



# ANGUILLA

## Substantial Activities Requirements Guidelines

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Draft Guidelines issued by the Registrar

27, April 2020

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Consultation Draft

## Overview

### General

The Guidance on Substantial Activity Requirements is prepared in accordance with the Section 98A (3) of the International Business Companies (Amendment) Act, Section 205A (3) of the Companies (Amendment) Act, Section 81A (3) of the Limited Liability Company (Amendment) Act and Section 24A (3) of the Limited Partnership (Amendment) Act. All Substantial Activities Requirement legislation and relevant resources are available at the [Commercial Registry's website](#) and/or the website of the [Competent Authority for tax purposes](#).

Economic substance requirements were implemented into law through amendments to the Companies Act, International Business Companies Act, the Limited Liability Company Act and the Limited Partnership Act (Formation Legislation) in response to the work conducted by the European Union Code of Conduct Group on Business Taxation (COCG) based on the framework established by the OECD Forum on Harmful Tax Practices (FHTP). In 2016, the European Union (EU) adopted criteria covering tax transparency, fair taxation and anti-base erosion and profit shifting (BEPS) against which countries were assessed. Anguilla became a member of the BEPS Inclusive Framework in 2018.

One criterion, Criterion 2.2 stated that: "The jurisdiction should not facilitate offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity in the jurisdiction". The jurisdictions which raised concerns, including Anguilla and other jurisdictions without corporate income tax, were asked to address these through the imposition of substance requirements, where appropriate, which would mirror those used in the FHTP in the context of specified preferential regimes.

The OECD and G20 countries developed a 15-point Action Plan to address BEPS. One of these actions was related to Countering Harmful Tax Practices More Effectively Taking into Account Transparency and Substance (Action 5). Action 5 revamps the work on harmful tax practices with a focus on improving transparency, including compulsory spontaneous exchange on rulings related to preferential regimes, and on requiring substantial activity for preferential regimes, such as IP regimes. The Inclusive Framework agreed in November 2018 that the FHTP would resume the application of the substantial activity factor to no or only nominal tax jurisdictions (hereafter the "Standard").

Anguilla has legislated substance requirements through the Formation Legislation, which comprises the Companies (Amendment) Act, 2019; the International Business Companies (Amendment) Act, 2019; the Limited Liability Companies (Amendment) Act; 2019 and Limited Partnerships (Amendment) Act, 2019 as well as respective Economic Substance Regulations and Rules (hereinafter referred to as “Substance Legislation”). The Substance Legislation requires simple adaptations to meet this new global standard. Predominantly, these changes would relate to expansion of spontaneous exchange of information beyond EU Member States to include all relevant jurisdictions in Anguilla’s Exchange of Information network.

This guidance is to be treated as a work in progress, recognizing that further technical aspects will be developed through further discussions with the FHTP and the COCG; and as the substance legislation is amended.

### Core Documents & Resources

- [BEPS Action 5](#)
- [Resumption of application of substantial activities for no or nominal tax jurisdictions, OECD](#)
- [Harmful Tax Practices - 2017 Progress Report on Preferential Regimes: Inclusive Framework on BEPS: Action 5, OECD/G20 Base Erosion and Profit Shifting Project, OECD](#)
- [Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing](#)
- [Scope of criterion 2.2 and Terms of reference for the application of the Code test by analogy \(Annex VII of The EU list of non-cooperative jurisdictions for tax purposes\)](#)
- [Scoping paper on criterion 2.2 of the EU listing exercise](#)

### Purpose and Interpretation of Guidance

This Guidance has been published in the Gazette and on the Economic Substance page of the “Commercial Registry’s website along with other relevant materials.

This document provides guidance on the scope and application of the Substance Legislation. This guidance is intended to assist relevant entities carrying on relevant activities to understand how to

satisfy the substance requirements and meet the economic substance test (ES test). A relevant entity that is subject to the Substance Legislation shall have regard to this Guidance for the purpose of meeting the ES test.

A number of terms used in this Guidance are defined in the Substance Legislation. Whilst this Guidance provides further information to assist with the interpretation of some of these terms and the reader is provided some definitions in the Glossary, the reader is referred to the Substance Legislation for full definitions of all relevant terms.

The guidance is principles-based and not prescriptive and therefore will not cover various specific applications and scenarios. Anguillian entities are encouraged to seek professional advice if unclear as to the obligations under the law.

## Domestic Law and Operations

### Domestic Law

The provisions in the Substance Legislation took effect from 1 January 2019 for entities registered on or after that date (and applies from 1 July 2019 for existing entities).

Substance requirements in Anguilla are applicable to entities registered in Anguilla, being companies, international business companies, limited liability companies and limited partnerships, unless they are exempt entities<sup>1</sup> (hereinafter referred to as “relevant entities”). The substance requirements are applicable to all geographically mobile activities (hereafter referred to as “Relevant Activities”) in scope of the Standard.

The Relevant Activities are:

**Banking:** A "banking business" as defined in the Banking Act, 2015 and in the Trust Companies and Offshore Banking Act, R.S.A. c.T60.

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<sup>1</sup> An entity is considered exempt from substance requirements in Anguilla if:

- it is centrally managed and controlled or carrying on the relevant activity in a jurisdiction where the rate at which the entity may be charged tax is 10% or higher; and
- the entity is resident for tax purposes in that other jurisdiction; and
- the entity files with the Registrar evidence of its tax residence in that jurisdiction and that an appropriate tax return has been submitted to the relevant tax authority of that jurisdiction in relation to the relevant activity.

“banking business” means—

(a) the business of receiving funds through the acceptance of money deposits payable on demand or after a fixed period or after notice or any similar operation through the frequent sale or placement of bonds, certificates, notes or other securities, and the use of such funds either in whole or in part for loans or investment for the account and the risk of the person doing such business; and

(b) any other activity prescribed by the Governor constituting customary banking practice that a bank engaged in activities described in paragraph (a) may additionally be authorised to do;

and

(a) the business of receiving funds through— (i) the acceptance of monetary deposits which are repayable on demand or after notice or any similar operation; (ii) the frequent sale or placement of bonds, certificates, notes or other securities, and the use of such funds either in whole or in part for extensions of credit or investment for the account and at the risk of the person doing such business; and

(b) any other activity recognised by the Central Bank as banking practice and which a licensed financial institution may additionally be authorised to do;

**Insurance:** An "insurance business" as defined in the Insurance Act, R.S.A. c.116. “insurance business” means the business of undertaking liability under a contract of insurance to indemnify a person in respect of any loss or damage, including the liability to pay damages or compensation contingent upon the happening of a specified event, and includes re-insurance business, long term business and running-off business including the settlement of claims;

**Fund management:** A business earning income from providing management services (including making decisions on investments) to an investment fund or its investors.

**Financing and leasing:** A business earning income from providing credit facilities for any kind of consideration to another person but does not include financial leasing of land or an interest in land, a banking business, an insurance business or a fund management business.

**Distribution and service centre:** A business earning income from - (a) purchasing raw materials and finished products from other group members and reselling these; or (b) providing services to other

entities of the same group, for example transporting and storing goods, managing stocks, taking orders, or providing consulting or other administrative services.

**Shipping:** A business earning income from shipping activities, for example – (a) managing the crew (including hiring, paying or overseeing crew members); (b) hauling and maintaining ships; (c) overseeing and tracking deliveries; (d) determining what goods to order and when to deliver them; or (e) organising and overseeing voyages.

**Intellectual property business:** A business earning income from intellectual property assets, including royalties and income from the sale of an intellectual property asset.

**Headquarters:** A business earning income from providing services such as managing, coordinating or controlling business activities for a group with which it is affiliated, whether for the group as a whole or for members of the group in a specific geographical area, for example – (a) taking relevant management decisions; (b) incurring expenditures on behalf of group entities; or (c) coordinating group activities.

**Holding company:** A business holding equity participation from which dividends or capital gains are earned."

## Relevant Authorities

The Registrar is the administering authority for the Substance Legislation. The Registrar's functions include administering the Substance Legislation; determining whether a relevant entity meets the ES test in respect of its relevant activities; and monitoring and enforcing compliance with the Substance Legislation.

The Competent Authority under the Tax Information Exchange (International Cooperation) Act, 2016 is the designated authority in Anguilla with statutory responsibility for international cooperation on matters involving the provision of tax related information. For the purposes of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, the Anguilla Competent Authority is the Permanent Secretary of Finance, whose functions are delegated. The Competent Authority will be responsible for effecting the spontaneous exchanges of information under the Substance Legislation at the direction of the Registrar, which in the case of Anguilla meeting a "Fully Equipped Monitoring Mechanism" will be in cases of non-compliance and high-risk intellectual property business.

## Notification and Reporting to the Registrar

### Notification

All **relevant entities** will be required, as part of their usual annual return, to file with the Registrar a declaration of whether or not they are carrying on **relevant activities**; and if any, whether or not they meet the economic substance requirements through the ES test. **Relevant Entities not conducting relevant activities will solely be required to declare the same - no further information is required as part of the annual return/filing.**<sup>2</sup>

All filings will as usual be conducted through the electronic portal, Anguilla Commercial Online Registration Network (ACORN), via the registered agents/company managers, who will be required to cross check the submitted returns with their available information and certify their submission as being correct.

### Reporting

All economic substance return (ES return) filings will be kept confidential and information only shared in specified cases in accordance with established protocols for spontaneous exchange of information by the Competent Authority.

This should be reviewed in conjunction with the intended economic substance return guidance which will provides guidance in relation to the information being sought from the returns.

### Notification & Reporting Timelines

For avoidance of doubt, the timelines for filing the annual returns are distinct from commencement of the obligation to have economic substance. Relevant entities, continued/registered in Anguilla before 1<sup>st</sup> January, 2019, and conducting relevant activities must have economic substance by 1<sup>st</sup> July, 2019. For all other relevant entities, the substance provisions took effect from the 1<sup>st</sup> January, 2019. The filing obligations for **all** relevant entities will commence in final quarter 2020, once the portal is available. The Registrar will issue further notice once the module for the ES returns becomes available on ACORN.

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<sup>2</sup> Declarations may be subject to verification by the Registrar where further information may be requested as part of the monitoring framework for ensuring compliance with the Standard. The legislation provides specific powers to request additional information in relation to any substance return.

## Filing Economic Substance Returns

Annual returns are submitted electronically by the registered agent. The Registrar will issue further updates in 3<sup>rd</sup> Quarter 2020 to confirm when ACORN will be able to accommodate ES returns. Revised guidance and a user guide will be issued shortly thereafter to assist with the process of reporting via the electronic portal.

## Economic Substance Returns

ES returns will be required to be filed during the relevant quarter that the annual return is due to be filed with the Registrar. **The relevant year shall be defined as the 12-month period ending on the last day preceding the commencement of the quarter during which the annual return is due to be filed. For example, if the date of incorporation is February 1<sup>st</sup>, the relevant year will be the 12-month period ending on December 31<sup>st</sup>.**

ES returns will only be required to be submitted by relevant entities that are required to meet the ES test in Anguilla. An officer, director, registered agent or liquidator of a relevant entity will be required to certify whether the relevant entity is engaged in relevant activities. If the relevant entity is not engaged in relevant activities, then the relevant entity will not be required to file any additional information with the Registrar.

## Guidance on Application of Substance Requirements and Sector Specific Guidance

### Core Income Generating Activities

An Anguillan relevant entity conducting relevant activities, **other than Holding Company Business**<sup>3</sup> must carry on Core Income Generating Activities (CIGAs) in Anguilla in relation to those activities with an adequate amount of operating expenditures and full-time qualified employees. CIGAs are those core

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<sup>3</sup> Holding Company business (ie the business of a pure equity holding company) are not required to carry on CIGAs in Anguilla. Holding Companies are not required to carry on CIGAs in Anguilla. See page 21 for specific considerations applying to pure equity holding companies

activities undertaken to generate income in relation to a relevant activity. CIGAs will be carried on in Anguilla if it is carried on by full-time qualified employees working in Anguilla, or is outsourced to a person whose own employees work in Anguilla.

CIGAs has the meaning specified in Schedule 1 of the ES Regulations and is not exhaustive. What constitutes the CIGA of a particular activity is a fact-specific issue which can vary from business to business. In some cases, it may be possible to carry on a relevant activity without also conducting all the related core income generating activities listed in the legislation. The issue is that whichever way a particular business is undertaking the income creation, that the key activities are to be undertaken in Anguilla. The CIGAs listed relate to each type of relevant activity. The activities which form the CIGA are likely to be the primary activities which a business carrying on the related relevant activity will be undertaking. As such they can assist in an understanding of the scope of the relevant activity itself. Core income generating activity “includes” the activities listed in the Schedule but is not restricted to the listed item.

For example, an entity that is carrying on banking business and is only generating income from deposit-taking need not carry on other listed elements of CIGA for banking business, such as hedging or providing loans or credit. What constitutes the CIGA for a particular relevant activity for a particular entity can vary.

A core-income generating activity for a relevant activity –

- (a) means an essential activity that is necessary to be carried out in order to produce the income from the relevant activity; and
- (b) in relation to each relevant activity in the first column of the table below, includes an activity specified in the second column of that table.

| Relevant activity* | Definition  | Core-income generating activities   |
|--------------------|---|---|
| Banking            | "banking business" as defined in the Banking Act, 2015 and in the Trust Companies and Offshore Banking Act, R.S.A. c.T60. | (a) Raising funds by managing risk, including credit, currency or interest risk;<br>(b) taking hedging positions; |

|                                 |   |   |
|---------------------------------|---|---|
|                                 |   | <p>(c) providing loans, credit or other financial services to customers; or</p> <p>(d) managing capital.</p>  |
| Insurance                       | An "insurance business" as defined in the Insurance Act, R.S.A. c.116.  | <p>(a) Predicting or calculating risk;</p> <p>(b) insuring or re-insuring against risk; or</p> <p>(c) providing insurance-related services to clients.</p>  |
| Fund management                 | A business earning income from providing management services (including making decisions on investments) to an investment fund or its investors.  | <p>(a) Taking decisions on the holding and selling of investments;</p> <p>(b) calculating risk and reserves; or</p> <p>(c) taking decisions on currency or interest fluctuations and hedging positions.</p>   |
| Financing and leasing           | A business earning income from providing credit facilities for any kind of consideration to another person but does not include financial leasing of land or an interest in land, banking business, fund management business or insurance business. | <p>(a) Agreeing funding terms;</p> <p>(b) identifying and acquiring assets to be leased (in the case of leasing);</p> <p>(c) setting the terms and duration of any financing or leasing;</p> <p>(d) monitoring and revising any agreements; or</p> <p>(e) managing any risks.</p> |
| Distribution and service centre | <p>A business earning income from –</p> <p>a) purchasing raw materials and finished products from other group members and reselling these; or</p> <p>b) providing services to other entities of the same group</p>                                  | <p>(a) Transporting and storing goods, components and materials;</p> <p>(b) managing stocks;</p> <p>(c) taking orders; or</p> <p>(d) providing consulting or other administrative services.</p>   |

|                                       |  |  |
|---------------------------------------|--|--|
| <p>Headquarters</p>                   | <p>A business earning income from providing services such as managing, coordinating or controlling business activities for a group with which it is affiliated, whether for the group as a whole or for members of the group in a specific geographical area</p> | <p>a) Taking relevant management decisions;<br/>                 b) incurring expenditures on behalf of group entities; or<br/>                 c) co-ordinating group activities.</p>   |
| <p>Holding Company</p>                | <p>A business holding equity participation from which dividends or capital gains are earned.</p>   | <p>All activities related to the business<sup>4</sup></p>  |
| <p>Intellectual property business</p> | <p>A business earning income from intellectual property assets, including royalties and income from the sale of an intellectual property asset.</p>  | <p>In respect of a business exploiting an intellectual property asset which is a patent or an asset that shares features similar to a patent, research and development –</p> <ul style="list-style-type: none"> <li>(a) advancing the understanding of scientific relations or technologies;</li> <li>(b) addressing known scientific or technological obstacles;</li> <li>(c) increasing knowledge; or</li> <li>(d) developing new applications.</li> </ul> <p>In respect of a business exploiting an intellectual property asset that is a marketing intangible that shares features similar to a trademark, marketing, branding and distribution activities directly linked to the specific intangible.</p> |

<sup>4</sup> All activities related to the business of managing equity participations in another entity.

|          |  |  |
|----------|--|--|
|          |  | <p>In exceptional cases, except in the case of a high-risk intellectual property entity, other core income generating activities relevant to the business and the intellectual property assets may include–</p> <ul style="list-style-type: none"> <li>(a) taking strategic decisions and managing (as well as bearing) the principal risks related to development and subsequent exploitation of the intangible asset;</li> <li>(b) taking the strategic decisions and managing (as well as bearing) the principal risks relating to acquisition by third parties and subsequent exploitation and protection of the intangible asset; or</li> <li>(c) carrying on the underlying trading activities through which the intangible asset is exploited leading to the generation of revenue from third parties.</li> </ul> |
| Shipping | A business earning income from shipping activities (via the sea) | <ul style="list-style-type: none"> <li>(a) Managing crew (including hiring, paying and overseeing crew members);</li> <li>(b) overhauling and maintaining ships;</li> <li>(c) overseeing and tracking deliveries;</li> <li>(d) determining what goods to deliver and when to deliver them; or</li> <li>(e) organising and overseeing voyages.</li> </ul>   |
|          |  |  |

## Outsourcing<sup>5</sup>

There is nothing intrinsically objectionable in entities outsourcing part of their operations to a third party. However, outsourcing should be done in such a way that will not pose a risk to the substance requirements. The legislation allows an entity to outsource core income-generating activity to a third party, but only if certain conditions are satisfied. **On the other hand, outsourcing of non-CIGAs outside Anguilla is allowed.**

If some or all of the CIGAs is outsourced to a third party service provider to meet the ES test, the relevant entity must be able to demonstrate that it has adequate supervision of the outsourced activities and that those CIGAs used to meet the ES test are carried out in Anguilla. The reason for the requirement that outsourcing of CIGAs used to meet the ES test may only be conducted in Anguilla, is to prevent the undermining of the premise of the economic substance standard, which is income being located in a no or nominal tax environment that is separated from the jurisdiction from where the activities have taken place.

Where CIGAs are outsourced the resources and qualifications of the service provider in Anguilla will be taken into consideration when determining whether there are full-time employees with adequate professional qualifications, adequate amount of operating expenditures and adequate physical assets and premises. There must be no double counting if the services are provided to more than one relevant entity carrying out relevant activities.

The employees of the service provider can be counted for the purpose of identifying the employees of the relevant entity used to satisfy the ES Test. This must be verified to ensure that only the portion of full-time equivalent employee time directly used in the service of the relevant entity is counted.

The company remains responsible for ensuring accurate information is reported on its return and this will include precise details of the resources employed by its service providers, for example based on the use of timesheets.

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<sup>5</sup> Outsourcing, in this context, includes outsourcing, contracting or delegating to third parties or to entities in the same Group.

## Conduct of Non-CIGAs Outside of Anguilla or Outsourcing of Non-CIGAs Outside of Anguilla

A relevant entity may conduct activities outside of Anguilla or outsource activities outside of Anguilla which are **not** CIGAs. Such activities may include, for example, back office functions, IT, payroll, legal services, or other expert professional services, provided that they are not a core activity in relation to the generation of income in respect of a relevant activity.

### Income in respect of a relevant activity

The type of income required to be reported in relation to an entity, means all of that entity's gross income from its relevant activities and recorded in its books and records under applicable accounting standards.

### Ultimate Parent Company and Group

Relevant entities which are carrying on relevant activities will be required to include in their returns the identity of its ultimate parent company and immediate parent company where applicable.

“Ultimate Parent Entity” means a Constituent Entity of an MNE Group that meets the following criteria—

- (a) it owns directly or indirectly a sufficient interest in one or more other Constituent Entities of the MNE Group such that it is required to prepare Consolidated Financial Statements under accounting principles generally applied in its jurisdiction of tax residence, or would be so required if its equity interests were traded on public securities exchange in its jurisdiction of tax residence; and
- (b) there is no other Constituent Entity of the MNE Group that own directly or indirectly an interest described in paragraph (a) in the first mentioned Constituent Entity.

“Group” means a collection of enterprises related through ownership or control such that it is either required to prepare Consolidated Financial Statements for financial reporting purposes under applicable accounting principles or would be so required if equity interests in any of the enterprises were traded on a public securities exchange;

“Consolidated Financial Statements” means the financial statements of an MNE Group in which the assets, liabilities, income, expenses and cash flows of the Ultimate Parent Entity and the Constituent Entities are presented as those of a single economic entity;

“Constituent Entity” means—

- (a) any separate business unit of an MNE Group that is included in the Consolidated Financial Statements of the MNE Group for financial reporting purposes, or would be so included if equity interests in such business unit of an MNE Group were traded on a public securities exchange;
- (b) any such business unit that is excluded from the MNE Group’s Consolidated Financial Statements solely on size or materiality grounds; and
- (c) any permanent establishment of any separate business unit of the MNE Group included in (a) or (b), provided that the business unit prepares a separate financial statement for such permanent establishment for financial reporting, regulatory, tax reporting, or internal management control purposes;

### Mind and Management

A relevant entity satisfies Condition C that the mind and management for a relevant activity is in Anguilla if, in relation to a relevant activity:

- (a) the directors of the company have the necessary knowledge and expertise to discharge the duties of the board of directors in relation to the relevant activity;
- (b) the meetings of the board of directors are conducted in Anguilla at a frequency that is appropriate to the decision-making required for the relevant activity;
- (c) a quorum of the board of directors is –
  - (i) resident in Anguilla; or
  - (ii) present at the meetings of the board conducted in Anguilla;
- (d) the minutes of the meetings of the board conducted in Anguilla record the making of strategic decisions of the company at those meetings;
- (e) the minutes of all board meetings and the records of the company are kept in Anguilla;

(f) the company's premises (whether leased, rented or owned) in Anguilla are adequate for the management of the relevant activity and;

(g) where the board of directors has decided to outsource the core-income generating activities in relation to the relevant activity, the board has maintained adequate supervision of those core-income generating activities.

It is necessary to ensure that adequate numbers of board meetings are held in Anguilla, dependent on the relevant activities of the relevant entity, although it is not necessary for all meetings to be held in Anguilla.

In the cases where there are corporate directors, the requirements will apply to the officers of the corporate directors that are actually performing the duties.

#### Meaning of "Adequate" & "Appropriate"

The substance legislation provides that the Registrar shall provide guidance on what is meant by "adequate" and "appropriate" which is used in the legislation.

For the purpose of the ES Test, the words "adequate" or "appropriate" shall have their natural and ordinary meaning, which shall be interpreted as: -

"Adequate" – as much or as good as necessary for the relevant requirement or purpose

"Appropriate" – suitable or fitting for a particular purpose, person, occasion.

Businesses vary by size and nature of activities and thus neither the Substance Legislation nor the Guidance can be prescriptive in what would be deemed adequate or appropriate for a relevant entity conducting relevant activities in relation to adequate physical assets, adequate operating expenditure, adequate full-time employees -with appropriate qualifications. Entities may need to hire additional employees or relocate activities to Anguilla to meet the new substance tests, however they are not required to hire more than needed etc. The legislation does not seek to require entities to incur more expenditure or engage more employees than necessary for genuine conduct of CIGAs in Anguilla.

#### Exempt Companies & Partnerships

The Substance Legislation provides that Anguilla registered entities carrying on relevant activities shall be exempt from the substance requirements and having to meet the ES test as follows:

An entity is considered exempt from substance requirements in Anguilla if:

- it is centrally managed and controlled or carrying on the relevant activity in a jurisdiction where the rate at which the entity may be charged tax is 10% or higher; and
- the entity is resident for tax purposes in that other jurisdiction; and
- the entity files with the Registrar evidence of its tax residence in that jurisdiction and that an appropriate tax return has been submitted to the relevant tax authority of that jurisdiction in relation to the relevant activity.

#### Determining tax rate for a jurisdiction

The Registrar will give regard to the corporate tax rate applicable to entities that are tax resident in the respective jurisdiction when determining whether the jurisdiction has a tax rate that is 10% or greater.

A company, limited liability company, international business company or limited liability partnership registered in or continued to Anguilla is not regarded as a relevant entity for the purposes of the Substance Legislation if it is tax resident outside of Anguilla. The Registrar will treat an entity<sup>6</sup> as **resident for tax purposes** in another jurisdiction, in the context of an exempt entity, if it is subject to corporate income tax of 10% or greater on the entirety of its income in that jurisdiction by virtue of its tax residence, domicile or any other criteria. In the case of entities deemed a “disregarded entity” for U.S. income tax purposes, and has a U.S. corporation as its parent, the Registrar will consider an exempt entity if satisfactory evidence is provided.

#### Documents to be provided to the Registrar

The Registrar will require any entity claiming to be tax resident outside Anguilla to produce satisfactory evidence to substantiate the same. For example, the evidence may include:

1. Tax Identification Number
2. Proof of payment of a corporate income tax liability in respect of that entity’s income
3. A letter or certificate from the competent authority of a jurisdiction stating that the entity is considered to be tax resident in that jurisdiction

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<sup>6</sup> The Registrar will apply this treatment also to branches of a relevant entity. In this context, a “branch” refers to a business unit or division of the relevant entity that is not a separate legal person from the relevant entity.

4. A tax demand
5. A confirmation of a tax self-assessment
6. Any other acceptable document, issued by the competent authority for the jurisdiction in question.

In the absence of such evidence the entity will be not be deemed an exempt entity and will be subject to the substance requirements.

Exempt relevant entities will be required to maintain sufficient supporting documentation to confirm that the relevant entity qualifies for the exemption. The Registrar may request this information from the relevant entity in fulfillment of the monitoring process. Documentary evidence of tax residence in respect of a relevant year may not be available until sometime after the end of the relevant year and outside the filing period. The Registrar may treat the entity as provisionally tax resident outside Anguilla during a reasonable period<sup>7</sup>, until documentary evidence should be available provided certain conditions are met<sup>8</sup>. If the entity fails to provide the documentary evidence after the expiry of the reasonable period then the entity will be required to demonstrate economic substance in Anguilla, and failing such will be subject to enforcement action.

The Authority will systematically exchange this information as described in the Section headed “Confidentiality and Exchanges of Information”.

### Companies in Liquidation

If a company in liquidation is still carrying on a relevant activity, then it is subject to the substance requirements. As generally when a liquidator is appointed all powers of the directors cease, it will be the liquidators of the company that are required to demonstrate that the company is directed and managed in Anguilla and for the directed and managed test the board of directors should be taken to be the liquidator.

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<sup>7</sup> This is anticipated to be no more than twelve months.

<sup>8</sup> The entity has established its tax residence in the jurisdiction in question for the previous relevant year, and certifies that its tax residence has not changed in the intervening period, or The entity evidences either that it has been too recently formed, or that it has too recently assumed tax residence in the jurisdiction in question, for there to be any documentary evidence of its tax residence, and produces other evidence to demonstrate that it met the criteria for tax residence in that jurisdiction during the financial period in question.

## Relevant Sectors<sup>9</sup>

### Holding Company Business

The term “holding company” should be interpreted to mean a “pure equity holding company”. A pure equity holding company is a relevant entity that only holds equity participations in other entities and only earns dividends and capital gains. The equity participations are accordingly controlling stakes in other companies.

If an entity carries on any other relevant activity, then it would not fall within the definition of a (pure equity) holding company. For such entities, **conducting relevant activities**, that hold a variety of assets and earn different types of income (e.g. interest, rents, and royalties), the core income generating activities would be those activities that are associated with the income that those companies earn. For example, a relevant entity that receives banking income would be required to have the core income generating activities associated with banking business, and to comply with the substance requirements of that relevant activity.

#### Examples:

1. Holdings Ltd. is a pure equity holding company, holding shares in two other companies and receiving dividends annually from such holdings. This is Holdings Ltd.’s only activity and thus Holding Ltd. is a pure equity holding company.
2. ABC Bank Ltd operates a deposit taking financial institution, it also holds all the shares in another company Sub Ltd. ABC Bank Ltd will not be a (pure equity) holding company as besides holding shares (in Sub Ltd) it is in the business of conducting banking business and thus will be required to demonstrate substance of such activities.
3. Real Estate Holdings Ltd. solely owns real estate property in Dog Island and only generates rental income associated with such activities, Real Estate Holdings Ltd would therefore not be a (pure equity) holding company. As no relevant activities are conducted, substance would not be required.

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<sup>9</sup> When a business is not in scope for a specific activity it may still it might be in scope for other activities.

A relevant entity that is only carrying on the business of a pure equity holding company is subject to a reduced ES Test which is satisfied if the relevant entity confirms that -

- (a) it has complied with all applicable statutory filing requirements; and
- (b) it has adequate human resources and adequate premises in Anguilla for holding and managing equity participations in other entities.

A pure equity holding company maintaining a registered office in Anguilla may engage its registered office service provider in accordance with the Laws of Anguilla and the activities of the registered office service provider may be able to satisfy these reduced substance requirements in Anguilla where the pure equity holding company is passively holding equity interests in other entities, depending on the level and complexity of activity required to operate its business. On the other hand, the entity may actively manage its equity participations, in which case it should have adequate and suitably qualified employees, and appropriate premises, in Anguilla to carry out this function.

A pure equity holding company is not required to be directed and managed in Anguilla or have mind and management within the meaning in the Substance Legislation.

If an entity meets the criteria to be regarded as a (pure equity) holding company, the placing of dividend monies received on deposit or using them to acquire and passively hold other securities will not constitute a “commercial activity” and therefore the company will still be regarded as a (pure equity) holding company.

#### Banking, Fund Management and Insurance Business

Entities within the scope of these activities are subject to regulation in Anguilla. Entities conducting such activities, which are subject to prudential regulation, can be easily identified as they are required to hold a licence issued by the Anguilla Financial Services Commission or the Eastern Caribbean Central Bank.

Whilst it is expected that regulated companies carrying on banking business will already be able to demonstrate that they conduct the CIGAs in Anguilla, those companies are still subject to the substance requirements.

Section 2 of the Insurance Act requires that “no person shall carry on, or hold himself out as carrying on, insurance business of any kind in or from within Anguilla unless he holds a Licence authorising him to carry on that kind of business and the Licence has not been suspended”.

Section 4 of the Trust Companies and Offshore Banking Act requires that “No person, including a domestic bank, shall carry on offshore banking business unless he holds a Licence that is not suspended.”

Section 2 of the Banking Act requires that “A person shall not carry on banking business or hold himself out as carrying on banking business in the Currency Union without a Licence granted by the Central Bank.”

### Financing and Leasing Business

Finance and Leasing cover the extension of credit or financing of any kind for consideration, such as loans, hire purchase agreements, long term credit plans, and finance leases in relation to assets other than land. This includes intra-group financing.

Where a relevant entity extends credit as an incidental part of a different sort of business, this will **NOT** fall within scope of finance and leasing business. Financing and Leasing does not cover cases where credit is extended but there was no expectation of consideration from the credit when providing it. A lending fee would be consideration, whereas the grant of security in favour of the lender would not constitute consideration.

Entities which hold debt securities and other instruments as an investment, for example, where the company has purchased bonds which are actively traded on one of the major security exchanges, will not be regarded as being in the business of providing credit facilities.

Provision of credit is a normal activity in banking, insurance and fund management businesses. As such these sectors are excluded from being within the scope of Financing and Leasing, and such activities will be subject to the substance test applicable to such relevant sectors.

Examples:

1. Trader Ltd is a merchant that provides its customers with arrangements to buy goods and services on account. If the customers have not paid within 60 days, Trader Ltd will charge late payment interest. This arrangement, whilst being a form of short-term financing, is not within financing and leasing, as the credit is not offered with the intention of generating interest.

2. Industrial Equipment Ltd provides short term leases of heavy equipment, without the provision of credit facilities. As the crucial part of financing and leasing is the provision of credit facilities, this business is not captured under financing and leasing.
3. Crew Ltd lends \$500,000 to Water Corp Ltd. to fund the development of a water plant at 5% interest. Crew operates the water plant on behalf of Water Corp Ltd under a profit sharing arrangement and generates income from such activities. Crew's financing activities would come within relevant activities.
4. ABC Ltd lends \$500,000 to its subsidiary, Sub Ltd, at a 3% interest rate. ABC Ltd's would be conducting relevant activities within the definition of financing and leasing.

The employees and Board of Directors of ABC Ltd and Crew Ltd in respect of the \$500,000 financing agreement would have set the terms of the financing provided including the amount to be lent, and the applicable interest rate. Such activities would have included a consideration of Sub Ltd's and Water Corp Ltd's respective ability to repay based on an assessment of each entity's assets and expected income streams. The respective Board may have engaged professional services in the conduct of such activities, such as engaging a law firm to document the agreements, but the activities of proposing and agreeing funding terms, monitoring performance and revising the agreements, and managing any risks were undertaken by the employees of ABC Ltd and Crew Ltd, and the final decision was taken by the Board in Anguilla. The employees and Boards of both companies had the appropriate knowledge and expertise to understand the terms of that financing agreement.

ABC Ltd and Crew Ltd have a staffed office on Anguilla who conduct monitoring of payments of interest and any other terms in line with the financing agreement. ABC Ltd and Crew Ltd will be deemed to have met the ES test with respect to having substance in Anguilla if CIGAs are to be conducted in Anguilla with an adequate number of full-time qualified employees and an adequate amount of operating expenditures.

### Shipping Business

To be conducting Shipping as a relevant activity, a relevant entity must operate one or more ships in international waters, for the transport of either passengers, cargo or both.

“Ship” has the meaning specified in Section 1 of the Merchant Shipping Act, but does not include a fishing vessel, a pleasure vessel or a small ship (vessels under 24m in length) (in each case, as defined by Section 1 of that Act);

Examples:

1. Shippers Ltd *charters* a 100m ship, the Deluxe and transports persons from Anguilla to St Maarten. Shippers is conducting a relevant activity as it is transporting persons in international waters. The company that owns the Deluxe, ABC Ltd and offers the ship for charters would not be engaging in shipping business as a relevant activity once it does not operate the ship. ABC Ltd may need to consider whether its activities fall under scope of Leasing Business if the lease of the ship is accompanied by credit facilities (see Financing and Leasing Business, in particular Example 2).
2. Cruise Agents Ltd is a travel agent whose sole business is selling tickets for passengers’ cruises. Because Cruise Agents Ltd is not engaged in the operation of a ship, Cruise Agents’ activities do not fit in the context of Shipping Business and will not be considered to be conducting Shipping Business.
3. ManuEx Ltd manufactures goods for export and arranges for shipment of such goods by sea. ManuEX does not operate a ship and as such will not be treated as conducting shipping business.

### Headquarters Business

Headquarters business includes the provision of headquarter services (as defined) to other members of the same Group<sup>10</sup>. Whether a relevant entity carries on headquarters business is not dependent on its status in the group structure but rather on the services it provides to other companies in the group, whether parents or subsidiaries.

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<sup>10</sup> Group means a collection of enterprises related through ownership or control such that it is either required to prepare Consolidated Financial Statements for financial reporting purposes under applicable accounting principles or would be so required if equity interests in any of the enterprises were traded on a public securities exchange;

## Distribution and Service Centre

Distribution and Service Centre Business includes purchasing raw materials and finished products from other members of the same group and re-selling them for a profit, as well as providing services, consulting or other administrative services, to other members of the same group. In cases where the Distribution and Service Centre Business is not the main activity of a company, in these circumstances those activities would be out of scope but only if that other activity is recharged at cost or less. (For example, where a company second staff for a limited period, recharging at cost rather than for a profit.)

### Examples:

1. ABC Ltd purchases raw materials and finished products from/ or provides services to NotRelated Ltd, an unrelated third parties. This activity would not be within the scope of distribution and service centre activity.
2. A & C Group Ltd second staff to C Ltd, a group subsidiary for a year, charging at cost. This secondment of staff is not the main activity of A & C Group Ltd. Such activities are not the main activities of A & C Group Ltd, and hence the company would not be treated as within the scope of distribution and service centre business as a relevant activity. If A & C Group Ltd seconded such staff for profit to another group member such activity would be within scope.
3. B & E Group Ltd's main activity is to purchase raw materials and provide them to other group companies at cost. As this is the main activity of B & E Group Ltd, despite supplying the raw materials at cost B & E Group Ltd would be subject to substance requirements.

## IP Business

Most entities will own some form of intellectual property (such as trademark protection, copyright in their advertising material and technical know-how relating to their processes) and will receive income from an intellectual property asset in a number of different scenarios.

### Example:

1. ABC Ltd manufactures a trademarked product and sells it to unrelated parties. The entity's income is derived from the sale of finished goods and not through the exploitation of intellectual property assets. The activity would not fall within the definition of an intellectual property business.
2. Trademarkz Ltd. holds a brand, the rights of which are licensed to others in return for a licence fee. This activity would fall within the definition of an intellectual property business.

### High Risk Intellectual Property Business

Generally, a company engaging in IP business should consider whether it engages in High-Risk Intellectual Property Business as defined under legislation.

A high-risk intellectual property entity means a relevant entity that –

- (a) acquired an intellectual property asset –
  - (i) from an affiliated entity; or
  - (ii) in consideration for funding research and development by another person situated in a country or territory other than Anguilla; and
- (b) licenses the intellectual property asset to an affiliated entity, or otherwise generates income from the asset in consequence of activities (such as facilitating sale agreements) performed by an affiliated entity;

A high-risk intellectual property entity must demonstrate that the income generated is as a result of Activities undertaken in Anguilla. The entity shall be deemed to fail to meet the economic substance test in relation to its intellectual property business unless it demonstrates to the satisfaction of the Registrar that there is and historically has been a high degree of control over the development, exploitation, maintenance, enhancement and protection of its intellectual property asset, exercised by an adequate number of full-time employees with the necessary qualifications who permanently reside and perform these activities in Anguilla. Due to the greater risks associated with High Risk IP Business, the Competent Authority will exchange all of the information provided, with the relevant EU Member State competent

authority where the immediate parent company, ultimate parent company and/or ultimate beneficial owner is resident.

A high-risk intellectual property entity seeking to demonstrate substance is required to provide the Registrar any information or evidence reasonably required by the Registrar for this purpose, including –

- (a) detailed business plans which demonstrate the commercial rationale for holding its intellectual property asset in Anguilla;
- (b) information about its employees, including level of experience, type of contracts, qualifications and duration of employment;
- (c) evidence that decision making in relation to the intellectual property asset is taking place within Anguilla; and
- (d) any other information that may be reasonably required by the Registrar to determine whether the entity meets the economic substance test.

Periodic decisions by non-resident directors or board members, or local staff passively holding intangible assets will not meet the high threshold, and will fail to rebut the presumption that the High Risk IP entity fails to meet the substance requirements.

## Confidentiality and Exchanges of Information

### Exchanges by the Competent Authority

The Substance Legislation gives the Registrar the power to provide to the Competent Authority information provided to him under the Law in respect of a company that is required to satisfy the economic substance test in relation to a relevant activity in specified circumstances.

Provided Anguilla is deemed to have a “Fully Equipped Monitoring Mechanism”, the Competent Authority will systematically spontaneously exchange information provided by the Registrar in cases of non-compliance (failure to meet economic substance test) or high risk IP business in accordance with relevant international standards and the Tax Information Exchange (International Cooperation) Act. Information may also be shared with the competent authority of the jurisdiction where an entity claims to be tax resident or subject to income tax on its relevant income. The exchanges would occur as

spontaneous exchanges of information (SEOI) under the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (the Convention), or where bilateral agreements are used, under applicable Tax Information Exchange Agreements or bilateral treaties that permit SEOI.

In line with the Standard, the exchanges under each scenario are detailed below. Recipient jurisdictions will be required to opt-in to receive such spontaneous exchanges and may make further follow up information requests subsequent to the information first received. The exchange framework will follow the agreed OECD Standard and will be transmitted via the OECD Common Transmission System using the XML Schema.

| <b>Scenario requiring exchange</b> | <b>Content of exchange</b>  | <b>Recipient jurisdictions</b>  |
|------------------------------------|---|---|
| Non-compliance by the entity       | <ul style="list-style-type: none"><li><input type="checkbox"/> Entity name and address</li><li><input type="checkbox"/> Summary of what elements of the core income generating activities test the entity has failed to meet</li><li><input type="checkbox"/> Name of the immediate parent, ultimate parent, and ultimate beneficial owner</li><li><input type="checkbox"/> Type of mobile income</li><li><input type="checkbox"/> Amount and type of gross income</li><li><input type="checkbox"/> Amount and type of expenses incurred, and assets and premises held, in the course of carrying out the business</li><li><input type="checkbox"/> Number of full-time, qualified employees</li><li><input type="checkbox"/> Any other relevant information.</li></ul> | Residence jurisdictions of: <ul style="list-style-type: none"><li><input type="checkbox"/> Immediate parent</li><li><input type="checkbox"/> Ultimate parent</li><li><input type="checkbox"/> Ultimate beneficial owner</li></ul> |
| High Risk IP <sup>11</sup>         | Annual exchange of: <ul style="list-style-type: none"><li><input type="checkbox"/> Entity name and address</li><li><input type="checkbox"/> Type of mobile income</li><li><input type="checkbox"/> Name of the immediate parent, ultimate parent, and ultimate beneficial owner</li><li><input type="checkbox"/> Amount and type of gross income (e.g. rents, royalties, dividends, sales, services)</li></ul>  | Residence jurisdictions of: <ul style="list-style-type: none"><li><input type="checkbox"/> Immediate parent</li><li><input type="checkbox"/> Ultimate parent</li><li><input type="checkbox"/> Ultimate beneficial owner</li></ul> |

## Confidentiality and Use of Information provided in Economic Substance Returns

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<sup>11</sup> For High- Risk IP, all collected information will be provided in one step as detailed in Section on High Risk Intellectual Property Business with the relevant EU Member State competent authority where the immediate parent company, ultimate parent company and/or ultimate beneficial owner is resident.

Information provided to or received by the Registrar and any officer or other person acting as an officer, a servant, an agent of the Registrar for the purposes of complying with the Substance Legislation shall be kept confidential as provided in accordance with the Substance Legislation. **The information provided in Economic Substance returns shall not be publicly available.** The information provided to the Registrar under the Substance Legislation shall be used for the purposes of monitoring compliance with the substance requirements.

Anguilla will exchange information with partner jurisdictions which have in place adequate measures to ensure the required confidentiality and data safeguards are met. Information provided to or received by the Competent Authority for the facilitation of the spontaneous exchanges of information or otherwise for tax purposes shall be kept confidential as provided in accordance with Section 22 of the Tax Information Exchange (International Cooperation) Act, 2016.

Improper disclosure of any information is a criminal offence, punishable by financial penalties or/and imprisonment.

## Enforcement

If a relevant entity that is conducting relevant activities fails to meet the economic substance test and demonstrate substance, it will be subject to sanctions.

These sanctions include exchange of information with Competent Authorities in other jurisdictions as outlined above, financial penalties and being struck off (involuntary dissolution).

APPENDIX I

GLOSSARY

“ACORN” means Anguilla’s Commercial Online Registration Network.

“affiliate entity”

An entity is an affiliated entity in relation to another entity if-

- a) one of them is the subsidiary of the other;
- b) both are subsidiaries of the same entity;
- c) each of them is controlled by the same entity; or
- d) they are both affiliated (within the meaning of paragraph (a), (b) or (c)) with the same entity at the same time.

"beneficial owner" has the meaning specified in section 2 of the Anti-Money Laundering and Terrorist Financing Regulations, Revised Regulations of Anguilla P98-I;

“calendar quarter” means one of the following periods –

- (a) 1 January to 31 March;
- (b) 1 April to 30 June;
- (c) 1 July to 30 September;
- (d) 1 October to 31 December;

“competent authority” means the designated authority under the Tax Information Exchange (International Cooperation) Act, 2016 with statutory responsibility for international cooperation on matters involving the provision of tax related information.

“Consolidated Financial Statements” means the financial statements of an MNE Group in which the assets, liabilities, income, expenses, and cash flows of the Ultimate Parent Entity and the Constituent Entities are presented as those of a single economic entity;

“Constituent Entity” means –

- (a) any separate business unit of an MNE Group that is included in the Consolidated Financial Statements of the MNE Group for financial reporting purposes, or would be so included if equity interests in such business unit of an MNE Group were traded on a public securities exchange;
- (b) any such business unit that is excluded from the MNE Group's Consolidated Financial Statements solely on size or materiality grounds; and
- (c) any permanent establishment of any separate business unit of the MNE Group included in (a) or (b) provided the business unit prepares a separate financial statement for such permanent establishment for financial reporting, regulatory, tax reporting, or international management control purposes.

"economic substance return" means a return required to be filed under section 205C of the Companies Act, section 98C of the International Business Companies Act, section 24C of the Limited Partnership Act and section 81C of the Limited Liability Companies Act.

"the economic substance test", in relation to a relevant activity, means the test prescribed as the economic substance test for the relevant activity.

"exempt relevant entity" means a relevant entity that is prescribed to be exempt from the economic substance test.

A relevant entity that carries on a relevant activity is exempt from the economic substance test in relation to the activity if, and only if-

- (a) the company is centrally managed and controlled or carries on the relevant activity in a jurisdiction where the rate at which the company may be charged tax is 10% or higher;
- (b) the company is resident for tax purposes in that jurisdiction; and
- (c) the company files with the Registrar evidence of its tax residence in that jurisdiction and that an appropriate tax return has been submitted to the relevant tax authority of that jurisdiction in relation to the relevant activity.

"formation legislation" means the Companies Act, International Business Companies Act, the Limited Liability Company Act and the Limited Partnership Act.

"filed information", in relation to a relevant entity, means any economic substance return or other information or evidence filed by it with the Registrar

“Group” means a collection of enterprises related through ownership or control such that it is either required to prepare Consolidated Financial Statements for financial reporting purposes under applicable accounting principles or would be so required if equity interests in any of the enterprises were traded on a public securities exchange;

"intellectual property asset" includes any copyright, design right, trademark, patent or similar asset including any utility model or any right given for plant breeders and genetic material;

"a high-risk intellectual property entity" means a relevant entity that-

- a) acquired an intellectual property asset-
  - (i) from an affiliated entity; or
  - (ii) in consideration for funding research and development by another person situated in a country or territory other than Anguilla; and
- b) licenses the intellectual property asset to an affiliated entity, or otherwise generates income from the asset in consequence of activities (such as facilitating sale agreements) performed by an affiliated entity;

“limited partnership” means a limited partnership registered under the Limited Partnership Act;

“relevant entity” means

- a) a body corporate that is incorporated or continued under the Companies Act or the International Business Companies Act;
- b) a foreign company registered under Division 3 of Part 4 of the Companies Act;
- c) a limited partnership registered under the Limited Partnership Act; or
- d) a limited liability company registered under the Limited Liability Companies Act

“relevant income” in relation to an entity, should be construed as all of the entity’s gross income from its relevant activities and recorded in its books and records under applicable accounting standards.

“Registrar” means the Registrar of Commercial Activities.

"relevant quarter", in relation to any relevant entity, means the calendar quarter in which the anniversary of the incorporation, continuance or first registration under the Formation Legislation falls.

“substance legislation” means the Companies (Amendment) Act, 2019, the International Business Companies (Amendment) Act, 2019, the Limited Liability Company (Amendment) Act, 2019, the Limited

Partnership (Amendment) Act, 2019 and the Companies (Economic Substance) Regulations, 2019, the International Business Companies (Economic Substance) Regulations, 2019, the Limited Liability Company (Economic Substance) Regulations, 2019 and the Limited Partnership (Economic Substance) Regulations, 2019.

Consultation Draft