

Beyond the Bermuda Triangle: Charting a Course to U.S. Redomestication

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For decades, Bermuda's zero corporate income tax policy made the island an attractive domicile for insurance and reinsurance companies. In 2023, Bermuda enacted the Corporate Income Tax Act 2023, which imposes a 15% corporate income tax on Bermuda entities that are members of multinational enterprise groups with annual revenue of EUR 750 million or more. The tax became effective for fiscal years beginning on or after January 1, 2025. The legislation aligns Bermuda with the OECD/G20 Inclusive Framework Pillar Two Global Anti-Base Erosion ("GloBE") rules, which establish a global minimum effective tax rate of 15% for large multinational enterprises. As a result, insurers and reinsurers either looking for a tax-advantaged domicile or reconsidering an existing domicile in Bermuda may now evaluate domiciliary considerations differently.

Bermuda's historically tax-free policy had long proved to be a strong justification for insurers to tolerate a range of non-tax costs and complexities that came with a Bermuda domicile. Now, when deciding whether to domicile in or redomicile out of Bermuda, insurers must now compare the cost of the new Bermuda corporate tax in addition to a range of other considerations that have historically fed into the requisite cost-benefit analysis, including: (1) Bermuda's regulatory framework; (2) the Bermuda Monetary Authority's ("BMA") reputation; (3) proximity and connectivity to the London market; and (4) the potential benefits and costs associated with alternate domiciliary jurisdictions.

Given the stir that Bermuda's new corporate tax has created, we have outlined below some thoughts regarding a redomestication out of Bermuda and to a U.S. state. For illustrative purposes, we have used Delaware, which is a common jurisdiction of incorporation. Other U.S. states likely have similar processes and share similar advantages.

Redomestication via Discontinuance

For companies that conclude that a departure from Bermuda would be beneficial, two principal legal pathways exist: (1) discontinuance from Bermuda followed by domestication into Delaware or (2) redomestication via a holding company merger structure. The choice of which path to follow may be driven by tax or other considerations.

Bermuda's Companies Act 1981 provides a statutory mechanism for a Bermuda company to "discontinue" from Bermuda and transfer its domicile to another jurisdiction. This process allows the company to maintain its legal identity and continuity while changing its jurisdiction of incorporation.

Bermuda Requirements

To effectuate a discontinuance, a Bermuda insurance company must satisfy several requirements. While a company's bye-laws may provide otherwise, the company's shareholders must approve the discontinuance, typically by a 75% supermajority vote. A director of the company must provide a statutory declaration filed with the Registrar of Companies stating that the company is solvent and that the discontinuance will not adversely affect the interests or rights of its creditors. The company and the directors must provide an irrevocable deed poll providing for service of process in Bermuda or at a specified address in the United States. The company must also publish notice of the proposed discontinuance at least 14 days before the effective date of the discontinuance in an appointed newspaper in Bermuda and in a national newspaper in each jurisdiction within which it carries on a substantial part of its business. Upon satisfaction of these requirements and the filing of a notice of discontinuance and related documents with the Registrar, the Registrar issues a certificate of discontinuance.

Delaware Domestication

Once a company's discontinuance from Bermuda is effective, it may domesticate into Delaware under Section 388 of the General Corporation Law of the State of Delaware ("DGCL"), which permits a non-U.S. entity to become a domestic corporation in Delaware. To effectuate domestication in Delaware, a company files a certificate of corporate domestication and a certificate of incorporation with the Delaware Secretary of State. Upon the effective date of these filings, the entity becomes a Delaware corporation.

Other Considerations

Insurance and reinsurance companies should discuss with the BMA whether the company will continue to be subject to regulatory supervision by the BMA, including as

a group supervisor, and whether any notice and approval requirements will be applicable. In addition, consider whether the company has Bermuda employees and the impact on existing employment agreements and arrangements.

SEC Requirements

For Bermuda companies that are publicly traded, the discontinuance must be effectuated through the filing of a Form S-4 registration statement under which the effective exchange of common shares in the Bermuda company for shares of common stock of the Delaware corporation is registered for purposes of the Securities Act of 1933. To the extent a vote of shareholders is required, the Form S-4 must also contain a proxy statement soliciting votes in favor of the discontinuance. The new constituent documents for the Delaware entity would need to be filed on Form 8-K, and post-effective amendments to existing registration statements may also be required for the new entity to assume the role as the registrant under those registration statements.

A key advantage of this approach is legal continuity. The company remains the same legal entity throughout the process—all contracts, insurance policies, licenses and obligations are preserved. There is no assignment or novation of existing agreements, which may be particularly important for an insurance company with numerous outstanding policies and reinsurance contracts. Another key advantage is the ability to effectuate the redomestication without the need for a shareholder vote if permitted by the company's bye-laws, which reduces the risk that the redomestication cannot be effected, shortens the redomestication timeline and reduces the cost of redomesticating since votes do not need to be solicited, and no special general meeting of shareholders needs to be held.

Redomestication via Holding Company Merger

An alternative approach involves a merger structure effectuated under DGCL Section 252, which permits mergers between a Delaware corporation and a corporation organized under the laws of any other jurisdiction, including a non-U.S. jurisdiction such as Bermuda. This structure is useful when a company wishes to establish a U.S. holding company structure simultaneously with a redomestication or where discontinuance presents tax, regulatory or other considerations.

Typical Structure

Such a transaction is generally structured as follows: A new Delaware holding company ("NewCo") is formed, which then forms a wholly owned Delaware merger subsidiary ("MergerSub"). MergerSub then merges with the Bermuda company pursuant to

Section 252 of the DGCL. In a typical “reverse triangular” structure, the Bermuda company survives the merger as a wholly owned subsidiary of NewCo, while the shareholders of the Bermuda company receive shares in NewCo, and the former shareholders of the Bermuda company become shareholders of NewCo. The reverse triangular merger would be used if there is a desire to keep a Bermuda entity in the structure for tax, regulatory or other reasons.

Key Procedural Requirements

A merger, as outlined above, requires the approval by the board of directors and shareholders of each constituent corporation. For the Delaware entities, the affirmative vote of a majority of outstanding shares is the standard approval threshold (and is an easy vote to obtain as wholly owned subsidiaries). For the Bermuda company, approval requires a 75% supermajority vote (unless the company’s bye-laws provide otherwise). Section 252(c) of the DGCL permits the certificate of merger to amend the certificate of incorporation of the surviving corporation, providing flexibility to establish the desired governance structure of the combined entity in connection with the merger transaction itself.

Appraisal Rights

Appraisal rights for dissenting shareholders of the Bermuda company are typically available in a long-form merger, which creates some risk of shareholders seeking the fair value of their shares in cash.

Regulatory Approvals

The merger transaction requires BMA approval for the Bermuda insurer, as the merger constitutes a material change to the insurer’s corporate structure. Additionally, if the Bermuda company has U.S. insurance subsidiaries, applicable state insurance department approvals or notices are likely to be required for any resulting change of control of those subsidiaries.

Other Considerations

The merger structure could result in a change of control or require consents under certain contracts, such as insurance policies, reinsurance contracts, credit agreements or other debt instruments or employment agreements, which should be reviewed in advance of effectuating the merger.

SEC Requirements

Similar to the discontinuance structure, for Bermuda companies that are publicly traded, the redomestication must be effectuated through the filing of a Form S-4 registration

statement that registers the shares of the new Delaware holding company that will be the consideration for the public shareholders in the merger for purposes of the Securities Act of 1933. The Form S-4 must also contain a proxy statement soliciting votes from shareholders in favor of the merger. Form 8-K disclosure will be required for the merger agreement and the new constituent documents, and new registration statements on Form S-3 and Form S-8 will need to be filed for the new Delaware holding company, which would succeed to the reporting history of the former Bermuda company.

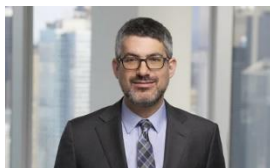
The merger approach to redomesticating may be preferable for several reasons. It allows the company to maintain the Bermuda company as a subsidiary (which may be desirable for certain lines of business, existing regulatory approvals or tax reasons) while establishing a publicly traded Delaware holding company. It also provides structural flexibility, as the holding company can serve as a platform for future acquisitions or organizational changes.

Final Thoughts

Bermuda's adoption of a corporate income tax represents a potentially fundamental shift in the competitive landscape for insurance and reinsurance companies. Companies that historically chose Bermuda for its tax-efficient environment may wish to reassess whether remaining in Bermuda continues to optimally serve their interests or whether redomestication to the United States is the better option.

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