

## Hong Kong

### Introduction of Substance Requirements for Certain Cayman Islands Entities

The Cayman Islands Government has passed legislation, with effect from 1 January 2019, requiring certain entities incorporated or registered in the Cayman Islands to maintain economic substance in the jurisdiction. We set out below a summary of the entities and activities which may be affected by this new legislation and of the resulting compliance issues that require consideration.

The *International Tax Co-Operation (Economic Substance) Law, 2018* (the “ES Law”) was enacted in response to a scoping paper issued by the European Union’s Code of Conduct Group (Business Taxation) in June 2018 in respect of initiatives to combat global base erosion and profit shifting. The paper set out jurisdictional substance requirements that certain jurisdictions outside the EU must adopt. Similar legislation has been enacted in other major offshore jurisdictions.

### Relevant Entities

The ES Law applies to a defined class of **relevant entities**. This includes Cayman Islands exempted companies, foreign companies that are registered in Cayman, as well as Cayman Islands LLCs and LLPs. Excluded from the defined relevant entities are (i) tax resident outside the Cayman Islands, (ii) investment

## 香港

### 若干开曼群岛实体的经济实质规定概要

开曼群岛政府已通过立法，规定在开曼群岛注册成立或登记的若干实体须在开曼群岛司法管辖区维持经济实质，法例自 2019 年 1 月 1 日起生效。下文概述可能受到新法例影响的实体和活动，及因此需要考虑的合规问题。

《2018 年国际税务合作（经济实质）法》（*The International Tax Co-Operation (Economic Substance) Law, 2018*）（下称“经济实质法”）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 月发布的关于打击全球税基侵蚀与利润转移措施的范围文件（scoping paper）而颁布。该文件载列欧盟以外若干司法管辖区必须对当地实体采纳的经济实质规定。其他主要离岸司法管辖区亦已通过相若的法例。

### 相关实体

经济实质法适用于特定类别的**相关实体**，包括开曼群岛豁免公司、在开曼登记的外国公司，以及开曼群岛有限责任公司（LLC）和有限责任公司（LLP）。特定相关实体不包括 (i) 开曼群岛以外地区税务居民；(ii) 投资基金，包括作为任何该等基金投资或经营平台的实体；

funds, including entities through which any such fund invests or operates, (iii) Cayman Islands companies limited by guarantee, and (iv) Cayman Islands not-for-profit companies.

## Relevant Activities

The categories of **relevant activities** include the following broad categories, each further defined in the ES Law:

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

## Economic Substance Test

Relevant entities will be required to meet the **economic substance test** (“**ES Test**”) set out in the ES Law in respect of their relevant activities in the Cayman Islands. The ES Test is described in general terms only in the ES Law as amended by the International Tax Co-operation (Economic Substance) (Amendment of Schedule) Regulations, 2019 and enhanced by Guidance issued on 22 February 2019. However, it is anticipated the Guidance will be amended to refine the ES Test further in due course.

Relevant entities carrying out most relevant activities will satisfy the ES Law if they:

- (a) conduct Cayman Islands core income generating activities (“Cayman Islands CIGA” – further defined below) in relation to the relevant activity;
- (b) are directed and managed appropriately in the Cayman Islands related to the relevant activity; and
- (c) with regard to the level of relevant income from the relevant activity carried out in the Cayman Islands –
  - (i) have an adequate amount of operating expenditure incurred in the Cayman Islands;
  - (ii) have an adequate physical presence (including maintaining a place of business or plant, property and equipment) in the Cayman Islands; and

(iii) 开曼群岛担保责任有限公司；及 (iv) 开曼群岛非营利公司。

## 相关活动

**相关活动**的类别大致如下，各类别在经济实质法中有进一步定义：

- 银行业务
- 分销和服务中心业务
- 融资及租赁业务
- 基金管理业务
- 总部业务
- 控股公司业务
- 保险业务
- 知识产权业务
- 航运业务

## 经济实质测试

相关实体须符合经济实质法就该等实体在开曼群岛的相关活动规定的**经济实质测试**（下称“**经济实质测试**”）。经济实质测试在经济实质法中仅有概括说明，随后经《2019年国际税务合作（经济实质）（附表修订）法规》（International Tax Co-operation (Economic Substance) (Amendment of Schedule) Regulations, 2019）修订并经2019年2月22日发布的《指引》（Guidance）进行改进，但预计《指引》会适时进行修订以进一步完善经济实质测试。

开展大部分相关活动的实体若满足下列条件，则符合经济实质法的规定：

- (a) 在开曼群岛开展与相关活动有关的核心创收活动（下称“开曼群岛核心创收活动” - 进一步定义见下文）；
- (b) 相关活动在开曼群岛适当管理；及
- (c) 就在开曼群岛进行的相关活动的收入水平而言 –
  - (i) 在开曼群岛产生足够的运营支出；
  - (ii) 在开曼群岛有足够的办公场所（包括维持营业场所或厂房、物业和设备）；及

- (iii) have an adequate number of full-time employees or other personnel with appropriate qualifications in the Cayman Islands.

The Guidance does not prescribe what will constitute “adequate” and “appropriate” for the ES Test but instead provides that this will be dependent on the particular facts of the relevant entity and its business activities. A relevant entity will have to ensure that it maintains and retains appropriate records to demonstrate the adequacy and appropriateness of the resources utilised, and expenditures incurred. Certain sector-specific guidance on relevant activities is set out in the Guidance but it is anticipated that this will be enhanced when the amended Guidance is published in due course.

A relevant entity may satisfy the ES Test by outsourcing the conduct of its Cayman Islands CIGA to another person provided that the relevant entity is able to monitor and control the carrying out of the Cayman Islands CIGA. The term “**Cayman Islands CIGA**” is defined in the ES Law to mean activities that are of central importance to a relevant entity in terms of generating income and that are being carried out in the Cayman Islands. It is anticipated that guidance notes when published will elaborate upon the ES Test requirements for Cayman Islands CIGA.

The ES Test for a relevant entity that is only carrying on the business of a pure equity holding company has reduced criteria, requiring that such an entity comply with all applicable filing requirements under the Companies Law (2018 Revision) and have adequate human resources and adequate premises in the Cayman Islands for holding and managing equity participations in other entities. A pure equity holding company is defined in the ES Law as a company that only holds equity participations in other entities and only earns dividends and capital gains.

## Timing

Existing relevant entities carrying on a relevant activity and incorporated or registered prior to 1 January 2019 must comply with the ES Test by 1 July 2019.

New relevant entities carrying on a relevant activity and incorporated or registered from 1 January 2019 must comply with the ES Test immediately.

- (iii) 在开曼群岛拥有充足的全职雇员或具有适当资格的其他人员。

《指引》并无规定就经济实质测试而言属‘合格’及“适当”的情况，而是规定这将取决于相关实体及其业务活动的具体事实。相关实体必须确保其保留适当的记录，以证明所用资源的充足性和适当性以及所产生的支出。《指引》载有若干针对个别领域的相关活动的指南，但预计会在适时发布经修订的《指引》时进一步改进。

相关实体可通过向其他人士外包其开曼群岛核心创收活动以符合经济实质测试，惟相关实体须有能力监察及控制开曼群岛核心创收活动的开展。“**开曼群岛核心创收活动**”在经济实质法中的定义为，指就创收而言对相关实体至关重要且正在开曼群岛开展的活动。预计指引说明发布时会详述对开曼群岛核心创收活动的经济实质测试要求。

对仅从事纯控股公司业务的相关实体进行的经济实质测试已降低标准，要求该等实体遵守《公司法》（2018年修订）规定的所有适用备案规定，并在开曼群岛拥有足够的人力资源和场所用于持有和管理其他公司的股权。纯控股公司在经济实质法中被定义为仅在其他实体中持有股权并只赚取股息和资本收益的公司。

## 时间安排

从事相关活动并于 2019 年 1 月 1 日之前注册成立或登记的现有相关实体必须在 2019 年 7 月 1 日之前符合经济实质测试。

从事相关活动并于 2019 年 1 月 1 日后注册成立或登记的新相关实体必须立即符合经济实质测试。

## Monitoring and Enforcement

Each relevant entity, whether or not carrying on relevant activities, will be required to file an annual report with the Cayman Islands Tax Information Authority in respect of their status under the ES Law including, in case of those entities carrying on relevant activities, their obligation to meet the applicable ES Test.

The penalty for failing to satisfy the ES Test for a relevant activity in a financial year is US\$1,220 and is US\$122,000 for failing to do so in the subsequent financial year. After two consecutive years, the Cayman Registrar may apply to the Grand Court for an order requiring the relevant entity to take a specified action, including for the purpose of satisfying the ES Test, or to be struck off.

## How can we help?

We are monitoring closely the development of the ES Law and the related guidance notes in the Cayman Islands and are available to assist clients in understanding their new obligations under the ES Law. For further information please contact [substanceinfohk@conyersdill.com](mailto:substanceinfohk@conyersdill.com) or your usual Conyers lawyer.

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.

## 监督及执行

各相关实体（不论是否进行相关活动）均须就各自在经济实质法下的状况向开曼群岛税务信息管理局提交年度报告，包括（倘为从事相关活动的实体）该等实体须符合适用经济实质测试的义务。

一个财政年度内未能符合相关活动的经济实质测试的罚款为 1,220 美元，而在下一个财政年度仍未符合经济实质测试的罚款为 122,000 美元。连续两年后，开曼注册处可向大法院申请颁令，要求相关实体采取指定行动以符合经济实质测试，或被除名。

## 本所如何提供帮助？

本所密切关注经济实质法的动态及开曼群岛的相关指引说明，可协助客户了解经济实质法规定的新义务。如需进一步信息，敬请发送电邮至 [substanceinfohk@conyersdill.com](mailto:substanceinfohk@conyersdill.com) 或联络阁下在康德明的日常联络律师。

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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