

UPDATE

# Enforcement Guidelines and administrative fines - CRS and economic substance

Update prepared by Sara Galletly and Louise Somers (Cayman Islands)

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The Cayman Islands Tax Information Authority published Enforcement Guidelines for each of the CRS and economic substance regimes in late March 2022. This Update provides an overview of the enforcement process and approach.

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## Introduction

The Cayman Islands Tax Information Authority (TIA) recently published [Enforcement Guidelines: Common Reporting Standard](#) and [Enforcement Guidelines: Economic Substance](#). These Guidelines confirm the process that the TIA will follow to take enforcement action under the Common Reporting Standard (CRS) and economic substance (ES) regimes. Enforcement is an important component in the effective implementation of those regimes; ensuring that complete and accurate information is collected, reported and exchanged with the applicable international competent authorities, demonstrating Cayman's commitment to international transparency.

## Enforcement Principles

Both sets of Enforcement Guidelines note the principles adhered to by the TIA in taking enforcement action and imposing administrative fines, with the aim of achieving consistency and fairness.

Those principles are:

- The TIA will exercise its enforcement powers in a manner which is reasonable, transparent, lawful, rational and proportionate.
- The TIA will take enforcement action that is timely and dissuasive, acting as a deterrent to the commission of future breaches of the CRS framework or ES legislation.
- The TIA will exercise its enforcement powers in a manner which is procedurally fair.

## CRS administrative penalties

### Power to impose fines and fine amounts

Under Regulation 24 of the Tax Information Authority (International Tax Compliance) (Common Reporting Standard) Regulations (2021 Revision) (the **CRS Regulations**), the TIA may impose a penalty (a **Primary Penalty**) for offences committed under Part 3 of the CRS Regulations in the following amount:

- up to approximately US\$60,975 for an offence committed either by (a) a body corporate or (b) an individual who forms part of an unincorporated Cayman financial institution (**FI**); or
- otherwise, approximately US\$24,390.

The TIA may also impose a daily default fine of US\$122 (a **Continuing Penalty**) where a Primary Penalty has been imposed and the contravention has not been, but is capable of, remediation.

## Criteria and amount of penalty

The CRS Enforcement Guidelines set out a non-exhaustive list of examples of offences under Part 3 of the CRS Regulations, together with an indication of the starting point of the corresponding administrative penalty that the TIA may impose. The amount of a fine imposed by the TIA may be more or less than the indicative amount stated in the Guidelines, based upon the criteria to be considered in determining a penalty amount.

In deciding whether to impose a penalty or its amount, the TIA must consider the following criteria, in the following order of importance:

- the need to ensure strict compliance with, and to penalise and deter contravention of, the CRS Regulations;
- the nature, seriousness and consequences of the breach;
- the apparent degree of the party's inadvertence, intent or negligence in committing the breach;
- the party's conduct after becoming aware of the contravention, including transparency with the TIA and efforts taken to remedy the breach and prevent recurrence; and
- the party's history of compliance with the CRS.

The above criteria prevail over any question concerning the party's resources or ability to pay.

## Imputed criminal liability of directors, etc.

The CRS Regulations provide for imputed criminal liability of directors, managers, secretaries and other officers, members, general partners, partners and/or trustees (dependent upon the type of vehicle), such that if an FI commits an offence, the relevant persons are also guilty of the offence. In this regard, the CRS Enforcement Guidelines state that if there is sufficient evidence to suggest that a director or officer, etc. of an FI intentionally committed an offence of a nature that is of sufficient seriousness and consequence, the TIA may impose the applicable administrative penalty on the director or officer, etc., as well as the FI itself.

## Double jeopardy and limitation period

A prosecution for an offence (whether or not a conviction occurred) prevents the imposition of an administrative penalty against the same person for that offence. However, the same is not true where an administrative penalty has been imposed; a person can still be prosecuted for the same offence.

The TIA may not, in general, impose a Primary Penalty for an offence under Part 3 of the CRS Regulations after the earlier of (a) one year after becoming aware of the breach<sup>1</sup> or (b) six years after the breach occurred.<sup>2</sup> There is no limitation period for imposing a Continuing Penalty.

## ES administrative penalties

### Power to impose fines and fine amounts

Under the International Tax Co-operation (Economic Substance) Act (2021 Revision) (the **ES Act**), the TIA has authority to impose administrative fines in the following situations:

- *Missed reporting*: Where a relevant entity has failed to prepare and submit an ES return by the relevant deadline, the TIA may by writing impose a penalty of approximately US\$6,098, plus a daily default fine of US\$610 for so long as the failure to comply continues.
- *Failure of ES test – Year 1*: The TIA is required to impose a fine of up to approximately US\$12,195 on a relevant entity which has failed to meet the ES test applicable to the relevant activity in the first year of assessment.

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<sup>1</sup> With respect to a breach of a statutory filing deadline, the TIA deems itself to become aware of the offence on the day immediately after the filing is due. Where a compliance investigation is undertaken to determine whether a breach has occurred, the TIA deems itself to become aware of the offence on the date the investigation is completed and a preliminary determination is made.

<sup>2</sup> However, the TIA may not impose a Primary Penalty for an offence under Regulation 15 more than one year after becoming aware of the contravention.

- *Failure of ES test – Subsequent year:* The TIA is required to impose a fine of up to approximately US\$121,951 on a relevant entity which has failed to meet the ES test applicable to the relevant activity in a subsequent year of assessment.

For more information on the ES regime, see our Guide, [Economic Substance in the Cayman Islands](#).

The ES Enforcement Guidelines set out a table of baseline administrative penalties that the TIA may impose in relation to the different ES Act breaches. The amount of a fine imposed by the TIA may be more or less than the indicative amount stated in the Guidelines, based upon the facts and circumstances surrounding each breach.

### Limitation period

The TIA may not impose an administrative penalty for failure to meet the ES test under the ES Act after the earlier of (a) one year after becoming aware of the offence<sup>3</sup> or (b) six years after the offence occurred.

### Administrative fine process

#### CRS Regulations

The TIA may only impose a Primary Penalty via the following steps:

- Breach notice:* The TIA must issue a breach notice, which must be dated and provide certain required information, including (i) the facts and circumstances that the TIA believes constituted the offence and (ii) a statement that the recipient may make representations to the TIA regarding the proposed action and/or the proposed fine amount, which period must be no less than 60 days after the giving of the notice. A breach notice may also set out the steps required to remedy a breach and the extent to which a breach is remediated will be a factor considered by the TIA in determining whether to issue a penalty notice (see below). However, remediation does not preclude the issue of a penalty notice imposing a fine.
- Consideration of representations:* If a recipient of a breach notice has made representations to the TIA in response, the TIA must consider all matters raised in those representations and reconsider the proposed action and, if relevant, the proposed fine amount.
- Penalty notice:* If it determines to continue with the imposition of an administrative penalty, the TIA must issue a penalty notice, which must be dated and provide certain required information, including (i) the reasons for the imposition of the penalty and its amount, (ii) that the penalty will become a debt owing to the Crown 30 days after the notice has been given and (iii) the right to appeal.

The TIA may only impose a Continuing Penalty by penalty notice.

The TIA will ordinarily issue notices by email to the person's Principal Point of Contact using the email address registered in the DITC portal.

### ES administrative penalties

The TIA will issue a penalty notice where it intends to impose an administrative penalty pursuant to the ES Act.

#### Missed reporting

Where an entity has failed to prepare and submit an ES return to the TIA, the penalty notice will provide certain notifications, including (a) the amount of the primary penalty imposed, (b) the amount of any additional penalty imposed (ie, the daily default fine) and (c) the date from which any additional penalty will begin to accrue.

An entity which fails to submit the ES return within 30 days of the date of a penalty notice will be deemed to have failed the ES test and will be assessed the maximum penalty available.

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<sup>3</sup> With respect to a breach of a statutory filing deadline, the TIA deems itself to become aware of the offence on the day immediately after the filing is due. Where an investigation is undertaken to make a determination, the TIA deems itself to become aware of the failure to meet the ES Test on the date the investigation is completed and a determination is made.

### Failure of ES test (first year or subsequent year)

A penalty notice issued by the TIA in relation to the failure to meet the ES test in the first year shall provide certain information, including (a) the reasons for the TIA's determination that the applicable ES test has been failed, (b) the amount of any penalty imposed, (c) the date on which the penalty is due (which must not be less than 28 days after the date of issue of the notice), (d) the TIA's directions as to remedial action to be taken to satisfy the ES test and the date by which such actions must be taken and (e) the right of appeal.

A penalty notice issued by the TIA in relation to the failure to meet the ES test in a subsequent year will be very similar to that for the first year but shall also notify the recipient that the TIA shall make a report to the Registrar (see below).

The TIA will not issue a penalty notice for a subsequent year unless the entity has received a 'first year' penalty notice and has had an opportunity to address the requirements set out by the TIA for the entity to meet the applicable ES test.

### Notice to Registrar

Under the ES Act, where the TIA issues a subsequent year penalty notice, it must provide the Registrar with a report of the matters referred to in the notice, together with any other additional information. If the Registrar receives such a report from the TIA, it must apply to the Grand Court for an order in accordance with the ES Act. If the Grand Court is satisfied that the entity was required to meet the ES test as determined by the TIA, it may make such order as it sees fit, including:

- an order requiring the entity to take specified action; or
- an order that the entity is to be considered defunct and struck from the register.

### Interest

Under the CRS Regulations, interest accrues on a penalty whilst all or any part remains outstanding at a daily rate which is the higher of (a) 5% or (b) the average percentage of the annual consumer price index and inflation rates for the most recent 3 calendar years.

Interest is compounded and any payments made are applied in payment of the interest owing before being applied to payment of the penalty itself.

The ES Act does not provide for the payment of interest on penalties imposed under the ES regime.

### Right of appeal

#### CRS Regulations

A party who has been given a penalty notice under the CRS Regulations may appeal to the court against the decision to impose a penalty and/or its amount. However, an appeal must be made within 60 days following receipt of the penalty notice, or such later period as the court may allow.

The court may affirm, set aside or vary the decision appealed against, or set aside the original decision and remit the matter to the TIA for reconsideration with directions. If the court's decision is to set aside and not remit, the penalty and any interest are deemed never to have been owing.

#### ES administrative penalties

A person who receives a penalty notice issued pursuant to the ES Act has a right to appeal to the Grand Court as follows:

- *Missed reporting*: Where a penalty has been imposed due to failure to report, an appeal must be made to the Grand Court within 30 days after the penalty notice is given.
- *Failure of ES test (first year or subsequent year)*: A relevant entity that has been notified of a determination of failure to satisfy the ES test where a penalty has been imposed may appeal to the Grand Court within 28 days after the notification.

An appeal may be made on questions of law or fact, or both, and the Grand Court may affirm or reverse the determination and penalty, or substitute its own penalty for that imposed by the TIA.

## Contacts

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**Hayden Isbister**  
Managing Partner  
Mourant Ozannes (Cayman) LLP  
+1 345 814 9125  
[hayden.isbister@mourant.com](mailto:hayden.isbister@mourant.com)



**Paul Christopher**  
Managing Partner  
Mourant Ozannes, Hong Kong  
+852 3995 5700  
[paul.christopher@mourant.com](mailto:paul.christopher@mourant.com)



**James Broad**  
Partner  
Mourant Ozannes, Hong Kong  
+852 3995 5722  
[james.broad@mourant.com](mailto:james.broad@mourant.com)



**Sara Galletly**  
Partner  
Mourant Ozannes (Cayman) LLP  
+1 345 814 9233  
[sara.galletly@mourant.com](mailto:sara.galletly@mourant.com)



**Louise Somers**  
Head of Tax Reporting Services  
Mourant Governance Services  
Cayman Islands  
+1 345 814 9102  
[louise.somers@mourant.com](mailto:louise.somers@mourant.com)

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