

BRITISH VIRGIN ISLANDS GUIDANCE ON THE BEARER SHARE REGIME

Anton Goldstein – March 2010

The Financial Services Commission in the British Virgin Islands has recently published guidance stating that in order to “re-enable” bearer shares that were disabled on January 1, 2010, it is necessary to apply to court in the British Virgin Islands. The key implication of this guidance is that failure to apply to court and “re-enable” bearer shares prior to December 31, 2010 will result in the shares becoming permanently disabled.

As has been widely publicised, a new bearer share regime came into effect in the British Virgin Islands at the beginning of this year. Broadly speaking, the most significant aspect of the new regime was that bearer shares in companies incorporated in the British Virgin Islands prior to January 1, 2005 which were not deposited with a custodian, or converted or exchanged into registered shares before January 1, 2010 were “disabled”. This meant that the shares lost all of their rights, including the right to vote, the right to receive dividends and the right to share in the assets of the company on liquidation.

Due to some ambiguities in the legislation, there has been some debate about the process for “re-enabling” disabled shares. One view is that disabled bearer shares can be re-enabled – and the rights restored – by the holders of the shares simply depositing the bearer shares with a custodian or arranging for the company to convert or exchange them for registered shares. The alternative view was that it was necessary to first apply to court so as to obtain an extension of the January 1, 2010 deadline before depositing, converting or exchanging the shares.

On March 5, 2010, the Financial Services Commission (the “FSC”) released guidance stating that, in its opinion, the second view was correct. In other words, the only way to re-enable disabled shares is for the company or a person with an interest in the bearer share (a) to apply to court in the British Virgin Islands so as to obtain an extension of time; and (b) to subsequently deposit the shares with a custodian or convert or exchange them for registered shares. In the FSC’s view, depositing disabled shares with a custodian or converting or exchanging them for registered shares without first applying to court is not effective to re-enable the disabled shares.

If the FSC’s interpretation of the legislation is correct, the key implication is that shares which are currently disabled will become *permanently disabled* at the end of the year. The reason for this is the relevant legislation only permits the court to grant an extension of time until December 31, 2010. After that date there will be no way to comply with the process for re-enablement set out by the FSC and the disablement will become permanent.

While we acknowledge the uncertainties in the legislation, there are some questions marks about whether the FSC’s interpretation of the legislation is correct. We are of the view that it is not. In particular, the consequence of permanent disablement appears to be in conflict with the operative provision in the legislation which states that “a bearer in a company is disabled *for any period* during which it is held by a person other than a custodian” (emphasis added). Furthermore, the definition of disablement expressly contemplates the ability to deliver shares to a custodian. It is also surprising that the FSC has adopted such a draconian interpretation in the absence of a provision in the legislation expressly contemplating permanent disablement.

The FSC’s interpretation also has the consequence of treating disabled bearer shares in companies incorporated prior to January 1, 2005 differently from those incorporated after that date. In particular, disabled shares in companies incorporated after January 1, 2005 can be re-enabled at any time without applying to court and can never become permanently disabled.

However, in practice the FSC's guidance is likely to mean that authorised custodians in the BVI will not accept the deposit of disabled bearer shares without evidence of an appropriate court order. Moreover, any attempt to re-enable disabled bearer shares without a court order will not be recognised as valid by the FSC, which has the power to liquidate companies which are not in compliance with the bearer share regime.

As such, we recommend that companies with disabled bearer shares in issue and holders of disabled bearer shares make an application to court and complete the other formalities to re-enable their shares as soon as possible and, in any event, prior to the end of the year. Otherwise, at least in the FSC's view, these shares will become permanently disabled.

If you have any queries or require any assistance on this topic, please do not hesitate to contact Robert Briant (+1 284 852 1100; robert.briant@conyersdillandpearman.com), Anton Goldstein (+1 284 852 1119; anton.goldstein@conyersdillandpearman.com) or your usual contact at Conyers Dill & Pearman.

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