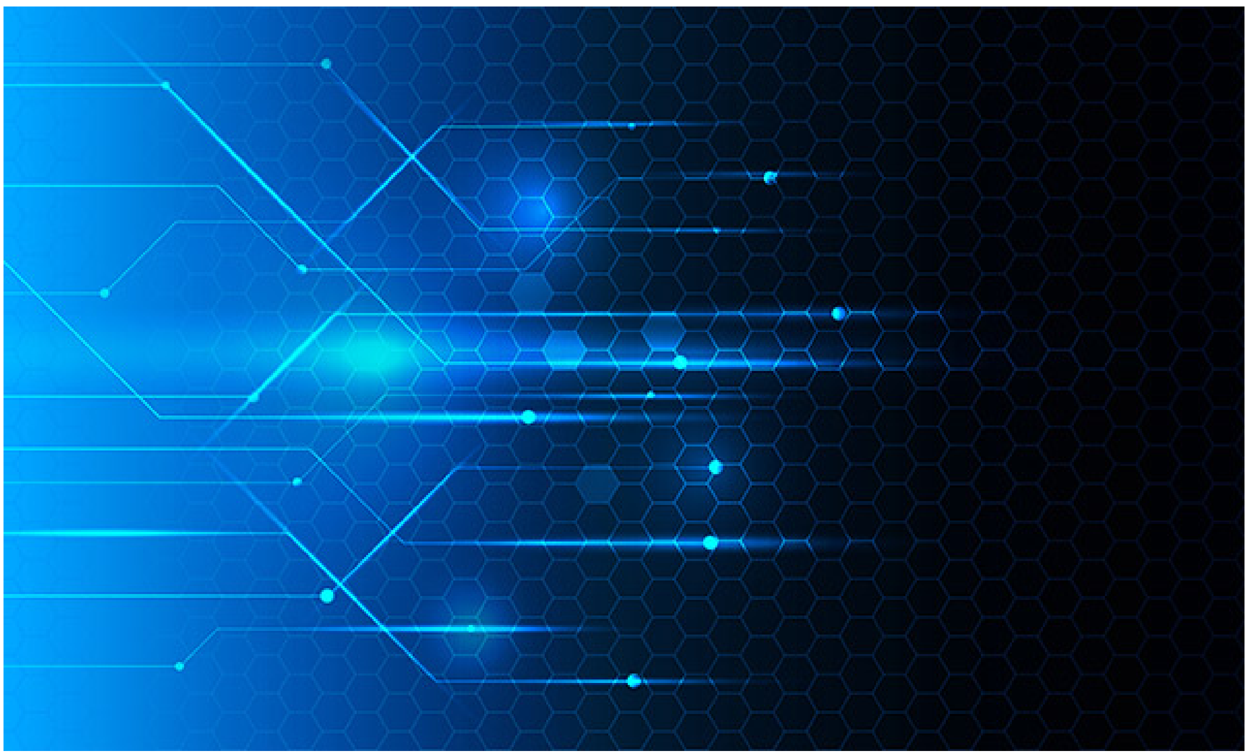
Innovation and Evolution

16-06-2021



shutterstock/chanut iamnoy

Chiara Nannini, director at Conyers Bermuda, outlines some of the key regulatory and tax-related developments that Bermuda-based captives need to be aware of.

The Bermuda Monetary Authority (BMA) has recently placed emphasis on innovation, with legislation being introduced to promote innovation across the insurance sector.

Recent changes to the Insurance Act 1978 have established a regulatory testing environment or “sandbox” where innovators may obtain restricted licences allowing them to test new technologies and products. This allows new products, services or delivery mechanisms to be scrutinised by the BMA in a controlled environment, before being licensed as fully operational.

In addition, there are new insurance classifications aimed at insurers carrying on business in an innovative or experimental manner. Specifically, an IGB class was created for insurers carrying on general business and the ILT class was created for insurers carrying on long-term business. These are all available to captive insurers.

Meeting evolving needs

One common captive structure is the ability to register as a segregated accounts company under the Segregated Accounts Companies Act 2000. This allows the company to establish a number of segregated accounts which may each insure the risks of its owner, segregated from other segregated accounts and the general account of the segregated accounts company. A segregated accounts company could also be used to segregate different product lines or individual contracts.

In November 2019, the Incorporated Segregated Account Companies Act 2019 was introduced by the Bermuda government, introducing a new corporate vehicle—an incorporated segregated accounts company (ISAC)—which complements the more traditional segregated accounts company.

The main difference between a segregated accounts company and an ISAC is that in contrast to segregated account company structures, each incorporated cell of an ISAC has a separate legal personality. This means that each incorporated segregated account of an ISAC will be able to enter into contracts with other incorporated segregated accounts within the same ISAC or third parties as well as with the ISAC itself.

It provides a more robust protection relative to creditors, particularly those domiciled in jurisdictions where the concept of segregated accounts is not yet recognised.

Given that each incorporated segregated account is a company within the meaning of the Companies Act 1981, and therefore has separate legal personality at the account level, it is anticipated that this will be beneficial for those wanting to set up different licensed incorporated segregated accounts within the same ISAC, with each ISAC being licensed separately by the BMA.

Further, each incorporated segregated account would potentially be able to obtain a credit rating and there would be the option to appoint separate boards for each proposed incorporated segregated account. ISACs can also merge or amalgamate with other ISACS and each incorporated segregated account can merge or amalgamate with other companies or other incorporated segregated accounts.

“It is worth noting that the Bermuda insurance industry, including in the captive space, has long required a connection to Bermuda and many insurers were already subject to requirements to maintain a presence in Bermuda by virtue of the sector's existing regulatory requirements.”

Changing perceptions

Bermuda, like other major offshore jurisdictions, has introduced regulations aimed at addressing European Union (EU) concerns with respect to offshore structures attracting profits without any real economic activity in the jurisdiction.

The Economic Substance Act (ESA) and Economic Substance Regulations, operative from December 31, 2018, requires all insurers (including captives) to maintain a “substantial economic presence” in Bermuda.

Each Bermuda captive will need to demonstrate that (i) it is managed and directed in Bermuda; (ii) its core income generating activities are undertaken in Bermuda; (iii) it maintains adequate physical presence in Bermuda; (iv) there are adequate full time employees in Bermuda with suitable qualifications; and (v) there is adequate operating expenditure incurred in Bermuda.

It is worth noting that the Bermuda insurance industry, including in the captive space, has long required a connection to Bermuda and many insurers were already subject to requirements to maintain a presence in Bermuda by virtue of the sector's existing regulatory requirements.

This would include captives who generally have resident directors that sit on their boards, hold board meetings in Bermuda and who outsource core income generating activities of the relevant activity of insurance to insurance managers in Bermuda. That said, a substance analysis should be done in respect of each insurer as the facts may differ from company to company.

Subsequent amendments are made to the ESA, in the form of the Economic Substance Amendment (No. 2) Act 2019, which came into effect at the start of 2020 to address EU requirements.

Soon after, in February 2020, EU Finance Ministers at a meeting of the Economic and Financial Affairs Council confirmed Bermuda’s status on the EU’s white list of fully cooperative tax jurisdictions.

Removed from the EU's list of “non-cooperative” jurisdictions for tax purposes, Bermuda, along with 15 other jurisdictions, was found to have implemented all necessary reforms to comply with EU tax good governance principles.

Cyber updates

The Bermuda Monetary Authority released its Operational Cyber Risk Management Code of Conduct for the insurance sector in October 2020. The purpose of the code is to promote the stable and secure management of information technology systems of regulated entities, which includes registered insurers, insurance managers and intermediaries.

Insurers will be required to implement their own technology risk programmes and determine what their top risks are and decide the appropriate risk response. They will be required to evidence that there is adequate board visibility and governance of cyber risk. A chief information securities officer must be appointed who will be responsible for the delivery of the cyber risk programme.

The code became operative on 1 January 2021 and all registrants must be compliant by 31 December 2021.

X

Sign up for the newsletter