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# Comp Talks International Equity Awards: Getting It Right

November 15, 2018

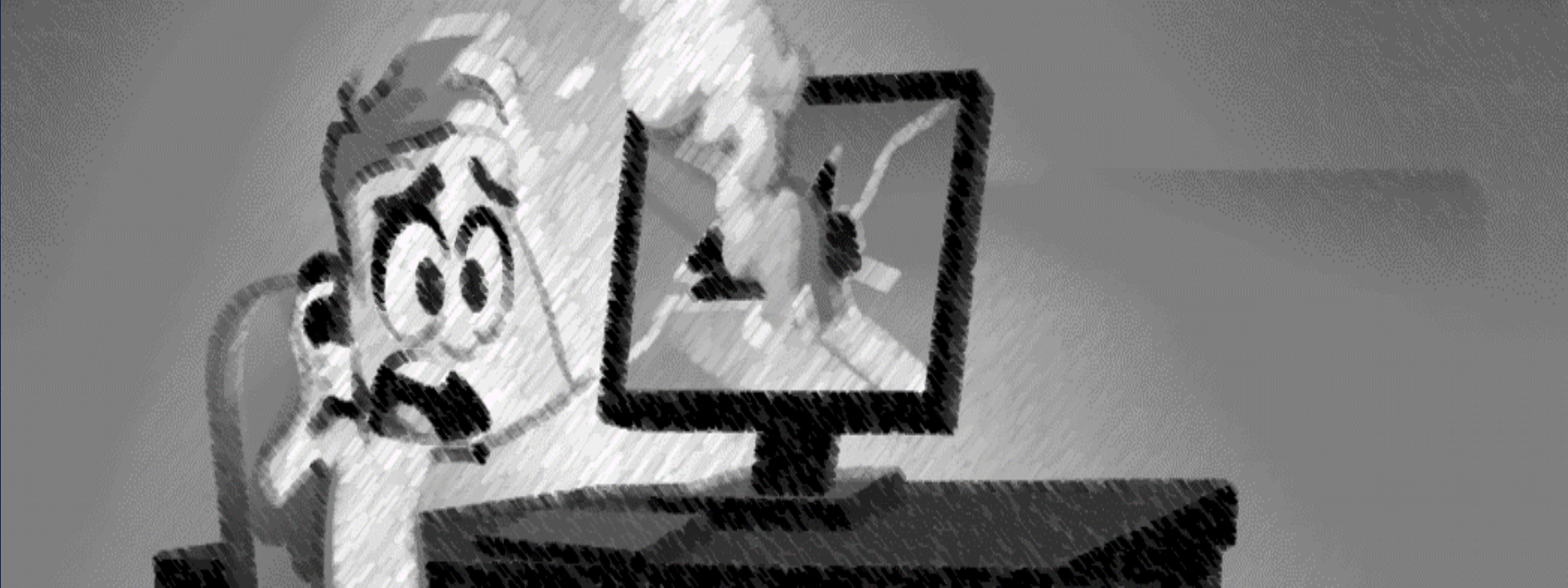
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through the Q&A feature at the  
bottom of the screen



# Getting It Right

Getting it right with international equity awards is all about:

- Questions
- Systems



# Getting It Right – Overview

- **G**ather the right information
- Avoid traps in local **E**mployment laws and practice
- Maximise **T**ax efficiencies
- Comply with data privacy laws
- Ensure effective communication**T**ions

**RIGHT ... AND KEEP GETTING IT RIGHT**



Gather the Right Information

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# Gather the Right Information – Where?

- Internal teams
  - HR
  - Legal
  - Finance
  - Equity incentives
- External resources
  - Local counsel
  - Accountants
  - Payroll providers
  - Share plan administrator



# Gather the Right Information (Internal)

- Contextual information:
  - Countries/locations
  - Type/size of awards to be offered and how that compares to what is being offered in the US
  - Number of participants in the short/medium term and are they employees/independent contractors/directors
  - Understand the local employing entity (subsidiary/branch/JV/locally specific)
- Administrative information:
  - Anything already in place
  - The budget internally and for local counsel
  - Team members in US and locally with useful expertise and relevant experience



# Gather the Right Information (External)

- For each country where potential participants reside, ask four key questions about:
  - Securities laws
  - Tax laws
  - Employment laws and practice
  - Exchange controls
  - Translations
  - Ability to use electronic delivery and acceptance





# (a) Securities Laws – Questions to Ask

1. Does the 'offering' (when employees are granted equity incentives) trigger any obligations?
2. Does the 'sale' (when employees sell shares for cash following vesting/exercise) trigger any obligations?
3. Is a prospectus or any filing required or is an exemption available?
4. Are the exemptions based on:
  - Identity of participants
  - Number of participants
  - Number of shares offered/sold and do exemptions require filings?



# Australia

Any offer of securities in Australia requires a disclosure document unless an exception applies. Common exceptions are:



- **“Small scale raising exception”** - allows an issuer to make personal offers (offers to employees qualify as personal offers) that result in issues to up to 20 persons in any 12 month period provided that the aggregate value of the securities issued does not exceed A\$2 million. This exception can be used for multiple offers (including to the same individuals) over the same 12 month period provided that the 20 persons/A\$2 million conditions are still satisfied.
- **“Senior manager exception”** - allows offers of securities to be made to senior managers of the issuer or a subsidiary of the issuer without a disclosure document. A senior manager is a person that takes part in the management of the company (regardless of the person’s designation and whether or not the person is a director or secretary of the company).

Australian Securities and Investments Commission (ASIC), also provides relief to allow larger employee share plans to be deployed without disclosure documents provided that certain conditions are satisfied including, filings and a short information document to be provided to employees.

## (b) Tax Laws – Questions to Ask

1. When is the equity award subject to tax?
  - Does the employer need to withhold?
  - At what rates?
2. Does the local employer have filing/ongoing reporting objections?
  - When?
  - How?
3. Are employer and employee social security contributions payable?
  - Does the employer need to withhold?
  - At what rates? is there a cap?
  - Is the employer burden transferable to the employee?
4. Is a local corporation tax deduction available?
  - By statute or by recharge agreement?



# New Zealand and France

## New Zealand

- From 1 April 2017:
  - Employers required to report equity award income via the PAYE Employer Monthly schedules
  - Employers may choose to withhold income tax on equity award benefits
  - Election is revocable, can be made on employee-by-employee basis



## France

- Employers withhold social insurance contributions
- From 1 January 2019 employers will withhold income tax on compensation such as spread on exercise of NQ options
- Special rules apply for compensation earned in 2018



## (c) Employment Laws and Practice – Questions to Ask

1. Does participation lead to (additional) rights on termination?
2. Does including independent consultants risk them being re-classified as employees?
3. Does involving the local entity have consequences for participants or for the group?
4. Can you enforce a clawback policy?



# UK and Denmark

## UK – “Micklefield” clause

- The inclusion of clear language that a termination (including wrongful dismissal) will cause entitlements to equity awards to be lost remains good law
- Doesn't apply outside the UK



## Denmark – The Danish Stock Option Act

- Currently provides award holders with continued entitlement to awards upon certain “good leaver” terminations of employment and pro-rata award for year of termination
- Change from 1 January 2019
- Employer statement still a requirement



# (d) Exchange Controls – Questions to Ask

1. Are exchange controls triggered by:
  - Local participants paying option exercise prices to US parent company
  - US parent company transferring value into the country following vesting/exercise
2. Are there limits/thresholds?
3. What needs to be done to comply:
  - Notifications to a central bank
    - By a company or participant
    - Before or after the event
4. Are there on-going obligations?



# China

- Non-PRC companies must seek approval from State Administration of Foreign Exchange (“SAFE”) for equity awards granted to “domestic individuals” working in China, followed by ongoing reporting obligations
- Approval only given to listed companies
- Filing required in province where issuing company has legal subsidiary
- All option exercises and related currency conversions and tax withholding needs to be conducted in designated accounts reportable to SAFE
- If new applicant, be strategic about where to file and which bank to use for the dedicated account and recognise pre-IPO grants may not be approved
- Promptly notify SAFE if change to broker, acquisition/corporate transaction impacting equity awards, etc.
- Beijing SAFE and Shanghai SAFE starting to closely scrutinise quarterly reports, Tianjin SAFE no longer requires quarterly reporting





## (e) Translations – Questions to Ask

1. When is a translation required?
2. Do all documents need to be translated?
3. If translation required, will the English language version control?
4. Should an acknowledgement of capacity to understand English be included?



Note: simpler documents are easier and cheaper to translate

# (f) Electronic Delivery and Acceptance – Questions to Ask

1. Is an electronic signature by an individual permitted?
2. Is an electronic signature by a company permitted?
3. Any issues with DocuSign or Carta?
4. Anything specific to bear in mind?

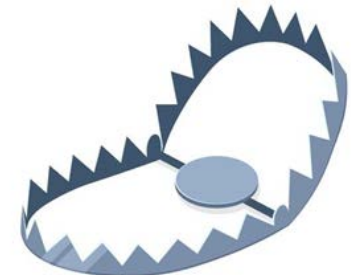


# Traps in Local Employment Laws

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# Traps in Local Employment Laws – Getting it Right

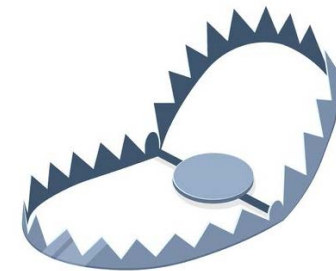
- Avoid unlawful discrimination
  - Direct discrimination:
    - e.g., active employment requirement could amount to disability discrimination in many jurisdictions
    - Retirement rules can be triggered re age discrimination
  - Indirect discrimination:
    - e.g., exclusion of part-timers (e.g. <20 hours a week for ESPPs) amounts to indirect sex discrimination in many jurisdictions
  - Difficult (and unattractive!) to try to justify discrimination



# Traps in Local Employment Laws - Getting it Right

(continued)

- Avoid unexpected rights on termination
  - Add language in award agreement to reinforce discretionary nature of awards
  - Add waiver of claims (but note that in some jurisdictions waivers may require specific procedures to be valid)
- Consequences of including “Cause” you didn’t anticipate
  - May be invalid as:
    - Unreasonable restriction of activity
    - Penalty clause
  - May be overridden by statutory provisions e.g. Brazil



Maximize Tax Efficiencies

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# Maximize Tax Efficiencies – Getting it Right

- The norm:
  - No tax on grant
  - Income taxes on full value at exercise/vesting
  - Capital gains tax on sale of shares
- Can you make it better:
  - For employees
  - For the local employer
  - For the group



# Tax – Making it Better for Employees

- Sheltering benefit from income taxes payable (i) immediately on delivery and (ii) at higher rates than capital gains tax
- Local tax efficient plans commonly adopted for employees in UK, France, Israel and Denmark
  - Often limits on size and/or participant numbers to qualify
  - May require different vesting schedules
  - Additional documents to create/approve
  - Additional tax filings/reporting required





# Tax – Making it Better for the Local Employer

- Ability to transfer employer social security costs
  - UK, Germany, Sweden
- UK employer National Insurance Contributions (NICs) charged at 13.8% can be transferred to employee:
  - By simple agreement (liability stays with employer); or
  - By formal transfer under “joint election” approved by HMRC (liability moves to employer)
  - Either way employees receive tax relief (so pay c.8%) but not very popular



# Tax – Making it Better for the Group

- Ability to secure a local corporation tax deduction

- Automatically by application of statute where shares are actually issued (may be otherwise available if cash cancel)
- Requiring a recharge agreement

Note: recharge may trigger tax withholding and social security costs

- Tax collection methods

- Cashless exercise most common method for stock option transactions (not always allowed)
- Net share settlement most common for RSUs

Note: determination of tax rate can be challenging and withholding taxes will need to be settled in local currency

- Protection

- Include tax indemnity for grants to independent contractors in case re-classified as employees

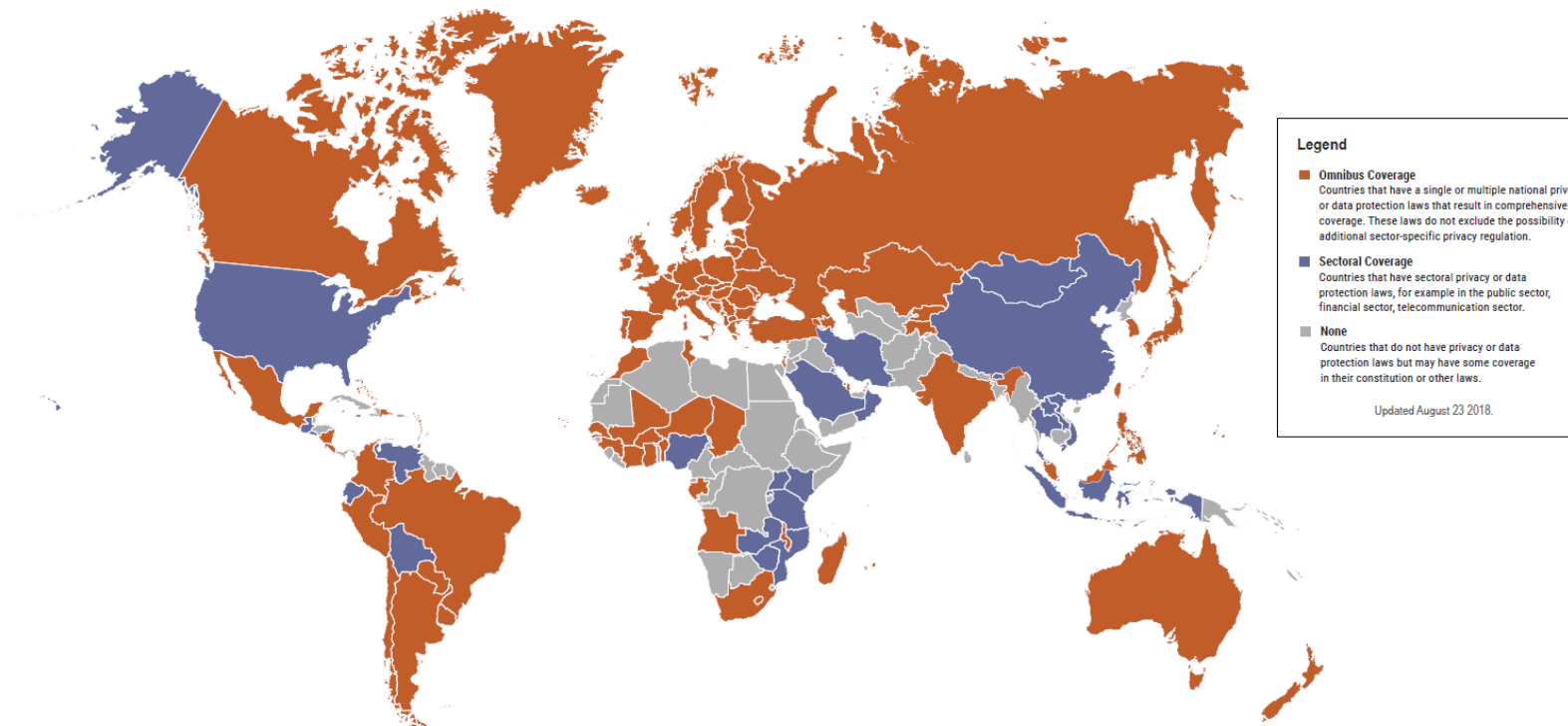


# Data Privacy Laws

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# Applicable Privacy/Data Protection Laws

## Sectoral and Omnibus Privacy and Data Protection Laws



**Legend**

- Omnibus Coverage**  
Countries that have a single or multiple national privacy or data protection laws that result in comprehensive coverage. These laws do not exclude the possibility of additional sector-specific privacy regulation.
- Sectoral Coverage**  
Countries that have sectoral privacy or data protection laws, for example in the public sector, financial sector, telecommunication sector.
- None**  
Countries that do not have privacy or data protection laws but may have some coverage in their constitution or other laws.

Updated August 23 2018.

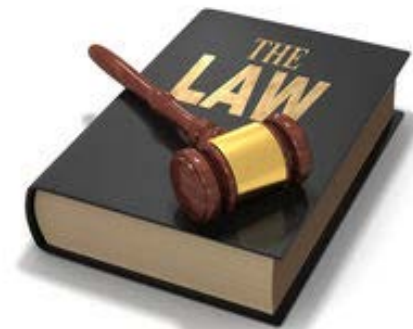
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Omnibus Law Countries										Sectoral Law Countries		
Abu Dhabi	Bahamas	Canada	Denmark	Greece	Italy	Macedonia	Netherlands	Russia	St. Lucia	Bahrain	Kenya	Uganda
Albania	Bahrain	Cape Verde	Dominican Republic	Greenland	Japan	Madagascar	New Zealand	San Marino	St. Maarten	Barbados	Kuwait	United States
Andorra	Belarus	Cayman Islands	Dubai	Guam	Jersey	Malawi	Nicaragua	Sao Tome and Principe	Sweden	Bolivia	Laos	Vanuatu
Angola	Belgium	Chad	Estonia	Guernsey	Kazakhstan	Malaysia	Niger	Senegal	Switzerland	Bhutan	Mongolia	Venezuela
Antigua & Barbuda	Benin	Chile	Faroe Islands	Guinea	Kosovo	Mali	Norway	Serbia	Taiwan	China	Montserrat	Vietnam
Argentina	Bermuda	Colombia	Finland	Hong Kong	Kyrgyz Republic	Malta	Paraguay	Seychelles	Trinidad & Tobago	China	Montserrat	Vietnam
Armenia	Bonaire/St. Eustatius/Saba	Costa Rica	France	Hungary	Latvia	Mauritius	Peru	Singapore	Tunisia	Ecuador	Mozambique	Zambia
Aruba	Bosnia & Herzegovina	Cote D'Ivoire	Gabon	Iceland	Lesotho	Mexico	Philippines	Slovakia	Turkey	Guatemala	Nigeria	
Australia	Brazil	Croatia	Germany	India	Liechtenstein	Moldova	Poland	Slovenia	Ukraine	Indonesia	Oman	
Austria	Bulgaria	Curacao	Georgia	Ireland	Lithuania	Monaco	Portugal	South Africa	United Kingdom	Iran	Rwanda	
Azerbaijan	Burkina Faso	Cyprus	Ghana	Isle of Man	Luxembourg	Montenegro	Qatar	South Korea	Uruguay	El Salvador	Saudi Arabia	
		Czech Republic	Gibraltar	Israel	Macao SAR	Morocco	Romania	Spain		Jamaica	Tanzania	

# Data Privacy Laws – Getting it Right

- Omnibus laws in 117 countries
- Sectoral laws in 28 countries (including U.S.; CaCPA)
- Even in the handful of countries without specific privacy laws, the handling of employee data may be covered by the constitution or other laws



# Informing Employees

- What data are collected
- For what purposes
- Legal basis for collecting/using data
- With whom data are shared
- Rights over their data
- Retention of data



# Legal Basis for Handling Employee Data

- Necessary to perform the employment contract
- Required by law
- Legitimate interests
- Vital interest
- Public interest
- Consent



# Employees' Rights Over their Data

- Right to:
  - Access
  - Correct/rectify, supplement and/or update
  - Erase
  - Restrict/object to processing





# Employee Data Issues in the EU

- General Data Protection Regulation 2016/679 (“GDPR”)
- Previous EU data privacy legislation pre-dated internet
- GDPR based on same principles as previous legislation **but**:
  - More rights for individuals (employees);
  - Stricter requirements for companies (employers); and
  - Much tougher penalties for non-compliance



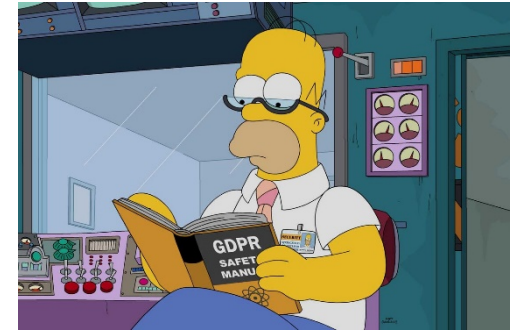
WHY DO YOU GET THAT LOOK  
WHENEVER WE TALK ABOUT  
GDPR COMPLIANCE?



# GDPR: Impact on Processing HR Data for Equity Grants

(continued)

- Amend plan rules to delete employee consents
- Issue employee privacy notices setting out:
  - Identity and contact details of employer/data controller and data protection officer;
  - Categories of data collected;
  - Purposes of processing;
  - Legal basis/es for processing (necessary for performance of contract / to comply with legal obligation (and consequences of refusal) / to achieve legitimate interests of employer (and what these are));
  - Recipients of data;
  - Retention period; and
  - Individual rights, including right to complain to supervisory authority



# GDPR: Sanctions for Non-Compliance

- **Financial** sanctions – two categories of administrative fines:
  - 4% or €20M, whichever is greater, for most significant breaches
  - 2% or €10M, whichever is greater, for other breaches
- **Non-financial** sanctions:
  - Investigations / audits
  - Warnings and reprimands
  - Orders to change processing activities / notify certain data breaches
  - Orders banning processing activities



# Employee Communications

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# Employee Communications – Getting it Right

- Balance of information versus simplicity
- Do employees have clarity?
  - At launch (ability to ask questions)
  - At vesting (update information on tax withholdings etc.)
  - At sale (understanding tax returns and financial notifications)
- Is company protected from claims or criticism?
  - Include waiver of claims language (check legally enforceable)
  - Include health warnings re share price and exchange rate fluctuations
  - Include language re compliance with local insider trading laws
  - Avoid inadvertently giving financial/tax advice – tell people to seek independent advice



Keep Getting it Right

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# Finally, Keep Getting it Right

- Getting it right for you and participants means ongoing compliance to avoid:
  - Unexpected costs
  - Reputational issues
- Ongoing compliance requires:
  - Systems to be in place to track data
  - Refreshing local information (both sought and provided)





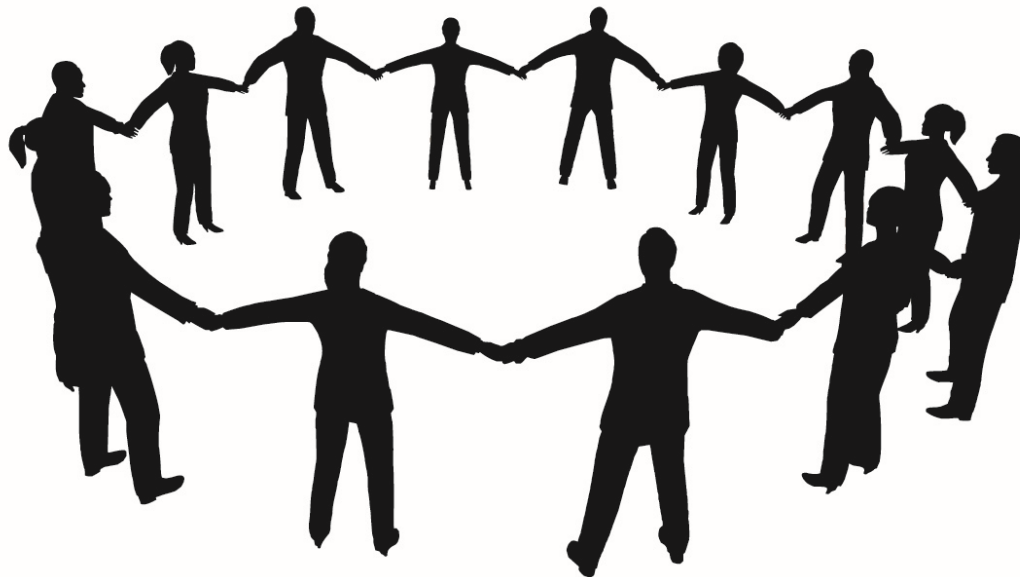
# Keep Getting it Right – Track

- Track numbers of participants in each jurisdiction
  - Security laws prospectus exemptions
  - Availability of tax efficient plans
- Track international secondees
  - How long in each jurisdiction
  - What does that mean for tax withholding and reporting
  - Inform if transfer means loss of tax efficiencies
- Track deadlines for reporting throughout the year
  - Tax
  - Exchange controls



# Keep Getting it Right – Refresh

- Schedule frequent internal reviews with all relevant personnel
- Update information gathered externally annually/at significant points in life of equity awards
- Keep local counsel updated to changes in company



# Keep Getting it Right

Keep getting it right with international equity awards is all about:

- Questions
- Systems

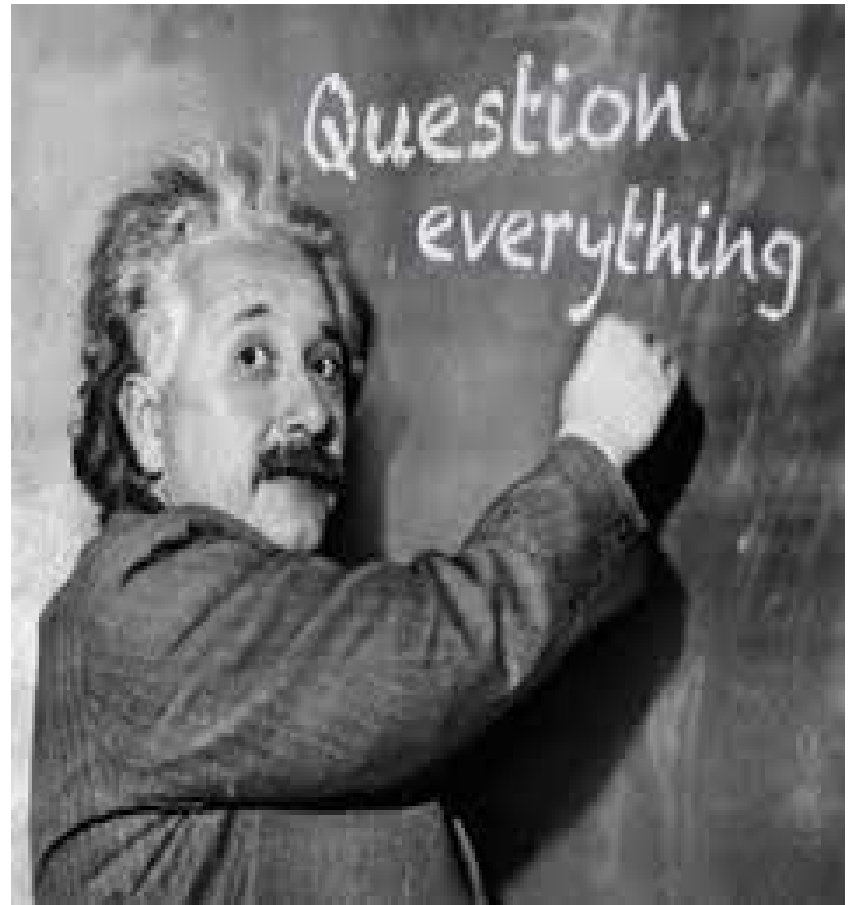


# Questions?

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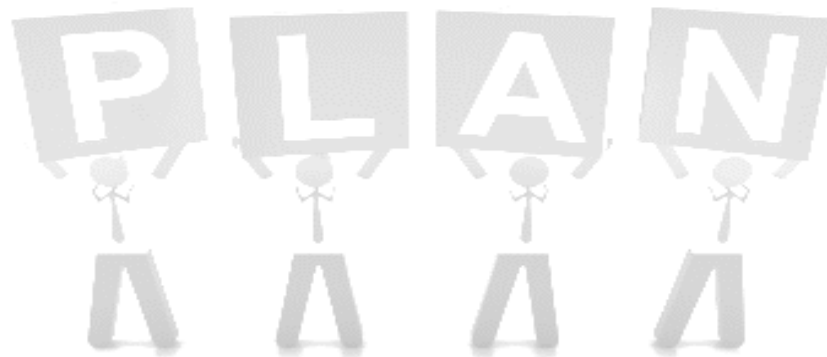
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# Future Comp Talk Programs

- **December 4:** Director Compensation Litigation
- **December 18:** Proxy Advisory Firm Policy Updates
- **January:** Equity Incentive Plan Design Tips



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