

# To Earmark Or Not To Earmark

This briefing sets out some of the concerns that clients are sharing in relation to earmarking trust assets for share plan management and a practical solution to this problem.

Ogier Fiduciary Services does not give tax or legal advice and nothing suggested in this briefing is intended to provide tax or legal advice. Companies should seek tax and legal advice prior to making any recommendations to the trustee in relation to their plans.

## Background

The Finance Bill 2011 received Royal Assent and has been supported by detailed guidance from HMRC together with a long set of Frequently Asked Questions.

On the whole, advisors are of a view that share plans established to retain and motivate employees can be operated within the legislation without too many amendments to existing processes and plan rules. To be clear, UK approved share plans are all exempt from this legislation and the plans in question are the unapproved plans used on a global or executive basis with offshore trustees.

One aspect that has created a fair amount of debate however is the question of whether plans fall within the exemptions from earmarking charges or whether clients should avoid earmarking altogether.

## Earmarking

The legislation has introduced the term "earmarking" into law. Earmarking happens when a relevant third person (the trustee) holds trust assets on behalf of known individuals.

Typical share warehousing, where the company manages all the detailed administration of the share plan and merely hedges its exposure to movements in the share price by warehousing shares in an offshore trust, does not usually give rise to earmarking. This is because the trustee is only ever asked to satisfy awards made by the company and is not in possession of the details as to who those shares are set aside for until the vesting date, which is also the tax point for those awards.

If the trustee has typically granted the awards over the shares, this could be earmarking and may be caught under the legislation unless the plan rules fall within certain exemptions.

The problem arises where the company has outsourced the full administration of the plan to the trustee, who also

administers the plan using the same staff and corporate entity. The trustee in these instances therefore knows the exact details of the awards made to employees and may have therefore earmarked the assets in the trust.

There is correspondence to suggest that HMRC will not impute certain knowledge on the trustee and there is a general acceptance that HMRC did not intend to make straight forward share plans difficult to manage or administer.

## Exemptions

There are a number of exemptions set out in the legislation that would suggest that most share plans that have criteria that match standard share options or share award arrangements should avoid a tax charge on granting of the award by a trustee, these may include where:

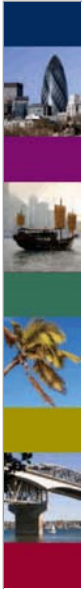
- the share plan is an approved SAYE, CSOP, SIP or qualifying EMI scheme;
- the trust is not funded with more shares than would reasonably be expected to be required to satisfy awards;
- there is a vesting date of not more than 10 years from the date of grant, which along with specified conditions, means there is a reasonable chance of the award being forfeited;
- individuals pay market value for shares that are purchased from the trust; or
- there is a specific exit event that will trigger the vesting of awards.

Where there is any uncertainty that the awards may not fall within an exemption as advised by the plan's legal or tax advisors, the solution may be for the trustee and administration functions of the plan to be split such that the trustee is no longer aware of the details of the share awards. This avoids a test on earmarking of trust assets altogether and the trustee will simply warehouse shares for the benefit of all employees generally within the beneficiary class.

## Ogier's Solution

Ogier offers both share warehousing and full service administration to its share plan clients.

We offer these services from various locations and in particular, have clients utilising our centre of excellence in Jersey for Employee Benefit Trust administration, whilst the trustee role is undertaken in a number of our jurisdictions, including Guernsey, Cayman Islands,



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Ireland, Bahrain and London depending on the nature of the trust and the needs of our clients.

Splitting the roles of trustee and administrator has therefore been a part of our service for many years and now has the added benefit of further mitigating any potential for earmarking tax charges. The trustee in each of our other jurisdictions does not have access to our client administration database and therefore has no way of having knowledge of individual employee awards under the plans that we manage.

## About Ogier

Ogier is an award winning world leader in the provision of offshore legal and fiduciary services.

The Group employs over 850 people and provides advice on all aspects of BVI, Cayman, Guernsey and Jersey law and fiduciary services through our international spread of offices that cover all time zones and key financial markets. Our network includes Bahrain, BVI, Cayman, Guernsey, Hong Kong, Ireland, Jersey, London, Shanghai and Tokyo.



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## Contact details

### Jersey

#### Fiduciary:

Philip Norman

+44 1534 504430

philip.norman@ogier.com

Tania Bearryman

+44 1534 753936

tania.bearryman@ogier.com

#### Legal:

Steve Meiklejohn

+44 1534 504462

steve.meiklejohn@ogier.com

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