



Morgan Lewis

GLOBAL PUBLIC COMPANY ACADEMY

GRANTING EQUITY OUTSIDE HOME JURISDICTIONS – ASIA, EUROPE AND US

Kate Habershon
Gina Lauriero
Zaitun Poonja

May 16, 2018

PLAN ELIGIBILITY

- REVIEW PLAN FOR ELIGIBILITY
 - Discretion to adopt subplans
 - Discretion to modify terms for local compliance
- COUNTRY-SPECIFIC ANALYSIS OF LOCAL COMPLIANCE
- GLOBAL FORM AGREEMENTS

COMPLIANCE ISSUES

- SECURITIES LAW
- TAXATION
- EXCHANGE CONTROL
- EMPLOYMENT LAW
- DATA PRIVACY

SECURITIES LAW COMPLIANCE

- VARY BY COUNTRY
- PROSPECTUS/NOTIFICATION/APPROVAL
- EXEMPTIONS FOR SMALL OFFERINGS

SECURITIES LAW COMPLIANCE – EUROPE

- EU PROSPECTUS DIRECTIVE
 - Public offers of transferable securities may require a prospectus
 - Options are usually not caught, as they are not transferable
 - Free shares are usually not covered
 - Exemptions for *de minimis* issues, i.e. fewer than 150 employees per EEA state and aggregate offering less than €5 million, but there may be local variations
 - 2019 changes – 150 people and less than €1 million in aggregate
- UK FINANCIAL PROMOTIONS
 - Invitation or inducement to make investments, including shares and potentially options
 - Exemption if only employees and former employees are able to participate
- GDPR

SECURITIES LAW COMPLIANCE – U.S.

- IF SECURITIES ARE PUBLICLY TRADED IN THE U.S. (e.g., ADRs)
 - There must be a valid Form S-8 filed with the SEC
 - Covers grants to employees, directors, officers, consultants and advisors
 - Must also provide a 10(a) prospectus to participants

SECURITIES LAW COMPLIANCE – U.S.

- IF SECURITIES ARE NOT PUBLICLY TRADED IN THE U.S.
 - Typically structure the issuance to comply with Rule 701 of the Securities Act
 - Covers grants to employees, directors, officers, consultants and advisors
 - Imposes limits on the amount of securities that may be sold in any 12 month period
 - Additional disclosure requirements if the aggregate sales price or amount of securities sold under Rule 701 during any 12-month period exceeds \$5 million
 - Consider state securities laws (“Blue Sky Laws”)

SECURITIES LAW COMPLIANCE – ASIA

- REGISTRATION/PROSPECTUS
 - Japan
- APPROVALS
 - Philippines
- NOTIFICATIONS
 - Malaysia

TAX CONSEQUENCES

- TAXABLE EVENT
- WITHHOLDING AND REPORTING
- SOCIAL INSURANCE
- IMPLICATION OF CHARGEBACK AGREEMENT
- MOBILE EMPLOYEES

TAX CONSEQUENCES – EUROPE

- GENERAL RULE IN MOST JURISDICTIONS
 - Stock options
 - Residence-based taxation
 - Typically no tax on grant or vesting
 - Non-approved share options versus tax-advantaged share options dictates tax on exercise or subsequent sale of shares
 - Restricted shares may be taxable on grant
 - Valuation issues in Europe
 - UK: section 431 elections
 - Restricted stock units (RSUs)
 - Characterization not always clear (option versus security)
 - Usually taxable on vesting
 - Tax reporting
 - Generally by EU employing company

TAX CONSEQUENCES – U.S.

- WHO IS SUBJECT TO U.S. INCOME TAX
 - U.S. citizens
 - Resident aliens
 - Lawful permanent residents of the U.S. (green card holders)
 - Substantial presence test
 - Must be physically present in the U.S. during at least
 - 31 days during the current year
 - 183 days during the three-year period that includes the current year and the two years immediately before that, counting all days present in the U.S. in the current year, one-third of the days present in the U.S. in the preceding year; and one-sixth of the days present in the U.S. in the year prior

TAX CONSEQUENCES – U.S.

- GENERAL RULE
 - Stock options
 - Nonqualified stock options versus incentive stock options (ISOs)
 - Restricted stock
 - 83(b) elections
 - Restricted stock units

TAX CONSEQUENCES – U.S.

- INTERNAL REVENUE CODE SECTION 409A
 - Consequences of noncompliance
 - Stock option considerations
 - Award at grant
 - Subsequent changes
 - RSU considerations
 - Exception for awards that pay on vesting
 - Payment timing upon termination of employment
 - Retirement vesting
 - Proper payment timing for nonexempt awards

TAX CONSEQUENCES – U.S.

- INTERNAL REVENUE CODE SECTION 457A
 - Nonqualified entities
 - Exception for 409A-exempt stock options
 - Exception for amount paid within 12 months following the end of the taxable year in which the substantial risk of forfeiture lapses
 - Applicability to RSUs

TAX CONSEQUENCES – ASIA

- GENERAL RULE:
 - Options taxed at exercise
 - Restricted shares may be taxable on grant
 - Restricted stock units taxed at vesting
- WITHHOLDING AND REPORTING
 - Varies by country
 - Malaysia
- SPECIAL RULES
 - Singapore

EXCHANGE CONTROL

- REGULATE FLOW OF FOREIGN CURRENCY
- APPROVAL TO OFFER/ACQUIRE FOREIGN SECURITIES
- SOME COUNTRIES WITH BURDENSOME REQUIREMENTS
 - China
- USE OF CASH SETTLEMENT TO AVOID EXCHANGE CONTROL REQUIREMENT

EMPLOYMENT LAW

- ACQUIRED RIGHTS
- INCLUSION IN SEVERANCE
 - Impact of chargeback agreements
- ANTI-DISCRIMINATION RULES
 - Age discrimination
 - Part-time employees
- TRANSLATION REQUIREMENTS
- CONSULTATION WITH WORKS COUNCIL

EMPLOYMENT LAW

- CLAWBACKS
- VALIDITY OF NONCOMPETE COVENANTS
 - Against public policy in some countries
 - Where enforceable, general rules as to reasonableness
 - Strict payment requirements in some countries
 - Stock as valid consideration
- OTHER REGULATORY
 - Data privacy consent
 - Electronic delivery of documents

PRACTICAL ISSUES

- COMPLIANCE WITH LOCAL LEGAL REQUIREMENTS
- COMMUNICATION
- ADMINISTRATION
- COMPLEXITY
- MOBILE EMPLOYEES

CLE

- If you registered noting that you need CLE the code is **G439R23**. Please be sure fill out the post event survey and enter this code and save this number; you will need this to receive a Certificate of Attendance. You will be contacted within 30-60 days by our CLE administrative team.
- We will process your credits for other states where this program has been approved.
- Questions? Please email Aaisha Khan at Aaisha.khan@morganlewis.com

THANK YOU

© 2018 Morgan, Lewis & Bockius LLP
© 2018 Morgan Lewis Stamford LLC
© 2018 Morgan, Lewis & Bockius UK LLP

Morgan, Lewis & Bockius UK LLP is a limited liability partnership registered in England and Wales under number OC378797 and is a law firm authorised and regulated by the Solicitors Regulation Authority. The SRA authorisation number is 615176.

Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan Lewis operates through Morgan, Lewis & Bockius, which is a separate Hong Kong general partnership registered with The Law Society of Hong Kong as a registered foreign law firm operating in Association with Luk & Partners.

This material is provided for your convenience and does not constitute legal advice or create an attorney-client relationship. Prior results do not guarantee similar outcomes. Attorney Advertising.