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Commercial Entities (Substance Requirements) Bill, 2023

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Commercial Entities (Substance Requirements) Bill, 2023

Background

- CESRA 2018 introduced due to listing and assessment exercise by EU Code of Conduct Group and commitments made by The Bahamas.
- EU Code of Conduct Group on Business Taxation and OECD FHTP BEPs guidance are part of the relevant materials for understanding scope, interpretation and context
- A standard monitoring mechanism differs from a fully equipped monitoring mechanism in terms of what information is required to be spontaneously exchanged.

Commercial Entities (Substance Requirements) Bill, 2023

Three Objectives:

- Provide definitions which support the self-classification process.
- Enhance the information provided by entities so that the Authority is able to analyze and audit the information.
- Consolidate reporting to Registered Agents or the Compliance Commission (revisions to be made to change RG to the Compliance Commission).

Commercial Entities (Substance Requirements) Bill, 2023

Key Change#1: New Definitions

- Banking Business, Insurance Business, Fund Management Business – definition linked to relevant enactments
- Financing and Leasing Business- excludes leasing of land or an interest in land
- Shipping Business – excludes shipping conducted solely within Bahamian waters as well as pleasure craft, yachts, and fishing vessels.
- Commercial use of intellectual property – clarifies that it extends to holding, exploiting or receiving income from the intellectual property asset.

Commercial Entities (Substance Requirements) Bill, 2023

Key Change #1 cont.: New Definitions

- Holding Business – removes the link between holding business and subsidiary activities.
- Commercial entity – excludes investment funds, foreign tax resident and resident-owned entities

Commercial Entities (Substance Requirements) Bill, 2023

Key Change #2: Economic Substance Test clarified

- The ES test is defined in relation to the obligations set out in s. 4, 6, 7, 8, 9 and 10 (as applicable)
- The ES test is set forth clearly in s. 7 (as to all components) namely:
 - a) Direction and Management with further clarification given in s. 8
 - b) Adequacy of operating expenditure, full-time equivalent employees, premises and physical assets
 - c) All CIGA conducted in The Bahamas (directly or through outsourcing) – indicative CIGA at s. 6
 - d) If outsourced, entity must monitor and control outsourced CIGA.

Commercial Entities (Substance Requirements) Bill, 2023

Key Change #3 : Reporting

- Entities report to Registered Agents and Registered Agents report to ES portal. Other entities or entities without a regulated entity acting as RO, will report to the Compliance Commission.
- RAs are only reporting agents and entities remain responsible for the accuracy of the information. See. S. 11 duty on entity to report to RA, s. 12(3) entity under sworn oath, s.19(b) RA reporting defence of reasonable excuse, and s. 24 protection of RAs.
- The deadline for ES portal uploads by Registered Agent remains within 9 months of the end of the financial year of the entity.
- The term RA includes a regulated entity providing a registered office and this would therefore permit RAs to report for entities which it provides only RO services to (i.e., domestic companies).

Commercial Entities (Substance Requirements) Bill, 2023

Key Change #4 : Information

- More fields and detail depending on whether:
 - Entity is not a commercial entity because resident owned
 - Entity is not a commercial entity (although conducting relevant activity) because it is tax resident and centrally managed and controlled in another jurisdiction
 - Entity is a commercial entity that does not conduct a relevant activity
 - Entity is an included entity (conducting a relevant activity)
 - Entity is an included entity that conducts the relevant activity of holding business
 - Entity is an included entity that conducts the business of the commercial use of IP (high-risk or low-risk)

Commercial Entities (Substance Requirements) Bill, 2023

Key Change #4 : Information cont.

- Note change to full-time equivalent employees to accommodate partial counting.
- No forms but information to be collected is prescribed in s. 11.
- No requirement for outsourcing provider to report (in that capacity).

Commercial Entities (Substance Requirements) Bill, 2023

Key Change #5 : Compliance Audit Process

For any Entity:

- Under s. 14 Authority has the power to compel production of documentation
- Authority may conduct an on-site inspection
- Authority may designate an approved auditor under s. 14
- If the audit reveals any of the reporting offences, the Authority may impose fines
- If the entity is an included entity the provisions of s. 18 apply

Commercial Entities (Substance Requirements) Bill, 2023

Key Change #5 cont : Compliance Audit cont.

For any included entity:

- Failure to meet ES test results in a notice requesting rectification
- Failure to comply with notice requesting rectification in 28 days or to provide documentation requested will result in a mandatory audit
- Authority has the power to compel an audit at the expense of the included entity
- If audit not commenced within 45 days an automatic penalty of \$50,000 will be imposed. Although the Bill does not yet say this, a daily default penalty is likely to be imposed until an audit is commenced.
- Audit deficiencies will result in a notice and a timeline not exceeding 30 days for rectification.

Commercial Entities (Substance Requirements) Bill, 2023

Key Change #6 : Penalties

- Distinction between offences in terms of severity of penalties.
- Reporting penalties are distinguished between intentional misleading actions, concealment and reporting and simply failing to report. See. S. 19(a) and (b) vs. 19(c) – (f).
- Highest likely penalty for failing to comply with notice of deficiency from formal audit. (\$300,000)

Commercial Entities (Substance Requirements) Bill, 2023

Transition

- Entities will report on their status when CESRA 2023 is effective in line with the definitions contained therein. Old portal will be deactivated once CESRA 2023 is in force.
- If an entity has already reported in the old portal:
 - a) they shall inform their registered agent within 30 days of the commencement of the Act and provide proof of filing.
 - b) if the entity having reported in the old portal reported as a non-included passive holding entity and they would have been required to be classified as a pure equity holding company had this Act been in force, they shall notify their registered agent of the change of classification within 30 days of the commencement of CESRA 2023.
- In respect of all entities, RA will notify the portal that a report has already been made for the most recent financial year. Will have to indicate any change of classification of a non-included passive holding entity to a PEH.

Commercial Entities (Substance Requirements) Bill, 2023

Proposed Bill Amendments

- Guidance like provisions will be moved to guidance (s. 7(4) in relation to “no relevant income”).
- A default daily penalty will be added to s.18(4) (like CESRA 2018).
- Revision to make Compliance Commission reporting entity for certain entities.
- Transition provision will be amended to require that all entities inform their RAs or the Compliance Commission if they have reported in the old portal for the financial year ending immediately prior to the commencement of CESRA 2023.
- Please send additional comments to BFSB by June 29th, 2023.



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