

**Ministry of International Business & Industry  
International Business and Financial Services Unit**

**Barbados Economic Substance Guidelines**

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Companies (Economic Substance) Act,  
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B'DOS ECONOMIC SUBSTANCE GUIDELINES DEC, 2019

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B'DOS ECONOMIC SUBSTANCE GUIDELINES DEC, 2019

## INTRODUCTION

The Companies (Economic Substance) Act, 2019-43 (“ESA”) introducing economic substance requirements for companies in Barbados was approved by Barbados Parliament on 27 November 2019 in response to the work of the Organization for Economic Cooperation and Development (“OECD”) as part of the Base Erosion and Profit Shifting (“BEPS”) Action 5 and the European Union (“EU”) Criterion 2.2 initiatives.

These standards require geographically mobile activities to have economic substance regardless of whether the activities are conducted in a no or nominal tax jurisdiction or in a preferential tax regime of a jurisdiction that has corporate income tax.

The ESA applies to all Barbados resident companies conducting relevant activities and is effective for fiscal periods commencing on the dates prescribed in the Regulations.

This document provides guidance on the scope and application of the ESA.

## SUMMARY OF THE ESA

The now repealed and replaced ESA first came into effect on 1 January 2019, and requires a “resident company” which derives income from the carrying on of a “relevant activity” to satisfy the Economic Substance Test (“ES Test”) in relation to that relevant activity. The resident company must be in compliance with the ESA with effect from a fiscal period commencing on or after 1 January 2020.

Core Income Generating Activities (“CIGA”) are activities that are of central importance to a resident company in terms of generating income and must be carried on in Barbados. CIGA are defined for each type of relevant activity.

A resident company may satisfy the ES Test by outsourcing the conduct of its CIGA to another person in Barbados, in accordance with the ESA and the guidance as set out below.

## INFORMATION REQUIREMENTS

A resident company shall, after January 1, 2020, file an Economic Substance Declaration ("declaration") with the Director annually within twelve months after the last day of the end of each fiscal period commencing on the dates prescribed in the Regulations stating:

- (a) whether or not they are carrying on a relevant activity;
- (b) whether or not they derive income a relevant activity
- (c) if the resident company is carrying on a relevant activity, whether or not all of the resident company's income in relation to the relevant activity
  - (i) is subject to tax in a jurisdiction outside of Barbados and, if so, shall provide appropriate evidence to support the liability to tax as may be required by the Director; or
  - (ii) is compliant with economic substance requirements in a jurisdiction outside of Barbados and, if so, shall provide appropriate evidence to support that economic substance as may be required by the Director;
- (d) whether it is beneficially owned or controlled by residents of Barbados , and whether it carries on a relevant activity exclusively in Barbados and derives income solely from such relevant activities; and
- (e) the date of the end of its fiscal period.

For the purposes of these Guidelines, "control" means the possession, whether directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, a voting trust arrangement or by any other means.

A resident company which is required to satisfy the ES Test must provide the following information:

- business/income types identifying the type of relevant activity;
- amount and type of income by relevant activity;
- amount of operating expenditure by relevant activity;
- details of business address;
- number of (qualified) full time employees;
- confirmation of the CIGA conducted for each relevant activity; and
- confirmation of whether any CIGA have been outsourced and if so relevant details.

A resident company that is carrying on more than one relevant activity is required to satisfy the ES Test in relation to each relevant activity.

### ADDITIONAL INFORMATION REQUIREMENTS

The Director may give notice requiring additional documents and information (including a copy of a relevant documents or other records, (or of electronically stored information) as shall be reasonably required to determine whether the resident company has passed or failed the ES Test. Such information shall be in the form approved by the Director and shall be provided within a reasonable time specified by the Director.

A resident company that is required to satisfy the ES Test in relation to a relevant activity must retain for six years after the end of a fiscal period any documents or other records, including any information stored by electronic means that relates to the information required to be provided to the Director.

## SCOPE OF THE ESA

### RESIDENT COMPANY

A resident company for the purposes of the ESA must satisfy all of the prescribed definitions in the ESA, simultaneously.

Therefore a resident company for the purposes of the ESA means a company, whether incorporated in Barbados or elsewhere, or a society with restricted liability organised in Barbados, or an association formed in Barbados (other than an association of underwriters), which is managed and controlled in Barbados.

For the avoidance of doubt and for the purposes of the ESA:

- 1 A "company" means:
  - any body corporate whether incorporated in Barbados or elsewhere and includes a society with restricted liability and an association other than an association of underwriters but does not include a local or public authority.
- 2 The following are expressly included in the definition of "resident company":
  - a company, whether incorporated in Barbados or elsewhere, or a society with restricted liability organised in Barbados, or an association formed in Barbados (other than an association of underwriters), which is managed and controlled in Barbados.
  - a company incorporated outside of Barbados, that is registered in Barbados as an external company that is not regarded as a tax resident company in the jurisdiction of incorporation.
  - A company incorporated in Barbados as an entity but which is not tax resident in any other jurisdiction.

- 3 The following are expressly excluded from the definition of “resident company”:
- any unincorporated body or association which does not have separate legal personality, including a general partnership, and a limited partnership;
  - a trust
  - a company (or entity) that is tax resident outside of Barbados, and
  - a public Director.

#### **TAX RESIDENT OUTSIDE BARBADOS**

A company incorporated in Barbados is not regarded as a resident company for the purposes of the ESA if it is tax resident outside Barbados.

Likewise, a company incorporated outside of Barbados, that is registered in Barbados as an external company is not regarded as a resident company if it is tax resident outside Barbados. The Director will regard a company, an external company and a branch of a resident company as tax resident outside Barbados if such company is subject to tax on the income from a relevant activity in another jurisdiction. The Director will require any such company claiming to be tax resident outside Barbados to produce satisfactory evidence to substantiate the same.

Such evidence should include evidence of its tax residence in that jurisdiction and evidence that an appropriate tax return has been submitted to the relevant tax authority of that jurisdiction in relation to the relevant activity. In the absence of such evidence, the Director will regard any such company as a resident company that is subject to the ESA.

In this context, a “branch” refers to a business unit or division of the resident company that is not a separate legal person from the resident company. An external company, or branch of a resident company carrying on a relevant activity in a jurisdiction with economic substance legislation shall not be considered to be a resident company.

For the purpose of the application of these Guidelines, an entity which is incorporated in Barbados but which is not tax resident in any other jurisdiction shall be treated as a resident company.

#### **LIQUIDATION OR OTHERWISE CEASING TO CARRY ON RELEVANT ACTIVITIES**

A resident company will, so long as it exists, continue to have any obligations which the ESA imposes on it. Liquidators (or equivalent) must ensure that the resident company

continues to satisfy all of its obligations under the ESA. If a resident company is in liquidation, winding up or other equivalent process, it must continue to satisfy the ES Test for any period during which it carries on relevant activities. Reporting will be required with respect to any period during which the resident company earns income derived from carrying on relevant activities.

## **THE ECONOMIC SUBSTANCE TEST ("ES TEST")**

### **TEST OF DIRECTION AND MANAGEMENT**

An entity which is a resident company for the purposes of the ESA will have to comply with the requirement to be directed and managed in Barbados. The entity will be deemed to be managed and directed in Barbados where-

- a) its board of directors, as a whole, has the appropriate knowledge and expertise to discharge its duties as a board of directors;
- b) meetings of the board of directors are held in Barbados at adequate frequencies given the level of decision making required;
- c) there is a quorum of directors physically present in Barbados during the meetings described in (b) above;
- d) the minutes of those meetings record the making of strategic decisions of the relevant entity at the meeting; and
- e) it keeps all such director meeting minutes and appropriate records in Barbados.

The directed and managed test is designed to ensure that there are an adequate frequency of board meetings held and attended in Barbados (although it is not necessary for all meetings to be held in Barbados).

What constitutes an adequate frequency of meetings in Barbados will be dependent on the relevant activities of the relevant entity.

The test also looks to ensure that the associated minutes and records are kept in Barbados and that the board is a decision making body with the appropriate knowledge and experience. In the case where there are corporate directors, the requirements will apply to the individual(s) (officers of the corporate director) actually performing the duties.

### **COMPLIANCE WITH THE ES TEST**

A resident company must satisfy the ES Test in relation to any income derived from relevant activities which it carries on.

A resident company is subject to the ESA from the date on which the resident company commences the relevant activity unless the resident company was in existence prior to 1 January 2019 in which case it must comply with the ESA by 1 January 2020.

A resident company that carries on a relevant activity, but which derives no income is not obliged to meet the requirements of the ES Test. This scenario could arise in cases where a company was incorporated and remained dormant or where a company is in its final stages of liquidation and therefore earning no income. Such a company is however still required to file an ES Declaration. There is an expectation that carrying on relevant activities will result in the generation of income and if there is any indication that a resident company is seeking to manipulate/artificially suppress its income to avoid the substance requirements, action will be taken by the Director in accordance with the legislation.

### **REDUCED ES TEST**

There is a reduced ES Test for single purpose equity holding companies, as described below under the heading "single purpose equity holding company".

A company which is beneficially owned or controlled by residents of Barbados , and carries on a relevant activity exclusively in Barbados and derives income solely from such relevant activities; shall not be required to provide any other documents or additional information unless as specifically required to do so by the Director.

### **COMPLIANCE TIMELINE FOR GRANDFATHERED RESIDENT COMPANIES**

A grandfathered resident company shall not be required to comply with the ESA until 1 January 2021, even where provisions of the ESA contain requirements or criteria that are described as necessitating "historical compliance". A grandfathered resident company must demonstrate that it is in compliance and complies with the provisions of the ESA from 2 January 2021 onwards.

### **CORE INCOME GENERATING ACTIVITIES (CIGA)**

CIGA means activities that are of central importance to a resident company in terms of generating income and, if carried on in respect of a relevant activity, must be carried on in Barbados. A resident company must conduct the appropriate elements of CIGA. The elements listed in the definition of CIGA in relation to each relevant activity are necessary to generating income and are not exhaustive. It is a question of fact in each case as to which activities are actually undertaken to generate income. The assessment of economic

substance in Barbados will include careful consideration of what CIGA are being undertaken by the resident company in Barbados.

“Outsourcing” describes the manner in which a resident company is permitted to outsource its CIGA and clarifies that there are no restrictions on outsourcing activities that are not CIGA.

### **INTERPRETATION OF “ADEQUATE”**

The Director’s guidance is that in each case “adequate” shall mean “as much or as good as necessary for the relevant requirement or purpose”.

What is adequate for each resident company will be dependent on the particular facts and circumstances of the resident company and its business activity. As such, the directors (or equivalent) of each resident company should address their minds to these questions and make their determination in good faith. A resident company must ensure that it maintains and retains appropriate records to demonstrate the adequacy of the resources utilized and expenditures incurred.

The application of these words to a particular type of relevant activity may be included in the section below headed “Sector-Specific Guidance on Relevant Activities”.

Given the stringent regulatory requirements in Barbados, which result in significant overlap with the substance requirements, it is expected that relevant entities licensed to carry on banking business, insurance business or licensed fund management business will already generally be operating in Barbados with adequate resources and expenditure. However, those relevant entities will still be subject to the ESA.

Adequate physical assets include but are not limited to maintaining an appropriate place of business or plant, property and equipment.

### **RELEVANT ACTIVITIES CONDUCTED BY ANY OTHER PERSON (“OUTSOURCING”)**

A resident company may satisfy the ES Test in relation to a relevant activity if its CIGA in relation to that relevant activity is conducted by any other person in Barbados and the resident company is able to monitor and control the carrying out of the CIGA by that other person.

Only that part of the relevant activity of that other person which is attributable to generating income for the resident company shall be taken into account in considering whether the resident company satisfies the ES Test.

That is, the ESA does not prohibit a resident company from outsourcing some or all of its activity. Outsourcing, in this context, includes outsourcing, contracting or delegating to third parties or to entities in the same group.

However, if some or all of the CIGA is outsourced, the resident company must be able to demonstrate that it has adequate supervision of the outsourced activities and that those CIGA are undertaken in Barbados.

Where CIGA are outsourced, the resources of the service provider in Barbados will be taken into consideration when determining whether the employees and physical assets test is met. The employees of the service provider can be counted for the purpose of identifying the employees of the resident company 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 resident company is counted.

There must be no double counting if the services are provided to more than one resident company carrying out relevant activities.

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

Where there are corporate directors, these will be looked through, to the individuals (officers of the corporate director) actually performing the duties of the director.

A resident company may outsource activities which are not CIGA to service providers which are located in or outside Barbados. Such activities may include, for example, back office functions, IT, payroll, legal services, or other expert professional advice or specialist services provided, in each case, they are not of central importance to the resident company in terms of generating income in respect of a relevant activity.

Resident companies that are conducting banking business, insurance business, and fund management business will be subject to the industry specific guidance in addition to the principles set out above under the ESA.

Where a company fails to meet the ES test due to an inadequate number of employees who are physically present in Barbados, only minor breaches thereof can benefit from the first notice without financial penalty procedure.

## **EMPLOYEES**

Directors should be counted as a fraction of a full time employee commensurate with the time commitment of the role, and to the extent that they are performing the relevant CIGA for the business.

The qualifications that are considered to be adequate will depend on the relevant sector that the company has activity in, the CIGA and the duties performed by those employees. Qualifications taken into account could include academic qualifications, vocational qualifications, relevant industry technical qualifications and also qualification by relevant experience.

## **SECTOR-SPECIFIC GUIDANCE ON RELEVANT ACTIVITIES**

### **HOLDING COMPANIES**

#### **SINGLE PURPOSE EQUITY HOLDING COMPANY**

A single purpose equity holding company” means a resident company that only holds equity participations in other entities and only earns dividends and capital gains. It will be subject to the substance requirements if it receives income on its own behalf from those holdings (i.e. if it is the beneficial owner of the shares).

If a resident company meets the criteria to be regarded as a single purpose equity holding company, the placing of dividend monies received on deposit or using them to acquire and passively hold other securities such as government bonds, will not constitute a “relevant activity” and therefore the company will still be regarded as a single purpose equity holding company.

#### **HOLDING COMPANIES CARRYING ON OTHER RELEVANT ACTIVITIES**

A resident holding company which undertakes other relevant activities must meet the substance requirements applicable for any other relevant activity.

If the resident company provides senior management, takes responsibility, control or provides substantive advice in respect of material risks to companies it controls, then it will not be a single purpose equity holding company. The resident company could be considered to carry on the activity of providing headquarters services.

#### **INTELLECTUAL PROPERTY (“IP”) BUSINESS**

For the purposes of the ESA, the term “intellectual property asset” includes any right from which identifiable income accrues to the business (i.e. such income being separately identifiable from any income generated from any tangible asset in which the

right subsists) and includes royalties and gain on the sale of an IP asset. That is, the term does not apply to a business which owns intellectual property merely as an adjunct to its business. **This means that the term IP asset does not include IP which is incidental and not exploited directly by the business.**

With respect to core income generating activities for patents and similar assets:

- (a) research and development activities include but are not limited to: advancing the understanding of scientific relations or technologies, addressing known scientific or technological obstacles, increasing knowledge or developing new applications; or

With respect to core income generating activities for marketing intangibles including trademarks:

- (b) marketing, branding and distribution activities should be directly linked to the specific IP asset.

The requirements of the ESA would not be met by merely passively holding IP assets and/or having periodic meetings of board members.

A resident company that is carrying on high risk IP business is presumed not to have met the ES Test for a fiscal period, even if there are CIGA relevant to the business and the IP assets being carried out in Barbados. A resident company may rebut this presumption if it can produce materials to the Director which demonstrate that there is, and historically has been, a high degree of control over the development, exploitation, maintenance, protection and enhancement (also referred to as "DEMPE") of the IP asset, exercised by an adequate number of suitably qualified employees who are physically present and perform their functions from within Barbados or who are on long-term contracts.

For the purposes of section 6(5) the Director shall have regard to policies articulated by the FHTP and shall request the following information upon filing the Economic Substance Declaration:

- (a) detailed business plans which demonstrate the commercial rationale for holding the IP assets in the jurisdiction;
- (b) employee information, including level of experience, type of contracts, qualifications and duration of employment;
- (c) evidence that decision making is taking place within Barbados; and
- (d) any other information as may be reasonably required.

### **SHIPPING BUSINESS**

This section will be included in subsequent versions of this Guidance.

### **BANKING BUSINESS**

This section will be included in subsequent versions of this Guidance.

### **FINANCING AND LEASING BUSINESS**

The definition encompasses any company which offers 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.

The scope also extends to the situation where a loan advanced for consideration by one company, which is within the scope of this sector, is transferred to a different company which then receives the loan capital repayments and consideration.

The scope does not extend to cases where credit is offered and there is 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.

The scope does not extend to cases where the company has purchased debt securities as an investment, as opposed to providing a credit facility, for example, where the company has purchased government bonds, quoted bonds or similar securities which are actively traded on one of the major security exchanges.

In banking, insurance and fund management businesses it may be a normal part of their activities to provide credit, and so these sectors are excluded from being within the scope of financing and Leasing, to prevent duplicate reporting.

'Setting the terms and duration of any financing or leasing' includes the financial terms, the parameters as to acceptable counterparties, the amounts, rates of interest, the legal agreements and the period for which financing or leasing is to be provided.

'Monitoring and revising any agreements' includes the acquisition of data about a borrower or lessee (or group of them), testing against covenants, extending durations of loans, and feeding back into decision making on writing new terms.

'Managing risk' includes instigating debt collection, considering spreading of risk across sectors or consumer groups. In leasing it includes monitoring and maintaining the underlying assets.

### **FUND MANAGEMENT BUSINESS**

This section will be included in subsequent versions of this Guidance.

### **INSURANCE BUSINESS**

This section will be included in the next version of this Guidance.

### **DISTRIBUTION AND SERVICE CENTRE**

The definition encompasses companies which purchase raw materials and finished products from other non-resident members of the same group/connected persons and re-sell them for a profit.

The definition also encompasses companies which provide services, consulting or other administrative services, to other non-resident members of the same group/connected persons.

The scope does not extend such activities to cases where a company purchases raw materials and finished products from, or provides services to third parties.

In banking, insurance, fund management, financing and leasing, shipping or headquartering businesses it may be a normal part of their activities to provide such services, and so these activities are excluded from being within the scope of distribution and service centre, to prevent duplicate reporting.

### **HEADQUARTERING**

The definition encompasses companies which provide headquarters services to other non-resident members of the same group/connected persons. A headquarters will take responsibility for the overall success of the group, or an important aspect of the group's performance, and ensure corporate governance. Such headquarters services include:

- the provision of senior management;
- taking responsibility or control of material risk for activities carried out by, or assets owned by, any of those persons; or
- the provision of substantive advice in relation to such risks

In banking, insurance, fund management, financing and leasing, shipping or distribution and service centre businesses it may be a normal part of their activities to provide headquarters services, and so these activities are excluded from being within the scope of Headquarters, to prevent duplicate reporting.

## **DIRECTORS' FUNCTIONS**

### **DETERMINATION OF WHETHER ES TEST IS SATISFIED**

The Director will take a "principles-based" approach to determining whether or not a resident company has satisfied the ES Test with respect to its relevant activities. This Guidance does not prescribe a minimum/maximum number of full-time employees or other personnel for a particular level of income either generally or for any particular type of relevant activity because that would be arbitrary and would prove uneconomical in many cases.

For the purpose of conducting an assessment, the Director may consider various factors, including the following:

1. CIGA are of central importance in terms of generating income and must be carried out in Barbados.
2. Such activities for a resident company may naturally fluctuate during the course of a fiscal period and from one fiscal period to the next with the result that what is an adequate level of employees/personnel may not be constant during the period or periods.
3. The Director may consider timesheets or other evidence of relevance when assessing whether a resident company has an adequate number of full-time employees or other personnel with appropriate qualifications or experience in Barbados.
4. The directors (or equivalent) of a resident company may sometimes perform CIGA in addition to performing their fiduciary duties for the resident company and thereby reduce or even eliminate the resident company's practical need for full-time employees or an outsourcing arrangement. In these cases, the Director may consider evidence of the CIGA performed by the directors (or equivalent) in Barbados.
5. The Director will need to take outsourcing activity into account in making its determination as to whether a resident company meets the ES Test, and this may include:
  - (a) identifying cases where outsourcing has taken place;
  - (b) verifying the accuracy of reports of employee numbers attributable to a resident company where this includes employees of a service provider (rather than counting all employees of a service provider for each entity that engages the service provider);
  - (c) verifying if outsourcing of CIGA has taken place outside Barbados; and
  - (d) distinguishing cases of genuine outsourcing of non-core activities.

**SHARING OF INFORMATION**

This section is to be completed subject to the final guidelines on EOI.

B'DOS ECONOMIC SUBSTANCE GUIDELINES DEC, 2019

## GLOSSARY

Terms which are defined in the ESA shall have the same meanings in the guidance. Further the following terms when used in the Guidance shall have the meanings following:

“**carrying on business in Barbados**” means carrying on a trade or business for gain from in Barbados ;

“**competent Director**” means, for each respective jurisdiction, the persons and authorities authorised pursuant to a scheduled agreement ;

“**Consolidated Financial Statements**” has the meaning given to that expression by section 2(1) of the Tax Information Director (International Tax Compliance) (Country-By-Country Reporting) Regulations, 2017 ;

“**Constituent Entity**” has the meaning given to that expression by section 2(1) of the Tax Information Director (International Tax Compliance) (Country-By-Country Reporting) Regulations, 2017 ;

“**director**”, in relation to an entity, means any director, officer, member or other person in whom the management of the entity is vested and “board of directors” shall be construed accordingly;

“**the Director**” means the Director of the International Business Unit for the purposes of the ESA. The Director’s functions under the ESA include administering the ESA, determining whether a resident company satisfies the ES Test in respect of its relevant activities, monitoring compliance with the ESA and sharing information with other competent authorities.

ES test means “**economic substance test**” and shall be construed in accordance with section 5 of the ESA;

“**ESA**” means the Companies (Economic Substance) Act, 2018;

“**ES Portal**” means the electronic portal to be developed by the Director for the purpose of receiving notifications and reports from resident companies to facilitate the Director performing its statutory functions under the ESA and ES Regulations, including the sharing of information with other competent authorities;

“**ES Regulations**” means regulations made by the Minister under the ESA.

“**income**” means gross income as recorded in its books and records under the relevant accounting standards.

“**grandfathered**” when used in respect of a resident company shall mean a resident company which has applied to the relevant Director under any of the following statutory provisions:

- section 20(a) of the Insurance (Amendment) Act, 2018-52
- section 35(1) (a) of the Financial Institutions (Amendment) Act, 2018-51
- section 3(1) of the International Business Companies (Repeal) Act, 2018-40
- section 6(1) of the Societies with Restricted Liability (Amendment) Act, 2018-47

“**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.

“**Public Director**” means a person exercises the duties of a custodian, receiver, judicial manager, public trustee or otherwise in respect of the administration of the affairs of a resident company under the authority of law.”

“**Registrar**” means

- (a) in the case of a company that is incorporated or registered under the Companies Act, has the meaning given to that expression by section 2 of that Act; and
- (b) in the case of a society with restricted liability that is organised or registered under the Societies with Restricted Liability Act, has the meaning given to that expression by section 2 of that Act.

“**ultimate holding company**” means a Constituent Entity of a Group that meets the following criteria -

- (a) it owns directly or indirectly a sufficient interest in one or more other Constituent Entities of the 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 a public securities exchange in its jurisdiction of tax residence; and
- (b) there is no other Constituent Entity of the Group that owns directly or indirectly an interest described in paragraph (a) in the first mentioned Constituent Entity.

These Barbados Economic Substance Guidelines are hereby issued by Director, International Business, Ministry of International Business and Industry on December 4, 2019.



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Director, International Business