Updated economic substance requirements for Jersey fund managers

Insights - 25/11/2019

The Taxation (Companies - Economic Substance) (Jersey) Law 2019 came into force on 1 January 2019. All tax returns filed in 2019 will need to confirm whether or not a company carries out any relevant activity under the law, with more detailed reporting applying to the tax returns completed in 2020 (relating to the tax year 2019).

The substance requirements apply to Jersey tax-resident companies that carry on certain specified geographically mobile activities, including fund management business. They have been implemented in order to comply with the requirements of the EU Code of Conduct Group for the purpose of demonstrating that the profits generated by such companies are commensurate with their economic activities and presence in Jersey. Jersey was put on the EU whitelist on 12 March.

The Crown Dependencies issued joint Guidance Notes on aspects of the Substance Requirements on 26 April 2019, which were updated on 22 November 2019.

Fund managers are in scope of the law where they have gross income in relation to their fund management activities. Other than self-managed funds, which will be in scope as fund managers after a change to the law expected to be effective in 2020, fund vehicles themselves are outside the scope of the Law.

The substance requirements establish economic substance tests which require companies to demonstrate the following:

They are "directed and managed" in Jersey in relation to that activity

In particular:

- meetings of the board of directors (all of whom must have the necessary knowledge and expertise to discharge their duties as a board) must be held in Jersey at adequate

frequencies, having regard to the level of decision making required;

- a quorum of the Board of Directors must be physically present in Jersey at those meetings and, where a meeting is called to consider a strategic matter, or CIGA, a majority of directors must be physically present in Jersey;
- the minutes must record the strategic decisions of the company made at those meetings; and
- all company records and minutes of all board meetings must be retained in Jersey, including all supporting documents relating to board meetings (or, if in electronic form, maintained and accessible in the Island).

Whilst it is not necessary for all of the company's meetings to be held in Jersey, it is expected that the majority of board meetings will be held in the Island and that a quorum of directors will be physically present. It is acknowledged that it may be necessary for certain meetings to be held outside Jersey, with the revised Guidance Notes providing a welcome confirmation that isolated decisions may be taken outside Jersey provided "it can be evidenced that the decisions taken and the CIGA undertaken in the Island are of a quality and quantity to clearly outweigh the question that the CIGA involving the decisions is undertaken outside the Island."

The board of directors must be the decision-making body and not simply approve decisions taken outside the Island. A fund management company is unlikely to meet the Substance Requirements if strategic decisions have been delegated to entities outside Jersey which make such decisions without reference to, or real oversight by, the board.

Adequate employees, expenditure and physical premises

Having regard to the level of relevant activity carried on in Jersey, the company has adequate:

- employees who are physically present in Jersey;
- expenditure in Jersey; and
- physical assets in Jersey (eg dedicated premises or access to meeting rooms).

In this context, "employees" is not limited to persons who are employed by the company, but includes persons deemed to be employees under Jersey law, owner-managers and directors. The resources of any outsourced service provider in Jersey will also be taken into consideration.

All of the "core income-generating activities" (CIGA) undertaken are carried out in Jersey

Fund managers must conduct all of their CIGA in Jersey and must be able to monitor and control any CIGAs carried out by another entity in Jersey. CIGA in respect of fund management business include any of the following:

- taking decisions on the holding and selling of investments. A company which is simply implementing the decisions of another entity (eg by selling investments), is not performing a CIGA. Further, in order for a decision to be determined as being taken in Jersey, the majority of persons making the decision should be physically present in Jersey;
- calculating risks (including market risk, credit risk, liquidity risk and operational risk) and reserves. A CIGA will not be being performed where calculations are limited to one area of applicable risk, but requires strategic calculation of the overall risk across the fund and the reserves required;
- taking decisions on currency or interest fluctuations and hedging positions. Such decisions (where relevant) must be taken at a strategic level in relation to the whole fund, not just in isolated circumstances involving specific investments; and
- preparing relevant regulatory reports for government authorities and investors.

Outsourcing

It is common for fund managers to outsource activities to other entities and the law does not prohibit this as long as the board monitors and retains the ability to control the activities of service providers in Jersey. Furthermore, as long as the company has set the strategic decisions and parameters within which investment decisions may be implemented by entities outside the Island, and it receives reports and is able to monitor and control the outsourcing, those activities will not undermine the fact that CIGA is conducted in Jersey.

Implications and Sanctions

The Law provides sanctions for non-compliance including financial penalties, strike-off from the register of Jersey companies and reporting to relevant tax or regulatory authorities.

About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

Disclaimer

This client briefing has been prepared for clients and professional associates of Ogier. The information and expressions of opinion which it contains are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

Regulatory information can be found under Legal Notice

Meet the Author



Niamh Lalor

Partner

Jersey

E: niamh.lalor@ogier.com

T: +44 1534 514210

Key Contacts



Emily Haithwaite

Group Partner, Ogier Legal L.P.

Jersey

E: emily.haithwaite@ogier.com

T: +44 1534 514072



Matthew Shaxson

Group Partner, Ogier Legal L.P.

Jersey

E: matthew.shaxson@ogier.com

T: +44 1534 514064



Sophie Reguengo

Partner

Jersey

E: sophie.reguengo@ogier.com

T: +44 1534 514122



Brooke Lewis

Associate

Jersey

E: brooke.lewis@ogier.com

T: +44 1534 514074

Related Services

Hedge Funds

Investment Funds

Managers and Sponsors

Regulatory

Legal

Related Sectors

Funds Hub