

# Bermuda



## Overview: Economic Substance in Bermuda

The Bermuda government has recently passed legislation in relation to Economic Substance to adhere to regulations imposed by the European Union.

Further to our client update of [21 December 2018](#) we have put together a brief overview of the new legislation now it has come into force.

### Introduction

The Economic Substance Act 2018 (the **Act**) and the Economic Substance Regulations 2018 (the **Regulations**, together with the Act, the **Laws**) came into force in Bermuda on 31 December 2018. As a result of the Laws, all Bermuda companies, limited liability companies (**LLCs**) and limited partnerships with separate legal personality engaged in *relevant activities* will need to comply with the Laws and to file an annual economic substance declaration (an **ESD**) demonstrating their substantive economic connection to Bermuda. Existing entities caught by the Laws have until 30 June 2019. New entities will need to comply from incorporation.

The EU Code of Conduct Group is due to report to Bermuda in late February/early March with its feedback on the Laws and it is quite likely that further changes will be required in order to incorporate the feedback and to align with the legislation of other Overseas Territories. Furthermore, we are waiting for the Bermuda Government to issue its guidance notes to assist with interpretation of the Laws, particularly in relation to the meaning of *adequate*.

### To what entities do the Laws apply?

The Laws apply to all entities registered in Bermuda (companies, LLCs and limited partnerships with separate legal personality) which carry out a *relevant activity*. *Relevant activity* is defined in the Act and includes the following:

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- Banking business
- Distribution and service centre business
- Finance and leasing business
- Fund management business
- Headquarters business
- Holding company business
- Insurance business
- Intellectual property holding business
- Shipping business

The Act provides that every entity carrying out a *relevant activity* must maintain a substantial economic presence in Bermuda by virtue of:

- (a) being managed and directed from Bermuda;
- (b) undertaking core income generating activities in Bermuda with respect to the relevant activity;
- (c) maintaining an adequate physical presence in Bermuda;
- (d) employing adequate full-time employees in Bermuda with suitable qualifications; and
- (e) incurring adequate operating expenditure in Bermuda in relation to the relevant activity. In addition, an entity must comply with any requirements set out in the Regulations.

The Regulations list the information that an entity will have to disclose to the Registrar in relation to economic substance (supplementing what is listed in the Act), state that to satisfy economic substance requirements the core income generating activities of an entity with respect to a *relevant activity* must be undertaken in Bermuda, and set out the types of activities that would apply in respect of each category of *relevant activity*.

## Which relevant activities would apply?

The relevant activity that is most likely to apply to the Company as a holding entity, although you should consider whether any other categories could potentially be relevant.

The Regulations provide that an entity is a pure equity holding entity where it only holds equity participations in one or more entities, and earns passive revenues from dividends, distributions, capital gains and other incidental income only.

For such entities, lower economic substance requirements apply which we describe further below.

## What are the lower economic substance requirements for holding entities?

The economic substance requirements of holding entities are lower than that applicable to other entities conducting relevant activities. To satisfy economic substance requirements, a holding entity being a pure equity

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holding company, is subject to minimum economic substance requirements, which are set out in regulation 4 of the Regulations and are defined as:

- (a) compliance with applicable corporate governance requirements set forth in the Companies Act 1981, the Limited Liability Companies Act 2016 and Partnerships Acts, including keeping records of account, books and papers and financial statements; and
- (b) submission of an annual ESD.

In addition, a holding entity must have *adequate employees for holding and managing equity participations and adequate premises in Bermuda*. The Laws apply a subjective test in respect of these economic substance requirements, such that the requirements as to physical presence and employees must be *adequate*. There is no statutory definition of *adequate*, deliberately so. For a pure equity holding company that does nothing apart from hold investments and have its annual meetings, it is likely to be sufficient for such entity to declare in its ESD that adequate premises and adequate employees for such entity is none.

## Next steps for Marbury clients

Your usual Marbury representative will be in touch when further guidance has been published.

## Disclaimer

This guide provides an overview of economic substance in Bermuda and should not be read as legal advice. For more information, please contact Marbury.