

Bermuda's Economic Substance Legislation

百慕大经济实质法例

The Bermuda Government has passed legislation, with effect from 31 December 2018, requiring relevant entities based in Bermuda to comply with certain obligations in regard to economic substance in the jurisdiction. We set out below a summary of the entities affected by this new legislation and the information that such entities will need to provide in order to evidence their compliance.

The *Economic Substance Act 2018* and the *Economic Substance Regulations 2018* were enacted in response to a scoping paper issued by the European Union's Code of Conduct Group (Business Taxation) in June 2018. The paper set out requirements that certain jurisdictions¹ outside the EU must adopt with regard to the economic substance of entities based in those jurisdictions, in order to avoid being black-listed by the EU. Broadly equivalent legislation has been passed in all of the major offshore jurisdictions in addition to Bermuda, including the Cayman Islands, BVI and the Channel Islands. It is anticipated that the EU's economic substance requirements will soon become a global OECD standard.

百慕大政府已通过立法，规定百慕大相关实体须遵守当地有关经济实质的若干义务，法例自2018年12月31日起生效。下文概述将受到新法例影响的实体，及该等实体证明其合规所需提供的资料。

《2018年经济实质法》(Economic Substance Act 2018) 及《2018年经济实质法规》(Economic Substance Regulations 2018) 乃为响应欧盟商业税收行为准则小组 (European Union's Code of Conduct Group (Business Taxation)) 于2018年6月发布的范围文件 (scoping paper) 而颁布。该文件载列欧盟以外若干司法管辖区¹，为避免列入欧盟黑名单而必须对当地实体采纳的经济实质规定。除百慕大外，开曼群岛、英属维尔京群岛及海峡群岛等全部主要离岸司法管辖区，亦已通过大致相若的法例。预期欧盟的经济实质规定，不久将成为全球经合组织的标准。

¹ Anguilla, Bahamas, Bahrain, Bermuda, British Virgin Islands, Cayman Islands, Guernsey, Isle of Man, Jersey, Marshall Islands, Turks and Caicos Islands, United Arab Emirates, Vanuatu

¹ 安圭拉、巴哈马、巴林、百慕大、英属维尔京群岛、开曼群岛、根西岛、马恩岛、泽西岛、马绍尔群岛、特克斯和凯科斯群岛、阿拉伯联合酋长国、瓦努阿图

Entities within scope

Registered Entities

Entities within the scope of the legislation ('registered entities') include **exempted and local companies, permit companies, exempted and local LLCs and partnerships that elect to have separate legal personality**, where those entities are carrying on a 'relevant activity'.

Relevant Activities

Those registered entities which carry on as a business any one or more of the following relevant activities will be in scope and must comply with **economic substance requirements**:

- Banking
- Insurance
- Fund management
- Finance and leasing
- Headquarters
- Shipping
- Intellectual property
- Distribution and service centres
- Holding entity

These terms are defined in the legislation and a summary of them is included in Appendix 2 to this bulletin. It is anticipated that guidance notes will be issued by the Bermuda Government in due course to provide further practical detail.

Entities out of scope

Registered entities which do not carry on as a business a relevant activity will not be required to comply with economic substance requirements.

Registered entities with minimum economic substance requirements

Local companies and **local LLCs** carrying on relevant activities, and **pure equity holding entities** (as defined in Appendix 2), are only required to comply with **minimum economic substance requirements**. These requirements include (i) compliance with the applicable corporate governance requirements of the *Companies Act 1981* (for companies) or the *Limited Liability Companies Act 2016* (for LLCs), or the *Partnerships Acts* (for partnerships that elect to have separate personality) including keeping records of account, books and papers and financial statements;

受规限实体

注册实体

受法例规限的实体（下称“注册实体”）包括从事“相关业务”的**获豁免及当地公司、许可公司、获豁免及当地有限责任公司和选择保留独立法人资格的合伙企业**。

相关业务

从事以下一项或多项相关业务的注册实体须受法例规限，并必须遵守**经济实质规定**：

- 银行
- 保险
- 基金管理
- 融资及租赁
- 总部
- 航运
- 知识产权
- 分销和服务中心
- 控股实体

上述词汇在法例中已有界定，相关概要载于本文附录二。预期百慕大政府会适时发布指引，进一步说明实施细则。

不受规限实体

不从事相关业务的注册实体毋须遵守经济实质规定。

须遵守最低经济实质规定的注册实体

从事相关业务的**当地公司及当地有限责任公司和纯控股实体**（定义见附录二）仅须符合**最低经济实质规定**，包括(i) 遵守《1981年公司法》(*Companies Act 1981*)（适用于公司）或《2016年有限责任公司法》(*Limited Liability Companies Act 2016*)（适用于有限责任公司）或《合伙企业法》(*Partnerships Acts*)（适用于选择保留独立法人资格的合伙企业）的相关企业管治规定，例如保存账目、簿册、文据和财务报表；及(ii) 提交经济实质声明（见下文）。纯控股实体还须拥有充足的雇员持

and (ii) filing an economic substance declaration (see below). Pure equity holding entities will also be required to have adequate employees for holding and managing equity participations, and adequate premises in Bermuda.

Economic substance requirements

For all other registered entities carrying on relevant activities, the legislation requires that they maintain a substantial economic presence in Bermuda, and in that regard comply with full economic substance requirements. These requirements will be met if:

- the entity is managed and directed in Bermuda
- core income generating activities are undertaken in Bermuda with respect to the relevant activity
- the entity maintains adequate physical presence in Bermuda
- there are adequate full time employees in Bermuda with suitable qualifications
- there is adequate operating expenditure incurred in Bermuda in relation to the relevant activity

The Registrar will determine whether or not the economic requirements are met, based upon the following information provided by the entity:

- the nature and extent of the relevant activity engaged in by the entity including, in particular, its core income generating activities undertaken with respect to such relevant activity
- the nature and extent of the entity's presence in Bermuda including physical offices or other premises occupied by the entity or its affiliate in Bermuda and an adequate level of annual expenditure of the entity in Bermuda
- whether the entity is managed and directed in Bermuda or from Bermuda, having regard to:
 - the location of strategic or risk management and operational decision-making, or where management of the entity meets to make decisions regarding business activities
 - the presence of an adequate number of senior executives, employees or other persons in Bermuda who are suitably qualified and responsible for

股及管理股权，并于百慕大拥有足够的营运场地。

经济实质规定

就从事相关业务的所有其他注册实体而言，法例规定该等实体须在百慕大经营主要经济业务，并全面遵守经济实质规定。须遵守规定为：

- 实体于百慕大管理
- 相关业务的核心创收活动在百慕大进行
- 在百慕大有足够的办公场所
- 于百慕大拥有充足的合资格全职雇员
- 相关业务在百慕大境内产生足够的营运支出

注册处处长会根据实体提供的以下信息判断其是否符合经济实质规定：

- 实体从事相关业务的性质及规模，特别是实体从事相关业务涉及的核心创收活动
- 实体于百慕大场所的性质及规模，包括实体或其附属公司于百慕大占用的办公场所或其他场地，及实体于百慕大每年产生的支出水平
- 实体是否在或从百慕大管理，依据是：
 - 策略或风险管理及经营决策的地点或实体管理层就业务活动决策而会面的地点
 - 于百慕大拥有充足的合资格高级管理人员、雇员或其他人员负责监管／执行其核心创收活动

oversight/execution of its core income generating activities

- the location and nature and frequency of board, manager or partnership meetings held in Bermuda in relation to the overall number of meetings
- the nature and extent of outsourcing arrangements (if any) to affiliates or service providers in Bermuda and whether and to what extent the persons carrying on the outsourced services are suitably qualified and have adequate capacity for the implementation and execution of those services, and whether the outsourced service provider complies with the economic substance requirements applicable to the outsourcing entity (noting that employees, premises and expenditure may not be counted multiple times by multiple entities with respect to such compliance)

This information should be viewed collectively, and not prescriptively. In other words, for all registered entities that are inscope, a combination of some or all information will be considered. In practice, this means that what constitutes compliance with economic substance requirements will necessarily differ from entity to entity, depending on each entity's relevant activity and its individual circumstances in relation to its business.

Core income generating activities

The core income generating activities that should be undertaken by the entity in Bermuda will differ between the various relevant activities. The core income generating activities identified in the legislation in respect of each relevant activity are set out in Appendix 2, and it will be necessary for entities to be conducting at least some of those activities in Bermuda, whether directly or through outsourcing arrangements in Bermuda (noting the comments above regarding the nature of any such outsourcing).

Regulated entities: insurance and banking

It is recognized that certain regulated sectors, notably insurance and banking, are already subject to 'substance' requirements in Bermuda by virtue of their existing regulatory requirements. As such, to the extent that entities are carrying on insurance or banking as a relevant activity, they will be deemed to meet economic substance requirements in respect of that activity through compliance with their existing

- 于百慕大举行董事、管理人员或合伙人会议的地点、性质及频率（以会议总次数衡量）

- 向百慕大附属公司或服务提供商所作外包安排（如有）的性质及规模、承接外包服务的人士是否及在何种程度上合格且有足够能力实施及执行有关服务，及外包服务提供商是否遵守适用于外包实体的经济实质规定（就该合规而言，不得就不同实体重复计算雇员、工作场地及开支）

上述信息应综合考虑，并无具体规定。换言之，就受法例规限的所有注册实体而言，注册处处长会综合审议部分或全部信息。实际上，不同实体符合经济实质规定的条件各异，须视乎各实体的相关活动及个别业务情况而定。

核心创收活动

百慕大实体须进行的核心创收活动因相关业务不同而各异。法例对各相关业务确定的核心创收活动载于附录二，而实体须于百慕大从事（不论直接或通过于百慕大的外包安排）至少部分该等活动（留意上文关于该等外包性质的说明）。

受监管实体：保险及银行

众所周知，若干受监管行业（特别是保险及银行业）已凭借业界既有的监管规定而须遵守百慕大的‘实质’规定。因此，从事保险及银行类相关业务的实体遵守既有的监管规定，即视为符合与该业务相关的经济实质规定。该等公司须填写并提交经济实质声明（见下文），惟确认遵守相关监管规定后，填写该声明的程序将大幅简化。

regulatory requirements. Such companies will be required to complete and file an economic substance declaration (see below), but by confirming compliance with their respective regulatory requirements, it is expected that the completion of that declaration should be much simplified.

Intellectual Property

Entities carrying on IP business as a relevant activity are subject to certain enhanced requirements and will be presumed not to comply with economic substance requirements unless those enhanced requirements are met. In particular, those entities carrying on **high risk IP activity** (namely, owning an IP asset that has been acquired from an affiliate or been obtained through the funding of overseas research and development and which is then licensed to a foreign affiliate or used to generate revenue through activities performed by a foreign affiliate) must provide additional information to the Registrar, including a detailed business plan, in order to rebut the presumption of non-compliance. Registered entities undertaking IP business as a relevant activity are advised to seek legal advice regarding these enhanced requirements.

Annual Economic Substance Declaration

All entities undertaking relevant activities, which includes all pure equity holding entities, will file an Economic Substance Declaration ("ESD") annually, with information provided in relation to the previous financial year (the 'relevant financial period'). The ESD will require the disclosure of certain key information applicable to an analysis of economic substance requirements. At a minimum this will include:

- whether or not the entity is carrying on a relevant activity and the type of relevant activity being undertaken
- whether the entity is engaging in high risk IP activity
- whether the entity will outsource the relevant activity and to whom
- the core income generating activities that are undertaken in Bermuda with respect to the relevant activity
- the gross income for the relevant financial year
- the premises in Bermuda
- the names and physical addresses of the directors/managers/partners resident in Bermuda

知识产权

从事知识产权类相关业务的实体须遵守若干更严谨的规定，且除非已符合该等更严谨的规定，否则将推定为不符合经济实质规定。特别是，从事**高风险知识产权活动**（即自附属公司收购或通过提供海外研发资金而取得的知识产权资产，并将其授予海外附属公司或供海外附属公司开展活动而创造收益）的实体必须向注册处处长提供额外资料，包括详细的业务计划，以推翻不合规的推定。建议从事知识产权类相关业务的注册实体就该等更严谨的规定寻求法律意见。

年度经济实质声明

所有从事相关业务的实体，包括所有纯控股实体，须每年提交经济实质声明（下称“经济实质声明”），提供一个财政年度（下称“相关财政期间”）的相关资料。经济实质声明须披露若干适用于分析经济实质规定的关键资料，至少包括：

- 实体是否正开展相关活动及所开展相关活动的类型
- 实体是否从事高风险知识产权活动
- 实体是否及向谁外包相关业务
- 在百慕大进行的与相关业务有关的核心创收活动
- 相关财政年度的总收入
- 在百慕大的场所
- 居于百慕大的董事／管理人员／合伙人的姓名及实际地址

- the holding entity, ultimate parent entity, owner or beneficial owner of the entity
- the operating expenses and assets for the relevant financial year and number of full time employees
- such other information as the Registrar may require

The form of ESD has not yet been prescribed by the Bermuda Government, but it is expected that it will be prescribed within the first half of 2019 and that, for most entities, the first ESD filing will be made in 2020.

Monitoring and enforcement

The Bermuda Registrar of Companies will be responsible for implementing, monitoring and enforcing the economic substance regime. The legislation provides for civil penalties up to BD\$250,000 to be applied in relation to non-compliance with the applicable economic substance requirements. If, after the civil penalties have been exhausted, an entity continues its failure to comply, the Registrar may apply to the Court for an order in such terms as it thinks fit. This may include an order for striking off the entity. There is also an offence created of knowingly making a false economic substance declaration, with penalties up to BD\$10,000 or imprisonment for two years, or both.

Confidentiality

In the collection of information or documents pursuant to the legislation (whether through the ESD or otherwise), the Registrar is expressly obliged to preserve the confidentiality of such information or documents, other than as may be required in connection with its duties (see below).

Information sharing with competent authorities

As an extension of Bermuda's existing obligations to share information in connection with international Tax Information Exchange Agreements, the legislation provides for the automatic provision of information in relation to economic substance in certain circumstances. In particular, where an entity is found not to be in compliance with economic substance requirements for a relevant financial period, or is engaged in high risk IP activities (as described above), the Registrar is required automatically to provide economic substance information to the competent authority of the EU member state in which the entity's holding entity, ultimate parent, owner or beneficial

- 实体的控股公司、最终母公司、拥有人或实益拥有人
- 相关财政年度的营运开支及资产和全职雇员人数
- 注册处处长可能要求的其他资料

百慕大政府尚未订定经济实质声明的格式，但预计会于2019年上半年定明，大部分实体将于2020年提交首份经济实质声明。

监察及执行

百慕大公司注册处处长将负责实施、监察及执行经济实质制度。法例规定，对违反相关经济实质规定者将处以最高250,000百慕大元的民事罚款。倘执行民事处罚后，实体仍未遵守规定，注册处处长可向法院申请其认为合适的命令，包括将该实体除册的命令。此外，对作出明知虚假的经济实质声明者，将处以最高10,000百慕大元的罚款或监禁两年，或两者同时执行。

保密

在依法收集资料或文件的过程中（不论是透过经济实质声明或其他方式），除与其职责（见下文）有关的规定外，注册处处长有明确责任为该等相关资料或文件保密。

与主管当局共享资料

法例规定在若干情况下自动提供经济实质相关资料，作为百慕大根据国际税务资料交换协议须遵守的资料分享义务的延伸。具体而言，倘发现实体于相关财政期间不符合经济实质规定或从事高风险知识产权活动（定义见上文），则注册处处长须向实体的控股公司、最终母公司、拥有人或实益拥有人注册成立、组建、留驻或注册所在的欧盟成员国的主管当局自动提供经济实质资料。

owner is incorporated, formed, resident or registered.

Transition

The economic substance requirements are applicable from 1 January 2019 for all new entities formed or incorporated on or after that date. For existing entities, formed or incorporated on or before 31 December 2018, the requirements will be applicable from 1 July 2019.

Further development

The EU is in the process of reviewing Bermuda's legislation, along with the legislation passed by other jurisdictions. It is currently expected that they will issue their final decision by the end of Q1 2019 on whether, or to what extent, the legislation meets the requirements of their scoping paper. Following that decision, amendments to the legislation (and guidance notes) may be required. To the extent that such changes are made, they will be the subject of future client bulletins.

How can we help?

We recognise that this legislation will in some cases require change to existing business models. Conyers Dill & Pearman is ready to assist clients in understanding their obligations under the legislation and in implementing any such changes that may be required.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

过渡安排

经济实质规定自2019年1月1日起适用于该日或之后组建或注册成立的所有新实体。对于2018年12月31日或之前组建或注册成立的现有实体，相关规定自2019年7月1日起适用。

后续发展

欧盟正在审议百慕大立法与其他司法管辖区通过的立法。目前预期会于2019年第一季度末就立法是否及在何种程度上符合范围文件规定公布最终决定。决定公布后或会修订法例（及指引说明）。倘法例日后有变更，本所会向客户发出公告。

本所如何提供帮助？

本所明白在部分情况下，现有业务模式须根据法例进行变更。康德明律师事务所可协助客户了解其根据法例所须承担的责任，及协助进行任何所需的变更。

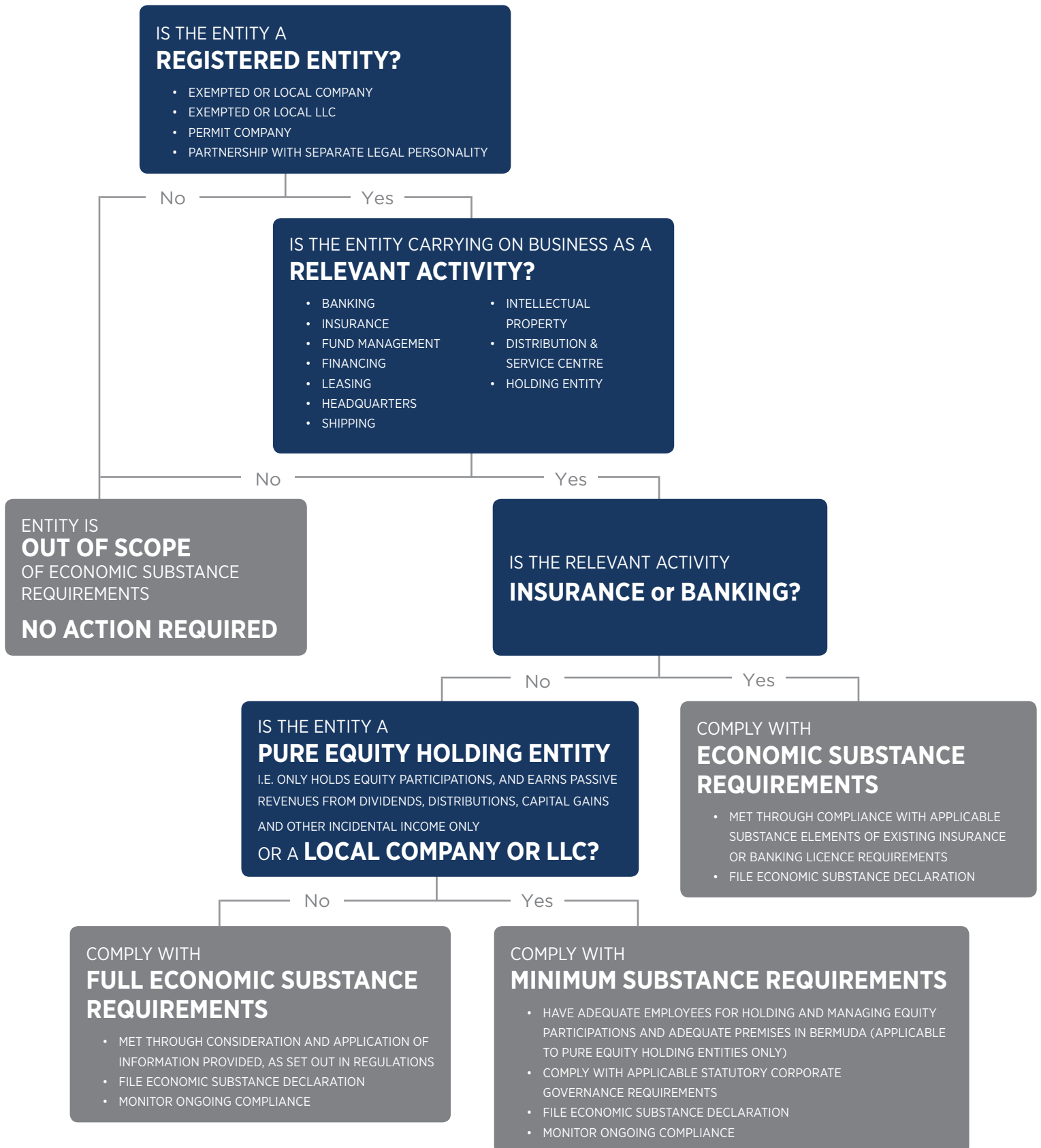
本文并非法律意见，其内容亦非详尽无遗，只可作为概览及一般参考资料。感谢您的垂阅！

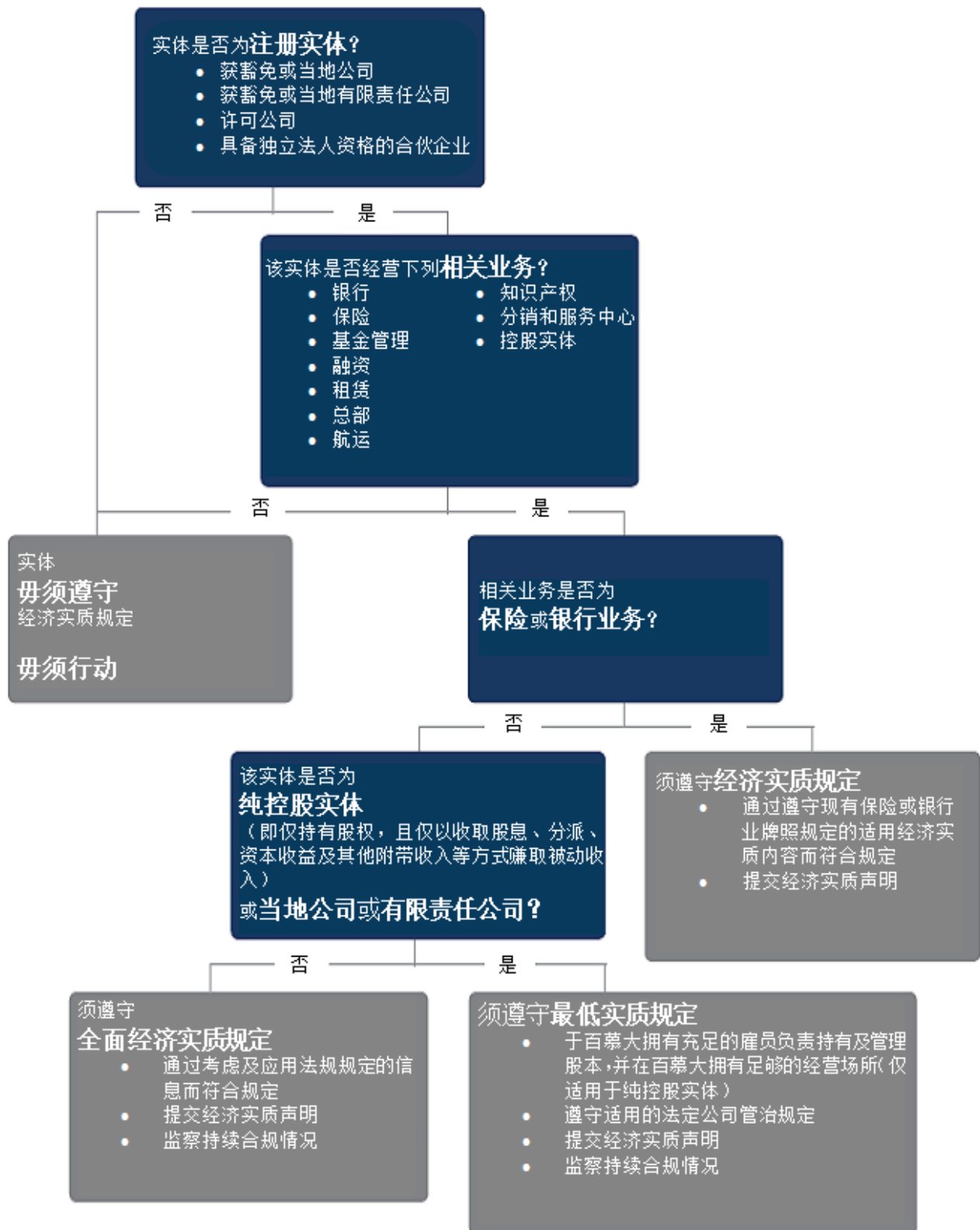
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APPENDIX 2

附录二

LIST OF CORE INCOME GENERATING ACTIVITIES, FOR EACH RELEVANT ACTIVITY

各相关业务的核心创收活动列表

Relevant Activity 相关业务	Definition and Core Income Generating Activities 释义及核心创收活动
BANKING 银行	<p>Engaging in deposit-taking business for which a licence is required in accordance with the <i>Banks and Deposit Companies Act 1999</i> 从事《1999 年银行及存款公司法》(<i>Banks and Deposit Companies Act 1999</i>)规定须持牌的接受存款业务</p> <ul style="list-style-type: none"> raising funds 集资 managing risk including credit, currency and interest risk 管理风险，包括信贷、货币及利率风险 taking hedging positions 设立对冲安排 providing loans, credit or other financial services to customers 为客户提供贷款、信贷或其他金融服务 managing regulatory capital 管理监管资本 preparing regulatory reports 编撰监管报告
INSURANCE 保险	<p>Engaging in business for which registration is required in accordance with the <i>Insurance Act 1978</i> 从事《1978 年保险法》(<i>Insurance Act 1978</i>)规定须登记的业务</p> <ul style="list-style-type: none"> predicting and calculating risk 预测及计算风险 insuring or reinsuring against risk 就风险投保或再投保 providing client services 提供客户服务 preparing regulatory reports 编撰监管报告
FUND MANAGEMENT 基金管理	<p>Managing investments for funds and in respect of which a licence is required in accordance with the Investment Business Act 2003 or for which a licence would be required if such activity were taking place in Bermuda 从事《2003 年投资业务法》(<i>Investment Business Act 2003</i>)规定须持牌的基金投资管理业务或在百慕大经营须持牌的基金投资管理业务</p> <ul style="list-style-type: none"> taking decisions on the holding and selling of investments 作出持有及出售投资的决定 calculating risk and reserves 计算风险及准备金 taking decisions on currency or interest fluctuations and hedging

	<p>positions 就货币或利率波动及对冲安排作出决定</p> <ul style="list-style-type: none"> • preparing relevant regulatory or other reports for government authorities and Investors 为政府部门及投资者编撰相关监管或其他报告
FINANCING 融资	<p>Providing funds, other than by way of subscription for shares or other equity contributions, for the business activities of one or more other entities (whether or not affiliated) 以认购股份或其他股权投资以外的方式为一个或多个其他实体(无论是否关连)的业务提供资金</p> <ul style="list-style-type: none"> • agreeing funding terms 协定融资条款 • setting the terms and duration of any financing 设定融资条款及年期 • monitoring and revising agreements 监督及修订协议 • managing risk associated with such agreements 管理与协议相关的风险
LEASING 租赁	<p>Providing leasing arrangements in respect of which it is the lessor of one or more assets leased to one or more affiliates or third parties 提供租赁安排, 以出租人身份将一项或多项资产出租予一名或多名关连人士或第三方</p> <ul style="list-style-type: none"> • identifying and acquiring assets to be leased 物色及收购用于出租的资产 • setting the terms and duration of any leasing 设定租赁条款及年期 • monitoring and revising agreements 监督及修订协议 • managing any risk associated with such agreements 管理与协议相关的风险
HEADQUARTERS 总部	<p>Engaging in the general management and administration of its affiliates within or outside Bermuda 处理百慕大境内外各联属公司的一般管理及行政事务</p> <ul style="list-style-type: none"> • taking relevant strategic or management decisions 作出相关策略或管理决定 • incurring expenditures on behalf of affiliates 代表联属公司产生开支 • coordinating group activities 协调集团事务
SHIPPING 航运	<p>Engaging in ownership, leasing, operation or management of a ship that is used to transport goods 拥有、租赁、运营或管理运货船舶</p> <ul style="list-style-type: none"> • managing the crew (including hiring, paying and overseeing crew members) 管理船员 (包括船员的雇用、薪资支付及监督)

	<ul style="list-style-type: none"> hauling and maintaining ships 拖运及维护船舶 overseeing and tracking deliveries 监督及追踪货物 determining what goods to order and when to deliver them 决定订购何种货物及发货时间 organising and overseeing voyages 组织及监督航程
DISTRIBUTION & SERVICE CENTRE 分销和服务中心	<p>Engaging in resale of goods purchased from a foreign affiliate (distribution centre); or primarily providing consulting or administrative services to a foreign affiliate (service centre) 转售自海外联属公司（分销中心）采购的货物；或主要为海外联属公司（服务中心）提供咨询或行政服务</p> <ul style="list-style-type: none"> transporting and storing goods (distribution centre) 运输及储存货物（分销中心） managing stock and taking orders (distribution centre) 管理存货及接受订单（分销中心） providing consulting or administrative services to a foreign affiliate (service centre) 为海外联属公司（服务中心）提供咨询或行政服务
INTELLECTUAL PROPERTY 知识产权	<p>The exploitation of IP assets held by the entity (including non-trade intangible assets) 利用实体持有的知识产权资产（包括非交易性无形资产）</p> <ul style="list-style-type: none"> conducting research and development in relation to IP assets such as patents 有关知识产权资产（如专利）的研发 marketing, branding, and distribution of non-trade intangible assets such as Trademarks 非交易性无形资产（如商标）的营销、品牌推广及分销 taking the strategic decisions and managing or bearing the principal risks, or both, related to the development and subsequent exploitation of an IP asset 就知识产权资产的开发和后续使用作出决策及管理或/及承担主要风险 taking the strategic decisions and managing or bearing the principal risks, or both, related to any third party acquisition and subsequent exploitation of an IP asset 就任何第三方收购及后续使用知识产权资产作出决策及管理或/及承担主要风险 carrying on the underlying trading activities through which IP assets are exploited and which lead to the generation of revenue from third parties 从事使用知识产权资产而从第三方获得收益的相关交易活动
HOLDING ENTITY 控股实体	<p>A holding entity* may include a pure equity holding entity. A pure equity holding entity is an entity that only holds equity participations in one or more entities, and earns passive revenues from dividends, distributions, capital gains and other incidental income only. 控股实体*可包括纯控股实体。纯控股实体为仅于一个或多个实体参股，且仅以收取股息、分派、资本收益及其他附带收入等方式赚取被动收入。</p>

	<ul style="list-style-type: none">• have adequate people and premises in Bermuda for holding and managing equity Participations 于百慕大拥有充足人员及场所负责持有及管理股本 <p>* <i>This term is not further defined in the legislation. It is currently unclear, but we expect that the Government-issued guidance notes and/or amendments to the legislation will in due course provide additional clarity.</i></p> <p>* 法例并无就该词汇的进一步定义。虽然目前并不清晰，但预期政府会适时发布指引说明及 / 或法律修订，进一步解释涵义。</p>
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