

公报文章

Cayman Islands Updated Economic Substance Guidance

开曼群岛更新经济实质指导说明

作者：Maree Martin, Counsel and Head of Knowledge Management 顾问律师兼知识管理主管 | Jennifer Marshall, Senior Knowledge Specialist 高级知识专员

Version 3.0 of the Cayman Islands guidance notes (“Guidance”) on the Cayman Islands’ economic substance legislation provides additional assistance in interpreting the International Tax Co-operation (Economic Substance) Law¹ (the “ES Law”).

The Guidance now includes a framework of industry-specific case studies along with an explanation of how the Tax Information Authority (“TIA”) will interpret the ES Law terms “adequate” and “appropriate” in relation to the ES Law’s requirements for economic substance (the “ES Test”, described in more detail below). The release of the Guidance follows a period of industry collaboration and demonstrates the Cayman Islands’ continued commitment to a reputable economic substance regime in line with global standards.

Notification Obligations

“Entities” to notify under the ES Law

The ES Law requires that every “entity” (see below) must notify the TIA annually by way of an Economic Substance Notification (“ESN”) whether or not it is carrying on a “relevant activity” (see below) under the ES Law and if so, whether or not it is a “relevant entity”. The ESN must be filed as a prerequisite to an entity filing its annual return with the Cayman Islands General Registry’s Corporate Administration Portal, in each case by 31 March. Going forward, we strongly recommended that both the ESN and the annual return are filed prior to 31 January each year, otherwise an entity’s ability to obtain a certificate of good standing from the Cayman Islands General Registry authorities will be impaired. Foreign companies must also

有关开曼群岛经济实质立法的开曼群岛指导说明（下称“《指导说明》”）3.0 版为解释《国际税务合作（经济实质）法》¹（下称“《经济实质法》”）提供了更多的帮助。

《指导说明》现在包括针对特定行业的案例研究框架，并说明了税务信息管理局（下称“TIA”）将如何就《经济实质法》对经济实质的要求来解释《经济实质法》的术语“足够”和“适当”（“经济实质测试”，下面将详细介绍）。《指导说明》是在经过一段时间的行业协作之后发布的，彰显开曼群岛持续对符合全球标准、声誉良好的经济实质制度的承诺。

通知义务

“实体”根据《经济实质法》进行通知

《经济实质法》规定，每个“实体”（见下文）必须每年通过提交“经济实质通知”（下称“ESN”）向 TIA 报告其是否根据《经济实质法》从事“相关活动”（见下文）。如果是，则其是否为“相关实体”。提交 ESN 是实体向开曼群岛总注册处的公司管理门户网站提交年度纳税申报单的先决条件，提交两者的截止日期均为 3 月 31 日。我们强烈建议，从目前开始，在每年 1 月 31 日之前提交 ESN 和年度纳税申报单，否则，实体从开曼群岛总注册处获得良好信誉证书的能力将受到损害。外国公司也必须在相同的截止日期之前提交 ESN，尽管此类实体不需要提交年度纳税申报单。

¹ All references to legislation being to the most recent revision of the same, as amended.
所有提及的法律均指最新修订、经修正的法律。

file an ESN by the same deadline, notwithstanding that such entities are not required to file an annual return.

“Entities” required to file an ESN include all legal persons registered with the Cayman Islands General Registry. This includes companies incorporated under the Companies Law (the “**Companies Law**”), limited liability companies registered under the Limited Liability Companies Law, limited liability partnerships registered in accordance with the Limited Liability Partnership Law, 2017 and companies incorporated outside of the Cayman Islands and registered under the Companies Law.

Entities that are not Relevant Entities

The Guidance provides that domestic companies, investment funds (including private funds registered under the Private Funds Law, 2020) and entities that are tax resident outside the Cayman Islands are not “relevant entities” for the purposes of the ES Law. These entities are obliged to provide an ESN as outlined above but are not required to satisfy the ES Test.

Under the most recent regulations adopted in amendment of the ES Law, companies limited by guarantee under the Companies Law are no longer exempt from the requirement to meet the ES Test, except in strict circumstances. To be so exempt, a company limited by guarantee must otherwise satisfy the criteria for the definition of “domestic company”, i.e. the company is not part of an MNE Group² and only carries on business in the Cayman Islands in compliance with section 4(1) of the Local Companies (Control) Law, section 3(a) of the Trade and Business Licensing Law, or is registered pursuant to section 80 of the Companies Law (i.e. a “not for profit” company).

Entities tax resident outside the Cayman Islands

An entity that is tax resident outside the Cayman Islands must also disclose the name and address of its immediate and ultimate parents and the ultimate beneficial owner(s) to the TIA. The jurisdiction in which the entity is claiming to be tax resident, and supporting evidence of such, must also be provided.

The TIA is obliged to provide information to a competent authority in the jurisdiction in which an entity states it is tax resident or in which its immediate parent, ultimate parent or ultimate beneficial owner(s) resides as well as to the competent authority of the relevant jurisdiction where the entity is incorporated.

需要提交 ESN 的“实体”包括在开曼群岛总注册处注册的所有法人。这包括根据《公司法》成立的公司，根据《有限责任公司法》注册的有限责任公司，根据《2017 年有限合伙企业法》注册的有限合伙企业以及在开曼群岛境外成立并根据《公司法》注册的公司。

不属于相关实体的实体

《指导说明》规定，就《经济实质法》而言，国内公司、投资基金（包括根据《2020 年私募基金法》注册的私募基金）以及在开曼群岛境外具有税收居民身份的实体不属于“相关实体”。这些实体有义务提供如上所述的 ESN，但不需要通过经济实质测试。

根据《经济实质法》修正案采用的最新法规，除非在严格的情况下，否则《公司法》所规定的担保有限公司不再享受对其通过经济实质测试方面的豁免。要获得这种豁免，担保有限公司必须满足“国内公司”的定义标准，即该公司不属于 MNE 集团²并且只在开曼群岛开展符合《当地公司（控制）法》第 4(1)条、《贸易和商业许可法》第 3(a)条的业务，或根据《公司法》第 80 条注册（即“非营利”公司）。

开曼群岛境外的税收居民实体

在开曼群岛境外具有税收居民身份的实体还必须向 TIA 披露其直系父母和最终父母以及最终实益拥有人的姓名和地址。如果实体声称自己是某个司法管辖区的税收居民，则必须注明，并且提供有关证明。

TIA 有义务向实体声称其为税收居民或其直系父母、最终父母或最终实益拥有人居住的司法管辖区的主管当局提供信息，也有义务向实体在其成立的相关司法管辖区的主管当局提供信息。

² The Guidance states that the term “MNE Group” means any Group that includes two or more enterprises for which the tax residence is in different jurisdictions or includes an enterprise that is resident for tax purposes in one jurisdiction and is subject to tax with respect to the business carried out through a permanent establishment in another jurisdiction. A “Group” is a collection of enterprises related through ownership or control required to prepare consolidated financial statements for financial reporting purposes or that would be so required if equity interests in any of the enterprises were traded on a public securities exchange in its jurisdiction of tax residence.

《指导说明》指出，“跨国企业集团”一词是指包括两个或两个以上的企业，这些企业的纳税地位位于不同的司法管辖区，或者包括一个企业，其纳税地位位于一个司法管辖区，但通过在另一个司法管辖区的常设机构开展的业务须纳税。“集团”是指一组通过所有权或控制权相关的企业，需要出于财务报告编制合并财务报表，或者如果其中任何企业的股权在其税收居住地的公共证券交易所交易，则也需要出于财务报告编制合并财务报表。

Reporting Obligations for relevant entities carrying on a relevant activity

A relevant entity carrying on a relevant activity³ must report information (“**ES Return**”) electronically via the Cayman Islands Economic Substance Portal in relation to the entity’s satisfaction of the ES Test in relation to that relevant activity. If a relevant entity is carrying on more than one relevant activity, it must satisfy the ES Test in respect of each relevant activity it undertakes and provide supporting details of such in the ES Return. The ES Return must be made within 12 months after the last day of the end of each financial year of the relevant entity commencing on or after 1 January 2019. The Guidance describes the reporting process and the nature of information required to complete the ES Return in more detail.

Relevant entities carrying on relevant activities must also now provide the name and address of the officer who is responsible for providing information to the TIA. At the date of this Alert, the Cayman Islands Department for International Tax Cooperation (“**DITC**”) Portal had not yet been launched, although the TIA has stated it will be launched in Q3 2020 to facilitate electronic reporting to the TIA and its sharing of information with other competent authorities in accordance with the ES Law.

The ES Test remains unchanged and requires that a relevant entity conducting a relevant activity:

- a. conducts core income generating activities (“**CIGA**”) in relation to that relevant activity;
- b. is directed and managed in an appropriate manner in the Cayman Islands in relation to that relevant activity; and
- c. having regard to the level of relevant income derived from the relevant activity carried out in the Islands, has an adequate –
 - i. amount of operating expenditure incurred in the Cayman Islands;
 - ii. physical presence (including maintaining a place of business or plant, property and equipment) in the Cayman Islands; and
 - iii. number of full-time employees or other personnel with appropriate qualifications in the Cayman Islands.

The TIA may impose a penalty of CI\$5,000.00 where a relevant entity fails to prepare and submit the ES Return within the specified timeframe. An additional penalty of CI\$500.00 per day applies for every day that the relevant entity fails to comply. Civil penalties of up to CI\$100,000/US\$121,950 apply in relation to non-

从事相关活动的相关实体的申报义务

从事相关活动的相关实体³必须通过开曼群岛经济实质门户网站以电子方式申报相关实体就该相关活动通过了经济实质测试的信息 (“**经济实质申报表**”)。如果相关实体从事一项以上的相关活动，则其从事的每项相关活动均须通过经济实质测试，并在经济实质申报表中提供此种情况的详细证明。经济实质申报表必须在相关实体于 2019 年 1 月 1 日或之后开始的每个财政年度结束的最后一天之后的 12 个月内提交。

《指导说明》更详细地描述了申报流程以及完成经济实质申报表需填信息的性质。

从事相关活动的相关实体现在还必须指明负责向 TIA 提供信息的高管的姓名和地址。在此提示简报发表之日，开曼群岛国际税务合作部（下称 “**DITC**”）门户网站尚未开通，尽管 TIA 曾表示会在 2020 年第 3 季度启动，以方便向 TIA 进行电子申报，并根据《经济实质法》与其他主管部门共享信息。

经济实质测试没有变化，要求从事相关活动的相关实体：

- a. 开展与该相关活动有关的核心创收活动（下称 “**CIGA**”）；
- b. 就该相关活动在开曼群岛以适当的方式进行指导和管理的；以及
- c. 考虑到在开曼群岛从事的相关活动所产生的相关收入水平，有足够的 –
 - i. 在开曼群岛产生的经营支出金额；
 - ii. 在开曼群岛建立的有形实体（包括维持营业场所或工厂、物业和设备）；以及
 - iii. 在开曼群岛拥有的全职员工或具有适当资格的其他人员的人数。

如果相关实体未在指定时间范围内填写并提交经济实质申报表，TIA 可能会对其处以 5,000.00 开曼元的罚款。相关实体每一天不遵守规定，就会被处以每天 500.00 开曼元的额外罚款。不遵守经济实质测试的，处以最高 100,000 开曼元 /121,950 美元的民事罚款。

³ “Relevant activities” are defined to include the following businesses (i) banking; (ii) distribution and service centres; (iii) financing and leasing; (iv) fund management; (v) headquarters (vi) holding companies (vii) insurance; (viii) intellectual property; and (ix) shipping.

“相关活动”被定义为包括以下业务 (i) 银行业务；(ii) 分销和服务中心；(iii) 融资和租赁；(iv) 基金管理；(v) 总部 (vi) 控股公司 (vii) 保险；(viii) 知识产权；以及 (ix) 航运。

compliance with the ES Test.

Interpreting “Adequate” and “Appropriate”

The ES Test makes use of the words adequate and appropriate, without definition. The Guidance now provides that, in each case these words shall have the meaning set out beside them:

- “adequate” shall mean “as much or as good as necessary for the relevant requirement or purpose”; and
- “appropriate” shall mean “suitable or fitting for a particular purpose, person, or occasion”.

What is adequate or appropriate for each relevant entity will be dependent on the particular facts of that entity and its business activity. The Guidance anticipates that the directors (or equivalent) of a relevant entity consider these questions and make their determination in good faith. Additionally, each relevant entity should maintain appropriate records to demonstrate the adequacy and appropriateness of the resources utilized and expenditures incurred.

Verification of Outsourcing

Where a relevant entity outsources CIGA, the TIA will only accept the relevant entity’s claim to have satisfied the ES Test by means of domestic outsourcing if the information is verified by the service provider. Such verification must be made within thirty days of the relevant entity providing the same information to the TIA. Service providers undertaking outsourced functions are also required to register with the DITC. This will enable the DITC to independently verify the engagement of service providers and the nature of the services they carry out.

Circumvention

The Guidance draws particular attention to arrangements which may be entered into for the main purpose or one of the purposes of which is to circumvent economic substance obligations under the ES Law. The TIA monitors any mechanisms which may result in circumvention, for example, an entity which seeks to manipulate or artificially suppress its income or falsely claims to be tax resident in another jurisdiction in respect of all of its income in the Islands from a relevant activity. Knowingly or willfully supplying false or misleading information to the TIA is also an offence under the ES Law and is punishable on summary conviction by a fine of CI\$10,000/US\$12,195 or with imprisonment for a term of five years, or both.

Sector Specific Guidance

The Schedule contained in the Guidance gives high-level information on each of the “relevant activities” within the scope of the ES Law. The scope of each sector is outlined along with industry-specific CIGA, compliance issues facing certain industries and examples of the application of the ES Law in factual scenarios. The examples are

解释“足够”和“适当”

经济实质测试使用了足够和适当这两个词，但没有给出定义。

《指导说明》现在规定，在每种情况下，这两个词具有其旁边列出的含义：

- “足够”意思是“为相关要求或目的所需的数量或质量”；以及
- “适当”意思是“适合或匹配某一特定目的、个人或场合”。

足够或适当对每个相关实体的含义取决于该实体及其业务活动的特定实际情况。《指导说明》期待相关实体的董事（或同等人员）考虑这些问题，真诚地做出决定。此外，每个相关实体均应保持适当的记录，以证明所用的资源和产生的支出是足够的、适当的。

外包验证

如果相关实体将 CIGA 外包出去，TIA 只接受相关实体声称以国内外包的方式通过了经济实质测试，前提条件是服务提供者验证了此信息。此类验证必须在相关实体向 TIA 提供相同信息后的三十天内完成。承担外包职能的服务提供商也需要向 DITC 注册。这将使 DITC 能够独立地验证服务提供商的参与情况及其所提供的服务的性质。

规避

《指导说明》特别提请注意某些以规避《经济实质法》规定的经济实质义务为主要目的或其中一个目的而签订的安排。TIA 会监控可能导致规避的任何机制，例如，某个实体企图操纵或人为抑制其收入，或者就其在开曼群岛从某项相关活动所得的所有收入，虚假地声称自己是另一司法管辖区的税收居民。根据《经济实质法》，明知或故意向 TIA 提供虚假或误导性信息也属违法，一经简易程序定罪，可处以 10,000 开曼元 /12,195 美元的罚款或五年监禁，或两者并罚。

特定行业指导说明

《指导说明》中包含的附表提供了有关《经济实质法》范围内每项“相关活动”的高级信息。每个行业的范围都做了概述，同时也说明了特定行业的 CIGA，某些行业面临的合规性问题以及在实际场景中应用《经济实质法》的示例。这些示例仅用作假设案例分析，《指导说明》强调，相关实体是否通过经济

intended as hypothetical case studies and the Guidance emphasizes that whether a relevant entity passes or fails the ES Test will depend on the application of ES Law principles and the specific facts of each case.

For any queries, please contact the author or your usual Conyers contact.

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. The Chinese translation of this article has been adapted from the English original, please refer to the original in case of ambiguity.

实质测试，取决于《经济实质法》原则的应用以及每个案例的具体情况。

如有任何疑问，请联系作者或康德明律师事务所中您惯常联络的律师。

本文的内容并非详尽无遗，旨在提供简要概述和一般资料，而不应用于替代法律建议或法律意见。中文译本仅供参考，如有歧义，请以英文原文为准。

作者 Authors :

Maree Martin
Counsel and Head of Knowledge Management
顾问律师兼知识管理主管
Maree.Martin@conyers.com
+1 345 814 7781

Jennifer Marshall
Senior Knowledge Specialist
高级知识专员
Jennifer.Marshall@conyers.com
+1 345 814 7795

其他联络人 Other Contacts :

Alan Dickson
Partner 合伙人
alan.dickson@conyers.com
+1 345 814 7790

Philippa Gilkes
Associate 律师
Philippa.Gilkes@conyers.com
+1 345 814 7751