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Belgium

New General Income Tax Withholding and Reporting Obligations Introduced for All Forms of Equity-Based Compensation

Please contact your GES attorney to discuss further.

We thank Luc Meeus of our Brussels office for his contribution to this new development.

The Belgian government has proposed new legislation introducing: •

1. a general income tax reporting obligation for all forms of equity compensation as of January 1, 2018; and
2. a general income tax withholding (and reporting) obligation for all forms of equity compensation as of January 1, 2019.

For Belgian subsidiaries of a foreign parent company, such obligations will apply regardless of whether the subsidiary has local involvement (e.g., reimburses the parent for the cost of awards).

* * * *

To date, the rules with respect to a Belgian employer's income tax withholding and reporting obligation for equity compensation granted by its foreign parent company have been tricky, mainly due to the lack of specific rules.

For stock options accepted within sixty (60) days after the offer date (and, therefore, taxable at grant), the rules clearly require the Belgian employer to report the grant of such options on an employee's fiscal voucher.

However, income tax withholding obligations and the withholding and reporting obligations with respect to social security contributions for stock options and other forms of equity compensation have been based on general rules. Pursuant to these general rules, a Belgian employer has an income tax and social security withholding and reporting obligation if the Belgian employer is "locally involved." Typically, the concept of "local involvement" has related to the existence of a reimbursement arrangement between the Belgian employer and its foreign parent, or other forms of involvement, such as making the actual grants, etc.

In order to streamline the rules and to ensure that equity income is reported and taxed, the Belgian government reached a political agreement at the end of July 2018 to introduce (i) a general income tax reporting obligation (to be complied with by all Belgian employers with respect to equity compensation grants made by the foreign parent company) for all equity based compensation (e.g., stock options, RSUs, an ESPP, etc.), independent of any facts and circumstances, as of January 1, 2018; and (ii) a general income tax withholding obligation (to be complied with by all Belgian employers with respect to equity based compensation grants made by the

foreign parent company) for all equity based compensation (e.g., stock options, RSUs, an ESPP, etc.), independent of any facts and circumstances, as of January 1, 2019.

Belgian Social Security Authorities Announce New Position on the Applicability of Social Security Contributions

The Belgian National Social Security Office recently published "Administrative Instructions," that indicate its new, formal position that Belgian employer and employee social security contributions apply to equity based compensation granted by a foreign parent company if (i) the Belgian employer bears the cost of the benefit, or (ii) the benefit can be linked to an award recipient's employment relationship with a Belgian employer, or the employee's function performed for the employer, regardless of whether there is "local involvement" by the employer.

Although the law has not changed and the authorities' position could be subject to legal challenge, practically speaking, this signals the social security authorities' intention to impose social security contributions on equity based compensation granted by a foreign parent company, regardless of the facts and circumstances, and a possible increase in related audit activity.

As such, companies should carefully consider their position with respect to the withholding of employee social security contributions (13.07% (uncapped, but deductible for income tax purposes)) and payment of employer social security contributions (approx. 25% (uncapped)).

Denmark

Changes Proposed to the Danish Stock Option Act

Please contact your Global Equity Services attorney to determine whether the terms/conditions for awards granted to Danish employees need to be changed for grants made on/after January 1, 2019.

The Danish Ministry of Employment introduced a bill that would eliminate the requirements under the Danish Stock Option Act for "good leavers" to retain equity awards after termination of employment and have an entitlement to a pro-rata award. If enacted, the change would apply for new grants made on or after January 1, 2019.

Under the current Danish Stock Option Act, the treatment of equity awards depends on whether an employee is a so-called "bad leaver" or "good leaver."

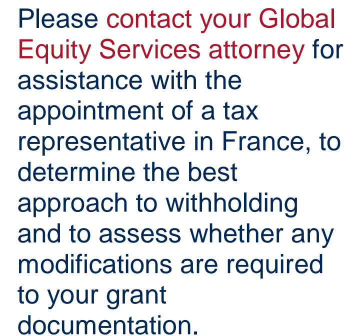
- If an employee voluntarily resigns or is dismissed due to the employee's breach of contract, the employee is considered a "bad leaver," and will lose the right to retain unvested / unexercised awards and to future awards, unless otherwise specifically stated in the governing award agreement.
- If an employer dismisses an employee for a reason other than the employee's breach of contract or if the employee resigns due to retirement (as determined pursuant to Danish law), the employee is considered a "good leaver" and is entitled to retain unvested / unexercised awards and to receive a pro-rata award if the employee would have been entitled to an award but for his or her termination of employment.

Under the proposed bill, an employer and employee can freely agree on the terms to apply in the event of employment termination (i.e., the employee could agree to the terms of an award agreement that provide that unvested / unexercised awards will be forfeited, regardless of the reason for the termination of employment).

The Danish Parliament is expected to review the bill in October 2018. If passed, the changes will apply only to grants made on/after January 1, 2019. Awards granted prior to such date will be covered under the existing rules.

France

Employer Income Tax Withholding Required on Equity Income Effective as of January 1, 2019



Please contact your Global Equity Services attorney for assistance with the appointment of a tax representative in France, to determine the best approach to withholding and to assess whether any modifications are required to your grant documentation.

On September 4, 2018, after a few days of suspense as to whether the contemplated withholding tax reform would be postponed or stopped, the French government finally confirmed that income tax withholding will be implemented effective January 1, 2019. For salary and any benefit taxed as salary, the employer will have to withhold income tax at the time the salary is paid.

The French tax authorities published guidelines confirming that the income tax withholding requirement will apply to non-qualified equity award income. As French qualified awards are taxable upon the sale of shares according to a specific tax regime, resulting gains are not subject to the new withholding tax system.

There are a number of practical questions that should be addressed with respect to non-qualified awards in France:

- The withholding obligation technically applies to the payor of the employment income. For equity awards, the payor is the issuer, which could be a US parent company. Therefore, any foreign issuer must appoint a representative in France (i.e., the French employer) to perform the withholding.
- Income tax withholding will apply at the rate available to the employer, as communicated by the French tax authorities. Practical issues will arise if gains are significant and the income tax to be withheld exceeds the cash salary to be paid locally to the employee.
- For issuers who have implemented a "sell-to-cover" or "share withholding" method to avoid the impact on payroll, determining the applicable tax rate may be a challenge, as a French employer is legally prohibited from communicating the relevant withholding tax rate for each employee to anyone except a payroll vendor.

In addition, to avoid payment of taxes in 2019 on both (i) 2018 employment income and (ii) 2019 employment income (through the withholding of income tax), the French tax authorities will grant a specific tax credit that is designed to eliminate the income tax due on 2018 employment income (A) falling within the scope of the 2019 tax withholding and (B) qualifying as non-exceptional income. Based on the French tax administration's guidelines, it is not clear whether all 2018 gains from non-qualified share awards will qualify as non-exceptional income in 2018 and can benefit from this tax credit (and thus be tax-free in France). A case by case analysis must be conducted based on the practice of each company with respect to grants of non-qualified share awards.

Note that the law has established a specific ruling procedure that would enable employers to file a ruling request to seek the qualification of non-exceptional income and, thus, the grant of the tax credit on non-qualified share award gain and/or any

other type of remuneration for which the qualification of non-exceptional income in 2018 is uncertain (e.g., a cash bonus which would not be included in the employment agreement). Per the procedure, the tax authorities are obligated to rule within three (3) months after receipt of the request. In the absence of a response, the request is deemed granted.

Note that this specific ruling is not mandatory and companies must balance the pros and cons of this procedure before filing.

For additional information regarding special issues arising for individuals (including US taxpayers) in France in connection with the new withholding tax system, please also refer to the following alert: Vive La (Withholding Tax) Révolution and Special Issues for US citizens and residents in France.

Your Global Equity Services attorney can help review the situation for grantees in France and, to the extent the grant and vesting conditions permit, file a ruling request to secure the non-taxation of 2018 share awards gain and/or any other type of remuneration subject to the ruling.

We thank Agnès Charpenet and Geoffrey Poras of our Paris office and Michael Jaffe of our New York office for their contribution to this new development.

New Zealand

"Payday" Reporting Will Replace EMS Reporting System

Companies should consider what impact the changes will have on their payroll reporting and any changes required to their current payroll systems.

From April 1, 2019, the existing employer monthly schedules ("EMS") reporting system will be replaced by "payday" reporting. The proposed changes aim to make payroll and "pay as you earn" reporting part of the employer's payday schedule, rather than a separate process.

The following employment information income ("EII") will need to be reported through the payday reporting system: the employee's name, tax identification number, income details (including the equity award taxable amount), and the total amount of tax withheld (if any).

For local employers who file the EII electronically or through their payroll system, the EII will generally be due within two (2) business days after the applicable pay date. However, for equity awards, the timing for such reporting will be deferred to the 20th day following the taxable event (the "ESS deferral date"). (Note that the ESS deferral date is the 20th calendar (not business) day following the taxable event.)

The local employer may choose between two reporting mechanisms: (i) using the ESS deferral date as the equity award "payday," in which case, the EII must be provided within two (2) business days after the ESS deferral date (i.e., the EII will be due 20 plus two working days after the taxable event), or (ii) provide the EII twice monthly; where if the ESS deferral date occurs between the 1st and 15th of the month, the EII must be provided within two (2) working days after the 15th (as if the 15th is the equity award payday), or if the ESS deferral date occurs between the 16th and month-end the EII must be provided within two (2) working days after month-end (as if month-end is the equity award payday).

Singapore

Proposal Would Eliminate the Need to Obtain Ministry of Manpower Approval to Collect ESPP Contributions through Payroll Deductions

The Singapore government introduced a proposal that would eliminate the need to seek Singapore Ministry of Manpower ("MOM") approval to collect ESPP contributions through payroll deductions if certain requirements are met. If approved, such proposal is expected to take effect on April 1, 2019.

Under current law, MOM approval is required to collect ESPP contributions through payroll deductions for employees covered by the Singapore Employment Act (rank-and-file employees, and professionals, managers, executives and technicians earning up to SGD 4,500 per month).

In February 2018, the Singapore government announced its intention to expand the scope of the Employment Act to cover all employees, regardless of their salary or position. In conjunction with this change, on October 2, 2018, the Singapore government released the Employment (Amendment) Bill that would change the Employment Act provisions on salary deductions. The practical effect of such change is that MOM approval would no longer be required to collect ESPP contributions through payroll deductions, provided that:

- employees' written consent to payroll deductions is obtained;
- an employee may withdraw his or her consent by giving notice of the withdrawal at any time before the deduction is made; and
- an employee would not be penalized for withdrawing such consent.

Currently, no guidance is available as to what constitutes "penalizing" an employee for withdrawing consent to payroll deductions. Additional guidance is expected in the coming months.

United Kingdom

Post-Brexit Transition Period

The negotiations between the UK and the EU have reached a critical stage.

If an overall withdrawal agreement is reached, the UK and EU reached a political agreement that EU rules and regulations generally will apply for a 21-month transition period after the UK exits the EU on March 29, 2019 (i.e., the transition period will run through December 31, 2020).

Amongst other things, this is relevant for purposes of determining the application of the new EU Prospectus Regulation set to take effect as of July 21, 2019 (see our June 2017 Clients and Friends Newsletter for additional details).

Technically, this transition agreement will not be legally binding until the withdrawal agreement between the UK and EU is formally agreed and ratified, a process which is expected to start in October 2018 and must conclude by March 29, 2019.

If a negotiated withdrawal agreement is not reached, it remains to be seen if the UK and the EU will still press ahead with a 21-month transition agreement or whether there will be a hard Brexit (i.e., an immediate withdrawal on March 29, 2019). In the case of a hard Brexit:

- The rules underpinning the General Data Protection Regulation ("GDPR") will still be in force in the UK, as the GDPR is already in force in the UK. However, there is still a possibility that the EU will not make a finding of adequacy against the UK's handling of data, as the UK has wide powers to collect and monitor data for security purposes. In such a case, agreements for the transfer of data between the UK and the EU will be needed, using EU compliant model clauses.
- The position in relation to the new EU Prospectus Regulation is not clear. The general assumption is that the UK regulators will put in place an employee share scheme exemption that is similar to the widened employee share scheme exemption under the EU Prospectus Regulation, which would allow US listed / domiciled companies to benefit from July 21, 2019. However, there has been no direct confirmation of this.

Companies are becoming increasingly concerned about the lack of certainty surrounding the form of Brexit and UK regulations so close to the date when the UK is scheduled to leave the EU.

EU State Aid Continues for EMI Options

Threats to Enterprise Management Incentive ("EMI") options highlighted earlier this year have been lifted and continued tax advantages for EMI options have been confirmed.

To recap, on April 6, 2018, EU state aid approval for EMI options expired. The expiration of EU state aid posed a risk that the tax advantages normally afforded to EMI options would not be available for EMI options granted after April 6, 2018.

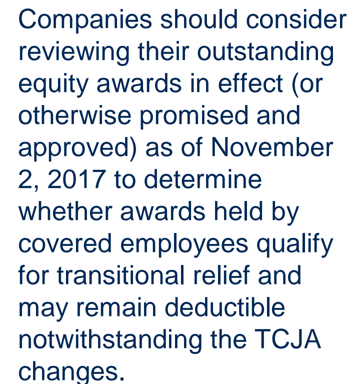
However, on May 15, 2018, the European Commission announced it would not object to prolonging the EMI scheme. This announcement means that EMI schemes will continue to operate in the same way as in the past and EMI options will continue to be eligible for tax advantages in the UK.

Please note though that the EU Commission's decision will only continue until Brexit and/or to the extent covered in any withdrawal agreement.

We thank Jeremy Edwards of our London office for his contribution to this new development.

United States

IRS Guidance on 162(m) Amendments - Key Takeaways for Equity Awards



Companies should consider reviewing their outstanding equity awards in effect (or otherwise promised and approved) as of November 2, 2017 to determine whether awards held by covered employees qualify for transitional relief and may remain deductible notwithstanding the TCJA changes.

Given the elimination of the qualified performance-based compensation exception, companies may also wish to review their equity award design or mix for upcoming awards to US employees.

On August 21, 2018, the IRS issued Notice 2018-68 (Notice), providing initial guidance on the 2017 Tax Cuts and Jobs Act's amendments to Code Section 162(m) ("162(m)").

As a reminder, for tax years beginning after December 31, 2017, the Tax Cuts and Jobs Act ("TCJA") (i) eliminated the performance-based compensation exception to 162(m)'s USD 1 million annual cap on the deductibility of compensation paid to "covered employees," (ii) expanded the "covered employees" to include the CFO and anyone who has ever been a covered employee for tax years after 2016, and (iii) broadened the definition of the "publicly held corporations" subject to the rule. However, under transitional relief, the TCJA changes do not apply to compensation provided under a "written binding contract" in effect on and not "materially modified" after November 2, 2017.

As outlined in our recent client alert, the Notice provided guidance on the new 162(m) "covered employee" rules and the transitional relief. Although the Notice addressed a broad range of cash, equity and deferred compensation arrangements, below are some key takeaways with respect to equity awards:

- **Stock Options & SARs**: Generally, stock options and stock appreciation rights granted or promised as of November 2, 2017 will not be subject to the TCJA amendments if (i) the awards comply with the performance-based compensation exception under pre-TCJA law (which is generally the case as long as the exercise price is not less than the fair market value at grant), (ii) all required Board/Committee approvals for the grant of the awards were obtained no later than November 2, 2017, and (iii) such awards are not materially modified after November 2, 2017.
- **Restricted Stock & RSUs**: Even if a time-based restricted stock or RSU award was a written binding contract in effect on November 2, 2017, compensation payable under the award to a covered employee generally remains subject to the USD 1 million deduction limit because time-based full value awards do not comply with the performance-based compensation exception and would not have been deductible under pre-TCJA law. However, if a CFO holds such an outstanding time-based full value award, the award would continue to be exempt from the USD 1 million deduction limitation, provided it is not materially modified and provided the CFO does not move into another covered employee role (e.g., the CEO role). This is because the CFO would not have been a "covered employee" under pre-TCJA law. In addition, if any other covered employee held an outstanding time-based full value award that provided for settlement at the

time of the covered employee's termination or thereafter, the award would continue to be exempt from the USD 1 million deduction limitation, provided it is not materially modified because under pre-TCJA law the employee would not have been considered to be a covered employee unless he/she served in such capacity on the last day of the company's taxable year.

- **Performance Stock Units ("PSU") and Negative Discretion**: Compensation intended to qualify as deductible performance-based compensation under pre-TCJA law often provided the company with "negative discretion" to reduce the compensation under such award even if the performance goals were met. Although particularly common in cash bonus arrangements, negative discretion was sometimes included in the terms of PSUs (assuming companies could get their accountants comfortable with it). This was a function of the pre-TCJA 162(m) regulations, which prohibited positive discretion with respect to the payment of a performance award, but permitted negative discretion, thereby giving companies some leeway to consider subjective performance factors in determining the amount payable. Unfortunately, the Notice indicates that compensation would not qualify for transitional relief to the extent that the company has negative discretion to reduce the amount payable, unless the employee has an enforceable right under applicable law (e.g., state contract law) to the compensation payable upon meeting performance and other vesting conditions without regard to the negative discretion provided under the terms of the arrangement.

SEC Increases Rule 701 Enhanced Disclosure Threshold to USD 10 Million

As noted in our June/July 2018 Clients & Friends Newsletter, the SEC was directed to increase the aggregate "sales" threshold – from USD 5 million to USD 10 million – that triggers enhanced disclosure obligations where a company grants stock-based awards to employees (or other service providers) in reliance on Rule 701 of the Securities Act of 1933, as amended ("Securities Act"). As directed, on July 18, 2018, the SEC amended Rule 701(e) to increase the "sales" threshold, effective immediately upon publication. The triggering threshold amount is also required to be indexed for inflation every five years.

Among the requirements that must be met to rely on Rule 701, certain burdensome disclosures, such as financial statements and risk factors, must be provided to award recipients if the aggregate value of securities "sold" in reliance on Rule 701 during any consecutive 12-month period exceeds the new USD 10 million threshold. Therefore, the increase to the triggering threshold will be a welcome relief for US private companies and non-US public and private companies that are not publicly traded in the US as they typically rely on Rule 701 when offering equity awards to their US employees.

Potential Changes to Rule 701 and Form S-8

At the same time as increasing the enhanced disclosure threshold under Rule 701 in July 2018, the SEC published a concept release, seeking comments on ways to modernize Rule 701 and the Form S-8 Registration Statement (the comment period has now expired). Among the changes that may be considered by the SEC are simplifying the Form S-8 to use a single form to register shares for all plans, eliminating the registration of a fixed number of shares, eliminating the Form S-8 entirely, and expanding Rule 701 to cover public companies.

For more information about the amendments to Rule 701 that were adopted and the SEC concept release that was issued, please see our blog post, SEC Increases Rule 701 Enhanced Disclosure Threshold and Seeks Comment on Rule 701 and Form S-8.

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