

# **Economic Substance Requirements for Bermuda**

**DRAFT**

**Guidance Notes**

**General Principles**

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# 1. Definitions

## 1.1. Definitions

In these Guidance Notes, the following terms shall have the following meanings:

Term	Meaning
<b>Affiliate</b>	Has the meaning provided in section 2 of the Act
<b>Act</b>	Economic Substance Act 2018
<b>CIGA</b>	Core income generating activities as more particularly defined in the Regulations
<b>COCG</b>	EU Code of Conduct Group (Business Taxation)
<b>Declaration Form</b>	Economic substance declaration form required to be filed pursuant to section 5(2) of the Act, in a form to be prescribed by the Registrar
<b>ECOFIN</b>	EU Economic and Financial Affairs Council
<b>Entity(ies)</b>	A company registered under the Companies Act 1981; a limited liability company formed under the Limited Liability Company Act 2016; an exempted partnership, exempted limited partnership or an overseas partnership that has a separate legal personality in accordance with section 4A of the Partnership Act 1902, in each case engaged in one or more Relevant Activity, but does not include a Non-resident entity
<b>ES Laws</b>	Collectively, the Act and the Regulations
<b>ES Requirements</b>	Economic substance requirements set forth in section 3 of the Act, and Regulation 3 and as further described in section 7 of these Guidance Notes
<b>FHTP</b>	OECD Forum on Harmful Tax Practices
<b>Local Entity</b>	A local company or local LLC which does not carry on banking or insurance business
<b>Minister</b>	Minister of Finance
<b>OECD</b>	Organization for Economic Co-operation and Development
<b>Non-resident entity</b>	An entity that is resident for tax purposes in a jurisdiction outside of Bermuda that is not on Annex 1 to the EU list of non-cooperative jurisdictions for tax purposes.
<b>Registrar</b>	Registrar of Companies
<b>Regulations</b>	Economic Substance Regulations 2018, as amended
<b>Regulatory Acts</b>	Insurance Act 1978 and the Banks and Deposit Companies Act 1999
<b>Relevant Activity</b>	Relevant activity as defined in section 2 of the Act and described in section 6 of these Guidance Notes (and <b>Relevant Activities</b> means more than one Relevant Activity)

<b>Compliance Measures Act</b>	Registrar of Companies (Compliance Measures) Act 2017, as amended from time to time
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1.2. Terms

Terms not otherwise defined in these Guidance Notes shall have the meaning given to such terms in the ES Laws.

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## **2. Introduction**

The Minister of Finance is issuing these Guidance Notes pursuant to the provisions of section 12 of the Act.

The ES Laws became operative on 31 December 2018. The purpose of the ES Laws are to ensure that Bermuda does not facilitate the use of structures which attract profits but which do not reflect real economic activity that is being undertaken in Bermuda.

The purpose of these Guidance Notes is to: (i) assist Entities to determine if they are in scope of the ES Requirements and, if so, to assist them in understanding how to satisfy the ES Requirements; and (ii) provide guidance as to how the Registrar will measure and assess the criteria for meeting the ES Requirements. These Guidance Notes have been published in the Official Gazette and can be found on the Government of Bermuda website: <https://www.gov.bm/department/registrar-companies>.

In determining whether an entity has complied with the ES Laws, the Registrar will consider whether that entity has followed the principles set out in these Guidance Notes. However, these Guidance Notes are not intended to be prescriptive or to provide an exhaustive list of all matters that an entity should consider when assessing compliance with the ES Laws.

The Registrar will consider if and to what extent each Entity satisfies the ES Requirements in light of the applicable Relevant Activity(ies) being conducted by that Entity, having regard to the nature, scale and complexity of that Entity's particular business.

Entities are encouraged to seek professional advice if they are uncertain as to whether or to what extent they are subject to and comply with the ES Laws.

## **3. Background**

In December 1997, the Council of the European Union and the representatives of the governments of EU Member States adopted a resolution on a Code of Conduct for business taxation, with the objective to curb harmful tax practices. The following year, ECOFIN (the organization responsible for EU economic policy, taxation issues and the regulation of financial services) established the COCG to assess certain tax measures.

Whilst the original focus of the COCG was on EU member states, the COCG began to turn its attention to third countries and territories to which EU treaties do not apply and began the process of applying the same principles to those countries and territories. Those principles include ensuring that jurisdictions do not facilitate the use of structures which attract profits but which do not reflect real economic activity that is being undertaken in that jurisdiction (the principle of "substantial economic presence"). The standards for substantial economic presence agreed upon by the COCG are set out in a scoping paper issued by the COCG and approved by ECOFIN in June 2018. The scoping paper is commonly referred to as the "2.2 Scoping Paper" and forms the basis for the ES Requirements.

## **4. Who do these economic substance requirements apply to?**

ES Requirements apply to every Entity (as defined on page 1).

An Entity that is not engaged in any Relevant Activity is not subject to ES Requirements. However, such an entity will still be required to indicate in its annual reporting to the Registrar that it is not engaged in any Relevant Activity.

A Non-resident entity is also not subject to ES Requirements but will be required to indicate in its annual reporting to the Registrar whether or not it is engaged in a Relevant Activity, and will provide the Registrar with evidence of its tax residency (see below).

## **5. Application of the Economic Substance Requirements**

Any entity that is incorporated, formed and/or registered in Bermuda on or after 1 January 2019 is immediately subject to the ES Laws.

Any entity that was incorporated, formed and/or registered in Bermuda prior to 1 January 2019 will be subject to the ES Laws from 1 July 2019.

## **6. What are the Relevant Activities?**

Relevant Activity means carrying on as a business any one or more of the following:

- (a) banking;
- (b) insurance;
- (c) fund management;
- (d) financing;
- (e) leasing;
- (f) headquarters;
- (g) shipping;
- (h) distribution and service centre;
- (i) intellectual property; and
- (j) holding entity.

Each of these terms is defined in the Regulations.

The Registrar will consider that the above activities are being carried on as a business where the activity is being undertaken by the Entity with a view to a profit (whether or not a profit is actually earned) and will have regard to whether or not the Entity earns any gross income in respect of a Relevant Activity during the relevant financial period.

An Entity formed for charitable purposes, whose income is used solely in promoting those charitable purposes and no dividends or distributions are paid to its members or partners, will not be regarded by the Registrar as undertaking a Relevant Activity.

## **7. What are the Economic Substance Requirements?**

### ***7.1. ES Requirements***

In order for an Entity to comply with the requirement to maintain a substantial economic presence in Bermuda, it must demonstrate that it meets the ES Requirements. An Entity meets ES Requirements if:

- (a) it is managed and directed in Bermuda;
- (b) its CIGA are undertaken in Bermuda with respect to the Relevant Activity;
- (c) it maintains an adequate physical presence in Bermuda;
- (d) there are adequate full time employees in Bermuda with suitable qualifications; and
- (e) there is adequate operating expenditure incurred in Bermuda in relation to the Relevant Activity.

### ***7.2. Minimum economic substance requirements***

An Entity may be subject only to “minimum economic substance requirements”, where such Entity is:

- (a) a “pure equity holding entity” (as defined in Regulation 14(2)); or
- (b) a Local Entity.

“Minimum economic substance requirements” for all such Entities include:

- (a) compliance with the corporate governance requirements set forth in the Companies Act, Limited Liability Companies Act 2016 or the relevant Partnerships Act (as applicable), including keeping records of account, books and papers and financial statements; and
- (b) the filing of a Declaration Form.

A pure equity holding entity must have adequate employees for holding and managing equity participations and have adequate premises in Bermuda.

The requirement for a pure equity holding entity to have adequate employees and premises does not imply a positive obligation on that entity to hire employees or to acquire premises where no such employees or premises are reasonably required by that entity in any event. In such circumstances, the maintenance of a registered office (or equivalent) in Bermuda, and the management of such entity by the board of directors (or equivalent) in Bermuda, may be considered by the Registrar to be adequate for these purposes, having regard to the nature, scale and complexity of the entity’s business.

## **8. Filing Requirements and Related Matters**

### ***8.1. Filing Requirements - General***

An Entity must demonstrate it has satisfied the ES Requirements in respect of any relevant financial period by filing a Declaration Form with the Registrar in respect of that financial period.



The Declaration Form will collect the information that will be considered by the Registrar when determining whether an Entity meets the ES Requirements. The information to be provided by each Entity will include the items set out in section 5(2) of the Act and regulation 3 of the Regulations. The Registrar will have regard to the nature, scale and complexity of each Entity's business in his analysis of the information provided when determining if or to what extent the ES Requirements have been satisfied by that Entity.

#### 8.2. Relevant Financial Period

The relevant financial period for an Entity or Non-resident entity will be the financial year of that Entity or Non-resident entity, as determined in accordance with its constitutional documents. The first relevant financial period for any Entity or Non-resident entity will be the first financial year of that Entity or Non-resident entity commencing after the operative date of the ES Laws (i.e. the first financial year commencing on or after the 1 January 2019).

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

#### 8.3. E-Registration

The Registrar is in the process of building an e-registration system to accept and manage the information and data collected pursuant to the ES Laws. The e-registration system is scheduled to launch in the second quarter of 2020. To the extent necessary, these Guidance Notes will be amended to incorporate the rules and procedures for filing the requisite information necessitated by the e-registration system.

#### 8.4. Local Entities

Local Entities are required to complete and file a Declaration Form.

#### 8.5. Regulated Entities

Entities licensed under the Regulatory Acts are generally considered to operate in Bermuda with adequate substance, and the Registrar will have regard to such Entities' compliance with the Regulatory Acts (in addition to compliance with the Companies Act) in his assessment of compliance with the ES Requirements. However, such Entities are still required to complete and file a Declaration Form, and the Registrar will also have regard to the information provided in that Declaration Form in making his assessment of compliance with the ES Requirements.

#### 8.6. Entities engaged in more than one Relevant Activity

Where an Entity is engaged in more than one Relevant Activity during a relevant financial period, the Entity must comply with the ES Requirements for each applicable Relevant Activity but will be required to file one Declaration Form only.

#### 8.7. Cessation of Relevant Activity

If an Entity ceases to engage in a Relevant Activity during a relevant financial period, the ES

Requirements will not apply from the point at which the Relevant Activity ceases.

*Example: An Entity has been engaged in more than one Relevant Activity, for these purposes, referred to as RA1 and RA2. The Entity ceases to engage in RA1 during a relevant financial period. The ES Requirements will not apply to the Entity in respect of RA1 from the point at which RA1 ceases, but the ES Requirements will continue to apply to RA2. The Entity will inform the Registrar on its Declaration Form of the cessation date of RA1.*

If an Entity in liquidation is carrying on a Relevant Activity it continues to be subject to the ES Requirements.

When an Entity ceases to undertake any Relevant Activity, that Entity will no longer be subject to the ES Requirements and will no longer be subject to the requirement to complete and file a Declaration Form.

## **9. Criteria for ES Requirements**

### *9.1. The Registrar's approach to ES Requirements*

As indicated in section 8.1 of these Guidance Notes, every Entity must demonstrate that it has satisfied the ES Requirements for the relevant financial period by filing a Declaration Form.

In general, the Registrar will take a practical approach to the interpretation and application of the ES Requirements. As noted above, in his analysis of each Entity, the Registrar will have regard to the nature, scale and complexity of that Entity's business, and will apply criteria such as "adequacy" in that context.

### *9.2. Management and Direction of the Entity*

In considering whether or to what extent an Entity is "managed and directed in Bermuda", the Registrar will assess whether the Entity:

- (a) holds meetings<sup>1</sup> in Bermuda where strategic or risk management and operational decisions are made ("key meetings"); and
- (b) has an adequate number of senior executives, employees and other persons in Bermuda who are suitably qualified and responsible for oversight or execution of the Entity's CIGA.

An Entity is expected to have key meetings at a frequency proportionate to the nature, scale and complexity of the Relevant Activities it conducts. The Registrar would normally expect at least a majority of such key meetings to be held in Bermuda. It is generally expected that even for Entities with a minimal level of activity there will be at least one key meeting held by such Entity in Bermuda in each relevant financial period. However, it is not always necessary for all such meetings to be held in Bermuda or that the quorum<sup>2</sup> always be present in Bermuda, where the

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<sup>1</sup> Meetings may include board meetings, managers' meetings and partnership meetings in the case of companies, LLCs and partnerships respectively, as well as senior executive/management and committee meetings.

<sup>2</sup> Quorum in this context will be determined in accordance with applicable law and/or the Entity's constitutional documents.

circumstances of the Entity reasonably require the holding of some meetings outside of Bermuda (provided that the Entity is able to evidence such circumstances).

It is expected that minutes will be kept of all key meetings and that such minutes will evidence all the relevant strategic or risk management and operational decisions taken. It is also expected that all such minutes will be available for inspection in Bermuda, whether held electronically or in hard copy. Where records are held electronically, it is sufficient that such records are maintained and accessible in Bermuda, and it is not necessary that the relevant data centre be located in Bermuda.

In respect of the senior executives, employees or other persons responsible for oversight or execution of an Entity's CIGA, the Entity in question will be expected to maintain records in (or accessible from) Bermuda that evidence that such persons are suitably qualified to hold such responsibilities.

### 9.3. CIGA

The CIGA of an Entity in respect of any Relevant Activity must be undertaken in Bermuda. Where the CIGA are undertaken by a service provider under an outsourcing arrangement or by an affiliate of the Entity, such activity must also be undertaken in Bermuda.

### 9.4. Adequate Physical Presence and Premises

The ES Laws include a requirement for an Entity to have an adequate physical presence in Bermuda. As noted above, what is considered "adequate" for any Entity will depend on the nature, scale and complexity of the business of that Entity. There is no one rule or formula that will fit all Entities or be suitable for all Relevant Activities, and the requirement does not imply a positive obligation on an Entity to acquire or occupy premises if no such premises are reasonably required for the business of that Entity in any event.

If the Entity, either itself or through monitored outsourcing arrangements with a service provider or an Affiliate, has an adequate physical presence in Bermuda to undertake the Relevant Activity, this requirement would be satisfied.

Premises may be shared with one or more Entities, provided that such premises are adequate for the Relevant Activities undertaken by each such Entity.

### 9.5. Annual operating expenditure in Bermuda

The Entity must incur adequate expenditure in Bermuda in relation to the Relevant Activity it is engaged in. Expenditure must be adequate relative to the CIGA undertaken in Bermuda and proportionate to the nature, scale and complexity of the business of the Entity in question. If the Entity engages in more than one Relevant Activity, the expenditure in respect of each Relevant Activity will be assessed separately. The expenditure will generally be expected to be in respect of business expenses, fees, goods, services and employment costs paid to individuals or entities located in Bermuda.

### 9.6. Adequate Employees

The ES Laws include a requirement for an Entity to have adequate full time employees in Bermuda with suitable qualifications in relation to its Relevant Activity(ies).

As noted above, what is considered “adequate” for any Entity will depend on the nature, scale and complexity of the business of that Entity. There is no one rule or formula that will fit all Entities or be suitable for all Relevant Activities, and the requirement does not imply a positive obligation on an Entity to hire full time (or any) employees if no such employees are reasonably required for the business of that Entity in any event.

If the Entity, either itself or through some appropriately monitored outsourcing arrangements with a service provider or an Affiliate, has adequate employees to carry on the relevant CIGA, this requirement would be satisfied.

A “full time” employee does not necessarily mean an individual working on a full time basis in connection with a Relevant Activity. The staffing requirement may only need a portion of an employee’s time to fulfill the requirements of his/her function in order to be adequate. An employee may also work for more than one Entity (either directly or via a monitored outsourcing arrangement). The time of an employee can be allocated between activities or between Entities if appropriate in the circumstances, provided that the time allocated in respect of that employee is not double counted.

The Entity must establish that it has sufficient suitably qualified employees in Bermuda to carry on its Relevant Activity(ies). The directors (or equivalent) of an Entity may sometimes perform CIGA in addition to performing their fiduciary duties for the Entity. This will result in the reduction or possible elimination of the Entity’s need for full time employees or an outsourcing arrangement. In such cases, the Registrar may consider evidence of the CIGA performed by the directors in Bermuda.

Each Entity will be expected to maintain records in (or accessible from) Bermuda that evidence the time spent by employees or other persons in relation to each Relevant Activity (and in relation to each Entity, where time is spent with more than one Entity), and that such employees or other persons are suitably qualified to fulfill the duties undertaken by them.

## **10. Outsourcing Arrangements**

### ***10.1. Outsourcing Generally***

The criteria for outsourcing arrangements are set out in Regulation 3(2)(a) & (b).

It is permissible for an Entity to outsource any or all of its CIGA to an Affiliate or service provider so long as the outsourced activities are undertaken in Bermuda.

If an Entity does outsource any of its CIGA to an Affiliate or service provider in Bermuda, it must maintain records in (or accessible from) Bermuda that evidence that there are suitably qualified employees or other persons in that Entity who are responsible for the oversight and assessment of the implementation and execution of the outsourcing arrangement by the Affiliate or service provider, and that the Affiliate or service provider has adequate suitably qualified employees and premises to be able to implement and execute the outsourcing arrangement.

Where time spent by employees or service providers is spent in respect of more than one Entity or more than one Relevant Activity undertaken by any Entity, the records maintained by the Entity in question will be expected to demonstrate that there has been no double counting of time spent by such employees or service providers.

## 11. Measuring Adequacy

“Adequacy” has its ordinary dictionary meaning. It means “enough or satisfactory for a particular purpose”. What will be adequate for each Entity to comply with ES Requirements in respect of its Relevant Activity(ies) will depend on the particular facts of the Entity and Relevant Activity having regard to the nature, scale, and complexity of the Entity and/or the Relevant Activity undertaken.

Every Entity is required to maintain and retain appropriate records in or accessible from Bermuda to demonstrate adequacy of the resources utilized and expenditures incurred.<sup>3</sup>

## 12. Tax Residency

### 12.1. *Resident for tax purposes outside of Bermuda*

An entity will be a Non-resident entity, and therefore out of scope of the ES Requirements, if it is resident for tax purposes in a jurisdiction outside of Bermuda provided that the jurisdiction in which the entity claims to be resident for tax purposes is not in Annex 1 to the EU list of non-cooperative jurisdictions for tax purposes<sup>4</sup>.

The Registrar will regard an entity as being resident for tax purposes in a jurisdiction outside of Bermuda if its income from Relevant Activities is subject to tax in that jurisdiction. This may include an entity whose income from Relevant Activities is taxed on a branch or agency basis in a jurisdiction outside Bermuda.

The Registrar acknowledges that some jurisdictions charge tax by reference to a criterion other than residence. The pertinent principle for the Registrar is whether or not the competent authority or tax authority in the jurisdiction in question has accepted that the entity (or its members or partners in the case of a transparent entity – see below) is chargeable to tax in that jurisdiction by reference to the relevant criteria in that jurisdiction.

### 12.2. *Claim of residency for tax purposes*

Any entity which carries on a Relevant Activity, but asserts that it is a Non-resident entity by reason of being resident for tax purposes outside Bermuda, must make a claim to that effect to the Registrar. That claim must set out the jurisdiction in which the Non-resident entity claims to be resident for tax purposes and must provide sufficient evidence to support that claim. The claim of residency for tax purposes, and the evidence provided in support of that claim, must be provided to the Registrar within the time required for the filing of a Declaration Form as set out in 8.2 above.

### 12.3. *Evidence to support claim of residency for tax purposes*

Evidence that the Registrar will accept as sufficient to demonstrate that an entity is resident for tax

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<sup>3</sup> The duty to maintain and retain records of account are contained in section 83 of the Companies Act 1981; Section 50 of the Limited Liability Company Act 2016; and section 9A of the Limited Partnership Act 1883.

<sup>4</sup> At the time of issuance of these Guidance Notes, the most recent version of Annex 1 to the EU list of non-cooperative jurisdictions for tax purposes could be found at <https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/>

purposes in another jurisdiction will include one or more of the following:

- (a) a letter or certificate from the competent authority or tax authority of the jurisdiction in question, stating that the entity is considered to be resident for tax purposes in that jurisdiction; or
- (b) an assessment to tax on the entity, a confirmation of self assessment to tax, a tax demand, evidence of payment of tax or any other document issued by the competent authority or tax authority for the jurisdiction in question.

In circumstances where the evidence described above requires further clarification, the Registrar may also require that he be provided with a letter, addressed to the Registrar, from a suitably qualified professional (e.g. lawyer or chartered accountant qualified to practice in the jurisdiction in question) stating that, in the opinion of the professional in question, the entity is considered to be resident for tax purposes in that jurisdiction.

In the case of a transparent entity, residency for tax purposes in another jurisdiction must be demonstrated by reference to the members or partners on whom the entity's profits are taxable. For these purposes, a "transparent entity" means an entity in respect of which the entire profits are treated under the law of another jurisdiction as attributable to and taxable on some or all of the members or partners in the entity in question.

#### *12.4. Evidence to be provided for each relevant financial period*

A Non-resident entity undertaking a Relevant Activity must make its claim of tax residence outside of Bermuda, and provide evidence to support that claim, in respect of each relevant financial period (as such term is described in section 8.2 of these Guidance Notes).

Where the relevant financial period is not the same period as the tax accounting period, fiscal period or year of assessment for tax purposes for the entity in question, evidence of tax residency must be provided by the Non-resident entity to span the entire relevant financial period.

#### *12.5. Evidence to be provided in English*

All evidence provided to the Registrar must be provided in English. For any official documentary evidence that is not in English, a certified English translation of that documentary evidence must be provided.

#### *12.6. Provisional claim of residency for tax purposes*

The Registrar acknowledges that, in respect of an entity claiming to be a Non-resident entity, documentary evidence of tax residency may not be available for an entire relevant financial period until some time after that relevant financial period has ended, and outside the time otherwise required for the filing of a Declaration Form for that entity (if it was not a Non-resident entity) in respect of that relevant financial period. In such circumstances, the Registrar may regard that entity as a Non-resident entity on a *provisional* basis, and may specify a reasonable period within which the appropriate documentary evidence of tax residency must be provided by that entity in order for the Registrar to confirm that provisional finding. If the necessary documentary evidence is not provided by the entity within the time specified by the Registrar (or any extension to such time specified by the Registrar) the entity in question will be treated as having failed to provide

sufficient evidence to support its tax residence and will not be regarded as a Non-resident entity.

The circumstances in which the Registrar may regard an entity as a Non-resident entity on a *provisional* basis include:

- (a) the entity has established its tax residence in the jurisdiction in question for the previous relevant financial period to the satisfaction of the Registrar, and certifies to the Registrar that its jurisdiction of tax residence has not changed in the intervening period; or
- (b) the entity supplies (within the time otherwise required for the filing of a Declaration Form) the most recent available documentary evidence of residency for tax purposes, and certifies to the Registrar that such residency has not changed since the period to which the documentary evidence relates; or
- (c) the entity evidences either that it was too recently formed or incorporated, or that it has too recently established tax residence in the jurisdiction in question, for there to be sufficient documentary evidence of its tax residence, and provides to the Registrar other evidence to demonstrate that it met or expects to meet the criteria for tax residence in that jurisdiction for the relevant financial period in question.

In each case, the evidence described above must be provided to the Registrar within the time required for the filing of a Declaration Form as set out in 8.2 above.

#### *12.7. Changes to EU list of non-cooperative jurisdictions for tax purposes*

The Registrar acknowledges that, from time to time, changes may be made to Annex 1 to the EU list of non-cooperative jurisdictions for tax purposes. In such circumstances, an entity affected by the change may wish to adjust its business operations such that it meets the ES Requirements in Bermuda, or establishes residency for tax purposes in another jurisdiction outside Bermuda (that is not on Annex 1 to the EU list of non-cooperative jurisdictions for tax purposes). The Registrar may receive representations to that effect from the entity in question, and may allow a reasonable period within which the entity may adjust its business accordingly.

### **13. Sector-Specific Guidance on Relevant Activities**

Regulations 7 to 16 set out the CIGA of the different Relevant Activities. Additional sector-specific guidance notes will be issued after further consultation with representatives of each specific sector. Such sector-specific guidance notes will also deal with the application of the adequacy test to particular Relevant Activities in further detail.

### **14. Reporting obligations of the Bermuda Government**

If the Registrar determines that an Entity:

- (i) has not met the applicable ES Requirements in respect of its Relevant Activities; or
- (ii) is engaged in a high-risk IP related activity with an Affiliate outside Bermuda

the Registrar is required by law to provide to the Minister the information filed by such Entity pursuant to the ES Laws (e.g. the Declaration Form and related information).

Where a Non-resident entity has provided evidence to the Registrar of its claim to be resident for

tax purposes outside of Bermuda, the Registrar must also provide that information to the Minister. Upon receipt of the above information from the Registrar, the Minister, as competent authority for exchange of information purposes, is required to provide that information to his counterpart in the relevant EU member state or other jurisdiction in which the relevant Entity or Non-resident entity has its holding entity, its ultimate parent entity, an owner or beneficial owner, or where the relevant Non-resident entity claims to be resident for tax purposes.

## **15. Monitoring and Enforcement**

### *15.1. Registrar's Duty to Monitor*

The Registrar has a duty to ensure that every Entity satisfies the ES Requirements. The process for enforcement is set out in sections 9A and 16A of the Compliance Measures Act. The sanctions for non-compliance run in two schemes which run successively to each other.

One scheme is the Notice to Comply. The other scheme is the civil penalty scheme, which is the result of the issuance of a Warning Notice and then a Decision Notice, with right of appeal.

### *15.2. Sanctions Schemes*

The sanctions schemes can be summarized as follows (assuming the Entity continues non-compliance and does not remedy the failure at any stage):

- (a) First Notice to Comply -> Warning Notice -> Decision Notice, with right to appeal;
- (b) Second Notice to Comply -> Warning Notice -> Decision Notice, with right to appeal;
- (c) Third/final Notice to Comply -> Warning Notice -> Decision Notice, with right to appeal;
- (d) After exhaustion of all notice requirements and appeal rights, the Registrar will move to either restrict the Entity's business operations/activities or move to strike the Entity off the register.

The non-compliant Entity will be provided with no fewer than 30 days and no greater than 180 days to remedy its non-compliance. The time period provided will be based on Entity-specific facts and circumstances as to its non-compliance, depending on the nature, scale and complexity of the business.

By way of example, an Entity may have a new Chief Financial Officer scheduled to start work in Bermuda, and this would cure the non-compliance. The CFO may be delayed in her/his start date due to numerous factors such as fulfillment of a notice period at a prior position, or securing housing in Bermuda. Each of these factors is outside of the Entity's control, and yet detrimentally affects the Entity's compliance. The Registrar will seek to provide the Entity with an adequate time to comply, based on the facts and circumstances regarding the Entity's non-compliance. The Registrar will always endeavour to afford the Entity adequate time to remedy the failure.

### *15.3. Civil Penalty after the First Notice to Comply*

Under section 11 of the Compliance Measures Act, the Registrar may impose a civil penalty on the Entity for failure to comply after the First Notice to Comply has been issued. The process starts with the issue of a Warning Notice, followed by the issuance of a Decision Notice, which is subject



to appeal. The process is described in section 12 of the Compliance Measures Act.

Section 12(1) of the Compliance Measures Act empowers the Registrar to issue a Warning Notice to the Entity which informs the Entity that the Registrar is proposing to impose a civil penalty with reasons provided. The Registrar must also inform the Entity that it is allowed to make representations to the Registrar regarding this proposal within a specified time (which cannot be less than 28 days).

Pursuant to section 12(2), the Registrar must issue a Decision Notice per section 12(3) within 3 months, which informs the Entity that:

- (a) no penalty will be imposed (if the Entity has complied with ES Requirements); or
- (b) that a penalty is being imposed, the amount of the penalty, and the reasons for the decision.

The penalty ranges from a minimum amount of not less than \$7,500 and a maximum amount not exceeding \$50,000 pursuant to the first Decision Notice.

#### *15.4. The Second Notice to Comply*

Pursuant to section 9A(3) of the Compliance Measures Act, if the Entity which engages in a Relevant Activity has not complied with ES Requirements within the relevant timeframe set by the Registrar in the First Notice to comply, the Registrar will issue a Second Notice to the Entity. The Second Notice to Comply will set out the matters set forth in subsection 2(a) and (b) of section 9A as per the First Notice to comply.

If the Entity remedies its failure to comply with ES Requirements as per the Second Notice to Comply, the process ends. The Registrar can impose a civil penalty for an Entity's failure to comply in the same manner as described for the First Notice to Comply. However, the penalty range for the second notice increases to a minimum amount of not less than \$25,000 to a maximum amount not exceeding \$100,000.

In the case of a Second Notice to Comply, the Entity will be given a minimum of 15 days and a maximum of 90 days to comply. The timeframe will depend on the facts and circumstances of noncompliance.

If the Entity remedies by complying with ES Requirements, the process ends. If the Entity fails to comply, the Registrar has the power to impose a civil penalty with a view to ensuring compliance. The Warning Notice and Decision Notice procedures, as outlined above, would then be implemented with regard to the Second Notice to Comply.

The imposition of civil penalties is subject to appeal with 28 days of the decision.

#### *15.5. The Third Notice to Comply*

Pursuant to section 9A(4) of the Compliance Measures Act, if the Entity has not complied with ES Requirements within the relevant timeframe set by the Registrar in the Second Notice to Comply, he will issue a Third (and final) Notice to Comply to an Entity.

If the Entity remedies its failure to comply with ES Requirements as per the Third Notice to Comply, the process ends. The Registrar can impose a civil penalty for an Entity's failure to comply in the same manner as described above. However, the penalty range for the Third Notice increases to a minimum amount of not less than \$50,000 to a maximum amount not exceeding

\$250,000.

In the case of a Third Notice to Comply, the Entity will be given a minimum of 8 days and a maximum of 45 days to comply. The timeframe will depend on the facts and circumstances of non-compliance.

If the Entity remedies by complying with ES Requirements, the process ends. If the Entity fails to comply, the Registrar has the power to impose a civil penalty with a view to ensuring compliance. The Warning Notice and Decision Notice procedures, as outlined above, would then be implemented with regard to the Third Notice to Comply.

The imposition of civil penalties following the issuance of a Decision Notice under section 12(3) of the Compliance Act is subject to appeal within 28 days of the date of the Decision Notice.

*15.6. Requirement for the Registrar to apply to the Court regarding continued non-compliance after Notices*

If an Entity still does not meet the ES Requirements after the Third Notice to Comply has been issued, and the civil penalty scheme of Warning Notices and Decision Notices has been exhausted (including any appeal rights), the Registrar will apply to the Court for an order pursuant to section 9A(5). The court order may:

- (a) regulate the conduct of the Entity's business; or
- (b) restrict the Entity from carrying on business, which would result in the Entity becoming defunct; or
- (c) authorise such proceedings under the relevant Act to be taken by the Registrar, including strike-off.

For this purpose, the "relevant Act" means under any act pursuant to which the Registrar performs regulatory, administrative or other functions with respect to an Entity and includes the Companies Act 1981, the Partnerships Acts, and the Limited Liability Company Act 2016.

## **16. Offences**

It is an offence to knowingly provide false information to the Registrar. Punishment for this offence on summary conviction is a maximum fine of \$10,000 or two years imprisonment or both.

Where the offence is committed by an Entity and proved to have been committed with the consent or connivance of an officer of the Entity, the officer as well as the body corporate commits the offence and will be liable to be proceeded against and punished accordingly.

An "officer" is:

- (a) a director as defined in section 2 of the Companies Act 1981;
- (b) a manager as defined in section 2 of the Limited Liability Company Act 2016; and
- (c) in the case of a partnership, a director or manager of the general partner of the partnership.

## **17. Confidentiality**

The information and documents provided by an Entity to the Registrar in respect of the ES

Requirements will be held in the strictest confidence except in so far as disclosure is necessary for the due performance of the Registrar's functions<sup>5</sup>. Disclosure is permissible in the following circumstances<sup>6</sup> –

- (a) to the Minister for the purpose of enabling or assisting him to discharge his statutory functions or in the public interest;
- (b) to the Bermuda Monetary Authority for compliance purposes;
- (c) if the information is available to the public from other sources;
- (d) in a summary or collection of information framed in such a way as not to enable the Entity to which the information relates to be ascertained; and
- (e) as otherwise authorised by law.

Otherwise, it is an offence to disclose or give access to ES Requirements related information or documents provided by an Entity to the Registrar which is punishable on summary conviction to a fine of \$50,000 or two years imprisonment or both and on indictment to a fine of \$100,000 or five years imprisonment or both<sup>7</sup>.

## **18. PATI and PIPA**

Economic substance information is not disclosable under the Public Access Information Act 2010.<sup>8</sup> Nor is personal information disclosable pursuant to the Personal Information Protection Act 2016.<sup>9</sup>

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<sup>5</sup> Section 7 of the Act.

<sup>6</sup> Section 18(3) of the Registrar of Companies (Compliance Measures) Act 2017.

<sup>7</sup> Section 18(2) of the Registrar of Companies (Compliance Measures) Act 2017.

<sup>8</sup> Section 9 of the Act.

<sup>9</sup> Section 10 of the Act.