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"Failure to Prevent" and More: The UK Economic Crime and Corporate Transparency Act 2023 Is Here

by Isabelle De Smedt, Nick Brockelsby, Alex Shattock, Simon Albert and Albert (BJ) Stieglitz

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The UK Economic Crime and Corporate Transparency Act 2023 (ECCTA) received Royal Assent on October 26, 2023. While some parts of the ECCTA come into force immediately, many others will require further statutory instruments over the coming months.

The ECCTA includes the following notable elements:

- **Creation of a "failure to prevent fraud" offense** similar to the "failure to prevent" offense in Section 7 of the UK Bribery Act 2010 (UKBA). Notably, and after much debate and public commentary on the issue, this offense will only apply to large organizations, defined as those with at least two of the following: (1) annual sales of more than £36 million; (2) balance sheet assets of more than £18 million; and (3) more than 250 employees. The "fraud" captured by this new offense includes Sections 2, 3, 4, 9, and 11 of the Fraud Act 2006 (false representations, fraudulent omissions, abuse of position, dishonestly obtaining services, and participating in a fraudulent business), Sections 17 and 19 of the Theft Act 1968 (false accounting and false statements by company directors), and Section 993 of the Companies Act 2006 (fraudulent trading). In addition, like Section 7 of the UKBA, this new offense establishes an affirmative defense through which otherwise culpable organizations may avoid liability if they can prove that at the time the underlying fraud offense was committed, they had prevention procedures in place that were reasonable in all the circumstances to expect them to have, or that it was not reasonable in all the circumstances to expect them to have any prevention procedures in place.

- **Changes to the identification principle** that establish and expand by statute what to date had been a common-law requirement for establishing corporate criminal liability through the "directing mind and will" of a corporation. Going forward, this liability may be established through "senior managers" of the corporation – individuals who play a significant role in the decision-making of how the whole or a substantial part of the activities of the corporate entity are to be managed or organized and the actual managing or organizing of the whole or a substantial part of those activities.

- **Reforms to Companies House**, including:
  - Identity verification for registered company directors.
  - Broadening the registrar's powers to check, remove, or decline information on the register.
  - Improving the financial information on the register.
  - Providing Companies House with more effective investigation and enforcement powers.
  - Allowing Companies House to share information with other law enforcement bodies.
- **Changes for limited partnerships (including Scottish limited partnerships),** including:
  - Tightening registration requirements.
  - Requiring limited partnerships to maintain a connection to the UK.
  - Increasing transparency requirements.
  - Enabling the registrar to deregister limited partnerships that are dissolved or no longer carrying on business or when a court orders that it is in the public interest to do so.
- **Enhanced law enforcement capabilities related to cryptoassets** through changes to the Proceeds of Crime Act 2002 that streamline and expedite seizure and recovery powers for such assets.
- **Increased information-sharing related to money laundering and other economic crime**, including:
  - Certain protections for businesses against civil liability for breaches of confidentiality for firms that share information to combat economic crime.
  - Permitting the National Crime Agency's Financial Intelligence Unit to seek and obtain information from businesses relating to money laundering and terrorist financing even if a Suspicious Activity Report (SAR) has not been submitted.
  - Expanding the types of cases in which businesses can deal with clients' property without having to submit a defense against money laundering SAR.
- **Increased judicial powers over strategic lawsuits against public protection** involving economic crime.

Looking Ahead

The UK government has described the ECCTA as introducing "world-leading powers which will allow UK authorities to proactively target organised criminals and others seeking to abuse the UK's open economy." While the ECCTA may allow such "targeting," much will depend on how zealously the UK's Serious Fraud Office (SFO) and others will actually wield their new powers. These new tools are being handed to a new Director of the SFO and Director of Public Prosecutions (DPP) against the background of a UK general election in the next year where the current leader of the opposition is himself a former DPP.

However zealously the UK authorities choose to exercise these new powers, companies will want and need to prepare, in particular through attention to compliance procedures and internal controls, to ensure that they are effectively positioned to detect and prevent conduct that could give rise to liability under any of the "failure to prevent" fraud offenses and also to ensure the existence of sufficient prevention procedures if there is government scrutiny.

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ATLANTA: One Atlantic Center ▪ 1201 West Peachtree Street ▪ Atlanta, Georgia, USA, 30309-3424 ▪ 404.881.7000 ▪ Fax: 404.881.7777
BEIJING: Hanwei Plaza West Wing ▪ Suite 21B2 ▪ No. 7 Guanghua Road ▪ Chaoyang District ▪ Beijing, 100004 CN ▪ +86 10 8592 7500
BRUSSELS: Rue Guimard 9 et Rue du Commerce 87 ▪ 3rd Floor ▪ 1000 Brussels ▪ Brussels, 1000, BE ▪ +32.2.550.3700 ▪ Fax: +32.2.550.3719
CHARLOTTE: One South at The Plaza ▪ 101 South Tryon Street ▪ Suite 4000 ▪ Charlotte, North Carolina, USA, 28280-4000 ▪ 704.444.1000 ▪ Fax: 704.444.1111
DALLAS: Chase Tower ▪ 2200 Ross Avenue ▪ Suite 2300 ▪ Dallas, Texas, USA, 75201 ▪ 214.922.3400 ▪ Fax: 214.922.3899
FORT WORTH: Bank of America Tower ▪ 301 Commerce ▪ Suite 3635 ▪ Fort Worth, Texas, USA, 76102 ▪ 214.922.3400 ▪ Fax: 214.922.3899
LONDON: 4th Floor, Octagon Point, St. Paul's ▪ 5 Cheapside ▪ London, EC2V 6AA, UK ▪ +44.0.20.3823.2225
LOS ANGELES: 333 South Hope Street ▪ 16th Floor ▪ Los Angeles, California, USA, 90071-3004 ▪ 213.576.1000 ▪ Fax: 213.576.1100
NEW YORK: 90 Park Avenue ▪ 15th Floor ▪ New York, New York, USA, 10016-1387 ▪ 212.210.9400 ▪ Fax: 212.210.9444
RALEIGH: 555 Fayetteville Street ▪ Suite 600 ▪ Raleigh, North Carolina, USA, 27601-3034 ▪ 919.862.2200 ▪ Fax: 919.862.2260
SAN FRANCISCO: 560 Mission Street ▪ Suite 2100 ▪ San Francisco, California, USA, 94105-0912 ▪ 415.243.1000 ▪ Fax: 415.243.1001
SILICON VALLEY: 755 Page Mill Road ▪ Building C - Suite 200 ▪ Palo Alto, California, USA 94304-1012 ▪ 650.838.2000 ▪ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ▪ 950 F Street, NW ▪ Washington, DC, USA, 20004-1404 ▪ 202.239.3300 ▪ Fax: 202.239.3333