

# Practical considerations for BVI economic substance (*ES*) reporting

All BVI companies and limited partnerships with legal personality must now report on their ES position annually (this includes foreign companies and limited partnerships with legal personality registered in the BVI).

Entities must report whether or not they conducted any “relevant activity” during the financial period, and if so, they will either need to report specifics of their substance in the BVI or supply evidence of their tax status, if they are claiming exemption as a “non-resident” entity.

Reporting for entities with no relevant activity or entirely passive entities carrying on “holding business” as a “pure equity holding entity” should be straightforward. However, entities carrying on any other relevant activity – particularly intellectual property (*IP*) business – or claiming the tax “non-resident” exemption should ensure that they allow sufficient time to prepare their reports, as this can be quite complex and may require input from BVI counsel, accountants and tax advisors.

Entities have 6 months from the end of each ES “financial period” within which to arrange reporting via their registered agent (*RA*). This financial period is not necessarily the same as any tax or financial year of the entity (as discussed below). Only RAs can submit information using the BOSS(ES) system – the ITA’s secured confidential database for ES information.

The vast majority of active BVI companies were incorporated prior to 2019, so this means first reports must be submitted to the International Tax Authority (*ITA*) before 30 December 2020. In practice, Harneys and most other RAs are setting deadlines to receive the information ahead of the actual deadline, due to the volume of reporting expected.

Although the compliance and reporting deadlines have not been extended, the ITA is very cognisant of the challenges posed by the COVID-19 pandemic. For our summary of the ITA’s guidance for entities affected by this please [click here](#).

Most users of BVI entities will be familiar with the different categories of relevant activity and have classified their entities. This guide addresses some of the questions we are being asked frequently as client move into the first reporting phase. Please [click here](#) to read our general guide on the ES requirements.

If you have not yet classified your entity, [click here](#) to access useful classification resources or to use our industry-leading Economic Substance Classification Solution.

Failure to identify relevant activities or to report can result in offences carrying significant fines and penalties (and even personal liability, in limited circumstances).

Entities which carry on any relevant activity cannot qualify for exemption from reporting on their beneficial ownership as an “exempt person”. This is potentially relevant to listed companies and their subsidiaries, as well as certain other types of entity.

## Dates and deadlines

The ITA Rules prescribe default financial periods determined by an entity’s date of incorporation (or in the case of continuations into the BVI, their date of registration in the BVI) as follows:

Incorporation date	Start of first ES financial period	End of first ES financial period
Entities registered before 1 January 2019	30 June 2019	29 June 2020
Entities registered from 1 January 2019 onwards	Date of incorporation	12 months from date of incorporation

The ES financial period therefore does not have to align with an entity's financial year for tax, accounting or other purposes. It is also important to recognise that entities must be considering their own individual financial records, and not group consolidated accounts, as intra-group balances may also be relevant to the entity's classification and reporting status.

New entities can notify the ITA to shorten their first ES financial period within 3 months of incorporation. Entities can also apply to the ITA to shorten a financial period but such changes can only be made to subsequent financial periods, so it is not possible to "back-date" a change to previous financial periods.

Unless they have already been altered, the default reporting periods outlined above will apply for the first reporting cycle, and then the entity could file an application to bring the end of a subsequent financial period forward.

Under the ES regime, entities are required to report within 6 months of their financial period end but many registered agents have prescribed an internal deadline to allow sufficient processing time – Harneys Corporate Services Limited's deadline is 2 weeks before the ITA deadline.

## Reporting

### Nil reporting

Every relevant entity must report annually. Even if no relevant activity was carried on during a financial period, a nil return is required.

### Exemption due to foreign tax status

If an entity carried on relevant activity during a financial period, it must either submit details demonstrating how it complied with the ES requirements during the period or claim and evidence a tax status qualifying it for exemption as a "non-resident" entity.

Such exemption is broader than the name suggests and includes entities tax resident outside the BVI as well as certain entities which are tax "transparent" or otherwise subject to tax on their income from relevant activities (for example, due to a taxable branch or permanent establishment), provided that the relevant jurisdiction does not appear on the European Union's list of non-cooperative countries for tax purposes.

Entities considering claiming exemption are recommended to consider the precise tests and implications with BVI counsel and their tax advisors if they are at all uncertain. These are set out in Part 4 of the ITA's rules and explanatory notes on ES (the **Rules**).

To claim such exemption, the entity must supply evidence of its tax status, covering the entire financial period, within the reporting deadline.

Under Rule 3, acceptable evidence includes:

- A letter or certificate from, or issued by, the competent authority for the jurisdiction in question stating that the entity is considered to be resident for tax purposes in that jurisdiction, or
- An assessment to tax on the entity, a confirmation of self-assessment to tax, a tax demand, evidence of payment of tax, or any other document, issued by the competent authority for the jurisdiction in question

Such claim will trigger the spontaneous exchange of information by the ITA with the competent authorities in the jurisdiction(s) of tax residence (as well as any EU member state in which a beneficial or legal owner of the entity resides), which may lead to follow-up or investigation to ensure the claim is valid.

## Provisional “non-resident” treatment

It may be difficult for entities to provide evidence within the reporting window as evidence needs to cover the entire ES financial period, which may not match the entity's fiscal period. If more time is needed to supply the evidence required, it is possible to apply for provisional treatment as a “non-resident” under Rule 6.

Rule 6 applications must be made within 6 months of the ES financial period end and submitted via the RA onto BOSS(ES). Broadly, the entity must either:

- Demonstrate that it has established “non-resident” status for the previous financial period to the satisfaction of the ITA and certify that its tax status has not changed in the intervening period
- Supply within the reporting period the most recent available documentary evidence of its tax status which complies with the requirements of Rule 3 (see above) and certify that its tax status has not changed in the time since the period to which such evidence relates
- Evidence that it has been too recently formed or established “non-resident” status to have any documentary evidence of such status which satisfies Rule 3 and produce some other evidence to demonstrate that it met the criteria to qualify as “non-resident” during the relevant financial period

If the entity's application is accepted, it will be given a revised deadline by the ITA within which to provide Rule 3 evidence. This deadline is likely to be no later than the end of the next ES financial period. The proper evidence must then be uploaded to BOSS (ES) once available.

If the entity cannot produce Rule 3 evidence before the deadline the ITA may determine that it is not “non-resident” and require it to demonstrate that it had substance in BVI for that period. If the entity did not have adequate substance in the BVI, it will be subject to enforcement action.

We therefore recommend that clients seek advice from BVI counsel and their tax advisors if they are at all uncertain whether their entity qualifies for the exemption (or if they need to apply for treatment as provisionally exempt). In practice, clients may also want to submit other supporting information to the ITA in relation to their tax status where Rule 3 evidence cannot be provided or is unclear. This may include an opinion from a suitably qualified tax advisor, for example.

## Relevant activity

Where relevant activity was conducted, and the entity is not tax resident elsewhere, it will need to submit economic substance data which the ITA will use to determine that the entity had adequate substance in the BVI throughout the period.

The particulars required vary according to which relevant activities were conducted, with a lesser test for pure equity holding entities carrying on holding business and a more onerous test for companies which carry on IP business.

The table below summarises the reporting requirements for relevant activities other than IP business.

Reportable information	Holding business	Other relevant activities
Turnover	No	Yes
Expenditure	No	Yes
Direction and management	No	Yes
Employees	Yes	Yes
Premises	Yes	Yes
Outsourcing of core-income generating activities	No	Yes

The reporting and evidential requirements for IP business to demonstrate compliance are complex and, in practical terms, may be impossible for some entities to comply with. We recommend that entities with potential IP business seek legal advice, if they have not already done so.

## Holding business – adequacy of BVI arrangements

Assuming an entity is purely passive, and does not have any employees it will likely wish to report zero employees globally (and in the BVI). The Rules state that the registered office address can be used as the BVI premises for holding business.

### Intellectual property

Where IP was conducted the entity must confirm if it is a “high risk IP legal entity” and if so whether it seeks to provide evidence to rebut the presumption as set out in ESA section 9(4) in which case evidence must be uploaded.

If the entity is not seeking to rebut the presumption it will need to provide detail of any other core-income generating activity conducted and its equipment in the BVI.

### Correcting errors in reports

Entities should take care when preparing their reports and ensure that the person preparing their reports is properly authorised to do so and has the necessary knowledge and information.

If a mistake is made when reporting it is important that it be corrected as soon as possible. The provision of false or misleading information may result in the commission of criminal offences and significant fines and penalties.

The first step would be to establish if the RA has reported information supplied to the ITA yet. If not, then the RA should be able to assist with correcting the report relatively simply.

If the reporting has been filed with the ITA the registered agent will need to initiate a correction with the ITA.

If you have any questions in relation to ES or an entity’s compliance or reporting obligations our experts are happy to help.



**Amy Roost**  
**+44 203 752 3641**  
amy.roost@harneys.com  
London



**Joshua Mangeot**  
**+1 284 852 4387**  
joshua.mangeot@harneys.com  
British Virgin Islands



**Claire Abrehart**  
**+1 284 852 2568**  
claire.abrehart@harneys.com  
British Virgin Islands



**Philip Graham**  
**+1 284 852 2551**  
philip.graham@harneys.com  
British Virgin Islands



**Kerry Graziola**  
**+1 284 852 2564**  
kerry.graziola@harneys.com  
British Virgin Islands

© Harneys, October 2020

Harneys is a leading international offshore law firm. From locations around the globe, Harneys advises the world’s top law firms, financial institutions and corporations on the laws of British Virgin Islands, Cayman Islands, Cyprus, Luxembourg, Bermuda, and Anguilla. For more information about Harneys please visit [harneys.com](https://www.harneys.com) or contact us at [marketing@harneys.com](mailto:marketing@harneys.com).

The foregoing is for general information only and not intended to be relied upon for legal advice in any specific or individual situation. Bermuda legal services are provided through an association with Zuill & Co which is an independently owned and controlled Bermudian law firm.