

## British Virgin Islands Economic Substance Requirements – 'Relevant Activity' of 'Banking Business'

For general background on The Economic Substance (Companies and Limited Partnerships) Act, 2018 (the "Economic Substance Act"), the related draft International Tax Authority Economic Substance Code that was issued on 22 April 2019 (the "Guidance") and for the meaning of 'legal entity'.

This update assumes that an entity has already been determined to be a 'legal entity' under the Economic Substance Act and that the 'legal entity' is now considering whether it is carrying on one of the nine categories of geographically mobile 'relevant activities' - in particular, under the 'banking business' category.

### What is 'Banking Business'?

'Banking business' in the Economic Substance Act is defined under section 2(1) of the Banks and Trust Companies Act, 1990 to mean 'the business of accepting deposits of money which may be withdrawn or repaid on demand or after a fixed period or after notice, by cheque or otherwise and the employment of such deposits, either in whole or in part: (a) in making or giving loans, advances, overdrafts, guarantees or similar facilities; or (b) the making of investments, for the account and at the risk of the person accepting such deposits'.

### Economic Substance Test

If a 'legal entity' **only** carries on a 'relevant activity' that is a 'banking business', it will be

subject to the economic substance test set out in the Economic Substance Act. The economic substance test can be satisfied in relation to that 'banking business' if the 'legal entity' ensures that:

- (a) the 'banking business' is directed and managed in the British Virgin Islands;
- (b) having regard to the nature and scale of the 'banking business':
  - (i) there are an adequate number of suitably qualified employees in relation to that activity who are physically present in the British Virgin Islands (whether or not employed by the relevant legal entity or by another entity and whether on temporary or long term contracts);
  - (ii) there is adequate expenditure incurred in the British Virgin Islands;
  - (iii) there are physical offices or premises as may be appropriate for the core income-generating activities (as described below in the context of 'banking business');
- (c) the legal entity conducts core income-generating activity in the British Virgin Islands as described below in the context of 'banking business': and

- (d) in the case of income-generating activity carried out for the relevant legal entity by another entity:
  - (i) no core income generating activity is carried on outside the British Virgin Islands;
  - (ii) only that part of the activities of that other entity which are solely attributable to generating income for the relevant legal entity and not for any other legal entity shall be taken into account when considering if the relevant legal entity meets the economic substance requirements;
  - (iii) the relevant legal entity is able to monitor and control the carrying out of that activity by the other entity.

### British Virgin Islands Core Income Generating Activities

The relevant British Virgin Islands core income generating activities in the context of 'banking business' include:

- (a) raising funds, managing risk including credit, currency and interest risk;
- (b) taking hedging positions;
- (c) providing loans, credit or other financial services to customers;
- (d) managing regulatory capital; and
- (e) preparing regulatory reports and returns.

### The Guidance on 'Banking Business'

At present there is no detailed sector specific guidance in respect of 'banking business' except

that the Guidance provides that the International Tax Authority will follow the interpretation of the Financial Services Commission of the British Virgin Islands (the "FSC") of what does or does not fall within the definition of 'banking business'. The Guidance further notes the effect of sections 3 and 4 of the Banks and Trust Companies Act, 1990 in that any entity which is either incorporated in the British Virgin Islands or a foreign entity doing business in the British Virgin Islands, which is carrying on 'banking business' must have a licence from the FSC, in order to carry on the business lawfully.

### What to do if a Legal Entity is Carrying on the 'Relevant Activity' of 'Banking Business'

It is worth noting that there are a range of consequences for breaches of the Economic Substance Act (including financial penalties and potential striking-off).

If you have any specific questions in relation to a 'legal entity' conducting 'banking business' or this update, please speak to your usual Maples Group contact or:

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