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Internal Controls of Olympic Proportions: BHP Billiton Settles SEC Investigation of Olympic Hospitality

When is it acceptable to invite foreign officials to a marquee hospitality event such as the Olympics or the World Cup? What internal controls should a company put in place in determining who specifically should be invited? These two questions arose anew this month, when, after a six-year investigation into one such event,[1] the Securities and Exchange Commission ("SEC") settled an administrative proceeding with BHP Billiton Ltd. and BHP Billiton Plc. (collectively "BHPB"), relating to BHPB's corporate hospitality at the 2008 Beijing Olympics.[2]

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1. BHP Billiton, "BHP Billiton Announces End of US Investigations," (May 20, 2015) (hereinafter, "BHPB Press Release"), http://www.bhpbilliton.com/home/investors/news/Pages/Articles/BHP-Billiton-Announces-End-of-US-Investigations.aspx.
2. SEC Exchange Act Release No. 74998; In the Matter of BHP Billiton Ltd. and BHP Billiton Plc, (May 20, 2015) (hereinafter, "Cease-and-Desist Order"), http://www.sec.gov/litigation/admin/2015/34-74998.pdf.

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The Cease-and-Desist Order arising from that settlement does not answer the first question and arguably suggests that stringent controls are required in response to the second. Continuing a recent trend, the SEC brought an administrative action in the absence of any Department of Justice ("DOJ") action. And, also continuing a trend, the Cease-and-Desist Order does not allege any violation of the anti-bribery provisions of the FCPA, but rather sets out alleged violations of the books and records and internal controls provisions.[3] BHPB neither admitted nor denied the facts set forth in the Cease-and-Desist Order, but it did agree to pay a $25 million civil penalty, and undertook a one-year self-reporting obligation.[4]

Although the BHPB settlement involves a smaller penalty than some other recent resolutions, it may well turn out to be one of the more notable FCPA resolutions in several years. This is because the case addresses issues of recurring concern to multinational corporations that have long been sought out as sponsors of – or, at least, purchasers of hospitality packages for – marquee sporting events.

As good corporate citizens, these firms have come to view the purchase of tickets and hospitality packages as part of the collaboration with host entities managing such events, including national governments. This is an integral element of brand management and corporate strategy. In the course of such collaboration, these companies also receive due credit for making the event a successful interlude during which governments, business, and society at large, pause to celebrate the endeavor of sport. Yet the very process of supporting such an event leads to the inevitable question of "whom may we invite?" From there, the issue of anti-bribery compliance becomes a central issue for in-house compliance personnel.

The BHPB resolution likely will lead U.S. issuers choosing to provide hospitality of this kind to expend significant additional time, resources, and money devising and maintaining controls suggested by the resolution. Even though the settlement lacks the force of law, it will no doubt raise considerable pressure on companies to exercise even greater care if inviting foreign officials to such events, and may cause some firms subject to the books and records and internal controls provisions of the FCPA, *i.e.*, those subject to SEC jurisdiction, to reconsider altogether this practice.

But to those who would read the resolution as draconian, on inspection several key facts likely animated this resolution, including the high-risk practice of inviting and paying for hospitality for spouses of foreign officials, and, in addition, inviting officials in a position to grant, refuse, or influence business at roughly the same time they received a free trip not clearly within the FCPA's affirmative "educational

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3. *Id.* at ¶¶ 36-38.

4. BHPB is continuing to cooperate with an investigation by the Australian Federal Police, announced in 2013. BHPB Press Release.

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expense" defense. These features thus appear to have driven the SEC's unusually close review of BHPB's actions. In addition, although BHPB implemented various internal controls surrounding its Olympics hospitality program, the Cease-and-Desist Order recounts ways in which the SEC nevertheless viewed those as falling short.

In this article, we address how the BHPB matter fits within the larger context of gift, travel, and hospitality-related expenditures and their treatment under the FCPA and other anti-bribery laws such as the UK Bribery Act 2010. The bottom line for compliance professionals and in-house counsel is that – despite statements by enforcement officials that the issues of greatest concern to them are those arising out of the "big bribe" – travel, hospitality, and entertainment remain front and center in many cases and, particularly for the SEC, can provide the basis for substantial settlements. Yet, with adequate planning and understanding of the law and how regulators are likely to approach future cases, it should be possible for companies to provide hospitality to marquee events with appropriate internal controls.

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Background and Analysis

BHPB was an official sponsor of the Beijing Olympics, and as a result received the rights to use the Olympic trademark and priority access to tickets, hospitality suites, and accommodations in Beijing during the 2008 Olympics.[5]

As have other sponsors of similar events, BHPB sought to use its access to the Beijing Olympics "to reinforce and develop relationships with key stakeholders," by inviting officers and employees of customers, suppliers, government, and members of the media to the Olympics.[6] Approximately one-fourth of the 650 representatives of stakeholders BHPB invited to the Olympics were foreign government officials (including ministers and governors) and employees of state-owned enterprises.[7]

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5. Cease-and-Desist Order at ¶ 8.
6. *Id.* at ¶ 10.
7. *Id.* at ¶¶ 15, 26-34.

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The main and sometimes sole business purpose of such "marquee events" is relationship building.[8] This is not *per se* an illegitimate business purpose, as has been held in any number of U.S. court decisions that carve from the prohibitions of anti-bribery laws "relationship building" that does not involve *quid pro quo* transactions.[9]

Yet, to appreciate the nature of the "relationship building" exception to prohibited practices under U.S. anti-bribery law, it is imperative to understand the government's baseline assumption, stated succinctly in the 2012 FCPA *Resource Guide*, that "[t]he larger or more extravagant the gift, . . . the more likely it was given with an improper purpose."[10] For U.S. regulators, gift, travel, and hospitality analysis is also properly animated, at least implicitly, by a principle of proportionality that takes into account the income and stature of the public official at issue, permitting higher gift, travel, and hospitality expenditures for those on whom such spending is less likely to have an influence.[11] A third factor considered in FCPA analysis is the benefit of transparency. Thus, "hallmarks of appropriate gift-giving [include] when the gift is given openly and transparently, properly recorded in the giver's books and records, provided only to reflect esteem or gratitude, and permitted under local law."[12]

These competing considerations and what they mean in the context of Olympics or World Cup hospitality present somewhat vexing issues. On the one hand, there is efficiency and, indeed, transparency in providing hospitality at such public events, in that they allow senior executives of multinational companies to maintain relationships with key stakeholders scattered throughout the world. Indeed, conducted in accordance with best practices, a business leader's sitting side-by-side with a foreign official guest at a public sporting event, taking time to share experience and learn what is legitimately important to winning business, is one of a number of transparent ways relationship-building may appropriately take place.

Yet, at the same time, the very things that make marquee events both enticing and also open gathering places is one reason hospitality for such events, including tickets, the provision of airfare (including business class travel for long journeys),

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8. *Id.* at ¶ 11.
9. *See* Bruce E. Yannett, Sean Hecker, Steven S. Michaels, and Noelle Grohmann Duarte, "Corrupt Intent, Relationship Building, and *Quid Pro Quo* Bribery: Recent Domestic Bribery Cases," *FCPA Update*, Vol. 3, No. 2 (Sept. 2011), http://www.debevoise.com/insights?tab=Search%20Insights&keyword=FCPA%20Update.
10. *See* DOJ, A Resource Guide to the U.S. Foreign Corrupt Practices Act 13-15 (2012) (hereinafter, "Resource Guide"), http://www.justice.gov/criminal/fraud/fcpa/guidance/.
11. Such a principle inheres in the requirement of "corrupt intent." *See id.* at 13-14. *See also id.* at 17 (discussing examples). The guidance by the UK Ministry of Justice relating to the Bribery Act 2010, certainly one of the world's most stringent cross-border anti-bribery law, states: "Bona fide hospitality . . . which seeks to improve the image of a commercial organisation . . . or establish cordial relations, is recognised as an established and important part of doing business." UK Ministry of Justice, *The Bribery Act 2010 Guidance* (Mar. 2011) at ¶ 26.
12. Resource Guide, note 10, *supra*, at 13-17.

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and accommodations, is expensive. In the case of BHPB, the cost was $12,000 to $16,000 per participant, not including airfare.[13] And, while the SEC did not charge BHPB with FCPA anti-bribery violations, it noted two key facts that appear to have driven the agency's concern: (1) payments for attendance by spouses and (2) payments to foreign officials to support their attendance at Olympic events at the very time BHPB had pending business before those officials or others over whom they may have had influence.[14]

In its resolution with BHPB, the SEC did not formally focus on these aggravating factors, although they were mentioned in the agency's press release and discussed in the appended stipulated Cease-and-Desist Order. And, as is typical in SEC-negotiated resolutions in which there is no primary anti-bribery charge, the agency phrased the nature of BHPB's deficiencies as failures of internal control as well as violations of the books and records provisions of the FCPA. In so doing, the SEC left open the possibility that, with greater control, and with sufficient facts and analysis, even spending of the kind BHPB engaged in might be appropriate. While that is the positive news for firms seeking flexibility in this area, the resolution also leaves many questions unanswered, most particularly how exactly companies should substantively weigh the various risks involved in marquee event hospitality.

BHPB, as the SEC stipulated, recognized the bribery risks inherent in Olympic hospitality and created a detailed program to address them. An important part of that program was a multi-question survey that was required to be filled out by BHPB employees for each invitee. The survey form came with a cover memorandum referencing the company's anti-bribery policy provisions and urging employees to consult BHPB's Guide to Business Conduct.[15] It included questions relating to existing or expected business with the invitee, asked whether there was a specific transaction which the invitee might be in a position to influence, whether the invitation could create the appearance of impropriety, and whether, with regard to BHPB's Guide to Business Conduct, the employee believed that other matters should be considered before tendering the invitation. After it was filled out by an employee, each questionnaire had to be approved by the relevant BHPB group or country President.[16] BHPB also established an Ethics Panel to provide employees advice.[17]

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13. Cease-and-Desist Order at ¶ 11.
14. Id. at ¶¶ 2, 15.
15. *Id.* at ¶ 18.
16. *Id.*
17. *Id.* at ¶ 20.

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The SEC nevertheless identified five reasons why these controls "did not adequately address the anti-bribery risks associated with offering expensive travel and entertainment packages to government officials:"[18]

- First, there was no independent legal or compliance review of the hospitality applications outside of the business group submitting the invitation;[19]
- Second, some applications were inaccurate or incomplete, while others used examples of answers provided by BHPB rather than an individualized description of the facts;[20]
- Third, BHPB "did not provide its employees and executives with any specific training on how to fill out the hospitality forms or how to evaluate whether an invitation to a government official complied with" its Guide to Business Conduct;[21]
- Fourth, BHPB did not institute a procedure for updating or reconsidering the hospitality applications if circumstances changed; [22] and
- Fifth, hospitality applications were filled out by individual groups within BHPB and, apart from circulating the invitee list to senior managers, there was no process to determine whether the invitee also had business with another company group.[23]

The SEC helpfully listed improvements in internal controls it believed were required. Some of these, however, particularly the second and third, will be potentially costly to implement and suggest the agency, at least as far as marquee hospitality for foreign officials is concerned, takes an aggressive view of the "reasonable assurances" language of the accounting provisions of the statute.[24] The Cease-and-Desist Order implies that, having implemented a specific control (namely, the invitation application), BHPB nevertheless implemented that control deficiently because "some applications were inaccurate or incomplete"; the SEC, relatedly, charged a books and records violation because there were errors in "certain Olympic hospitality applications."[25]

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18. *Id.* at ¶ 18.
19. *Id.* at ¶ 19.
20. *Id.* at ¶ 21.
21. *Id.* at ¶ 22.
22. *Id.* at ¶ 23.
23. *Id.* at ¶ 24.
24. 15 U.S.C. § 78m.
25. Cease-and-Desist Order at ¶¶ 21, 38.

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Beyond the point that the FCPA does not require flawless controls or perfect records, this aspect of the resolution detracts from the fact that, as noted, BHPB had engaged in conduct, such as inviting and paying for spouses of foreign officials without special justification, and, more generally, inviting officials before whom the company had pending business, which are points of genuine risk. Yet in focusing on the procedural compliance issues of accuracy and completeness, the resolution runs the risk of promoting the very "'check the box' compliance approach" that the agency criticized in its press release announcing the settlement of the investigation.[26]

"The implied requirement that companies that engage in marquee event hospitality must provide greater detail than did BHPB in the contemporaneous business rationale statements that formed the basis for approving foreign official travel and entertainment expense may also prove potentially costly and time-consuming."

The implied requirement that companies that engage in marquee event hospitality must provide greater detail than did BHPB in the contemporaneous business rationale statements that formed the basis for approving foreign official travel and entertainment expense may also prove potentially costly and time-consuming. For example, the agency singled out the following business rationale as being insufficiently specific in identifying a proper purpose for the marquee spending:

> Yes, the invitee is in a position to influence the outcome of the pending contract, however, this is an organization that we have been conducting business with for over five years. Negotiations and contract outcomes are a regular occurrence but due to the lengthy relationship with BHP Billiton there is evidence [of] a long term commitment that would not necessarily be influenced by this gesture. It is a way of rewarding the business that has previously been conducted with BHP Billiton.[27]

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26. SEC Press Rel. 2015-93, SEC Charges BHP Billiton With Violating FCPA at Olympic Games (May 20, 2015), http://www.sec.gov/news/pressrelease/2015-93.html.

27. Cease-and-Desist Order at ¶ 21, n.4.

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While the quoted text appears to be a reasonable answer that addresses considerations that would reduce the risk of bribery and make hospitality permissible, the SEC may have intended to suggest that this scenario created the risk that the conferral of a benefit as a "reward" for past business could be an implied signal that future rewards would be forthcoming if future business was secured. But the FCPA is not an anti-gratuity statute. And as the Cease-and-Desist order is framed, it is not clear why the SEC opposed this rationale for the travel. The Cease-and-Desist Order does not state why the rationale was inappropriate or provide guidance on how much more specific the answer should have been. Is a recitation of all past business dealings required? Would a comparison of the size of the pending contract to past contracts have helped?

"Because of the ambiguities in the BHPB settlement, issuers will now inevitably need to exercise even greater caution when inviting 'foreign officials' (including employees of state-owned enterprises) to events like this one."

If the issue was not lack of specificity, but what was said in the documentation, the BHPB case will be received as a genuine missed opportunity for the SEC to state its true concerns, specifically as to the issue of paying for relationship-building entertainment during the period in which government business decisions are pending, and whether and under what circumstances such entertainment – as opposed to educational-related travel such as business site visits while a contract with the government is pending, for example – is ever permissible in the eyes of the SEC. For now, companies may seek to take some comfort in the lack of primary anti-bribery charges in this resolution for conduct related to these forms of benefits.

Similarly, the SEC's third noted deficiency of not providing "specific training on how to fill out hospitality forms or how to evaluate [the invitations]," appears to reflect a new requirement. The 2012 *Resource Guide* identified "Hallmarks of an Effective Compliance Program," which include, in relevant part, "periodic training."[28] BHPB provided "generalized training" to employees.[29] In addition, the hospitality questionnaire to employees was accompanied by a memorandum restating BHBP's anti-bribery rules and urging employees to review the Guide to Business Conduct.

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28. *See* Resource Guide, note 10, *supra*, at 59.

29. Cease-and-Desist Order at ¶ 22.

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That document included an example of a minister who requested travel in exchange for favorable treatment and set forth the rule that "you must not offer to provide anything that could be reasonably regarded as an attempt to unduly influence the Minister's decision."[30]

Again, although the SEC's stated concern was lack of specificity in training, the lack of guidance in the SEC's order as to what the training should have entailed suggests that the agency's real concern was the substance of the event, not the process that led to it. Had the agency taken that view, the issue of major-event hospitality would have been joined in clear way, and could have provided courts (in subsequent litigated cases) and Congress the chance to clarify or change the law if they disagreed.

Conclusion

As in all settled FCPA matters, the terms of the BHPB resolution are the product of negotiation designed to serve the immediate interests of the parties in resolving a pending matter, and not the broader interest in definitively clarifying the law. And, at the end of the day, and after years of investigation, this particular resolution appeared to have yielded, at most, violations of lower severity than those that have led to larger settlements. It is notable that the Cease-and-Desist Order identified only four individuals out of 176 "foreign officials" invited to the Olympics who were involved with or in a position to influence pending matters involving BHPB. Of those four, only one official attended the Olympics. In these circumstances, it is no surprise that the DOJ did not take action.

But even for one of the smaller FCPA cases on its docket, the SEC could have provided more useful guidance in a compliance area where government officials and the courts alike (the latter at least in domestic bribery cases) have long stated that companies should have substantial leeway – provided that no *quid pro quo* arrangements inhere.[31] Because of the ambiguities in the BHPB settlement, issuers will now inevitably need to exercise even greater caution when inviting "foreign officials" (including employees of state-owned enterprises) to events like this one.

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30. *Id.*

31. The Cease-and-Desist Order does not address one internal control that many companies require in connection with marquee events and potential conflicts of interest: transparency. The Cease-and-Desist Order contains an example of an official whose invitation was rescinded because "BHPB became concerned that [a counter-party in a dispute] had learned about the Olympics invitation," suggesting that the invitations were not publicized, but it does not address whether the relevant governments were informed. *Id.* at ¶ 30.

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The Cease-and-Desist Order may not have found this practice to violate the FCPA's anti-bribery provisions. But the SEC has set a high bar for any company extending hospitality to foreign officials in terms of necessary internal controls, requiring independent review of almost every decision, potentially exacting accuracy and specificity for documentation, special training, and other procedures.

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Spain Adopts New Compliance Defense

On March 31, 2015, the Spanish Official State Gazette (no. 77) published a new set of amendments[1] to modify la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal (the "1995 Criminal Code"). Due to take effect on July 1, 2015, the amendments will introduce a defense for companies potentially exposed to criminal liability for crimes committed by their officers or employees. As a result, Spain now joins various other nations, most notably the United Kingdom, that have incorporated compliance defense concepts into their anti-bribery and corruption laws.[2]

I. Background

On December 17, 1997, Spain signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "OECD Convention"), and ratified it on January 14, 2000.[3]

On January 11, 2000, the Spanish legislature effectively implemented the OECD's provisions by adding Article 445 (which has since been revised) to the 1995 Criminal Code. The scope of the prohibitions set forth in Article 445 was somewhat wider than those required by the OECD Convention, applying to foreign "authorities" as well as foreign officials. The Article effectively supplemented the existing law on domestic bribery and corruption, which was set out in the 1995 Criminal Code.

That said, and contrary to the recommendations of the OECD Convention, Article 445 applied only to natural persons and not to corporations. At the time, Spanish law did not recognize the criminal liability of non-natural legal persons, such as companies. This aspect of Spanish criminal law was modified in 2010 through the implementation of Article 31 bis[4] (*cf*. la Ley Orgánica 5/2010 of June 22, 2010), which stipulated that companies could be liable for:

- criminal offenses committed by their *de jure* or *de facto* legal representatives or directors, acting in the name of or on behalf of such company and for their benefit; and

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1. La Ley Orgánica 1/2015 de 30 de marzo, http://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-3439.
2. Other states that have compliance defense concepts in their anti-bribery and corruption laws include Australia, Hungary, Italy, Japan, Korea, Poland, Portugal, Sweden and Switzerland. *See generally*, Mike Koehler, *Revisiting a Foreign Corrupt Practices Act Compliance Defense*, Wis. L. Rev 609, 638-44 (2012).
3. The OECD Convention has been adopted by the 34 OECD member states as well as the following seven non-member states: Argentina, Brazil, Bulgaria, Colombia, Latvia, Russia and South Africa. *See* http://www.oecd.org/corruption/oecdantibriberyconvention.htm.
4. The drafters of Spanish legislation use Latin terminology for numbering provisions that are added to the original legislative instrument after such original legislative instrument is enacted. As such, references in this article to "Article 31 bis" and "Article 31 quinquies" may be read as "Article 31.2" and "Article 31.5."

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- criminal offenses committed in the context of corporate activities by persons (such as employees) acting under the authority of such company's *de jure* or *de facto* legal representatives or directors, acting in the name of or on behalf of such company and for their benefit, who have been able to perpetrate such acts, as due control was not exercised over them, having regard to the specific circumstances of each case.

The scope for corporate criminal liability was potentially extensive under this new regime as it could apply even in situations in which it was not possible to identify the individual perpetrator of the relevant criminal act or in those cases in which it had not been possible to prosecute an individual. Additionally, the scope of "due control" was unclear.

Significantly, the 2010 modification did provide that companies could mitigate their criminal liability if, after the criminal act had been committed, they could demonstrate the following:

- The company had reported the criminal act to the authorities prior to criminal proceedings being brought against them;
- The company had collaborated in the investigation of the events;
- Prior to any trial, the company had taken steps to remediate or reduce the damage caused by the criminal act; and
- The company had, before trial, established effective measures to prevent and detect future criminal acts.

The 2010 modification did not, however, specify in terms that a company's existing compliance program would lead to mitigation of any criminal sanction, although the adoption of a compliance program might be considered one means of establishing that the company had established effective measures to prevent and detect future criminal acts.

II. The 2015 Amendments

A. OECD Working Group Recommendations

On December 14, 2012, an OECD Working Group on Bribery (the "Working Group") released its Phase 3 Report on Spain, which evaluated and made recommendations on Spain's implementation of the OECD Convention and the

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2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions.[5] At the outset of the Report, the Working Group expressed "serious concerns that, almost 13 years after the entry into force of Spain's foreign bribery offense, no individual or company has ever been prosecuted or sanctioned for this offense."[6] At the time of the report, the Spanish foreign bribery offense had given rise to only seven investigations, all of which had been closed without charges having been lodged. These investigations had been conducted under Article 445 of the amended 1995 Criminal Code concerning alleged bribery of foreign public officials by individuals, but no corporation was investigated.

"[T]he [OECD] Working Group expressed 'serious concerns that, almost 13 years after the entry into force of Spain's foreign bribery offense, no individual or company has ever been prosecuted or sanctioned for this offense.'"

The Working Group acknowledged that the implementation of criminal liability for legal persons in 2010 was "an important step," but noted, critically, that state-owned enterprises were excluded from this regime. The Report concluded that, under Spanish law, state-owned enterprises could therefore bribe foreign public officials without incurring criminal liability under the Article 31 bis regime. As there are over 2000 public companies in Spain,[7] this gap potentially affected a wide array of enterprises. Furthermore, financial institutions that had received government support in the financial crisis of 2008 might also fall under the exception. During the Working Group's on-site visit, however, Spanish prosecutors denied that such institutions were exempt from liability.[8]

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5. *See* http://www.oecd.org/daf/anti-bribery/spain-oecdanti-briberyconvention.htm. The OECD Working Group on Bribery monitors OECD Convention signatories' implementation and enforcement in three phases: "Phase 1 evaluates the adequacy of a country's legislation to implement the OECD Convention; Phase 2 assesses whether a country is applying the legislation effectively; and Phase 3 focuses on enforcement of the OECD Convention, the 2009 Anti-Bribery Recommendation, and outstanding recommendations from Phase 2." *See* http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm.
6. Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Spain, Dec. 2012, at 5, http://www.oecd.org/daf/anti-bribery/spain-oecdanti-briberyconvention.htm.
7. "El Gobierno suprime el 17% del las empresas publicas," *Público* (Mar. 15, 2012), http://www.publico.es/espana/gobierno-suprime-17-empresas-publicas.html.
8. *See* sources cited in notes 5 and 6, *supra*.

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The Report also identified the "vagueness in the law with regard to the possible enforcement of the lack of 'due control' criteria."[9] The Working Group recommended that Spanish law should clarify "the criteria of 'due control' as well as the onus and level of proof of this standard of liability."[10] In response to this recommendation, the Spanish legislature reconsidered the wording of Article 31 bis "with the aim of minimizing the cases of exemption from liability for legal persons."[11]

B. Spanish Government Proposals to Amend the Spanish Criminal Code

On September 20, 2013, the Spanish Ministry of Justice published its proposals for amending the amended 1995 Criminal Code. Although the Preamble to the proposals does not expressly refer to the recommendations of the Working Group, some of the proposals may have been drafted with those recommendations in mind. These proposals became the basis for the amendments made to the amended 1995 Criminal Code pursuant to la Ley Orgánica 1/2015.

The proposals included a new Article 286 seis, which sought to introduce a stand-alone offense whereby legal representatives or directors of companies would be held accountable for the failure for such companies to adopt compliance measures that are designed to prevent illicit conduct. Where a legal representative or director fails to fulfill this duty, the provision would impose:

- either imprisonment for a period between three months to one year, or
- a fine of 12 to 24 months,
- and, in any case, disqualification from work in the relevant industry or business for a period lasting between six months to two years.

This provision was not in fact adopted in the final amendments to the amended 1995 Criminal Code.

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9. *Id.* at 25.
10. *Id.*
11. Spain: Follow-up to the Phase 3 Report & Recommendations, March 2015, at 14, http://www.oecd.org/daf/anti-bribery/spain-oecdanti-briberyconvention.htm. *See* Part C, La Ley Orgánica 1/2015 Amendments, *infra*.

C. The 2015 Amendments

The amended Article 31 bis now stipulates that companies can be liable for:

- criminal offenses committed by legal representatives or persons authorized to take decisions in the company's name or on behalf of the company and to the company's benefit;[12] and
- criminal offenses committed in the context of corporate activities by persons (such as employees) acting under the authority of the company's legal representatives or persons authorized to take decisions in the company's name or on behalf of the company and to the company's benefit, who have been able to perpetrate such acts where the company has *seriously* breached its duties to supervise, oversee and control such corporate activities.[13]

Previously, Spanish law did not require a breach to be serious. Nevertheless, under the amended Article 31 bis, either offense is triggered if the benefit to the company is direct or indirect.

A company will have a defense to liability for an Article 31 bis.1.a) offense if it can establish that the following factors, set out in Article 31 bis.2, are satisfied:

- Prior to the commission of the crime in question, the board of directors implemented a compliance program providing appropriate compliance monitoring aimed at preventing similar crimes or significantly reducing the risk of such crimes being committed;
- The supervision of the compliance program is entrusted to a body of the company either with autonomous powers or that is legally mandated with the function to supervise internal controls of the company (the "Compliance Body");
- The perpetrators of the criminal conduct in question have fraudulently circumvented the compliance program; and
- The Compliance Body has not neglected to perform its duties of supervision, oversight and control.

Partial satisfaction of the above may go to mitigation but will not provide a full defense to liability. In the case of small companies (*i.e.*, those authorized by Spanish law to file simplified profit and loss accounts), the new Article 31 bis.3 provides that the functions of the Compliance Body may be conducted by the board of directors.

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12. *See* La Ley Orgánica 1/2015 de 30 de marzo, art. 31 bis.1.a), http://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-3439.
13. See La Ley Orgánica 1/2015 de 30 de marzo, art. 31 bis.1.b), http://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-3439.

Spain Adopts New Compliance Defense

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Under the new Article 31 bis.4, a company has a defense to the Article 31 bis.1.b) offense if, prior to the commission of the crime in question, it has implemented an adequate compliance program to prevent or significantly reduce the risk of such crimes being committed. Article 31 bis.5 sets out the six key elements, all of which are necessary to evidence the adequacy of a compliance system, namely that:

- Appropriate risk assessments have been conducted;
- Protocols or procedures have been implemented to mitigate the risks identified;
- Adequate, preventative financial controls are in place;
- Compulsory reporting policies are in force to ensure that misconduct is promptly notified;
- Adequate disciplinary sanctions are implemented; and
- The compliance program is subject to periodic review and updated accordingly.

Furthermore, a new Article 31 quinquies has been included to address the concerns of the Working Group with respect to the exclusion of State-owned enterprises from the anti-bribery and corruption provisions in the 2010 version of the amended 1995 Criminal Code. Drafted in similar fashion to the old Article 31 bis.5, this provision explicitly stipulates that public corporations that implement public policies or provide services of general economic interest are included in the corporate criminal liability regime.

Interestingly, a potential inconsistency appears to arise between Article 31 bis.1.b), which requires there to have been a serious lack of compliance oversight for a company to be held criminally liable, and Article 66 bis.2, a sentencing provision amended by la Ley Orgánica 1/2015, which now provides that companies may still be liable for sanctions of up to two years where the breach is not of a serious nature. It may be that the resultant lack of clarity as to the circumstances in which corporate liability arises will need to be resolved by the courts.

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III. Sanctions Applicable to Companies

Corporates may be exposed to numerous sanctions if they are held criminally liable for Article 31 bis offenses. Article 33.7 sets out the range of sanctions which include:

- A fine;
- Compulsory dissolution;
- Suspension of the company's activities for a period not exceeding five years;
- Closure of the company's branches and establishments for a period not exceeding five years;
- Prohibition, either temporary or permanent, to carry out the activities that led to the commission of the criminal act;
- Disqualification from obtaining public subsidies and support for a period not exceeding five years; and
- Court intervention to protect the rights of the company's employees and creditors for a period deemed necessary, though such period shall not exceed five years.

"Although it appears from the statistics that corporate prosecutions were previously almost non-existent, the latest amendments perhaps signal a recognition by the Spanish authorities that greater clarity was needed as to the expected levels of corporate governance required of companies."

In the event that court intervention is imposed on a company, such intervention can affect the whole organization or only part of the business, the extent of which is to be determined by the court. This intervention can be modified or suspended at any time.

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IV. Conclusion

The latest amendments are helpful in clarifying that State-owned entities fall under the corporate liability regime. More significantly, perhaps, they provide Spanish companies with a defense to liability for acts committed by their employees and representatives. Although it appears from the statistics that corporate prosecutions were previously almost non-existent, the latest amendments perhaps signal a recognition by the Spanish authorities that greater clarity was needed as to the expected levels of corporate governance required of companies. The amendments go some way towards providing this. With greater clarity comes a greater obligation on companies to ensure that they have adequate systems in place and those with corporate interests in Spain should be minded to ensure that those interests meet, at a minimum, the new standards enshrined in the legislation.

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Victories for UK Law Enforcement in Corruption and Fraud Cases

In recent weeks there have been a number of significant anti-bribery, money laundering, and corruption matters in the United Kingdom, both in the UK courts and involving the Serious Fraud Office ("SFO"). These developments suggest that the SFO remains committed to the policy of its Director, David Green QC, of prosecuting bribery and corruption offences in the courts as opposed to through settlement.

Such a view is supported by the SFO's very recent charging of Jean-Daniel Lainé, a retired Senior Vice President for Ethics & Compliance at Alstom, with two charges of corruption under section 1 of the Prevention of Corruption Act 1906, as well as two offences of conspiracy to corrupt in breach of section 1 of the Criminal Law Act 1977. The alleged offences are said to have taken place between 1 January 2006 and 18 October 2007 and concern the supply of trains to the Budapest Metro.

Lainé is the sixth individual to be charged by the SFO in its investigation of Alstom and his position as a former head of compliance makes this an unusual prosecution. It is not yet known whether the SFO alleges direct involvement by Lainé in criminal activity, or some kind of criminal "failure of responsibility." The matter has been sent for trial at Southwark Crown Court.

Beyond the Lainé prosecution, which is at its earliest stages, important recent events in the United Kingdom include two very recent – and as yet formally unreported – successes for the SFO in the UK courts. One concerns the recent prosecution of a UK national for historic (pre-Bribery Act 2010) corruption offences. The other relates to the SFO's ability to compel the production of documents belonging to a suspect where those documents are held by law firms.

In this article, we assess these new developments and their significance to anti-bribery compliance for companies subject to the jurisdiction of the courts of England and Wales.

The article also addresses a UK Supreme Court judgment clarifying the definition of "criminal property," a key concept under the Proceeds of Crime Act 2002 ("POCA"), the UK's principal money laundering legislation.

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SFO Obtains Access to Documents Held by Beny Steinmetz's Lawyers

As reported in the British press, including *The Financial Times*, lawyers acting for the mining arm of Israeli tycoon Beny Steinmetz's business empire are to be required to produce documents related to an alleged African bribery scheme to the SFO.

It was reported that, on 30 April 2015, the UK High Court rejected an application by Steinmetz's Guernsey-registered company, BSG Resources ("BSGR"), to block the SFO from assisting a criminal investigation in the west African state of Guinea, including by compelling the production of documents held by BSGR's lawyers.

BSGR had held mining rights in Guinea worth US$ 5 billion, including virgin deposits of iron ore considered amongst the world's highest quality and potentially most profitable. Last year, Guinea's government annulled the mining rights following a two-year inquiry that concluded that the company had won the mining rights by making payments of cash and shares to the wife of Lansana Conté, the former Guinean president. Following this determination, BSGR brought arbitration proceedings against Guinea. Vale, the Brazilian mining company that had bought a majority stake in BSGR's Guinean prospects in 2010, brought separate proceedings against BSGR. Both Guinea and the United States Department of Justice launched criminal investigations. Neither the company nor Steinmetz has been charged in any of the investigations although Frederic Cilins, a former agent for BSGR in Guinea, was jailed last year after pleading guilty to obstructing the US probe.

As part of its investigation, Guinea sought assistance from the UK authorities. As a result, last year the SFO issued notices under Section 2 of the Criminal Justice Act 1987 compelling the production of documents from Mishcon de Reya and Skadden, Arps, Slate, Meagher & Flom LLP – respectively the current and former lawyers for BSGR – and Onyx Financial Advisers, the company's agents in London. The documents requested are said to be voluminous.

BSGR sought permission to apply for a judicial review of the decision by the SFO (and Home Secretary Theresa May) to assist the Guinean probe. The company argued that Guinea's request for legal assistance should have been denied because it was part of a politically motivated plot that led to the cancellation of BSGR's mining rights. Dag Cramer, a BSGR director, claimed in a witness statement that the government of Alpha Condé, the current president of Guinea, had expropriated the company's assets as part of a conspiracy to reward the people behind what Cramer alleged was a scheme to rig the election that brought Condé to power in 2010.

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The High Court dismissed BSGR's application. No official judgment is yet available, but Lord Justice Davis is reported to have stated that Mr. Cramer's statement showed "little first-hand knowledge of the underlying facts" of the alleged plot against BSGR. The court ordered BSGR to pay costs and, as of this time, reports were that BSGR did not intend to appeal.

The High Court's ruling means that the SFO is now free to enforce the Section 2 notices. The decision confirms the breadth of the powers available to the SFO to compel the production of information, even where such information is contained in documents held by a company or individual's lawyers.

"The [Marchment] conviction related to acts taking place between 2004 and 2008, during which time Marchment (together with his co-conspirators) supplied confidential information on high-value energy and infrastructure projects to targeted bidding companies in exchange for illicit payments concealed as consultancy services."

British Procurement Engineer Jailed Following SFO Energy Corruption Prosecution

On 11 May 2015, British national Graham Marchment, a former procurement engineer, was sentenced to two and a half years of imprisonment in respect of three counts of conspiracy to corrupt under section 1(1) of the Criminal Law Act 1977. The prosecution was part of a long-running SFO action against illicit trading of information for payment. These terms will be served concurrently. The court will determine compensation and confiscation at a later date.

His sentencing followed an earlier guilty plea and the imprisonment of four co-conspirators in January 2012.[1] The conviction related to acts taking place between 2004 and 2008, during which time Marchment (together with his co-conspirators) supplied confidential information on high-value energy and infrastructure projects to targeted bidding companies in exchange for illicit payments concealed as consultancy services. The projects in question were the QASR Gas Gathering Project in Egypt, the Sakhalin Island Field Project in Russia,

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1. *See* Karolos Seeger, Matthew Getz, and Lucy Norris, "SFO Successfully Prosecutes Four Individuals for Private Sector Corruption in Offshore Oil and Gas Projects," *FCPA Update*, Vol. 3, No. 8 (Mar. 2012), http://www.debevoise.com/insights?tab=Search%20Insights&keyword=FCPA%20Update.

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and the Parallel Train Project in Singapore, collectively worth approximately £40 million (US$ 62 million).[2] Marchment and his alleged co-conspirators had acquired this information through their employment with companies acting as procurement agents for projects in Egypt, Russia, and Singapore.

During the SFO's initial investigation, Marchment had been living in the Philippines and had refused to return to the United Kingdom for questioning when the SFO requested his attendance. At the time of the trial of his co-defendants, no extradition treaty existed between the Philippines and the United Kingdom and the SFO was not able to compel Marchment's return to the United Kingdom. He therefore did not stand trial with his co-defendants, Andrew Rybak, Ronald Saunders, Philip Hammond and Barry Smith, who were each found guilty and received custodial sentences (Smith received a suspended sentence). It was only when Marchment's UK passport expired last year and he was unable to renew it due to the arrest warrant against him that he was compelled to return to the United Kingdom, whereupon he was arrested and charged. He was subsequently denied bail.

The sentencing of Marchment brings to an end a seven-year joint investigation by the SFO and City of London Police Force into energy and infrastructure linked corruption which covered numerous foreign jurisdictions. It also demonstrates how the SFO is actively seeking to prosecute individuals, as well as corporate entities, for their part in corporate crime.

The SFO first became aware of the corruption through a tip-off in respect of the Parallel Train Project in Singapore. It was alleged that the defendants had passed on confidential information about three specific components of the project.

The SFO alleged that this information had subsequently been offered to bidders Ecodyne Ltd, a Canadian water treatment company, and Ondeo Industrial Solutions (based on France), which allegedly agreed to pay commissions if awarded the contracts. A third company, GE Water & Process Technologies Ltd, was also approached, but turned the information down and instead reported the offer thereof to the procurement company. This in turn led to the SFO and the City of London Police being called in to investigate the case.

In the 2012 proceedings, the companies that provided the procurement services for the three projects in Egypt, Russia, and Singapore offered significant assistance to the SFO's investigation. These companies were not charged.

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2. SFO Press Rel., Four Guilty in £70 Million Contracts Corruption Case (Jan. 25, 2012), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/four-guilty-in-70-million-contracts-corruption-case.aspx.

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The case underscores the extra-territorial application by the courts of England and Wales of the criminal law of conspiracy in cases in which the accused is a UK national. As Detective Constable Martina McGrillen of the City of London Police was quoted as saying:

"Marchment's imprisonment . . . sends out a clear message that if you break UK laws you should expect to face the consequences in a British court. Hiding away overseas is not the answer; it is just delaying the inevitable."

Matthew Wagstaff, the Joint Head of Bribery at the SFO, said:

"Collaboration with national and international agencies enabled the SFO to secure Mr. Marchment's conviction, despite his attempts to evade justice for this greedy and parasitic crime."[3]

Section 328 Proceeds of Crime Act 2002: When Does an Arrangement Become Criminal?

In its 22 April 2015 judgment in *R v GH*,[4] the UK Supreme Court provided some clarification as to the meaning of "criminal property" as defined in POCA. The concept of "criminal property" is an essential component of the substantive POCA offences (which are identified in sections 327, 328, and 329 of the statute[5]) and has arisen in a number of contexts, including alleged bribery[6] and fraud[7] offences.

The Supreme Court has confirmed that, for liability under the POCA substantive offences to arise, the property in question must constitute "criminal property" *prior to* the commission of the alleged POCA offence. Lord Toulson's leading judgment also delivers a message to the UK's law enforcement agencies and prosecutors that use of POCA is not always appropriate in cases in which the criminal conduct in question is "sufficiently covered by substantive offences."

The facts in the most recent case involved a fraudster, "B," who had set up four websites which falsely purported to offer cut-price motor insurance. The fraudster recruited "H," a third party, to open bank accounts for channelling the proceeds.

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3. SFO Press Rel., Guilty Plea in Multi-Million Pound Energy Corruption Case (May 11, 2015), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2015/guilty-plea-in-multi-million-pound-energy-corruption-case.aspx.
4. [2015] UKSC 24.
5. Section 327 of POCA covers concealing, disguising, converting or transferring criminal property, or removing criminal property out of the UK; s.328 concerns entering into or becoming concerned in an arrangement linked with criminal property; and s.329 is the offence of acquiring, using, or being in possession of, criminal property.
6. *Kensington Int'l Ltd. v Republic of Congo (formerly People's Republic of Congo) (Vitol Services Ltd, Third Party)* [2007] EWCA (Civ) 1128.
7. *R v Amir and Akhtar*, [2011] EWCA (Crim) 146.

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One of the fraudulent websites, relating to AM Insurance, operated from September 2011 to January 2012. Shortly before the website went live, H opened two bank accounts, of which B subsequently took control. In total, members of the public paid £594,143 into the bank accounts for non-existent motor insurance cover.

B pleaded guilty to a number of offences. H stood trial at the Central Criminal Court, charged with the section 328(1) offence of entering into or becoming concerned in "an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person," namely the money received into the two bank accounts, by or on behalf of B.

The trial judge determined that H had no case to answer, holding that at the time H entered into the arrangement, no criminal property existed, because the money paid into the account by those defrauded was not itself criminal property. The Court of Appeal agreed with the trial judge, though it focused on the moment the money was paid into the account by those defrauded, ruling that it was not criminal property even then as it was not the benefit of criminal conduct.

The Supreme Court, however, unanimously allowed the prosecution's appeal and reversed the judgment below. Lord Toulson held that property is "criminal property" if it has that quality or status by reason of prior criminal conduct. In this case, he found that the money being paid into the accounts that H had set up was criminal property because it resulted from B's fraud on the unwitting consumers – which was a criminal act.

Lord Toulson distinguished the facts of this case from those in *R v Geary*,[8] a leading ruling regarding what is and is not "criminal property." For property to be "criminal property," it must both (i) constitute or represent the benefit criminal conduct, and (ii) be known or suspected by the offender to constitute or represent such benefit. *Geary* focused on the second element of the definition.

In *Geary*, the defendant helped a friend to hide money by allowing it to be transferred into his bank account before repaying it to his friend. The money had originally been stolen, so it satisfied the first element of the definition of criminal property. But Geary argued that he had not known of the theft, but instead thought that his friend wanted to hide the money from his wife, as he was about to get divorced. That may have been illegal, but Geary denied any knowledge that there had been prior criminal conduct.

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8. *R v Geary*, [2010] EWCA (Crim) 1925.

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The trial judge in *Geary* directed the jury that Geary's explanation did not provide him with a defence, and Geary was found guilty, on the basis of a plea. However, he then successfully appealed against his conviction to the Court of Appeal, which held that "to say [section 328(1)] extends to property which was originally legitimate but became criminal only as a result of carrying out the arrangement is to stretch the language of the section beyond its proper limits."[9]

Lord Toulson distinguished the present case from *Geary*, holding that the monies transferred by the victims became criminal property for the purposes of POCA at the moment when the victims paid the money into the respondent's accounts *because of the fraud perpetrated on them*, and not merely by reason of the arrangement made between B and H – which was the case in *Geary*.

"However, the existence of prior criminal conduct remains essential to a conviction. Lord Toulson observed that significant uncertainty would ensue if liability for the substantive POCA offences could arise where there had been no prior criminal conduct."

However, the existence of prior criminal conduct remains essential to a conviction. Lord Toulson observed that significant uncertainty would ensue if liability for the substantive POCA offences could arise where there had been no prior criminal conduct. He noted that this would particularly be the case for banks and other financial institutions which are already under broad and onerous obligations to report known, suspected or reasonably suspected money laundering. Lord Toulson quoted with approval the Hong Kong Court of Final Appeal in *HKSAR v Li Kwok Cheung George*,[10] which held:

"It is one thing to criminalise dealing with funds where the dealer knows or has reasonable grounds to believe that they are the proceeds of crime, it is quite a different matter to stigmatise as a money launderer, a lender dealing with its own 'clean' funds because of what the borrower does or intends to do with them."

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9. Moore-Bick L.J. at ¶ 19.

10. [2014] H.K.C.F.A. 48, Ribeiro and Fok, PJJ., joint judgment, ¶ 84.

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Although this remains a complex area of law, the Supreme Court ruling has provided some certainty that funds received as a result of fraud are criminal property as soon as an "arrangement," in the terms of section 328 of POCA, acts on them. In this case, the arrangement was the payment of funds into the agreed bank account. The Supreme Court's statements will also perhaps encourage prosecutors to consider further whether a prosecution under POCA is appropriate in the absence of a compelling public purpose for doing so. Financial institutions may take some comfort from the fact that the UK's highest court did not seek to further extend the application of POCA offence to encompass situations in which a bank or financial institution may suspect that legitimate funds paid into accounts will subsequently become criminal property.

Given the UK court's decision last year seemingly extending the reach of POCA to apply to the receipt of the proceeds of a fraud in the UK into Spanish bank accounts (*R v Bradley David Rogers & Ors*, [2014] EWCA (Crim) 1680), POCA liability continues to be a relevant issue not only to UK-based companies but also to foreign companies and individuals acting in connection with property that may be the benefit of criminal conduct in the United Kingdom.

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