



PRACTICAL LAW

MULTI-JURISDICTIONAL GUIDE 2011/12

EMPLOYEE SHARE PLANS

LABOUR AND EMPLOYEE BENEFITS VOL 2

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Essential legal questions answered
in 21 key jurisdictions

Comparative table

Analysis of critical
legal issues



Switzerland

Ueli Sommer and Tina Shih-Thurnheer
Walder Wyss Ltd

www.practicallaw.com/8-502-9891

EMPLOYEE PARTICIPATION

1. Is it common for employees to be offered participation in an employee share plan?

Most listed companies in Switzerland offer one or more share plans to their employees. Many private companies also offer share plans. Some companies restrict participation in share plans to senior executives, or offer senior executives different plans from those offered to other employees.

2. Is it lawful to offer participation in an employee share plan where the shares to be acquired are shares in a foreign parent company?

Employees working in Switzerland can participate in share plans offered by a foreign parent company. However, Swiss employment law may restrict multinational groups' freedom to determine the structure and terms of their share plans.

The extent to which Swiss employment law applies to foreign share plans is unclear. It does not apply if the employees concerned act as informed investors rather than as employees (*decision of the Swiss Federal Court (BGE 130 (2004) 495*). However, that decision suggests that employees who are granted options or shares at a discount or for no consideration act as employees and not as informed investors, meaning that Swiss employment law would apply to these types of plans. The distinction is unclear, so share plans governed by foreign law should be modified to comply with Swiss employment law (for example, by incorporating an addendum governed by Swiss law for all Swiss employees).

SHARE OPTION PLANS

3. What types of share option plan are operated in your jurisdiction?

There are no specific legal types of share option plans. However, there is significant variation between plans adopted.

4. In relation to the share option plan:

- What are the plan's main characteristics?
- Which types of company can offer the plan?
- Is this type of plan popular? If so, among which types of company is this plan particularly popular?

Share option plan

Main characteristics. In a typical share option plan, the employer grants an employee a free option to buy shares. The option normally has a vesting period, and once it vests, the employee can exercise it for a fixed price during a fixed exercise period. Typically, when an employee leaves the company:

- An option that has not yet vested lapses.
- The exercise period of an option that has already vested reduces dramatically under a truncation clause.

Types of company. The corporation (*Aktiengesellschaft* (AG)) (the most common form of company in Switzerland) and the limited liability company (*Gesellschaft mit beschränkter Haftung* (GmbH)) can offer share option plans.

Popularity. Generally, corporations use share option plans. However, because of reforms to company law that came into force on 1 January 2008, which make it easier for limited liability companies to transfer shares, option plans became more popular with limited liability companies.

Share option plans are particularly popular with smaller companies because they have significant tax advantages for employees (see *Questions 5 to 7*). They are, however, also very popular with big companies.

Grant

5. In relation to the grant of share options under the plan:

- Can options be granted on a discretionary basis or must they be offered to all employees on the same terms?
- Can options be granted to non-employee directors and consultants as well as employees?
- Is there a maximum value of shares over which options can be granted, either on a per-company or per-employee basis?
- Must the options have an exercise price equivalent to market value at the date of grant?
- What are the tax and social security implications of the grant of the option?

Share option plan

Discretionary/all-employee. It is generally accepted that employers can treat employees differently if this is based on reasonable and appropriate criteria. Therefore, when allocating and awarding share options, employers can treat different management levels differently, but must treat employees at the same level equally.

Non-employee participation. It is possible to include non-employees (such as contractors). However, the company needs to clearly limit the participants in order to avoid prospectus requirements.

Maximum value of shares. There are no restrictions on the maximum value of shares over which options can be granted under a share option plan. However, the employer must ensure that it can meet its obligations under the share option plan.

Market value. The exercise price can be above or below the shares' market value, but cannot be lower than the shares' nominal value where new shares are issued.

Tax/social security. The grant of share options is only subject to income tax if it falls into all of the following categories:

- It has no vesting period.
- It has no truncation clause.
- It has a value that is determinable when it is granted. This applies if either:
 - the option can be traded; or
 - all parameters for the Black-Scholes option valuation formula are known. The Black-Scholes formula is a pricing model that calculates the value of share-based payments using variables such as:
 - dividend yield;
 - exercise period;
 - exercise price;
 - market price;
 - risk-free rate of return; and
 - share price volatility.

The model assumes that options are exercised at one point in time.

If income tax does arise on grant, it is charged on the value of the option calculated in accordance with the Black-Scholes formula if the option is not sold immediately following grant (in which case the consideration realised is the basis for the income tax calculation). If income tax is charged on grant, no income tax arises on vesting or exercise.

The employee also pays wealth tax on the value of the option.

Taxes are levied at federal, cantonal and communal level, so their rates are not centralised and vary substantially. Generally, employees pay income tax (source tax only applies in special cases, for example for foreigners without a permanent residence in Switzerland).

Social security treatment always follows tax treatment, so is charged at the same time and on the same amount. The main social security charges amount to 12.1% (split equally between the employer and the employee). If social security contributions are due, the employer must withhold and transfer them to the competent cantonal authority.

If tax and social security are due, the employer must report the income resulting from the shares in the employee's yearly salary statement. The employee must pay tax based on the declaration of income in his personal tax return. Social security contributions are split between the employer and the employee. The employer deducts the social security contributions due from the employee from the monthly salary payment to the employee.

Vesting

6. In relation to the vesting of share options:

- Can the company specify that the options are only exercisable if certain performance or time-based vesting conditions are met?
- Are any tax/social security contributions payable when these performance or time-based vesting conditions are met? Who is obliged to account for the liability and by when? How (if appropriate) is the liability recovered from employees?

Share option plan

Exercisable only on conditions being met. Employers can set performance or time-based vesting criteria for share plans. However, performance-based criteria must be capable of being objectively measured, and all vesting conditions must be clearly set out in the plan documentation.

Tax/social security. A share option is only subject to income tax on vesting if it falls into all of the following categories:

- It has a vesting clause.
- It has no truncation clause.
- It has a value that is determinable when it vests (*see Question 5, Share option plan: Tax/social security*).

If income tax arises on vesting, it is charged on the value of the option at the time of vesting, calculated according to the Black-Scholes formula (if the option is not sold immediately following vesting (in which case the consideration realised will be the basis for the income tax calculation)). If income tax arises on vesting, it is not charged on exercise.

The employee also pays wealth tax on the value of the option.

If tax is due, the employer also has social security and reporting obligations (*see Question 5, Share option plan: Tax/social security*). The employee must pay tax based on the declaration of income in his personal tax return. Social security contributions are split between the employer and the employee. The employer deducts the social security contributions due from the employee from the monthly salary payment to the employee.

Exercise and sale

7. Do any tax or social security implications arise when the:

- Option is exercised?
- Shares acquired on exercise are sold?
- Who is obliged to account for the liability and by when?
- How (if appropriate) is the liability recovered from employees?

Share option plan

Tax/social security on exercise. In most cases, tax is due when a share option is exercised because most option plans include truncation clauses. Tax is charged on the difference between:

- The shares' market value.
- The price the employee pays to exercise the option.

However, no taxation occurs on exercise if it has already been paid on grant or vesting.

If tax is due, the employer also has social security and reporting obligations (see *Question 5, Share option plan: Tax/social security*).

Tax/social security on sale. Capital gains derived from the sale of shares by an individual are not subject to tax or social security contributions. If tax is due, the company also has social security and reporting obligations.

Accounting for tax/social security. See *Question 5, Share option plan: Tax/social security*.

How liability recovered is from employee. Under most plans the company is granted a right to withhold shares resulting from exercise and/or to sell the shares if tax and withholding obligations are not met. The participants usually grant the company the right to make deductions from other payments due to the participant (such as base salary) to cover withholding obligations.

SHARE ACQUISITION OR PURCHASE PLANS

8. What types of share acquisition or purchase plan are operated in your jurisdiction?

There are three main types of share acquisition or purchase plan:

- Employee share plans.
- Share incentive plans (SIPs).
- Share matching plans (SMPs).

9. In relation to the share acquisition or purchase plan:

- What are the plan's main characteristics?
- Which types of company can offer the plan?
- Is this type of plan popular?

Employee share plan

Main characteristics. The purpose of employee share plans is to strengthen the employees' relationship with, and commitment to, the employer. Usually, the employer offers shares to some or all employees at a discounted price.

Types of company. Corporations and limited liability companies can offer an employee share plan.

Popularity. Employee share plans are very popular with companies of all sizes. They are most popular with corporations. Due to the changes in the company law which came into effect on 1 January 2008 (see *Question 4, Share option plan: Popularity*) more limited liability companies have implemented employee share plans.

SIP and SMP

Main characteristics. An SIP is an employee share plan with additional incentives granted to the employee on acquisition of the shares. Usually, employers grant employees free shares according to the number of shares the employees purchase (matching element). Frequently, these free shares are blocked

(that is, cannot be sold) for a defined period. Sometimes, the matching is subject to vesting conditions.

The SMP is a form of SIP where the employee first makes an investment with his own funds. This indicates that the employee acts as an informed investor, rather than as an employee. These plans have a matching element, although it is usually not fixed or blocked. Frequently, the matching element is subject to the employee and/or the company satisfying performance criteria.

Types of company. Corporations and limited liability companies can offer an SIP and SMP.

Popularity. SIPs were not very common with Swiss companies and were mainly used by foreign companies with subsidiaries in Switzerland. However, SMPs have become increasingly popular because, among other reasons, they provide the investment element required by case law to show the employee is acting as an informed investor (see *Question 2*), and therefore the company might not be subject to the labour law restrictions (although this is disputed).

Acquisition or purchase

10. In relation to the initial acquisition or purchase of shares:

- Can entitlement to acquire shares be awarded on a discretionary basis or must it be offered to all employees on the same terms?
- Can shares be offered under the plan to non-employee directors and consultants as well as employees?
- Is there a maximum value of shares that can be awarded under the plan, either on a per-company or per-employee basis?
- Must employees pay for the shares and, if so, are there any rules governing the price?
- What are the tax/social security implications of the acquisition or purchase of shares?

Employee share plan

Discretionary/all-employee. The same considerations apply as for share option plans (see *Question 5, Share option plan: Discretionary/all-employee*).

Non-employee participation. It is possible to include non-employees (such as contractors). However, the company needs to clearly limit the participants in order to avoid prospectus requirements.

Maximum value of shares. There are no restrictions on the maximum value of shares that can be awarded.

Payment for shares and price. Employees usually pay the market price for the shares, although the shares can be awarded at a substantial reduction from market price or for free. If the shares are newly issued, the issue price must be at least equal to the shares' nominal value.

Tax/social security. Income tax and social security contributions arise when the employee receives legal title to the shares. If there is no vesting period or vesting conditions for the shares, the employee receives legal title to them when they are awarded.

Income tax is charged on the difference between:

- The shares' market value.
- The price the employee paid for the shares.

If tax is due, the employer also has social security and reporting obligations (see *Question 5, Share option plan: Tax/social security*).

SIP and SMP

Discretionary/all-employee. The same considerations apply as for share option plans (see *Question 5, Share option plan: Discretionary/all-employee*).

Non-employee participation. It is possible to include non-employees (such as contractors). However, the company needs to clearly limit the participants in order to avoid prospectus requirements.

Maximum value of shares. There are no restrictions on the maximum value of shares that can be awarded.

Payment for shares and price. Employees often do not have to pay for their matching or incentive shares, or receive them at a substantially reduced price. If the shares are newly issued, the issue price must be at least equal to the shares' nominal value.

Tax/social security. As with employee share plans, income tax is charged when the employee receives legal title to the matching or incentive shares. Therefore, if the shares have no vesting period or vesting conditions, tax is charged when the shares are awarded.

The tax treatment differs between:

- The shares that the employee paid for. These are charged to income tax in the same way as employee share plan shares (see *above, Employee share plan: Tax/social security*). The employee also pays cantonal wealth tax on these shares.
- The shares awarded to the employee for free. These are charged to income tax on the shares' market value when they are awarded. If the free shares are subject to a blocking period, the authorities reduce their market value by 6% for each year of this period. For each following year, the 6% is applied in accordance with the following schedule, depending on the blocking period:
 - one year: a discount of 5.66%;
 - two years: a total discount of 11%;
 - three years: 16.038%;
 - four years: 20.791%;
 - five years: 25.274%;
 - six years: 29.504%;
 - seven years: 33.494%;
 - eight years: 37.259%;
 - nine years: 40.81%;
 - ten years: 44.161%.

Therefore, the maximum reduction from the market value is 44.161% (for the ten-year blocking period). However, income tax is still charged on award on this reduced market value, as is cantonal wealth tax.

If tax is due, the employer also has social security and reporting obligations (see *Question 5, Share option plan: Tax/social security*). In the employee's yearly salary statement, the employer must report the income from free shares separately from the income received from shares that the employee paid for but that were granted at a discount.

Vesting

11. In relation to the vesting of share acquisition or purchase awards:

- Can the company award the shares subject to restrictions that are only removed when performance or time-based vesting conditions are met?
- Are any tax/social security contributions payable when these performance or time-based vesting conditions are met? Who is obliged to account for the liability and by when? How (if appropriate) is the liability recovered from employees?

Employee share plan

Restrictions removed only on conditions being met. The same considerations apply as for share option plans (see *Question 6, Share option plan: Exercisable only on conditions being met*).

Tax/social security. Taxation takes place when the employee receives legal title to the shares (vesting). If there are time or performance-based conditions, the employee only receives legal title to the shares when those vesting conditions have been met. In this case tax is due when the vesting conditions are met rather than when the shares are awarded.

For employee share plans' tax and social security treatment, see *Question 10, Employee share plan: Tax/social security*.

SIP and SMP

Restrictions removed only on conditions being met. The same considerations apply as for share option plans (see *Question 6, Share option plan: Exercisable only on conditions being met*).

Tax/social security. As with employee share plans, if an SIP or SMP has vesting conditions, tax only arises when these conditions have been met (see *above, Employee share plan: Tax/social security*).

For the tax and social security treatment of SIPs and SMPs, see *Question 10, SIP and SMP: Tax/social security*.

Sale

12. What are the tax and social security implications when the shares are sold? Who is obliged to account for the liability and by when? How (if appropriate) is the liability recovered from employees?

Employee share plan

Capital gains derived from the sale of shares are exempt from income tax and social security contributions.

SIP and SMP

See *above, Employee share plan*.

PHANTOM OR CASH-SETTLED SHARE PLANS

13. What types of phantom or cash-settled share plan are operated in your jurisdiction?

There are two types of phantom or cash-settled share plan:

- Phantom share plans.
- Phantom share option plans.

14. In relation to the phantom or cash-settled share plan:

- What are the plan's main characteristics?
- Which types of company can offer the plan?
- Is this type of plan popular? If so, among which types of company is this plan particularly popular?

Phantom share plan

Main characteristics. Employees buy, on a virtual basis, phantom shares that mirror the growth of the employer's shares (underlying shares). The phantom shares do not give the right to vote or receive dividends. Usually, when the employer's shareholders receive dividends, employees holding phantom shares receive an equivalent cash payment. When employees sell their phantom shares, the price they receive reflects the underlying shares' market value. Phantom shares cannot be traded, only sold back to the employer.

Types of company. Phantom share plans are used in corporations, limited liability companies and any other kind of business, such as a partnership, where they will mirror the growth of the value of that business.

Popularity. Phantom share plans are not very common. However, employers sometimes use them to stop employees becoming shareholders in a group company (for example, a wholly owned subsidiary of an international group).

Phantom share option plan

Main characteristics. Employees are granted rights that mirror options to buy the employer's shares (underlying shares). In most cases, rights are granted for free with a fixed exercise price. Usually, the rights are subject to a vesting period. When employees exercise the rights, they receive a cash amount, which is the difference between:

- The market value of the underlying shares.
- The fixed exercise price.

In most cases, employees are not required to pay the exercise price, because only settlement of the appropriate figure occurs on exercise and the cash amount is then paid out to the employee.

Types of company. Any type of company can offer a phantom share option plan.

Popularity. The same considerations apply as to phantom share plans (see above, *Phantom share plan: Popularity*).

Grant

15. In relation to the grant of phantom or cash-settled awards:

- Can the awards be granted on a discretionary basis or must they be offered to all employees on the same terms?
- Can participation in the plan be offered to non-employee directors and consultants as well as employees?
- Is there a maximum award value that can be granted under the plan, either on a per-company or per-employee basis?
- What are the tax/social security implications when the award is made?

Phantom share plan

Discretionary/all-employee. See *Question 5, Share option plan: Discretionary/all-employee*.

Non-employee participation. It is possible to include non-employees (such as contractors). However, the company needs to clearly limit the participants in order to avoid prospectus requirements.

Maximum value of awards. There are no restrictions on the maximum value of phantom share plan awards.

Tax/social security. No tax or social security contributions are payable when an award is made under a phantom share plan.

Phantom share option plan

Discretionary/all-employee. See *Question 5, Share option plan: Discretionary/all-employee*.

Non-employee participation. It is possible to include non-employees (such as contractors). However, the company needs to clearly limit the participants in order to avoid prospectus requirements.

Maximum value of award. There are no restrictions on the maximum value of shares over which phantom share option plans can be granted.

Tax/social security. No tax or social security contributions are payable when a phantom share option award is granted.

Vesting

16. In relation to the vesting of phantom or cash-settled awards:

- Can the awards be made to vest only where performance or time-based vesting conditions are met?
- Are any tax/social security contributions payable when these performance or time-based vesting conditions are met? Who is obliged to account for the liability and by when? How (if appropriate) is the liability recovered from employees?

Phantom share plan

Award vested only on conditions being met. The same considerations apply as for share option plans (see *Question 6, Share option plan: Exercisable only on conditions being met*).

Tax/social security. No tax or social security contributions are payable when a phantom share award vests.

Phantom share option plan

Award vested only on conditions being met. The same considerations apply as for share option plans (see *Question 6, Share option plan: Exercisable only on conditions being met*).

Tax/social security. No tax or social security contributions are payable when a phantom share option award vests.

Payment

17. What are the tax and social security implications when the phantom or cash-settled award is paid out? Who is obliged to account for the liability and by when? How (if appropriate) is the liability recovered from employees?

Phantom share plan

When a phantom share award is paid out, income tax is charged on the cash amount received, that is, the difference between:

- The market value of the underlying shares on the date of sale.
- The virtual purchase price of the shares.

If dividend equivalents are received under a share award, these are subject to income tax when they are received.

No wealth tax is charged for any virtual share held by the employee. However, wealth tax applies to cash payments received.

When tax is due, the employer also has social security and reporting obligations (see *Question 5, Share option plan: Tax/social security*).

Phantom share option plan

The same rules apply as for phantom share plans (see *above, Phantom share plan*).

INSTITUTIONAL, SHAREHOLDER, MARKET OR OTHER GUIDELINES

18. Are there any institutional, shareholder, market or other guidelines that apply to any of the above plans, and which types of company are subject to them? What are their principal terms?

There are a number of guidelines and obligations that may apply to companies operating share plans in Switzerland. Some apply to all companies, and some only apply to listed companies.

Listed companies

Insider dealings. If the shares are listed or traded on a stock exchange (even in pre-market dealings (that is, trades in listed securities that do not take place within official trading times)), then all participants who have inside information are prohibited

from dealing in options and shares during certain periods. Non-compliance can attract criminal sanctions under the Swiss Criminal Act. To comply with insider dealings rules, a plan should provide blocking periods during which participants cannot deal in the shares.

Disclosure requirements. If a company has shares that are listed or traded on a stock exchange, it must disclose the key elements of any employee share option plan in its annual report.

It must also disclose any share option or similar award to its board members and top management in the annex to its financial statements. In addition, listed securities are subject to general disclosure obligations, and special disclosure regulations apply to managers. For example, substantial transfers must be made subject to ad hoc publicity. Finally, companies holding their own shares must disclose this fact in the annexes to their financial statements.

The International Financial Reporting Standards (IFRS) reporting obligations generally apply to companies listed on the Swiss stock exchange.

All companies

The Swiss Code of Best Practice for Corporate Governance of Economiesuisse, the umbrella organisation for Swiss employer organisations, provides recommendations. It recommends that the dilution effects on general shareholders created by option plans for senior managers should be minimal, and that once an employee holds an option, the conditions for exercising the option cannot be modified in favour of the employee. Generally, large Swiss companies comply with these recommendations on a voluntary basis.

EMPLOYMENT LAW

19. Is consultation or agreement with, or notification to, employee representative bodies required before an employee share plan can be launched? If so, what information must be provided and how long does the process take?

Generally, employers do not have to consult or agree with employees or their representative bodies before launching a share plan. However, if an employer intends to offer a plan to a substantial number of employees, it may have to inform them or their representative bodies of its terms.

20. Do participants in share plans have rights to compensation for loss of options or awards on termination of employment?

There are no exchange control regulations that stop employees sending money from Switzerland to another jurisdiction to buy shares in a share plan, unless the government has barred dealings with that jurisdiction (for example, bans are issued from time to time on trading with countries at war).

EXCHANGE CONTROL

21. How do exchange control regulations affect employees sending money from your jurisdiction to another to purchase shares under an employee share plan? If consents or filings are needed, how much will they cost and how long will they take?

There are no exchange control regulations that stop employees repatriating proceeds derived from selling shares in another jurisdiction, unless dealings with that jurisdiction have been banned.

22. Do exchange control regulations permit or require employees to repatriate proceeds derived from selling shares in another jurisdiction? Are there any conditions for repatriating funds (such as monetary limits, timing, filings or consents)?

There are no exchange control regulations that stop employees repatriating proceeds derived from selling shares in another jurisdiction, unless dealings with that jurisdiction have been banned.

INTERNATIONALLY MOBILE EMPLOYEES

23. What is the tax position when:

- An employee who is resident in your jurisdiction at the time of grant of a share option or award leaves your jurisdiction before any taxable event (such as the amendment, vesting, exercise or release of the option or award or the grant of a replacement) affecting the option or award takes place?
- An employee is sent to your jurisdiction holding share options or awards granted to him before he is resident in your jurisdiction and a taxable event occurs after he arrives in your jurisdiction?

Resident employee

If an employee who was resident in Switzerland when granted an award under a share plan then exercises it in another jurisdiction, the employer's liability to withhold income tax and social security contributions is proportionate to how long the employee has been resident in Switzerland during the award's vesting period. For example, if the employee lived in Switzerland for two continuous years out of a four-year vesting period, the employer withholds tax on half of the gain that arises.

Any subsequent capital gain derived from the sale of shares that are received when exercising an option abroad is not generally subject to Swiss income tax or social security contributions.

Non-resident employee

If an employee was awarded a share plan while resident in another jurisdiction and then moves to Switzerland, the tax charged on the exercise of the award is proportionate to how

long the employee has been in Switzerland during the vesting period. For example, if the employee works in Switzerland for two years out of a four-year vesting period, income tax is charged on half of the profit derived from exercising the award.

Any capital gain derived from the sale of shares that are received when exercising an option abroad is not subject to Swiss income tax or social security contributions.

PROSPECTUS REQUIREMENTS

24. For the offer of and participation in an employee share plan:

- What are the prospectus requirements?
- Are there any exemptions from prospectus requirements?
- If so, what are the conditions for the exemption(s) to apply?
- Are any prospectus/securities laws consents or filings required?

Prospectus needed for employee share plan offer. If a company issues new shares to the public, it must publish a prospectus (*Swiss Code of Obligations*). The prospectus must disclose at least the following information:

- Information on the company (for example, the company name, address, registration number, purpose and so on).
- The amount and composition of share capital.
- Any preferential rights.
- Any authorised or conditional share capital.
- The number and content of profit-sharing certificates.
- Dividends paid during the last five years.
- The latest annual financial statements and auditor's report.
- Interim financial statements if the closing balance sheet is more than six months old.
- The resolution of the shareholders authorising the issue of new shares.

An offer is public if it is deemed to be an offer to an unlimited number of addressees. Employee share plans are therefore unlikely to fall under this prospectus requirement, as they are offered to a limited number of addressees. However, a prospectus may be necessary for either:

- Negotiable options.
- Share plans offered to a very large number of employees, especially if the issuing company does not actually employ these employees (for example, through group issuings, or where service providers or contractors can participate).

In addition, a prospectus is required for the issue of any new listed shares on the Swiss Stock Exchange, according to the SIX's listing rules, unless an exemption applies. The main exemption is where the new issue is less than 10% of the market capitalisation of the company's previously listed securities.

To determine whether these thresholds have been reached, capital increases during the preceding 12-month period are added together. These tests are applied on a rolling basis, including the shares proposed to be issued under the share plan, meaning that a share option requires a prospectus when the decision for the capital increase is made, not when options are allocated or when they vest.

A prospectus is not (and will never be) required where equity securities are proposed to be allocated to employees and equity securities of the same class are already listed.

Exemption(s) for employee share plan offers. There are no specific exemptions for employee share plan offers. However, in most cases employee share plan offers comply with the above requirements and consequently do not have to issue a prospectus.

Conditions for exemptions. Not applicable.

Consents or filings. No prospectus or securities law consents or filings are required.

OTHER REGULATORY CONSENTS OR FILINGS

25. Are there any other regulatory consents and filing requirements and/or other administrative obligations for an offer of and participation in an employee share plan?

Government approval is not generally required to set up a share plan. However, any increase in the issuing company's share capital must be registered in the commercial register.

FORMALITIES

26. What are the applicable legal formalities?

Translation requirements. There is no statutory requirement to translate a plan into one or several of the official Swiss languages. However, there is a risk that participants may argue that they did not understand the terms of the agreement and that consequently there is a lack of agreement in regard to some or all of the provisions. Hence, it is good practice to provide translations (or at least summaries of the major terms) in the local language in case there is some doubt in regard to the language capabilities of the participants.

E-mail or online agreements. Online agreements are normally enforceable. However, there are some clauses that need a written agreement (such as a non-competition undertaking) in which case an online procedure is not sufficient.

Witnesses/notarisation requirements. There are no such requirements.

Employee consent. The employee's consent is necessary to make the terms of the plan enforceable. The employee's consent is also necessary for actions to administer the options or awards and to make deductions from salary. The general requirements under the data protection laws apply to the transfer of personal data to overseas companies.

DEVELOPMENTS AND REFORM

27. Please briefly summarise:

- **The main trends and developments (including market practice) relating to employee share plans over the last year.**
- **Any official proposals for reform of any laws which will affect the operation of employee share plans.**

Trends and developments

During the last few years, there has been a shift away from share option plans and towards employee share plans, which continued last year. Phantom share plans and phantom share option plans are also becoming more popular. There is also a trend towards plans with an investment element for the employees, such as SMPs (see *Question 9, SIP and SMP: Popularity*). This may partly be because of the recent decision of the Swiss Federal Court (see *Question 2*). It may also be because such plans require more commitment from the employees than if they were to receive free bonuses.

As a result of the financial crisis there is a tendency for longer vesting periods and risk-based vesting conditions.

Reform proposals

New tax legislation is currently being discussed for share plans:

- **Share option plans.** It is proposed that tax will always be due on exercise of the option (see *Question 7, Share option plan: Tax/social security on exercise*). The taxable amount will be reduced by 10% for each year of any restriction period to a maximum of 50%. In addition, the taxation of options for employees resident outside of Switzerland is proposed to be limited to a maximum tax rate of 11.5%.
- **Employee share plans, SIPs and SMPs.** Tax is currently imposed on the date of acquisition of the shares, regardless of any restrictions (see *Question 10*). However, a discount will now be introduced for restrictions when determining taxable income. The proposed discount is 6% per annum for each year of restriction.

This new law will not come into force before 1 January 2012. It may well not come into force before 2013. The changes will be effected by amendments to the Federal Tax Act and the Tax Harmonisation Act.

CONTRIBUTOR DETAILS**UELI SOMMER****Walder Wyss Ltd****T** +41 44 498 98 98**F** +41 44 498 98 99**E** ueli.sommer@walderwyss.com**W** www.walderwyss.com**TINA SHIH-THURNHEER****Walder Wyss Ltd****T** +41 44 498 98 98**F** +41 44 498 98 99**E** tina.shih@walderwyss.com**W** www.walderwyss.com**Qualified.** Switzerland, 1995**Areas of practice.** Employment; labour and benefits; pensions, tax.**Recent transactions**

- Advised on the long term share incentive scheme for top management and board of a listed SWX company.
- Advised on long term participation and succession plan for owner/managers of a medium size company.
- Advised on set up of phantom stock plan for an international reinsurance company.
- Advised on the set up of an incentive share scheme for board and top management of a listed company in the industrial production sector.
- Advised on the set up of a share matching plan for top level management of a SIX-listed company with international operations, the applications for tax rulings, and the international co-ordination of the plan adoption and roll-out.
- Advised on the set up of a long-term incentive structure for management of an investment fund, including international tax arrangements.
- Advised on the set up of a stock option plan for top level management of an SWX IPO candidate, the applications for tax rulings, and the international co-ordination of the plan adoption and roll-out.
- Advised on the set up of a participation plan for managers of an international private equity house, the applications for tax rulings, and the international co-ordination of the plan adoption and roll-out.
- Advised on the up of carried interest structure for executives of an international fund structure, the applications for tax rulings, and the international co-ordination of the plan adoption and roll-out.

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What makes Walder Wyss a leading source of legal services in Switzerland? Certainly the professional knowledge of our attorneys and their ability to advise in all areas of business law. Also our experience in selected industries which enables us to understand our clients' needs and objectives. But more than that our particular commitment to create workable solutions and to support their implementation. It is this approach to our profession paired with the culture of our firm which brought us to the forefront of business law firms in Switzerland.

walderwyss attorneys at law

Walder Wyss Ltd.

Seefeldstrasse 123
P.O. Box 1236
8034 Zurich

Phone + 41 44 498 98 98
Fax + 41 44 498 98 99
reception@walderwyss.com
www.walderwyss.com

Bubenbergplatz 8
P.O. Box 8750
3001 Berne

Phone + 41 44 498 98 98
Fax + 41 44 498 98 99
reception@walderwyss.com
www.walderwyss.com