

Alert

Managing your Bermuda business and transactions during the COVID-19 pandemic [Updated 6 April 2020]

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Conyers is very mindful of the strains that are being placed on our clients during the present Covid-19 crisis. We would like to reassure you of our continued support and provide an update on the operation of our Bermuda office and international business support in the jurisdiction. In addition, in these exceptional circumstances, there are practical challenges which you are likely to encounter in the handling of business transactions and the day to day running of your operations. We have set out some guidance on such matters.

Conyers' Bermuda office

Our dedicated attorneys, corporate managers and administrators are working normal hours, but are now working remotely. Our systems and processes are designed to securely support this type of working environment, which enables us to ensure that our clients' interests continue to be protected and advanced in these difficult times, whilst prioritising the safety and well-being of our people.

Meetings

Bermuda entered a two-week period of strict lock-down from Saturday 4 April; physical meetings may not take place during that period. In addition, due to passenger flight restrictions, board members and advisors who would ordinarily travel to Bermuda in order to participate in meetings will not be able to do so for at least the next several weeks. The Bermuda Monetary Authority (BMA) has assured regulated entities that it will not enforce regulatory requirements associated with the need to hold Board/committee meetings in Bermuda during the first half of 2020. However, meetings should continue to be held by audio or video conferencing. Notice of meetings should be given to all directors, and other formalities observed, in the usual way. Directors of Bermuda companies are advised to examine their bye-laws to determine if meetings may be held by telephone or video-conferencing link.

Economic Substance

If a company is in scope of economic substance requirements and is looking to add substance through board meetings in Bermuda, the entity may consider appointing Bermuda-resident directors, or having a quorum of directors in Bermuda for board meetings.

In light of the COVID-19 crisis, the Bermuda Registrar of Companies (RoC) has recognised that some of the usual factors they would look to for economic substance – including board meetings and/or having other persons in Bermuda who are suitably qualified for oversight or execution of the entity's activities – may be difficult to satisfy in the current period. In response, the RoC has confirmed that they will take all appropriate circumstances into account in assessing compliance with the Economic Substance Act 2018, in line with the principles set out in the Guidance Notes and assuming entities act on a good faith basis. As such, where meetings or other similar compliance measures are not possible due to necessary travel or quarantine restrictions, this may be taken into account by the RoC. As with all information evidencing compliance, entities are advised to keep careful records of all such circumstances, and should continue in good faith to ensure their ongoing compliance with the economic substance requirements as set out in the legislation and Guidance Notes.

ESD Portal

The Registrar of Companies has advised that significant progress has been made in the development of the e-filing system for the Economic Substance Declaration (ESD), and that the ESD portal is anticipated to “go live” on or about 1 May, 2020.

An entity carrying on as a business a “relevant activity” which has a financial year which ended on 31 December, 2019 will be required to file its ESD (or claim tax residence outside Bermuda, as the case may be) within six months after that date, i.e. on or before 30 June, 2020.

Government and public offices and banks

The Registrar of Companies, the Bermuda Monetary Authority and other public offices are functioning largely on a remote basis, at least until 6 April, and have implemented new guidelines for using their services throughout this isolation period. While essential services remain available, they have advised that there may be some delay to usual processing times. All correspondence and application requests must be submitted electronically. All payments to the BMA and RoC must be made via wire transfer. At present, our experience is that it is likely to take a minimum of one week from the submission of duly completed paperwork until incorporation of a new company.

Since 18 March, electronic filing protocols have been in place at the RoC for new company registrations, official receiver appointments and liquidations, bankruptcy applications, and real estate licences and business applications. Certificates of compliance requests and company name reservations may also be submitted electronically, as usual.

Searches of public files at the RoC have generally been discontinued, although certain records may be provided electronically if necessary. The RoC has adapted its normal practice and is now facilitating the carrying out of company search requests electronically via email.

While banks appear to be accepting digital signatures in lieu of their traditional requirement for ‘wet ink’, our experience to date is that customers can nonetheless expect delays in transacting ordinary banking business. We would hope and expect that, as all parties become more accustomed to operating remotely, everyday business transactions will speed up.

Insurance filings

The BMA has advised that insurance groups, insurers, and insurance intermediaries may request a one month extension for their respective annual statutory filing dates, and the usual fee for any such request will be waived.

Execution of documents

Digital Signatures

Under Bermuda law an electronic signature must be uniquely linked to the signatory, be capable of identifying the signatory and must be created using means that the signatory can maintain under his control. Bermuda law recognises different methods to create an “electronic signature”, in the broadest sense of that term. These are (1) faxed or scanned copies of handwritten signatures (recognised by the common law), (2) a ‘signature’ produced by software using encryption keys, (3) an authenticating sign or attribute of an electronic document produced by some other means, like a bar code or a system such as DocuSign. A valid electronic signature on documentation using any of these methods binds the signatory to all the terms of the documentation, in just the same manner as a wet-ink signature on a document is taken to demonstrate the consent of the signatory to incorporate into the contract between the parties all the terms set out in the document.

Owing to the primary meaning of signature as handwriting, the typing of someone’s name in document using word-processing software like Microsoft Word (or into an e-mail attaching a document) is **not** a valid signature.

An individual can give instructions to someone else to affix their electronic signature to a document on their behalf. Where an individual’s signature is added as a clerical act, it is prudent to ask for authorization from that individual that he or she consents to the use of the signature on each occasion.

Company seals and form of execution

Under section 23 of the Companies Act 1981 and the bye-laws of many Bermuda companies, deeds and documents do not need to be executed using the company seal. Alternative forms of execution by the company can be used instead, such as authorised signatories signing in the presence of a witness (see below for further points on witnesses).

Where two directors normally sign each document or deed the procedure could be revised temporarily so that, during these difficult times, only one director has to sign and, as needed, either:

a) affixes the company seal which would have to be kept at one director's residence in Bermuda

or

b) does so in front of an adult witness in the same residence as the director (again, see below for further points on this).

Witnessing of documents

Documents which are to be executed under hand, including agreements, letter agreements, contracts, etc. may be witnessed remotely by video-link.

Where a deed is to be executed by a company, the directors may choose to depart from the "best practice" of having a witness or may avail of the same technique suggested above. However, Section 6A of the Conveyancing Act 1983 requires that an individual signing a deed in their personal capacity (and not on behalf of a corporation) must do so in the presence of a witness. There is an argument that in the age of technology "being present" could be interpreted to include having remote visual connection, i.e. video link. However, in the absence of Bar Council guidance to this effect, we recommend a more conservative approach. In the unusual circumstance that a deed requires execution, we recommend:

a) If the party signing the deed is co-isolating with another adult, they should sign the deed in their presence. Confidentiality may be preserved by covering the substantive portion of the document. The witness need only have sight of the execution block in order to witness the signatory's execution of the deed.

b) If a document must be signed by someone self-isolating under compulsory quarantine, please consult with your Conyers contact to make special arrangements.

Stamp Duty and Filing

The Bermuda Stamp Duty Act allows 30 days in which to affix duty to stampable instruments. Although Conyers staff are working remotely, while Bermuda remains on "lockdown" until close of business on 18 April 2020, no stamps can be affixed. Once the formal lockdown ends and pending Government advice, our people should be permitted to attend the office on an 'as needs' basis, and will be in a position to assist with the affixing of duty at that time, which will hopefully be within the 30 days specified in the Act. Conyers will be liaising with Government to seek waivers of this time period where needed.

Certification and Notarising of Documents

In the modern world, more and more documents are produced in electronic form only, obliging attorneys to consider what constitutes 'an original' document for certification purposes. This issue has not changed with the Covid-19 dilemma. Conyers attorneys will continue to certify electronically produced documents in the normal way.

As regards documents which do have 'an original' in the physical world, e.g. driver's licences and passports, we continue to require sight of the original document prior to providing a certified or notarised copy. As of Monday 20 April, Conyers will resume a notarial service for clients on an appointment basis, which can be arranged through our main reception or by contacting one of us.

We are here to help

Like you, we are deeply concerned about the rapidly evolving situation and are closely monitoring developments. It is important that businesses do not lapse into accepting the practical or simplest solution at the expense of sound practices. Please feel free to reach out to your usual Conyers contacts with questions, no matter how basic they may seem. We will be pleased to help.

We will do our best to keep you up to speed with developments as the situation evolves in Bermuda, and we have created a dedicated page on our website for useful information and articles: <https://www.conyers.com/news-insights/covid-19/>.

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