SQUIRE SANDERS

MAJOR GOVERNMENT CONSULTATION ON TAX-ADVANTAGED SHARE PLANS

June 2012

The Government has published its response to the report from the Office of Tax Simplification (OTS) on tax-advantaged employee share schemes in the UK. The plans affected are:

- share incentive plans (or SIPs);
- savings-related share option schemes (or SAYE or Sharesave);
- company share option plans (CSOPs); and
- enterprise management incentive (EMI) schemes.

In summary, the Government has divided the OTS recommendations into three categories:

- those it intends to take forward after consultation;
- those that it wishes to consider further after consultation; and
- those which it has not accepted or is only taking forward in a modified form.

OTS recommendations accepted in principle

- adoption of a new approval process for all tax-advantaged schemes (self-certification, as currently for EMI);
- a relaxation of certain requirements - for example, giving companies and trustees more flexibility in the way they communicate with participants and dispensing with the practice of attaching a full copy of a company's articles of association to an EMI option agreement;
- changing the rules with respect to features of schemes that are "not essential or reasonably incidental"; and
- harmonising the approach to retirement across SIP, SAYE and CSOP.

The Government has published a consultation document on the issues arising from these changes, which can be accessed at:

http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageVAT_ShowContent&propertyType=document&columns=1&id=HMCE_PROD1_032132

The closing date for comments is 18 September 2012. It is proposed that draft legislation relating to the harmonisation of retirement is published in autumn 2012 and will come into force in summer 2013. On the rest of the issues above, it is proposed that implementation occurs "no later than 2014".

Recommendations for further consideration

In this category are issues where the Government accepts the points made by the OTS as to the complexity for companies and wishes to consider the proposals further after consultation. If the Government decides to proceed with changes in these areas, it is intended that draft legislation will be published in autumn 2012 and come into force in 2013.

- allowing tax-free early exercise of options or withdrawal of shares from a SIP in the event of a takeover;
- removing the requirement under SIP, SAYE and CSOP to allow scheme shares to have only permitted restrictions and replace it with a requirement that the terms of the awards include details of the restrictions, as is currently the case for EMI options;
- removing the "material interest" provisions for SIP and SAYE and aligning the percentages for EMI and CSOP to 30%;
- allowing companies to specify whether the date on which the share price from which the number of shares to be awarded under a SIP is calculated is the award date, the start of an accumulation period or the lower of the price at the start and the end of an accumulation period;
- relaxing the deadline for accounting for PAYE on shares leaving a SIP to 90 days from the taxable event;
- removing the cap on the value of dividend shares re-invested in a SIP and the three-year limit on the carry-forward of cash dividends;
- expanding the circumstances in which contributions to SAYE savings contracts can be made other than from salary; and
- extending the period during which EMI options can be exercised on a tax-free basis after a "disqualifying event" (such as the participant leaving the company) from 40 days to 6 months.

In addition, following the suggestion by the OTS that the policy rationale for CSOP is unclear, the Government is to carry out further work to investigate the current relevance of CSOP. It is seeking evidence as to whether the CSOP as currently used "has a positive effect on productivity and economic growth, addresses market failures and supports Government objectives in a cost-effective and targeted way that justifies support through the tax system". The outcome of this investigation will be announced in the autumn and consulted on if appropriate.

Recommendations that have been rejected or modified

The Government's consultation does not extend to the following recommendations by OTS:

- allowing companies with more than one class of share to operate SAYE and CSOP, because of concern that this may provide scope for manipulation and abuse;
- allowing tax-advantaged schemes to be extended to associated companies provided they are subsidiaries of the issuer, since this extended eligibility could lead to significant cost for the Exchequer;
- reducing the holding period for SIP shares from five years to three years, again on a cost basis;
- removing the working time eligibility requirement for EMI for non-director employees, so as to ensure that EMI continues to be targeted only on employees who commit a significant amount of their working time to the company; and
- relaxation of the excluded activities that prevent a company granting EMI options, to ensure that EMI remains targeted and because of the cost impact.

Also within this category are OTS recommendations where the Government is consulting on its variants of the suggestions made by the OTS:

- creating a single annual return for all tax-advantaged schemes operated by a company, introducing on-line filing for share plan returns and in time moving to real-time recording instead of an annual return. The Government expects that self-certification for SIP, SAYE and CSOP will involve changes to the returns procedure and HMRC will take account of these recommendations as self-certification arrangements develop after consultation;
- allowing participants under SIP, SAYE or CSOP other than those who leave because of voluntary resignation or dismissal with cause to be considered "good leavers" and therefore able to exercise on a tax-advantaged basis. Although not agreeing that changes should go this far, the Government does propose that the "good leaver" circumstances for SIP, SAYE and CSOP are harmonised to the position that currently applies for SIP, as this covers the widest range of circumstances of leaving;
- the recommendation to merge CSOP and EMI schemes will await the outcome of the work on the relevance of CSOP to be announced in autumn 2012; and
- the Government notes the OTS recommendation that the Department of Business, Innovation and Skills (BIS) takes the issue of the requirement for a company to appoint a carrier for SAYE savings contracts into account in its longer-term review on the wider application of employee share ownership amongst smaller private companies.

Additional Information

For additional information about these changes please contact one of the Squire Sanders lawyers listed below or one of the Squire Sanders lawyers with whom you routinely work.

Patrick Ford
T +44 161 830 5014
E patrick.ford@squiresanders.com

Lawrence Green
T +44 121 222 3394
E lawrence.green@squiresanders.com

Berhard Gilbey
T +44 207 655 1318
E bernhard.gilbey@squiresanders.com

Mark Simpson
T +44 113 284 7014
E mark.simpson@squiresanders.com