SLAUGHTER AND MAY/

NEWSLETTER

APRIL 2022

INCENTIVES BULLETIN

Update to Listing Rules requires publication of plan rules on National Storage Mechanism

National Insurance rise comes into force

Supreme Court dismisses HMRC appeal in *NCL Investments*

Remuneration trusts settlement opportunity

ERS return annual deadline

One Bunhill Row
London EC1Y 8YY
United Kingdom
T: +44 (0)20 7600 1200

Welcome to the Spring 2022 edition of our Incentives Bulletin, updating you on the latest developments in executive remuneration and share plans. In this Bulletin, we look at the new Listing Rules requirement to publish share plan rules on the National Storage Mechanism, the recent rise in Class 1 National Insurance contributions and the Supreme Court decision in *HMRC v NCL Investments*.

UPDATE TO LISTING RULES REQUIRES PUBLICATION OF PLAN RULES ON NATIONAL STORAGE MECHANISM

The FCA has recently introduced amendments to the Listing Rules to change the requirements that apply where a listed company seeks shareholder approval of an employee share scheme. The purpose of these changes is to allow shareholders to review the detail of share plan rules online. Historically, shareholders have been able to review the full plan rules only in hard copy at a place "in or near the City of London". At a practical level, few shareholders took up this opportunity. The fact that the relevant plans will be available to read online is likely to mean that the plan rules will come under greater scrutiny both by shareholders and other interested third parties.

Under the updated Listing Rule 13.8.11, where a company does not include the full text of the relevant draft plan rules in its notice of meeting to shareholders, the company is required to publish the plan rules on the FCA's National Storage Mechanism at the time the notice summarising the plan is circulated. This development has clear parallels in the long-standing US requirement to publish share plan rules on the US Securities and Exchange Commission's EDGAR platform.

Given these increased disclosure requirements, it is possible to envisage a situation (similar to what commonly happens currently in the United States) where in future UK-listed companies adopting new employee share plans may choose to put particularly commercially sensitive provisions in confidential award documentation rather than in their publicly available plan rules. While it is too early to identify the extent to which companies will take this approach and how shareholders would react to such an approach (in particular, whether such an approach would be a voting issue for shareholders), this will be a key area of emerging market practice to monitor in the AGM seasons to come.

NATIONAL INSURANCE RISE COMES INTO FORCE

As announced by the Chancellor in September 2021, employees' and employers' Class 1 National Insurance contributions ("NICs") rates have each increased by 1.25% for the 2022/23 tax year commencing on 6 April. The Government has stated that this will be an interim measure for one year, until the increased rate is replaced by a separate 1.25% Health and Social Care Levy, which will be 'ring fenced' for NHS and social care spending.

Under the relevant tax legislation, there is a general prohibition on the cost of employer's NICs being transferred to employees (meaning that companies simply have to bear this additional cost as part of their general costs of doing business). There is however an exception to that general rule where the charge to tax arises in connection with employees acquiring "employment-related securities" (i.e. shares in their employer or a related company) under certain specific charging provisions set out in Part 7 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"). Standard employee share options and long-term incentive awards will normally fall within the scope of Part 7 of ITEPA.

Assuming that the company wishes to transfer the employer's NICs liability to the employee, there are two options open to the company:

(i) include the ability to recover employer's NICs in the indemnity commonly found in plan rules, which allows the company to recover the income tax and employee's NICs that it has to withhold under PAYE in the normal course (commonly referred to as the "indemnity route"); or

(ii) enter into an HMRC-approved document to formally transfer the primary liability for the employer's NICs to the employee (the "joint election route").

The "joint election route" has the advantage of transferring the primary liability to account to HMRC for the employer's NICs, meaning that the company does not need to make a provision for the employer's NICs in its accounts. It is however generally more complex and time-consuming than the indemnity route. As a result, as a matter of practice, where employer's NICs are transferred, using the indemnity route tends to be more common. The good news for the employee, if their employer does transfer the employer's NICs, is that the employee can claim an income tax deduction in respect of the employer's NICs transferred, reducing their effective rate of tax on the option/award.

It is therefore possible for employers to partially mitigate the cost of the recent increase in NICs rates, at least in so far as they relate to their employee share plans. That said, in practice we have not seen a significant uptake of this approach, with companies preferring to take on this supplementary cost themselves.

SUPREME COURT DISMISSES HMRC APPEAL IN *NCL INVESTMENTS*

The Supreme Court has unanimously dismissed HMRC's appeal in *HMRC v NCL Investments Limited and another*, a case concerning the availability of corporation tax deductions (under historic legislation) for accounting charges in connection with lapsed employee share options. The Supreme Court upheld the Court of Appeal's decision that the accounting charges were deductible for the purposes of calculating trading profits, thereby reducing the amount of corporation tax due.

Whilst subsequent legislation has been enacted to ensure that no deduction would now be available in comparable circumstances, the decision will be welcomed by other employers who are disputing the availability of relief in respect of periods prior to 20 March 2013.

The Supreme Court also affirmed the broader commentary expressed by lower courts that costs incurred in connection with the operation of employee share schemes were both "wholly and exclusively for the purposes of the trade" and "revenue" rather than "capital" in nature for the purposes of corporation tax. This guidance will be appreciated by corporates seeking to persuade HMRC that a corporation tax deduction should be available on a "general principles" basis in other circumstances, where the generous statutory deduction for employee share schemes is not available for any reason.

REMUNERATION TRUSTS SETTLEMENT OPPORTUNITY

Regular readers will be aware of HMRC's long-standing campaign to counter "family benefit trust" tax planning, both through the introduction of the "disguised remuneration" rules in Part 7A of ITEPA and litigation such as the well-publicised *Rangers EBT* case.

Following their success in *Rangers EBT*, HMRC has continued to encourage taxpayers that have used similar types of arrangement in the past to settle any outstanding liabilities that they may owe based on (HMRC's reading of) *Rangers EBT*. We are aware of a significant number of companies which have taken up this opportunity to bring their discussions with HMRC on this topic to a conclusion.

HMRC has announced that the settlement window for these remuneration trust-related tax issues will close on 31 July 2022. To the extent that companies wish to settle with HMRC (thereby reducing the interest and penalties HMRC may seek to impose on taxpayers in respect of any PAYE or NICs that they consider should have been accounted for), they should submit their applications, including their tax calculations completed in accordance with HMRC's settlement terms, before this date.

ERS RETURN ANNUAL DEADLINE

With the recent end of the tax year, companies will be turning their minds to the completion of their "employment related securities" ("ERS") returns for 2021/22. Employers should note that this year's annual ERS returns must be submitted through HMRC's online portal on or before 6 July 2022.

In previous years, HMRC's IT infrastructure has collapsed under the weight of traffic put onto the system close to the July deadline. Therefore, at a practical level, we would recommend that, if at all possible, ERS returns are submitted at least a couple of weeks before the 6 July deadline.

If you would like to discuss any of the issues referred to in this briefing please contact one of the individuals listed below or your usual Slaughter and May contact.

CONTACT

- PADRAIG CRONIN
- PARTNER
- T: +44 (0)20 7090 3415
- E: Padraig.Cronin@slaughterandmay.com

- PHIL LINNARD
- PARTNER
- T: +44 (0)20 7090 3961
- E: Philip.Linnard@slaughterandmay.com

- IAN BROWN
- SENIOR COUNSEL AND HEAD OF INCENTIVES KNOWLEDGE
- T: +44 (0)20 7090 3576
- E: Ian.Brown@slaughterandmay.com

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650

Published to provide general information and not as legal advice. © Slaughter and May, 2022.
For further information, please speak to your usual Slaughter and May contact.

www.slaughterandmay.com