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A Global Anti-Corruption Newsletter

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Corporate Hospitality Loses When the SEC is the Referee: Telefônica Agrees to $4M Penalty Involving Hospitality at Marquee Soccer Events

On May 9, 2019, the SEC entered into a Cease-and-Desist Order with Telefônica Brasil S.A. ("Telefônica"), a Brazilian telecommunications group and the largest telecommunications company in Brazil (the "Telefônica Order").[1] As part of this settlement, Telefônica agreed to pay the SEC a $4.125 million civil penalty.[2] Although a Brazilian company that does not operate in the United States,[3] Telefônica is subject to the FCPA because it is an "issuer," by virtue of its American Depository Receipts that

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1. Order, *In the Matter of Telefônica Brasil S.A*, Securities Exchange Act Rel. No. 4046 (May 9, 2019), https://www.sec.gov/litigation/admin/2019/34-85819.pdf [hereinafter "Telefônica Order"].
2. *Id*. at 6.
3. See Telefônica Brasil S.A., Form 20-F for the Fiscal Year Ending December 31, 2018 at 32 (filed Feb. 21, 2019), http://ri.telefonica.com.br/en/corporate-governance/cvm-sec-filings.

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trade on the New York Stock Exchange. According to the findings in the SEC's Order, which Telefônica neither admitted nor denied,[4] Telefônica violated the books and records and internal controls provisions of the FCPA in providing corporate hospitality to government officials leading up to the 2014 World Cup in Brazil and the earlier Confederations Cup in 2013.[5]

The Telefônica Order is reminiscent of the SEC's 2015 Cease-and-Desist Order against BHP Billiton (the "BHP Order"), which found similar violations in connection with the 2008 Beijing Olympics.[6] As with the BHP Order, the Telefônica Order raises questions about what controls the SEC expects regarding corporate hospitality expenditures. It also provides yet another example of the SEC's virtually strict liability approach to enforcement of the FCPA's accounting provisions.

The Telefônica Order

Brazil hosted both the World Cup soccer tournament in June 2014 and the Confederations Cup soccer tournament the preceding year.[7] Telefônica paid approximately $5.5 million for just over 1,800 World Cup tickets and 240 tickets for the Confederations Cup, when those tickets became available for purchase.[8] The recorded purpose of these purchases in the company's books and records was "relationship-building activities with strategic audiences."[9] Each ticket was paired with corporate hospitality, leading to an average World Cup per-person cost of around $3,200 (about 85% of which was ticket cost) and an average Confederations Cups per-person cost of $3,085 (about 58% of which was ticket cost).[10] According to the Order, some of these tickets and hospitality were provided to government officials, including "federal congressmen and senators, mayors, and other government officials," as well as employees of local embassies that were Telefônica's customers.[11]

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4. Telefônica Order at 1.
5. *Id.* ¶ 2.
6. *See* Andrew M. Levine, Bruce E. Yannett, Mathew Getz, Steven S. Michaels & Philip Rohlik, "Internal Controls of Olympic Proportions: BHP Billiton Settles SEC Investigation of Olympic Hospitality," FCPA Update, Vol. 9, No. 12, at 6 (May 2015), https://www.debevoise.com/insights/publications/2015/05/fcpa-update-may-2015 [hereinafter "BHP FCPA Update article"]; Order, *In the Matter of BHP Billiton Ltd. and BHP Billiton Plc*, Securities Exchange Act Rel. No. 74998 (May 2015), https://www.sec.gov/litigation/admin/2015/34-74998.pdf [hereinafter "BHP Order"].
7. Telefônica Order ¶¶ 7, 10.
8. *Id.*
9. *Id.* ¶ 7.
10. *Id.* ¶¶ 7, 10.
11. *Id.* ¶ 9.

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The Order notes that Telefônica's code of ethics "explicitly prohibited offering or accepting gifts, hospitality, or other types of incentives 'which may reward or influence a business decision.'"[12] In addition, the Order states that the government officials who received the tickets "were significant to the company's business interests" and that Telefônica "looked at the possible benefit to the company and at opportunities to build relationships with important officials."[13] The SEC found that the failure to implement controls around the prohibition of offering hospitality that "may reward or influence a business decision" violated the internal controls provisions of the FCPA.[14]

"The Telefônica Order raises questions regarding corporate hospitality similar to those that stemmed from the BHP Order, and unfortunately answers none of them."

The SEC further found that Telefônica violated the books and records provisions of the FCPA by recording the costs associated with the tickets as "Publicity Institutional Events" and all the hospitality provided as "Advertising and Publicity,"[15] when, according to the SEC, the tickets and related hospitality provided to government officials should have been characterized differently in Telefônica's books and records, presumably as the costs of gifts (tickets and related hospitality) for government officials.

Corporate Hospitality and the FCPA

The Telefônica Order raises questions regarding corporate hospitality similar to those that stemmed from the BHP Order, and unfortunately answers none of them. Corporate hospitality is defined in the Oxford English Dictionary as "[t]he entertaining of clients by companies in order to promote business, especially at sporting or other public events."[16] Such gatherings are ubiquitous at major sporting events such as the World Cup and the Olympics. The practice benefits both business and the sporting events themselves, and even is reflected in the architecture of many sporting venues in the form of luxury boxes.

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12. *Id.* ¶ 13.
13. *Id.* ¶ 9.
14. *Id.* ¶ 13.
15. *Id.* ¶ 17.
16. *Corporate Hospitality*, Oxford English Dictionary, https://en.oxforddictionaries.com/definition/corporate_hospitality (last visited May 24, 2019).

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The legitimate business purpose of corporate hospitality is, among other things, what Telefônica sought: to build relationships. "Informal settings at sports events [are] better suited to networking than formal roundtable dinners."[17] As one industry executive described: "In today's uber-connected world of smartphones and social media, salespeople and executives are in need of actual face time with their clients and an exciting experience at a sporting event . . . is an ideal way to make that happen."[18]

The established nature of corporate hospitality also has been recognized in the anti-corruption context, including as part of the U.K. Ministry of Justice's Guidance to the Bribery Act. Then Lord Chancellor Kenneth Clarke specifically noted in the forward to the Guidance that "no one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix."[19]

Unlike the UK, the SEC has provided no such comfort regarding such practices, including two settled enforcement actions in the last four years. In thinking about corporate hospitality that the SEC or other regulators may scrutinize, we note the brief examples contained in the *Resource Guide to the U.S. Foreign Corrupt Practices Act*. In context, the SEC and DOJ considered as reasonable certain entertainment, for example "a baseball game and a play," but not junkets with little or no business purpose, for example "an all expenses paid week-long trip to Las Vegas."[20] Guidance on where the Olympics, World Cup, or any similar event falls on the spectrum of appropriate corporate hospitality would be beneficial. A comparison of the Telefônica and BHP Orders highlights key questions left unanswered by the SEC.

What are the legitimate goals of corporate hospitality? The Telefônica Order quotes the internal approval for the purchase of World Cup tickets as being "for relationship-building activities with strategic audiences."[21] Similarly, the BHP Order describes the stated goals of the BHP Olympic hospitality as "to reinforce and develop relationships with key stakeholders" and "to build relationships with stakeholders from product and investor markets, and regions where we have or would like to have operations."[22] Does the SEC consider these stated goals to be illegitimate? If not, why were they quoted in the orders, and what was the specific

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17. Maine Belonio, *How Corporate Hospitality Took Over The Sports Business*, HUFFINGTON POST (Jan. 11, 2017), https://www.huffpost.com/entry/how-corporate-hospitality_b_14113774.
18. Robert Tuchman, *How Corporate Hospitality Has Become A Major Part Of The Sports Business*, FORBES (June 10, 2015), https://www.forbes.com/sites/roberttuchman/2015/06/10/how-corporate-hospitality-has-become-a-major-part-of-the-sports-business/#24dfb09e2567.
19. U.K. Ministry Of Justice, The Bribery Act 2010: Guidance About Procedures Which Relevant Commercial Organisations Can Put In Place To Prevent Persons Associated With Them From Bribing (Section 9 Of The Bribery Act 2010) (Mar. 2011), www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf.
20. A Resource Guide to the Foreign Corrupt Practices Act at 17-18 (Nov. 14, 2012) (hereinafter "FCPA Guidance").
21. Telefônica Order ¶ 7.
22. BHP Order ¶ 10.

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"improper purpose" underlying these actions? Ultimately, is the SEC implying that any benefits conveyed to government officials as corporate hospitality are improper if the issuer seeks an advantage in the relationship with the government official or agency involved? Alternatively, is the SEC making narrower points regarding the adequacy of internal accounting controls and the separate and express recording of such hospitality in an issuer's books and records?

How important is the distinction between gifts and hospitality? Telefônica and BHP both dealt with "hospitality program[s]."[23] However, the Telefônica Order confuses the issue by focusing on (and repeatedly referring to) "tickets and related hospitality,"[24] while elsewhere referring just to tickets "provided to" or "given to" government officials.[25] By focusing on the tickets as the thing that was provided to government officials, the SEC conflates gifts and hospitality. In this case, since the tickets were part of corporate hospitality, they were not "gifts" as that term is generally understood. As described above, corporate hospitality involves sharing an experience and has a clear and legitimate business purpose of relationship building. Gifts, on the other hand, lack the "shared" element. As a technical matter, these considerations matter more for the anti-bribery provisions of the FCPA (which were not at issue in either order), but the SEC's failure to distinguish the two further muddles an issue already lacking in clarity.

When is an invitation inappropriate? In the BHP Order, the SEC identified four specific officials who were invited to the Olympics and were in a position to make decisions regarding specific, substantial, and imminent business as examples of failures in BHP's internal controls.[26] The Telefônica Order provides no such specificity. It states that the guests included "individuals who were significant to the company's business interests," mentions that Telefônica took "into account the importance of the actions that each guest has already effectively done in our favor," and includes quotes without context regarding a guest "who has opened many doors" or whose help a Telefônica employee would need, or who has given "ongoing support."[27] Without further guidance, it remains unclear at what point an official is sufficiently removed from a company's business that the official can be invited to a soccer match.

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23. This point is clearly made in the press releases accompanying both. *See* SEC Press Rel. No. 2015-93, *SEC Charges BHP Billiton With Violating FCPA at Olympic Games* (May 20, 2015), https://www.sec.gov/news/pressrelease/2015-93.html ("An SEC investigation found that BHP Billiton failed to devise and maintain sufficient internal controls over its global hospitality program connected to the company's sponsorship of the 2008 Summer Olympic Games in Beijing."); *see also* SEC File No. 3-19162, *SEC Charges Telefônica Brasil S.A. with Violating Books and Records and Internal Accounting Controls Provisions of the FCPA* (May 9, 2019), https://www.sec.gov/enforce/34-85819-s. ("According to the SEC's order, Telefônica failed to devise and maintain sufficient internal accounting controls over a hospitality program that the company hosted in connection with the 2014 World Cup and 2013 Confederations Cup.").
24. Telefônica Order ¶¶ 2, 8, 10, 12, 18.
25. *Id.* ¶¶ 3, 7, 9, 12, 14.
26. *Id.* ¶¶ 25-34.
27. *Id.* ¶ 9.

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What about family and guests? The Telefônica Order notes in passing that "in some cases, more than one ticket was given to an official so he or she could invite friends or family members."[28] The BHP Order referred to invited spouses on numerous occasions and found fault with BHP's lack of guidance as to how invitations to spouses should be assessed under BHP's procedures.[29] The examples in the Guidance also specifically note that paying expenses for officials' spouses "appear[] to be designed to corruptly curry favor with [] foreign government officials."[30] The SEC apparently espouses the view that inviting family members along undermines any legitimate business purpose to the trip. At the same time, given the experiential nature of corporate hospitality, there are times when invitations to family members might be justified, but should be made with extreme caution.

Does location matter? The Telefônica Order does not specify what the hospitality included. However, as far as can be gleaned from the Telefônica Order, the hospitality was offered by a Brazilian company, to residents of Brazil, at sporting venues in Brazil. The BHP Order involved "three to four day hospitality packages includ[ing] event tickets, luxury hotel accommodations, meals, other hospitality, and in many instances offers of business-class airfare."[31] Though a significant number of earlier travel and hospitality cases focused on international travel, the SEC does not appear to be distinguishing between domestic and international travel for such events, as it already suggested in 2016's SciClone settlement.[32] Although the Telefônica Order finds violations of only the accounting provisions, the underlying conduct involves a Brazilian company's interactions with Brazilian government officials in Brazil. As a result, the question remains whether policing such activity is best left to local authorities, especially in countries (like Brazil) that have demonstrated the ability to monitor the ethics of their own businesses and government officials.

What procedures should a company wishing to offer corporate hospitality put in place? The BHP Order described relatively elaborate screening procedures instituted by BHP, which were not always successful and with which the SEC found fault for other reasons (no independent vetting by compliance, no specialized training, no mechanism for reconsideration, and no cross checking between business groups).[33] At the time, we suggested this was an example of the SEC excessively

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28. *Id.* ¶ 8.
29. BHP Order at ¶ 22.
30. FCPA Guidance *supra* n.20 at 18.
31. BHP Order at ¶ 1.
32. *See* Paul R. Berger, Andrew M. Levine, Bruce E. Yannett & Philip Rohlik, "SEC Brings First FCPA Enforcement Actions of 2016," FCPA Update, Vol. 7, No. 7, at 11-12 (Feb. 2016), https://www.debevoise.com/insights/publications/2016/02/fcpa-update-february-2016.
33. *See* BHP FCPA Update article, *supra* n. 6.

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micromanaging compliance programs.[34] As far as one can tell from the Telefônica Order, Telefônica had no procedures at all, which the SEC describes as a "compliance breakdown."[35] Setting aside the smaller penalty for Telefônica, which likely resulted from a smaller spend, the result for Telefônica was not materially different than for BHP. It is unfortunate that the SEC did not use the Telefônica Order as an occasion to offer more concrete guidance as to what controls it deems to be required.

"It is unfortunate that the SEC did not use the Telefônica Order as an occasion to offer more concrete guidance as to what controls it deems to be required."

Relatedly, at what point should such procedures be triggered? Companies typically have in place approval thresholds based on spend, over which hospitality requires approval, often by a compliance or similar professional. In the BHP Order, the SEC suggested that the procedures BHP had in place were insufficient and that special screening procedures were required for expenses ranging from $12,000 to $16,000 per-person.[36] From the Telefônica Order, it does not appear Telefônica had any controls in place, and costs were just over $3,000.[37] At what point should companies go beyond ordinary approval procedures and adopt the more stringent screening mechanisms reflected in the BHP Order? The Telefônica Order provides no guidance. We also note that we are unaware of the SEC ever pursuing a company in connection with luxury suites at U.S. sporting events, which cost easily several hundred dollars per person.

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34. *Id.*
35. Telefônica Order ¶ 15.
36. *See* BHP FCPA Update article, *supra* n. 6.
37. Telefônica Order ¶¶ 8, 11.

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Virtual Strict Liability

The Telefônica Order adds to the mounting examples of recent SEC enforcement actions charging violations of the accounting provisions unaccompanied by specific findings of bribery or "illicit" or "improper" payments.[38] In doing so, the SEC seemingly polices behavior that it thinks *may* have happened (but is unwilling to state explicitly). It then crafts ad hoc internal controls under a statutory provision originally intended to broadly address "management misfeasance, misuse of corporate assets and other conduct reflecting adversely on management's integrity."[39]

According to the Telefônica Order, the company inadequately policed the portion of its code of ethics prohibiting gifts or hospitality "which may reward or influence a business decision."[40] As a result, "the company ended up offering such tickets and hospitality to government officials who were directly involved with, or in a position to influence regulatory matters, legislation, and other business."[41] According to the Telefônica Order, the company can be criticized legitimately for not having any controls at all (assuming such controls are actually "internal accounting controls" as specified in the statute). But the standard in Telefônica's code of ethics, which the SEC appears to have adopted – that a company should not provide gifts or hospitality to anyone who "*may* reward or influence business" – is not a workable one. Government officials of the type described in the Telefônica Order are *always* in a position to influence "regulatory matters, legislation, and other business," as the U.S. Supreme Court has recognized twice in rejecting the attempt to apply such a broad standard in domestic anti-corruption law.[42] In the absence of labeling corporate hospitality bribery, the SEC would ideally articulate a workable standard against which actions by Telefônica and other companies can be measured.

Likewise problematic is the conclusion of the Telefônica Order regarding the FCPA's record-keeping provisions. It states that Telefônica improperly accounted for its purchase of World Cup and Confederations Cup tickets and related hospitality for government officials. Telefônica booked the first two installment payments for World Cup tickets as "Publicity Institutional Events" and the third installment

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38. See, *e.g.*, SEC Press Rel. No. 2012-158, *SEC Orders Oracle Corporation With FCPA Violations Related to Secret Side Funds in India* (Aug. 16, 2012), https://www.sec.gov/news/press-release/2012-2012-158htm. ("Oracle Order"); see also Paul R. Berger, Jonathan R. Tuttle, Bruce E. Yannett, Philp Rohlik, and Jil Simon "Beyond 'Virtual Strict Liability': SEC Brings First FCPA Enforcement Action of 2018," Vol. 9, No. 8 (Mar. 2018), https://www.debevoise.com/insights/publications/2018/03/fcpa-update-march-2018.

39. *SEC v. World-Wide Coin Investments, Ltd.*, 567 F. Supp. 724, 748 (N.D. Ga 1983).

40. Telefônica Order ¶ 14 (emphasis added).

41. *Id.*

42. *See McDonnell v. United State*s, 135 S. Ct. 2355, 2370 (2016); *see also United States v. Sun–Diamond Growers of Cal.*, 526 U.S. 398, 406-07 (1999) ("the Secretary of Agriculture *always* has before him or in prospect matters that affect farmers, just as the President always has before him or in prospect matters that affect college and professional sports, and the Secretary of Education matters that affect high schools.").

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payment, as well as the hospitality provided, as "Advertising and Publicity."[43] Telefônica booked the payment for the Confederations Cup tickets as "Publicity Institutional Events" and the hospitality provided as "Advertising and Publicity."[44]

The SEC determined that, by booking expenses in this manner, Telefônica failed to "properly characterize the purchase of tickets and related hospitality that were given to government officials."[45] The SEC found a books and records violation seemingly because the same items (tickets and hospitality) were not characterized differently when offered to a government official. What is left unclear, however, is what the actual book-keeping failure is and exactly how the SEC believes the ticket and hospitality expenses should have been characterized. At a minimum, this approach places an undue burden on companies either to restrict severely how their corporate hospitality programs are run or to completely eliminate a legitimate business practice. If applied consistently, a pharmaceutical company that bought branded pens would have to separately account for those given to doctors in state-owned hospitals, or a business lunch would need to be broken up for accounting purposes if both private and government guests attended.

Key Considerations for Corporate Hospitality and the FCPA

The SEC has made clear its suspicions of corporate hospitality at marquee sporting events, notwithstanding that such hospitality remains a legitimate business practice in many circumstances. These kinds of events therefore should be undertaken with caution. Companies offering such hospitality should consider the following:

- Define a limit above which hospitality requires special approval. Given the lack of clarity noted above, conservative thresholds are prudent.
- Institute procedures to identify government official invitees.
- Define standards under which it is not appropriate to invite government officials.
- Be extremely cautious about inviting spouses or guests.
- Designate legal or compliance personnel independent from the business to screen the government official invitees against those standards, including some check of other invitees to verify that they are not government officials.
- Provide training for employees who compile invitee lists, provide information about invitees, and screen the invitees.

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43. Telefônica Order ¶ 16.
44. *Id.* ¶ 17.
45. *Id.* ¶ 18.

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- Institute procedures for reconsideration of an invitation if the business relationship with a previously approved government official changes.
- Ensure that the various parts of the company that may have contact with an official are consulted regarding the appropriateness of an invitation.
- Confirm that providing or receiving particular hospitality does not breach any applicable local law or policy.
- Ensure that the costs and corresponding benefits to any government officials involved are recorded and expressly described as corporate hospitality.

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U.K. Considers Reforms to Enforcement Involving Economic Crime

As the U.K. parliamentary agenda remains largely occupied with Brexit-related matters, companies and their advisers handling cross-border investigations with a U.K. component may wish to take note of two recent policy-related updates. *First*, the U.K. government responded earlier this month to a Parliamentary Committee's recommendations in respect of the U.K. Bribery Act 2010 (the "UKBA"). *Second*, another Parliamentary Committee recently proposed legislative reform to create a more stringent regime for corporate liability for economic crime.

Government Response to Post-Legislative Review of U.K. Bribery Act

On May 13, 2019, the U.K. government published a response[1] to a report produced by the House of Lords Select Committee on the Bribery Act 2010[2] (the "Lords Committee"). The Lords Committee had been set up in May 2018 to conduct a post-legislative review of the Bribery Act. The Lords Committee report, which was published two months earlier, on March 14, 2019, is extensive. It concluded that the UKBA is "an excellent piece of legislation," with the new offense of corporate failure to prevent bribery being "particularly effective." With respect to Deferred Prosecution Agreements ("DPAs"), the report found the regime adequate although not a substitute for the prosecution of individuals. The report then made 35 conclusions and recommendations. We set out four of the most significant along with the government's response.

The Defense of "Adequate Procedures"

The corporate offense of failing to prevent bribery under Section 7 of the UKBA provides for a defense where the company can show it had in place "adequate procedures" to prevent bribery from occurring.

The Lords Committee examined the uncertainties surrounding the requirement that procedures be "adequate." Indeed, commentators have noted that procedures that fail to prevent bribery could be, by definition, not "adequate." The Lords Committee recommended that the statutory wording be left intact but that the

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1. Ministry of Justice, *Government response to the House of Lords Select Committee on the Bribery Act 2010* (May 13, 2019) (hereinafter "Government Response"), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/800930/govt-response-hol-select-committee-bribery-act-2010.pdf.
2. House of Lords Select Committee on the Bribery Act 2010, Report of Session 2017-19, *The Bribery Act 2010: post-legislative scrutiny* (Mar. 14, 2019), available at https://publications.parliament.uk/pa/ld201719/ldselect/ldbribact/303/303.pdf.

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current Ministry of Justice Guidance[3] ("the MoJ Guidance") to the UKBA be amended to make clear that "adequate" does not mean anything more stringent than "reasonable in all circumstances."

The government appeared to agree with the recommendation. While leaving the final say to the courts, the government stated that "it appears very unlikely that a company which had in place anti-bribery procedures which were reasonable in all the circumstances but did not prevent bribery taking place on a *specific* occasion" would not be able to invoke the adequate procedures defense.[4] While the government has not committed to a revision of the MoJ Guidance, this authoritative exchange is helpful to companies. Reading "adequate" as "reasonable in all the circumstances" would be in line with the decision made in the Criminal Finances Act 2017, where the terminology used for the same concept is "reasonable procedures" in relation to failure to prevent the facilitation of tax evasion.

Further Guidance on "Adequate Procedures"

The Lords Committee also recommended that the MoJ Guidance be expanded by giving more examples and suggested procedures that are likely to constitute a good defense, particularly for small and medium-sized enterprises ("SMEs"). The Lords Committee recommended that the MoJ make clear that all but the smallest business are likely to need procedures tailored to the business' risk profile.

The government departed from these recommendations, noting that the MoJ Guidance was only ever intended to provide "general procedural guidance" and is not intended to be a prescriptive, "one-size-fits-all" document. The government urged companies to consult, in addition to the MoJ Guidance, legal and compliance professionals, or trade bodies such as the Federation of Small Businesses.[5]

Corporate Hospitality

The Lords Committee recommended that the government provide clearer examples of acceptable corporate hospitality beyond what is provided in the MoJ Guidance.

The government disagreed, again noting that the MoJ Guidance was "deliberately" drafted in a "high-level, non-prescriptive way."[6] Accordingly, companies appear to retain considerable discretion, and should continue to look to the MoJ Guidance – as well as other guidance, such as Transparency International's publications – for indications on how to draft their internal procedures on corporate hospitality.

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3. Ministry of Justice, *The Bribery Act 2010: Guidance* (March 2011), available at https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.
4. Government Response §§ 52-53 (emphasis added); § 56.
5. *Id.* §§ 48-51.
6. *Id.* §§ 38-39.

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Sentencing Discount for Self-Reporting

There is no provision in either English law or the DPA Code[7] that companies that self-report should receive bigger discounts when negotiating a DPA than those that do not.

The Lords Committee recommended that, in order to promote self-reporting, a distinction should be drawn between the amount of discount received by companies that self-report and those that do not.

The government merely "note[d]" this recommendation but did not propose to take specific action, arguably correctly as legislating would mostly serve to reduce prosecutorial flexibility. The government also noted that the Director of the SFO will shortly publish guidance for corporates who wish to self-report that will set out "the requirements for full and genuine cooperation, a pre-requisite before any consideration of inviting a company to enter into DPA negotiations."[8]

"[T]he government is expected to look at the various proposed solutions to address the perceived difficulty of prosecuting corporates in England and Wales . . . ."

Finally, the Lords Committee recommended, and the government agreed, that the following features of U.S. law should not be introduced into English law. *First*, non-prosecution agreements along the lines of the U.S. model will not be adopted in the U.K.[9] *Second*, facilitation payments will not be legalized under English law.[10] And *third*, the SFO will not offer advice in individual cases akin to the DOJ Opinion Procedure Releases.[11]

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7. Serious Fraud Office and Crown Prosecution Service, *Deferred Prosecution Agreements Code of Practice* (Feb. 14, 2014), available at https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf.
8. Government Response §§ 60-63; 66-67.
9. *Id.* § 68.
10. *Id.* § 40.
11. *Id.* § 54.

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Proposal for More Stringent Regime for Corporate Liability for Economic Crime

In a report published on March 8, 2019, the House of Commons Treasury Committee (the "Commons Committee") urged legislative reform on corporate liability for economic crime.[12] It followed the pronouncement by the U.K. Serious Fraud Office (the "SFO") last year that suggested the creation of a new offense of "failing to prevent economic crime".[13] The SFO argued that such general offense is a natural extension of the existing "corporate offence" under UKBA Section 7 for "failure to prevent bribery", and for failure to prevent tax evasion under the Criminal Finances Act 2017.

Also in March, the All-Party Parliamentary Group on Fair Business Banking sent a letter to the U.K. Prime Minister, Theresa May, similarly to urge her to reform U.K.'s corporate liability framework to enable the adequate prosecution of large corporate economic crimes. The letter pointed out that the absence of an existing legal mechanism to prosecute "large-scale fraud or for laundering of the proceeds of corruption and other crimes"[14] has allowed U.K. to become a place where £100 billion of wealth is laundered annually, and where fraud is costing the U.K. economy up to £110 billion annually.[15]

These calls for reform derive from the fact that English law makes it difficult to prosecute companies for offences committed by its employees and agents. The common law principle known as the "identification principle" requires that prosecutors demonstrate that the controlling minds of the business (usually, the board of directors or seniors officers) had the knowledge of the criminal acts. This is often very difficult to prove in large, multi-national corporations where management is delegated to mid-level managers or subsidiaries; as Sir David Green QC, the former director of the SFO once put it, "inevitably the email trail tends to dry up at middle management."[16]

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12. House of Commons Treasury Committee, Twenty-Seventh Report of Session 2017-19, *Economic Crime – Anti-money laundering supervision and sanctions implementation* (Mar. 5, 2019), available at https://publications.parliament.uk/pa/cm201719/cmselect/cmtreasy/2010/2010.pdf.
13. Letter from Mark Thompson of the Serious Fraud Office to the Chair of the Treasury Select Committee (July 16, 2018), available at https://www.parliament.uk/documents/commons-committees/treasury/Written_Evidence/sfo-corporate-liability-160718.pdf.
14. Letter from Kevin Hollinrake MP and The Rt Hon Norman Lamb MP, Co-Chairs of the All-Party Parliamentary Group on Fair Business Banking, to the Prime Minister (Mar. 6, 2019), available at http://www.appgbanking.org.uk/wp-content/uploads/2019/03/060319-Prime-Minister-Corporate-Liability-Regime-APPG-Fair-Business-Ba....pdf.
15. Letter from the Prime Minister to Kevin Hollinrake MP (Apr. 8, 2019), available at: http://www.appgbanking.org.uk/wp-content/uploads/2019/04/080419-Prime-Minister-Corporate-Liability-Regime-for-Economic-Crime.pdf.
16. Martin Bentham, Fraud chief calls for tougher corporate prosecution laws, The Evening Standard (Jan. 6, 2016), available at https://www.standard.co.uk/news/uk/fraud-chief-calls-for-tougher-corporate-prosecution-laws-a3150011.html.

U.K. Considers Reforms to Enforcement Involving Economic Crime

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On April 8, 2019, in her response to the letter by the All-Parliamentary Group on Fair Business Banking, the Prime Minister acknowledged the urgency of the matter. She emphasised the government's achievements in this realm to-date – including the recent creation of the role of the "Security and Economic Crime Minister," of the "Economic Crime Strategic Board Taskforce" to oversee the economic crime sector, and of the new "Economic Crime Delivery Board" to tackle economic crime. The Prime Minister promised to publish a response "soon" to its Call for Evidence on Corporate Criminal Liability for Economic Crime – a public consultation issued by the Ministry of Justice that ended in March 2017.[17] In its response, the government is expected to look at the various proposed solutions to address the perceived difficulty of prosecuting corporates in England and Wales – whether by introducing a general offense for failing to prevent economic crime; replacing the common law identification doctrine with a new principle for the attribution of corporate liability; or something else.

Regardless of whether or not the law is reformed, companies should already devise and maintain appropriate procedures to prevent economic crime from occurring. For example, even if companies cannot be made liable for fraud committed by their employees, company assets derived from the crime are still at risk of civil recovery under the Proceeds of Crime Act 2002.

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17. Ministry of Justice, *Corporate Liability for Economic Crime: Call for Evidence* (Jan. 2017), available at https://consult.justice.gov.uk/digital-communications/corporate-liability-for-economic-crime/supporting_documents/corporateliabilityforeconomiccrimeconsultationdocument.pdf.

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