A new Pathway for Employee Share Schemes in the KSA

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Employee share schemes have operated for many years as a tool to reward, retain and attract talent. In many jurisdictions, employers seek to incentivise their workforce by offering them a share in the company, thereby creating a direct link between the company's overall performance and the employee's remuneration.
Whereas employee share schemes have increased in profile and prominence globally, they have yet to gain significant traction in the Kingdom of Saudi Arabia ("KSA").
Employers who have sought to incentivise staff in the KSA with the offer of share schemes have found the regulatory regime, at times, difficult to navigate and unduly burdensome. However, recent changes introduced by the Capital Markets Authority ("CMA") to the regulation of securities in the KSA appear to have made it easier for employers to set up and implement share schemes. This article will examine these changes, and their impact on employee share schemes in particular.

KSA Share Schemes

Incentive schemes in the KSA have traditionally comprised of relatively unsophisticated bonus and commission schemes.
In the KSA, employee share schemes have largely been the preserve of multinational employers. The recent changes to the regulatory regime relating to the offer of securities have potentially opened the door to employee share schemes becoming more widely implemented as an additional form of remuneration, and a means for incentivising employees.
The offer of securities (which includes the offer of shares) in the KSA is regulated by the CMA pursuant to the Capital Market Law issued by Royal Decree No. M/30 dated 2/6/1424 H. Until recently, share schemes were governed by the Offers of Securities Regulations ("OSRs") issued by the CMA on 4 October 2004 (as amended). On 1 April 2018, the CMA replaced the OSRs with the Rules on the Offer of Securities and Continuing Obligations ("ROSCOs"). A summary of the position under the old OSRs is set out below together with an examination of the new rules under the ROSCOs and how they will impact the offer of share schemes.

Old rules under the OSRs

Under the OSRs, an offer of shares generally fell into one of two main categories: a "public offer"; or a "private placement". In the context of an employee share scheme, an offer of shares was understood to fall within the definition of a private placement by virtue of being a "limited offer" under the OSRs, i.e. an offer of securities where the "offeree is an employee of the issuer or its affiliate". Accordingly, although companies did not have to comply with the stringent requirements of preparing a prospectus for a public offering, there were still certain requirements prescribed in the OSRs that had to be complied with for the purposes of employee share schemes.
In particular, the offer of the shares had to be made through an "authorised person" (as defined in CMA regulations) and the offeror had to comply with a pre and post offer notification requirement,

under which it had to provide the CMA with certain information relating to the offering of shares as a private placement. Importantly, the CMA had the right to raise objections to any of the details provided in the notification and could go so far as preventing the issuing of the shares if it considered it appropriate.

Moreover, the OSRs also set out certain requirements regarding the information that had to be made available to any participants of the share scheme, which had to be submitted to the CMA as part of the pre-offer notification process. There were also certain declarations that had to be signed by the offeror as well as the authorised person when filing the pre-offer notification with the CMA. Finally, an offer of shares could only be made to employees if the CMA did not object to the pre-offer notification.

New rules under the ROSCOs

Under the ROSCOs, an offering of shares to employees of the issuer or its affiliate (e.g. a local KSA entity of a multinational organisation) now falls under the newly created category of an "exempt offer" provided that it is not an offer of shares listed on the KSA stock exchange. Although private placements still exist under the ROSCOs, and many of the previous requirements under the OSRs still apply to them, the requirements relating to an offering of shares as an exempt offer are now less stringent.

The ROSCOs state that when an offeror is making an exempt offer it must notify the CMA on a quarterly basis of certain information that is set out in the ROSCOs including, e.g.: the total number and value of the exempt offers; the category of offerees; and the price paid for each security. Further, where an exempt offer is not yet complete, the ROSCOs specify certain information which must be included in the quarterly notification to the CMA relating to the ongoing exempt offer(s). Notably, the ROSCOs do not give any right to the CMA to object to the offering of shares under an exempt offer. Similarly, there is no requirement to submit any documents which may be used under a share scheme or any signed declarations from the offeror or an authorised person to the CMA together with the notification of an exempt offer. Importantly, the ROSCOs appear to suggest that an offer of shares as an exempt offer can be made directly by the offeror rather than having to be made through an authorised person as was previously the case under the OSRs.

The notification requirements under the ROSCOs appear less onerous than under the OSRs. The supporting information required by the CMA has been reduced, and the CMA has relinquished its ability to block the offering of shares. These factors suggest that the CMA is comfortable with changing the focus of its role to one of oversight rather than scrutiny when it comes to employee share schemes.

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Impact of the changes under the ROSCOs

It is still too early to definitively assess the impact of the new ROSCOs, and whether they will lead to an increase in the offer of share schemes to employees in the KSA. However, the changes to the regulatory regime are likely to encourage more innovative means of rewarding and incentivising employees on a longer-term basis, given the relaxation of the previous requirements governing the offering of shares under the OSRs. This can only be good news for employers who are looking to engender a more performance driven work culture that aligns the interests of employees with the shareholders of the business.

Employee share schemes offer one solution for fulfilling the long-term aspirations and ambitions of employers and employees, and the changes introduced by the ROSCOs to the regulatory regime give hope to greater creativity in the market for other forms of long-term incentive plans to be introduced and to thrive in the KSA.

Whilst the ROSCOs are a step in the right direction and promise greater flexibility in the provision of long-term incentive plans in the KSA, employers still need to be aware of the notification and filing requirements under the new rules, which have to be complied with on a quarterly basis. The possibility for employers to offer share schemes directly without the need to go through an authorised person should reduce the complexity and cost of implementing share schemes in the KSA. Over time, we expect that this will lead to more long-term incentive plans being introduced into the KSA.

Al Tamimi & Company's Employment and Incentives team regularly advises on employee share schemes. For further information please contact Mohsin Khan (Mohsin.Khan@tamimi.com) or Zahir Qayum (Z.Qayum@tamimi.com).