

MEMORANDUM ON NEW BAHAMAS LEGISLATION AFFECTING BAHAMIAN COMPANIES

I. THE COMMERCIAL ENTITIES (SUBSTANCE REQUIREMENTS) ACT, 2018

Purpose

The Commercial Entities (Substance Requirements) Act, 2018 (“the Act”) was enacted on the 31st December, 2018 to ensure that tax benefits are commensurate with economic activities and imposes a requirement on all “commercial entities” conducting a “relevant activity” to demonstrate a “substantive economic presence” in The Bahamas.

Definition of commercial entity

Pursuant to section 2 of the Act a commercial entity includes the following legal entities:

1. companies incorporated, registered or continued under the International Business Companies Act;
2. companies incorporated, registered or continued under the Companies Act;
3. partnerships under the Partnership Act, Partnership Limited Liability Act and Exempted Limited Partnership Act;

Provided that such legal entity is not owned by a resident of The Bahamas and conducts its core income generating activities in The Bahamas or is centrally managed and controlled outside The Bahamas and is a tax resident in a jurisdiction other than The Bahamas.

Definition of relevant activity

Pursuant to section 4 of the Act a relevant activity includes the following:-

1. Banking business;
2. Insurance business;
3. Fund management business;
4. Financing and leasing business;
5. Headquartering business;
6. Distribution and service centres business (which may include transporting and sorting of goods, managing stocks and taking orders, and providing consulting or other administration services);
7. Shipping business;
8. Commercial use of intellectual property; or
9. Holding company engaged in, or where one of more of its subsidiaries is engaged in, one of the activities listed above.

Definition of an included entity

A commercial entity which is engaged in a relevant activity is considered an included entity.

Substantive economic presence requirement

Under the Act an included entity is required to show it has substantive economic presence in The Bahamas by satisfying Two (2) criteria:

1. The included entity must carry on core income generating activities in The Bahamas;
and
2. The direction and management of the business is undertaken in The Bahamas.

Core income generating

The included entity must generate adequate amounts of annual operating expenditure and maintain levels of qualified full-time employees, physical offices and levels of board management and control within The Bahamas.

The included entity may outsource any part of the core income generating activities to a third party service provider within The Bahamas. An included entity must report such outsourcing services annually to the Ministry of Finance in the prescribed form.

Direction and Management of business

The included entity must show that:

1. it has an adequate number of board meetings that are being held in The Bahamas, with a proper quorum physically present;
2. strategic decisions that are made at meetings are properly recorded in minutes of the meetings;
3. records and minutes of the entity are kept in The Bahamas; and
4. the board as a whole has the necessary knowledge and expertise to discharge its duties.

Non-included entity

The Act defines a non-included entity as a legal entity which is:

1. a company incorporated, registered or continued under the International Business Companies Act or Companies Act or a partnership under the Partnership Act, Partnership Limited Liability Act and Exempted Limited Partnership Act;
2. wholly owned directly or indirectly by one or more natural persons who are ordinarily resident and domiciled in The Bahamas or have been issued a certificate of permanent residence and who physically resides in The Bahamas for a cumulative period of at least Three (3) months in every calendar year; and
3. conducts its core income generating activities in The Bahamas or is centrally managed and controlled outside The Bahamas and is tax resident in a jurisdiction other than The Bahamas.

Reduced requirements for holding companies and non-included entities

The Act provides for reduced substance requirements for pure equity holding companies as noted below:

1. the legal entity shall comply with all applicable laws and regulations of The Bahamas; and
2. the legal entity shall have adequate human resources and adequate premises in The Bahamas for holding and managing equity participation.

The Act provides that a non-included entity is required to comply with all applicable laws and regulations of The Bahamas which would include annual reporting obligations and the registration as a non-included entity under the Act.

Enhanced substance requirements for intellectual property income generating included entities

The Act provides a risk based approach to determine the substance requirements.

For legal entities engaged in low-risk intellectual property activities the standard substance requirements (core income generating activities in The Bahamas and direction and management of the business is undertaken in The Bahamas) must be demonstrated in addition to the following activities:

1. taking the strategic decisions and managing, as well as bearing the principal risks relating (i) to the development and subsequent exploitation of the intellectual property asset, or (ii) to the third-party acquisition and subsequent exploitation of the intellectual property asset; or
2. carrying on the underlying trading activities through which the intellectual property asset is exploited and which lead to the generation of revenue from a third party.

For legal entities engaged in high-risk intellectual property activities the standard substance requirements (core income generating activities in The Bahamas and direction and management of the business is undertaken in The Bahamas) must be demonstrated in addition to the following activities:

1. taking the strategic decisions and managing principal risks;
2. carrying on underlying trading activities within The Bahamas; or
3. a high degree of control over the development, exploitation, maintenance, enhancement and protection of the intellectual property asset.

Failure to meet the substance requirements

Should a legal entity fail to meet the substance requirements, the Act provides for a timeframe for compliance and in certain instances an audit.

Should the legal entity fail to comply within the relevant timeframe, the Act provides for the imposition of administrative penalties ranging from \$150,000.00 to \$300,000.00, the removal of the legal entity from the Register of Companies and on summary conviction to a fine of \$10,000.00 or imprisonment for a term of Six (6) months or both.

The legal entity may elect to pay its assessed taxation to the reportable jurisdiction and remain on the relevant register in The Bahamas and produce evidence that it is in compliance with the tax requirements of the relevant reportable jurisdiction of the legal or beneficial owner of the entity as specified in the Second Schedule of the Act.

Reporting requirement

The timeframe for compliance by legal entities incorporated, registered or continued in The Bahamas prior to 31st December 2018 is the 30th June, 2019.

Legal entities incorporated, registered or continued in The Bahamas from 1st January, 2019 must comply immediately.

All legal entities must report their compliance to the Ministry of Finance via its electronic portal within Nine (9) months of its fiscal year end which includes the submission of the statutory forms annexed to the Act.

Exchange of information

The Minister of Finance is empowered to exchange relevant information with the relevant jurisdiction of the legal or beneficial owner of the included entity if the included entity:

1. engages in high-risk intellectual property activities;
2. has failed to satisfy substance requirements of the Act; or
3. has declared that it is tax resident in another jurisdiction.

The above summary is intended to be general in nature and does not constitute legal advice.

For specific advice on matters of concern please contact Attorney Mike A. Klonaris or Attorney Patrick A. Knowles at Klonaris & Co.

II. REGISTER OF BENEFICIAL OWNERSHIP ACT, 2018

Purpose

The Register of Beneficial Ownership Act, 2018 (“the Act”) was enacted on the 20th December, 2018 to provide for the establishment of a secure beneficial ownership database by the Attorney General of the Commonwealth of The Bahamas as the competent Authority.

Database

The database will be managed by registered agents which hold beneficial ownership information of entities incorporated, registered, continued or otherwise established in accordance with the Companies Act or the International Business Companies Act. It is important to note that the database does not create a public register of beneficial owners.

Identification of beneficial owners

Section 8 of the Act provides that every legal entity incorporated, registered or continued under the International Business Companies Act that is not an ‘exempt person’ must identify its beneficial owners and its registerable entities and notify its registered agent or the Registrar General within Fifteen (15) days of identifying any person as either as a beneficial owner, an affiliate or wholly owned subsidiary of that company.

Meaning of beneficial owner

The term beneficial ownership is defined under section 5 of the Act and in short refers to a natural person with significant ownership and control in a company and includes (but is not limited to):

1. any person who exercises management of the company other than in the capacity of a director, advisor to a professional manager; or
2. where two or more persons hold any interest jointly, whether as joint tenants or tenants in common; or
3. where a company is a subsidiary of another company if the parent entity holds a beneficial interest of 75% or more of the shares in the company.

Exempt persons

The following classes of persons are exempt from the provisions of the Act:

1. a legal entity whose securities are listed on a regulated stock exchange;
2. a legal entity that is a licensee or registrant under the Bank and Trust Companies Regulation Act, the Investment Funds Act, the Securities Industry Act, the Insurance Act, the External Insurance Act and the Financial and Corporate Services Providers Act or an affiliate or wholly owned subsidiary of such licensee or registrant; and

any other legal entity that the Minister of Legal Affairs may exempt by regulations.

Beneficial owner particulars

In accordance with Section 9 of the Act, registered agents of legal entities are required to keep current information on all legal entities and their beneficial ownership on a database accessible

by the search system established by the Attorney General and enter on the database the required particulars in accordance with the Act.

The required particulars consist of the following:

Legal entity

1. the full legal name, including alternative names;
2. the incorporation number or its equivalent;
3. date of incorporation;
4. status;
5. registered address; and
6. any other particulars as the Minister of Legal Affairs may by Order specify.

Beneficial owner

1. the full legal name;
2. residential address and, if different, an address for service of notices under the Act;
3. country of ordinary residence or domicile;
4. date of birth; and
5. nationality information identifying the person from his passport, driver's licence or other government-issued document including –
 - (i) identifying number;
 - (ii) country of issue; and
 - (iii) the date of issue and expiry.

Registrable entity

1. the details of the registrable legal entity as outlined in the paragraph above with respect to a legal entity;
2. the jurisdiction in which the registrable legal entity is formed;
3. the basis upon which the legal entity is designated as a registrable legal entity; and
4. where the registrable legal entity is a foreign regulated person, the name of the jurisdiction of regulation and the name of the foreign regulator and where the registrable legal entity is a foreign state or a wholly owned subsidiary of a foreign state, the name of that foreign state and, if applicable wholly owned subsidiary.

Exempt person

1. the details of the exempt person as outlined in the paragraph above with respect to legal entity; and
2. the basis upon which the exempt person is designated as an exempt person.

Where there is a change in the required particulars relating to a beneficial owner or registrable legal entity, the legal entity must notify its registered agent within Fifteen (15) days of the change and the registered agent must immediately update the database to reflect this information.

Retention period

In instances where a legal entity is dissolved, information maintained in a database in respect of that legal entity shall be maintained by the administrator, liquidator or other person involved in the dissolution of that legal entity for a period of Five (5) years from (i) the date of the dissolution, (ii) the date that the legal entity cease to be a legal entity or (iii) the date that the registered agent ceases to be the registered agent for the legal entity.

Confidentiality

All information maintained on each database is confidential and must not be accessible by any person except by a designated person through the secured search system from physically secure premises using a secure information technology system and the registered agent to whom the database relates.

Transitional period

A legal entity incorporated or registered before the commencement of the Act and a registered agent must within a One (1) year period from the date of commencement of the Act meet the requirements under the Act.

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III. REMOVAL OF PREFERENTIAL EXEMPTION ACT, 2018

Purpose

The Removal of Preferential Exemption Act, 2018 (“the Act”) came into force on the 31st December, 2018 and was introduced to remove tax preferences afforded to companies incorporated, registered or continued under the International Business Companies Act, the Exempted Limited Partnership Act, the Investment Condominium Act, 2014 and the Executive Entities Act, 2011 (“the Preferential Acts”) which operate exclusively outside The Bahamas and were deemed non-resident by the Exchange Control Department of the Central Bank of The Bahamas.

Tax preferences

The tax preferences which will be removed by the Act includes but are not limited to stamp duty, business licence fees, income tax, corporation tax, capital gains tax, estate tax, inheritance tax, succession tax or gift tax which such companies were entitled under the Preferential Acts if such companies operated outside of The Bahamas.

Removal of tax preferences

In accordance with the provisions of the Act all companies and entities incorporated, registered or continued under the Preferential Exemption Acts are now subject to the payment of any tax which is non-nominal meaning that it is not equal to zero or almost zero.

Transitional period

The relevant legal entities under the International Business Companies Act, the Exempted Limited Partnership Act and the Investment Condominium Act, 2014 have been granted a Three (3) year transitional period before the provisions of this Act become enforced. Thereafter, the previous exemptions will be removed.

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IV. MULTINATIONAL ENTITIES (FINANCIAL REPORTING) ACT, 2018

Purpose

The Multinational Entities (Financial Reporting) Act, 2018 (“the Act”) was introduced on the 1st January, 2018 to provide for country-by-country reporting for Bahamas based corporate entities that are part of a multinational group structure that is generating an annual combined turnover in excess of US\$850 million.

Applicability

A company would be subject to the provisions of the Act if it can be shown that it is a member of a multinational group structure which is generating an annual combined turnover in excess of US\$850 million.

Multinational Entities Group

The Act defines a multinational entities group (an “MNE Group”) as Two (2) 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 and has with respect to any fiscal year of the group a total consolidated group revenue of USD\$850 million during the fiscal immediately preceding the reporting fiscal year as reflected in its consolidated financial statements for such preceding year.

Filing requirement

Each ultimate parent of an MNE that is resident in The Bahamas must file with the Authority namely the Minister of Finance a country-by-country report with respect to its reporting fiscal year on or before Twelve (12) months after the last day of the reporting fiscal year of the MNE Group (“Country-by-Country Report”).

The Country-by-Country Report must be filed in the prescribed form and must contain such information as revenue (profit or loss before income tax), income tax (paid and accrued), stated capital, accumulated earnings, number of employees and tangible assets other than cash or cash equivalents with regard to each jurisdiction in which the MNE Group operates and an identification of each constituent entity of the MNE Group setting out the jurisdiction of tax residence of such constituent entity and, where different from such jurisdiction of tax residence, the jurisdiction under the laws of which such constituent entity is organized and the nature of the main business activity or activities of such constituent entity.

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