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Briefing in relation to new developments in Liberian legislature affecting the bearer shares of Liberian corporations

## Amendment to Liberian Business Corporations Act implementing a new bearer share policy and custodial requirements for Liberian corporations

- 2 The Government of the Republic of Liberia passed legislation, which prohibits new Liberian entities formed after May 31<sup>st</sup>, 2018 from issuing shares in bearer form
- 2 Existing Liberian entities formed on or before May 31<sup>st</sup>, 2018 are allowed to maintain bearer shares under certain conditions
- 3 The holders of bearer shares of existing Liberian entities should place the relevant certificates of such shares in the custody of a Custodian approved by the Registrar
- 5 If any existing Liberian entity fails to comply with the requirements of the new bearer shares policy by the date specified in the law, then its articles of incorporation shall be automatically amended to registered shares, the issued bearer shares shall be disabled and the entity shall be subject to penalties
- 6 Existing Liberian entities should submit annually to the Registrar in the form of an affidavit information regarding bearer shares

Following the general movement to increase corporate transparency, Liberia recognized the new international requirements and standards for maintaining beneficial ownership information for domestic and foreign entities and has been striving to ensure adherence thereto and compliance with such requirements and standards and the implementation thereof. Hence, the Liberian Government has enacted an amendment to the Business Corporations Act, Chapter 1, Title 5, Liberian Code of Laws Revised (the "Amendment"), implementing certain recommendations of the Organization for Economic Co-operation and Development Global Forum on Transparency and Exchange of Ownership Information for Tax Purposes (the "OECD") and the Financial Action Task Force on Money Laundering (the "FATF").

In line with these requirements and standards, the Amendment recognized the lack of a legal mandatory requirement for Liberian business and corporate entities to file information regarding their directors, officers or shareholders and accepted that the financial transactions of such entities presented risks for tax evasion, illicit flow of capital, money laundering and terrorist financing and like.

The Government of Liberia acknowledged that the issuance of bearer shares exposed Liberia, with impact on other countries too, to prospects of deprivation of resources that would otherwise be available to support sustainable development through investments in numerous sectors. Therefore, the Senate and the House of Representatives of the Republic of Liberia enacted the Amendment to regulate the ownership and use of bearer shares and the maintenance of ownership and other associated information by business and corporate entities formed under the laws of Liberia.



**The Amendment implements a new bearer shares policy which prohibits new Liberian entities from issuing shares in bearer form and introduces several conditions to apply to ownership of bearer shares of existing entities**

**New Liberian entities formed after May 31<sup>st</sup>, 2018 will not be authorized to issue bearer shares**

For some time now, certain lending banks have ceased to accept bearer shares and require corporations to amend their articles of incorporation and issue registered shares instead. The main reasons for this can be attributed to the banks' difficulty of complying with their KYC requirements due to the fact that bearer shares present an impediment to transparency of ownership and/or to the potential liability that may arise from taking pledges of bearer shares and/or for reasons of reputation.

This specific amendment to the Liberian Business Corporations Act follows the general movement to increase corporate transparency and is an attempt of the Liberian Government to comply with the international standards for ensuring availability and access of information regarding the ownership of entities.

Under the Amendment, Liberian entities incorporated after May 31<sup>st</sup>, 2018 will not be authorized to issue shares or

other equity interests in bearer form. Such new entities incorporated after the said date will be authorized to issue registered shares only. Their articles of incorporation will state the authorized capital as "registered shares" with or without par value.

**Existing Liberian entities formed on or before May 31<sup>st</sup>, 2018 are allowed to retain bearer shares under certain conditions**

Each existing Liberian entity incorporated on or before May 31<sup>st</sup>, 2018 which has authority in its articles of incorporation to issue shares in bearer form should do one of the following by the first anniversary of the date of its incorporation subsequent to December 31<sup>st</sup>, 2018 (the "Conversion Date"), that is by the anniversary date of its incorporation in 2019: (a) cause its articles of incorporation to be amended to authorize the issuance of registered shares only, thus removing the power to issue shares in bearer form and consequently cause each holder of bearer shares to convert any such shares to registered form, or (b) retain the

**"Liberian entities incorporated after May 31<sup>st</sup>, 2018 will not be authorized to issue shares or other equity interests in bearer form. Such new entities incorporated after the said date will be authorized to issue registered shares only"**

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option of having bearer shares and cause each holder of its shares already issued in bearer form to either (i) deposit the certificate(s) of the relevant bearer shares with a Custodian approved by the Registrar pursuant to the terms of a custodial agreement entered between such holder and the Custodian, or (ii) convert such bearer shares to registered form, or (c) where no shares in bearer form have yet been issued by an existing Liberian entity, but such entity prefers to retain the authority to issue shares in bearer form, each such entity shall submit annually to the Registrar an affidavit stating that no bearer shares are issued and outstanding in bearer form; if a Liberian entity issues bearer shares after the Conversion Date, the holder thereof should either deposit the relevant bearer share certificates with a Custodian or convert such shares to registered form.

### **Custodial requirements for bearer share certificates**

For the purposes of the above provision of the Amendment stipulating the placement of bearer share certificates in the custody of a Custodian approved by the Registrar, such Custodian is a duly authorized person or entity that may exercise custody over share certificates evidencing bearer shares duly issued by a Liberian entity, responsible for maintaining a minimum of information regarding the holder and the beneficial owner of the share certificates in its custody. A Custodian may be either (a) the Liberian Business Registry for resident Liberian entities, or (b) the LISCR Trust Company or any domestic bank or other trust company with a paid in capital of not less than Fifty Thousand United States Dollars (US\$50,000) which is authorized by the Liberian legislature to act as a custodian for the above purpose and has obtained a license by the Liberian Minister of Foreign Affairs for non-resident Liberian entities, or (c) an institution licensed to provide trust services by the jurisdiction of its operation, approved by the Registrar and contractually bound to comply with the below requirements of the Amendment.

Under the Amendment, where a Liberian entity decides to retain the option of having shares issued in bearer form, the Owner of any such bearer shares who elects to maintain its bearer shares (and not to convert them to registered form) should enter into a custodial agreement with a Custodian to place the certificates representing such bearer shares in the latter's custody. Such custodial agreement should specify and include the following information: (a) name and address details of the Owner and of the Beneficial Owner of the respective bearer shares, (b) name and address details of

**Existing Liberian entities should either amend their articles of incorporation to authorize the issuance of registered shares only and thus existing bearer shares should be converted to registered form or retain the option of having bearer shares and thus the holders of such bearer shares should either deposit the relevant certificates of such shares with a Custodian approved by the Registrar pursuant to a custodial agreement or convert them to registered form**

**“Where no shares in bearer form have yet been issued by an existing Liberian entity, but such entity prefers to retain the authority to issue shares in bearer form, such entity shall submit annually to the Registrar an affidavit stating that no bearer shares are issued and outstanding in bearer form”**

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**Upon receipt of any bearer share certificates, the Custodian shall inform the relevant Liberian entity which has issued such certificates of its name and contact details, the number of each share certificate and the number of shares evidenced by each such certificate and the date each certificate was placed in its custody and shall also inform accordingly the Registrar confirming that all required information has been submitted by the Owner of such shares to the Custodian**

**“Only upon the request of the Registrar pursuant to a tax compliance information request or court order shall the Custodian provide full details of ownership of the shares issued in bearer form which are in its custody”**

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two natural persons who shall act as the legal representatives of the Owner, (c) an instruction by the Owner to the Custodian to hold the respective certificates in accordance with the provisions of the law, and (d) any other information, requirements or undertakings that may be requested by the Custodian.

For the purposes of the above provision of the Amendment, “beneficial owner” refers to the natural person(s) who ultimately own(s) or control(s) a Liberian entity and/or the natural person(s) on whose behalf a transaction is being conducted and/or exercise(s) ultimate effective control of a legal entity or arrangement.

Once a custodial agreement is entered into by the Owner of a Liberian entity’s bearer shares and the Custodian, the latter shall inform such Liberian entity in writing of (a) the Custodian’s name and contact details, (b) the number of each share certificate placed in its custody and the number of shares evidenced by each such certificate and (c) the date on which each such certificate was delivered in its custody. The Custodian shall also inform the Registrar within thirty days upon receipt of such share certificates in its custody and shall confirm that all required information has been submitted to him by the Owner.

The Custodian holding a certificate

evidencing bearer shares shall deliver confirmation to the corporation that has issued such certificate and to any other person upon the written consent or instruction of the Owner of such certificate that the Owner has deposited such certificate with the Custodian, specifying the name and address of the Owner and the persons who are entitled to give instructions to the Custodian with respect to the disposition of such shares.

The Custodian shall adjust its records to change the name and address of the Owner to another person only upon receipt of relevant instructions from the current Owner in a form approved by the Custodian.

The Custodian shall also provide to the Registrar information with regards to all share certificates which are in its custody, the number of each share certificate and the number of shares evidenced by each such certificate.

However, only upon the request of the Registrar pursuant to a tax compliance information request or court order shall the Custodian provide full details of ownership of the shares issued in bearer form which are in its custody.

The Custodian shall retain the information and documents provided for a period of five (5) years after the end of the calendar year during which the custodial agreement expires or terminates.

**What are the effects and ramifications of a Liberian entity's failure to comply with the provisions of the Amendment by the Conversion Date?**

**Existing Liberian entities incorporated on or before May 31<sup>st</sup>, 2018 are allowed to maintain bearer shares, but should act by the first anniversary of the date of their incorporation subsequent to December 31<sup>st</sup>, 2018**

A phase-in period is provided for Liberian entities that have been incorporated on or before May 31<sup>st</sup>, 2018 authorized to issue shares in bearer form, which runs until the first anniversary of the date of their incorporation subsequent to December 31<sup>st</sup>, 2018 (the "Conversion Date") to bring the entity into compliance with the Amendment's requirements.

If any such existing Liberian entity fails to take action and comply by the Conversion Date with the requirements of the Amendment by either amending its articles of incorporation to authorize the issuance of registered shares only and converting its bearer shares to registered form or by causing the holders of its bearer shares to place them in the custody of a Custodian, then, with effect on the Conversion Date, its articles of incorporation shall be deemed automatically amended, without the necessity of filing any instrument of amendment, to authorize shares in registered form only and any shares then outstanding in bearer form shall be converted to registered form.

As a result, however, each of its already issued and outstanding shares in bearer

form shall be disabled and any such entity not in compliance shall be liable to a fine of not less than Three Thousand United States Dollars (US\$3,000) and not exceeding Five Thousand United States Dollars (US\$5,000) or shall be subject to revocation or cancellation of its corporate documents or to dissolution, or to any combination of the above penalties. Any entity dissolved as the result of non-compliance with the above requirements may be reinstated only after the Minister of Foreign Affairs has been satisfied that such entity has complied with the aforesaid provisions of the Amendment.

For the purposes of the above provision of the Amendment, "disabled" means that the relevant bearer shares remain outstanding without any change in the stated capital, but do not carry any of the rights that would ordinarily attach to such shares. Any holder of a bearer share certificate representing any such shares shall not have the right to vote in shareholders' meetings, receive any dividends or any distribution of the assets of the such entity in the event of a dissolution or winding up of the entity, or transfer any interest in such shares (and the entity may not reacquire any such shares). However, the holder of a bearer share certificate representing any such shares shall have the right to exchange such certificate for a certificate in its name representing the relevant shares in registered form.

**If any Liberian entity fails to comply with the requirements of the Amendment by the Conversion Date, then its articles of incorporation shall be automatically amended to registered shares only, any issued bearer shares shall be automatically disabled and the entity shall be subject to penalties**

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**Liberian entities are required to submit annually information regarding shares in bearer form to the Registrar in the form of an affidavit and failure to comply may result in penalties and ramifications**

Any Liberian entity which has shares issued and outstanding in bearer form on the Conversion Date, in addition to the aforesaid requirements, shall also submit to the Registrar within thirty (30) days of the Conversion Date and on the anniversary of its date of incorporation annually thereafter an annual affidavit confirming the number of the shares issued and outstanding in bearer form on the relevant anniversary and the number of shares evidenced by certificates deposited with a Custodian pursuant to a custodial agreement as well as the name of such Custodian in respect of each such certificate deposited.

Similarly, any Liberian entity which has authorization to issue shares in bearer form but has not issued any such shares shall submit to the Registrar within thirty (30) days of the Conversion Date and on the anniversary of its date of incorporation annually thereafter an annual affidavit confirming that no shares are issued and outstanding in bearer form.

Any Liberian entity that fails to comply

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with its obligation to file such an affidavit shall be liable to a fine of not less than Three Thousand United States Dollars (US\$3,000) but not exceeding Five Thousand United States Dollars (US\$5,000), or be subject to revocation or cancellation of the entity's corporate documents, or dissolution, or any combination of the aforementioned penalties. Any entity dissolved as the result of non-compliance with its obligation to file such an affidavit may be reinstated only after the Minister of Foreign Affairs has been satisfied that such entity has complied with its obligations.

**Changes to each Liberian entity's obligation to maintaining records of its shareholders**

Every domestic entity and foreign corporation authorized to do business in Liberia shall keep up-to-date records containing the names and addresses of all registered shareholders and beneficial owners, the respective number and class of shares held by each and the dates of ownership thereof. In addition, any Liberian entity which issues bearer shares subject to the provisions of the Associations Law shall maintain a record of all certificates issued in bearer form, including the number, class and dates of issuance of such certificates. A resident domestic entity shall keep such records in Liberia.

**Liberian entities authorized to issue bearer shares should inform annually the Registrar in the form of an affidavit either of the number of such shares issued and outstanding and of the number of shares evidenced by certificates deposited with a Custodian or that no bearer shares have been issued and outstanding**

## Conclusion

Many offshore financial centers have already moved towards eliminating bearer shares or finding other solutions to comply with the OECD guidelines. Liberia has been one of the jurisdictions not having addressed the concerns with regards to transparency and availability of ownership information raised by bearer shares. This Amendment, in order to comply with the OECD guidelines and to fight illegal activities, eliminates bearer shares for new Liberian entities but implements an innovative solution regarding already issued and outstanding bearer shares of existing Liberian entities by immobilizing such shares rather than removing them completely. Therefore, existing Liberian entities authorized to issue bearer shares may retain such power and the confidentiality of the beneficial owners is protected. The freezing of bearer shares attempts to keep the free circulation of such shares controlled and maintain the exercise of rights granted by the ownership of the same, but assure knowledge of the ultimate owner of the bearer shares.

Hence, the details and information of the holders and beneficial owners of bearer shares shall be maintained by the Custodian holding the respective bearer share certificates, and, although such information is not a public record, may be disclosed upon the request of the Registrar pursuant to a tax compliance information request or court order.

It should be noted that these new requirements introduced by the Amendment have potentially significant penalties and ramifications. Liberian entities should amend their articles of incorporation or cause the holders of their bearer shares to place the relevant certificates of such shares in custody and make the necessary declarations and affidavits within the deadlines specified in the law in order to avoid any penalties.

Should you wish to discuss any of the issues discussed in this briefing, feel free to contact the author, Giannos Dalakos or a lawyer at our firm.

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