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# 5 Questions You Should Ask About Your Global Equity Awards

By **William Woolston and Victoria Ha** *(May 18, 2018, 12:22 PM EDT)*


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As U.S. companies expand internationally, they often wish to compensate their non-U.S. employees with stock options, restricted stock, phantom stock and other forms of equity compensation. But offering equity compensation to non-U.S. employees is not as straightforward as it may sound, and is often more complicated than it is at home. U.S. companies venturing into the world of global equity compensation confront a complex, cross-border web of rules and regulations, which can vary markedly from country to country.

In this article, we highlight five critical questions that can help U.S. companies navigate common legal pitfalls in the global equity space. These questions focus on some of the most rapidly evolving areas of law, including securities, exchange controls, data privacy, tax and foreign account reporting, and labor and employment.

**1. Do I have to file a prospectus for the offering with local securities regulators?**

Many companies are surprised to discover that offering equity compensation to employees in other countries can trigger securities registration or other filing requirements under local law, even for public companies listed on U.S. exchanges or private companies that comply with SECexemptions. Every country's laws are a little different, but many provide exemptions that may be available to both private and public U.S. companies. Companies must carefully evaluate local securities law to determine whether an exemption is available, and whether the company can meet the exemption's requirements.

For example, one of the most common exemptions applies to limited equity offerings to no more than a specified number of individuals, which requires employers to carefully monitor the number of award recipients in each country. Another common exemption requirement is for special language to be included in award documentation (e.g., language indicating that the grant does not constitute a public offer of securities). Companies can sometimes avoid local securities requirements altogether by offering cash-settled awards, which do not constitute securities in certain jurisdictions.

**Country Spotlight:** Member nations of the EU are currently subject to the Prospectus Directive, which allows securities offerings to be made across the EU using only one prospectus (a prospectus is analogous to a U.S. registration statement). Because it is a directive, and not a regulation or law, the Prospectus Directive has not been implemented in a uniform manner across the EU. Even exemptions to the Prospectus Directive, such as the exemption for offerings to fewer than 150 people, have been implemented in slightly different ways by some EU member nations. The good news is that in 2019, the Prospectus Directive will be replaced by the Prospectus Regulation, which will eliminate most of the small distinctions across EU member nations and make it easier for many U.S. companies to award equity compensation in the EU without a prospectus.

**2. Will awards be impacted by foreign exchange filings or limits?**

Operating a global equity program, particularly a program that offers stock options or share purchases, will almost always involve the flow of funds between countries. This can occur when, for example, foreign-held awards are settled by the U.S. issuer, or when a foreign grantee pays the option exercise price directly to the U.S. issuer. Exchange controls can also be an issue when the U.S. issuer and local subsidiary have entered into a "recharge" agreement, under which the subsidiary reimburses the issuer for the cost of shares granted to its employees. Exchange control restrictions can range from minor reporting requirements to blanket prohibitions on the transfer of funds, depending on the applicable monetary thresholds. Importantly, companies should be aware that exchange control reporting requirements are frequently the responsibility of the employee who received the award, and not the company.

**Country Spotlight:** China requires all foreign-listed companies to submit a costly and complex filing with the State Administration of Foreign Exchange, or SAFE, before equity awards can be made to Chinese nationals and certain foreign nationals residing in China. Ongoing quarterly reporting requirements to SAFE and local tax offices also apply after the initial SAFE filing. Privately held companies are generally not authorized to file with SAFE under existing guidance unless they fall within a narrow exception (which, in practice, is extremely difficult to satisfy).

**3. Do I need to worry about data privacy rules?**

The administration of a global equity program involves the collection, use and transfer of an award recipient's personal data by the employer, and in many cases, third-party plan administrators. Some jurisdictions require companies to notify local data privacy authorities about any intended or actual processing of personal data, and may also require that the company appoint an internal data controller. At the extreme end of the spectrum, companies may be required to physically house any databases containing personal data of local award recipients within the local country.

**Country Spotlight:** Beginning in May 2018, companies who are located in or have staff in the EU must comply with the General Data Protection Regulation, or GDPR, which imposes substantial obligations on employers relating to the processing of personal data and significantly enhances the rights of individuals over their personal data. U.S. companies granting equity awards to recipients in EU countries should ensure that their global equity program and award documentation are reviewed for compliance with GDPR requirements.

**4. How will awards be taxed and reported under local law?**

Companies must pay attention to the tax treatment that applies at each stage of an award (i.e., grant, vesting, exercise (if applicable), and sale), as well as the timing of any employee or employer social insurance contributions, which can differ markedly from how awards are treated in the U.S. Certain jurisdictions also require companies to make periodic local reports regarding the income tax due on equity awards, as well as the grant, vesting and/or exercise of equity awards during the period covered by the report. Companies may also be subject to cross-border reporting requirements relating to their equity grants.

**Country Spotlight:** In Belgium, stock options are taxable at grant (rather than exercise) if the employee signs the option agreement or otherwise accepts the option in writing within 60 days after the offer date. The tax is based on the market value of the underlying shares and is assessed immediately. However, if the employee remains silent, or acknowledges receipt of the option after 60 days, the option will instead be taxed at exercise on the spread between the strike price and fair market value on the exercise date.

**5. What are the labor and employment issues?**

Although every country has its own local laws and ways of handling employment matters, there are a few general themes that come up frequently when offering equity compensation globally, including:

- Acquired Rights: Certain countries have strong "acquired rights" laws, which enable grantees to claim a contractual right to receive equity compensation even where such awards are intended to be discretionary.

- Discrimination: Eligibility requirements and vesting terms that are compliant under U.S. law may run afoul of local anti-discrimination rules.

- Employee Organizations: Depending on the breadth and depth of the grant program, there may be a legal obligation to consult with local labor unions or works councils before any equity grants may be made.

- Translation: Translated copies of plan and award documentation in the local language may need to be provided to award recipients, in addition to English versions.

These five questions highlight the most common stumbling blocks that companies encounter when offering global equity awards, but they are by no means the only ones out there. Companies should watch out for these legal pitfalls, as the penalties for noncompliance can be costly. Often, these penalties fall on the shoulders of the employees who received the awards, which can frustrate the employer's retention and incentive goals in offering equity compensation, and create awkward communications challenges for human resources staff and in-house counsel. Employers should engage in proactive compliance to ensure that their global equity programs are, and remain, in good health. Foreign laws are always evolving, making a vigilant compliance plan a critical part of any global equity program.

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