

AS TABLED IN THE HOUSE OF ASSEMBLY

A BILL

entitled

ECONOMIC SUBSTANCE ACT 2018

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WHEREAS it is expedient to enhance provisions relating to economic substance for registered entities and connected matters;

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:

Citation

- 1 This Act may be cited as the Economic Substance Act 2018.

Interpretation

- 2 In this Act, unless the context otherwise requires—

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“affiliate” in relation to—

- (a) a company, means an affiliated company as that term is defined in section 2 of the Companies Act 1981;
- (b) a limited liability company, has the meaning given in section 3(3) of the Limited Liability Company Act 2016;

“company” means a company to which the Companies Act 1981 applies;

“economic substance requirements” has the meaning given in section 3(2);

“entity” means a registered entity;

“limited liability company” means a limited liability company formed under the Limited Liability Company Act 2016;

“Minister” means the Minister responsible for companies;

“prescribed” means prescribed by regulations;

“registered entity” means a company or limited liability company;

“Registrar” means the Registrar of Companies appointed under section 3 of the Companies Act 1981;

“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; and
- (i) intellectual property,

and “relevant activities” shall be construed accordingly;

“relevant financial period” has such meaning as shall be prescribed.

Economic substance requirements

3 (1) Every entity to which this section, by virtue of section 4, applies shall maintain a substantial economic presence in Bermuda, and in that regard shall comply with the economic substance requirements set forth in subsection (2).

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(2) An entity referred to in subsection (1) complies with the economic substance requirements if—

- (a) the entity is managed and directed in Bermuda;
- (b) core income generating activities (as may be prescribed) are undertaken in Bermuda with respect to the relevant activity;
- (c) the entity maintains adequate premises in Bermuda;
- (d) there are adequate employees in Bermuda; and
- (e) there is adequate expenditure incurred in Bermuda in relation to the relevant activity.

(3) In determining whether an entity complies with subsection (2), the Minister shall have regard to such matters as may be prescribed.

Application of section 3

4 (1) Section 3 applies to an entity that is engaged in a relevant activity.

(2) A holding entity that satisfies the criteria in subsection (1) shall be subject to the economic substance requirements.

Filing of minimum required information with Registrar relating to economic substance requirements

5 (1) Entities that are subject to the economic substance requirements shall file an economic substance declaration with the Registrar on an annual basis in the prescribed form and on or before the prescribed date.

(2) The economic substance declaration shall at a minimum include the following information for the relevant financial period—

- (a) the type of relevant activity carried on or undertaken by the entity;
- (b) physical office location in Bermuda;
- (c) the name(s) and physical address(es) of the following—
 - (i) where the entity is a company, the director or directors;
 - (ii) where the entity is a limited liability company, the manager or managers,
who are ordinarily resident in Bermuda;
- (d) such other information as may reasonably be required by the Registrar.

Provision of information to competent authority

6 (1) If—

- (a) the Registrar determines that an entity has not met the economic substance requirements for a relevant financial period; or

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- (b) an entity is engaged in such intellectual property related activities prescribed as high risk, with an affiliate outside of Bermuda,

the Registrar shall provide to the competent authority the information required by section 5(2) relating to that entity for that period.

(2) Where the competent authority receives information from the Registrar under subsection (1) relating to an entity, the competent authority shall provide the information so received relating to that entity for that period to the foreign competent authority of any relevant EU member state in which—

- (a) a holding entity;
- (b) the ultimate parent entity;
- (c) the owner; or
- (d) the beneficial owner,

of the entity is incorporated, registered or resident.

(3) The exchange of information by the competent authority shall be subject to the provisions of the International Cooperation (Tax Information Exchange Agreements) Act 2005 (and any Agreement with the relevant EU member state made thereunder) and shall be exchanged in such form or manner as shall be prescribed.

(4) Nothing in this section shall be construed as affecting the exchange under the International Cooperation (Tax Information Exchange Agreements) Act 2005 of information that does not relate to the economic substance requirements, or the Registrar's powers under section 18(3)(b) of the Registrar of Companies (Compliance Measures) Act 2017.

(5) In this section—

“Agreement” has the meaning given in section 2 of the International Cooperation (Tax Information Exchange Agreements) Act 2005;

“beneficial owner” has the meaning given in section 98E of the Companies Act 1981;

“competent authority” means the competent authority for Bermuda as defined in section 2 of the International Cooperation (Tax Information Exchange Agreements) Act 2005;

“foreign competent authority” means a competent authority which, in the relevant EU member state, exercises functions corresponding to the functions of the competent authority for Bermuda;

“owner” means the person registered as the owner of the entity;

“ultimate parent entity” has the meaning given in regulation 2 of the International Cooperation (Tax Information Exchange Agreements) Country-by-Country Reporting Regulations 2017.

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Confidentiality

7 (1) Except in so far as may be necessary for the due performance of his functions relating to the economic substance requirements, the Registrar and any officers or other persons who are acting as an officer, a servant, an agent or an adviser of the Registrar shall preserve and aid in preserving confidentiality with regard to all matters relating to information or documents that may come to his knowledge in the course of the performance of his duties under this Act.

(2) Subsections (2) and (3) of section 18 of the Registrar of Companies (Compliance Measures) Act 2017 apply for the purposes of this section.

Immunity from suit

8 Sections 282 and 283 of the Companies Act 1981 apply with any necessary modifications for the purposes of this Act.

Application of Public Access to Information Act 2010

9 (1) Notwithstanding any provision of the Public Access to Information Act 2010, this section shall have effect.

(2) For the purposes of this Act, no person who—

- (a) obtains information relating to economic substance in respect of any entity directly or indirectly for the purposes of or pursuant to this Act; and
- (b) receives a request under the Public Access to Information Act 2010 for such information relating to economic substance,

shall disclose the request or such information so requested.

Application of Personal Information Protection Act 2016

10 Nothing in this Act authorises a disclosure in contravention of any provision of the Personal Information Protection Act 2016 of personal information (as defined by that Act).

Regulations

11 (1) The Minister may make such regulations as are expedient to give effect to the provisions of this Act.

(2) Regulations made by the Minister under this section shall be subject to the negative resolution procedure.

Guidance

12 (1) The Minister may from time to time give guidance on the application of this Act and regulations made under it.

(2) In determining whether a person has complied with section 3 or 5, the Minister shall consider whether an entity to which that section applies has followed any relevant guidance which was at the time—

- (a) issued by the Minister; and

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- (b) published in a manner approved by the Registrar as appropriate in his opinion to bring the guidance to the attention of persons likely to be affected by it.

(3) Guidance issued under this section is not a statutory instrument and the Statutory Instruments Act 1977 shall not apply to it.

Penalties

13 Where an entity fails to comply with the provisions of this Act, or regulations made in relation to this Act, the Registrar may exercise the powers conferred on him by Part 2 or 3, as the case may be, of the Registrar of Companies (Compliance Measures) Act 2017.

Offences

14 (1) Where any person knowingly provides false information to the Registrar, the person shall be liable on summary conviction to a fine not exceeding \$10,000 or to imprisonment for two years or to both such fine and imprisonment.

(2) Where an offence under subsection (1) committed by an entity which is a body corporate is proved to have been committed with the consent or connivance of an officer of the body corporate, the officer as well as the body corporate commits the offence and shall be liable to be proceeded against and punished accordingly.

(3) In subsection (2), “officer”, in relation to—

- (a) a company, means a director as that term is defined in section 2 of the Companies Act 1981;
- (b) a limited liability company, means a senior manager as that term is defined in section 2 of the Limited Liability Company Act 2016.

Consequential amendment of Registrar of Companies (Compliance Measures) Act 2017

15 (1) The Registrar of Companies (Compliance Measures) Act 2017 is amended in section 2 by inserting in the appropriate alphabetical order the following—

“ “economic substance requirements” has the meaning given in section 2 of the Economic Substance Act 2018;

“relevant financial period” has such meaning as may be prescribed under the Economic Substance Act 2018.”.

(2) The Registrar of Companies (Compliance Measures) Act 2017 is amended by inserting after section 9 the following—

“Notice to comply with economic substance requirements

9A (1) Where, pursuant to an inspection or otherwise, the Registrar has determined that a registered entity (in this section and section 16A referred to as “an entity”), to which the economic substance requirements under the Economic Substance Act 2018 or any regulations made thereunder apply, has failed to meet

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the economic substance requirements for a relevant financial period, the Registrar shall notify the Minister accordingly.

(2) The Registrar shall after such notification under subsection (1) issue a notice in writing to the entity concerned—

- (a) notifying the entity that the Registrar has determined that the entity does not meet the economic substance requirements for the relevant financial period and the reasons for that determination;
- (b) requiring the entity to, within the time period specified in the notice, take such steps to remedy the failure as may be so specified in the notice.

(3) If, at any time after the expiry of the time period specified in the notice issued by the Registrar under subsection (2) to an entity, the Registrar determines that the entity fails to meet the economic substance requirements, the Registrar shall issue a further notice to the entity specifying the matters set forth in subsection (2)(a) and (b).

(4) If, pursuant to the notice to an entity issued by the Registrar under subsection (3), the Registrar determines that an entity fails to meet the economic substance requirements, the Registrar shall issue a further notice to the entity specifying the matters set forth in subsection (2)(a) and (b).

(5) Where an entity fails to comply with a requirement of the Registrar under subsection (2), (3) and (4), or if no appeal is made under section 16 within the time period for such appeal or if such appeal is not allowed, the Registrar shall notify the Minister and may thereafter exercise such powers as are conferred on him under section 16A. ”.

(3) The Registrar of Companies (Compliance Measures) Act 2017 is amended in section 11 by inserting after subsection (3) the following—

“(4) Where an entity fails to comply with a requirement of the Registrar under section 9A(2), (3) or (4), the Registrar shall, subject to section 12, exercise such powers conferred on him under this section with a view to ensuring compliance.

(5) Any civil penalty imposed by the Registrar under this section shall be—

- (a) with respect to subsection (2) of section 9A, an amount of not less than \$7,500 and not exceeding \$50,000;
- (b) with respect to subsection (3) of section 9A, an amount of not less than \$25,000 and not exceeding \$100,000;
- (c) with respect to subsection (4) of section 9A, an amount of not less than \$50,000 and not exceeding \$250,000.”.

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(4) The Registrar of Companies (Compliance Measures) Act 2017 is amended in section 12(3)(c), by inserting after the word “Court” the words “within 28 days of the date of the decision notice”.

(5) The Registrar of Companies (Compliance Measures) Act 2017 is amended by inserting after section 16 the following—

“Power for Registrar to apply to Court regarding economic substance requirements

16A (1) Where pursuant to section 9A(5), the Registrar determines that an entity (as that term is defined in section 9A(1)) has not met the economic substance requirements, he may apply to the Court for an order under this section.

(2) If, on receiving an application under subsection (1), the Court is of the opinion as set forth in the Registrar’s determination in respect of the entity that is the subject of the application, the Court may make such order as it thinks fit requiring the entity to take any action specified in the order for the purpose of meeting the economic substance requirements or shall make such other order as it sees fit in the circumstances.

(3) Without prejudice to the generality of subsection (2), the Court may make such order as it thinks fit including an order—

- (a) for regulation of; or
- (b) restricting,

the conduct of the entity’s affairs or business in the future.

(4) The Court may at any time after an order is made under subsection (3), and on proof to the satisfaction of the Court that the entity has taken steps to comply with the economic substance requirements, stay the application of the order either altogether or for a limited time, on such terms and conditions as the Court thinks fit.

(5) Where the Court makes an order under subsection (3)(b) restricting the conduct of the entity’s business altogether it may on hearing the Registrar make such order as it considers desirable to enable the entity to conduct its business as nearly as practicable as it did before the order restricting business was made.

(6) On any application under this section, the Court may, before making an order, require the Registrar to furnish to the Court a report with respect to any facts or matters which the Court considers relevant to the application.”.

Transitional

16 (1) In this section, “existing”, in relation to an entity, means an entity which exists on the date of the coming into operation of this Act.

(2) An existing entity shall, within six months of the date of the coming into operation of this Act, comply with the provisions of section 3.

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(3) The Minister may by order subject to the negative resolution procedure extend the period set forth in subsection (2).

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EXPLANATORY MEMORANDUM

The purpose of this Bill is to enhance provisions relating to economic substance for registered entities and connected matters.

Clause 1 provides a title for this Bill.

Clause 2 provides definitions for the interpretation of this Bill.

Clause 3 imposes an obligation on an entity to maintain a substantial economic presence in Bermuda, and in that regard comply with economic substance requirements (“ESR”) set forth in subsection (2).

Clause 4 provides that the ESR regime applies to any registered entity that is engaged in a relevant activity (as that term is defined in section 2).

Clause 5 sets forth the filing requirements under the ESR regime. An economic substance declaration form will be prescribed for purposes of this regime.

Clause 6 makes provision for the competent authority for Bermuda, pursuant to the International Cooperation (Tax Information Exchange Agreements) Act 2005, to exchange ESR information with any EU member state. Regulations will be made to prescribe matters relating to such exchange of information.

Clause 7 requires that confidentiality be preserved. This clause applies certain provisions of the Registrar of Companies (Compliance Measures) Act 2017 which prescribe criminal penalties for a breach of confidentiality. Clause 7 specifies limited circumstances where the disclosure of information is permitted.

Clause 8 applies the provisions in the Companies Act 1981 to provide for immunity from suit for any officer, employee or agent of the Registrar and others acting on his behalf provided such persons act in good faith in the performance of their duties.

Clause 9 provides for matters relating to the Public Access to Information Act 2010.

Clause 10 provides for matters relating to the Personal Information Protection Act 2016.

Clause 11 provides for the making of Regulations. Such regulations will be subject to the negative resolution procedure.

Clause 12 provides for guidance to be issued by the Minister in relation to the application of this Bill and regulations made under the Bill. This clause also allows the Registrar to publish such guidance in such manner as he thinks fit.

Clause 13 allows the Registrar to exercise the powers conferred on him by Part 2 or 3, as the case may be, of the Registrar of Companies (Compliance Measures) Act 2017 where an entity fails to comply with the provisions of this Act, or regulations made in relation to this Act.

Clause 14 provides for offences relating to the provision of false information.

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Clause 15 amends the penalty provisions set forth in the Registrar of Companies (Compliance Measures) Act 2017 in respect of the sanctions which will be applied where an entity is determined to have failed to comply with the economic substance requirements. This clause provides for the Registrar to apply for a Court order which may ultimately result in the exercise of power to strike-off the entity.

Clause 16 provides for transitional matters. The ESR regime will be immediately applicable to new entities registered after this Act comes into operation. The operative date for the imposition of ESR is anticipated to be 1 January 2019, with a six-month transitional period for existing entities.