

Significant Legal Changes to Corporate Criminal Liability for Economic Crime and What You Should Do to Protect Your Business

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The UK government has introduced two fundamental changes to corporate criminal liability for fraud and economic crime. These changes will significantly increase organisations' risk of exposure to criminal investigation and prosecution for economic crime and fraud perpetrated by their senior managers and associated persons. It is important to know how this will impact your business, and the steps that you should take to put reasonable fraud prevention procedures in place.

Companies Liable for Economic Crimes Committed By "Senior Managers"

From 26 December 2023, companies can be held criminally liable for economic crimes committed by senior managers in their business. Previously, a company could only be liable if the offence was committed by a "directing mind and will". The list of offences covered by this change is extensive, including fraud, theft, false accounting, fraudulent trading, bribery, money laundering and various tax offences.

Who is a "Senior Manager"?

A "senior manager" is defined as someone who "plays a significant role in the making of decisions about how the whole or a substantial part of the activities of the body corporate or partnership are to be managed or organised, or the actual managing or organising of the whole or a substantial part of those activities".

Whether an individual is a senior manager is a question of substance not form; it is not determined based solely on job titles. The following questions will help identify whether someone is a senior manager:

- What are their responsibilities and roles?
- What influence do they exert within the organisation?
- What is their decision making authority, both in theory and in practice?
- Do they nevertheless have an operational management role that is not a traditional HQ management role?

Failure to Prevent Fraud Offence (FTPFO)

The UK government is introducing a failure to prevent fraud offence (the FTPFO) which is expected to come into force in Q2 of 2025. This offence follows the trend set by the UK's other failure to prevent offences, for bribery and tax evasion, which aim to make it easier to pin liability for economic crimes on corporates and encourage the implementation of robust compliance programmes.

- **The offence** – An organisation can be criminally liable where an associated person commits a specified fraud offence with the intention of benefiting the organisation (or its customers). It will not be necessary to prove that the company's leadership (directors or senior managers) were complicit or knew about the fraud.
- **The defence** – It is a defence if an organisation can show it had reasonable fraud prevention procedures in place, or that it was not reasonable in all the circumstances to expect the organisation to have any prevention procedures. The UK government will issue guidance for organisations setting out what constitutes reasonable fraud prevention procedures.
- **Timing** – The offence will not come into force until the government guidance is issued – expected to be this month or next. The offence is likely to apply from Q2 of 2025.

What Type of Conduct is Caught?

The offence will capture a broad range of fraudulent activity which results in a benefit for the company or its clients. Some examples include:

- Dishonest sales practices e.g. misrepresentations
- Dishonest accounting practices e.g. falsifying accounts or inflating figures
- False statements to investors or in an M&A process
- Green/blue washing e.g. misrepresenting environmental, human rights or other sustainability credentials to investors, consumers or authorities
- Dishonest falsification of test results, clinical trials etc.
- Bid rigging

Does the Failure to Prevent Fraud Offence Apply to My Company?

Does your corporate entity meet two out of three of the following:

- >250 employees
- >£36 million in turnover
- >£18 million in total assets

YES

Your corporate entity is a “large organisation” and will be caught, wherever located.

It will be liable for the fraudulent actions of its associated persons which are committed with the intention of benefiting your corporate entity, your customers or parents of your customers.

“Associated persons” will include your employees, agents and subsidiaries of the corporate entity, and may include employees of subsidiaries or others who perform services for or on behalf of the corporate.

NO

Does the group organisation (of which your corporate entity is part) collectively meet two out of three of the following:

- >250 employees
- >£36 million in turnover
- >£18 million in total assets

YES

The entire group organisation (including your corporate entity and other subsidiaries) will be caught, wherever located.

The parent of the group will have the full liability of a “large organisation” (see above).

Your corporate entity will be a “relevant body” but will only be liable for the fraudulent actions of its employees (not for other associated persons), and the fraud must have been intended to benefit your corporate entity (rather than other persons).

NO

Your corporate entity is not caught.

What Steps Should My Organisation Be Taking?

We recommend that companies do not wait until the UK government issues guidance to start reviewing their fraud prevention procedures and considering how to mitigate the risks of corporate liability for fraud.

We have set out below 10 key steps that you can take to assess and strengthen your existing fraud compliance framework:

1.	Consider whether your company or group organisation meets the test for a large organisation
2.	If you are part of a group that is caught, ensure that overseas entities, particularly the parent entity, are aware of the new FTPFO and the scope of potential liability across the group
3.	Review personnel to identify who is likely to be a senior manager
4.	Conduct a risk assessment covering the risk of fraud in your organisation, including mapping out “associated persons”, identifying the typologies of fraud that might arise and those which might be intended to benefit the organisation, its customers etc.
5.	Engage with a variety of stakeholders across your organisation to form a comprehensive view of potential risks, their likelihood and the severity of impact if they should occur
6.	Review your existing control framework, including due diligence on associated persons, to identify any gaps where controls may need to be implemented or enhanced
7.	Draw up a plan to enhance policies and procedures, address any gaps and obtain appropriate resource, budget, etc., to implement the plan within a reasonable timeframe
8.	Encourage top level commitment for setting/overseeing priorities, objectives, risk appetite and expectations
9.	Devise a training programme tailored to different levels of seniority and business operations
10.	Engage with others in your industry/sector to share information and best practice

Our firm’s global Government Investigations & White Collar team regularly advises individuals and corporates on compliance, as well as internal and external investigations relating to financial crime. We are currently helping clients understand their potential exposure in light of the changes to corporate criminal liability for economic crime, to undertake risk assessments, evaluate their existing compliance framework and implement reasonable fraud prevention procedures. If we can assist you with these or other matters, please contact us.

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