New economic substance rules: a ‘need to know’ for Jersey fund managers following the November 2019 updated guidance

Service area / Taxation and Economic Substance

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This briefing is intended to provide a summary of some of the key issues being encountered by fund managers in relation to the Taxation (Companies – Economic Substance) (Jersey) Law 2019 (the ‘ESJL’). For further information or advice on any specific circumstances, please get in touch with your usual Carey Olsen relationship contact.

Executive summary – what has changed?

The latest guidance affects the application of the ESJL to:

1. Jersey collective investment vehicles (“CIVs”)

   New guidance has been released to clarify that (subject to the below exception) all CIVs are out of scope of the ESJL. The definition of a CIV is expected to include both public and private fund companies which are regulated in Jersey.

   The only exception will be that self-managed fund companies will be brought into scope for fund management business (‘FMB’) only. However, this change will only take effect from the date that the amended ESJL comes into force (so will not apply to the 2019 tax year).

2. CIV subsidiaries and group companies

   Other Jersey tax resident companies within a fund structure (such as subsidiaries of CIVs) may need to consider whether they are conducting certain other ‘relevant activities’, such as intra-group lending and holding company activities. Please refer to our separate briefing notes for further details.

3. Limited partnerships

   The requirements of the ESJL currently do not apply to any limited partnerships, regardless of whether or not they are CIVs. However, it is possible that the position may change in future.

Summary of FMB requirements

If a Jersey tax resident company (including a cell company) derives gross income from carrying on FMB, it should ensure that the business is directed and managed in Jersey and appropriate record-keeping processes are put in place and adhered to. Key activities (aka ‘CIGA’ – see below) must generally be carried on in Jersey, either by the company or by a third party under the company’s supervision.

In our experience, the vast majority of Jersey fund managers and self-managed fund companies already largely comply with the requirements of the ESJL, so this is mainly a case of being mindful of the requirements for the annual tax filing sign off and ensuring that certain activities are not outsourced to a different jurisdiction.

FMB

FMB relates to the provision of management services to funds by a Jersey manager or investment manager. Where a fund has both a general partner and a manager, only the manager will need to meet the relevant requirements. A self-managed fund will be viewed as a fund manager for these purposes in future tax years.

The FMB requirements will apply both to regulated and to unregulated/exempted managers and investment managers of public and/or private funds which receive gross income from such activities.

If such managers undertake FMB, they will usually only be required to comply in respect of FMB CIGA, even if other ‘relevant activities’ are carried on by them.

Core Income Generating Activities ('CIGA') in relation to FMB are:

- taking decisions on the holding and selling of investments;
- calculating risk and reserves;
- taking decisions on currency or interest fluctuations and hedging positions; and
- preparing reports and returns to investors and the Jersey Financial Services Commission or any body or entity with equivalent functions relating to the supervision or regulation of such business.

Importantly, guidance has made it clear that CIGA activities comprise considering and making of the decisions, as opposed to implementing such decisions, taking administrative steps to effect decisions or general support functions such as IT or HR. Making isolated risk calculations or hedging decisions (as opposed to decisions applying across the whole fund's position) would not in itself constitute FMB.

Initial issues to watch out for

The requirement to conduct CIGA in Jersey

The ESJL had previously required that all CIGA take place in Jersey. However, the new guidance clarifies that isolated decisions may be taken outside Jersey provided that it can be evidenced that the decisions taken and the CIGA undertaken in Jersey are of a quality and quantity to clearly outweigh the fact that certain isolated decision(s) were made outside Jersey.

Investment Committees: Outsourcing and delegation

- If CIGA is carried out for the company by another entity, that CIGA needs to be conducted in Jersey and monitored by the board of directors (the 'Board') of the company (save for occasional / isolated decisions as referred to above).
- Terms of reference should be put in place for any committees to which CIGA is delegated, which should also meet the ESJL requirements for consistency with the Board's processes.
- Certain delegations (e.g. to investment committees) may be considered not to be CIGA, if their activities fall within clear parameters set by the Board. The company's board minutes and relevant terms of reference should make clear that the delegate must act only within those parameters and is only given limited discretion to act within them.

Compliance and tax filings

- Even though the form of the certification to be contained in the tax form is not yet known, the company should check its own compliance with the ESJL and, in particular, ensure appropriate systems and processes for reports are in place. Companies should start doing internal review audits now in preparation (please refer to our Jersey Taxation and Economic Substance tool).
- Adequate Jersey employees, expenditure and assets for the business should be put in place, but directors and resources provided by the administrator can be taken into account for these purposes.
- Full records of the CIGA and board minutes recording relevant activities, together with all supporting documents tabled to those meetings, should be kept. The company's administrator should be able to assist with such record keeping.
- It is not currently expected that fund managers will need to split out their FMB CIGA income to refer to individual funds in their tax filings. However, the form of tax confirmation is yet to be confirmed.

Best practice for board and committee meetings

- Strategic decisions to be taken at board / committee meetings held in Jersey by directors (or committee members) with sufficient appropriate knowledge and experience. Avoid use of alternates where possible.

  The new guidance clarifies that the ESJL does not require every board meeting to be held in Jersey or for a quorum of directors to be physically present at every board meeting which is held in Jersey.

  However, those requirements should be met in relation to the board meetings which the company considers to count towards demonstrating that board meetings are held in Jersey at an adequate frequency given the level of decision making required.
- Board / committee to meet in Jersey with adequate frequency, with a quorum and majority of directors / members physically present, especially when considering CIGA matters.
- Where possible, directors should avoid dialling in to meetings from outside Jersey. Full minutes should be kept.
- Avoid written resolutions but, if used, they should be signed in Jersey by directors meeting the same requirements as if a board meeting had been held (or, if relevant, the company's sole director).

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FIND US

Carey Olsen Jersey LLP
47 Esplanade
St Helier
Jersey JE1 0BD
Channel Islands

T +44 (0)1534 888900
E jerseyco@careyolsen.com

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