

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 referendum is a mandate to the UK Government to commence the process of withdrawing from the EU, but the timing is very unclear at this point.

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 will likely take at least two years (and probably 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-transferable 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

BREXIT

Impact On Your Global Share/Incentive Plans



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 General Data Privacy Regulation which is intended to replace the current EU Data Privacy Directive. The UK's data privacy laws implement the standards imposed by the EU Data Privacy Directive. The new General Data Privacy Regulation comes into force in May 2018, and it is unlikely that the UK will have formally withdrawn from the EU by that point, so companies should continue to prepare for the adoption of the General Data Privacy Regulation in the UK as in other EU jurisdictions. Once the UK withdraws from the EU, it may be free to amend its data privacy laws or implement new laws, but the degree of latitude which the UK has (if any) will depend on the nature of the relationship it negotiates with the EU. Quite what impact any new data privacy laws will have on share plans offered in the UK is a matter of conjecture at this stage. Companies operating share plans in the UK should continue to monitor developments in this area. We will be publishing updates on this point as more information becomes available.

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, though the ability to do so depends on the nature of the relationship the UK ultimately negotiates with the EU.

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, Stephen Ratcliffe, Arun Srivastava and Ross Denton for their help with this alert.

BREXIT

Impact On Your Global Share/Incentive Plans



For More Information

Narendra Acharya

Chicago
+1 312 861 2840
narendra.acharya@bakermckenzie.com

Valerie Diamond

San Francisco
+1 415 576 3086
valerie.diamond@bakermckenzie.com

Barbara Klementz

San Francisco
+1 415 591 3211
barbara.klementz@bakermckenzie.com

June Anne Burke

New York
+1 212 626 4371
juneanne.burke@bakermckenzie.com

Denise Glagau

San Francisco
+1 415 576 3067
denise.glagau@bakermckenzie.com

Aimee Soodan

Chicago
+1 312 861 7515
aimee.soodan@bakermckenzie.com

Nicole Calabro

San Francisco
+1 415 576 3010
nicole.calabro@bakermckenzie.com

Sinead Kelly

San Francisco
+1 415 591 3241
sinead.kelly@bakermckenzie.com

Brian Wydajewski

Chicago
+1 312 861 8286
brian.wydajewski@bakermckenzie.com

Follow us   

Disclaimer - Baker & McKenzie International is a Swiss Verein with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a "partner" means a person who is a partner, or equivalent, in such a law firm. Similarly, reference to an "office" means an office of any such law firm.