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Client Alert:
The UK Government Introduces a New Failure to Prevent Fraud Offence

11 April 2023

The U.K. government announced on 11 April 2023 a new failure to prevent fraud offence, which will make it easier to prosecute a large organisation if an employee commits fraud for the organisation's benefit. The impetus for such an offence tracks back to the Law Commission's Corporate Criminal Liability Options paper and it had long been speculated that the Economic Crime and Corporate Transparency Bill (currently pending) would usher in a new "failure to prevent" offence similarly to the process followed for the "failure to prevent bribery" offence, which was introduced through the Bribery Act 2010.

Details of the proposed legislation have been outlined in a fact sheet. Under the new offence, an organisation (meaning an incorporated entity) will be liable when a specified fraud offence is committed by an employee or agent for the organisation's benefit, and the organisation did not have reasonable fraud prevention procedures in place. It does not need to be demonstrated that company management ordered or knew about the fraud. The offences captured are the fraud and false accounting offences most likely to be relevant to corporations, namely:

- fraud by false representation (section 2, Fraud Act 2006)
- fraud by failing to disclose information (section 3, Fraud Act 2006)
- fraud by abuse of position (section 4, Fraud Act 2006)
- obtaining services dishonestly (section 11, Fraud Act 2006)
- participation in a fraudulent business (section 9, Fraud Act 2006)
- false statements by company directors (section 19, Theft Act 1968)
- false accounting (section 17, Theft Act 1968)
- fraudulent trading (section 993, Companies Act 2006)
- cheating the public revenue (common law)

The government has indicated that this list may be updated through secondary legislation in future but has excluded money laundering offences.

Whilst the offence applies to all sectors, only large organisations are in scope to ensure that SMEs are not unduly burdened. An organisation will be in scope if it meets any two of the following criteria:

i) more than 250 employees;

ii) more than £36 million turnover; and/or

iii) more than £18 million in assets.

The thresholds may, in the future, be amended through secondary legislation.

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Organisations will be able to avoid prosecution if they have reasonable procedures in place to prevent fraud. The government will publish relevant guidance about reasonable procedures and the offence will not come into force prior to the publication of such guidance. There may also be circumstances where it is reasonable to have no fraud prevention procedures in place. For example, as the fact sheet states, that may be the case for organisations where the risk is extremely low; this will likely be detailed in the guidance.

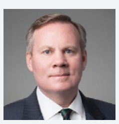
Another crucial tenet of the offence is that it does not introduce individual liability as the government considers doing so disproportionate where an individual did not consent or know of the offence happening.

A company would be subject to an unlimited fine for committing an offence and the courts would have to consider all the circumstances in in deciding the appropriate level for a particular case.

The government's announcement has been received positively by the Director of the Serious Fraud Office, who called the offence a "game-changer for law enforcement" and a boost to prosecutors.

The new offence is another addition to the U.K.'s arsenal of tools to combat financial crime and we will be monitoring its development closely.

For more information, contact:



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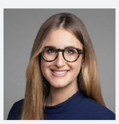

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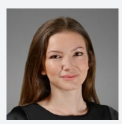

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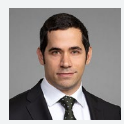

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