legislation affecting share and other incentive plans is changed.

Notwithstanding, we offer some preliminary thoughts below on areas affecting share and other incentive plans that may be impacted by Brexit in the future:

Securities Law Implications for Option and RSU/Restricted Share Grants

At present, most, if not all, of the local securities authorities appear to take the view that non-transferrable employee options or other equity incentive awards offered for no consideration are not "securities" subject to the EU Prospectus Directive (2003/71/EC) (the "Prospectus Directive"). Therefore, companies offering these kinds of incentives to their employees in the EU, including in the UK, have not been required to file a prospectus in connection with the offer.

Once the UK leaves the EU, we would expect that the UK securities authorities will take a similar view as to non-transferable employee options and other equity incentive awards offered for no consideration and that no UK securities filing would be necessary in connection with the offering of such awards.

Securities Law Implications for Share Purchase Plans

The Prospectus Directive requirements are different for the offering of employee share purchase plans ("ESPPs") in the EU. Rights to purchase shares under an ESPP generally are treated as securities offerings under the Prospectus Directive and require a prospectus filing, unless the company can rely on an exemption or exclusion. Many companies are able to rely on the small-offering exemption which applies if the ESPP is offered to fewer than 150 employees in an EU country. In addition, an employee share plan exemption exists but this exemption currently applies only to companies incorporated in the EU or listed on an EU-regulated stock exchange.

Companies that are required to file a prospectus in the EU (because they cannot rely on any of the available exemptions or exclusions) are able to file one prospectus (in their "home member country") and passport the prospectus into any other EU country in which the ESPP offering qualifies as a public offering (typically because it is made to 150 or more employees).

Once the UK leaves the EU, the Prospectus Directive may no longer apply. In this case, the UK may implement equivalent rules which could provide for the mutual recognition of prospectuses approved in a EU or EEA country. Whether there is a willingness to grant mutual recognition will depend on whether the EU will reciprocate. Problems may arise if the EU is not open to reciprocity in which case the UK may not agree to recognize a prospectus from another jurisdiction and require the company to file another/new prospectus in the UK.

However, it is also possible that the UK securities authorities will not consider ESPP offerings to be public offers of securities (similar to options and awards offered for no consideration) or that they would accept offer materials prepared under the laws of the home country of the issuer to be sufficient disclosures and not require a UK-compliant prospectus. For example, for US issuers, the delivery of a plan prospectus prepared in accordance with Section 10(a) of the U.S. Securities Act of 1933 may be considered to be sufficient.

For companies that have been relying on the employee share plan exemption under the Prospectus Directive because they are either incorporated or listed in the UK, the exemption may no longer be available after the UK withdraws from the EU, unless the company is also listed on another EU-regulated exchange. Or if a company is relying on the exemption because it is incorporated or listed in another EU or EEA country, after the UK's withdrawal from the EU, it is no longer certain if the UK will recognize the employee share plan exemption. However, as noted in the preceding paragraph, it is possible that the UK may then no longer require a prospectus filing for any employee share plan offerings. If that is not the case, another/new prospectus filing in the UK may be required (notwithstanding the continued availability of the employee share plan exemption for the EU offering).

Data Privacy Implications

As you know, data privacy regulations in the EU are in a major state of flux due to the invalidation of Safe Harbor and due to a proposed new EU Data Privacy Regulation which is intended to replace the current EU Data Privacy Directive. The UK's data privacy laws closely adhere to the standards imposed by the EU Data Privacy Directive. Once the UK withdraws from the EU, it will be free to amend its data privacy laws or implement new laws. In addition, the new EU Data Privacy Regulation will have no effect in the UK. As such, companies collecting, processing or transferring data from/to the UK will need to be prepared to comply with another set of rules that may impose new or different requirements from the rules in the EU. It would be surprising, however, if the UK would not consider consent to be a valid ground to collect, process and transfer personal data. Therefore, we encourage companies to continue to seek the employee's consent for any collection, processing and transfer of personal data for purposes of the employee's participation in a share plan.

Discrimination

Various EU directives (such as the EU Framework Directive) implemented into UK law prohibit discrimination against employees based on different grounds. For example, discrimination against part-time or fixed-term employees or discrimination against employees on the basis of age is prohibited. This can impact share plan offerings by companies to EU employees (e.g., by restricting the use of age-based retirement provisions or requiring that awards be offered also to part-time employees). As noted above in the data privacy context, it is possible that the UK may reconsider these laws after withdrawing from the EU, although it is unlikely that we will see any material changes.

Employment Considerations

To learn more about Brexit's impact on your company's employment relationships, click here.

BREXIT Webpage

In addition, Baker & McKenzie has set up a BREXIT webpage containing information relevant for clients as well as contact details for our BREXIT team and recent press coverage. It can be accessed via the following link: http://www.bakermckenzie.com/brexit/

Our thanks to our colleagues in the United Kingdom, Jeremy Edwards, Arun Srivastava and Ross Denton for their help with this alert.

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April 2016

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Argentina

Argentina Lifts Some Exchange Control Requirements on Outward Remittance of Funds

The Argentine Central Bank issued Communication "A" 5850 which lifts several exchange control restrictions and allows Argentinian residents to purchase foreign currency and transfer funds abroad for investment purposes.

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Australia

Changes to Australian Share Plan Reports

The end of the Australian tax year is approaching and companies need to prepare the Employee Share Scheme statements and the ESS returns.

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Belgium

Shares Acquired Under Employee Share Plan Excluded from New Capital Gains Tax

A so-called speculation tax has been adopted in Belgium and individuals are required to pay tax at a rate of 33% on capital gains realized from listed shares which are sold within six months of acquisition.

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Canada

No Changes to Canadian Stock Option Deduction

In the recent Canadian federal elections, the fiscal agenda of the Liberal Party included a proposal to cap the 50% tax deduction applicable to stock option income at approximately CAD 100,000/year.

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China

Shanghai SAFE Declines Registrations for Companies with Main Operations Elsewhere in China

Shanghai SAFE has recently declined a number of applications by companies on the basis that the company's main operations in China were in a province other than Shanghai.

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Denmark

Proposed Favorable Tax Regime for Share-Based Awards

The Danish Finance Act 2016, expected to be implemented spring 2016, provides for a favorable tax regime for share-based awards granted to employees on or after July 1, 2016.

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European Union

EU Court of Justice Invalidates Safe Harbor Program

The European Court of Justice ruled that the transatlantic Safe Harbor framework,

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Available for download on your iPhone, iPad or Android smartphone which allowed U.S. companies registered under Safe Harbor to transfer consumer and employee personal data from Europe to the U.S., was invalid.

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Israel

Recent Court Decision Impacts "Cost-Plus" Arrangements

The Tel Aviv District Court ruled on a tax issue related to expensing of equity-based compensation.

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Romania

New Tax Exemption for Stock Option Plans

Effective January 1, 2016, Romanian tax law introduced a new tax exemption applicable to the grant of awards under "stock option plans."

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Russia

Foreign Account Reporting Requirements Detailed in New Regulations

The Russian government has adopted and published new regulations detailing the foreign bank account reporting requirement for Russian individuals.

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Cash Proceeds from Sale of Shares Not Required to be Repatriated as from January 1, 2018

Effective January 1, 2018, Russian exchange control laws have been relaxed and Russian residents can receive funds directly into foreign accounts in OECD or FATF countries, without first repatriating such funds to Russia, provided cash proceeds are from the sale

New Publication Available For Download

The Global Employer Magazine - 2015 Review and 2016 Preview

In this issue of the Global Employer Magazine we cover some of the most important developments that took place around the world in 2015 and set out recommended actions on how you should respond. Click here to download.

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of securities listed on the Russian stock exchange or foreign stock exchanges specified by Russian federal law.

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Spain

Income Tax Exemption Further Limited

As of January 1, 2015, the €12,000 income tax exemption requires that awards be offered to all employees under the same conditions.

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Sweden

Court Rules that Inbound Employees Subject to Tax Only on Swedish Source Income Related to Equity Awards

The Swedish Supreme Administrative Court found in two rulings that the existing Swedish tax regime discriminates against EU/EEA citizen employees who become Swedish tax residents after having received an equity grant abroad.

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United Kingdom

Recent Court of Appeals Case Rules U.K. Court has Jurisdiction over U.S. Stock Option Plan

The English Court of Appeals recently ruled that a U.K. court has jurisdiction over a U.K. executive's lawsuit involving a stock option plan offered by the U.S. parent company, despite the plan's clear language providing for Massachusetts law as the governing law.

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Vietnam

State Bank of Vietnam Issues Decree that Could Allow Individuals to Hold Shares in Foreign Companies

The Vietnamese government issued a decree allowing individual Vietnamese investors to “implement indirect investments in plans issued abroad.”

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February 1, 2016

BAKER & McKENZIE

Luxembourg Tax Authorities Impose New Employer Notification Requirement for Equity Plans

On December 28, 2015, the Luxembourg tax authorities released a new circular (LITL n°104/2bis) which imposes a new notification requirement on companies offering share plans to employees in Luxembourg.

The circular provides that, effective January 1, 2016, an employer whose employees receive awards under an equity plan is required to notify the tax office ("Bureau RTS") in charge of the employer at least two (2) months before the plan becomes effective. The circular does not clarify when a plan *becomes effective*, but it is likely that the notification requirement is triggered when the plan is offered for the first time to employees in Luxembourg.

The notification requirement applies to all equity plans and equity-based awards (not just stock options). While the circular does not specify a form of notification, we understand that the notification should consist of a copy of the equity plan and the name of the beneficiaries (i.e., eligible employees).

If awards have been granted to employees in Luxembourg prior to January 1, 2016 and remain outstanding, Bureau RTS should be notified as soon as possible of the applicable plan(s). Bureau RTS has not set a deadline for completing the notification for outstanding awards, but employers should aim to complete the notification **by the end of February 2016**, if possible. The circular does not provide for penalties for failure to file the notification or for a late notification. However, a general obligation exists for Luxembourg taxpayers to inform the tax authorities, if so requested by the tax authorities. If the taxpayer is delinquent in providing the requested information, penalties may be imposed.

We would like to thank our colleagues Ludovic Deflandre and Amar Hamouche in our Luxembourg office for contributing to this alert.

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Argentina Lifts Some Restrictions on Outward Remittance of Funds for General Investment Purposes

Following Argentine Central Bank's Communication 5318 which suspended the ability of residents and legal persons to purchase foreign currency since 2012, foreign companies have been unable to offer employee stock purchase plans ("ESPPs") in Argentina and employees or other individuals have been unable to remit funds out of Argentina for the purchase of shares under other equity plans.

On December 17, 2015, the Central Bank issued Communication "A" 5850 which lifts several exchange control restrictions and allows Argentinian residents (both individuals and local entities, other than entities in the financial sector) to purchase foreign currency and transfer funds abroad for investment purposes (including for investment in foreign securities), subject to certain restrictions and requirements (further described below).

Practically speaking, this means companies can resume offering ESPPs or similar purchase plans and lift any cashless exercise restrictions imposed on stock options. Similarly, local entities should be able to make reimbursement payments for shares issued to its employees to the foreign parent company.

Any outward remittances are subject to a monthly limit of US$2 million per individual/local entity, and in order to effect the foreign fund transfer from Argentina, certain steps must be taken. In particular, various documents must be completed and executed, such as a currency exchange slip provided by the bank assisting with the transfer, a sworn statement indicating the origin of the funds used to purchase the foreign currency/ assets and a sworn affidavit declaring that the individual/entity has not exceeded the US$2 million monthly limit. The bank assisting with the transfer may ask for other administrative forms to be completed and executed. Any funds must be transferred to a foreign account opened in the name of the individual/local entity which acquired the foreign currency.

It is not clear yet whether intercompany transfers (*i.e.*, the remittance of funds by way of offsetting book entries between the local entity and the foreign parent company) will be permitted.

It is expected that the requirements for the remittance of funds out of Argentina will be further clarified in the coming months.

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If you have questions about the impact of Communication "A" 5850 on your company's equity plans, please contact your Global Equity Services attorney.

We would like to thank our colleagues in Buenos Aires, Martin Quintanar and Gabriel Gomez-Giglio, for their advice and contributions to this alert.

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Understanding the New Tax Rules for Options in Australia

October 13, 2015 10:17 AM | *Posted by* Barbara Klementz | Print this page

As we reported in our July 2, 2015 client alert, the new Australian share plan legislation received Royal Assent on June 30, 2015 and applies to all equity awards granted on or after July 1, 2015. Under the new tax regime, stock options are generally taxed at exercise only (not at vesting).

In this post, I want to explore the practical implications of the new legislation for most companies and examine the exceptions to the rule.

Grant Document Changes

Under the old tax regime that was in effect from July 1, 2009 until June 30, 2015, options generally were taxed at vesting which obviously was not a good result for companies nor for employees. As a result, many companies stopped granting options in Australia altogether. The companies that persevered (often private companies with no alternatives, such as RSUs, available to them) usually imposed special terms designed to avoid a taxable event prior to a liquidity event or at a time when options were underwater. To achieve this, they restricted exercisability of the options until a liquidity event occurred and/or until the option was in the money.

For options granted prior to July 1, 2015, these restrictions should continue to be enforced because the old tax regime continues to apply to these grants. However, for options granted on or after July 1, 2015, these restrictions are no longer needed. This means companies should revise their award documents and delete these restrictions (usually contained in the Australia appendix to the award agreement).

Exceptions, Exceptions, Exceptions……

As mentioned, under the new tax rules, tax is generally is due only at exercise of options, but of course there are exceptions (this being Australia). Three exceptions may be relevant to companies:

1. First, tax could be further deferred (past exercise) in case the shares acquired at exercise are subject to genuine restrictions on sale/transfer. For publicly traded companies, this will typically be the case only if the employee is subject to insider trading restrictions which prevent the employee from selling/transferring the shares acquired at exercise. If an employee exercises the option during a black-out period imposed by an insider trading policy, tax is deferred until the black-out period expires.

   Shares of privately-held companies are often subject to restrictions prior to a liquidity event, such as a right of first refusal, a right of repurchase or, in some cases, an absolute transfer restriction. Unlike an absolute transfer restriction, a right of first refusal and a right of repurchase typically do not qualify as a genuine restriction on transfer, because neither prevents an employee from selling the shares. By contrast, a market stand-off restriction which prevents an employee from selling shares during a certain period of time after an IPO can represent a genuine restriction for Australian tax purposes, but only if the exercise occurs during the stand-off period. In all of these case (where the employee acquires shares at exercise that are subject to genuine restrictions on sale), tax is deferred until the restrictions lapse. The taxable amount would be equal to the fair market value of the shares at the time the restrictions lapse (as determined according to Australian tax law) minus the exercise price.

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Barbara Klementz

2. Second, tax can be deferred past exercise if the shares acquired upon exercise are sold within 30 days of exercise. In this case, the taxable amount is the difference (or spread) between the sale proceeds and the exercise price. This rule is helpful in clarifying the tax treatment of a cashless sell-all exercise, but can be more difficult to administer if an employee uses a cash exercise method to exercise the option but then subsequently sells the shares within 30 days of exercise. In this case, the company would typically not know that the employee has sold the shares. Thankfully, the Australian tax authorities have recognized this problem and allow companies to still report the exercise date as the taxable event (in the annual return to be provided to the tax authorities and in the annual statement to be provided to employees) and the spread at exercise as the taxable amount. It is the employee's responsibility to report the sale as the actual taxable event and the gain realized at sale as the actual taxable amount, and pay tax accordingly.

3. Finally, termination continues to be considered a taxable event, unless the option is forfeited upon termination. This means that:

- If an employee terminates employment with vested options (that do not forfeit upon termination but only after the expiration of a post-termination exercisability period), the employee will be taxed at termination, not exercise.
- If the employee does not exercise the option and the option expires, the employee is able to claim a refund for any tax paid at termination (or, more likely, never has to pay the tax to begin with assuming termination and expiration of the option occur in the same tax year).
- If the employee exercises the option before it expires (e.g., 15 days after termination) and holds the shares, the taxable event would be at termination and not at exercise. In this case, the taxable amount would be the market value of the option at the time of termination (usually determined according to a statutory formula). However, if the employee goes on to sell the shares within 30 days of the termination date (e.g., if the employee uses a cashless sell-all exercise method 15 days after termination), the sale date will be considered the taxable event (pursuant to the exception described above).

What?

Although the new tax legislation certainly improved the tax treatment of options in Australia, the details remain challenging. And while there is still no tax withholding obligation in Australia (unless an employee has not provided his/her tax ID number which would be very unusual), the employer has to report the taxable events. Therefore, understanding the tax rules (and exemptions) is crucial. Similarly, if companies provide tax information regarding equity awards to employees, the information must be carefully tailored to reflect possible exemptions from the general tax rule.

Global Equity, Australia