



EMI OPTIONS BECOMING INVALID

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Ten years is a long time for EMIs

- What do we look for now in DD we may not have looked for ten years ago:
 - Description of restrictions
 - Working time wording (used to be in a form)
 - Cashless exercise
 - Exercise in anticipation of takeover

Restrictions

- This change took us all by surprise (28 July 2016)
- Restrictions stated in accordance with HMRC's guidance in force at the time of grant will be considered to be acceptable
- Evidence restrictions have been brought to Optionholder's attention in a meaningful way at or near the date of grant
 - HMRC to QCA "HMRC is not aware of any options that have yet been disqualified for this reason." 17 February 2018
 - Failure to state a trivial restriction will not be a compliance issue
 - Exit only options; HMRC relaxed

What are common restrictions?

- Reference the economic rights (probably not a restriction but money is key and doesn't hurt)
- Can directors refuse registration
- Do you have to offer shares around before you can sell them
- Compulsory sale of your shares
- Conversion of your shares
- Pre-emption rights
- Drag [and tag] rights

- If the company is listed; hard to say there are restrictions

Working Time Declaration

- More of problem now because some employees don't sign anything
- My preference is a contract between the company and Optionholder
- Seems harsh for Optionholders who work Monday to Friday 9 to 5
- If you forget approach HMRC:
 - Send employment contract so it's obvious;
 - Look for previous hard copy EMI 1 forms

What we don't worry about (or care about less than we did)

- Time off on furlough
- Looking for EMI1 forms
- Entrepreneur's relief
- Notifying HMRC if missing cashless exercise wording

Faulty EMI contracts

- Must refer to Schedule 5
 - Death plus one year
 - Inappropriate Performance Conditions
 - Cashless Exercise
 - Hard First Exercise Date
 - 1% of the company
-
- Must be in writing

Faulty EMI contracts; what have I corrected

- ~~○ Must refer to Schedule 5~~
- ~~○ Death plus one year~~
- ~~○ Inappropriate Performance Conditions~~
- ~~○ Cashless Exercise~~
- ~~○ Hard First Exercise Date~~
- ~~○ 1% of the company~~

- Must be in writing

Amending the Articles (Disqualifying events)

- 1 Affects the value of the option shares, and
 - Creates, varies or removes a right on **any** shares;
 - Imposes, a restriction on **any** shares; or
 - varies or removes restriction on the option shares

- 2 Increases the value of the option shares and
 - is not made for commercial reasons; or
 - the main purpose (or one thereof) is to increase the value of the option shares

EMI 9 things to check

1. Does it refer to Schedule 5 ITEPA?
2. Is there any comfort the Options have been notified to HMRC?
3. Check the number and class of shares (do they even exist)?
4. Can you have a cashless exercise (or is the exercise price so low it doesn't matter)?
5. Is there a valid exercise trigger?
6. Who is paying any tax / employer's NIC?
7. Has there been a disqualifying event?
8. Are the options in the money?
9. Has a valuation been agreed with HMRC and was it on the basis of cards up?

HMRC

- Credit where credit is due:
 - They actually give an answer
 - They respond quickly

- Enquiry powers
 - 12 months after the end of the 92 day notification period;
or
 - Longer if information in the notification of grant is false or misleading in any material respect

- Are you feeling brave?

Questions

- Any questions?

- If I could change one thing about EMI what would I change?



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