

Alert

Complying with Economic Substance Requirements in the Face of the COVID-19 Pandemic

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In the face of travel restrictions and lock-downs imposed globally to contain the spread of COVID-19, many entities will be concerned about their ability to comply fully with legislated economic substance requirements in their jurisdictions, for example where entities address economic substance requirements by holding a certain number of board meetings with a quorum and majority of those voting physically present in the jurisdiction.

The regulatory authorities in Bermuda, the Cayman Islands and the British Virgin Islands have issued guidance notices on this matter, acknowledging the current extraordinary circumstances and outlining circumstances that will be taken into account when assessing compliance with economic substance requirements.

Bermuda

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, in a notice issued on 20 March 2020, the RoC 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 Bermuda economic substance 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 in assessing an entity’s compliance with the legislated economic substance requirements. Entities should keep a careful record of all meetings affected, the details of such restrictions and steps taken.

British Virgin Islands

For legal entities which are within scope of the BVI economic substance regime and which are required to hold board meetings within the BVI, the BVI International Tax Authority (ITA) has provided the following guidance in light of the COVID-19 pandemic:

- where possible, recourse should be had to the appointment of alternate directors in the BVI in order to meet substance requirements
- all directors do not have to attend Board meetings in the BVI - only as many as required to make the meeting quorate (given social distancing protocols, virtual meetings may be preferred)
- not all Board meetings need to be held in the BVI - only those related to core income generating activities
- where it is still not possible to have a Board meeting in the BVI or to meet some other substance requirement due to restrictions (whether in the BVI or otherwise) due to the COVID-19 outbreak, then entities are urged to retain documentation to be able to support such claims for the applicable periods of time affected
- individual requests should be made to the ITA for any extension of time within which to comply with Notices, along with any supporting evidence

It should be noted that the above guidance is temporary and entities are urged to make every effort to otherwise comply with full substance requirements (including filing deadlines) as the practical and reasonable approach described above only applies where

entities need to make adjustments to their usual operating practices and so far as these are necessary to manage threats from the COVID-19 outbreak.

Cayman Islands

On 21 March 2020, the Cayman Islands Ministry of Financial Services issued an industry advisory in which it noted that where board of director meetings are required to be held virtually due to the measures put in place to combat COVID-19, the Cayman Department for International Tax Cooperation (DITC) will take this into consideration when determining whether an entity has passed or failed the economic substance test in its reporting due in 2021. However, it is noted that the requirement to be directed and managed in Cayman is only one element of the economic substance test and that an entity that is within scope is also required to conduct core income generating activities in relation to its relevant activity.

The deadline for entities required to make an economic substance notification for the past financial year has been extended to 30 June.

Corporate Governance

All entities are advised to ensure that their governance arrangements enable them to function despite physical 'social distancing' restrictions. Constitutional documents should be reviewed to ensure that meetings can be held by telephone or video conferencing, rather than requiring physical meetings to take place. If not, consider legal advice on amending bye-laws to include these provisions.

When submitting economic substance filings for the period of the COVID-19 disruption, companies may be asked to provide evidence as to how their operating practices have been affected. Detailed records should be kept of all circumstances that may have impacted compliance, including travel restrictions imposed on company officers, the dates of such restrictions and the reasons for them (e.g. government prohibitions).

Resident Directors

If a company is in scope of economic substance requirements and is looking to add substance through board meetings in its jurisdiction, consideration should be given to appointing one or more resident directors. In today's business environment, where excellence in corporate governance is increasingly important to meet the expectations of both regulators and the business community at large, appointing an experienced local lawyer as a professional independent director on your board can add value from a corporate governance as well as an economic substance perspective. Conyers provides independent professional directors for a commercially competitive fee.

We are here to help

Please reach out to your usual Conyers contacts if you have questions relating to compliance with economic substance requirements, or any other matter. We will do our best to keep you up to speed with developments as the COVID-19 situation evolves. Please visit the dedicated page on our website for useful information and articles: <https://www.conyers.com/news-insights/covid-19/>

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