

Business Law & Tax Review

Nip and tuck for share incentive schemes

It is time to update your incentive scheme before it is too late

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MOST listed companies will be aware that, from October 15 2008, the JSE replaced in its entirety schedule 14 of its listings requirements which regulates the requirements for the share incentive schemes of listed companies.

Any new schemes adopted on or after that date are required to comply with the new schedule 14. In respect of existing share incentive schemes, all issuers are required to make appropriate amendments to their existing schemes by not later than January 1 2011, although the amendments will not affect options already in issue.

In general, all issuers will be required to approach their shareholders for approval of the required amendments (in the form of an ordinary resolution requiring a 75% majority of the votes cast excluding the votes of existing participants).

From a cost point of view, there is a significant saving if the requisite resolutions can be put to the company in general meeting as part of the annual

general meeting (AGM) of the company or other general meeting if called. If a listed company has already had its AGM this year, then there is only one more opportunity (the 2010 AGM) to coincide the required amendments to the share scheme with the AGM, failing which, the company will need to go to the cost of calling a special general meeting to have the amendments approved before January 1 2011.

Bearing in mind a reasonable amount of planning goes into designing the commercial issues around the required amendments, some details of which are discussed below, and there is the usual JSE approval lead time that is to be considered, in the ordinary course it could take anywhere from three to six weeks (including two weeks for the JSE approval process) from start to finish before the company has the necessary draft amendments to the scheme in place, together with an appropriately worded resolution and summary to be included in the circular to shareholders.

So, if the notice of AGM is to be sent within the next two to three weeks you've probably already missed the boat unless you have efficient advisors



Picture: STOCK.XCHNG

and a well-connected sponsor.

So what needs to be done? The good news is that options issued under existing schemes won't be affected by the changes. The key changes focus around the philosophy that shareholders need more certainty around the dilutionary effects of these share schemes, the category of participants, the basis of participation and that certain key features of the scheme, once approved, cannot be amended without shareholders being revisited for consent.

In this regard, schemes must now specify the maximum limit of shares which can be utilised for the overall scheme and a fixed maximum number of shares that can be awarded to any one participant. The well utilised practice of "rolling over" shares forming part of the scheme allocation and, to a lesser degree, the backdating of options, are now specifically prohibited.

There are also certain principle terms which must be contained in any scheme, which must be approved of by the requisite majority of shareholders and which may not be amended with-

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out a similar approval of a requisite majority. These terms relate to categories of participants, aggregate maximum limits for the scheme and the individual, the amounts payable on exercise, the basis for determining price and the period in which payments or loans to provide same must be paid; the voting, dividend, transfer and other

rights attaching to the shares or options, the basis on which awards are made and the treatment of the options in instances of mergers, takeovers and corporate actions. The rights of participants who leave the employment of the issuer must also be regulated.

The scheme should also provide for mandatory adjustments in the event of sub-division or consolidation of shares as well as optional adjustments in the event of capitalisation issues, special dividends, rights issues or reductions of capital.

The company's auditors or other independent advisors are now required to confirm in writing to the JSE whenever such adjustments are made, that they have been made in accordance with the scheme. All the adjustments must be reported in the annual financial statements together with opening and closing balances of the scheme allocation and any changes during the reporting period.

The above analysis is not exhaustive and companies should consult the new rules or their advisors in regard to the full extent of the requirements.

Security transfer compliance a priority

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DOU comply with the Security Transfer Tax (STT) which came into effect on July 1 last year replacing the old Stamp Duties and the Uncertificated Securities Tax Acts?

STT is a tax levied on the transfer, not registration, of a security such as a share in a South African company and is payable at a rate of 0,25% on the higher of the consideration paid or market value of the security.

STT must be paid to the South African Revenue Service (SARS) by the 14th day of the month following the

month during which transfers of listed securities took place and within two months for unlisted securities.

In respect of the transfer of unlisted securities the STT is payable by the company which issued the shares. However, the company may recover the tax from the transferee of the security. Since a company may not always be aware that its shares are being transferred it would be important to take note of this liability. The STT Act does provide that the transferee is under the obligation to notify the company within 30 days from the date of the transfer of the unlisted security.

For example, Mr X sells his shares in Company A (Pty) Ltd to Mr Y for

☞ One should note that STT records must be kept for a period of five years

R100 000 when these shares are worth R80 000. STT is payable by Company A (Pty) Ltd at 0,25% on the higher of the consideration paid or market value of the shares. Therefore, Company A (Pty) Ltd needs to pay R250 (R100 000 x 0,25%) to SARS within two months of this transaction.

Note that Mr Y must inform Company A (Pty) Ltd of this transaction within 30 days and Company A (Pty) Ltd may recover the STT from Mr Y.

With regard to the transfer of listed shares, the STT liability lies with the member or participant per the Securities Service Act and recoverable from the persons to whom the securities are transferred or from the person that

cancels or redeems securities. Where shares or securities are cancelled or redeemed, the tax is then payable by the company cancelling or redeeming the shares.

Exemptions from STT are, among other things, provided for security transfers under provisions of the Income Tax Act (the so-called corporate rules). Unpaid STT will be subject to interest and a penalty of 10% of the unpaid STT.

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SARS has not yet published this year's statistics, but the revised 2009 budget revenue collections estimated R3,8bn in respect of STT collections.

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