

Update on Bermuda's Economic Substance Legislation

Bermuda's Economic Substance regime amended with the aim of regularising the Bermuda regime with other offshore jurisdictions.

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We are pleased to report recent developments relating to the Bermuda economic substance regime. On 24 December 2019, both the Economic Substance Amendment (No. 2) Act 2019 and the Economic Substance Amendment (No. 3) Regulations 2019 came into force (together, the “Amendments”). As promised, the Amendments seek to regularize Bermuda’s economic substance regime with that of other offshore jurisdictions. In addition to the Amendments, the Minister of Finance issued the Economic Substance Requirements for Bermuda – Guidance Notes – General Principles (the “Guidance Notes”).

The Amendments ~ Sector Specific

A. Holding Entities

The definition of “pure equity holding entity” has been restricted to those entities whose primary function is to acquire and hold shares or an equitable interest in other entities, performs no commercial activity and the shares or equitable interests are majority or controlling interests in such other entities.

The minimum economic substance requirements have been outlined as (i) compliance with the applicable corporate governance requirements set out in the Companies Act 1981, (ii) submission of an annual economic substance declaration form, (iii) adequate “people” for holding and managing equity participations and (iv) adequate premises in Bermuda.

B. Insurance

The Amendments provide that an insurance entity will now only be in scope if it engages in insurance business in accordance with the Insurance Act 1978. As a result, insurance agents, brokers and managers, and other intermediaries that are regulated under the Insurance Act 1978, will be out of scope of the economic substance regime as long as they are not carrying on insurance business or another Relevant Activity.

C. Financing and Leasing

The Amendments have combined the relevant activities of financing and leasing. The consolidated Relevant Activity now incorporates providing credit facilities of any kind for consideration to any person of any kind, such as loans, hire purchase arrangements, finance leases (excluding land) and conditional sale or credit sale arrangements. Where a credit receivable is assigned to another person the assignee will be considered to be the person providing the credit facility, and will therefore be in scope.

Note that banking, insurance and fund management activities will not constitute financing and leasing.

D. Shipping

This Relevant Activity has been narrowed to the operation of a ship anywhere in the world other than in the territorial waters of Bermuda, including (i) transporting, by sea, passengers or animals, goods or mail for a charge, (ii) renting or chartering of ships for transporting, by sea, passengers or animals, goods or mail for a charge, (iii) sale of travel tickets and ancillary ticket-related services connected with the operation of a ship, (iv) use, maintenance or rental of containers, including trailers and other vehicles or equipment for the transport of containers, used for the transport of anything by sea and (v) functioning as a private seafarer recruitment and placement service. Save for cruise ships, the sole ownership of a ship will no longer bring such entity within scope. The definition of “ship” does not include a pleasure vessel.

E. Local Company

The definition of “local company” has been restricted to those entities that are carrying on a Relevant Activity (with the exception of banking and insurance business) and which (i) are required to be at least 60% beneficially owned and controlled by Bermudian persons, (ii) carry on business only in Bermuda, and (iii) are not part of a multinational enterprise group, are subject to reduced economic substance requirements. Such local companies will be required only to comply with applicable corporate governance requirements set out in the Companies Act 1981 (or equivalent legislation) but will not be required to complete and file an annual economic substance declaration form.

Guidance Notes - Clarification Points

A. Filing Requirements / Relevant Financial Period

Each Entity is required to file its Declaration Form, and each Non-resident entity is required to file its evidence of tax residency, no later than 6 months after the last day of each relevant financial period.

Example: The Entity has a financial year ending on 31 March. For that Entity, the first relevant financial period will be the financial year ending on 31 March 2020. The Entity will therefore be required to file its Declaration Form (or claim of tax residency outside of Bermuda, as the case may be) within six months after 31 March 2020 – i.e. on or before 30 September 2020.

B. “As a business”

The Guidance Notes have outlined that carrying on a Relevant Activity “as a business” means where the entity earns gross income in respect of such activity during the relevant financial period. As such, if an entity earns no gross income it will be out of scope of the economic substance regime.

C. Foreign Permanent Establishment

Where activities being undertaken by an entity outside of Bermuda result in a foreign permanent establishment (as understood under the OECD model tax convention), such that the entity can evidence that it is earning income and performing CIGA within that foreign permanent establishment, that may be taken into consideration by the Registrar of Companies in its assessment. Note, Relevant Activity resulting in gross income reported in Bermuda (and not in the foreign permanent establishment) would be subject to the economic substance requirements. In any event, an entity must ensure that CIGA is undertaken in Bermuda to meet the requirements.

D. Activities other than CIGA

Activities may be carried on in, or outsourced to, a jurisdiction other than Bermuda. Such activities may include, for example, back office functions, IT, payroll, legal services, or other expert advice or specialist services provided that, in each case, they are not of central importance to the entity in terms of generating gross income from a Relevant Activity.

The corporate team at CHW is available to advise on any queries relating to Economic Substance requirements.

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